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SB BUILDING ASSOCIATES, L.P., SB  
MILLTOWN INDUSTRIAL REALTY  
HOLDINGS, L.L.C. and ALSOL CORP.;

Plaintiffs/Appellants,

v.

THE PLANNING BOARD OF THE  
BOROUGH OF MILLTOWN, THE  
BOROUGH OF MILLTOWN, MILLTOWN  
FORD AVENUE REDEVELOPMENT  
AGENCY, BORAIE DEVELOPMENT,  
L.L.C., and MILLTOWN FORD AVENUE  
REDEVELOPERS, LLC;

Defendants/Respondents.

SUPERIOR COURT OF NEW  
JERSEY  
APPELLATE DIVISION  
APPELLATE DOCKET NO.:  
A-003253-22

CIVIL ACTION

Appeal of the Order of  
Judgment and Decision of the  
Hon. Thomas Daniel  
McCloskey, J.S.C. entered  
May 22, 2023.

Sat Below:

Hon. Thomas Daniel  
McCloskey, J.S.C.; Superior  
Court of New Jersey Docket  
No.: MID-L-6083-22

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**AMENDED BRIEF OF PLAINTIFFS/APPELLANTS SB BUILDING  
ASSOCIATES, L.P., SB MILLTOWN INDUSTRIAL REALTY HOLDINGS,  
L.L.C. AND ALSOL CORP.**

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## PRELIMINARY STATEMENT

The New Jersey Legislature, in both the Municipal Land Use Law and the Local Redevelopment and Housing Law, has elevated the significance of a municipality's Master Plan (particularly the Land Use Element) in guiding local land use decisions. Municipalities in New Jersey have no inherent power to enact land use regulations. Such authority is delegated to the municipalities through enabling legislation such as the MLUL and the LRHL which constrain how municipalities exercise land use power.

The Legislature requires that a municipality's zoning ordinances (and any amendments thereto) to be substantially consistent with the Land Use Element of the Master Plan. A municipality is not prohibited from adopting an ordinance that is inconsistent with the Master Plan, provided that the governing body identifies the inconsistencies and explains its reasons for deviating from the Master Plan.

All proposed zoning ordinances must first be reviewed by the municipal Planning Board to advise the governing body whether such Ordinances are consistent with the Land Use Element of the Master Plan. Planning Boards are given over a month to carefully analyze such Ordinances before providing their recommendations to the governing body.

The case at bar addresses the critical issue of what provisions of the Master Plan need to be addressed in the making the consistency determination. All master



plans must have at least 2 elements (1) Objectives Element; and (2) Land Use Plan Element. The Planning Board in this matter, at best, addressed the Objectives Element of the Master Plan. The governing body in its resolution claimed to have considered both elements, but it could not have done so because it did nothing other than to rely on the Planning Board's determination in making its decision and the Planning Board never examined the Land Use Element.

Most objectives of Master Plans are standard broad provisions (providing generally for housing, open space, etc.). It is in the Land Use Element that the land within the municipality is considered for specific uses (commercial vs. residential, large lots vs. small lots, and location and use of any open space). The real meaningful issues involving land use are hammered out by each municipality in the Land Use Element of their Master Plan. The Land Use Element guides the planning board and the governing body as to specific uses for each property in the municipality. It is the Land Use Element that most concerns the voters of any municipality and establishes the character of each New Jersey municipality.

In the case before the Court, the Milltown Planning Board decided that a proposed ordinance authorizing significant changes to (1) the amount, use and location of open space, (2) the density of the residential units to be built in a Redevelopment Area and (3) the ratio of market units to COAH units (which most importantly determines whether the Redevelopment Project intended to satisfy

Milltown's affordable housing obligation might ever be built) was not inconsistent with the Master Plan.

If the determination of consistency is based solely on the generalizations contained in the Master Plan's general Objectives Element, but ignores the specific recommendations made in the Land Use Element, then as a practical matter every land use ordinance will likely be deemed to be consistent with the Master Plan because every Master Plan contains such generalizations and every ordinance is likely to impact one of the generalizations.

Consistency determinations are designed for thoughtful consideration by Planning Boards and for public scrutiny and allow for judicial review by ensuring that any such inconsistencies are clearly recognized and rationalized by the governing body. These objectives are not met when planning boards and governing bodies fail to examine the specifics of the Land Use Element.

Further, in this case, even the Objectives Element of the Master Plan was hurt, as the Planning Board would have discovered if it had really considered the proposed Ordinance, because the Ordinance reduced the chances of the Affordable Housing Objective ever being obtained.

The decision below sends a very bad message to both Planning Boards and Municipal authorities.

## STATEMENT OF FACTS

### **A. Background**

Plaintiffs, SB Building Associates, L.P., SB Milltown Industrial Realty Holdings, L.L.C and Alsol Corp. are legal entities organized and existing under the laws of New Jersey. **(Pa 107)**. Pursuant to a Bankruptcy Court Order in Case No. 22-14231 issued by the Bankruptcy Court for the District of New Jersey, Plaintiffs, SB Building Associates, L.P., SB Milltown Industrial Realty Holdings, L.L.C and Alsol Corp. were consolidated and a Certificate of Merger was filed on July 1, 2022. **(Pa 107)**. Accordingly, Plaintiffs, SB Building Associates, L.P., SB Milltown Industrial Realty Holdings, L.L.C and Alsol Corp. will be referred to collectively herein as “Plaintiff.”

Plaintiff is the owner of real property, containing approximately 22.5 acres, located in the Borough of Milltown, Middlesex County, New Jersey, designated as Block 58, Lots 1.01, 1.02, 1.03 and 1.07 and Block 59.01, Lot 5.01 on the official tax map of the Borough of Milltown (the “Plaintiff’s Property”). **(Pa 175)**.

### **B. Redevelopment Plan**

Plaintiff’s Property has been designated as an area in need of redevelopment under a redevelopment plan adopted by the Defendant, Borough of Milltown (“the “Borough”) and being implemented by Defendant, Milltown Ford Avenue Redevelopment Agency (“Redevelopment Agency”). **(Pa 174)**.

The Redevelopment Plan for Plaintiff's Property was originally adopted in 2002 (twenty-two years ago) and has been amended on numerous occasions, the last being the Second Ordinance (as defined below and which is the Ordinance being challenged by Plaintiff in the within action) in 2022 (as amended, "Redevelopment Plan"). (Pa 91). The only property subject to the Redevelopment Plan is Plaintiff's Property. (Pa 170).

The Redevelopment Plan as it was originally adopted made no provision for addressing the Borough's constitutional Mt. Laurel obligation to provide a realistic opportunity for low and moderate income housing to be built in Milltown. (Pa 108).

Pursuant to the Redevelopment Plan, as it existed through 2019, a less than 4 acre strip of the Plaintiff's Property was designated as an approximately 50 foot wide linear greenway to be sold to the County of Middlesex (the "County"). (Pa 4). That strip ran along the banks of Mill Pond and would tie into a system of such greenways running along the banks of the waterways (Lawrence Brook) feeding to and from Mill Pond. (Pa 4). The balance of the 22.5 acres or approximately 18 acres was to be developed for 350 residential housing units at a density of approximately 19 units per acre. (Pa 4).

Defendant, Boraie Development, LLC ("Boraie") is the designated redeveloper of Plaintiff's Property under the Redevelopment Plan. Defendant,

Milltown Ford Avenue Redevelopers, LLC is the assignee of Boraie's rights under the Redevelopment Agreement (as defined below) (Boraie and Milltown Ford Avenue Redevelopers, LLC is collectively referred to hereafter as the "Redeveloper"). (Pa 48).

**C. Mt. Laurel Action**

In 2006, Plaintiff successfully filed an action in the Superior Court of New Jersey, Law Division, against the Borough, and others, under Docket No. MID-L-9439-06 alleging, among other things, that the Borough was in violation of its constitutional obligation to provide a reasonable opportunity for its fair share of "Mt. Laurel" housing to be constructed in the town. ("Mt. Laurel Action"). (Pa 109). The Court in that action found the Borough in violation of its obligation under the New Jersey Constitution and Fair Housing Act of 1985 to adequately create sufficient realistic opportunities for low and moderate income housing to satisfy its fair share of the unmet regional needs and entered an Order for Municipal Compliance on January 18, 2012 – over twelve years ago. (Pa 109).

The Borough has not obtained a Judgment of Compliance from the Court determining that the Borough has complied with the 2012 Order for Municipal Compliance. Up until the latest 2022 amendment to the Redevelopment Plan, embodied in the Second Ordinance, it has been the Borough's stated plan to effect compliance with the 2012 Order for Municipal Compliance through a 350 unit

residential development, with a set aside of 70 low and moderate income residential units, and a small commercial component to be built on the Property. (Pa 5). The plan also included an approximately 50 foot wide linear strip “greenway” running along the bank of Mill Pond to be sold to the County of Middlesex. (Pa 5). This plan for redevelopment is referred to in this brief as the “350 Unit Boraie Development.” A copy of the plan depicting the 350 Unit Boraie Development is can be found in Appellant’s Appendix at Pa 5.

**D. The Master Plan**

The Master Plan for the Borough was last amended and updated by the Borough on December 23, 2019 (“Master Plan” or “2019 updated Master Plan”). (Pa 7). The Master Plan recognizes the redevelopment project under the Redevelopment Plan as “consisting of 350 residential units, of which 70 will be affordable, a commercial component, and open space buffer along the Mill Pond and Lawrence Brook,” i.e., the 350 Unit Boraie Development. (Pa 38). This project, as the Master Plan states, “is consistent with the Redevelopment Plan, two rulings by Superior Court Judges, the Affordable Housing Court Master’s reports, and sound planning practice.” Id. The 2019 Master Plan Reexamination concludes that “[n]o further changes to the Ford Avenue Redevelopment Plan are recommended at this time” and that “[t]he Borough and Redevelopment Agency should continue to work with the designated Redeveloper to ensure that the

redevelopment project is successfully completed.” Id. There has been no amendment to the Master Plan after December 23, 2019.

**E. Pending condemnation action**

Despite Plaintiff’s Property being the key to the Borough’s plan for compliance with the 2012 Order for Municipal Compliance, the Borough has not yet acquired the Plaintiff’s Property. **(Pa 41)**. A condemnation action, instituted by the Redevelopment Agency in response to Case Management Order V dated November 12, 2019 in the Mt. Laurel Action, which at Plaintiff’s insistence ordered the Redevelopment Agency to file such action by November 22, 2019, is pending in the United States District Court for the District of New Jersey. **(Pa 41)**.

A June 3, 2024 trial date in the pending condemnation action for the establishing of the fair compensation needed to be paid for Plaintiff’s Property has been set as contemplated by the November 12, 2019 Case Management Order, but no Declaration of Taking has been filed as required for a quick taking. **(Pa 41)**. If the jury finds a value in excess of what the Redeveloper is willing to pay, there will be no taking and no Redevelopment Project.

**F. The change in the Redevelopment Plan based on the New Agreement among the Borough of Milltown, The Redevelopment Agency, The Redeveloper And Middlesex County (the “County”).**

On or about July 26, 2021, the Redevelopment Agency, the Borough, the Redeveloper and the County entered into an Agreement (the “Four Party Purchase Agreement”) pursuant to which the Redevelopment Agency agreed to re-sell one-half of Plaintiff’s Property (11 acres) to the County for Open Space if the Redevelopment Agency acquires Plaintiff’s Property. (Pa 45-64).

Prior to the Four Party Purchase Agreement, the Redevelopment Plan, as it then existed, contemplated that the Redevelopment Agency, with funding provided by the Redeveloper, would acquire the 22.5 acre Plaintiff’s Property. (Pa 111). The Redevelopment Agency would then transfer the 22.5 acre property to the Redeveloper who would construct the 350 Unit Boraie Development on the site, which would need to include 70 affordable units to partially comply with the Borough’s Mt. Laurel obligation as ordered by the 2012 Judgment for Municipal Compliance. (Pa 111-112). In addition, under the prior plan, an approximately 50 foot wide greenway running along the bank of Mill Pond (approximately 4 acres) would be sold to the County as part of an Open Space plan creating a walkway for the public around Mill Pond and some connecting waterways. This is the plan that was described by the Borough as part of its 2019 Master Plan. (Pa 30, 38).

Under the new Four Party Purchase Agreement entered into in 2021 which the Ordinance is intended to facilitate, the Borough and the Redevelopment Agency have contractually agreed not to proceed with the 350 Unit Boraie



Development, but instead have agreed to adopt a new Redevelopment Plan. (Pa 64). Under that new Redevelopment Plan only one-half (11 acres) of Plaintiff's Property would be retained by the Redeveloper for a reduced residential development of 300 units and the other half of Plaintiff's Property (11 acres) would be sold to the County for Open Space. A copy of the new Redevelopment Plan is attached as an exhibit appearing as the last page of the Four Party Purchase Agreement. (Pa 64). As a result of this Agreement, the density of the residential component of the project increased from 19 residential units per acre to 27 units per acre, a 42% increase. (Pa 64). Although the total residential units would be reduced to 300 residential units from 350 residential units under the original plan, the number of Mount Laurel units to be provided stays the same at 70 units which will likely affect the economic viability of the project and the likelihood of it ever getting built. Building the affordable housing is one of the objectives of the Master Plan which is actually being hurt by the Ordinance, making the Ordinance inconsistent with the Master Plan even if only the Objectives of the Master Plan are examined. (Pa 64).

**G. First attempted Amendment to Redevelopment Plan**

As required under the Four Party Purchase Agreement, on May 9, 2022, almost a year after the Four Party Purchase agreement was executed, the Borough's Town Council approved on "first reading" Ordinance 22-1511 (the "First

Ordinance”) entitled “An Ordinance to Amend the Redevelopment Plan”. (Pa 112). The purported purpose of the First Ordinance was to approve an amendment to the Redevelopment Plan so as to (i) reduce the size of the development that the Redeveloper would be required to build, and (ii) include the purchase by the County of half of the Redevelopment Property (more than 11 acres) for Open Space, as opposed to the much smaller (approximately 4 acres) “greenway” running along the banks of Mill Pond, which was provided for under the Redevelopment Plan and the Master Plan. Compare the 350 Unit Boraie Development (Pa 5) with the new Redevelopment Plan (attached as the last page of Four Party Purchase Agreement, Pa 64). (See also Pa 112).

The Milltown Planning Board (the “Planning Board”), without making any reviewable findings of fact, adopted on June 1, 2022, Resolution No. PB09-2022 (the “First Planning Board Resolution”) and therein “opined that the new Ordinance is substantially consistent with the Borough’s land use plan and housing plan element of the Master Plan.” (Pa 112).

At the “second reading” of the First Ordinance, on June 23, 2022, the Milltown Town Council, as the governing body of the Borough, adopted the First Ordinance. (Pa 112).

Plaintiff filed a Complaint In Lieu of Prerogative Writ on July 29, 2022, under Docket Number MID-L-003764-22, challenging, *inter alia*, the First Ordinance for numerous procedural defects in its adoption (the “Prior Action”). (Pa 112).

**H. Second attempted amendment to the Redevelopment Plan**

Rather than defend the First Ordinance in the Prior Action, the Borough replaced the First Ordinance. (Pa 113).

On September 27, 2022, the Borough’s Town Council adopted, on “first reading”, Ordinance 22-1516 (the “Second Ordinance”) which also sought to approve the same amendment to the Redevelopment Plan as the First Ordinance. (Pa 91-94).

On October 12, 2022, the Planning Board adopted Resolution No. PB10-2022 (the “Second Planning Board Resolution”), which provides that the “Amended Redevelopment Plan is consistent with the goals and objectives of the Master Plan of the Borough of Milltown.” (Pa 69-71). (Emphasis added).

At the October 12, 2022 Planning Board meeting, as the transcript of the meeting shows, the Planning Board did not make any analysis or factual examination to determine if the Second Ordinance was consistent with the most current Borough of Milltown Master Plan or to analyze the Ordinance in any way to gage the impact on the Borough. See Transcript of Planning Board Meeting (Pa 73-89). The Planning Board apparently accepted the conclusion of the Borough Planner that the Second

Ordinance was consistent with the Master Plan because it provided for open space (and other generalized objectives of the Master Plan), and therefore in the view of the Board Planner, was consistent with at least some of the objectives of the Master Plan. **(Pa 73-89)**.

At the “second reading” of the Second Ordinance which took place on October 24, 2022, the Borough’s Town Council adopted the Second Ordinance which provided that “the Amended Development Plan is consistent with the Master Plan of the Borough of Milltown.” **(Pa 91-92)**. The Town Council, in stating that conclusion, simply accepted the conclusion stated in the Second Planning Board Resolution. The transcript of the meeting confirms that there was no discussion, analysis or findings made by the Borough Council in adopting the Second Ordinance. **(Pa 95-101)**.

**I. Application for judgment of compliance**

There is currently pending before the Law Division in the Mt. Laurel Action an application by the Borough for a Judgment that the Borough has now, after 12 years, complied with the 2012 Order for Municipal Compliance. **(Pa 109)**.

