CT07 SPII, LLC and DT07 SPII, LLC, Plaintiff-Respondents, vs. ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MONROE, THE TOWNSHIP OF MONROE, and MAYOR GERALD W. TAMBURRO, in his official capacity as Mayor of the Township of Monroe, Defendant-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-002471-22 On Appeal from the Superior Court of New Jersey, Law Division – Middlesex County Sat Below: Hon. Thomas D. McCloskey, J.S.C. Docket No.: MID-L-3953-19

DEFENDANT-APPELLANTS, TOWNSHIP OF MONROE AND MAYOR GERALD W. TAMBURRO, MEMORANDUM OF LAW IN SUPPORT OF APPEAL

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Dated: September 7, 2023

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CT07 SPII, LLC	Respondent-Cross Appellant	Plaintiff	Participated Below
DT07 SPII, LLC	Respondent-Cross Appellant	Plaintiff	Participated Below
Zoning Board of Adjustment Township of Monroe	Respondent-Cross Appellant	Defendant	Participated Below
Township of Monroe	Appellant	Defendant	Participated Below
Mayor Gerald W. Tamburro	Appellant	Defendant	Participated Below

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(2T) Transcript of Trial Proceeding	July 15, 2020
(3T) Transcript of Motion for Reconsideration	June 15, 2021
(4T) Transcript of Motion to Enforce Litigants Rights	September 14, 2021
(5T) Transcript of the Special Hearing Officer Proceedings Day 1 March 24, 2022	March 24, 2022
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PRELIMINARY STATEMENT

Defendant-Appellants, Township of Monroe (the "Township") and Mayor Gerald W. Tamburro, in his official capacity as Mayor of the Township (the "Mayor") (collectively referred to as "Appellants") appeal the trial courts order of October 15, 2020 improperly overturning the denial of the Respondents' use variance application by the Monroe Township Zoning Board of Adjustment (the "Board"), as well as the trial courts' orders of October 14, 2020, June 16, 2021, September 14, 2021, and August 9, 2022, which compounded upon the initial improper decision by the trial court. The reversal of the Board's decision was coupled with the inappropriate appointment of a Special Hearing Officer ("SHO") and Special Master; and ultimately, the adoption of the SHO's resolution granting the Respondents' preliminary and final site plan.

From the onset, the trial court misapplied the law and used contradictory findings as a means to an end: to wrest away the Board's powers and turn them over to a SHO without any legal or factual supporting basis. The trial court paid no attention to the Appellants' continued objections to the utility or appropriateness of a SHO. The trial court used spurious reasoning to appoint an SHO to oversee the matter. Contrary to caselaw, the trial court did not find a record of obstruction and hostility to an affordable housing developer and/or the court in order to appoint a SHO. Instead, the trial court appointed an SHO while finding the exact opposite:

> The irony here is that, but for this **singular transgression** of the Zoning Board that was inescapably provoked, in material part, by the Mayor's interference, **Monroe Township pro-actively had come into voluntary compliance with its Mt. Laurel obligations** on the immediate coattails of Mt. Laurel IV and earned the Court's entry of the 2016 Judgment of Compliance; and, by all accounts, **is diligently implementing them**. Therefore, wresting back wholesale control of the Township's delegated zoning powers, as the Township's attorneys argued at trial, and **this Court agrees, would be a "bridge too far"** - for now, at least, for a municipality that to date **has taken commendable steps to come into voluntary compliance** with its Third Round affordable housing obligations **and is actually implementing them**.

M51-52[1]. (Emphasis added). From this twist in logic, the SHO's decision to grant preliminary and final site plan approvals was borne. The trial court fashioned this extraordinary remedy out of a tortured interpretation of First Amendment protected comments made by the Mayor; and ancillary to the Board's hearing on the merits. This "one-off" event, if it can even qualify as one, was characterized as so egregious it warranted specialized Mt. Laurel remedies.

Further, the trial court failed to appreciate the significance of, and the Appellants objections to, the court's improvident decision to grant Respondents' variances in the October 15, 2020 Order. In so doing, the trial court laid the groundwork for an "as of right" application for preliminary and final site plan

[1] "M" denotes the appendix for the Township of Monroe and Mayor Gerald W. Tamburro.

approval that merely required the SHO to check the boxes before granting Respondents' application. The trial court's adoption was a rubber-stamped approval of a flawed procedure put in place by itself.

Without any sufficient basis to appoint an SHO, the acceptance of that same SHO's recommendations was equally as flawed. The only appropriate remedy now is for this Court to reverse all of those decisions that created this unsuitable result.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[2]

The matter stems from the Board's proper denial of the Respondents' amended application for Use Variance and Bulk Variance approvals[3]. The Respondents sought to develop 43,568 square feet of commercial/retail uses and 206 residential units, including 43 affordable rental units (2 of which are generated by the 9 townhomes on a separate property on Applegarth Road known as the "Applegarth Rd. Site") on the property referred to as the "Route 33 Site" (the "Amended Application") as memorialized in a written Resolution adopted on April 30, 2019 under Application No.: BA 5135-16. M68. This Amended Application is a substantial change from the approvals granted Respondents' predecessor in title

[2] The relevant factual and procedural history are intertwined, and are therefore combined.

[3] Use Variance pursuant to N.J.S.A. 40:55D-70(d)(1), two (2) Height Variances pursuant to N.J.S.A. 40:55D-70(d)(6)), and various Bulk Variances pursuant to N.J.S.A. 40:55D-70(c), in order to develop the Property with 43,568 square feet of commercial uses and 206 residential units with 43 affordable apartment units (two of which are generated by the 9 townhomes on the Applegarth Rd.)

under Board Application No.: BA-5112-15, and memorialized in the Board's April 26, 2016 Resolution (the "Prior Approvals").

Under the Prior Approvals, the Applegarth Rd. Site and the Route 33 Site ("Combined Properties") received a Use Variance pursuant to N.J.S.A. 40:55D-70(d)(1) and certain Bulk Variances, in order to develop the site with 65,000 square feet of commercial/retail uses (on the Route 33 Site only); and, 215 residential units (206 were allocated to and to be built on the Route 33 Site and nine (9) were allocated to and to be built on the Applegarth Rd. Site), with 20% or 43 affordable apartment units with all affordable housing units to be built on the Route 33 Site only; however, two (2) of which are generated by the nine (9) townhomes on the Applegarth Rd. Site. M70-71.

The "Property" (known as Block 4, Lot 14.01 on the tax maps of the Township) is located in the Township's HD Highway Development Zone and in the VC-2 Village Center Overlay, and, the rear portions are also in the FHC Flood Hazard/Conservation District. M69.

The Township, for its part, has been compliant with its obligations under Mt. Laurel. A review of the Township's Mt. Laurel compliance history reveals the following: (1) The Township proactively and voluntarily sought to satisfy its Mt. Laurel obligation by creating a plan wherein properties in the Township (such as the property at the center of this litigation) were zoned as inclusionary affordable

housing developments; (2) that Respondents were not a part of the Township's Declaratory Judgment action as an intervenor, interested party, or otherwise; and (3) that the Township's Mt. Laurel obligation settlement was reached by and through the Township's settlement agreement with Fair Share Housing Center (the "FSHC Settlement Agreement") and not with Respondents.

Indeed, in late March/early April of 2017, after the Prior Approvals, Respondents discovered an eagle's nest on the Property. As a result, the amount of developable land from the Prior Approvals to the Amended Application was reduced from 50.3 acres to 35.9 acres due to a 660-foot radius setback from the eagle's nest. The 660-radius setback is required by State and Federal laws and regulations. M72-73.

This reduction in developable land is illustrated by the exhibits marked by the Respondents at the Board hearing, see M103, Board Hearing Exhibit A-3, which show the developable land and development of the Property under the Prior Approvals prior to the discovery of the eagle's nest, and, see M104, Board Hearing Exhibit A-4, which shows the reduced developable land available as a result of the eagle's nest. Although, the amount of developable land was reduced by almost half (1/2), the intensity of the development was only reduced by 21,432 square feet of commercial use to 43,568 square feet (about 1/3); and the number of residential units (206 units) was unchanged. Id; see also M78-79.

Whereas the Prior Approvals only required 2 variances, the impact of the proposed development under the Amended Application, on the reduced developable land, created a number of substantial variances. In total, the Amended Application on the reduced developable land, required 12 different variances. M73-74.

The Board, as detailed in its Resolution, made extensive findings of fact and expressed substantive reasons why it did not accept the conclusions of the Respondents' experts by appropriately applying the facts to the applicable law and did so as to each and every one of the 12 variances requested by the Respondents. M78-85. Following the denial of the Amended Application, Respondents challenged the Board's decision, seeking various relief in the form of the Prerogative Writ and Related Mt. Laurel Compliance Claims, and other counts and claims. M16. By Order filed October 25, 2019, the Superior Court bifurcated for trial the Prerogative Writ and Related Mt. Laurel Compliance Claims from the other counts of the Respondents' Complaint. M822.

Following a July 2020 trial, the trial judge issued an October 15, 2020, Order and Opinion, M9. Additional orders and actions were taken in this regard, those being: the Order of the Hon. Michael A. Toto, A.J.S.C. designating the Hon. Jamie D. Happas to Appoint a Special Hearing Officer dated and entered on October 14, 2020, M65, and the Memorandum of Honorable Jamie D. Happas, P.J.Cv. dated October 14, 2020 granting permission to the Trial Judge to appoint Timothy M.

Prime, Esq. as Special Hearing Officer. M66-67.

On November 4, 2020, the Township and Board each filed their respective motion for leave to file an interlocutory appeal to the Appellate Division. M514-515. On December 24, 2020, the Appellate Division denied both motions. M516-517.

Thereafter, on June 16, 2021 and again on September 14, 2021, the trial court modified its October 15, 2020 Order for purposes of the hearing before the SHO. M462-473; M474-476.

The SHO conducted hearings on the Respondents Amended Application on March 24 and 25, 2022. At the hearing, the Respondents sought preliminary and final site plan approval to construct the project set forth in their Amended Application. Pursuant to the trial court's October 15, 2020 Order, the Amended Application was considered by the SHO as an "as of right" application. M496. At the hearing, the SHO considered testimony from the Respondents' experts, including site plan and engineering expert, Brent Skapinetz, PP, PE of Dynamic Engineering; architectural expert, Stephn T. Tietke; traffic and transportation expert, Scott Kennel of McDonough & Rea Traffic Engineers; and planning expert, Arthur Bernard, PP, AICP. M484.

Due to the process put in place by the trial court, the full complement of the Board was unable to attend hearing and was thus unable to participate. Additionally, members of the public were significantly short-handed based on the requirement that

the hearing take place during regular business hours at the Middlesex County Courthouse, rather than the Township's facilities. The Township only was able to offer limited forms of testimony and questioning by three of its professionals, Township Engineer, Mark J. Rasimowicz, PE, PP, CME, CPWM, and Township planning consultant, Malvika Apte, PP, AICP of CME Associates; and Township Traffic Engineer, James C. Watson, PE, PTOE of CME Associates. M484; see also generally M518-711. The Respondents and their witnesses were subject to cross-examination by the attorneys representing the Township and Board. Further, the Special Master appointed by the court, Elizabeth McManus, PP, AICP, LEED, AP participated and offered testimony. M484.

Following the hearings, the SHO produced a draft proposed Resolution, to which the parties offered objections and comments. The SHO responded to those comments on June 7, 2022. M479. Thereafter, the trial court received the SHO's recommendations, together with the hearing transcripts, and supplemental correspondence from the parties on June 15, 2022 and June 22, 2022. M480.

On August 9, 2022, the trial court entered its Order, which adopted the SHO's recommendations and proposed final resolution dated June 7, 2022 and granted the Respondents' Preliminary and Final Major Site Plan Approval for the project set forth in their Amended Application. M477.

Thereafter, on August 29, 2022, the Appellants filed a motion for leave to file an interlocutory appeal with this Court. M712. The Appellate Division denied the Appellants' motion. M714.

Following the denial of the Appellants' motion for leave to appeal, the trial court entered an Amended and Final Case Management Order on Bifurcated Claims dated September 23, 2022. M788. This order permitted the parties to take depositions, if necessary and further set forth that dispositive motions were to be filed on or by November 4, 2022. Id.

On November 4, 2022, the Appellants and Board filed their respective motion for summary judgment on the remaining bifurcated civil rights and discrimination claims not previously heard by the trial court. M716. Following oral argument on February 10, 2023, the trial court by order entered on March 10, 2023, granted the Appellants' and Board's summary judgment motions, dismissing the remainder of the Respondents' complaint in its entirety with prejudice. M718.

On April 21, 2023, the Appellants filed their Notice of Appeal as of right seeking reversal of the trial court's orders of October 14, 2020; October 15, 2020; June 16, 2021; September 14, 2021; and August 9, 2022. M757. On April 24, 2023, the Respondents filed a cross-appeal challenging the trial court's grant of summary judgment on March 10, 2023. M762. Then, on April 26, 2021, the Board filed its cross-appeal appealing the trial court's orders of October 14, 2020; October 15,

2020; June 16, 2021; September 14, 2021; and August 9, 2022. M766.

After the filing of the Notice of Appeal, the Appellants filed a Motion to Stay in the trial court on April 26, 2023. M790. On May 12, 2023, the trial court entered an Order and Opinion denying the Appellants' motion. M792.

LEGAL ARGUMENT

POINT I

LEGAL STANDARD OF REVIEW (Issue not raised below).

As a general rule in non-jury actions, appellate courts apply a deferential standard in reviewing factual findings by a judge. Balducci v. Cige, 240 N.J. 574, 595 (2020). However, such deference is not without its limits and appellate courts may disturb such findings if "convinced that those findings and conclusions were so manifestly unsupported by or inconsistent with the competent, relevant, and reasonably credible evidence as to offend the interests of justice." Grienpenburg v. Twp. Of Ocean, 220 N.J. 239, 254 (2015). However, "a trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. Of Manalapan, 140 N.J. 366, 378 (1995). Accordingly, an appellate court's review of rulings of law and issues same is *de novo*. See Vitale v. Schering-Plough Corp., 231 N.J. 234, 246 (2017).

POINT II

THE TRIAL COURT'S APPOINTMNET OF A SPECIAL HEARING OFFICER WAS IMPROPER AND WITHOUT LEGAL BASIS AS THERE WAS NO MT. LAUREL VIOLATION FOUND. (M38-57; M477-513).

The trial court's decision to appoint a Special Hearing Officer and Special Master was an extraordinary judicial remedy in search of an equally extraordinary problem where none could be found.

Our case law is replete with examples of courts remanding applications to a Board, even upon finding that the Board had acted arbitrarily, capriciously, and unreasonably. See Reinauer Realty Corp. v. Borough of Paramus, 34 N.J. 406, 419 (1961) (Remanding application to Board of Adjustment following Board's denial of special exception use despite a formidable record in support of the application); Dallmeyer v. Lacey Twp. Bd. of Adjustment, 219 N.J. Super. 134, 147 (Law. Div. 1987) (Remanding application to Board of Adjustment for a new hearing after Board denied a (c)(1) variance, a conclusion the court found "difficult to justify" and based upon "mere speculation"); Pagano v. Zoning Bd. of Adjustment of Twp. of Edison, 257 N.J. Super. 382, 398 (Law. Div. 1992) (Remanding use variance application to Zoning Board of Adjustment after finding Board's decision arbitrary, unreasonable and erroneous).

In limited circumstances, New Jersey courts can act in lieu of a municipality or municipal body in regard to affordable housing matters. See Southern Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158 (1983) ("Mt. Laurel II"). While New Jersey courts have conferred builders' remedies in the form of removing a board's authority and appointing a master in its place, New Jersey courts emphasize that such remedies should rarely be used. Morris Cty. Fair Hous. Council v. Boonton Twp., 220 N.J. Super. 388, 408–09, (Law. Div. 1987), aff'd as modified, 230 N.J. Super. 345, (App. Div. 1989). In Morris Cty. Fair Hous. Council, the court cautioned that:

> The court probably has the power to grant such relief. Mount Laurel II, 92 N.J. at 285–290, 456 A.2d 390. However, the Legislature has conferred responsibility upon the board to pass upon site plan applications. This responsibility should be preserved, if at all possible.

Id. at 409.

A. The Trial Court Improperly Usurped the Zoning Board's Powers and Conferred A Mount Laurel and Builder's Remedy Upon Respondents. (M1-64).

In a Mount Laurel lawsuit, "the cause of action is the alleged unconstitutionality of the defendant-municipality's zoning because of its failure to provide for the municipality's fair share of affordable housing." See S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp., 92 N.J. 158, 214-216 (1983); see also

Oceanport Holding, L.L.C. v. Borough of Oceanport, 396 N.J. Super. 622, 630 (App. Div. 2007).

There is no finding or fact in the matter below that sets forth that this is a Mount Laurel lawsuit. The trial court actually found the opposite of such and stated that the Township "pro-actively [came] into voluntary compliance with its Mt. Laurel obligations" and "is diligently implementing them." See M51-52.

This case is also not a "builder's remedy" lawsuit. In that type of action, a plaintiff who seeks to provide a substantial amount of lower income housing and who has attempted in good faith to seek relief to proceed with the project, "thereafter vindicates the constitutional obligation in Mount-Laurel type litigation," and is granted a declaration of plaintiff's entitlement to a "builder's remedy" to proceed with the project. Such circumstances have generally been found only where the governing body or board has a history or pattern of obstruction and/or hostility to an affordable housing developer and/or the court itself. See Matter of Application of Township of South Brunswick, 448 N.J.Super. 441, 466 (Law Div. 2016). In Cranford Development Associates, LLC v. Township of Cranford, 445 N.J.Super 220, a "builder's remedy" lawsuit, the court recognized that the designation of a Special Master was a mechanism utilized in the specific context of Mt. Laurel lawsuit where a municipality was found to have failed to comply with its fair share housing obligations under the Mount Laurel doctrine:

> The court's authority to appoint Special Masters in Mount Laurel cases is well established. See Southern Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158 (1983). Given the **Township's record of obstructing affordable housing projects, and the Planning Board's past hostility** to a much more limited affordable housing plan, the court's decision to appoint the hearing examiner was justified in this case.

Id. at 232-233. (emphasis added).

Likewise, in Matter of Application of Township of South Brunswick, 448 N.J. Super. 441, 466 (Law Div. 2016), a Mt. Laurel lawsuit, the Court only removed the Township's authority over its affordable housing compliance after finding "systematic 'abuses' of the declaratory judgment process."

Oddly, the trial court in this matter found that despite the Township's well-established track record of Mt. Laurel compliance and lack of evidence of past hostility, the extraordinary appointment remedy was appropriate. In a Mount Laurel lawsuit, "the cause of action is the alleged unconstitutionality of the defendant-municipality's zoning because of its failure to provide for the municipality's fair share of affordable housing." See S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp., 92 N.J. 158, 214-216 (1983)("Mount Laurel II"); see also Oceanport Holding, L.L.C. v. Borough of Oceanport, 396 N.J. Super. 622, 630 (App. Div. 2007). There is no finding of fact or legal determination in the matter below that sets forth that this matter qualifies as a Mount Laurel lawsuit. As the trial court noted: "[t]he

Supreme Court has directed that when a municipality has demonstrated and is determined to be non-compliant with its affordable housing obligations, 'a strong judicial hand [must be] used." M51 (citing S. Burling Cty. N.A.A.C.P., supra, 92 N.J. at 199). The trial court made no such finding below. Instead the trial court noted the "irony" that despite this:

> singular transgression of the Zoning Board that was inescapably provoked, in material part, by the Mayor's interference, Monroe Township has actively come into voluntary compliance with its Mt. Laurel obligations on the immediate coattails of Mt. Laurel IV and earned the Court's entry of the 2016 Judgment of Compliance; and by all accounts, is diligently implementing them.

The trial court continued its praise and found that:

> Therefore, wresting back wholesale control of the Township's delegated zoning powers, as the Township's attorneys argued at trial, and this Court agrees, would be a "bridge too far" - for now, at least, for a municipality that to date has taken commendable steps to come into voluntary compliance with its Third Round affordable housing obligations and is actually implementing them.

M51-52.

Despite all evidence to the contrary, the trial court did an about face and found the appointment of a SHO and Special Master required. Ironically enough, this rejection of the evidence before its own eyes is exactly what the trial court found the Board (and Township) had allegedly done when denying Respondents Amended Application.

The Property was originally included in the court-approved plan. Further, the 2016 Prior Approvals called for 215 residential units on the Property with a set aside of 43 affordable housing units on 50.3 acres of land. It was not included due to any petition of the Respondents, as **they** were not a part of the Township's Declaratory Judgment action as an intervenor, interested party, or otherwise, but instead, by the Township's own determination that the site was a suitable option to assist the Township in meeting its affordable housing obligation. The presence of the bald eagle's nest and the resultant environmental constraint on the Property created a substantial reduction from 50.3 acres of developable land to 35.9 acres. Given this substantial reduction, it was entirely reasonable for the Board to have anticipated a proportionate reduction in the Respondent's project. This was not the case. As a result, a dozen different variances were required for Respondents Amended Application

The Township at no time sought to amend the original court-approved plan. Notably, the Township has also not taken the position that the potential loss of affordable housing units on the site due to the changed circumstance would not be recovered through increased affordable housing development on other sites or through other means. The Township similarly has not taken any action that would demonstrate "hostility" toward its Mt. Laurel obligations. No such "hostility" can even be gleaned through the Board's denial of Respondent's Amended Application.

The trial court strained to find such hostility. It opted to take an appropriately made opposition to the Amended Application and turn it into something heinous. This proverbial square peg does not fit in the round hole. While the trial court found that the lack of opposition to the original application was evidence of bad faith in the present circumstance, the evidence supports the opposite conclusion.

The Mayor's opposition to the Amended Application was pointed toward the density of the Project compared to its reduced acreage and the presence of the bald eagle's nest. Both of these considerations did not exist, or at least were not known, at the time the original application was approved by the Board in 2016. The Mayor was not, and is not, obligated to look at the Amended Application through the same lens as the original application. After all, the Project has a very real impact on the Township. To require this to be viewed in a vacuum would require willful blindness lest a developer get the wrong impression. The Mayor voicing his opinion over a Project that now had changed circumstances does not constitute the type of "past hostility" necessary for finding the appointment of a SHO and Special Master.

Despite these circumstances and Respondents' Mt. Laurel claims being dismissed against the Appellants, the trial court conferred upon Respondents the extraordinary Mt. Laurel remedy of a SHO appointment. Such an exceptional remedy is especially improper in this matter where the Township's land use

regulations have been found to afford a realistic opportunity for low- and moderate-income housing as required under Mt. Laurel.

Pursuant to the above, the Appellants respectfully request that this Court reverse the trial court's decision to appoint an SHO in this matter.

B. The Process Fashioned by the Trial Court for the SHO was Flawed and Failed to Adequately Permit Township and Public Participation in the Hearing and was Inconsistent with the Municipal Land Use Law. (M 1-64; 462-473).

The process set forth by the trial court required the matter to be heard at an inconvenient location rather than within the Township, and at an inconvenient time that limited public participation and Township professionals' participation, and grossly limited the Board's participation. This "hearing" stood in stark contrast to the those envisioned by the Open Public Meetings Act (hereinafter the "OPMA").

In enacting the OPMA, the Legislature declared its explicit intent to ensure the public's right to be present at public meetings and to witness government in action:

> The Legislature finds and declares that the right of the public to be present at ***all meetings*** of public bodies, and ***to witness in full detail*** all phases of the deliberation, policy formulation, and decision making of public bodies, is ***vital to the enhancement and proper functioning of the democratic process***; that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society […]
> [N.J.S.A. 10:4-7 (emphases added)].

The OPMA established as public policy the objective to insure:

> [T]he right of its citizens ***to have adequate advance notice of and the right to attend all meetings of public bodies*** at which ***any business*** affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.
> [Id. (emphasis added).]

The OPMA serves not only the goal of enshrining and protecting the ***right*** to access. Rather, it also serves the long-recognized goal of ***maximizing, enhancing, and promoting*** increased public access. See S. Jersey Pub. Co. v. N. J. Expressway Auth., 124 N.J. 478, 494 (1991) ("[I]t would be anomalous to interpret the Open Public Meetings Act, enacted by the Legislature to ***enhance the public's access to and understanding of the proceedings of governmental bodies***, in a manner that foreclosed the public's right to obtain material and information vital to its ability to evaluate the wisdom of governmental action.") (emphasis added); Kean Fed'n of Tchrs. v. Morell, 448 N.J. Super. 520, 543 (App. Div. 2017), aff'd in part as modified, rev'd in part, 233 N.J. 566 (2018) ("The overarching public policy of the OPMA seeks to encourage, promote, and ***enhance*** the public's participation in the democratic process") (emphasis added). Despite claiming that it did not seek to wrest wholesale control of zoning powers from the Township, the trial court fundamentally altered the hearing process. It ordered that the hearing on the Amended Application

take place at the Middlesex County Courthouse, rather than in Monroe where regularly scheduled zoning board hearings are held. This action completely deprived the Township and the Board of its jurisdiction in order to placate to a specious belief that a neutral location was more desirable. If the trial court's concern was social distancing necessary for the hearing[4], the trial court had options to allow the hearing to still take place within the Township, such as the local high school gym or auditorium. This would have also allowed a greater opportunity for public engagement in the hearing. However, the trial court decided to have the hearing held at the Middlesex County Superior Court, during regular court hours. Regular court hours are generally between 8:30 a.m. and 4:30 p.m., Monday through Friday. This decision directly limited the public and Township's participation. Most zoning board hearings are held on weekday evenings in order to maximize public engagement. This is a key component of the Open Public Meetings Act. In fact, the Zoning Board must consider several factors in determining whether due process rights are sufficiently addressed, including, "at minimum, the scale of the project, the number of approvals requested, the degree of public interest, and the number of potential objectors." N.J.A.C. 5:39-1.7(a). The trial court's adopted procedure for the special hearing officer flew in the face of these factors and effectively stifled public opinion.

[4] The trial courts Order was entered in October 2020, less than a year into the Covid-19 Pandemic and resultant state of emergency.

The result was a hybrid procedure akin to Frankenstein's monster overtaking the statutorily conferred process and powers of the Board. The monster, now allowed to run amuck, should have never been borne in the first place. The SHO's decision is nothing more than the result of an ill-conceived remedy looking for a problem. The trial court's Order should therefore be reversed as it expands on the improper conference of a Mt. Laurel remedy contrary to well-established case law.

POINT III

THE TRIAL COURT'S FINDING THAT THE MAYOR'S COMMENTS HAD UNDULY PREJUDICED THE ZONING BOARD'S ABILITY TO HEAR THE AMENDED APPLICATION WAS PRETEXTUAL. (M38-51; M477-513).

Plainly, the trial court's decision to appoint a SHO was founded on a pretextual basis. According to the trial court, the Mayor's supposed opposition to the project so tainted the Board that a hearing could only be conducted by a "neutral" observer. However, this finding is unsupported by the record below, wholly discounts the Board's prior approvals, and improperly creates a basis to suppress the Mayor's freedom of speech.

To begin this analysis, it is important to note that the Mayor of the Township of Monroe does not have any specific appointment or control powers over Zoning Board members. See N.J.S.A. 40:55D-69 and Monroe Municipal Code Section 108.3.2; see also, Voci v. Hard Cheese AC, LLC, No. A-5916-17T1, Unpub. 2019

WL 3029866, (App. Div.) certif. denied. 240 N.J. 78 (2019). Indeed, the members of the Zoning Board are appointed by the Township Council. Id. It is an independent, administrative body acting in a quasi-judicial capacity. See Rogoff v. Tufariello, 106 N.J.Super. 303, 308 (App.Div.), *certif. den.* 54 N.J. 583 (1969).

To prove improper influence on behalf of a public official, a court must find that the official had an actual conflict of interest (i.e. having a direct or indirect pecuniary or personal interest in the matter in question), or that the official took some direct improper official action toward the Zoning Board. See N.J.S.A. 40A:9-22.5(d); N.J.S.A. 40:55D-69; Piscitelli v. City of Garfield Zoning Bd. of Adjustment, 237 N.J. 333, 351-53 (2019); Grabowsky v. Twp. of Montclair, 221 N.J. 536, 553; Wyzykowski v. Rizas, 132 N.J. 509, 528-532 (1993). Here, there is not a scintilla of evidence that the Mayor had any conflict of interest such as a direct or indirect pecuniary or personal interest nor is there evidence of direct improper official action by the Mayor.

Case law is clear that espousing an opinion on a public matter does not constitute "improper influence" no matter how confounding the opinion may be. The Mayor was clearly within his right to express public opposition to the project. See Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 282-83 (1965); Cent. 25, LLC v. Zoning Board of City of Union City, 460 N.J. Super. 446, 459 (App. Div. 2019) certif. denied, 241 N.J. 4 (2020)(holding that a letter to the community from the

mayor, on city letterhead, opposing a developer's application for zoning use variance is insufficient to show that mayor or zoning board had prejudged the application).

Certainly, "members of [zoning boards of adjustment] must be 'free of conflicting interests that have the capacity to compromise their judgments.'" Cent. 25, LLC, 460 N.J.Super. at 450 (citing Piscitelli, supra 237 N.J. at 338). In Cent. 25, LLC, the Appellate Division reviewed the allegation that the Mayor of Union City had improperly influenced the zoning board by sending out letters/flyers regarding the plaintiff's pending zoning application. The first letter/flyer stated:

> I am writing this letter to inform you that I am personally not in favor of the live poultry market that is proposed for 25th Street and Central Avenue. This is not something I believe would benefit or improve your neighborhood. I know you see, first hand, how hard and how diligent the Commissioners and I are working to improve your neighborhood and the City.
>
> All I ask is if you attend the meeting on November 12th at 6:00 PM at City Hall – 2nd Floor at 3715 Palisade Avenue. It is important to voice your opinion and concerns. I do not have a vote on the board that will hear this proposal so it is important for you to let your voice be heard.

Id. at 453.

The plaintiff also noted an additional flyer from Mayor Stack, in which the mayor appeared to reaffirm his "condemnation of plaintiff's application and further requested that residents attend the meeting at its updated time and location 'to voice your opinion and concerns.'" Ibid. Each of these flyers came on official City of

Union City letter head. Prior to the receipt of each of these letters/flyers, plaintiff testified that he had met with the Mayor about his application and believed that he had secured the Mayor's blessing. Id. at 451-452. Despite this belief, the zoning board voted to deny plaintiff's application. Plaintiff argued that the denial was based on the mayor's improper influence. Further, it was argued that because two of the zoning board members were also officers and trustees of the mayor's civic association, their votes were improperly tainted. Id. at 456.

The Appellate Division did not render a finding that the Mayor's comments were improper. Instead, they noted that "[t]he Mayor, as an elected public official and a resident of the City, had the right to express his opinion on this proposed project." Id. at 459. Indeed, the central issue was not whether the mayor's comments improperly influenced the board, but whether the board members had any improper conflicts that precluded them from voting. Id. at 460.

In In re Twp. Of E. Brunswick, 2021 N.J.Super.Unpub.LEXIS 1627 (App.Div. July 30, 2021) the Appellate Division overturned the trial court's decision to disqualify and enjoin the mayor from hearing all site plan applications relating to the 2016 HESP and Final Judgment of Compliance and Repose due to a perceived conflict of interest that derived from the mayor serving as a voting member on the East Brunswick Planning Board. The trial judge had determined that the entire process had been "irreparably tainted" by the mayor's comments regarding the

plaintiff's property, project, and affordable housing. Therefore, the trial court found that the mayor's opposition to such applications created a conflict of interest. The Appellate Division, however, found that while the record was "clear that [the mayor]…did not welcome the increase of affordable housing in the Township" the judge should not have enjoined his participation. Id. at *19. Notably, in reaching this conclusion, the Appellate Division wrote: "public officials 'cannot and should not be expected to be without any personal interest in the decisions and policies of government.' N.J.S.A. 40A:9-22.4; see also Grabowsky v. Twp. of Montclair, 221 N.J. 536, 554 (2015)('it is essential that municipal offices be filled by individuals who are thoroughly familiar with local communities and concerns.')." Id. at *23-24. The Appellate Division reviewed the trial court's application of conflict of interest principles under the MLUL, Local Government Ethics Law, and common law to the enjoining of the mayor and found:

> The mayor's comments, while showing his disregard for affordable housing, are not tantamount to a conflict of interest regarding plaintiff's complex or nay other development pending before the Planning Board due to his direct or indirect pecuniary or personal interest having a likely capacity to tempt him to depart from his sworn public duty.

Id. at *24.

In the instant matter, there is no evidence that the Mayor improperly influenced the Board. As an elected public official and a resident of the Township,

Mayor Tamburro had the right to express his opinion on the Respondents' Amended Application. That much is true, even when the opinion is antagonistic to the application. Moreover, as the Appellate Division found in Cent. 25, LLC, these opinions can be expressed even on official municipal letterhead. Without any reference to legal precedent and failing to provide comment on how the Mayor's press release differs from the other forms of allowable public comment, the trial judge instead focused almost thirteen (13) pages of the 53-page Opinion on the effectiveness of the press release in engaging members of the public and admonished the Mayor for having "ginned-up" opposition to the application. M40.

Incredibly, the trial judge found that the Mayor's free expression of opinion through public press releases amounted to "a subversion of due process and fundamental fairness to the [Respondents]." M38. To dull the muzzling of the Mayor, the lower court's opinion suggests that it would have been more proper for the Mayor to have appeared at the hearing, either personally or through a representative, to voice his objection to the application. The trial court acknowledges that same would have been his "irrefutable right." M39. However, based on the trial court's belief that the Mayor had such undeniable influence over the voting members, it is curious how his actual attendance at the hearing, before those members, would have somehow been less influential.

Perhaps, though, the trial court's issue isn't that the Mayor held an opinion in the general sense. Again, this was acknowledged as his right. Instead, the issue is more accurately framed as whether the Mayor had the "correct" opinion. The trial court's disagreement with the Mayor's opinion is effectively that it could have hindered the Respondent's Amended Application since his opinion was negative. If the Mayor's opinion were in favor of the Amended Application, would it still carry the same air of impropriety? The trial court notes, without any concern, that the Respondents were miffed that they could not get a meeting with the Mayor to get his approval for the project before the board heard the Amended Application. Clearly, the Respondents wanted to sway the public and the board in their favor. These are then two sides of the same coin. The Respondents cannot seek out the Mayor's approval in order to boost their chances, and then claim foul play when the Mayor does not support their cause. Similarly, the trial court's opinion errs in that it finds a flaw only where the Mayor opposes the Respondents application. Upon this flawed finding, the trial court determined a SHO was necessary.

A. The Trial Court's Holding Concerning the Mayor's Press Release Creates a Chilling Effect on the Ability of Local Public Officials to Comment on Important Community Issues. (M38-51).

Increasingly, litigation has been commenced by those with commercial interests for the purpose of intimidating citizens who exercise their constitutionally protected right to speak out. LoBiondo v. Schwartz, 323 N.J. Super. 391, 418

(App.Div.1999). In this way, commercial interests seek to quell effective opposition. Ibid. In other words, protesting citizens are being sued into silence. This type of litigation is consequently viewed as a serious and significant threat to the free, open and vigorous debate on public issues that the courts have so scrupulously protected as a bedrock principle of the first amendment, which is imperative to a democratic form of government. Ibid; see also, George Pring and Penelope Canan, Strategic Lawsuits Against Public Participation, 35 Soc. Probs. 506 (1988); George Pring and Penelope Canan, Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches, 22 L. & Soc'y Rev. 384 (1988).

Of paramount importance to first amendment free speech rights is the ability of a public official to discharge their duties without unnecessary fear of reprisal. Thus, the first amendment mandates that the mere potential risk of a restriction on that right should be viewed with extreme prejudice. The muzzling of a local public official, especially the mayor, on matters within their prerogative as a duly elected representative of the people, flies in the face of the democratic ideals enshrined in the United States and New Jersey Constitutions. Respondents' litigation against the Mayor amounts to a strategic lawsuit against public participation designed to chill any potential, constitutional opposition to a development project. To make matters worse, the trial court's opinion endorses the Respondents' end goal with its opinion of October 15, 2020.

The trial court Opinion erroneously conflates substantive public engagement for improper influence on a development application. The trial court focuses on the number of residents at the hearing and the seventeen (17) residents who spoke in opposition to the application as if either were evidence of anything untoward. M40. The October 15, 2020, Opinion states, "[i]t is clear that the Mayor had, as Plaintiffs' counsel argued, successfully "ginned-up" opposition to ensure that in the face of that agitated crowd [Zoning] Board Members acceded to issuing the overtly suggested, if not dictated, denial." M40. Such a characterization suggests that undue influence can be proved solely by the presence and comment of public opposition. Ironically, the trial court noted in its opinion that, "[…]the hearing itself was conducted in a professional and orderly fashion (thanks to the skilled stewardship exhibited by the [Zoning] Board's counsel[…]," and even notes that those same "agitated" members of the public, "politely complimented the Applicant and its testifying professionals, lamenting with them over the unexpected dilemma the developer faced […]." M41.

