SHIPYARD ASSOCIATES,L.P.,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-001085-17T3
Plaintiff/Respondent,	
-vs.-	Civil Action
	On Appeal From: Law Division, Hudson County
CITY OF HOBOKEN,	Docket No. HUD-1308-16
	Sat Below: Hon. Peter F. Bariso, A.J.S.C.
Defendant/Respondent.	

APPELLATE BRIEF AND APPENDIX OF RESPONDENT FUND FOR A BETTER WATERFRONT

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Date: February 16, 2018

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PRELIMINARY STATEMENT

The Fund for Better Waterfront ("FBW") a nonprofit organization based in Hoboken, participates in this appeal to support the validity and importance of Hoboken's Flood Damage Prevention Ordinances, Z-263 and Z-264, and to seek reversal of the trial court's decision prohibiting the City from enforcing such ordinances against Shipyard Associates, L.P.'s ("Shipyard") proposed construction on a pier jutting into the Hudson River.

This matter raises the legal issue of whether, under New Jersey law, a municipality may impose a health and safety ordinance on a proposed development project that has received final site approval prior to the adoption of such ordinance, but has yet to apply or receive a building permit. The trial court answered this question in the negative stating that "[p]ermitting these ordinances to apply to Shipyard's application would essentially turn the function of vesting rights on its head." (Da263) FBW fundamentally disagrees with the court's analysis and asserts that prior to and since the enactment of the Municipal Land Use Law, ("MLUL") 40:55D-1 *et seq.*, in 1975, holders of final site approvals, short of construction, do not enjoy protection against the application of municipal ordinance amendments, including zoning changes, specifically related to health and public safety.

As early as 1926, the N.J. Supreme Court held:

> . . . [T]his court, when confronted with an ordinance passed in the valid exercise of power conferred upon the municipality [will not] disregard its existence and direct a permit to be granted . . . to erect a building. . ., although its erection will be a threat to the public safety, merely for the reason that such ordinance was not passed until after the conclusion of the hearing before the board of adjustment and its action thereon.
> Rohrs v. Zabriskie, 102 N.J.L. 473, 475 (Sup. Ct. 1926)

The authority of a municipality to apply health or public safety ordinances to development projects, yet to be constructed though approved prior to the adoption of such measures, is embedded in the MLUL. The vested rights granted a developer pursuant to N.J.S.A. 40:55D-52(a) governing final site approvals incorporate the "zoning requirements applicable" to the relevant preliminary site approval previously granted, and "all other rights conferred upon the developer pursuant" to N.J.S.A. 40:55D 49(a), including the health and public safety limitation on such rights explicitly provided in Section 49(a). To interpret these provisions otherwise would be to defy common law prior to 1975, and to ignore the numerous provisions in the MLUL enshrining municipal power to act to promote the public health and safety, including N.J.S.A. 40:55D-10.5 (effective 2011). Contrary to the trial court's opinion, N.J.S.A. 40:55D-10.5's "time of application" rule (supplanting municipal and judicial use of the "time of decision" rule in the land use context), with its

explicit exception for "provisions of an ordinance . . . relating to health and public safety," applies herein. N.J.S.A. 40:55D-10.5 applies to "any decision made with regard to [an] application for development" including judicial review of such decision, and is not limited to municipal review of the application for development, as held by the court below.

Furthermore, the trial court did not adequately address Hoboken's well-documented position that Z-263, an Ordinance that was modeled after NJDEP's Model Flood Damage Prevention Ordinance, constitutes a general environmental regulation that was promulgated pursuant to its general police powers, not its authority under the MLUL. Such Ordinance creates a new permitting scheme applicable to "new construction and substantially improved residential and commercial structures" (Da30-31) located in certain flood-prone areas throughout the City (Da25), and though it touches on land-use concerns shared with the MLUL, it was not authorized under that law. Accordingly, the trial court erred as a matter of law when it insisted that Hoboken was precluded from imposing Z-263 on Shipyard's development project because it had received final site plan approval pursuant to the MLUL.

During Hurricane Sandy it became apparent that Hoboken had a flooding problem. The City, with a well documented record analyzing the safety risks to its residents, took proper action.

Accordingly, as a matter of law and public policy, it should be permitted to impose Z-263 and Z-264 on all development projects yet to be constructed, including the Monarch project.

PROCEDURAL HISTORY

FBW restates and incorporates herein the Procedural History set forth in Hoboken's Appellate Brief. Hoboken's Br. at 4-6. It further states the following:

FBW, a 28-year old New Jersey 501(c)(3) nonprofit organization, with its principal office located in Hoboken, intervened in the federal litigation initiated by Shipyard seeking to challenge the validity of Hoboken's Flood Damage Prevention Ordinances, Z-263 and Z-264; as a result of that intervention, FBW, representing approximately 200 active supporters, was permitted to file an Answer in the state judicial proceeding now on appeal, without making an additional motion for intervention. (Da212-239) FBW sought participation in the federal action because, pursuant to its mission, FBW has been actively engaged in supporting municipal and federal efforts to respond to the flooding issues Hoboken faces due to climate change. Specifically, FBW has held seminars and attended conferences addressing the storm and flooding issues facing Hoboken and other shore municipalities, put together a team of professionals who submitted a proposal to the federal Hurricane Sandy Rebuilding Task Force's Rebuild by Design competition, and

has written over 20 articles pertaining to flooding that have been posted on its website and sent to its mailing list via a monthly, newsletter. (Da2603-2608) Most importantly, it was an active supporter of Z-263 and Z-264, whose implementation is jeopardized by the trial court's action herein. Accordingly, FBW desired to participate in this appeal and filed a Civil Case Information Statement, dated November 29, 2017, in response to Hoboken's Notice of Appeal. (FBWRa1-2)

