SHIPYARD ASSOCIATES, L.P.,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A4504-14T3
Plaintiff/Respondent,	Civil Action
-vs.-	On Appeal From: Law Division, Hudson County
HOBOKEN PLANNING BOARD, and HUDSON TEA BUILDINGS CONDOMIUM ASSOCIATION,	Docket No. HUD-L-4157-12
Defendants/Appellants.	Sat Below: Hon. Nesle A. Rodriguez, J.S.C.

APPELLATE BRIEF OF AMICUS FUND FOR A BETTER WATERFRONT

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FBW'S STATEMENT OF INTEREST

The Fund for Better Waterfront ("FBW") is a New Jersey 501(c)(3) nonprofit organization, with its principal office located at Neumann Leathers Building, 300 Observer Highway in Hoboken. FBW currently has approximately 200 active supporters, and since its early years (approximately 25 years ago), FBW and its supporters have been engaged specifically in advocacy to enhance the public's access to the Hudson River within the City of Hoboken.

FBW was a party in the trial court decision now on appeal in City of Hoboken v. Shipyard Associates, L.P., Docket No.-004637-14. It sought intervention in that matter because it had been intimately involved in the public planning processes related to Shipyard's development of an 1160-residential unit planned unit development on the Hudson River Waterfront (in 1996-1997), which included recreation improvements on Hoboken's North Pier. In accord with its longstanding advocacy for a continuous, public waterfront park, FBW desired to support the City of Hoboken's efforts to enforce Shipyard's 1997 agreement with the City to rebuild the North Pier as open space, including tennis courts, a tennis pavilion and a public walkway.

Indeed, FBW's involvement with Shipyard's development at the site pre-dated 1996. In 1994, the Coalition for a Better Waterfront ("CBW"), (which included FBW) successfully sued the

Hoboken Planning Board, the City of Hoboken Planning Board, City of Hoboken, and Shipyard with respect to its original application to build a large supermarket at Shipyard's property on the Hudson River waterfront. (Docket No. HUD-L-7651-94). On April 27, 1995, Judge Gallipoli decided in favor of the plaintiffs rendering the Planning Board's variances null and void. Again, in 1995-1996, CBW challenged zoning amendments adopted by the City of Hoboken that it contended were designed to accommodate the Shipyard Project (Docket No. HUD-L-8453-95). In a decision dated July 9, 1998, Judge Seymour Margulies ruled in favor of the defendants; a decision that was upheld by the Appellate Division. Also in 1998, CBW, represented by the Rutgers Environmental Law Clinic, challenged a waterfront permit granted to Shipyard by the New Jersey Department of Environmental Protection. This appeal was decided on Oct. 20, 1998 in favor of Shipyard. Finally, in 2000, FBW challenged Shipyard's application before the Hoboken Planning Board for a North Pier townhouse development on Block 264.1, Lot 1 and Block 264.2, Lot 1. This was a proposed addition to the approved 1160-unit planned unit development noted in the previous paragraph. After FBW sent a letter to the Planning Board listing numerous violations with the State's Residential Site Improvement Standards, Shipyard withdrew its application.

Pursuant to its mission, FBW has not only been an active public participant in the municipal planning processes governing Shipyard's planned unit development ("PUD") on the Hudson River waterfront, but also it has been actively engaged in supporting municipal and federal efforts to respond to the flooding issues Hoboken faces due to climate change, which is implicated in this matter.

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. Most importantly, it has been an active supporter of Hoboken's Flood Damage Prevention, Open Space and Recreation Ordinances, which are jeopardized by the trial court's action herein.

This appeal, Shipyard Associates, L.P., v. Hoboken Planning Board, A-4504-14T3, involves the application of the relevant automatic approval statute, despite the fact that Hoboken had enacted specific health and safety flood prevention ordinances prohibiting all residential construction on Hoboken piers after Shipyard had filed its site applications for the Monarch project

with both Hoboken and Hudson County Planning Boards. Furthermore, the trial court applied the automatic approval statute even though the application before the planning board was in fact not complete, Shipyard had refused to bring its dispute with the Planning Board over the need for variances to the Board of Adjustment for resolution, and there were no planning board hearings on the amended application in which FBW or other members of the public could comment and otherwise participate. Open space, recreational space and a continuous walkway on the Hoboken waterfront are integral components of FBW's mission, and Shipyard's amended application with respect to the final PUD property lot puts all three at risk. Accordingly, this appeal raises legal and policy issues of significant public importance, and FBW has a strong interest in being heard by the Appellate Division.

Because of FBW's expertise and previous involvement in the planning processes governing development of the Hoboken waterfront generally and the Shipyard PUD more specifically, FBW is able to assist the court in resolving whether the trial court appropriately applied the automatic approval statute under the circumstances presented in this case.

PRELIMINARY STATEMENT

This matter constitutes Part Two of a three-part saga in which the public stands bewildered as to how the courts have granted Shipyard approval of its amended application to build the Monarch Project on a development site that since at least 1997 has been understood by the public to be slated for development exclusively as open and recreational space. In this case, the trial court misapplied the lessons and holding of Amerada Hess Corp. v. Burlington County Planning Bd, 195 N.J. 616 (2008) (hereinafter "Amerada Hess Corp.") to convert a reasonable determination by the Planning Board and its counsel (even if it is ultimately determined to be wrong) that it lacked jurisdiction to hear the amended application into a cynical "failure to hold a hearing." (HTSa1144). The Board's decision to **deny** the application without prejudice due to its expressed lack of jurisdiction constitutes requisite action under N.J.S.A. 50:44-61, and does not support a judicial grant of default approval; if the Board was mistaken about its lack of jurisdiction, the remedy was remand, not approval.

