MICHAEL S. RUBIN, Plaintiff-Appellant, vs. BOROUGH OF CALDWELL and PLANNING BOARD OF THE BOROUGH OF CALDWELL, Defendants-Respondents.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003534-22T4 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY DOCKET NO. ESX-L-000433-22 SAT BELOW: HON. THOMAS R. VENA, J.S.C. CIVIL ACTION

BRIEF OF PLAINTIFF-APPELLANT MICHAEL S. RUBIN

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PRELIMINARY STATEMENT

Plaintiff appeals the grant of summary judgment. On January 20, 2022, Plaintiff Michael S. Rubin ("Plaintiff") filed an order to show cause ("OTSC") and Verified Complaint in Lieu of Prerogative Writs (the "Verified Complaint") seeking to enjoin the Borough of Caldwell ("Borough") from proceeding with public business because its annual Reorganization Meeting of January 11, 2022, a special meeting, was held in violation of the Open Public Meetings Act, N.J.S.A. 10:4-6, *et seq*. ("OPMA").

The challenge was based on the Borough prefacing its notice of the meeting sent to its official newspapers with an instruction that the notice was "FOR YOUR RECORD ONLY." The notice also violated other OPMA requirements. Notice was never published.

Defective special meeting notices, most containing the same directive not to publish, also infected special meetings held by the Planning Board and Governing Body in amending the Borough of Caldwell Redevelopment Plan (the "Redevelopment Plan") by Ordinance No. 1423-21, adopted on December 28, 2021. The OPMA violations were compounded by the Borough's substantive and procedural violations of the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1, *et seq*. ("LRHL"), and its failure to follow the requirements for adopting ordinances set forth in N.J.S.A. 40:49-2.

The First Count of the Verified Complaint sought to void all actions taken by the Borough Council at its January 11, 2022, reorganization meeting and to direct the Council to convene a new meeting due to it failure to properly notice the January 11th special meeting. The reorganization meeting had previously been noticed for January 4, 2022, but was not held on that date.

The Second Count of the Verified Complaint challenged the Borough's enactment of Ordinance 1423-21 on December 28, 2021, which amended the Redevelopment Plan because (i) the amendment was introduced on November 12, 2021, at a special meeting held in violation of the OPMA; (ii) the ordinance was reviewed at a special meeting of the Planning Board held on December 16, 2021, in violation of OPMA; and (iii) adoption of the Ordinance violated the substantive and procedural requirements of the LRHL and N.J.S.A. 40:49-2.

The Third Count of the Complaint sought a waiver of the 45-day limitations period to permit plaintiff to challenge the original adoption of the Redevelopment Plan in December, 2020, which suffered from some of the same violations of the LRHL and of N.J.S.A. 40:49-2 that plagued the adoption of the amendment.

PROCEDURAL HISTORY

Plaintiff filed a Verified Complaint and Order to Show Cause on January 20, 2022. (Pa 1.) On January 24, 2022, the Honorable Sharifa R. Salaam, J.S.C. entered an *ex parte* Order to Show Cause imposing temporary restraints on the Borough, including enjoining the Borough from holding any further official meetings until a proper reorganization meeting could be held (the "TRO"). (Pa 23.)

On January 26, 2022, Plaintiff filed a motion in aid of litigant's rights after the Borough Council held a public meeting on January 25, 2022, despite acknowledging at the meeting receipt of the TRO entered the previous day.

On January 27, 2022, the Honorable Thomas Moore, P.J. Civ., convened a *sua sponte* hearing, vacated the TRO and set forth a briefing schedule on the Plaintiff's application for preliminary relief and Plaintiff's litigant's rights motion. (Pa 29.)

On March 4, 2022, Hon. Thomas R. Vena, J.S.C., heard oral argument on the vacated TRO and Plaintiff's motion in aid of litigant's rights. Judge Vena denied both. (Pa 31 and Pa 37; see Pa 233 for the transcript of the hearing before Judge Vena, which was included as an Exhibit to one of the Borough's certifications submitted in support of its motion for summary judgment.)

The Borough filed its answer to the Verified Complaint on March 4, 2022. (Pa 39.) On June 27, 2022, Plaintiff sought the entry of default against defendant Planning Board, which was entered on June 28, 2022. (Pa 59.) The Planning Board filed a Consent Order Vacating Default which was entered by Judge Vena on July 26, 2022, (Pa 61), and then filed its Answer to the Verified Complaint on July 29, 2022. (Pa 62.)

On July 8, 2022, the Borough filed a motion for summary judgment. The motion was supported by a brief with five point headings:

> POINT I
> THE BOROUGH IS ENTITLED TO SUMMARY JUDGMENT ON COUNT ONE OF THE COMPLAINT BECAUSE PLAINTIFF'S OPMA CLAIM REGARDING THE REORGANIZATION IS MOOT.
>
> A. The Standard on Summary Judgment
> B. Count One is Moot because any Notice Defect of the January 11, 2022 Reorganization Meeting was Cured by the Plenary Reorganization Meeting.
>
> POINT II
> THE BOROUGH IS ENTITLED TO SUMMARY JUDGMENT ON COUNT THREE OF THE COMPLAINT REGARDING ORDINANCE NO. 1394-20 BECAUSE IT IS TIME-BARRED UNDER R.4:69-6(a).
>
> POINT III

THE BOROUGH IS ENTITLED TO SUMMARY JUDGMENT ON COUNT TWO OF THE COMPLAINT BECAUSE ANY ALLEGATIONS PERTAINING TO THE INTRODUCTION OF ORDINANCE NO. 1423-21 ARE TIME-BARRED UNDER R. 4:69-6(a) AND OPMA.

POINT IV
THE BOROUGH IS ENTITLED TO SUMMARY JUDGMENT ON COUNT TWO OF THE COMPLAINT BECAUSE THERE WAS ADEQUATE NOTICE OF THE PLANNING BOARD'S DECEMBER 16, 2021 MEETING FOR REVIEW OF ORDINANCE 1423-21PURSUANT TO OPMA.

POINT V
THE BOROUGH IS ENTITLED TO SUMMARY JUDGMENT ON COUNT TWO OF THE COMPLAINT BECAUSE THE BOROUGH PUBLISHED NOTICE OF ITS MEETING FOR FINAL PASSAGE OF ORDINANCE 1423-21 IN ACCORDANCE WITH THE ORDINANCE PROCEDURE STATUTE (N.J.S.A. 40:49-2).

(Pa 72.)[1] The Borough's motion did not address Plaintiff's timely challenge to the adoption of Ordinance 1423-21 amending the Redevelopment Plan, which alleged procedural and substantive violations of the LRHL and N.J.S.A. 40:49-2.

[1]The Borough's point headings from its initial summary judgment brief and excerpts from plaintiff's opposition brief and the Borough's reply brief are included in the Appendix solely to demonstrate that the trial court was made aware that the Borough's motion did not address all of plaintiff's claims but that it apparently chose to believe the Borough's representations to the contrary. (Rule 2-6:1(a)(2.)

Plaintiff's opposition to the Borough's motion identified this omission and informed the trial court that the motion should be properly characterized as a motion for partial summary judgment. (Pa 74.)

Rather than acknowledging the limited nature of its motion, the Borough's reply brief explicitly affirmed that it was seeking dismissal of "every count" of the Verified Complaint and its motion was for "complete summary judgment." (Pa 77.)

Oral argument on the Borough's motion was held on September 9, 2022, and on that same date Judge Vena entered an Order Granting Summary Judgment in the form submitted by the Borough, dismissing the Verified Complaint "in its entirety with prejudice." (Pa 80.)

The bulk of Judge Vena's five page Statement of Reasons attached to the Order summarizes the parties' position. (Pa 82.) Section VII, the three paragraph "Substantive Analysis," discusses only whether the Planning Board's December 16, 2021, special meeting was held in violation of OPMA. (Pa 86.) No explanation for the dismissal of the other claims raised in the Verified Complaint was given. (Pa 85-86.)

The Planning Board filed no papers in support of the Borough's motion and did not join in its motion.

After the Verified Complaint was dismissed "in its entirety with prejudice," Plaintiff filed a timely Notice of Appeal as of right on October 21, 2022, which was assigned Docket No. A-000570-22. (Pa 87.)

After filing its initial Case Information Statement, the Borough submitted a November 8, 2022, letter to the Court with an amended CIS objecting to the appeal as of right. The basis of the objection was that the trial court order was not a final order because it did not dismiss clams against the Planning Board, a position directly contrary to the Borough's position below and the express language of the Order prepared by the Borough's counsel and entered by Judge Vena verbatim. (Pa 100.)

Despite responsive correspondence from Plaintiff that pointed out the Borough's hypocrisy, (Pa 101), and a letter from the Planning Board agreeing that the Order should be treated as final despite the Board's lack of participation in the motion, the Appellate Division, following its receipt of a responsive letter from the Borough, (Pa 107), dismissed the Appeal by Order entered December 8, 2022. (Pa 114.)

On June 23, 2023, Judge Vena entered an Order Dismissing Plaintiff's Claims Against Defendant Planning Board of the Borough of Caldwell with the

consent of counsel for Plaintiff and the Planning Board, citing the reasons set forth in the court's September 9, 2022, Statement of Reasons. (Pa 115.)

On July 21, 2023, Plaintiff filed a second Notice of Appeal as of right with the Appellate Division. (Pa 117.)

STATEMENT OF FACTS

The defective special meeting notice sent to the Star Ledger by e-mail on December 28, 2021, to "advertise" the January 11, 2022, special reorganization meeting instructed the recipients not to publish by prefacing the notice with instructions that it was for "YOUR RECORD ONLY," with all capitals in the original. Following the Borough's directive, notice of the meeting was never published, but the meeting was held.

The December 28th notice continued a years' long policy of sending notices to newspapers of Council and Planning Board special meetings that violated the Open Public Meetings Act. The notices not only instructed the recipients not to publish, they were often sent too late to publish at least 48 hours before the meeting or were sent to only to one newspaper. All of the special meeting notices in the Record violated one of more of the notice requirements of the OPMA, including the omission of access information for remotely held meetings, the omission of an agenda, and the failure to inform whether formal action would be taken.

The Borough's Designated Newspapers

The Borough designated the same three official newspapers for calendar years 2020, 2021 and 2022: The Progress, Star Ledger Newspaper and Tap into West Essex. (Pa 253.)

The Progress is a weekly newspaper that publishes on Thursdays. The Star Ledger is a daily newspaper. Tap into West Essex is a web site. The deadline for submitting legal advertisements to The Progress is the Tuesday prior to publication by 1:00 a.m. (Pa 257.) The deadline for submitting legal advertisements to the Star Ledger is three business days before the desired publication date. (Pa 259.)

There are no legal ads published on the Tap into West Essex website.

The Borough's Efforts to Reorganize for the 2022 Calendar Year

The Borough originally scheduled its reorganization meeting for January 4, 2022. Notice of the reorganization meeting was published in The Progress on December 23, 2021. The notice indicated it was to be conducted via Zoom and included information for the public to access the meeting. The notice did not include a copy of the agenda. (Pa 261.)

On December 28, 2021, the Borough sent an e-mail to its designated newspapers providing notice that the reorganization meeting was being rescheduled for Tuesday, January 11, 2022. The notice informed the newspapers

that this information was “FOR YOUR RECORD ONLY" (all caps in original). The e-mail did not include an agenda (although it indicated one would be forthcoming), did not indicate whether formal action would be taken and did not provide information as to how the public could access the meeting, indicating access information would be available only on the Borough website. (Pa 170.)

The Borough's December 28, 2021, e-mail was the only notice of the rescheduled January 11, 2022, reorganization meeting sent to its designated newspapers. None published the notice as directed by the Borough.

After plaintiff filed his Verified Complaint and Order to Show Cause on January 20, 2022, challenging notice of the January 11th special meeting, the Borough scheduled a curative meeting for February 1, 2022. It sent notice of the curative meeting on Wednesday, January 26, 2022, but only to the Star Ledger, not two of the Borough’s designated newspapers. (Pa 165; ¶12 of the Heun Cert. I.) The notice was published in the Star Ledger on January 29, 2022, and included access information for the Zoom meeting but did not include an agenda and did not indicate whether formal action would be taken. (Pa 173 and Pa 189.) A copy of the transmittal notice from the Borough is not in the record.

On Friday, January 28, 2022, the Borough sent an e-mail notice of the Tuesday, February 1, 2022, curative reorganization special meeting to all its

designated newspapers. The notice indicated that an agenda was attached, but did not indicate whether formal action would be taken and did not provide information for the public to access the meeting, referring instead to the Borough website. There was no directive not to publish. (Pa 175.)