STATEMENT OF FACTS

FBW restates and incorporates herein the Statement of Facts set forth in Hoboken's Appellate Brief. Hoboken's Br. at 6-22. It further states the following:

Both Ordinance Z-263, Amending Chapter §104 (FLOOD DAMAGE PREVENTION) To Reflect Updates Recommended By The New Jersey Department of Environmental Protection's Latest Revised Model Ordinance, and Z-264, Amending Chapter §196 (ZONING) Addressing Community Health, Safety and General Welfare Through Flood Hazard Mitigation Measures and Development Limitations, were adopted by the Hoboken City Council on December 18, 2013. (Da1839) Pursuant to Section four of each Ordinance, they respectively took "effect upon passage and publication as provided by law." (Da34; 40) Z-263 was signed by the Mayor on January 8, 2014.

Ordinance Z-263, an environmental regulation applicable throughout the City targets new construction and substantially improved residential and commercial structures in certain flood-prone areas throughout the City. (Da30-31). Ordinance Z-264, a zoning ordinance applies only to new construction and substantial improvement of existing docking and ship building and repair facilities located in certain coastal areas. (Da38) This Ordinance provides for the continuation of non-conforming uses, (Da39), and it specifically states that "it is not intended to repeal, abrogate or annul any building permit, certificate of occupancy, variance or other lawful permit issued and in full force and effect on the effective date of this chapter or any subsequent amendment." §196-103.2 (Da38)(codified as §196-4). Z-264 was signed by the Mayor on December 20, 2013.

LEGAL ARGUMENT

In reviewing a trial court's summary judgment decision, the appellate court uses the same standard as the trial court. Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016). When the question presented on appeal is a matter of law, as is the case herein, the decision below is subject to *de novo* review. Balsamides v. Protameen Chems. 160 N.J. 352, 372 (1999). This means that a reviewing court need not show any special deference to the trial court's legal conclusions, and must undertake its own analysis. Tumpson v. Farina, 431 N.J. Super. 164, 168 (App.

Div. 2013), aff'd in part and rev'd in part, 218 N.J.450 (2014). See also Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995) (affirming application of *de novo* review when evaluating a trial court's decision that is inconsistent with well-settled law). "[I]f the trial judge misconceives the applicable law, or misapplies it to the factual complex . . . it is the duty of the reviewing court to adjudicate the controversy in the light of the applicable law in order that a manifest denial of justice be avoided." Kavanaugh v. Quigley, 63 N.J. Super. 153, 158 (App. Div. 1960).

I. Z-263 and Z-264, ENACTED TO MITIGATE POTENTIAL FLOOD HAZARDS ORDINANCES, ARE VALID SAFETY ORDINANCES AS A MATTER OF LAW. (Da254, Da256-63)

In his Opinion, Judge Bariso noted that

> Hoboken has provided sufficient support to show that the Ordinances were likely passed in response to Federal and State efforts to prevent future flood damage following Hurricane Sandy. (Da257)

This comment indicates more a concern with whether the two Ordinances were enacted in good faith for valid purposes than a determination of the "public safety" character of the Ordinances. The fact that these Ordinances are designed to protect "public safety" and "human life and health" against flood risks cannot be understated, and as fully established in Hoboken's brief, should be found by this Court to constitute valid safety ordinances as a matter of law.

In elaborating on the challenges to flood control ordinances, New Jersey courts have long made clear that special sensitivity is required because such ordinances are primarily designed to protect safety. Terner v. Spyco, Inc., 226 N.J. Super. 532, 543 (1988)(citing Usdin v. State, Dep't of Envtl. Prot., Div. of Water Res., 173 N.J. Super. 311, 331 (Law Div. 1980), aff'd, 179 N.J. Super. 113 (App. Div. 1981)). Put another way, the threat to safety "weigh[s] [so] strongly" that variances to such ordinances "should rarely be granted." Terner v. Spyco, supra, 226 N.J. Super. at 543. This concern is more than a factual one. In Terner v. Spyco, the court observed, such a flood related safety designation cannot be treated "as an open factual question" by municipal boards or experts. Rather it is a question of law. Id. at 537-539. See also Judge Rodriquez' Opinion in which she found that the City's Report, entitled Flood Hazard Risk and Compliance Concerning Developments on Piers and Platforms, City of Hoboken, Hudson County, Da172, "raises dangers facing potential riverfront pier development" thus presenting a compelling issue of safety.(Da71)

In addition to the extensive material presented by the City of Hoboken to the trial court detailing Hoboken's flooding risk, (Miller Cert, *passim*, Da1822-2585), FBW presented to the court numerous efforts it has taken pertaining to Hoboken's flooding problems that attest to the reality that the Monarch Project

implicates serious flooding and related public safety concerns that are real, and need to be evaluated prior to permitting the project to proceed to construction. Cert. of Ron Hine, ¶¶31-47 (Da2603-2608) In short, both Z-263 and Z-264, enacted by Hoboken to address flooding risks, are safety ordinances as a matter of law and should be accorded such status for purposes of interpreting the MLUL and applying the common law regarding Hoboken's exercise of its police power in this case.

