SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-003086-22T4

HOPEWELL BOROUGH, a political sub-division of the State of New Jersey, PENNINGTON BOROUGH, a political subdivision of the State of New Jersey PAUL ANZANO, individually, and JAMES DAVY, individually,	:	CIVIL ACTION
	:	ON APPEAL FROM THE FINAL ORDER OF THE
	:	SUPERIOR COURT OF NEW JERSEY,
	:	LAW DIVISION
Plaintiff-Appellants,		DOCKET NO. L-497-22
	:	
v.		Sat Below:
	:	HON. ROBERT LOUGY, A.J.S.C.
HOPEWELL TOWNSHIP, a political sub-Division of the State of New Jersey and COURTNEY PETERS-MANNING, individually and in her official capacity as Mayor, MICHAEL RUGER, individually and in his official capacity as Deputy Mayor,	:	
(Caption Continued Inside Cover)	:	

BRIEF ON BEHALF OF PLAINTIFF-APPELLANTS

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Date Submitted: October 11, 2023

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U.S. HOME AT HOPEWELL PARC URBAN RENEWAL, L.L.C., U.S. HOME :
CORPORATION d/b/a LENNAR, and ABC CORP 1-5 (fictitious entities including public: entities) and JOHN DOES 1-5 (fictitious individuals), :

Defendant-Respondents. :

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PRELIMINARY STATEMENT

This case challenges the legality of a thirty-year exemption from real property taxes granted by Hopewell Township to the developer Lennar for a 1,077 unit residential development which will include a 20% set-aside for affordable housing ("the Project"). Pa494. Plaintiffs do not question the value of the Project in responding to area needs for housing, particularly affordable housing. All at issue is the justification under the Long Term Tax Exemption Law for an exemption for a development that stands to be extremely profitable to Lennar but that will inflict a major cost on the Boroughs by shifting $25,000,000 of school tax burden to their taxpayers.

Central to the appeal is the meaning of the statutory criteria for a tax exemption in the Long Term Tax Exemption Law (LTTEL) N.J.S.A. 40A:20-1et seq. and whether the criteria can be satisfied by conclusory recitals or whether the statute requires evidentiary support. Plaintiffs argue that the criteria require supportable findings that the exemption is necessary to make a development Project financially feasible. The Trial Court disagreed, ruling that so long as procedural formalities for exemption are observed, LTTEL does not obligate the municipality to provide any evidence supporting its findings. The Court denied Plaintiffs discovery of defendants' underlying financial analyses and, although

Plaintiff's expert report called the findings into serious question, it discounted that report, stating that there was no disputed factual issue to explore because the recitals in the Ordinance were all the LTTEL required.

Plaintiffs maintain that the Trial Court applied the wrong legal analysis to the interpretation of the LTTEL. Its analysis, essentially immunizing long-term tax exemptions from meaningful judicial review, could invite misuse of the exemption power to achieve ends wholly unrelated to the redevelopment goals of the statute. Plaintiffs also maintain that defendant Hopewell Township's determination that a thirty-year term exemption was necessary to make the development financially feasible and to influence buyers to locate there lacks credibility. The record shows that defendant Lennar, with the exemption, will realize an unleveraged internal rate of return of 67.9% on its invested capital. It further shows that an exemption structured to require buyers to pay almost full taxes for 25 of the 30 year period cannot plausibly be viewed as a means of influencing purchasers to locate there. Plaintiffs further maintain that the real purposes for the exemption were the improper ones of shifting a significant portion of the school tax burden, estimated at $25,000,000 over thirty years, to Plaintiffs, and of generating a new and lucrative source of revenue for Defendant Hopewell Township.

Plaintiffs maintain that the LTTEL must be interpreted to require substantial evidence showing that an exemption is in fact necessary to make a redevelopment

project happen. Accordingly, Plaintiffs ask this Court to reverse the Trial Court's ruling to the contrary and to grant appropriate relief.

PROCEDURAL HISTORY

This is an action in lieu of prerogative writ brought to invalidate a long-term tax exemption granted to the developer of an inclusionary housing development in Hopewell Township. The developer is U.S. Home at Hopewell Parc Urban Renewal L.L. C., which is fully owned by U.S. Home Corporation, which is fully owned by Lennar Corporation. ("Lennar") Pa 352. The exemption was granted by the Hopewell Township Committee on February 22, 2022, after a public hearing, by adoption of Ordinance 22-1766 titled "Ordinance of the Township of Hopewell, County of Mercer, State of New Jersey, Approving the Application of and the Execution of Financial Agreement with U.S. Home at Hopewell PARC Urban Renewal, LLC" [the "Ordinance"]. Pa 649.

Plaintiffs are Hopewell Borough, Pennington Borough, and Hopewell Borough Mayor and resident Paul Anzano and Pennington Borough resident and Mayor James Davy. ["Plaintiffs"] Plaintiffs timely filed the Complaint in Lieu of Prerogative Writ on March 17, 2022. Pa 138 The Complaint named Hopewell Township, ("Township"), individual Township Committee members, and Lennar and affiliated fictitious entities as Defendants. On May 6, 2022 in response to a

motion by the Township, the individual Committee members were dismissed by consent order. Pa 266.

The three-count Complaint sought declaratory relief that the Ordinance was invalid as arbitrary, capricious and unreasonable and in violation of law because the exemption did not comply with the justification required by the Long Term Tax Exemption Law (LTTEL), N.J.S.A. 20-1, et seq. , and was adopted for improper purposes, including shifting a significant tax burden to plaintiff Boroughs.

After a case management conference, the parties propounded discovery requests. Pa 213, 203. Co-defendants Hopewell and Lennar moved to suppress Plaintiffs' requests on the grounds that they sought propriety information and information protected by the deliberative process privilege.Pa 182; 185; 197; 200. On July 28, 2022, Fair Share Housing Center (FSHC) filed an unopposed motion to intervene on behalf of defendants. Pa 252. In support of the need for discovery, Plaintiffs submitted a detailed Certification by Robert S. Powell, Jr., an expert in real estate finance and development, questioning the adequacy of the factual support for the exemption. Pa 239 On September 12, 2022, following argument, the Trial Court ruled for defendants and entered an "Order Granting Defendants' Motion for Protective Order Pursuant to Rule 4:10-3", Pa 30, and an Order admitting FSHC as amicus curiae. The Court found discovery not warranted

because in its view there was no disputed factual issue because the Ordinance and its Financial Agreement findings were sufficient under LTTEL. Pa 58.

After briefing accompanied by supplemental Certifications, a merits trial was held on On May 1, 2023 consisting entirely of arguments by counsel. The Court ruled for defendants and entered an Order Dismissing the Complaint With Prejudice, along with a supporting opinion. Pa 1. Relying on the presumption of validity that attaches to municipal ordinances. the Court reiterated its view that the Ordinance satisfied the requirements of the LTTEL and required no evidentiary backup. It discounted Certifications by plaintiffs' experts as of no weight and it found that, whether or not shifting the school tax burden might have been a purpose, the Ordinance was nevertheless valid because it had the proper purpose of providing for affordable housing. Pa 114, 116.

Plaintiffs timely filed this appeal on July 23, 2023.

STATEMENT OF FACTS

The thirty-year exemption from real property taxes was granted by Hopewell Township to defendant Lennar for a 1,077 unit residential development which will include a 20% set-aside for affordable housing ("the Project"). Pa494. The property is located on Scotch Road in Hopewell Township north of I-95 and consists of approximately 190 acres of vacant land, presently wooded or in agricultural use. It was acquired by defendant Lennar after it was designated as an

"area in need of redevelopment" by the Township pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40:12A-1. Through the subsequent redevelopment process, the Township entered into redevelopment agreements authorizing Lennar to apply--through its urban renewal entities--for a long-term tax exemption under the Long Term Tax Exemption Law, N.J.S.A. 40A:20-1 et seq. ("LTTEL") The issues arising from the exemption center on the return Lennar is projected to make, whether the exemption was at all necessary to make the project financially feasible, and the lawfulness of making exemption decisions for reasons unrelated to the needs of the redevelopment project.

The mix of units in Lennar's Project will include apartments, townhomes, stacked townhomes, condominium units and free-standing single-family homes. Plans call for 808 for-sale units (or 75% of total units) and 269 rental units, all apartments (25% of total units). Pa661. The up to 216 units to be designated affordable housing are described as affordable condos (162) and affordable apartments (54). Id.

According to the Township experts, the total cost of the Project will be approximately $300 million, including all construction costs, land acquisition, soft costs and financing costs. Pa661. The projected market value of the 808 for-sale units is a "conservative" $285 million and the market value of the 269 rental units is estimated at $47 million, for a total of $332 million (all rounded figures). Id.

This means that the market value of the for-sale units represents 85% of the total value of all units in the Project.

The exemption approved by the Township is accompanied by a 30-year agreement for payments-in-lieu of taxes ("PILOT"). The PILOT will yield the Township an estimated $387 million in unrestricted revenue over 30 years, 6 times the $67 million in municipal taxes it could otherwise collect. It will also keep the Project off the tax rolls for at least that long. (The exemption period may be extended for a phased development to 50 years. T1.51:2.)[1]

The Plaintiff Boroughs are partners with Hopewell Township in the Hopewell Valley Regional School District, which is funded by each of the three municipalities through school taxes in proportion to ratable wealth. Keeping a $330 million ratable off the Township's tax rolls for 30 years will reduce the Township's share of school taxes while shifting an estimated $25 million of school costs to Plaintiffs. Over the same time period, the developer will earn by its own calculation a 67.9% return on equity. Pa705, par 18.

At the public hearing on the Ordinance that approved the Financial Agreement granting the exemption and PILOT, the Township's legal and financial experts advised the governing body and the public that the Long-Term Tax

[1] The three transcripts in this appeal are designated T1 (hearing before Hopewell Township Committee on February 22, 2022); T2 (argument before Trial Court on motion to suppress discovery on September 9, 2022); T3 (trial on March 28, 2023).

Exemption Law "allows municipalities to grant PILOTs [to] the projects that would not otherwise be able to be financed," T1.51:14-52:4, and that, based on a "comprehensive financial analysis" it has been determined that "[t]his project would likely not occur in its current form without a PILOT." Pa649; Pa658.

The findings in support of the tax exemption and PILOT, approved by the Township Committee as part of the Financial Agreement, purport to be grounded in the need for the exemption to make the project happen. These findings are set forth in Sections 9.01 and 9.02 of that agreement, both underscoring in identical language:

> "Considering current market conditions, economic factors and development costs impacting this Project, it is not financially feasible to undertake the development of this Project in the absence of the tax exemption provided for herein."

Pa623, 624.

In fact, there is no "comprehensive financial analysis" of record to support this and related findings. Pa242, par 9. Plaintiffs have attempted in vain to identify the underlying financials by requesting the supporting documentation through discovery, Pa213, but both Defendants successfully opposed these efforts and obtained a ruling barring discovery. Pa182, 197; Pa30.

In support of their discovery efforts Plaintiffs submitted the certification of Dr. Robert Powell of Nassau Capital Advisors as an expert in real estate finance

and development. Pa240. Dr. Powell has served as advisor to scores of municipalities considering whether to grant similar PILOT agreements to redevelopers. Pa242, par 7. His resume is part of the record at Pa248.

Dr. Powell reported that "nowhere in the presentation was any evidence of financial analysis" that supported the conclusion that the Project would not likely occur in its current form without a PILOT. Pa242, par 9. The absence of such analysis, he added, reduces any such representation to a "net opinion" and therefore "not credible as the evidentiary basis of the Township Committee's official actions." Pa243, par 11.

Dr. Powell explained that an appropriate analysis would require a pro forma cash flow projection together with detailed costs and sources and uses of funds. Pa242, par 9. He advised that financial modeling of this kind is commonly done in connection with determining the nature and extent of the need for a PILOT and the developer's projected return on investment with and without full real estate taxes. Id.

The Township experts testified at the Ordinance hearing that the financial analysis in this case included "(i) modeling the projected PILOT revenues, other applicable conventional taxes and overall economics of the Project; (ii) how it will impact services across the Township and School District; and (iii) a review of revenues against incremental costs to ensure that a PILOT is sufficient to fully

cover these costs." Pa659; Pa243, par 10. However, as indicated, the Township has been successful in shielding that analysis from disclosure. Pa243, par 11.

The Issue of Extraordinary Costs as Justification for the Exemption

In the Application for Tax Exemption, Exhibit 16 asks the Defendant Lennar to:

> "Attach an explanation of why the applicant believes that a long term tax exemption is necessary to make this Project economically feasible. Include specific figures where possible to explain any financing gaps."

Lennar's response reads in its entirety:

> "Due to excessive off-site sewer and water infrastructure obligations as well as excessive sewer reservation fees"

(no period in original) Pa597.

Plaintiffs' requests for discovery included requests for engineering, financial and planning reports and details relating to the basis for this statement. Pa221, nos. 7-10. During argument on the motion to suppress discovery, while declining to provide the requested information, Mitchell Newman, Lennar's Director of Land Acquisition and Entitlements, sought to supplement Exhibit 16. He submitted a certification representing that Lennar's response to Exhibit 16 "is the crux of Lennar's application for a long-term tax exemption for this Project" and that "the sewer and water costs of the project were far in excess of the reasonable and ordinary costs of a typical residential project." Pa192, par 30. He then specified a variety of costs totaling $17,547,005, labeling but not explaining them. The largest

costs are a "Capacity Fee + Connection Fee (to be paid)" totaling $11,404,218. , Id., together with $4,057,000 for the construction of a sewer force main from the Project to the required manhole in Ewing Township on the south side of I-295. Pa193, par 31. The overall reported total is $17,547,005.

Dr. Powell submitted a second report responding to these claims for briefing in the merits case. Pa699. He observed that "Mr. Newman does not indicate anywhere in his certification the basis for his claim that such costs were 'excessive' in the context of a project with total development costs of $304 million. Nor does he explain how the very modest and short-term relief from real estate taxes provided by this PILOT agreement would be critical in mitigating these 'excessive fees.'" Pa704, par 13.

In his reference to "short-term" tax relief, Dr. Powell was referring to the structure of the tax exemption, an issue described further below.

The Issue of Profitability

Dr. Powell's second report reveals that Exhibit 13 in the "Home Building Income Statement by Plan," included in the Application for Exemption, contains relevant financial information about the likely financial results of the Project. Pa705, par 18. By Lennar's own projection, " 'Unleveraged IRR' produced by the project would be a remarkably high 67.9% on the developer's invested equity capital." Id.

Based on his professional experience in "structuring financing and equity investments for more than 100 similar projects," Dr. Powell explains that a "well-conceived and sponsored project needs to demonstrate an unleveraged IRR in the range of 10% - 12% in order to attract the equity capital needed as a source of funds." Pa705, par 20. The developer's own projection that the Project will "produce an unleveraged IRR of 67.9% [is] more than five times this benchmark standard." Id.

> "This extraordinary profitable return is projected despite the so-called 'extraordinary costs,' and with a very modest short-term PILOT agreement." Id.

Dr. Powell concludes that the Project would be financially viable if it were subject to full taxes and that without the tax exemption it would still be constructed. Pa706, par 22) Although the IRR would be reduced with full taxes, it "would still have been at least two or three times the IRR level needed to confirm the project as financially feasible based on the standards of expected investor returns in the capital markets. Id.

The Structure of the Exemption and the 30-Year Term

The PILOT differentiates between "Multi-family" and "Single-family" components of the Project. For the Multi-family component, the annual PILOT will be:

> (i) for years one (1) through five (5), sixty-six percent (66%) of conventional real estate taxes;

(ii) for years six (6) through ten (10), seventy-five percent (75%) of the conventional taxes;
(iii) for years eleven (11) through thirty (30), ninety-nine and one-half percent (99.5%) of the conventional taxes. Finance Agreement (FA), Sec 4.03, A,B,C, Pa614.

For the Single-family component, the annual PILOT will be:

(i) for years one (1) through five (5), 75% of conventional taxes;
(ii) for years six (6) through thirty (30), ninety-nine and one-half percent (99.5%) of conventional taxes. FA, Sec 4.04, A,B, Pa615.

Lennar will not pay the PILOT for units transferred to purchasers. Instead, upon the sale of any unit, Lennar will be relieved of any obligation for the unit, including payment of the PILOT. FA, Sec 8.07, 8.08, Pa 623. That responsibility transfers to the Unit Purchaser. FA, Sec 1.02 ("Unit Purchaser'), Pa 610. The developer will only pay taxes on the part of the land for which no certificate of occupancy has yet been issued, based on the then applicable assessment. FA, Pa 615.

During the period of tax exemption, LTTEL limits the profits and dividends the Project owner can receive. N.J.S.A. 40A:20-15. FA, Sec 7.04, Pa619. However, and importantly, this limitation does **not** apply to gain realized on the sale of units. Id.; N.J.S.A. 40A:20-3(a).[2]

[2] The definitions of "Allowable Net Profit" and "Allowable Profit Rate" require a determination of "Annual Gross Revenue," which as defined by the statute excludes gain realized on the sale of units. Pa607,619; N.J.S.A. 40A:20-3(a).

Dr. Powell addressed the structure and duration of the exemption and PILOT in both of his reports. He concluded that even if data or analysis were produced indicating that the application of full property taxes would undermine the financial feasibility of the Project at any time during the 30-year exemption period, all owners paying 99.5% of full taxes for most of that time would not resolve the problem. Pa246-7, par 19.

He explained that even if the modest 5-year and 10-year incentives were a material factor in the project's feasibility, which has not been demonstrated, then "[a]t these five- and ten-year intervals, *all the improvements should logically be returned to the Township tax rolls as ratables*." Pa247, par 20. (italics and underlining in the original)

In his expert report on the merits, Dr. Powell stated:

> ". . . I find no basis whatsoever related to financial need for the term of this Financial Agreement to extend for 30 years. To the extent the Financial Agreement provides any benefit to the developer, the duration of that benefit is sharply limited by the Financial Agreement." Pa 706-7

The Issue of Accelerating the Sale of the Units

In a Supplemental Certification in support of Lennart's motion to strike Plaintiffs' discovery requests Lennar's expert Mitchell Newman changed the rationale for the exemption given in Exhibit 16. In his supplemental offering, he maintained that the "primary benefit" of the PILOT agreement for Lennar is that it

will facilitate sales and. . .provide a desired absorption rate in the development," Pa260, par 14, meaning facilitate the "pace" of sales. Pa261, par 15.

There are no data or analytical information in the record by which to assess Mr. Newman's assertions about the importance of the exemption for the "absorption rate" of affected homes. Dr. Powell's opinion was that owners paying 99.5% of full taxes for all but 5 years of the 30-years the PILOT is in effect will not accomplish much:

> "Based on my experience in structuring long-term PILOT agreements for for-sale housing, a 5-year term for such tax relief is not a material incentive to accelerate the sales pace or full pricing of such units, because the incentive is of such limited duration." Pa246, par 19.