In addition, despite the Planning Board's October 13, 2011, resolution deeming Shipyard's amended site plan application complete (HTSa1454), the record is replete with letters from the Board's Planning and Engineer Consultants indicating that the application was indeed "not complete," and that variances were

required and calculations and other check-list items needed to revised. In fact, the record demonstrates that at the time the Planning Board denied the application without prejudice on July 10, 2012, it had come around to agreeing with the conclusion articulated by its planner, Eileen F. Banyra, in a letter dated just four days earlier that the application remained incomplete. (Ja1912-1925). Because an incomplete application is not entitled to any consideration on the merits, the public interest weighs against default approval. Default approval of an arguably incomplete application (due to the applicant's failure to apply for required variances, submit all required calculations and provide other information requested) is not a risk contemplated by the Legislature in enacting the default approval statutes, and was accordingly an inappropriate remedy herein.

Moreover, the trial court's initial perfunctory dismissal (given more serious consideration only upon reconsideration) of Hoboken's, and the Planning Board's assertion that the Monarch Project, as set forth in its application, posed serious risks to the public's safety cannot be countenanced. The Supreme Court in Amerada Hess Corp. never contemplated the application of the default approval statutes under such circumstances. Whether this application falls within the limited "public health and welfare" exception briefly discussed in Amerada Hess Corp. or the MLUL's

"health and public safety" exception to the time of submission (of the development application) rule is less important than the fact that under either legal theory, the Monarch Project cannot be approved on its merits. In addition to documents presented to the trial court by the City of Hoboken upon reconsideration, professional reports, conference proceedings, state coastal management rules, federal flood hazard maps and other articles pertaining to flooding that have been posted on FBW's website support Hoboken's adoption of its Flood Damage Prevention, Open Space and Recreation Ordinances. (FBWa1-4) Application of such Ordinances requires rejection of Shipyard's amended application for Block G, which calls for residential development strictly prohibited by such Ordinances, and enforcement of its original commitments.

PROCEDURAL HISTORY

FBW restates and incorporates the procedural history of this litigation as set forth in Appellant's Brief on Behalf of the Hoboken Planning Board ("HPB") (HPB Br. at 6-12).

STATEMENT OF FACTS

FBW restates and incorporates the facts pertaining to HPB's handling of this matter as set forth Appellant's Brief on Behalf of HPB (HPBb13-21). In particular, FBW would like to (i) clarify that Block G is not "bounded by Fourteenth and Fifteen Streets," but is north of Fifteenth Street, as is the platform ("North

Pier")that is situated "perpendicular to the subject site" (HTSa1513) and is also not "located on 14th Street" (HPBb13);[1] and, (ii) highlight the nature of that pier.

Block G does not meet the requirements of a development block, as defined by Hoboken's Ord. §196-6B (FBWa7i), because it is not bounded by existing public streets or any streets created in accordance with the Urban Design Review Guidelines, applicable to all planned developments. (§196.27.1)(FBWa13). See also HTSa1490 (Engineer Report to HPD stating, "[a]s designed, the area . . . does not meet the criteria for street for Chapter 196 Development Block consideration."). Accordingly, once the design guidelines were adopted in 1995, Hoboken never contemplated such pier to be a residential development platform (HPBb13 n.2); see also HTSa1511 (Hoboken planner states, "From the PUD's inception [in 1996] Block G has been represented as open space with three regulation tennis courts, a one-story tennis pavilion and 44 surface parking spaces.").

STATUTORY FRAMEWORK

This appeal questions the validity of the trial court's application of the Municipal Land Use Law's ("MLUL") concept of

[1] "The applicant proposes to repair and rehabilitate an existing pier . . . [that] is located at the northeast corner of Hoboken, NJ extending into Weehawken Cove and situated approximately 800-feet north from the intersection of Shipyard Lane and Sinatra Drive" (Ja643). Such platform/pier herein referred to as the North Pier runs parallel to the Hudson River.

default or automatic approval to an amended preliminary site plan application and final site application for one component, Block G, of a previously approved PUD (Ja1864-1881); both of which were denied by the HPB, without prejudice.

Pursuant to Hoboken Ordinance §44-106, (hereinafter, "Hob. Ord.") HPB must determine whether an application is complete within 45 days of the date of submission. "If the application lacks required information, documents or fees, . . . the applicant shall be notified . . . and the application shall be deemed incomplete." (FBWa5) In accord with Hob. Ord. §196-26 (Site Plan Review), detailed checklists are provided, and prior to an application being deemed complete, an applicant must ensure that "items in the checklist have been provided," architectural and engineering plans and calculations are both technically complete and in conformance with all City ordinances, and any variances or waivers sought have been requested in writing. Id. at §196-26(B). (FBWa9-11). Where site plan review is conducted concurrently with applications for a variance or a planned development, as is the case herein, public hearings and notice are required pursuant to N.J.S.A. 40:55D-12 (Id. at §196-26(B)(5))(FBWa10); and such notice of the hearing on the application for development shall include reference to the request for variances required by the Planning Board. N.J.S.A. 40:55D-60(c). Disputes about whether a variance from

the zoning ordinance is required should be resolved by the Board of Adjustment, which is authorized to resolve challenges to the interpretation of a zoning ordinance. N.J.S.A. 40:55D-70b (authorizing boards of adjustment to hear and decide requests for interpretation of the zoning map or ordinance). Furthermore, in considering and approving site plans, HPB is required to "take into consideration the public health, safety and general welfare, and the comfort and convenience of the general public." Id. at §196-26E. (FBWa12).

Hob. Ord. §44-107 sets forth the time limitations imposed upon the HPB in which it must act: with respect to site plan applications, HPD must grant or deny its approval within 95 days of the date on which an applicant has submitted a complete application in accord with N.J.S.A. 40:55D-46, or within 120 days if the application involves a request for a 'c' variance. N.J.S.A. 40:55D-61; (FBWa5-7). Planning boards may secure further time in which to act if the applicant consents. In this matter, the applicant agreed that the 120-day framework applied, despite its continuing refusal to submit a separate application for any variances or pay the required fees. (*e.g.*, HTSa1535).