Allowing the trial court's October 15, 2020 to stand will set a disturbing precedent that will no doubt be used by developers or other interested parties throughout the State to stymie public engagement and participation in matters of public importance such as land use applications. Public opposition to an application does not and cannot constitute "undue influence." Even in cases where the Mayor has apparently stirred the rabble-rousers, there is no support for the conclusion that

same can be muzzled. Indeed, land use board members are well equipped to handle polite, measured, non-violent, and non-disruptive dissent. There is nary a public meeting that occurs where dissent isn't voiced in varying degrees and multitudes. A ruling in favor of the trial court's interpretation places board counsel and, indeed, all public officials in the untenable position of representing their constituents' interests while nervously treading through a new precarious minefield that threatens them personally with monetary damages.

Further, the longer the ruling below is allowed to stand, the higher the likelihood that it will be used as precedent by other litigants throughout the State to restrict elected officials' from exercising their first amendment rights and the right of the public to be involved in matters that intimately affect local government and their communities.

By incorrectly assigning impropriety to the Mayor, the trial court manufactured the very scenario in which appointment of an SHO was deemed warranted. Even assuming that the Mayor's expression of opinion was not appropriate, same does not constitute a basis to appoint an SHO on its own. Under no circumstance did the trial court have a legitimate basis to usurp the Board's authority and appoint a SHO. The use of the Mayor's press releases to do so was nothing more than the first card in a house full of them.

POINT IV

THE TRIAL COURT'S ADOPTION OF THE SPECIAL HEARING OFFICER'S RECOMMENDATION WAS PROCEDURALLY FLAWED AND THEREFORE REQUIRES REVERSAL. (Issue not raised below).

The trial court appointed the SHO to oversee the Respondent's Amended Application via its order dated October 15, 2020. Specifically, the trial court set forth that the SHO was appointed pursuant to R. 4:41-5(b). Under R. 4:41-5(b), the trial court can only act upon the report of the master, or in this case the SHO, after a party move's for action on the report and a hearing is consequently held. Here, while the parties each had an opportunity to make comments or objections to the report in supplemental filings with the trial court, no hearing was thereafter requested or held by the trial court. Instead, the trial court entered its decision without any party moving to and without any hearing on the matter. The procedural flaw cannot be overlooked. The rule specifically identifies that the trial court's action on the report can only occur "after hearing on the motion." Without requiring a party to move on the SHO's recommendations, it is clear that the result was a fait accompli. Respondents were already given the benefit of the trial court's usurpation of the Board's authority and granted their requested variances. Thus, the site plan application became an "as of right" removing any doubt that Respondents site plan would be approved by the SHO.

By failing to adhere to the requirements under R. 4:41-5(b), the trial court compounded the procedural issues regarding the SHO and prejudiced the Township to the benefit of the Respondents. The Township and Board were not afforded an opportunity to argue the issues related to the SHO recommendations Accordingly, the Court's August 9, 2022 Order was improperly entered and should be reversed.

CONCLUSION

For the reasons set forth above, it is respectfully requested that this Court hereby reverse the decision of the trial court as set forth in its Orders and Opinions dated October 14, 2020, October 15, 2020, June 16, 2021, September 14, 2021, and August 9, 2022.

Respectfully submitted,

RAINONE COUGHLIN MINCHELLO, LLC

By: _____
Mathew R. Tavares, Esq.

Dated: September 7, 2023

CT07 SPII, LLC and DT07 SPII, LLC Plaintiffs-Respondents/ Cross-Appellants v. ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MONROE, THE TOWNSHIP OF MONROE, and MAYOR GERALD W. TAMBURRO, in his Official capacity as Mayor of The Township of Monroe, Defendants-Appellant/ Cross-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-002471-22 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MIDDLESEX COUNTY SAT BELOW: HON. THOMAS D. McCLOSKEY, J.S.C. Docket No.: MID-L-3953-19

BRIEF OF DEFENDANT/CROSS-APPELLANT ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MONROE IN SUPPORT OF CROSS-APPEAL

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PRELIMINARY STATEMENT

The present action is a "garden variety" prerogative writ action to review the denial of an application for development by a municipal land use board. Unfortunately, the Trial Court abrogated its obligation to review the denial under the relevant statutory and case law; and, instead, decided to impose its decision and use the case as a vehicle to demonstrate its knowledge of obscure relief inapplicable to the matter. In an attempt to impose such relief, the Trial Court ignored the record developed before the municipal land use board and selectively chose those facts which implemented its agenda. As such, this Appellate Court cannot give countenance to these actions and must overturn the decision of the Trial Court.

PROCEDURAL HISTORY AND STATEMENT OF FACTS [1]

The Monroe Township Zoning Board of Adjustment (the "Board") hereby adopts the Statement of Facts and Procedural History contained in the Brief filed by the Township of Monroe and Mayor Gerald W. Tamburro in Support of Appeal; as supplemented herein.

2019 BOARD HEARING AND DECISION

On March 26, 2019, the Board properly denied the application of CTO7 SPII

[1] Please note that the Procedural History and Statement of Facts have been consolidated for judicial economy and ease of presentation and understanding.

LLC, and DT07 SPII LLC (the "Respondents") for a (d)(1) use variance and a two (d)(6) height variances, as well as numerous bulk variances, in order to develop Block 4, Lot 14.01 (the "Property") with 43,568 square feet ("SF") of commercial uses and 206 residential units (including 43 affordable apartment units) (the "Application"). See generally 1T. The Board's decision denying the Application was memorialized in a written resolution adopted on April 30, 2019 under Application No.: BA 5135-16 (the "Board Resolution"). M68-86. The Application sought to substantially modify approvals granted by the Board to the Respondents' predecessor under Application No.: BA-5112-15; as memorialized in a written resolution adopted by the Board on April 26, 2016 (the "Prior Approvals"). M87-102.

Under the Prior Approvals, the Property and an additional property on Applegarth Road received a (d)(1) use variance and certain bulk variances from the Board, in order to develop the Property and the Applegarth Road property with 65,000 SF of commercial uses (on the Property only); and 215 residential units (206 on the Property and 9 on the Applegarth Road property). M87-102. Under the Prior Approvals, all affordable housing units (20% or 43 affordable apartment units) were to be built on the Property despite the fact that 2 of the affordable housing units were generated by the 9 townhomes on the Applegarth Road property. M87-102. The provision of the affordable units was a requirement of the

overlay zone under which the Property was developed; which required that at least 20% of any residential units be provided as affordable housing as defined by the State of New Jersey. Ba8.[2] Under the Prior Approvals, a traffic signal on New Jersey State Highway 33 (the "Route 33 Signal") was to be provided as a voluntary condition of approval; and be installed and operational prior to the issuance of the first certificate of occupancy. M87-102.

At the time the Board granted the Prior Approvals, the Township had filed and was prosecuting a Declaratory Judgment action (captioned In the Matter of the Application of the Township of Monroe for Substantive Certification of its Obligations Under the Fair Housing Act, Docket No.: MID-L-3365-15) seeking the judicial equivalent of substantive certification for its Third Round Affordable Housing Obligation (hereinafter the "DJ Action"). M107-130. Based upon the Prior Approvals and the affordable units provided therein, the Property was included in the Township's 1999-2025 Housing Element and Fair Share Plan (the "2016 HEFSP"), as well as a Settlement Agreement to meet its Third Round Affordable Housing Obligation. M107-130; M358-461. On October 5, 2016, the Township was successful in its efforts the Court entered a Declaratory Judgment of

[2] "Ba" shall refer to the Appendix of the Zoning Board of Adjustment of the Township of Monroe.

Compliance and Repose in the DJ Action (the "2016 Judgment of Compliance"). M131-137.

After the Prior Approvals, the Property was transferred to the Respondents; who discovered a bald eagle's nest on the Property. M68-86. The presence of the bald eagle's nest reduced the developable portion of the Property by approximately half (1/2) due to a 660-foot buffer from the bald eagle's nest required by certain state and federal laws and regulations. M68-86. Although, the developable portion of the Property was reduced by approximately half (1/2), the intensity of the development proposed in the Application was only reduced by 21,432 SF of commercial use (65,000 SF reduced to 43,568 SF) and the number of residential units (206 units) was unchanged. M68-86. Respondents agreed to a voluntary condition to supply the Route 33 Signal; and that it would be installed and operational prior to the issuance of the first certificate of occupancy. M68-86.

The impact of the proposed development in the Application on the reduced developable land created a substantial increase in the number of variances from the Prior Approvals. M68-86. The Prior Approvals only required a (d)(1) use variance; and bulk variances for the minimum setback of two apartment buildings from Route 33. M87-102. The Respondents' Application now required twelve (12) variances; including: a (d)(1) use variance; two (d)(6) height variances; and nine bulk variances. M68-86. The Board, as detailed in the Board Resolution

denying the Respondents' Application, made extensive finding of fact and thoroughly established the reasons why it did not accept the conclusions of the Respondents' professionals by appropriately applying the facts to the applicable law for each and every one of the twelve (12) variances requested by the Respondents. M68-86.

VC-2 VILLAGE CENTER OVERLAY ZONING

The present action concerns the proper denial by the Board of the Respondents' Application to develop the Property located in the VC-2 Village Center Overlay Zone (the "VC-2 Zone"). As will be demonstrated herein, the Respondents' Application was inimical to the Purpose, as well as the General Goals of the VC-2 Zone set forth in the Monroe Township Land Development Ordinance ("LDO"); which establishes the following Purpose for the VC-2 Zone:

> Purpose: The purpose of the VC-2 Overlay is to promote a full range of commercial, office and residential land uses within a newly created, pedestrian-friendly, mixed-use environment that will serve local, community-wide and regional needs and create new employment opportunities. Pedestrian movement is encouraged to flow throughout the overlay zone area by generally permitting stores and shops and personal service establishments on the ground floor of buildings and promoting the use of upper floors for office and, in certain circumstances, residential dwelling units. Land uses within the overlay zone should be arranged to provide for highway-oriented commercial and office uses along Route 33. In order to create a neo-traditional downtown, less-intensive commercial and office uses mixed with residential uses on upper floors should be oriented toward the interior of the area along a primary access road that extends in a general north to northeast direction from Route 33 to Applegarth Road. The bulk of the residential uses should be developed in areas

> that are in the vicinity of the less intensive "downtown" and extend north from Route 33 toward the edge of woods along the Millstone River.

Ba6. The LDO further provides the following General Goals of the VC-2 zone:

> General goals:
> (a) Proper screening and buffering around the perimeter of the area and along surrounding roads;
> (b) Adequate building setbacks from surrounding roads;
> (c) Well-landscaped interior spaces for residential and nonresidential land uses;
> (d) Open space for active and passive recreational amenities for residential land uses;
> (e) Public amenities including, but not limited to, pedestrian plazas and sitting areas;
> (f) Opportunities for shared off-street parking and stormwater management facilities;
> (g) Off-street parking that is well screened from public view;
> (h) Controlled and coordinated internal circulation system for pedestrians and vehicles; and
> (i) Coordinated design themes, i.e., buildings, streetscapes, parking areas, landscaping, lighting and signage.

Ba6-7. By compressing the entire development into the portion of the Property adjacent to Route 33, the Respondents undermined both the Purpose of the VC-2 Zone, as well as its General Goals. M68-86; Ba6-7. The development no longer resembled a town center but rather consisted a series of mixed-use structures providing none of the character sought for the VC-2 Zone; while requiring countless variances from its requirements. M68-86; Ba6-16.

TRIAL COURT LITIGATION

Following the denial of the Application, the Respondents filed a lawsuit in Superior Court, seeking relief in the form of prerogative writs and related Mt. Laurel compliance claims, as well and other civil rights, discrimination and defamation claims. The prerogative writs and related Mt. Laurel compliance claims were bifurcated from the remaining claims by October 25, 2019 Order of the Trial Court. M822-825.

A trial was held on the prerogative writs and related Mt. Laurel compliance claims on July 15, 2020. 2T. On October 15, 2020, the Trial Court issued an Order (the "2020 Order") and Opinion (the "2020 Opinion") which reversed the denial by the Board of the Respondents' Application; approved the Respondents' Application; appointed a Special Hearing Officer ("SHO") to conduct a hearing on remand of Respondents' application for preliminary and final site plan approval; and established procedures and requirements for the conducting of the hearing of the Respondents application for preliminary and final site plan approval by the SHO. M1-64.

Additionally, an Order was entered on October 14, 2020 designating the Hon. Jamie D. Happas to Appoint a SHO, as well as a Memorandum of Honorable Jamie D. Happas, P.J.Cv. dated October 14, 2020 granting permission to appoint a SHO. M65-66.

On November 4, 2020, the Township, Mayor and Board filed motions for leave to appeal to the Appellate Division; which were denied on December 24, 2020. M514-517.

On June 16, 2021 and September 14, 2021, the Trial Court entered Orders which, in part, modified its Order of October 15, 2020 concerning the hearing to be conducted by the SHO. M462-476. The September 14, 2021 Order, in part, established a framework for the SHO to consider a request by the Respondents for relief from the requirement of the LDO that Route 33 Signal be supplied. M474-476.

On March 24, 2022 and March 25, 2022, a hearing was conducted during normal business hours at the Middlesex County Court House by the SHO on the Respondents' application for preliminary and final site plan approval. See generally 5T and 6T. The procedure for the hearing was established by the SHO and was inconsistent with the standard procedure for a hearing before the Board under the Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq. (the "MLUL").

On August 9, 2022, the Trial Court entered an Order adopting the findings and proposed resolution of the SHO. M477-513. The resolution of the SHO, in part, relieved the Respondents from the obligation to provide the Route 33 Signal. M477-513.

On August 29, 2022, the Township and Mayor filed a motion for leave to appeal to the Appellate Division; which were denied on September 19, 2022. M712-715.

On November 4, 2022, the Township, Mayor and Board filed summary judgment motions on the civil rights and discrimination claims. M716-717. Oral argument was conducted by the Trial Court on the motions on February 10, 2023. 7T. On March 10, 2023, the Trial Court entered an order and opinion granting the summary judgment motions and dismissing the remaining counts in the complaint with prejudice. M718-719.

On April 21, 2023, the Township and Mayor filed a Notice of Appeal to the Appellate Division. M757-761. A Notice of Cross-Appeal was filed by the Respondents on April 24, 2023. M762-765. A Notice of Cross-Appeal was filed by the Board on April 26, 2023. M766-771.

ROUTE 33 TRAFFIC SIGNAL

As indicated above, both the Prior Approvals and the Respondents' Application included the provision of the Route 33 Signal. M68-102. The provision of the Route 33 Signal is a requirement for the development of the Property under the VC-2 Zone standards in the LDO. Ba12. The VC-2 overlay zone includes regulations governing traffic and circulation within the VC-2 district; and provides, in pertinent part:

> (10) Traffic and circulation:
>
> (a) A detailed traffic study analyzing the development's impact on the existing road system including, but not limited to, Applegarth Road, Route 33, the full intersection of Applegarth Road and Route 33, Bentley Road and proposed road intersections with any of the surrounding roads shall be filed with the development application.
>
> (b) A primary access road in the form of a boulevard with a treed center median that interconnects Applegarth Road through the VC-2 Village Center Overlay Zone with Route 33 at a signalized intersection at the main entrance of the existing Renaissance age-restricted development located on the southern side of Route 33.

Ba12. The Property is located across Route 33 from the entrance to the existing Renaissance age-restricted development; and, therefore, the LDO imposes an obligation on the Respondents, as well as the initial applicant in the Prior Approvals to supply the Route 33 Signal as part of the development of the Property. Ba12. Both the Respondents and the initial applicant in the Prior Approval voluntarily agreed to supply the Route 33 Signal as a condition of any Board approval. M71-72; M91.

In an effort to provide the Route 33 Signal, the applicant in the Prior Approvals and their professionals, including the Applicant's Traffic Engineer Scott Kennel, attended a pre-application meeting with the new Jersey Department of Transportation (hereinafter the "NJDOT"). See Ba22-26.

At a pre-application meeting on April 8, 2015 (hereinafter the "2015 NJDOT Meeting"), the NJDOT communicated significant support for the Route 33 Signal.

Ba22-26. In reliance on the NJDOT's support for the Route 33 Signal at the 2015 NJDOT Meeting, the Route 33 Signal was included with the application filed for the Prior Approvals. Additionally, the applicant in the Prior Approvals voluntarily agreed to a condition of approval requiring the installation and operation of the Route 33 Signal prior to the issuance of a certificate of occupancy. M91. This condition was in the resolution of approval for the Prior Approvals. M91.

On February 14, 2019, over a month before the March 26, 2019 Board hearing on the Respondents' Application, a meeting was conducted between the Respondents, their professionals and the NJDOT (hereinafter the "2019 NJDOT Meeting"). Ba27-30. At the 2019 NJDOT Meeting, the NJDOT advised that they were now not in favor of the Route 33 Signal. Ba27-30. This was a change in NJDOT's position from prior pre-application meetings. Ba22-30. Specifically, the minutes from the 2019 NJDOT Meeting indicate:

> Pinakin Tank [of the NJDOT] stated that the department was not in favor of a median turn lane at the new intersection because the abutting intersections east and west of the site have jughandles to accommodate left turns and the left turn movement along Route 33 should be consistent for the motoring public. Furthermore, it was stated that it was his opinion that an *Access Level* change would be required for the department to consider a median turn lane at the subject property.
>
> Pinakin Tank stated that if the access level modification is approved, it will be necessary to submit an application with supporting documentation to justify the new traffic signal as well as a *Waiver Request* for relief on the signal spacing requirement.

Ba29. Shortly after the 2019 NJDOT Meeting, on March 26, 2019, the Board hearing occurred on the Application. 1T.

Throughout March 26, 2019 hearing on the Respondents' Application, Respondents' representatives testified as to the benefit of the Route 33 Signal. See generally 1T. Specifically, Carey Tajfel, Principal of Respondents identified the new traffic signal as benefit of the project for the Township. See 1T15-11. Additionally, David Minno, Respondents' Architect testified that:

> what [Applicants] have done is we've got a plan where the two buildings are the very entry of the site, and this is what I say the entry is a boulevard entry which creates a signalized intersection across from Renaissance, which is a benefit to the people across the street to allow the ability to get east on – I'm sorry, west on Route 33.

See 1T60-21 to 1T61-3. Finally, Art Bernard, P.P., the Respondents' Professional Planner, opined that the Route 33 Signal was an element of the Respondents' ability to satisfy the proofs necessary for the use variance; stating:

> With the traffic improvements that are being made, most notably the [Route 33 Signal] and the ability to go move within this development to Applegarth Road, it advances purpose (h) which is to encourage the free flow of traffic.

See 1T117-10 to 1T117-14.

However, most telling, Scott Kennel, the very representative of Respondents who was present at the 2019 NJDOT Meeting, testified that:

> A significant element of this development that was discussed was the access. As far as Route 33 is proposed to have two access driveways. The most important one is the primary access located opposite

> Renaissance Boulevard which will be controlled by a traffic signal. Providing that the traffic signal allows direct left turns to and from Route 33 without the need of using the adjoining intersection, that being Applegarth Road and Twin Rivers Road, for U-turns. And that's a benefit not only to the application before you, it's also a benefit to the Monroe Village development to the east, as well as to the residents of the Renaissance.

See 1T89-18 to 1T90-6. Mr. Kennel further indicated that:

> It's also important to recognize that with this traffic signal at this location it improves the Levels of Service at Applegarth Road as well as at Twin Rivers Drive because we're not – traffic will have direct access to this site and not be required to utilize other signals for U-turns like they currently do today for the approved developments.

See 1T91-2 to 1T91-9. At no point did Mr. Kennel mention or even allude to the fact that the NJDOT was no longer in favor of the Route 33 Signal. See generally 1T.

In fact, even when challenged by a member of the public concerning the ability to secure the Route 33 Signal, Mr. Kennel did not waiver in his position; nor did he allude to the position taken by the NJDOT at the 2019 NJDOT Meeting. 1T162 to 1T164. Specifically, the following exchange occurred:

> MS. WALFISH: The other question is about the traffic light. Whether it's a good configuration or not you keep talking about this traffic light at Renaissance at Boulevard. That is not a sure thing. You said it's under consideration. It's a proposal at the D.O.T. They may turn it down. They have turned it down in the past because they said it's – our boulevard, Renaissance Boulevard, is too close to Twin Rivers intersection and they wouldn't put in a traffic light there. And now you're keep on talking about the benefit of a traffic light for us and it's just a proposal by you, it's not a sure thing. And I just want to clarify that. Am I correct?

* * *

> MR. KENNEL: Yes, it is proposal, but let me just clarify. Renaissance Boulevard itself does not generate enough traffic to warrant the installation of a traffic signal. The combination of traffic from both sides of Route 33 would meet the criteria as a candidate for a traffic signal. And then from there we would go into more detailed designs and analysis for their consideration.
>
> MS. WALFISH: Okay. Because the last time we asked about it the State D.O.T. said to us it had nothing to do with the amount of traffic, it was the distance between Twin Rivers and our development that they didn't want to put a traffic light between Twin Rivers and Applegarth. So I just want to point that out. You keep on talking about a traffic light. Regardless of the configuration of it, it may be not be approved anyway. So I just wanted to clarify that.

1T163 to 1T164. While the testimony of the public hearing on March 26, 2019 on behalf of the Respondents is replete with discussion of the benefits of the new Route 33 Signal, it is remarkably devoid of any mention that the NJDOT was in fact no longer in favor of the proposed Route 33 Signal. See generally 1T.

Subsequent to 2020 Order, the Respondents' sought relief from the requirement of the Route 33 Signal. The Respondents asserted that the NJDOT was no longer supportive of the Route 33 Signal. This position was based upon an April 6, 2021 pre-application meeting between the Respondents and the NJDOT (hereinafter the "2021 NJDOT Meeting"). Ba17-21. At the 2021 NJDOT Meeting, the Respondents indicate that the NJDOT modified its prior endorsement of the

Route 33 Signal; as indicated in the following excerpt from the minutes of the meeting:

> Pinakin Tank and Joseph Idowu [both from the NJDOT] took the position that, in order to proceed with the [Route 33 Signal], an *Access Level* change would be required in accordance with the *State Highway Access Management Code*. Neither Pinakin Tank nor Joshua Idowu could provide a citation requiring an access level change in order to permit a median left turn lane.
>
> Pinakin Tank further stated that if the access level change was perfected, it would not guaranty an approval of the [Route 33 Signal] and that a detailed corridor analysis with and without the new traffic signal would be required, including a *Waiver Request* to install the new traffic signal 1,200 feet east of Twin Rivers Drive where 2,640 feet is required.

See Ba19. However, the Respondents' assertion that the NJDOT modified it position at the 2021 NJDOT Meeting ignores the similar (if not identical) position taken by the NJDOT at the 2019 NJDOT Meeting. Ba17-21; Ba27-30.

As a result of the 2021 NJDOT Meeting, the Respondents filed a motion seeking relief from the voluntarily condition requiring the provision of the Route 33 Signal. M474-476. This motion was denied by the Trial Court; and the issue was remanded to the SHO to address as part of the Respondents' site plan application. M474-476. However, rather than merely remand the issue, the Trial Court interjected a series of parameters for the consideration of the issue by the SHO. M474-476.

During the Respondents' site plan application to the SHO, the Respondents again sought relief from the provision of the Route 33 Signal based upon the purported change in the position of the NJDOT. See generally 5T and 6T. The basis of the request was that: (a) the NJDOT would be unlikely to approve the Route 33 Signal, therefore, making its inclusion in the development unreasonable; and (b) the requirement of the Route 33 Signal was an unduly cost generating obligation for the Respondents.

The obligation to provide the Route 33 Signal was included in the VC-2 Zone at the time the Township of Monroe was granted the 2016 Judgment of Compliance. 6T272 to 6T282. At that time, the Respondents' predecessor did not intervene in the action to contest the obligation to provide the Route 33 Signal in connection with the development of the Property. M107-137; 6T272 to 6T282. Similarly, the Respondents did not contest the obligation to supply the Route 33 Signal at the time of the Application or during the hearing on the Application. M68-86; 1T. In fact, as in the Prior Application, the Respondents voluntarily agreed to supply the Route 33 Signal as a condition of any Board approval. M71-72.

LEGAL ARGUMENT

The Monroe Township Zoning Board of Adjustment (the "Board") hereby adopts the Legal Argument contained in the Brief filed by the Township of Monroe

and Mayor Gerald W. Tamburro in Support of Appeal; as supplemented herein.

POINT I

THE DENIAL OF THE RESPONDENTS' APPLICATION BY THE BOARD WAS PROPER AND MUST BE AFFIRMED (M1-64).

In the present action, the Trial Court failed to follow the clear mandate of well-stablished law in regard to the review of a land use board's decision, and **specifically** that of denying a use variance. Our Courts have clearly and consistently held that the arbitrary, capricious or unreasonable standard is the least demanding form of judicial review. "We have long recognized that zoning boards, 'because of their peculiar knowledge of local conditions[,] **must be allowed wide latitude in the exercise of delegated discretion**.'" Price v. Himeji, LLC, 214 N.J. 263, 284 (2013) (alteration in original) (quoting Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 296 (1965)). "A Court will not substitute its judgment for that of a board '**even when it is doubtful about the wisdom of the action.**' Cellular Tel. Co. v. Zoning Bd. of Adj., 90 F. Supp. 2d 557, 563 (D.N.J. 2000)." Cell South of New Jersey, Inc., v. Zoning Board of Adjustment of West Windsor Township, 172 N.J. 75, 81 (2002) (emphasis added).

Despite the Trial Court's findings to the contrary in the 2020 Opinion, our Courts have routinely found that a board is not bound by an applicant's expert witnesses. M32-34. As noted in Hawrylo v. Board of Adjustment, Harding Twp.,

249 N.J. Super. 568, 579 (App. Div. 1991), "A board is free to accept or to reject the opinions of a planner proffered by an Applicant or objector." Id. (citations omitted). However, "[w]hile a board may reject expert testimony, it may not do so unreasonably, based only upon bare allegations or unsubstantiated beliefs." New York SMSA, L.P. v. Bd. of Adjustment of Twp. Of Weehawkin, 370 N.J. Super. 319, 338 (App. Div. 2004)(citation omitted). Finally, "A board may accept or reject the testimony of any witness and, **so long as it is reasonably made, that decision is conclusive on appeal**. Kramer, *supra,* 45 *N.J.* at 288 . . . ." Nextel of New York, Inc. v. Borough of Englewood Cliffs Bd. of Adjustment, 361 N.J. Super. 22, 41 (App. Div. 2003) (emphasis added). As noted, the Board Resolution is very detailed in general and in this regard, and the Board appropriately expressed its disagreement with the Respondents' experts' opinions and conclusions. M68-86.

Additionally, the Trial Judge determined that the record is lacking in "substantial proof" to justify the Board's decision. M29-31, M44, M59-60. However, the Trial Judge failed to give due consideration to the case law which holds that the Board Resolution is part of the record and as noted above, properly detailed the findings of fact, the Board's analysis of the application and the basis for its decision. As noted by the Courts and as remarked upon on by the noted commentator, William M. Cox, the Court should not only review the transcript and exhibits but should also give substantial weight to the memorializing Board

Resolution. See, Scully-Bozarth Post # 1817 of the Veteran of Foreign Wars of U.S. v. Planning Bd. of City of Burlington, 362 N.J. Super. 296, 311-312 (App. Div. 2003), New York SMSA, L.P. v. Bd. of Adjustment of Tp. of Weehawken, 370 N.J. Super. 319, 333-334 (App. Div. 2004), and Cox & Koenig, New Jersey Zoning and Land Use Administration, (GANN, 2023) § 19-7.1, see also, N.J.S.A. 40:55D-10(g). "**It is the resolution, and not board members deliberations, that provides the statutorily required findings of fact and conclusions.**" New York SMSA v. Bd. of Adjustment of Tp. of Weehawken, 370 N.J. Super. at 334 (emphasis added).

Contrary to the 2020 Opinion and as detailed in the Board Resolution, the Board made extensive and detailed findings of fact, thoroughly analyzed the Application, and gave substantial reasons for its denial. M68-86. This fully complies with the Board's duties as noted by the Trial Judge:

> Rather, "the resolution must contain sufficient findings, **based on the proofs submitted,** to satisfy a reviewing court that the **board has analyzed** the applicant's variance request in accordance with the statute and in light of the municipality's master plan and zoning ordinances." New York SMSA v. Bd. of Adjustment of Twp. of Weehawken, 370 N.J. Super. 319, 333 (App. Div. 2004). A "resolution cannot consist of a mere recital of testimony or conclusory statements couched in statutory language", and "[w]ithout such findings of fact and conclusions of law, the reviewing court has no way of knowing the basis of the board's decision." Id. at 332-33.

M29 (emphasis in original). Specifically, the Board made the following findings in the Board Resolution:

1. The Board finds that the Applicant has not met the required proofs for the Use Variance as required by N.J.S.A. 40:55D-70(d)(1) and otherwise provided by law for minimum lot size for the 48.29 acre Route 38 Site, whereas pursuant to Ordinance Section 108-6.18(K)(3) the VC-2 Overlay Zone requires a minimum lot size of 75 acres. The undersized lot in and of itself would not be objectionable but for the over-intense proposed development of the lot. The intensity of the proposed development in the developable area of the lot is far too intense as evidenced by the D1 Use Variance, the two (2) D6 Height Variances, and the number, type, character and extent of the variances requested. Granting of the Use Variance for minimum lot size would create substantial negative impacts upon the Township and the immediate area and for the future residents of the project. The site would not provide sufficient air, light and open space within the developable area, as required by the regulations in the Ordnance, due to the intensity of the proposed development within that area. Granting the application would not advance the purpose of the Master Plan and Zone Plan for the VC-2 Overlay Zone as those are premised upon conformance with the regulation of the affected areas by the applicable zoning ordinances, and the current Application's departure from those regulations are substantial and therefore vitiate advancing the purposes of the Master Plan and Zone Plan. Specifically, the variance would not advance, and would frustrate the purpose of a less intensive downtown as set forth in Ordinance Section 108-6.18(K)(1), and, the goals of: (a) proper screening and buffering around the perimeter of the area and along surrounding roads; (b) adequate building setbacks from surrounding roads; (c) well-landscaped interior spaces for residential and nonresidential land uses; and (g) off-street parking that is well screened from public view, as set forth in Ordinance Section 108-6.18(K)(2). The Board finds that these negative impacts outweigh the positive impacts as noted by the Applicant. The Board is cognizant that a "reasonable" accommodation should be made to the Applicant as they are providing affordable housing; however the Board finds that the number, type, character and extent of the variances requested are excessive, overly intense and would not be a "reasonable" accommodation. Further, the number, type, character and extent of the variances requested serve only to advance the Applicant's economic interest which has been specifically rejected by the Courts as a basis to justify the granting of variances.

2. The Board finds that the Applicant has not met the required proofs for the Height Variances as required by N.J.S.A. 40:55D-70(d)(6) and otherwise provided by law. As noted the Applicant requires two (2) Height Variances for: (i) building height for nonresidential structures, and (ii) building height for residential structures. As noted, both Height Variances exceed both the maximum permitted number of stories and maximum permitted height. The Board's practice is to view both deviations as one (1) request for relief, such that a number of stories variance is subsumed into a height as measured in feet variance and vice-versa; however, this practice does not obviate the need for the two (2) Height Variances required for this Application. The Board finds that the same reasons expressed for the denial of the Use Variance pursuant to N.J.S.A. 40:55D-70(d)(1) are equally applicable to the two (2) Height Variances, and therefore deny both Height Variances. Additionally, these buildings of these heights are out of character in relation to the residential and mixed-use developments. In the area of the Township.

3. The Board finds that the Applicant has not met required proofs for the Bulk Variances as required by N.J.S.A. 40:55D-70(c)(1) and otherwise provided by law. The Board finds that the same reasons expressed for the denial of the Use Variance pursuant to N.J.S.A. 40:55D-70(d)(1), and the two (2) Height Variances pursuant to N.J.S.A. 40:55D-70(d)(6), are equally applicable to the Bulk Variances and therefore denies the Bulk Variances. The Board further notes that the presence of the eagle's nest and the required buffer does creates a hardship; however the number, type, character and extent of the Bulk Variances requested are far too intense and exceed a reasonable modification of the site to offset the impact of the eagle's nest. These variances result in an overly intense use of the developable portion of the site and serve only to advance the Applicant's economic interest which has been specifically rejected by the Courts as a basis to justify the granting of variances.

4. The Board finds that the Applicant has not met required proofs for the Bulk Variances as required by N.J.S.A. 40:55D-70(c)(2) and otherwise provided by law. The Board finds that the same reasons expressed for the denial of the Use Variance pursuant to N.J.S.A. 40:55D-70(d)(1), the two (2) Height Variances pursuant to N.J.S.A. 40:55D-70(d)(6), and the Bulk Variances pursuant to N.J.S.A.

40:55D-70(c)(1) are equally applicable to the Bulk Variances relief under N.J.S.A. 40:55D-70(c)(2) and therefore denies the Bulk Variances. Additionally, the Board rejects the Applicant's arguments that the variances provide a benefit in that by the Applicant using space more efficiently, it allows the Township to address its affordable housing obligation and attract more retail uses for the Property by allowing additional space for the retail and the parking required to attract retail users. The Board finds that the space is not more efficiently used, but is overly developed in a far too intensive manner. The Board rejects the Applicant's argument that the variances which allow the residential uses provide a benefit to attract retail users to the Property. The Board finds that there is more than sufficient residential development in and about this area of Route 33 to support retail uses on the Property.

5. The Board finds that the Applicant has not met the negative for the Bulk Variances as required by N.J.S.A. 40:55D-70(c)(2) and otherwise provided by law. The Board finds that the Bulk Variances do not provide for a better zoning alternative and create a substantial negative impact, individually and taken as a whole. Further, the impact of the eagle's nest or any other physical feature of the site can be accommodated through better and less intensive site design.

Additionally, in regard to the specific Bulk Variances requested, the Board finds

1. Building Setback to Route 33. In the VC-2 Overlay zone, pursuant to Ordinance Section 108-6.18(K)(4)(m), buildings containing residential units shall be located at least 500 feet from Route 33. The Applicant proposes Building "A" and Building "B", both of which contain residential units, to be located approximately 167 feet from Route 33. Under the Prior Approvals the Applicant was granted a setback of 360 feet from Route 33. That variance was granted to provide a coherent look along Route 33 with the Shared Properties project to the east and development in this area of Route 33. The Applicant's argument to justify this variance do not comport with this prior finding and reasoning for the prior variance of 360 feet.

2. Building Setback to Road: In the VC-2 Overlay Zone, pursuant

to Ordinance Section 108-6.18(K)(8)(b)(3), the minimum front yard for principal building to curb line of internal road is 30 feet. As noted above, the purpose of this Zone is to create a less intense downtown and this variance does not advance that purpose. The Applicant proposes 16 feet to Market Street and the deviation is not justified.

3. Landscape Buffer: In the VC-2 Overlay Zone, pursuant to Ordinance Section 108-6.18(K)(9)(c) the minimum width of landscape buffer area along tract boundary is 100 feet for nonresidential uses abutting residential zones and 50 feet for residential uses abutting residential zones is required. The Applicant proposes a 30 foot buffer for Building "C" containing nonresidential uses along the East Windsor boundary which contains a residential zone and uses, where a buffer of 100 feet is required. The Applicant submits that the 30-foot buffer from the East Windsor tract boundary is adequate because the uses on the other side of the border are also multi-family. This landscape buffer on the East Windsor side and the encroachment to the buffer is surface parking that does not deprive anyone of air and light and could be screened at site plan so that people do not have to deal with headlight glare from the parking area. The Board rejects these reasons and finds that the Applicant, not the Board has the duty to provide for the amelioration of the negative impacts of a variance, and deferring the same to site plan design is legally insufficient to justify the variance.

4. On-Street Parking: In the VC-2 Overlay Zone, pursuant to Ordinance Section 108-6.18(K)(10)(d) requires on-street parking along the “downtown" commercial section of the treed boulevard. The Applicant proposes no on-street parking. The Applicant submits that the lack of parking on the relatively short boulevard entrance is probably safer. There is a lot of activity with cars entering that boulevard from Route 33, cars leaving the designated parking areas on either side of the boulevard, and then if there are cars parked on the boulevard there would be a lot of potential conflicts and potential for cars backing out to Route 33. So this is a better zoning alternative. The Board rejects these reasons and finds that the parking is

need as the Applicant failed to justify, and withdrew its shared parking analysis. The Board rejects the idea of cars backing out onto Route 33 as the ordinances do not require, and the Board did not require, and would not require or permit cars to be parked that close to Route 33 so that there would be a possibility of this occurring.

5. Location of Parking: In the VC-2 Overlay Zone, pursuant to Ordinance Section 108-6.18(K)(13)(a) and Section 108-9.1(A)(13), parking shall be located in side and rear yards. The Applicant proposes parking in front yards throughout the site. The Applicant submits that there is not a substantial detriment associated with parking in the front yard. Parking is going to be screened by landscaping. Also, the parking is set back 90 feet from Route 33 and in part because it's lined up with parking on the Shared Property site to the east and it allows connectivity between the two parcels. The Board rejects these reasons for this variance. The connectivity with the Shared Properties project to the east does not impact the ability to design this Property to avoid this variance. Further, not all parking areas have landscaping and/or sufficient landscaping, specifically the lack of landscaped islands which is another variance required for the Application.