Moreover, none of the government permits Shipyard has already obtained or interpretative letters issued render the Ordinances inapplicable to the Monarch Project, cast doubt on the accuracy of the Ordinances or exempt such proposed development from compliance therewith. See Hoboken Br. at 58-62 (discussing permit secured under the Clean Water Act, NJDEP waterfront permit, FEMA Appeal Resolution Mapping, and FEMA Conditional Letter of Map Revision). First, the verifications issued by the U.S. Army Corps of Engineers under the Clean Water Act concern the impact that maintenance and outfall work associated with the proposed project may have on water quality in the Hudson River, not the increase risks and dangers posed to future residential occupants and emergency personnel during the recurrence of a major costal storm. The verifications thus concern an issue unrelated to the Hoboken Ordinances. It must be noted that these verifications are also conditioned upon

Shipyard's compliance with FEMA-approved State or local flood plain management requirements. Id. at 59 (citations omitted). Similarly, the Waterfront Development Permit issued by NJDEP in 2011, which was issued prior to Hurricane Sandy and prior to the project's designation in a V Zone, is expressly conditioned on Shipyard's compliance with local regulations such as the Ordinances. Id. at 60. An October 20, 2015 letter from FEMA indicating that it would revise its Revised Preliminary Flood Insurance Map, dated January 30, 2015, in response to Shipyard's appeal of that map, indicates that even under its revised, appeal resolution mapping, the project site remains primarily in the VE Zone; the VE Zone, like the V Zone, is a zone in which all new construction is required to be "located landward of the reach of mean high tide," a requirement not met by Shipyard's proposed project. Id. at 61 (citations omitted). And finally, on March 3, 2016, FEMA issued a Conditional Letter of Map Revision Comment Document ("CLOMR") that reduces the flood risk for the project site on a 2006 Flood Insurance Rate Map from Zone AE to "Zone X", which is a moderate flood hazard area. (Da1493) Although FEMA is in the process of revising the 2006 Flood Insurance Map, every preliminary flood map published by FEMA since Hurricane Sandy has shown the North Pier to be located in the Coastal High Hazard Area (V Zone). Hoboken Br. at 62 (citations omitted). Notwithstanding any impact the CLOMR may

have on FEMA's revised preliminary maps, FEMA's regulations note that any local ordinances which are more restrictive than criteria set forth in its own regulations are not only encouraged but "shall take precedence." 44 C.F.R. §60.1(d).

In this way, none of the permits received or letters of interpretation issued prohibit Shipyard from satisfying, or relinquish it of, its duty to comply with Hoboken's flood prevention safety Ordinances.

II. UNDER NEW JERSEY LAW, HOLDERS OF FINAL SITE APPROVALS ARE NOT PROTECTED AGAINST AMENDMENTS TO ORDINANCES RELATED TO HEALTH AND PUBLIC SAFETY. (Da254, Da256-263)

In its Order, the trial court directed that neither Z-263 or Z-264 shall be applied to Shipyard's development, which must be permitted to proceed in accord with plans that were "initially submitted to the Hoboken Planning Board with the site plan application filed on August 25, 2011" and which were last revised June 5, 2012. (Da241) It based its Order on its holding that

> [t]here is no health and public safety exception under N.J.S.A. 40:55D-52 and N.J.S.A. 40:55D-10.5 does not apply to projects that have been given final approval. (Da263)

This holding is erroneous in several respects: First, it fails to acknowledge that Z-263 is a general environmental regulation authorized pursuant to Hoboken's police powers, and is thus not a "business regulation" as defined by the MLUL,

N.J.S.A. 40:55D-4, subject to the provisions of that law. Second, it ignores established common law permitting a municipality to exercise its police power by denying a building permit due to changes in health and public safety ordinances enacted after site plan approvals have been secured; and, third it fails to interpret provisions of the MLUL concerning vested rights as incorporating that principle with respect to post-approval amendments to business regulations, including zoning ordinances, "related to health and public safety." Provisions granting holders of preliminary and final approvals vested rights under the MLUL explicitly include a health and public safety limitation that reflects the longstanding public policy in this State that encourages municipalities to promote, further and protect the health and public safety of its residents, including taking actions to prevent and mitigate the potentially dire consequences of flooding, even if such actions impair private rights.

A. Z-263 Is A General Environmental Regulation That Is Not Governed By The MLUL; Pursuant To Its General Police Powers Hoboken Must Apply It To The Monarch Project That Involves New Construction.