Since The Progress publishes on Thursdays, a notice sent on a Friday for a meeting the following Tuesday could not possibly have been published in the newspaper and never was. Moreover, since the Borough did not transmit the agenda to the Star Leger until January 28, 2022, at the earliest, the agenda was not included in the newspaper's January 29, 2022, publication of the special meeting notice sent to it on January 26th. (Pa 173 and Pa 189.)

Thus, notice of the curative reorganization meeting held on February 1, 2022, was sent to and published in only one newspaper instead of two because it was not sent to The Progress in a timely manner. (Pa 165; ¶12 of the Heun Cert. I; Pa 173; Pa 175.) Moreover, the agenda for the reorganization meeting was never published, whether prior to the January 4th meeting, prior to the January 11th special meeting or prior to the February 1st curative special meeting. None of the special meeting notices disclosed whether formal action would be taken and the January 28, 2022, notice sent to the newspapers omitted Zoom access information. (Pa 173.)

The Borough's Redevelopment Process

The Borough, utilizing the Local Redevelopment and Housing Law, N.J.S.A. 40A:12-1, *et seq*. ("LRHL"), for the first time, adopted the Borough of Caldwell Redevelopment Plan on December 15, 2020, through Ordinance No. 1394-20. (Pa 331.)

Notice of the public hearing on adoption of Ordinance 1394-20 was published on November 26, 2020. The notice did not include a copy of the Plan or a summary of its contents and did not inform the public how they could obtain a copy of the Plan and ordinance. (Pa 149.)

The LRHL requires the Borough to wait 45 days from introduction of a redevelopment plan ordinance before holding a public hearing on final passage, to afford time for the Planning Board to remit the report required by N.J.S.A. 40A:12A-7. Ordinance No. 1394-20 was introduced on November 17, 2021, and adopted on December 15, 2021, 28 days after introduction. (Pa 15, Verified Complaint, ¶67; Pa 151.)

The Borough introduced Ordinance No. 1423-21, an amendment to the Redevelopment Plan, at a special meeting held on November 12, 2021. (Pa 153.) Notice of the meeting was e-mailed to the designated newspapers on November 10, 2021, too late to be published in either paper. (Id.) The notice nonetheless

instructed the newspapers that it was not for publication since it was prefaced with "FOR RECORD ONLY" (caps and [sic] in original). (Id.) The special meeting notice provided no information on the agenda or how to access the remote meeting, other than referencing the Borough's website, and failed to indicate whether formal action would or would not be taken. (Id.) Notice of the November 12, 2021, special meeting of the Council was never published.

As required by N.J.S.A. 40:49-2, the Borough published notice of a public hearing on adoption of Ordinance 1423-21 in The Progress on November 18, 2021. The hearing was scheduled for a December 14, 2021, special Council meeting, thirty-three (33) days after introduction. (Pa 157.)

According to the public hearing notice published in The Progress, Ordinance 1423-21 included a provision referring the ordinance to the Planning Board for review. (Id.) The legal ad did not, however, include a summary of the proposed redevelopment plan amendments and did not inform the public as to how to obtain a copy of the amendments, leaving the public ignorant as to their nature and scope. (Id.)

The Borough also published an OPMA notice for the December 14, 2021, special meeting of the Council in the Star-Ledger on November 30, 2021. (Pa 268.) The published notice indicated the meeting was originally scheduled for

December 7, 2021, and provided access information for the public. (Id.) The notice did not include an agenda, despite it being a rescheduled meeting and despite the Borough having published notice on November 18th of the public hearing on Ordinance 1423-21 to be held on December 14th. The notice also did not indicate if formal action would or would not be taken. (Id.)

The record is silent as to whether notice of the December 14, 2021, Council special meeting was published in The Progress and it does not include a copy of the notice as transmitted by the Borough.

The Planning Board commenced review of Ordinance 1423-21 at its regular meeting held on December 8, 2021, six days before the scheduled second reading of the ordinance before the Council on December 14, 2021. (Pa 245, ¶31.) Unable to complete its review during that meeting, it voted to continue review at a special meeting to be held on December 16, 2021, two days after the scheduled second reading. (Pa 245, ¶32.) The special meeting was scheduled after Mayor John Kelly ("Kelly"), a statutory member of the Planning Board, rejected a request to give the Board more time to review the redevelopment plan amendments. (Pa 12, Verified Complaint ¶¶55-56.) Although second reading was publicly noticed for December 14th, Kelly told the other Planning Board members that the public

hearing on Ordinance 1423-21 would be held on December 28th, the 46th day after introduction and referral, and would not be adjourned. (Id.)

No public hearing on Ordinance 1423-21 was held on December 14, 2021, because the matter was removed from the agenda. (Pa 167; ¶19; Pa 214.) As evidenced by the minutes of the December 14th Council meeting, no announcement was made at the Council meeting explaining its removal of the public hearing from the agenda or even the fact thereof, and, more importantly, no notice was given that the public hearing would instead be held on December 28th, a fact clearly known since Kelly announced that date at the Planning Board's December 8th meeting. (Pa 264; Pa 12, Verified Complaint ¶¶55-56.)

The Planning Board continued its review of Ordinance 1423-21 at its Thursday, December 16, 2021, special meeting. (Pa 270.) Notice of the special meeting was sent by the Borough to the designated newspapers on Friday, December 10, 2021. (Pa. 209.) It also instructed recipients that it was "FOR YOUR RECORD ONLY!" (caps in original). (Id.) The notice informed the recipients that the purpose of the meeting was to continue the Board's review of the Redevelopment Plan amendment and that final action could be taken. (Id.) It referred recipients to the Borough website for remote access information. (Id.) (The notice references an attachment but does not identify its contents; the agenda

was attached to the e-mail notice included in the Borough's exhibits filed with the court below.) (Id.)

Although the notice was sent well before the deadline for the Star-Ledger, it was not published. Since the notice was sent on a Friday, the earliest it could be published in The Progress was the following Thursday, the 16th of December, the same day as the Planning Board meeting. It was, however, never published.

The minutes of the December 16th special meeting reflect that the Planning Board concluded its review of Ordinance 1423-21 with a vote finding the proposed amendments inconsistent with the Borough's Master Plan. (Pa. 270-273.) Only Kelly voted against the motion. The minutes also reflect that the other statutory member, Councilman Frank Rogers ("Rogers"), could not vote because "of technical difficulties." (Id.)

The Planning Board identified five inconsistences between Ordinance 1423-21 and the Master Plan, among them the amendment that would permit "more than one principal building on a lot in Subdistrict 5 . . . ." (Id.)

Mysteriously, there is no recording of the Planning Board's December 16, 2021, special meeting. (Pa 275.) The Borough's website posts video recordings of

public meetings, and the December 16th special meeting appears to be the only Planning Board or Council meeting not recorded.[2]

The Borough Council held the public hearing on Ordinance 1423-21 at its December 28, 2021, regular meeting. (Pa 278-279.) No notice of the December 28th public hearing was ever published or even sent to the Borough's designated newspapers for publication.

At the public hearing, no testimony was offered to support the adoption of Ordinance 1423-21 or to address the inconsistencies with the Master Plan. (Pa 278-279.) Kelly and Rodgers were both present at the December 28th meeting of the Council but, as reflected in the meeting minutes, failed to disclose during the public hearing that the Planning Board found Ordinance 1423-21 inconsistent with the Master Plan. (Id.)

Ordinance 1423-21 was adopted by a vote of four in favor, including Councilman Rogers, and two abstentions: Councilmen Jonathan Lace and Jeffrey Gates. (Id.) Under the Borough's form of government, the Mayor only votes to break ties on the six member council. There was no concurrent resolution adopted

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[2]See: (https://caldwell-nj.com/index.asp?SEC=96CB42D4-DDD4-4B5F-8876-515F55A434E2.)

identifying the inconsistencies with the Master Plan identified by the Planning Board and the reasons for the divergence. (Id.)

The Lane Avenue Development

In related litigation, Plaintiff herein challenged Planning Board approval under the original Redevelopment Plan of a multi-family development on Lane Avenue in Caldwell, an area identified as Subdistrict 5 in the Plan. Ordinance 1423-21 amended the development regulations governing Subdistrict 5 to, *inter alia*, permit more than one principal building on a lot. (Pa 205, ¶8.) As discussed in the previous section of this Brief, the Planning Board found this amendment (among others) inconsistent with the Master Plan. (Pa 270-273.)

The related Action in Lieu of Prerogative Writs, encaptioned Rubin v. Planning Board of the Borough of Caldwell, *et al.,* Docket No. ESX-L-007948-21, filed on October 22, 2021, before the introduction of Ordinance 1423-21, asserted that the Planning Board's approval of the Lane Avenue development was invalid because (i) it occurred at a special meeting noticed in the same manner as the meetings challenged herein; (ii) the application needed a use variance because it contemplated the merger of two lots already developed with multi-family dwellings with a third lot proposed for a new multi-family dwelling, thereby permitting a substantial increase in density for the new development, but the

merger would result in more than one principal building on a lot, a condition not permitted under the Redevelopment Plan; and (iii) the Planning Board improperly delegated review and approval of the stormwater management plan to the municipal engineer.

In a Judgment entered on May 8, 2023, the Hon. Keith E. Lynott, J.S.C., found for Plaintiff in Docket No. ESX-L-007948-21 on all three bases of his challenge. A copy of Judge Lynott's Judgment and Statement of Reasons is included in Plaintiff's Appendix. (Pa. 333.)

Plaintiff's challenge to the approval apparently led to the rush to adopt Ordinance 1423-21, which, in addition to permitting more than one principal building on lots on Lane Avenue, greatly expanded the geographic area governed by the Redevelopment Plan to include Caldwell University.[3] (Pa 205, ¶8.)

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[3]As alleged in the Verified Complaint, Councilmen Gates and Lace publicly recused themselves from all matters related to development on Lane Avenue, including the vote to adopt Ordinance 1423-21. However, during the Governing Body's discussion surrounding the introduction of Ordinance No. 1423-21 at its November 12, 2021, special meeting, the Borough Attorney asked the Borough Administrator, Thomas Banker, whether the amendment made any changes to the regulations in the Redevelopment Plan governing development on Lane Avenue. Mr. Banker falsely responded that the amendments did not relate to Lane Avenue. As a result of the false information provided by the Borough Administrator, Councilman Gates voted to introduce Ordinance No. 1423-21. Councilman Lace abstained. (Pa 9, Verified Complaint, ¶¶39-41.)

The Substantive Challenge to the Redevelopment Plan

The Verified Complaint was filed on January 20, 2022, well within the 45-day limitation established by Rule 4:69-6 to challenge the December 16, 2021, Planning Board special meeting and the adoption of Ordinance 1423-21 on December 28, 2021. (Pa1.)

In addition to the inconsistencies identified by the Planning Board at its December 16th meeting, the Verified Complaint alleged multiple other inconsistencies applicable not just to the amendments but to the original Redevelopment Plan.

For example, the density of 40 dwelling units per acre permitted on Lane Avenue by the original Redevelopment Plan far exceeds the 15-20 dwelling units per acre permitted by the Borough's Fair Share Plan for those same parcels, or the 53 dwelling units per acre permitted for the new multi-family dwelling approved by the Planning Board, which required the merger of three lots permitted only because of the amendments enacted by Ordinance No. 1423-21. (Pa. 12 to 14; Verified Complaint ¶¶62-65.)

There was no opportunity to demonstrate these inconsistencies at the December 28, 2021, public hearing on Ordinance 1243-21 since no testimony was taken. (Pa 278-279.)

The Borough Effectuated a Policy Designed to Operate in Secret

The defective public notices transmitted by the Borough detailed above were part of a longstanding practice, as evidenced by notices obtained through Open Public Record Act requests, and included in the record below. (Pa. 285 and Pa. 397.)

Of the 28 meeting notices in the record, nine were copies of notices actually published and the remainder were of the e-mail transmittals. All failed to comply with the Open Public Meetings Act or N.J.S.A. 40:49-2. (Id.)

LEGAL ARGUMENT

POINT I

AN APPELLATE COURT REVIEWS A TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT *DE NOVO*. (Not Raised Below)

A recent Appellate Division opinion approved for publication cogently sets forth the standard of review of a trial court's grant of summary judgment:

> Appellate courts review the trial court's grant or denial of a motion for summary judgment *de novo*, applying the standard used by the trial court. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). The court considers "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).
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> An appellate court's review of rulings of law and issues regarding the applicability, validity (including constitutionality) or interpretation of laws, statutes, or rules is also de novo. See In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020). "[A] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).
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> If a judge makes a discretionary decision but acts under a misconception of the applicable law or misapplies it, the exercise of legal discretion lacks a foundation and it becomes an arbitrary act, not subject to

> the usual deference. Summit Plaza Assocs. v. Kolta, 462 N.J. Super. 401, 409 (App. Div. 2020). In such a case, the reviewing court must instead adjudicate the controversy in the light of the applicable law in order to avoid a manifest denial of justice. State v. Lyons, 417 N.J. Super. 251, 258 (App. Div. 2010).

