SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO. ESX-L-008631-17

PLANEWARK, BUTTON FACTORY CONDOMINIUM ASSOCIATION, INC., ALEIX MARTINEZ, MADELINE RUIZ, LISA SANDERS, Plaintiffs, v. MUNICIPAL COUNCIL OF THE CITY OF NEWARK, NEWARK CENTRAL PLANNING BOARD, KENNETH LOUIS, in his official Capacity as City Clerk of the City of Newark, Defendants.	CIVIL ACTION

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON COUNTS I, III, AND IV

Renée Steinhagen, Esq.
Jorge A. Sanchez, Esq.
NEW JERSEY APPLESEED
Public Interest Law Center
50 Park Place, Rm. 1025
Newark, New Jersey 07102

Attorneys for Plaintiffs

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, Rules and Regulations:

Other Authorities:

PRELIMINARY STATEMENT

The City of Newark, through its Mayor, Municipal Council and Central Planning Board, have started to reinstate the City's lamentable, past pattern of regulating development in the City through rezoning (and redevelopment plans) without the necessary deference to the City's Master Plan -- a plan that was adopted in 2012 after a lengthy and comprehensive review process that involved numerous stakeholders throughout the City. In this case, this lack of deference to the goals and objectives of the Master Plan has been accentuated by the Defendants' perfunctory regard for the procedural requirements of the Municipal Land Use Law (MLUL), and minimal regard, if not disdain, for the desires of the residents living adjacent to the relevant area east of Penn Station (the "Rezoned Area" or "District") and within the broader community. Plaintiffs' Complaint was filed to hold the City of Newark accountable and demand that it follows the procedures required by the MLUL and principles of fundamental fairness; and ultimately, to compel the City to maintain the 2015 zoning regulations applicable to the District or to rezone it only in a manner that is consistent with the vision set forth in the 2012 Master Plan.

Plaintiffs, along with hundreds of other Newark residents, attended Municipal Council meetings, Central Planning Board hearings and a community meeting where the predecessor of

Ordinance No. 17-1437 -- i.e., Ordinance No. 17-1131 -- was discussed (the "Reclassification Ordinance"). Nonetheless, throughout the process, Plaintiffs and other Newark residents were not given the opportunity to cross-examine the City's Planner regarding his recommendations to modify the Reclassification Ordinance (as originally proposed) or review the Planning Board's Resolution regarding that Ordinance, on which the City Council allegedly relied when it adopted Ordinance No. 17-1437. Instead, the public was consistently met by a governing body and Central Planning Board members, who appeared to have a predetermined bias to proceed with the zoning change regardless of what Plaintiffs and other members of the community had to say.

Plaintiffs, some of whom did not receive the statutory notice of the Council meeting at which the Reclassification Ordinance was adopted, assert that based on the undisputed facts in this case, they are entitled to summary judgment on Counts I ("Substantial Inconsistency with Master Plan" claim), III ("Failure to Give Statutory Notice to All Owners" claim) and IV ("Failure to Permit Cross-Examination of Planner Testimony" claim) of their Complaint.[1] As a result, this Court should

[1]Count II ("Arbitrary Spot Zoning") is not ripe for adjudication because both the Planning Board and the Municipal Council have not responded to Plaintiffs' discovery request for documents relevant to Defendants' decision-making.

declare Ordinance No. 17-1437 invalid *ab initio*, and, at minimum, require the Municipal Council to state on the record its reasons for enacting a zoning ordinance that is inconsistent with the 2012 Master Plan thereby forcing the Mayor and Municipal Council to acknowledge that they are ramming a zoning ordinance down the throats of their constituents that is not in accord with the community's vision for the Rezoned Area located in the Ironbound.

STATEMENT OF FACTS

The facts as set forth in Plaintiffs' Statement of Undisputed Material Facts ("SUMF"), which are restated and incorporated herein, are based on the Certifications of Jerome L. Eben, FAIA, PP ("Eben Cert."), Aleix Martinez ("Martinez Cert.") Lisa Sanders ("Sanders Cert.") and Lisa Scorsolini, Esq. ("Scorsolini Cert.") They are, in summary, as follows.

The Master Plan for the City of Newark was adopted in September 2012. SUMF, ¶5. This was followed three years later, in 2015, with a comprehensive Zoning Ordinance that zoned the relevant District as R-5 in accord with the Master Plan's recommended R-MM classification. SUMF, ¶13.

Pursuant to regulations applicable to R-5, the largest permitted Building Type is the "Mid-rise Multifamily," which, in addition to the 8-story maximum height, also requires 60 percent maximum lot coverage, and a minimum lot area per dwelling unit

of 350 SF. "High-rise Multifamily" is not permitted in the R-5 zone. SUMF, ¶14. The R-5 classification is consistent with the goals and objectives set forth in the Master Plan with respect to transit-oriented development and the particular, local character of the Ironbound neighborhood. SUMF, ¶¶6-11.

With respect to the 2017 rezoning effort, the Municipal Council first introduced proposed Ordinance 17-1131 at its June 21, 2017 Council meeting, and referred it to the Central Planning Board for review pursuant to Resolution No. 7R20-G. The purpose of Ordinance 17-1131 was to create an MX-3 zone, which "would blend high density residential and commercial uses." SUMF, ¶15, Eben Cert., ¶27. In contrast to the R-5 zone, the MX-3 zone permits the "High-rise Multifamily" Building Type. This building type permits a maximum of 20 stories in height and a minimum lot area per dwelling unit of 300 SF. The minimum building transparency for the primary façade is set at 40%, 10% less than otherwise required for such Building Type. SUMF, ¶27. In addition, the proposed Ordinance lessens restrictions for bulk and design standards for the "Ground Floor Commercial with Commercial or Residential above" Building Type. SUMF, ¶28. Specifically, in the MX-3 zone, buildings of this type are permitted a maximum of 12 stories, and a minimum lot area per dwelling unit of 130 SF. SUMF, ¶28. Furthermore, a developer intending to build a residential building that would be

permitted 60% lot coverage in the R-5 zone could just add ground floor commercial space and then be allowed 85% lot coverage in the MX-3 zone. SUMF, ¶28.

Five days after the proposed Ordinance was introduced, the Central Planning Board held a hearing on June 26, 2017 to determine the consistency of Ordinance 17-1311 with the 2012 Master Plan. SUMF, ¶16. Over 100 people attended and people were permitted to state their opposition. SUMF, ¶17. It appears that Board members were overwhelmed by the number of people attending the meeting; realizing the enormous opposition to the proposed change, the Board deferred its decision until a community meeting could be held between the Newark Department of Economic Development and community residents. SUMF, ¶18. Such meeting was held on July 6, 2017, and again numerous people spoke in opposition to the Reclassification Ordinance noting its inconsistency with the Master Plan. SUMF, ¶¶19-21.

On July 24, 2017, the Central Planning Board held another hearing. Stating that this was merely a continuation of the previous hearing, Board members did not permit the public to participate. SUMF, ¶23. Notwithstanding, the Board heard testimony from the City's Planning consultant, Mr. Fred Heyer, who appeared and made suggestions on how to revise Ordinance 17-1131. SUMF, ¶22. Mr. Heyer's testimony created confusion as to what the proposed Reclassification Ordinance actually said.

Members of PLANewark and others who attended were neither permitted to cross-examine Mr. Heyer, challenge his conclusions nor ask the Board questions to flesh out why Mr. Heyer now seemed to be testifying that "with changes" the Reclassification Ordinance would be consistent with the Master Plan. SUMF, ¶23.

A Memorialization Resolution was produced by the Planning Board and certified by Paul L. Oliver, Co-Chair of the Planning Board that same night, dated July 24, 2017. SUMF, ¶26, Eben Cert., ¶24. The Resolution states: "While the MX-3 Zone ordinance may advance portions of the Master Plan, it is proposing a development density, height, and mix of uses that differ in some ways from the vision put forth in the Plan's Land Use Element." SUMF, ¶26. This Resolution that was apparently prepared prior to the hearing was not shared with the public for their review and comment. SUMF, ¶25.

On August 2, 2017, the Municipal Council introduced a revised zoning ordinance, Ordinance 17-1437, No. 6PsF-C, for first reading. SUMF, ¶30. It did not, however, refer Ordinance 17-1437 to the Central Planning Board for its review. On September 6, 2017, PLANewark submitted a protest petition to the City Clerk pursuant to N.J.S.A. 40:55D-63, which was supplemented on October 3, 2017. SUMF, ¶¶31-32. On October 4, 2017, the Council held its second reading of proposed Ordinance 17-1437. At that meeting, members of the public were permitted

to speak for three (3) minutes; but based on comments from members of the governing body, it is clear that such comments had no impact on their decision. See Transcript of 10/4/17 City Council hearing. At the conclusion of the public comment period, the Municipal Council adopted Ordinance 17-1437, No. 6PsF-C, without acknowledging its substantial inconsistency with the Land Use element of the 2012 Master Plan. SUMF, ¶34 On October 10, 2017, the Mayor signed Ordinance 17-1437. SUMF, ¶33.

PROCEDURAL HISTORY

On November 27, 2017, Plaintiffs filed a Complaint in Lieu of Prerogative Writ asserting four claims, two against the Municipal Council, one against the Central Planning Board, and one against the Newark Municipal Clerk, Kenneth Louis. The Complaint was personally served on all three parties the following day. On February 28, 2018, the Planning Board filed an Answer. Soon thereafter, Plaintiffs served a Request for Documents on the Planning Board. On May 9, 2018, Plaintiffs filed Proof of Service with the Court.

The following day, outside counsel for the City of Newark asked for a "5-day extension" to respond to Plaintiffs' Complaint. Immediately upon such notification, Plaintiffs served the same Request for Documents on the Municipal Council and City Clerk that it had served on the Planning Board. On May 29, 2018, six months after Plaintiffs' filed their Complaint,

Ms. Shabazz-Charles filed an Answer with the court on behalf of the Municipal Council and the Mayor, but not the City Clerk.

On June 19, 2018, Assistant Corporation Counsel for the City of Newark produced documents responsive to Plaintiffs' discovery request, which were in the control and possession of the City Clerk. In an Order dated June 22, 2018, this Court dismissed the City Clerk, Mr. Kenneth Louis, as a party to this action for failure to prosecute. On June 28, 2018, Plaintiffs filed a Motion to Restore the City Clerk as a defendant in this action and to enter default on him. At this date, such motion is pending.

Plaintiffs now file this motion for summary judgment on Counts I, III and IV of their Complaint, with a return date of August 31, 2018.

LEGAL ARGUMENT

A party may move for summary judgment under R. 4:46-2, which states, in pertinent part, that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2. On a summary judgment motion, the Court must inquire "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided

that one party must prevail as a matter of law." Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 536 (1995). The purpose of the summary judgment procedure is, with proper adherence to the rules, to avoid trials that would serve no useful purpose and to afford deserving litigants immediate relief. Warthen v. Toms River Community Memorial Hospital, 199 N.J. Super. 18, 23 (App. Div. 1985) certif. denied, 101 N.J. 255 (1985).

In this case, the material facts are not in dispute. The City Clerk did not send out proper notice to all owners entitled to receive such notice, the Central Planning Board did not permit members of the public to question and counter the City Planner's testimony; and the Municipal Council did not acknowledge that the Reclassification Ordinance it adopted was substantially inconsistent with the Land Use Plan Element of the 2012 Master Plan. Accordingly, as a matter of law, Plaintiffs' motion for summary judgment as to Counts I, III and IV of their Complaint must be granted.

I. THE PROCEDURAL REQUIREMENTS OF THE MUNICIPAL LAND USE LAW MUST BE RIGOROUSLY ADHERED TO AND IMPLEMENTED.

On this motion for summary judgment, Plaintiffs assert that this Court should invalidate Ordinance 17-1437, No. 6PsF-C, because all three Defendants committed procedural violations, either of the MLUL or the dictates of the principles of

administrative due process and fundamental fairness. One can anticipate that the Municipal Council, the City Clerk and the Central Planning Board will allege that they have done no wrong and that this Complaint should be dismissed. Plaintiffs disagree and have presented undisputed factual evidence that justifies the Court granting their partial summary judgment motion and declaring Ordinance 17-1437, No. 6PsF-C, void *ab initio*.

There is little doubt that although a court's role with respect to the power to zone is generally limited, a court may declare an ordinance invalid if in enacting the ordinance the municipality has not complied with the requirements of the statute. Taxpayer Ass'n of Weymouth Township v. Weynouth Township, 80 N.J. 6, 21 (1976). See also Mahwah Realty v. Tp. of Mahwah 430 N.J. Super. 247, 259 (App. Div. 2013)(noting the obligation of the court to view planning and zoning determinations generally, including zoning ordinances, with understanding that municipalities must act "in strict conformance with the MLUL."). A zoning ordinance must not only advance one of the purposes of the MLUL as set forth in N.J.S.A. 40:55D-2, it must also be "substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements," N.J.S.A. 40:55D-62, unless the procedural requirements of that provision are otherwise satisfied. Furthermore, the ordinance must be

adopted in accordance with other statutory and municipal procedural requirements, including stringent notice requirements and a prerequisite that the zoning ordinance be referred to the planning board for its review in accord with N.J.S.A. 40:55D-26. See, e.g., Route 15 Assoc. v. Jefferson Township, 187 N.J. Super. 481 (App. Div. 1982)(citing several cases where the zoning ordinance was invalidated because it was adopted in violation of procedural requirements); Pop Realty Corp. v. Springfield Bd. of Adjustment, 176 N.J. Super. 441, 454 (Law Div. 1980)(stating that attempts to exercise local zoning power in contravention to procedural requirements contained in MLUL have been considered ultra vires or a denial of due process.)

Taken together, the statutory mandate that a zoning ordinance be "substantially consistent" with the Master Plan and the statutory directives that the governing body explain its reasons for adopting an inconsistent ordinance and the Planning Board note such inconsistencies in a report to the municipality are all designed to preclude the governing body from acting arbitrarily. Accordingly, courts have typically required municipal actors to strictly adhere to such procedural dictates when adopting a zoning ordinance. There is no reason why such "strict conformance" with the procedural mandates of the MLUL does not apply herein.

II. THE CITY CLERK FAILED TO SEND THE STATUTORILY REQUIRED NOTICE TO ALL OWNERS ENTITLED TO RECEIVE SUCH NOTICE PURSUANT TO N.J.S.A. 40:55D-62.1

The City Clerk's failure to provide notice under N.J.S.A. 40: 55D-62.1 to all property owners that were entitled to receive such notice renders his actions insufficient and invalid.[2] As a result of such deficiency, Ordinance 17-1437 in turn is rendered invalid and a nullity.

It is axiomatic that notice must be given to property owners within 200 feet of property subject to development. N.J.S.A. 40:55D-12. A governing body is **also** required to provide notice to property owners when it undertakes a periodic review of its Master Plan under N.J.S.A. 40:55D-13, and to property owners within a district when a governing body proposes a classification or boundary change. N.J.S.A. 40:55D-62.1; see also N.J.S.A. 40:55D-63, N.J.S.A. 40:55D-62.1 specifically directs that **all** property owners within a zoning district shall receive personal notice if the municipal body seeks to change the classification or boundaries of a zoning district. N.J.S.A. 40:55D-62.1 provides in pertinent part:

> Notice of a hearing on an amendment to the zoning ordinance proposing a change to the

[2] At the time of this filing, Plaintiffs do not know whether the court has restored the City Clerk, Mr. Kenneth Louis, as a defendant to this action and has entered default against him pursuant to our Motion filed June 28, 2018. Accordingly, we are arguing the merits of the claim against him assuming that he will be restored as a party defendant.

> classification or boundaries of a zoning district, exclusive of classification or boundary changes recommended in a periodic general reexamination of the master plan by the planning board pursuant to [N.J.S.A. 40:55D-89], shall be given at least 10 days prior to the hearing by the municipal clerk to the owners of all real property as shown on the current tax duplicates, located, in the case of a classification change, within the district and within the State within 200 feet in all directions of the boundaries of the district, and located, in the case of a boundary change, in the State within 200 feet in all directions of the proposed new boundaries of the district which is the subject of the hearing.
>
> A notice pursuant to this section shall state the date, time and place of the hearing, the nature of the matter to be considered and an identification of the affected zoning districts and proposed boundary changes, if any, by street names, common names or other identifiable landmarks, and by reference to lot and block numbers as shown on the current tax duplicate in the municipal tax assessor's office.
>
> Notice shall be given by: (1) serving a copy thereof on the property owner as shown on the said current tax duplicate, or his agent in charge of the property, or (2) mailing a copy thereof by certified mail and regular mail to the property owner at his address as shown on the said current tax duplicate.