The Borough maintains that the current Redevelopment Plan, as amended by the Second Ordinance, which is the subject of the instant action, satisfies the Borough’s constitutional violation found in the 2012 Order for Municipal Compliance by allegedly providing a realistic opportunity for low and moderate

income housing to be built on Plaintiff's Property which will satisfy part of the Borough's fair share of the unmet regional need for such housing. (Pa 109). The Ordinance being reviewed reduces Milltown's chance of obtaining a Judgment of Compliance, which was never considered in Milltown's consistency determination either by the Planning Board or the Borough Council. (Pa 69-71 and Pa 91-93).

### PROCEDURAL HISTORY

On July 29, 2022, Plaintiff filed a Complaint in Lieu of Prerogative Writs and for Declaratory Relief with the Superior Court of New Jersey, Law Division, Middlesex County under Docket Number MID-L-003764-22 (the "Prior Action") challenging, *inter alia*, the First Ordinance. (Pa 112).

On December 8, 2022, Plaintiff filed a Complaint in Lieu of Prerogative Writs and for Declaratory Relief with the Superior Court of New Jersey, Law Division, Middlesex County under Docket Number MID-L-006083-22 (the "Instant Action" or "this Action") challenging, *inter alia*, the Second Ordinance. (Pa 114).

In light of the adoption on the Second Ordinance by the Borough, on December 22, 2022, a Notice of Dismissal of the Prior Action challenging the First Ordinance was filed by Plaintiff. (Pa 112).

On March 22, 2023, the Hon. Thomas Daniel McCloskey, J.S.C. presided over a trial in the instant action. Judge McCloskey entered an Order for Judgment in favor of Defendants dismissing Plaintiff's complaint and filed a written opinion on

May 22, 2023. Plaintiff filed its Notice of Appeal with this Court on June 28, 2023. (Pa 102-132).

### STANDARD OF REVIEW

Generally, a reviewing court should presume the validity and reasonableness of a municipal ordinance. First Peoples Bank v. Medford, 126 N.J. 413, 418 (1991).

The party attacking the ordinance bears the burden of overcoming the presumption of validity. See Ward v. Montgomery Township, 28 N.J. 529, 539 (1959). The presumption that a zoning ordinance is valid may be overcome by a showing that the ordinance is "clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the [zoning] statute" or, as in this case, was not "adopted in accordance with statutory and municipal procedural requirements." Riggs v. Long Beach, 109 N.J. 601, 610-12 (1988).

Municipalities have no inherent land use power, but depend upon the legislative delegation of the State's police power. Lusardi v. Curtis Point Property Owners Asso., 86 N.J. 217, 226 (1981); Gripenburg v. Township of Ocean, 220 N.J. 239, 252-253 (2015). See also N.J.Const. (1947), Art. IV, § VI, par. 2. The delegation of this power is embodied in the Municipal Land Use Law, N.J.S.A. 40:55D-1 to 92. Id. Similarly, the municipality has no inherent

power to designate lands for redevelopment, but rather depends upon the grant of power from the Legislature under the Local Redevelopment and Housing Law, N.J.S.A. §§ 40A:12A-1 to -73. See Vineland Constr. Co., Inc. v. Township of Pennsauken, 395 N.J. Super. 230, 250-251 (App. Div. 2007), dismissed as moot, 195 N.J. 513 (2008)

Municipalities exercising the land use powers granted to them by the Legislature must observe the limitations of the grant and the standards which accompany the grant, otherwise a court may declare the ordinance invalid despite the presumption of validity. See Taxpayers Ass'n of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6, 21 (1978); Kohl v. Mayor & Council of Fair Lawn, 50 N.J. 268, 275 (1967).

In order to be valid, a zoning ordinance must satisfy certain objective criteria. Riggs v. Long Beach, *supra*, 109 N.J. at 611. As enunciated by the New Jersey Supreme Court in Riggs: First, the ordinance must advance one of the purposes of the Municipal Land Use Law as set forth in N.J.S.A. 40:55D-2; Second, the ordinance must be "substantially consistent with the land use plan element and the housing plan element of the master plan not the "objectives" element of the Master Plan as was the thinking of the Planning Board and the court below, (see N.J.S.A. 40:55D-62a), unless the requirements of the statute are otherwise satisfied; Third, the ordinance must comport with constitutional

constraints on the zoning power, including those pertaining to due process, equal protection, and the prohibition against confiscation; and Fourth, the ordinance must be adopted in accordance with statutory and municipal procedural requirements.

Riggs v. Long Beach, supra, 109 N.J. at 611-612 (citations omitted).

Further, a determination predicated on unsupported findings is the essence of arbitrary and capricious action. In re Boardwalk Regency Casino Licensing Application, 180 N.J. Super. 324, 334 (App.Div.1981), modified on other grounds, 90 N.J. 361 (1982). Moreover, mere recitals of testimony are not “findings”. See New Jersey Zoning Use and Law Administration, Cox & Koenig, §19.7.2 (2022 ed.) A board is under a statutory responsibility to make and memorialize in its resolution findings of fact on which its conclusions and decisions are founded so that a reviewing Court has something to review. See Loscalzo v. Pini, 228 N.J. Super. 291, 305 (App. Div. 1988), cert. den. 188 N.J. 216 (1989). See also Cox and Koenig, New Jersey Zoning Use and Law Administration, at §19.7.2, (2022).

Finally, a consistently determination with the Land Use Element of the Master Plan by both the Planning Board and the governing body are central to the validity of the Ordinance even if findings of fact were made, which they were not in this case.



**LEGAL ARGUMENT**

**POINT ONE**

**THE LAW REQUIRES PLANNING BOARDS AND GOVERNING BODIES TO DETERMINE WHETHER THE PROPOSED ORDINANCE IS INCONSISTENT WITH THE LAND USE ELEMENT OF THE MASTER PLAN. (PA 114-118).**

The Municipal Land Use Law is clear as to what the Planning Board is required to review when determining whether an Ordinance is consistent with the Master Plan. N.J.S.A. 40:55D-62A provides:

“all of the provisions of such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements[.]” (emphasis added)

Thus, both the Planning Board and the governing body must consider the Land Use Element of this Master Plan when determining an Ordinance’s consistency. The LRHL also requires the Planning Board to make a consistency determination. N.J.S.A. 40A:12A-7a.

The Cox treatise on New Jersey Zoning and Land Use Administration explains the importance of municipal compliance with this requirement.

It is thus clear that the focus of the Municipal Land Use Law is on the enhanced role of planning and that it strengthens the planning process itself. The statutory enumeration of the factors to be considered in formulating a master plan, and the statutory directive that

the master plan itself include an evaluation of proposed ordinances in light of these factors, N.J.S.A. 40:55D-28b(2), serve the end of heightening the role of planning as a condition of proper zoning. It follows that the requirement that a zoning ordinance be substantially consistent with the master plan should be strictly enforced.

Cox and Koenig, New Jersey Zoning and Land use Administration, § 10-2.2

(2022). As discussed below, the Planning Board and the Borough Council each failed to review the Land Use Element of the Master Plan in arriving at their consistency determinations.

## POINT TWO

**THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S COMPLAINT BECAUSE THE ADOPTION OF THE SECOND ORDINANCE WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE SINCE IT WAS BASED UPON THE PLANNING BOARD'S DETERMINATION OF THE SECOND ORDINANCE'S CONSISTENCY WITH ONLY GENERALIZED OBJECTIVES OF THE MASTER PLAN, WHICH DETERMINATION WAS ITSELF ARBITRARY, CAPRICIOUS AND UNREASONABLE AND UNSUPPORTED IN THE RECORD. FURTHER, THERE WERE NO FINDINGS OF FACT. (PA 114-II 8, 123-130).**

### **A. The Local Redevelopment and Housing Law**

The municipal power to adopt and implement a plan of redevelopment is derived from the State and is governed by the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 to -73. See Vineland Constr. Co., Inc. v. Township of Pennsauken, 395 N.J. Super. 230, 250-251 (App. Div. 2007), dismissed as moot,

195 N.J. 513 (2008). As with other land use powers, the municipality must adhere to the requirements of the enabling statute in order for its exercise of those powers to be valid. Failure of a municipality to observe the limitations of the grant and follow the standards and requirements which accompany the grant, require a court to invalidate the municipal action as arbitrary, capricious and unreasonable or otherwise *ultra vires*. See Weymouth Township, supra, 80 N.J. at 21; Kohl v. Mayor & Council of Fair Lawn, supra, 50 N.J. at 275; Rockhill v. Chesterfield Tp., 23 N.J. 117, 125 (1957); Swan Lake Spa LLC v. Twp. of Montville, 2019 N.J. Super. App. Div. Unpub. LEXIS 1712, \*7-9; Cona v. Twp. of Washington, 456 N.J. Super. 197, 202 (App. Div. 2018) and East Mill Associates v. Township Counsel of East Brunswick, 241 N.J. Super. 403 (1990) (“We agree with Plaintiff that the failure to comply with N.J.S.A. 40:55D-62a invalidates the Ordinance”).

The procedure for adopting a Redevelopment Plan, as well as an amendment to an existing Redevelopment Plan, is governed by N.J.S.A. 40A:12A-7. This is a similar provision as 40:55D-62a found in the MLUL. See Powerhouse Arts Dist. Neighborhood Ass'n v. City Council of City of Jersey City, 413 N.J. Super. 322, 333 (App. Div. 2010). Under the LRHL, “[a]ll provisions of the redevelopment

plan shall be either substantially consistent with the municipal master plan”.

N.J.S.A. 40A:12A-7d.<sup>1</sup>

Similar to the MLUL’s requirements for adopting zoning ordinances, the LRHL also provides that prior to adopting, revising or amending a redevelopment plan, the plan should be referred to the planning board, which, shall review the redevelopment plan, revision or amendment, and report to the governing body setting forth the board’s recommendation concerning the redevelopment plan, including the identification of any inconsistencies .... N.J.S.A. 40A:12A-7e.<sup>2</sup>

### **B. The Planning Board’s review of the Second Ordinance**

In the case at bar, the Second Ordinance, before its adoption by the Borough’s Town Council on October 24, 2022, was referred to the Borough’s Planning Board. The Planning Board considered the Second Ordinance at its

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<sup>1</sup> While the LRHL requires that all provisions of the redevelopment plan, including any amendments, be substantially consistent with the master plan, the municipality may free itself from this requirement and adopt a plan “inconsistent with or not designed to effectuate the master plan by affirmative vote of a majority of its full authorized membership **with the reasons for so acting set forth in the redevelopment plan.**” N.J.S.A. 40A:12A-7d (emphasis added). In the instant case, there has been no such decision to adopt an inconsistent redevelopment plan, as (i) no such reasons for the departure from the requirement are stated in the ordinance, and (ii) both the Planning Board and the Borough’s Town Council stated to the contrary, i.e., they stated that the Second Ordinance is consistent with the Borough’s Master Plan. See Preliminary Statement above for the reasons for these requirements.

<sup>2</sup> In the case at bar, the Planning Board seemed to rush through its consistency analysis because the governing body “required” the Planning Board to make its determination before the second reading of the Ordinance. The law gives more than a month for the Planning Board to carefully consider its determination, but the Planning Board took less than 15 days to make its determination in an apparent attempt to appease the Milltown Borough Council which had no authority to cut the time under the law for the Planning Board to seriously consider the Ordinance.

October 12, 2022 meeting. The minutes state that Chairman Pietanza at the beginning of the meeting stated that the planning board's review of the Second Ordinance is merely a "formality" of reviewing what they already approved. (Pa 66)<sup>3</sup>.

The Second Planning Board Resolution states that that the Second Ordinance:

"is consistent with the goals and objectives of the Master Plan of the Borough of Milltown; specifically, Objectives 2, 3 and 6 in Section D of the Master Plan Reexamination Report, dated December 23, 2019, as follows:

a. Objective 2 provides that "Future plans should provide for more parks and opens paces [sic], within the Borough;" and the Amended Redevelopment Plan is fully consistent with this objective, in that it increases the amount of park and open space within the Borough;

b. Objective 3 provides that the Borough's housing obligation is satisfied through the provision of low and moderate affordable housing....; and

c. The Amended Redevelopment Plan substantially addresses environmental impacts . . . as provided for in Objective 6 . . . ." (Pa 69-70). (emphasis added).

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<sup>3</sup> The Chairman's reference to the Second Ordinance having already been approved the Planning Board is presumably to the action taken with respect to the First Ordinance amending the Redevelopment Plan, which the Borough rendered moot by adopting the Second Ordinance after Plaintiff filed the Prior Action challenging the validity of the First Ordinance.

The main reason underlying the need for the Second Ordinance was to authorize three major changes in the Redevelopment Plan as the result of the new plan for Plaintiff's Property under the Four Party Purchase Agreement. Those changes are (i) the reduction of the size of the residential development the Redeveloper is to build – 300 units in the Second Ordinance, down from 350 units in the 2019 Master Plan Amendment (the 70 affordable units remain unchanged); (ii) the reduction of the size of the land area on which residential development is to be built to 11 acres in the Second Ordinance from 22.5 acres in the 2019 Master Plan Amendment (resulting in a significant increase in “density” of the project)<sup>4</sup>; and (iii) selling to the County of Middlesex the other half of Plaintiff's Property from what was a 50 foot wide “greenway” along the bank of Mill Pond to tie into and continue the County's system of greenways running along the banks of Lawrence Brook and Mill Pond in the 2019 Master Plan Amendment, to what is now an 11 acre park pursuant to the Second Ordinance. **(Pa 45)**.

In describing how the Second Ordinance is consistent with the Master Plan, Mr. Barrec, the Borough Planner, who testified before the board at the October 12<sup>th</sup>

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<sup>4</sup> Residential density is commonly stated in terms of units per acre (N.J.S.A. 40:55D-4). In this case, the result of reducing the land area available for residential development meant going from 350 residential units on the 18 developable acres (22 acres less the 4 acre greenway strip originally approved) to 300 units on 11 developable acres (22 acres less the 11 acres to be sold to the County) or from 19 units per acre to 27 units per acre. It is obvious that the entire character of the project can be changed by the density of what gets built. The change here equaled a 42% increase in density. The Planning Board never considered the increase in density.

meeting, claimed the consistency is based on the Second Ordinance providing, for the first time, an 11 acre park and open space for the County, because open space is a general objective in the Master Plan (Objective 2). (Pa 74-82). There is no further discussion other than the observation that the Master Plan states open space as a general planning objective. (Pa 74-82).

The Board Planner also mentioned Objective 3 and 6 of the Master Plan. (Pa 74-76). As for objective 3's provision for low and moderate housing, serious analysis of the Second Ordinance would have revealed that this objective is adversely impacted by the Ordinance but was not recognized by the Planner and not considered by the Planning Board. See further discussion below in sub-point D below of this brief. See also Footnote 5 for a discussion of Objective 6.

### **C. No Findings of Fact by the Planning Board**

In connection with the issuance of its report, the planning board, like any other governmental body, must set forth basic findings of fact, supported by the evidence and supporting its determination. See Powerhouse Arts Dist. Neighborhood Ass'n v. City Council of City of Jersey City, 413 N.J. Super. 322, 332-333 (App. Div. 2010). See also Urban v. Manasquan Planning Bd., 124 N.J. 651, 662 (1991); In re Issuance of a Permit by Dep't of Env'tl. Prot. to Ciba-Geigy Corp., 120 N.J. 164, 172, (1990) (the requirement for stating the basis for its decision is for the "salutary purpose of informing the interested parties and any

reviewing tribunal of the basis on which the final decision was reached so that it may be readily determined whether the result is sufficiently and soundly grounded or derives from arbitrary, capricious or extra-legal considerations.").

A determination not predicated on findings is the essence of arbitrary and capricious action. In re Boardwalk Regency Casino Licensing Application, supra, 180 N.J. Super. at 334.

Despite the recitals in the Second Planning Board Resolution, the transcript of the meeting at which the Second Planning Board Resolution was adopted, is devoid of any discussion by the Planning Board of the testimony presented, nor any findings of fact or conclusions made by the Planning Board. (Pa 81).

**D. The Planning Board and the Borough Council Ignored the Inconsistencies Between the Master Plan and the Second Ordinance.**

In reviewing the Second Ordinance, the Planning Board engaged in no examination or analysis as to the amendment's consistency or inconsistency with the Land Use Element of the Master Plan. It is clear from the record that the Planning Board did not approach its task with any seriousness or vigor as it was told by its Chairman that their review was "merely a formality of reviewing what they have already approved." The only basis for the Board's determination of consistency was the testimony from the Borough Planner that amending the



Redevelopment Plan to provide for an 11 acre park is consistent with Objective 2 of the Master Plan, i.e., providing more parks and open spaces.<sup>5</sup>

The Planning Board did not consider, in fact, totally ignored, reconciling consistency with the fact that the land use element of the Master Plan did not designate Plaintiff's Property as a location for an 11-acre park open to any resident of the county nor was there any consideration of how the Second Ordinance hurt the possibility of providing Mt. Laurel housing (Objective 2) nor the increase in density of housing that resulted from the Second Ordinance..

### 1. Open Space

While increasing open space may be within the general objectives of the Master Plan, the split use of Plaintiff's Property between the Redeveloper and the County and the calling for an 11 acre park in an area never designated for such use in the Master Plan, as provided in the Second Ordinance, "materially undermine(s) or distort(s)" the plans for the use of Plaintiff's Property contained and endorsed in the land use provisions of the 2019 updated Master Plan. Accordingly, the Second Ordinance cannot be substantially consistent with the Master Plan.