Sackman Enterprises, Inc. v. Mayor and Council of Belmar, --- N.J. Super. ---- (App. Div. 2024), slip opinion at 7-8. (Pa. 367-368.)

The Appellate Court's *de novo* review should apply the well known test for granting summary judgment, whereby the Court's "determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540.

POINT II

THE TRIAL COURT'S STATEMENT OF REASONS DID NOT MEET THE REQUIREMENTS OF RULE 1:7-4 AND IS THEREFORE ENTITLED TO NO DEFERENCE. (Pa82)

Trial courts must comply with the dictates of Rule 1:7-4 when deciding summary judgment motions. Rule 4:46-2(c). This requires an opinion setting forth detailed findings of fact and conclusions of law. "The obligation to make specific findings on summary judgment motions in accordance with R. 1:7–4 has been explicitly stated in R. 4:46–2 since 1972. A trial judge is obliged to set forth factual findings and correlate them to legal conclusions. Those findings and conclusions must then be measured against the standards set forth in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995)." Great Atlantic & Pacific Tea Co., Inc. v. Checchio, 335 N.J. Super. 495, 498 (App. Div. 2000).

The trial court's reasoning, as set forth in its Section V, Legal Analysis and its Section VII [sic], Substantive Analysis, of its Statement of Reasons, cites only one case, Township of Bernards v. State of New Jersey Department of Community Affairs, 233 N.J. Super. 1 (App. Div. 1989). (Pa. 80.) The trial court relied on this single decision to justify its conclusion that notice of the Planning Board's December 16, 2021, special meeting was properly forwarded to the Borough's designated newspapers, despite the "FOR YOUR RECORD ONLY!" directive not

to publish The trial court's conclusion is based on a misreading of the law; a municipality 's obligations under OPMA must include a good faith effort to get its notices published in a timely manner or the statute is meaningless, thereby allowing local governments to operate in secret, as the Borough of Caldwell has tried to do. (This legal issue is discussed in Point VI, *infra*.)

The trail court's analyses do not address any other defects in the reorganization meeting notices, or defects in the notices for other special meetings, or the allegations that the Borough amended the Redevelopment Plan by an ordinance adopted in violation of N.J.S.A. 40:49-2 and the LRHL.

A comparison of the Verified Complaint, the record below, and the trial court's Statement of Reasons demonstrates the failure of the trial court to meet the requirements of Rule 1:7-4.[4]

A. First Count

Plaintiff alleged that the January 11, 2023, reorganization meeting violated the OPMA. The OPMA's requirements for special meeting notices are broader than the publication requirement addressed by the trial court. The definition of

[4]As set forth in the Procedural History, above, the Borough's brief in support of its summary judgment motion failed to address Plaintiff's claims alleging violations of the LRHL, and its motion should have been recognized as one for partial summary judgment.

"Adequate Notice" requires 48 hours' notice of a special meeting, "giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken," and which notice must be (i) posted in a prominent place, (ii) provided to a municipality's designated newspapers which "have the greatest likelihood of informing the public," and (iii) filed with the municipal clerk. N.J.S.A. 10:4-8.

The trial court's Statement of Reasons, in Sections II and III, acknowledges plaintiff's claims that the January 11, 2023, reorganization special meeting and the February 1, 2023, curative special reorganization meeting were held in violation of the OPMA, although it does not identify the alleged defects. Yet the court's Substantive Analysis does not even mention the Borough's reorganization efforts. (Pa 86.)

The January 11th special meeting was noticed by an e-mail from the Borough to the designated newspapers dated December 28, 2021. (Pa 170.) Notice of the February 1st curative meeting was sent to the Star Ledger only on January 26th and published in the paper on January 29th. (Pa. 165, ¶12 of the Heun Cert. I) A second notice for the February 1st meeting was sent to the Star Ledger and The Progress on January 28th but published in neither paper. (Pa 175.)

All of the Borough's special reorganization meeting notices directed the newspapers not to publish since they included the ubiquitous language that it was "FOR YOUR RECORD ONLY." They also omitted details required for Adequate Notice.

Perhaps the trial court's reliance on Township of Bernards, *supr*a, in its Statement of Reasons to vindicate the notice of the Planning Board's December 16th special meeting may be extrapolated to apply to the Borough's deliberate decision not to publish notices of its reorganization special meetings, but it cannot justify the court ignoring the other flaws in the Borough's efforts to reschedule its 2022 reorganization meeting, as placed before the trial court in the plaintiff's Counter Statement of Material Facts:

- The December 28, 2021, e-mail did not include an agenda (although it indicated one would be forthcoming), did not indicate whether formal action would be taken and did not provide information as to how the public to access the meeting, indicating access information would be available only on the Borough website (Pa 170);
- The Borough's December 28, 2021, e-mail was the only notice of the rescheduled January 11, 2022, reorganization meeting sent to its designated newspapers;

- No designated newspaper published notice of the rescheduled January 11, 2022, reorganization meeting;

- The Wednesday, January 26, 2022, notice of the Tuesday, February 1, special meeting to cure the defective January 11, 2022, reorganization meeting was sent only to the Star Ledger, and not to two of the Borough's designated newspapers. (Pa 165, ¶12 of the Heun Cert.) The Star Ledger published the notice on January 29, 2022. It did not include an agenda and did not indicate whether formal action would be taken (Pa 173);

- The Borough's Friday, January 28, 2022, e-mail notice to both the Star Ledger and The Progress again advising of the February 1, 2022, curative special reorganization meeting indicated that an agenda was attached, but did not indicate whether formal action would be taken and did not provide information for the public to access the meeting, referring instead to the Borough website (Pa 175);

- Since The Progress publishes on Thursdays, a notice sent on a Friday for a meeting the following Tuesday could not possibly have been published in the newspaper and thus it did not publish notice of the February 1st meeting;

- Since the Borough did not transmit the agenda with its original January 26th e-mail to the Star Ledger but waited until its e-mail of January 28th,

the agenda was not included in the newspaper's January 29, 2022, publication of the February 1st special meeting notice; and

- The agenda for the reorganization meeting was never published,

whether prior to the January 4th meeting, prior to the January 11th rescheduled meeting or prior to the February 1st curative special meeting.

B. Second Count

The Second Count alleged that Ordinance 1423-21, the amendment to the Redevelopment Plan, was adopted in violation of the OPMA, the LRHL and N.J.S.A. 40:49-2. These multiple defects were summarized in paragraph 77 of the Verified Complaint:

> 77. The enactment of Ordinance No. 1423-21 amending the Redevelopment Plan was invalid because: (i) The ordinance was introduced at a public meeting held in violation of the OPMA; (ii) Councilman Gates improperly voted to introduce the ordinance despite having recused himself from all matters affecting development on Lane Avenue; (iii) The public hearing on final passage of the ordinance was not noticed in conformance with N.J.S.A. 40:49-2; (iv) The Planning Board reviewed the ordinance at a December 16, 2021, special meeting which was not noticed in conformance with the OPMA; (v) The December 16, 2021, special meeting of the Planning Board was not recorded, although the December 8, 2021, Planning Board meeting where the ordinance review began was recorded; (vi) Mayor Kelley and Councilman Rodgers failed to disclose to the other members of the governing body that the Planning Board had concluded that Ordinance 1423-21

> was inconsistent with the Borough's Master Plan and had made multiple recommendations for the Council to consider; (vii) The Redevelopment Plan is devoid of any acknowledgment of or explanation for the inconsistencies with the Master Plan, as required by the LRHL; and (viii) The Council failed to acknowledge or vote on the Planning Board's recommendations as required by the LRHL.

(Pa 17.)

All of these defects were supported by the Verified Complaint and plaintiff's Counter Statement of Material Facts. The OPMA violations were the same as those dogging the reorganization process in early 2022. The Borough's November 10, 2021, notice for special meeting held on November 12, 2021, when Ordinance 1423-21 was introduced, was defective because it could not be timely published, included the awkwardly worded directive "For Record Only" [sic], indicating it was not for publication, did not indicate whether formal action would be taken and did not include public access information, referring only to the Borough website. (Pa 153.)

The public hearing on Ordinance 1423-21 was noticed for a December 14, 2021, special meeting of the Borough Council. Notice of the special meeting was published in the Progress on November 18, 2021, and provided remote access information. It did not include an agenda and did not indicate whether formal action would be taken. (Pa 157.)

The Planning Board's Thursday, December 16, 2021, special meeting, when it continued its review of Ordinance 1423-21, violated the OPMA because the Borough's e-mail notice was sent to the designated newspapers on Friday, December 10th and thus could not be published in The Progress until the day of the meeting. It also included the directive "FOR YOUR RECORD ONLY!" and was therefore never published by either newspaper. Although the notice included information that Ordinance 1423-21 would be reviewed, and that "[r]egular action may be taken," it did not provide access information to the remote meeting, referring only to the Borough's website. (Pa 209.) Compounding these defects, there is inexplicably no recording of the December 16th Planning Board meeting, contrary to N.J.S.A. 40:55D-10(f), and thus no transcription is possible. (Pa 275.)

The Borough violated the LRHL in adopting Ordinance 1423-21 because at its December 16th meeting, the Planning Board identified inconsistencies between the Master Plan and the amendments to the Redevelopment Plan. (Pa. 270-273.) Those inconsistencies were not identified in the minutes of the December 28, 2021, Council meeting when the ordinance was adopted, as required by N.J.S.A. 40A:12A-7(d) and (f). (Pa 278-279.)

The Verified Complaint identifies additional inconsistencies between the Master Plan and Ordinance 1423-21, allegations which were never addressed

below, either in briefing or the trial court's analyses. (Pa 13-14, Verified Complaint ¶¶62-64.)

Adoption of Ordinance 1423-21 also violated N.J.S.A. 40:49-2, which governs the adoption of municipal ordinances, because the public hearing for the ordinance was noticed for December 14, 2021, a special meeting of the Borough Council, but was instead held on December 28, 2021, without any further public notice. (Pa 263 and Pa 278-279.) The published notice of the December 14th hearing date did not include a copy of the amending ordinance or a summary thereof, and did not inform the public as to how to obtain a copy. (Pa 211.)

The trial court's Legal and Substantive analyses ignored the claims raised in the Second Count alleging violations of the LRHL and N.J.S.A. 40:49-2, but instead provided only a stunted discussion of the publication requirement and an oblique reference to the court's unwillingness to extend the 45-day requirement of Rule 4:69-6(a), with no discussion or analysis. (Pa 84-86.)

In the context of the adoption of Ordinance 1423-21, the 45-day limitations period could be applied only to the improper introduction of the ordinance in November, 2021. Claims related to the Planning Board's special meeting of December 16, 2021, where the ordinance was reviewed, and the Borough Council's adoption of the ordinance on December 28, 2021, were brought well

within the 45-day period established by Rule 4:69-6(a). The Verified Complaint was filed on January 20, 2022. (Pa 1.)

The trial court offered no analysis justifying dismissal of the timely filed claims alleging violations of the LRHL and N.J.S.A. 40:49-2 in the adoption of Ordinance 1423-21. Those claims are entitled to *de novo* hearing before the trial court, particulaly since the minutes of the Borough Council meeting of December 28, 2021, reflect there was no record developed at the public hearing on Ordinance 1423-21. (Pa. 278-279.)

> [T]he only hearing required before adoption of a redevelopment plan, as with any other municipal ordinance, is a legislative hearing before the governing body. See N.J.S.A. 40:49–2(b). Consequently, if an action is brought challenging a redevelopment plan, there ordinarily is no administrative record other than whatever report the planning board may have submitted to the governing body and a transcript of the quasi-legislative hearing before the governing body. Thus, plaintiff's challenge to the validity of the redevelopment plan, specifically the rezoning of the property he has contracted to purchase, is governed by the same procedures that would govern any other challenge to the validity of a municipal ordinance.
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> At a hearing before a governing body concerning the proposed adoption of a municipal ordinance, there is no requirement that evidence be presented providing a factual foundation for the ordinance, and the governing body does not ordinarily make any findings of fact to justify its action. (Citations omitted.) Consequently, an action in lieu of prerogative writs challenging the validity

> of an ordinance is subject to different procedures than an action challenging the quasi-judicial action of a municipal agency. If quasi-judicial action is challenged, the court's decision "must be based solely on the agency record," which the court reviews to determine whether the agency's "factual findings are based on 'substantial evidence' and whether its discretionary decisions are 'arbitrary, capricious and unreasonable.' " (Citation omitted.) In contrast, if an action is brought challenging the validity of an ordinance, and resolution of the challenge turns on disputed factual issues, the case must proceed in the same manner as other civil litigation, with an opportunity for discovery, pretrial motions and a trial. (Citation omitted.)