N.J.S.A. 40:55D-62.1.

Additionally, N.J.S.A. 40:55D-62.1 requires that "[n]otice to a condominium association, horizontal property regime, community trust, or homeowners' association, because of its ownership of common elements or areas located within 200 feet of

the boundaries of the district which is subject of the hearing, [] be made in the same manner as to a corporation, in addition to notice to unit owners, co-owners, or homeowners on account of such common elements or areas." Here, it is undisputed that Plaintiffs Lisa Sanders and Aleix Martinez, as well as the Button Factory Condominium Association did not receive the required notice pursuant to N.J.S.A. 44:55D-62.1. See Sanders Cert., ¶3 and ¶6; Martinez Cert., ¶3 and ¶5. See also Scorsolini Cert., ¶24, Ex. G (List of Owners Served by City omitting Plaintiffs). Plaintiffs did not undertake a door-to-door survey so we are unaware if other owners entitled to notice also did not receive same. Nonetheless, as a result of the City's actions known to be deficient, Ordinance 17-1437 should be voided because there are certain property owners, entitled to receive notice, who did not receive the required notice of the zoning amendment.

Not surprisingly, failure to provide notice of the zone change contravenes sound judicial precedent as well; specifically, in cases like the one at issue here where the zoning ordinance dramatically alters the character of a neighborhood. In Robert James Pacilli Homes, L.L.C., the Appellate Division held that:

> Given the breadth and impact on development of real property within each zone, amended

> zoning ordinance, which changed density and bulk standards and increased the amount of open space and greenway land requirements for subdivisions within three residential zones, effected a change of classification within residential zones, and therefore, statutory personal notice to all owners of real property in the affected districts was required; the changes effected within residential zones dramatically altered the intensity of residential use within each zone and promised to affect the character of future development in the zones.

Robert James Pacilli Homes, L.L.C. v. Township of Woolwich, 394 N.J. Super. 319 (App. Div. 2007).

Here, notice of the zone change was required just like in Robert James Pacilli Homes, L.L.C., and was not provided. In Robert James Pacilli Homes, L.L.C., an amendment made "sweeping" changes to the bulk and density requirements in two residential zoning districts and "dramatically altered the intensity of the residential use within each zone and promised to affect the character of the future development in both zones." Id. at 332. The Appellate Division noted "the scope of the changes . . . is illustrated simply by focusing on the maximum gross density per acre," which changed from one unit per two acres under the existing zoning laws and the ordinance's "Option 1" to one unit per ten acres under the ordinance's "Option 2." Ibid. The court ruled that this change "effects a fundamental alteration of the character of this zoning district." Id. at 332. Therefore, "the

Township Committee was required to follow the notice requirements of N.J.S.A. 40:55D-62.1." Id. at 333.

Most recently, in Concerned Citizens of Livingston v. Township of Livingston[3], 2018 N.J. Super Unpub. LEXIS 1356 (June 11, 2018)(attached hereto as Ex. A), the Appellate Division reversed the trial court decision below and found that the underlying zoning amendment, upon which a development applicant relied, was invalid for precisely the same notice deficiencies at issue here. In Concerned Citizens, a group of citizens filed suit in the trial court seeking to overturn the adoption of the ordinance which amended a particular zoning district. Because this action was filed beyond 45-days from the Township's publication of the newly enacted zoning ordinance, the trial court summarily dismissed the appeal as untimely. On appeal, the Appellate Division reversed.

The Appellate Division found that given the breadth of change to the zoning classification, a more onerous notice procedure was required by N.J.S.A. 40:55D-62.1 than the one provided by the municipality. The Appellate Division held that the municipality was required to provide written notice, via personal service or by regular and certified mail, to all

[3] Counsel has conducted a thorough legal search for any available contrary decisions and to date has not found one that would advocate for a contrary legal conclusion than the one posited by Concerned Citizens of Livingston v. Township of Livingston, 2018 N.J. Super Unpub. LEXIS 1356 (June 11, 2018).

property owners entitled to receive notice at least 10 days prior to the hearing at which time the zoning amendment was to be considered. Specifically, such personal notice was to have been provided to all property owners located within the affected district in which the classification change was proposed, and also to all property owners located within 200 feet in all directions of the proposed boundaries of the affected district. Here, it is undisputed that neither Lisa Sanders, Aleix Martinez, nor the Button Factory Condominium Association received proper notice as required by the statute or established case law. The Municipal Clerk was required to send each of them notice via personal service or by regular and certified mail. As such, because no genuine issue of material fact exists as to whether adequate notice was provided to several of the Plaintiffs under N.J.S.A. 40:55D-62.1, the ordinance is void and a nullity.

III. PRINCIPLES OF FUNDAMENTAL FAIRNESS REQUIRE THE PUBLIC TO HAVE AN OPPORTUNITY TO REVIEW, CONTEST AND PROVIDE EVIDENCE BEFORE THE PLANNING BOARD ON THE ISSUE OF SUBSTANTIAL CONSISTENCY.

Plaintiffs also claim that the Central Planning Board violated principles of fundamental fairness and due process when it would not permit Plaintiffs and other members of the public to cross-examine the City Planner, Mr. Heyer, when he testified before the Central Planning Board on July 24, 2017, did not

permit Plaintiffs to challenge his conclusion that certain changes to the Reclassification Ordinance would render that Ordinance consistent with the Master Plan, and question the Board as to what modifications were actually being considered. In addition, the Planning Board did not share its Resolution, including recommendations, with the public, which seemingly were prepared before the hearing was held, depriving them of the opportunity to challenge its conclusions and recommendations.

Pursuant to N.J.S.A. 40:55D-26, the Planning Board, prior to the adoption of a zoning ordinance,

> . . . shall make and transmit to the governing body, within 35 days after referral, a report including identification of any provisions in the proposed development regulation, revision or amendment which are inconsistent with the master plan and recommendations concerning these inconsistencies and any other matters as the board deems appropriate. The governing body, when considering the adoption of a development regulation, revision or amendment thereto, shall review the report of the planning board and may disapprove or change any recommendation by a vote of a majority of its full authorized membership and shall record in its minutes the reasons for not following such recommendation.

Plaintiffs do not dispute that the Planning Board issued its Resolution within 35 days after the City Council referred the Reclassification Ordinance -- Ordinance No. 17-1131 -- to the Board. Plaintiffs also do not claim that the statute explicitly requires the Board to hold a public hearing or accept public comment. See Cox & Koenig, N.J. Zoning & Land Use

Administration §10.-2.1 (GANN, 2018) (speculating that the statute does not require the Board to hold a public hearing because the public is able to make comments before the municipal council upon second reading of a proposed zoning ordinance). However, one should not be able to employ the statute to permit a planning board to prohibit members of the public to cross-examine or challenge testimony given to the board at an open meeting. To do so would be contrary to one of the established goals of the MLUL, which is to encourage public involvement in land-use planning and development, Great Atlantic and Pacific Tea Co. v. Borough of Pt. Pleasant, 137 N.J. 136 (1994); not stymie public questioning and comment.

Notwithstanding the fact that the statute does not explicitly require that the Central Planning Board hold a public meeting, let alone a public hearing with public comment, does not mean that the Planning Board, under the circumstances presented in this case, exercised its discretion reasonably. In fact, Plaintiffs allege that in fact the Planning Board's decision to not allow public questioning and testimony at the July 24, 2017 meeting was arbitrary and capricious and violated the principles of meaningful participation, fundamental fairness and administrative due process. See, e.g., In the Matter of Dept. of Insur. Order Nos. A89-119 and A90-125, 129 N.J. 365, 383 (1992)(core value of review of administrative action is

accountability and so parties must have the opportunity to rebut evidence on which the agency relies); High Horizons Development Co. v. State, Dept. of Transportation, 120 N.J. 40, 50-53(1990)(though no statute required a hearing, when agency decision is quasi-judicial and rests on a factual determination, the public must have the opportunity to cross-examine any evidence presented); Brotherhood of R.R Trainmen v Palmer, 47 N.J. 482, 487-88 (1966)(noting that parties must be given ample opportunity to test the trustworthiness of information or evidence on which an agency's decision is based); In the Matter of Bell Atlantic N.J., Inc., 342 N.J. Super. 439, 444 (App. Div. 2010)(public entitled to hearing to afford them adequate opportunity to test the factual premises of government's proposal and proofs in support thereof; a hearing that "promotes fundamental fairness and fosters the integrity of governmental processes."); N.J. Div. of Youth and Family Services v. M.R., 314 N.J. Super. 390 (App. Div. 1988)(holding that a hearing may be required even where not mandated by statute, the Constitution or the Administrative Procedure Act, but where "fairness" requires that the affected parties be given an opportunity to challenge the evidence on which the administrative agency relied).

Based on the sequence of events in this case, it appears that the Planning Board had already prepared its Resolution,

which included recommendations, by the night of July 24, 2017, and that the Board had no intention of holding a hearing and permitting meaningful participation by any Newark residents; instead, it just wanted to pass a resolution referring the Reclassification Ordinance to the City Council, with recommendations that may or may not have emerged following the July 6, 2017 community meeting the Department of Economic Development had convened in the East Ward after the previous Board hearing on June 26, 2017.

Notwithstanding the Board's decision to decline hearing from the general public, it did accept the testimony of the City's planning consultant, Mr. Fred Heyer. It did not, however, permit members of the public to cross-examine Mr. Heyer nor review any written submission he made to the Board, if any, or challenge any conclusions and recommendations he made during his testimony. In fact, his testimony only created confusion as to what the proposed Ordinance said, and what version of the Ordinance was under discussion. The failure of the Planning Board, under these circumstances, to permit Plaintiffs and other members of the public people to question the planner as to his finding of consistency, to present their own expert testimony, to review all the evidence that the Board was considering when it rendered its Resolution violates the doctrine of fundamental

fairness and administrative due process acknowledged by New Jersey courts.

The lackadaisical adherence to transparency and procedural fairness is apparent. Because Plaintiffs have presented adequate and undisputed facts to support their legal claim against the Planning Board as set forth in Count IV of the Complaint, summary judgment against the Central Planning Board should be granted on such Count.

IV. SUMMARY JUDGEMENT IS APPROPRIATE WHEN THERE IS NO FACTUAL DISPUTE AS TO WHETHER THE PROPOSED ORDINANCE IS SUBSTANTIALLY CONSISTENT OR NOT WITH THE MASTER PLAN.

The heart of Plaintiffs' Complaint is Count I alleging that the Reclassification Ordinance -- Ordinance 17-1437 -- that was adopted by the City of Newark Municipal Council is not substantially consistent with the 2012 Master Plan, and is thus invalid. The requirement that a zoning ordinance be substantially consistent with the Master Plan must be strictly enforced. Riggs v. Long Beach Twp., 109 N.J. 601, 421 (1988)(J. Handler, concurring)(citing to N.J.S.A. 40:55D-62, and stating that if the provision is not satisfied, the courts should declare the ordinance invalid). Similarly, the procedural requirements set forth in N.J.S.A. 40:55D-62 must also be strictly enforced. It can be anticipated that the Newark City Council will assert that it complied with such statute simply because it believed, relying on the recommendations made by the

Planning Board, that Ordinance 17-1437 was substantially consistent with the 2012 Master Plan. Plaintiffs controvert such legal conclusion by presenting the Certification of Mr. Jerome L. Eben, FAIA, PP, a professional planner licensed in this State.

N.J.S.A. 40:55D-62 states in part:

> The governing body may adopt or amend a zoning ordinance . . . Such ordinance shall be adopted after the planning board has adopted the land use plan element and the housing plan element of a master plan, and all of the provisions of such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements; provided that the governing body may adopt a zoning ordinance or amendment or revision thereto which in whole or part is inconsistent with or not designed to effectuate the land use plan element and the housing plan element, but only by affirmative vote of a majority of the full authorized membership of the governing body, with the reasons of the governing body for so acting set forth in a resolution and recorded in its minutes when adopting such a zoning ordinance.

The Courts are clear that the requirement that a governing body expressly acknowledge an ordinances' inconsistency with the municipality's master plan is significant, and that it requires the municipality "to treat the Master Plan with respect and the importance assigned to it by the Legislature." Willoughby v. Wolfsen Group, Inc. 332 N.J. Super. 223, 229 (App. Div.), certif. denied, 165 N.J. 603 (2000). Moreover, the failure of a

planning board to explicitly find such inconsistency, as herein,[4] does not exonerate the responsibility of the governing body to undertake the analysis itself. For if an ordinance is inconsistent with the Master Plan, the municipality's failure to explain why it was appropriate to impose such zoning suggests that its choice was entirely arbitrary. Riya Finnegan LLC v. Twp. Council of Twp. of South Brunswick, 197 N.J. 184, 193 (2008).

Mr. Eben is certain in his conclusion: "Ordinance 17-1437 is substantially inconsistent with Newark's Master Plan. "The main purpose of the Ordinance is to replace the former R-5 zone with the new MX-3 zone. The new zone allows additional building types, greater height limits, less facade transparency, and a greater number of uses than previously permitted." Eben Cert., ¶33. Mr. Eben's analysis details sections of the Master Plan, including the Neighborhood Element of Plan, that are specifically relevant to this District, Eben Cert., ¶¶9-15. In

[4] In its Memorialization Resolution, the Planning Board wrote: "While the MX-3 Zone ordinance may advance portions of the Master Plan, it is proposing a development density, height, and mix of uses that differ in some ways from the vision put forth in the Plan's Land Use Element." Eben Cert., ¶25. Although the Resolution does not employ the phrase "substantially inconsistent," this statement acknowledged that the Reclassification Ordinance did not comport with the Master Plan and thus the Board found it necessary to recommend several changes to it. The Board, however, never explicitly stated that an ordinance that incorporated its suggested changes would be consistent with the Master Plan.

addition, he analyzes specific provisions of the Land Use Plan Element of the Master Plan that Ordinance 17-1437 contradicts. For example, he notes that 2012 Master Plan specifically marked out the area around Penn Station in the Ironbound neighborhood as not suitable for high-rise development over eight (8) stories in height. Eben Cert., ¶¶35-37. Nonetheless, the Reclassification Ordinance permits a height limit of 12-stories for mixed commercial/residential buildings and 20-stories for "High-rise Multifamily" buildings-- a building type that the Master Plan explicitly declared as unsuitable for this Rezoned Area. Ibid. He notes that the new Ordinance also significantly decreases "minimum lot area per dwelling unit" resulting in densities three times as great as that recommended in Newark's Master Plan for residential buildings in the R-MM zone. Eben Cert., ¶38. Moreover, reduced transparency requirements within the MX-3 zone, and the introduction of a number of new uses not specified as appropriate for the this District are now permitted, such as Data Centers and Light Manufacturing. Together, these new regulations render Ordinance 17-1437 substantially inconsistent with the Master Plan insofar as they have significantly changed the character of the Rezone Area. Eben Cert. ¶¶39-40.

In Manalapan Realty v. Twp. Committee of Manalapan, 140 N.J. 366 (1995), the New Jersey Supreme Court adopted the common

sense meaning of the term "substantial" and held that the concept of "substantially consistent" permits some inconsistency, provided such inconsistency does not "undermine or distort the basic provisions and objectives of the Master Plan." Id. at 384. In accord with this definition, several courts have found that zoning ordinances that materially change the character of an area, undermine specific goals set forth in the Master Plan for the rezoned area and/or conflict with the designated zoning in the land use plan element of a master plan render it substantially inconsistent for purposes of N.J.S.A. 40:55D-62. See e.g., Willoughby v. Planning Bd. of Township of Deptford, 326 N.J. Super. 158, 163 (App. Div. 1999)(where Board's designation of certain property in the land use element of the Master Plan as Office Campus was designed to protect residential development, court found such goal endangered by Board's rezoning of such property as Town Center); East Mill Assoc. v. Twp. Council of East Brunswick, 241 N.J. Super. 402 (App. Div. 1990)(requiring "contemporaneous debate" rather than "post-hoc rationalizations" explaining inconsistency with Master Plan, when Township rezoned an O-1 zone permitting apartment dwellings up to a density of 9 units per acre into a R-3 zone that allowed single family dwellings with a density of only 2 units per acre). On the other hand, a new zoning ordinance that does not alter the character of the zone is not inconsistent.