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<sup>5</sup> The Planning Board's Resolution No. PB10-2022 also states that consistency of the Second Ordinance with the Master Plan is supported by furtherance of Objectives 3 (providing affordable housing) and 6 (addressing environmental events). (Pa 69) "Objective" 6 is not met by something new in the Second Ordinance that changes the existing Redevelopment Plan. The Redevelopment Plan based on the 350 Unit Boraie Development already met this objective. As we discuss in this brief, Objective 3 (providing affordable housing) was particularly hurt by the Second Ordinance.

While the Second Ordinance's 11-acre County park may be in accord with the Master Plan's general objective to increase open space, it is patently inconsistent with the Master Plan's Land Use Element setting forth the amount of open space and where in the municipality such open spaces should be located and how that open space should be used and by whom.

The Master Plan does not designate Plaintiff's Property for a park. While the increase in open space in other locations of Milltown in furtherance of Objective 2 (Open Space) are specified in the Master Plan's Land Use Element, Plaintiff's Property is not one of them. Thus, the use of half Plaintiff's Property for a park available for use by all residents of the county (the park land is intended to be bought by the County of Middlesex) is not contemplated in the Master Plan to implement the open space objective and is clearly inconsistent with the Master Plan.

The Legislature has permitted municipalities to use their Master Plans to designate areas within the municipality for a variety of public purposes, including open space. N.J.S.A. 40:55D-28. See also, New Jersey Shore Builders Ass'n v. Township of Jackson, 199 N.J. 449, 453-4 (2009). The Borough's 2019 updated Master Plan does not designate Plaintiff's Property as being the location for an 11 acre park. Nor does the 2019 updated Master Plan envision a deviation from the 350 Unit Boraie Development which the updated Master Plan endorses to be

developed on the 22.5 acre site. In fact, the 2019 updated Master Plan states as to the Ford Avenue Redevelopment Plan (i.e., 350 Unit Boraie Development) “being developed on Plaintiff’s 22.5 acre site, [n]o further changes to the Ford Avenue Redevelopment Plan are recommended at this time.” **(Pa 38)**. The Master Plan has not been amended after 2019 to change that recommendation.

There can be no other conclusion other than the Second Ordinance, which substantially changes the 350 Unit Boraie Development and creates an 11 acre park on one half of Plaintiff’s land, is inconsistent with the Master Plan as a matter of law. The Planning Board and the Borough Council rendered the Master Plan irrelevant.

## **2. Reduced Residential Development**

Further, neither the Planning Board nor its expert, in their consistency reviews, address the fact the redevelopment of Plaintiff’s Property under the Second Ordinance results in a smaller residential development than under the existing Redevelopment Plan, and therefore is inconsistent with the use the Land Use Element of the Master Plan designated for Plaintiff’s Property, i.e., the 350 Unit Boraie Development on the 22.5 acre site. A use for which the Master Plan, in its 2019 Report and adoption by the Borough, expressly stated it saw no need to recommend any change. A smaller residential component impacts residents who might consider occupying one of the residential units.

### **3. Affordable Housing Objective is at Risk**

The Second Ordinance eliminates 50 residential units shown on the Master Plan for development on Plaintiff's property and replaces that development with a park. The amendment makes it more difficult for the municipality to meet Objective 3 (the providing of affordable housing) because, as a result of the Second Ordinance, the economics of the project for the potential developer become worse. In other words, pursuant to the Second Ordinance, there are only 230 market residential units (300 total residential units proposed less 70 low income housing units proposed) to support the possible construction of 70 low income housing units, as opposed to the Master Plan's vision that there would be 280 market units (350 total residential units less 70 low income housing units) economically supporting the possible construction of the affordable housing. Since low income housing units do not generate profits for the developer, the more market units in the project relative to the total number of affordable housing units, the greater the likelihood the project will meet the economics necessary to get built. The Second Ordinance decreases the chances that low income housing will be built in Milltown by changing the ratio.

#### 4. Increase in Density

The Court below noted in its opinion (Pa 128) that the Plaintiff has commenced 8 lawsuits against the Borough of Milltown<sup>6</sup>. Plaintiff is not sure of the number (it depends on how you count them) but Plaintiff believes it only lost one of those suits. In that lawsuit, Plaintiff sued the Borough to increase the density of the residential development on the site. With the standard 20% low income housing set-aside, the 350 unit plan previously approved only produced 70 (350 residential units x 20% = 70) of the 158 low income housing units the Borough of Milltown needed to meet its Mt. Laurel obligation. Under Milltown's then plan, almost 8 acres of Plaintiff's property was proposed to be left along the pond as open space. Plaintiff thought that such open space should be developed for additional housing units to allow Milltown to get closer to its 158 unit low income Mount Laurel requirement. (Pa 110-111).

Ironically, the court in that case rejected Plaintiff's request essentially for two reasons: (1) the density proposed by Plaintiff of 25 units per acre was held to be not "good planning" and (2) the Redeveloper was found to be in a position to start construction of the 350-unit plan immediately as opposed to the 550 unit plan

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<sup>6</sup> The purpose of noting the fact twice in the Judge's opinion is perplexing especially since Plaintiff was successful in almost all of the litigation. (Pa 107, 128).

proposed by Plaintiff which would require a new Planning Board approval. (**Pa 110-111**).

Since the trial court's opinion was issued in that case in 2018 (six years ago), the Borough, the Redeveloper, the County and the Redevelopment Agency have entered into the Four Party Agreement (which the Second Ordinance was intended to implement) and which has increased the density of the proposed development to 27 units per acre<sup>7</sup>, which is more than the 550-unit plan presented by Plaintiff in its lawsuit (only 25 units per acre) and found by the Court in its decision to be too dense a development and "bad planning" (making the current Redevelopment Plan before the Planning Board and Borough Council seemingly "very bad planning") and should have been considered as such by both the Planning Board and the governing body in this matter as being inconsistent with the Milltown Master Plan.

#### **E. The Milltown Borough Council Adoption of the Second Ordinance**

There appears to be no consideration or discussion of the issue of the Second Ordinance's consistency with the Master Plan by the Milltown Town Council at the October 24, 2022 meeting at which they adopted the ordinance on its "second reading." The Resolution adopting the Second Ordinance, which purports to have been adopted on the same day as the meeting does not mention the conclusions of the Planning Board or its report, but simply concludes consistency. (**Pa 92**).

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<sup>7</sup> See Footnote 4

## F. Summary

1. Even if the Planning Board had only considered the Objectives of the Master Plan and not the Land Use Element, it should have found that by reducing the number of market units from 280 to 230 while keeping the COAH units at 70, the Second Ordinance was actually going counter to one of six (6) objectives of the Master Plan (Objective 3 - providing affordable housing) by decreasing the likelihood that affordable housing units would ever be built. The Planning Board and the governing body never considered this issue.

2. Providing an 11-acre park on Plaintiff's property when no park was shown on the Land Use Element of the Master Plan made the Second Ordinance inconsistent with the Master Plan and was *ad hoc* planning -- just what the Master Plan is intended to avoid.

3. Reducing the residential component by 50 residential units and substituting a park was contrary to the Master Plan Land Use Element.

4. Increasing the density of the residential development from 19 units per acre called for in the Master Plan to 27 residential units per acre provided in the Second Ordinance could negatively impact the character of the residential development and is contrary to the Master Plan Land Use Element's provision.

The Planning Board said nothing about the Land Use Element of the Master Plan. The Borough Council did but did not do anything to explain the reasons for the Ordinance's inconsistency with the Master Plan's Land Use Element.

As the Second Planning Board Resolution should be declared invalid by this Court, so too must the Resolution of the Borough Council adopting the Second Ordinance, which was based upon nothing more than the erroneous consistency determined by the Planning Board, be declared invalid.

To conclude otherwise is to eliminate the restrictions that the Master Plan is designed by the Legislature to place on municipal land use decisions and support *ad hoc* decision-making by a municipal body which is judicially unreviewable.

**POINT THREE**

**THE TRIAL COURT ERRED BY RUBBER STAMPING THE PLANNING BOARD'S CONSISTENCY DETERMINATION BASED SOLELY ON THE GENERAL OBJECTIVES SET FORTH IN THE MASTER PLAN CREATING A PRECEDENT FOR FUTURE PLANNING BOARDS AND GOVERNING BODIES TO APPROVE ORDINANCES CONTRARY TO THE SPECIFICS OF THE LAND USE ELEMENT OF THE MASTER PLAN WITHOUT EXPLAINING THEIR REASONS FOR DEVIATING FROM THE MASTER PLAN'S LAND USE VISION, CONTRARY TO THE LEGISLATURE'S REQUIREMENTS IN ITS DELEGATION OF POWER TO MUNICIPALITIES. (PA 124-130).**

The Trial Court upheld the Planning Board's determination that the Second Ordinance was not inconsistent with the Master Plan and the Borough Council's pro-forma adoption of the Planning Board's determination. The Trial Judge



accepted the Board Planner's conclusion that based on the general objectives<sup>8</sup> of the Master Plan, as opposed to its specific recommendations which are contained in the Land Use Element of the Master Plan, the Second Ordinance was consistent with the Master Plan. (Pa 125-128).

The Trial Judge stated he "is not going to second guess the Borough's determinations." (Pa 128). But the Trial Judge missed the point that both the Planning Board and Borough Council failed to consider the specifics of the Land Use Element of the Master Plan in coming to their unfounded determinations. (Pa 128-129). The Judge's job is to review these determinations. A review is not "second guessing".

We know of no Master Plan in this state which does not start out by reciting the general objectives of zoning as set forth in the preamble of the MLUL (N.J.S.A. 40:55D-2) particularly subsection (g) thereof which states that the intent and purpose of the act is:

to provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens.  
N.J.S.A. 40:55-2g.

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<sup>8</sup> Which is not even true because Objective 3 (providing affordable housing) is actually hurt, as discussed above.

If Planning Boards base their determination that a proposed ordinance is consistent with the Master Plan because the Ordinance includes a provision for increasing open space and the general objectives of the Master Plan make reference to open space, then every Ordinance that increases open space will be deemed to be consistent with the Master Plan regardless of the extent to which the Ordinance deviates from the Master Plan's specifics as to the areas in which open space should be located and the types of open space that are most desired including whether that open space should be available for use only by the residents of a municipality or a county-wide population which might be deemed undesirable by the municipality's residents for valid reasons.

The court below created a system by which the Planning Board and the governing body can avoid the work of analyzing and acknowledging the Ordinance's actual inconsistencies with the Master Plan, as well as the requirement of giving clear reasons why such inconsistencies are acceptable which helps inform the municipal residents as to whether their wishes are being carried out by their elected representatives. In addition, this procedure allows for judicial review -- not abdication.

The Court's opinion in the case at bar encourages *ad hoc* action not planning. In Willoughby v. Planning Board of Twp. of Deptford, 332 N.J. Super. 223, 227 (App. Div. 2000), this Court examined the reasons why inconsistency

determinations are so important and why governing bodies are required to explain their rationalization for adopting an inconsistent ordinance at the time of adopting resolutions:

By requiring contemporaneous passage, the law not only provides an avenue for public scrutiny of the action (including a record for judicial review) but, perhaps more importantly, ensures that the inconsistency is clearly recognized and rationalized when the action is taken. There is a significant difference between contemporaneous debate and post hoc rationalization.

The *Willoughby* court went on to instruct municipalities going forward that:

It is apparent that the MLUL gives the master plan a central role in a municipality's decisions regarding the use and development of the land within its jurisdiction. Section 62a anchors the master plan's role by generally requiring not only that amendments to a zoning ordinance be "substantially consistent" with the master plan, but that "all of the provisions of such zoning ordinance" be "substantially consistent" with the master plan.

We conclude that before adopting a zoning amendment inconsistent with the master plan, the governing body must expressly recognize the inconsistency. This will give effect to the significance the Legislature attached to the master plan. Recognition of inconsistency triggers the *requirement* of a full majority vote. That fact may alter the political landscape regarding a proposed amendment. Recognition of inconsistency flags the significance of the proposal and its potential impact on land use. Moreover, and perhaps most important, the rule we announce today compels the governing body to treat the master plan with the respect and importance assigned to it by the Legislature.

We make one additional observation. N.J.S.A. 40:55-26 requires reference to the planning board of any proposed zoning amendment. The planning board “shall make and transmit to the governing body... a report including identification of any provisions in the proposed ... amendment which are inconsistent with the master plan and recommendations concerning these inconsistencies...” *Ibid.* As previously indicated, the planning board also found the amendment to be consistent with the master plan.

Although not necessary to our decision, we are persuaded that the planning board’s failure to find inconsistency would not have been fatal to the ordinance if the governing body had expressly recognized the inconsistency. The power to adopt an ordinance is in the governing body. To rule otherwise would permit a planning board, by declining to find inconsistency, to impose a *de facto* veto over any proposed zoning ordinance that was inconsistent with the master plan.

The need for municipalities to make consistency determinations is therefore critical to (1) provide for public scrutiny of whether ordinances impacting land use, are contrary to a town’s zoning vision as embodied in the Land Use Element of the Master Plan; (2) giving courts a basis for reviewing such ordinances; (3) encouraging contemporaneous debate on the merits of a proposed ordinance; and (4) insuring that the authority to enact land use ordinances are not effectively transferred to a planning board who is unwilling to find inconsistency or to do the hard work necessary to make that determination.

Finding consistency based on the consideration of only general objectives contained in the Master Plan, as the Planning Board did in the Case before the

Court, was an easy way to avoid the work that the New Jersey Legislature requires. There was no consideration of the fact that (i) the Plaintiff's property was not shown in the Master Plan as having any open space; (ii) the right to use the proposed open space never included anyone residing outside Milltown (i.e. opening up a new park for the entire county); (iii) the increase in density per acre of the development brought about by reducing the land area for the Mt. Laurel development from 22.5 acres to about 11 acres and changing the number of units permitted to be constructed (350 residential units shown in the Master Plan reduced to 300 residential units in the Second Ordinance) i.e. a 50% reduction in land size but only a 14% reduction in number of units resulting in a substantial increase in density from 19 units per acre to 27 per acre, thereby impacting the character of the development; and (iv) by keeping the number of Mt. Laurel units the same (70 units) while decreasing the number of market units by 50 units, thereby substantially reducing the likelihood that the project will ever be built<sup>9</sup> and the Mt. Laurel obligation of the Township will ever be met with Plaintiff's land.

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<sup>9</sup> If the ordinance is not overturned, the Redeveloper will have only 230 market residential units to support the cost of the 70 Mt. Laurel units. Presently, in the Master Plan there are 280 market units intended to carry the 70 Mt. Laurel units. The reason for the universal provision of a 20% set aside is that such a set aside has been proven to be such that a project can economically handle that level of low-cost housing. With only 300 residential units and 70 Mount Laurel units, the project therefore will have an almost 25% set aside. There was no discussion by the Planning Board or Borough Council as to whether the project can handle such a burden, as a result the chance the project will not be built increases.

## CONCLUSION

Although Defendants argued, and the Court below accepted, that each Municipality has complete control over land use within its borders, the Legislature does not agree. To reduce arbitrariness in land use decisions, the Legislature required that each municipality adopt a Master Plan which mandates them to consider land uses apart from who is the owner of any particular parcel of land. In the process of adopting a Master Plan, various interest groups could debate what they believe to be in the best interest of the municipality as a whole.

Once a plan is adopted containing the views of the property owners and their elected representatives, and the likely give and take of various different interests, future land use decisions become significantly less arbitrary so long as such decisions have to be made in the context of the adopted plan. The more specific the Plan, the more meaningful the Master Plan is to future land use decisions.

All land use decisions impact the distribution of wealth within the municipality – commercially owned land is probably more valuable than residentially owned land and small lot zoning is probably more valuable on a per acre basis than large lot zoning.

The “character” of each municipality is created in the Land Use Element of the Municipality’s Master Plan. More importantly, the more difficult it is to change the Master Plan, the greater the stability of land use in the municipality and the

more effort will go into the issues involved in the initial adoption of the Master Plan.

Further, the process of changing zoning is significant in prohibiting the next governing body from undoing what the prior governing body did to the benefit of a potentially whole group of new “friends” and, to the extent that change requires a rational basis, the Master Plan has some long run significance.

The lower court decision eliminated the intended purpose of the Master Plan to make land use decisions less arbitrary and more stable. The Planning Board’s job was to point out to the governing body any possible inconsistency between the Ordinance under review and the Master Plan. The governing body can then focus on such items and either conclude there is no inconsistency or can still pass the Ordinance by setting forth reasons for passage despite the inconsistency. The Planning Board in the case before the Court just punted by failing to do the work envisioned by the Legislature to make land use decisions more transparent for both public scrutiny and judicial review.

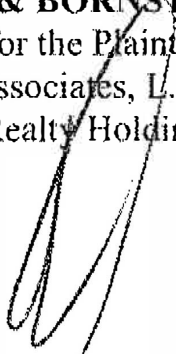
Based upon the foregoing and the arguments to be made during trial in support of the relief sought, Plaintiff respectfully requests this Court to reverse the decision of the Law Division by:

1. **D**eclaring that the Second Planning Board Resolution is vacated, void, invalid and of no force or effect.