The MLUL also sets forth a set of notice and publication procedures that must be followed by applicants who claim approval by reason of a municipality's failure to render a decision in a timely fashion. N.J.S.A. 40:55D-10.4.

In general, under the MLUL, "development regulations which are in effect on the date of submission of an application for development shall govern the review of that application . . . and any decision made with regard to that application." N.J.S.A. 40:55D-10.5. However, that same provision explicitly exempts ordinances and regulations "relating to health and public safety." Such measures, if enacted subsequent to the date of submission of a development application, nonetheless apply. Id.

Subsequent to Shipyard's application of its amended site application in August 2011, but prior to the trial court's Order, dated February 4, 2014, granting approval of that development application, Hoboken enacted Ordinances Z-263 and Z-264, prohibiting the construction of residential housing on all piers within the City. (HTSa1351-1373). These Ordinances were adopted in response to Hurricane Sandy, relied upon several reports sponsored by the City, and sought to satisfy more stringent FEMA standards for coastal high hazard flood areas (such as the "V Zone" in which Block G and the North Pier are located),[2] protect Hoboken residents from higher insurance rates, and mitigate against future hurricane and storm impacts. (Hoboken Br. at 32- 33).

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[2] See also. N.J. COASTAL ZONE MANAGEMENT RULES, N.J.A.C. 7:7-9.18 (b) (where, "[r]esidential development, including hotels and motels, is prohibited in coastal high hazard areas except for single family and duplex infill developments that meet [certain] standards.")

LEGAL ARGUMENT

When reviewing a trial court's decision where the court has reviewed municipal action or inaction, the Appellate Division is bound by the same standards as was the trial court. Fallone Properties, LLC v. Bethlehem Township Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004)(citations omitted). That is, the court must interpret the governing municipal ordinance *de novo*, at the same time that it must give substantial deference to the agency's findings of fact (to the extent that they are grounded in evidence in the record). Id. at 562. A board's determination of whether an application is complete is entitled to this presumption of validity, which is "normally accorded such administrative actions." Eastampton Center, LLC v. Planning Board of the Twp. of Eastampton, 354 N.J. Super. 171, 192 (App. Div. 2002)

In this way, the court's review in land use matters is a *de novo* review on the record established in the preceding municipal proceedings, Price v. Himeji, LLC., 214 N.J. 263, 296 (2013); and grant of an approval which follows from failure of the board to act within the required time limits, is not subject to a presumption of correctness. See Lizak v. Faria, 96 N.J. 482, 498 (1984), cited in, Cox & Koenig, New Jersey Zoning & Land Use Administration (GANN, 2015) §42-3.1 at 896. Pursuant to this standard of review, the trial court's decision to grant default

approval based on the record in this matter is clearly erroneous and must be reversed.

I. AS A MATTER OF LAW, DEFAULT APPROVAL IS NOT AN APPROPRIATE REMEDY WHEN THE LOCAL PLANNING BOARD DENIES AN APPLICATION FOR LACK OF JURISDICTION IN A TIMELY MANNER.

In the present case, the trial court granted default (commonly referred to as automatic approval) of Shipyard's amended preliminary application for an amended preliminary and final site plan application for one component, Block G, of a previously approved PUD (Ja1864-1881), despite the Planning Board's reasonable determination that it did not have jurisdiction to hear the amended application on its merits. Specifically, the trial court stated:

> By raising the jurisdiction issue --- which is more appropriate for determination as to the completeness of an application --- and ignoring a statutory requirement [N.J.S.A. 40:55D-22] to hear the matter, the practical effect of a request for a temporary withdrawal, a dismissal, or a denial without prejudice, is that the Planning Board has granted itself an extension of time.
> (HTSa1455)

Based on an erroneous assumption that the Board's jurisdiction is related to the completeness of the application, and that questions of jurisdiction can be waived (or determined at a hearing on the merits), the trial court then proceeded to conclude that to allow the Planning Board "to deny a complete application to await judicial clarification" of its jurisdiction

over Shipyard's amended application would be no different than permitting it "to contrive determinations that 'end-run around' the strict application of the statutory timetable, in direct contravention to the Amerada Hess decision." (HTSa1457).

This decision is wrong as a matter of law. Cf. Allied Realty, Ltd. v. Borough of Saddle River, 221 N.J. Super. 407 (App. Div. 1987), certif. denied, 110 N.J. 304 (1988) (where Appellate Division reversed planning board's conclusion that *res judicata* barred review of second application, but held that its denial was reasonable and precluded application of default approval statute). The question of the completeness of an application is not tied to the jurisdiction of the Planning Board.[3] And, where a board's expressed lack of jurisdiction is reasonable and without bad faith, even if ultimately proved to be wrong, there is no legal or factual justification for default approval. See Tanenbaum v. Wall Bd. of Adjustment, 407 N.J. Super. 371 (App. Div. 2009)(where court affirmed planning board's decision that it did not have jurisdiction to determine

[3] Compare Eastampton Center, LLC v. Planning Bd. of the Twp. of Eastampton, supra., 354 N.J. Super. at 171 where planning board's inaction stemmed from its belief that the application was incomplete, the trial judge's grant of automatic approval reversed) with Cicchine v. Township of Woodbridge, 413 N.J. Super. 393, 403 (Law Div. 2010)(holding that a board is "divested of jurisdiction" to modify a prior action that is the subject of an appeal, absent a remand despite the fact that the board accepted and processed a second, amended application for minor subdivision and bulk variances; automatic approval denied).

density variance, even though it was responsible for approving development in *Mt. Laurel* zones). If the board is mistaken about its lack of jurisdiction, the remedy is remand, not approval. Tanenbaum at 461 (citing TWC Realty v. Zoning Bd. of Adjust., 315 N.J. Super. 205, 224-225 (Law Div. 1998), aff'd o.b. 321 N.J. Super. 216 (App. Div. 1999)).