6. Parking Stall Size: In the VC-2 Overlay Zone, pursuant to Ordinance Section 108-9.1 10 foot by 20 foot spaces are required. The Applicant proposes 10 foot by 18 foot spaces for nonresidential uses and 9 foot by 18 foot spaces are proposed for residential uses (in compliance with RSIS). The Applicant submits that the 10-by-18 spaces that are being provided here are large enough for most vehicles to fit into and the ten-foot wide spaces provide space for people with packages to get in and out of their cars. The 9 by 18 spaces for the residential uses comply with state Residential Site Improvement Standards (RSIS) that apply throughout the State. The Applicant offers no valid reasons for this variance for the size of nonresidential parking spaces and the only basis is to advance its economic interests by over-building this Property.

7. Minimum Parking Setback from Structure: Pursuant to

Ordinance Section 108-9.1(E)(1) a 30 foot setback from structures to parking areas is required. The Applicant proposes 7 feet. The Applicant submits that the seven-foot parking setback from the building provides adequate room for sidewalk and some green area. As noted above, the purpose of this Zone is to create a less intense downtown and this variance does not advance that purpose, nor does the Applicant provide a sufficient reason for this relief.

8. Minimum Parking Setback to Residential Use: Pursuant to Ordinance Section 108-9.1(F)(1) a 50 foot setback from residential structures to parking areas is required. The Applicant proposes 30 feet to the East Windsor boundary. The Applicant submits that there is no substantial impact associated with the parking 30-foot from the East Windsor property line. It is more than adequate and can be buffered at site plan to prevent headlight glare from leaking on to the East Windsor property. The Board rejects these reasons and finds that the Applicant, not the Board has the duty to provide for the amelioration of the negative impacts of a variance, and deferring the same to site plan design is legally insufficient to justify the variance.

9. Landscape Islands: Pursuant to Ordinance Section 108-9.1 (F)(3), parking areas of twenty (20) or more vehicles shall contain grassed or landscaped island areas of at least six (6) feet in width separating rows of parking spaces. The Applicant proposes none in all such parking areas. The Applicant submits that there are some advantages to no landscaping islands in the parking area. It makes the parking area easier to maintain especially during snow events, and allows the applicant to provide additional parking spaces for residents and customers. As noted above, the purpose of this Zone is to create a less intense downtown and this variance does not advance that purpose, nor does the Applicant provide a sufficient reason for this relief. The Applicant offers no valid reasons of this variance and the only basis is to advance its economic interests by over-building this Property.

6. As a result of the foregoing, the Board finds that Use Variance pursuant to N.J.S.A. 40:55D-70(d)(1), the two (2) Height Variances

pursuant to N.J.S.A. 40:55D-70(d)(6), and the Bulk Variances do not advance the purposes of the Municipal Land Use Law contained in N.J.S.A 40:55D-2 as follows: Purpose (a) to encourage the appropriate use of land, purpose (e) to promote appropriate population densities and concentrations, purpose (g) to provide sufficient space and appropriate location for residential and nonresidential uses, purpose (e) to promote appropriate population densities and concentrations, and, purpose (g) to provide sufficient space and appropriate location for residential and nonresidential uses as the land uses are not advances by these variances. Although the Master Plan and the Housing Element envision this type of development on this site the Master Plan and Zone Plan for the VC-2 Overlay Zone are premised upon conformance with the regulation of the affected areas by the applicable zoning ordinances, and the current application's departure from those regulations are substantial and therefore vitiate advancing the purposes of the Master Plan and Zone Plan. Purpose (i) to promote desirable visual environment, is not advanced as the proposed "beautiful" buildings are not of exceptional quality or features as they are in conformance with the design guidelines in the zoning ordinances. Purpose (d) to ensure that development does not conflict with adjacent municipalities and the State is not advanced as the variances affecting the neighboring residential development in East Windsor will not provide appropriate air, light and undeveloped space in that portion of the Property. Purpose (d) to ensure that development is consistent with the State Plan's vision of creating mixed-use communities and incentives is not advanced as those goals are premised upon reasonable and appropriate development and the number, type, character and extent of the variances requested are excessive and overly intense. Although this leaves purpose (h) to promote the free flow of traffic by the proposed traffic light that in and of itself is not a sufficient reason to find the Applicant has met the positive criteria and that if it were to be considered so, that it would outweigh the substantial negative impacts of the proposed use.

7. The Board finds that if the variances were granted that they would create a substantial detriment to the public good. The variances would create a use that is more intense than permitted under the VC-2 Overlay standards which are applicable to this Property. There is a presence of nonresidential uses in this area, and those properties would suffer a substantial detriment due to the more intense proposed

> use of the Property. Therefore, the Board finds that the Applicant has not shown that the variances can be granted without a substantial detriment to the public good and finds that the variances if granted would cause a substantial detriment to the public good. The Applicant has not shown that the granting of the variances would provide a better zoning alternative for the Property and/or provide a benefit to the community and therefore the Board finds that the variance would only advance the individual Applicant's and/or property owner's economic interests. The Board finds that after weighing the positive and negative criteria as stated that, on balance, the granting of the variances would cause substantial detriment to the public good and are therefore denied.
>
> 8. The law requires that the Board consider any reasonable conditions to lessen any detrimental effects of the granting of a Use Variance, here the Use Variance as required by N.J.S.A. 40:55D-70(d)(1), and the two (2) Height Variances as required by N.J.S.A. 40:55D-70(d)(6). The Board finds that no reasonable conditions could be imposed to ameliorate the negative impacts short of imposing permitted standards or lesser variances both in number and in degree of variance sought. However, to do so would require a complete re-design of the entire property which is not the providence of the Board or the responsibility of the Board, therefore the Board declines to do so.

M76-85. While the Trial Court might not have agreed with the substance of the Board Resolution, its conclusion that the Board Resolution "lacks substantial proof" clearly ignores the record.

The Trial Judge also takes issue with one Board member's comments (M34; M42-43) and attributes them to the actions and motivations of the entire Board. Again, caselaw holds that the remarks of members of the Board "represent informal verbalizations of the speaker's transitory thoughts, they cannot be equated to deliberative findings of fact." New York SMSA, L.P., supra, 370 N.J. Super. at

334. This holding is rooted in the fact that any body must speak as a whole, and that whole, singular voice is expressed and embodied in the Board Resolution. See Id. Moreover, the objectionable portions of that Board member's comment, as noted with emphasis by the Trial Court, were not included in the Board Resolution and thereof cannot be imputed to the Board as whole, and/or to each individual Board member. M68-86.

The Trial Court's 2020 Opinion also fails to consider the context in which the Board member's comments were made. 1T174 to 1T176. Immediately prior to the comments characterized by the Trial Court as offensive, Respondents' counsel concluded her presentation with a veiled threat to the Board regarding the ramifications of denying the Application. 1T174 to 1T176. Specifically, she stated

> MS. JENNINGS: Sure. So that essentially concludes our case. And what we would like the board to consider is we're basically trying to do a balancing act here. We have an approval from 2016 that permitted the number of units and the retail is greater, almost a third greater than what we're proposing today. We've got the eagle's nest and we're trying to make sure that we have the appropriate buffering for the eagle's nest. This is a project that is part of the township's affordable housing obligation. There is a settlement in place. That settlement represents a substantial reduction in the township's affordable housing obligation. Denying this application would probably reopen the settlement and possibly lead to a finding that the township has abrogated the settlement. If the settlement is found to be nullified the obligation may be increased, possibly to the tune of 1,668 units under Judge Jacobson's methodology. That's an increase in obligation of 535 units. This is a substantial downside risk to the board denying this application. We respectfully request that the board grant the applicant's application. Thank you.

1T174 to 1T175. The comments made by the Board member were consistent with the tone established by Respondents' counsel and were clearly not intended to form the basis of the Board's opinion; which was thoroughly set forth in the Board Resolution.

Further, the Judge failed to fully appreciate impact of the eagle's nest buffer on the developable portion of the Property; and the limited modifications to the Prior Approvals encompassed in the Application. Although, the amount of developable land was reduced by approximately half (1/2), the intensity of the development was only reduced by 21,432 SF of commercial use (65,000 SF reduced to 43,568 SF) and the number of residential units (206 units) was unchanged. M70-71. Exhibits A-3 and A-4 from the 2019 Board hearing on the Respondents' Application show the reduced developable land available as a result of the eagle's nest. M103-104. As noted in the Statement of Facts this resulted in the prior two (2) variance being increased to twelve (12) variances which include three (3) "d" variances and nine (9) bulk or "c" variances. Despite this undeniably substantial change, the Trial Court improperly relies upon the reasons for the Prior Approvals as a basis for overturning the Board's present denial (M36); however, caselaw does not support the reliance upon previously granted variances as competent evidence to meet the positive criteria. See generally, Kohl v. Mayor and Council of Fair Lawn, 50 N.J. 268, 276 (1967), Reich v. Borough of Fort Lee

Zoning Bd. of Adjustment, 414 N.J. Super. 483, 502 (App. Div. 2010), and Cox & Koenig, New Jersey Zoning and Land Use Administration, (GANN, 2023) Sect. 28-3. See also, N.J.S.A. 40:55D-70(c) (requiring any "c" variance to relate to a "specific" property), and N.J.S.A. 40:55D-70(d) (requiring any "d" variance to apply to a "particular case").

Finally, the Trial Court failed to appreciate that the underlying bulk standards and requirements within the VC-2 zone exist to protect the residents of the property being developed, as well as to further the Purpose and General Goals of the VC-2 Zone. These prospective residents in both market-rate units and affordable units should be entitled to the same level of development as those residents in any other section of the municipality. The Respondents' attempt to maximize the development to include the greatest number of units should not be accomplished at the expense of the very residents the affordable housing regulations are designed to serve; nor should it be done in a manner which undermines the Purpose and General Goals of the VC-2 Zone. The countless variances included in the Respondents' Application clearly impede the nature of the development contemplated by the VC-2 zone and undermine the sound planning upon which it was based. The approval of the Respondents' Application will result in less light, less air and less open space than required by a conforming plan.

In sum, the Trial Court allowed its disagreement with the Board's decision to undermine its obligation to follow the clear well-established case law that requires the Trial Court to give deference to the Board, especially in the denial of a use variance. In doing so, the Trial Court failed to consider the substantial change in the Property due to the discover of the eagle's nest; the resultant effect on the Respondents' Application and the Board denial thereof. As aptly noted by the Court in Galdieri v. Bd. of Adjustment of Morris, 165 N.J. Super. 505, 515 (App. Div. 1979)(citations omitted), "more is to be feared in the way of breakdown of zoning plans from grants than denials of variances."

POINT II

THE TRIAL COURT USURPED THE AUTHORITY OF THE BOARD BY APPOINTING THE SPECIAL HEARING OFFICER (M1-64).

In appointing the SHO, the Trial Judge applied a remedy only available for a violation of a municipality's Mt. Laurel obligations. In the present action, the Trial Court actually found the municipality in compliance with its obligations:

> The irony here is that, but for this **singular transgression** of the Zoning Board that was inescapably provoked, in material part, by the Mayor's interference, **Monroe Township pro-actively had come into voluntary compliance with its Mt. Laurel obligations** on the immediate coattails of Mt. Laurel IV and earned the Court's entry of the 2016 Judgment of Compliance; and, by all accounts, **is diligently implementing them**. Therefore, wresting back wholesale control of the Township's delegated zoning powers, as the Township's attorneys argued at trial, and **this Court agrees, would be a "bridge too far"** - for now, at least, for a municipality that to date **has taken**

> **commendable steps to come into voluntary compliance** with its Third Round affordable housing obligations **and is actually implementing them**.

M51-52 (emphasis added), and see M10 and M58.

The Trial Court's pretext for the imposition of the SHO was a press release by Defendant Mayor, expressing his opinion in opposition to the Application; and the resultant impact on the members of the Board. Yet, the Trial Court ignored clear precedent holding that mayors have a right to publicly oppose development projects, provided such opposition is not done for private gain. See, Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 282–83 (1965); Paruszewski v. Twp. of Elsinboro, 154 N.J. 45 (1998); Central 25, LLC v. Zoning Board of Union City, 460 N.J. Super. 446 (App. Div. 2019) certif. denied, 241 N.J. 4 (2020). To be sure, there has been no assertion, or finding that the Mayor's press release was made for private gain. Moreover, the Order violates the protections afforded to the Township under Mt. Laurel IV, and the appointment of the SHO abrogated the Township's dutiful compliance with the procedures established by the New Jersey Supreme Court, and unjustifiably provided the Respondents rights under the HEFSP (M358-461), and the Settlement Agreement reached between the Township and the Fair Share Housing Center in the DJ Action. M131-137.

Additionally, the Trial Court's decision fails to recognize the members of the Board are not appointed by the Mayor. M783. Under the LDO, the Board

members are appointed by the Monroe Township Council. M783. Therefore, there is no reason to believe that the appearance and opposition proffered by the Mayor at the hearing on the Respondents' Application would be considered differently than an objection or comment made by any other member of the public.

The Trial Court's Order also violates the Board's right, and responsibility, to hear the Respondents' site plan application. The remedy of removing a board's authority and appointing a master in its place should be rarely used. As cautioned by the Court in Morris County Fair Housing Council v. Boonton Tp., 220 N.J. Super. 388, 408-409 (Law. Div. 1987), aff'd. as modified, 230 N.J. Super. 345 (App. Div. 1989)(emphasis added):

> The court probably has the power to grant such relief. Mount Laurel II, 92 N.J. at 285–290, 456 A.2d 390. **However, the Legislature has conferred responsibility upon the board to pass upon site plan applications. This responsibility should be preserved, if at all possible.**

Morris County, 220 N.J. Super. at 408. Further, this remedy has been limited to situations where a governing body's or board's actions are a result of a record of obstruction and hostility to an affordable housing developer and/or the Court. As noted by the Court in Cranford Development Associates, LLC v. Township of Cranford, 445 N.J. Super. 220, 232-233 (App. Div. 2016)(emphasis added):

> The court's authority to appoint Special Masters in Mount Laurel cases is well established. See Mount Laurel II, supra, 92 N.J. at 282–85, 456 A.2d 390. Given the **Township's record of obstructing affordable housing projects**, and the **Planning Board's past**

> **hostility** to a much more limited affordable housing plan, the court's decision to appoint the hearing examiner was justified in this case.

Similarly, in In the Matter of the Application of Township of South Brunswick, 448 N.J. Super. 441, 466 (Law Div. 2016), the Court only removed the Township's authority over its affordable housing compliance after finding "**systematic "abuses"** of the declaratory judgment process". (Emphasis added).

The Trial Court's own findings demonstrate that no such abuse, let along systematic abuse exists in this case, and the imposition of the SHO is improper under both the facts of this matter and the clear, unambiguous and binding law. M51-52; M58. Additionally, the terms in the 2020 Order of the hearing to be presided over by the SHO were similarly improper. M4-7. The 2020 Order required that the hearing be held "during regular court hours" at the Middlesex County Court House. M6-7. The time and location of the hearing clearly frustrated the realistic possibility of the public to attend hearings; as is afforded to them under the by the Open Public Meeting Act, N.J.S.A. 10:4-6, et seq. and the MLUL. It similarly undermined the goals of the Open Public Meetings Act; namely to ensure, as well as enhance public access to meetings. See S. Jersey Pub. Co. v. N.J. Expressway Auth., 124 N.J. 478. 494 (1991). Further, the 2020 Order in Sections (I) and (K) required the SHO's fees and the fees and costs of any retained experts to be shared by the Respondents and the Township. M6. These

provisions are improper as such costs would be borne by the Respondents if the Board heard the matter.

Finally, it cannot be overlooked that the imposition of the SHO transformed the Respondents' site plan application into an adversarial hearing; and eliminated the right of the Board to make a decision on the Respondents' site plan which would then entitled to deference by a reviewing Court. Had the Court properly remanded the Respondents' site plan application to the Board, the application would have proceeded in due course in compliance with the MLUL. Based upon the record before the Trial Court, there was no basis for the complicated, onerous framework which it established; and which undermined the rights of the general public, as well as those of the Board.

POINT III

THE TRIAL COURT IMPROPERLY CONSIDERED THE ELIMINATION OF THE CONDITION OF APPROVAL REQUIRING THE ROUTE 33 TRAFFIC SIGNAL (4T).

In making its decision on the underlying issue in the present action, the Trial Court selectively determined that the Prior Approvals impacted the actions of the Board in deciding the Respondents' Application. Specifically, the Trial Court found that the granting of the variance relief in the Prior Approvals required the Board to grant the subsequent variance relief in the Respondents' Application. However, the Trial Court ignored the fact that the Route 33 Signal was a voluntary

condition of approval agreed to by the applicant in the Prior Approvals, as well as voluntarily agreed to by the Respondents during the hearing on the Application.

A condition of approval imposed by a board may be eliminated by a developer upon application to the Superior Court or by application to the board. The Courts have established the following parameters for consideration of such a request:

> A variance condition must be reasonably calculated to achieve some legitimate land use purpose. If it was not, and was thus invalid when imposed, it can be excised, unless the use permitted by the variance, if continued without the condition, would alter the character of the neighborhood or do violence to the zoning plan, [ ], or unless a balance of equities favors protection of property development patterns that have relied on the existence of the condition and fairly call for its continuation.
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> * * *
>
> [I]n entertaining an application to strike a variance condition the board should consider all of the criteria ordinarily relevant to a variance application; among other things it should sympathetically consider patterns of existing neighborhood use and development and should be aware of the danger to the zone plan. It should consider whether the original purpose of the condition remaining intact and whether the interests it protected still exist.

Aldrich v. Schwartz, 258 N.J. Super. 300, 310-312 (App. Div. 1992). In the present action, the rationale for the provision of the Route 33 Signal remains valid; and the VC-2 Zone is premised upon the provision of the signal. However, the Trial Court ignored the standard for elimination of a condition and established its own methodology.

Following the entry of the 2020 Order, the responsibility for the oversight and disposition of the Respondents' site plan application was delegated to the SHO. Despite the delegation to the SHO, the Respondents' filed a Litigants' Rights application to the Trial Court for elimination of the condition of the Route 33 Signal. Rather than direct the Respondents' motion to the SHO, the Trial Court considered the application.

While the Trial Court ultimately denied the Respondents' motion, it did make certain findings and provided a framework for the later consideration of relief from the provision of the Route 33 Signal by the SHO. Initially, the Trial Court determined that the relief required by the Respondents was a wavier rather than a variance; despite the clear requirement for the Route 33 Signal in the VC-2 Zone. The Trial Court then advised that the SHO should consider the following with respect to the Respondents' obligation to provide the Route 33 Signal:

> A. Can the proposed amended development project be approved and constructed with a Waiver of Section K-(10).(b) of the VC-2 Overlay Zone. In other words, are there other methods to address any negative impacts to the public welfare from development without a traffic signal being installed? If so, how? If not, then
> B. Can the proposed amended development be approved and required to be constructed with a traffic signal – without an approved wavier, but rather, as a condition of approval – in accordance with Section K-(10).(b) of the VC-2 Overlay Zone? IF required, then
> (1) Is the installation of a traffic light essential for the protection of public welfare since there are other methods to address any negative impacts to the public welfare from the development should a traffic light not be installed; and

> (2) Would strict adherence to Section K-(10).(b)'s requirement for a traffic signal – and imposition of same as a condition of approval – constitute a "cost-generative" feature within the meaning and intendment, and thus a violation, of N.J.S.A. 52:27D-314.b of the New Jersey Fair Housing Act and N.J.A.C. 5:93-10, 10.1 (Purpose) and 10.2 (Standards) of COAH's Second Round Rules such that it presents a detriment to the financial feasibility of this inclusionary development project?

M475-476. The characterization of the Route 33 Signal requirement as a waiver ignores the determination of the Board Planner concerning the issue. Ba39; Ba53-54. Further, the framework announced by the Trial Court is clearly contrary to the established standards for the elimination of a condition of approval in a board resolution. Finally, the Trial Court's decision completely ignores that the condition for the Route 33 Signal was a voluntary condition agreed to by the Respondents; not a condition imposed by the Board.

POINT IV

THE SPECIAL HEARING OFFICER IMPROPERLY ELIMINATED THE CONDITION OF THE ROUTE 33 SIGNAL (M477-513).

The resolution of the SHO (the "SHO Resolution"), in part, granting relief from the LDO requirement for the Route 33 Signal; as adopted by the Order of the Trial Court (the "2022 Order"), was improper. The SHO Resolution concludes that the Respondents are not required to provide the Route 33 Signal. The primary issue at the hearing concerning the Respondents' Site Plan revolved around traffic issues associated with impact of the Respondents' development on Route 33 and

the neighboring intersections. The 2020 Order provided the SHO to retain any experts necessary to consider the Site Plan Application; specifically providing:

> I. In the event the [SHO] requires additional expertise by separate expert review of the Plaintiffs' site plan, the [SHO] may engage such additional experts as the [SHO] deems appropriate, upon notice and consultation with the Court and all parties, the fees and costs for which shall be borne equally by the Plaintiffs and the Township;

M6. Despite the fact that the 2020 Order provided the SHO with the ability to retain any necessary professionals to assist with reviewing the Respondents' site plan application, the SHO did not engage an independent traffic expert and chose to adopt the opinions of Respondents' professionals and reject the opinion of Board's and Township's professionals without identifying the basis for his decision.

The SHO Resolution concludes that no evidence was presented that the Route 33 Signal is necessary for public health and safety; and that the site can function with a right-in/right-out driveway on Route 33. However, this conclusion ignores the facts adduced by the Board's Traffic Expert, James Watson, during his cross-examination of Mr. Kennel, as well as the direct testimony of Mr. Watson. See generally 5T186 to 5T205. Mr. Watson identified the detrimental effects associated with the failure to install the Route 33 Signal; including the resultant impacts on both the Applegarth Intersection and the intersection of Route 33 and Twin Rivers Drive. Further, Mr. Watson in both his report and his testimony

identified additional information necessary to ascertain the ultimate effect of the failure to provide the Route 33 Signal and resultant effect on safety. See Ba65-76. This information was not required by the SHO; nor was it provided by the Respondents. Finally, the conclusion in the SHO Resolution that the site can function with right-in/right-out driveway on Route 33 ignores the obvious traffic issues with such movements on a 55-mile-per-hour roadway, as well as the provision of safe pedestrian access from the Renaissance Development on the southerly side of Route 33 to the commercial uses on the Property.

Further, the SHO Resolution confirms that the position of the NJDOT concerning the Route 33 Signal remained consistent at the pre-application meetings in 2019 and 2021; namely, that both an access level change and a signal spacing wavier would be required for the Route 33 Signal. M490. However, the SHO fails to acknowledge or address the inconsistency in Mr. Kennel's testimony concerning the effect of the position conveyed by the NJDOT. Following the 2019 pre-application meeting, Mr. Kennel testified in support of the Respondents' use variance application before the Board including the Route 33 Signal. 1T87 to 1T102. However, despite the NJDOT maintaining the same position and requirements, Mr. Kennel opined at the hearing on Respondents' site plan that the Route 33 Signal can no longer be secured. 5T134 to 5T224. An examination of the minutes of the 2019 and 2021 NJDOT pre-application demonstrates that the

requirements of the NJDOT for the Route 33 Signal are the same; the only difference is Mr. Kennel's characterization of the position of the NJDOT concerning the Route 33 Signal. Ba17-30.

Mr. Kennel's opinion regarding the NJDOT's own opinion concerning the Route 33 Signal seems to be based primarily on the opinions of two NJDOT reviewers, Pinakin Tank and Joshua Idowu, who were present at all of the NJDOT pre-application meetings. Ba17-30. Further, Mr. Kennel acknowledges that these two individuals have been more negative than other reviewers over the years. See 5T187 to 5T188. However, the opinion of Messrs. Tank and Idowu are not dispositive on the issue of the Route 33 Signal. Finally, Mr. Kennel clearly confirms that he has been successful with applications to the NJDOT for median left turn lanes in the past; and also identified other median left turn lanes on Route 33 in the vicinity of the Property. See 5T147 to 5T148; 5T161; 5T208. The report of the Board Traffic Engineer identified and questioned Mr. Kennel's position concerning the ability to secure NJDOT approval for the Route 33 Signal.

It should be clear that the underlying decision by the NJDOT on the issues regarding the Route 33 Signal will not occur until an application is filed. To date, the Respondents never filed the application to the NJDOT. As such, the time and cost associated with the NJDOT application is speculative; and cannot be

concluded to be more time consuming and expensive than the anticipated mitigation required for the Applegarth Intersection.

Likewise, when the Township secured the 2016 Judgment of Compliance, the VC-2 Zone with the obligation of the Route 33 Signal was included in the LDO. Ba1-16. At that time, the Respondents had secured the initial approval for the Property (including the Route 33 Signal) which resulted in the site being included in the 2016 HEFSP. The Respondents did not object to the obligation of the Route 33 Signal during the DJ Action; and the Respondents and the prior owner included the Route 33 Signal in both applications to the Board. Although these facts were borne out during the Hearing, the SHO completely disregarded both the inaction of Respondents, as well as the ramifications of same, in the SHO Resolution. See generally 6T278 to 6T282.

Finally, the SHO Resolution justifies elimination of the Route 33 Signal, at least in part, on perceived delays and expenses experienced by the Respondents due to the actions of the Board and the Township. M500-502. However, it is clear that much of the delay and accordant expense was not due to the actions of the Board or the Township. Clearly, the discovery of the bald eagle's nest on the Property is not attributable to the Board or the Township. In fact, the failure to discover the bald eagle's nest prior to the initial approval is arguably attributable to the Respondents. Further, the COVID-19 pandemic clearly created a delay in the

prosecution of the Site Plan Application which is not attributable to the Board or the Township. Finally, the Respondents could have avoided the impact of the perceived change in the NJDOT's position on the Route 33 Signal by simply filing the application to the NJDOT within 1 year of the pre-application meeting with the NJDOT in 2015.

Despite these numerous factors resulting in delay which are not attributable to the Board or the Township, the SHO Resolution concludes that the Respondents are relieved of the obligation of pursuing the Route 33 Signal due to the delays experienced during the development of the Property and places the blame for delays on the Board and Township. M500-502.

It remains that the Respondents have never filed a formal application to the NJDOT for the Route 33 Signal; or for Route 33 access to the Property. The unilateral decision to forestall the filing of any application to the NJDOT has resulted in significant delay to the Respondents; which is not attributable to the Board or the Township. Further, until the formal application is filed to the NJDOT, the position of the NJDOT on the application is unknown. Mr. Kennel identified numerous situations within the vicinity of the Property where relief similar to the relief required by the Respondents has been granted by the NJDOT. 5T147 to 5T148; 5T161; 5T208. The entire basis of the decision of the SHO to eliminate the Route 33 Sign seems to rely upon the "hunch" or "feeling" of Mr. Kennel; more

appropriately characterized as a "net opinion." The Board submits that something more concrete must be the basis of such a decision; and without such evidential support, Mr. Kennel's testimony is a net opinion which must be disregarded.

The SHO Resolution further ignores the intent and purpose of the VC-2 Zone, as well as the prior history of development in the VC-2 Zone. M503. The development "middle property" in the VC-2 Zone was undertaken by a related entity of the Respondents. See 6T298 to 6T304. The design of the project for the "middle property" included the connector roadway contemplated by the VC-2 Zone linking Applegarth Road and Route 33. The roadway was dedicated to and accepted by the Township in anticipation of the Route 33 Signal. The development of the "middle property" included an obligation to construct a traffic signal at the intersection of the connector roadway and Applegarth Road; an obligation borne entirely by the developer of the "middle property." To permit the Respondents to develop the Property without the Route 33 Signal would entitle them to the benefits of the VC-2 Zone, as well as the improvements made by the developer of the "middle property" without imposing the obligations contained in the VC-2 Zone on the Respondents.

Finally, it must be recognized that the VC-2 Zone is an overlay zone in the H-D (Highway Development District) Zone. Ba1-16. While the Respondents sought to develop the Property pursuant to the VC-2 Zone standards, nothing

prevented them from pursuing an application under the underlying H-D Zone standards. The Respondents have noted several times that the minimum lot size of 75-acres in the VC-2 Zone made it impossible to develop the Property or the "middle" property without a minimum lot area variance. However, the Board submits that the minimum lot size of 75-acres clearly evidences the intention of the Township that the entire area of the VC-2 (or at least a significant portion thereof) be developed as a singular development; or at most two developments. 5T130 to 5T231. The Respondents' decision to develop the "middle property" and the Property as separate developments should not alleviate the clear obligation of the VC-2 Zone. The provision of the Route 33 Signal was an essential element of the VC-2 Zone. Ba12. If the Respondents did not wish to supply the Route 33 Signal, they were free to develop the Property pursuant to the underlying H-D Zone standards. The Respondents' request to eliminate the obligation of the Route 33 Signal while availing themselves of the benefits of the VC-2 Zone, clearly undermines the intent and purpose of the Zone Plan and Zoning Ordnance of the Township of Monroe.

The SHO's Resolution further focuses on the imposition of the Route 33 Signal on the Respondents but not upon the other two developers of the properties within the VC-2 overlay zone. The SHO's Resolution ignores the Purpose and General Goals of the VC-2 overlay zone; namely, to provide for a comprehensive

development of the properties within the zone. Ba6-7. This is demonstrated by the lot area requirement of 75 acres. The VC-2 Zone was designed to provide for the holistic development of the area within its boundaries in order to foster its Purpose and achieve its General Goals. By failing to amalgamate the necessary lot area to comply with the VC-2 Zone requirements, the impact of the Route 33 Signal on the Respondents was a self-created hardship.

Finally, at the time of the initial application resulting the Prior Approvals, the Respondents' predecessor in title did not object to the imposition of the Route 33 Signal as a condition of approval for the development of the Property under the VC-2 Zone. 6T270 to 6T282. Neither the Respondents, nor their predecessors in title intervened in the DJ Action to object to the imposition of the Route 33 Signal as a condition of approval for the development of the Property under the VC-2 Zone standards. M107-130; 6T270 to 6T282. Further, despite the 2019 NJDOT Meeting, during the hearing on the Application, the Respondents did not object to the Route 33 Signal; and agreed to provide it and have it operational prior to the issuance of the first certificate of occupancy as a condition of any Board approval. M71-72.

For the forgoing reasons, it is clear that the decision of the SHO in the SHO Resolution to eliminate the obligation that the Route 33 Signal was improper; as was the adoption of the SHO Resolution by the Trial Court including this relief.

POINT V

THE SPECAL HEARING OFFICER EXCEEDED THE SCOPE OF HIS AUTHORITY IN IMPOSING THE OBLIGATION TO UTILIZE EMINENT DOMAIN POWERS AND AFFORDABLE HOUSING TRUST FUNDS (M477-513).

It is clear that both the Trial Court and the SHO were emboldened by the usurp of the Board's authority in the 2020 Order. As indicated previously, the 2020 Order appointed the SHO and established the scope of his authority. M1-8. The specific tasks to be undertaken by the SHO were outlined in Paragraphs (A) through (L) of the 2020 Order. M4-7. The parameters of the SHO's authority are set forth in Paragraphs (A), (H) and (L) which provide:

> A. [The SHO shall] [c]onduct a hearing on public notice as to all aspects of the Plaintiffs' site plan application for the purpose of rendering a recommendation to the Court as to whether the Court should enter an Order and Judgment, approving, denying, or approving with conditions the site plan (and, as necessary, subdivision application);
>
> * * *
>
> H. The Special Hearing Officer shall conduct the proceedings in accord with the requirements of the [MLUL]. The Plaintiffs shall present expert testimony as they deem necessary to demonstrate that the Plaintiffs' proposal meets sound land use planning principles and satisfies applicable environmental regulations. The Plaintiffs shall present their testimony and evidence in support of their site plan, which may be subjected to cross-examination. Following completion of the Plaintiffs' testimony and evidence, the Township may present its response and testimony regarding the Plaintiffs' site plan, which also may be subjected to cross-examination. The public and all interested parties shall be allowed to comment on and/or present evidence and testimony either for or against the Plaintiffs' site plan

> upon the conclusion of the Township's presentation. The Special Master shall participate in all hearings before the [SHO] and shall provide such planning review and testimony as may be deemed necessary by the [SHO]. The Plaintiffs shall identify all other Federal, State and ancillary governmental permits and approvals that are required for the Plaintiffs' project, and the satisfaction of these ancillary permit requirements shall be a condition of any Order approving the Plaintiffs' application;
>
> * * *
>
> L. Upon conclusion of the hearing, the [SHO] shall provide the Court, the Township and Plaintiffs with his recommendation as to whether the Plaintiffs' site plan should be approved, denied, or approved with conditions in the form of a resolution. Any comments or objections to the [SHO's] recommendations set forth in the resolution shall be filed with the Court no later than ten (10) days from the date of the recommendation. The [SHO] shall set forth such findings of fact and conclusions necessary, and appropriately summarize the evidence presented, so as to enable the Court to enter Judgment. The Court's Order as to the site plan (and, as applicable, subdivision) shall be considered a preliminary and final site plan (and, as applicable, subdivision) approval for purposes of filing an application for a building permit;
>
> * * * *

M4-7. During the course of the hearings on the Respondents' Site Plan, the Respondents requested that the SHO require the Township to exercise its power of eminent domain to acquire any right-of-way necessary to implement intersection mitigation improvements required by the NJDOT for approval for Respondents' application. 5T242 to 5T251. The Respondents further requested that the SHO require that the Township utilize its affordable housing trust funds to pay for off-

site improvements necessary to implement the Respondents' site plan. 5T242 to 5T251.

The SHO Resolution issued at the completion of the Respondents' Site Plan Hearing included a provision requiring that the Township to exercise its power of eminent domain to obtain any right-of-way required to construction intersection mitigation improvements. M511. The SHO Resolution further denied the Respondents' request regarding the Township use of affordable housing trust funds. M511. The 2022 Order adopting the SHO Resolution, determined that the SHO Resolution decision on the affordable housing trust funds was denied without prejudice to the ability of the Respondents to make the application to the Court seeking the same relief. M481.

As indicated above, the scope of the role of the SHO was set forth in the 2020 Order; and further encompassed in MLUL inasmuch as the SHO was acting as the Board. However, neither the 2020 Order, nor the MLUL imbue the SHO with authority to compel municipal use of eminent domain or the use of affordable housing trust funds to aid an applicant. In light of this fact, the provisions in the SHO Resolution and the 2022 Order concerning the use eminent domain and affordable housing trust funds to aid the Respondents must eliminated.

CONCLUSION

Based upon the foregoing, it is clear that the decision of the Board denying the Respondents' Application applied the relevant legal standard to the facts adduced at the hearing and was entitled to deference and affirmation by the Trial Court. The actions of the Trial Corut reversing the Board's denial of the Respondents' application, as well as the extraordinary decision to appoint the SHO were clearly in contravention of both statutory law and caselaw; and must be overturned by this Court.

Respectfully submitted,

CLARKIN & VIGNUOLO, P.C.

By: _____
PETER A. VIGNUOLO, ESQ.

Dated: 10 October 2023

CT07 SPII, LLC and DT07 SPII, LLC Plaintiffs-Respondents/ Cross-Appellants v. ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MONROE, THE TOWNSHIP OF MONROE, and MAYOR GERALD W. TAMBURRO, in his Official capacity as Mayor of The Township of Monroe, Defendants-Appellant/ Cross-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-002471-22 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MIDDLESEX COUNTY SAT BELOW: HON. THOMAS D. McCLOSKEY, J.S.C. Docket No.: MID-L-3953-19

REPLY BRIEF AND APPENDIX OF DEFENDANT/CROSS-APPELLANT ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MONROE IN SUPPORT OF CROSS-APPEAL

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Dated: January 4, 2024 (Revised: 1/17/2024)

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REFERENCE/PROCEDING TYPE	DATE
(1T) Transcript of Hearing before Zoning Board of Adjustment. . .	March 26, 2019
(2T) Transcript of Trial Proceeding	July 15, 2020
(3T) Transcript of Motion for Reconsideration.	June 15, 2021
(4T) Transcript of Motion to Enforce Litigants Rights.	September 14, 2021
(5T) Transcript of Hearing before Special Hearing Officer (Day 1)	March 24, 2022
(6T) Transcript of Hearing before Special Hearing Officer (Day 2)	March 25, 2022
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Mark A. Remsa, PP, LLA, AICP, ASLA prepared for
November 2016 application Ba77

COUNTER-PRELIMINARY STATEMENT

They say a picture is worth a thousand words. In the present action, the Concept Site Plans for the approved 2015 Application and the denied 2018 Amended Application offer even more. The Concept Site Plan for the approved 2015 Application depicts a development which occupies the entirety of the Subject Property and advances the purposes of the VC-2 zone in which it is located. See M103. The Concept Site Plan for the denied 2018 Amended Application compresses all development and shoves it to the front portion of the Subject Property along State Highway 33. See M014. In the denied 2018 Amended Application, despite a reduction in the developable land on the Property, the Respondents did not reduce the number of proposed units from the approved 2015 Application; which necessitated countless variances not required in the approved 2015 Application. Despite the readily apparent differences between these two Concept Site Plan, the Trial Court obligated the Board to equate the two applications and approve the 2018 Amended Application merely because it approved the first. This oversimplification cannot be condoned by this Court.