E.g., Hartz Mt. Indus. v. Planning Bd. of Ridgewood Park, 2001 N.J. Super. Unpub. LEXIS 18 (where Master Plan contemplated zone as an office park and it essentially remained an office park)(attached hereto as Ex. B).

As explained in detail in Mr. Eben's Certification, Ordinance 17-1437 changed a mid-rise residential zone into a high density, high-rise mixed residential/commercial zone. Such change is not minor or a bit more of the same thing. Instead, it constitutes a new vision of the Rezoned Area that is substantially inconsistent with the Land Use Plan Element of the 2012 Master Plan as a matter of fact and law.

The reclassification of the R-5 (Mid-Rise Multifamily Residential) to the MX-3 (High Density Mixed Residential and Commercial Use) is a real, material and significant change that is contrary to the goals and objectives of the City's 2012 Master Plan with respect to the Rezoned Area in the Ironbound. Accordingly, this court may resolve this claim on a motion for summary judgment, and a plenary hearing is not required.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment against the City Clerk, Newark Central Planning Board and Newark Municipal Council must be granted and Ordinance 17-1437 shall be declared null and void *ab initio*. The City of Newark must restart the rezoning process: First, by referring

Ordinance 17-1437, as currently drafted, to the Planning Board to issue a report regarding the consistency of that Ordinance with the Master Plan; second, by requiring the Central Planning Board to permit members of the public to present or contest evidence or testimony regarding the consistency of the Ordinance with the Master Plan; thirdly, by requiring the City Clerk to notify all property owners entitled to receive notice with respect to a reclassification zoning ordinance; and, finally and most importantly, by requiring the Municipal Council to explain its basis for adopting Ordinance 17-1437 that is substantially inconsistent with the Master Plan of 2012.

Respectfully submitted,

Date: August 1, 2018

RENÉE STEINHAGEN, ESQ.

/s/ Jorge Sanchez

JORGE SANCHEZ, ESQ.

EXHIBIT A

Concerned Citizens of Livingston v. Township of Livingston

Superior Court of New Jersey, Appellate Division

September 26, 2017, Argued; June 11, 2018, Decided

DOCKET NO. A-4171-15T3

Reporter
2018 N.J. Super. Unpub. LEXIS 1356 *; 2018 WL 2923482

CONCERNED CITIZENS OF LIVINGSTON, Plaintiff-Appellant, v. TOWNSHIP OF LIVINGSTON, LIVINGSTON TOWNSHIP COUNCIL, and PLANNING BOARD OF LIVINGSTON, Defendants-Respondents, and SUNRISE DEVELOPMENT, INC., Defendant/Intervenor-Respondent.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-2171-16.

Core Terms

Ordinance, notice, zone, feet, enlargement, property owner, changes, trial court, municipal, assisted living facility, zoning district, classification, maximum, residential, requirements, density, personal notice, days, public interest, setbacks, mail, forty-five, acres, proposed ordinance, conditional use, lot size, per acre, designation, building height, redevelopment

Counsel: Charles X. Gormally argued the cause for appellant (Brach Eichler, LLC, attorneys; Charles X. Gormally, of counsel and on the brief; Autumn M. McCourt, on the briefs).

James T. Bryce argued the cause for respondents (Murphy McKeon, PC, attorneys; James T. Bryce, on the brief).

Paul H. Schneider argued the cause for intervenor-respondent (Giordano, Halleran & Ciesla, PC, attorneys; Paul H. Schneider, of counsel and on the brief; Matthew N. Fiorovanti, on the brief).

Judges: Before Judges Carroll and Leone.

Opinion

PER CURIAM

Plaintiff Concerned Citizens of Livingston appeals from a May 10, 2016 order dismissing its complaint challenging the notice given concerning zoning ordinance 22-2015 (Ordinance) of defendant Township of Livingston (Township). The trial court dismissed the complaint as untimely under *Rule* 4:69-6(a). We agree with the court that notice was fatally deficient because the Ordinance changed the classification of the zone. We also agree that the complaint was filed beyond the rule's time period. However, we find the fatal notice deficiency justified an enlargement of time under Rule 4:69-6(c). Accordingly, we affirm in part, [*2] reverse in part, and remand.

I.

Plaintiff filed a verified complaint, stating plaintiff is a representational plaintiff comprised of residents of Livingston living within 200 feet of a particular lot (Lot) as well as residents living beyond 200 feet who are impacted by the Ordinance. Plaintiff claimed that, prior to the adoption of the Ordinance, the Township's zoning ordinances prohibited the development of an assisted living facility on the Lot. Plaintiff alleged the Ordinance was passed to enable intervenor Sunrise Development, Inc. (Sunrise) to build an assisted living facility on the Lot.

At its September 24, 2015 meeting, defendant Planning Board of the Township of Livingston (Board) recommended the proposed Ordinance to defendant Livingston Township Council (Council), the Township's governing body. The Council gave published notice of its October 26, 2015 meeting by faxing the agenda to the West Essex Tribune and the Star-Ledger. The agenda stated there was a proposed Ordinance about

"Assisted Living - Conditional Use," and added: "Purpose: Amends Township Code to allow Assisted Living Facilities as a conditional use when certain criteria are met." No other notice was given to [*3] members of the public.

On October 26, the Council introduced the proposed Ordinance for first reading. The Council referred the proposed Ordinance to the Board to determine if the Ordinance was consistent with Livingston's master plan. As discussed below, the Council on October 29, 2015, gave notice only by publication that the Ordinance would be considered for final passage on November 9, 2015. The Council did not provide written notice to property owners within 200 feet of the affected zones.

At its November 3, 2015 meeting, the Board considered the Ordinance. Notice of the meeting was published in the West Essex Tribune and posted on a bulletin board. The Board's agenda simply stated that it was reviewing the Ordinance about "Assisted Living - Conditional Use." No members of the public appeared in connection with the Board's review of the Ordinance. The Board determined the Ordinance about "Assisted Living - Conditional Use" was consistent with the master plan.

On November 9, twelve days after the Ordinance's introduction in the Council, the Council adopted the Ordinance by title only, without reading it publicly. No members of the public appeared or spoke at the Council meeting regarding [*4] the Ordinance. On November 12, 2015, the Township clerk published in the West Essex Tribune a notice simply stating that the Ordinance had been passed on November 9.

On February 2, 2016, the Board held a hearing on Sunrise's application to build an assisted living facility on the Lot. Sunrise concedes its proposal was designed to be consistent with the Ordinance.

On March 31, 2016, plaintiff filed an action against the Township, the Council, and the Board (defendants). The complaint contained three counts, alleging violation of: (1) the notice requirements of *N.J.S.A.* 40:55D-62.1; (2) the prohibition on spot zoning; and (3) the *New Jersey Civil Rights Act (CRA), N.J.S.A.* 10:6-2. The trial court granted plaintiff's request to temporarily restrain the Board from considering Sunrise's application.

The Township filed an answer, and a motion to dismiss count three for failure to state a claim upon which relief can be granted under *Rule* 4:6-2(e). On April 22, 2016, the trial court issued an order granting Sunrise's motion to intervene.

On May 10, 2016, the trial court sua sponte dismissed the entire complaint because it was not filed within forty-five days of the publication of the enacted Ordinance. The court denied plaintiff's oral motion [*5] for a stay. We denied plaintiff's emergent motion seeking a stay pending appeal.

II.

Whether the complaint challenging the Ordinance should have been dismissed as untimely depends in part on whether notice concerning the Ordinance was deficient. Thus, we begin by reviewing the trial court's decision that the notice was fatally deficient.

The notice generally required is set forth in *N.J.S.A.* 40:49-2(a), which provides that, after the first reading, a proposed ordinance

> shall be published in its entirety or by title or by title and summary at least once in a newspaper published and circulated in the municipality, if there be one, and if not in a newspaper printed in the county and circulating in the municipality, together with a notice of the introduction thereof, the time and place when and where it will be further considered for final passage, a clear and concise statement prepared by the clerk of the governing body setting forth the purpose of the ordinance, and the time and place when and where a copy of the ordinance can be obtained without cost by any member of the general public who wants a copy of the ordinance.

After the first reading of the Ordinance, the Council issued a public notice dated October [*6] 29, 2015, published in the West Essex Tribune, which stated the Ordinance had been "introduced and passed on first reading" on October 26, and would be considered for final passage on November 9, 2015, at 8:00 p.m. at the M&PB. The published notice printed the entire Ordinance, whose preamble stated its purpose, and also advised that copies were available at the clerk's office. This complied with *N.J.S.A.* 40:49-2(a).

However, the trial court found that under *Robert James Pacilli Homes, LLC v. Twp. of Woolwich [Pacilli*], 394 N.J. Super. 319, 926 A.2d 412 (App. Div. 2007), "the notice provisions of *N.J.S.A.* 40:55D-62.1 [we]re triggered, requiring certified mail notices to property owners within the affected zones as well as property owners within 200 feet of the affected zones." We agree.

The Municipal Land Use Law (MLUL), *N.J.S.A.* 40:55D-

1 to -163, imposes additional notice requirements for certain ordinances. *N.J.S.A.* 40:55D-62.1 "directs that all property owners within a zoning district shall receive personal notice if the municipal body seeks to change the classification or boundaries of a zoning district." *Pacilli*, 394 N.J. Super. at 329; *see Grabowsky v. Twp. of Montclair*, 221 N.J. 536, 558-59, 115 A.3d 815 (2015). The statute provides:

> *Notice of a hearing on an amendment to the zoning ordinance proposing a change to the classification* or boundaries *of a zoning district . . . shall be given* at least 10 days prior to the [*7] hearing by the municipal clerk *to the owners of all real property* as shown on the current tax duplicates, *located*, in the case of a classification change, *within the district and* within the State *within 200 feet* in all directions of the boundaries of the district, and located, in the case of a boundary change, in the State within 200 feet in all directions of the proposed new boundaries of the district which is the subject of the hearing.
> . . . .
>
> *Notice shall be given to a property owner by*: (1) *serving a copy* thereof on the property owner as shown on the said current tax duplicate, or his agent in charge of the property, *or* (2) *mailing a copy thereof by certified mail and regular mail to the property owner* at his address as shown on the said current tax duplicate.
>
> [*N.J.S.A.* 40:55D-62.1 (emphasis added).]

It is undisputed the Council did not serve or mail a copy of the Ordinance to all property owners within the district and within 200 feet of the district. Thus, whether notice was adequate depends on whether the Ordinance "propos[ed] a change to the classification . . . of a zoning district." *Ibid.*

"We examined what the MLUL intended by a 'classification' change in [*Pacilli*], recognizing that '[u]nlike many [*8] terms found in the MLUL, "classification" is not defined.'" *Mahwah Realty Assocs., Inc. v. Twp. of Mahwah*, 430 N.J. Super. 247, 253, 63 A.3d 1217 (App. Div. 2013) (quoting *Pacilli*, 394 N.J. Super. at 329). "Until the Legislature adopts some different meaning, we will continue to apply, as we apply here, *Pacilli*'s general understanding of the term[.]" *Id.* at 254 (footnote omitted).

In *Pacilli*, we ruled that "in its most general sense, classification refers to the use permitted in a zoning district, such as residential, commercial or industrial, as well as sub-categories within the broader uses, such as single-family residential and high-density residential, highway commercial and neighborhood commercial, and highway retail and neighborhood retail." 394 N.J. Super. at 330-31. Classification also refers to "uses that may be permitted under certain conditions within a generally designated category. A change in any of these broad categories and sub-categories has the capacity to fundamentally alter the character of a zoning district." *Id.* at 331.

We also ruled in *Pacilli* that "classification" also "include[s] changes to the density, bulk and height standards and conditions applicable to designated uses," because "changes in bulk and density requirements within a zone can effect a substantive change in future development within a zone without any alteration to the [*9] label applied to the zone." *Id.* at 331-32. Thus, determining "the type of notice to be provided on the occasion of a proposed amendment to a zoning ordinance should focus on the substantive effect of the amendment rather than the appellation given to the zone." *Id.* at 332.

In *Pacilli*, we held an amendment which made "sweeping" changes to the bulk and density requirements in two residential zoning districts "dramatically altered the intensity of the residential use within each zone and promised to affect the character of the future development in both zones." *Id.* at 332. We observed "the scope of the changes . . . is illustrated simply by focusing on the maximum gross density per acre," which changed from one unit per two acres under the existing zoning laws and the ordinance's "Option 1" to one unit per ten acres under the ordinance's "Option 2." *Ibid.* We ruled that change itself "effects a fundamental alteration of the character of this zoning district." *Id.* at 332. Therefore, "the Township Committee was required to follow the notice requirements of *N.J.S.A.* 40:55D-62.1," and as it did not, the ordinance was "invalid." *Id.* at 333.

As the trial court found, the Ordinance made similarly "sweeping changes" to the bulk and density requirements for assisted living [*10] facilities. Before its passage, section 170-88.1 of the existing Township Code provided that an assisted living facility was a permissible conditional use in any zone, with specified exceptions. Such a facility had to have: road frontage and direct access to one of seven roads, including South Orange Avenue or Passaic Avenue; a minimum lot size of six acres; minimum frontage width of 100 feet;

minimum setbacks of 100 feet from residential property lines and seventy-five feet from non-residential property lines; maximum impervious coverage of 50%; a maximum building height of thirty-five feet; a maximum of twenty units per acre; and a maximum total number of units of 5% of the number of single-family detached dwelling units in the Township.

The Ordinance added a new subsection to section 170-88.1 that provided that an assisted living facility could be permitted as a conditional use in any zone, with an increased number of exceptions, if it had: road frontage and direct access to South Orange Avenue or Passaic Avenue; a minimum lot size of three acres; a minimum frontage width of 200 feet; minimum setbacks of twenty-five feet from both residential and non-residential property lines with 150 feet from any dwelling; a [*11] maximum impervious coverage of 60%; and a maximum building height of thirty-five feet or three stories, or forty-seven feet or four stories plus a six-foot mansard if set back 100 feet; a maximum of 32.31 units per acre.

The Ordinance also exempted affordable housing units from the maximum total number of assisted living units which were limited to 5% of the number of single-family detached dwelling units in the Township. The Ordinance also required: a minimum of 102 units with thirteen affordable housing units and a maximum of 105 units with fourteen affordable housing units; specific setbacks for the principal building and gazebo; and specific requirements for parking and landscape buffers.

We agree with the trial court's findings that the Ordinance's

> changes are sweeping in that they allow for 32.21 units per acre on 3 acre lots, rather than the 20 units per acre on 6 acre lots in the pre-existing ordinance. The Ordinance removes most of the protections in place that buffered surrounding neighbors, and increases the allowable building height from 35 feet to 47 feet, all while placing the buildings in closer proximity to roads and adjoining properties.

The trial court explained that [*12] under the Ordinance, "[t]he required front yard setback changed from 100 feet to 75 feet," and "[r]equired rear and side setbacks" changed from "100 feet from residential property lines" "to only 25 feet." The court found the Ordinance "decreases the lot size and increases the density, increases the building height and decreases nearly every setback requirement." The court concluded the Ordinance made "significant changes that adversely affect the single family residential nature of the R-1 zone, and thereby fundamentally alter the character of the zoning district." We agree.

Sunrise argues the Ordinance's changes are less sweeping than those in *Pacilli*. However, like the ordinance in *Pacilli*, the Ordinance changed minimum lot width; minimum front, side, and rear setbacks; maximum impervious coverage; minimum lot size; and maximum unit density per acre. The Ordinance also changed the maximum building height, and made other changes.

Sunrise notes "the test is not the number of changes but the substance of the changes." *Pacilli*, 394 N.J. Super. at 333. However, the Ordinance's changes are comparable in substance to those in *Pacilli*. For example, the Ordinance decreased the minimum acreage by 50%, decreased the side [*13] and rear setbacks by 66.6%, and increased the maximum number of units per acre by over 61%. The Ordinance changed by three acres the minimum lot size, as did the ordinance's Option 2 in *Pacilli* for each half unit.