FBW joins in the City of Hoboken's position with respect to Z-263: its status as a general environmental regulation setting forth an additional permitting process independent of and separate from the site plan review and approval process under

the MLUL; and its status outside the definition of "development regulations" under the MLUL,[1] and that statute's provisions granting vested rights in preliminary and final site plan approvals. See Hoboken Br. at 24-33;39-44) The permit requirement of Z-263 is a separate requirement that is administered by the Floodplain Administrator in addition to approvals administered by the Planning Board, and, therefore, it is not necessary to "abrogate" any Planning Board approval in order for the permit requirement to apply. Indeed, similar to other safety ordinances enacted specifically to protect the public, the Hoboken City Council intended Z-263 to take effect "upon passage and publication as provided by law" (Da34), and it is intended to apply only to all development projects located in flood hazard areas throughout the City that had not commenced construction by January 8, 2014 (at which date the Ordinance wa signed by the Mayor).

Similarly, FBW joins in the City of Hoboken's argument that the trial court erred by failing to construe its police powers liberally in favor of the City, as required by article IV, section 7, paragraph 11 of the New Jersey Constitution and the Home Rule Act, N.J.S.A. 40:42-2. Hoboken Br. at 33-38.

[1] "Development regulation" means a zoning ordinance, subdivision ordinance, site plan ordinance, official map ordinance or other municipal regulation of the use and development of land, or amendment thereto adopted and filed pursuant to P.L. 1975, c. 291 (C. 40:55D-1 et seq.). N.J.S.A. 40:55D-4.

Fundamentally, as the court recognized in Kliqman v. Lautman, 98 N.J. Super. 344, 356-357 (App. Div.), aff'd 53 N.J. 517 (1967), the MLUL does not constrain the City's separate, general police power to regulate local environmental concerns and public safety regardless of whether such regulations touch on the use and development of land that may have also been authorized by the MLUL, and included in an ordinance adopted and filed pursuant to the MLUL. Hoboken enacted Z-263 as an environmental regulation pursuant to its general police powers, not the MLUL, because the NJDEP Revised Model Ordinance regarding flood damage prevention directed it to do so. There was no known effort to take a zoning ordinance and dress it up as something else simply to circumvent otherwise applicable restrictions in the MLUL, as the trial court tacitly implied.

Notwithstanding the trial court's finding that Z-263 "actually effects [sic] what and where a structure can be built similar to what a typical zoning ordinance does," (Da262) common law establishes the right of municipalities, pursuant to their police power, to enforce newly amended building codes, sewage regulations and other environmental regulations related to health and safety that also impact the "where, how or what" structure may be built, prior to the commencement of construction. As the N.J Supreme Court held in Rohrs v. Zabriskie, 102 N.J.L. 473 (Sup. Ct. 1926):

> . . . [W]ill this court, when confronted with an ordinance passed in the valid exercise of power conferred upon the municipality disregard its existence and direct a permit to be granted . . . to erect a building. . ., although its erection will be a threat to the public safety, merely for the reason that such ordinance was not passed until after the conclusion of the hearing before the board of adjustment and its action thereon. We have no doubt but that this question should be answered in the negative. Admitting that the ordinance does not have a retroactive effect, so far as buildings in the course of construction are concerned, it is clearly applicable where the process of construction has not yet been begun. Id. at 475 (emphasis added).

Other states share New Jersey's common law rule permitting municipalities, pursuant to the police power, to enforce changed health and safety ordinances, including zoning ordinances, after site plan approvals have been obtained, but prior to the commencement of construction. See e.g., Davidson v. County of San Diego, 49 Cal. App. 4th 639, 56 Cal. Rptr. 2d 617 (Ca. App. 1996)(where zoning ordinances at time of application applied, court held that rights created by either a development agreement or a vesting map did not prevent local agency from applying subsequent zoning regulations to a project if it determined that such regulations were necessary to prevent the operation of a crematorium from being a danger or nuisance to the public); McNaughton Co. v. Witmer, 613 F.2d 104 (Pa 1992), aff'd, 46 F.3d 1120 (3d. Cir. 1994)(in contest challenging the validity of an ordinance declaring a moratorium on the issuance of sewage permits, the court denied developer's claim that he had a vested

right to a sewage permit by virtue of the town's approval of his subdivision plans; ordinance found to be an emergency public health and safety ordinance); Ford v. Bellingham-Whatcom Cty., Dist. Bd. of Health, 558 P.2d 821 (Wa. 1977)(where septic tank regulations changed, developer not entitled to application of the regulations in effect at the time site division plan was approved); Metropolitan Dade County v. Rosell Const. Corp., 297 So. 2d 46, 48 (Fla. 1974)(court held that change in zoning may effectively revoke a building permit, if municipality can show some new peril to health and safety of the municipality has arisen between granting of building permit and subsequent change of zoning to the detriment of landowner); and Belle Harbor Realty Corp. v. Kerr, 323 N.E. 2d 697 (N.Y. 1974)(where City revoked prior approvals to construct a 4-story nursing home based on a finding of inadequate sewer connections, court held that City must establish that it acted in response to a health emergency and that its actions were reasonably circumscribed by the exigencies of the problem). See also KOB-TV, L.L.C., v. City of Albuquerque, 111 P.3d 708 (N.M. 2005)(permitting City to revoke permit allowing construction of helicopter pad based on zoning amendment enacted to protect health and safety even though such pad had already been constructed).