Hirth v. City of Hoboken, 337 N.J. Super. 149, 165–66 (App. Div. 2001).

C. Third Count

The Third Count sought relaxation of the 45-day limitations period established by Rule 4:69-6(a) to permit, in the interests of justice a challenge to the adoption of the Redevelopment Plan on December 15, 2020, through Ordinance No. 1394-20. As alleged in the Verified Complaint, Ordinance 1394-20 was also adopted in violation of the LRHL and N.J.S.A. 40:49-2.

As originally adopted, the Redevelopment Plan contained many of the same inconsistences with the Master Plan as the Amended Plan, inconsistencies never identified by the Borough Council in its minutes when it adopted the Plan, in violation of the LRHL. Moreover, Ordinance 1394-20 was introduced on November 17, 2021, and adopted December 15, 2021, less than thirty days later.

(Pa 15, Verified Complaint, ¶67; Pa 151.) The LRHL requires a governing body to wait at least 45 days after referral to permit review of the redevelopment plan by the Planning Board. N.J.S.A. 40A:12A-7(e).

Additionally, the adoption of Ordinance 1394-20 violated N.J.S.A. 40:49-2 because the notice of the December 15, 2020, public hearing published on November 26, 2020, did not include a copy of the Redevelopment Plan or a summary of the contents and did not inform the public on how to obtain copies published. (Pa 149.)

Presumably, this Count was included in the trial's courts conclusion that relaxation was not warranted, albeit without any explanation or analysis.

POINT III

ORDINANCE 1423-21 IS VOID BECAUSE IT WAS ENACTED IN VIOLATION OF THE LRHL AND N.J.S.A. 40:42-9.

After introduction and prior to adoption, a municipality must publish every ordinance in one of its newspapers, "together with a notice of the introduction thereof, the time and place when and where it will be further considered for final passage, a clear and concise statement prepared by the clerk of the governing body setting forth the purpose of the ordinance, and the time and place when and where a copy of the ordinance can be obtained without cost by any member of the general public who wants a copy of the ordinance." N.J.S.A. 40:49-2.

The public hearing on adoption of Ordinance 1423-21 was noticed for December 14, 2021, a special meeting. As discussed in Pont II(B), above, the Borough's special meeting notice for the December 14th meeting violated the OPMA because it was published only in one newspaper, it did not include an agenda, and it did not indicate whether formal action would be taken. (Pa 268.)

Defects also plagued the statuary notice for the public hearing on the ordinance. The published notice for the December 14, 2021, public hearing on Ordinance 1423-21 failed to conform with N.J.S.A. 40:49-2 because it did not include "a clear and concise statement prepared by the clerk of the governing body

setting forth the purpose of the ordinance" as required by the statute, describing it only as an amendment to the Redevelopment Plan. The notice should have, at a minimum, given an overview of the proposed changes to be effectuated by the Plan amendments. The published notice also did not provide information on how to obtain a copy of the amendment to the Redevelopment Plan, as required by statute. (Pa 157.)

At some point, the public hearing on Ordinance 1423-21 was removed from the December 14th agenda without public notice or explanation. No announcement was made at the December 14th meeting that the public hearing was adjourned. (Pa 167, ¶19; and Pa 264.)

The public hearing on the adoption of Ordinance 1423-21 was then placed on the Council's December 28, 2021, meeting, without further notice to the public from the Borough. Thus, the only notice of a public hearing on the amendment to the Redevelopment Plan, a matter of significant public interest, was for a meeting where the public hearing did not take place, which itself was an improperly noticed special meeting. Showing complete disdain for the public, the Borough gave no notice of the change in the public hearing date to December 28th. This fact alone demonstrates a violation of N.J.S.A. 40:49-2.

N.J.S.A. 40:49-2 "must be construed strictly." Masnick v. Cedar Grove, 99 N.J. Super. 436 (Law Div. 1968). Notice of the proposed adoption of municipal legislation is of public importance and a significant legislative concern." Gober v. Township Committee of Pemberton Township, 185 N.J. Super. 323, 329 (Law. Div. 1982). See, also, Township Committee of the Township of Edgewater Park v. Edgewater Park Housing Authority, 187 N.J. Super. 588, 596 (Law Div. 1982).

In Gober, the court examined whether a notice for final passage of an ordinance which identified the correct date but not the correct day of the week complied with the statute. Id. at 328. The court found the notice misleading and ineffective. Id. at 329.

Similarly, once the Borough published notice of a public hearing to be held on December 14th, it had an obligation to re-notice to advise the public of the adjourned date, or at least to have announced the adjournment at its December 14th meeting. N.J.S.A. 40:49-2(c) permits a hearing to be adjourned "to any time and place." The problem here is that the hearing on the amending ordinance was never commenced and thus never adjourned. The failure to provide notice of the adjournment invalidates Ordinance 1423-21.

> A meeting, once started, may be adjourned by a governing body without further publication. The announcement at the public meeting, in the presence of those persons in attendance, is sufficient notice. LaRue

> v. East Brunswick, 68 N.J. Super. 435, 451–452 (App. Div. 1961). Here, no meeting was held, no valid adjournment was authorized and no appropriate notice of the adjournment or of the new date for further consideration of the ordinance was given. Consequently, for these additional reasons, Ordinance 15–81 is invalid.

Township Committee of the Township of Edgewater Park, 187 N.J. Super. at 596.

The Borough made no announcement regarding the scheduled public hearing on Ordinance 1423-21 at the December 14, 2021, meeting, and thus there was never any notice to the public that the hearing would be held on December 28, 2021. The Borough kept the public in the dark. Allowing the Borough to claim conformance with N.J.S.A. 40:49-2 under these facts would allow any municipality to adopt ordinances in secret, in direct contravention of the intent and purpose of the Statute.

POINT IV

THE INTERESTS OF JUSTICE DICTATE THAT THE TIME FOR FILING PLAINTIFF'S CHALLENGE BE EXTENDED

The trial court apparently concluded that Plaintiff's challenge to the Ordinance 1394-20, the vehicle for the adoption of the original Redevelopment Plan, was time barred because the Verified Complaint was filed more than one year after its adoption, well outside the 45-day time limit established by Rule 4:69-7.

Rule 4:67-6(c), however, allows extension of the time limitation "where it is manifest in the interest of justice." Although plaintiff did not move for an enlargement of time prior to the filing of the Borough's summary judgment, it was appropriate for the Court to consider the request in the context of dispositive motion practice. Gregory v. Borough of Avalon, 391 N.J. Super.181, 189 (App. Div. 2007.)

The Gregory court explained that the jurisprudence interpreting the language of subsection (c) has recognized three categories of cases which justify an extension of time: "'(1) [I]mportant and novel constitutional questions; (2) informal or ex parte determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification." Id. at 188-189, *citing*, Borough of Princeton v. Board of Chosen Freeholders of Mercer County, 169 N.J. 135, 152 (2001).

"Our courts have found sufficient public interest to justify an extension of time for filing a prerogative writ action in a variety of circumstances, including challenges to the validity of ordinances on the ground that they were not adopted in conformity with the applicable statutory requirements." Willoughby v. Planning Board of the Township of Deptford, 306 N.J. Super. 266, 277 (App. Div. 1997).

The Verified Complaint identified violations of N.J.S.A. 40:49-2 and violations of the LRHL when enacting Ordinance 1349-20 and amending Ordinance 1423-21. In is indisputable that the Planning Board identified inconsistences between Ordinance 1423-21 and the Master Plan at its December 16, 2021, special meeting which were never acknowledged by the governing body when is adopted the ordinance. (Pa 270-273 and Pa 278-279.) The Borough's failure to acknowledge and explain these inconsistencies in its minutes when it adopted the two ordinances violated the LRHL. N.J.S.A. 40A:12A-7(d) and (f). Plaintiff's complaint raises important public issues that warrant an extension of time to file "in the interests of justice."

POINT V

THE BOROUGH'S NOTICES VIOLATED THE OPEN PUBLIC MEETINGS ACT.

The trial court relies solely on Township of Bernards v. Department of Community Affairs, 233 N.J. Super. 1 (App. Div. 1989) to bless the Borough's policy to direct newspapers not to publish special meeting notices and to transmit those notices when they had no chance of publication. The Statement of Reasons ignores the other OPMA defects.

The court's reading of Bernards is constrained and would gut the OPMA. The Legislature declared "it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way . . . ." N.J.S.A. 10:4-7.

To effectuate this policy, "Adequate Notice" requires notices of a regular, special or rescheduled to be sent to newspapers which "have the greatest likelihood of informing the public." N.J.S.A. 10:4-8(d). Notice must be given at least 48 hours in advance of the meeting. The notice must state the time, date and location of the meeting, the agenda to the extent known, and "whether formal action may or may not be taken," with the latter stated "accurately." The notice must be prominently posted in a public place, must be provided to "at least two newspapers

which newspapers shall be designated by the public body to receive such notices because they have the greatest likelihood of informing the public," and must be filed with the clerk of the municipality. (Id.)[5]

The Introductory Statement to the legislation makes clear that publication is not required: "Publication of legal notice is not required." N.J.S.A. 10:4-6. This statement leaves open the question as to whether the OPMA absolves a municipality of any responsibility for the failure to publish. The trial court, quoting the following passage from Bernards, concluded that it does:

> The statute only requires "adequate notice" to the public of a meeting; and N.J.S.A. 10:4–8(d) defines the term "adequate notice" as giving written notice to newspapers at least 48 hours before the meeting. Unlike N.J.S.A. 40:55D–12(a) (required publication under the Municipal Land Use Law), and N.J.S.A. 40:53–2 (publication generally of public notice by municipalities), N.J.S.A. 10:4–9 and 10:4–8 do not require that notice be published by the newspapers, only that it be sent to the newspapers 48 hours before the meeting.

Bernards, 233 N.J. Super. at 26. (Pa. 80.)

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[5]By P.L. 2002, c.91, codified as N.J.S.A. 10:4-9.1 and 9.2, the Legislature amended the OPMA to permit internet notice of a public meeting. Section 9.2 explicitly states, however, that "no electronic notice issued pursuant to this act shall be deemed to substitute for, or be considered in lieu of, such adequate notice." Thus, the posting on the Borough website of notices of special and rescheduled meetings did not substitute for its obligation to comply with the requirements for "Adequate Notice" set forth in N.J.S.A. 10:4-8(d).

The conclusion that publication is not required is not new law, as evidenced by the Bernards court's reference to Worts v. Mayor & Council of Upper Township, 176 N.J. Super. 78, 81 (Ch. Div. 1980), immediately following the passage quoted by the trial court, a reference absent from the court's quotation. (Id.) The Bernards opinion, however, does not answer the question of municipal culpability.

The facts set forth in the Bernards opinion reflect that the Council on Affordable Housing, a defendant, transmitted notices of a December 9, 1985, special meeting by letter dated November 20, 1985, nineteen days before the meeting. The notices were not published, with no hint of COAH responsibility evident in the opinion. Id. at 26. Thus, Bernards simply restates the legislative intent set forth in N.J.S.A. 10:4-6.

Interestingly, the opinion attempts to distinguish between the notice necessary to provide "Adequate Notice" and the phrase "advanced published notice as required by law" used in N.J.S.A. 10:4-15(a). Section 15(a) permits a court to void any action taken by a public body in violation of the OPMA unless "advance published notice of at least 48 hours is provided as required by law," which publication excuses the "failure to conform with any notice required by this act." Id.

The Bernards court attempted to distinguish the different terms this way:

> This "adequate notice" standard of N.J.S.A. 10:4–9(a), which limits the matters that may lawfully be considered, is not the same as the "advanced published notice" which may be required by law for specific governmental actions in N.J.S.A. 10:4–15(a). COAH, however, cannot claim the protection of N.J.S.A. 10:4–15(a), since it gave no "published notice," but only "adequate notice" of the meeting, and such publication was not "required by law."

Bernards, 233 N.J. Super. at 26.

This provision of the OPMA does not, however, save the Borough's defective notices because none of the actions challenged by Plaintiff were properly noticed.

The nod by the Bernards court to the Worts decision suggests an approval of the trial court's analysis that answers the municipal culpability question not addressed directly by the Appellate Division.