Because the zoning code already conditionally permitted assisted living facilities in the R-1 zone, Sunrise argues the Ordinance did not change the uses or sub-categories of uses. The same was true in *Pacilli* - the residential zones already permitted homes - but the ordinance changed "the intensity of the permitted use." *Id.* at 330. The Ordinance did the same. The total effect of the Ordinance's changes allowed an assisted living facility with 105 units on the Lot, which was half the size of the lot required for any assisted living facility or units under the existing zoning code.

The trial court found the Ordinance "allow[ed] for the construction of an assisted living facility on a lot where it could not have previously been constructed." The court noted the R-1 zone was "designed for single-family homes on lots not smaller than 35,520 square feet," that is, one house per lot of at least 7.28 acres. Allowing the densely-populated assisted living facility in the R-1 zone of seven-acre [*14] housing lots was a substantial change comparable to that made by Option 2 in the ordinance in *Pacilli*, which "transform[ed] a zoning district of generous lots to one of manorial proportions." *Id.* at 332.

We recognize the change in *Pacilli* affected the housing lots in the residential zones, while the change here

affected a conditional use in the R-1 residential zone.[1] However, we have already found that a change in one of many uses may constitute a significant enough change under *Pacilli*. In *Mahwah*, we held "an ordinance that authorizes 'health and wellness centers' and 'fitness and health clubs' in two industrial zones changes the 'classification' of those zones." 430 N.J. Super. at 250. We ruled "[t]he additional uses in question fundamentally alter the industrial zoning districts" because the "proposed uses are clearly discordant from the uses permitted in the affected industrial zoning districts[,]" which included "public parks, playgrounds or athletic fields." *Id.* at 254-55. The Ordinance allowed a densely-populated assisted living facility that was comparably "dissimilar" to and "discordant" from the seven-acre per unit residential lots in the R-1 zone. *Ibid.*

Because the Ordinance worked a classification change, *N.J.S.A.* 40:55D-62.1 required certified [*15] mail notices to property owners within the affected zones concerning the proposed Ordinance. As the trial court found: "This was not done by Livingston, and the failure to do so would invalidate the Ordinance."[2]

III.

Despite finding that required personal notice of the Ordinance was not given to plaintiff's members, the trial court sua sponte dismissed plaintiff's complaint because it was untimely. The court found the complaint was not filed within the period set in *Rule* 4:69-6(a), and there was no reason to enlarge that period under *Rule* 4:69-6(c). We address each in turn.

A.

Plaintiff does not contest that its action is governed by *Rule* 4:69-6(a). "No action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed, except as provided by paragraph (b) of this rule." *Ibid.* Here, the Ordinance was adopted on November 9, 2015, and notice of its adoption was given by a publication on November 12, 2015.

Defendants argue that the right to review accrued on the date of the notice. *N.J.S.A.* 40:49-2(d) provides:

> Upon passage, every ordinance, or the title, or the title and a summary, together with a notice of the date of passage or approval, or both, shall be published at least once [*16] in a newspaper circulating in the municipality, if there be one, and if not, in a newspaper printed in the county and circulating in the municipality. No other notice or procedure with respect to the introduction or passage of any ordinance shall be required.

Plaintiff argues the lack of personal notice meant that its cause of action did not accrue upon publication and that the forty-five days never began to run. Plaintiff cites Harrison Redevelopment *Agency v. DeRose*, 398 N.J. Super. 361, 401, 942 A.2d 59 (App. Div. 2008). However, *DeRose* concerned the question

> whether a property owner who fails to challenge a redevelopment designation containing his or her property within forty-five days of its adoption by a municipal governing body, pursuant to the Local Redevelopment and Housing Law ("LRHL"), *N.J.S.A.* 40A:12A-1 to -49, may still challenge, in full or in part, the public purpose of the taking of his or her property, by way of a defense in an ensuing condemnation action.
>
> [*Id.* at 367.]

In *DeRose*, we held an owner could raise such a challenge "unless a municipality provides the property owner with contemporaneous written notice that" the owner's property has been designated for redevelopment and could be acquired against the owner's will unless he challenged that designation with a specified [*17] period. *Id.* at 367-68. "Conversely, we also h[e]ld that if the municipality's notice does contain these constitutionally-essential components, an owner who wishes to challenge the designation presumptively must bring an action, in lieu of prerogative writs, within forty-five days of the municipality's adoption of the designation." *Id.* at 368.

The question we faced in *DeRose* is not posed here.

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[1] The Ordinance also changed the uses in other zones, including by providing that "[a]n assisted living facility, congregate senior living facility or nursing home" were no longer permitted in zones R-5F, R-5G, R-5H, and R-5I.

[2] Plaintiff contends that the personal notice here should have included "an identification of the affected zoning districts and proposed boundary changes, if any, by street names, common names or other identifiable landmarks, and by reference to lot and block numbers." *N.J.S.A.* 40:55D-62.1. In *Mahwah*, however, we held "*N.J.S.A.* 40:55D-62.1 requires only identification of the zoning districts affected by the classification change. The additional requirement for identification of the specific impacted properties only applies when a change in boundaries is proposed." 430 N.J. Super. at 250, 255-60.

This case does not concern redevelopment or condemnation, let alone the defenses available in condemnation. *See Milford Mill 128, LLC v. Borough of Milford*, 400 N.J. Super. 96, 115 n.10, 946 A.2d 75 (App. Div. 2008) (distinguishing *DeRose*). The Ordinance did not threaten to take the properties of plaintiff's members against their will. *See Town of Kearny v. Disc. City of Old Bridge, Inc.*, 205 N.J. 386, 404-05, 16 A.3d 300 (2011) (distinguishing *DeRose* where the plaintiff was a tenant and not the owner of the property targeted for redevelopment). No constitutional challenge has been raised here. *See Iron Mountain Info. Mgmt., Inc. v. City of Newark*, 202 N.J. 74, 78, 995 A.2d 841 (2010) (same). Because *DeRose* "addressed an entirely different question," the trial court properly did not find *DeRose* controlling. *See ibid.*

Thus, the right of review accrued on November 12, 2015, when notice of the Ordinance's passage was published.[3] Plaintiff's complaint was not filed until March 31, 2016. Thus, plaintiff's action was not filed within the forty-five day period in *Rule* 4:69-6(a).

B.

Rule 4:69-6(c) provides that "[t]he court may enlarge [*18] the period of time provided in paragraph (a) or (b) of this rule where it is manifest that the interest of justice so requires." The trial court found it was not in the interests of justice to relax the time limit. The court reasoned: "Despite the fact that mailed written notice was not provided to individual landowners, notice was provided by publication, in the same manner that all other ordinance change notices are provided." The court found that "was sufficient notice to the residents of Livingston that the Ordinance change was to take effect."

However, the notice provided after the Ordinance's passage bore no resemblance to the notice that plaintiff's members were entitled to receive. As discussed above, *N.J.S.A.* 40:55D-62.1 required defendants to give plaintiff's members personal notice by hand-service or by both certified and regular mail that the Ordinance was being considered for final passage. That notice was required to state "the nature of the matter to be considered and an identification of the affected zoning districts." *Ibid.* Had defendants sent plaintiff's members the October 29 notice, they would have received the full text of the Ordinance, which would have alerted them not only to the zoning districts [*19] affected, but also the Ordinance's rationale that assisted living facilities should "be encouraged at appropriate locations by reductions in minimum lot size requirements, limited increases in permitted density and building height and other bulk changes," and to the details of the lot size, density, height, setback, and other changes.

By contrast, the only notice that the Ordinance had been passed was a tiny item published on November 12, 2015, in the West Essex Tribune stating that the "TOWNSHIP OF LIVINGSTON PASSED [AN] ORDINANCE" on November 9, 2015, and describing only as "ORDINANCE NO. 22-2015[:] ORDINANCE OF THE TOWNSHIP OF LIVINGSTON AMENDING CHAPTER 170 OF THE CODE OF THE TOWNSHIP OF LIVINGSTON." That notice gave no clue about the subject or content of the Ordinance unless the reader knew Chapter 170 was the "Land Use" chapter of the Code, and even then the notice did not specify the section or subsection amended. That notice published in the West Essex Tribune provided none of the information which plaintiff's members would have received through personal service of the October 29 notice under *N.J.S.A.* 40:55D-62.1.

These circumstances "satisfy the standards in *Rule* 4:69-6(c) and warrant enlargement of the forty-five-day [*20] period because 'it is manifest that the interest of justice so requires.'" *See Hopewell Valley Citizens' Grp. v. Berwind Prop. Grp. Dev. Co.*, 204 N.J. 569, 571, 10 A.3d 211 (2011). "[T]he plain language of paragraph (c) suggests that a court has discretion to enlarge a *Rule* 4:69-6(a) or (b) timeframe when it perceives a clear potential for injustice." *Id.* at 578.

"Our Supreme Court has recognized that cases 'involving: (1) important and novel constitutional questions; (2) informal or ex parte determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification' have satisfied the 'interest of justice' standard in *Rule* 4:69-6(c)." *Mullen v. Ippolito Corp.*, 428 N.J. Super. 85, 106, 50 A.3d 673 (App. Div. 2012) (citation omitted); *see In re Ordinance 2354-12 of W. Orange*, 223 N.J. 589, 601, 127 A.3d 1277 (2015). However, that "list of exceptions was not intended to be exhaustive." *Hopewell Valley*, 204 N.J. at 584.

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[3] Thus, this case does not resemble *Trenkamp v. Burlington*, 170 N.J. Super. 251, 406 A.2d 218 (Law Div. 1979), where the court found accrual was delayed because there was "no statute requiring a public announcement in connection with applications for or issuance of building permits." *Id.* at 259.

Courts have also "recognized municipal negligence as a basis for invoking *Rule* 4:69." *Ibid.* (citing *Reilly v. Brice*, 109 N.J. 555, 557, 538 A.2d 362 (1988)). In *Reilly*, "the challenge to the council's ratification of a four-year $20,000 municipal consulting contract was not brought until five months after it occurred." *Id.* at 580 (citing *Reilly*, 109 N.J. at 557). The published agenda for the meeting did not list the contract as an agenda item, and the minutes of the meeting "failed to state any of the specifics of the contract." *Reilly*, 109 N.J. at 559-60.

Our Supreme Court in *Reilly* "attributed the blame for the lateness [*21] of that proceeding to the negligence of the municipality" because "'the descriptions of the proposed public action [could have] been more specific' on the agenda of the meeting that was published." *Hopewell Valley*, 204 N.J. at 580-81 (quoting *Reilly*, 109 N.J. at 559-60). The Court "h[e]ld that in the circumstances of this case the proper exercise of discretion is to enlarge the forty-five day limitation to allow review of the challenged municipal action." *Reilly*, 109 N.J. at 557. The Court reversed the trial court's denial of an extension, and itself enlarged the time. *Id.* at 560-61.

In *Reilly*, the Court noted "[p]laintiffs assert no private interest in challenging this contract, but rather seek vindication of the public interest." *Id.* at 558. The Court acknowledged that "[b]alanced against these public interests, however, is the important policy of repose expressed in the forty-five day rule." *Id.* at 559. The rule "is designed to encourage parties not to rest on their rights. In general, ignorance of the existence of a cause of action will not prevent the running of a period of limitations except when there has been concealment." *Id.* at 559. However, "[i]mportantly, the concealment need not be intentional or malicious, as evidenced by the fact[s] . . . in *Reilly*[.]" *Hopewell Valley*, 204 N.J. at 580.

Here, even if unintentional and non-malicious, [*22] the concealment of the nature of the Ordinance was at least as significant as the concealment in *Reilly*. As in *Reilly*, the concealment primarily occurred in the notice preceding the meeting in which the challenged municipal action was taken, and was compounded by the lack of detail in the subsequent statement of what action had been taken. As set forth above, defendants' failure to mail personal notice to plaintiff's members deprived them of the individual service of information required by *N.J.S.A.* 40:55D-69.1, and the notice after the Ordinance's passage gave them little if any information. The delay in filing the complaint here was shorter than the five-month delay in *Reilly*.

In addition to the private interests of plaintiff's members, there are public interests at stake here. "Our courts have found a sufficient public interest to justify an extension of time for filing a prerogative writ action in a variety of circumstances, including challenges to the validity of ordinances on the ground that they were not adopted in conformity with the applicable statutory requirements." *Willoughby v. Planning Bd. of Deptford*, 306 N.J. Super. 266, 277, 703 A.2d 668 (App. Div. 1997) (citing *Reilly*, 109 N.J. at 560-61). The failure to provide personal notice as required by *N.J.S.A.* 40:55D-62.1 contravenes the public interest in ensuring residents in a district [*23] know of their opportunity to oppose a change in its classification. *See Pacilli*, 394 N.J. Super. at 333. There is also a public interest in opposing spot zoning, which is "'the use of the zoning power to benefit particular private interests rather than the collective interests of the community.'" *Riya Finnegan Ltd. Liab. Co. v. Twp. Council of S. Brunswick*, 197 N.J. 184, 195, 962 A.2d 484 (2008) (citation omitted). Considered together, there was "sufficient public interest to warrant relaxation of the forty-five-day filing limitation through application of *Rule* 4:69-6(c)." *Concerned Citizens of Princeton, Inc. v. Mayor & Council of Princeton*, 370 N.J. Super. 429, 447, 851 A.2d 685 (App. Div. 2004); *see DeRose*, 398 N.J. Super. 361, 418, 942 A.2d 59 (App. Div. 2008) (ruling an enlargement under Rule 4:69-6(c) was justified by the public interest and "[t]he multiple defects of notice"); *Wolf v. Shrewsbury*, 182 N.J. Super. 289, 296, 440 A.2d 1150 (App. Div. 1981) (reversing the denial of an enlargement where notice was inadequate).

Sunrise cites *Rocky Hill Citizens for Responsible Growth v. Planning Bd. of Rocky Hill*, 406 N.J. Super. 384, 967 A.2d 929 (App. Div. 2009). In *Rocky Hill*, we upheld denial of an enlargement largely because "the ordinance was the subject of intense debate at all times. Public consideration of this ordinance was extensive," and "participation was substantial" at the public hearings, which one of the plaintiffs attended, yet plaintiffs adopted "a 'wait and see' strategy" and failed to file a complaint for nearly two years. *Id.* at 402-03.[4]

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[4] In *Rocky Hill*, we also noted other aspects of cases granting enlargement were not present, such as issues of "the constitutional adequacy of the notice to property owners" present in *DeRose*, and "significant impact on density" as in *Willoughby*. 406 N.J. Super. at 400-01. Here, we have statutorily-inadequate notice to property owners and a significant impact on density.

Here, by contrast, the notice for the hearing on the Ordinance was fatally deficient, no member of the public appeared in connection with the Council's review of [*24] the Ordinance, there is no claim any member of plaintiff was aware of the Ordinance at or near its November 2015 passage, and plaintiff filed its complaint within five months. Those circumstances were sufficient to justify an enlargement under *Reilly*.

Sunrise claims plaintiff had actual knowledge of the adoption of the Ordinance in early January 2016. Sunrise cites the verified complaint and certification signed by Lidia Dumytsch. She identified herself as "an owner of property within 200 feet of the [Lot]," "a member of" plaintiff, plaintiff's volunteer "Secretary/Treasurer," and the "Tax Assessor for the Township of Livingston." In the complaint and her certification, she attested she was unaware of the Ordinance until after she received a request as the Tax Assessor to prepare a list of property owners who lived within 200 feet of the Lot for Sunrise's application to the Board for approval of its site plan, when she investigated and discovered the Council had passed the Ordinance in November 2015.

However, Dumytsch did not state when she received the request for the list or when her investigation discovered the Ordinance. Sunrise claims that occurred in early January, and cites its [*25] site plan application. However, the application appears to have been signed January 26, 2016. Notice of Sunrise's application to all property owners "within 200 feet in all directions of the" Lot was not required until "at least 10 days prior to the date of the hearing" on the site application, which was held on February 2. *N.J.S.A.* 40:55D-12, -12(b). Even assuming Dumytsch's discovery of the Ordinance occurred in early rather than late January, it would not necessarily bar an enlargement for plaintiff or its other members.