These courts recognize that private development interests, such as Shipyard's interest in developing the Monarch project

pursuant to its site plan approvals, are often subordinate to the public interest advanced by safety and health regulations. And in such circumstances, a statute or regulation that gives effect, retrospective or not, to essentially remedial changes does not unconstitutionally interfere with rights otherwise vested under law. See e.g., New Jersey Dept. of Envtl. Prot. C. Ventron Corp., 94 N.J. 473, 498-99 (1983)(applying Spill Act amendment enacted subsequent to judgment of the trial court, and which prohibited the discharge of hazardous substances, to impose liability based on finding "that the public interest outweighs any impairment of private property rights"); Rothman v, Rothman, 65 N.J. 219 (1974), police power enactments to promote the public health or safety may "validly curtail[]" private rights so long as the "legislation [is deemed to be in the greater public interest.").

It therefore follows that notwithstanding Shipyards' receipt of site plan approvals, Hoboken is entitled to apply Z-263, a public safety ordinance, to the Monarch project, simply because construction has not yet commenced. As a result, the trial court's decision must be reversed; and Shipyard, in accord with Z-263, must be required to secure a development permit from the Floodplain Administrator pursuant to the standards set forth in that Ordinance.

B. Shipyard Is Not Protected Against The Application Of Z-264 Because N.J.S.A. 40:55D-52(a) Incorporates The Health And Safety Limitation Set Forth In N.J.S.A. 40:55D-49(a).

In its unpublished decision, Shipyard Assocs., L.P. v. Hoboken Planning Bd., Dkt. No. 4504-14T3, the Appellate Panel wrote:

> "Failure of the planning board to act within the period prescribed shall constitute approval of the application..." N.J.S.A. 40:55D-61 (emphasis added). At that point, Shipyard obtained the vested rights associated with preliminary and final site plan approval. N.J.S.A. 40:55D-52(a). (Da1771-72)

The court did not discuss the parameters of those vested rights nor whether they included protection from changes to zoning ordinances related to health and safety. That analysis was the task placed before Judge Bariso, although the City has yet to take any action either to impose Z-263 on the Monarch project or to deny Shipyard a building permit for that development.[2]

Notwithstanding such lack of municipal action, the trial court held that N.J.S.A. 40:55D-52(a) does protect a holder of final site plan approval from changes to any zoning ordinance, including those related to health and safety, for the time period specified in the statute. This decision fails to (1) give effect to language in 52(a) incorporating "the zoning

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[2] See Independent Realty Co. v. Township of North Bergen, 376 N.J. Super. 295 (App. Div. 2005)(request for judgment declaring that zoning changes did not impact site plan approvals secured 16 years earlier dismissed as not ripe for determination prior to denial of building permit or other municipal action)

requirements applicable to the preliminary approval first granted and all other rights conferred upon the developer pursuant to [N.J.S.A. 40:55D-49];" and (2) construe N.J.S.A. 40:55D-52(a) in harmony with several specific provisions of the MLUL that encourage and direct municipalities to take actions that will promote public health and safety, including safety from flood and other natural and man-made disasters.

This matter concerns the interpretation of the MLUL; and as the City of Hoboken has so methodically presented, the New Jersey Constitution and Home Rule Act requires this court to "liberally" construe the MLUL "most favorably" to the City in determining whether the MLUL precludes the City from enforcing Z-264 against Shipyard's yet to be constructed project. See Hoboken Br. at 33-39. The court's "task in statutory interpretation is to determine and effectuate the Legislature's intent." Bosland v. Warnock Dodge Inc., 197 N.J. 543, 553 (2009); see also N.J.S.A. 1:1-1 ("In the construction of the laws and statutes of this state, . . . words and phrases shall . . ., unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning.]"). Therefore, courts will look first to the plain language of the statute, and will only look for further guidance if the

Legislature's intent cannot be derived from the words it has chosen. Bosland, supra, 197 N.J. at 553.

Specifically, the "plain language of the statute must be considered with the assumption that the words employed enjoy their "ordinary meaning and significance" and that the Legislature did not use "any unnecessary or meaningless language." Jersey Cent. Power & Light Co. v. Melcare Utility Co., 212 N.J. 576, 587 (2013)(citations omitted). Therefore, all words employed in a provision are to be construed in a series consistent with the words surrounding them and no words or phrases can be ignored. Gilhooley v. County of Union, 164 N.J. 533 (2000). Second, when a party's contention rests on multiple parts of a single statute, such as herein, the court "must read and understand all the provisions in harmony and as parts of a unitary enactment." Hubner v. Spring Valley Equestrian Center, 203 N.J. 184, 194-95 (2010)(citations omitted). That means, all the provisions must "be read together in light of the general intent of the act, in this case the MLUL. Perez v. Zagami, LLC, 218 N.J. 202 (2014)(quoting Hubner). See also Burnett v. Cnty. of Bergen, 198 N.J. 408, 421 (2009) ("statutes must be read in their entirety; each part or section should be construed in connection with every other part or section to provide a harmonious whole.")(quoting Bedford v. Riello, 195 N.J. 210, 224 (2008)(citation omitted)). Finally, the Legislature is presumed

to be familiar with its own enactments, with judicial declarations relating to them, and to have passed or preserved cognate laws with the intention that they be construed to serve a useful and consistent purpose." State v. Federanko, 26 N.J. 119, 129 (1958).