In Worts, plaintiffs challenged a special meeting for which notice was sent to four newspapers three days in advance of the meeting. Worts, 176 N.J. Super. at 80. Based on the newspapers' publishing schedules, only "one paper could have published the notice 48 hours before the scheduled meeting." Of the other three papers, once could publish on the day of the meeting and the two others could only publish after the meeting. Id. at 81.

The court concluded that the Township's efforts failed to meet OPMA's notice requirements because "[w]hen a public body sends meeting notices to newspapers for publication and, to the actual or readily ascertainable knowledge of that body, those newspapers cannot publish the notice at least 48 hours in advance of the meeting, there is no compliance with the Open Public Meetings Act. Logic demands this conclusion; were the opposite true, the purpose of the law would be circumvented easily." Id. at 81-82.

The court, citing Houman v. Pompton Lakes, 155 N.J. Super. 129, 167 (Law Div.1977), required "'all reasonable effort to notify the public,'" and concluded that

> it is only when a public body has given 48 hours advance notice to newspapers capable of timely publication that it can be concluded that all reasonable effort has been made. It is therefore the obligation of every public body affected by the act, . . . to use only those newspapers for notice purposes which have the ability to publish notices at least 48 hours in advance of meeting dates.

Id. at 82. See, also, Lakewood Citizens for Integrity in Government, Inc. v. Lakewood Township Committee, 306 N.J. Super. 500, 510-511 (Law Div. 1997), endorsing the decision in Worts.

In Patterson v. Cooper, 294 N.J. Super. 6 (Law Div. 1994), former Essex County Assignment Judge Weiss, in *dicta*, adopted the holding in Worts in

recognition of the "vital need of the public for adequate notice of public body meetings." Judge Weiss cautioned the parties "to comply with N.J.S.A. 10:4-8(d) in the future by sending notice to the designated newspapers in time for the newspapers to publish the notice at least forty-eight hours before the meeting." Id. at 15-16.

The explicit purpose of the OPMA is to keep the public informed, but Judge Vena's interpretation would have the direct opposite affect, as evidenced by the failure of the Borough's newspapers to publish any of the notices sent by the Borough of Caldwell containing the directive not to publish.[6]

"[S]trict adherence to the letter of the law is required in considering whether a violation of the [OPMA] has occurred." Polillo v. Deane, 74 N.J. 562, 578 (1977). The public policy goals of the OPMA, as set forth in N.J.S.A. 10:4-7, create "an affirmative duty upon a public body to use its resources to fulfill the obligations of the statute. Compliance must be real and not merely formal or

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[6]Publication has always been the rule in this State. In 2016, then Governing Chris Christie tried to get legislative approval to eliminate the need to publish in newspapers, permitting instead the use of municipal websites. In a message posted electronically on December 17, 2016, in support of his effort, Governor Christie acknowledged that his proposal "maintains the requirement for local governments to provide advance notice for matters such as meetings," while eliminating "the requirement of publishing exorbitantly expensive notice in a newspaper." (Pa 309.)

technical. 'A statute should not be construed to permit its purpose to be defeated by evasion.' Accardi v. North Wildwood, 145 N.J. Super. 532, 545 (Law Div. 1976)." Jenkins v. Newark Board of Education, 166 N.J. Super. 357, 366 (Law Div. 1979).

Neither the Bernards decision nor any other court opinion found by Plaintiff has endorsed actions similar to the Borough which effectuate a policy designed to deliberately deprive the public of notice of special meetings. The Borough has violated the OPMA for years.

CONCLUSION

For the reasons set forth herein, the decision of the trial court granting summary judgment should be reversed.

Respectfully submitted,

LAW OFFICE OF MICHAEL S. RUBIN, LLC
Attorney for Plaintiff

By: /s/ Michael S. Rubin
MICHAEL S. RUBIN, ESQ.

Dated: April 24, 2024

MICHAEL S. RUBIN, Plaintiff-Appellant, v. BOROUGH OF CALDWELL and PLANNING BOARD OF THE BOROUGH OF CALDWELL, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-003534-22T4 CIVIL ACTION On Appeal from a Final Judgment of the Superior Court of New Jersey, Law Division, Essex County Docket No. ESX-L-433-22 Sat Below: Hon. Thomas R. Vena, J.S.C.

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT BOROUGH OF CALDWELL

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[1] Plaintiff raises this issue for the first time on appeal.

POINT VI PLAINTIFF'S APPEAL IS BARRED BY THE LAW OF THE CASE DOCTRINE BECAUSE HE FAILED TO APPEAL THE COURT'S ORDERS AND RULINGS DATED MARCH 4, 2022[2] 24

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[2] Defendant Borough of Caldwell raises this issue for the first time on appeal because it was not ripe prior to appeal.

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[3] Plaintiff's Notice of Appeal only designates the two Orders listed herein. (Pa117). However, Plaintiff's Table of Judgments, Orders, and Rulings Being Appealed cites to six different documents. (Pb at iii). On appeal, the Court's review should be limited to the two orders that were designated in Plaintiff's Notice of Appeal. See W.H. Indus., Inc. v. Fundicao Balancins, Ltda, 397 N.J. Super. 455, 458-59 (App. Div. 2008) (reviewing only the order specifically designated in the notice of appeal).

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PRELIMINARY STATEMENT

This matter arises out of an action in lieu of prerogative writs challenging the validity of the business conducted at the Caldwell Borough Council Meeting on January 11, 2022, as well as the separate adoption of two Borough ordinances: namely, Ordinances 1394-20 and 1423-21 concerning the Borough's Redevelopment Plan. The majority of Plaintiff's allegations stem from supposed violations of the notice provisions of the Open Public Meetings Act, N.J.S.A. 10:4-6, et seq. ("OPMA").

The trial court ultimately dismissed the Verified Complaint with prejudice, finding that most of Plaintiff's claims were filed out of time; the subject meeting notices did not violate OPMA; and that a plenary Reorganization Meeting held on February 1, 2022, cured the alleged procedural deficiencies of the prior meeting.

Notwithstanding the obvious futility of this litigation, the Plaintiff tries to obstruct the Defendants official business by relitigating minutiae in this appeal that the trial court has already considered and dismissed on several occasions. The Plaintiff's appeal is a house of cards supported only by circular arguments. For the reasons that follow, the Plaintiff's appeal must be denied.

PROCEDURAL HISTORY

On January 20, 2022, Plaintiff filed an Order to Show Cause and Verified Complaint in Lieu of Prerogative Writs against the Defendants, alleging violations of the Open Public Meetings Act, N.J.S.A. 10:4-6, et seq. ("OPMA"), as well as the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1, et seq. ("LRHL"). (Pa1).

On January 24, 2022, the Hon. Sharifa R. Salaam, J.S.C., entered Plaintiff's Order to Show Cause ex parte with preliminary restraints, enjoining the Defendants from "[i]mplementing any actions taken at its January 11, 2022, Council Reorganization Meeting" and prohibiting Defendants from convening any public meetings involving the entities and individuals present at said meeting. (Pa23).

On January 27, 2022, the Hon. Thomas M. Moore, P.J.Cv., acting sua sponte, entered an Order vacating the restraints imposed by the prior Order. (Pa29). The trial court set a hearing date of March 4, 2022, to address Plaintiff's request for temporary restraints, as well as to decide a separate Motion to Enforce Litigant's Rights filed on behalf of the Plaintiff. (Pa30).

On March 4, 2022, after hearing oral argument, the trial court issued two Orders denying Plaintiff's request for temporary restraints and Plaintiff's separate Motion to Enforce Litigant's Rights. (Pa31, Pa37). The Hon. Thomas R. Vena,

J.S.C., placed a comprehensive opinion on the record, which was specifically referenced as the law-of-the-case in the September 9, 2022, Order under appeal. (Pa86, Pa225).

The Defendant Borough of Caldwell subsequently filed an Answer to the Verified Complaint on March 4, 2022. (Pa39).

On July 8, 2022, the Borough filed a Motion for Summary Judgment. (Pa72). On September 9, 2022, following oral argument, the Court granted the Borough's Motion for Summary Judgment, dismissing the Verified Complaint with prejudice. (Pa80).

On June 23, 2023, the Court entered an Order dismissing the Verified Complaint with prejudice as against the Defendant Planning Board of the Borough of Caldwell. (Pa115).

After final judgment had been entered as to all parties, Plaintiff filed the subject Notice of Appeal on July 21, 2023. (Pa117).

STATEMENT OF FACTS

This matter arises out of alleged procedural deficiencies affecting the business conducted at the Caldwell Borough Council Meeting on January 11, 2022, as well as the separate adoption of two Borough ordinances: namely, Ordinances 1394-20 and 1423-21. (Pa1).

Ordinance 1394-20 – Adoption of the Redevelopment Plan

On November 26, 2020, the Borough published in The Progress newspaper notice of a Caldwell Borough Council Meeting scheduled for December 15, 2020, to consider the final adoption of Ordinance 1394-20. (Pa149). The purpose of the Ordinance was to adopt a Redevelopment Plan, and contents of the Ordinance were fully set forth in the published notice. (Pa149).

On December 15, 2020, the Council passed Ordinance 1394-20 and adopted the Redevelopment Plan. (Pa204). On April 12, 2021, the Borough published in the Star-Ledger newspaper notice of the final adoption of Ordinance 1394-20. (Pa151).

First Amendment of the Redevelopment Plan

On May 4, 2021, the Council adopted Ordinance 1410-21, amending the Redevelopment Plan for the first time. (Pa205).

Ordinance 1423-21 – Second Amendment of the Redevelopment Plan

In or about November 2021, the Borough endeavored to amend the Redevelopment Plan for a second time. (Pa146). Accordingly, on November 10, 2021, the Borough of Caldwell Deputy Clerk, Brittany Heun, sent notice via e-mail to the Borough's designated newspapers of a Special Meeting of the Caldwell Borough Council to take place on November 12, 2021. (Pa146). The e-mail notice attached a copy of the meeting agenda, reflecting the introduction of Ordinance 1423-21 – which was a proposed second amendment to the Redevelopment Plan. (Pa146, Pa153). The notice provided as follows:

> FOR RECORD ONLY! – The Borough of Caldwell Borough Council will be holding a Special Council Meeting on November 12th at 5:15pm. The meeting will be on Zoom, and access information will be posted on the Borough website.
>
> [(Pa153).]

Ms. Heun also posted the notice of the Special Meeting on the Borough's website and on the bulletin board in Borough Hall. (Pa146).

On December 10, 2021, Ms. Heun sent notice via e-mail to the Borough's designated newspapers[4] of a Special Meeting of the Caldwell Borough Planning Board scheduled for December 16, 2021, to review Ordinance 1423-21. (Pa167,

[4] Caldwell Borough's designated newspapers for all periods relevant to this appeal were The Progress, Star-Ledger, and TAPinto – West Essex.

Pa208). The notice attached a copy of the meeting agenda and provided as follows:

> FOR YOUR RECORD ONLY! - A Special meeting of the Caldwell Planning Board has been called for 7pm on Thursday, December 16, 2021, to review Ordinance 1423-21 An Ordinance Amending the Borough of Caldwell Redevelopment Plan in Accordance with the Provisions of the Local Redevelopment and Housing Law. Regular action may be taken. The meeting will be held on Zoom, and access information can be found on the Borough website.
>
> [(Pa208 – Pa209).]

The notice of the Special Meeting was also posted on the Borough's website and on the bulletin board in Borough Hall as of December 13, 2021. (Pa167).

Separately, on November 18, 2021, the Borough published in The Progress newspaper notice of a Caldwell Borough Council Meeting scheduled for December 14, 2021, to consider the final adoption of Ordinance 1423-21. (Pa166, Pa211). The contents of the Ordinance were fully set forth in the published notice. (Pa211). The notice further provided that the Council Meeting would take place on December 14, 2021, at 7:15pm "or as soon thereafter as the matter may be reached, at which time and place, or at any time and place such meeting shall from time to time be adjourned," where all interested persons would be given the opportunity to be heard. (Pa212).

Ultimately, Ordinance 1423-21 was not considered at the Council Meeting on December 14, 2021, and it was instead placed on the agenda for the regularly scheduled Council Meeting on December 28, 2021. (Pa167, Pa218). Notice of the December 28, 2021, Council Meeting was published in the Borough's designated newspapers on January 30, 2021, together with all other regular meetings of the Borough Council. (Pa167). This notice was also posted on the Borough website and on the bulletin board in Borough Hall. (Pa167).