Significantly, Mr. Newman's absorption rate rationale is not borne out by statements at the Ordinance hearing. At that hearing, a Township representative who had been in negotiations with Lennar said that it "was intentioned by the Township to minimize the impact of this PILOT program on the existing single family home supply in the Township" and that that "was a specific issue that the Township wanted us to address as we negotiated the terms." T1.61:22-62:14.

The Issue of Purpose

The conclusion that this Project would be financially viable if it were subject to full taxes, Pa706, par 21, and that the Project would be built regardless, Id., par 22, raises a question as to the actual purpose for the exemption.

The PILOT as a New Revenue Source for the Township

At the Ordinance hearing, the Township Committee's Finance Chair Kevin Kuchinski made no mention of the need for the PILOT to make the Project succeed. T1.30:11. Instead, he depicted the PILOT as a new revenue source for the Township and a means for shifting regional school costs to the Plaintiffs. Beginning at T1.30:11.

Mr. Kuchinski made a Power Point presentation entitled "Hopewell Township: Financing Our Future – New Municipal Revenue Sources for a Changing World." Copies of the slides are found at Pa674, et seq.. He explained how a PILOT can serve as a new funding source for the general financial needs of the Township:

> "We're here tonight, really, to talk about new municipal revenue sources for a changing world. * * * [W]e have a proud record of financial responsibility. Hopewell Township has the lowest equalized municipal tax rate in Mercer County, but we face some challenges. One, state aid has been flat at roughly 1.6 million since 2011 and now covers only 6.6 percent of expenditures. Beginning in last decade, the state diverted, the legislature diverted significant portions of the energy tax distributions that municipalities used to receive towards other priorities. And that diversion created significant funding gap at local levels, roughly a million and a half, just over a million [and] a half dollars for Hopewell Township. Some of our non-tax revenues are relatively small but * * * several have been negatively impacted by COVID-19. For example, our cumulative municipal court revenues are now down over 70 percent versus 2015 or approximately $287,000, and then our debt level remains relatively high. So the challenge * * * is to deliver the services our residents expect while keeping property taxes as low as possible. And so we have been working over the recent years to seek new revenue sources for a

> changing world. And one potential solution which we're going to discuss in more detail today are PILOTs.

T1.33:6-34:7. (emphasis added)

That the PILOT would yield $387 million in new revenues was the focus:

> "[T]he focus of tonight in this ordinance is * * * a new PILOT for Hopewell Par[c] which will deliver 387 million in new revenues over its 30 year term, which is approximately six times higher than conventional * * * taxes. Importantly, PILOTS can also support investments in our schools and EMS services, they can fund new services and amenities for residents and they can be used to offset residential property taxes."

T1. 35:16-24. A related slide at Pa696 showed a projected 387 million in PILOT revenues compared with 67 million in property taxes the Township would otherwise collect as the municipal share of the total tax bill, a 5.8 to 1 ratio.

Mr. Kuchinski concluded his presentation with an invitation to the community to get involved in deciding how the new money should be spent:

> "[W]e still ahead have additional discussions of how to use the incremental revenue from these PILOTS, but some of the opportunities will be Number 1, to reduce the municipal taxes by paying off the Township's outstanding debt. That will enable us to fully fund future year capital needs through the regular operating budget, fund upgraded facilities for our EMS and other first responders. As you heard tonight, we are moving forward with the study of those future needs in this year's capital budgets. And then there is the potential for other new community amenities, including a new senior and community center. Third, you know, the PILOT revenues will enable us to fund Hopewell Township share of the school district levy on incremental school obligations, offsetting any tax impact for current residents. * * * And then finally, an opportunity to continue to accelerate road

> repair and maintenance in Hopewell Township. So we look forward to working with our residents and community partners on other ideas and proposals towards a better Hopewell Township. So stay tuned for opportunities to get involved and to provide input."

T1.46:5-47:6. (emphasis added)

There was not a single allusion to how the PILOT revenues will benefit the Project or how the conventional tax revenues it would otherwise generate would be insufficient to meet related needs. As the Township's financial experts pointed out, the projected PILOT revenue "exceeds" the estimated incremental school costs[3] and will have only a modest impact on public safety and emergency services expenditures, exceeding estimated incremental municipal costs overall. Pa666. The $320 million more in revenue to the Township in excess of the municipal share of conventional taxes will "far exceed" the estimated incremental municipal and school costs. Pa667.[4]

The PILOT as a Means of Shifting Regional School Costs

Mr. Kuchinski began his presentation talking about the schools,

[3] "Projected School Costs" indicate that the Project will generate 342 new students at a total cost of $4,992,748. Pa665.

[4] The Finance Agreement defines both the "Multi-family Component Annual Service Charge" and the "Single-family Component Annual Service Charge" (i.e., PILOT) as the "amount the Entity has agreed to pay the Township . . . pursuant to Article IV for municipal services supplied . . . which sum is in lieu of taxes on the Land and Improvements. . . ." Pa609.

representing that a PILOT does not have a bearing on the school funding process," T1.31:14-15, and affects only how school costs are shared among the school partners:

> "[H]ow this school tax is distributed between the towns is determined by the Mercer County tax assessor. * * * [O]ne of the things that we have expressed concern over, over the past couple of years is with the school budget representing just under 60 percent of the total tax bill. The allocations of these monies do matter, and with the current formula, Hopewell Township is currently paying 34 percent more per student for its students enrolled in the Hopewell Valley Schools than the boroughs, which amounts to $3.8 million in additional costs for Township residents."

T1.32:12–33:6 (emphasis added) The related presentation by Township expert Morris at public hearing confirmed these data. Pa663.

Comments by the Township's Deputy Mayor Michael Ruger further stressed the link between the tax exemption/PILOT issue and the distribution of school costs affecting the Boroughs. He confirmed with Mr. Morris the basis for Mr. Kuchinski's remarks that Township residents "already paid $3.3 million more per year in taxes given the way the formula's set for schools." In these circumstances, he continued, "[I]t seems that the good folk of Hopewell Township are already doing more than their fair share for paying for the schools in that regard. That's all that I have." T1 .77:5-21.

During public comment, Plaintiff James Davy spoke in opposition to the Ordinance, explaining the lack of need for the PILOT. He argued that the 20% set-

aside and zoning accommodations would be sufficient to ensure the viability of the development as they have been in the past for similar projects. He also challenged the Township shifting its tax burden to the Plaintiff Borough taxpayers. T1.82:25-85:12. Hopewell Borough Councilperson Ryan Kennedy spoke in a similar vein. T1.89:23-91:14.

After public comment closed, the Township's Mayor Peters-Manning also addressed the issue of the school Funding formula:

> "I wanted to first address [Pennington] Mayor Davey and Councilman Kennedy from Hopewell Borough. * * * [R]ight now the school funding formula disadvantages Hopewell Township taxpayers. We showed the slide that Hopewell Township taxpayers pay 30 percent more per pupil than borough taxpayers pay. So we are as Township taxpayers essentially subsidizing students from the boroughs. And that's not fair and I, I don't want to promise anything in particular, but until that at least begins to equalize and become more fair and improve[,] [m]y responsibility is to the Hopewell Township taxpayers first and foremost. * * * [W]e need to do something about the fact that the school funding formula right now is not fair to our taxpayers."

T1.118:22-120:7. (emphasis supplied).

In Dr. Powell's second report, on the merits, he estimates that the exemption will shift a $25,000,000 school tax burden to plaintiff Boroughs. He explains his methodology in detail at paragraphs 25 through 33 of his report. Pa707-708. He concludes:

> "Thus, in my professional opinion, for the reasons set forth herein, the only material financial consequence of this PILOT agreement is to cause a substantial cost-shift of the regional

> school funding burden away from Hopewell Township and on to the property taxpayers of Hopewell Borough and Pennington Borough. The PILOT agreement will have no material impact (positive or negative) on the financial feasibility of the Project."

Pa707, par 34.

LEGAL ARGUMENT

I. THE TRIAL COURT APPLIED THE INCORRECT LEGAL STANDARD IN EVALUATING THE VALIDITY OF THE LONG-TERM TAX EXEMPTION

A. A LTTEL EXEMPTION REQUIRES FINDINGS THAT A REDEVELOPMENT PROJECT WOULD NOT BE FINANCIALLY FEASIBLE WITHOUT IT

The Long Term Tax Exemption Law was enacted in 1991 to further the purposes of the Local Redevelopment and Housing Law (LRHL)(Local Redevelopment Law), N.J.S.A. 40:12A-1 et seq., through the use of special financial arrangements, including the granting of property tax exemptions. In particular, LTTEL sought to encourage investment by "private capital" in projects designed to further the public purpose of restoring "deteriorating or neglected properties" and eliminating "blighted conditions. N.J.S.A. 40A:20-2. See MEPT Journal Square Urban Renewal LLC v. Jersey City, 455 N.J. Super. 608, 623 (App. Div. 2018), *certif. den.* 236 N.J. 387 (2019). Importantly, Section 40A:20-2 of the LTTEL directs that the act "should be construed in conjunction with" the Local Redevelopment Law. Id. See, e.g., Millennium Towers Urban Renewal

LLC v. Municipal Council of City of Jersey City, 343 N.J. Super. 367, 778 A. 2d 498 (App. Div. 2001)(emphasizing that LTTEL and LRHL must be construed in concert).

Both the LTTEL and the LRHL in turn have a grounding in the taxation provisions of the New Jersey Constitution. Accordingly, the taxation parameters set by the Constitution provide an essential backdrop for questions of interpretation arising under both the LTTEL and the LRHL. The Uniformity Clause, Article VIII, Section 1, paragraph l(a), provides that property is to be assessed under general laws and by uniform rules.[5] Exemptions undermine uniformity, and special constitutional provisions have been necessary to create exceptions to the limitations imposed by the Uniformity Clause. For redevelopment, the Blighted Areas Clause, Article VIII, Section 3, paragraph 1, identifies urban redevelopment as a public purpose for which eminent domain may be used. The Clause permits the legislature to delegate to municipalities the power to grant tax exemptions or tax abatements for limited periods of time to facilitate

[5]Article VIII, Section 1, paragraph 1(a) provides in full that "Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value, except as otherwise permitted herein, and such real property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district

the redevelopment of blighted areas.[6] Since both LTTEL and LRHL have their constitutional footing in the Blighted Areas Clause, both statutes must be construed in light of its constraints. See, e.g., Malanga v. Tp. of West Orange, 253 N.J. 291, 309 (2023) (construing LRHL with reference to the Blighted Areas clause); 62-64 Main ST. v. Mayor & Council of Hackensack, 221 N.J. 129, 134 (2015) (LRHL).

It is worth pausing to emphasize that the question of interpretation at issue does not involve the procedural steps required by the LTTEL[7], because Plaintiffs agree that those procedures were followed. Nor does the issue concern the inclusionary redevelopment plan and its affordable housing component, for Plaintiffs have not questioned the plan and certainly not its provision for needed affordable housing. Rather, at issue is the interpretation of N.J.S.A. 40A:20-11 which, plaintiffs argue, imposes on the municipality the obligation to ensure that a

[6] Article VIII, Section 3, paragraph 1, provides in full that "The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired. Municipal, public or private corporations may be authorized by law to undertake such clearance, replanning development or redevelopment; and improvements made for these purposes and uses, or for any of them, may be exempted from taxation, in whole or in part, for a limited period of time during which the profits and dividends payable by any private corporation enjoying such tax exemption shall be limited by law. The conditions of use, ownership, management and control of such improvements shall be regulated by law."

[7] LTTEL provides detailed procedures to be followed by urban renewal entities who wish to qualify for a tax exemption.

long term property tax exemption is required to attract investment in a redevelopment project.

An entitlement to a long term exemption does not follow automatically from an ANR declaration or approval of a redevelopment plan with or without an affordable housing component. Millennium Towers Urban Renewal LLC v. Municipal Council of City of Jersey City, supra, 343 N.J. Super. at 376. Rather, the LTTEL specifically mandates that the financial agreement include findings that establish the appropriateness of the proposed exemption. In particular, N.J.S.A. 40A:20-11 provides:

> "A financial agreement approved pursuant to this act shall include *findings by the municipality*, approved by the municipal governing body, setting forth *appropriate* tax exemption provisions and an appropriate annual service charge schedule which shall be based upon the provisions of section 12 of this act and the municipalities determinations as to
>
> a. The relative benefits of the project to the redevelopment of the redevelopment area when compared to the costs, if any, associated with the tax exemption.
>
> b. An assessment of the importance of the tax exemption to be granted in obtaining the development of the project and in influencing the locational decisions of probable occupants of the project." [Emphasis added]

The core question, then, in determining whether an exemption is "appropriate," then, is whether the exemption is actually necessary to attract investment in a redevelopment project. If an exemption is not needed to attract

private capital, any cost-benefit analysis required by N.J.S.A. 40A:20-11a. is moot and the exemption itself would be constitutionally problematic since it would be unmoored from the redevelopment goals of the Blighted Areas Clause.

Indeed, the Township's own experts have confirmed the critical importance of this criterion. At the public hearing on the Ordinance, attorney Kevin McManimon, appearing for the Township as an expert, testified:

> A long-term tax exemption law allows municipalities to grant PILOTS [to] the projects *that would not otherwise be able to be financed, projects that would not likely occur in their proposed form without the PILOT*. Redevelopment projects in general are frequently unable to attract private investment without assistance in the form of a municipal PILOT or in some cases, bond financing.
>
> The combination of risks associated with redevelopment projects and the uncertainty of conventional taxes make marginal projects difficult to finance. That's common because by definition, you're talking about the development of properties or projects that face stresses, burdens that * * * the development of raw land, proximate utilities and things like that don't otherwise face.[8]

[8] Mr. McManimon's analysis is confirmed by the Municipal Tax Abatement Handbook of the N.J. Department of Community Affairs which states: "[T]he tax exemption laws exist to incentivize private developers to invest in the development of a property or area of a municipality in a manner that may not be economically viable without a financial incentive." Municipal Tax Abatement Handbook, Department of Community Affairs at 5. A 2010 report by the Office of the State Comptroller entitled A Programmatic Examination of Municipal Tax Abatements, (OSC Report) makes the same point:

"While abatement of taxes otherwise owed is uniformly positive from the perspective of the developer, it results at least in the short term in lost revenues for

The "findings" made by the Township likewise confirm that the Township understood the test of "appropriateness" under 40A:20-11 to be whether the exemption is necessary to make the development happen. Seven of the representations in Sections 9.01 and 9.02 of the Financial Agreement declare in various ways that the exemption is necessary. Most specifically, both Sections conclude with the representation that the long-term exception is necessary to make the project "financially feasible."

B. THE ORDINANCE FINDINGS ARE CONCLUSORY

Throughout this litigation, plaintiffs have maintained that the Township's findings are conclusory, meaning lacking in any supporting evidence, and thus do not meaningfully respond to the statutory requirements. The point is best understood from a brief analysis of the sections in the Financial Agreement with "findings" that respond to the statutory requirements:

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government entities. In addition, these financial arrangements can create tax inequity and present opportunities for unfair favoritism. . . . . *Given these concerns, municipalities' use of abatements warrants scrutiny, particularly in ensuring that the abatement of taxes is necessary to spur the property owner's investment.*" T1.51:14-52:4 at 3 (emphasis added)

The first, cost-benefit, paragraph reads:

"SECTION 9.01 Relative Benefits of the Project

In accordance with the Long Term Tax Exemption Law, specifically N.J.S.A. 40A;20-11(a), the Township hereby finds and determines that this Agreement is to the direct benefit of the health, safety, welfare and financial well-being of the Township and its citizens despite the tax exemption granted hereunder. The Property is currently underutilized. The Project will redevelop the site with a mix of approximately 1,077 residential units consisting of apartments, townhomes, stacked townhomes, condominiums and single family homes, subject (*sic*) to Article III of the Redevelopment Agreements, at least the lesser of 20% of the total residential units or 216 of residential units or 216 of such units will be Affordable Units, to be sold or leased at market rates and affordable rates, as applicable, in accordance with the Redevelopment Plan, the redevelopment Agreements and Site Plan Approval. The Project will create approximately 2,410 construction jobs and 10 permanent jobs. The Project will generate significant amounts of new (otherwise unavailable) municipal revenues through the Annual Service Charge, construction permit fees and water/sewer fees. More importantly, the Project will help the Township fulfill its constitutional obligation to provide housing opportunities for households with limited incomes. *Considering current market conditions, economic factors and development costs impacting this Project, it is not financially feasible to undertake the development of this Project in the absence of the tax exemption provided for herein."* [Emphasis added]

The second paragraph, addressing the need for the exemption, reads:

SECTION 9.02 Importance of Tax Exemption
In accordance with the Long Term Tax Exemption Law, specifically N.J.S.A. 40A:20-11(b), the Township has reviewed the Application and accompanying financial information and it has determined that this Agreement is a critical in Project in the Township due to the extraordinary costs associated with the development of the Property. The tax exemption permits the development of underutilized property and provides a stream of revenue in the form of the Annual Service Charges. The Annual Service Charge will allow the Units to be sold at marketable prices and leased at marketable rates, which will ensure the likelihood of the success of the

> Project and ensure that it will have a positive impact on the surrounding area. The tax exemption permits the development of the Project in an area that cannot otherwise be developed in its proposed scope by reducing the expenses associated with the ownership or operation of the Project. Reduced expenses allows for more competitive purchase prices and rents, thus helping to ensure the Project's success. As a result, the locational decisions of the probable residents and tenants will be influenced positively by the tax exemption. *Considering current market conditions, economic factors and development costs impacting this Project, it is not financially feasible to undertake the development of this Project in the absence of the tax exemption provided for herein. Without the Project, the benefits described above would not be realized*." [Emphasis added].

Section 9.01, which purports to be a cost-benefit analysis focuses only on benefits. The benefits cited include *regional* benefits in the form of 2,410 construction jobs[9] and, of course, affordable housing. However, Section 9.01 is silent on costs, most particularly the shift of a $25,000,000 school tax burden to plaintiff Boroughs, a significant cost that under the plain language of the statute should have been weighed. Cf. Cresskill v. Dumont, 15 N.J. 235, 247 (1954)(municipal zoning decisions must consider adverse effects on residents and taxpayers in adjoining municipalities). Finally, both Sections are bereft of any analysis to support the claim that the project would not be feasible without the exemption.

[9] It can be assumed that many of the construction jobs will be filled by employees living outside of Hopewell Township and the Boroughs.