2. Declaring that the Second Ordinance and the actions taken therein, including, but not limited to, the approval of the Amended Redevelopment Plan are vacated, void, invalid and of no force or effect.

Respectfully submitted,  
**BERGER & BORNSTEIN, LLC**  
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Building Associates, L.P., SB Milltown  
Industrial Realty Holdings, L.L.C. and Alsol  
Corp

Dated: March 1, 2024

By:   
\_\_\_\_\_  
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<p>SB BUILDING ASSOCIATES, L.P., SB MILLTOWN INDUSTRIAL REALTY HOLDINGS, LLC AND ALSOL CORP.;</p> <p>Plaintiffs-Appellants,</p> <p>v.</p> <p>THE PLANNING BOARD OF THE BOROUGH OF MILLTOWN, THE BOROUGH OF MILLTOWN, MILLTOWN FORD AVENUE REDEVELOPMENT AGENCY, BORAIE DEVELOPMENT LLC, and, MILLTOWN FORD AVENUE REDEVELOPERS LLC,</p> <p>Defendants-Respondents,</p>	<p>SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-3253-22</p> <p>ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY</p> <p>DOCKET NO.: MID-L-6083-22</p> <p>SAT BELOW: Hon. Thomas Daniel McCloskey, J.S.C.</p>
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**DEFENDANTS-RESPONDENTS, BOROUGH OF MILLTOWN AND  
MILLTOWN FORD AVENUE REDEVELOPMENT AGENCY'S,  
APPELLATE DIVISION BRIEF**

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**PRELIMINARY STATEMENT**

This appeal involves Plaintiffs, SB Building Associates, L.P., SB Milltown Industrial Realty Holdings, L.L.C., and Alsol Corp.’s (collectively, “Plaintiffs”), challenge to Defendant Borough of Milltown’s (“Borough”) actions in adopting an amendment to a Redevelopment Plan for the Ford Avenue Redevelopment Area, following a report of the Borough of Milltown Planning Board (“Planning Board”) determining that the Amended Redevelopment Plan was consistent with the Borough’s Master Plan. After a one-day trial before the Honorable Thomas D. McCloskey, J.S.C., his Honor dismissed Plaintiffs’ Complaint in its entirety, with prejudice, finding:

[T]he Planning Board’s adoption of Resolution No. PB10-2022 dated October 12, 2022 and the Borough Council’s subsequent adoption of Ordinance No. 22-1516 on October 24, 2022 to effectuate and implement the Board’s recommended amendments to the Borough’s Redevelopment Plan, and resulting Amended Redevelopment Plan itself, shall be AFFIRMED in all respects. [Pa 130].

In upholding Ordinance 22-1516, Judge McCloskey conducted a thorough review of the history of the Borough’s attempt to foster the redevelopment of Plaintiffs’ Property and Plaintiffs’ determined obstruction of same. He appropriately and correctly rejected Plaintiffs’ claims that the Amended Redevelopment Plan is inconsistent with the Master Plan and determined that

the decisions by the Borough's governing body and Planning Board were valid since they were well-reasoned and well-founded in the record before him. This appeal is nothing more than Plaintiffs' latest attempt to frustrate the Borough's long-standing efforts to redevelop Plaintiffs' Property with an inclusionary residential project to assist the Borough in meeting its affordable housing obligation.

As found by the lower court, the adoption of Ordinance 22-1516 represents a considered, rational decision justified by legitimate planning concerns and the Master Plan, was well-founded based on the record which included un rebutted testimony of the Borough's professional planner, and was adopted in a manner consistent with the applicable provisions of the Municipal Land Use Law ("MLUL") and the Local Redevelopment and Housing Law ("LRHL"). The Planning Board relied on the testimony of the Borough's planner that Ordinance 22-1516 is consistent with and furthers certain objectives of the Master Plan. The record before the Planning Board demonstrates that the governing body's adoption of the Ordinance was rational and entitled to deference.

In sum, this Court must uphold Judge McCloskey's decision because the adoption of Planning Board Resolution PB10-2022 and Ordinance 22-1516 were neither arbitrary, capricious nor unreasonable. Plaintiffs' endeavor failed and

continues to fail to overcome the presumption of validity which attaches to the Ordinance. For that reason, and the reasons set forth in Judge McCloskey's written decision, Plaintiffs' appeal should be denied.



## STATEMENT OF FACTS

### **A. The Parties.**

Plaintiffs collectively own real property consisting of approximately 24 acres, designated as Block 58, Lots 1.01, 1.02, 1.03, 1.07 and Block 59, Lot 5.01 (the “Property”) on the tax map of the Borough of Milltown. See Complaint ¶¶4; Pa 107. A portion of the Property, consisting of approximately 22 acres, has been designated an area in need of redevelopment and included in the Milltown Ford Avenue Redevelopment Plan (“Redevelopment Plan”) for decades. Id. In 2001, the Mayor and Council of the Borough of Milltown (“Borough”) created the Milltown Ford Avenue Redevelopment Agency (“Redevelopment Agency”) to administer the Redevelopment Plan. See Complaint ¶9.

### **B. History of the Milltown Ford Avenue Redevelopment Plan, 2004-2019.**

In 2004, the Redevelopment Agency entered into a Redevelopment Agreement with Boraie Development, LLC (“Boraie”) to construct 324 housing units, commercial office and retail space, and provide for open space. See Complaint ¶¶11-12; Pa 91, 108. The Redevelopment Agreement was subsequently amended in 2004, 2009, 2012, and 2019 (“Redevelopment Plan”). Pa 91. The most recent amendment, adopted in 2022, is the subject of this appeal.

In 2005, pursuant to the 2004 amendment, the project was reduced to 276 senior residential units. Pa 108. In 2006, Middlesex County (“County”), the Redevelopment Agency, and Boraie entered into an agreement wherein the County would acquire a 4-acre portion of the Property for open space (“County Agreement”). Pa 91, 108.

In 2006, while Boraie’s site plan application was pending, Plaintiffs filed a builder’s remedy lawsuit seeking to, *inter alia*, construct 550 units on the Property, nullify the Redevelopment Agreement and make Plaintiffs the redeveloper (“Builder’s Remedy Action”). Pa 109. In 2011, the requested builder’s remedy relief was denied, based upon a finding that Plaintiffs were “speculators,” “clearly not builders but investors,” and that the *Mount Laurel* claims were brought to obtain leverage in Plaintiffs’ dispute over the value of the Property for condemnation purposes. Pa 109. However, as part of its determination, the Court required the Borough to amend the Redevelopment Plan to permit 350 residential units, 70 of which would be set aside for low and moderate income households. Pa 109. The 2012 amendment to the Redevelopment Plan incorporated this revision and also provided for a 50-foot-wide greenway along Mill Pond, consisting of the 4 acres contemplated for acquisition under the County Agreement entered into in 2006. Pa 110-11.

In 2015, following the Supreme Court’s decision in In re N.J.A.C. 4:96 & 5:97, 221 N.J. 1 (2015), the Law Division reevaluated the Property’s capacity for development with affordable housing in the Builder’s Remedy Action. Pa 109. The Court considered Plaintiffs’ proposal of 550 residential units, which did not include the aforementioned greenway contained in the Redevelopment Plan, and the Borough’s proposal that the 350-unit proposed development, including the greenway, remain in place. Pa 110. Ultimately, the Court agreed that the 350-unit development “affords a realistic opportunity for development,” that the larger proposal submitted by Plaintiffs was “excessive” and “does not demonstrate sound land use planning,” and entered an order providing for the development of 350 residential units, including 70 units set aside for low and moderate income housing. Pa 110. In 2019, the Borough’s Master Plan and the Redevelopment Plan were both updated to comply with this order by way of the 2019 Master Plan Reexamination Report. Pa 111.

In 2018, the development rights under the Redevelopment Agreement were assigned to Milltown Ford Avenue Redevelopers, LLC (“Milltown Redevelopers”). See Complaint ¶13; Pa 91. In 2019, unable to reach an agreement as to the fair market value of the Property with Plaintiffs, the Redevelopment Agency filed a condemnation action, which was subsequently

removed to the United States District Court for the District of New Jersey, and remains pending as of this filing, on the issue of just compensation. Pa 48, 111.

**C. Modification of the County Agreement.**

In 2021, the County agreed to increase the portion of the Property it would acquire for recreation and open space purposes from 4 acres (the 50-foot greenway along Mill Pond) to 11 acres, which would now also include the southwestern portion of the Property bordering Mill Pond, closest to East Brunswick. Pa 91. To effectuate the acquisition, the County, the Redevelopment Agency, the Borough, and Milltown Redevelopers entered into an agreement on July 26, 2021 (“County Agreement”). Pa 51-53. Upon acquisition, the Borough would maintain the portion of the Property acquired by the County. Pa 56-57.

As set forth in the County Agreement,

The Borough intends to further amend the Redevelopment Plan to permit the Development Property to be developed in part as a residential development with approximately 300 units, 70 of which are for low and moderate households and with the Open Space Parcel consisting of a portion along Mill Pond and the eastern most portion of the property being used for passive recreation, all as shown on the attached Concept Plan[.] [Pa 49].

This agreement, adopted after the most recent Master Plan Reexamination Report completed in 2019, plainly contemplates an amendment to the

Redevelopment Plan to accommodate the expanded area of land to be acquired by the County for open space purposes.

**D. First Attempt at the 2022 Amendment to the Redevelopment Plan.**

On February 28, 2022, the amendment to the Redevelopment Plan referenced in the County Agreement was addressed by the Law Division during a case management conference on the Builder's Remedy Action. As a result of that case management conference, the Court entered an Order as follows:

2. The Borough's governing body shall introduce an ordinance amending the Redevelopment Plan and refer same to the Planning Board on or before **April 15, 2022.**

3. The Planning Board shall conduct a public hearing, make recommendations, and refer same back to the governing body on or before **June 2, 2022.**

4. The Borough's governing body shall approve an ordinance amending the Redevelopment Plan on or before **June 30, 2022.** [Pa 138-39].

After an adjustment of the date for introduction of the ordinance, see Pa 112, 146, the Borough introduced the proposed amendment to the Redevelopment Plan which reflects the increase in the portion of the Property to be acquired by the County and provides for the construction of 300 residential units, including 70 units for low and moderate income households. See Complaint ¶18; Pa 112. On June 1, 2022, the Planning Board determined the

amendment was consistent with the Master Plan. See Complaint ¶¶22. The amendment was adopted by the Mayor and Council on the ordinance's second reading at the June 23, 2022 governing body meeting. See Complaint ¶¶24.

Plaintiffs challenged the adoption of this ordinance as a violation of the automatic stay imposed in their ongoing bankruptcy proceeding. Pa 113. However, by Order entered September 15, 2022, the Bankruptcy Court lifted the automatic stay to allow the amendment to proceed, stating:

[T]o the extent the automatic stay may be applicable, the Borough of Milltown is granted relief from the automatic stay in order to adopt [the] June 13 [sic], 2022 Ordinance No. 22-1511, effective upon the entry of this Order (but not *nunc pro tunc* as requested in the Cross-motion). This stay [of] relief includes, but is not limited to, the adoption of the related Redevelopment Plan and the prosecution of the Mt. Laurel action to and including entry of Final Judgment. [Pa 151].

**E. 2022 Adoption of amendment to the Redevelopment Plan.**

Following the entry of the September 15, 2022 Bankruptcy Court Order, and in accordance with the directive of that Order that the requested relief to permit amendment of the Redevelopment Plan was not granted "*nunc pro tunc*," on September 27, 2022, the Mayor and Council referred Ordinance 22-1516

(“Ordinance”), the amendment to the Redevelopment Plan, to the Planning Board for review and reporting. Pa 92, 157.<sup>1</sup>

On October 12, 2022, the Planning Board conducted a hearing on the proposed amendment to the Redevelopment Plan. At that hearing, John Barree, P.P., the Borough’s Planner and author of the Borough’s 2019 Master Plan Reexamination Report, Pa 7-8, provided testimony that:

[O]ur role as the planning board is to review the plan for consistency with the Borough’s master plan. And there are a number of ... objectives in the master plan that are directly related to the -- the Ford Avenue Redevelopment Plan, the 2019 Master Plan Reexamination Report. [Pa 74].

Mr. Barree then proceeded to examine the pertinent “Milltown Planning Objectives” provisions of Section D of the Master Plan with regard to the proposed amendment to the Redevelopment Plan, beginning with Milltown Planning Objective Two of the Master Plan (“Future plans should provide for more parks and open spaces within the Borough.”), stating:

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<sup>1</sup> Plaintiffs, at Pb 13, ascribe particular significance to what they characterize as the Borough’s failure to defend the First Ordinance, and suggest that the Borough’s decision to readopt the Ordinance authorizing the Amended Redevelopment Plan constitutes an admission by the Borough that there was an error in the first adoption of same. This argument is erroneous. The record conclusively establishes that the Bankruptcy Court’s Order affirmed that the stay was lifted and the Borough’s requested relief was not granted *nunc pro tunc*. This is the reason the Borough readopted the Amended Redevelopment Plan.

Objective two talks about how future plans should provide for additional parks and open space in the borough. And one of the -- you may recall one of the main purposes behind the last amendment to the plan was to change some of the standards because the county, borough, the redevelopment agency, the redeveloper had entered into a four party agreement that ... called for the -- the county to acquire a larger piece of -- of the property to be used for -- for open space in the future.

So that goal is certainly directly consistent with ... the amended redevelopment plan. [Pa 31, 74-75 (2:25-3:11), emphasis added].

Turning to Milltown Planning Objective Three of the Master Plan (“The Borough’s housing obligations should be satisfied through the provision of low and moderate affordable units.”), Mr. Barree testified:

Objective three talks about ... satisfying the borough’s affordable housing obligation through the provision of low and moderate income house units. [A]nd also the ... 2019 housing element and fair share plan identifies the Ford Avenue site as one of the ... primary mechanisms to accomplish that.

[C]alling for the provision of 70 units to satisfy the -- the borough’s second round obligation and a portion of the borough’s third round obligation. So certainly the -- the plan is -- is consistent with both of those, both the objective and the reexamination report and the housing element and fair share plan. [Pa 31, 75 (3:11-24), emphasis added].

Lastly, Mr. Barree addressed Milltown Planning Objective Six of the Master Plan (“Future land use decisions should carefully consider



environmental impacts including local flooding events and broader impacts through a lens of sustainability and resiliency.”):

And then objective six of the re-examination report calls for addressing -- working to address environmental impacts including local flooding events through a lens of ... resiliency and sustainability and calling for additional green space along the ... Mill Pond additional ... area that could be natural space and certainly act as flood storage furthers that goal as well.

So ... and there's also a -- an obligation to review the plan in the context of neighboring municipalities. There's -- there's no particular ... direct impact on neighboring municipalities. It's the -- the road network is -- is adjacent to the planned site, is within Milltown properties ... not directly impacting ... neighboring municipalities. [Pa 31, 75-76 (3:25-4:15), emphasis added].

Mr. Barree summarized his conclusions with respect to the consistency between the Master Plan and the proposed amendment to the Redevelopment Plan:

So I don't see any ... consistency issues there, no immediate impacts. So that's the brief rundown of the technical obligations ... and some recommendations for findings that the board may make as to ... master plan consistency. And literally nothing else has changed. Nothing has changed with the plan. It's the -- the same as -- as we discussed and reviewed last time. [Pa 76 (4:16-23)].

In response to a question from the Planning Board Attorney, Mr. Barree emphasized that his testimony spells out directly how the Amended

Redevelopment Plan is consistent with the Housing Element and Fair Share Plan provisions of the Master Plan. Pa 77 (5:2-10).

After discussing Mr. Barree's testimony, the Planning Board voted unanimously to recommend the ordinance amending the Redevelopment Plan to the Borough Council. Pa 81-82 (9:10-13). No one appeared before the Planning Board to object to that recommendation. Thereafter, the Planning Board unanimously adopted Resolution No. PB10-2022, dated October 12, 2022 ("Resolution"), setting forth its detailed findings and recommending the Mayor and Council adopt Ordinance 22-1516. Pa 70-71, 166. At the beginning of the Resolution, the Planning Board recites:

[I]t is the opinion of Mr. Barree that the revisions contained in the Amended Redevelopment Plan are necessary to facilitate the redevelopment of the Ford Avenue Redevelopment Area; and

[I]t is the further opinion of Mr. Barree that the Amended Redevelopment Plan is generally consistent with, and certainly not inconsistent with any of the goals and objectives of the Master Plan of the Borough of Milltown; the Master Plan of any municipality contiguous to the Borough of Milltown; as well as the Middlesex County Master Plan; and the State Development and Redevelopment Guide Plan; as set forth in the Amended Redevelopment Plan[.] [Pa 69].