In *Rockaway Shoprite Assocs., Inc. v. City of Linden*, 424 N.J. Super. 337, 37 A.3d 1143 (App. Div. 2011), the city sent notice of proposed ordinances that was fatally defective. *Id.* at 344. The "[d]efendants and intervenor nevertheless contend[ed] that because plaintiff's representative attended the public hearing . . . and did not object to the lack of proper notice, plaintiff 'waived' its right to challenge the ordinances on that basis." *Id.* at 351. In rejecting that argument, we cited "[t]he general rule . . . that strict compliance with statutory notice requirements is mandatory and jurisdictional, and non-conformity renders the governing body's resultant action a nullity." *Id.* at 352. We also found "compelling" "'the principle that the entire public is entitled to notice in full compliance with the governing [*26] statutory provisions, and that the public's entitlement to such notice may not be waived by those individual members of the public who actually attend the improperly noticed hearing.'" *Id.* at 354 (citation omitted). "On the issue of public notice of adopting or amending a zoning ordinance, a jurisdictional defect is not personal to a single objector but rather the right of the public, and therefore cannot be waived by one individual." *Ibid.*

If in *Rockaway Shoprite* the appearance at the hearing of Shoprite's attorney and professional planner "who voiced no objection to the ordinance" did not waive Shoprite's right to claim lack of notice, *id.* at 342, 355, then Dumytsch's post-hearing discovery of the fatal lack of notice here did not waive the right of any other member of the public to seek an enlargement to claim lack of notice, including the persons represented by plaintiff. Although Sunrise notes Dumytsch is plaintiff's only identified member, Dumytsch certified that "the number of members of [plaintiff] is currently in excess of 75 residents, [and] as each day goes by I am being contacted by others who are learning of the amended zoning at issue in this lawsuit and who express an interest in joining [plaintiff]'s [*27] efforts."

Sunrise cites "the imputation doctrine" that "a principal is deemed to know facts that are known to its agent." *NCP Litig. Tr. v. KPMG LLP*, 187 N.J. 353, 366, 901 A.2d 871 (2006). However, in *Rockaway Shoprite*, despite the knowledge of Shoprite's attorney and planner, we held Shoprite could challenge the fatally-defective notice to vindicate the public's "jurisdictional and non-waivable" right to notice of zoning amendments. 424 N.J. Super. at 355. We are even more reluctant to wield the doctrine to prevent plaintiff from challenging the fatally-defective notice here, because it is a representational plaintiff which apparently was not in existence when Dumytsch discovered the Ordinance, and whose other members learned of the Ordinance after Dumytsch did.

Rule 4:69-6 is "*aimed at those who slumber on their rights*." *Hopewell Valley*, 204 N.J. at 579 (quoting *Schack v. Trimble*, 28 N.J. 40, 49, 145 A.2d 1 (1958)). We cannot say all of plaintiff's members slumbered on their rights as the record contains no information when each member, deprived of the notice required by *N.J.S.A.* 40:55D-62.1, first learned of the Ordinance. *See id.* at 585 (finding a plaintiff did not "slumber on its rights" when it received incorrect information from a Board employee).

In *Reilly*, our Supreme Court ruled: "Without delving into the question of when plaintiffs' right to challenge the Council's action arose (plaintiffs [*28] claim not to have learned of the matter until early April), we are satisfied that this factual setting properly calls for an exercise of judicial discretion to enlarge the time to review the action." 109 N.J. at 560. We similarly do not believe we must remand to delve into when each of plaintiff's members learned of the Ordinance, particularly as Dumytsch certified new members had only recently joined plaintiff's efforts, and any timely member may be sufficient to allow the suit to proceed. *See id.* at 560-61 ("rather than remand this matter for further exercise of discretion by [the trial] court, we believe that in the interest of expedient disposition of this matter, time should be enlarged").

Moreover, the delay here from the November 12 notice, or Dumytsch's discovery of the Ordinance sometime in January, to the March 31 filing of plaintiff's complaint was less than the five-month delay in *Reilly*. *Id.* at 557, 561. The trial court cited the Law Division's statement in *Trenkamp* that courts should "in no circumstance enlarge the time period on this ground beyond 45 days from the time at which plaintiff knew or should have known of the cause of action." 170 N.J. Super. at 265. However, we have since held that where the public interest is involved, "the court [*29] may grant even a very substantial enlargement of the time in order to afford affected parties an opportunity to challenge the alleged unlawful governmental action." *Willoughby*, 306 N.J. Super. at 276-77 (citing enlargements of several years). In any event, Dumytsch's certification and the lack of the required personal notice indicates some of plaintiff's members neither knew nor should have known of the Ordinance until within forty-five days of the filing of the complaint.

"[T]he determination to enlarge a timeframe under [*Rule* 4:69-6](c) [i]s an 'exercise of judicial discretion.'" *Hopewell Valley*, 204 N.J. at 578 (reversing the denial of an enlargement) (quoting *Reilly*, 109 N.J. at 560 (same)). We review the trial court's decision for abuse of discretion. *Willoughby*, 306 N.J. Super. at 273 (reversing the denial of an enlargement). We must hew to that standard of review.

Applying that standard, as our Supreme Court did in *Reilly*, we reverse the dismissal of plaintiff's complaint as untimely because we are convinced "that this factual setting properly calls for an exercise of judicial discretion to enlarge the time to review the action." 109 N.J. at 559-60. "The MLUL ensures that the public has a chance to be heard . . . by imposing notice requirements." *Twp. of Stafford v. Stafford Twp. Zoning Bd. of Adjustment*, 154 N.J. 62, 70, 711 A.2d 282 (1998). "The Legislature's choice to compel notice to property owners within a 200-foot radius [*30] provides an objective measure of a neighboring property owner's interest in a zoning dispute." *Grabowsky*, 221 N.J. at 559. Given the denial to plaintiff's members of the personal notice of the Ordinance required by *N.J.S.A.* 40:55D-69.1, "the interest of justice" requires they have an opportunity to challenge the Ordinance. *R.* 4:69-6(c). Accordingly, we reverse the dismissal of plaintiff's complaint as untimely.

IV.

The zoning power "must be exercised in strict conformity with the delegating enactment — the MLUL." *Nuckel v. Borough of Little Ferry Planning Bd.*, 208 N.J. 95, 101, 26 A.3d 418 (2011). Our Supreme Court has ruled "'[t]he giving of statutory notice of hearing is a jurisdictional requirement, and unless notice is given as required by statute the board lacks power to hear or consider an application.'" *Twp. of Stafford*, 154 N.J. at 79 (citation omitted). "Non-compliance with the personal notice requirements of *N.J.S.* 40:55D-62.1 renders an amendment invalid." *Cox & Koenig, New Jersey Zoning & Land Use Administration*, § 10-2.3 at 159 (2018) (citing *Pacilli*, 394 N.J. Super. at 333). Thus, we declare the Ordinance is invalid.

Plaintiff also appeals the trial court's dismissal of its count alleging a violation of the CRA. Although the invalidation of the Ordinance may remove the need to further litigate that claim, plaintiff's CRA count also seeks attorney's fees and costs under *N.J.S.A.* 10:6-2(f). Out of an abundance of caution, [*31] we review the dismissal of the CRA count.

The trial court dismissed the CRA count for failure to state a claim. "[W]e apply a plenary standard of review from a trial court's decision to grant a motion to dismiss pursuant to *Rule* 4:6-2(e)." *Rezem Family Assocs., LP v. Borough of Millstone*, 423 N.J. Super. 103, 114, 30 A.3d 1061 (App. Div. 2011). We affirm the dismissal of the CRA count substantially for the reasons set forth in the court's May 10, 2016 statement of reasons. *See id.* at 113-15; *see also Nostrame v. Santiago*, 213 N.J. 109, 128, 61 A.3d 893 (2013).

Much time has passed since enactment of the Ordinance in November 2015. We have almost no information on subsequent developments. We remand to the trial court to determine what further proceedings

and relief are needed under plaintiff's complaint.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

End of Document

EXHIBIT B

Hartz Mt. Indus. v. Planning Bd. of Ridgefield Park

Superior Court of New Jersey, Appellate Division

May 12, 2004, Argued; June 2, 2004, Decided

DOCKET NO. A-80-02T3

Reporter
2004 N.J. Super. Unpub. LEXIS 18 *; 2004 WL 4076238

HARTZ MOUNTAIN INDUSTRIES, INC., a New York Corporation, Plaintiff-Respondent, v. THE PLANNING BOARD OF THE VILLAGE OF RIDGEFIELD PARK, Defendant-Respondent, and RIDGEFIELD PARK OFFICE COMPLEX L.L.C., Defendant-Appellant. EXXON MOBIL CORPORATION, Plaintiff-Respondent, v. RIDGEFIELD PARK OFFICE COMPLEX, L.L.C., a Limited Liability Company of the State of New Jersey, Defendant-Appellant and THE PLANNING BOARD OF THE VILLAGE OF RIDGEFIELD PARK, Defendant-Respondent. HARTZ MOUNTAIN INDUSTRIES, INC., a New York Corporation, Plaintiff-Respondent/Cross-Appellant, v. THE VILLAGE OF RIDGEFIELD PARK, and THE PLANNING BOARD OF THE VILLAGE OF RIDGEFIELD PARK, Defendants-Respondents, and RIDGEFIELD PARK OFFICE COMPLEX L.L.C., Defendant-Appellant/Cross-Respondent. EXXON MOBIL CORPORATION, Plaintiff-Respondent, v. THE VILLAGE OF RIDGEFIELD PARK, a body corporate and politic of the State of New Jersey, and PLANNING BOARD OF THE VILLAGE OF RIDGEFIELD PARK, Defendants-Respondents, and RIDGEFIELD PARK OFFICE COMPLEX L.L.C., a Limited Liability Company of the State of New Jersey, Defendant-Appellant. HARTZ MOUNTAIN INDUSTRIES, INC., a New York Corporation, Plaintiff-Respondent, v. THE BOARD OF CHOSEN FREEHOLDERS OF BERGEN COUNTY, and THE PLANNING BOARD OF THE COUNTY OF BERGEN, Defendants-Respondents, and RIDGEFIELD PARK OFFICE COMPLEX, L.L.C., Defendant-Appellant. EXXON MOBIL CORPORATION, a Corporation of the State of New Jersey, Plaintiff-Respondent, v. THE COUNTY OF BERGEN, a body corporate and politic of the State of New Jersey, and PLANNING BOARD OF THE COUNTY OF BERGEN, Defendants-Respondents, and RIDGEFIELD PARK OFFICE COMPLEX, L.L.C., a Limited Liability Company of the State of New Jersey, Defendant-Appellant.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from the Superior Court of New Jersey, Law Division, Bergen County, six consolidated cases with docket numbers BER-L-2600-01, BER-L-2659-01, BER-L-7521-01, BER-L-8263-01, BER-L-498-02, and BER-L-1076-02.

Core Terms

planning board, Village, Zone, ordinance, master plan, Planning, notice, municipal, Freeholders, recommended, site plan, governing body, proposed development, redevelopment, traffic, height, development application, regulations, zoning ordinance, variance, inconsistencies, developer, feet, Challenger, approvals, coverage, invalid, buildings, reexamination, public notice

Counsel: Kenneth E. Meiser argued the cause for appellant/cross-respondent Ridgefield Park Office Complex, L.L.C. (Hill Wallack, attorneys; Mr. Meiser, of counsel; Mr. Meiser and Jessica S. Pyatt, on the brief).

D. Mark Leonard argued the cause for respondent/cross-appellant Hartz Mountain Industries, Inc. (Horowitz, Rubino & Patton, attorneys; Allen J. Magrini, of counsel; Mr. Leonard, on the brief).

Henry Ramer argued the cause for respondent Exxon Mobil Corporation (Williams, Caliri, Miller, Otley & Stern, attorneys; Mr. Ramer, of counsel and on the brief).

N. Patrick Quirk argued the cause for respondent, Planning Board of the Village of Ridgefield Park (Quirk & Gallagher, attorneys; Mr. Quirk, on the brief).

Philip N. Boggle argued the cause for respondent Village of Ridgefield Park (Durkin & Boggia, attorneys; Mr. Boggia and Martin T. Durkin, of counsel; Mr. Durkin, on the brief).

Edward J. Floria argued the cause for respondent Board of Chosen Freeholders of Bergen County (Sarkisian, [*2] Florio & Kenny, attorneys; Mr. Florio, of counsel; Mr. Florio and Nita Ravel, on the brief).

Robert E. Laux argued the cause respondent Planning Board of Bergen County (Esther Suarez, Bergen County Counsel, attorney; Mr. Laux, Deputy County Counsel, on the brief).

Judges: Before Judges Conley, Carchman and Wecker.

Opinion

PER CURIAM

Ridgefield Park Office Complex, L.C.C. (RPOC) proposes to develop a high-rise office park (Sky Mark Corporate Center, hereinafter referred to as Sky Mark) in the Village of Ridgefield Park. The Planning Board of the Village of Ridgefield Park (Village Planning Board) granted preliminary major site plan approval for the entire project, and final site plan approval for Phase I. Phase I includes the construction of one office tower, a parking structure and all of the off-site transportation infrastructures. Sky Mark, if built, would reclaim a thirty-three acre brownfield site upon which there was formerly a landfill and a paper company which has laid fallow for years. It is property which the Village, through its various master plans, has repeatedly called for redevelopment in like fashion to Hartz's property, upon which pursuant to a Village redevelopment plan, an office park [*3] has been constructed.

One of the conditions of the Village Planning Board approval was site plan approval from the Planning Board of Bergen County (County Planning Board). That approval was granted and, on the objectors' appeal to the Bergen County Board of Chosen Freeholders, the Freeholders similarly approved.

In addition, RPOC must acquire adjacent property owned by Exxon Mobil Corporation (Exxon) which blocks its access to Route 46 eastbound. Exxon has resisted any such acquisition.

Hartz and Exxon actively participated in the various municipal and county proceedings[1] and brought in lieu of prerogative writs actions to set aside the approvals. In addition, a subsequent ordinance enactment, ordinance 01-08 which potentially removes a building height issue, was challenged in separate actions. All of these actions were consolidated and, in the end, the trial judge set aside the site plan approvals and vacated the ordinance. However, he rejected Hartz's claim that RPOC could not gain critical access to a roadway (the Challenger Road Extension) built on land Hartz owned but upon which Hartz had granted to the Village a public easement. RPOC appeals. Hartz cross-appeals.

The trial judge's [*4] vacation of the Village Planning Board site plan approval was, for the most part, premised upon various procedural grounds. No party contests his rejection of Hartz's and Exxon's substantive challenges to the site plan approval. Indeed, the judge's findings and conclusions in that respect are well grounded in the applicable legal criteria and the facts. His other rulings, however, are not and necessitate a reversal. Moreover, we disagree with his rationale for setting aside the County Planning Board and the Freeholders' county site plan approval. Similarly, we reject his rationale for vacating ordinance 01-08, although even under the prior ordinance there is not a height variance jurisdictional defect. Accordingly, we reverse the vacation of the site plan approvals and 01-08.

As to Hartz's cross-appeal, we are entirely convinced the trial judge's rationale is unassailable. We see insufficient merit to Hartz's claims to warrant further, discussion. *R.* 2:11-3(e)(1)(A),(E). Accordingly, on the cross-appeal, we affirm for the reasons set forth by the trial judge in his written decision.

I.

The Relevant Facts

The Village of Ridgefield Park is located in southeastern Bergen County, Approximately 93% of its land [*5] area

[1] Exxon claims that its participation was delayed as a result of an alleged inadequacy in the statutory notice. We will shortly return to this issue but for now point out that hearings before the Village Planning Board commenced on August 21, 2000. The last hearing was on January 8, 2004. Exxon first appeared at the November 6, 2000, hearing and objected to the adequacy of its notice. At that time, counsel for RPOC made available to Exxon the transcripts of the prior hearings and offered to bring back witnesses who had previously testified so that Exxon could cross-examine them. Exxon participated fully in all subsequent proceedings.

is considered developed. The focus of this litigation is a strip of land which is bordered by the New Jersey Turnpike to the west and the Overpeck Creek to the east. At the northern-most edge of this strip of land is the Overpeck County Park. South of Overpeck County Park is Hartz's office park development, known as the Overpeck Center. The land underlying the Overpeck Center, a former landfill site, is owned by the Village and leased to Hartz by the Ridgefield Park Redevelopment Agency.