Thus, even though Section 9.02 says the Township "has reviewed the Application and accompanying financial information" the section includes no data, no analysis. While the Township's expert stated in the Ordinance hearing that a comprehensive financial analysis had been performed, he did not disclose its contents. Indeed, to date that analysis has not been disclosed, defendants having persuaded the Trial Judge to quash discovery.

Section 9.02 further asserts that the exemption "is critical" due "to the extraordinary costs associated with the development of the Property." Again, however, it provides no explanation, comparative figures or other analysis to support the assertion. Only to defend its motion to bar discovery did Defendant Lennar provide cost figures, and even then without explanation or analysis.[10]

Section 9.02 goes on to state that the long-term exemption will reduce the expenses of the Project and that the "locational decisions" of probable tenants or residents "will be influenced positively" by the exemption. The reasonableness of these representations, based on a 30-year tax exemption requiring affected properties to make PILOT payments the virtual equivalent of full taxes for most of its duration, is not immediately obvious. They require evidentiary support.

[10] In a small dollar project, those costs might qualify as excessive but in a costlier project they would be seen as negligible in light of other factors, including profits and the returns on investment.

C. A LTTEL EXEMPTION REQUIRES FINDINGS SUPPORTED BY SUBSTANTIAL EVIDENCE, AND THE TRIAL COURT ERRED IN RULING OTHERWISE

The Trial Court interpreted LTTEL as requiring nothing more than recitals that touch the bases identified by N.J.S.A. 40A:20-11(a)&(b). Relying on Hirth v. City of Hoboken, 337 N.J. Super. 149, 165-166 (App. Div. 2001), the Court reasoned that because the exemption was approved by Ordinance and not after a quasi-judicial proceeding there was "no requirement that evidence be presented…providing a factual foundation for the ordinance" and that a governing body "does not ordinarily make any findings of fact to justify its actions." Pa53. Instead, the Court reasoned that the representations in the Financial Agreement were "all the statute requires." Pa57. The Court went on to find that plaintiffs had failed "to overcome the presumptive validity of the ordinance" and that even if altering the Township's contribution to the school district was among the purposes, the challenge failed because the "ordinance has a legitimate purpose." Pa55.

This approach cannot be reconciled with the framework that informs N.J.S.A. 40A:20-11 or with the case law that was the basis for the trial court's decision. While a hearing on a municipal ordinance may not involve the presentation of evidence, the procedures governing ordinance adoption cannot override the substantive requirements of the statute a particular ordinance implements. New Jersey Shore Builders Association v. Mayor and Township

Committee of Township of Middletown, 234 N.J. Super. 619, 621 (Law Div. 1989) (ordinance placing moratorium on land use applications invalid because supported only by health officer's opinion and other recitals when applicable statute required specific factual support).

In the case of a long term tax exemption, even if the "findings" say the right thing, plaintiffs have a right to challenge those findings if they believe the findings are unfounded and do not conform to the LTTEL's requirements. Cf. Fields v. Princeton University, 28 N.J.Tax 574, 583 (Tax Ct. 2015)(exemption determinations rely significantly on the representations made in paperwork in support of the application) The Hirth opinion acknowledges this, making clear that if an action challenges the validity of an ordinance and "resolution of the challenge turns on disputed factual issues, the case must proceed in the same manner as other civil litigation." Hirth, supra, 337 N.J. Super at 166.

Further, the crux of plaintiffs' case was and is that as a factual matter the long term exemption was not necessary to attract investment and make the project financially feasible. See Clary v. Borough of Eatontown, 41 N.J. Super. 47, 63 (App Div. 1956)(economic feasibility is factual issue). Yet, the Trial Court ruled that there were no disputed factual issues because of its view that all that LTTEL requires was that the Financial Agreement made the requisite recitals. That

approach, which treated the municipality's findings as determinative, is in error for several reasons.

To begin with, it cannot be squared with Hirth since, as will be argued in the next section, plaintiffs did make a showing sufficient to call the Township's findings into question and to raise a genuine factual issue.

Second, the trial court's decision – which essentially interpreted the LTTEL as giving the municipality a final and unreviewable power to grant long-term tax exemptions – cannot be squared with the terms of LTTEL and the constitutional framework that informs it. Although the issue here is one of first impression, the Supreme Court's recent decision in Malanga v. Tp. of West Orange, 253 N.J. 291 (2023) teaches that a requirement of sufficient or substantial evidence is compelled by that framework.

Malanga was an action in lieu of prerogative writs challenging the designation of the West Orange Library as an "area in need of redevelopment" (ANR) under the Local Redevelopment Law, 40 N.J.S.A. 12A-5(d). The planning analysis, using language that mirrored the statute, concluded there was "substantial evidence to demonstrate that the library property qualified." Id. at 304. The Planning Board agreed with the analysis, Id., and the governing body accepted it and passed a resolution designating the library site as an ANR. The Trial Court, affirmed by the Appellate Division, upheld the designation, reasoning that the

Council's action was entitled to a presumption of validity and was supported by substantial evidence. Id.

The Supreme Court reversed. It construed the relevant statutory text[11] as requiring (l) "sufficient proof that [the areas] suffer from one or more specified conditions; and (2) "sufficient proof that, as a result…the areas 'are detrimental to the safety, health, morals or welfare of the community." Id. at 311 The Court found that, notwithstanding the presumption of validity that attaches to municipal action, judicial deference "does not mean that a court is a rubber stamp." A searching review of the record is still required to assess whether there is "substantial evidence" to support the redevelopment designation. The Court wrote:

> "[M]ore than a bland recitation of applicable statutory criteria and a declaration that [they have been] met" is required. Gallenthin, 191 N.J. at 373, 924 A.2d 447. The record must instead contain sufficient credible evidence that the designation satisfies the requirements of the LRHL. ERETC, L.L.C. v. City of Perth Amboy, 381 N.J. Super. 268, 277, 885 A.2d 512 (App. Div. 2005). "Judicial deference does not mean that a court is a rubber stamp." 62-64 Main St., 221 N.J. at 157, 110 A.3d 877. Courts "must review the complete record" to assess whether it contains substantial evidence to support a redevelopment designation. Hirth v. City of Hoboken, 337 N.J. Super. 149, 157, 766 A.2d 803 (App. Div. 2001).
> Id. at 314.

[11] N.J.S.A. 40A:12A-5(d) reads, in pertinent part, that the "delineated area may be determined to be in need of redevelopment if…the governing body…concludes that within the delineated area any of the following conditions is found: d. Areas with buildings or improvements which by reason of …obsolescence [or other factors]..faulty arrangement…obsolete layout [or other factors], are detrimental to the safety, health, morals, or welfare of the community." N.J.S.A. 40A:12A-5(d)

The Court concluded that the record lacked credible substantial evidence to support the designation. It reasoned that even if proof of the condition relied upon (in this case obsolescence) was arguably sufficient, there was insufficient proof that the library site - still in active use by the community - was detrimental to the community's welfare. Id. at 323

In Malanga, the Court stressed the need to interpret the LRHL in light of the goal to further redevelopment of blighted areas as required by the constitutional framework.[12] Id. at 309. Here, the legislature has mandated that the LTTEL be construed in concert with the LRHL and both are governed by the same constitutional constraints. Accordingly, LTTEL should not be read to authorize long-term exemptions without sufficient evidentiary support for the determination that a redevelopment Project would not be feasible without them.

Third, settled interpretative principles governing tax exemption statutes apply with equal force to redevelopment exemptions, including those under the LTTEL. In Millennium Towers Urban Renewal LLC v. Municipal Council of

[12]Plaintiffs note that the Local Redevelopment Law, in the section discussing review by the Commissioner of Community Affairs of ANR determinations, N.J.S.A. 40A:12A-6b(5)(c), states that the determination shall be binding if supported by "substantial evidence." However, the Court in Malanga did not rely on or even reference this provision for its interpretation of Section 12A-5(d) presumably because it viewed the Blighted Areas Clause as mandating that there be sufficient evidence that a designated area meets the ANR requirements.

City of Jersey City, supra, 343 N.J. Super. at 376, the Court made clear that LTTEL merely authorizes municipalities to grant such abatements, it does not obligate them to do so. Secaucus v. Jersey City, 19 N.J. Tax 10, 28 (Tax 2000) affirmed the principle that in the redevelopment context "tax exemptions are to be granted … only to those who comply strictly with the applicable requirements." The Court wrote that " the policy in favor of development and redevelopment of blighted areas" must coexist with "the strong public policy that exemptions are to be granted sparingly." This rule of construction furthers the equitable principle that everyone should bear [their] just and equal share of the public tax burden." Id. See also, Princeton University Press v. Borough of Princeton, 35 N.J. 209, 214 (1961)(embracing these principles with respect to an exemption application under N.J.S.A. 54:4-3.6.)

Fourth, fundamental due process considerations also require that a long-term exemption under LTTEL be subject to meaningful judicial review to ensure that the applicable requirements have been met. Town of Secaucus v. Jersey City, 20 N.J. Tax 384, 421 (Tax 2002) (right of appeal guaranteed by due process gives a taxpayer or municipality the ability to ensure that grant or denial of exemption is proper). To be meaningful, judicial review requires that the applicable requirements for exemption be justified with more than bare conclusions. In this case, involving a long-term property tax exemption that will over its life shift a

heavy school tax burden to the plaintiff Boroughs, meaningful review requires "more than a bland recitation of applicable statutory criteria and a declaration that they have been met." Just as in Malanga, the findings responding to the statutory criteria should be supported by sufficient, objective evidence.

Finally, the Trial Court denied discovery and ultimately ruled for defendants in this case, relying not simply on Hirth but also on the presumption of validity that attaches to municipal ordinances. Plaintiffs do not dispute the well-settled law that ordinances ordinarily enjoy a presumption of validity. Yet here a presumption of validity is not enough to sustain the ordinance. As already noted, when the statute at issue requires meaningful fact-finding and the municipality does not undertake it, the presumption is overcome. New Jersey Shore Builders Association v. Mayor and Township Committee of Township of Middletown, supra 234 N.J. Super. at 621 (Law Div. 1989).

As Hirth recognizes, if plaintiffs challenge a tax exemption under LTTEL they should be entitled to develop the case upon a showing that the findings supporting the exemption are conclusory, offering evidence suggesting that in fact the findings are not supportable. Even under the "arbitrary or capricious" standard of review, an ordinance that is not founded on substantial evidence under the terms of the relevant statute is, by definition, arbitrary or capricious. Lyons v. City of Camden, 48 N.J. 524, 533 (1967); Bryant v. City of Atl. City, 309 N.J. Super.

596, 610 (determination arbitrary if predicated on unsupported findings); Application of Boardwalk Regency Corp. for a Casino License, 180 N.J. Super. 324, 334 (App. Div. 1981); Riya Finnegan LLC v. Township Council of Township of South Brunswick, 97 N.J. 184, 194-95 (2008) (zoning ordinance found arbitrary because municipality failed to explain the basis for it)

II. PLAINTIFFS PROOFS SHOWED THE ORDINANCE WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

On the record before the Trial Court, all that the Township offered to defend the exemption were the conclusory findings in the Financial Agreement and the belatedly revealed sewer costs which it continued to assert were excessive. In granting defendants' motion to quash discovery, the Trial Court relied on its view that the LTTEL only requires a municipality to adhere to the law's procedural steps and to make findings that nod to the exemption criteria. Accordingly, plaintiffs efforts to discover more robust information that would reasonably elucidate the findings were rebuffed. On the merits, the court flatly discounted plaintiff's expert report, stating that "the court does not need an expert to interpret and apply the relevant statute to the challenged ordinance and financial agreement." Pa57-58. The Court relied on Hirth v. City of Hoboken, supra, 337 N.J. Super. at 166-167, but Hirth recognizes that if the validity of an Ordinance "turns on disputed factual issues" the case must "proceed in the same manner as other civil litigation."

The Financial Agreement finding that the exemption was necessary to make the project "financially feasible' was a factual finding, and plaintiffs disputed it. Unless the LTTEL is read to give municipalities the final say on whether exemptions are or or not necessary—a position that is an untenable reading of the statute—then plaintiffs were entitled to pursue that factual claim. In this instance, plaintiffs did so, offering a report by Robert Powell of Nassau Capital Advisors, an eminently qualified expert,[13] to support its claim that the exemption did not meet the requirements of LTTEL.

Mr. Powell presented a detailed analysis, one sufficient to meet plaintiff's burden of overcoming any presumption in favor of the Ordinance's validity. Mr. Powell affirmed that the financial standard against which to evaluate a PILOT application is whether it is necessary to attract private financing. He wrote:

> "[R]edevelopment projects are frequently unable to attract private investment without assistance in the form of a PILOT or, in some cases, bond financing. The combination of risk associated with redevelopment projects and uncertainty of conventional taxes make marginal projects difficult to finance." Pa242, par 6 and 7, quoting Phoenix/McManimon slide #3.

Analyzing the Township's findings, Mr. Powell focused on the Section 9.02 statement that the Agreement is a critical incentive "due to the extraordinary costs

[13] Mr. Powell has served as real estate financial advisor to more than 50 municipalities considering whether to grant PILOT agreements to redevelopers.

associated with the development of the Property." He went on to observe that defendant Lennar offered no basis for its claim that the off-site sewer fees and water infrastructure costs were "excessive" in the context of a project with total development costs of $304 million. Pa704, par 12. He also observed that defendants did not explain how the short-term relief from the PILOT would be critical in mitigating these 'excessive fees.' Id., par 13. Mr. Powell pointed out that--notwithstanding assurances by Township experts that a "'comprehensive financial analysis' was an essential part of the record for the official actions of Township Committee authorizing the Financial Agreement--no comprehensive financial analysis is to be found in the public record. Id., par.14. "The absence of any such comprehensive financial analysis in the public record." he wrote, "renders the official actions of the Township Committee devoid of any analytical basis or justification, and [is] therefore arbitrary." Pa704. par.17.

However, Dr. Powell did locate and highlight a significant piece of financial information found in an Exhibit 13 titled "Home Building Income Statement Summary by Plan" in Lennar's exemption application. Pa593 The exhibit indicates that the '*Unleveraged IRR' produced by the project would be a remarkably high 67.9% on the developer's invested equity capital'*. (emphasis added) Dr. Powell explained that "IRR" is an abbreviation for Internal Rate of Return. "Unleveraged IRR" is a term used widely in the real estate capital markets

to assess the financial attractiveness and feasibility of a proposed equity investment in a real estate project. Based on his professional experience, he concluded that

> "a well-conceived and sponsored project needs to demonstrate an unleveraged IRR in the range of 10% - 12% in order to attract the equity capital needed as a source of funds. By the developer's own calculation. . .. the subject project is expected to produce an *unleveraged IRR [internal rate of return] of 67.9%, more than five times this benchmark standard*. This extraordinarily profitable return is projected despite these so-called 'extraordinary costs,' and with a very modest short-term PILOT agreement." (emphasis added)

From defendant Lennar's own financial disclosure, Dr. Powell further concluded that the "project would be financially viable if it were subject to full taxes. " The PILOT agreement, he said, provided minimal property tax relief over the life of the exemption,[14] with a structure providing that the PILOT is 99.5% of taxes (essentially full taxes) for most of the term of the Agreement. He reasoned

[14] The relief from full taxes within this 30-year agreement is quite modest and short term. The multi-family rental apartments will pay 66% of full taxes in years 1–5, then 75% of taxes in year 6-10, and then 99.5% of taxes (essentially full taxes) for the last

20 years of the Agreement. For the for-sale homes, the tax relief is even more modest and short term for the developer. The PILOT would be 75% of full taxes for just five years (years 1-5), and thereafter, for the remaining 25 year term of the Agreement, the PILOT is 99.5% of taxes (essentially full taxes for most of the term of the Agreement).

that the project would have been constructed even at full taxes since even a reduced unleveraged IRR would have been at least *two or three times the IRR level needed to confirm the project as financially feasible."* (emphasis added)

Dr. Powell also questioned the 30-year term of the tax exemption, finding no basis whatsoever related to financial need for the term of this Financial agreement to extend for 30 years." Pa706, par 23.

Finally, and crucially, he concluded that over the life of the Project the major result of the Financial agreement will be to "shift approximately $25 million in Hopewell Valley Regional School costs away from Hopewell Township taxpayers, and shift that cost burden to the taxpayers of Hopewell Borough and Pennington Borough." Pa707, par 24.

In the case of a long-term tax exemption ordinance based only on conclusory "findings," Plaintiffs arguably have a lesser burden of overcoming the presumption in favor of its validity since, by its terms, it does not satisfy the LTTEL as Plaintiffs construe the law. Nonetheless, conceding arguendo that Plaintiffs still have a heavy burden of overcoming the presumption, see e.g., Bryant v. City of Atl. City, supra 309 N.J. Super. at 610, the Powell reports offer an analysis that starkly calls into question the core finding that the exemption was necessary to make the project financially feasible. As such, the reports were adequate to meet Plaintiffs burden of overcoming the presumption of validity.

Indeed, in the absence of countervailing proof by defendants, his reports demonstrate that the finding of necessity was not supported by credible substantial evidence and, as such, was arbitrary and capricious.

III. THE ORDINANCE AND FINANCIAL AGREEMENT WERE APPPROVED FOR AN UNLAWFUL PURPOSE

An ordinance enacted for an unlawful purpose cannot stand. In Riggs v. Long Beach Tp., 109 N.J. 601, 611 (1988), the Supreme Court held that a court can invalidate an ordinance if in enacting it "the municipality has not complied with the requirements of the statute" or it is adopted for an unlawful purpose. Riggs invalidated the township's rezoning of a waterfront property to lower density residential, finding that the sole purpose was the unlawful one of reducing the fair market value of property prior to condemnation.

The Court cautioned that while adoption of an ordinance for an unlawful purpose is grounds for invalidating the ordinance, a distinction must be made between the purpose of the ordinance and the motives of those who enacted it. "Courts generally will not inquire into legislative motive to impugn a facially valid ordinance, but will consider evidence about the legislative purpose when the reasonableness of the enactment is not apparent on its face." Id. at 613. "Motive" ordinarily addresses the subjective considerations that move a legislator and "purpose" speaks to the goals to be achieved. Id. If an ordinance has both a valid

and an invalid purpose, courts should not guess which purpose the governing body had in mind, a single valid purpose is sufficient to sustain the ordinance. Id. The determination of purpose depends on objective factors, most particularly the legal framework for the ordinance, its operation and effect, and the context in which the ordinance was adopted.

The Trial Court ruled that the single valid purpose sustaining the validity of the present ordinance is the provision of affordable housing. Pa26 In doing so, the Court ignored critical objective factors, in particular the structure of the PILOT, its operation and effect, and the context of its adoption.