In accord with these rules of statutory construction, it is apparent that the Legislature did not intend to protect holders of a site plan approval against zoning amendments related to health and safety (at any time prior to construction). Cox & Koenig, New Jersey Zoning and Land Use Administration §19-3.5 at 414 (GANN 2017).

N.J.S.A. 40:55D-52(a) reads in relevant part:

> The zoning requirements applicable to the preliminary approval first granted and all other rights conferred upon the developer pursuant to section 37 of P.L. 1975, c.291 (C.40:55D-49), whether conditionally or otherwise, shall not be changed for a period of two years after the date on which the resolution of final approval is adopted. . . Notwithstanding any other provisions of this act, the granting of final approval terminates the time period of preliminary approval pursuant to section 37 of P.L. 1975, c. 291 (C.40:55D-49) for the section granted final approval. (emphasis added)

According to the express words of this provision, the vested rights granted a developer pursuant to the MLUL incorporate the "zoning requirements applicable" to the relevant preliminary site approval previously granted, and "all other

rights conferred upon the developer pursuant" to N.J.S.A. 40:55D 49(a). In this way, a developer's vested rights from changes in zoning amendments expressly provided in 49(a) are carried over and incorporated into 52(a), including any limitation on or qualification of such rights.

Specifically, the zoning requirements applicable to the developer's preliminary site approval, and the right to have those zoning requirements apply for a certain period of time, are explicitly incorporated into N.J.S.A. 40:55D-52(a). N.J.S.A. 40:55D-49(a), however, qualifies such protection as follows:

> . . .; except that nothing herein shall be construed to prevent the municipality from modifying by ordinance such general terms and conditions of preliminary approval as relate to public health and safety.

Standing alone, this provision makes clear that a developer who has received a preliminary site approval is protected during the three-year repose period (plus any extensions granted) from "non-safety related ordinance changes;" not adoption of a flood prevention ordinance such as Z-263. D.L. Real Estate Holdings, L.L.C. v. Point Pleasant Beach Planning Bd., 176 N.J. 126, 135 (2003). Standing together with N.J.S.A. 40:55D-52(a), it is equally clear that such health and safety limitation to vested rights is also applicable to final site plan approvals, because of subsection 42(a)'s direct reference to all rights conferred

under N.J.S.A. 40:55D-49. See B & W Assoc. v. Planning Bd. of Town of Hackettstown, 242 N.J. Super. 1, 5 (App. Div. 1990) ("While a municipality is granted continuing authority to change or amend its ordinances, absent a problem of health and safety it may not do so to the detriment of an applicant who has receive prior [preliminary or final] subdivision approval for the time specified in the statute.").

The Legislature's intent to carry over the health and safety limitation found in 49(a) into 52(a) is further supported by the fact that the language in 52(a) specifically notes that the time period governing preliminary site plan approval terminates upon grant of final site approval; while at the same time, it is silent as to the health and safety limitation on rights conferred under the preliminary approval provision. The Legislature's decision to change the time limitations on vested rights granted under preliminary approval and final approval, but not the nature of the rights protected (i.e., the zoning requirements applicable to preliminary approval also apply to final approval) implies that the same health and safety limitation on such rights similarly pertains to final approvals.

To interpret these two connected MLUL provisions otherwise would be to defy the common law prior to 1975, when these two provisions -- 49(a) and 52(a) -- were first enacted employing similar if not identical language, and to ignore the numerous

provisions in the MLUL enshrining municipal power to act to promote the public health and safety, including N.J.S.A. 40:55D-10.5 (effective 2011). See also Hoboken Br. at 50-51 (specifying specific provisions in the MLUL, including those establishing similar health or safety limitations, evidencing that the overriding purpose of the MLUL is to enable municipalities to regulate land use in a manner that will "promote the public health [and] safety").

The enactment of N.J.S.A. 40:55D-10.5 further supports the above interpretation of N.J.S.A. 40:55D-52(a). In 2010, the N.J. Legislature enacted N.J.S.A. 40:55D-10.5 adopting the "time of application rule" whereby "those development regulations which are in effect on the date of submission of an application for development" govern both the review of any development application and "any decision" made with respect to that decision. See Jai Sai Ram, LLC v. Planning/Zoning Bd. of Bor. Of So. Toms River, 446 N.J. Super. 338 (App. Div. 2016)(discussing the legislative intent behind N.J.S.A. 40:55D-10.5). The Legislature made an exception to this rule, however; it explicitly stated that "[a]ny provisions of an ordinance, **except those relating to health and public safety,** that are adopted subsequent to the date of submission of an application for development, shall not be applicable to that application. . .." Id. (emphasis added) In other words, the

Legislature balanced the equities involved -- *i.e.*, municipality's zoning interest against the developer's interest in protection against any change in use, set-back or other zoning requirements -- and determined that when health and public safety ordinances are involved, the "time of decision rule," which previously had been the general rule governing development applications and judicial review of decisions concerning those applications, serves a beneficial purpose and thus applies; not the newly imposed "time of application rule." See CBS Outdoor, Inc. v. Bor. of Lebanon Planning Bd./Bd. of Adj., 414 N.J. Super. 563, 588 (App. Div. 2010)(noting that the time of decision rule, with limited exceptions such as vested rights, permits a municipality to make changes to a zoning ordinance at any time); Burcam Corp. v. Planning Bd. of Medford, 168 N.J. Super. 508, 512 (App. Div. 1979)(explaining rationale as to why in the area of land use, the time of decision rule may apply even after a building permit issued). Such policy concerns are equally applicable to preliminary and final approvals.