At the Council Meeting on December 28, 2021, Ordinance 1423-21 was called for a second reading, and the hearing was opened for public comment. (Pa167). Plaintiff attended the meeting and even publicly commented on the Ordinance. (Pa167). After the close of the public comment session, the Council voted to adopt Ordinance 1423-21, thus amending the Redevelopment Plan for a second time. (Pa167, Pa221).

January 11, 2022 – Caldwell Borough Council Meeting

Caldwell Borough's 2022 Reorganization Meeting was originally scheduled to take place on January 4, 2022. (Pa163). The Borough published notice of the Reorganization Meeting in the Borough's designated newspapers on December 23, 2021. (Pa163, Pa261). Notice of the meeting was also posted on the Borough website and on the bulletin board in Borough Hall. (Pa163).

In the last two weeks of December 2021, Ms. Heun unfortunately became ill with COVID-19, and was unable to perform her duties as Deputy Clerk during that time. (Pa164). As a result, Ms. Heun was unable to adequately prepare for the Reorganization Meeting and it had to be postponed to January 11, 2022. (Pa164).

On December 28, 2021, Ms. Heun's colleague, Kim Conlon, sent notice via e-mail to the Borough's designated newspapers of the new date for the Reorganization Meeting. (Pa164, Pa170). The notice provided as follows:

> FOR YOUR RECORD ONLY. The Borough of Caldwell has postponed their Reorganization Meeting to 7:15pm Tuesday, January 11, 2022 via Zoom. (It was originally scheduled for January 4, 2022). We will be sending you an agenda as we get closer to the meeting date.
>
> [(Pa170).]

Additionally, notice of the January 11, 2022, Reorganization Meeting was also posted on the Borough's website and on the bulletin board in Borough Hall more than 48 hours in advance of the meeting. (Pa164).

On January 11, 2022, Calwell Borough held its annual Reorganization Meeting in accordance with the notice. (Pa164).

Litigation and Redo of the Reorganization Meeting

On January 20, 2022, Plaintiff filed an Order to Show Cause and Verified Complaint in Lieu of Prerogative Writs against the Defendants, alleging violations

of OPMA and the LRHL. (Pa1). On January 24, 2022, the Hon. Sharifa R. Salaam, J.S.C., entered Plaintiff's Order to Show Cause restraining the Defendant Borough of Caldwell from, among other things, "Implementing any actions taken at its January 11, 2022, Council Reorganization Meeting." (Pa24).

Given these restraints and circumstances that substantially inhibited the Borough's ability to function, the Borough determined the prudent course of action would be to follow Para. 2 of the Order, and promptly hold a plenary Reorganization Meeting to re-adopt all agenda items from the January 11, 2022, Reorganization Meeting. (Pa165). It was thought that a redo would also remedy any potential OPMA violation that may have occurred. (Pa165).

Accordingly, on January 26, 2022, Ms. Heun sent notice to the Star-Ledger of a Special Meeting, designated as the "Plenary Reorganization Meeting of the Caldwell Mayor and Borough Council," to "be held via Zoom on Tuesday, February 1, 2022 at 6:15pm". (Pa173). On January 28, 2022, Ms. Heun sent notice of the plenary Reorganization Meeting to the other of the Borough's designated newspapers. (Pa165, Pa175). As of that date, Ms. Heun also posted the notice on the Borough's website and on the bulletin board in Borough Hall. (Pa166). The Star-Ledger published the notice of the plenary Reorganization Meeting on January 29, 2022. (Pa189).

In accordance with the notice, Caldwell Borough held a plenary Reorganization Meeting on February 1, 2022, where the governing body again heard, adopted, and ratified all agenda items, resolutions, and appointments that were on the agenda for the January 11, 2022, annual Reorganization Meeting. (Pa166, Pa192, Pa198).

In the meanwhile, on January 27, 2024, the Hon. Thomas M. Moore, P.J.Cv., entered an Order vacating the restraints imposed upon the Borough. (Pa29). The trial court set a hearing date of March 4, 2022, to address Plaintiff's request for temporary restraints, as well as to decide a separate Motion to Enforce Litigant's Rights filed on behalf of the Plaintiff. (Pa30).

March 4, 2022 – Order and Statement of Reasons on the Record

On March 4, 2022, after hearing oral argument, the trial court issued two Orders denying Plaintiff's request for temporary restraints and Plaintiff's separate Motion to Enforce Litigant's Rights. (Pa31, Pa37). The Hon. Thomas R. Vena, J.S.C., placed a comprehensive opinion on the record, which was specifically referenced as the law-of-the-case in the September 9, 2022, Order under appeal. (Pa86, Pa225). The Judge placed an additional opinion on the record at the September 9, 2022, hearing where the Court dismissed Plaintiff's Verified Complaint with prejudice, and the Judge supplemented his oral opinion with a

written Statement of Reasons appended to the Order dated September 9, 2022. (Pa80, 1T).

LEGAL ARGUMENT

POINT I

STANDARD OF REVIEW

Issues of law involving statutory interpretation are subject de novo review. North Jersey Media Group, Inc. v. State, Office of Governor, 451 N.J. Super. 282, 296 (App. Div. 2017) (quoting Manalapan Realty L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). However, an appellate court should not disturb a trial judge's findings if they are "supported by adequate, substantial, and credible evidence." Id. at 295 (quoting Zaman v. Felton, 219 N.J. 199, 215 (2014)).

Where interpreting a statute, the court's goal is "to ascertain and effectuate the Legislature's intent." Kean Federation of Teachers v. Morell, 233 N.J. 566, 583 (2018) (quoting Cashin v. Bello, 223 N.J. 328, 335 (2015)). To do that, courts should "look first to the statute's actual language and ascribe to its words their ordinary meaning." Id. (citing Mason v. City of Hoboken, 196 N.J. 51, 68 (2008)). Courts should consider extrinsic evidence only where the statutory language is ambiguous. Id. (citing Cashin, 223 N.J. at 335-36).

When interpreting issues of law arising under the Open Public Meetings Act, N.J.S.A. 10:4-6, et seq., ("OPMA"), courts must be cautious not to foist burdens upon public bodies that the Legislature did not intent to impose. Id. at 586. To do

so "would risk throwing off the careful balance that the Legislature struck between a public body's need to control its own proceedings and at the same time determine when and how to protect confidential interests of the public body or others." Id.

For reasons more fully set forth herein, the Defendant Borough of Caldwell has fully complied with the law in every respect, and the well-reasoned opinion of the trial court should not be disturbed.

POINT II

THE TRIAL COURT'S STATEMENT OF REASONS FULLY COMPLIES WITH RULE 1:7-4. (Pa82, Pa225, 1T).

Plaintiff avers that the trial court erred by failing to submit a sufficient statement of reasons to support the final judgment in this matter. However, the record reveals that the trial court issued a comprehensive well-reasoned opinion to support the Orders dismissing the Verified Complaint with prejudice, fully satisfying the requirements of Rule 1:7-4.

Pursuant to Rule 1:7-4, a trial court is required to "find the facts and state its conclusions of law thereon . . . on every motion decided by a written order that is appealable as of right." "Naked conclusions do not satisfy the purpose of Rule 1:7-4(a)"; a court's fact findings must be correlated "with the relevant legal conclusions." Curtis v. Finneran, 83 N.J. 563, 570 (1980). However, exactly how that is accomplished "is vested in the sound discretion

of the trial judge." In re Trust Created by Agreement Dated Dec. 20, 1961, 399 N.J. Super. 237, 253 (App. Div. 2006), aff'd, 194 N.J. 276 (2008). In fact, a judge may even grant or deny a motion for the reasons set forth by the parties rather than issue an independent statement of reasons. Id. at 254. The purpose of the rule is to make sure that the court makes its own determination following careful consideration of the record and the law. Id. at 254 (citation omitted).

On September 9, 2022, the trial court held oral argument on the Borough's Motion for Summary Judgment, where the Parties were given ample opportunity to argue their points. (1T). Following arguments, the court granted summary judgment in favor of the Defendant Borough of Caldwell, dismissing Plaintiff's Verified Complaint with prejudice. (1T at 16:22 – 18:12). In support of its decision, the court placed the following reasons on the record:

> THE COURT: Okay. Thank you very much. All right. I have had the opportunity to review the moving papers, opposition thereto, the reply therefrom, attachments thereto. I'm also familiar with the case.
>
> It is therefore determined by this Court that defendant Borough of Caldwell's Motion for Summary Judgment is granted. On March 4th, 2022, this Court denied plaintiff's Motion to Enjoin and void as mistaken special meetings of the defendant, Borough of Caldwell, and the Borough of Caldwell Planning Board, alleging violations of the Open Public Meetings Act, N.J.S.A. 10:4-6.

> The Court finds that summary judgment is appropriate at this stage of the proceedings. The March 4th, 2022 Order found that the Borough of Caldwell needed only transmit paper notice of the des--- to the designated newspapers at least 48 hours in advance of the meeting. On December 10th, 2021, the Borough Deputy Clerk transmitted notice to the -- the -- the newspapers of the December 16th, 2021 Special meeting, six days in advance of the meeting.
>
> The Appellate Division in Township of Bernards versus the State Department of Community Affairs, 233 N.J. Super. at 26, an Appellate Division opinion from 1989, makes clear that publication of these notices is not required to comply with the Open Public Meetings Act. Therefore, and plaintiff's argument re- -- regarding the "For Your Record Only" -- the words "For Your Record Only" is without merit, given the clear holding of the Township of Bernards case.
>
> The Court does not find reason to extend the statutorily required time of 45 days, pursuant to Rule 4:69f(6)(a). As such, plaintiff's claim is moot.
>
> For those reasons and that will be more specifically set forth the Court's statement of reasons, opposition thereto, and having the opportunity to consider argument of counsel, defendant's Motion for Summary Judgment is granted.
>
> [Id. (emphasis in original).]

The very same day, the court issued an Order granting summary judgment in favor of Defendant Borough of Caldwell, to which the court appended an even

more detailed Statement of Reasons. (Pa80). Additionally, the court's oral opinion placed on the record and its Statements of Reasons both cite to the March 4, 2022, Order as additional support for its conclusions of law. (Pa86, 1T at 17:3-17).

The trial court set forth its statement of reasons to support the March 4, 2022, Order, in an oral opinion placed on the record. (Pa225). The court's March 4, 2022, opinion is probably its most comprehensive examination of the issues presented, and the court later indicated that it established the law-of-the-case in many respects. This opinion is explicitly cited by the court in its September 9, 2022, opinions, and it should be included when analyzing the adequacy of the court's reasoning pursuant to Rule 1:7-4.

Importantly, the trial court's opinion set forth on the record on March 4, 2022, declared Count One of the Verified Complaint to be moot, as follows:

> Plaintiff's application as to the reorganization is moot. On January (inaudible) the Borough of Caldwell plenary reorganization meeting was held. The meeting it remedied any possible defect in the notice provided for the original meeting which took place on January 11th, 2022. A notice was sent to all, (inaudible) in the newspapers on January 28th, 2022.
>
> A notice for publication is filed on January 29th and (inaudible) publish it.

[(Pa233).][5]

Here, Plaintiff initially argues that the trial court's opinion is inadequate solely because the court relied upon a single published opinion of the Appellate Division when entering judgment. Pl.'s Br. at 25 (citing Twp. of Bernards v. State of New Jersey Dept. of Community Affairs, 233 N.J. Super. 1 (App. Div. 1989)). Putting aside that the trial court amply cited to the OPMA statute, Plaintiff's argument is not legitimate. In New Jersey, "[a] trial court is bound to follow the rulings of an appellate court in this State, which decisions are binding when the same issues are presented." Caldwell v. Rochelle Park Twp., 135 N.J. Super. 66, 76 (Law Div. 1975). According to this directive, a trial court cannot just ignore a published decision of the Appellate Division that is directly on point – even if it is the only opinion to examine that particular issue.

Twp. of Bernards is directly on point and is dispositive of a majority of the legal issues raised by Plaintiff. In Twp. of Bernards, the Court examined the obligations that OPMA imposes on public entities to provide "adequate notice" of public of a meeting. 233 N.J. Super. at 25-26. At issue was whether the act of transmitting written notice to newspapers at least 48 hours before the meeting

[5] Plaintiff has not appealed the Court's Order and decision dated March 4, 2022, and therefore he cannot challenge the trial court's finding that Count One of the Verified Complaint is moot.

constitutes "adequate notice", or whether the notice must be published in the newspapers before it becomes "adequate notice". Id. The Court held that merely transmitting the notice to newspapers at least 48 hours in advance of the meeting satisfies the "adequate notice" requirements under OPMA. Id. The Court reasoned that OPMA defines the term "adequate notice" as giving written notice to newspapers at least 48 hours before the meeting, which is unlike the provisions of the Municipal Land Use Law that require publication. Id. at 26 (citing N.J.S.A. 10:4–8d; N.J.S.A. 40:55D–12a). It is therefore reasonable to conclude that the Legislature intended for OPMA to only require transmission of the notice to newspapers in order to satisfy the "adequate notice" requirement.