Because of the nature of its location, roadway access was essential to the success of the Overpeck Center. That access has been provided by the Challenger Road, built at Bergen County's expense, and an extension thereto (the Challenger Road Extension), built on Hartz's and at its expense.[2] The Challenger Road Extension provides access to the Overpeck Center from major thoroughfares, including the New Jersey Turnpike and Route 80. RPOC proposes to connect its property to the Challenger Road Extension. The site plan approvals encompass this connection.

This connection is important. RPOC's land does not directly abut Route 46. Rather, it is hemmed in to the north by adjacent property owners — a [*6] Hampton Inn Motel, and an Exxon gas station — both of which block RPOC's access to Route 46. RPOC does have a fifty-foot-wide right-of-way over the Exxon property connecting RPOC's property to Route 46 eastbound, but that easement is insufficient for the large-scale development proposed by RPOC. RPOC also has no road access on its western or eastern borders. To the west is a tract of land owned by the New Jersey Turnpike Authority. To the east and south is Overpeck Creek.

At present, RPOC's only direct access to local streets is from the Bergen Turnpike near its southern boundary. However, traffic safety from this access site is considered poor and hazardous because it is located at a dangerous curve in the road.

RPOC's property is the "largest tract of undeveloped and under-developed land in Ridgefield Park." It is considered environmentally contaminated. Indeed, for more than decade, the Village has sought redevelopment of the property. For example, in its 1992 Master Plan, the Village Planning Board declared as one of its objectives:

> To encourage commercial redevelopment of the rest of the Route 46 frontage in the Village, extending and complementing the recent new development at the [*7] Overpeck Office Center . . . [including] the Lincoln Paper Company [formerly located on RPOC's property] and related properties . . .

The Village Planning Board also published a "Special Study of the Redevelopment of the Lincoln Paper Company Area" as an appendix to the 1992 Master Plan and recommended that the land be re-zoned from industrial and commercial zones to an office park zone. In terms of improving traffic access to the property, the Village Planning Board recommended widening the Bergen Turnpike.

Consistent with the Village Planning Board's 1992 recommendations, the Village enacted ordinance 9-93, as amended by ordinance 12-94. These ordinances created an OP-2 (Office Park) Zone, covering the entire area bounded to the north by Route 46, to the west by the New Jersey Turnpike Authority's land, and to the east by. the Overpeck Creek. The new OP-2 Zone encompasses RPOC's land, as well as the land owned by the Hampton Inn and Exxon.

Notwithstanding the 1993/1994 creation of the OP-2 Zone, RPOC's tract of land remained undeveloped. In its 1998 periodic reexamination of the Master Plan, the Village Planning Board again urged commercial development of the property and related properties [*8] in the area to complement the Overpeck Center development. The Village Planning Board then undertook a redevelopment study with respect to the site as well as the Turnpike property. As a result of that study, in October 1999 the Village Planning Board adopted a resolution which declared RPOC's land and a portion of the adjacent New Jersey Turnpike Authority's property as an area in need of redevelopment under Local Redevelopment and Housing Law, *N.J.S.A.* 40A:12A-1 to -49.

In March 2000, the Village Planning Board adopted a new Master Plan. In the Land Use Plan Element of the 2000 Master Plan, it was again recommended that RPOC's property be redeveloped and that a new access plan be developed for the property with the assistance

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[2] As part of the 1989 subdivision process through which Hartz obtained approval to construct its Overpeck Center, the Village Planning Board required that the Challenger Road Extension be dedicated to public use. To that end, on October 25, 1990, Hartz recorded a Dedication of Easement in the Bergen County Clerk's Office. Thereafter, by ordinance 01-01, Ridgefield Park accepted the dedication of the Challenger Road Extension as a public street.

of the New Jersey Turnpike Authority, the New Jersey Department of Transportation, and the Bergen County Highway Department.

Much of the expert testimony presented in the challenge to ordinance 01-08 focuses upon the lack of a more specific plan for the property in the Village's Master-Plan. Indeed, that was the judge's rationale, in part, for vacating the ordinance. But as the Village has explained, at the time of the 2000 Master Plan the planners were aware of the RPOC development [*9] plan. Obviously it was a plan to be encouraged. In any event, the 2004 Master Plan now encompasses specific planning for the property.

There have been some significant developments at the Village level since the Village Planning Board approved RPOC'S development application. First, in July 2001, the Village Planning Board adopted an "Amendment to the Ridgefield Park Master Plan Traffic Plan." Public notice was given of this amendment. Through this document, the Village Planning Board found that RPOC's proposed development and all suggested highway infrastructure improvements were consistent with the goals and objectives of the 2000 Master Plan. The Village Planning Board agreed that the best way to provide vehicular access to RPOC's property is to extend Challenger Road by a bridge over Route 46 and across Exxon's property. It was aware that construction of that bridge would entail "acquisition of the Exxon gas station."

Second, effective September 6, 2001, the Village adopted ordinance 01-08 as the product of a periodic reexamination of its zoning regulations and in conjunction with the Village Planning Board's issuance of the 2000 Master Plan. The validity of ordinance 01-08 is at [*10] issue in this appeal. Under the ordinance au it existed at the time of RPOC's development application, there was "no maximum height" for buildings located in the OP-2 Zone, "except as regulated by area and yard requirements." That provision was one of the bases for the trial judge's vacation of the approvals. By contrast, under 01-08, there are no height restrictions imposed in the OP-2 tone, except as regulated by the Federal Aviation Administration.[3]

II.

Legal Issues As They Relate to The Site Plan Approvals

a.

Standing

The Law Division reversed the grants of approval given by the Village Planning Board, the County Planning Board and the Freeholders on various grounds. One of those was that RPOC did not have standing to pursue its development applications with these bodies because it was not a "developer" as defined by the Municipal Land Use Law, *N.J.S.A.* 40:55D-1 to -136 (MLUL), in *N.J.S.A.* 40:55D-4. The trial judge concluded that RPOC was not a "developer" because it did not own all of the land needed for the development, in particular the Exxon property, and it did, not have written consent from the owners of that land. He further concluded that there was no evidence of a public/private partnership whereby RPOC's development [*11] project would become feasible as a result of a governmental exercise of eminent domain.

Standing is a threshold jurisdictional issue. *Watkins v. Resorts Int'l Hotel and Casino, Inc.*, 124 N.J. 398, 417-18, 591 A.2d 592 (1991). The parties do not dispute that to have standing at the Village Planning Hoard level RPOC must fit the MLUL's definition of "developer." The County Planning Board and Freeholders, however, contend that no such requirement is imposed by the County Planning Act, *N.J.S.A.* 40:27-1 to -8, which governs actions before county planning bodies. We need not reach this issue as we reject the trial judge's conclusion that RPOC was not a "developer" within the meaning of the MLUL so that, even if a similar requirement applies to a county planning board application, RPOC meets that requirement.

The MLUL defines an applicant as a "developer submitting an application for development." *N.J,S.A.* 40:55D-3. A "developer" is defined as:

> the legal or beneficial owner or owners of a lot or of *any* land proposed to be included in a proposed development, including the holder of an option contract to purchase, or other person having an enforceable proprietary interest in such land.
>
> [*N.J.S.A.* 40:55D-4] (emphasis added).]

The Law Division held that in order to be "developer" an applicant must be a legal or beneficial owner [*12] of *all*

[3] Ridgefield Park is within the air corridors of Teterboro Airport.

the land to be used in the proposed development. This is not what the definition says. The Legislature's requirement is that one own, or have a proprietary interest in, "*any* land proposed to be included in a proposed development." *N.J.S.A.* 40:55D-4. The word "any" is not interchangeable with the word "all." Its dictionary meaning includes "one or some, regardless of sort, quantity, or number," "an indeterminate number or amount." *Webster's II New Collegiate Dictionary* 51 (1999). "All," on the other hand, includes "the whole number, amount, or quantity of" or "the total entity or extent of." *Id.* at 29.

Thus, a plain reading of *N.J.S.A.* 40:55D-4 would lead to the conclusion that RPOC is a "developer" because it owns "any" land proposed to be included in a proposed development. Indeed, RPOC owns the majority of land to be included in its proposed development; RPOC even has an enforceable interest in Exxon's land because it is the successor in interest to an easement across Exxon's land.

The cases upon which Hartz and Exxon rely do not address the issue. The two cases they collectively cite and which directly address *N.J.S.A.* 40:55D-4 are *Ric-Cic Co. v. Bassinder*, 252 N.J. Super. 334, 339-43, 599 A.2d 943 (App. Div. 1991), and *Trinity Baptist Church of Hackensack v. Louis Scott Holding Co.*, 219 N.J. Super. 490, 501, 530 A.2d 828 (App. Div. 1987). *Ric-Cic* addresses whether a leaseholder is a "developer." *Trinity* addresses whether contract purchasers [*13] are "developers." Neither case is helpful here.

In addition, *Hartz* cites *Garofalo v. Tp. of Burlington*, 212 N.J. Super. 458, 464, 515 A.2d 501 (Law Div. 1985). But, while citing *N.J.S.A.* 40:55D-4, the issue resolved in *Garofalo* was whether a planning board can rescind a site plan approval when the applicant was only a contract purchaser at the time of the approval. That is not the issue here.

Hartz's reliance upon *Brower Dev. Corp. v. Planning Bd. of Clinton*, 255 N.J. Super. 262, 604 A.2d 994 (App. Div. 1992), is also misplaced. *Brower* is a notice case. It does not address, not to mention cite, *N.J.S.A.* 40:55D-4. The definition of "developer" was simply not the subject of *Brower*.

Respondents argue, further, that the acquisition condition is invalid. Indeed, we have observed that "a municipality cannot guide the use and development of lands in this state if fundamental elements of a development plan are left unresolved before preliminary approval, leaving them instead for an unspecified later day." *Field v. Mayor and Council of Franklin Tp.*, 190 N.J. Super. 326, 332-33, 463 A.2d 391 (App. Div.), *certif. denied*, 95 N.J. 183, 470 A.2d 409 (1983). On the other hand, we have held that a planning board should grant preliminary approval of a development application even though a necessary drainage easement was not yet in hand and that, instead of denying the application, the board should condition its approval upon acquisition of the necessary easement. *W.L. Goodfellows & Co. of Turnersville v. Wash. Twp. Planning Bd.*, 345 N.J. Super. 109, 117-18, 783 A.2d 750 (App. Div. 2001) (*Goodfellows*).

Here, the Village planning Board granted preliminary major site [*14] plan approval to RPOC, and both preliminary and final site plan approval for Phase I of RPOC's project (with Phase I including all off-site road improvements), conditioned upon, among other things, "(a)cquisition of properties needed to construct the approaches to the development indicated on the site plan."[4] Based upon the record, this condition seems feasible.

First, while Exxon has adamantly refused to sell, condemnation in order to facilitate redevelopment of RPOC's property and to improve traffic safety in accessing the Hampton Inn property is not inconceivable. Such action on the part of the Village would be permissible under *N.J.S.A.* 40A:12A-8, which permits a municipality to acquire property in order to effectuate a redevelopment plan. *See also Twp. of W. Orange v. 769 Assocs., L.L.C.*, 172 N.J. 564, 567, 576-80, 800 A.2d 86 (2002) (municipality may condemn private property for use as a public street, notwithstanding argument that proposed taking was solely to further interests of private developer).

In this respect, moreover, in its July 2001 amendment to the 2000 Master Plan, the Village Planning Board commented approvingly on RPOC's proposed development, as well as RPOC's proposed changes to the public highway infrastructure, finding them in the

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[4] In asserting that this condition is invalid, respondents equate it to the off-tract purchase we found invalid in *Tennis Club Assocs. v. Planning Bd. of Tp. of Teaneck, supra*, 262 N.J. Super. at 433. We disagree with the equation. First, the off-tract improvements required by the planning board in *Tennis Club* were not essential for the development nor part of the applicant's development plans. *Id.* at 434-35. Second, off-tract improvements by MLUL definition are not part of the development property whereas off-site. improvements, such as; RPOC's access road, are, *N.J.S.A.* 40:55D-5.

public interest and consistent [*15] with the 2000 Master Plan. The Village Planning Board also expressly recognized that it was in the public interest that the Exxon property be acquired through condemnation in order to facilitate redevelopment of RPOC's land, stating:

> The safest and most efficient way for access to the Werner [RPOC] property and other parcels in this area is for a bridge to be constructed over Route 46 across the Exxon property. *Eventually, the Exxon property and some other takings will have to be purchased by a public agency involved in constructing these roads and if that can not be accomplished, taken by eminent domain*.
> [Emphasis added.]

There is no evidence that the Village's governing body has commenced condemnation procedures with respect to Exxon's property, as recommended by the Village Planning Board. Neither does it appear that the Exxon property has ever been part of redevelopment plan. However, the Village has appeared as a respondent in this litigation, supported RPOC's proposed development, and has declared RPOC's land, as well as the nearby Turnpike property, in need of redevelopment.

Second, there is no real issue as to any property other than Exxon's. The record reflects that no property [*16] owners other than Exxon and Hartz object to RPOC's proposed development. The other Landowners whose property would be used by RPOC are the Gasho Restaurant, the Hampton Inn, and the New Jersey Turnpike Authority. The Gasho Restaurant wished RPOC "every bit of luck and success in its project." The Village Planning Board conditioned its approval on "[s]uitable agreement with the Hampton Inn," and the record reflects that RPOC was in negotiations with the owners of the Hampton Inn and was confident that an agreement would be reached. Finally, the Turnpike Authority has tentatively approved RPOC's development plan.

b.

Notice

i.

Sufficiency of Public Notice of Village Planning Board Application.

Under the MLUL, the relevant municipal agency must hold hearing on each application for development. *N.J.S.A.* 40:55D-10(a). Public notice by the applicant must be given at least ten days prior to the date of the hearing. *N.J.S.A.* 40:55D-12. The notice of hearing must state:

> the date, time and place of the hearing, the *nature of the matters to be considered and . . . an identification of the property proposed for development by street address, if any, or by reference to lot and block numbers* as shown on the current tax duplicate in the municipal tax [*17] assessor's office, and the location and times at which any maps and documents for which approval is sought are available . . . .
>
> [*N.J.S.A.* 40:55D-11 (emphasis added).]

Proper notice is a jurisdictional prerequisite. Therefore, a failure to provide adequate notice may be deemed fatal to a planning board's approval. *Perlmart of Lacey, Inc. v. Lacey Twp. Planning Bd.*, 295 N.J. Super. 234, 236-38, 684 A.2d 1005 (App. Div. 1996).

The purpose of providing notice

> is to ensure that members of the general public who may be affected by the nature and character of the proposed development are fairly apprised thereof so that they may make an informed determination as to whether they should participate in the hearing or, at the least, look more closely at the plans and other documents on file.
>
> [*Id.* at 237-38.]

Accordingly, the notice should be written in plain language, such that the ordinary layperson could understand its potential impact upon him or her. *Id.* at 238-39. "[T]he critical element of such notice has consistently been found to be an accurate description of what the property will be used for under the application." *Id.* at 238.

Here, the public notice of RPOC's Village Planning Board application stated in pertinent part as follows:

> PLEASE TAKE NOTICE that the undersigned as owner and developer has filed an application with the Planning Board of the Village [*18] of Ridgefield Park for simultaneous preliminary and/or

> *final site plan approval and preliminary and/or final subdivision approval, a construction phasing plan and variances for size and number of spaces, a lighting variance, bulk variance for impervious coverage, lot area, width, depth, buffers, setbacks, building coverage, height of buildings, size of buildings, road access, level of service road design variances, and for size, number and location of signs and a variance for the retail component mix and limitation on its size and number all* as otherwise provided in the Village ordinances and any other applicable variances from the requirements of the land use development regulation ordinances for the Village of Ridgefield Park or waivers that may be requested so as to permit the construction of *three (3) office towers of approximately 2,000,000 sq. ft. of office space plus amenities and a separate hotel, conference center of approximately 225,000 sq. ft.* in Ridgefield Park adjacent to the New Jersey Turnpike northbound and its exit at Route 46 Eastbound and designated as Lot 1, Blocks 49.01, 53.01, 54.01, 56.01, 65.02, 66.01, 67.01, 60.02, 69.02, 70.02 and 71.01 on the Village of [*19] Ridgefield Park's Tax Map and commonly known as the Werner Property at 300 Bergen Turnpike a/k/a Lincoln Paper Company.
> [Emphasis added.]