The PILOT agreement is structured to extend for 30 years when there is nothing in the needs of the developer or future homeowners that merits keeping a $330 million ratable off the tax rolls for that long. For 75% of the dwellings in the Project, representing 85% of its market value, future property owners will pay 99.5% of full taxes for 25 of the 30 years the PILOT is in effect. For the remaining 25%, payment of only 0.5% less than full taxes will stretch out for 20 of the 30 years.

This PILOT as structured cannot be viewed reasonably as facilitating the creation of affordable housing. It is not providing financing for needed municipal and school services that conventional taxes are unable to cover. It is not making the developer whole for alleged "excess" costs. It is not even making homes in the

Project more marketable – a conscious choice it appears, from the Township's fear of making single-family homes elsewhere in the Township less competitive. T1.61:22-62:14

There are only two reasonable interpretations of the purpose of the PILOT structure in this case, both requiring affected properties to be kept off the tax rolls for as long as possible. One such purpose is to maximize the number of years the Township can receive from these properties discretionary revenue six (6) times greater than the yield of conventional municipal taxes. The other is to maximize the shift of regional school costs to Plaintiffs. Neither purpose is a valid purpose under the LTTEL.

The intended operation and effect of the ordinance, consistent with these purposes, was on full display at the public hearing before Township Committee. New revenue sources and righting perceived wrongs in the school funding formula were indeed the principal selling points that night. The affordable housing was a given. It had been part of the plan since the adoption of redevelopment plans for the property. It was not the purpose of the tax exemption and PILOT as ultimately designed and enacted.

In the alternative, if not unlawful per se, the 30-year PILOT as structured is arbitrary, capricious and unreasonable, unmoored from attracting financing for inclusionary development, and therefore invalid.

If the Long Term Tax Exemption Law is construed in light of its underlying redevelopment goals, it must be read to impose meaningful substantive constraints on financial agreements authorizing long-term exemptions that – as demonstrated in this case--can have severe adverse consequences for regional partners. It is no defense that the shift in school costs here is the function of the school funding formula or the operations of the County tax assessor. The problem is how these mechanisms are intentionally used for purposes unrlated to redevelopment.

IV.THE COURT ERRED IN DENYING PLAINTIFFS DISCOVERY

The Trial Court barred all discovery requested by Plaintiffs. It did not address the various arguments raised by Defendants, including the deliberative process privilege raised by the Township and the trade secrets arguments raised by Lennar. Instead, it reasoned that the requested information was not relevant because "it is this Court's job to determine if the Township fell short of the statutory requirements by neglecting to provide adequate findings in the Financial Agreement, not to replace its judgment for that of a duly elective legislative body." Pa60.

The Court was in error in ruling as a matter of law that the findings satisfied LTTEL. Further, even if conclusory findings could be deemed sufficient to satisfy the statute, Mr. Powell's report (which plaintiffs first offered in the briefing on discovery) clearly demonstrated that those findings were problematic and was

sufficient to raise a factual dispute whether the project would have been financially feasible without the exemption. Resolution of this case clearly turned on that factual dispute. Under Judge Skillman's opinion in Hirth v. City of Hoboken, plaintiffs were entitled to proceed with discovery. To quote the relevant passage from the Hirth opinion again:

> "[I]f an action is brought challenging the validity of an ordinance, and resolution of the challenge turns on disputed factual issues, the case must *proceed in the same manner as other civil litigation, with an opportunity for discovery, pretrial motions and a trial*. See Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158, 292 (1983). 337 N.J. Super. at 165.(emphasis supplied)

CONCLUSION

Because the record shows that the long-term exemption was not necessary to attract investment in the Project and further shows that the 30-year PILOT serves no discernable legitimate purpose, the Court should reverse the decision below and declare that the exemption and PILOT are arbitrary, capricious, and unreasonable and contrary to law.

Respectfully submitted,

s/Joseph C. Tauriello
Joseph C. Tauriello, Esquire
Attorney for Plaintiffs
Lead Counsel

s/Walter R. Bliss, Jr.
Walter R. Bliss, Jr., Esquire
Attorney for Plaintiffs
Co-Counsel

Dated: October 11, 2023

HOPEWELL BOROUGH, a political sub-division of the State of New Jersey, PENNINGTON BOROUGH, a political sub-division of the State of New Jersey, PAUL ANZANO, individually, and JAMES DAVY, individually,

Plaintiff-Appellants,

v.

HOPEWELL TOWNSHIP, a political sub-division of the State of New Jersey, COURTNEY PETERS-MANNING, individually and in her official capacity as Mayor, MICHAEL RUGER, individually and in his official capacity as Deputy Mayor,
(Caption Continued Inside Cover)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No.: A-003086-22T4

Civil Action

Sat below:
Hon. Robert T. Lougy, A.J.S.C.
Docket No. MER-L-497-22

BRIEF OF RESPONDENT FAIR SHARE HOUSING CENTER

FAIR SHARE HOUSING CENTER
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By: William S. Fairhurst, Esq.
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Submitted Date: December 13, 2023

DAVID CHAIT, individually and in his official capacity as Committeeperson, KEVIN KUCHINSKI, individually and in his official capacity as Committeeperson, UMA PURANDARE, individually and in her official capacity as Committeeperson, U.S. HOME AT HOPEWELL PARC URBAN RENEWAL, L.L.C., U.S. HOME CORPORATION d/b/a LENNAR, and ABC CORP 1-5 (fictitious entities including public entities) and JOHN DOES 1-5 (fictitious individuals),

Defendant-Respondents.

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PRELIMINARY STATEMENT

Hopewell and Pennington Boroughs are attempting to delay and ultimately deny over two hundred working families long-promised and constitutionally mandated housing opportunities in the Township of Hopewell. They do so with novel legal theories about municipal authority and bring these theories six years too late. Hopewell Township's affordable housing plan has been vetted by the lower court pursuant to several publicly-noticed hearings, and every municipal action taken by Hopewell Township has complied with the appropriate sunshine laws. FSHC urges the court to reject the Appellants' belated attempt to thwart the Mount Laurel compliance of its neighbor.

FACTUAL AND LEGAL BACKGROUND[1]

The NJ Supreme Court has designated FSHC as an interested party in all declaratory judgment actions resulting from its decision in In re N.J.A.C. 5:96 and 5:97, 221 N.J. 1 (2015) ("Mount Laurel IV"), which resulted from a motion to enforce litigants rights brought by FSHC. FSHC has participated in over 300 such actions statewide. Pa256-257.

[1] The procedural and factual history are combined as the relevant facts are contained in the procedural history. In addition, FSHC participated in the matter below as an amicus curiae and will similarly offer specific procedural and factual history in this brief, none of which are in dispute, which are relevant to FSHC's special interest and involvement in this matter.

FSHC actively participated in the trial court declaratory judgment action filed by Hopewell Township as a result of Mount Laurel IV and reached a settlement with the Township on July 13, 2017, shortly after the conclusion of the trial on methodology held in Mercer County by the Hon. Mary C. Jacobson, A.J.S.C. and prior to the decision being issued in that trial. Pa257.

As a part of that settlement, the parties agreed to a 1,141- unit Third Round (1999- 2025) obligation that represented a 35% downward adjustment of the FSHC expert's determination of Hopewell Township's cumulative Third Round need, including the "gap present need" that accrued during the 16 years between 1999 and 2015. Pa121; T2.10:11. Notably, Judge Jacobson ruled that Hopewell Township would have had an even larger fair share if the matter had not settled.

On August 28, 2017, Judge Jacobson accepted the Special Master's recommendation and approved the settlement, including the development presently at issue. Pa186; T2.10:3. One developer left out of the plan, Deer Valley, objected at the hearing, and neither Hopewell Borough nor Pennington Borough appeared at the hearing. T2.37:12-15.

On December 14, 2017, following approval of the settlement, the court scheduled an amended compliance hearing with public notice allowing for objections to be filed. Judge Jacobson approved Hopewell Township's

Housing Element and Fair Share Plan ("HEFSP") plan and implementing ordinances at that hearing. The implementing ordinances included the Redevelopment Plan for what was then referred to as the CF Hopewell property, which was adopted by the Township Committee on November 27, 2017. Pa231. Again, Deer Valley objected at the compliance hearing, but neither Hopewell Borough nor Pennington Borough appeared. In addition, neither Hopewell Borough nor Pennington Borough appealed the November 27, 2017 Redevelopment Plan. T2.37:12-15.

After the final compliance hearing, Judge Jacobson directed the Township to satisfy several conditions, among them execution of a redevelopment agreement covering the CF Hopewell property, which redevelopment agreement was executed in several parts by the Township and Lennar in summer 2019. Pa232. Those redevelopment agreements explicitly stated that Lennar intended to apply for a Long Term Tax Exemption and reserved the right to terminate the agreements if such request was not granted. Pa597. Neither Hopewell Borough nor Pennington Borough appealed the execution of the redevelopment agreements. T2.37:12-15.

After Deer Valley appealed the initial fairness and compliance orders, FSHC, Hopewell Township, and Deer Valley reached agreement on an amended settlement of the Township's Mount Laurel action, which also

resulted in changes to the development of the CF Hopewell site. After giving adequate public notice, on August 29, 2019, a Fairness Hearing and Hearing to Amend the Final Judgment of Compliance and Repose was held before Judge Jacobson to review the changes to the plan for redevelopment of the CF Hopewell site and development of the Deer Valley site. Pa230; T3. 30:1-4. Neither Hopewell Borough nor Pennington Borough appeared at this hearing. T2.37:12-15.

Judge Jacobson approved the amended plan and granted a Final Judgment of Compliance and Repose to the Township. T3. 30:1-4. Neither Hopewell Borough nor Pennington Borough appealed the final judgment in the declaratory judgment action. T2.37:12-15.

Lennar was granted preliminary and final approval for the inclusionary development by the Township Planning Board on May 27, 2021, which approval was memorialized on August 24, 2021. Pa301. Neither Hopewell Borough nor Pennington Borough appealed this approval. Pa188; T2.37:12-15.

Lennar completed an application for financial agreement, dated October 11, 2021. Pa339. As part of this agreement, the parties agreed to a payment-in-lieu-of-taxes ("PILOT") to make the creation of an inclusionary affordable housing project economically feasible and successful. Pa597. Hopewell Township Ordinance No. 22-1766 ("township ordinance") was adopted on

February 22, 2022. Pa235. Nearly six years after the initial settlement agreement providing for the redevelopment of the site Lennar seeks to develop, Hopewell Borough and Pennington Borough for the first time challenged the redevelopment of the site through appealing the PILOT, even though it had been readily apparent since at least the adoption of the Redevelopment Plan in 2017 that it was likely that a PILOT would be granted to the site, potentially threatening the development of the site altogether. Pa50.

On March 17, 2022, Plaintiffs filed a Complaint In Lieu of Prerogative Writs seeking to overturn Hopewell Township's affordable housing ordinance and financial agreement with Lennar. Pa4. On May 17, 2022, after Defendants filed their respective Answers, the court conducted a case management conference and subsequently entered an order setting a discovery schedule. Pa4-5. On May 27, 2022, Plaintiffs put forward a request for interrogatories and a request for production of documents. Pa5. On June 24, 2022, Defendants U.S. Home and Lennar moved to quash this request. Pa5. On June 27, 2022, the remaining Defendants filed a motion for a protective order under Rule 4:10-3 to prohibit further discovery altogether. Pa5. On July 28, 2022, FSHC filed a motion for leave to appear as amicus curiae in the matter, which the court subsequently granted on September 9, 2022. Pa252, Pa272. On

September 9, 2022, the court held oral argument on the above discovery motions, and on September 12, 2022, the court granted both the Defendants' motion to quash and the motion for a protective order. Pa31-32. On October 11, 2022, the court held a case management conference, setting forth an expert report and briefing schedule and setting a trial date for March 16, 2023. Pa276.

The court subsequently rescheduled the trial for March 28, 2023, on which date Hon. Robert T. Lougy, A.J.S.C. heard oral argument from the parties on their trial briefs. Pa280. On May 1, 2023, Judge Lougy issued an opinion ruling in favor of the Defendants and finding that the Hopewell Township ordinance implementing the PILOT is valid and comports with the Long Term Tax Exemption Law ("LTTEL") N.J.S.A. 40A:20-1 et seq.. Pa1. On June 13, 2013, the Plaintiffs filed the present appeal. Pa61.

LEGAL ARGUMENT

I. AS A MATTER OF LAW, HOPEWELL BOROUGH AND PENNINGTON BOROUGH'S REQUEST TO OVERTURN HOPEWELL TOWNSHIP'S AFFORDABLE HOUSING ORDINANCE AND FINANCIAL AGREEMENT IS INAPPROPRIATE.

The NJ Supreme Court was clear in its Mount Laurel IV ruling that the goal of the Court was "to establish an avenue by which towns can demonstrate their constitutional compliance to the courts through submission of a housing plan and use of processes, where appropriate, that are similar to those which

would have been available through COAH for the achievement of substantive certification." In re N.J.A.C. 5:96 and 5:97, 221 N.J. 1, 23 (2015).

One such tool that townships such as Hopewell may use in achieving its affordable housing obligation is a PILOT agreement, pursuant to the LTTEL. N.J.S.A. 40A:20-1 et seq. PILOT agreements serve as a tool in New Jersey that municipalities may use to come to terms with private entities to "undertake redevelopment projects in return for tax exemptions." N.J.S.A. 40A:20-4. This is exactly what Hopewell Township did in coming to an agreement with Lennar to create an opportunity for affordable housing to be developed and satisfy its affordable housing obligation.

The Appellants are asking the court to allow them to decide which municipalities may or may not use a PILOT agreement and determine how they may use it. Allowing municipalities to decide how other municipalities may use legitimate financing tools at their disposal in creating opportunities for affordable housing is both inappropriate and another tactic municipalities may use in delaying the construction of affordable housing in nearby communities.

Additionally, the Appellants are asking the court to step in and subvert the role of the Legislature by asking it to challenge or investigate a PILOT agreement based on criteria not provided for in the LTTEL. As the Township

has previously argued in its papers, the LTTEL requires certain findings by the legislative body. N.J.S.A. 40A:20-11. As the lower court previously agreed, there is nothing in the LTTEL or case law that suggests that objectors can go on a free ranging process to discover potential facts that may counter the findings. Rather, the challenger bears the burden of showing the municipal action is arbitrary, unreasonable, or contrary to the statute or Constitution. There is no law that supports the notion that granting a PILOT allows for heightened scrutiny beyond the normal standards for municipal action.

If anything, a court should exercise heightened deference to actions in furtherance of a municipal plan for constitutional compliance that has already gone through multiple levels of court review and recognizes the myriad constitutional and statutory commands to ensure a realistic opportunity for development of affordable housing. See, e.g., N.J.S.A. 52:27D 311(a) (granting municipality authority to "provide for its fair share of low- and moderate income housing by means of any technique or combination of techniques which provide a realistic opportunity for the provision of the fair share.")

II. THE AGREEMENT BETWEEN THE TOWNSHIP OF HOPEWELL AND FSHC OCCURRED AFTER A LENGTHY PUBLIC HEARING PROCESS.

The court necessarily should view this challenge in the context of the long history before it. After several years of litigation to come into compliance with its Constitutional obligations, the process by which Hopewell Township reached an agreement to meet its affordable housing obligations was both transparent and compliant with Mount Laurel IV.

Since July 14, 2017, when the Township entered into a court-approved settlement agreement incorporating the settlement between the Township and the predecessors in interest to Lennar, the Appellants had nearly five years to participate in the fairness and compliance hearing process. They chose not to.

In November 2017, the Township submitted its HEFSP and implementing ordinances, including the redevelopment plan for this site, and as per the trial court's order, provided the required public notice prior to the December 14, 2017 compliance hearing. The Appellants did not object during this time despite the review process for the Township being highly public and drawing other objections. On December 14, 2017, the compliance hearing took place and Judge Jacobson approved Hopewell Township's HEFSP.

Two years later, Hopewell Township and Lennar entered into redevelopment agreements that explicitly stated that the parties anticipated a PILOT on the site. On August 29, 2019, the court again had a fairness and compliance hearing and approved a Final Judgment of Compliance and Repose

with adequate public notice given. The Appellants again chose not to object during this time or appeal the redevelopment agreements or subsequent site plan approvals.

Following these redevelopment agreements and the introduction of the PILOT to finance the redevelopment project, the Hopewell Township committee held public meetings on Jan. 24, 2022 and February 22, 2022 regarding ordinance No. 22-1766. The committee subsequently adopted the ordinance at a public hearing on February 22, 2022. The Appellants offered only testimony in these hearings, but did not present evidence or request additional information.

The Appellants have chosen to sit out at every appropriate opportunity given to them to bring an objection prior to this. If what the Appellants had sought was a fundamental change to the Township's right to enter into a PILOT as part of this project, they should have brought objections to the passage of a redevelopment plan or execution of a redevelopment agreement providing for such. It is not a surprise at all that the Township is now implementing long-ago approved plans and agreements within the discretion accorded to a municipality that uses the statutory tools of redevelopment.

III. THE TOWNS CHALLENGING THIS AGREEMENT HAVE NO COURT-APPROVED FAIR SHARE PLANS OF THEIR OWN AND IGNORE THE FACT THAT MOUNT LAUREL IS A REGIONAL OBLIGATION.

It is understood that a municipality's Mount Laurel obligation does not cease at its borders but extends to the surrounding region. See, e.g., S. Burlington Cnty. NAACP v. Mt. Laurel, 92 N.J. 158, 208-209 (1983) ("Mount Laurel II") ("the general welfare includes more than the welfare of that municipality and its citizens: it also includes the general welfare – in this case the housing needs – of those residing outside of the municipality"); Dynasty Bldg. Corp. v. Borough of Upper Saddle River, 267 N.J. Super. 611, 616 (App. Div. 1993) ("municipal obligations to provide for low- and moderate-income housing are established on the basis of regional responsibility").

While Hopewell Township has made significant progress towards meeting its fair share obligation and has acted in good faith in negotiating a settlement agreement, the Boroughs of Hopewell and Pennington, do not have court-approved fair share plans and did not participate in the methodology trial before Judge Jacobson.

Even if Hopewell and Pennington Boroughs did have approved fair share plans, it is well understood that there may be impacts from neighboring municipalities' fair share plans. The NJ Supreme Court has held that all municipalities must "not impede the general welfare represented by

satisfaction of the housing needs of lower income people throughout the region." Oakwood at Madison, Inc. v. Madison, 72 N.J. 481, 495 (1977). For example, neighboring municipalities have an affirmative obligation to extend sewer to help with neighboring towns' affordable housing needs. While a municipality or regional sewerage authority generally has the discretion to grant or deny service to residents of another municipality, they still may be required to provide sewer service when doing so will enable the neighboring municipality to implement its fair share plan. See, e.g., Bi-County Dev. Of Clinton v. Borough of High Bridge, 174 N.J. 301, 316, 326-328 (2001). Towns conversely may not impede on a neighboring town attempting to secure access to sewer service to meet its fair share plan and have an obligation to extend sewer service even in the absence of a pre-existing inter-municipal agreement for such service. See id. at 326; accord Samaritan Cntr., Inc. v. Borough of Englishtown, 294 N.J. Super. 437, 454 (Law Div. 1996).