STATEMENT OF FACTS

The Township refers this Court to the Statement of Facts filed with its initial brief in this Appeal for a recitation of facts necessary for the disposition of the issues raised in this brief.

LEGAL ARGUMENT

The Monroe Township Zoning Board of Adjustment (the "Board") hereby adopts the Legal Argument contained in the Reply Brief filed by the Township of Monroe and Mayor Gerald W. Tamburro in Support of Appeal and in Opposition to Cross-Appeal; as supplemented herein.

POINT I

THE BOARD PROPERLY TOOK JUDICIAL NOTICE OF THE FACTS NECESSARY TO DENY THE APPLICATION.

The October 15, 2020 Trial Court Opinion (the "2020 Opinion"), as well as the Respondents' Opposition Brief continuously assert that the only evidence proffered during the hearing on the 2018 Amended Application was the evidence supplied by the Respondents and their professionals. However, this position disregards the well-established fact that:

> a board of adjustment may take "judicial notice" of such matters as are so notorious as not to be the subject of reasonable dispute.
>
> * * *
>
> In addition to matters which are common knowledge, the board of adjustment may also take judicial notice of the public laws of the State of New Jersey dealing with the subject of planning and zoning, and the ordinances of the municipality in which the board is located.

Cox & Koenig, New Jersey Zoning and Land Use Administration, (GANN, 2023) § 18.4(d) (citing Reinauer Realty Corp. v. Nucera, 59 N.J. Super. 189, 201-203 (App. Div.) certf. den. 32 N.J. 347 (1960)). The 2019 Board Resolution denying

the 2018 Amended Application clearly demonstrates the Board's reliance upon the Purpose and General Goals of the VC-2 Village Center Overlay Zone (the "VC-2 Zone"); as outlined at length in the Board's Brief in Support of Cross-Appeal. Ba6-7. Despite the position taken by the Trial Court in the 2020 Opinion, the Board is not obligated to accept the inconsistent documentary evidence and professional testimony proffered by the Respondents.

Further, the Site Concept Plan for the initial, approved 2015 Application and the Site Concept Plan for the 2018 Amended Application, proffered by the Respondents at the March 26, 2019 hearing as Exhibits A-3 and A-4, supply additional support for the Board's decision. See M103-104. Exhibit A-3 clearly demonstrates a plan which encompasses a development which meets the Purpose and General Goals of the VC-2 Zone; while Exhibit A-4 shows a compressed development shoved toward the front of the Property adjacent to Route 33. M103-104.

The Purpose of the VC-2 Zone states, in part, that:

> In order to create a neo-traditional downtown, less-intensive commercial and office uses mixed with residential uses on upper floors should be oriented toward the interior of the area along a primary access road that extends in a general north to northeast direction from Route 33 to Applegarth Road. The bulk of the residential uses should be developed in areas that are in the vicinity of the less intensive "downtown" and extend north from Route 33 toward the edge of woods along the Millstone River.

Ba6. Exhibit A-3 clearly fosters the desired separation of the commercial and residential uses; while Exhibit A-4 shows a singular project with commercial and residential uses compacted together and separated by common parking areas. M103-104. As more specifically identified in the Board's Brief in Support of Cross-Appeal (incorporated herein by reference in lieu of repetition), the 2019 Board Resolution exhaustively recited the deficiencies in the Respondents' 2018 Amended Application clearly undermining rationale underlying the 2020 Opinion of the Trial Court.

POINT II

THE BOARD PROPERLY DENIED THE APPLIATION DUE TO THE SIGNIFICNAT VARIANCE RELIEF NOT PRESENT IN THE 2015 APPLICATION.

The VC-2 Zone under which the Respondents sought to develop the Property permits residential dwelling subject to certain conditions. Specifically, the VC-2 Zone provides:

> Residential dwellings: townhouse and multifamily dwellings in individual complexes separate from nonresidential land uses that must be located at least 500 feet from Route 33; affordable housing units over nonresidential uses that are on the ground floor within mixed-use buildings located in the "downtown" area; and affordable housing units in 100% affordable housing buildings that must be located at least 500 feet from Route 33. A [set-aside] of at least 20% of all residential dwellings shall be provided as affordable housing as defined by the State of New Jersey in order for residential dwellings to be part of any development.

Ba8. Therefore, any residential development within the VC-2 Zone is required to be located at least 500 feet from Route 33. Ba8.

Inasmuch as the 2015 Application and the Respondents' 2018 Amended Application sought to provide residential units within 500 feet of Route 33, a (d)(1) use variance was required in connection with both applications. Exhibits A-3 and A-4 demonstrate that the majority of the residential uses in the 2015 Application were located in a conforming location (at least 500 feet from Route 33); while the majority of the residential units in the 2018 Amended Application were located in a nonconforming location (within 500 feet of Route 33). M103-104. Further, under the 2015 Application the closest residential units were located 360 feet from Route 33; while under the 2018 Amended Application the closest residential units were located 167 feet from Route 33. M81.

Additionally, while only a (d)(1) use variance and bulk variances for the minimum setback of two apartment buildings from Route 33 were required in connection with the 2015 Application; the 2018 Amended Application required twelve (12) variances; including: a (d)(1) use variance; two (d)(6) height variances; and nine bulk variances. See generally M68-102. Clearly, the number and extent of the variance relief required in the Respondents' 2018 Amended Application was significantly greater than in the 2015 Application; and, as a result, carried with it a greater evidentiary burden to be demonstrated by the Respondents.

In light of this fact, the Trial Court's determination that granting of the variance relief in the 2015 Application required the approval of the variances in the Respondents' 2018 Amended Application was clearly in error and must be overturned.

POINT III

RESPONDENTS MISREPRESENT THE TIMELINE AND UNDERLYING FACTS CONCERNING THE 2015 APPLICATION AND THE 2018 AMENDED APPLICATION.

Throughout the Respondents' Opposition Brief, they "cherry pick" facts and dates in order to lead this Court to belief that the 2015 Application and the 2018 Amended Application were undertaken to further the Township's compliance with its affordable housing obligations. Specifically, the Respondents assert that the original 2015 Application was undertaken to further the Settlement Agreement, the Township's Housing Element and Fair Share Plan ("HEFSP") and the Judgment of Compliance and Repose. Respondent Opposition Brief ("ROB") page 10. However, a simple review of the record demonstrates that the Settlement Agreement was entered into on March 28, 2016; the HEFHP was adopted in March 2016; and the Judgment of Compliance and Repose was entered by the Court on October 5, 2016 – all after the filing of the 2015 Application. M107-137; M358-461.

In fact, the provision of affordable housing units by the Respondents was the result of the explicit requirements of the VC-2 Zone; which states:

> Residential dwellings: townhouse and multifamily dwellings in individual complexes separate from nonresidential land uses that must be located at least 500 feet from Route 33; affordable housing units over nonresidential uses that are on the ground floor within mixed-use buildings located in the "downtown" area; and affordable housing units in 100% affordable housing buildings that must be located at least 500 feet from Route 33. A [set-aside] of at least 20% of all residential dwellings shall be provided as affordable housing as defined by the State of New Jersey in order for residential dwellings to be part of any development.

Ba8. Thus, the provision of the affordable units was a requirement of the VC-2 Zone; not the Settlement Agreement, the HEFSP or the Judgment of Compliance and Repose.

Similarly, the Respondents advise that a second application filed in November 2016. ROB page 11. However, the Respondents fail to note that this application sought to increase the number of residential units proposed for the Subject Property by 11 units; in excess of the permitted density in the VC-2 Zone. Ba77-80. The application also failed to supply any additional affordable units; and therefore, did not comply with the 20% set-aside in the VC-2 overlay zone. Ba77-80. This application was ultimately undermined by the discovery of the eagle's nest in the spring of 2017.

Additionally, the Respondents assert that the 2015 Application sought approval for 215 residential units and 65,000 square feet of commercial/retail

space; while the 2018 Amended Application sought less development in the form of 206 residential units and 43,568 square feet of commercial/retail space. Respondent Brief 10-12. However, the Respondents fail to note that 9 of the residential units in the 2015 Application were to be constructed on a separate property (not the Subject Property). The reduction in the development in the 2018 Amended Application consisted of the elimination of 21,432 square feet of commercial/retail space; despite the fact that the eagle's nest buffer prevented the development on over half the Subject Property.

In sum, the Respondents have clearly mischaracterized the relevant facts in an attempt to bolster their position before this Court and undermine decision rendered by the Board. Such action cannot be given countenance by this Court; and should demonstrate the appropriateness of the actions taken by the Board.

POINT IV

RESPONDENTS' PURPORTED MISUNDERSTANGING OF THE PURPOSE OF TECHINCAL REVIEW COMMITTEE MEETINGS IS CONTRARY TO THE RECORD.

The 2020 Opinion, as well as the Respondents' Opposition Brief misconstrues the nature, purpose and binding effect of municipal Technical Review Committee ("TRC") meetings. Specifically, the Respondents assert that they were led to believe that the Township representatives supported the 2018 Amended Application and that they would be permitted to proceed with same. ROB at 13.

This position is echoed in the 2020 Opinion. M9-64. However, a TRC cannot provide any such position regarding the approval of the application without usurping the authority of the land use board. The adoption of the Respondents' legal position concerning the binding effect of a TRC meeting would clearly undermine and/or usurp the statutory authority of a land use board to hear and decide a land use application under the Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq.

TRC meetings are informal opportunities for an applicant and its professionals to meet with land use board professional consultants and other municipal department representatives in order to ensure that the land use board is presented with the information necessary to dispose of the application at the ultimate hearing on same. Despite the continued assertions by the Trial Court and the Respondents, TRC meetings are NOT binding on a land use board; which is entitled to review the documentary and testimonial evidence provided at the hearing to make its decision on the application.

During the hearing on the 2018 Amended Application, the Board Attorney properly characterized the nature and purpose of the TRC meetings; stating:

> So we have a Technical Review Committee which is made up of board professionals and township staff. At the beginning of those meetings every applicant is advised that it's merely a courtesy review. No recommendations of the professionals are binding upon the board. It's their input and guidance to the developer. We do appreciate that this developer, along with others, often takes those considerations to

> heart and looks at their application, sometimes makes changes. But again those changes were not required, it is just an advisory committee.

1T17 to 1T18. In response to additional assertions by the Respondents over the binding nature of the TRC meetings, the Board Planner retorted:

> [W]hy do we keep hearing about [Technical Review Committee] . . . but the board has to stand on the testimony that it's hearing. The professional staff does not make decisions for the board, so I want to make that absolutely clear. And we keep hearing that over and over tonight and it's pushed in our face.

1T68. In reply, the Respondents' legal counsel acknowledged the non-binding nature of TRC meetings; stating:

> Well I would like to address that. I think that you're correct, with the fact that you don't make a decision on the application . . . .

1T68-1T69. Therefore, both the Board and the Respondents clearly understood the purpose and binding effect of the TRC meetings at the time of the hearing in 2019 on the 2018 Amended Application.

Despite the clear understanding of the purpose and effect of the TRC meetings, the Respondents have continued to assert that they were unduly prejudiced and misled by actions taken at the TRC meetings. Further, these assertions were accepted by the Trial Court and reiterated in the 2020 Opinion; as a basis for the decision to overturn the Board's decision. The unilateral, self-serving assertions of misunderstanding by the Respondents cannot properly form a basis for undermining the proper decision of the Board; which was not present during

the TRC meetings and was unaware of what transpired therein. Such reliance clearly undermines the 2020 Decision and requires the reinstation of the original Board decision.

POINT V

RESPONDENTS FAILED TO ESTABLISH ANY SUFFICENT BASIS TO GRANT RELIEF FROM THE PROVISION OF THE ROUTE 33 SIGNAL.

In their efforts to be relieved from providing the Route 33 Signal, the Respondents, Trial Court and Special Hearing Officer have cobbled together a self-serving irrelevant standard which ignores the well-established basis for granting relief from a condition of a land use approval. Specifically, they focus on whether there is a need for the Route 33 Signal for public safety. Such a standard clearly ignores the standard for relief from a condition, as well as the explicit language of the VC-2 Zone.

While it is well established that an applicant can seek relief from a condition of a prior land use approval; the relevant standard is whether the condition is unreasonable or unlawful. Cox & Koenig, New Jersey Zoning and Land Use Administration, (GANN, 2023) § 19-6.2 (citations omitted). "[A] condition may become unreasonable through changed circumstances or may be revealed as unnecessary and may be reconsidered by board in later years." Id. (citing Cohen v. Fair Lawn, 85 N.J. Super. 234 (App. Div. 1964)). This is acknowledged by the Respondents in their Opposition Brief. ROB at 58.

As indicated in the Board's Brief in Support of Cross-Appeal, the NJDOT advised the Respondents of the change in the NJDOT position concerning the Route 33 Signal in February 2019; one month prior to the hearing on the 2018 Amended Application in March 2019. Despite this changed position by the NJDOT, the Respondents proceeded with the hearing on the 2018 Amended Application; proffered the Route 33 Signal; and made no mention of the change in the NJDOT's position concerning the Route 33 Signal to the Board or its professionals. It is noted that while a Township representative (the Township Engineer) was present at the 2015 NJDOT meeting and the 2021 NJDOT meeting, he was not present at the 2019 NJDOT meeting. Ba17-Ba30. Therefore, only the Respondents were aware of the change in the NJDOT position concerning the Route 33 Signal in 2019. Regardless, the Respondents were clearly aware of the change prior to the 2019 hearing at which time they proposed the Route 33 Signal as a voluntary condition of approval; and cannot now assert the reiteration of the position of the NJDOT regarding the Route 33 Signal at the 2021 hearing is a changed circumstance.

Additionally, while the Respondents were aware of the change in the NJDOT position concerning the Route 33 Signal prior to the hearing on the 2018 Amended Application in 2019, the Respondents failed to advise the Board of the change in the NJDOT position. The Respondents proceeded with the hearing on

the 2018 Amended Application; and deliberately or negligently withheld the changed NJDOT position concerning the Route 33 Signal. The Board should have been advised of the change in the NJDOT position prior to the March 2019 hearing on the 2018 Amended Application. This would have permitted the Board to consider the changed NJDOT position as part of the hearing on the 2018 Amended Application. By withholding the change NJDOT position, the Respondents denied the Board the statutory right to consider this information as part of the hearing on the 2018 Amended Application.

Further, the Respondents should be estopped from seeking the elimination of the Route 33 Signal. It is well established that "doing or forbearing to do an act induced by the conduct of another may work an estoppel to avoid wrong or injury ensuing from reasonable reliance upon such conduct." Summer Cottagers' Ass'n v. City of Cape May, 19 N.J. 493, 504 (1955). "Estoppel is 'an equitable doctrine, founded in the fundamental duty of fair dealing imposed by law, that prohibits a party from repudiating a previously taken position when another party has relied on that position to his detriment.'" Casamasino v. City of Jersey City, 158 N.J. 333, 354 (1999) (quoting State v. Kouvatas, 292 N.J.Super. 417, 425 (App. Div. 1996)).

In the present action, the Respondents continuously represented to the Board that they would supply the Route 33 Signal; as required by the VC-2 Zone. Further, the Respondents relied upon the provision of the Route 33 Signal in

support of the variance relief sought in both the 2015 Application and the 2018 Amended Application. The Board (and the Trial Court) relied upon these representations in determining whether the Respondents had met their burden for the requested variance relief. In light of these facts, it would now be inequitable to permit the Respondents to be relieved from providing the Route 33 Signal.

Further, the Respondents mischaracterize the facts by asserting that "the amount of development requested in 2019 was significant less than the development approved in 2016, when the traffic light was agreed to." ROB page 58. However, as indicated previously, the Respondents voluntarily agreed to the Route 33 Signal as condition of approval at the time of the hearing on the 2018 Amended Application. Additionally, the Respondents further ignore the nature of the relevant analysis by asserting "[c]ircumstances have indeed changed, with traffic being reduced below what was envisioned in 2016." Id. However, to the extent that the Respondents agreed to the Route 33 Signal in 2019, the relevant analysis is a change between 2019 and time of the site plan application (subsequent to the 2020 Opinion).

Finally, the Respondents argue that the obligation to provide the Route 33 Signal in the VC-2 Zone is somehow unreasonable due to the absence of any obligation in the H-D Zone. However, this simplistic argument ignores the Purpose and General Goals of the VC-2 Zone. The VC-2 Zone was established to

create a comprehensive, holistic plan for the development of the area it encompasses. This is clear in the 75-acre minimum lot size. The H-D Zone encompasses a greater area than the H-D Zone; and has a minimum lot size of 5-acres. The Township clearly envisioned a town-center styled community for the area in the VC-2 Zone. However, in order to avail themselves of the ability to develop in accordance with the VC-2 Zone requirements, a developer was required to supply the Route 33 Signal.

Based upon the foregoing, it is apparent that the Respondents failed to establish any basis for the elimination of the Route 33 Signal. In light of this fact, this Court must reinstate the requirement that the Route 33 Signal be provided as a condition of any approval of the Respondents' 2018 Amended Application.

CONCLUSION

Based upon the foregoing, the Board represents that its decision denying the Respondents' 2018 Amended Application applied the relevant legal standard to the facts adduced at the hearing and was entitled to deference and affirmation by the Trial Court. The actions of the Trial Court must be overturned by this Court.

Respectfully submitted,

CLARKIN & VIGNUOLO, P.C.

By: _____
PETER A. VIGNUOLO, ESQ.

Dated: January 17, 2024

CT07 SPII LLC, and DT07 SPII LLC, Plaintiffs-Respondents/Cross-Appellants, vs. ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MONROE, THE TOWNSHIP OF MONROE, and MAYOR GERALD W. TAMBURRO, in his official capacity as Mayor of the Township of Monroe, Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002471-22 Civil Action On appeal from the Law Division of Superior Court, Middlesex County DOCKET NO. MID-L-003953-19 Sat below: Hon. Thomas D. McCloskey, J.S.C.

BRIEF OF PLAINTIFFS-RESPONDENTS/CROSS-APPELLANTS, CT07 SPII LLC, AND DT07 SPII LLC, IN OPPOSITION TO APPEAL OF DEFENDANTS-APPELLANTS, THE TOWNSHIP OF MONROE, MAYOR GERALD W. TAMBURRO, AND ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MONROE, AND IN SUPPORT OF CROSS-APPEAL OF PLAINTIFFS-RESPONDENTS/CROSS-APPELLANTS

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Reference/Proceeding Type/Title	Date
(1T) Transcript of Twp. Public Hearing	March 26, 2019
(2T) Transcript of Trial Proceeding	July 15, 2020
(3T) Transcript of Motion for Reconsideration	June 15, 2021
(4T) Transcript of Motion to Enforce Litigants Rights	September 14, 2021
(5T) Transcript of the Special Hearing Officer Proceedings Day 1March 24, 2022	March 24, 2022
(6T) Transcript of the SHO Proceedings Day 2	March 25, 2022
(7T) Transcript of Motion for Summary Judgment	February 10, 2023

PRELIMINARY STATEMENT

Plaintiffs-Respondents/Cross-Appellants, CT07 SPII LLC and DT07 SPII LLC ("Plaintiffs") are the owners of property designed to assist defendant Monroe Township in meeting its affordable housing obligations. Indeed, the site is among those properties constituting the Township's court-approved Mount Laurel compliance plan, which resulted from a settlement.

In an effort to develop the subject property, Plaintiffs filed a variance application for an inclusionary development with the Zoning Board, which application was initially approved. However, following the discovery on the site of a bald eagle's nest, modifications to the previously approved variance application were required in order to provide a buffer protecting that bald eagle's nest. That amended application seeking approval of modified variances (the "Amended Application") was submitted to the Monroe Township Zoning Board. However, largely due to the vociferous interference of the defendant Mayor, and the opposition he generated, the Amended Application was denied by the Zoning Board. Thus, the case below, seeking reversal of that denial, was filed.

Following trial on the bifurcated Counts of Plaintiffs' Complaint, the Trial Court properly found that the Mayor unlawfully interfered with the Zoning Board hearing and decision, and correctly held that the Zoning Board's decision denying the Amended Application was arbitrary, capricious and unreasonable, with the

Court deeming approved the variances that were sought on the Amended Application. In recognition of the fact that the Mayor had irreversibly tainted the Zoning Board, and in accordance with applicable law, the Trial Court then appropriately appointed a Special Hearing Officer to hear the Plaintiffs' application seeking preliminary and final site plan approval (the "Site Plan Application") based upon the variances.

Following public hearings on Plaintiffs' Site Plan Application conducted by the Special Hearing Officer, the Trial Court adopted the Special Hearing Officer's recommendations and Resolution (the "Resolution") granting that application for preliminary and final major site plan approval.

On appeal, Defendants insist that the discovery of the bald eagle's nest, and Plaintiffs' efforts to protect that nest in accordance with law, should be punished and Plaintiffs should be prevented from providing the affordable housing that resulted from the settlement of the Township's Mount Laurel litigation. Plaintiffs submit that both the Trial Court and the Special Hearing Officer acted completely in accordance with law when reversing the Zoning Board's denial and taking the actions required to allow Plaintiffs to proceed with development of the subject property.

Despite their unlawful conduct, as adjudicated by the Trial Court, Defendants-Appellants Township and Mayor then sought summary judgment

seeking to dismiss Plaintiffs' remaining Counts, seeking damages' which were premised upon that unlawful conduct. Those Counts asked the Trial Court to make Plaintiffs whole, i.e., to award damages and attorney's fees and costs to Plaintiffs resulting from Defendants' unlawful conduct. However, the Trial Court, despite acknowledging the egregiousness of the Mayor's actions, and the arbitrariness of the Zoning Board's decision, denied Plaintiffs' claims for damages under the Federal and New Jersey Civil Rights Acts, and the New Jersey Law Against Discrimination. For the reasons stated herein, presented to this Court via the cross-appeal, the Trial Court's ruling dismissing the damage claims should be reversed.

Plaintiffs file this Brief: (1) in opposition to the appeals filed by Defendants-Appellants Township of Monroe (the "Township") and Mayor Gerald W. Tamburro (the "Mayor"), in his official capacity as Mayor of the Township of Monroe, and the Zoning Board of the Township of Monroe ("Zoning Board" or "Board" (collectively "Defendants"); and (2) in support of Plaintiffs-Respondents/Cross-Appellants' cross-appeal.

For the reasons to follow, Plaintiffs respectfully request herein that this Court affirm the various Orders from which Defendants appeal, and reverse the Trial Court's March 10, 2023 Order denying Plaintiffs' claims seeking damages, attorney's fees and costs of suit.

PROCEDURAL HISTORY

On May 22, 2019, Plaintiffs filed a Complaint in Lieu of Prerogative Writs, in Middlesex County Superior Court, seeking reversal of the defendant Zoning Board's Resolution denying Plaintiffs' Amended Application as described above. Ra1.[1] The Complaint also sought the appointment of a Special Hearing Officer to oversee further proceedings regarding Plaintiffs' efforts to develop their affordable housing site, i.e., Plaintiffs' request for site plan approval, as well as an award of damages, litigation costs and attorney's fees.

The Complaint set forth eight counts: (1) the First Count sought entry of judgment confirming automatic approval of the Amended Application due to the Zoning Board's failure to make a decision within the statutory time frame; (2) the Second Count sought reversal of the Zoning Board's ultimate denial of the Amended Application, on the grounds that said denial was arbitrary, capricious, and contrary to the Municipal Land Use Law, and impermissibly tainted by interference from the Township's Mayor; (3) the Third Count asserted a violation of the Township's Mount Laurel obligations, including a violation of the obligations imposed pursuant to the Settlement Agreement in the Township's Mount Laurel litigation; (4) the Fourth Count sought relief due to Defendants'

[1] "Ra" references are to the Appendix of Plaintiffs/Respondents, submitted herewith. "M" references are to the Appendix of Defendants/Appellants Township of Monroe and its Mayor. "Ba" references are to the Appendix of Defendant/Appellant Monroe Township Zoning Board of Adjustment.

violation of the Federal Civil Rights Act ("FCRA"), 42 U.S.C. § 1983; (5) the Fifth Count sought relief due to Defendants' violation of the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c); (6) the Sixth Count sought the appointment of a Special Hearing Officer to hold hearings on the Plaintiffs' subsequent application(s) to develop the subject property; (7) the Seventh Count sought relief due to Defendants' violation of the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1, et seq.; and (8) the Eighth Count sought damages as a result of the Mayor's statements defaming the Plaintiffs. Id.

By way of Order dated October 25, 2019, this Court denied Defendants' early motion to dismiss the Complaint. Through that same Order, certain claims (Counts One, Two, Three and Six) were scheduled for a prerogative writ trial, and other claims (Counts Four, Five, Seven and Eight) were bifurcated and stayed. M121

On July 15, 2020, the prerogative writ trial was held before the Honorable Thomas Daniel McCloskey, J.S.C., sitting below, on the Plaintiffs' bifurcated claims asserted in the First, Second, Third, and Sixth Counts of the Complaint. 2T.[2]

By Order and Opinion dated October 15, 2020 (the "October 15, 2020 Opinion"), the Trial Court held that the Zoning Board unlawfully denied Plaintiffs'

Amended Application and granted Plaintiffs' request for partial judgment and the appointment of a Special Hearing Officer to hear Plaintiffs' application for site plan approval, pursuant to the Sixth Count of the Complaint. M4-7. The October 15, 2020 Opinion further entered judgment in favor of Plaintiffs on the Second Count of the Complaint, which asserted that the Zoning Board's denial of the Amended Application was arbitrary, capricious and unreasonable and contrary to the Municipal Land Use Law, thus reversing the Zoning Board's denial and approving the variance relief sought in the Amended Application. M3.

The October 15, 2020 Opinion also dismissed without prejudice the Third Count of the Complaint (asserting a violation of the Township's Mount Laurel obligation), subject to the Township's implementation of its continuing obligations with respect to Plaintiffs' property under the Settlement Agreement, the Housing Element and Fair Share Plan ("HEFSP), along with all implementing ordinances and resolutions, and the Judgment of Compliance and Repose in the Township's prior Mount Laurel declaratory judgment action ("DJ Action"). M3

Finally, the October 15, 2020 Opinion retained jurisdiction to continue to enforce the Order granting partial judgment, as well as the 2016 Judgment of Compliance and Repose, and retained jurisdiction with respect to the remaining bifurcated claims asserted in Counts Four, Five, Seven, and Eight. M7.

On November 4, 2020, defendants Township, Mayor and Zoning Board filed

motions for leave to appeal, which were denied by Orders of the Appellate Division dated December 24, 2020. M516, M517 Among other things, the Defendants sought interlocutory review of the Trial Court's October 15, 2020 Order appointing the Special Hearing Officer. On June 28, 2021, Plaintiffs filed a motion seeking entry of an Order providing that installation of a traffic light on Route 33 shall not be deemed a condition of approval for its proposed inclusionary development, despite language set forth in the prior Resolution of Approval for the Original Application dated April 26, 2016. By Order dated September 14, 2021, the Court denied the motion in part, and remanded consideration of the installation of the traffic signal to the Special Hearing Officer. M474.

By subsequent Order dated October 21, 2021, the Trial Court dismissed the Eighth Count of the Complaint (asserting defamation) for procedural reasons. Ra125.

On March 24 and 25, 2022, the Special Hearing Officer, Timothy M. Prime, Esq., conducted public hearings on Plaintiffs' Site Plan Application, preceded by all notices required by law, hearing testimony and considering other evidence produced by the Plaintiffs and the Defendants. After considering comments provided by the Parties via letter (Ra127, Ra136) the Special Hearing Officer then issued a Resolution recommending that the Trial Court approve the Site Plan Application. Ra138.

By Order dated August 9, 2022, the Trial Court adopted the Special Hearing Officer's recommendations and the Resolution granting Plaintiffs' Site Plan Application seeking preliminary and final major site plan approval. M477.

On August 29, 2022, Defendants filed another motion for leave to appeal, seeking reversal of the Trial Court's August 9, 2022 Order, which was denied by Order of the Appellate Division dated September 20, 2022. M714.

On November 4, 2022, Defendants filed a motion for summary judgment seeking dismissal of the remaining Counts, which sought damages and attorney's fees. Plaintiffs cross-moved for summary judgment and, by way of an Order and Opinion dated March 10, 2023, the Trial Court dismissing the remaining claims. M718. Defendants Township and Mayor then filed a motion seeking a stay pending this appeal, which motion was denied by Order and Statement of Reasons dated May 12, 2023. M792.

This appeal and cross-appeal follow.

STATEMENT OF FACTS

Plaintiffs own approximately 48.29 acres of land in Monroe Township, which land is designated as Block 4, Lot 14.01 on the tax maps of the Township (the "Subject Property"). Ra2. The Subject Property is located within the southern portion of the Township along the northern (westbound) side of Route 33. Ra3. It presently consists of farmland and commercial land, and is located within the

Highway Development District ("HD Zone"), which zone also provides for overlay zoning known as the VC-2 Village Center Overlay ordinance provisions. Id. The VC-2 Overlay requires, among other things, the provision of low and moderate income housing designed to help meet the Township's Mount Laurel obligations.

Township's Mount Laurel Obligations and Settlement Agreement

In June 2015, the Defendant Township filed a declaratory judgment lawsuit captioned In the Matter of the Adoption of the Township of Monroe Housing Element and Fair Share Plan and Implementing Ordinances, Docket No. MID-L-3365-15 ("DJ Action"), an action concerning the Township's obligation to provide for its fair share of the regional need for low and moderate income housing pursuant to the Mount Laurel doctrine. M107.

In the DJ Action, the Township faced the possibility of having to create over 2,000 affordable housing units to fulfill its total Mount Laurel obligation. However, by way of a Settlement Agreement reached between the Fair Share Housing Center ("FSHC") and the Township, which was signed by the Defendant Mayor in this action, the Township was ultimately able to reduce its affordable housing obligation to approximately 1,133 affordable housing units. M107.

A critical component of the Settlement Agreement is the Township's reliance upon the 43 affordable units that are to be produced by the development on the Subject Property to assist in satisfaction of the Township's constitutional

Mount Laurel obligations. M128. As a result of its execution of the Settlement Agreement in the DJ Action, the Township obtained a Judgment of Compliance and Repose on October 5, 2016. M131.

Indeed, the Township expressly relied upon the affordable units allocated to the Subject Property when it entered into the Settlement Agreement and obtained the subsequent Judgment of Compliance and Repose in the Township's DJ Action. M134.

Zoning Board Applications

Plaintiffs submitted several applications to the Zoning Board in furtherance of their efforts to develop the Subject Property per the Settlement Agreement, the HEFSP, and the Judgment of Compliance and Repose. Ra5-Ra7.

First, on or about December 9, 2015, Plaintiffs submitted a "d" variance[3] application to the defendant Monroe Township Zoning Board of Adjustment as part of their efforts to develop the Subject Property with mixed commercial and residential uses consistent with the VC-2 Overlay Zone provisions applicable to the Subject Property (the "Original Application"). Ra4. Specifically, the Original Application envisioned development of 215 residential units, consisting of townhouses and apartments, 43 of which are to be affordable units limited to occupancy by low and moderate income households, including very low income

[3] The "d" variance applications were submitted pursuant to N.J.S.A. 40:55D-70(d), and the "bulk" variance requests ("c" variances) were made pursuant to N.J.S.A. 40:55D-70(c).

households, along with the construction of five buildings totaling 65,000 square feet to be used as commercial/retail space. Id.

On February 23, 2016, the Zoning Board held a public hearing on Plaintiffs' Original Application and the Zoning Board approved the Original Application by Resolution dated April 26, 2016 (the "Prior Approval"). Ra5. One of the conditions of approval was the installation of a traffic signal on the portion of Route 33, a State highway, abutting the development[4].

The following variances from the requirements of the VC-2 Overlay Zone were granted by the Zoning Board for the Original Application:

a. Variance relief pursuant to N.J.S.A. 40:55D-70(d)(1), as the Combined Properties consisted of 50.3 acres of land, whereas a minimum of 75 acres is required by the VC-2 Overlay provisions; and

b. Variance relief pursuant to N.J.S.A. 40:55D-70(c2)as Buildings C1 and C2, which were to contain affordable units, were designed to be approximately 360 feet from Route 33 whereas the minimum setback per the ordinance is 500 feet.

1T8:3-19

Plaintiffs filed a second application with the Zoning Board in November of 2016, seeking to amend the terms of approval previously granted by the Prior Approval. Ra6

[4] This traffic signal was later required as part of the Township's updated Land Development Ordinance ("LDO") if the land was developed under the VC-2 Overlay provisions. To this day, the LDO does not require a traffic signal if the Subject Property were developed with warehouses or any other use permitted by the underlying HD zoning. Ba11.

However, Plaintiffs then became aware of the presence of a bald eagle's nest on the Subject Property. 1T7:5-7. In order to provide a sufficient buffer protecting the bald eagle's nest, Plaintiffs revised their proposal and submitted a second amended application to the Zoning Board in July of 2018, seeking approval of less development than allowed under the Original Approval, i.e., a 206-unit residential development project, consisting of 163 market-rate apartments and 43 affordable apartments, along with 43,568 square feet of retail space (the "Amended Application"). 1T7:19-24. To protect the bald eagle's nest, Plaintiffs' redesign included a 660-foot buffer area on Plaintiffs' proposed plan. 1T13:6-7 Given the extensive buffer restriction and project redesign resulting from the discovery of the bald eagle's nest, the Amended Application also requested additional variance relief. 1T105:19-23

On July 25, 2018, Plaintiffs submitted their Amended Application to the Zoning Board for review, accommodating the 660-foot buffer. Ra6. The Amended Application was first reviewed by the Monroe Technical Review Committee ("TRC")[5]. Plaintiffs attended five TRC meetings – in September 2017, December 2017, July 2018, September 2018, and January 2019 – during which the TRC provided Plaintiffs with input and comments regarding the Amended Application.

[5] The TRC is a development application review committee designed to provide applicants with guidance on an applicant's development proposal prior to a public hearing before the Zoning Board.

A representative of the defendant Mayor was often present at the TRC meetings. Ra9. Throughout this time, Plaintiffs further revised their proposed plans several times in response to the guidance provided by the TRC. 1T106:6-19.

During these meetings, the TRC actively participated in discussions regarding the development of the Subject Property. 1T106:6-19. Further, during the meetings, the Township representatives and their professionals supported Plaintiffs' revised variance proposal, i.e., Plaintiffs were led to believe that they would be permitted to proceed with their planned development while also complying with the 660-foot buffer provided in order to allow for a sufficient distance between development and the bald eagle's nest. Ra10.

Plaintiffs also requested to meet with the Mayor to obtain his feedback on their Amended Application prior to the Zoning Board's public hearing on the application. However, once the TRC meeting was scheduled and representatives of Plaintiffs arrived at the Mayor's office, they were informed that no such appointment was on the Mayor's schedule. Ra24.

Plaintiffs attempted to reschedule the meeting with the Mayor. However, soon thereafter, Plaintiffs received a telephone call from the Township's attorney discouraging them from holding a meeting with the Mayor and instead advising that they should continue with the above-described TRC meetings and follow the guidance provided therein. Ra25

Because there was no indication from the TRC that the revised plans, with the decreased amount of developable property and decreased development yield, would be unacceptable to the Township, the Mayor, the Zoning Board, or anybody else, Plaintiffs amended their proposal several times per the TRC's suggestions, at great expense, assuming that the TRC was conducting such meetings in a good faith attempt to work with Plaintiffs in amending their proposal to address any concerns and protect the bald eagle's nest. R25.

Nonetheless, the defendant Mayor then precipitously launched a scorched earth campaign to interfere with the Zoning Board application process and stir up public opposition to Plaintiffs' proposal. Most egregiously, one week before the public hearing on Plaintiffs' application, the defendant Mayor made numerous statements that were published as a Township press release on March 19, 2019. Ra25.

The press release was headlined "**Monroe Mayor Calls for Zoning Board to Reject Proposed SPII-LLC Housing Development on Route 33**." The sub-headline of said press release stated: "Mayor Tamburro Says Environmentally Sensitive Area Can't Be Home to 206 Apartments and Retail." Ra26. The press release portrayed Plaintiffs and their development proposal in a completely negative light and contained language that cast Plaintiffs as a lawbreaker proposing an unlawful development. Id.

Specifically, despite signing a Settlement Agreement that called for development of the Property, the Mayor stated in the press release that: "I've not been pleased with this proposal since its inception; it is yet another way in which developers use state affordable housing mandates to force more development into towns . . . And now, the developer is still trying to squeeze as much development as possible onto this site, even with a bald eagle nesting ground. To me this is absolutely unacceptable." Id.