In its January 23, 2014 decision, the trial court characterized the Planning Board's justification for denying (without prejudice) Shipyard's amended application without first holding a hearing on the merits as stemming from three concerns. (HTSa1446). The first two asserted that the Board did not have jurisdiction to hear the amended application, and the third, concerning "variances," raised an issue of completeness and proper notice (which will be addressed in Point II, infra.) See also Ja238-248 (Hob. Pl. Bd. Res., dated August 7, 2012).

The two jurisdictional concerns were intimately related to the question of whether Hoboken and the Planning Board could enforce the 1997 Developers Agreement (Ja43-70); that is, whether Shipyard even had the right to amend its previously approved preliminary and final site plan for Block G - the last component to be developed in its PUD. The Planning Board, a party to the Agreement made a determination that it (i) could not proceed without the consent of the City "as documented in a written Amendment to the Agreement that has been signed by all

parties" (Ja240), and (ii) could not proceed when the enforceability of the Developers Agreement and the question of whether Shipyard was permitted to file an amended site plan application was before the Superior Court. (Ja241-242). The first basis - lack of consent to amend - places this matter within the ambit of Allied Realty, Ltd. v. Borough of Saddle River, 221 N.J. Super. at 407 (where board denied on the basis of *res judicata* without a hearing on the merits); and the second basis - pending litigation of application for same property - renders the holding in Cicchine v. Township of Woodbridge, 413 N.J. Super. at 403 (where planning board "divested of jurisdiction" to hear an amended application while the merits of the initial application were being litigated in the Superior Court, absent a remand) applicable as well. Seen through the lens of either precedent, the Planning Board's denial of Shipyard's amended application does not constitute "inaction" for purposes of N.J.S.A. 40:55d-61, and default approval does not apply.

Not only did the trial court err when it found that the Board's decision not to hold a hearing on the merits triggered N.J.S.A. 40:55d-61,[4] but it also erred when it insisted on

[4] N.J.S.A. 40:55d-61 reads in part,

> Whenever an application for approval of a subdivision plat, site plan or conditional use includes a request for relief pursuant to section 47 of this act, the

applying N.J.S.A. 40:55D-22(a) to the facts herein without properly analyzing the intent of such provision. Pursuant to N.J.S.A. 40:55D-22(a) (Conditional Approvals), a municipal board is required to process a development application in accordance with the MLUL, "in the event . . . [that such] development is barred or prevented, directly or indirectly, by a legal action instituted by any State agency, political subdivision or other party to protect the public health and welfare . . .." And, if such application satisfies municipal development regulations it should be approved "conditioned on removal of such legal barrier to development." Id.

It is puzzling to FBW, how the court could deem Hoboken's litigation against Shipyard, in which FBW intervened, "legal action instituted [directly]. . . to protect the public health and welfare." As noted above, the litigation sought to compel Shipyard to complete its PUD in accord with its initial 1997 approvals, prevent Shipyard from submitting an amended development application for Block G, and prevent the Planning Board from processing that application without Hoboken's consent. Such legal action is not the type of legal action contemplated by N.J.S.A. 40:55D-22(a). Hoboken's legal action

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planning board shall grant or deny approval of the application within 120 days after submission by a developer of a complete application . . . (emphasis added)

challenged the Planning Board's jurisdiction to decide whether the amended application complied with local development regulations; it did not seek to prevent the construction or operation of such development due to public health and safety concerns **extraneous to those same regulations**. The trial court seemed to ignore this distinction, and continued to insist that the Planning Board's jurisdictional justifications for denial were spurious and adopted in bad faith.

This conclusion that the Planning Board's denial for lack of jurisdiction was not reasonable and was undertaken solely for purposes of delay is further undermined by Judge Arre's opinion in A-004637-14T3 (which was available to Judge Rodriguez). In his June 21, 2013 decision, Judge Arre held that it was not the court's role to determine, in the first instance, whether Shipyard had met its burden to establish sufficient change in circumstances to avoid an order compelling it to perform in accord with the terms of the Developer's Agreement; he noted, "that the proper determination as to whether changed circumstances exist . . . rests with the Planning Board." (Ja1501:T49-18 to 50-6). In this way, Judge Arre held that Shipyard was entitled to a hearing on changed circumstances before the Planning Board, not a hearing on the merits of its amended application. He did not state or imply that absent changed circumstances, Shipyard would be entitled to proceed

with its amended application without Hoboken's and the Planning Board's written consent, nor that the Planning Board would be required to hold a hearing on the merits of that application. In other words, he did not decide that the Planning Board's denial of jurisdiction over the amended application was meritless, unreasonable or even wrong; he simply held that the Planning Board had to give Shipyard the opportunity to establish changed circumstances before the 1997 Resolution and the Developer's Agreement could be given preclusive effect. Cf. Allied Realty, Ltd. v. Borough of Saddle River, 221 N.J. Super. at 407 (holding that *res judicata* did not necessarily bar review of the application and the planning board had to provide applicant with an opportunity to demonstrate a change in circumstances).

Because circumstances similar to those in Allied Realty, Ltd. exist in this case, the Planning Board's denial on the basis of lack of jurisdiction must also be deemed reasonable, even if not correct with respect for the need for Hoboken's consent. As the Appellate Court stated in Allied Realty, Ltd.,

> We, nevertheless, point out that the Board was of the view that it had rendered a final determination on Allied's application and the matter had concluded. Our careful reading of the record convinces us that the Board's belief in that respect was entirely reasonable under the circumstances.
> (Id. at 418-41)

Despite the Appellate Court's further conclusion that the board's "entirely reasonable" belief regarding the reviewability of the application was mistaken, it declined to apply the automatic approval statute. Instead, the court "remanded for further proceedings consistent with [its] opinion. Id. at 420. See also Manalapan Holding Co. v. Planning Bd. of the Twp. of Hamilton, 92 N.J. 466, 480 (1983), rev'g 184 N.J.Super. 99 (App. Div. 1982) (holding that failure to timely act on an application is excusable when the board is "operating under an understandable misconception of law.").