In the Resolution, the Planning Board, after incorporating its recitals as findings, made the following specific conclusions with respect to the Amended Redevelopment Plan:

3. The Amended Redevelopment Plan is consistent with the goals and objectives of the Master Plan of the Borough of Milltown; specifically, Objectives 2, 3 and 6 in Section D of the Master Plan Reexamination Report, dated December 23, 2019, as follows:

a. Objective 2 provides that “future plans should provide for more parks and open spaces within the Borough;” and the Amended Redevelopment Plan is fully consistent with this objective, in that it increases the amount of park and open space within the Borough;

b. Objective 3 provides that the Borough’s housing obligation be satisfied through the provision of low and moderate affordable units; and the Amended Redevelopment Plan provides development standards that require the construction of at least 70 affordable housing units within the Milltown Ford Avenue Redevelopment Area as part of an inclusionary development in satisfaction of the Borough’s Second Round Affordable Housing obligation and a portion of the Borough’s Third Round Affordable Housing obligation; as identified by the Housing Element and Fair Share Plan, adopted December 23, 2019, as the mechanism by which the Borough’s “Prior Round Obligation” will be satisfied; and

c. The Amended Redevelopment Plan substantially addresses environmental impacts, including local flooding events through a lens of sustainability and resiliency as provided for in Objective 6; include[ing] the significant increase in the buffer along Mill Pond which [is] in furtherance of Objective 6.

4. The Amended Redevelopment Plan is consistent with the Master Plans of the municipalities contiguous to the Borough of Milltown; the Middlesex County Master Plan; and the State Development and Redevelopment Plan. [Pa 69-70].

On October 24, 2022, the Mayor and Council, having received the Resolution, found consistency with the Master Plan, and unanimously voted to adopt Ordinance No. 22-1516, thereby effectuating the most recent amendments to the Redevelopment Plan. Pa 91-93. No one appeared before the Mayor and Council to object to that ordinance.

Importantly, the Amended Redevelopment Plan itself addresses its consistency with the Master Plan, stating, in pertinent part:

Dating back to the 1959 Master Plan, the study area has generally been designated for Industrial use. The study area has contained present and previous uses such as Michelin, Chicopee of J & J, Middlesex Container, Herman Warehousing, Swing Rite Doors, Pinella Painting, and others. However, both the 1989 Master Plan and the 1996 Master Plan update recognized the abandonment of the industrial use of the past and recommended that a portion of the site be utilized for affordable senior housing, with the remainder being designated for light industrial use. The 2002 Master Plan Reexamination Report recommended that the redevelopment plan for this area include affordable housing. The 2009 and 2019 Master Plan Reexamination Reports carried forward the recommendations related to the provision of affordable housing in the Redevelopment Area.

The 2003 Amended Housing Element and Fair Share Plan, the 2007 Milltown Housing Element and Fair Share Plan, the April 2009 Housing Element and Fair Share Plan, the May, 2012 Housing Element and Fair Share Plan, the October 2011 Decision of Judge James P. Hurley, the July 20, 2018 Decision of Judge Arnold L. Natali Jr., and the December 23, 2019 Amended Housing Element and Fair Share Plan all affirm that the Ford Avenue Redevelopment Site should be used to assist in meeting, alongside other measures, the Borough's affordable housing obligation. [Pa 178-79, emphasis added].

In addition to addressing consistency with the Master Plan, the Amended Redevelopment Plan also addresses consistency with the master plan of East Brunswick and the County, along with the applicable State plans:

7. Significant Relationship of Redevelopment Plan to the Master Plans of Contiguous Municipalities, County, State Development and Redevelopment Plan.

a. The redevelopment area is located in the south central portion of the Borough on the municipal boundary with East Brunswick Township. The adjoining lands on the south side of Lawrence Brook in East Brunswick are zoned RP Rural Preservation. The proposed redevelopment will provide for a mixed-use development and open space which is more compatible with the adjacent East Brunswick zoning than the existing underutilized and under maintained manufacturing and light industrial uses.

b. The proposed redevelopment is consistent with the overall land uses provided in the County Master Plan.

c. The redevelopment area is located in the Metropolitan Planning Area as indicated on the New Jersey State Development and Redevelopment Plan

Policy Map (adopted on March 1, 2001). The State Development and Redevelopment Plan defines the purpose of the Metropolitan Planning Area (PA1) as follows:

“The planning area is to provide for much of the State’s future redevelopment; revitalize cities and towns; promote growth in compact forms; stabilize older suburbs; redesign areas of sprawl; and protect the character of existing stable communities.”

The Milltown Ford Avenue Redevelopment Plan is consistent with these purposes as enumerated in the State Development and Redevelopment Plan. [Pa 205-06, emphasis added)

## PROCEDURAL HISTORY

As set forth above, the Mayor and Council referred Ordinance 22-1516 to the Planning Board for review at the Ordinance's first reading on September 27, 2022. The Planning Board adopted Resolution PB10-2022, finding the Ordinance consistent with the Master Plan and recommending its adoption, on October 12, 2022. At its second reading on October 24, 2022, the Borough adopted Ordinance 22-1516.

On December 8, 2022, Plaintiffs filed the Complaint challenging both the Planning Board's adoption of Resolution PB10-2022 and the Borough's adoption of Ordinance 22-1516. The Law Division conducted a trial on March 22, 2023, before Judge McCloskey. The Court upheld the adoption of both the Planning Board's Resolution and the Ordinance on May 22, 2023 in its Order for Judgment. This appeal was filed on June 28, 2023.<sup>2</sup>

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<sup>2</sup> References to "1T" are to the transcript of proceedings before the Law Division, occurring on March 22, 2023.

## STANDARD OF REVIEW

The applicable standard is firmly established: the factual determinations of a board are presumed to be valid and will not be overturned unless the challenger demonstrates them to be arbitrary, capricious or unreasonable. Dunbar Homes, Inc. v. Zoning Bd. of Adj. of Twp. of Franklin, 233 N.J. 546, 558 (2018); Grabowski v. Tp. of Montclair, 221 N.J. 536, 551 (2015). Such deference is afforded to a Planning Board because local citizens, rather than courts, are in the best position to review the merits of zoning decisions. See CBS Outdoor v. Lebanon Planning Bd., 414 N.J. Super. 563, 577 (App. Div. 2010). The “substantial evidence” standard that would apply to a board’s individualized fact finding for a variance application does not apply to a “discretionary decision of broader application” such as a decision to adopt a zoning ordinance or redevelopment plan. New Jersey Zoning & Land Use Administration, Cox & Koenig, 2024 ed., § 42-2.1, pg. 619 (quoting Powerhouse Arts District Neighborhood Assoc. v. City Council of City of Jersey City, 413 N.J. Super. 322, 332 (App. Div. 2010), certif. den., 205 N.J. 79 (2011)). Instead, application of the arbitrary, capricious and unreasonable standard is most appropriate.

Judicial review must only determine the validity of the agency’s action, not substitute the court’s judgment for that of the Planning Board. CBS Outdoor, supra, 414 N.J. Super. at 578. The Court is reviewing the determination to



determine whether the board followed statutory guidelines and properly exercised its discretion. Burbridge v. Mine Hill Tp., 117 N.J. 367 (1990).

Municipalities also “possess broad police power to zone for the public good.” Pheasant Ridge Corp. v. Twp. of Warren, 169 N.J. 282, 289 (2001 (citing Riggs v. Township of Long Beach, 109 N.J. 601, 610 (1988))). The courts must respect local policy decisions in the zoning field and refrain from “rewrite[ing] or annul[ing] a particular zoning scheme duly adopted by a governing body merely because the court would have done it differently.” Bow & Arrow Manor, Inc. v. Town of West Orange, 63 N.J. 335, 343 (1973); see also Pascack Ass’n v. Mayor of Washington Tp., 74 N.J. 470, 481 (1977).

To that end, municipal action will only be overturned if it is arbitrary, capricious, or unreasonable. Charlie Brown of Chatham v. Board of Adjustment of Chatham, 202 N.J. Super. 312, 321 (App. Div. 1985). A municipal action, like the amendment of the Redevelopment Plan at issue here, is presumed valid. New Jersey Shore Builders Association v. Jackson, 199 N.J. 38, 55-56, n. 8 (2009); Fanelli v. City of Trenton, 135 N.J. 582, 589 (1994). As stated in Bryant v. City of Atlantic City, 309 N.J. Super. 596, 610 (App. Div. 1998), “a challenge to the validity of a municipal ordinance or action must overcome the presumption of validity -- a heavy burden.”

Here, the action of the Borough in adopting the Ordinance amending the Redevelopment Plan is a legislative action, subject to an even more difficult standard for Plaintiffs to overcome:

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. This presumption can be overcome only by proofs that preclude the possibility that there could have been any set of facts known to the legislative body ... [that] would rationally support a conclusion that the enactment is in the public interest.

Hamilton Park Gardens v. West Orange Township Council, 68 N.J. 543, 564-565 (1975)(citations omitted). To overcome the presumption of validity, the party attacking an ordinance amending a redevelopment plan must show that it is arbitrary and capricious. Powerhouse Arts District, supra, 413 N.J. Super. at 332, 335. The adoption of an amendment to a redevelopment plan does not ordinarily require findings of fact. Id. at 332-33. The hearing before the governing body does not require the presentation of evidence to provide the “factual foundation for the ordinance, and the governing body does not ordinarily make any findings of fact to justify its action.” Hirth v. City of Hoboken, 337 N.J. Super. 149, 165-66 (App. Div. 2001) (citing Gardens v. City of Passaic, 130 N.J. Super. 369, 377-78 (Law Div. 1974), aff’d o.b., 141 N.J. Super. 436 (App. Div. 1976)). Thus, Plaintiffs’ attempt to show the governing

body failed to make appropriate factual findings in support of Ordinance 22-1516 is insufficient to overcome the presumption of validity. Instead, they were required to demonstrate that the record failed to justify the Mayor and Council's conclusions, showing that the Ordinance is arbitrary, capricious and unreasonable. They did not, and the trial court agreed. Because Plaintiffs failed to carry their burden, the trial court appropriately ruled in favor of the Borough and the Redevelopment Agency.

When an appellate court is reviewing the decision of a trial court that has reviewed municipal action, the appellate court is bound by the same standard as was the trial court. New York SMSA v. Weehawken Bd. of Adj., 370 N.J. Super. 319, 331 (App. Div. 2004); Charlie Brown of Chatham, *supra*, 202 N.J. Super. at 321. Thus, the appellate court must give substantial deference to the findings of fact, to the extent they are made by the trial court, and refrain from overturning them unless they are arbitrary, capricious and unreasonable. Friends of Peapack-Gladstone v. Borough, 407 N.J. Super. 404, 424 (App. Div. 2009).

## LEGAL ARGUMENT

Plaintiffs are unable to satisfy the heavy burden requiring them to overcome the presumption of validity which attaches to the ordinance in question. Ordinance 22-1516 is the product of decades of negotiations with two redevelopers and Middlesex County, is intended to permit development of property which was twice the subject of evaluation by Law Division judges, and balances various objectives of the Borough's Master Plan. As amended by Ordinance 22-1516, the Redevelopment Plan is consistent with the Borough's Master Plan, the County Master Plan, the MLUL, N.J.S.A. 40:55D-1 et seq., and the LRHL, N.J.S.A. 40A:12A et seq.

Ordinance 22-1516 is a valid exercise of the Borough's authority pursuant to the LRHL to regulate development within its borders. It is the product of reasonable planning and zoning concerns, bolstered by unrebutted expert planning testimony, and is therefore entitled to deference by the courts. Consequently, Plaintiffs cannot sustain their claim that the Ordinance or Amended Redevelopment Plan is arbitrary, capricious, or unreasonable. The Law Division properly reached this conclusion, and its Order for Judgment dated May 22, 2023 should be upheld by this Court.

**POINT I**

**The Planning Board Properly Found That The Ordinance And Amended Redevelopment Plan Are Substantially Consistent With The Master Plan. [Pa127].**

A master plan is created pursuant to N.J.S.A. 40:55D-28 of the MLUL. Under that statute, a master plan must contain: “a statement of the objectives, principles, assumptions, policies and standards upon which the constituent proposals for the physical, economic and social development of the municipality are based.” N.J.S.A. 40:55D-28(b). Generally speaking:

A master plan is simply a proposal for the planned future growth and development of a municipality. It need only be adopted by the local planning board. Approval of the plan by the governing body is neither required nor contemplated by the statute. It remains nothing more than a plan unless implemented by the municipal governing body in the form of zoning enactments. Until a master plan or parts thereof have been legislatively adopted by the governing body, its proposals have no binding effect or legal consequences. Its proposals exist only as a hopeful declaration of policy expressing future guidelines for the municipality.

[Cervase v. Kawaida Towers, Inc., 124 N.J. Super. 547, 567-568 (Law Div. 1973), aff'd, 129 N.J. Super. 124 (App. Div. 1974)].

The second component of the master plan is the “land use element” which must state its relationship to the principles previously identified, and to other adopted master plan elements. N.J.S.A. 40:55D-28(b). Most significantly, while

a master plan serves as the basis for a zoning ordinance, it does not have the operative effect of a zoning ordinance. Manalapan Realty v. Township Committee, 140 N.J. 366, 381 (1995).

Because the Ordinance concerns the amendment of a redevelopment plan, the primary authority to adopt the Ordinance is derived from the LRHL. Bryant v. City of Atlantic City, *supra*, 308 N.J. Super. 596. In Bryant, the Appellate Division affirmed that N.J.S.A. 40A:12-7 does not require complete specificity in a redevelopment plan, only that the completed project must be consistent with the redevelopment plan. *See id.* at 618-19. The plan must only contain an “outline” of the development, and the LRHL contemplates that a redevelopment agreement might address specificities left out of the redevelopment plan. *Ibid.* It also requires only that a redevelopment plan address its relationship to the objectives set forth in the local master plan. *Ibid.*

Under the LRHL, N.J.S.A. 40A:12-7(c) requires that “[t]he redevelopment plan shall describe its relationship to pertinent municipal development regulations as defined in the [MLUL].” The LRHL further requires:

All provisions of the redevelopment plan shall be either substantially consistent with the municipal master plan or designed to effectuate the master plan; but the municipal governing body may adopt a redevelopment plan which is inconsistent with or not designed to

effectuate the master plan by affirmative vote of a majority of its full authorized membership with the reasons for so acting set forth in the redevelopment plan.

[N.J.S.A. 40A:12A-7(d) (emphasis added)].

In Manalapan Realty v. Township Committee, supra, the New Jersey Supreme Court addressed the meaning of the term “substantially consistent” in the zoning context:

The Legislature has not defined what is meant by “substantially consistent” with a master plan. “When construing legislation, in the absence of a specific definition, we give words their ordinary and well-understood meanings. *Great Atl. & Pac. Tea Co. v. Borough of Point Pleasant*, 137 N.J. 136, 143-44 (1994) *Levin v. Township of Parsippany-Troy Hills*, 82 N.J. 174, 182 (1980). The only interpretation of “substantially consistent” that will not defeat the objective of the MLUL is to give these words their plain meaning. Substantial means “[h]aving substance, not imaginary, unreal, or apparent only; true, solid, real.” *The Compact Oxford English Dictionary* 1947 (2d ed. 1993), or “having real existence, not imaginary[;] firmly based, a substantial argument.” *The New Lexicon Webster’s Dictionary of the English Language* 987 (1987). Thus, the concept of “substantially consistent” permits some inconsistency, provided it does not substantially or materially undermine or distort the basic provisions and objectives of the Master Plan.

[140 N.J. at 383-384 (emphasis added)].

In Victor Recchia Residential Construction, Inc. v. Zoning Board of Adjustment of the Township of Cedar Grove, 338 N.J. Super. 242 (App. Div. 2001), the Appellate Division addressed the broad issue of consistency between a master plan and zoning ordinance, stating:

It is undisputed that the Cedar Grove zoning ordinance is not wholly inconsistent with the land use element of the master plan. The associated land use map is not intended to serve as a lot-specific zoning ordinance to be rubber stamped by the governing body. Such an interpretation of the MLUL would permit the Planning Board to usurp the power of the governing body to enact local zoning laws. The intent of the master plan is to provide recommendations to guide the governing body in establishing the zoning ordinance. Thus, partial inconsistency between the land use map and the zoning ordinance does not render the ordinance invalid.

[338 N.J. Super. at 251(emphasis added)].

Indeed, even when a master plan does not identify open space as a planned use in a particular area, a municipality may proceed to acquire such land for open space purposes. Mount Laurel Tp. v. Mipro Homes, LLC, 379 N.J. Super. 358, 368-369 (App. Div. 2005), *aff'd*, 188 N.J. 531 (2006).

The Planning Board's role in reviewing the Amended Redevelopment is limited. It is only obligated to prepare and submit to the governing body "a report containing its recommendation concerning the redevelopment plan" which must "include an identification of any provisions in the proposed



redevelopment plan which are inconsistent with the master plan and recommendations concerning these inconsistencies.” N.J.S.A. 40A:12A-7(e). Here, the Planning Board’s review was limited to evaluating the consistency of the Amended Redevelopment Plan with the Master Plan.

Of import here, the New Jersey Supreme Court in Manalapan Realty observed:

The Board that prepared and adopted the Master Plan also determined pursuant to *N.J.S.A. 40:55D-26a* that the proposed zoning amendments are substantially consistent with the master plan. Such a determination by the Board is entitled to deference and great weight.

[140 N.J. at 383 (emphasis added)].

The legal principles established above require an examination of particular Master Plan objectives implicated by the Amended Redevelopment Plan, and application of the pertinent legal concepts, such as “substantially consistent” along with the overall advisory nature of a master plan.