This statement reflects the bad faith of the Township, through the Mayor, in conducting the TRC meetings, with the Mayor stating that he found the plan, "since its inception," to be "absolutely unacceptable." M40. Prior to the Mayor's press release, Plaintiffs had no reason to believe that the proposed development of the Subject Property, which was included in the Township's own court-ordered Mount Laurel settlement, would be prohibited or opposed by the Township. Ra26

The Mayor's press release also stated that "The developer could have easily reduced the amount of housing units to lower the density and create an appropriate buffer to protect the bald eagle . . . But, instead, the plan calls for building rental apartments, some of which will be on top of reduced retail space right on Route 33. It will be unsightly, unnecessary and not in the best interest for Monroe." Ra27. Thus, through false statements and innuendo, the Mayor told the public that Plaintiffs were not providing "an appropriate buffer" to protect the bald eagle's

nest, when the truth is that a fully lawful 660-foot buffer protecting the nest was proposed. Id. Moreover, as the Mayor was well aware given the Settlement Agreement he had signed, any reduction in the density of the Amended Application would have been inconsistent with the Settlement Agreement, as such a reduction would reduce the number of affordable units on the Subject Property and put the Township out of compliance with its Mount Laurel obligations. Id.

No such alleged concerns were raised by the Mayor's representative in the numerous TRC meetings, where such comments might have been productive. Instead, the Mayor laid in wait and launched his interference campaign first behind the scenes, and then publicly at the last moment, primarily through the published Township press release, in order to generate public opposition to development of a property that is part of the Township's own affordable housing plan, as the Mayor well knew given his signature on the subject Settlement Agreement. Ra28

The Mayor's press release went even further, stating that "As the zoning board votes, eaglets are beginning to hatch on the Millstone River . . . Our community needs to stand up in full force against the SPII-LLC housing project. I am proud to lead the charge." M45

The Mayor's statement in this regard was a compete fabrication - he had no knowledge that any bald eagle eggs were in fact beginning to hatch. The overall thrust of the Mayor's statements was that Plaintiffs were not doing what was

legally required to protect the bald eagle – our national symbol. That was entirely false. Plaintiffs proposed to fully protect the eagle's nest in accordance with the law, at considerable financial sacrifice. Id.

As held by the Trial Court, the Mayor's statements, published by the Township, were clearly improper since the Mayor possessed great influence on the public and the members of the Zoning Board. The Mayor waited until the 11th hour to publicly oppose Plaintiffs' proposal, and succeeded in garnering massive opposition to the proposal, neglecting to admit that the Township relied on Plaintiffs' proposed development when entering into the Settlement Agreement. M46.

Subsequently, hundreds of objectors, having been misled by the Mayor, attended the March 26, 2019 Zoning Board public hearing to oppose Plaintiffs' Amended Application. M45. The Mayor's illegal interference and the resultant public outcry was successful – the Zoning Board unanimously denied the Amended Application, with that decision being memorialized through the April 30, 2019 Resolution on Application No.: BA 5135-16 ("Resolution"). M68.

Yet, as found by the Trial Court, the evidence provided by Plaintiffs in support of the Amended Application during the March 26, 2019 public hearing was overwhelming, and uncontradicted. M15. Mr. Carey Tajfel, a representative of Plaintiffs, presented fact testimony and the following experts testified in support of

Plaintiffs' Amended Application: Andrew Robbins, Esq., an environmental attorney; Henry Kent-Smith, Esq., an affordable housing attorney; Lorali Totten, P.E. of Crest Engineering Associates, Inc.; David Minno of Minno & Wasko - Architects and Planners; Richard Arzberger of Sonnenfeld & Trocchia Architects; Scott Kennel of McDonough and Rea Associates, LLC (Plaintiffs' traffic expert); and Art Bernard, P.P. (Plaintiffs' professional planner). Ra10. There was no professional testimony provided by any objectors.

Despite all the uncontroverted evidence, the Zoning Board still voted to deny Plaintiffs' Amended Application, with Member Vincent LaFata making a motion to deny the Amended Application, stating in relevant part that "I think they're basing everything and every professional that came up **kept bringing up the affordable housing**. We have other developments going on. **They're not going to hold us ransom based on that**." 1T176:7-14 (emphasis added).

Through the Resolution, the Zoning Board asserted, without benefit of any support in the record, and contrary to all the evidence produced, that the Applicant failed to provide proofs supporting its request for the variance relief, sought pursuant to N.J.S.A. 40:55D-70(d)(1), to allow development upon a 48.29 acre lot, whereas a 75 acre minimum tract size is required by Ordinance and the VC-2 Overlay Zone. M68. Indeed, as the Trial Court had previously noted, that same variance was previously granted by the Resolution of the Board for the Subject

Property when the Board granted the Original Application on April 26, 2016. M87.

The requested bulk variances, sought per N.J.S.A. 40:55D-70(c), were also denied, without benefit of any support in the record, and contrary to the evidence of record, as the Zoning Board arbitrarily concluded that the discovery of the bald eagle's nest did not constitute a sufficient hardship justifying relief pursuant to N.J.S.A. 40:55D-70(c)(1), with the Resolution further asserting, without any support in the record, that the requested variances "exceed a reasonable modification of the site to offset the impact of the bald eagle's nest." M80.

The Resolution further asserted, without benefit of any support in the record, that: the requested variances do not advance the purposes of the Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-1, et seq. and that, if the variances were granted, they would create a substantial detriment to the public good. M85. The Resolution further failed to recognize the uncontroverted expert testimony from Plaintiffs' experts which extensively discussed the relevant standards for variance relief established by Plaintiffs during these hearings. M34.

Following receipt of the Resolution, Plaintiffs filed the Complaint below in the Law Division, Middlesex County. Ra1.

After Plaintiffs filed this case, the Mayor again authored, and the Township published, additional disparaging and purposely misleading references to the Respondents under the headline "**Mayor Gerald Tamburro Will Not Be**

Silenced" on the Township's website in the form of an E-Newsletter called the Township of Monroe News, June 11, 2019. Ra160.

Facts Relevant to the Elimination of the Requirement for a Traffic Signal

As set forth in the Certification of traffic expert Scott Kennel, which was provided in support of the Plaintiffs' June 28, 2021 Motion concerning a traffic signal on Route 33 (Ra168), Plaintiffs and their professionals, including Mr. Kennel, attended several pre-application meetings with the New Jersey Department of Transportation ("NJDOT") in an effort to provide the then-proposed traffic signal as envisioned in the Prior Approval. The NJDOT has sole jurisdiction over State Route 33, including any proposed traffic signals on that highway.

At the April 8, 2015 meeting, the NJDOT communicated significant support for both the traffic signal and the eastbound median left turn lane. (Ba18) In reliance on the NJDOT's prior expressed support for both the traffic signal and the eastbound median left turn lane, Plaintiffs did not oppose the installation of a traffic light condition as memorialized in the Prior Approval.

On April 6, 2021, Mr. Kennel attended another pre-application meeting with the NJDOT (remotely). Present were representatives of the NJDOT and the parties, including Monroe Township. The purpose of the meeting was to discuss the Route 33 access for Plaintiffs and follow up on the NJDOT pre-application meetings held on April 8, 2015 and February 14, 2019 in anticipation of an application to the

NJDOT. In a reversal of its prior expressed support for both the traffic signal and the eastbound median left turn lane, the NJDOT indicated at that meeting that approval of a traffic light on Route 33 is doubtful at best and, at a minimum, seeking such approval would be a long, expensive, multi-stage process with little chance of success. Ba19.

More specifically, during the April 6, 2021 meeting, the NJDOT advised Plaintiffs that, to seek such a traffic signal, Plaintiffs would first have to file an application for an access level change with NJDOT changing the highway access designation for Route 33. (Id) Such applications are extremely lengthy and expensive and would also require the approval of Monroe Township (which opposes Plaintiffs' development), East Windsor Township, Middlesex County, and Mercer County. Ba20.

Further, the NJDOT advised that, even if the access level change were permitted, the granting of an application for approval of the traffic signal, which would be another lengthy process to begin thereafter, would remain doubtful because the location in question was too close to existing signals on Route 33, given the NJDOT's spacing requirement in its regulations. Id. Thus, Plaintiffs sought relief from any requirement to provide a traffic signal on Route 33.

Facts Relevant to the Plaintiffs' Civil Rights Claims

With regard to the Plaintiffs' federal and state civil rights claims and the claims premised upon the New Jersey Law Against Discrimination ("NJLAD"), the Certification of Art Bernard, P.P. ("Bernard Cert."), filed in support of Plaintiffs' Cross-Motion for Summary Judgment, which was denied by the Trial Court by Order and Opinion dated March 10, 2023 (M718), and is the subject of Plaintiffs' cross-appeal, makes a number of salient points. First, he notes that Monroe Township is unique in that it is the home of so many age-restricted communities. As a result, the 2016-2020 American Community Survey ("ACS") reveals that 37.6 percent of Monroe's population is 65 or over. To put this into context, the 2016-2020 ACS reveals that only 16.2 percent of the State's population and only 15.0 percent of Middlesex County's population is 65 or over. Of course, one of the characteristics of age-restricted communities is the absence of school age children, since children under the age of 19 are not permitted in such communities. Ra165.

Mr. Bernard further noted, id., that the 2016-2020 ACS reveals that Monroe has a much more homogenous housing stock than the State and Middlesex County. Indeed, when comparing the ACS data, it is apparent that the Township has a disproportionately high percentage of single family (attached and detached) housing. Single family homes are usually the most expensive type of housing and

the least likely to be rented. Thus, they are the least likely form of housing to be occupied by low and moderate income households. The percentage of the housing stock recorded by the Census Bureau as single-family housing (detached and attached) is as follows:

New Jersey: 63.1%

Middlesex County: 64%

Monroe Township: 87.1%

Further, African American and Hispanic households are a disproportionately high percentage of the low and moderate income population. This is illustrated by the 2016-2020 ACS data that provides the following median income data:

Race/Ethnicity	New Jersey	Middlesex County
White	$91.555	$84,926
Black	$55,453	$79,063
Hispanic	$60.352	$65,771

Ra166.

Given the very high percentage of single-family homes in Monroe Township, it would be expected that the Township would have a disproportionately low percentage of African American and Hispanic residents. The data provided in the 2016 – 2020 ACS bear this out, confirming the following racial breakdown in the State, the County, and the Township:

New Jersey: 12.4% African American 21.6% Hispanic

Middlesex County: 9.1% African American 22.4% Hispanic

Monroe Township: 3.4% African American 5.7% Hispanic

Id.

Mr. Bernard further confirmed that, in contrast to the lack of multi-family housing in Monroe, Plaintiffs' inclusionary development is designed to provide affordable multi-family housing, including low and moderate income housing, that will be more readily available to the minority population than the housing that has previously been allowed by the Township's zoning policies. Further, Plaintiffs propose housing for families with children, not the age restricted housing that is so prevalent in the Township, all of which is relevant to Plaintiffs' civil rights and NJLAD claims. Id.

For the following reasons, when the applicable law is applied to the facts established in this matter, it becomes clear that the Trial Court Orders from which Defendants appeal were providently issued, with the only error made below being the Trial Court's dismissal of Plaintiffs' claims for damages and attorney's fees.

LEGAL ARGUMENT

POINT I

STANDARD OF REVIEW

Rulings by a trial court judge should be upheld on appeal when supported by adequate, substantial and credible evidence. New Jersey Turnpike Authority v. Sisselman, 106 N.J. Super. 358 (App. Div. 1969), certif. den. 54 N.J. 565 (1969).

The "appellate function is a limited one: we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice," Fagliarone v. Twp. of No. Bergen, 78 N.J. Super. 154, 155 (App. Div. 1963), and the appellate court therefore ponders whether, on the contrary, there is substantial evidence in support of the trial judge's findings and conclusions. Rova Farms Resort v. Investors Ins. Co. 65 N.J. 474, 478 (1974), citing Weiss v. I Zapinsky, Inc., 65 N.J. Super. 351, 357 (App. Div. 1961).

In this case, the Trial Court found adequate, substantial, and credible evidence as related to the reversal of the Zoning Board's variance denial, the appointment of the Special Hearing Officer and the adoption of his recommendations, and there is no need to disturb its findings. However, despite the Trial Court's correct interpretation of the facts underlying the civil rights claims, its failure to award damages should be reversed given the applicable law.

POINT II

THE ZONING BOARD UNLAWFULLY DENIED THE APPLICATION, AND THE TRIAL COURT CORRECTLY REVERSED ITS DENIAL

Defendants claim that the Trial Court erred when reversing the Zoning Board's denial and ostensibly "stripping the Township and the Zoning Board of

their jurisdiction" by "fashioning new procedures" for the review of Plaintiffs' site plan application, and that the ruling "departs from long established case law." However, Defendants fail to mention, let alone describe in detail, the reasons why the Trial Court ruled that the Defendants have no further approval authority over Plaintiffs' site plan application. Indeed, Defendants' briefs on appeal do not even quote or otherwise refer to the Trial Court's decisions below. The reasons behind the Trial Court's decision, as first described in detail in the 64-page Order and Opinion of October 15, 2020 (the "October 15, 2020 Opinion") were supported by ample evidence and the governing law, as set forth below.

A. The Trial Court properly found that the Zoning Board's decision in this case was arbitrary, capricious and unreasonable

While a board's decision on a development application enjoys a presumption of validity when under review by the courts, a board's decision may be overturned if it is not supported by the evidence and is therefore arbitrary and capricious. Price v. Himeji, LLC, 214 N.J. 263, 284 (2013); Kramer v. Board of Adjustment, Sea Girt, 45 N.J. 268, 296 (1965).

A zoning board must rely on substantial, credible evidence of record to support a denial of an application for a use variance. Cell v. Zoning Bd. Of Adjustment, 172 N.J. 75, 89 (2002) (reliable record evidence is the preferred standard when a zoning board acts in a quasi-judicial, as opposed to a legislative capacity). Accord, PADNA v. City Council of Jersey City, 413 N.J. Super. 322,

332 (App. Div. 2010), certif. denied, 205 N.J. 79 (2011). While there is deference to decisions of land use boards, the courts do not act as a "rubber stamp" to approve a board's findings. To the contrary, our courts review a board's decisions to determine whether the board's findings were in error and lacking a basis in the record. Anastasio v. Planning Bd. of Tp. of West Orange, 209 N.J. Super. 499, 522, (App. Div.) certif. denied 107 N.J. 46 (1986).

Boards are entitled to weigh the testimony of experts who provide their opinions and assign such weight to those opinions as they deem appropriate under the circumstances of the case. Nextel of N.Y., Inc. v. Borough of Englewood Cliffs Bd. of Adjustment, 361 N.J. Super. 22, 41 (App. Div. 2003). However, "while a board may reject expert testimony, it may not do so unreasonably, based only upon bare allegations or unsubstantiated beliefs." New York SMSA v. Bd. of Adjustment, 370 N.J. Super. 319, 338 (App. Div. 2004).

In this case, the Trial Court correctly applied those legal principles and entered judgment in favor of Plaintiffs on the Second Count of the Complaint, reversing the Zoning Board's denial and approving the use variance and bulk variance relief sought through the Amended Application in its entirety. The Trial Court properly determined that Plaintiffs established their case for variance relief based on the overwhelming, substantial credible evidence and proofs placed on the

record at the public hearing on the Amended Application, and that Plaintiffs were therefore entitled to an approval.

The October 15, 2020 Opinion granting partial summary judgment in favor of Plaintiffs detailed the relevant law and standards governing the granting of use and bulk variance belief. M1 The October 15, 2020 Opinion exhaustively examined the standards for the granting of variance relief under N.J.S.A. 40:55D-70(d)(1) ("Special Reasons") and (d)(6) ("Height") (M25-M27), and under N.J.S.A. 40:55D-70(c)(1) and (c)(2) ("Bulk Variances") (M27-28). The Trial Court then carefully applied these standards to the record before it and found that:

> "the Board has not presented a record which demonstrates a clear decision of balancing the positive and negative factors and offered no analysis of those factors in the record despite purporting to have done so in its Resolution. To the contrary, its decision was unsupported by either the memorializing Resolution or the record and, instead, ascribed "undue weight to the residents' unsubstantiated and, at times, irrelevant testimony."

M31.

In holding that the Zoning Board "failed to establish that it relied on substantial and reliable record evidence to support any findings of fact" in denying the Plaintiffs' Application for variances, the Trial Court found that:

> [The Board's] decision was not supported by substantial evidence or "grounded in evidence in the record." Consequently, the Zoning Board acted "arbitrarily, capriciously, [and] unreasonably" since its findings of fact in support of the denial of the variance relief sought were not supported by the record and, thus, its decision must be reversed.
>
> A close examination of the record below reveals that the Board's

> Resolution of Denial was contrary to the statutory criteria and contrary to the factual record and opinion testimony presented to the Board in support of the requested variances by Plaintiffs' witnesses, including professional planner (Art Bernard, P.P.) and architect (David Minno). A summary of the Applicant's proofs bears this out and ultimately informs the Court decision.

M31.

The Trial Court then proceeded to set forth the reasons for its decision in greater detail, extensively citing to the record below, specifically highlighting testimony provided by Plaintiffs' experts in support of the variance requests. Notably, the Trial Court pointed out that Plaintiffs' planner "methodically and thoroughly walked the Board through the (c)(1) and (c)(2) criteria and provided ample justification to support the request for the various bulk variances":

> In support of its request for relief pursuant to N.J.S.A. 40:55D-70(d), [Plaintiffs] SPII offered the testimony of its professional planner Art Bernard, P.P., who was qualified by the Board to offer expert planning testimony. As he testified, although the Board was requiring a "d variance" for SPII's proposed variance from the minimum tract size area ordinance provision, SPII did not meet the 75-acre minimum tract size ordinance provision even when the Zoning Board granted the identical relief in the 2016 Approval, and that "[i]n fact, none of the properties in the zone had the 75 acres. And the lack of acreage is required for everyone to work together to come up with a cohesive connection" so that the affordable housing required by the Township can be provided. TN 122:4-25. He also testified that the proposed development, as amended, was consistent with the Township's Master Plan and particularly suitable because "the proposed uses are compatible with multi-family housing in East Windsor that is adjacent to the site, and the mixed-use development that has been approved to the east" and also due to "its location on Route 33 and the presence of public water and sewer on the property."

M32.

The Trial Court also noted that the Board ignored the competent evidence presented by Plaintiffs (SPII's) architect in support of variance relief, despite any proofs to the contrary:

> David Minno, SPII's architect, testified, without contradiction or challenge, that the proposed parking in the front of the nonresidential structures is more beneficial for retail purposes because parking in the rear of retail does not properly support retail and the parking in the front yard would actually allow retail to thrive. TN 64:24-65:90. Among the other benefits identified by SPII's experts, all ignored by the Zoning Board when denying SPII's requested variance relief, were the fact that the proposed development provided more open space than the original 2016 Approval, provided for a pedestrian friendly mixed-use environment that serves local and regional needs while also creating new employment opportunities within the Township, and that SPII's proposed affordable units would provide housing opportunities for low and moderate income individuals who are otherwise unable to afford market-rate housing.

M33-34.

The Trial Court, at numerous points, stressed the lack of any testimony or evidence in the record contradictory to Plaintiffs' experts, or in support of the Board's ultimate resolution:

> Despite the absence of any expert or other testimony to the contrary, the Zoning Board nevertheless denied said variance relief, baldly asserting in the Resolution that "The intensity of the proposed development in the developable area of the lot is far too intense as evidenced by the D1 Use Variance, and the two (2) D6 Height Variances, and the number, type, character and extent of the variances requested."

M32.

> The Zoning Board ignored SPII's uncontested expert testimony requesting variance relief under the "flexible c" standards to the effect that "the variances which allow the residential uses provide a benefit to attract retail users to the Property. The Board found that there is more

> than sufficient residential development in and about this area of Route 33 to support retail uses on the Property." See Exhibit A, page 14, para. 4. However, apart from there being no evidence in the record to support that conclusion, the Resolution failed to acknowledge Mr. Minno's testimony regarding the increased support for retail and the resulting benefit to the Township that the proposed development would provide. In short, when denying the variance relief requested by SPII in the 2018 Amended Application, the Zoning Board systematically disregarded or improperly gave little weight to the benefits of the proposed variances to the public good, as well as to the testimony presented by SPII's experts in support of the variances requested by SPII in the 2018 Amended Application.

M34.

Additionally, the Trial Court focused on the reasons behind the request for a hardship variance, noting that Plaintiffs modified their application after the discovery of the bald eagle's nest and sought all variances resulting from this discovery so as to sufficiently buffer the nest. M31. As the Trial Court held, "[a]mple evidence in support of that proposition was provided to the Board, and no contrary evidence was produced. In the Court's view, **a stronger, more equitable case for variance relief is difficult to imagine, but the Board nevertheless denied the variance relief.**" M31.

The Trial Court further determined that Plaintiffs "provided overwhelming and uncontested evidence demonstrating [their] satisfaction of the special reasons standard applicable to requests for variance relief under N.J.S.A. 40:55D-70(d), the positive criteria standards applicable to requests for variance relief under N.J.S.A. 40:55D-70(c), and the negative criteria standards applicable to requests for variance relief under N.J.S.A. 40:55D-70." M34

Importantly, as evidence that the Board acted in an arbitrary and capricious manner in denying the variances, the Trial Court noted the discrepancies between the Board's 2018 findings and the findings in the Board's Resolution approving Plaintiffs' 2016 Application:

> In the resolution for the 2016 Approval, the Zoning Board **actually found** that SPII had met the criteria for hardship for lot area because no one in the chain of title for the Property ever owned any adjoining land. The Board also previously found that the site was particularly suited for the proposed use since the site is adjacent to, and will be connected to, a mixed use development that together with the Property exceeds 75 acres of land required to be developed as a mixed use community.

M34-35.

In further support of its conclusion that the Board acted arbitrarily and capriciously, the Trial Court quoted extensively the findings from the Board's 2016 Resolution:

> The Governing Body by enacting the VC-2 Overlay Zone has already determined that the site would be particularly suitable for the proposed mixed-use development, if it were 75 acres in size. As the site is only 50.5 acres that Applicant needs to, and can, demonstrate that it is still particularly suited despite being undersized. . . .

M35.

> The Board finds from the testimony presented, subject to the conditions agreed upon by the Applicant and those imposed by the Board, that the Applicant has satisfied the positive and negative criteria requirements and has shown special reason for the Use Variance for this project pursuant to N.J.S.A. 40:55D-70(d)(1), and the Board adopts the Applicant's testimony, **specifically that of their Planner in this regard**....

M36-37.

As highlighted by the Trial Court, in the 2016 Resolution the Board specifically adopted the testimony of Plaintiffs' professional planner, Art Bernard. Yet in 2018 the Board arbitrarily and capriciously ignored and discounted the testimony of the same planner as to the same issues - despite hearing no contrary testimony:

> A mere two (2) years since its explicit findings in granting the 2016 Approval, the only thing that changed was the unexpected discovery of the bald eagle's nest and resultant need to (i) reconfigure the site plan to accommodate the federally mandated 660-foot buffer and at the same time, (ii) maintain the affordable unit yield required by the HEFSP, the Judgment of Compliance, and the 2016 Approval itself.
>
> Here, despite and ignoring its prior findings in granting the 2016 Approval, the Board argues that it justifiably rejected the opinions of Respondents' experts, specifically Respondents' planner - the same planner whose testimony it accepted and adopted in granting the 2016 Approval. Similar to its findings then and especially applicable here, the Board was provided with no evidence that the requested variances will have a detrimental effect on the surrounding area, or that they could not be granted without substantial detriment to the public good and without substantially impairing the intent and purposes of the Township's identical Master Plan and Zoning Ordinance. However, the Board's reasons for its decision, as set forth in its Resolution of Denial, were merely conclusory assertions not supported by any factual evidence or professional opinions, were not based upon substantial, credible evidence in the record, and the Board's findings were completely impeached by the uncontroverted evidence presented by Respondents during the Zoning Board hearing. If anything, the conclusory assertions contained in the Resolution of Denial not only were not grounded on any facts or rebuttal evidence or opinion of any Board witness (which there were none) or professionals, but also, were tantamount to inadmissible net opinion.

M37.

Even with all the uncontroverted evidence, and given the 2016 Resolution, the Zoning Board voted to deny Plaintiffs' 2018 Amended Application for variance relief, with Member Vincent LaFata making a motion to deny the 2018 Amended Application, stating in relevant part that "I think they're basing everything and every professional that came up kept bringing up the affordable housing. We have other developments going on. They're not going to hold us ransom based on that." TN 176:7-14. M34.

In direct contravention of the claims of Board Member LaFata in denying the 2018 Amended Application, the Trial Court highlighted that:

> the Zoning Board explicitly found in the 2016 Approval that the site is particularly suited for the proposed use because "the project advances the purposes of the VC-2 Overlay Zone including affordable housing that is subsidized by market housing, the proposed development advances the 2011 Monroe Township's Land Use Plan Element, the proposed development advances the 2012 Monroe Township's Master Plan Housing Element and the proposed development plan advances a number of express purposes set forth in the Municipal Land Use Law including but not limited to N.J.S.A. 40:55D-2(a), (e), (g), (d) and (i)."

M35-36.

The record below is replete with examples of clear, concise, and supported evidence and professional testimony that went completely unchallenged throughout the pendency of the hearings on the 2018 Amended Application. The Trial Court recognized this, and in accordance with the appropriate legal standards, reversed the Board's decision. As stated by the Trial Court, "[t]here was no further

discussion nor evidence of any deliberation by the Board prior to voting to deny the Application. In sum, the Board simply rejected all of the evidence before it," including its own statements in approval of the earlier application. This is a textbook example of arbitrary and capricious decision-making, and the Trial Court's reversal was correct and must be upheld.

B. The Trial Court properly found that the Zoning Board's denial was improperly tainted by the Mayor's conduct

In the October 15, 2020 Opinion, the Trial Court correctly criticized the actions of the Mayor prior to the Zoning Board hearing. M58. The Trial Court determined that the Board's 2019 Resolution denying the 2018 Amended Application, "dressed-up" a predetermined outcome, with no evidence in the record to support that outcome. M59. The Trial Court also specifically cited the "disturbing evidence in the record" related to the comments and behavior of the Township's then-mayor, Gerald Tamburro, in opposition to the Amended Application. M38.

Among the actions of Mayor Tamburro prior to the Zoning Board hearing which drew criticism from the Trial Court was his outrageous issuance of an "inappropriate" press release arguing against Plaintiffs' then-pending application, which "appear[s] to have preordained the Amended Application's denial; and that, along the way, resulted in the subversion of due process and fundamental fairness to the Applicant. If anything, at a bare minimum, those actions only served to

further inform and underscore the arbitrariness and unreasonableness of the Board's denial decision." M38. The Trial Court noted that:

> Instead of electing to exercise his right to appear at the hearing, either himself or through the Township attorney, to express his views on the Amended Application in his official capacity – or, even as a private citizen-resident of the Township off the dais, as was his irrefutable right - the Mayor did neither. Instead, unbeknownst to the Applicant, he resorted to surreptitiously authorizing publication of a press release that was posted to the Township's official website to convey his sentiments utilizing the Township's resources (which release, inferably, was likely email blasted as an E-Newsletter to all Township residents who subscribed to the website or otherwise taken from electorate lists).

M40.

The Trial Court went on to quote the Mayor's statement from the press release:

> "I've not been pleased with this proposal since its inception; it is yet another way in which developers use state affordable housing mandates to force more development into towns," said Tamburro, noting the proposal would include 42 court-mandated affordable units. "And now, the developer is still trying to squeeze as much development as possible onto this site, even with a bald eagle nesting ground. To me, this is absolutely unacceptable."
>
> "The developer could have easily reduced the amount of housing units to lower the density and create an appropriate buffer to protect the bald eagle," the mayor said, "but, instead, the plan calls for building rental apartments, some of which will be on top of reduced retail space right on Route 33. It will be unsightly, unnecessary and not in the best interest for Monroe."

M40.

Not only were these statements in the press release "incendiary", according to the Trial Court, but they were made on March 19, 2019 - a full week *before* the

evidence and proofs were presented by Plaintiffs at the Zoning Board hearing. Additionally, the statements were demonstrably false, given that Plaintiffs did make significant modifications in order to accommodate the buffer needed for the bald eagle's nest. The Mayor also omitted the fact that the affordable units had already been provided for in the Township's Housing Element and Fair Share Plan, which had been previously approved by the Township (and memorialized in an agreement signed by the Mayor himself) in 2016.

As the Trial Court noted, the press release appeared to have had its desired effect on ginning up public opposition. At the March 26, 2019 public hearing, a standing-room only crowd of residents opposing Plaintiffs' Amended Application appeared. M40. Seventeen residents spoke against the Amended Application. After the conclusion of Plaintiffs' proofs, the Board, instead of discussing the matter or asking further questions, voted unanimously to deny Plaintiffs' Amended Application as sought by the Mayor, with only Board Member LaFata commenting that he thought the affordable housing was an attempt to "hold the Township hostage," and, with no further explanation, that "the negative criteria outweighs the positive criteria." M318.

Also missing from the discussion at the hearing was the Mayor himself. The Trial Court, in the October 15, 2020 Opinion, compared the mayor's behavior to "rolling a grenade in on the Application hearing" and then running away. M44.

The Mayor recklessly disregarded the impact of his press release, and launched a public campaign to interfere with the Zoning Board process by suggesting that Plaintiffs proposed an unlawful and unrestrained development - a campaign which was very successful at the Zoning Board level. The statements made by the Mayor are even more egregious considering the numerous statements and implications which are at odds with the truth. Notably, the Trial Court found that the Mayor's statements implied that Plaintiffs failed to adequately protect the bald eagle's nest, when in reality, Plaintiffs had undergone considerable sacrifice to meet the applicable guidelines to do so, and the Mayor further claimed that Plaintiffs were at fault for not reducing the number of affordable units in the development, when, in reality, the number of affordable units was predetermined by an agreement signed years earlier by the Mayor himself. M45. Finally, the Trial Court noted that the Mayor stated in his Township press release that that eaglets were hatching on the Subject Property at the time of the hearing, with the Trial Court further noting that the statement:

> was made without reference to any evidence or reported fact, false on its face and, at the very least, made in reckless disregard of the truth. And yet, it was purposely tinged with enough intent to evoke emotional, outraged and visceral responses that one such resident-objector voiced his objections to the Application in the record in a way that highlighted the effect of the statement and the unfounded fears it stoked.

M46.

It is important to stress the legal framework governing the manner in which

variance applications are supposed to be reviewed pursuant to the Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-1, et seq. It is well-settled that hearings conducted before a zoning board of adjustment to decide an application for a land use approval are quasi-judicial proceedings. Dolan v. DeCapua, 16 N.J. 599, 612 (1954). Board members acting in a quasi-judicial capacity when exercising powers granted to them to make land use decisions must make their decisions based on the evidence produced during the hearing and "uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action." Kramer v. Sea Girt Board of Adj., 45 N.J. 268, 280 (1965) (emphasis added) (quoting Penna. R.R. Co. v. N.J. State Aviation Com., 2 N.J. 64 (1949). A zoning board's powers include the "judicial" role of deciding questions of credibility and whether to accept or reject testimony, expert or otherwise. Griggs v. Zoning Bd. of Adjustment of Princeton, 75 N.J. Super. 438, 446 (App. Div. 1962).

Although the governing body is the chief municipal legislative body, N.J.S.A. 40:55D–4, and is empowered to enact zoning ordinances, N.J.S.A. 40:55D–62, its power is tempered by the authority of the planning board and board of adjustment to permit deviation from those ordinances in appropriate circumstances. See N.J.S.A. 40:55D–25 (listing powers of planning board); N.J.S.A. 40:55D–70(listing powers of board of adjustment).

The MLUL prohibits the governing body or other officials from infringing on those powers that are expressly reserved to the planning and zoning boards. See N.J.S.A. 40:55D–20 ("Any power expressly authorized by this act to be exercised by [the] (1) planning board or (2) board of adjustment shall not be exercised by any other body, except as otherwise provided in this act."). The planning and zoning boards are not only protected by statute; courts have also protected their powers to rule on zoning and planning matters free from "adulterat[ion] or interfere[nce] ... by acts of local governing bodies or officials." Diller & Fisher Co. v. Architectural Review Bd., 246 N.J. Super. 362, 367–68 (Law Div.1990) (emphasis added); see also Paruszewski v. Twp. of Elsinboro, 154 N.J. 45, 53–54 (1998).

By giving exclusive authority over variance review to the zoning boards, the New Jersey Legislature evidenced its intent that the governing body and other municipal officials should not interfere with or influence the zoning board's decision. Stated another way, the Legislature did not intend that an official like the Mayor could lead a public charge against and application, infringe on the prerogatives of the zoning board and instruct it how to rule on variance applications.

In their briefs, Defendants disregard that law and they mischaracterize the legal standards applicable to the Mayor's actions. This is not a situation tainted by an impermissible conflict of interest on the part of a government official. This is

not a situation where, as in Cent. 25 LLC v. Zoning Board of City of Union City, 460 N.J. Super 446, 450 (App. Div. 2019), the mayor merely expressed a personal opinion on a development proposal. In Cent 25, LLC, the mayor of Union City sent out a flyer stating that he was "personally not in favor" of a live poultry market planned for the City. He did not opine on the merits of the planned market, nor did he make inflammatory or misleading statements about the impact of the planned market on the community, as the defendant Mayor did in this case. The Trial Court here correctly found that, while the Mayor had the right to oppose the Amended Application, his attempt to spread misinformation and "gin up" opposition was improper, and impermissibly tainted the Zoning Board hearing, leading to an arbitrary, capricious, and unreasonable result.

Owing to the lack of evidence in the record contradicting Plaintiffs' proofs, and underscored by the Mayor's statements, which the Trial Court characterized as "tantamount to direct, calculated interference with the independent, quasi-judicial processes contemplated by the MLUL for the fair hearing and consideration of [Plaintiffs'] Amended Application" (M47), the Trial Court correctly found that the Board's denial of the Amended Application was arbitrary, capricious, and unreasonable, and properly reversed that denial.

POINT III

THE TRIAL COURT'S APPOINTMENT OF THE SPECIAL HEARING OFFICER, THE HEARING ITSELF, AND THE COURT'S ADOPTION OF THE SPECIAL HEARING OFFICER'S RECOMMENDATIONS WERE PROPER

A. The Trial Court's appointment of the SHO was made in accordance with the relevant law and was proper given the facts of this case

As a result of the wrongful conduct of the Township, Mayor Tamburro, and the Zoning Board with regard to the denial of Plaintiffs' Amended Application as detailed above, the Trial Court properly appointed a Special Hearing Officer to "undertake specific tasks in the review, evaluation and recommendation" of further proceedings, such as site plan proceedings, required for the development of the Subject Property. There is ample precedent in the case law justifying the appointment of the Special Hearing Officer, and the Trial Court's decision should not be disturbed.

The appointment of a Special Hearing Officer has its origins in the landmark case of Southern Burlington County NAACP v. Mount Laurel, 92 N.J. 158, 285 (1983)("Mount Laurel II"). The Mount Laurel II opinion provided our trial courts with a vast array of remedies and considerable discretion to bring about the speedy construction of affordable housing. While not providing an exclusive list of remedies designed to bring about prompt compliance, the Supreme Court in Mount Laurel II held that "The point here is that we intend that the appointment of a

master be viewed by the court as a readily available device, one to be liberally used." Mount Laurel II, 92 N.J. at 283. The Court continued:

> We adhere to the belief that where conventional remedies are adequate to vindicate a right, they should be employed, that it is unwise to devise remedies that partake more of administrative and legislative than of judicial power where traditional remedies will do. Judicial legitimacy may be at risk if we take action resembling traditional executive or legislative models; but it may be even more at risk through failure to take such action if that is the only way to enforce the Constitution.
>
> In short, there being a constitutional obligation, we are not willing to allow it to be disregarded and rendered meaningless by declaring that we are powerless to apply any remedies other than those conventionally used. We intend no discourse on the history of judicial remedies, but suspect that that which we deem "conventional" was devised because it seemed perfectly adequate in view of the obligation it addressed. We suspect that the same history would show that as obligations were recognized that could not be satisfied through such conventional remedies, the courts devised further remedies, and indeed the history of Chancery is as much a history of remedy as it is of obligation. The process of remedial development has not yet been frozen. [Mount Laurel II, 92 N.J. at 287 (emphasis added)].

Indeed, the remedial flexibility granted to trial courts in Mount Laurel II even goes so far as to authorize trial courts, where deemed appropriate, to enter orders providing "that the zoning ordinance and other land use regulations be deemed void in whole or in part so as to relax or eliminate building and land use restrictions..." Mount Laurel II, 92 N.J. at 285.