The notice also gave the date and time of the public hearing, and indicated that maps, plans, and other related documents were available for inspection at the Village Planning Board.

The trial judge found the notice inadequate because it did not sufficiently alert the public to the extensive roadway infrastructure that was required. We disagree. RPOC gave the location of the development and a detailed description of the construction it planned to undertake on the property. The notice specifically referred to "road access, level of service, road design variances." Given the large-scale development RPOC proposed, even a causal reader would understand "the nature of the matter to be considered," including that a system of internal roadways would have to be constructed with access to the adjacent existing roadway structures.[5]

Hartz writes "[I]ncredibly, appellant's brief does not cite, much less address, the *Brower* decision." *Brower*, however, did not address the contents of a public notice. The issue addressed in *Brower* was whether property owners within 200 feet of an *access* road that was [*20] part of development plans should have received personal notice. *Brower Dev. Corp. v. Planning Bd., supra*, 255 N.J. Super. at 268-70. Whether a development's off-site improvements will have such an impact upon adjacent property owners that public notice is required has no bearing upon what that notice should contain. As we have said, even a casual reader of the public notice here would have known that the development would encompass significant roadway access improvements, impacting upon the existing roadway infrastructures in the area and the affected property. Moreover, as to Exxon's claim of inadequate notice, it knew RPOC already had a right-of-way access easement. Presumably, it must have been aware that it was inadequate for such a large scale development and that RPOC would, ultimately, need to obtain better access over its property. *N.J.S.A.* 40:55D-12 was satisfied.

ii.

Pre-Hearing Meetings

RPOC submitted its development application in May 2000. However, the application was not deemed final, and the Village Planning Board did not begin formal hearings on the application, until August 21, 2000. The record reflects that between January 2000 and August 2000, the Village Planning Board held regularly scheduled meetings, in accordance with *N.J.S.A.* 40:55D-9, and with the Open Public [*21] Meetings Act, *N.J.S.A.* 10:4-6 to -21. On several occasions at these meetings the Board informally discussed RPOC's proposed development.

As to these discussions, the record shows the following:

> *January 3 2000*: The Village Planning Board noted that Lancaster Resources [RPOC] had purchased the Werner property; an office park with 15-story high-rise buildings was proposed, and the Turnpike also proposed a Change in the exit ramp to make it safer; Lancaster Resources had requested a meeting.
>
> *March 20, 2000*: Under the heading "Informal," the Village Planning Board noted that Lancaster's attorney, Frank DeVito, advised the Board that meetings had been held with the Department of

[5] Since we are satisfied that the notice was adequate, we decline to address RPOC's alternative contention that Hartz and Exxon. waived any deficiencies in the notice by participating in the planning board process.

Environmental Protection (DEP) and the New Jersey Turnpike Authority; he anticipated the submission of plans in May, and he hoped the project would be started before the end of the year; the architect also gave a brief description of the project, which was described as three towers with a parking deck, with access from the Turnpike, Route 46, and Challenger Road, and a nature walk around the perimeter of the property; anticipated building height was 326 feet, with 8000 parking spaces expected;

April 3, 2000: Under the heading "Informal," [*22] the Village Planning Board noted that attorney Frank DeVito, attorney for the Lancaster Group, advised the Board that approval had been received from the DEP; proposed plans were shown for roadways; three office towers with parking garages, walkways, storm water basins, and loading areas;

April 17, 2000: There is no indication that anybody from RPOC was present at this meeting. However, the Village. Planning Board noted that the Lancaster Group needed: approval to set up equipment to grind concrete for fill; the Board also moved to classify the Werner property as a redevelopment property;

May 15, 2000: There is no indication that anybody from RPOC was present at this meeting. However, the Village Planning Board noted that a discussion was held regarding the office park to be developed on the Werner tract; a Board member stated that some information was missing, a traffic report must be reviewed, proposed roads must be reviewed, and initial reports will be needed before the hearing;

June 5, 2000: There is no indication that anybody from RPOC was present at this meeting. However, the Village Planning Board discussed bids for the work to be done at the Werner property, including estimates [*23] for a planning review, and for traffic studies; an estimate for an engineering study was expected in two weeks; the Board voted in favor of accepting bids for the planning and traffic studies;

June 19, 2000; There is no indication that anybody from RPOC was present at this meeting. However, the Village Planning Board noted its receipt of a bid for an engineering study with respect to RPOC's development application; the Board voted in favor of accepting the bid;

July 10, 2000: There is no indication that anybody from RPOC was present at this meeting. The Village Planning Board approved payment of a voucher submitted by the Board's attorney, for work done regarding the proposed SkyMark development; the Board also distributed copies of the reports received regarding the SkyMark project; the Board determined that, based upon the reports, there were extensive outstanding issues to be addressed prior to the public hearing; the SkyMark application was deemed incomplete, and the scheduled hearing date of July 17, 2000 was postponed; the Board voted to notify RPOC's attorneys of these facts;

July 17, 2000: Under the heading "Informal," the Village Planning Board noted that RPOC's attorney presented [*24] architectural plans showing what the site would look like if the proposed development were approved; traffic issues were also noted, as was the necessity for two variances; RPOC's attorney requested that the Board draft a redevelopment plan, and the Board indicated it could not say how a redevelopment plan would turn out if it adopted one; the Board further advised RPOC's attorney that it could not proceed with the site plan application until it received the information it had requested, including information on the proposed amount of office and retail space, and the identity of the property's owners; a public hearing was scheduled on the application for August 21, 2000; and

August 7, 2000; The Village Planning Board approved payment of vouchers received from the Board's attorney and planner, for work done regarding the SkyMark application; in addition, the attorney for RPOC gave an update on the application; traffic counts were updated, and a hearing on - the application was scheduled for August 21, 2000.

The Law Division concluded that, the Village. Planning Board's poet-application, pre-hearing discussions regarding RPOC's proposed development, particularly those in - July and August [*25] for which personal notice was not given, were so extensive that they violated the MLUL, warranting reversal of the Village Planning Board's approvals. We disagree.

The MLUL anticipates that a Planning Board may consider a proposed development before a formal development application has been filed. Specifically, the MLUL provides that, at the request of a developer, a

Planning Board may grant an informal review of a concept plan for a development for which the developer intends to prepare and submit an application for development. *N.J.S.A.* 40:55D-10.1. The Village Planning Board's discussions of RPOC's proposed development, prior to the application being filed on May B, 2000, are consistent with that anticipated by the MLUL.

The MLUL also anticipates that a Planning Board may discuss a development application after the application has been filed but before a formal hearing is commenced. Specifically, the MLUL provides that a Planning Board may review a development application for completeness and may communicate with a developer regarding the adequacy of its application. *N.J.S.A.* 40:55D-10.3. A development application is not complete until so certified by the relevant municipal body. *Ibid.*

Here the Village Planning Board's post-application, [*26] pre-hearing discussions of RPOC's development application were consistent with *N.J.S.A.* 40:55D-10.3. In its May 2000 discussion, the village Planning Board merely noted that information was missing from RPOC's application. In its June 2000 discussions, the Village Planning Board merely approved the hiring of consultants needed to analyze RPOC's application. Finally, in its July and August discussions, the Village Planning Board continued to note deficiencies in RPOC's application; any discussions of the details of the application appear to have been very brief, and were no more extensive than the review which occurred before the application was filed.

In reaching his conclusion, the trial judge relied upon *Stewart v. Planning Bd. of Manalapan*, 334 N.J. Super. 123, 756 A.2d 1082 (Law Div. 1999). In *Stewart*, an applicant before the Planning Board sought approval to develop a Rite Aid pharmacy. *Id.* at 125. Prior to submitting a formal development application, the applicant requested, and received, an informal concept review by the Planning Board. *Id.* at 126. Soon after this informal review, the applicant submitted a development application. *Ibid.* But after the application was deemed complete, the Planning Board held a second, informal review of the application. *Ibid.* Ultimately, after public hearings, preliminary [*27] and final site plan approvals were granted. *Ibid.* In his subsequent action in lieu of prerogative writs action, neighboring property owner contended that the applicant's pre-hearing meetings with the Planning Board violated the notice requirements of the MLUL, and deprived him of due process. *Id.* at 128. The Law Division judge agreed with this contention. In particular, the judge took issue with the Planning Board's "informal review" of the applicant's proposed development which Occurred after the development application had been filed but before formal hearings commenced, stating:

> This court is concerned that such an informal review hearing or meeting may cause Board members to decide matters before them without interested parties being noticed. This court does not find that such a procedure (i.e. substantive review of an application subsequent to a concept review and waiver request) is authorized by statute. The loss of an opportunity for interested persons to present views to a neutral, unbiased and uninfluenced Board serves to taint action taken by the Board due to the shadow of impropriety that such action casts. Whether or not a record is kept of such a meeting is of little concern to this [*28] court. It is well known that recording procedures of such meetings are not immune from manipulation and "off the record discussions" of pending applications often take place.
>
> [*Id.* at 129.]

The judge, therefore, held that the post-application, pre-hearing meeting without public notice rendered the site plan approval invalid. *Id.* at 131-32.

The *Stewart* decision has been the subject of criticism; *See* David J. Frizell, 36 *New Jersey Practice* $16.83, at pp. 33-34 (2003 pocket part). Frizell opined that the procedure condemned in *Stewart* is commonplace, and, if applied statewide, *Stewart's* prohibition against post-application, pre-hearing discussions would slow development applications to a crawl, and accelerate the trend of viewing every municipal land use hearing as adversarial. *Ibid.* Frizell maintains that

> [a]s long as the Board gives the public a complete opportunity to examine each of the legal standards and proofs which the applicant must meet, to cross-examine every essential witness who in necessary to the application, and to fully present their side of the story, there is no reason to prohibit the applicant from appearing before the Board and presenting his case informally and receiving feedback from the Board prior to giving formal notice to the [*29] neighboring property owners.
>
> [*Id.* at 34.]

See also Gandolfi v. Town of Hammonton, 367 N.J. Super, 527, 545-47, 843 A.2d 1175 (App. Div. 2004).

We need not determine whether *Stewart* was correctly decided. Factually, it is distinct. Here, unlike in *Stewart*, the Village Planning Board's pre-hearing discussions occurred before RPOC's development application was declared complete. Indeed, the Village Planning Board's post-application discussions generally centered around the deficiencies in the completeness of RPOC's application. The Village Planning Board did not declare RPOC's application complete until the first day of the hearings, August 21, 2000. moreover, unlike in *Stewart*, there is no evidence in the record that any issues of consequence to RPOC's application were discussed at the post-application pre-hearing meetings. Furthermore, Hartz and Exxon extensively participated in the hearing proceedings and there is no evidence that any of the post-application pre-hearing meetings had any impact upon the ultimate approvals. *Cf. Gandolfi v. Town of Hammonton, supra*, 367 N.J. Super. at 546-47.

C.

Height Variance

Interpreting the Village zoning ordinance that was applicable at the time of RPOC's development application, the Village Planning Board concluded that RPOC did not need a height variance. The Law Division judge disagreed with the Board's interpretation [*30] of the ordinance. He held that RPOC needed a height variance, which it could only obtain from the Board of Adjustment. Therefore, the judge concluded that the Village. Planning Board did not have jurisdiction to hear RPOC's application. While we agree that a height variance, had one been required, would have required a Board of Adjustment subsection d variance application, *N.J.S.A.*, 40:55D-70(d)(6), we disagree that the ordinance in effect at the time imposed such a requirement.[6]

Where the language of a zoning ordinance is clear and unambiguous, no interpretation is necessary, and the plain language should be applied. Where the language is susceptible to multiple interpretations, however, in general, the ordinance should be liberally construed in favor of the interpretation propounded by the municipality and the Municipal Planning Board. *State, Tp. of Pennsauken v. Schad*, 160 N.J. 156, 170, 733 A.2d 1159 (1999); *Atlantic Container, Inc. v, Tp. of Eagleswood Planning Bd.*, 321 N.J. Super. 261, 270, 728 A.2d 849 (App. Div. 1999); *Terner v. Spyco, Inc.*, 226 N.J. Super. 532, 539, 545 A.2d 192 (App. Div. 1988). Deference is afforded to a Planning Board's belief as to legislative intent because the Planning Board is involved in both the municipality's adoption of a master plan and the municipality's adoption and amendment of zoning ordinances. Therefore, the Planning Board 'can be expected to have more than a passing knowledge of the legislative intent at the time of the enactment." [*31] *Atlantic Container, Inc. v. Tp. of Eagleswood Planning Bd., supra*, 321 N.J. Super, at 269.

At the time RPOC filed its development application, the pertinent ordinance provisions provided:

> F. Maximum height . . . *There shall be no maximum height except as regulated by area and yard requirements*,
> G. Area, yard and bulk regulations.
> . . . .
> [3] No structure shall be closer to any street right-of-way line or to any property line than thirty (30) feet for buildings not in excess of one hundred fifty (150) feet in height. For buildings in excess of one hundred fifty (150) feet, the setback requirements shall be increased by one (1) foot for each additional foot of building height.
> (4) The maximum building coverage shall be as follows:
>
> Go to table1
>
> (5) The maximum lot coverage (building plus paving plus parking lots and parking garages) shall not exceed seventy-five percent (75%). The remaining twenty-five percent (25%) shall be landscaping.
> [96-87(F) and (C) (emphasis added).]

RPOC's plan calls for Building A, closest to the Exxon property to have a height of approximately 352 feet (21 stories). Under 96-87, a building of such height would require a setback of at least 232 feet from Exxon's property line. [*32] Also, there would be a building coverage limit of 20 percent, and a total impervious coverage limit of 75 percent. RPOC, however, proposed a setback of only 166 feet from Exxon's property line, a

[6] Because we reject the trial judge's construction of the ordinance, we do not consider whether the new ordinance, which clearly does not have a height requirement, applies. We also need not consider RPOC's evidence contentions contained in point V of its brief.

building coverage of 34 percent, and a total impervious coverage of 55 percent. It sought variances for the deviant setback, building coverage and impervious coverage, and its expert testified during the Village Planning Board proceedings that only setback and coverage variances were required. The Board's planner agreed with this assessment. Although Hartz's expert contended that a height variance was needed, the Village Planning Board disagreed.

We see no reason to interfere with this determination. The language of the ordinance evidences a primary concern with area, yard, and bulk regulations, and only a secondary concern with building height. For example, the regulations do not impose a specific height limitation on buildings within the OP-2 Zone in terms of feet or number of stories. Rather, the regulations allow buildings of any height, and depending upon the proposed height, the setback and building coverage requirements are altered. That is to say under the language of the ordinance, [*33] setbacks and building coverage follow height, rather than vice versa.

The language used in the regulations also evidences an anticipation by the Village that the OP-2 Zone would contain buildings of immense height. The ordinance references buildings in excess of one hundred fifty (150) feet," and buildings of "18 plus" stories, with no reference to a maximum height in terms of either feet or stories. Clearly, the legislative intent was not to rule out the possibility of buildings of 21 stories, such as the ones proposed by RPOC. A subsection d variance, then, was not required.

d.

County Board of Chosen Freeholder's Approval

In affirming the County Planning Board's approval of RPOC's development application, the Freeholders applied the "arbitrary or capricious" standard of review, based upon the record before the County Planning Board and the arguments made by counsel. The Law Division invalidated the Freeholders' decision, holding that the Freeholders should have reviewed RPOC's application *de novo*, concluding that was "entirely speculative " whether the Freeholders would have reached-the same result had they applied the more demanding standard of review, and, further, concluding that [*34] even under an "arbitrary or capricious" standard, the Freeholders improperly approved the site plan, While we agree the standard of review should have been de nova, we disagree that the error requires setting aside the Freeholders' approval. Moreover, we disagree that even under the less demanding standard, the Freeholders' approval is vulnerable. We do not address RPOC's claim that the doctrine of "invited error" applies.