Similarly, once Judge Arre's decision was rendered and there was no litigation regarding the enforceability of the Developers Agreement with respect to Block G pending in the Superior Court, the trial court in this matter should have remanded this case for a hearing on changed circumstances. Application of the automatic approval mechanism to the facts of this case simply does not advance the legislative purpose behind the default approval statute - *i.e.*, to avoid deliberate delay; rather, "the remedy of automatic approval under the circumstances here would be disproportionately weighed against the public interest" Id. at 419-420.

II. AUTOMATIC APPROVAL STATUTE IS NOT APPLICABLE WHEN APPLICATION, THOUGH DEEMED COMPLETE BY PLANNING BOARD, IS NOT IN FACT COMPLETE AND RAISES SIGNIFICANT HEALTH AND SAFETY ISSUES.

A clear picture emerges from the record: Shipyard was intent on steamrolling its amended application through the planning board process without a full public review of the merits of its application. First, demanding a default determination of "completeness," despite timely reports issued by Hoboken's Board's Planning and Engineer Consultants indicating that the application was indeed "not complete"; and then suing for default approval to avoid seeking the variance relief and providing the calculation and check-list revisions required by such Planner. There is little doubt that there was growing hostility to the Monarch Project, among both City officials and Hoboken residents so that Shipyard likely desired to avoid a public hearing; but, automatic approval of an incomplete application, especially a project that raises compelling issues of public safety that should and, most appropriately, could have been addressed by the municipal planning board, is not a valid way to by-pass public review.

A. Record Indicates that Shipyard's Application Was Incomplete At of Date Hearing Was Scheduled.

In its decision, the trial court noted,

> A determination of the necessity of a variance, particularly when the applicant and the municipal entity have taken opposing views, is best suited for a

> hearing on the merits. More importantly, the Planning Board has not cited a rule, case or statute supporting its proposition that this type of application deficiency or disagreement is a legitimate reason to avoid automatic approval.
> (HTSa1460)

FBW agrees with the trial court that the "necessity of a variance" when the applicant and the municipal agency, often the Zoning Officer, disagree "is best suited for a hearing on the merits." However, we do not agree with the court's implicit conclusion that the Planning Board was the appropriate entity to hear such dispute. As Hoboken's Planner and counsel for the Planning Board stated several times to Shipyard each time Shipyard made a new submission, and the Planning Board responded, "N.J.S.A. 40:55D-70(b) vests the Zoning Board of Adjustment with sole and exclusive jurisdiction to render interpretations of the zoning ordinance. The Planning Board does not have jurisdiction to render [such] determinations." (HTSa1537); see also (Ja244)(Hob. Pl. Bd. Res., dated August 7, 2012); DePetro v. Twp. of Wayne Planning Bd., 367 N.J. Super. 161 (App. Div.), certif. denied 181 N.J. 544)(2004)(holding that statutory functions of the Planning Board are enumerated and they do not include resolution of a challenge to the interpretation of an ordinance). It therefore follows that Shipyard had to satisfy the Planning Board's determination that certain variances were required unless the Board of Adjustment

decided otherwise. Given that Shipyard declined to pursue an application for an interpretation with the Board of Adjustment, refused to amend its pending application and file an appropriate application requesting variance relief (and pay the required escrow fees), and failed to specify the "statutory basis for the variance relief requested" in writing, as required by Hoboken's Site Plan Application (Ja1869) and Hob. Ord. §196-26(B),[5] its application remained incomplete. See also Hob. Ord. §44-106(B)("If the application lacks required information, documents or fees, . . . the applicant shall be notified . . . and the application shall be deemed incomplete."). (FBWa5). A careful review of the record supports this conclusion.[6]

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[5] Hob. Ord. §196-26(B) states, in part: "The applicant must . . . provide all appropriate attachments called for by the checklist in addition to the completed application form and applicable fees. . . . The initial submittal will be reviewed by the Board professionals to insure that proper administrative and escrow fees have been posted, that the items required in the checklist have been provided, and that the architectural and engineering plans and calculations are technically complete and in conformance with City ordinances. Applicant must specifically request, in writing, any variances and/or waivers being sought." (emphasis added) (FBWa5)

[6] The failure to submit to the Planning Board sufficient information on which it can base its decision -- the issue of completeness -- is different than, but related in this matter to the Planning Board's position that "the Public Hearing Notices that were published and mailed for Shipyard's proceedings before the Planning Board on July 10, 2012" were deficient. (Ja244). Shipyard's statement in that Notice expressing its intent to "seek[] variances, waivers and other relief as may be required by the Board," does not adequately inform the public so as to enable informed participation in the public review of the

The MLUL provision on completeness of a site plan application, or incompleteness as the case may be, is relatively clear-cut. See N.J.S.A. 40:55D-10.3. If "the application lacks information "on the "checklist" adopted by ordinance and the Planning professionals notify the applicant of the deficiencies" within 45 days of submission, the application shall not be deemed complete. Id. In this case, both planning board professionals - Eileen F. Banyra, PP, AICP, and Andrew Hipolit, P.E., --- wrote detailed reports dated October 7, 2011 specifying why Shipyard's application was incomplete. (HTSa1511-1528). Mr. Hipolit's twelve-page letter was sent to Shipyard's counsel electronically (HTSa1528), and it is not clear from the record when Shipyard received Ms. Banyra's six-page memorandum. The Planning Board received that memo on October 11, 2011 (HTSa1511), two days past October 9, 2011, which was the 45th day from Shipyard's August 25, 2011 application submission. Notwithstanding these timely dated communications that raised significant issues of completeness, (see HTSa1513-1515), the Planning Board on October 13, 2011 "passed a resolution deeming Shipyard's application complete" pursuant to N.J.S.A. 40:55D-10.3's default provision. From the public's perspective, this resolution set the application off on seriously wrong path.