On the whole, the Amended Redevelopment Plan is “substantially consistent” with the Borough’s Master Plan. It provides for the redevelopment of the Property in manner consistent with the Master Plan, including uses that are prescribed for the Property. The Amended Redevelopment Plan eliminates only 50 residential units, but keeps the same number of affordable housing units. There was testimony from the Borough’s planner that the proposal complies

with three objectives set forth in the 2019 Master Plan Reexamination Report. Judge McCloskey also noted that though there was no testimony as to Objective One, (“All vacant and abandoned parcels of land should be fully utilized by either development with ratable or public amenities including designated open space preservation, as appropriate”), Pa 31, “it is clear that the proposed amendments recommended by the Planning Board most certainly would and do advance that objective and thus ensure their consistency with the Master Plan on this score.” Pa 127, n. 12.

At its October 12, 2022 hearing, the Planning Board considered the following points of the Borough Planner’s testimony, keyed to Section D of the Master Plan:

Objective two talks about how future plans should provide for additional parks and open space in the borough. And one of the -- you may recall one of the main purposes behind the last amendment to the plan was to change some of the standards because the county, borough, the redevelopment agency, the redeveloper had entered into a four party agreement that ... called for the -- the county to acquire a larger piece of -- of the property to be used for -- for open space

...

Objective three talks about ... satisfying the borough’s affordable housing obligation through the provision of low and moderate income house units. [A]nd also the ... 2019 housing element and fair share plan identifies

the Ford Avenue site as one of the ... primary mechanisms to accomplish that. [C]alling for the provision of 70 units to satisfy the -- the borough's second round obligation and a portion of the borough's third round obligation.

...

And then objective six of the re-examination report calls for addressing -- working to address environmental impacts including local flooding events through a lens of ... resiliency and sustainability and calling for additional green space along the ... Mill Pond additional ... area that could be natural space and certainly act as flood storage furthers that goal as well.

[Pa 74-76 (emphasis added)].

Mr. Barree also testified that, because the Project will utilize an existing road network in Milltown, there will be no direct impact to neighboring municipalities. Pa 76. His testimony was unrebutted.

Plaintiffs' claim that the Planning Board made no findings of fact is demonstrably incorrect. The Board's resolution explicitly references Mr. Barree's testimony in the "whereas" recitals and plainly incorporates them by reference in its findings. Pa 70 ("The aforementioned recitals are incorporated herein as though fully set forth at length."). The Amended Redevelopment Plan, which includes its own statements of consistency with the Master Plan, was also incorporated by reference. The reference to the proceeding being a "mere formality" by the Planning Board Chairman does not negate the findings the

Planning Board made. The Board made appropriate findings of fact, there being no opposing planning testimony, and those findings are entitled to deference in these proceedings.

Plaintiffs also argue that the Planning Board failed to make findings specific to the Master Plan's land use element. As referenced in the argument before the trial court, Planning Board members are presumed to know the content of their ordinances and Master Plan. 1T 21:6-9. As the lower court recognized, the Planning Board members were not required to ignore the history of litigation concerning the Property or prior attempts to redevelop it. Previous iterations of the Master Plan, of which the Court can take judicial notice, all indicate that there are dual goals of providing more parks and open space and satisfying the Borough's affordable housing obligation. 1T 18:3-7, 18:25-19:15. There is nothing inconsistent between the Amended Redevelopment Plan and the Master Plan, including its land use element.

The Court must also remember that the Planning Board's role is limited. N.J.S.A. 40A:12A-7(e) requires review of the Master Plan, but only requires the Board to identify inconsistencies. Here, the Board found no inconsistencies with respect to any component of the Master Plan. In fact, the Amended Redevelopment Plan is consistent with the specific description of the Ford Avenue Redevelopment Plan discussed in the 2019 Master Plan Reexamination

Report. See Pa 38. There being no inconsistencies, that the Board did not identify any searching review specific to the land use component of the Master Plan does not invalidate its efforts. Plaintiffs argue that the Planning Board failed to conduct such an evaluation of the land use component, but Plaintiffs failed to identify to the lower court any provision in the land use element that precludes the use of the Property for open space. In fact, there is none.

Instead, Plaintiffs simply argue that because the Master Plan does not identify the Property for open space, it is necessarily inconsistent with the Master Plan for the Redevelopment Plan to do so. In making this argument, Plaintiffs are asking the Court to make the logical leap that any proposal which is not supported by an affirmative statement in a master plan is inconsistent with it. Even assuming that such a logical leap were appropriate, such a leap is not the courts' to make. It was well within the discretion of the Planning Board to determine that, in the absence of a specific exclusion, use of Plaintiffs' Property for open space was consistent with the Master Plan. In the absence of a specific provision pertaining to the Property, the Planning Board appropriately (or at least, reasonably) evaluated the general provisions and objectives of the Master Plan for consistency and made such a finding, satisfying its statutory obligation. Having reasonably reached the conclusion there were no inconsistencies, it was not obligated to report any.

Setting aside Plaintiffs’ misconstruction of the Planning Board’s resolution and that the Planning Board did, in fact, make factual findings, the choice of legal authority they rely upon at Pb 24 in support of their position that the Planning Board must do so is misplaced. Powerhouse Arts District, *supra*, did not concern a challenge to a Planning Board determination. If anything, the passage cited by Plaintiffs, 413 N.J. Super. at 332-33, most closely supports the opposite proposition: that ordinarily, governing body determinations, when adopting ordinances, do not require formal findings of fact and that its determinations must merely be adequately supported by the record—no formal findings are necessary so long as the support is there. The Supreme Court’s decision at Urban v. Manasquan Planning Bd., 124 N.J. 651, 662 (1991), rebukes a local planning board’s determination based on inappropriate factors such as ownership of the lots, and lacks applicability here. In re Issuance of a Permit by Dep’t of Env’tl. Prot. to Ciba-Geigy Corp., 120 N.J. 164, 172 (1990), does apply to the general principle that fact-finding is necessary, but is limited in utility because it addresses the granting of permits by an administrative agency. Of course, Plaintiffs omit the fact that the case plainly indicates that “the usual remedy is to remand the matter to the agency to correct the deficiency.” *Id.* at 173 (citations omitted). In any event, no remand is necessary here because the Planning Board did make findings of fact, as described above.

Importantly, Plaintiffs fail to provide legal support for the relief they seek concerning the Planning Board's consistency review conducted pursuant to N.J.S.A. 40A:12A-7(e), which requires a planning board to act within 45 days and make a recommendation to the governing body concerning a redevelopment plan. However, that statute does not provide any consequence or remedy as to a planning board's failure to act. To the contrary, the statute expressly permits the governing body to proceed in the absence of the planning board's consistency review. ("Failure of the planning board to transmit its report within the required 45 days shall relieve the governing body from the requirements of this subsection with regard to the pertinent proposed redevelopment plan or revision or amendment thereof."). In light of the terms of the statute, it is difficult to fathom how a planning board recommendation based on insufficient findings of fact would justify invalidation of approval of a redevelopment plan if the Legislature did not intend to invalidate an approval of a redevelopment plan if no planning report is submitted at all.

Based on the statutory language, even if the Planning Board failed to properly satisfy its obligations under N.J.S.A. 40A:12A-7(e), that is of no consequence to the validity of the Amended Redevelopment Plan or Ordinance 22-1516. The statute contemplates the governing body proceeding without a planning board's report. See Willoughby v. Wolfson Group, Inc., 332 N.J.

Super. 223, 229-30 (App. Div. 2000) (evaluating N.J.S.A. 40:55D-26, and finding that “[t]o rule otherwise would permit a planning board, by declining to find inconsistency, to impose a *de facto* veto over any proposed zoning ordinance that was inconsistent with the master plan.”). Instead, the governing body must make its own consistency determination which remains subject to the “arbitrary, capricious and unreasonable” standard. Here, the governing body found consistency, a determination supported by the testimony before the Planning Board, which the lower court correctly found to be reasonable.

Overall, the Planning Board’s conclusion that Ordinance 22-1516 was consistent with the Master Plan, was rational based upon appropriate findings of fact, and was properly upheld by the Law Division. Judge McCloskey noted that Plaintiffs failed “to provide any analysis or examination of the particular Master Plan objectives implicated by both the prior and newly amended versions of the Redevelopment Plan vis-à-vis the applicable legal standards as to the consistency and the concept of ‘substantial’ consistency.” Pa 126. Accordingly, the Plaintiffs have failed to meet their burden to overcome the presumption of validity that the governing body’s or the Planning Board’s actions were invalid, and the Law Division’s Order must be affirmed.



**POINT II**

**Ordinance 22-1516 is “Substantially Consistent” with the Master Plan and the Borough’s Findings are Entitled to Deference. [Pa 128-29].**

In this case, the Redevelopment Plan as amended by Ordinance 22-1516 is “substantially consistent” with the Master Plan. As contemplated by N.J.S.A. 40A:12A-7, it refers to the Borough’s 2019 Master Plan Reexamination Report. See Pa 178-79. It also sets out general redevelopment objectives, Pa 181, and addresses the fact that the current zoning of the Property is not consistent with the Land Use Element of the Master Plan. Pa 187. It addresses the redevelopment area’s location in relation to neighboring municipality and the uses permitted in the areas of that municipality closest to the redevelopment area. See Pa 205-06. It maintains the critical components of the proposed redevelopment of the Property as set forth in the Master Plan, including its residential, affordable housing, commercial and open space elements and ensures that the development of the Property is consistent with the surrounding area and the uses preferred by the Master Plan at the Property.

At the outset, prior precedent firmly establishes that the governing body is not required to make particularized factual findings in adopting an ordinance. See Powerhouse Arts District, supra; Hirth, supra. Though N.J.S.A. 40A:12A-7(d) requires a redevelopment plan to offer an explanation of any substantial

inconsistencies with the local master plan, here, the Redevelopment Plan does not have any substantial inconsistencies, and therefore, does not discuss any. The governing body's decision finding consistency was reasonable, based on the contents of the Redevelopment Plan, its members' knowledge of the area and history of attempted development at the Property, and the record developed by the Planning Board.

The elimination of 50 market rate units does not negate the substantial consistency of the Amended Redevelopment Plan with the Master Plan. Nor does it render the council's decision arbitrary or capricious. In an analogous case, Powerhouse Arts District, supra, the objectors argued that because the existing redevelopment plan was successful in encouraging mid-rise structures and preserving the historical industrial nature of the neighborhood, both of which were goals of that redevelopment plan, the change to allow high-rise development was not rational. 413 N.J. Super. at 333-34. The Appellate Division disagreed, finding that the governing body could have rationally rejected the argument that the existing plan was superior and that the amendment was within its discretion so long as it was neither arbitrary nor capricious. Ibid. Thus, the fact that one option might be viewed as "superior" does not render the governing body's decision rejecting that option in favor of another rational option as arbitrary, capricious or unreasonable.

Here, the modification reducing the total number of units to be constructed was a rational decision by the Borough, in light of the fact that a larger portion of the Property would be dedicated to open space and passive recreation. There was unrebutted expert planning testimony that the addition of this open space is consistent with Objective Two and Objective Six of the Master Plan. See Pa 31. The number of affordable units was not changed; i.e., the Amended Redevelopment Plan's inclusion of 70 affordable units remains consistent. Therefore, the amendment to the Redevelopment Plan furthered Objective Three, which aims to satisfy the Borough's affordable housing obligation.

Plaintiffs' claim that the Borough's affordable housing obligation is at risk by reducing the number of market rate units is wholly unsupported by the record. The Borough already has a Redevelopment Agreement and a redeveloper, which boosted the credibility in the judge's eyes in the Builder's Remedy Action that the project would be built and should have equal credibility in these proceedings. In fact, Milltown Redevelopers is a signor of the 2021 County Agreement, which acknowledges the Redevelopment Plan will be amended. Pa 49. There is nothing in the record to support the Plaintiffs' claim speculation the development as permitted in the Amended Redevelopment Plan is economically infeasible. Plaintiffs also omit that the Amended

Redevelopment Plan includes a commercial component, which permits the redeveloper to defray the cost of the affordable housing units even further.

In light of the fact that the prior iteration of the Redevelopment Plan already had an open space component, consisting of space along the Mill Pond perimeter of the Property, plus an additional buffer provided in connection with the proposed development, the revision to the Redevelopment Plan is consistent with the Master Plan. See Pa 5. That revision simply expands the open space buffer into the Property. The revision also brings the redevelopment into closer compatibility with the zoning of the adjacent property in East Brunswick, which is zoned “Rural Preservation.”

Plaintiffs’ reliance on the single page of the 2019 Master Plan Reexamination Report, Pa 38, to establish the Amended Redevelopment Plan’s inconsistency with the Master Plan is flimsy, at best. That page provides the following description of the project:

It is anticipated that a redevelopment project consisting of 350 residential units, of which 70 will be affordable, a commercial component, and an open space buffer along the Mill Pond and Lawrence Brook will eventually be developed at the site.

It also notes that the Redevelopment Plan was, at that time, in “the process of being amended,” that the Redevelopment Agency and the redeveloper should continue to work together to ensure a successful redevelopment, and that “[n]o

further changes to the Ford Avenue Redevelopment Plan are recommended at this time.” (emphasis added). Plaintiffs’ argument must be rejected for two reasons.

First, the elimination of 50 units is the only deviation from that description and the proposal remains consistent with the Master Plan. The Amended Redevelopment Plan continues to permit commercial components and a significant open space buffer along the adjacent water features. The Amended Redevelopment Plan retains the significant multi-family housing component, with only a 14% reduction in the total number of units. Crucially, it maintains that same number of affordable housing units, which was the primary concern of the prior judicial decisions in the Builder’s Remedy Lawsuit. The deviations from the Master Plan are minor in the context of the entire Amended Redevelopment Plan, and the governing body’s determination that the Amended Redevelopment Plan is consistent with the Master Plan is entitled to deference here. See Pa 92. The Plaintiffs have not established why, in light of all the facts, not simply those they choose to highlight, such deference is not appropriate.

Second, the speculative, forward-looking language of this provision “anticipates” that the Redevelopment Plan is not finalized and could be revised. It merely acknowledges that no further changes were recommended “at this time.” The drafters of the 2019 Master Plan Reexamination Report would not

have been aware of the 2021 County Agreement (to the extent the agreement is not referenced in the Master Plan) and could not have anticipated any changes to the Redevelopment Plan that would have been prudent in light of that agreement. The language of the Master Plan plainly contemplates revisions might be necessary if circumstances were to change, as plainly occurred here. The revisions do not change the overall character of the development, are within the universe of changes that were contemplated by the speculative and anticipatory language drafted in 2019, and do not offend the specific provisions or descriptions of the proposed development as set forth in the Master Plan. See Pa 38.

Plaintiffs overlook another provision of the 2019 Master Plan Reexamination Report evaluating the Borough's planning objectives from 2009. With respect to item 2, "Future plans should provide more parks and open spaces within the Borough,"

[T]here is limited undeveloped land available in the Borough. The future development of the Ford Avenue Redevelopment Area represents an opportunity to provide for an open space greenway along the Lawrence Brook and Mill Pond. Future redevelopment projects in the Borough, particularly those in a flood hazard area, should include open space components. In addition, the Borough should explore ways to reduce impervious coverage and increase vegetative cover. [Pa 14]

The use of the Property for open space purposes is plainly consistent with this passage and is consistent with Objective Two and Objective Six of the Master Plan, as described in greater detail above. Plaintiffs complain that the Property was not specifically targeted for open space by the Master Plan, but fail to identify any properties not currently used for open space that were targeted for such use, or more importantly, that any list of such properties was intended to be exhaustive. Indeed, the Master Plan makes clear that the Borough, as of 2019, had not adopted an Open Space and Recreation Plan. Pa 17, 33. Thus, the fact that the Master Plan does not specifically identify the Property for use as open space (to the extent this claim is even true), cannot have evidentiary value since no exclusive list exists.<sup>3</sup>

Given the lack of an explicit prohibition, and the fact that general objectives support the open space use, Plaintiffs cannot demonstrate that such a use “materially undermine[s] or distort[s] the basic provisions and objectives of the Master Plan” enough for such an inconsistency to be “substantial.” See Manalapan Realty, supra, 140 N.J. at 383-84. Given the Master Plan’s

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<sup>3</sup> It is worth noting that even if Plaintiffs succeed in this appeal, such an outcome would not prevent the use of Plaintiffs’ Property for open space. That determination became binding when the Borough entered into the 2021 County Agreement, the validity of which is not challenged in this appeal.

acknowledgement that vacant land is a scarce resource in the Borough, it is evident that the Master Plan would welcome an opportunity to provide parks and open space. That the Redevelopment Plan originally included a 50-foot-wide greenway at the Property evidences this desire, and the expansion of that area to be made available to the public only furthers that goal.

Plaintiffs' argument that the density of the developable portion of the property must be rejected for its refusal to examine the context of Plaintiffs' prior 550-unit proposal during the Builder's Remedy Action, compared to the Amended Redevelopment Plan. Their attempt to contrast the rejection of their proposal for the higher-density development in the Builder's Remedy Action with the density proposed in the Amended Redevelopment Plan does not tell the whole story. Plaintiffs' 550-unit proposal proposed a 25 units/acre density for the entire tract, whereas the 27 units/acre development allowed by the Redevelopment Plan covers only 11 acres of the Property. The higher density in the Amended Redevelopment Plan is coupled with the 11 acres of open space to be owned by the County and managed by the Borough, whereas the Plaintiffs'



proposal provided no open space.<sup>4</sup> The open space proposed in the Amended Redevelopment Plan mitigates the higher density permitted on the other half of the tract. The two proposals represent different choices from a planning perspective.