In its effort to create compliance with the Mount Laurel doctrine, the NJ Supreme Court in Mount Laurel IV urged trial courts to "secure, whenever possible, prompt, voluntary compliance from municipalities in view of the lengthy delay in achieving satisfaction of towns' Third Round obligations." Mount Laurel IV, 221 N.J. at 6. Yet, after nearly eight years of waiting, and after both Boroughs have been on notice of the NJ Supreme Court's directive

to calculate its Third Round fair share obligation utilizing the Prior Round methodology, the Appellants have still failed to show that they will comply with their constitutional requirements. Both towns now not only have failed to show how they will meet the needs for affordable housing in their own borders, but also seek, in the 11th hour, to block their much larger neighbor with a far larger obligation, which has moved forward with constitutional compliance to actually construct affordable housing. The court should reject the Appellants' attempts to create a novel and extensive process to stop affordable homes from being built through unprecedented action to stop the unremarkable use of a PILOT to effectuate a long-planned redevelopment.

CONCLUSION

This case threatens the opportunity to build a critical number of affordable homes. This opportunity is the product of years of careful settlement negotiation, thoughtful legislative deliberation, and court supervision. The Appellants had every opportunity to be meaningful participants in this process, but they rejected them. They should not be permitted to second guess the result now. For the foregoing reasons, FSHC respectfully requests that the court enter judgment denying the Appellants' appeal and affirming the decision of the lower court.

Respectfully Submitted,

Dated: December 13, 2023

FAIR SHARE HOUSING CENTER

William S. Fairhurst, Esq.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003086-22T4

HOPEWELL BOROUGH, a political subdivision of the State of New Jersey, PENNINGTON BOROUGH, a political subdivision of the State of New Jersey, PAUL ANZANO, individually, and JAMES DAVY, individually, **Plaintiffs-Appellants,** **v.** **HOPEWELL TOWNSHIP, a political subdivision of the State of New Jersey, COURTNEY PETERS-MANNING, individually and in her official capacity, as Mayor, MICHAEL RUGER, individually and in his official capacity as Deputy Mayor,** **(Caption Continued on Next Page)** **Defendants-Respondents.**	**CIVIL ACTION** **On Appeal from the Final Order of the Superior Court of New Jersey, Law Division** **Docket No. MER-L-497-22** **SAT BELOW:** **Hon. Robert Lougy, A.J.S.C.**

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS, HOPEWELL TOWNSHIP, COURTNEY PETERS-MANNING, MICHAEL RUGER, DAVID CHAIT, KEVIN KUCHINSKI, AND UMA PURANDARE

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December 13, 2023

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Defendants-Respondents.

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PRELIMINARY STATEMENT

In 2015, Hopewell Township went to court to make sure that its affordable housing plan was constitutional. Now, eight years later, as the Township attempts to effectuate a key provision of that plan—a financial agreement with Lennar, a developer of affordable housing—its neighbors, Hopewell Borough and Pennington Borough, have sued. They claim that Lennar did not need the financial agreement's tax exemption to develop its affordable housing project, and that their school taxes will go up.

Plaintiffs' complaint is baseless. Hopewell Township had the legal authority to enter the financial agreement. The agreement helped promote affordable housing and develop an underutilized site. It was authorized by the Local Housing and Redevelopment Law and the Long Term Tax Exemption Law. Acting in their legislative capacity, the Hopewell Township committee members assessed the risks and benefits of entering the financial agreement, and concluded that doing so was in the best interests of the residents of the Township.

The Boroughs now want the court to second-guess the Township Committee's conclusions, and to substitute its judgment for that of the elected representatives of the people. But the Committee's legislative determinations are entitled to deference and on this record must be sustained.

Plaintiffs' legal theory has no support in the law—in fact, they admit that their case is "one of first impression." Pb32. Plaintiffs want the court to rewrite the Long Term Tax Exemption Law in at least three ways—first, by finding that it prohibits the governing body from adopting a financial agreement absent a finding that the development would not have occurred but-for the tax exemption; second, by requiring the governing body to engage in quasi-judicial fact-finding; and third, by requiring the governing body to consider the effect that the financial agreement might have on other municipalities. The law requires none of this.

Implementation of the Township's affordable housing plan has been delayed too long. The financial agreement between Hopewell Township and Lennar is valid, enforceable, and has been adopted in accordance with the law.

PROCEDURAL HISTORY

Hopewell Borough, Pennington Borough, Paul Anzano, and James Davy (collectively "Plaintiffs"), filed a Complaint in Lieu of Prerogative Writs on March 17, 2022 in the New Jersey Superior Court, Law Division, Mercer County (the "Complaint"). Pa138-Pa151. The Complaint named Hopewell Township (the "Township"), U.S. Home at Hopewell Parc Urban Renewal, L.L.C., U.S. Home Corporation d/b/a Lennar ("Lennar"), and five Township Committee

members in their individual capacities, as defendants (collectively "Defendants"). Pa138.

The Township moved to dismiss the committee members in their individual capacities. Plaintiffs consented. Pa266-Pa268.

After the Trial Court (Hon. Robert Lougy, A.J.S.C.) held a case management conference, Lennar filed a motion to quash Plaintiffs' interrogatories and document demands, and the Township filed a motion seeking a protective order and order striking Plaintiffs' interrogatories and document demands. Pa182-Pa184; Pa197-Pa199.

On September 9, 2022, the Trial Court granted Fair Share Housing Center's ("FSHC") motion to intervene. Pa272-Pa273.

On September 12, 2022, the Trial Court granted the Township's and Lennar's discovery motions, and ordered that "no discovery shall be hand in this case." Pa30-Pa60. The Trial Court's Order was accompanied by a 31-page written decision with findings of fact and conclusions of law. Pa30-Pa60.

Plaintiffs submitted an expert report from Robert Powell on November 8, 2022, and Lennar filed an expert report from Richard Reading on December 13, 2022. Pa699-Pa709; Pa710-Pa738.

On May 1, 2023, after briefing and oral argument, the Trial Court dismissed the Complaint with prejudice. Pa1-Pa29. The Trial Court's Order

was accompanied by a 29-page written decision with findings of fact and conclusions of law. Pa1-Pa29. This appeal followed.

STATEMENT OF FACTS

The Township's Declaratory Judgment Action

1. Hopewell Township is a municipality in Mercer County, New Jersey. Like all municipalities in New Jersey, Hopewell Township has a constitutional obligation to provide for its fair share of the regional need for affordable housing. See Da67-Da74.

2. In July 7, 2015, after the New Jersey Supreme Court had decided In re N.J.A.C. 5:96 and 5:97, 221 N.J. 1 (2015) ("Mount Laurel IV"), the Township filed a declaratory judgment action captioned In the Matter of the Application of the Township of Hopewell, Docket No. MER-L-1557-15. Da1-Da41.

3. Several property owners and developers, as well as Fair Share Housing Center, intervened. The interveners included CF Hopewell CC&L, LLC ("CF Hopewell"), owners of the properties now being developed by Defendant Lennar as "Hopewell Parc." Da43. (These properties are referred to herein as the "property-in-question" or the "subject property.")

The Fairness Hearings

4. After mediation, the Township entered into settlement agreements with each Intervener, including CF Hopewell. (collectively "2017 Settlement Agreements"). Da43-Da44.

5. On August 28, 2017, the Hon. Mary C. Jacobson, A.J.S.C., held a fairness hearing, and on January 10, 2018, issued a Conditional Judgment of Compliance and Repose. That Conditional Judgment set the Township's Third Round affordable housing obligations at 1,141 units and, among other things, approved the CF Hopewell settlement agreement. Da43; Da45; Da69-Da70.

6. On June 24, 2019, after additional litigation with a separate property owner known as Deer Valley Realty, the Township, the Intervenors, and Deer Valley Realty entered a Global Settlement Agreement ("GSA"). Da49-Da66.

7. On August 29, 2019, Judge Jacobson considered the Global Settlement Agreement at a second Fairness Hearing, and on September 27, 2019, approved the GSA and issued a Final Judgment of Compliance and Repose without Conditions. Da67-Da74.

Judge Jacobson Concludes the Deer Valley Realty Litigation and Finds the Property in Question to be an Area in Need of Redevelopment

8. On October 29, 2019, one month after approving the GSA and issuing the Final Judgment, Judge Jacobson entered an order ending the Deer Valley Realty litigation. Among other things, Deer Valley had challenged the

Township's finding that the property-in-question should be considered an area in need of redevelopment. Judge Jacobson ruled "that (a) the determination of the Township Committee of the Township of Hopewell to declare the CF Hopewell Property and the Lennar Property as areas in need of redevelopment are supported by substantial evidence, are based upon a proper interpretation of the Local Housing and Redevelopment Law, N.J.S.A. 40A:12A-1 et seq. and are affirmed[.]"[1] Da385-Da397.

The Redevelopment Plan Anticipates a Tax Exemption

9. The Township's affordable housing settlement agreement with CF Hopewell had provided that the property-in-question could be developed for affordable housing, in an inclusionary development, by way of the Local Redevelopment and Housing Law ("LRHL"). On November 27, 2017, the Township adopted a Redevelopment Plan for the property. Da44; Da78-Da113.

10. The Redevelopment Plan authorized the redevelopment agreement to include provisions relating to "Payment In Lieu of Taxes Agreement." Da112-Da113.

[1] Judge Jacobson's Order in MER-L-2326-17 was not part of the record below, but was part of the Township's affordable housing litigation. It is subject to judicial notice N.J.R.E. 201(b)(4). It is offered here in response to Plaintiffs' argument at Pb32, *et seq.*, relating to the Supreme Court's March 13, 2023 decision in Malanga v. Twp. of West Orange, 253 N.J. 291 (2023), which was not raised below.

The Redevelopment Agreements Permit Lennar to Terminate the Agreement if a Tax Exemption is Not Granted

11. On July 25, 2019, the Township and the property's new owner, Lennar, executed redevelopment agreements for the property-in-question ("Lennar Redevelopment Agreements"). Da114-Da173; Da174-Da233; Pa651.

12. Consistent with the LRHL and the Redevelopment Plan, Section 2.06 of the Lennar Redevelopment Agreements authorized Lennar to apply for a Long Term Tax Exemption under the Long Term Tax Exemption Law, N.J.S.A. 40A:20-1 et seq. ("LTTEL"):

> Following the Effective Date, the Urban Renewal Entity(ies) formed by the Redeveloper may submit to the Township an application for tax exemption in accordance with the Long Term Tax Exemption Law (the "Application") and the terms of one or more Financial Agreements, which shall provide, *inter alia,* that the Urban Renewal Entity(ies) formed by the Redeveloper shall construct the Residential Project, or applicable portion thereof, and shall make annual payments to the Township in lieu of taxes in amounts set forth in such Financial Agreement(s).
>
> Da126; Da186.

13. Section 2.06 of the Lennar Redevelopment Agreements allowed the redeveloper to terminate the agreement if the parties did not enter a financial agreement:

> The Redeveloper shall have the right to terminate this Redevelopment Agreement upon written notice to the Township if the Township and the Urban Renewal Entity(ies) have not duly negotiated, agreed to, executed and delivered to each other the Financial Agreement(s) within one hundred twenty (120) days of

> the submission of the Application. If this Agreement is terminated pursuant to the terms of this Section 2.06 then, except as expressly set forth herein to the contrary and upon full payment of all Allowable Township Costs accruing through the date of such termination, this Agreement (including, without limitation, all the covenants contained herein) shall be of no further force and effect and the Parties hereto shall have no further rights, liabilities and/or obligations hereunder.
>
> Da126; Da186-Da187.

Lennar and Other Intervenors File Suit Against ELSA, Seeking Sewer Service at a Reasonable Cost

14. On January 10, 2020, Lennar and other Intervenors filed a complaint in lieu of prerogative writs against the Ewing-Lawrence Sewerage Authority ("ELSA"), seeking sewer service for their inclusionary developments at a reasonable cost. Hopewell Township was joined as an indispensable party. Da235; Da237; see Da234-Da333.

15. On December 29, 2021, the parties settled the litigation. Lennar and the Township were both parties to that settlement agreement. Lennar and the other developers agreed to pay $26,076,000 to ELSA for infrastructure upgrades and sewer treatment capacity to service their inclusionary developments. Da339; see Da334-Da382.

Lennar Receives Site Plan Approval

16. On May 27, 2021, the Hopewell Township Planning Board granted Lennar preliminary and final site plan approval for its inclusionary development

on the subject property. The Planning Board memorialized the approvals by resolution dated August 24, 2021. The inclusionary development was to be known as "Hopewell Parc." Pa582; Pa588; see Pa560-Pa588. The development was to include 861 market rate units and 216 affordable units. Pa561.

Lennar's Application for a Tax Exemption

17. On October 11, 2021, Lennar submitted an application for a Long Term Tax Exemption, under its urban renewal entity, US Home at Hopewell Parc Urban Renewal, LLC. ("PILOT Application"). The application sought a thirty-year tax exemption for the Hopewell Parc development, which consisted of 108 low-income units, 108 moderate income units, 861 market rate units, for a total of 1,077 units. Pa339; Pa344; Pa347.

18. The application included a statement explaining the need for a tax exemption. The tax exemption was needed:

> Due to excessive off-site sewer and water infrastructure obligations as well as excessive sewer reservation fees.
>
> Pa597.

The Hopewell Township Committee Introduces an Ordinance to Approve a Financial Agreement with the Redeveloper

19. On January 24, 2022, the Township Committee introduced Ordinance 22-1766, entitled: "Ordinance of the Township of Hopewell, County of Mercer, State of New Jersey, Approving the Application of and the Execution of

Financial Agreement with US Home at Hopewell Parc Urban Renewal, LLC." Pa650-Pa655.

20. Ordinance 22-1766 was duly advertised, and opened for public hearing at the February 22, 2022 Township Committee Meeting. Pa655; T1.29:15-25; T1.77:22-25; 78:1.4[2].

The Public Hearing

21. The public hearing on Ordinance 22-1766 included presentations by committee member Kevin Kuchinski; the Township's redevelopment counsel, Kevin McManimon, Esq.; and the Township's financial advisors, Phoenix Advisors, LLC.

22. Citing guidance provided by the New Jersey Department of Community Affairs ("DCA"), Mr. Kuchniski noted that PILOTs[3] foster economic development, enhance the municipal tax base, expand community resources, and help advance other policy initiatives. T1.36:12-17. DCA guidance also states that "providing affordable housing is one of the primary recommended uses for PILOTs." T1.36:24-25.

[2] Plaintiffs filed three transcripts with this Court. Defendants will use the same nomenclature for ease of reference: **T1** (legislative hearing before Hopewell Township Committee on February 22, 2022); **T2** (oral argument before Trial Court on discovery motions on September 9, 2022); **T3** (oral argument before Trial Court at trial on March 28, 2023).

[3] "PILOT" is shorthand for "payment in lieu of taxes."

23. Committee member Kuchinski explained that PILOTs "can help the Township meet its affordable housing obligations[,]" and that they provide the "most attractive financial option" to do so. T1.40:4-5; 41:7.

24. The benefits that PILOTs provide to help satisfy affordable housing obligations were echoed by Mr. McManimon, who explained that PILOTs "can help promote redevelopment in areas that need it and can help municipalities achieve important goals like the fulfilment of the affordable housing obligation"; PILOTs "allow[] municipalities to have increased decision-making powers throughout the process." T1.52:5-8; 52:12-14.

25. Mr. McManimon also dispelled a common misconception that PILOTs impact the money received by school districts. "[B]y statute, the school system does not get a share of the PILOT revenues generated by this project. Many people think that that means the school system gets less money. And for the reason that the mayor and Mr. Kuchinski spoke about earlier, that's simply not true. The school system gets what it needs through the budgetary process." T1. 55:17-24.

26. Both James Davy, the Mayor of Pennington Borough, and Ryan Kennedy, a councilmember of Hopewell Borough, spoke at the public hearing, presenting their opinions opposing the PILOT agreement. See, e.g. T1.82; T1. 89.

27. Through the litigation, Plaintiffs have produced two expert reports prepared by Robert Powell. Pa239-Pa248; Pa699-Pa709. Neither was presented at the public hearing. See T1.

Approval of the Financial Agreement by Ordinance of the Township Committee

28. After closing the public hearing and addressing public comment, the five committee members took turns explaining their decision-making.

29. Committeeman David Chait spoke in support of the PILOT. He said, in relevant part:

> I am supportive of affordable housing, but more than anything, the ordinance before us tonight represents the best possible way to keep the taxes of current residents from exploding. We have an affordable housing obligation that was adopted by unanimous bipartisan consensus of this committee to settle litigation associated with the (inaudible) doctrine, the Fair Housing Act of 1985, and to meet our third-round obligation. To meet this legal obligation as was noted tonight, we could built the 653 affordable units ourselves at an estimated nine plus figure cost, which would have increased all our taxes significantly. Or we could take the approach adopted by this committee years ago of which this PILOT ordinance is a piece, in which the developer is paying all of the costs to develop our required affordable units for the right to also build market rate units. And the new residents of these market rate units are subsidizing our affordable housing obligation, and in effect, subsidizing our own tax burden. Without this broader approach, our taxes would vastly increase to build these affordable units which is a legal obligation. This ordinance is fiscal pragmatism at its core, a piece of the puzzle protecting us from tax increases. …
>
> T1.134:22-25 to 135:1-21.

30. Committeeman Kuchinski again explained why he believes a PILOT is the best financial decision for the Township's obligation to provide a realistic opportunity for affordable housing. T1.137:1-23.

31. Committeewoman Purandare provided similar comments:

> … This plan will enable us to fulfill the Township commitment to the state of New Jersey in a way that burden does not fall heavily on current Hopewell Township taxpayers. To follow my promises to Hopewell residents, that I'm committed to making fiscally responsible decisions and maintaining the welcoming culture of the Hopewell Valley community for all present and future residents coming here...
>
> T1.141:8-15.

32. Deputy Mayor Michael Ruger also explained his support for the PILOT:

> … So here's why I support the PILOT. Simply put, running a Township costs money. We all drive in Township roads, rely on our Township police depend on our Township public works too, benefit from Township parks and recreation opportunities and need our Township employees to provide vital services. … So based on everything I've learned, I believe this PILOT will be a critical part of ensuring the Township can continue to provide necessary services without increasing taxes. And for those reasons, I will vote yes.
>
> T1.143:6-25 to 144:1-15.