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application. (FBWa16-17). Similarly, incomplete applications impede public participation as well.

On December 9, 2011, Shipyard submitted revised plans and information set in direct response "to the checklist items and substantive issues" raised in Ms. Banyra's October 7, 2011, "completeness memo." (FBW3626). On December 26, 2011, Ms. Banyra set a letter to Shipyard's planner/engineer, Mr. Wuestneck, PE, PP, "remind[ing]" him that at least one variance had been identified, and that he should "amend [Shipyard's] application to identify the variance and submit the appropriate variance application and related fees." (HTSa1529). In a report, dated February 17, 2012, Ms. Banyra provided the first "comprehensive planning review of the project" based on the "zoning ordinance, revised plans and information set submitted and dated December 9, 2011." (FBWa19). She again raised serious substantive issues with the application, noted calculation deficiencies and requested "additional documentation/verification" of several changed items (including "easements, residential floor area, public parking and design changes to the waterfront walkway and street") "since these changes represent potential variances as outlined elsewhere in the report." Id. See 2/17/12 Report (FBWa18-33).

In a letter dated April 12, 2011, counsel for the Planning Board informed Shipyard's counsel that "[n]either the Planning Board nor its professionals have received Shipyard's revised development plans as of yet which makes it impossible to

determine whether the five variances noted in Ms. Banyra's February 17th planner's review letter are still required." (HTSa1537). In this letter, Mr. Morgan further told Shipyard that it should either resolve the variance issue with Ms. Banyra "to make sure that its application . . . otherwise complies with the City variance application and public notice requirements" or bring a challenge to her determination before the Zoning Board. (HTSa1538). It did neither.

On May 24, 2012, Shipyard again submitted revised plans and information, and in her report dated July 6, 2012, Ms. Banyra again reported substantial disagreement that in effect rendered the application incomplete. The report states, "there is still disagreement regarding the definition of development block and the resulting variances which has muddled the application and all of the resulting calculations." (Ja1912). Furthermore, Ms. Banyra identified several areas where the applicant had not provided "sufficient detail to show compliance' with sections of the Urban Design Guidelines or Building Façade Ordinance (Ja1915), accurate calculations regarding the "Development Block" and "Gross Area Use (Ja1919), or even the listing of satisfaction of certain conditions of approval that was required by ordinance. (Ja1925) - all of which implicated checklist items. Because planning professionals retained by the Hoboken Planning Board are authorized to determine completeness under

Hob. Ord. §196-26, Ms. Banyra's determination is entitled to deference. See Eastampton Center, LLC v. Planning Board of Twp. of Eastampton, supra., 354 N.J. Super. at 171 (finding that board was entitled to take a strict view of the elements required to deem plaintiff's application complete thus deserving "presumption of validity"). Nonetheless, the trial judge ignored the record in this case, and simply endorsed Shipyard's position that its site plan application was **in fact** complete as of October 13, 2013, simply because the Board had bowed to Shipyard's demand to apply the default statute, and had deemed the application complete months earlier in the process. Obviously, by the time of the July 10th hearing, the Planning Board shared its planner's assessment of Shipyard's application; finding Shipyard's insistence that its application is "variance free" an important factor in declining to proceed with a hearing on the merits. (Ja244).

Because an incomplete application is not entitled to any consideration on the merits, the public interest weighs against default approval. Eastampton Center, LLC v. Planning Board of Twp. of Eastampton, supra., 354 N.J. Super. at 195. Default approval of an arguably incomplete application (due to the applicant's failure to apply for required variances, submit all required calculations and provide other information requested) is not a risk contemplated by the Legislature in enacting the

default approval statutes, and was accordingly an inappropriate remedy herein. Ibid. at 196 (noting that the legislature did not intend that a good faith error in determining the completeness of an application or the procedural requisites for completeness justifies automatic approval). As the Appellate Division said in Eastampton Center, LLC, "had plaintiff's GDP application properly been found complete by default, the appropriate remedy would have been to remand to the Board for consideration of the application on its merits," not approval. Id.

B. Residential Construction on Northern Pier In Lieu Of Previously Planned Open and Recreational Space Negatively Impacts Public Welfare.

In her initial decision, Judge Rodriguez scornfully dismissed the Planning Board's assertion that compelling safety concerns rendered default approval in this matter inappropriate. (HTSa1460-1461). In her second opinion, she partially reversed course, by finding that the City's Report, entitled *Flood Hazard Risk and Compliance Concerning Developments on Piers and Platforms, City of Hoboken, Hudson County, NJ,* (Ja1638-1686), "raises specific dangers facing potential riverfront pier developments," thus "present[ing] a more compelling issue of safety than the traffic concerns of *Amerada Hess*." (Ja1764). Nonetheless, despite her finding that potential flood issues in Hoboken presented a compelling issue of safety, she held, that

the City had "failed to demonstrate that other government oversight will not satisfy" those concerns. (Ja1766). The court's reasoning on this latter point is less than convincing.