Plaintiffs' final argument, that if Ordinance 22-1516 is allowed to stand, then any ordinance increasing open space must be deemed valid, does not merit serious consideration. Each ordinance must be evaluated based on each municipality's master plan and the particular planning concerns specific to that municipality. Ordinance 22-1516 is not valid simply because it provides for more open space, and the Borough is not asking the Court to make such an unnuanced finding. The decision to provide for more open space in the Redevelopment Plan is consistent with the Borough's Master Plan, which recognizes vacant land is a scarce resource in the Borough and aims to provide more open space, as well as the other factors identified in greater detail above.

The proposal is "substantially consistent" with the Master Plan, as required by the LRHL, and the Borough's governing body rationally determined

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<sup>4</sup> Notably, Plaintiffs failed to present any expert planning testimony before the Planning Board, Mayor and Council, or Law Division that the proposal increasing open space as well as density on the developable tract is a poor choice from a planning perspective.

that adoption of Ordinance 22-1516 amending the Redevelopment Plan was preferable to the prior iteration of the Redevelopment Plan. Plaintiffs' attempt to hide their true complaint that the Amended Redevelopment Plan is not entirely consistent with the Master Plan behind the argument that the Amended Redevelopment Plan is not substantially consistent with the Master Plan. However, viewed globally, it is clear that there are far more consistencies than inconsistencies such that the Amended Redevelopment Plan is substantially consistent with the Master Plan, and the governing body's determination was not arbitrary, capricious or unreasonable.

Furthermore, the Master Plan, which is not legislation and is merely guidance, is but one of the factors that must be considered by the governing body. It must also evaluate the existing zoning for the Property and its inconsistency with the Master Plan, the uses in the surrounding area, the zoning in neighboring East Brunswick, its affordable housing obligation, and its binding agreements with other entities. The Borough's decision to adopt Ordinance 22-1516 was reasonable considering all of these factors and struck a reasonable balance between them. The lower court aptly concluded that it "compatibly" ensured the construction of affordable housing and increased the amount of open space on the Property. Pa 128. This Court should not second-guess the Borough's decision.

For that reason, the trial court correctly determined that the Plaintiffs failed to show that the Borough acted arbitrarily, capriciously or unreasonably, and dismissed Plaintiffs' complaint. Because the trial court appropriately interpreted the law and gave proper deference to the Planning Board and the Borough, this Court should affirm the trial court's dismissal.

As Judge McCloskey aptly concluded stated,

The Plaintiffs ignore the unrefuted testimony of the Borough planner who authored the 2019 Master Plan Reexamination Report and his very own familiarity with the iterations of the redevelopment planning dating back to 2006 which specifically included the land use element of the Master Plan. Understandably, they choose to overlook and side-step the decades of litigation they themselves instituted by and among the parties to this action and the resultant evolution of the Redevelopment Plan. Over time, the litigation resulted in improving and a tweaking of the planned redevelopment of the Plaintiffs' Property and, most recently, in ways that consistently, and rationally, advanced the goals of facilitating the actual construction of affordable housing at an appropriate – and, Court-adjudicated, albeit reduced – total unit yield that preserves the 70-unit affordable unit set-aside, and preserving and promoting open space. [Pa 128].

As the Court found, Plaintiffs comprehensively failed to satisfy their burden of proof in order to overcome the presumption of validity. Plaintiffs' appeal fares no better in that endeavor and should therefore be rejected.

## CONCLUSION

Plaintiffs’ arguments attacking the validity of Resolution PB10-2022 and Ordinance 22-1516 fall flat. As Judge McCloskey held, the effect of the Amended Redevelopment Plan, with its preservation of affordable housing and increase in open space, is consistent with the Master Plan and “can be characterized as a model of concinnity in sound land use planning over – and in spite of–decades of ever-continuing litigation over this site.” Pa 128. The Court should not second guess the Planning Board’s or Mayor and Council’s determinations that the Amended Redevelopment Plan is substantially consistent with the Master Plan. The Court must consider whether the Planning Board’s and the Mayor and Council’s decisions approving Ordinance 22-1516 are rational. Indeed, those decisions were well supported by the record, including the un rebutted planning testimony. The text of the Amended Redevelopment Plan confirms consistency with various planning objectives applicable to the Property. The trial court correctly found that the presumption of validity was not overcome.

In sum, there was ample basis for the adoption of Ordinance 22-1516. The plan satisfied at least three objectives set forth in the Master Plan and maintained the character of the proposed development described in the Master Plan for the Property. It is not inconsistent with any specific provision of the Master Plan.

The lower court reached a well-reasoned conclusion confirming that these determinations were not arbitrary, capricious or unreasonable. For these reasons, the Law Division's Order for Judgement should be upheld.

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*/s/ Donna M. Jennings* \_\_\_\_\_  
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Dated: March 29, 2024

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HOLDINGS, LLC AND ALSOL  
CORP.,

Plaintiffs-Appellants,

v.

THE PLANNING BOARD OF THE  
BOROUGH OF MILLTOWN, THE  
BOROUGH OF MILLTOWN,  
MILLTOWN FORD AVENUE  
REDEVELOPMENT AGENCY,  
BORAIE DEVELOPMENT LLC,  
AND MILLTOWN FORD  
AVENUE REDEVELOPERS LLC,

Defendants-Respondents.

SUPERIOR COURT OF  
NEW JERSEY  
APPELLATE DIVISION

DOCKET NO.: A-3253-22

Civil Action

On Appeal From:

Superior Court of New Jersey, Law  
Division, Middlesex County

Docket No. MID-L-6083-22

Sat Below: Hon. Thomas D.  
McCloskey, J.S.C.

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**BRIEF OF DEFENDANTS/RESPONDENTS  
BORAIE DEVELOPMENT LLC &  
MILLTOWN FORD AVENUE REDEVELOPERS LLC**

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**PRELIMINARY STATEMENT**

Since 2004, Boraie Development LLC (“Boraie”) and Milltown Ford Avenue Redevelopers LLC (“Redeveloper”), as its assignee (collectively, “Redeveloper Defendants”), have been the designated redevelopers for Ford Avenue Redevelopment Area (“Redevelopment Area”). Over the past two decades, the Redeveloper Defendants as well as the Defendants Borough of Milltown (“Borough”) and Borough of Milltown Planning Board (“Planning Board”) have worked to complete this project, only to have those efforts impeded, delayed and frustrated by no less than eight litigations asserted by Plaintiffs SB Building Associates, L.P., SB Milltown Industrial Realty Holdings, LLC, and Alsol Corp. (collectively, “Plaintiffs”) and their principal, Lawrence Berger.

This appeal is Plaintiffs’ latest attempt to further obstruct the Borough’s and the Redeveloper Defendants’ construction of affordable housing and the acquisition of public open space. Here, through baseless procedural attacks, Plaintiffs challenge the Borough’s adoption of an amendment to the Redevelopment Plan for the Redevelopment Area (“Redevelopment Plan”) after the Planning Board determined the amendment was consistent with the Borough’s Master Plan.

The trial court determined that Plaintiffs' claims were not supported by the record. Instead, the trial court found that "substantial credible evidence" in the record, including the long-standing history of Defendants' efforts to redevelop Plaintiffs' property, supported the Planning Board's determinations regarding, and the Borough's adoption of, the amended Redevelopment Plan. Finding the Borough's and Planning Board's actions neither arbitrary nor capricious, the trial court dismissed Plaintiffs' Complaint with prejudice.

As explained by the Borough's planner, the amended Redevelopment Plan – which includes constructing affordable housing and increasing open space – is substantially consistent with the objectives of the Master Plan. Given the adequate support in the record, the actions by the Planning Board and Borough are entitled to deference. Conversely, and as explained by the trial court, the record is devoid of any support for Plaintiffs' claims and, thus, Plaintiffs cannot satisfy their heavy burden to overcome the presumption of validity afforded to the amended Redevelopment Plan.

For these reasons, as discussed in more detail below, the trial court's decision – that the adoption of the amended Redevelopment Plan was neither arbitrary, capricious nor unreasonable – should be affirmed.

## **STATEMENT OF FACTS**

To avoid burdening the Court with a recitation of duplicative facts, the Redeveloper Defendants adopt the statement of facts set forth by the Borough and the Milltown Ford Avenue Redevelopment Agency (collectively, “Milltown Defendants”). See MDb4-17.<sup>1</sup>

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<sup>1</sup> “MDb” shall refer to the Milltown Defendants’ brief, filed March 29, 2024, and “Pb” shall refer to the Plaintiffs’ amended brief, filed March 1, 2024.

## **PROCEDURAL HISTORY**

Similarly, the Redeveloper Defendants adopt the procedural history set forth by the Milltown Defendants. See MDb18.

## LEGAL ARGUMENT<sup>2</sup>

### **I. PLAINTIFFS FAIL TO SUSTAIN THEIR BURDEN TO OVERCOME THE PRESUMPTION OF VALIDITY AFFORDED TO THE AMENDED REDEVELOPMENT PLAN.**

There is no dispute as to the applicable standard of review: municipal actions are presumed valid and will only be overturned if they are arbitrary, capricious, or unreasonable. Pb15-16; MDb19-21. See, e.g., New Jersey Shore Builders Ass'n v. Jackson, 199 N.J. 38, 55-56, n. 8 (2009) (an ordinance is “presumptively valid and ... [is] not to be nullified except upon an affirmative showing that the action taken ... was unreasonable, arbitrary or capricious.”). The same deferential standard applies to a municipality’s adoption of a redevelopment plan or its subsequent amendments. See Powerhouse Arts Dist. Neighborhood Ass'n v. City Council of City of Jersey City, 413 N.J. Super. 322, 333 (App. Div. 2010) (“We discern no reason to accord a less deferential standard of review to the adoption of a significant amendment than to the adoption of the initial plan.”). To overcome the presumption of validity, the challenging party bears a “heavy burden.” Bryant v. City of Atlantic City, 309 N.J. Super. 596, 610 (App. Div. 1998).

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<sup>2</sup> The Redeveloper Defendants adopt and join the positions asserted by the Milltown Defendants’ brief and briefly supplement those positions below. Unless otherwise defined, capitalized terms shall have the meaning set forth in the Milltown Defendants’ brief.

**A. The Borough’s and Planning Board’s Actions Are Adequately Supported by the Record**

Plaintiffs fail to carry their burden to overcome the presumption of validity, as the municipal actions at issue are adequately supported by the record. See Powerhouse Arts, 413 N.J. Super. at 333 (explaining that the adoption of an amendment to a redevelopment plan is only arbitrary or capricious if the “findings underlying the municipal governing body’s redevelopment decision” are not “adequately supported by the record”).

Based on the detailed, unrebutted testimony of the Borough’s planner, the Planning Board determined that the proposed amendment to the Redevelopment Plan was consistent with the Borough’s Master Plan. See Pa126-27; see also MDb29-31; Pa69 (“[I]t is the further opinion of Mr. Barree that the Amended Redevelopment Plan is generally consistent with, and certainly not inconsistent with any of the goals and objectives of the Master Plan[.]”); Pa74-76 (testimony of the Borough planner finding the amended Redevelopment Plan consistent with the objectives of the Master Plan). The Planning Board memorialized this determination in a duly adopted resolution identifying the specific objectives – Nos. 2, 3, and 6 – of the Master Plan that were implicated by the amended Redevelopment Plan and then explained how the amended Redevelopment Plan was substantially consistent with each objective. See Pa70 (“[T]he Amended Redevelopment is consistent with the goals and objectives of the Master Plan .

. . . specifically, Objectives 2, 3 and 6 in Section D of the Master Plan Reexamination Report[.]”). The resolution also specifically incorporated the testimony of the Borough’s planner. See Pa69-70 (“The aforementioned recitals are incorporated herein as though fully set forth at length.”). Upon receipt of the Planning Board’s resolution, the Borough Council properly adopted Ordinance 22-1516 to amend the Redevelopment Plan. See Pa127; see also Pa91-92 (“It is hereby found and determined that the Amended Redevelopment Plan is consistent with the Master Plan of the Borough[.]”).

Based on this clear record, the determinations of the Planning Board that the amended Redevelopment Plan is substantially consistent with the Master Plan are adequately supported by the record and, therefore, entitled to deference. Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 383 (1995) (“The Board that prepared and adopted the Master Plan also determined . . . that the proposed [] amendments are substantially consistent with the Master Plan. *Such a determination by the Board is entitled to deference and great weight.*”) (emphasis added). Because the record adequately supports the determinations of the Planning Board and Borough and Plaintiffs have not made any affirmative showing that the actions were arbitrary, capricious or unreasonable, the trial court properly rejected Plaintiffs’ challenge.



**B. The Planning Board's and Borough's Actions Require Deference As Plaintiffs Fail to Satisfy Their Burden**

Plaintiffs contend the adoption of the amended Redevelopment Plan was arbitrary, capricious or unreasonable, arguing that the Planning Board failed to make any findings of fact or consistency determination. As explained above, this position is belied by the record. See Pa128 (“The Plaintiffs ignore the unrefuted testimony of the Borough Planner who authored the 2019 Master Plan Reexamination Report and his very own familiarity with the iterations of the redevelopment planning dating back to 2006 which specifically included the land use element of the Master Plan”); see also Pa70 (incorporating by reference the Borough planner’s testimony in the Planning Board’s resolution that affirmed “[t]he Amended Redevelopment Plan is consistent with the goals and objectives of the Master Plan”). Given this fact, Plaintiffs cannot satisfy their burden to show that amended Redevelopment Plan “materially undermine[s] or distort[s] the basic provisions and objectives of the Master Plan,” let alone that it does so to a degree that can be considered a “substantial” inconsistency. Manalapan Realty, 140 N.J. at 384.<sup>3</sup>

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<sup>3</sup> To the contrary, as noted by the trial court, the record illustrates that the amended Redevelopment Plan is substantially consistent with the Master Plan. Pa128 (finding the amended Redevelopment Plan substantially consistent because it “ensure[s] both the actual construction of affordable housing pursuant

Ignoring the evidence supporting the Borough's and Planning Board's determinations, Plaintiffs claim that the Planning Board and Borough acted arbitrarily and capriciously by failing to identify alleged inconsistencies between the amended Redevelopment Plan with the Master Plan. See Pb25-33. As the Milltown Defendants adequately rebut these meritless claims, see MDb36-46, the Redeveloper Defendants only briefly address Plaintiffs' argument regarding the amended Redevelopment Plan's impact on affordable housing.

Simply, Plaintiffs' assertion that the amended Redevelopment Plan decreases the likelihood that affordable housing will be built in contravention of the Master Plan is entirely without basis and contrary to the record. See MDb38-39. Plaintiffs seemingly ignore the fact that the Redeveloper Defendants have been designated as the redeveloper for the property under the Redevelopment Agreement since 2004. Pa91, -108. And, they also ignore the fact that the Redeveloper is a party to the 2021 County Agreement, which sets forth the Borough's intention to amend the Redevelopment Plan to reduce the total

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to the . . . Master Plan . . . and further not only the preservation but also a significant increase in the amount of open space on the subject Property[.]”).

number of residential units to 300 while keeping 70 units designed for affordable housing. Pa49, -61.<sup>4</sup>

Contrary to Plaintiffs' speculative argument, the undersigned Redeveloper Defendants are ready, willing and able to complete the project as set forth in amended Redevelopment Plan. These facts support the contention that the affordable housing units will realistically be built. See MDb40. Thus, the only threat to the construction of the affordable housing is the Plaintiffs' continued obstruction of this project. See Pa107 ("This matter is the latest of no less than eight (8) litigation cases previously brought by the Plaintiff entities dating back to 2006 that have since implicated all parties to this action.")<sup>5</sup>

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<sup>4</sup>As noted by the Milltown Defendants, Plaintiffs also disregard the fact that the redevelopment includes a commercial component that will assist to defray the cost of the affordable housing units. Pa126.

<sup>5</sup> With regard to development density, the Redeveloper Defendants note that Plaintiffs assert this argument for the first time on appeal, see Pb30-31, having failed to raise these issues before the Planning Board, Borough Council or, most notably, the trial court. See MDb44, n.4; see also 1T10:8-14. Therefore, it should not be considered by this Court. See generally Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (explaining that reviewing courts "will decline to consider questions or issues not properly presented [below] ... when [the] opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the [proceeding] or concern matters of great public interest'"). Regardless, Plaintiffs fail to articulate any provision of the Master Plan that the amended Redevelopment Plan offends by increasing the amount of open space on the property while decreasing the size of the developed portion of the property.

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Given this clear and substantial record supporting the challenged municipal actions of Borough and Planning Board, the trial court properly concluded that the substantial deference and presumption of validity afforded to the municipal actions could not be overcome. See *Fallone Properties, L.L.C. v. Bethlehem Twp. Planning Bd.*, 369 N.J. Super. 552, 562 (App. Div. 2004) (“[W]hen reviewing the decision of a trial court that has reviewed municipal action, we are bound by the same standards as was the trial court” and “will give substantial deference to findings of fact” so long as the challenged actions are “grounded in evidence in the record”). With Plaintiffs’ burden unsatisfied, the actions of the Borough or Planning Board cannot be set aside as arbitrary, capricious, or unreasonable.