33. Mayor Courtney Peters-Manning voiced similar support:

> … The costs of building affordable housing include bringing all of the public and water -- for the public water and sewer infrastructure to a potential tight site. And these costs are enormous and therefore PILOTs are critical in making affordable housing projects

> economically viable. As we heard tonight several times, both the school district and the fire district will be 100 percent whole with or without the PILOT, and it gives the Township flexibility in an uncertain world. I am therefore voting yes on this ordinance.
>
> T1.145:1-11.

34. By a unanimous vote, the Township Committee approved Ordinance 22-1766, and authorized execution of a financial agreement consistent with the LTTEL. Pa654-Pa655.

The Financial Agreement

35. On March 15, 2022, the Township and Lennar executed the Scotch Road Financial Agreement. ("Financial Agreement"). Pa601-Pa634.

36. As required by the LTTEL, the Financial Agreement addressed the duration of the PILOT, the annual service charge, and the general obligations of the parties. Pa601-Pa634.

37. The Financial Agreement included a section articulating the relative benefits of the project:

> SECTION 9.01 Relative Benefits of the Project.
>
> In accordance with the Long Term Tax Exemption Law, specifically N.J.S.A. 40A:20-11(a), the Township hereby finds and determines that this Agreement is to the direct benefit of the health, safety, welfare and financial well-being of the Township and its citizens despite the tax exemption granted hereunder. The Property is currently underutilized. The Project will redevelop the site with a mix of approximately 1,077 residential units consisting of apartments, townhomes, stacked townhomes, condominiums and single family homes, subject to Article IITI of the Redevelopment Agreements, at least the lesser of 20% of the total residential units

> or 216 of such units will be Affordable Units, to be sold or leased at market rates and affordable rates, as applicable, in accordance with the Redevelopment Plan, the redevelopment Agreements and Site Plan Approval. The Project will create approximately 2,410 construction jobs and 10 permanent jobs. The Project will generate significant amounts of new (otherwise unavailable) municipal revenues through the Annual Service Charge, construction permit fees and water/sewer fees. More importantly, the Project will help the Township fulfill its constitutional obligation to provide housing opportunities for households with limited incomes. Considering current market conditions, economic factors and development costs impacting this Project, it is not financially feasible to undertake the development of this Project in the absence of the tax exemption provided for herein.
>
> Pa623-Pa624.

38. The Financial Agreement included a section articulating the importance of the tax exemption to the project and the municipality:

> SECTION 9.02 Importance of Tax Exemption.
>
> In accordance with the Long Term Tax Exemption Law, specifically N.J.S.A. 40A:20-11(b), the Township has reviewed the Application and accompanying financial information and it has determined that this Agreement is a critical incentive for the Entity to undertake the Project in the Township due to the extraordinary costs associated with the development of the Property. The tax exemption permits the development of underutilized property and provides a stream of revenue in the form of the Annual Service Charges. The Annual Service Charge will allow the Units to be sold at marketable prices and leased at marketable rates, which will ensure the likelihood of the success of the Project and ensure that it will have a positive impact on the surrounding area. The tax exemption permits the development of the Project in an area that cannot otherwise be developed in its proposed scope by reducing the expenses associated with the ownership or operation of the Project. Reduced expenses allows for more competitive purchase prices and rents, thus helping to ensure the Project's success. As a result, the

> locational decisions of the probable residents and tenants will be influenced positively by the tax exemption. Considering current market conditions, economic factors and development costs impacting this Project, it is not financially feasible to undertake the development of this Project in the absence of the tax exemption provided for herein. Without the Project, the benefits described above would not be realized.
>
> Pa624.

39. The Financial Agreement also included a section defining how the Township could use the proceeds of the payments in lieu of taxes. The Township reserved the right to dedicate such proceeds to address the potential impact of the development on the regional school district and to support a community center:

> SECTION 16.14 Use of Annual Service Charge Proceeds.
>
> A. The Township may, in its sole discretion, discuss the potential impact of the Project on the Hopewell Valley Regional School District with the School Board and the potential use of a portion of the Annual Service Charge proceeds to address such impact.
>
> B. Except for the County Portion, which will be paid to the County, the Township may use a minimum of the first 2% of each year's Annual Service Charge revenue to pay debt service on bonds, or notes issued in anticipation thereof, issued to finance costs associated with the Community Center; provided, however, that this provision shall apply only to the extent there is such debt service outstanding at the time such revenue is received by the Township.
>
> Pa630.

ARGUMENT

I. STANDARD OF REVIEW.

A. Adoption of a Municipal Ordinance: Arbitrary, Capricious, or Unreasonable. (Raised Below: Pa20-Pa29)

Like other legislative enactments, municipal ordinances are entitled to a presumption of validity. See, e.g., N.J. Shore Builders Ass'n v. Twp. of Jackson, 199 N.J. 38, 55 (2009) (citing Brown v. City of Newark, 113 N.J. 565, 571 (1989); Hutton Park Gardens v. Town Council of Town of W. Orange, 68 N.J. 543, 564 (1975).

A party challenging a municipal ordinance bears a heavy burden to overcome the presumption of validity. See, e.g., 388 Route 22 Readington Realty Holdings, LLC v. Twp. of Readington, 221 N.J. 318, 339 (2015); Bryant v. City of Atl. City, 309 N.J. Super. 596, 610 (App. Div. 1998). To overcome this heavy burden, the challenging party must establish through a "clear showing" that the ordinance is arbitrary or unreasonable. See, e.g., 515 Assocs. v. City of Newark, 132 N.J. 180, 186 (1993) (citing Hudson Circle Servicenter, Inc. v. Kearny, 70 N.J. 289, 299); Quick Check Food Stores v. Springfield, 83 N.J. 438, 447 (1980).

"Legislative bodies are presumed to act on the basis of adequate factual support and, absent a sufficient showing to the contrary, it will be assumed that

their enactments rest upon some rational basis within their knowledge and experience." Hutton Park Gardens, 68 N.J. at 564–65.

"To determine whether a municipal ordinance is authorized by a state statute, we need decide only whether that ordinance represents a reasonable exercise of the Legislature's delegation of authority to the municipality in enacting the statute." Bryant, 309 N.J. Super. at 610–11 (App. Div. 1998) (citing Fanelli v. City of Trenton, 135 N.J. 582, 591 (1994)). Therefore, an ordinance will be upheld where "any state of facts may reasonably be conceived to justify [them]." Quick Check Food Stores, 83 N.J. at 447 (citing Hutton Park Gardens, 68 N.J. at 565). This standard arises from an understanding that "the underlying policy and wisdom" of the ordinance is left to the governing body, not the courts. Quick Check Food Stores, 83 N.J. at 447 (citations omitted). Said another way, "[i]f an ordinance has both a valid and an invalid purpose, courts should not guess which purpose the governing body had in mind." Riggs v. Long Branch, 109 N.J. 601, 613 (1988) (citing United States v. O'Brien, 391 U.S. 367, 383–84 (1968)).

B. Statutory Interpretation: *De Novo*. (Raised Below: Pa24-Pa29)

When the Appellate Division reviews the trial court's interpretation of a statute, ordinance, or case law, the standard of review is *de novo*. See, e.g., 388 Route 22 Readington Realty, 221 N.J. at 338 (citations omitted). The court's

duty is well-defined when construing the meaning of a statute: " to effectuate the legislative intent in light of the language used and the objects sought to be achieved." Merin v. Maglaki, 126 N.J. 430, 435 (1992) (quoting State v. Maguire, 84 N.J. 508, 514 (1980)). "[T]he starting point of all statutory interpretation must be the language used in the enactment. We construe the words of a statute in context with related provisions so as to give sense to the legislation as a whole." MEPT Journal Square Urban Renewal, LLC v. City of Jersey City, 455 N.J. Super. 608, 623 (App. Div. 2018) (internal quotations and citations omitted). With the exception of technical terms or terms of art, the court reads words chosen by the Legislature in accordance to their ordinary meaning. Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553 (2009) (citations omitted). The court will not "rewrite a plainly-written enactment of the Legislature … [or] presume that the Legislature intended something other than that expressed by way of the plain language." Id. (quoting O'Connell v. State, 171 N.J. 484, 488 (2002)).

C. Discovery Decisions: Abuse of Discretion. (Raised Below: Pa24; Pa28-Pa29)

The Appellate Division reviews a trial court's discovery rulings for abuse of discretion. Pomerantz Paper Corp. v. New Community Corp., 207 N.J. 344, 371 (2011) (citing Bender v. Adelson, 187 N.J. 411, 428 (2006)). The Appellate Division will generally defer to the trial court's discovery decisions unless "the

court has abused its discretion or its determination is based on a mistaken understanding of the applicable law." Id. (quoting Rivers v. LCS P'ship, 378 N.J. Super. 68, 80 (App. Div.), certif. denied, 185 N.J. 296 (2005)).

This includes expert testimony: "admission or exclusion of expert testimony is committed to the sound discretion of the trial court." Townsend v. Pierre, 221 N.J. 36, 52 (2015) (citing State v. Berry, 140 N.J. 280, 293 (1995)).

Trial courts are afforded "considerable latitude" when reviewing the admission or exclusion of evidence, and a trial court's ruling will only be overturned if it "was so wide of the mark that a manifest denial of justice resulted.'" State v. Terrell, 452 N.J. Super. 226, 248 (App. Div. 2016), aff'd, 231 N.J. 170 (2017) (citations omitted).

II. THE TRIAL COURT APPLIED THE APPROPRIATE LEGAL STANDARD UNDER THE LTTEL. (Raised Below: Pa20-Pa29)

A. The Long Term Tax Exemption Law.[4] (Raised Below: Pa8-Pa11; Pa20-Pa29)

The New Jersey Long Term Tax Exemption Law allows a municipality to "enter into a financial agreement with an urban renewal entity for the undertaking of a project set forth in a redevelopment plan adopted by the

[4] Sections II(A), II(B), II(C), and II(D) respond to Sections I(A) and I(B) in Plaintiffs' brief.

governing body pursuant to the 'Local Redevelopment and Housing Law[.]'" N.J.S.A. 40A:20-4. The Legislature intended to give the state's municipalities wide latitude to craft an appropriate agreement:

> In enacting the LTTEL, the Legislature carefully crafted a statutory scheme that provides municipalities with the means to carry out the public policy underpinning the act. One of the key issues concern the parameters of the financial agreements that set the terms between the City and the urban renewal entities. Pursuant to N.J.S.A. 40A:20-4, "[t]he governing body of a municipality which has adopted a redevelopment plan pursuant to the 'Local Redevelopment and Housing Law,' ... may enter into a financial agreement with an urban renewal entity ...." However, the form and content of the "financial agreement shall include, but not be limited to, those provisions set forth in [other sections of the LTTEL]. Ibid. For example, N.J.S.A. 40A:20-8 delineates the contents of application forms, the process for review by the "mayor or other chief executive officer," and the final approval by the municipal governing body.
>
> [MEPT Journal Square Urban Renewal, LLC v. City of Jersey City, 455 N.J. Super. 608, 623 (App. Div. 2018), certif. denied, 236 N.J. 356 (2019).]

The legislative history of the LTTEL makes it clear that the purpose of the law was to give municipalities "the ability to negotiate a financial agreement on terms most favorable to the municipality," and to "provide for municipal flexibility in negotiating tax exemptions":

> In addition to revising and consolidating the law, the bill strengthens the ability of the municipality to use the law to effectuate its redevelopment plans and purposes by:
>
> ***

> 2. Requiring review and approval of financial agreements on projects by the Director of Local Government Services in the Department of Community Affairs, as well as the municipal governing body, and strengthening the ability of the municipality to negotiate the financial agreement on terms most favorable to the municipality;
> ***
> 4. Provide for municipal flexibility in negotiating tax exemptions, based upon municipal findings regarding the costs and benefits of the project, the importance of the project to its redevelopment purposes, and the importance of tax exemptions to probable users of the project. The bill establishes a flexible in-lieu of tax formula, which requires a phase-in to full taxation over the period of tax exemption, which may be negotiated between the municipality and the urban renewal entity.
>
> [S. Cty. & Mun. Gov't Comm. Statement to S. 291 (L. 1991, c. 431) (emphasis added).]

Not only was the Law designed to strengthen a municipality's hand, and give it greater flexibility when entering PILOT agreements, it was also intended to operate quickly, so that there would not be delays:

> Amended also are sections 8 and 9 of the bill, to eliminate the requirement that both the application for tax exemption and the financial agreement between the urban renewal entity and the municipality be approved by the Division of Local Government Services of the Department of Community Affairs so as to eliminate delays in the implementation of local tax exemption programs.
>
> [Comm. Amendments to S. Cty. & Mun. Gov't Comm. Statement to S. 291 (L. 1991, c. 431) (emphasis added).]

In an unpublished case, Four Felds, Inc. v. City of Orange Twp., 2019 WL 2323711, Dkt. No. A-4623-15T3 (App. Div. May 31, 2019)[5], the Appellate

[5] Pursuant to R. 1:36-3, the unpublished decision is provided at Da383-Da384.

Division considered a challenge to a PILOT adopted pursuant to the LTTEL. As in this case, plaintiffs challenged the governing body's legislative findings, alleging that:

> the City failed to attach the long term tax exemption application to the public's Agenda Packet; the City failed to obtain a fiscal impact study in support of the Oakwood Towers' Acquisition and Rehabilitation PILOT [(payments in lieu of taxes)]; the City failed to create a proper legislative record supporting its mandatory statutory costs/benefits findings; the City failed to make a proper legislative record for its need for additional affordable housing statutory finding; the City accepted less than 10% of the Project's Revenues; the City permitted the former owner to keep all of the "net" sale proceeds; the City failed to quantify the minimum guaranteed payment due [to] the City.
>
> [Id. at *1.]

The Appellate Division rejected the challenge, finding "no legal basis to question the validity of the ordinance." Id. at *2. In rejecting the challenge, the court emphasized the presumption that attaches to all municipal legislation:

> Municipal ordinances duly adopted pursuant to authority delegated by statute enjoy a presumption of validity. N.J. Shore Builders Ass'n v. Twp. of Jackson, 199 N.J. 38, 55 (2009) (citing Brown v. City of Newark, 113 N.J. 565, 571 (1989). The party challenging the ordinance bears a heavy burden of overcoming that presumption. 388 Route 22 Readington Realty Holdings, LLC v. Twp. of Readington, 221 N.J. 318, 339 (2015). A challenging party can overcome the presumption of validity only through a clear showing that an ordinance is arbitrary or unreasonable. 515 Assocs. v. City of Newark, 132 N.J. 180, 186 (1993) (citing Hudson Circle Servicenter, Inc. v. Kearny, 70 N.J. 289, 299).
>
> [Id.]

The LTTEL details the specific procedures that must be followed by both the municipality and the developer. First, the developer must submit an application that addresses information required by the municipality, including but not limited to, a general statement of the nature of the proposed project, its estimated cost, sources and amounts of private capital, and a fiscal plan. See generally, N.J.S.A. 40A:20-8(a)-(e). The application must also include a proposed financial agreement. N.J.S.A. 40A:20-8(f).

Separate provisions address, the required form and contents of the financial agreement (N.J.S.A. 40A:20-9) and optional provisions of the financial agreement (N.J.S.A. 40A:20-10). Additionally, the LTTEL requires the municipality weigh the relative benefits of the project against the costs associated with the tax exemption, and assess the importance of the exemption to the project:

> A financial agreement approved pursuant to this act shall include findings by the municipality, approved by the municipal governing body, setting forth appropriate tax exemption provisions and an appropriate annual service charge schedule which shall be based upon the provisions of section 12 of this act and the municipality's determinations as to:
>
> a. The relative benefits of the project to the redevelopment of the redevelopment area when compared to the costs, if any, associated with the tax exemption;
>
> b. An assessment of the importance of the tax exemption to be granted in obtaining the development of the project and in

> influencing the locational decisions of probable occupants of the project or units of the project.
>
> [N.J.S.A. 40A:20-11.]

B. Tax Exemptions are Favored for Affordable Housing. (Raised Below: Pa8-Pa11; Pa20-Pa29)

Tax exemptions are permitted by the Constitution (N.J. Const., art. VIII, § 3, ¶ 1) and legislative enactment, and are recognized by the Supreme Court as a critical tool for promoting affordable housing. See S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp., 92 N.J. 158, 265 (1983) ("Mount Laurel II").

In Mount Laurel II, the Court required that municipalities use every avenue available, whether financial or otherwise, to assist affordable housing developers:

> There are two basic types of affirmative measures that a municipality can use to make the opportunity of lower income housing realistic: (1) encouraging or requiring the use of available state or federal housing subsidies, and (2) providing incentives for or requiring private developers to set aside a portion of their developments for lower income housing. Which, if either of these devices will be necessary in any particular municipality to assure compliance with the constitutional mandate will initially be up to the municipality itself. Where necessary, the trial court overseeing compliance may require their use.
>
> [Mount Laurel II, 92 N.J. at 262.]

Mount Laurel II recognized the financial impact affordable housing can have on a municipality, while urging the use of tax exemptions for affordable projects:

> Satisfaction of the Mount Laurel obligation imposes many financial obligations on municipalities, some of which are potentially substantial. By contrast, a tax abatement for a low or moderate income housing project will have only a minimal effect on the public fisc. Thus viewed, the asserted fiscal reasons justifying the failure to provide tax abatement may be nothing more than a red herring.
>
> [Id.]

Here, the Trial Court properly found that the Township's purpose for granting Lennar a tax exemption was to provide for affordable housing. Pa26. From as early as 2017, the property-in-question has been part of the Township's court-approved affordable housing plan. The redevelopment plan anticipated a tax exemption, and the redevelopers agreements required that if no tax exemption were granted, the redeveloper could terminate the agreement. Da126; Da186-Da187. In short, the tax exemption is and has been instrumental in allowing the Township to meet a significant portion of its overwhelming affordable housing obligation. And at no time during the affordable housing or redevelopment process did Plaintiffs challenge the use of a tax exemption for this site.

C. The LTTEL does not Require a "But-For" Test. (Raised Below: Pa8-Pa11; Pa24-Pa29)

Plaintiffs assert that the LTTEL prohibits a municipality from entering a PILOT agreement unless the tax exemption was "necessary to attract investment and make the project financially feasible." Pb24; Pb31. They call this the "core

question," and the "crux of plaintiffs' case." Pb24; Pb31. In essence, they argue that a tax exemption can only be granted if the affordable housing project could not be developed but for the exemption.