In addition to the approximately 200 pages presented by the City of Hoboken to the court on Hoboken's flooding risk, (see Ja1529-1727), numerous articles written by FBW's Executive Director and other source materials pertaining to Hoboken's flooding problems attest that the Monarch Project implicates serious public safety concerns that must be resolved by the municipality prior to approval of the project. A list of those materials is included in FBW's Appendix (FBWa1-4). See e.g., Hine, R., "Gov. Christie vetoes bill risking flood insurance eligibility for Hudson River municipalities,"(August 20, 2013)(quoted Union of Concerned Scientists that praised Christie of "putting the safety and welfare of New Jersey residents and the long-term viability of coastal communities ahead of narrow short-term economic interests")(FBWa35);Hine, R., "Politics trumps public safety as NJ Assembly Committee ignores testimony on A3933," June 11, 2013 (noting that Hoboken's amended flood ordinances were enacted "in order to protect the public's health and safety" by prohibiting building over the Hudson River on piers and platforms)(FBWa38-41);Hine, R., "Monarch Towers now in FEMA's Coastal High Hazard Zone," (February 9, 2013)(noting that NJ's "current policy allowing non-water dependent residential

development on piers . . . is ripe for change)(FBWa42-44); and, Hine, R., "12-Point Plan in preparation for the Next Sandy" (November 20, 2012)(noting that FBW will pursue a 12-Point Plan, "in cooperation with the government, experts and local citizens, in an effort to diminish the impact of the next, inevitable storm")(FBWa45-48). There is little doubt that such public safety concerns would be central to the Planning Board's consideration of Shipyard's application and the attendant public hearings held regarding the project, even if Hoboken had not enacted Post-Hurricane Sandy zoning measures; for this reason alone, automatic approval is inappropriate.

The fact that there was never a public hearing at which time the flood risk posed by the proposed development project was debated, let alone resolved, weighs against automatic approval. See e.g., Eastampton Center, LLC v. Planning Board of Twp. of Eastampton, supra., 354 N.J. Super. at 196 (where the public interest with respect to the impact of such a planned development heavily outweighed automatic approval based upon the board's arguably late determination): D'Anna v. Planning Bd. of Washington Twp., 256 N.J. Super. 78, 84 (App. Div. 1992)(rejecting automatic approval when "matters vital to the public health and welfare . . . must be resolved before preliminary approval is granted," where Board did not act in bad faith). In Manalapan, the New Jersey Supreme Court recognized

the "public's interest in and the municipality's right to hold a public hearing." Manalapan Holding Co.v. Planning Bd. of the Twp. of Hamilton, supra., 92 N.J. at 480. The public's interest in "preserving the opportunity for a public hearing on a preliminary subdivision application" was again acknowledged by the same court in Amerada Hess Corp., when discussing and quoting its previous decision in Manalapan. Amerada Hess Corp., supra., 195 N.J. at 631. Indeed, in several cases where automatic approval was upheld, public hearings (at which time community members had the opportunity to participate) had been held, and the offending governmental inaction came after those hearings had occurred. See e.g., Amerada Hess Corp., 195 N.J. at 624-25)(public hearings were held by the Township which considered same project as County Board); South Plainfield Properties, L.P. v. Middlesex County Planning Bd., 372 N.J. 410, 466-467 (App. Div. 2004)(major site plan and subdivision applications submitted to municipal and county boards concurrently approved by municipal board within statutory time frame after public hearing). Similarly, in several cases where the trial court granted automatic approval, but the appellate court reversed that decision, public hearings had been held on the application. See e.g., Fallone Properties, LLC., supra., 369 N.J. Super. at 567 (public hearing on the merits of plaintiff's cluster plan application were held over the course

of two days); Precision Industrial Design Co. v. Beckwith, 185 N.J. Super., 9, 12 (App. Div. 1982)(Planning Board conducted hearings on the application on three days). Accordingly, despite Manalapan's warning that "we would not anticipate that in the future, even under a similar pattern of conduct, would a public hearing upon a preliminary subdivision application still remain available one the statutory periods for municipal action had expired," (Manalapan Holding Co.v. Planning Bd. of the Twp. of Hamilton, supra., 92 N.J. at 482), Amicus has not found one reported New Jersey decision in which automatic approval has been granted when the public did not have the opportunity to be heard, let alone a case where such a significant safety issue, as here, was at stake.

The trial court's holding that "[t]he present case does not present an issue of safety that will not be captured by another agency" because, "at the absolute minimum, emerging flood related safety issues associated with the project will be addressed in the City's appeal before the NJDEP and in [Shipyard's] application for a construction permit," ignores the central role that the Planning Board would play in conducting a public hearing on these issues. (Ja1767). Neither the construction officer nor the DEP conducts a public hearing prior to issuing either a construction permit or waterfront development permit, respectively. Moreover, in this case, it is

highly unlikely that Hoboken's Construction Officer would have the authority to refuse to issue a construction permit for a residential project once it is approved by the Planning Board.

The court's speculation that the Appellate Division may find DEP's issuance of waterfront development permit pre-hurricane Sandy arbitrary and capricious also misses the policy justifications for the Amerada Hess Corp. "public health and welfare" exception to automatic approval. Because NJDEP issued the relevant permit prior to Shipyard's submission of its Monarch Project Application, it is simply not an agency that will deal with the flood issues posed by the project post-approval. In addition, since the City's, FBW's and Hudson Tea Buildings' requests for an adjudicatory hearing to appeal that permit were denied, (FBWa49-64), there will never be a hearing on such issues in which members of the public may participate.

It therefore follows that even if the Planning Board misunderstood its obligation to hear the application despite its findings of no jurisdiction and application incompleteness, automatic approval should not have been granted prior to a public hearing at which time the Planning Board could consider the public safety issues raised by the project, and the public could have the opportunity to express its concerns on such issues as well. Under these circumstances, significant safety concerns implicated by the proposed residential project clearly

outweigh the Legislature's intent to compel board adherence to strict time limits even when faced with a complete development application; which was not the case herein.

III. THE COURT FAILED, AS A MATTER OF LAW, TO APPLY THE TIME OF DECISION RULE AT THE TIME IT RENDERED ITS DEFAULT APPROVAL DECISION.

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 and "any decision" made with respect to that application. (emphasis added). 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 interests against the developer's interest in protection against a change in use requirements --- and determined that when health and public safety ordinances are involved, the "time of decision rule" serves a beneficial purpose and thus applies; not the "time of application rule."