Citing the language in Mount Laurel II providing the trial courts with vast remedial flexibility, the Appellate Division, in Cranford Development Associates,

LLC v. Tp. of Cranford, 445 N.J. Super. 220 (App. Div. 2016), upheld the trial court's decision to appoint a special hearing examiner to consider the development application submitted by that builder. In this regard, the Appellate Division held as follows:

> The court's authority to appoint Special Masters in Mount Laurel cases is well established. *See* Mount Laurel II, supra, 92 N.J. at 282–85, 456 *A*.2d 390. Given the Township's record of obstructing affordable housing projects, and the Planning Board's past hostility to a much more limited affordable housing plan, the court's decision to appoint the hearing examiner was justified in this case. The motion practice which occurred after the appointment further confirmed the wisdom of the court's action. In addition to opposing the Township's reconsideration motion, CDA filed a cross-motion to have the hearing examiner, instead of the Township, review soil removal permits because the Township had unreasonably delayed the permit approvals. In fact, it appeared undisputed that Township officials had publicly stated that they would not issue the approvals and would issue a stop work order instead. Consequently, the judge gave the hearing examiner authority to hear any soil permit application that the Township unduly delayed. As the judge noted, the CDA project would face various municipal regulatory "hurdles" and the hearing examiner's participation would likely be needed to resolve them.
>
> We recognize that a "trial court (and the master, if one is appointed) should make sure that the municipal planning board is closely involved in the formulation of the builder's remedy[,]" and "should make as much use as they can of the planning board's expertise and experience so that the proposed project is suitable for the municipality." Id. at 280, 456 A.2d 390. However, the Court also added the "caveat" that "[t]his does not mean that the planning board should be permitted to delay or hinder the project [.]" [Cranford Development Associates, supra, 445 N.J. Super. at 232-233(emphasis added)].

Thus, in affirming the trial court's appointment of a special hearing examiner to hear the builder's development applications in that case, the Appellate Division held that, given "the Township's record of obstructing affordable housing projects, and the Planning Board's past hostility to a much more limited affordable housing plan, the court's decision to appoint the hearing examiner was justified in this case." It is respectfully submitted that the record in this case, including, but not limited to the Mayor's blatant interference with the Zoning Board's processing of Plaintiffs' 2018 Amended Application, including the issuance of a press release urging a denial of the Application, and the mounting of a public campaign against the Application, accompanied by defamatory statements, justified the Trial Court's conclusion below that the same remedy was appropriate and necessary in this case.

Indeed, this remedy was also employed in the declaratory judgment litigation involving the Township of South Brunswick. Therein, the court's appointment of special hearing officers was preceded by the reported opinion captioned I/M/O Tp. of South Brunswick, 448 N.J. Super. at 441, 467 (Law Div. 2016). In that opinion, the court summarized its rulings finding that the Township of South Brunswick had declined to meet its Mount Laurel obligations in good faith, which resulted in the court terminating the Township's immunity and authorizing builder's remedy claims. 448 N.J. Super. at 448-451. The court

concluded its opinion referring to prior case law announcing consequences for recalcitrant municipalities, and noted as follows:

> Regrettably, because South Brunswick failed to heed this warning, the elements of its affordable housing plan will not be those selected by its elected and appointed representatives, but instead, will be those designed and implemented by third parties, the Special Master, and the Court. [Id. at 468 (emphasis added)].

Such a course of action was especially appropriate in this case given the factual circumstances outlined above. In granting Plaintiffs' request for a Special Hearing Officer ("SHO"), the Trial Court reasoned that "[p]ermitting the Zoning Board to once again rule upon an application regarding SPII's Property would lead to nothing but heightened antagonism, extraordinarily lengthy, expensive hearings resulting in another pre-ordained denial, and yet more litigation and delay." M57.

Defendants argue that the appointment of a SHO was, despite the antagonism and extreme prejudice exhibited by the Defendants, inappropriate because they claim to have been wholly supportive of affordable housing production within Monroe Township. Respectfully, this is not the case. As set forth in the Certification of Plaintiffs' Professional Planner Art Bernard, P.P. (Ra162), the Township has displayed a long term propensity toward favoring age restricted housing, with the Township's demographic statistics confirming a relative shortage of minority households as well as a shortage of housing occupied by families with

children – the intended beneficiaries of the Mount Laurel doctrine. Ra165. As further noted by Mr. Bernard in his Certification:

> 16. In arguing that this Court's rulings in this case, including the appointment of a Special Hearing Officer, were incorrect, the Township suggests in its motion papers that its efforts to thwart the Respondents' inclusionary development are somewhat anomalous, and that the Township otherwise makes its best efforts to allow for the low- and moderate-income housing required by the Mount Laurel doctrine. That has not been my experience.
>
> 17. In addition to the Township's long-term favoritism toward the age restricted population, and its bias against families with children, as demonstrated by the data summarized above, I note that the Township's AHMUD/HD overlay zoning governing inclusionary development on the properties within the Highway Development Zone, including the Subject Property, imposes an excessive minimum tract size requirement which is not met by any of the properties within that district. Thus, each such property was forced to seek a "d(1)" variance from the Zoning Board. As a planner with a great deal of experience in representing municipalities and developers on inclusionary development applications, I found the entire Monroe approach contrary to the basic Mount Laurel principles requiring municipalities to eliminate cost generating standards and take affirmative measures to promote and expedite inclusionary development. Indeed, the Zoning Board denied the Respondents' request for such variance relief after the bald eagle was discovered on the site. The requirement to seek d(1) variance relief and the Zoning Board's subsequent denial can hardly be categorized as municipal cooperation when it comes to Mount Laurel compliance.
>
> 18. Second, I was involved with the efforts of K. Hovnanian to develop a different site in Monroe Township, and that experience is quite revealing when it comes to the Township's compliance with its Mount Laurel obligations. K. Hovnanian filed an application to convert its approvals for an age-restricted community to a community open to all households under the Sarlo legislation. The Sarlo legislation required a 20% low and moderate income housing set-aside on the site. That application was denied by the Township, leading to litigation. That litigation was settled by way of a settlement agreement that required the Township to construct lower income

> housing on a site that, as I recall, was provided by K. Hovnanian. The Township was to build 37 very low-, low- and moderate-income housing units on this site by 2019 (consistent with N.J.A.C. 5:93-5.5 and Monroe's January 2017 Spending Plan which was made part of the settlement agreement pursuant to Paragraph 6 of that settlement agreement). The settlement envisioned that the Township would finance the construction with $7,000,000 dollars in development fees and four percent tax credits. (Paragraph 4(c)i of settlement agreement).
>
> 19. When before Special Hearing Officer Timothy Prime in this case, I testified that my research indicated that the Township had not yet begun construction on this site; and the Township offered no conflicting testimony. This is yet another example of the Township's policy of avoiding its Mount Laurel obligations.

Id.

Thus, while there is no legal authority for the proposition that the appointment of an SHO is limited to cases in which widespread hostility toward affordable housing developments is apparent, such hostility is apparent in this case. Indeed, the more relevant inquiry is whether a particular property has been subject to unfair, hostile treatment by a reviewing board and politicians possessing power, as occurred below. The Trial Court correctly made such findings as to the treatment to which the Subject Property was subjected, and that property is a property required by the Township's affordable housing plan designed to assist in satisfaction of the Township's Mount Laurel obligations.

In sum, there is ample legal authority justifying the Trial Court's appointment of a Special Hearing Officer, and it was required in this case given the ongoing hostility of Defendants towards Plaintiffs and their Applications designed

to assist the Township in meeting its Mount Laurel obligations as memorialized in the Settlement Agreement and the Judgment of Compliance and Repose. Defendants' briefs provide no basis to conclude that the Court erred when appointing a Special Hearing Officer.

B. The SHO process was fair and impartial and the SHO's decision was correct

By way of the October 15, 2020 Order, the Trial Court explicitly detailed the role of, and the procedures to be utilized by, the SHO in reviewing Plaintiffs' Site Plan Application. M4. In relevant part, the October 15, 2020 Order provides:

> A. [The SHO shall] [c]onduct a hearing on public notice as to all aspects of the application for the purpose of rendering a recommendation to the Court as to whether the Court should enter an Order and Judgment approving, denying, or approving with conditions the site plan (and, as necessary, subdivision) application;
>
> B. The Site Plan Application was to be deemed a fully conforming "as of right" application in accordance with the existing Township standards for development in the HD and VC-2 Overlay Zones, coupled with the Use Variance and Bulk Variance approvals granted to SPII by the terms of this [October 2020] Order. The Special Hearing Officer shall review the site plan application and shall grant preliminary and final site plan (and, if/as necessary, subdivision) approval, with or without conditions, unless the Special Hearing Officer concludes that the site plan application is clearly contrary to sound land use planning principles or environmental concerns. Compliance with Residential Site Improvement Standards ("RSIS") shall be dispositive as to all residential design elements governed by the RSIS;
>
> C. SPII shall include nonresidential components as part of their site plan proposal before the Special Hearing Officer, and on notice to the Township, Fair Share Housing Center, the Special Master and the

Special Hearing Officer. Upon approval by the Court, the nonresidential components will be included in such relief as may be granted by this Court upon recommendation of the Special Hearing Officer;

...

F. The Township shall conduct a substantive review of the Respondents' submission, and may engage the Zoning Board, Township staff and other Township professionals in the review of the Respondents' submission as the Township deems appropriate. All responsive reports, requests for additional information and comments by the Township shall be filed with the Special Hearing Officer, Special Master and the Respondents at least thirty (30) days prior to the hearing date. The Respondents may be asked to submit additional information, reports or studies by the Township, with such requests being made at least thirty (30) days prior to the hearing date. Such request(s) should be made promptly upon determination by the Township, and any objection to such additional submissions shall be resolved by the Special Master. In no event shall the submission of such additional information delay the hearing date. Any supplemental Township review submission shall be filed with the Special Hearing Officer, Special Master and the Respondents no later than fourteen (14) days prior to the hearing date. The Special Master shall serve as the nonbinding arbiter of any disputes relating to the submissions and report on the Respondents' site plan;

G. Public notice of the hearing before the Special Hearing Officer shall be provided in accordance with N.J.S.A. 40:55D-12, which notice shall be provided by the Respondents. All documents, reports, plans and other data in support of the Respondents' submission shall be on file with the Township Planning Office and the Office of the Municipal Clerk at the Township Municipal Building at least ten (10) days prior to the hearing date. The Respondents may respond to Township reports and comments at the hearing date, in accord with customary Zoning Board and Planning Board practice;

H. The Special Hearing Officer shall conduct the proceedings in accord with the requirements of the Municipal Land Use Law, N.J.S.A. 40:55D-10. The Respondents shall present expert testimony as they deem necessary to demonstrate that the Respondents' proposal meets sound land use planning principles and satisfies applicable environmental regulations. The Respondents shall present their testimony and evidence

in support of their site plan, which may be subjected to cross-examination. Following completion of the Respondents' testimony and evidence, the Township may present its response and testimony regarding the [Respondents]' site plan, which also may be subjected to cross-examination. The public and all interested parties shall be allowed to comment on and/or present evidence and testimony either for or against the [Respondents]' site plan upon the conclusion of the Township's presentation. The Special Master shall participate in all hearings before the Special Hearing Officer and shall provide such planning review and testimony as may be deemed necessary by the Special Hearing Officer. The [Respondents] shall identify all other Federal, State and ancillary governmental permits and approvals that are required for the [Respondents]' project, and the satisfaction of these ancillary permit requirements shall be a condition of any Order approving the [Respondents]' application;

I. In the event the Special Hearing Officer requires additional expertise by separate expert review of the [Respondents]' site plan, the Special Hearing Officer may engage such additional experts as the Special Hearing Officer deems appropriate, upon notice and consultation with the Court and all parties, the fees and costs for which shall be borne equally by the [Respondents] and the Township;

J. All hearings conducted by the Special Hearing Officer shall be in the Superior Court of New Jersey in New Brunswick or, conducted virtually in accordance with New Jersey Department of Community Affairs guidelines, during regular court hours, and if at the courthouse at a courtroom designated by the Court. The Respondents shall secure a transcript of each hearing on an expedited basis, to be paid for by the Respondents, and shall distribute copies of the hearing transcripts to the Township, the Special Hearing Officer and the Special Master;

K. All costs for the Special Hearing Officer, and any expert(s) retained on behalf of the Special Hearing Officer, shall be split equally between the Respondents and the Township for the application being reviewed by the Special Hearing Officer. All costs associated with the Special Master shall continue to be borne by the Township;

L. Upon conclusion of the hearing, the Special Hearing Officer shall provide the Court, the Township and the Respondents with his

> recommendation as to whether the Respondents' site plan should be approved, denied, or approved with conditions and in the form of a resolution. Any comments or objections to the Special Hearing Officer's recommendations set forth in the resolution shall be filed with the Court no later than ten (10) days from the date of the recommendation. The Special Hearing Officer shall set forth such findings of fact and conclusions necessary, and to appropriately summarize the evidence presented, so as to enable the Court to enter Judgment. The Court's Order as to the site plan (and, if/as applicable, subdivision) shall be considered a preliminary and final site plan (and, as applicable, subdivision) approval for purposes of filing an application for a building permit.
>
> As stated by the Court, SPII still must prove their case on the site plan application in accordance with MLUL standards and applicable case law in order to warrant overall approval of the plan. (pg. 57, para. 3).

As set forth above, the Trial Court provided an exhaustive roadmap for the consideration of the Site Plan Application, which, as the Trial Court found in its August 9, 2022 Order and Opinion, (M479), was strictly followed by all Parties involved. The Defendants have not alleged, nor can they, that any of these instructions were inappropriate, that the Trial Court's Order inadequately addressed the requirements for the hearing, or that the SHO failed to adhere to those carefully detailed instructions.

i. SPII Provided the Requisite Public Notices and the Public Was Afforded Every Opportunity to Participate in the Hearing

Among other things, Defendants' briefs suggest that the SHO procedures somehow gave short shrift to the ability of the public to be heard. Prior to opening

the first of the two hearings at which he presided, the SHO concluded that adequate notice had been provided for the meeting, noting that:

> the applicant provided the required notices of this hearing pursuant to the New Jersey Municipal Land Use Law, including a legal notice to the public hearing published in the March 14, 2022 issue, Home News Tribune, certified mail notices of the hearing being mailed on March 14,2022 to all of the property owners within 200 feet of the property on the list provided by the East Windsor and Monroe Townships.

5T9:14-25.

The Municipal Land Use Law (MLUL) governs the requirements for public notice of a hearing on a land use application. Specifically, N.J.S.A. 40:55D-12 provides in relevant part that:

> Public notice shall be given by publication in the official newspaper of the municipality, if there be one, or in a newspaper of general circulation in the municipality…
> …notice of a hearing requiring public notice… shall be given to the owners of all real property as shown on the current tax duplicates, located in the State and within 200 feet in all directions of the property which is the subject of such hearing. [Id.]

As stated by the SHO, the public notice provided adhered exactly to the requirements of the MLUL. The MLUL requirements cited above, incidentally, are the same requirements met for notice of the 2019 hearing at which Plaintiffs' Amended Application was summarily denied. Appellants' claim that the public was deprived of its right to access the SHO hearing when it had just as much notice as for earlier hearings is without merit. This Court has already approved the holding of such SHO proceedings at a courthouse during regular working hours.

See Cranford, supra. In this case, members of the public had full opportunity to attend the hearings in person (or via Zoom) and present any questions or testimony they wished to present.

ii. The SHO's Decision Was Made on the Merits of the Application and in Accordance with the Trial Court's Directive and the Relevant Law

Over the course of two hearings, the SHO took testimony and evidence from both Plaintiffs' professionals and from Defendants' professionals. Plaintiffs provided testimony from four expert witnesses, with the Township offering the testimony of three of its own professionals. Additionally, the Special Master appointed to oversee the Township's compliance with its affordable housing obligations provided testimony. The SHO thoroughly questioned all witnesses, and, when appropriate, encouraged solutions to contested issues, such as a conservation easement and a disputed farmland assessment. 6T312:23-25, 6T313:1-7.

Throughout the course of the hearings, which took a total of eight and one half-hours, the attorneys and other professionals for both Defendants and Plaintiffs were given ample opportunity to examine the witnesses and the proofs provided. In fact, at numerous points during the hearings the Defendants' professionals engaged with professionals for Plaintiffs to request additional information or clarification

on aspects of the Site Plan Application. Members of the public also participated and were able to question the witnesses. (See, for instance 5T201:12-25).

After the hearings were concluded, the SHO drafted and provided to the Parties a draft Resolution granting Plaintiffs' site plan application, with conditions, and gave the Parties an opportunity to comment, which the Parties did via letters. Ra127, Ra136. The SHO then submitted the proposed Resolution (Ra138) to the Trial Court.

In the 33-page Resolution, the SHO clearly summarized the testimony and evidence presented by the Parties over the course of the two hearings. The Resolution adequately detailed the factual underpinnings supporting his decision to recommend to the Trial Court the granting of site plan approval and related relief. The Trial Court judge then accepted the Resolution and an Order was entered accordingly. Because the Resolution was completely supported by the facts and testimony adduced at the hearing, there was no reason for the Trial Court to reject it. Indeed, Defendants provided no cogent arguments to the contrary.

iii. The SHO's Elimination of the obligation to install the Route 33 traffic signal was proper and based on substantial evidence in the record

In its brief, the Zoning Board argues that the SHO should have continued to require a traffic signal on Route 33 (a State highway, which means that only the NJDOT could approve such a signal regardless of what the Township may want). As noted above, the applicable zoning does not require a signal if development is

undertaken pursuant to the HD ordinance standards, such as for warehouses, but there is language in the VC-2 Overlay provisions suggesting a traffic signal, but not providing who should provide a signal. As the SHO was advised, there have been numerous applications for different property owners using the VC-2 Overlay standards and none of them were required to provide a traffic signal. Nevertheless, the Township, desirous of preventing Plaintiffs' inclusionary development, argues that the development cannot proceed without a traffic signal.

The SHO's Resolution eliminated any obligation for Plaintiffs to provide a traffic signal at Route 33. The provision of this traffic light was not among the conditions of approval attached in the Prior Approval Resolution governing the Subject Property, but the Resolution does mention a traffic light, since a light was then proposed and supported by the NJDOT, and it was treated below as a condition of approval. M87. However, since the 2016 Approval, the facts have changed, as documented before the SHO below.

The New Jersey Supreme Court has held the Municipal Land Use Law (MLUL) "explicitly codifies the right of a party to request a change in the conditions of approval in N.J.S.A. 40:55D–12(a), 'for modification or elimination of a significant condition or conditions in a memorializing resolution[ ].' " Toll Bros., Inc. v. Bd. of Chosen Freeholders of Burlington, 194 N.J. 223, 246–47 (2008) (quoting N.J.S.A. 40:55D–12(a)).

While applications to remove conditions of approval are typically made to the local planning authority or its successor, which granted the initial approval, Ibid.; Allied Realty, Ltd. v. Borough of Upper Saddle River, 221 N.J. Super. 407, 414 (App. Div. 1987), certif. denied, 110 N.J. 304 (1988), in this case the Special Hearing Officer was tasked by the Court with sitting in lieu of the Zoning Board and deciding whether or not the condition may be removed. Further, a reviewing court (or, as in this case, a Special Hearing Officer) may excise conditions which it rules are unreasonable or unlawful under the circumstances. See e.g. Tirpak v. Board of Adjustment, 457 N.J. Super. 441, 445 (App. Div. 2019) (striking a condition of approval which limited the rental of a two-family home to only one unit); Darst v. Blairstown Twp. Zoning Board of Adjustment, 410 N.J. Super. 314, 339 (App. Div. 2009) (where a planning board attaches a condition that is not authorized by a valid municipal ordinance, a reviewing court need not defer to its discretion); Orloski v. Plan. Bd. of Borough of Ship Bottom, 226 N.J. Super. 666, 672 (1988) (conditions may not be unnecessarily burdensome to the applicant); DeFelice v. Zoning Bd. of Adj., 216 N.J. Super. 377, 383 (App. Div. 1987) (condition can be excised without setting aside the underlying variance); see also Cox, Koenig, Drill & John-Basta, New Jersey Zoning & Land Use Administration, § 19-6.2 at 431 (2021).

As admitted by the Township's own expert and the Affordable Housing Special Master when before the SHO, providing a traffic signal on Route 33 would require the approval of the NJDOT. 5T201:16-17, 6T335:17-20. The NJDOT has indicated, contrary to its prior position in 2015-2016, that such approval is unlikely at best, and that acquiring an "official" denial of such a request would require a very long, expensive, multi-stage process, with Plaintiffs then being unable to construct the proposed inclusionary development providing for affordable housing. Ba19.

A condition may become unreasonable through changed circumstances or may be revealed as unnecessary and may be reconsidered in later years. See Cohen v. Fair Lawn, 85 N.J. Super. 234 (App. Div. 1964). Where the condition was not essential to the approval, the approval will stand after excision of the condition. See Sherman v. Zoning Bd. of Adj., 242 N.J. Super. 421, 429-435 (App. Div.), cert. den. 122 N.J. 404 (1990). The amount of development requested in 2019 was significantly less than the development approved in 2016, when the traffic light was agreed to. Circumstances have indeed changed, with traffic being reduced below what was envisioned in 2016. Moreover, there is no nexus between the variance granted and any need for a traffic light. Whether variances were granted or not, the magnitude of development (number of units and square footage of nonresidential) would be the same. Again, no increase in density of development

was sought. Thus, even if the traffic light were viewed as a condition of approval, application of the case law principles set forth above justifies the ruling by the SHO providing that no such traffic light can be required. Most importantly, the SHO concluded based on the testimony that the proposed development can be safely constructed without the need for a traffic signal on Route 33, as confirmed by Plaintiffs traffic expert, which was not disputed by the Township's own expert. 5T203:2-3. The Township should not be permitted to demand a traffic light on a State highway when the entity with jurisdiction – the NJDOT - does not want it.

iv. The SHO's recommendation that the Township utilize eminent domain was lawful and proper

As set forth in Section H of the October 15, 2020 Order (M1), the Plaintiffs were to identify all "permits and approvals that are required" for the Project, and "the satisfaction of these ancillary permit requirements shall be a condition of any Order" approving the Amended Application. As such, Plaintiffs' traffic expert identified the potential acquisition of additional property needed to enlarge a jughandle on Route 33 at Applegarth Road as an alternate means of accessing the Project. 5T224:3-14. Therefore, the SHO's consideration of the possible need for eminent domain to serve affordable housing projects was within his remit.

Further, in accordance with N.J.R. 4:41-5(b), the SHO's recommendation was not binding until so ordered by the Trial Court, which may "adopt the report,

[or] modify or reject it in whole or in part". Id. In this case, the Trial Court correctly adopted the SHO's recommendations, which, as discussed herein, were based on substantial and credible evidence.

Additionally, as set forth in the Eminent Domain Act (N.J.S.A. 20:3-1 et seq) and the case law, the Trial Court has the authority to compel the exercise of eminent domain. See N.J.S.A. 20:3–5; Schiavone Constr. Co. v. Hackensack Meadowlands Dev. Comm'n, 98 N.J. 258, 265, 486 A.2d 330 (1985), Magliochetti v. State by Com'r of Transp. 276 N.J. Super 361, 371 (Law. Div., 1994). Eminent domain may be utilized to acquire private property necessary for a legitimate public purpose. American Tel. & Tel. Co. of New Jersey v. Ranzenhofer, 128 N.J.Super. 238, 319 A.2d 754 (A.D.1974). In enacting the NJ Fair Housing Act, the New Jersey Legislature provided for "the acquisition, construction and maintenance of buildings, structures or other improvements necessary or useful for the provision of low- and moderate-income housing" by "purchase, lease, or acquire by gift or through the exercise of eminent domain". N.J.S.A. 52:27D-325.

Thus, the Trial Court was fully authorized by statute to compel the Township to exercise its power of eminent domain for improvements incidental to the provision of affordable housing if necessary - exactly as the Plaintiffs proposed to the SHO, and the SHO recommended in his Resolution. Neither the SHO nor the

Trial Court overstepped their authority, and the Trial Court's rulings in this regard should be upheld.

C. The Trial Court acted properly in adopting the SHO's recommendations

The Trial Court, upon receipt of the Resolution from the SHO, properly issued an Order adopting the SHO's recommendations. M477. Defendants take issue with the Trial Court Order in this regard, incorrectly claiming that a "hearing" should have been held before the Trial Court adopted the SHO's recommendations. Defendants cite as their authority R. 4:41-5(b) which governs the use of special masters; *not* special hearing officers. Nevertheless, that Rule provides, as to review of a special master's findings:

> In an action to be tried without a jury the court shall accept the [special] master's findings of fact unless contrary to the weight of the evidence. Within [ten] days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties and may move the court for action upon the report and the objections thereto. [Id. (emphasis added).]

As indicated above, either party may serve written objections and may file a motion regarding the report. However, the plain language of R. 4:41-5(b) does not require a motion or a "hearing" before a trial court may act on the report. In this case, Defendants had ample opportunity to file a motion with the Trial Court objecting to the SHO's Resolution pursuant to R. 4:41-5(b). However, Defendants

chose instead to provide their comments by way of letter, and they did not request a hearing or oral argument.

Indeed, the Trial Court's August 9, 2022 Order (M477) notes that Defendants raised objections to the text of the Resolution before both the SHO and the Trial Court. Specifically, following the March 24 and 25, 2022 public hearings on Plaintiffs' Site Plan Application, after Defendants put on their own case through expert testimony, the SHO prepared and circulated a draft Resolution for comments by the parties. By separate letters to the Trial Court dated May 31, 2022, the Township and Zoning Board provided comments and objections to the SHO regarding the draft Resolution. M127. The Township also provided comments by letter dated June 22, 2022. M136. At no time did Defendants request a "hearing" before the Trial Court as permitted by R. 4:41-5(b).

Further, the rule cited by Defendants *requires* that the Trial Court accept the findings of a master unless those findings are contrary to the weight of the evidence. As set forth above, the SHO provided detailed support for his findings; the Defendants have not argued otherwise. Defendants were afforded full due process and every opportunity to make their objections known with regard to both the hearing on the Site Plan Application and the Trial Court's adoption of the SHO's Resolution granting the Site Plan Application. Their procedural and

substantive arguments are wholly without merit and, in some, all Orders from which Defendants appeal should be affirmed.

POINT IV

THE TRIAL COURT'S DISMISSAL OF THE DAMAGE CLAIMS SHOULD BE REVERSED

A. The Trial Court Found that the Defendants Violated the Respondents' Civil Rights under the Federal and New Jersey Civil Rights Acts and Therefore Damages are Warranted

The unlawful actions taken by the Defendants amount to a violation of the Federal Civil Rights Act ("FCRA"), 42 U.S.C. § 1983 and the New Jersey Civil Rights Act ("NJCRA"), N.J.S.A. 10:6-1 *et seq.* It is clear that the Defendant Mayor took numerous actions designed to interfere with the Zoning Board's processing of Plaintiffs' Application, including a publicity campaign designed to intimidate the Zoning Board members into bending to the Mayor's will, and generating public opposition to the Amended Application. It is also clear that the Zoning Board unlawfully denied Plaintiffs' Amended Application, with both the Mayor and a Zoning Board member making plain that they acted to thwart Plaintiffs' inclusionary development because they were hostile to the Mount Laurel doctrine.

As noted above when discussing the merits, Zoning Board are independent, quasi-judicial bodies, created by statute, and it is a violation of the statutes and constitutional precepts to interfere with the independence of a Zoning Board. See

e.g., Dolan v. DeCapua, supra, 16 N.J. at 612; Diller, supra, 246 N.J. Super. at 367–68; Paruszewski, supra, 154 N.J. at 53–54.

The Federal Civil Rights Act provides that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..." [Id. (Emphasis added).][6]

As to Defendants' substantive due process violations, we note above how the development application process is supposed to work under the MLUL. A developer files an application, and an independent quasi-judicial zoning board adjudicates it. The Mayor's illegal interference turned the statutory scheme on its head, as the Mayor essentially turned the Zoning Board into his own instrument to achieve his own illicit ends.

The Trial Court ruled as follows in its October 15, 2020 Opinion:

> Our courts have noted that the arbitrary and capricious standard, while sounding harsh, is simply a standard of review, and a finding that the local board has erred. Anastasio v. Planning Bd. of Tp. of West Orange certif. den., 107 N.J. 46 (1986). "[T]he law presumes that boards of adjustment and municipal governing bodies will act fairly and with proper motives and for valid reasons." Fallone, supra, 369 N.J. Super. at 562, 849 A.2d 1117 (quoting Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J., supra, at 296) (internal quotations omitted). The standard of review

[6] A nearly identical provision is found in the NJCRA, which also covers violations of state statutes and the New Jersey Constitution.

is analogous to the substantial evidence standard. Cell South of New Jersey, Inc. v. Zoning Bd. of Adjustment of W. Windsor Twp., 172 N.J., supra, at 89. Reviewing courts are to review the complete record made before a local board and then decide whether the board decision should be sustained. Willoughby v. Planning Bd. of Twp. of Deptford, 306 N.J. Super. 266, 273 (App. Div. 1997). A reviewing court may reverse the denial of a variance and find a board acted "arbitrarily, capriciously, or unreasonably if its findings of fact in support of a grant or denial of a variance are not supported by the record[.]" Ten Stary Dom Partnership v. Mauro, 216 N.J. 16, 33 (2013). A board's decision must be supported by substantial evidence and be "grounded in evidence in the record." Fallone, supra, 369 N.J. Super. at 562.

M30.

In this case, as will be seen below, the Board has not presented a record which demonstrates a clear decision of balancing the positive and negative factors and offered no analysis of those factors in the record despite purporting to have done so in its Resolution. To the contrary, its decision was unsupported by either the memorializing Resolution or the record and, instead, ascribed "undue weight to the residents' unsubstantiated" and, at times, irrelevant testimony.

M31.

Consequently, the Zoning Board acted "arbitrarily, capriciously, [and] unreasonably" since its findings of fact in support of the denial of the variance relief sought were not supported by the record and, thus, its decision must be reversed. A close examination of the record below reveals that the Board's Resolution of Denial was contrary to the statutory criteria and contrary to the factual record and opinion testimony presented to the Board in support of the requested variances by Respondents' witnesses, including professional planner (Art Bernard, P.P.) and architect (David Minno).

Id.

In the Court's view, SPII provided overwhelming and uncontested evidence demonstrating its satisfaction of the special reasons standard applicable to requests for variance relief under N.J.S.A. 40:55D-70(d), the positive criteria standards applicable to requests for variance relief under N.J.S.A. 40:55D-70(c), and the negative criteria standards applicable to requests for variance relief under N.J.S.A. 40:55D-70.

> However, the Zoning Board voted to deny SPII's 2018 Amended Application for variance relief, with Member Vincent LaFata making a motion to deny the 2018 Amended Application, stating in relevant part that "I think they're basing everything and every professional that came up kept bringing up the affordable housing. We have other developments going on. They're not going to hold us ransom based on that." TN 176:7-14. There was no further discussion nor evidence of any deliberation by the Board prior to voting to deny the Application. In sum, the Board simply rejected all of the evidence before it.

M34.

Thus, the Defendants' violations of Plaintiffs' statutory and due process rights were firmly established. The Zoning Board's adoption of the Resolution of denial due to the unlawful interference of the Mayor is sufficient "formal approval" to establish liability under Monell v. Department of Social Services, 436 U.S. 658 (1978), which establishes the definitive test for municipal liability under the FCRA. In fact, the Resolution denying Plaintiffs' Amended Application itself incorporates the false narrative of the Mayor's publicity campaign against Plaintiffs. Specifically, it states:

> **The Board further notes that the presence of the eagle's nest and the required buffer does create a hardship**; however the number, type, character and extent of the Bulk Variances requested are far too intense and exceed a reasonable modification of the site to offset the impact of the eagle's nest. These variances result in an overly intense use of the developable portion of the site *and serve only to advance the Applicant's economic interest which has been specifically rejected by the Courts as a basis to justify the granting of variances.*

M79.

As stated by the Trial Court:

As to the italicized reference, there was no proof in the record to support

> that finding, and, at trial, when pressed to point the Court to such proof counsel for the Zoning Board admitted he could not. It was pure speculation that conveniently advanced the narrative of the Mayor's public campaign to defeat this Application.

M33.

In addition, the Township's publication of the Mayor's press release further establishes Monell liability. The Mayor's full-throated attack against Plaintiffs' proposal, launched by him through an official Township press release, and the unjustified intimidation of Zoning Board members and the public opposition it generated, was the procuring cause and actual reason underlying the denial of the Amended Application, as the Mayor's false narrative made its way into the Resolution as quoted above.

The Trial Court described the mayor's behavior thusly:

> The Mayor's statements, published by the Township, were clearly inappropriate. It is one thing to assert one's right to free speech, as the Mayor unquestionably had, and in his case even the right to convey his sentiments as a resident at the meeting or, in his official capacity, through the Township attorney. In his official capacity, the Mayor possesses great influence on the public and the members of the Zoning Board. Here, however, in reckless disregard of that influence, without any semblance of judicious self-restraint, and yet in his official capacity, the Mayor waited until the eleventh hour to publicly oppose SPII's proposal and through the instrumentality of the press release selected as the means by which he chose to do so, succeeded in garnering opposition to the Application, neglecting to advise, *inter alia*, that the Township relied on SPII's proposed development when entering into the Settlement Agreement with FSHC.
>
> At best, the Mayor's publicly reported and disseminated statements the week before were as inappropriate as they were appalling and shocking;

> at worst, they were tantamount to direct, calculated interference with the quasi-judicial processes contemplated by the MLUL for the fair hearing and consideration of the Respondents' Amended Application by the Zoning Board. The last of his quotes in the press release concerning the alleged hatching of eaglets on the Property at the time the Board was to vote was made without reference to any evidence or reported fact, false on its face and, at the very least, made in reckless disregard of the truth. And yet, it was purposely tinged with enough intent to evoke emotional, outraged and visceral responses that one such resident-objector voiced his objections to the Application in the record in a way that highlighted the effect of the statement and the unfounded fears it stoked.

M46.

Such conduct, as described above and at other points throughout this Brief does, indeed, shock the conscience - it was a blatant interference with Plaintiffs' clear statutory and constitutional right to have an application heard by an independent quasi-judicial Zoning Board. See Dolan, 16 N.J. at 612; and Kramer, 45 N.J. at 280. The factual allegations regarding the Mayor's unlawful interference with Plaintiffs' Application "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense, thus violating the substantive component of the Due Process Clause." See United Artists Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392, 399 (3d Cir. 2003) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 847, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

In South Salem Street Associates, LLC v. Planning Bd. of Twp. of Montville, 2008 WL 4647539 (N.J. Super. A.D.), cert. denied, 197 N.J. 477 (2009), the Appellate Division held that a reasonable jury could find that the plaintiff's

substantive due process rights were violated when the appellant mayor deliberately manipulated actions by the Board and the Township, slowing development of, and reducing the size of, the plaintiff's proposed development. The plaintiff further alleged that the mayor threatened to have the property rezoned to eliminate office buildings, which were contemplated in plaintiff's plan, as a permitted conditional use, and participated in having an ordinance introduced that would have accomplished that goal. The Appellate Division held that these facts were sufficient for a jury to infer that the appellants, either jointly or individually, deliberately acted to stall or obstruct plaintiff's proposed project for the mayor's personal gain. It was held that this would be sufficiently egregious to "shock the conscience" and support a FCRA action. Id. at 8.

In this case, such findings were made by the Trial Court when he reversed the Zoning Board's denial of the Amended Application. Plaintiffs are the unquestioned owners of the Subject Property, and the Mayor's pervasive improper interference and influence over the Zoning Board in violation of the Fourteenth Amendment and Plaintiffs' statutory and substantive due process rights, undertaken for his own personal and political gain, including his publicity campaign to mislead the public and intimidate the Zoning Board members into denying the Application, has been firmly established.

By subjecting Plaintiffs to a Zoning Board proceeding under conditions of

extreme bias and animus, and by adopting a Resolution that incorporated the Mayor's false narrative against the Amended Application, Defendants violated the statutory and substantive due process rights of Plaintiffs to a fair and impartial consideration of their Application in violation of Plaintiffs' rights to substantive due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution, and in violation of the FCRA. The Trial Court's Order dismissing Plaintiffs' civil rights claims should be reversed, and a hearing should be scheduled so that the quantum of damages due to Plaintiffs, including attorney's fees pursuant to 42 U.S.C. § 1988, can be determined.

B. The Defendants have Violated the New Jersey Law Against Discrimination and Therefore Damages are Warranted

The Defendants' conduct establishes a clear violation of the New Jersey Law Against Discrimination ("NJLAD") N.J.S.A. 10:5-1 *et seq.* which provides, in relevant part, that:

> All persons shall have the opportunity to . . . obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, liability for service in the Armed Forces of the United States, nationality, sex, gender identity or expression or source of lawful income used for rental or mortgage payments, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right. [See N.J.S.A. 10:5-4.]

The NJLAD provides legal remedies "to all persons protected by this act and

that this act shall be liberally construed in combination with other protections available under the laws of this State[,]" including compensatory and punitive damages. See N.J.S.A. 10:5-3.

Plaintiffs have direct and derivative standing for the NJLAD claim based on the following factors: 1) Plaintiffs are property owners in the municipality; 2) Plaintiffs' Property is included within the Township's HEFSP, Amended HEFSP, and Settlement Agreement; and 3) Plaintiffs' Amended Application, unlawfully denied by Defendants, was designed to provide housing for individuals protected by the NJLAD - racial minorities and families - individuals who as a practical matter could not bring the within action since only Plaintiffs were the actual applicant before the Zoning Board.