**CONCLUSION**

For the foregoing reasons, the trial court's decision should be affirmed.

**GIBBONS P.C.**

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Dated: May 1, 2024

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SB BUILDING ASSOCIATES, L.P., SB  
MILLTOWN INDUSTRIAL REALTY  
HOLDINGS, L.L.C. and ALSOL CORP.;

Plaintiffs/Plaintiffs,

v.

THE PLANNING BOARD OF THE  
BOROUGH OF MILLTOWN, THE  
BOROUGH OF MILLTOWN, MILLTOWN  
FORD AVENUE REDEVELOPMENT  
AGENCY, BORAIE DEVELOPMENT,  
L.L.C., and MILLTOWN FORD AVENUE  
REDEVELOPERS, LLC;

Defendants/Respondents.

SUPERIOR COURT OF NEW  
JERSEY  
APPELLATE DIVISION  
APPELLATE DOCKET NO.:  
A-003253-22

CIVIL ACTION

Appeal of the Order of  
Judgment and Decision of the  
Hon. Thomas Daniel  
McCloskey, J.S.C. entered  
May 22, 2023.

Sat Below:

Hon. Thomas Daniel  
McCloskey, J.S.C.; Superior  
Court of New Jersey Docket  
No.: MID-L-6083-22

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**REPLY BRIEF OF PLAINTIFFS/PLAINTIFFS SB BUILDING  
ASSOCIATES, L.P., SB MILLTOWN INDUSTRIAL REALTY HOLDINGS,  
L.L.C. AND ALSOL CORP.**

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## PRELIMINARY STATEMENT

In their opposition to the instant appeal filed by Defendants, they argue that the Milltown Ordinance 22-1516 is entitled to the presumption of validity which can only be rebutted by showing that the ordinance is arbitrary, capricious and unreasonable. Defendant argue that this is a formidable bar which Appellants/Plaintiffs, SB Building Associates, L.P., SB Milltown Industrial Realty Holdings, L.L.C and Alsol Corp. (collectively referred to in that initial brief and this Reply Brief as “Plaintiff”) failed to clear.

Defendants’ recital of the standard for rebutting the presumption of validity is too limited. While some cases (which are the ones cited by Defendants) do mention only an arbitrary, capricious and unreasonable showing to rebut the presumption of validity, the New Jersey Supreme Court repeatedly has stated that while a zoning ordinance is insulated from attack by a presumption of validity, that presumption “may be overcome by a showing that the ordinance is ‘clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the (zoning) statute.’” Riggs v. Long Beach, 109 N.J. 601, 610-11 (1988); Bow & Arrow Manor v. West Orange, 63 N.J. 335, 343 (1973); Taxpayer Ass’n of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6, 20 (1976). In addition, “the ordinance must be adopted in accordance with statutory and municipal procedural requirements.” Riggs v. Long Beach, supra, 109 N.J. at 612.

Thus, a court may declare an ordinance void if in enacting the ordinance the municipality has not complied with the requirements of the enabling statute. Id. at 611. To enact a valid land use ordinance certain criteria must be met. Id. For example, “the ordinance must be ‘substantially consistent with the land use element and the housing plan element of the master plan . . . .’” Id.

Defendants argue that the Defendants were “rational” in adopting Ordinance 22-1516, and that the history of the site and Plaintiff’s almost 20 year effort to compel Defendants to cure their continuing violation of their constitutional “Mt. Laurel” obligations somehow shields the Ordinance from its deficiencies. Defendants are again wrong. Being “rational” in adopting an ordinance or adopting the ordinance as part of a plan to satisfy the 2014 Order of Compliance entered against the Town in the Mt. Laurel litigation brought by Plaintiff are laudable, however, they do not relieve the Defendants from complying with the requirements imposed by the MLUL and the LRHL for the enactment of a redevelopment or land use ordinance. That is exactly what Defendants want this Court to ignore.

As explained in Plaintiff’s initial brief, in order for a zoning ordinance involving land use to be validly enacted there must be a determination by both the Planning Board and the municipality’s governing body that the proposed ordinance is consistent with not only the Goals Element of the Master Plan but the Land Use

Element as well. In fact, the Legislature found the need for these determinations to be so important that the Legislature expressly provided that any land use or redevelopment ordinance needs to be first sent to the Planning Board for its review and comment before being taken up by the governing body.

Plaintiff has shown that the record is devoid of evidence that Defendants complied with the requirements necessary for the lawful adoption of Ordinance 22-1516. Good intentions or rational behavior are not substitutes for compliance with statutory requirements. The presumption of validity has been rebutted by Plaintiff's showing of non-compliance with statutory requirements.

Further, there were no findings of fact made by the planning board that might guide the governing body or the Court in reviewing the actions of the planning board. There were also no findings of fact by the municipal governing body supporting the enactment of Ordinance 22-1516. Defendants saying there are does not make it so. Nor does arguing that the facts were in the collective minds of the board members or council members based on their being familiar with the "history" of the property. The failure to provide findings of fact based on evidence in the record makes the adoption of the Ordinance 22-1516 arbitrary, capricious and unreasonable.

**LEGAL ARGUMENT**

**POINT ONE**

**MILLTOWN FAILED TO COMPLY WITH THE STATUTORY  
REQUIREMENTS FOR ENACTING ORDINANCE 22-1516 SO AS TO  
RENDER IT VOID.  
(Pa 118, 121, 126-130)**

A municipality derives its authority to enact land use ordinances from the grant of such power from the State, specifically by the Municipal Land Use Law, N.J.S.A. 40:55D-1 to -163 (“MLUL”). See 388 Route 22 Readington Realty Holdings, LLC v. Township of Readington, 221 N.J. 318, 339-340 (2015).

Similarly, the municipal power to adopt and implement a plan of redevelopment is derived from the State and is governed by the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 to -73 (“LRHL”). See Vineland Constr. Co., Inc. v. Township of Pennsauken, 395 N.J. Super. 230, 250-251 (App. Div. 2007), dismissed as moot, 195 N.J. 513 (2008).

Both the MLUL and LRHL require that the municipal exercise of power must be done in adherence with the requirements imposed by these statutes in order for the municipal exercise of powers to be valid. Failure of a municipality to observe the limitations of the grant and follow the requirements for enactment which accompany the grant, require a court to invalidate the municipal action.

Riggs v. Long Beach, *supra*, 109 N.J. at 611. See also Speakman v. North Plainfield, 8 N.J. 250, 259 (1951) (cited to in Riggs).

Defendants' argument that rebutting the presumption of validity is limited to showing the ordinance to be arbitrary, capricious and unreasonable is myopic. The New Jersey Supreme Court has repeatedly stated that the presumption may be overcome by a showing that the ordinance is "clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the [zoning] statute" or, as in this case, was not "adopted in accordance with statutory and municipal procedural requirements." Riggs v. Long Beach, *supra*, 109 N.J. 601, 610-12 (1988). See also Bow & Arrow Manor v. West Orange, *supra*, 63 N.J. at 343; Taxpayer Ass'n of Weymouth Twp. v. Weymouth Twp., *supra*, 80 N.J. at 20.

As the Supreme Court stated in Riggs, a zoning ordinance, which Ordinance 22-1515 undoubtedly is, as well as an ordinance amending a redevelopment plan subject to the LRHL, is required to satisfy certain criteria, including among other things, that such ordinance is substantially consistent with the land use plan element of the master plan, and being adopted in accordance with statutory and municipal procedural requirements. Riggs v. Long Beach, *supra*, 109 N.J. at 611-612.

Defendants' reliance on the testimony of their planner, Mr. Barree, the only witness before the Planning Board, to provide a basis for concluding the ordinance's "substantial consistency" with the land use plan element of the master plan, is fanciful. Mr. Barree's testimony, as discussed in Plaintiff's initial brief, pages 23-26, was only as to the "Objectives" element of the masterplan. He never addressed the critical "Land Use" element of the Master Plan.

Despite protestations to the contrary, Defendants, as set forth and analyzed in detail in Point Two of Plaintiff's initial brief, failed to show that the Planning Board considered whether Ordinance 22-1516 was "substantially consistent" with the Land Use element of the Master Plan as expressly required by the enabling legislation. As also discussed more fully in Point Two of Plaintiff's initial brief, the governing body's resolution should also be declared invalid as it contains no finding of consistency other than a perfunctory parroting of what the Planning Board stated without appropriate consideration.

These failures on the part of Defendants to satisfy the requirements for adopting Ordinance 22-1516 rebuts the presumption of validity and renders the ordinance void.

**POINT TWO**

**EVEN IF LIMITED TO THE STANDARD OF ARBITRARY CAPRICIOUS  
OR UNREASONABLE TO REBUT THE PRESUMPTION OF VALIDITY,  
PLAINTIFF HAS MET THAT STANDARD.  
(Pa 118-121, 129-130)**

Defendants appear to ignore the clear case law that recognizes that the presumption of validity is overcome if the ordinance was not adopted in accordance with the requirements of its enabling legislation. Rather, Defendants would like to limit rebuttal to instances in which the ordinance is shown to be arbitrary, capricious or unreasonable. Nonetheless, even if such a standard is applied, Plaintiff has established that Ordinance 22-1516 also offends this standard.

A municipal land use board is under a statutory duty to make and memorialize in its resolution findings of fact on which its conclusions and decisions are founded so that a reviewing Court has something to review. See Loscalzo v. Pini, 228 N.J. Super. 291, 305 (App. Div. 1988), cert. den. 188 N.J. 216 (1989). See also Cox and Koenig, New Jersey Zoning Use and Law Administration, at §19.7.2, (2022). While Defendants argue that findings of fact are not required in the adoption of an ordinance, relying on Hirth v. City of Hoboken, 337 N.J. Super. 149, 165-66 (App. Div. 2001), Powerhouse Arts Dist. Neighborhood Ass'n v. City Council of City of Jersey City, 413 N.J. Super. 322, 332-33 (App. Div. 2010), a case relied upon by



Defendants and Plaintiff in their respective brief, makes it clear Hirth was referring to ordinances in general, not land use ordinances, which have different requirements.

The well-respected *Cox and Koenig* treatise on New Jersey Land Use makes it clear what needs to be done to make appropriate findings of facts on any land use decision:

The board's findings must be made on the basis of facts which are in the record and may never be made on nondisclosed evidence that the parties have had no opportunity to rebut. See *High Horizons Dev. v. Dept of Transp.*, 120 N.J. 40, 53-54 (1990). Mere recitals of testimony are not "findings." In the resolution it should be stated very clearly what the board's actual findings are ....Mere recitals of testimony do not satisfy a board's statutory responsibility to make findings of fact. *Loscalzo v. Pini*, 228 N.J. Super. 291, 305 (App. Div. 1988), certif. den. 188 N.J. 216 (1989). The resolution requires a decision by the board as to which facts are found to be the true facts based upon the testimony heard. See also *New York SMSA v. Weehawken Bd. Of Adj.* 370 N.J. Super. 319, 332-334 (App. Div. 2004). And see *Saadala v. E. Brunswick Zoning Bd.*, 412 N.J. Super. 541, 551-552 - 40 - (App. Div. 2010), reversing grant of use variance where the Board's resolution approving the application made only conclusory statements lacking evidential support ... . *Cohen v. Borough of Rumson*, 396 N.J. Super. 608, 617-618, 621 (App. Div. 2007), remanding for reconsideration where there was no evidence supporting the board's conclusion . . . .

*Cox & Koenig*, New Jersey Zoning Use and Law Administration, § 19-7.2 (2022 ed.).

Powerhouse also stated that “findings underlying municipal governing body’s redevelopment decision, including any regarding the consistency or inconsistency with the Master Plan, must be adequately supported by the record, less resulting plan adoption be arbitrary or capricious.” Powerhouse Arts Dist. Neighborhood Ass'n v. City Council of City of Jersey City, supra, 413 N.J. Super. at 333 (emphasis added).

Both the Planning Board and the governing body were required in connection with the adoption of Ordinance 22-1516 to make a finding that the proposed ordinance is either substantially consistent with the Master Plan or it is not. To do so requires an examination of the Master Plan and an examination of the proposed ordinance in order to factually set forth the consistencies or inconsistencies of the two.

Defendants argue that “[t]he governing body’s decision finding consistency was reasonable, based on the contents of the Redevelopment Plan, its members’ knowledge of the area and history of attempted development at the Property, and the record developed by the Planning Board.” Db, p. 37. The argument collapses on itself. Knowledge of the Redevelopment Plan is obviously essential in order to conduct the examination of it and the Master Plan so a determination as to consistency with the Master Plan can be made. However, just knowing the Redevelopment Plan is clearly not enough – there must be an examination of it

with the Master Plan. Defendants' argument lacks any mention of the requisite comparison or the facts on which such a determination is based.

The claim that the members' knowledge of the area and history of attempted development, without setting forth that knowledge, is equally useless for purposes of setting forth findings of fact. Neither the public or the courts are mind readers.

Lastly, as is argued at length in Plaintiff's initial brief, the record before the Planning Board does not set forth sufficient findings based on the record to address consistency. Thus, the members' knowledge not spelled out on the record accomplishes nothing.

Moreover, Defendants' explanation that the Planning Board's findings of fact are contained in the "whereas" recitals in the Resolution because they reference Mr. Barree's testimony before the Board is simply incorrect. See Db, p. 30. As stated at pages 5-6 above in this Reply Brief and in Plaintiff's initial brief, Mr. Barree's testimony was limited only to the "Objectives" of the Master Plan. He made no mention of nor any examination of the land use element. The enabling statute requires a finding that the ordinance is substantially consistent with both the "Objectives" of the Master Plan, as well as the land use element of the Master Plan. Therefore, Mr. Barree's testimony, which did not examine consistency of the ordinance with the land use element of the Master Plan, was

deficient for purposes of satisfying as to what the enabling statute required for a valid enactment of Ordinance 22-1516.

The Defendants' reliance on the "recital" referencing Mr. Barree's testimony of the ordinance's consistency with the "Objectives" element of the Master Plan, is not enough to establish the validity of the ordinance. While such a recital might be sufficient to satisfy the first part of the statutory requirement (consistency with the "Objectives" element), the second part of the statutory requirement, consistency with the land use element, is absent. Hence, there is no mention of such a finding, let alone the underlying facts in support of that conclusion, in the resolution, be it in a recital or otherwise. Satisfying one out of the two statutory requirements does not satisfy the requirement for valid enactment of a land use ordinance.

In Point Two of Plaintiff's initial brief, the requirement of findings of fact and the lack of such findings by the Planning Board and governing body is addressed. Defendants' brief, which appears to be an attempt to respond to Plaintiff's arguments on the issue, simply fails to meet that challenge with any coherent or organized points.

The adoption of a land use ordinance predicated on unsupported findings is the essence of arbitrary and capricious action. Bryant v. City of Atlantic City, 309 N.J. Super. 596, 610 (App. Div. 1997); Infinity Broadcasting Corp. v. New Jersey Meadowlands Comm'n, 377 N.J. Super. 209, 225 (App. Div. 2005).

Thus, the failure of the Board and governing body to include findings of fact in support of the adoption of Ordinance 22-1516 renders that action arbitrary, capricious and unreasonable, which rebuts the presumption of validity and supports the invalidation of the ordinance by the Court.

**POINT THREE**

**CONTRARY TO THE ARGUMENT OF THE DEFENDANTS, THE  
DECISION OF THE PLANNING BOARD CAN ONLY BE MADE BASED  
ON THE RECORD BEFORE IT.**

**(Pa 118-121, 129-130)**

On Page 31 of the Defendants' Brief, the Defendants argue:

As the lower court recognized, the Planning Board members were not required to ignore the history of litigation concerning the property or prior attempts to redevelop it. Db, p. 31

Black letter New Jersey law is that land use decisions must be based on the evidence in the record adduced at the land use board hearings:

The facts adduced at the hearing, all testimony and all evidence on which the board made its decision must be part of the record and the board's decision must include findings of the facts from the record on which it made its decisions and conclusions on the points of law raised. See *Pagano v. Zoning Bd. Of Adjustment*, 257 N.J. Super. 382, 399-401 (Law Div. 1992). Or, as stated in *Lincoln Hgts. v. Cranford Plan. Bd.*, 314 N.J. Super. 366, 386 (Law Div. 1998), *aff'd o.b.* 321 N.J. Super. 355 (App. Div.), certif. den. 162 N.J. 131 (1999).

Cox, *supra*, § 19-3.1.

Without findings of facts and conclusions of law based on the evidence in the record, a reviewing court cannot determine whether the Board acted properly.

The arguments raised by Defendants based on matters outside the record of the Planning Board are irrelevant and should have been ignored by the trial court and should be ignored by this Court.

**CONCLUSION**

For the reasons set forth in Plaintiff's initial brief and the reasons argued here, the Milltown Ordinance 22-1516 should be struck down as invalid because of its defective enactment or because of its failure to make findings of fact which make the ordinance arbitrary, capricious or unreasonable.

Respectfully submitted,

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