As the 2011 amendment to the MLUL reflects the Legislature's intent to provide developers with protection against zoning changes once they submit a completed application to the local agency, except in the case of zoning changes related to health and public safety, a similar concern animates

the "health and safety" limitation governing site plan approvals. As the court explained in Aronomwitz v. Planning Bd. of Tp. of Lakewood, 257 N.J. Super. 347, 363-364 (Law Div. 1992), final site plan approval is "an early step in the development process which frequently requires many other approvals before actual construction can commence." Accordingly, the MLUL seeks to provide a period of repose during which all such approvals and permits can be secured without a concern that a new zoning ordinance will be adopted that will detrimentally impact the proposed project. The Legislature, however, did not intend such protection to extend against ordinances enacted to prevent injury to the public or significant property damage at any point in the development process prior to construction.

In accord with this understanding of the scope of Shipyard's vested rights under N.J.S.A. 40:55D-52(a), which include a health and safety limitation, the trial court's decision with respect to Z-263 and Z-264 must be reversed. Specifically, the City of Hoboken may enforce Z-264 against Shipyard by denying any building permit application it makes with respect to the Monarch project. The Ordinance expressly states that it governs all new construction, though is not intended to abrogate a valid building permit issued prior to the effective date of the Ordinance. Hob. Ord. §196-4. The effective

date of Z-264 was December 20, 2013 (at which time it was signed by the Mayor). With respect to the Monarch project, no such building permit was issued prior to that time nor since.

III. N.J.S.A. 40:55D-10.5 APPLIES TO THE TRIAL COURT'S DETERMINATION OF WHETHER THE PLANNING BOARD'S DECISION APPROVING SHIPYARDS' APPLICATION FOR DEVELOPMENT IS SUBJECT TO HOBOKEN'S FLOOD PREVENTION ORDINANCES. (Da254, 256-63)

In his opinion, Judge Bariso states that N.J.S.A. 40:55D-10.5 neither governed nor informed his decision, because such provision "does not apply to projects that have already been given final approval." (Da263) This position makes no sense since N.J.S.A. 40:55D-10.5 by its own words governs "any decision" made with regard to a development application, and a resolution granting final site approval or a court order granting a default final site approval constitutes a decision made with respect to a development application.

N.J.S.A. 40:55D-10.5 provides as follows:

> Notwithstanding any provision of law to the contrary, those development regulations which are in effect on the date of submission of an application for development shall govern the review of that application for development and any decision made with regard to that application for development. Any provisions of an ordinance, except those relating to health and public safety, that are adopted subsequent to the date of submission of an application for development, shall not be applicable to that application for development.

This amendment to the MLUL rejects the "time of decision" rule that had governed local agency decision-making under the

MLUL since its enactment as well as judicial review of such decisions;[3] in lieu of the time of decision rule, the provision adopts a time of application rule, except with respect to ordinances "relating to health and public safety. See Dunbar Homes, Inc. v. Zoning Bd. of Adj. of Township of Franklin, 448 N.J. Super. 583, 586 (App. Div. 2017), certif. granted July 20, 2017 (time of decision rule meant that land use decisions were based on ordinances existing at time application was being decided or an appeal of that decision was being decided); Kruvant v. Mayor and Council of Cedar Grove Twp., 82 N.J. 435, 442 (1980)(explaining that in the context of land use matters, the time of decision rule means that the zoning ordinance in effect at the time the case is ultimately decided by a court is the ordinance that is controlling); see also Assembly Housing and Local Government Committee Statement to A. 437 (March 4, 2010)(acknowledging that "[u]nder current law, applicants are subject to changes to municipal ordinances that are made after the application has been filed, and even after a building permit

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[3] One may read the N.J.S.A. 40:55D-10.5 to require development regulations in effect on the date of submission of an application for development to govern the review of (1) the application and (2) any decision made with regard to that application. Reading the provision in this way, it becomes apparent that the Legislature was trying to stop municipalities from issuing new ordinances while applications were pending before the local board, but also while decisions about such applications were pending before the courts.

has been issued, as long as the applicant has not substantially relied on the permit.")

As a result of this "rule" change, preliminary and final site plan approvals must be based on zoning ordinances in effect at the time the application for development is submitted, except for health and safety ordinances, and not those ordinances in effect when the approval is granted. Similarly, a court when reviewing such final site approvals must evaluate them in light of ordinances in effect at the time the application for development was submitted and not the time court is making its decision. Conversely, N.J.S.A. 40:55D-10.5 dictates that whenever a safety or health ordinance is at issue, a local agency must apply such ordinance to its review of the application for development, and a court must apply such ordinance to its review of the agency decision made with regard to that application.