However, there is no such requirement in the LTTEL, and it is the words of the statute, not what Plaintiffs believe is *implied*, which govern. See e.g. Brock v. Pub. Serv. Elec. & Gas Co., 149 N.J. 378, 391 (1997) (citing Ocean Pines, Ltd. v. Borough of Point Pleasant, 112 N.J. 1, 7 (1988) ("When the statutory language is not unclear or obscure, and no ambiguity may be inferred from related legislation or other circumstances, a court ordinarily should apply the statute as written."). No court has ever held that a tax exemption cannot be given unless the municipality finds that the development would not have occurred but-for the exemption, and Plaintiffs cite no law to support this novel interpretation.

Instead, the LTTEL at N.J.S.A. 40A:20-11 requires that the governing body approve a financial agreement that includes "appropriate" tax exemption provisions and an "appropriate" annual service charge. It is for the governing body to determine what is "appropriate." Only the governing body can weigh the relative benefits of the project against the costs associated with the tax exemption, and assess the importance of the exemption to the project. The governing body's decision is inherently legislative in nature.

To support their assertion that no tax exemption can be granted unless it was "necessary to attract investment and make the project financially feasible," Plaintiffs rely upon Robert Powell, who thinks the tax exemption cannot be granted because in his opinion, the project would be "financially feasible" without it. However, the words "financial feasibility" do not appear in the LTTEL.

Moreover, the Powell reports cannot now form the basis for a reinterpretation of the LTTEL. They were not part of the legislative record. Dr. Powell never testified under oath and his opinions were never subject to cross-examination. His reports were contradicted at the discovery motion by certifications of Lennar's Director of Land Acquisition and Entitlements, Mitchell Newman, and at the trial stage by an expert report from Richard Reading. His interpretation of the legal requirements of the LTTEL is irrelevant as a matter of law, and his opinions about Lennar's finances or the long term effects of the financial agreement are speculative. Yet Plaintiffs base their entire argument on the Powell reports, treating them as though they were proven fact. They are not.

In sum, Plaintiffs are asking this court to radically reinterpret the LTTEL. There is no "but-for" test in the statute, nor do the words "financially feasible" appear in it. There is no support in case law for Plaintiffs' interpretation, and

the Powell reports are unavailing. This court should not rewrite the statute or presume that it means something other than that expressed by its plain language. Bosland, 197 N.J. at 553.

D. The Ordinance Findings are not Conclusory. (Raised Below: Pa20-Pa29)

Plaintiffs argue that the ordinance must be invalidated because its findings are "conclusory." Pb26. They are not. They track the requirements of the statute with site-specific information. They may lack the information Plaintiffs want to see, but they are reasonable and not arbitrary. Judge Lougy agreed. He reviewed the Township's findings and found, "That is all the statute requires. Plaintiffs' assertions and arguments otherwise are unmoored from the statutory text itself. If the Legislature wanted municipalities to include detailed factual findings or engage in a but-for analysis, then the Legislature would have said so." Pa28.

Also, Plaintiffs' claim that the Hopewell Township Committee should have considered the effect that the Financial Agreement would have on the school taxes paid by plaintiff Boroughs (Pb28) ignores the statutory scheme that *does not* require payments to the regional school district but *does* require payments to the county. N.J.S.A. 40A:20-12(b).

E. The LTTEL does not Require Substantial Credible Evidence to Affirm the Ordinance's Validity.[6] (Not Raised Below)

Plaintiffs insist that Judge Lougy's decision gave the Township, "final and unreviewable power to grant a long-term tax exemption." Pb32. Far from it: Judge Lougy reviewed the record to ensure that the Township's decision complied with the statute. His decision recognized the presumption of validity that attaches to municipal legislative action, and recognized that the judicial role was circumscribed. In short, he effectuated the intent of the LTTEL, which is to give municipalities flexibility in negotiating tax exemptions and to negotiate a financial agreement on terms most favorable to the municipality. See supra Section II(A). In so doing, he exercised the judicial restraint that recognizes the "constitutional division of governmental functions" imbedded in the New Jersey Constitution and "time-honored traditions of restraint." Franklin v. Dep't of Human Servs., 225 N.J. Super. 504, 530 (App. Div.), aff'd, 111 N.J. 1 (1988) (Bilder, J.A.D., concurring).

Plaintiffs, on the other hand, want this court to create a new standard of review for financial agreements approved pursuant to the LTTEL. They now insist that "a LTTEL exemption requires findings supported by *substantial evidence*." Pb30; Pb32 (emphasis added). They concede that their argument is

[6] Section II(E) responds to Section I(C) in Plaintiffs' brief.

one of first impression (Pb32), but argue that it follows the Supreme Court's recent decision in Malanga v. Twp. of West Orange, 253 N.J. 291 (2023). In effect, Plaintiffs want this court to impose a standard of review reserved for quasi-judicial actions upon a local legislative act.

Plaintiffs' reliance on Malanga is misplaced. Malanga was a Local Housing and Redevelopment Law ("LHRL") case, not an LTTEL case. Malanga clarified the proofs required by N.J.S.A. 40A:12A-5(d) to declare a site an area in need of redevelopment. It said nothing about the proofs required by N.J.S.A. 40A:20-11.

The procedures under the LHRL for declaring a property to be in need of redevelopment and the procedures under the LTTEL for approving a tax exemption are fundamentally different. The first requires a resolution of the governing body, after a quasi-judicial hearing is held before the planning board on notice to all potentially affected property owners. The second requires an application and approval of a financial agreement by ordinance. The LHRL explicitly requires that the area-in-need designation be "supported by substantial evidence[.]" N.J.S.A. 40A:12A-6(b)(5)(c). There is no similar provision in the LTTEL, nor could there be, since by its very nature the approval of a financial agreement is a legislative act, based on a legislative, not quasi-judicial record. A legislative act can only be overturned based on a "clear showing" that the

ordinance was arbitrary or unreasonable. See, e.g., 515 Assocs., 132 N.J. at 186 (citing Hudson Circle, 70 N.J. at 299); Quick Check, 83 N.J. at 447. The requirements established by Malanga for an area-in-need designation cannot be grafted onto the LTTEL. They are based on a different statutory scheme.

Plaintiffs argue that the LRHL and the LTTEL must be "construed in concert" with each other (Pb34), citing N.J.S.A. 40A:20-2 (Pb21). But construing the LTTEL in conjunction with the LHRL does not require the procedural requirements of one be applied to the other, particularly when both statutes provide their own separate procedures.

Moreover, in this case the property-in-question was properly designated by the Township as an area in need of redevelopment. Judge Jacobson specifically found that "the determination of the Township Committee of the Township of Hopewell to declare the CF Hopewell Property and the Lennar Property as areas in need of redevelopment are supported by substantial evidence, are based upon a proper interpretation of the Local Housing and Redevelopment Law, N.J.S.A. 40A:12A-1 et seq. and are affirmed[.]" Da389-Da390.

Finally, Plaintiffs cite several other cases to support their argument that the Township's findings in response to the requirements of N.J.S.A. 40A:20-11(a) and (b) were inadequate. None of those cases is on point. For example,

- Hirth v. City of Hoboken, 337 N.J. Super. 149 (App. Div. 2001), allowed, but did not obligate discovery in a prerogative writ matter challenging an ordinance. As we have argued, and as Judge Lougy found, discovery in this matter was irrelevant.

- New Jersey Shore Builders Ass'n v. Mayor and Twp. Comm. of Twp. of Middletown, 234 N.J. Super. 619 (Law Div. 1989) was a Law Division case interpreting the moratorium requirements under the Municipal Land Use Law.

- Fields v. Princeton University, 28 N.J. Tax 574 (Tax 2015) was a Tax Court case addressing the nature of the proofs required to establish an exemption for educational purposes pursuant to N.J.S.A. 54:4-3.6.

- Clary v. Borough of Eatontown, 41 N.J. Super. 47, 63 (App Div. 1956) addressed a claim that the Borough's zoning ordinance confiscated plaintiff's property. The court found that plaintiff did not overcome the presumption that a municipal zoning ordinance was valid and reasonable in its impact upon property owners.

- Secaucus v. Jersey City, 19 N.J. Tax 10 (Tax 2000) was a Tax Court case addressing whether the annual service charge violated provisions of the Fox-Lance Law and the LTTEL. The court held that it did, after determining that "the language of both N.J.S.A. 40:55C-65c and N.J.S.A. 40A:20-12b(1) is 'clear and unambiguous on its face.' The annual service charge is limited to 2% of total project cost, no more and no less." Id. at 34. In the case at bar, the annual service charge complies with the law.

- Princeton University Press v. Borough of Princeton, 35 N.J. 209 (1961) addressed the burden of proof for establishing a tax exemption under N.J.S.A. 54:4-3.6, not the LTTEL.

- Town of Secaucus v. Jersey City, 20 N.J. Tax 384 (Tax 2002) addressed whether the Fox-Lance Law and the LTTEL allowed the transfer of a project to another urban renewal corporation, with the consent of the municipality.

Again, none of these cases remotely suggests that a LTTEL exemption requires findings supported by substantial evidence, or that the municipality's determination was arbitrary.

III. PLAINTIFFS' EXPERT REPORT IS NOT PROBATIVE, RELEVANT EVIDENCE TO THE LEGAL ISSUE BEFORE THE TRIAL COURT AND THIS COURT.[7] (Raised Below: Pa9; Pa20-Pa29)

Plaintiffs argue that their own "proofs showed the ordinance was not supported by substantial evidence." Pb37. As argued above, "substantial evidence" is not the proper standard. The Township's legislative act was entitled to deference and can only be overturned based on a "clear showing" that the ordinance is arbitrary or unreasonable. See Section (I)(A); Section (II)(E).

Beyond that, Plaintiffs' alleged "proofs" that the ordinance was arbitrary or unreasonable are exclusively found in the Powell reports. Those reports do not constitute "proof" and should not be considered by this court.

First, as noted above, the Powell reports were not part of the legislative record before the Township Committee. Instead, Dr. Powell performed an after-the-fact analysis of the Financial Agreement, for litigation purposes.

Second, the Powell reports were properly determined by Judge Lougy to be irrelevant. A governing body does not ordinarily make findings of fact to

[7] Section III responds to Section II in Plaintiffs' brief.

justify its actions. Hirth, 337 N.J. Super. at 165–66; Pa28. The Township satisfied its statutory requirement to assess the "'relative benefits of the project to the redevelopment of the redevelopment area when compared to the costs, if any, associated with the tax exemption'" and "'the importance of the tax exemption to be granted in obtaining the development of the project and in influencing the locational decisions of probable occupants of the project or units of the project.'" Pa27.

Third, the Powell reports were contradicted—first, at the discovery motion stage, when Defendant Lennar submitted certifications of Mitchell Newman, Lennar's Director of Property Acquisition to rebut Dr. Powell's conclusions, and second: at the trial stage, when Defendant Lennar submitted the report of Richard Reading, to again rebut Dr. Powell's conclusions. Pa185-Pa195; Pa239-Pa247; Pa699-Pa709; Pa710-Pa738.

Fourth, Dr. Powell's opinions were never the subject of sworn testimony or cross-examination.

Fifth, Dr. Powell's personal opinion about the standards required by the LTTEL was an inadmissible net opinion. Pomerantz, 207 N.J. at 373 (citing Taylor v. DeLosso, 319 N.J. Super. 174, 180 (App. Div. 1999)). His opinions about Lennar's finances or the long term effects of the financial agreement were speculative.

Finally, no prerogative writ action challenging a PILOT agreement should be reduced a "battle of the experts." The importance of the exemption and the balance of risk versus reward was for the members of the governing body, serving as the elected representatives of the people, to determine, not Mr. Powell, and not a court. "It is not the function of a reviewing court to substitute its judgment for that of the municipality's governing body and it is bound by the record before governing body." Palamar Const. Inc. v. Pennsauken Twp., 196 N.J. Super. 241 (App. Div. 1983).

IV. THE ORDINANCE WAS ADOPTED FOR A LAWFUL PURPOSE.[8] (Raised Below: Pa8-Pa11; Pa20-Pa29)

Plaintiffs allege that the ordinance "cannot stand" because it was adopted for an unlawful purpose—to "maximize the number of years the Township can receive … discretionary revenue" and to "maximize the shift of regional school costs to the Plaintiffs." Pb42; Pb44. But the clear public purposes were affordable housing and redevelopment. The law is clear: If an ordinance has both a valid and an invalid purpose, courts should not guess which purpose the governing body had in mind. O'Brien, 391 U.S. at 383–84; see also Riggs, 109 N.J. at 613 ("Courts generally will not inquire into legislative motive to impugn facially valid ordinance, but will consider evidence about the legislative purpose

[8] Section IV responds to Section III in Plaintiffs' brief.

when the reasonableness of the enactment is not apparent on its face."); Csaki v. Woodbridge Twp., 69 N.J. Super. 327, 33 (Law. Div. 1961) ("if there was legal power to adopt the ordinance, the motives of the members of the governing body are immaterial."); Kirzenbaum v. Paulus, 57 N.J. Super. 80, 84 (App. Div. 1959) ("If there was legal power to adopt the ordinance and resolution, the motives of the members of the governing body in doing so, absent fraud, personal interest or corruption, are immaterial.").

Plaintiffs may think that the terms of the Financial Agreement, including the annual service charge, benefit the Township to the detriment of the Boroughs, but they do not and cannot argue that the terms are illegal. The terms of the Financial Agreement comply with the requirements of the LTTEL found at N.J.S.A. 40A:20-12.

Plaintiffs may think that the alleged shift of regional school costs was unfair, but any such shift was a product of the law, not the Financial Agreement. The LTTEL specifically allocates five percent of the annual service charge collected under a PILOT to the county, and does not allocate any of the service charge to the schools. N.J.S.A. 40A:20-12(e) ("Each municipality which enters into a financial agreement on or after the effective date of P.L. 2003, c. 125 (C. 40A:12A-4.1 et al.) shall remit 5 percent of the annual service charge collected

by the municipality to the county in accordance with the provisions of R.S. 54:4-74.").

Plaintiffs' arguments about the effect that the statutorily-determined allocation could have on tax rates in the boroughs are best directed at the Legislature, not the Township. See e.g. Burton v. Sills, 53 N.J. 86, 95 (1968) ("The arguments bear on the wisdom of the legislation rather than on its validity. Presumably they were all weighed by the Legislature when it concluded that the Law would further the public interest and should be adopted. We do not sit here as a super legislature and we accept the legislative judgment as to the wisdom of the statute."); Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52 (App. Div. 2001) ("Generally, the wisdom, prudence and good sense of the Legislature in the enactment of law are not questions for the judiciary to resolve."). Indeed, Plaintiffs' complaint—that the PILOT unfairly shifted the regional school district's tax burden—is a complaint that any taxpayer in a regional district could make against any regional district member-municipality that enters a PILOT. That is not what the law envisions.

The Legislature has determined that 95% of the service payments generated through the PILOT shall be maintained by the municipality, to be appropriated at its discretion. This makes sense—it is the municipality that has the responsibility to revitalize areas in need of redevelopment and to shoulder

the burden of providing for affordable housing.

Yet despite the fact that the law does not allow a portion of the service charge to be allocated to the schools, the Township Committee members made it clear that they were concerned about the potential impact the project might have on the schools, and pledged to continue working with district officials to alleviate any such impact. The legislative record included a demographic study prepared by Phoenix Advisors. T1.57:8-15. The Township Committee pledged to commission another demographic study in collaboration with the school district. T1.57:22-25; 58:1-2. The Financial Agreement itself states that "[t]he Township may, in its sole discretion, discuss the potential impact of the Project on the Hopewell Valley Regional School District with the School Board and the potential use of a portion of the Annual Service Charge proceeds to address such impact." Pa630. Far from ignoring the schools, the Committee expressed its concern and willingness to appropriate funds in the future, both at the hearing and in the Financial Agreement.

V. THE TRIAL COURT PROPERLY DENIED PLAINTIFFS' DISCOVERY DEMANDS.[9] (Raised Below: Pa9-Pa10; Pa20-Pa29)

Judge Lougy properly determined that there would be no discovery in this prerogative writ action. He had the authority to do so. R. 4:10-3(a). His decision must be reviewed for abuse of discretion. See Section I(C). Judge Lougy's 31-page written decision explains his reasoning, and we will not reargue the matter here, other to note that discovery aimed at determining the motives of the governing body members for enacting the legislation, or determining whether a different financial agreement could have been struck, or determining the effect the Financial Agreement would have on a regional school funding formula, was irrelevant. As a matter of public policy, tax exemptions granted under the LTTEL are designed to be implemented without delay. See Comm. Amendments to S. Cty. & Mun. Gov't Comm. Statement to S. 291 (L. 1991, c. 431). As a matter of public policy, tax exemptions granted to help provide for affordable housing must be predictable and certain. Discovery would needlessly delay the construction of affordable housing and give its opponents an additional weapon to fight affordable housing projects.

[9] Section V responds to Section IV in Plaintiffs' brief.

CONCLUSION

For the reasons set forth herein, Defendants, Hopewell Township, Courtney Peters-Manning, Michael Ruger, David Chait, Kevin Kuchinski, and Uma Purandare, respectfully requests that the Court affirm the Trial Court's decision.

PARKER McCAY P.A.
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Michael Ruger, David Chait, Kevin Kuchinski,
and Uma Purandare

BY: *s/ Steven P. Goodell*
STEVEN P. GOODELL, ESQ.

Dated: December 13, 2023
4859-6282-3575, v. 1

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-003086-22T4

HOPEWELL BOROUGH, a political sub-division of the State of New Jersey, PENNINGTON BOROUGH, a political subdivision of the State of New Jersey PAUL ANZANO, individually, and JAMES DAVY, individually,	:	CIVIL ACTION
	:	ON APPEAL FROM THE FINAL ORDER OF THE
	:	SUPERIOR COURT OF NEW JERSEY,
	:	LAW DIVISION
Plaintiff-Appellants,		DOCKET NO. L-497-22
	:	
v.		Sat Below:
	:	HON. ROBERT LOUGY, A.J.S.C.
HOPEWELL TOWNSHIP, a political sub-Division of the State of New Jersey and COURTNEY PETERS-MANNING, individually and in her official capacity as Mayor, MICHAEL RUGER, individually and in his official capacity as Deputy Mayor,	:	
(Caption Continued Inside Cover)	:	

PLAINTIFF-APPELLANTS' REPLY BRIEF

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CORPORATION d/b/a LENNAR, and ABC CORP 1-5 (fictitious entities including public: entities) and JOHN DOES 1-5 (fictitious individuals), :

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PRELIMINARY STATEMENT

This case turns on a straightforward issue of statutory interpretation: whether the Long Term Tax Exemption Law (LTTEL) imposes substantive as well as procedural constraints on the long-term tax exemptions it authorizes a municipality to grant to developers of redevelopment projects.