The courts of New Jersey liberally grant a litigant standing to bring a legal claim, Jen Elec., Inc. v. Cnty. of Essex, 197 N.J. 627, 645 (2009), especially in the Mount Laurel context. Oceanport Holding, L.L.C. v. Borough of Oceanport, 396 N.J. Super. 622, 631 (App. Div.2007). Generally, a litigant has standing under the common law to challenge a governmental action when he has "a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." In re Camden Cnty., 170 N.J. 439, 449 (2002); see also Jen Elec., 197 N.J. at 645; see also In re Adoption of Baby T., 160 N.J. 332, 340

(1999).

In Berner v. Enclave Condominium Ass'n, 322 N.J. Super. 229, 231 (App.Div.), certif. denied, 162 N.J. 131 (1999), the Appellate Division held that a Caucasian condominium owner had standing to assert a NJLAD claim against a condominium association that did not permit him to lease his unit to an African American because of his race, holding that "[the][p]laintiff was directly affected by Enclave's actions, having lost his lease to Murray. He was no more or less the object of Enclave's conduct than was Murray." Id. at 234. In this respect, the Appellate Division preliminarily interpreted N.J.S.A. 10:5–13, which provides that "'[a]ny person claiming to be aggrieved by ... unlawful discrimination' may file a LAD complaint" to include the plaintiff as "such an aggrieved person." Id. at 235. Under the NJLAD, non-protected class members harmed due to their relationship with a protected class member may pursue a civil action against the perpetrator of unlawful discrimination. N.J.S.A. 10:5-13; O'Lone v. New Jersey Dept. of Corrections, 313 N.J. Super. 249, 254-55 (1998).

These cases comport with the NJLAD's directives to liberally construe the NJLAD in combination with other protections available under New Jersey's laws in order to reflect New Jersey's strong public policy to fight discrimination against any of its inhabitants. N.J.S.A. 10:5-3; Hernandez v. Region Nine Hous. Corp., 146 N.J. 645, 651-52 (1996); Fuchilla v. Layman, 109 N.J. 319, 334, cert. denied, 488

U.S. 826 (1988); Pukowsky v. Caruso, 312 N.J. Super. 171, 177 (App. Div. 1998); Grigoletti v. Ortho Pharm. Corp., 118 N.J. 89, 96 (1990).

As the owners of property designed to assist the Township in meeting its constitutional affordable housing obligations, Plaintiffs have clear standing to maintain this claim on behalf of the racial minorities and families who will occupy the housing units in the planned development on the Subject Property.

Despite the fact that the State of New Jersey is incredibly diverse, the Township's population is fairly homogenous. Planner Art Bernard addressed the Township's housing stock and population:

> 10. My review reveals that Monroe is unique in that it is the home of so many age-restricted communities. As a result, the 2016-2020 ACS (American Community Survey) reveals that 37.6 percent of Monroe's population is 65 or over. To put this into context, the 2016-2020 ACS reveals that only 16.2 percent of the State's population and only 15.0 percent of Middlesex County's population is 65 or over....
>
> 11. Also, reviewing the 2016-2020 ACS reveals that Monroe has a much more homogenous housing stock than the State and Middlesex County.
>
> 12. When comparing the ACS data, it is apparent that the Township has a disproportionately high percentage of single family (attached and detached) housing. Single family homes are usually the most expensive type of housing and the least likely to be rented. Thus, they are the least likely form of housing to be occupied by low- and moderate-income households...
>
> 13. African American and Hispanic households are a disproportionately high percentage of the low- and moderate-income population...
>
> 14. Given the very high percentage of single-family homes in Monroe Township, I would expect that the Township would have a disproportionately low percentage of African American and Hispanic residents...

> 15. In contrast to the lack of multi-family housing in Monroe, Plaintiffs' inclusionary development is designed to provide affordable multi-family housing, including low- and moderate-income housing, that will be more readily available to the minority population than the housing that has previously been allowed by the Township's zoning policies.

R166-7.

The effects of the Defendants' unlawful treatment of racial minorities and families with children cannot legitimately be denied. This is the very type of conduct made unlawful by the NJLAD. Further, the statements contained in the Mayor's press release were expressly intended to interfere with the Zoning Board's independent review of Plaintiffs' Amended Application. This interference led to the Zoning Board's denial of the Amended Application. Such conduct violates the NJLAD, and Plaintiffs possess standing as an "aggrieved" party contemplated by N.J.S.A. 10:5–13. As noted above, the scope of individuals who have standing to assert an NJLAD claim is construed in broad, liberal terms by New Jersey courts. Berner, 322 N.J. Super. at 234; see also O'Lone, 313 N.J. Super. at 255; Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 629-631 (1995).

The Mayor's unlawful and illegal interference with the Zoning Board's application review process as well as the Mayor's statements that were made to directly block the creation of affordable housing for low and moderate income individuals, and the Zoning Board's denial of the Amended Application, constitute a violation of the NJLAD, and the relief sought on Plaintiffs' cross-appeal seeking

damages should be granted.

CONCLUSION

For the foregoing reasons, the Orders contested on Defendants' appeal should be affirmed, and the relief sought on Plaintiffs' cross-appeal should be granted, with this Court ordering a hearing so that the quantum of damages, attorney's fees and costs due Plaintiffs can be established.

Respectfully submitted,

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By: _____
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Dated: November 9, 2023

CT07 SPII, LLC and DT07 SPII, LLC, Plaintiff-Respondents, vs. ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MONROE, THE TOWNSHIP OF MONROE, and MAYOR GERALD W. TAMBURRO, in his official capacity as Mayor of the Township of Monroe, Defendant-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-002471-22 On Appeal from the Superior Court of New Jersey, Law Division – Middlesex County Sat Below: Hon. Thomas D. McCloskey, J.S.C. Docket No.: MID-L-3953-19

DEFENDANT-APPELLANTS/CROSS-RESPONDENTS, TOWNSHIP OF MONROE AND MAYOR GERALD W. TAMBURRO, MEMORANDUM OF LAW IN SUPPORT OF APPEAL ON REPLY AND IN OPPOSITION TO PLAINTIFF-RESPONDENTS/CROSS-APPELLANTS CROSS-APPEAL

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Dated: December 21, 2023

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LIST OF PARTIES

Party Name	Appellate Party Designation	Trial Court/ Agency Party Role	Trial Court/Agency Party Status
CT07 SPII, LLC	Respondent-Cross Appellant	Plaintiff	Participated Below
DT07 SPII, LLC	Respondent-Cross Appellant	Plaintiff	Participated Below
Zoning Board of Adjustment Township of Monroe	Respondent-Cross Appellant	Defendant	Participated Below
Township of Monroe	Appellant	Defendant	Participated Below
Mayor Gerald W. Tamburro	Appellant	Defendant	Participated Below

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LEGAL ARGUMENT

The Appellants adopt and incorporate the arguments set forth by the Zoning Board of Adjustment of the Township of Monroe ("Zoning Board") as set forth in their initial appellate brief.

POINT I

THE MLUL AND CASE LAW DO NOT AUTHORIZE THE APPOINTMENT OF A SPECIAL HEARING OFFICER WITHOUT A MT. LAUREL VIOLATION. (M38-57; M477-513).

The Plaintiffs-Respondents/Cross-Appellants, CT07 SPII LLC and DT07 SPII LLC ("Respondents") argue that the Township of Monroe and Mayor Gerald Tamburro ("Appellants") fail to acknowledge the "reasons why the trial court ruled that the Defendants have no further approval authority over Plaintiffs' site plan application." Pb26. This is not true. The Appellants recognize the basis that the lower court provided for its decision. However, such basis is wholly irrelevant when placed in the context of designating a special hearing officer to oversee an application.

As set forth in the Appellant's original moving papers, and as evidenced by Respondents lack of argument to the contrary, this matter does not qualify as a Mt. Laurel lawsuit or a builder's remedy suit. Primarily, there is no evidence in the record that the Township is one that has a considerable or even noteworthy past of hostility and obstruction toward affordable housing units and the satisfaction of its obligations for same. Respondents' rebuttal to this undeniable fact is laborious

citations to the trial court's opinion which suggest that the Mayor's opinion on the application, a so-described one-off event, established the basis for an extraordinary Mt. Laurel remedy. This is belied by the trial court's same opinion that expressly sets forth that this event was a "singular transgression" and that the Township had taken notable steps to voluntarily comply with its Third Round housing obligations. M51-52. The cases cited in support of this conclusion by both the Respondents and the trial court are distinguishable from the present matter and fail to provide the support they seek.

As noted previously, New Jersey courts have cautioned that builders' remedies in the form of removing a board's authority and appointing a master in its place should rarely be used. See Morris Cty. Fair Hous. Council v. Boonton Twp., 220 N.J. Super. 388, 408–09, (Law. Div. 1987), aff'd as modified, 230 N.J. Super. 345, (App. Div. 1989).

In a Mount Laurel lawsuit, "the cause of action is the alleged unconstitutionality of the defendant-municipality's zoning because of its failure to provide for the municipality's fair share of affordable housing." See S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp., 92 N.J. 158, 214-216 (1983); see also Oceanport Holding, L.L.C. v. Borough of Oceanport, 396 N.J. Super. 622, 630 (App. Div. 2007). Decidedly, there is no claim here that supports a Mt. Laurel cause of action. Indeed, Respondents have offered no argument to demonstrate that the

Appellants had failed to provide for the municipality's fair share of affordable housing. Again, the trial court acknowledged in several instances in its otherwise incorrect opinion that the Township was compliant with its obligations.

Similarly, a builder's remedy suit is one where a builder "vindicates the constitutional obligation in Mount-Laurel type litigation," and is granted a declaration of plaintiff's entitlement to a "builder's remedy" to proceed with the project. Respondents argue that the circumstances in this matter are akin to those demonstrated in two oft cited cases: Matter of Application of Township of South Brunswick, 448 N.J.Super. 441 (LawDiv.2016) and Cranford Development Associates, LLC v. Township of Cranford, 445 N.J.Super 220 (App.Div.2016). In those matters, the courts were clear that a history of obstruction and/or hostility toward affordable housing projects and compliance with constitutional obligations was the genesis of the remedy's invoked. An actual review of those matters reveals clear differences between them and the matter at bar.

In South Brunswick, Judge Wolfson meticulously detailed the Township's history or pattern of obstruction and/or hostility to an affordable housing developer and/or the court itself. See Matter of Application of Township of South Brunswick, supra 448 N.J.Super. at 448-451 (Law Div. 2016). The court noted that while South Brunswick had initially demonstrated good faith in satisfying its constitutional obligations to justify an initial five-month period of immunity and an additional

month after demonstrating compliance with formulating a plan, such compliance was soon deficient. The Township at first provided a revised fair share plan with "slight incremental improvements" that were otherwise "contrary to the Special Master's direction [and] still included too many 100% affordable housing projects, proposed virtually no inclusionary developments, and included too many senior units." Id. at 449. After instructing the Township to address the deficiencies and providing another extension of immunity, the Township returned to court with "little or no improvement." Id. Judge Wolfson noted that "[m]any of the plan's component parts were unrealistic or impractical…others were contrary to valid COAH regulations and/or judicial precedent." Id. The court then extended the Township's immunity again, but this time required that the Township show cause why the court should not conclude that the Township is "determined to be non-compliant." Id. On the return date of the order to show cause, the court again found that the Township's plan was "inconsistent with COAH regulations and judicial precedents, and did not address even its own estimated fair share number"; proposed inclusionary development "not of traditional, multi-family units, but rather, only of age-restricted, single-family, detached homes"; insisted on a 33% set-aside for low to moderate income units as opposed to the traditional 15-20% set-aside sanctioned by COAH and the courts; and significantly limited the gross density of the proposed inclusionary development. Id. at 450.

In light of all of the evidence and the "Township's steadfast refusal to remedy and/or remove the plan's obvious flaws" the court was "**constrained** to conclude that South Brunswick was not proceeding in good faith and was "determined to be non-compliant." Id. at 450-451 (emphasis added). Only then did the court determine that the only meaningful way to advance the matter was through the appointment of a special master. No similar circumstances exist here. Here, the record is replete with the trial court's approval of the Appellants' voluntary compliance with its fair share housing obligations. There is no history of obstruction to affordable housing projects. There is no evidence of delay. There is no evidence of bad faith on behalf of the Appellants.

Similarly, the facts of this matter have no similarities with those that gave rise to the appointment of a special hearing officer in Cranford. In that "builder's remedy" lawsuit, the court recognized that the designation of a Special Master was a mechanism utilized in the specific context of Mt. Laurel lawsuit where a municipality was found to have failed to comply with its fair share housing obligations under the Mount Laurel doctrine. Cranford supra 445 N.J.Super. at 232-233.

In Cranford, the Appellate Division rejected the municipal entities' arguments that the trial court abused its discretion in appointing a special hearing officer. The Court found that the Township had already agreed to the same process in a prior

builder's remedy settlement; there was no objection to the appointment of the special hearing officer; that the appointment itself was authorized under Mount Laurel II; the appointment of the special hearing officer was warranted by the Township's "record of obstructing affordable housing projects and the planning board's past hostility to a much more limited plan; and the delay caused by the Township in refusing to grant needed permits for the developers' project. See Id. at 232-234.

Respondents' opposition brief offers no similar evidence that supported the appointment of a special hearing officer in Cranford. Instead, the Respondents point to the singular instance giving rise to the complaint: the Mayor's opposition to the Respondents' Amended Application. Much like the trial court, the Respondents provide no factual link between the Mayor's opposition and the denial thus being pre-determined. Critically, they ignore the Zoning Board's prior approval of the original application for development and act as though their amended application had never been given a fair shake. This further ignores the reality that the Respondents' Amended Application was not denied because of the Appellants desire to limit or reduce its fair share housing obligations, to delay or obstruct the creation of said units, or otherwise provide hostility toward same. Instead, the Amended Application was denied because the scope of Respondents' project was far more intense after the bald eagle buffer was incorporated. Not only was the Appellants' prior history with this project, inclusive of the affordable units, a positive one, but

the Appellants' overall history, as noted by the trial court was positive with respect to its constitutional obligations. There is expressly no finding by the trial court that the Appellants were deficient with their obligations. It was this application that was denied. No more, no less.

In a half-hearted effort to throw water on these facts, Respondents cite to their planning experts certification offered, not at the time of the trial court's decision on the prerogative writ claims or before the Zoning Board, but instead at the time of the Appellants' summary judgment on the Respondents' civil rights claims. Frankly, this certification was offered improperly before the trial court as it is purportedly an opinion of an expert who offered no report or studies nor provided any discoverable material in support of his claims. Instead, he conclusively asserts opinions that the Township has "displayed a long term propensity toward favoring age restricted housing" and the like. Pb46. These opinions were not even offered before the court below on the issue of the Township fair share housing compliance and indeed are directly contrary to the trial court's findings on same. The Respondents almost complete reliance on this certification that could not even be challenged before the trial court should find no welcome before this Court.

The clear evidence of good faith and compliance makes the trial court's decision to suddenly and swiftly invoke an extraordinary remedy all the more vexing. The trial court lacked any legal authority to fashion the remedy it did. No

amount of citations to the trial court's objections to the Mayor's comments create any factual scenario that supports the appointment of a SHO. For these reasons, the Appellants respectfully request that this Court reverse those findings of the trial court.

A. The Respondents offer no relevant rebuttal to the fact that the process fashioned by the trial court was flawed and inconsistent with the purposes of the MLUL and OPMA. (M1-64; M462-473).

In their opposition brief, the Respondents summarily suggest that because the process for the hearing before the Special Hearing Officer was detailed by the trial court and followed by the SHO and Respondents, there were no issues with the process itself. This tautological reasoning does not obviate the arguments advanced by the Appellants in their opening brief.

Regardless of the detailed nature of the process by the trial court, the process itself limited public participation and the participation of Township professionals and Zoning Board members. The goal of the Open Public Meeting Act, N.J.S.A. 10:4-6, *et seq*. ("OPMA") is to encourage and ensure public participation at its highest levels. See S. Jersey Pub. Co. v. N. J. Expressway Auth., 124 N.J. 478, 494 (1991). While Respondents focus their arguments on whether the public was properly noticed of the hearing, they offer no meaningful rebuttal to the fact that even with proper notice, the time and location of the hearing was inconvenient and restrictive of their participation. Generally, open public meetings of public bodies

take place at town hall or, at the very least, within the municipality itself and during evening or after work hours. This, of course, is to advance the goals of the OPMA by maximizing public participation. Not only that, but it is without question that members of public bodies, including the Zoning Board in this matter and the Township's professionals, ordinarily have day jobs, which limit their ability provide their public services until after regular business hours. Here, the trial court provided a process that required anyone seeking to participate to go to the Middlesex County Courthouse during regular court hours, which is typically 8:30 a.m. to 4:30 p.m. M6-7. Not only was the matter removed from the locale, but it was also held at a time when most members of the public are not available to participate.

Tellingly, the trial notes that the hearing before the Zoning Board on the Amended Application had hundreds of objectors show up and seventeen residents offered public comment. Though its unclear from the record how the court came to the conclusion that all of the "hundreds" of people in attendance were objectors, what is clear is that this was an application that had an interested public. The purpose of the OPMA is to allow that interested public to engage in these matters of public concern. It does not matter whether that concern was raised by the residents solitary reading of the news or if their concern grew after hearing from a public official. What matters is that they have an opportunity to hear and be heard. That could not and did not happen once the trial court removed the matter through its flawed

process. This, of course, only served as a benefit to the Respondents who clearly did not want to hear public discontent with their Amended Application. It is not in the trial court's discretion to thwart an enthused public simply because the enthusiasm does not match the Respondents.

The process created by the trial court was the antithesis of maximizing public participation. It also unfairly and unreasonably limited the Appellants, the Zoning Board, and their professionals from engaging in matters obviously concerning the Township. This process was created under the guise of fairness, but in reality, created imbalance decidedly in favor of the Respondents.

B. The adoption of the SHO's recommendations was procedurally flawed. (M1-64; M462-473).

In rebuttal to the Appellants' arguments that the trial court erred in adopting the SHO's recommendations in violation of R. 4:41-5(b), the Respondents essentially contend that since the Appellants did not file a motion on the SHO's recommendations, the trial court was permitted to enter an order adopting the recommendations. In support of this conclusion, the Respondents only quote a portion of the rule. They argue that the filing of objections to the SHO's recommendations and the filing of a motion "for action on the report and the objections thereto" are permissive and therefore, there is no requirement that a hearing take place. However, the rule expressly provides that only after a hearing on the motion may the court adopt, modify, or reject the report in whole or in part,

receive further evidence, or recommit it with instructions. See R. 4:41-5(b). No party moved before the trial court for the adoption of the recommendations by the SHO. Objections were indeed submitted. The trial court, however, had no basis to move forward with adoption of the recommendations without a motion and hearing having first occurred. Undeniably, this did not occur. Failure to adhere to this requirement under the rule requires reversal.

POINT II

THE TRIAL COURT'S OBJECTIONS TO THE MAYOR'S COMMENTS WAS AN IMPROPER BASIS FOR THE APPOINTMENT OF A SPECIAL HEARING OFFICER. (M38-51; M477-513).

On the issue of the validity of the trial court's determination that the Mayor's comments improperly tainted the Zoning Board's decision making process, Respondents' offer nothing more than recitals to the trial court's opinion. The problem, is that the opinion itself lacks any foundational basis for its conclusion.

The comments from the Mayor that drew the ire of the trial court are as follows:

> "I've not been pleased with this proposal since its inception; it is yet another way in which developers use state affordable housing mandates to force more development into towns," said Tamburro, noting the proposal would include 42 court-mandated affordable units. "And now, the developer is still trying to squeeze as much development as possible onto this site, even with a bald eagle nesting ground. To me, this is absolutely unacceptable."

> ***
>
> "The developer could have easily reduced the amount of housing units to lower the density and create an appropriate buffer to protect the bald eagle," the mayor said, "but instead, the plan calls for building rental apartments, some of which will be on top of reduced retail space right on Route 33. It will be unsightly, unnecessary, and not in the best interest for Monroe."
> ***
>
> "As the zoning board votes, eaglets are beginning to hatch on the Millstone River," Tamburro said. "Our community needs to stand up in full force against the SPII-LLC housing project. I am proud to lead the charge."

M39-40.

That was it. The trial court paints these comments, expressing the Mayor's opinion on the Respondents' Amended Application, in colorful language by deeming them "incendiary", "inappropriate", and "surreptitiously" made. Respondents echo these sentiments. These descriptors are off the mark and the trial court's misplaced disgust toward them only served as a flimsy basis for the conclusion that a Special Hearing Officer was necessary.

Underscoring this problematic analysis is the fact that the trial court used speculation and hyperbole, no doubt borne from the Respondents own speculative and hyperbolic arguments, to bolster its fashioned remedy. As cited by Respondents the trial court deemed the Mayor's publicly published comments as "surreptitious" without any indication of how they were so. There is nothing in the record the

suggested that the Mayor offered praise or approval of the Respondents' Amended Application. The suggestions from the trial court and the Respondents that the Mayor's representative attended Technical Review Committee meetings and did not offer any opinion on the Amended Application is of no moment. M44-45. There is no requirement that the Mayor or his/her designee attend such meetings let alone offer any opinion at same. As Respondents already know, these meetings are for the technical review of the application by various municipal departments in order to head off any clear **technical** issues with the application before going before the land use board. It is not a forum for the Township or administration to usurp the land use board's authority and deem an application worthy of approval or not. While this is clearly what the Respondents hoped for, it would be definitively in violation of the MLUL's powers delegated to land use boards. See N.J.S.A. 40:55D-25 and 40:55D-70.

Additional speculation painted the trial court's decision. The trial court found that:

> [U]nbeknownst to the Applicant, [the Mayor] resorted to surreptitiously authorizing publication of a press release that was posted to the Township's official website to convey his sentiments utilizing the Township's resources (which release, inferably, was likely email blasted as an E-Newsletter to all Township residents who subscribed to the website or otherwise taken from electorate lists).

M40. Without any evidence in the record to support this claim, the trial court determined that a press release posted on the Township's website was **email blasted as an E-Newsletter** to an indeterminate number of Township residents **or otherwise taken from electorate lists**. This "inference" is doing a lot of work that should otherwise be done by factual evidence. But without them, the end result does not sound nearly as nefarious. No such evidence exists that these Nevertheless, the lower court proceeded to admonish the Appellants for imagined issues.

The trial court further took issue with the Mayor's comments because he apparently failed to mention that the Amended Application provided affordable units that were already approved for the site. Frankly, though, this is irrelevant. No comment from the Mayor suggests that the affordable housing units were to be affected in any way. The comments from the Mayor solely mention housing units and reduced density. Not a word is mentioned about a desired reduction of affordable housing units. Indeed, the Amended Application included 203 total housing units. The plain language of the Mayor's comments demonstrates that the reduction he suggests could have come from the non-affordable units. But, in order to make the Mayor's comments "incendiary", the trial court suggested and the Respondents argue that the Mayor was suggesting the opposite – the reduction of affordable housing units in contravention of the Township's Housing Element and Fair Share Plan. This is entirely unsupported by the record. It is a telling mischaracterization

because it purposefully confuses the language of the Mayor's press release to create a basis deeming the comments "inappropriate."

The Respondents also contend that the Appellants arguments "disregard the law" and "mischaracterize the legal standards applicable to the Mayor's actions." Pb40. Respondents state that this case is distinguishable from Cent. 25 LLC v. Zoning Board of City of Union City, 460 N.J.Super. 446 (App.Div.2019), but offer no such distinction. They attempt to parse a difference in between that matter and the one at hand by stating that the mayor of Union City simply stated that he was personally not in favor of an application. The Mayor in this matter offered his personal disfavor of an application. He did so in one press release prior to a hearing on the Amended Application. Respondents offer no argument that the Mayor's opinion and first amendment rights cannot be curtailed. In fact, they agree that the Mayor had a right to show up at the hearing and voice his opinion on the matter. They fail to articulate how the Mayor's opinion at the hearing as opposed to prior to the hearing has any different impact. In other words, the Respondents suggest that the Mayor's written opinion prior to the hearing "impermissibly tainted the Zoning Board hearing", but that if the Mayor attended the hearing and expressed those same opinions directly to the Zoning Board members there would be no similar tainting of the Zoning Board. It is impossible to square these two scenarios. It is not a stretch to say that had the Mayor attended the hearing and spoke before the Zoning Board,

and public in attendance, that we would be hearing the same arguments from Respondents – the Mayor offered an "incendiary" opinion in order to tip the scales and did so in full view of the public before the Zoning Board. The truth of the matter is that the Respondents, like the court below, take issue with the fact that the mayor's opinion was not the correct opinion.

This is a not a sufficient basis to wrest control away from the Zoning Board. It is based merely on speculation and a guttural objection to the notion that the Mayor was not in favor of the Amended Application. There is not a speck of evidence to support the claim that the Zoning Board's decision was impacted at all by the Mayor's press release. See Cent. 25, supra, 460 N.J.Super. at 459; see also Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 282-83 (1965). The Respondents are incorrect in their suggestion that this courts analysis should not begin with a review of whether a conflict of interest prompted improper influence. The case law is clear that this such a review is how courts determine whether or not there was improper influence. See Piscitelli v. City of Garfield Zoning Bd. of Adjustment, 237 N.J. 333, 351-53 (2019); Grabowsky v. Twp. of Montclair, 221 N.J. 536, 553; Wyzykowski v. Rizas, 132 N.J. 509, 528-532 (1993). They simply do not want this analysis to occur because they know and even agree that there is no evidence of a conflict of interest leading to a finding of improper influence. Pb40.

For these reasons and those set forth in the Appellants original filings, it is respectfully requested that the trial's orders of October 14, 2020, October 15, 2020, June 16, 2021, September 14, 2021, and August 9, 2022 be reversed by this Court.

POINT III

ON APPEAL FROM A SUMMARY JUDGMENT DECISION, THE APPELLATE COURT EMPLOYS THE SAME STANDARD OF REVIEW AS THE TRIAL COURT. (Issue not Raised Below).

In reviewing a trial court's decision on summary judgment, an appellate court reviews the matter with the same standard applied by the trial court. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010). "[T]he appellate court should first decide whether there was a genuine issue of material fact, and if none exists, then decide whether the trial court's ruling on the law was correct." Id.

In Brill v. The Guardian Life Insurance Company of America, 142 N.J. 520 (1995), the New Jersey Supreme Court held:

> [A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the nonmoving party…If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2. The import of our holding is that when the

> evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment.
>
> [142 N.J. at 540 (citing Liberty Lobby v. Anderson, 477 U.S. 242, 250-52 (1986)).]

The thrust of the Brill decision was to encourage trial courts not to refrain from granting summary judgment when proper circumstances present themselves. Id. at 541. While the New Jersey Supreme Court recognized the importance of not shutting a deserving litigant from trial, it stressed that it was just as important that the court not "allow harassment of an equally deserving suitor for immediate relief by a long and worthless trial." Id. (*quoting* Judson, 17 N.J. at 77). To send a case to trial, knowing that a rational jury can reach but one conclusion, would be "worthless" and "will serve no useful purpose." Brill, 142 N.J. at 541.

Although moving papers supporting a summary judgment motion are closely scrutinized with all inferences of doubt drawn against the moving party, once a movant demonstrates a *prima facie* right to summary judgment, the burden shifts to the non-moving party. R. 4:46-5. The non-moving party must counter the summary judgment motion with competent evidential material to show a genuine factual dispute. Robbins v. Jersey Township, 23 N.J. 229, 241 (1957). R. 4:46-5 provides:

> When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the

> pleadings, but must respond by affidavits…setting forth specific facts showing that there is a genuine issue for trial.

Thus, the opponent of a summary judgment motion must show controverting facts, not merely bare assertions, representations or allegations in pleadings without affidavit or other evidentiary support. The opponent must clearly establish the existence of a genuine issue of material fact. The failure to discharge this duty entitles the movant to summary judgment. Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74-75 (1954).

POINT IV

THE TRIAL COURT'S DISMISSAL OF RESPONDENTS' CIVIL RIGHTS AND DAMAGES CLAIMS UNDER 42 U.S.C. §1983 and N.J.S.A. 10:6-2(c) WAS APPROPRIATE AND SHOULD BE AFFIRMED. (M718-756).

Respondents cross-appeal the decision of the trial court to dismiss their claims against the Appellants for violations of their substantive due process rights under both 42 U.S.C. §1983 ("§1983") and the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c) ("NJCRA") and procedural due process rights under §1983. The Respondents do not espouse any case law that supports their contentions. Instead, they rely almost exclusively on the lower court's findings that regarding the Mayor's comments as a basis for constitutional violations. As the trial court correctly determined these findings are not as intertwined as the Respondents would like them to be. Though

the trial court believed they served as a basis to find arbitrary, capricious, and unreasonable conduct, which Appellants disagree with, it is irrefutable that they cannot serve as a basis to contend that there were any constitutional violations in this matter.

In Count IV, Plaintiffs assert a violation of the United State Constitution under 42 U.S.C § 1983 and in Count V, Plaintiffs assert a violation of the New Jersey Civil Rights Act.[1]

42 U.S.C. § 1983 provides, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

[1]The NJCRA is generally interpreted nearly identically to § 1983 and claims under the NJCRA are generally coterminous with and subject to the same defenses and immunities as those brought under § 1983. Trafton v. City of Woodbury, 799 F. Supp. 2d 417, 443-44 (D.N.J. 2011). Thus, all arguments in this brief pertaining to the § 1983 claims also applies to the NJCRA claims.

The purpose of a §1983 claim is to provide a remedy for state action aimed at depriving persons of rights protected by the Constitution and laws. Popow v. City of Margate, 476 F.Supp. 1237, 1243 (D.N.J. 1979). However, a §1983 claim is not itself a source of substantive rights, but rather a method for vindicating federal rights. Baker v. McCullan, 443 U.S. 137, 145 n. 3 (1979).

The Supreme Court has held that the Civil Rights Act of 1871 allows for municipal liability under Section 1983 where the alleged unconstitutional actions are connected to official policy. Monell v. Dept. of Soc. Servs. of the City of New York, 436 U.S. 658, 690 (1978) (holding that governing bodies may be sued under § 1983 where "the action that is alleged to be unconstitutional implements of executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.") This does not mean that municipalities may be held liable under *respondeat superior*, but only where the governing body "under the color of some official policy, 'causes' an employee to violate another's constitutional rights." Id. at 691-92.

Therefore, in order to sustain a Section 1983 claim against a governing body, Plaintiffs must prove a causal link between an official policy, practice or custom and the constitutional violation. Losch v. Borough of Parkesburg, 736 F.2d 903, 910 (3d Cir.1984). The burden of proof requires Respondents to show proximate cause

between the municipal, practice or custom and the specific constitutional right being violated. Bielevicz v. Dubinion, 915 F.2d 845, 830 (3d Cir., 1990).

A policy, practice or custom of the municipality must exist to hold it liable. Obviously, a resolution passed by City Council or the implementation of City Ordinances would satisfy this requirement. Pembaur v. City of Cincinnati, 106 S.Ct. 1292, 1294 (1986); Owen v. City of Independence, 100 S.Ct. 1398 (1980); Chambers v. City of Los Angeles, 762 F.2d 753 (9th Cir. 1985). It is important to note that the policy, ordinance, regulation or decision must be adopted or promulgated by the local entity. A local government's mere enforcement of state or federal law, as opposed to express incorporation or adoption of those laws into local regulations is insufficient to establish Monell liability. See e.g. Bethesda Lutheran Homes and Services Inc. v. Leean, 154 F.3d 716, 718 (7th Cir. 1998); Surplus Store and Exchange, Inc. v. City of Delphi, 928 F.2d 788, 793 (7th Cir. 1991); O'Donnell v. Brown, 335 F. Supp.2d 787, 816, 817 (W.D. MI. 2004). "A course of conduct is considered to be a 'custom' when though not authorized by law, such practices of state officials [are] so permanent and well settled as to virtually, constitute law". Andrews v.. City of Philadelphia, 895 F.2d 1469, 1480 (3d. Cir. 1986); See also Adickes v. S.H. Kress & Co., 398 U.S. 144, 167 (1970).

It is not enough for a plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must further show that, through its deliberate

conduct, the municipality was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability, and demonstrate a causal link between the municipal action and the deprivation of federal rights. Monell, supra, 436 U.S. at 689; Bd. of County Comm'rs of Bryan County, Oklahoma v. Brown, 520 U.S. 397, 403-404 (1997). Therefore, plaintiff must prove an affirmative link between the policy and the deprivation of the Constitutional rights. Board of County Commissioners v. Brown, 520 U.S. 397 (1997); Vippolis v. Village of Haverstraw, 768 F.2d 40 (2d. Cir. 1985) (causal relationship was not shown since no proof of type of an adequate training); Plesent v. Zamieski, 895 F.2d 272 (6th Cir. 1990); Losch v. Borough of Parksburcih, 736 F.2d 903 (3d. Cir. 1984); Strauss v. City of Chicago, 760 F.2d 765 (7th Cir. 1985). The policy, practice or custom must have directly caused the constitutional harm. Stoneking v. Braford Area Sch. Dist., 882 F.2d 720, 725 (3d. Cir. 1989). "[O]nly where…a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter" will liability attach to the municipality. Thus, in order for liability to be imposed against a municipality under § 1983, the plaintiff carries the burden of demonstrating the existence of a particular municipal policy or custom, and further proving that such policy subjected or caused him to be subjected to

constitutional injury. See City of Oklahoma v. Tuttle, 471 U.S. 808, 829-30, (1985) (Brennan, J., concurring).

Here, the thrust of Respondents' allegations under §1983 (and the New Jersey Civil Rights Act) are that the Mayor, in his official capacity, sent out a press release in opposition to the Plaintiffs' Amended Application to the Zoning Board one week prior to the Zoning Board's public hearing on the matter on March 26, 2019. More specifically, the Respondents contend that the Mayor's release and comments within constitute a deprivation of constitutional rights. The case law regarding municipal and government official liability under §1983 cut against this theory. Respondents must demonstrate that a particular policy, practice, or custom was established that specifically led to a constitutional deprivation. Plaintiffs cannot demonstrate such evidence in this matter.

The singular instance of opposition to Plaintiffs' Amended Application for zoning variances can hardly be deemed to constitute a policy, custom, or practice. It was, in all circumstances, a one-off incident of the Mayor expressing opposition to a development within his community. The Township and Mayor took no legislative or other action to create any policy that affected Plaintiffs alleged constitutional rights. Indeed, it was specifically noted by the trial court that "the irony here is that, but for this singular transgression…Monroe Township pro-actively had come into voluntary compliance with its Mt. Laurel obligations…and by all accounts, is

diligently implementing them." M51-52. There is certainly no history, official policy, or custom demonstrating that the Township or Mayor would not comply with its Mount Laurel obligations. Moreover, there is no custom, policy, or practice demonstrating that the Township or Mayor did not grant or permit Respondents to take part in the process for obtaining zoning approval for their project. Respondents' proposed development was subject to multiple reviews by the Zoning Board, both before and after the discovery of the bald eagle's nest on the Subject Property. The Respondents initial application was granted by the Zoning Board. There is no argument from Respondents that their application and ability to be heard on the matter were interfered with at that time. If that were the case, then perhaps there would be a plausible argument that there was a custom, policy, or practice to deprive Respondents of a constitutional right. This is not the case. They complain solely of a single instance. They are seeking to find a "custom" was created by the Mayor's objection to *their* project, without any regard to the Township and Mayor's agreement with respect to Mount Laurel obligations on the whole. There is no case law nor evidence sufficient to demonstrate that the Mayor exercising his rights to express an opinion on a development project is tantamount to a policy, custom, or practice that deprives a person of constitutional rights.

A. Respondents' claims for violation of substantive due process rights fail as a matter of law and were properly dismissed by the trial court. M730-735.

As the trial court correctly pointed, the New Jersey Supreme Court in Rivkin v. Dover Tp. Rent Leveling Bd., 143 N.J. 352, 366 (1996) found that "[i]n light of the clearly evident trend of the Supreme Court to limit substantive due process rights under the Fourteenth Amendment, we believe that the denial of a property right in the context of municipal governance rarely will rise to the level of a substantive due process violation." M733. Further, the Supreme Court observed "substantive due process is reserved for the most egregious governmental abuses against liberty or property rights, abuses that 'shock the conscience or otherwise offend…judicial notions of fairness… [and that are] offensive to human dignity.'" Ibid; see also Chainey v. Street, 523 F.3d 200, 219 (3d. Cir. 2008); United Artists Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392, 399 (3d. Cir. 2003). This heightened standard replaced the previous "improper motive" test established in Bello v. Walker. 840 F.2d 1124 (3d. Cir. 1988). The heightened test of "shocks the conscience" was implemented to "avoid converting federal courts into super zoning tribunals." Eichenlaub v. Township of Indiana, 385 F.3d 274, 285 (3d. Cir. 2004). Though what "shocks the conscience" is not precise and "varies depending on the factual context", it is generally reserved for only the most egregious official conduct. Id. (quoting United Artists, supra 316 F.3d at 400).