Notwithstanding this legislative decision, the trial court

held that the time of decision rule was "not applicable to this case." (Ja1772). The Court did not reach its decision by denying that Z-263 (Ja1792-1808) and Z-264 (Ja1810-1815), Hoboken's Flood Damage Prevention, Open Space and Recreation Ordinances, enacted on December 20, 2013 and January 8, 2014, respectively, constituted "health and public safety" ordinances.[7] Rather, the trial court determined that the time of decision rule applied to the Planning Board's default approval of the application in July 2012 (when the Board allegedly failed to act by not holding a hearing); not when the court determined, in February 2014 (and again in May 2014), that the default statues actually applied to Shipyard's application for development. (Ja1773). This holding wrongly assumes that the default provisions of the MLUL are automatic or self-executing, and seriously misunderstands the application of the time of decision principle in the context of land use matters.

Pursuant to N.J.S.A. 40:55D-10.4 (Procedures for applicants claiming approval by reason of municipal failure to act), default approval does not simply occur when the statutory time limit to deny or approve an application occurs. An applicant must first provide notice of the default approval to the Planning Board and to the public through the official newspaper

[7] See Mayor Zimmer's memorandum to the City Council, dated September 12, 2013, stating that the purpose of the Ordinances was, among other things, to reduce safety hazards. (Ja1818).

of the municipality. The applicant must then file an affidavit of proof of service and publication with the appropriate administrative officer and request that officer to issue whatever permits or certificates are necessary for the approval. Id. If such officer refuses to issue the requested certificates, the applicant must file a prerogative writ action in the Superior Court (which Shipyard did herein) requesting the "the court to issue the same." Cicchine v. Twp. of Woodbridge, supra., 413 N.J. Super. at 403-404. Therefore, it is not until the administrative officer issues the requisite certificates, or a court determines that the default statute applies (and issues those same certificates) that the application can be deemed "approved." In this way, if a court finds that an application should have been approved by virtue of the default provisions of the MLUL, the time of decision rule applies to the court's determination, and not the board's inaction or the clerk's refusal to issue certificates necessary to effectuate the approval.[8]

This conclusion is supported by the N.J. Supreme Court's

[8] It should be noted that counsel for the Planning Board has reviewed "all previous documents submitted to all Courts and could not locate a publication of a notice of default or evidence of a submission to the administrative officer of an affidavit of proof of service and publication." (HPBb62). Accordingly, Shipyard is also not entitled to a default approval due to its failure to follow the statute's procedural prerequisites. Cicchine v. Twp. of Woodbridge, supra., 413 N.J. Super. at 400.

decision in Kruvant v. Mayor and Council of Cedar Grove Twp., 82 N.J. 435, 440 (1980), quoted in, Eastampton Center, LLC v. Planning Board of Twp. of Eastampton, supra., 354 N.J. Super. at 197 (stating that "under the time-of-decision rule, an appellate court may apply the statute and/or ordinance in effect at the time of its decision, 'at least when the legislature intended that its modification be retroactive to pending cases.'"). In Kruvant, the N.J. Supreme Court explained 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. Kruvant v. Mayor and Council of Cedar Grove Twp., supra., 82 N.J. at 442 (citations omitted). In the context of N.J.S.A. 40:55D-10.5, this legal conclusion is the only one that makes sense as a matter of public policy as well.

For example, let us create an analogous situation by picturing a train in motion, and a conductor who, after the train has left the station, is faced with new track rules that could impact the proper operation of his train. He stops to decide what to do in consultation with his supervisor, but they then decide to continue forward because the supervisor determines that the conductor was implicitly given approval by inaction to operate his train before the new track rules went into effect. The new rules, however, were explicitly put in

place to protect passengers and the public against significant health and safety risks. At the time the supervisor decides that the conductor was previously given approval by inaction, the supervisor should be compelled to consider the new rules, as a matter of public policy. Otherwise, courts and municipal agencies would never be able to stop a train wreck in the making, even if they are aware of new public safety rules at the time they make their decision.

With this analogy in mind, it is safe to say that the trial court erred as a matter of law and policy when it failed to apply the time of decision rule to this matter, and failed to take into consideration Z-263 and Z-264, the prevailing ordinances at the time it granted Shipyard's request for automatic approval. Had the trial court followed the Legislature's directive on this issue, it would have denied Shipyard's application to construct the Monarch Project on Hoboken's waterfront because, at the time of its decision, such residential construction was prohibited.

CONCLUSION

For all the foregoing reasons, Judge Rodriguez's deeply flawed decision must be reversed. First, the trial court's finding that the Planning Board's decision that it lacked jurisdiction was wrong is erroneous, because N.J.S.A. 40:55D-22(a) does not apply to the facts in this case. Second, the court's conversion of the Board's reasonable decision to deny Shipyard's application without prejudice (pending determination of its jurisdiction to hear the matter, and completion of the application in accord with its Planner's directives to revise calculations and seek variance relief) into inaction, because it did not hold a hearing on the merits of the application is also wrong as a matter of law. Third, the court's decision to nonetheless approve the application despite significant changes to the applicable zoning ordinances, which would prohibit residential construction for public safety reasons, further compounds the errors in this decision.

The upshot of Part I and Part II of this saga is that Shipyard is, at best, entitled to a hearing on changed circumstances, not a hearing on the merits of its application to build the Monarch Project. Default approval is simply not appropriate in this case, and the matter should be remanded for a hearing on whether Shipyard should even be permitted to file an amended application for Block G, let alone an application for

residential construction. Furthermore, FBW and the residents of Hoboken deserve an opportunity to participate in such a hearing, since the future of a significant portion of the waterfront and the safety of their City is at stake.

Respectfully submitted,

NEW JERSEY APPLESEED PILC

Dated; February 3, 2016

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On behalf of Amicus FBW