LTTEL authorizes municipalities to grant "appropriate" tax exemptions to investors in redevelopment projects based on "findings" by the municipality that assess the costs and benefits of the exemption, assess "the importance of the exemption in obtaining development of the project," and asses the "influence on the locational decisions" of probable occupants. These words, construed against the background of constraints imposed by the taxation provisions of the New Jersey Constitution, establish a standard to guide municipalities as they determine whether or not to grant exemptions. The standard, quite simply, means that exemptions under LTTEL require credible findings that they are necessary to attract investment in the project.

Defendants disagree, making the bold claim that so long as a municipality follows LTTEL's procedures and recites the requisite findings a LTTEL exemption is immune from challenge. Their position is aptly summarized in the Township's claim that "it is for the governing body to determine what is appropriate." (Dtb27)

At the same time, defendants quarrel with the basic facts suggesting that no exemption is needed for a project that stands to make defendant Lennar a 67.9% return on unleveraged capital and approaches full taxation for 25 years of its 30 year life, thus belying any claim that it will attract buyers looking for a significant break in property taxes. They also dismiss the relevance of the impact of the exemption on plaintiffs, arguing that the shift of $ 25 million of school tax burden to plaintiff Boroughs, albeit intentional on defendants' part, is a problem for the State Legislature.

The flaws in defendants' position are manifest. First, they claim that because a LTTEL exemption is granted "legislatively" by ordinance, the exemption is essentially immune from judicial review as long as LTTEL's procedures are followed. However, the meaning of LTTEL is not to be found in a standard of review but in the text of the statute. Nothing in the text of LTTEL vests unreviewable discretion in the governing body. Moreover, decisions by municipalities to grant long-term tax exemptions even when not needed for the success of a project would also violate the New Jersey Constitution, which defendants ignore.

Second, defendant Lennar centers its argument on the contention that whether an exemption is necessary cannot be proved. Yet this argument ignores the plain language of LTTEL requiring a municipality to assess costs and benefits and

"the importance of the exemption in obtaining development of the property." Unless these terms are merely precatory, to which a municipality can respond with conclusory recitals, LTTEL does require proof in the form of facts and figures presumably available in the "comprehensive financial analysis" that to date defendants claim exists but decline to disclose to plaintiffs.

Third, defendants attempt, unpersuasively, to soften the facts showing that Lennar's project on undeveloped farmland in the Township will be hugely profitable and showing further that the peculiar structure of the exemption reflects the Township's interest in shifting school tax burdens and generating revenues for its unrestricted use and not in any necessity to attract investment by Lennar. However, defendants' quarrel with the facts only reinforces the point that there is a factual dispute that called for development through discovery.

This Court should clarify that LTTEL exemptions require credible evidence that they are necessary for the financial feasibility of the project, and reverse.

ARGUMENT

I. A LTTEL EXEMPTIONREQUIRES COMPLIANCE WITH SUBSTANTIVE AS WELL AS PROCEDURAL STANDARDS.

A. Plain Language.

The question whether Section 40A:20-11 of LTTEL vests a municipality with the final unreviewable say on whether tax exemption provisions are "appropriate" is a question of statutory interpretation that is reviewed de novo.

e.g., MEPT Journal Square Urban Renewal, LLC v. City of Jersey City, 455 N.J. Super. 608, 622-23 (App.Div. 2018); 388 Route 22 Readington Realty Holdings v. Twp of Readington, 221 N.J. 318, 338 (2015). The objective of statutory interpretation is to "determine and effectuate Legislature's intent," Id., at 623. (citations omitted) and the "best indicator of that intent is the statutory language," DiProspero v. Penn, 183 N.J.477, 492 (2005). The words of a statute are normally given their generally accepted meaning, Spade v. Select Comfort Corp., 232 N.J. 504, 514-15 (2018) (quoting N.J.S.A. 1:1-1) and are construed "in context with related provisions" to give sense to the legislation as a whole. Id. at 515. If there is ambiguity, New Jersey courts turn to extrinsic evidence, including, inter alia, legislative history and committee reports. DeProspero, supra, 183 N.J. at 492-93.

Defendants pay lip service to these basic principles but do not follow them. The plain language of N.J.S.A. 40A:20-11 provides that a financial agreement "shall include findings" by the municipality setting forth "appropriate" tax exemption provisions and an "appropriate" annual service charge [PILOT] schedule. The statute asks the municipality to make "determinations" as to (a) "the relative benefits" of the project "when compared to the costs, if any, associated with the tax exemption" and (b) "the importance of the tax exemption to be granted in obtaining the development of the project and in influencing the locational decisions of probable occupants of the project or units of the project." These

straightforward words contain nothing to suggest that the findings made are to be insulated from substantive challenge. To the contrary, N.J.S.A. 40A:20-12 permits the "validity" of a financial agreement or exemption to be challenged by an action in lieu of prerogative writ. The present action contests the "validity" of a financial agreement, including most importantly the factual basis for the findings. The meaning of "valid" relevant here is "well-grounded or justifiable." *Merriam-Webster's New Collegiate Dictionary* (9th ed. 1983) Plaintiffs have credibly challenged the grounds for the Township's conclusory statement that it is "not financially feasible" to undertake development of the Project without the tax exemption (Pb27-28), and with good reason, given the developer's reported expectation of a 67.9% return on invested capital. Defendants have not attempted to challenge this point on a substantive basis beyond claiming that plaintiff's expert reports are "irrelevant" or otherwise out of order. (Dtb34-36)

B. Intent and Purpose of Statute.

Lacking any support in the text of LTTEL, N.J.S.A. 40A:20-1, et seq., for their position that the requisite "findings" are not open to substantive challenge, defendants rely on selected language from the legislative history stating that LTTEL aimed to give municipalities "flexibility" in negotiating tax exemptions on terms most favorable to the municipality and that it also was intended to operate "quickly." (Dtb21-22) These points beg the question. Giving municipalities

"flexibility" does not add up to relieving them of the obligation to defend an exemption scheme if challenged. The legislature presumably understood that court challenges could be resolved expeditiously through calendar management. Indeed actions in lieu of prerogative writs have special case management rules to expedite final disposition. See Pressler & Verniero, Current N.J. Court Rules, Comment R. Rule 4:69-4 (GANN).

Defendants' focus on "flexibility" ignores the primary goal of encouraging investment by private capital in redevelopment projects through the use of special financial arrangements to accomplish the purposes of the Local Redevelopment and Housing Law (LRHL). That law is intended to facilitate the redevelopment of blighted areas. N.J.S.A. 40A:20-2. The tax exemptions authorized by LTTEL are thus designed to give municipalities necessary tools to attract investment in projects that would otherwise be passed over by private capital. The Township plainly understood this when it asked defendant Lennar to state why it believed that a long-term exemption was necessary to make the project "economically feasible." (Dlb26) Its current claim that defendants have imported a feasibility or but/for test into LTTEL therefore rings hollow.

C. Constitutional Framework.

Significantly, defendants have come forward with no meaningful response to plaintiffs' argument that LTTEL must be construed against the background of the

Uniformity Clause, N.J. Const. Art. VIII, Section 1, Par. 1(a), and the Blighted Areas clause, N.J.Const. Art. VIII, Sec. 3, par 1, the taxation provisions that set the constitutional framework for grants of tax exemption. (Pb21-23) The Blighted Areas clause provides necessary constitutional grounding for tax exemptions that would otherwise violate the principle that property is to be assessed according to general laws. Exemptions that are not necessary to obtain financing for a redevelopment project lose the connection to redevelopment goals required by the Constitution. Exemptions that are not necessary to obtain financing for a redevelopment project lose the connection to redevelopment goals required by the Constitution. e.g., Secaucus v. Jersey City, 19 N.J. Tax 10, 28 (Tax 2000) (exemptions even if connected with redevelopment must be granted sparingly and only to those who comply strictly with applicable requirements). Just as Malanga v. Tp. of West Orange, 253 N.J. 291 (2023)[1] interprets the LRHL in light of the Blighted Areas clause, so should LTTEL be interpreted against that clause, most especially given the legislative directive that LTTEL is to be construed "in concert" with LRHL. Millenium Towers Urban Renewal LLC v. Municipal Council of City of Jersey City, 343 N.J. Super. 367, 380-81 (Law Div. 2001)(emphasizing that LTTEL's "construing" language covers the entire legislative scheme).

[1] Contrary to the Township's assertion at fn. 1 of its brief (Dtb6,fn1), plaintiffs did raise the Malanga decision (recently decided) below. (3T25:21-26:6)

D. Standard of Review Cases

The standard of review cases defendants rely on for their reading of LTTEL do not do the work defendants ask of them.[2] Those authorities are all cases that speak to the presumption of validity that attaches to duly adopted municipal ordinances and an asserted distinction between "legislative" and "quasi-judicial" action. Most of defendants' authorities involve police power ordinances,[3] but these cases are not apt. Police power ordinances rely on the core duty of a municipality to provide for the health, welfare, and safety of its inhabitants, and the presumption of validity gives them wide latitude. They do not involve ordinances

[2] The unpublished opinion in The Four Felds, Inc. v. City of Orange Twp., 29 WL 2323711, Dkt. No. A-4623-15T3 (2019), cited by the Township provides no useful guidance. At issue was a replacement tax exemption issued to a successor owner of an apartment complex. The prerogative writ complaint alleged various procedural shortcomings and stated that the City failed to create a proper legislative record. In its two-page opinion affirming the trial court's dismissal of the complaint, the Court relied on the presumption of validity and stated that on its review of the record plaintiffs had "not presented sufficient grounds to overcome" that presumption. The opinion gives no detail on the specific grounds for the challenge. Here, plaintiff has put forth ample grounds to overcome the presumption of validity and raise an issue requiring discovery and trial. Hirth v. Hoboken, 337 N.J. Super. 149 (App. Div. 2001)

[3] N.J. Shore Builders Ass'n v. Twp. of Jackson, 199 N.J. 38, 55 (2009)(tree removal ordinance); Hutton Park Gardens v. Town Council of Town of W. Orange, 68 N.J. 543, 564 (1975)(rent control ordinance); 388 Route 22 Readington Realty Holdings, LLC v. Twp. of Readington, 221 N.J. 318, 339 (2015)(sewer capacity); 515 Assocs. v City of Newark, 132 N.J. 180, 186 (1993)(requirement for armed guards in apartment complex); Quick Check Food Stores v. Springfield, 83 N.J. 438, 447 (1980)(closing hours for convenience stores).

adopted pursuant to a delegation by the legislature to further a specific statutory scheme that calls for particular findings.

The two cases cited by defendants that do involve regulatory ordinances, Bryant v. City of Atlantic City, 309 N.J. Super. 596 (App Div. 1988)(challenge to LRHL redevelopers agreement) and Hirth v. City of Hoboken, 337 N.J. Super 149 (App Div. 2001)(challenge to LRHL redevelopment plan), are also unhelpful to defendants. Bryant, to be sure, states that "legislative bodies are presumed to act on the basis of adequate factual support," Bryant, supra, 309 N.J. at 610, but it also makes clear that the presumption can be overcome by a "sufficient showing" that the enactment does not have a rational basis. Id. Indeed, Bryant states that a "determination predicated on unsupported findings is the essence of arbitrary and capricious action." Plaintiffs have come forward here with a showing that calls the Township's findings and the validity of the exemption into serious question.

Hirth states that at a hearing on a municipal ordinance "there is no requirement that evidence be presented providing a factual foundation," Hirth, supra, 337 N.J. Super. at 158. However, LTTEL itself requires findings that are factual in nature. Indeed, at the ordinance hearing, the Township's witnesses alluded to a "comprehensive financial analysis" to back up those findings. (Pb8) Further, one of the plaintiffs questioned the need for an exemption, pointing out that a similar inclusionary development in the Township had gone up without any

tax breaks. (Pb19-20) Just as importantly, Hirth makes clear that if a prerogative writ action challenges the validity of an ordinance and "resolution turns on disputed factual issues," the case must proceed in the same manner as other civil litigation…" Id. Here, plaintiffs have made a showing more than sufficient to raise a factual dispute. The trial court's decision to deny discovery and dismiss the complaint can only be sustained if the municipality has final and unreviewable say on what is and what is not an "appropriate" exemption under LTTEL. That interpretation is untenable for the reasons stated.

II. THE EXEMPTION SCHEME AT ISSUE DOES NOT SATISFY LTTEL'S SUBSTANTIVE STANDARD

A. Missing Nexus Between the Benefits of the Project and the Exemption and Disregard of its Full "Costs."

Defendants dwell on the benefits of the Project in providing affordable housing, but the issue here is whether the tax exemption granted to Lennar was necessary to achieve these benefits. Lennar, not surprisingly, claims that "anything" that will help it sell houses is a substantial benefit to its business, (Dlb45) but under LTTEL "anything" is not the standard. Plaintiffs' expert concludes even on the limited record made available and without equivocation that the exemption was not necessary to make the Project financially feasible. (Pb12) Defendants have represented to the contrary, claiming that the asserted need for the exemption is based on a "comprehensive financial analysis" but refusing

nonetheless to make that analysis available or subject it to discovery. (Pb8) Indeed, defendants' briefs make no reference to that analysis and, instead, argue in effect that the finding they have proposed in support of the financial agreement -- that the exemption is necessary for the financial feasibility of the project (Id.) – is irrelevant.

With respect to assessment of the "cost" of the exemption, defendants insist that it need not consider the impact of shifting $25 million in school taxes to their partners in the regional schools. (Dlb33) By disregarding those costs, however, defendants ignore LTTEL's plain directive that the comparison of costs to benefits must consider "the costs, if any, associated with the tax exemption." N.J.S.A. 40A:20-11 (a). Like the benefits to be considered (Pb28), "costs" do not stop at the municipal boundary.

Defendants also challenge the $25,000,000 figure as "speculative" but provide no explanation. See second Powell report for his methodology. (Pb20; Pa707-8)

B. Facially Suspect PILOT

Defendants give scant attention in their briefs to the anomalous structure of the 30-year exemption they have designed, in particular, that for most of those 30 years unit owners will be paying 99.5% of full taxes. (Pb12-13) They fall back on the fact that the statute requires a phasing back in of conventional taxes in

increasing minimum percentages over time but does not set a maximum percentage. N.J.S.A 40A:12b(2). (Dlb31) However, the absence of a ceiling does not explain the bizarre choice of a PILOT equal to 99.5% of full taxes for almost the entirety of the exemption . Property owners whose units represent 85% of the project's market value will pay 99.5% of full taxes for 25 of 30 years, (Pb7,13). This exemption structure is a facially suspect vehicle for incentivizing investment.

Indeed, while the PILOT produces no significant benefit for the Project or its occupants, it maximizes both the tax shifting to the Boroughs and the unrestricted PILOT revenues that will flow to the Township. The comments of the Township's Mayor, Deputy Mayor and Finance Chair at public hearing applauding the shift in school taxes indicate that the shift in the school tax burden, not a need to secure investment in the Project, was the purpose of the exemption. (Pb18-20) Plaintiffs maintain that these purposes are unlawful, and at the least, plainly arbitrary and unreasonable.

D. Profitability Revisited

Defendant Lennar argues, improbably, that the estimated 67.9% Unleveraged Rate of Return that appears in its Application for exemption has nothing to do with the issue of profits. (Dlb29) This is incorrect. It is a matter of common knowledge that the rate of return on an investment is measured by how much profit the investor gets back in relation to the amount invested. A rate of

return of 67.9% on an investment of $1,000,000, for example, implies a profit of $679,000. A lower percentage of return implies lower profit.

Defendant Lennar also argues for the first time that the "Net Pretax Income" shown in Exhibit 13 ranges "from a very modest 3.5% to 6.5% among the five housing types." (Dlb30) However, calculation of net pretax income depends on the expenses built into the calculation. If this contention had been argued below, plaintiffs would have been prepared to point out that Lennar's calculations reflected in Exhibit 13 include "indirect" project costs not consistent with the definition of "total project unit cost" and "project cost" at N.J.S.A. 40A:20-3(h).

III. THE STANDARD PLAINTIFFS ARGUE FOR IS MANAGEABLE

Defendant Lennar argues that "no one can prove the ultimate profitability or financial viability of an affordable housing project or its ultimate success in advance, or that a project would not be built unless the tax exemption is granted," and for this reason the statute does not require such a showing. (Dlb3) Lennar's position, apparently, is that it is enough to show that an exemption is "helpful" (Dlb45), a standard that can always be met and would render LTTEL's requirements meaningless.

Lennar's concerns about the problems of proof with plaintiff's position are, in any event, unfounded. Plaintiffs' expert , Dr. Robert Powell, has explained that private capital markets follow numerical standards when assessing the feasibility

of a real estate project for financing and investment purposes. (Pb11-12) No doubt Lennar does assessments of this kind on a regular basis. Moreover, the standard of proofs in a challenge to an LTTEL exemption is "substantial basis." This is a concept that courts have dealt with in land use and other contexts for generations.

IV. POWELL'S FEASIBILITY ANALYSIS HAS NOT BEEN CHALLENGED

Defendant Township seeks to discredit the analyses offered by Dr. Powell on an assortment of grounds unrelated to the substance. In fact, neither of Defendants' experts has joined issue with him on the issue of feasibility. Lennar's in-house authority Mitchell Newman belatedly supplemented the information provided in Lennar's Application, first adding information about sewer costs (Pb10-11) and then making an unsubstantiated contention that the exemption is needed to facilitate the sale of units. (Pb14-15) The Township offered an expert in affordable housing, Richard Reading, who also failed to question Mr. Powell's analysis. (Pa722)

On the sewer issue, the Township has calculated a per unit cost for Mr. Newman's total figure but without reference to overall project cost. (Dtb27) The question plaintiffs long ago asked of defendants remains unanswered: what makes a sewer-cost of $17,547,105 "excessive" in a development costing more than $330,000,000 to build. (Pb11) Instead, the Township asks the Court to ignore the

Powell reports on procedural grounds and characterizes his quantitative estimate of the long-term effects of the exemption as "speculative." (Dtb28, 34-5)

Nonetheless, the Trial Judge elected to try the matter summarily and Dr. Powell's reports must therefore speak for themselves. They are fully adequate to challenge the validity of the exemption. Under Hirth v. Hoboken, supra, 337 N.J. Super. at 158, plaintiffs have raised material issues of fact that they should have been permitted to develop through discovery and trial. Hirth makes clear that this rule—which permits expansion of the record--applies to an action challenging the validity of an ordinance. Significantly, the Trial Court did not bar Dr. Powell's reports from the record but instead discounted them based on the Court's view of the LTTEL that are the subject of this appeal. As it stands, Dr. Powell's opinion that Lennar's project was lucrative and did not need a tax exemption to attract investment has not been contradicted.

CONCLUSION

For the reasons stated here and in the plaintiffs' initial brief, the Court should reverse the decision below and declare that the exemption and PILOT are arbitrary, capricious and unreasonable and contrary to law.

Respectfully submitted,

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