Here, the Respondents attempt to forge an argument that the Mayor's comments "shock the conscience" simply because the trial court took issue with the comments and found the Zoning Board's decision arbitrary and capricious as a result. But the arbitrary and capricious standard is much different from the standard of finding what "shocks the conscience." To meet the heightened showing of the "shocks the conscience" test, a party must show that the alleged misconduct rises to the level of self-dealing, an unconstitutional taking, or interference with otherwise constitutionally protected activity on the property. Eichenlaub, supra, 385 F.3d at 285; see also Cherry Hill Towers, L.L.C. v. Twp. of Cherry Hill, 407 F. Supp. 2d 648, 655 (D.N.J. 2006) ("[S]ubstantive due process concerns are not implicated when a plaintiff alleges that a government official merely acted with an improper motive or made a decision based upon any reason unrelated to the merits of the application").

The allegations at issue in the instant lawsuit do not involve the claims of hostility to constitutionally protected activity on Respondents property, such as, for instance, the selective closing of medical offices for abortion services or discrimination of an ethnic group. Moreover, this case does not involve any allegations of self-dealing. The courts have recognized that even a personal animus without more cannot shock the conscience for constitutional purposes in the land use context. See Am. Marine Rail NJ, LLC v. City of Bayonne, 289 F. Supp. 2d 569,

584 (D.N.J. 2003) ("[I]mproper motives, particularly personal animus toward a plaintiff do not shock the conscience for constitutional purposes"). Notably, in Eichenlaub, the Third Circuit affirmed an order granting summary judgment on a substantive due process claim brought by a land developer. The Court held that claims of inconsistent subdivision requirements, unnecessary inspections and enforcements, delay of permits and approvals, and, even, the maligning of the developer did not rise to the level of conscience shocking. 385 F.3d at 286. The Court emphasized that "there is no allegation of corruption of self-dealing here." Ibid.

Ironically, Respondents' only case recitation in support of their substantive due process violation claims is to a non-precedential case that, in fact, supports Appellants arguments and illustrates Respondents misapplication of the law. Respondents state that the Appellate Division in S. Salem St. Assocs., LLC v. Planning Bd., No. A-5401-06T3, 2008 N.J. Super. Unpub. LEXIS 1792 (Super. Ct. App. Div. Oct. 21, 2008) determined that a mayor's deliberate manipulation of land use board and municipal actions, as well as threats to eliminate plaintiff's buildings through rezoning, were sufficient to support a violation of substantive due process. Pb68-69. Respondents' gloss of this case is remarkable for what it elides. In fact, the case is replete with discussion about the egregious self-dealing underlying the mayor's actions. Respondents mention none of this.

S. Salem St. Assocs. turned upon far more than undue pressure and improper motives. The Appellate Division found that the mayor deliberately manipulated actions for personal gain. Id. at 23. Notably, the mayor, who did indeed threaten to have property rezoned to eliminate office buildings as a conditional use, had signed a contract to purchase property across from plaintiff's own property and had begun leasing the property for the very use that the zoning change would prevent on plaintiff's property. The court recognized that a jury's finding that the mayor had acted deliberately to stall or obstruct a proposed project for his "personal gain" was the showing that could support a section 1983 action. Id. at 24-25.

Respondents ignore this fundamental holding of the case. The reason is quite evident: Respondents have not and cannot present any facts that suggest any self-dealing or financial or personal gain to the Mayor from making any statements made about the Respondents' projects.

In dismissing these claims, the trial court correctly concluded that the allegations in this case "do not involve claims of hostility to constitutionally protected activity on the [Respondents] property…[n]or do they involve claims or allegations of either corruption or self-dealing on the part of the Mayor, in particular, or any Zoning Board member." M735. Respondents cannot and will not be able to produce any argument contrary to this holding. Accordingly, same should be affirmed.

B. Respondents' have no legal basis for their procedural due process claims as they availed themselves of the very process set by New Jersey law. M735-748.[1]

Procedural due process claims only apply to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 569–70 (1972); Patterson v. City of Utica, 370 F.3d 322, 329 (2d Cir.2004). When protected interests are involved, "the right to some kind of prior hearing is paramount." Id. The Due Process Clause of the Fourteenth Amendment generally requires that a person must be afforded the opportunity for a hearing prior to being deprived of a constitutionally protected liberty or property interest. N.Y. State Nat'l Org. for Women v. Pataki, 261 F.3d 156, 164 (2d Cir.2001) As the Supreme Court has maintained, although "'[l]iberty' and 'property' are broad and majestic terms "the range of interest protected by procedural due process is not infinite,'" Roth, 408 U.S. at 570.

As the protection of the of procedural due process is not limitless, "The Fourteenth Amendment due process guarantee ... only extends to property claims to which an individual has a 'legitimate claim of entitlement." N.Y. State Nat'l Org. for Women, 261 F.3d at 164 (quoting Roth, supra, 408 U.S. at 577). To establish

[1] Respondents' case information statement and notice of appeal seek reversal of the trial court's dismissal of Counts IV and V of the Complaint. Each count suggests a substantive and procedural due process violation. The trial court's decision of March 10, 2023 dismissed both substantive and procedural due process claims. Respondents' cross-appeal brief does not make a specific argument about the dismissal of its procedural due process claims. Appellants contend that such claims are therefore waived. Nevertheless, the Appellants will brief the issue in the event this Court disagrees on whether it has been waived by Respondents.

a § 1983 procedural due process claim, a plaintiff must show: (1) that he or she was deprived of a property interest protected by the Fourteenth Amendment, and (2) that the process attendant to the deprivation was constitutionally deficient. Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 460 (1989). In other words, the plaintiff must establish that the state or governmental procedure for challenging the alleged deprivation does not satisfy the requirements of procedural due process. DeBlasio v. Zoning Board of Adjustment for Tp. of West Amwell, 53 F.3d 592, 597 (3d. Cir. 1995) abrogated on other grounds United Artists, supra 316 F.3d at 401. "[A] state provides constitutionally adequate procedural due process when it provides reasonable remedies to rectify a legal error by a local administrative body." United Artists, 316 F.3d at 400.

Our State provides adequate safeguards to aggrieved applicants to zoning boards who wish to challenge decisions of the zoning board.

> New Jersey statutes provide that a Zoning Board of Adjustment ("ZBA") has the power to decide appeals of the zoning officer's enforcement of a municipality's zoning ordinance and to decide requests for an interpretation of the zoning law. N.J.S.A. 40:55D-70(a) and (b). Additionally, the ZBA has the power to grant a request for a variance or other relief so long as it is not a substantial detriment to the public good and it will not substantially impair the intent and purpose of the zoning ordinance. Id. N.J.S.A. 40:55D-70(c) and (d).
>
> Moreover, New Jersey allows any interested party affected by any decision of an administrative officer of the municipality based upon or made in the enforcement of the

> zoning ordinances or official map to make an appeal to the ZBA. Id. 40:55D-72(a). Finally, pursuant to Rule 4:69-1, et seq. of the New Jersey Court Rules [a plaintiff is] entitled to a review, a hearing, and relief by filing a complaint in the New Jersey Superior Court, Law Division, before the expiration of forty-five days from the time [the plaintiff] receive[s] notice that [its] application for rezoning ha[s] been denied. R. 4:69-1, et seq.

John E. Long, Inc. v. Borough of Ringwood, 61 F. Supp. 2d 273, 278-79 (D.N.J. 1998) *aff'd* 213 F.3d 628 (3d. Cir. 2000) (quoting DeBlasio, supra, 53 F.3d at 597).

The trial court cited to the Rivkin Court which noted that "[p]ost-deprivation remedies are most likely to be deemed satisfactory substitutes for pre-deprivation process when a meaningful pre-deprivation hearing is impracticable and property rather than a life or liberty interest is at stake…" Rivkin, supra, 143 N.J. at 372.

> The post-deprivation remedy that the State furnished to the Rivkins was an action in lieu of prerogative writs. The 1947 New Jersey Constitution preserved the substance of common law prerogative writ review by permitting parties to seek "review, hearing and relief" in the Superior Court of all actions of municipal agencies. N.J. Const. art VI, §5, P4. New Jersey Court Rule 4:69 implements this constitutional provision. A court may set aside a municipal board decision if it is shown to be arbitrary, capricious, or unreasonable, not supported by the evidence, or otherwise contrary to law. (Citations omitted).
>
> Plaintiffs contend that the action in lieu of prerogative writ is not an adequate remedy because it does not enable them to recover damages, attorney's fees or costs. In Parratt [Parratt v. Taylor, 451 U.S. 527 (1981)], the Court concluded, "Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under §1983 that

> does not mean that the state remedies are not adequate to satisfy the requirements of due process." Parratt, supra 451 U.S. at 544. Accord Ayers v. Jackson Township, 202 N.J.Super. 106, 128-129 (App.Div.1985) ("[A] state remedy may be sufficient, even if not as complete as that allowed under 42 U.S.C. §1983), aff'd in part and rev'd in part, 106 N.J. 557 (1987).
>
> Plaintiffs' action in lieu of prerogative writs provided an adequate state post-deprivation remedy as required by the Parratt doctrine. The remedies provided were quite complete.

Rivkin, 143 N.J. at 377-378.

There is no doubt that Respondents not only sought redress from the perceived slight of the Zoning Board denial, but also received the exact remedy they sought: full reversal of the Zoning Board's denial and a grant of the variances by a Special Hearing Officer. Respondents followed the specific procedures as set forth in John E. Long. They appealed the zoning officials decision to the Zoning Board. Following the Zoning Board's denial of their Amended Application, the Respondents followed the adequate and constitutionally sound procedures set forth in the Municipal Land Use Law and our Court Rules and filed the instant action challenging the Zoning Board's decision. There is simply no basis for Respondents to aver that the Township or Mayor in any way deprived them of their ability to challenge the actions of the Zoning Board. Accordingly, dismissal of Respondents' procedural due process claims was appropriate and should be affirmed by this Court.

POINT V

RESPONDENTS' NJLAD CLAIMS WERE PROPERLY DISMISSED AS THEY CANNOT ESTABLISH STANDING NOR A COGNIZABLE CLAIM UNDER THE NJLAD. (M749-754).

The New Jersey Law Against Discrimination (hereinafter "NJLAD") states, in pertinent part that:

> "[a]ll persons shall have the opportunity to…obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, liability for service in the Armed Forced of the United States, nationality, sex, gender identity or expression or source of lawful income used for rental or mortgage payments, subject only to conditions and limitations appliable alike to all persons."

See N.J.S.A. 10:5-4.

Protected classes pursuant to NJLAD include race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, liability for service in the Armed Forced of the United States, nationality, sex, gender identity or expression or source of lawful income used for rental or mortgage payments. "The predominant goal of the NJLAD 'is nothing less than the eradication of the cancer of discrimination in the workplace.'" Garnes v. Passaic County, 437 N.J. Super. 520, 532 (App.Div.2014).

"The concept of standing refers to a litigant's 'ability or entitlement to maintain an action before the court'". Triffin v. Somerset Valley Bank, 343 N.J. Super. 73, 80 (App.Div.2001) (quoting N.J. Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402, 409 (App.Div.1998). "The essential purpose of the standing doctrine in New Jersey is to:

> Assure that the invocation and exercise of judicial power in a given case are appropriate. Further, the relationship of plaintiffs to the subject matter of the litigation and to other parties must be such to generate confidence in the ability of the judicial process to get to the truth of the matter and in the integrity and soundness of the final adjudication. Also, the standing doctrine serves to fulfill the paramount judicial responsibility of a court to seek just and expeditious determinations on the ultimate merits of deserving controversies.

N.J. State Chamber of Commerce v. N.J. Election law Enforcement Comm'n, 82 N.J. 57, 69 (1980). "As a corollary…our courts will not 'entertain proceedings by plaintiffs who are mere intermeddlers or are merely interlopers or strangers to the dispute.'" Ridgewood Educ. Ass'n v. Ridgewood Bd. of Educ., 284 N.J. Super. 427, 432 (App.Div.1995). The Court has "consistently held that in cases of great public interest, any 'slight additional private interest' will be sufficient to afford standing.'" Salorio v. Glaser, 82 N.J. 482, 491 (1980). Further, The LAD was enacted to protect the civil rights of individual aggrieved employees and protect the public's strong interest in a discrimination-free workplace. Fuchilla v. Layman, 109 N.J. 319, 334, 537 A.2d 652.

Unequivocally, Respondents do not qualify or belong to a protected class as defined under the NJLAD and therefore lack any standing to sue pursuant to NJLAD. Furthermore, Respondents cannot assert a claim on behalf of a hypothetical class that they do not belong to. See Schiavo v. Marina Dist. Development Co., LLC, 442 N.J.Super. 346, 347 (App.Div.2015). Even an alleged derivative suit brought by Respondents on behalf of an unquantified and unqualified class cannot be maintained here. Respondents are the quintessential intermeddlers or interlopers seeking to gain redress on someone else's behalf without any actual interests at stake other than self-interest.

While a person who is discriminated against because of their association with a member of a protected group can assert a LAD claim (see Berner v. Enclave Condo. Ass'n, 322 N.J. Super. 229 (App. Div. 1999)), our courts have made clear that "the Legislature did not intend to establish a cause of action for any person other than the individual against whom the discrimination was directed." Catalane v. Gillan Instrument Corp., 271 N.J. Super. 476, 500 (App. Div. 1994); see also L.W. ex. rel. L.G. v. Toms Rivers Reg'l Schs. Bd. Of Educ., 382 N.J. Super. 465, 500-01 (App. Div. 2005) (mother aggrieved by sexual orientation-based harassment of her son was not the functional equivalent of a member of that protected group as she was not discriminated against herself because of her association with her son).

Respondents cite almost exclusively to Berner for the proposition that they are entitled to relief under the NJLAD in this matter. Their reliance is misplaced, though. Respondents urge that, "[u]nder the LAD, non-protected class members harmed due to their relationship with a protected class member may pursue a civil action against the perpetrator of unlawful discrimination." Pb72. Distinctly, in Berner, the Appellate Division recognized that the Caucasian lease holder had standing because "he was discharged for allegedly associating with a member of a protected group." Id. at 234-235. There is no such corollary here.

Respondents make no argument that they themselves are members of low or moderate income households or families. The facts of the case certainly do not demonstrate that any comments directed toward their Amended Application concerned the fact that they were to provide affordable housing units. The mere fact a certain number of low- and moderate-income housing were not built as promptly as Respondents sought does not create standing to pursue a LAD claim where there exists no showing that Appellants discriminated against Respondents because they were incorporating affordable housing units in their project.

Tellingly, the Respondents self-interest in asserting NJLAD claims is found in their own arguments that outright suggest that the low to moderate income housing units would only go to racial minorities. Respondents argue unironically: "as the owners of property designed to assist the Township in meeting its

constitutional affordable housing obligations, Plaintiffs have clear standing to maintain this claim on behalf of **racial minorities** and families who will occupy the housing units in the planned development on the Subject Property." Pb73. Respondents equate low to moderate income housing with racial minorities directly. This is not only absurd, but also in and of itself, discriminatory. Respondents have no idea who would occupy any one of the affordable housing units for the site.

Respondents' arguments not only hinge on this absurd stereotyping, but they also rest on the certification of their planner, Art Bernard, whose opinions were offered on the subject for the first time at summary judgment via the same certification. As argued above, this certification should be flatly ignored by this Court. Respondents had ample opportunity to not only name Mr. Bernard as an expert on issues purportedly related to the Township's alleged discriminatory conduct, but they also had ample opportunity to produce and provide a report or rendering of his so-called expert opinion on the matter if they so desired. Any outside expert opinions offered by Respondents were required to be provided by October 8, 2021 pursuant to the trial court's February 26, 2021 Case Management Order. Moreover, the lower court's September 23, 2022 Case Management Order prohibited any further discovery and did not contemplate expert reports or depositions. Mr. Bernard's certification was therefore improperly asserted outside of the discovery period. Indeed, no certification of due diligence pursuant to R. 4:17-

7 was provided to demonstrate the basis for such a woefully late submission. The Appellants had no opportunity to examine, discover, or rebut any of Mr. Bernard's opinions or conclusions. Even so, they offer no support for Respondents' position that they have standing under the NJLAD. No aspect of the certification touches upon the question of whether Plaintiffs were discriminated against. It does not establish any facts, any indicium of discriminatory intent by the Mayor or Township toward the Plaintiffs upon their submission of an amended application. Rather, this certification concerns Mr. Bernard's opinion concerning the Township's fulfillment of its Mount Laurel obligations. Importantly, these opinions were not espoused during that portion the litigation either. Accordingly, the entire certification should be ignored by this Court.

A. Even if the Respondents could establish standing under the NJLAD, they fail to articulate any facts that support a finding of a violation under the NJLAD. (M749-754).

Even if standing were not to be deemed an issue by this Court, Respondents still cannot demonstrate any discriminatory conduct, severe or pervasive, that occurred in this matter so as to damage Respondents under the NJLAD. There is no dispute that the 2018 Amended Application contained residential units for low to moderate income families. However, the denial of the Amended Application was not based on any discriminatory conduct or action by the Township. The Zoning Board authored its resolution and there is no discriminatory animus to be found in the

resolution. Moreover, the Mayor's press release made no mention either expressly or implicitly that his opposition was based on any enumerated protected class, let alone due to the "affordable housing units." Notably, the Original Application that contained low to moderate income family units was approved with nary a word about it. It was only after the Amended Application was made which reduced to size of developable land, but not the intensity of the Project, that the Mayor stated his opposition to the Amended Application. Even then, those statements in the press release clearly reflected opposition based on the environmental concerns and intensity/density concerns of the Project. There is simply no factual basis to state that the objections had anything to do with the status of Respondents or any other persons within a protected class.

Likewise, the opposition voiced by the Mayor cannot be separated from the greater context of the Township's voluntary compliance with its Mount Laurel obligations. It is without question that the Township has taken proactive steps to ensure compliance with affordable housing obligations. The Township entered into a settlement agreement with the Fair Share Housing Center which incorporated the Township's obligation settlement and included the Subject Property. The trial court specifically noted that Township's history of compliance with its Mount Laurel housing obligations. There is simply no cognizable basis to conclude that the Mayor's comments were made with any discriminatory intent or animus toward any

protected class, let alone against low to moderate income family units within the Township. Clearly, the comments regarding the Amended Application were specific to the Respondents' Amended Application and proposed development in its entirety.

The Appellants submit that dismissal of Respondents claims under the NJLAD were appropriately dismissed by the trial court and such dismissal was soundly based in prevailing case law. Accordingly, the trial court's dismissal of Count VII of the Complaint should be affirmed by this Court.

CONCLUSION

For the reasons set forth above and for the reasons set forth in the Appellants initial appellate filings, it is respectfully requested that this Court hereby reverse the decision of the trial court as set forth in its Orders and Opinions dated October 14, 2020, October 15, 2020, June 16, 2021, September 14, 2021, and August 9, 2022 and affirm the decision of the trial court dated March 10, 2023.

Respectfully submitted,

RAINONE COUGHLIN MINCHELLO, LLC

By: _____
Mathew R. Tavares, Esq.

Dated: December 21, 2023

CT07 SPII LLC and DT07 SPII LLC, Plaintiffs-Respondents/Cross-Appellant, vs. ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MONROE, THE TOWNSHIP OF MONROE, and MAYOR GERALD W. TAMBURRO, in his official capacity as Mayor of the Township of Monroe, Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-002471-22 On Appeal from the Superior Court of New Jersey, Law Division- Middlesex County Sat Below: Hon. Thomas D. McCloskey, J.S.C. Docket No.: MID-L-3953-19

PLAINTIFFS-RESPONDENTS/CROSS-APPELLANTS' REPLY BRIEF AND SUPPLEMENTAL APPENDIX IN SUPPORT OF CROSS-APPEAL

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PRELIMINARY STATEMENT

Plaintiffs/Respondents/Cross-Appellants, CT07 SPII LLC and DT07 SPII LLC ("Plaintiffs"), submit this Reply Brief in support of Plaintiffs' cross-appeal.

The Trial Court below has adjudicated that the Defendant/Respondent/Cross-Appellant Zoning Board, at the instigation of the Mayor, unlawfully denied Plaintiffs' development application. Thus, it has been held that Defendants have engaged in arbitrary, capricious and unreasonable actions taken contrary to the terms of the applicable statutes set forth in the Municipal Land Use Law and the case law cited by the Trial Court. That denial of Plaintiffs' development application has cost the Plaintiffs an inordinate amount of money consisting of damages, attorney's fees and costs of suit. The Trial Court's reversal of the denial does not make Plaintiffs whole. Defendants argue in their briefs that such a result, where Plaintiffs bear the financial burden of Defendants' unlawful conduct, is consistent with the law and notions of fairness.

Defendants assert that Plaintiffs have inadequate legal authority to seek compensation for their losses arising from Defendants' unlawful conduct. In making their arguments, Defendants once again seek to re-litigate prior adverse rulings against them, and they urge a misapplication of the governing law. In essence, Defendants argue that Plaintiffs must, as a matter of law, bear the financial burdens resulting from Defendants' unlawful conduct. For the reasons set forth in this Reply

Brief and in Plaintiffs' initial Brief on this appeal, Plaintiffs respectfully submit that Defendants are incorrect, and the relief requested on Plaintiffs' cross-appeal should be granted, with this matter being scheduled for trial including a proof hearing as to the quantum of damages suffered by Plaintiffs, along with their entitlement to an award of attorney's fees and costs of suit.

Although the Trial Court correctly held that Defendants engaged in unlawful conduct when denying Plaintiffs' variance application, it is respectfully submitted that the Trial Court improperly dismissed the damage claims that were premised upon that unlawful conduct. Indeed, Defendants' arguments in support of dismissal of the damage claims, and the claims below seeking attorney's fees and costs, are largely premised upon their positions on factual issues that are hotly disputed. Plaintiffs urged below that a trial was required to explore the parties' divergent positions on a number of issues, and that Plaintiffs' claims could not be dismissed as a matter of law, as urged by the Defendants. Plaintiffs respectfully request that this Court reverse the dismissal of Plaintiffs' damage claims and remand this matter for a trial.

LEGAL ARGUMENT

POINT I

DEFENDANTS VIOLATED THE RIGHTS OF PLAINTIFFS TO A FAIR AND UNBIASED CONSIDERATION OF THEIR APPLICATION IN VIOLATION OF PLAINTIFFS' RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT AND NEW JERSEY STATUTES IN VIOLATION OF 42 U.S.C. § 1983 AND THE NEW JERSEY CIVIL RIGHTS ACT.

Defendants first argue that the unlawful denial of the Plaintiffs' application giving rise to Plaintiffs' civil rights claims fails to meet the test established in Monell v. Dept. of Soc. Servs. of the City of New York, 436 U.S. 658, 690 (1978), namely that: (1) the direction of the Township's chief executive office - the Mayor – cannot be considered as the policy of the Township; (2) there is no evidence of a causal link between the Mayor's directive and the denial of Plaintiffs' application; (3) the unlawful denial of Plaintiffs' application at the direction of the Mayor does not adequately shock the conscience; and (4) the Defendants' unlawful denial of Plaintiffs' application cannot otherwise amount to a denial of substantive due process.

Under Monell, governing bodies and their executive officers – mayors - can be sued directly under 42 U.S.C. §1983 for monetary, declaratory, or injunctive relief where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Id. at 690. Moreover, "local governments, like

every other §1983 'person', by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels." T & M Homes, Inc. v. Mansfield Twp., 162 N.J. Super. 497, 504 (Law. Div. 1978). Indeed, the Township's reply brief itself acknowledges that the Monell policy, practice or "custom" requirement is met when the unlawful action in question is the action of the municipality itself. See Township reply brief at p. 22 ("Trb22") where the Township acknowledges that municipal action through a resolution or ordinance satisfied the policy, practice or custom standard. For some reason, however, which the Township does not explain, the Township asserts that similar authoritative action by the Township's chief executive officer does not similarly satisfy that standard and establish liability.

A municipality may be liable for a decision of an official who "possesses final authority to establish municipal policy with respect to the action ordered." Stomel v. City of Camden, 192 N.J. 137, 146 (2007) (quoting Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986)). Whether "an official ha[s] final policymaking authority is a question of state law." Besler v. Bd. of Educ. of W. Windsor-Plainsboro Reg'l Sch. Dist., 201 N.J. 544, 566 (2010), quoting Stomel, at 146.

The Township's government is organized pursuant to the Mayor-Council Plan of the Optional Municipal Charter Law, N.J.S.A. 40:69A-1 *et seq.* (the "Faulkner

Act"). Under the Faulkner Act, the mayor enjoys broad powers, including the supervision and control "of all departments of the municipal government" (see N.J.S.A. 40:69A-40(c)), the examination of "operations of any board," and N.J.S.A. 40:69A-40(d)), concerning the supervision of the care and custody of all municipal institutions and agencies. See also N.J.S.A. 40:69A-40(f)). In other words, the mayor is the official tasked with oversight and control of all governmental functions within a municipality. It is undisputed that he (or she) is the final policymaking authority in accordance with state law.

Despite all of this, Defendants blithely dismiss the fact that the directive to deny the Plaintiffs' application came from the Township's Mayor - the chief executive officer who himself is the final policymaking authority of the Township. The fact that the Mayor establishes the Township's policy is further bolstered by the fact that statements evidencing this policy were published and disseminated through a Township newsletter and on the Township's website, confirming that the Mayor was not simply "acting as a private citizen expressing an opinion," but as a policy-making official. The Mayor directed the Zoning Board to follow his established policy and deny Plaintiffs' application. This is precisely the kind of scenario envisioned by the holding in Monell.

This is not a *respondeat superior* issue as alluded to in the Township's reply brief. This is a case in which an instrumentality of the Township - the Zoning Board

– made an unlawful decision as directed by the chief executive office of the Township – the Mayor.

Similarly, there is little doubt as to the causal link between the Mayor's policy directive and the Zoning Board's denial of the application. As set forth in the Plaintiffs' initial Brief, the Zoning Board's adoption of the Resolution of denial itself incorporates the false narrative of the Mayor's publicity campaign against the Application:

> **The Board further notes that the presence of the eagle's nest and the required buffer does create a hardship**; however the number, type, character and extent of the Bulk Variances requested are far too intense and exceed a reasonable modification of the site to offset the impact of the eagle's nest. These variances result in an overly intense use of the developable portion of the site *and serve only to advance the Applicant's economic interest which has been specifically rejected by the Courts as a basis to justify the granting of variances.*

The trial court found the italicized language to be unsupported by the record, and "pure speculation that conveniently advanced the narrative of the Mayor's public campaign to defeat this Application." M33. Thus, it is clear that the Board's denial of the Application was driven by the Mayor's established position and authority. The "causal link" prong of the Monell test has been met.

Defendants further argue that, as a matter of law, the unlawful denial of the application fails to "shock the conscience." Again, Defendants disregard the language of the Trial Court, as well as the relevant law governing the conduct of zoning boards. As set forth in Plaintiff's initial Brief, the Municipal Land Use Law

(N.J.S.A. 40:55D-1 *et seq.*, "MLUL") prohibits the governing body or other officials from infringing on those application review powers that are expressly reserved to the planning and zoning boards. See N.J.S.A. 40:55D–20 ("Any power expressly authorized by this act to be exercised by [the] (1) planning board or (2) board of adjustment shall not be exercised by any other body, except as otherwise provided in this act.").

By giving exclusive authority over variance review to the zoning boards, the New Jersey Legislature evidenced its intent that the governing body and other municipal officials should not interfere with or influence the zoning board's decision. The Trial Court found that the Mayor's statements against the application, and the dissemination of those statements the week before the hearing on the application, were "appalling and shocking", and "direct, calculated interference" with the powers reserved to the Zoning Board by the Legislature. M46. The Mayor's direction to the Zoning Board was, in effect, a chief executive officer unlawfully asserting his authority and unlawfully issuing a directive to a body that is, by law, a quasi-judicial, impartial body.

At Trb27-28, the Township further argues that liability cannot be established because the Mayor did not act unlawfully due to personal financial motives. However, Plaintiffs are not obligated to make such a showing. Indeed, the nature of self-dealing that shocks the conscience is not limited to financial motives. In this

case, the Mayor presumably acted to advance his political self-interest (although no trial has been held on this issue). Similarly, a showing of personal animus is not necessary to establish liability. Indeed, as acknowledged by the Township in its reply brief at Trb27, to satisfy the shocks the conscience standard, "a party must show that the alleged misconduct rises to the level of self-dealing, an unconstitutional taking, or interference with otherwise constitutional protected activity on the property." There has, indeed, been an interference by Defendants with the constitutionally protected activity attempted by Plaintiffs on their property, i.e., Plaintiffs' attempt to provide low and moderate income housing as protected by the Mount Laurel doctrine.

In sum, the municipal conduct below shocks the conscience for the reasons advanced above, and more. At a minimum, it is respectfully submitted that the Trial Court erred in finding, as improvidently advanced by Defendants below, that their conduct does not shock the conscience as a matter of law. This matter should be remanded for a trial on that issue.

The Defendants below deprived Plaintiffs of a fair hearing regarding their development application in violation of the MLUL, a deprivation of a substantive due process right guaranteed by the Fourteenth Amendment. "When ... a government agency has engaged in egregious misconduct rising to the level of a substantive due process violation or has invidiously discriminated against a member of society, a

§1983 violation occurs 'regardless of the fairness of the procedures used to implement' the abuse." Rivkin v. Dover Tp. Rent Leveling Bd., 143 N.J. 352, 384, (1996) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

By subjecting Plaintiffs to a Zoning Board proceeding under conditions of extreme bias and animus, and by adopting a Resolution that incorporated the Mayor's false narrative against the Amended Application, Defendants violated the statutory and due process rights of Plaintiffs to a fair and impartial consideration of their Application as secured by the Fourteenth Amendment to the United States Constitution, in violation of 42 U.S.C. §1983, and the New Jersey Civil Rights Act. The ruling to the contrary below should be reversed and this matter should be remanded for a trial on the issues raised on Plaintiffs' cross-appeal, including Plaintiffs' claims for damages, attorney's fees, and costs of suit.

POINT II

PLAINTIFFS HAVE STANDING TO MAINTAIN THE CLAIM AGAINST DEFENDANTS FOR VIOLATIONS OF THE NEW JERSEY LAW AGAINST DISCRIMINATION ON BEHALF OF THE CLASSES AGAINST WHICH DEFENDANTS HAVE DISCRIMINATED, AND SUCH DISCRIMINATION IS APPARENT.

The New Jersey Law Against Discrimination ("NJLAD") provides legal remedies "to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this

State[,]" including compensatory and punitive damages. See N.J.S.A. 10:5-3. In cases concerning claims under the NJLAD, "special rules of interpretation also apply." Nini v. Mercer Cty. Cmty. Coll., 202 N.J. 98, 108 (2010). "When confronted with any interpretive question" pertaining to the NJLAD, our courts "must recognize" the NJLAD's pronouncement of its broad public policy goals. Smith v. Millville Rescue Squad, 225 N.J. 373, 390 (2016). Calabotta v. Phibro Animal Health Corp., 460 N.J. Super. 38, 60 (App. Div. 2019).

Defendants first argue that Plaintiffs have no standing to pursue their claim under the NJLAD. However, Defendants fail to acknowledge that the courts of New Jersey liberally grant a litigant standing to bring a legal claim, Jen Elec., Inc. v. Cnty. of Essex, 197 N.J. 627, 645 (2009), especially claims raised in a Mount Laurel setting. Oceanport Holding, L.L.C. v. Borough of Oceanport, 396 N.J. Super. 622, 631 (App. Div., 2007). Generally, a litigant has standing under the common law to challenge a governmental action when he has "a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." In re Camden Cnty., 170 N.J. 439, 449 (2002); see also Jen Elec., 197 N.J. at 645; see also In re Adoption of Baby T., 160 N.J. 332, 340 (1999). Further, the NJLAD itself provides that it "shall be liberally construed in combination with other protections" available under New Jersey's laws in order to reflect New Jersey's

strong public policy to fight discrimination against any of its inhabitants. N.J.S.A. 10:5-3; See also Hernandez v. Region Nine Hous. Corp., 146 N.J. 645, 651-52 (1996); Montells v. Havnes, 133 N.J. 282, 298 (1993); Pukowsky v. Caruso, 312 N.J. Super. 171, 177 (App. Div. 1998); Grigoletti v. Ortho Pharm. Corp., 118 N.J. 89, 96 (1990).

Plaintiffs meet the criteria set forth in Camden Cnty. The Plaintiffs, as the property owners, clearly have a sufficient stake in the outcome of the litigation, are clearly adverse to the Defendants, and have been and will be substantially harmed if they are not compensated given the Defendants' unlawful actions. Further, as set forth in the Plaintiffs' initial Brief, they are entitled to standing under the NJLAD's policy to afford standing broadly. Under the NJLAD, non-protected class members harmed due to their relationship with a protected class member may pursue a civil action against the perpetrator of unlawful discrimination. N.J.S.A. 10:5-13; O'Lone v. New Jersey Dept. of Corrections, 313 N.J. Super. 249, 254-55 (App. Div.,1998); Berner v. Enclave Condo Ass'n, 322 N.J. Super.229, 235 (App. Div. 1999) (citing N.J.S.A. 10:5-13). As the owners of property designed to assist the Township in meeting its affordable housing obligations, Plaintiffs have clear standing to maintain this claim on behalf of the racial minorities and families who will, among others, occupy the housing units in Plaintiffs' planned development on the Subject Property.

Defendants acknowledge, as they must, that the classes protected by the

NJLAD include racial minorities and families. Nevertheless, the Township argues in its reply brief, at Trb 35-36, that Plaintiffs are mere "intermeddlers or interlopers" lacking standing to advance the interests of racial minorities and families. In a rather clumsy effort to reverse the analysis, the Township argues, at Trb38, that Plaintiffs are engaging in "absurd stereotyping" by noting that such low- and moderate-income housing tends to be disproportionally occupied by families and racial minorities.

However, there is nothing absurd about this notion, nor is it "stereotyping." It is simply reality that Defendants seek to evade in order to baselessly argue that the interest of classes protected by the NJLAD are not implicated in this matter. As set forth below in the Certification of Art Bernard, P.P., a very respected professional planner in the field of affordable housing, quoted extensively in the Plaintiffs' initial Brief:

> 13. African American and Hispanic households are a disproportionately high percentage of the low and moderate income population. This fact is illustrated by the 2016-2020 ACS data that provides the following median income data:
>
> | Race/Ethnicity | New Jersey | Middlesex County |
> |---|---|---|
> | White | $91.555 | $84,926 |
> | Black | $55,453 | $79,063 |
> | Hispanic | $60.352 | $65,771 |

> 15. In contrast to the lack of multi-family housing in Monroe, Plaintiffs' inclusionary development is designed to provide affordable multi-family housing, including low and moderate income housing, that will be more readily available to the minority population than the housing that has previously been allowed by the Township's zoning policies. Further, Plaintiffs propose housing for families with children, not the age restricted housing that is so prevalent in the Township. As I understand it, the New Jersey Law Against Discrimination is designed to protect the interests of racial minorities and families, among other things. The Township's opposition to Plaintiffs' inclusionary development obviously thwarts those interests.

Ra166-7.

In other words, Plaintiffs have a factual, provable basis on which to base their claim that Defendants' actions in denying their application, which will provide a significant amount of affordable housing, harm minorities and families with children. This is the very type of conduct made unlawful by the NJLAD. Plaintiffs have standing to assert their claims.

Defendants also assert that this Court should simply "flatly ignore" Mr. Bernard's Certification. They do so by arguing that it was procedurally improper for Plaintiffs to submit the Certification in opposition to Defendants' motion to dismiss the damage Counts (which were stayed while the other Counts raising the substantive claims were adjudicated below). However, there was nothing improper about opposing Defendants motion in this way. Indeed, the NJLAD issues were not even placed before the Trial Court before Defendants filed their motion. Despite Defendants' claim to the contrary, no expert report was required to oppose the

motion. The issues raised by Mr. Bernard would have been raised at a trial on the NJLAD claim if such a trial took place. Plaintiffs respectfully submit that dismissal of Plaintiffs' NJLAD claims as a matter of law was improvident, and that such a trial should take place upon remand.

On a substantive level, the actions below were, indeed in violation of the provisions of the NJLAD, which forbid discrimination in housing against the classes protected by the NJLAD. Defendants engaged below in willful conduct designed to deprive racial minorities and other families, who would directly benefit from approval of the application, of their rights to housing.

As set forth in Plaintiffs' initial Brief and the Certification of Mr. Bernard, Monroe Township has a much higher percentage of single-family homes than other communities in Middlesex County and in New Jersey. Because minorities (specifically African-American and Hispanic) comprise a disproportionate percentage of residents in low-income multi-family housing, it follows that the number of minority residents in Monroe would be disproportionately low. By failing to allow the development of a multi-family residential development with an affordable housing component, the Defendants have taken actions resulting in discrimination against classes protected by the NJLAD.

CONCLUSION

For the reasons set forth above and in Plaintiffs' initial Brief on appeal, the relief sought by Defendants on appeal should be denied, and the relief sought on Plaintiffs' cross-appeal should be granted, with the Court remanding this matter for a trial on the cross-appeal issues, including the quantum of damages, attorney's fees and costs due to Plaintiffs.

Thank you for your kind attention to this matter.

Respectfully submitted,

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s/ Thomas F. Carroll, III

By: _____
Thomas F. Carroll, III, Esq.

Dated: January 18, 2024