This is the precise issue that was presented to the trial court in this matter. Here, Plaintiff alleged that the Defendants violated the notice provisions of OPMA because some of the meeting notices at issue may not have actually been published in the newspapers they were sent to. (Pa83). However, the trial court aptly recited the facts of record which demonstrate that the Defendants properly transmitted notice of the subject meetings to the newspapers, and that publication is not ultimately required to satisfy OPMA. (Pa86, Pa234, 1T at 17:9 – 18:2). Therefore, the Court held that there was no OPMA violation. Id. The trial court's reliance upon the Twp. of Bernards opinion was entirely appropriate because in that case,

the appellate court examined the identical issue, and the trial court was thus bound to adhere to the jurisprudence of a higher court.

Plaintiff further argues that the trial court failed to satisfy Rule 1:7-4 because the court did not perform a detailed analysis of each of his other allegations that the Defendants violated OPMA's notice provisions. Pl.'s Br. at 26. However, this circular argument neglects the fact that the trial court dismissed these arguments on other grounds. The trial court dismissed these arguments by holding that Plaintiff's challenges were time barred pursuant to Rule 4:69:6(a) (concerning actions in lieu of prerogative writ). (Pa86). Therefore, the court was not required to engage with Plaintiff on each of his abstruse variations of the same argument.

In summary, the trial court addressed each of Plaintiff's allegations in the Verified Complaint as moot, time barred pursuant to Rule 4:69:6(a), or involving conduct that is not in violation of OPMA. Therefore, the court fully satisfied its obligations under Rule 1:7-4 to make adequate findings of fact and conclusions of law thereon.

POINT III

FOR REASONS MORE FULLY STATED IN POINTS II AND VI OF THIS BRIEF, ORDINANCE 1423-21 WAS LAWFULLY ENACTED. (Pa83).

Plaintiff continues to argue the same points concerning violations of the OPMA notice provisions. However, for reasons more fully stated in Points II and VI of this Brief, Ordinance 1423-21 was lawfully enacted by the Borough of Caldwell, and Plaintiff's appeal should be denied.

POINT IV

THE COURT SHOULD NOT EXTEND THE TIME TO FILE AN ACTION IN LIEU OF PREROGATIVE WRITS.

Plaintiff argues for the first time on appeal that the Court should extend the 45-day time limit within which to file an action in lieu of prerogative writs, on equitable grounds. See Rule 4:69-6(3). Specifically, Plaintiff avers that courts should be lenient in situations such as this, where it is alleged that ordinances were not adopted in conformance with the law. Pl.'s Br. at 41-42 (citing Willoughby v. Planning Board of the Township of Deptford, 306 N.J. Super. 266, 277 (App. Div. 1997)).

Actions in lieu of prerogative writs must be commenced within 45 days of accrual of the right of action. Rule 4:69-6. Although there are exceptions to the

rule that allow a court to enlarge the period in the interests of justice, they are rarely invoked, and only for meritorious reasons. See Rocky Hill Citizens for Responsible Growth v. Planning Bd. of Borough of Rocky Hill, 406 N.J. 384, 402-403 (App. Div. 2009) (affirming denial of relaxation of the 45-day time limit, where plaintiff, with full knowledge of the proceedings, waited two years to file suit). When dealing with public interests, one must balance those interests with the "important policy of repose expressed in the forty-five day rule." Id. at 398 (quoting Horsnall v. Washington Twp. Fire Div., 405 N.J. Super. 304, 313 (App. Div. 2009)).

The Rocky Hill court examined the Willoughby opinion and determined that it was an exceptional situation because "development of the property in accordance with the zoning change would have a significant impact on the residents of the adjoining neighborhood and would impact the flow of traffic on a major thoroughfare; moreover, the public would lose access to nature trails due to the rezoning." Id. at 401-402 (citing Willoughby, 306 N.J. Super. at 277). The Willoughby case therefore involved significant issues of public interest, which ultimately warranted relaxation of the 45-day time limit. Id. The Rocky Hill court cautioned that cases such as Willoughby "must represent the exception rather than the rule." Id. at 401.

Here, Plaintiff has failed to point to any exceptional circumstance affecting the public welfare, that might merit some relaxation of the rule. It is not enough to simply allege that the subject ordinance was not adopted in conformity with the law, because ostensibly every single challenge to the validity of an ordinance would necessarily involve the allegation that it was adopted in violation of the law. As set forth in Rocky Hill, relaxation is far and away the exception rather than the rule, and a plaintiff must demonstrate compelling circumstances to avail him or herself of such relief. For these reasons, the interests of justice weigh heavily in favor of Defendants' right of repose, and Plaintiff's request for relaxation should be denied.

POINT V

THE SUBECT PUBLIC MEETINGS WERE NOTICED IN COMPLIANCE WITH THE OPEN PUBLIC MEETINGS ACT. (Pa83).

Plaintiff argues yet again that the Twp. of Bernards opinion was either decided incorrectly, or that this matter is somehow distinguishable. Pl.'s Br. at 43 (citing Twp. of Bernards v. State of New Jersey Dept. of Community Affairs, 233 N.J. Super. 1 (App. Div. 1989)). As more fully set forth in Point II of this Brief, the Twp. of Bernards court held that OPMA's requirement to provide "adequate notice" of public meetings is satisfied by transmitting notice to two newspapers at least 48-hours in advance of the meeting. 233 N.J. Super. at 26.

Plaintiff cites to several trial court opinions that seem to impose another requisite element of "adequate notice" – not only that the notice must be transmitted to two newspapers 48-hours in advance, but also, that it must be provided to newspapers that have the ability to publish said notice at least 48-hours in advance of the meeting. See Lakewood Citizens for Integrity in Government v. Lakewood Township Committee, 306 N.J. Super. 500, 510-11 (Law Div. 1997); Houman v. Pompton Lakes, 155 N.J. Super 129, 167 (Law Div. 1977).

To be clear, this was not a burden imposed by the Appellate Division in the Twp. of Bernards decision, despite citing the Worts opinion as support for its ruling and having knowledge of the trial court's discussion in Worts. If the Appellate Division believed that OPMA required notice of public meetings to be provided to two newspapers that have the ability to publish said notice at least 48-hours in advance of a meeting, the Court would have stated as such in the Twp. of Bernards decision. This is an onerous burden that is completely different than simply transmitting notice to two newspapers 48-hours in advance of a meeting.

Placing the burden on a public entity to determine whether a newspaper has the ability to publish notice 48-hours prior to a meeting would require having knowledge of the newspaper's publication schedule, the publication cutoff time, and the workload of the editors on any particular day, among many other variables.

The Legislature could not possibly have intended to place that burden on public entities.

Our Supreme Court has warned that when interpreting issues of law arising under OPMA, courts must be cautious not to foist burdens upon public bodies that the Legislature did not intent to impose. Kean Federation of Teachers v. Morell, 233 N.J. 566, 586 (2018). This Court should follow the "adequate notice" rule clearly set forth in Twp. of Bernards, and it should not deviate to impose burdens on public entities that simply do not exist in the plain language of the statute. See N.J.S.A. 10:4-8d.

For these reasons, the Defendants did not violate OPMA.

POINT VI

PLAINTIFF'S APPEAL IS BARRED BY THE LAW OF THE CASE DOCTRINE BECAUSE HE FAILED TO APPEAL THE COURT'S ORDERS AND RULINGS DATED MARCH 4, 2022.

Plaintiff's Notice of Appeal does not designate the Court's Orders and Rulings dated March 4, 2022 – which were dispositive of a majority of the claims set forth in the Verified Complaint – and therefore, Plaintiff is barred by the law of the case doctrine from now arguing those issues on appeal. (Pa31, Pa117, Pa225). Plaintiff attempts to improperly backdoor these now unappealable decisions through later Court Orders that merely reference the issues disposed of by way of

the March 4, 2022, Orders and Rulings. However, these March 4, 2022, Orders and Rulings of the trial court became the law of the case upon the entry of final judgment, and Plaintiff was required to designate them in his Notice of Appeal for them to be considered. See W.H. Indus., Inc. v. Fundicao Balancins, Ltda, 397 N.J. Super. 455, 458-59 (App. Div. 2008) (reviewing only the order specifically designated in the notice of appeal).

"[T]he 'law of the case' rule ordinarily precludes a court from re-examining an issue previously decided by the same court, or a higher appellate court, in the same case." State v. K.P.S., 221 N.J. 266, 276 (2015) (quoting State v. Reldan, 100 N.J. 187, 208 (1985) (O'Hern, J., dissenting)). It is a non-binding rule intended to "prevent relitigation of a previously resolved issue." Lombardi v. Masso, 207 N.J. 517, 539 (2011). An interlocutory order may become the law of the case when final judgment is entered, and it is no longer subject to reconsideration. Id.

In this matter, the trial court disposed of many issues in Plaintiff's Verified Complaint at a hearing on March 4, 2022, which was convened to address Plaintiff's request for temporary restraints, as well as to decide a separate Motion to Enforce Litigant's Rights filed on behalf of the Plaintiff. (Pa30). Specifically, the court ruled that Count One of the Verified Complaint was moot because the Borough held a curative plenary Reorganization Meeting (Pa233); the court ruled

that every allegation in the Verified Complaint involving official action that occurred beyond 45 days prior to filing – including all of Count Three – failed to state a claim because it was filed out of time (Pa235); and the court denied Plaintiff's request in the Verified Complaint for additional time to file an action in lieu of prerogative writs because "the notice requirement would weigh heavily in the Borough's favor." (Pa235).

These issues were conclusively decided at the March 4, 2022, hearing, and the rulings were referenced in the September 9, 2022, Order and Statement of Reasons that are under appeal. (Pa86, 1T at 17:9 – 18:2). Once final judgment was entered, the March 4, 2022, Orders and Rulings were no longer interlocutory, and they became the law of the case. In order to challenge these decisions of the trial court, Plaintiff was required to designate them in his Notice of Appeal, which he failed to do. (Pa117). Plaintiff cannot appeal these same rulings under the guise that they were merely mentioned in a later Order and Statement of Reasons.

For these reasons, the Court should not consider on appeal any of the March 4, 2022, Orders or Rulings.

CONCLUSION

For the foregoing reasons, Plaintiff's appeal should be denied, affirming the trial court's dismissal of the Verified Complaint with prejudice.

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By: */s/ James F. Moscagiuri*
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DATED: July 29, 2024

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August 13, 2024

Via E-Courts

Appellate Division Clerk's Office
Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
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Trenton, New Jersey 08625-0006

Re: Michael S. Rubin, Plaintiff/Appellant v.
Borough of Caldwell and Planning Board of the Borough of Caldwell, Defendants/Respondents
Superior Court of New Jersey, Appellate Division
Docket No. A-003534-22T4
On Appeal From: Superior Court of New Jersey, Law Division: Essex County
Docket No. ESX-L-000433-22
Sat Below: Hon. Thomas R. Vena, J.S.C.
Civil Action

Dear Sir/Madam:

This office represents plaintiff Michael S. Rubin in the above-captioned matter. Please accept this letter brief in lieu of a more formal brief in reply to defendant Borough of Caldwell's (the "Borough") Brief.

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[1]Footnote 3 of the Borough's Brief claims that the inclusion of six documents in plaintiff's Table of Judgments suggests that he seeks appellate review of rulings other than Judge Vena's September 9, 2022, Order and Statement of Reasons. The Borough misconstrues Rule 2:6-2(a)(2), which requires inclusion of not only the orders and rulings being appealed but all "Intermediate decisions." Rule 2:6-2(a)(2)(C).

[2]References are to Plaintiff's Appendices included with is initial submissions.

PROCEDURAL HISTORY

Plaintiff relies on the Procedural History set forth beginning at Page 3 of Plaintiff's Brief.

STATEMENT OF FACTS

Plaintiff relies on the Statement of Facts set forth beginning at Page 9 of Plaintiff's Brief.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S STATEMENT OF REASONS FAILED TO CONFORM WITH THE REQUIREMENTS OF RULE 1:7-4. (Pa82)

Point II of the Borough's Brief, beginning on Page 13, argues that the Trial Court's Statement of Reasons satisfied the obligation under Rule 1:7-4 for a court to make "specific" factual findings and legal conclusions when deciding a summary judgment motion. However, the Judge Vena's Substantive Analysis contained within the Statement of Reasons only directly addressed plaintiff's claims under the Open Public Meetings Act, N,J,S,A, 10:4-1, *et seq*. ("OPMA"). (Pa86.) Plaintiff's other claims were ignored, except for one oblique reference to the 45-day limitation period established by Rule 4:69-6(a). Id.