In this way, N.J.S.A. 40:55D-10.5 directed the trial court, consistent with N.J.S.A. 40:55D-49(a) and N.J.S.A. 40:55D-52(a), to apply the safety zoning ordinances in effect at the time it was asked to determine whether final site approval protects Shipyard from compliance with Z-263 and Z-264 (which were enacted after Shipyard received final approval but before it has even applied for a building permit). Because sections 49(a) and 52(a) do not protect holders of site approvals from ordinances

relating to health and safety, the trial court when reviewing such approvals was required, pursuant to N.J.S.A. 40:55D-10.5 to apply Z-263 and Z-264 to Shipyards' proposed development, and not the ordinances in effect at the time its application for development was submitted nor final approval of the development application was granted.

In short, the language of N.J.S.A. 40:55D-10.5 makes clear that the Legislature intended to grant a developer the right to have its application reviewed and decided based on business regulations, including zoning requirements, existing at the time the application was submitted **at any time during the development process.** The language also makes clear that the Legislature did not intend to protect a holder of such right from application of health and safety ordinances existing at the time it secures a site plan approval or at the time a court reviews such decision. As such, the trial court erred when it found that N.J.S.A. 40:55D-10.5 had no bearing on its determination of whether Shipyard's final site approval secured in July 2012 prohibits Hoboken from applying Z-264 to Shipyard's Monarch project. It therefore should be reversed.

CONCLUSION

For all the foregoing reasons, the trial court's grant of summary judgment in favor of Shipyard must be reversed and its Order, dated October 17, 2017 vacated. Z-263 and Z-264 are valid safety ordinances. Hoboken may apply them to Shipyard's Monarch project, despite its grant of final site plan approval in July, 2012.

Respectfully submitted,

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Appendix VII

New Jersey Judiciary
Superior Court - Appellate Division
Civil Case Information Statement

Please type or clearly print all information.

Title in Full	Trial Court or Agency Docket Number
Shipyard Associates L.P. v. City of Hoboken, Hudson Tea Bldg. Condominium Association, and Fund for Better Waterfront.	HUD-L-1308-16

• Attach additional sheets as necessary for any information below.

Appellant's Attorney Email Address: cmiller@mfhenvlaw

☐ Plaintiff ■ Defendant ☐ Other (Specify)

Name	Client			
Christopher Miller, Mariziti Falcon, LLP	City of Hoboken			
Street Address	**City**	**State**	**Zip**	**Telephone Number**
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Respondent's Attorney* Email Address: steinhagen_pilc@yahoo.com

Name	Client			
NJ Appleseed PILC; Eastern Environmental Law Center	Fund for Better Waterfront			
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* Indicate which parties, if any, did not participate below or were no longer parties to the action at the time of entry of the judgment or decision being appealed.

Give Date and Summary of Judgment, Order, or Decision Being Appealed and Attach a Copy:

In an Order, dated October 17, 2017, the trial court granted Shipyard Associates, L.P.'s summary judgment motion as to Counts IV and V, dismissing all remaining counts of the Complaint as moot, and denying City of Hoboken's, Fund for Better Waterfront's and Hudson Tea Bldg. Condo Assoc.'s respective cross-motions for summary judgment as to those same counts.

Are there any claims against any party below, either in this or a consolidated action, which have not been disposed of, including counterclaims, cross-claims, third-party claims and applications for counsel fees? ☐ Yes ■ No

If so, has the order been properly certified as final pursuant to *R.* 4:42-2? (If not, leave to appeal must be sought. *R.* 2:2-4,2:5-6) ☐ Yes ☐ No

(If the order has been certified, attach, together with a copy of the order, a copy of the complaint or any other relevant pleadings and a brief explanation as to why the order qualified for certification pursuant to *R.* 4:42-2.)

Were any claims dismissed without prejudice? ☐ Yes ■ No

If so, explain and indicate any agreement between the parties concerning future disposition of those claims.

Is the validity of a statute, regulation, executive order, franchise or constitutional provision of this State being questioned? (*R.* 2:5-1(h)) ☐ Yes ■ No

Give a Brief Statement of the Facts and Procedural History:

In December 2013, following numerous hearings and reports, Hoboken adopted two flood damage prevention safety ordinances, the terms of which preclude, among other things, the construction of Shipyard's proposed high-rise residential development on a reconstructed pier. Initially, Shipyard filed a complaint in federal court challenging the constitutionality of Z-263 and Z-264, additionally asserting several state claims. The complaint was voluntarily dismissed and re-filed in state court on March 28, 2016, without its federal claims. On August 30, 2017, Shipyard filed a partial summary judgment motion asserting that the safety ordinances do not apply to its project since the Superior Court had granted final automatic approval as of July 2012 in separate litigation and had refused to apply such ordinances that were in effect at the time of the court's decision. Defendants filed cross-motions for partial summary judgment alleging that the MLUL's exception for health and safety ordinances must be applied at this time despite the grant of final approval. On 10/17/17, the court granted Shipyard's motion and denied defendants' motion.

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