Whatever this Appellate Court may think of the sufficiency of Judge Vena's discussion of plaintiff's OPMA claims, His Honor's conclusions were wrong as a matter of law, rendering the writing's conformance with Rule 1:4-7 irrelevant as those claims. (See Point IV, *infra*; but see, also, Plaintiff's Brief,

Point II(A), which explains why the Statement of Reasons was also insufficient as to the OPMA claims.)

Where the Statement of Reasons is indisputably deficient was in its failure to address the other claims raised in plaintiff's Verified Complaint. The Borough's Brief ignores these claims as well. Plaintiff alleged violations of the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1, *et seq*., and N.J.S.A. 40:49-2 in the adoption of Ordinance 1423-21, an amendment to the Borough of Caldwell Redevelopment Plan. These claims, discussed in detail in Plaintiff's Brief, were brought within the 45-day Prerogative Writ limitation period and are summarized below:

- Enactment of Ordinance 1423-21 violated N.J.S.A. 40:49-2 when the public hearing was removed from the December 1, 2021, Borough Council special meeting agenda, which was not properly noticed, and placed on the December 28, 2021, meeting agenda without public notice of its removal or the new date. The original published notice of the public hearing also failed to comply with the statute since it

omitted substantive information about the ordinance. (Plaintiff's Brief, Page 37, Point III); and

- Enactment of Ordinance 1423-21 also violated the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1, *et seq*., because the Borough Council failed to identify inconsistencies between the amending ordinance and the Master Plan, even though the Planning Board identified multiple inconsistencies in its statutory review of Ordinance 1423-21. (Plaintiff's Brief, page 32, Point II(B)).

Additionally, plaintiff's claim that the Planning Board's December 16, 2021, special meeting was held in violation of the OPMA was timely field. (Plaintiffs' Brief, page 32.) It was at this meeting that the Planning Board continued its review of Ordinance 1423-21 and found inconsistencies. There was also no recording of the meeting created, in violation of the Municipal Land Use Law, specifically N.J.S.A. 40:55D-10(f). Id.

Plaintiff's Verified Complaint was filed January 20, 2022, well within the 45-day limitations period to challenge the adoption of Ordinance 1423-21. (Pa1.)

In the Borough's Preliminary Statement on Page 1 of its Brief, it asserts that the Trial Court found "that most of Plaintiff's claims were filed out of time." The only reference in the Court's Statement of Reasons as to the 45-day time limitation period are two brief sentences: "This Court does not find reason to extend the statutorily required time of 45 days, pursuant to Rule 4:69-6(a). As such, plaintiff's claim is moot." (Pa86.)

It would be difficult to imagine a more blatant violation of Rule 1:7-4. The Trial Court failed to identify the "claim" deemed moot among the many set forth in the Verified Complaint, or to distinguish it from those that were not, and failed to articulate any factual basis or legal reasoning supporting its ruling. The Trial Court's Statement of Reasons included no substantive discussion of plaintiff's non-OPMA claims.

The Trial Court dismissed plaintiffs' timely claims brought under the LRHL and N.J.S.A. 40:49-2 without basis and without explanation, in violation of Rule 1:7-4.

POINT II

PLAINTIFF'S CHALLENGE TO ORDINANCE 1394-20 SHOULD BE PERMITTED TO PROCEED ALTHOUGH FILED OUT OF TIME. (NOT RAISED BELOW)

The initial Borou8gh of Caldwell Redevelopment Plan was adopted by Ordinance 1394-20 on December 15, 2020. Notice of the adoption of the Ordinance was not published until April 12, 2021. (Pa 151.) Again, plaintiff's Verified Complaint was filed on January 22, 2022, less than ten months after notice of adoption was published.

In Point IV of the Borough's Brief, it relies on Rocky Hill Citizens for Responsible Growth v. Planning Board of the Borough of Rocky Hill, 406 N.J. Super. 384 (App. Div. 2009) to support its position that plaintiff should not be allowed to challenge the adoption of Ordinance 1394-20 out of time.

Plaintiff relied on Willoughby v. Planning Board of the Township of Deptford, 306 N.J. Super. 266, 277 (App. Div. 1997), in support of its argument that the extension of time should be granted "in the interest of justice." (See Plaintiff's Brief, beginning on page 41.) Rocky Hill distinguished Willoughby and another decision which extended time, Concerned Citizens v. Mayor and

Council of Princeton Borough, 370 N.J. Super. 429 (App. Div.), *certif. denied*, 182 N.J. 139 (2004).

In Rocky Hill, the court rejected the plaintiffs' request to extend the time to challenge a zoning ordinance. The complaint was filed on October 26, 2006, 406 N.J. Super. at 396, nearly two years after publication of adoption of the ordinance on December 31, 2004. Id. at 391. The court determined that the requested extension was not in the interests of justice.

In distinguishing Willoughby, the Rocky Hill court noted that unlike the facts before it, the Willoughby zoning ordinance challenge was "brought within a year after it was adopted" and not two years later, with the court expressing concerns about the adverse impact of the ordinance on the surrounding community and the public response to its adoption. Id. at 400.

The Rocky Hill court similarly distinguished the Concerned Citizens decision because in the latter case, the challenge to the adoption of a redevelopment plan "was brought less than a year after accrual." The court also noted the "numerous violations" of the LRHL in adopting the ordinance, and

rejected the idea that public concern should be judged by the number of plaintiffs in a lawsuit. Id. at 399-400.

Plaintiff herein sits in a position much more similar to the plaintiffs in Willoughby and Concerned Citizens than to the plaintiffs in Rocky Hill. His Verified Complaint was filed less than ten months after the April 12, 2021, publication of notice of adoption of Ordinance 1394-20. The complaint alleged violations of the LRHL and N.J.S.A. 40:49-2 in adopting the ordinance. (Plaintiff's Brief, Pages 35-36.) Finally, adoption occurred during the ongoing Covid-19 pandemic, limiting public participation.

POINT III

THE OPMA REQUIRES PUBLIC BODIES TO ACT IN GOOD FAITH IN COMPLYING WITH ITS NOTICE OBLIGATIONS. (Pa82)

Point V of the Borough's Brief contends that Township of Bernards v. Department of Community Affairs, 233 N.J. Super. 1 (App. Div. 1989), is dispositive of the OPMA issues raised by plaintiff's Verified Complaint because the decision correctly holds that the statute does not require publication of notices. (Borough's Brief, page 17.) According to the Borough, the Township

of Bernards decision is defeats plaintiff's claims because it is "directly on point." Id.

Curiously, the Borough does not discuss the facts presented to the Court in Township of Bernards or address the discussion in Plaintiff's Brief that clearly distinguishes those facts from the facts herein. (Plaintiff's Brief, beginning on Page 43.) In Township of Bernards, the notices were sent to the newspapers in a timely manner with no direction not to publish. In contrast, the notices at issue herein were sent after the publication deadlines for the municipally designated newspapers and with a directive not to publish. Id.

Simply put, the Township of Bernards decision does not address the issue of public entity fault in the failure to publish. Instead, the court cites to Worts v. Mayor & Council of Upper Township, 176 N.J. Super. 78, 81 (Ch. Div. 1980), which concerned municipal culpability in failing to send notices in a timely manner. The court held that "[w]hen a public body sends meeting notices to newspapers for publication and, to the actual or readily ascertainable knowledge of that body, those newspapers cannot publish the notice at least 48 hours in advance of the meeting, there is no compliance with the Open Public Meetings

Act. Logic demands this conclusion; were the opposite true, the purpose of the law would be circumvented easily." Id. at 81-82.

The Borough's suggestion that the Township of Bernards court should have engaged in a *dicta* discussion of municipal culpability is unconvincing. (Borough's Brief, Page 23.) It addressed that question by citing Worts.

The Borough also relies on language in Kean Federation of Teachers v. Morell, 233 N.J. 566, 586 (2018), that "courts must be cautious not to foist burdens upon public bodies that the Legislature did not intent [sic] to impose. (Plaintiff's Brief, Pages 12 and 24; the actual quote from the court references the decision Rice v. Union County Regional High School Board of Education, 155 N.J. Super. 64 (App. Div. 1977), and states in full: "We find the procedural notice created in Rice should not be stretched beyond its factual setting. To do so would result in adding to the OPMA requirements that the Legislature did not impose." Kean Federation of Teachers, 233 N.J. at 586.)

In its initial discussion of the OPMA, the court in Kean Federation of Teachers noted that the OPMA "makes explicit the legislative intent to ensure the

public's right to be present at public meetings and to witness government in action," citing, N.J.S.A. 10:4-7. Kean Federation of Teachers, 233 N.J. at 570.

The Rice decision involved the requirements for notice to public employees affected by an adverse employment decision set forth in N.J.S.A. 10:4-12(b), and the right for those employees to have the matter discussed in public rather than in private. As summarized in Kean Federation of Teachers, the Rice court "stated that the right to compel public action on the personnel topic would be rendered "useless and inoperative" if affected personnel are not give some form of notice that action affecting their employment status is on the agenda." Kean Federation of Teachers, 233 N.J. at 573.

Similarly, the right of the public to receive notice of a special meeting scheduled by a public entity "would be rendered 'useless and inoperative'" if that entity could decide that its notices will not be published, either by failing to transmit notices in a timely manner or by directing the recipients not to publish. Id. The Borough acted in bad faith when it deliberately undermined "the legislative intent to ensure the public's right to be present at public meetings and to witness government in action." Id. at 570.

POINT IV

THE "LAW OF THE CASE" DOCTRINE IS INAPPLICABLE TO INTERLOCUTORY ORDERS (Not Raised Below)

Point VI of the Borough's Brief appears to argue that plaintiff was obligated to appeal the Trial Court's interlocutory decision, by Order dated March 4, 2022, denying plaintiff's request for injunctive relief, and his failure to do so bars this appeal. The Borough asserts that the March 4, 2022, Order bars the appeal because it became the "law of the case," even though interlocutory.

The Borough relies on several cases to support its position. The first is W.H. Industries, Inc. v. Fundicao Balancins LTDA, 397 N.J. Super. 455 (App. Div. 2008.) This matter involved jurisdictional issues resulting from a contract dispute between defendant Brazilian company and plaintiff New Jersey company. The trial court found for the defendant on the jurisdictional issues and plaintiff's motion for reconsideration was denied. Plaintiff's notice of appeal referenced only the order denying reconsideration and not the initial order dismissing the complaint. The Appellate Division noted the improper designation of the lower court orders in the notice of appeal, but nonetheless agreed to address the

underlying order because "the orders resolved all issues as to all parties." Id. at 458-459.

The W.H. Industries decision is not applicable to the facts herein because Judge Vena's denial of injunctive relief was interlocutory and did not "resolve all issues as to all parties." Moreover, plaintiff does not now appeal the denial of injunctive relief rendered March 4, 2022, but instead appeals the granting of summary judgment and the dismissal of the Verified Complaint in its entirety. Thus, plaintiff properly designated the orders being appealed in his Notice of Appeal.

Another decision relied upon by the Borough is Lombardi v. Masso, 207 N.J. 517 (2011), a contract action involving the sale of real estate where interlocutory orders were entered and appealed. The Borough paraphrases the Lombardi court's opinion as concluding that "[a]n interlocutory order may become the law of the case when final judgment is entered, and it is no longer subject to reconsideration," citing Lombardi at page 539. (Borough's Brief, Page 25.)

This is a gross misrepresentation, as the Lombardi court reached the exact opposite conclusion, as evidenced by the actual quote from the opinion:

> Importantly, the law of the case doctrine is only triggered when one court is faced with a ruling on the merits by a different and co-equal court on an identical issue. . . . It is entirely inapposite where, as here, in trial court proceedings, the same judge is reconsidering his own interlocutory ruling. . . . Because such a ruling is always subject to reconsideration up until final judgment is entered, . . . , it is not considered "law of the case."

Id. at 539 (citations omitted.)

The Borough's argument that the law of the case doctrine bars plaintiff's appeal is without merit.

CONCLUSION

For the reasons set forth herein and in plaintiff's initial Brief, the judgement of the Trial Court dismissing plaintiff's Verified Complaint should be reversed, the adoption of Ordinance 1423-21 be voided, and the plaintiff be permitted to pursue his claims challenging Ordinance 1394-20.

Respectfully submitted,

/s/ Michael S. Rubin

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cc: James F. Moscagiuri, Esq. (via e-courts)
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