A Board of Chosen Freeholders exercises both the executive and legislative powers of its county. It is empowered to manage, control, and govern the property, finances, and affairs of the county. *N.J.S.A.* 40:20-1. No county is required to have a county planning board. Under the auspices of the County Planning Act, however, a Board of Chosen Freeholders "may create a county planning board." *N.J.S.A.* 40:27-1. If a Board of Chosen Freeholders creates a county planning board, it 'shall provide" that the county planning board is responsible for reviewing "all subdivisions of land within the county" and approving "those subdivisions affecting county road or drainage facilities." *N.J.S.A.* 40:27-6.2. It "may provide" that the county planning board is responsible for reviewing and approving site plans for land development [*35] "along county roads or affecting county drainage facilities." *N.J.S.A.* 40:27-6.6. The Freeholders also are empowered to adopt standards for a county planning board to follow in reviewing subdivision and site plan applications. *N.J.S.A.* 40:27-6.2 to -6.6. Consistent with the County Planning Act, the Bergen County Board of Chosen Freeholders has created a Bergen County Planning Board and the governing county site plan standards.

When considering applications for subdivision or site plan approval, county planning boards act in a quasi-judicial capacity. *Cf. Willoughby v. Planning Bd.*, 306 N.J. Super. 266, 273, 703 A.2d 668 (App. Div. 1997) (municipal planning board's approval of site plan application constituted "quasi-judicial decision of a municipal administrative agency"). However, the Freeholders retain ultimate authority for rendering the final decision on such matters because appeals from a subdivision or site plan decision of a county planning board may be taken to the Freeholders. In this respect, the County Planning Act provides:

> Any person aggrieved by the action of the county planning board in regard to subdivision review and approval or site plan review and approval may file an appeal in writing to the board of chosen freeholders within 10 days after the date of [*36] notice by certified mail of said action. . . [T]he,

> board of chosen freeholders . . . shall consider such appeal at a regular or special public meeting within 45 days from the date of its filing. Notice of said hearing shall be made by certified mail at least 10 days prior to the hearing to the applicant and to such of the following officials as deemed appropriate for each specific case: the municipal clerk, municipal planning board, board of adjustment, building inspector, zoning officer, board of chosen freeholders and the county planning hoard. The board . . . shall render a decision within 30 days from the date of the hearing.
>
> [*N.J.S.A.*, 40:27-6.9.]

The County Planning Act does not specify what standard of review should be applied by the Freeholders on an appeal to it pursuant to *N.J.S.A.* 40:27-6.9 or what the "hearing" should consist of. But we draw an analogy to a municipal governing body's review of a decision by a board of adjustment. *See, e.g.*, *Builders League of S. Jersey. Inc, v. Burlington County Planning Bd.*, 353 N.J. Super. 4, 22, 801 A.2d 380 (App. Div. 2002) (drawing analogy between the County Planning Act and the MLUL). Under the MLUL, appeals from a board of adjustment may be taken to the municipal governing body if permitted by local ordinance. *N.J.S.A.* 40:55D-17(a). The governing body conducts a de novo review of the board's decision. *Evesham Tp. Zoning Bd. of Adj. v. Evesham Tp. Council*, 86 N.J. 295, 300-02, 430 A.2d 922 (1981). The governing [*37] body "may reverse, remand, or affirm with or without the imposition of conditions." *N.J.S.A.* 40:55D-17(d). However, its review is based solely upon the record before the board of adjustment and the arguments of counsel. *N.J.S.A.* 40:55D-17(b) and (d). We see no reason for a different standard to apply to the Board of Chosen Freeholders' review of its planning board's site plan approval.

But it matters not that the Freeholders here utilized an arbitrary or capricious standard. The evidence, even under a *de novo* review standard, amply supports the county site plan approval. That is to say, had the Freeholders applied that standard, we are convinced it would have reached the same result. Furthermore, we specifically reject the trial judge's conclusion that the approvals were "arbitrary or capricious."

The issues presented to these bodies concerned the possible drainage and traffic effects of RPOC's proposed development on county facilities and county roads. *N.J.S.A.* 40:27-6.2; *N.J.S.A.* 40:27-6.6; *Builders League of S. Jersey, Inc. v. Burlington County Planning Bd., supra*, 353 N.J. Super. at 11-19. Hartz and Exxon appeared at hearings before both the County Planning Board and the Freeholders; they contested the traffic effect of RPOC's proposed development (not the drainage effect).

As to the traffic issue, the county bodies considered a report submitted by [*38] RPOC's traffic expert, joint reports and memoranda submitted by the County Department of Planning and Economic Development and the County Engineer's Office, and the decision rendered by the Village Planning Board. Testimony was presented during the County Planning Board proceeding from Hartz's traffic engineer expert, RPOC's traffic engineer expert, the County Planner, the County Traffic Engineer, and the County Director of Public Private Partnerships.

All but Hartz's expert offered opinions that the development would not result in an unacceptable overburdening of those county roads which would be affected. Hartz's expert opined that all the other experts had underestimated the traffic effect of RPOC's proposed development on those roads. In particular, Hartz's expert predicted that RPOC's development would significantly increase traffic on the county-owned portion of Challenger Road, such that Challenger Road would probably need to be widened. On the other hand, RPOC's expert and the county experts agreed that RPOC's development should have little or no effect on traffic along county roads because it was anticipated that most individuals visiting the site would travel along major thoroughfares [*39] such as the New Jersey Turnpike and Route 46. The quotations Hartz cites in its brief, which seem to indicate vacillation on the part of the County's experts, are taken out of context, and do not reflect the true tenor of the County experts' opinion, which that RPOC's development application should be approved, subject to conditions.[7]

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[7] For example, the County Planning Hoard:

> reserved) the right to require the applicant/property owner to submit supplemental traffic data concerning affected regional intersections upon the opening of the center and cooperate with the County or an Agent of the County in the event these affected intersections are not operating at a safe E. efficient level as deemed by the County.

In addition:

> The Applicant's engineer will provide to the County Engineer the data related to the feasibility of a turning movement from eastbound Route 46 to northbound on Challenger Road. If deemed appropriate by the County

It was well within the discretion of the county bodies to reject the opinion offered by Hartz's expert. Of particular significance is the fact that RPOC's property adjoins only one county road, the Bergen Turnpike. The primary means of [*40] accessing RPOC's proposed development will be over state highways (the Turnpike, Route 80, and Route 46) and over the Village's portion of the Challenger Road. The only direct ingress and egress affecting a county road would be for emergency vehicular ingress and egress utilizing the Bergen Turnpike.

In conclusion, the approvals were well grounded in the record. The appropriate standard of review by the Freeholders is a *de novo* standard. But under either an arbitrary or capricious standard or the more exacting *de novo* standard, the approvals withstand scrutiny.

III.

Issues Relating to 01-08

a.

Master Plan

The Law Division judge ruled that ordinance 01-0B was invalid to the extent it affected the OP-2 Zone because he concluded that the Village Planning Board's 2000 Master Plan did not contain any specific planning recommendations for the OP-2 Zone. We disagree. We have previously set forth the historical planning actions by the Village and its planning board. We are entirely convinced 01-08 was enacted pursuant to the Village's historical planning concept for the area.

In judging the validity of a zoning ordinance, there are generally four factors to be considered. First, the ordinance must [*41] advance one of the purpose's of the MLUL; second, the ordinance must be "substantially consistent" with the Master Plan or designed to effectuate such plan elements;[8] third, the ordinance must comport with constitutional constraints on the zoning power; and fourth, the ordinance must be adopted in accordance with applicable procedural requirements. *Riggs v. Long Beach Tp.*, 109 N.J. 601, 611-12, 538 A.2d 808 (1988).

It is the 'substantially consistent" factor that is at issue here. The MLUL defines a master plan as "a composite of one or more written or graphic proposals for the development of the municipality." *N.J.S.A.* 40:55D-5. Its purpose is "to guide the use of lands within the municipality in a manner which protects public health and safety and promotes the general welfare." *N.J.S.A.* 40:55D-28(a). A master plan must consist of at least two elements: (1) "[a] statement of objectives, principles, assumptions, policies and standards upon which the constituent proposals for the physical, economic and social development of the municipality are based"; and (2) a land use plan element. *N.J.S.A.* 40:55D-28(b).

The MLUL also provides general criteria for judging the adequacy of the land use element of a master plan. Under the MLUL, the land use element should: (1) take into account and state its relationship to [*42] the statement of objectives, other master plan elements, and natural conditions of the land (*e.g.*, topography and soil conditions); (2) show the existing and proposed location for varying types of land uses (*e.g.*, residential, commercial, industrial, etc.); (3) state the relationship of these land uses to the existing and proposed location of any airports and the boundaries airport safety zones; and (4) include a statement of the standards of population density and development intensity recommended for the municipality. *N.J.S.A.* 40:55D-28(b)(2).

Despite this framework, it is obvious that the local planning bodies cannot identify every possible compatible and incompatible use in a master plan. *Manalapan Realty, L.P. v. Tp. Comm. of Manalapan*, 140 N.J, 366, 385, 658 A.2d 1230 (1995). Moreover, some inconsistency between a master plan and a zoning ordinance is permitted, "provided it does not substantially or materially undermine or distort the basic provisions and objectives of the Master Plan." *Id.* at 384. *Accord, Victor Recchia Residential. Constr., Inc. v. Zoning of Adi. of Tp. of Cedar Grove*, 338 N.J. Super. 242, 251, 768 A.2d 803 (App. Div. 2001). Compare, *Willoughby v. Planning Bd. of Tp. of Deptford*, 326 N.J.

Engineer, the Applicant will revise its traffic plans to provide said movement.

[8] The governing body may enact a zoning ordinance which, is inconsistent with the master plan, but may only do so by "affirmative vote of the full authorized membership of the governing body, with the reasons of the governing body for so acting set forth in a resolution and recorded in its, minutes when adopting such a zoning ordinance." *N.J.S.A.* 40:55D-62(a).

Super. 158, 162-66, 740 A.2d 1097 (App. Div. 1994) (ordinance amendment changing developer's property from office campus, which did not permit the proposed development, to town center, which did, was not substantially consistent with master plan).

Turning to the question of the adequacy of the Village Planning Board's 2000 Master Plan, [*43] the document contains the two elements required under *N.J.S.A.* 40:55D-28(b) (a statement of objectives and a land use element), as well as many of the discretionary elements identified in the MLUL. The land use element, in particular, extends over eight pages; it addresses the municipality's residential, commercial, office park, industrial, and "mixed overlay" land uses, as well as the issues of senior citizen housing, highway office and residential uses, and the area which encompasses RPOC's land in the OP-2 Zone.

Plainly put, the Village Planning Board did not ignore the OP-2 Zone in its 2000 Master Plan. It addressed the OP-2 Zone, and RPOC's land in particular, in the section entitled "Traffic and Transportation Analysis," under the subpart entitled 'Other Transportation Issues," and in the "Land Use Plan Element" under the subparts entitled "Redevelopment Plan" and "Industrial Development." The Plan identified RPOC's land as the largest tract of undeveloped and underdeveloped land in the Village of Ridgefield Park and attributed this lack of development to the lack of adequate traffic access to the property, and also to certain wetlands constraints. The Plan further noted that RPOC's property had been [*44] declared an area in need of redevelopment, recommended that a new traffic access plan be developed for the property, and noted that the 1992 Master Plan had suggested a mix of office, industrial, and warehouse uses on the site. The OP-2 Zone, and RPOC's land in particular, was again addressed in a July 2001 amendment to the 2000 Master Plan which recommended that access to RPOC's property be pursued through a bridge over Route 46, construction of which would entail "acquisition of the Exxon gas station." The amendment noted that this recommendation was consistent with the recommendations of the planners' engineering consultants, as well as RPOC's development application which by that time had been approved.

Turning to the question of ordinance 01-08's consistency with the 2000 Master Plan, we perceive no substantial inconsistency warranting invalidation of the ordinance. The 2000 Master Plan's recommendations for the OP-2 Zone were left vague, and essentially unchanged from the recommendations made in the 1992 Master Plan. Similarly, ordinance 01-08 wrought few changes in the regulations applicable to the OP-2 Zone. The. permitted principal, accessory, and conditional uses in the OP-2 [*45] Zone have remained essentially unchanged.[9] While more significant changes were made to the technical area, yard and bulk regulations, these changes do not alter the basic character of the zone.

Thus, it is not as though, through ordinance 01-08, the governing body altered established expectations regarding the nature of the OP-2 Zone. The zone was an office park zone, and it remains one. Even the Law Division Judge agreed with this point, observing that the changes to the OP-2 Zone regulations, while important, did not have "the capacity to materially alter the essential character of the zone."

Hartz and Exxon, however, point to the addition of the New Jersey Turnpike Authority's land to the OP-2 Zone by way of ordinance 01-08. This zone change, however, is entirely consistent with the Village's 2000 Master Plan planning documents over the years. We see no basis for invalidation of ordinance 01-08 as inconsistent with that planning. *Compare Manalapan Realty, L. P. v. To. Comm. of the Tp. of Manalapan, supra*, 140 N.J. at 383 (no inconsistency between an ordinance banning the sale of lumber and large items described as "building materials" in C-1 zone where the municipality's master plan was silent on the issue) *with Willoughby v. Planning Bd. of Tp. of Deptford, supra*, 326 N.J. Super. at 163 (in light of master plan's express rejection of town [*46] center zoning for property, change of its office center zoning to town center zoning by subsequent ordinance is substantially inconsistent with master plan and invalid.).

b.

Inconsistency Statement

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[9] Only minor changes were made. For example: (1) in the new ordinance, parking lots and garages are a 'permitted use, whereas, under the previous ordinance, they were a permitted conditional use; (2) the level of retail service permitted as an accessory use has been reduced from 15% of gross floor area to 5% of gross floor area; and (3) the new regulations increase the number of restaurants permitted in any one building, and permits one freestanding restaurant.

The Law Division judge held that ordinance 01-08 was invalid because the governing body's inconsistency statement was inadequate. More specifically, the judge found that, because the 2000 Master Plan contained no land use recommendations for the OP-2 Zone, the governing body was prevented from issuing an adequate inconsistency statement. He stated: "the putative identification of inconsistency between the land use plan element and the OP-2 zoning regulations adopted in Ordinance No. 01-08 was an illusory exercise to futility." *See* Cox, *supra*, § 34-2.2, at p. 703 ("Failure [of the planning board] to adopt either the land use element or the housing plan element clearly will vitiate the adoption or amendment of any zoning ordinance as it would be impossible to ascertain the required consistency or explain the reasons for deviation."). We disagree with the trial judge.

Under *N.J.S.A.* 40:55D-26(a) and *N.J.S.A.* 40:55D-64, a municipal governing body may refer a proposed development regulation or zoning ordinance to the Municipal Planning Board for review. [*47] Under *N.J.S.A.* 40:55D-26(a), within thirty-five days, the planning board shall submit a report to the governing body, identifying any inconsistencies between a proposed development regulation and the master plan, and shall make "recommendations concerning these inconsistencies and any other matters the board deems appropriate." Thereafter:

> The governing body, when considering the adoption of a development regulation, revision or amendment thereto, shall review the report of the planning board and may disapprove or change any recommendation by a vote of a majority of its full authorized membership and shall record in its minutes the reasons for not following such recommendation.
>
> [*Ibid.*]

Similarly, under *N.J.S.A.* 40:55D-62(a):

> The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon. Such ordinance shall be adopted after the planning board has adopted the land use plan element and the housing plan element of a, master plan, and all of the provisions, of such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the land use plan element and the housing plan element of the master plan or designed [*48] to effectuate such plan elements; provided that the governing body may adopt a zoning ordinance or amendment or revision thereto which in whole or part is inconsistent with or not designed to effectuate the land use plan element and the housing plan clement, but only by affirmative vote of a majority of the full authorized membership of the governing body, with the reasons of the governing body for so acting set forth in a resolution and recorded in its minutes when adopting such a zoning ordinance; . . .

A governing body's failure to recognize and address inconsistencies between a proposed zoning regulation and the master plan, at the time the ordinance is adopted, will result in invalidation of the ordinance. *Willoughby v. Wolfson Group, Inc.*, 332 N.J. Super. 223, 229-30, 753 A.2d 162 (App. Div.), *certif. denied*, 165 N.J. 603, 762 A.2d 218 (2000); *East Mill Assocs. v. Tp. Council of East Brunswick*, 241 N.J. Super. 403, 405-08, 575 A.2d 61 (App. Div. 1990); *Route 15 Assocs, v. Jefferson TP.*, 187 N.J. Super. 481, 487-88,455 A.2d 518 (App. Div. 1982).

Here, consistent with the MLUL, the Village governing body referred ordinance 01-08 to the Village Planning Board for review, prior to its adoption. By resolution dated August 6, 2001, the Village Planning Board identified inconsistencies between ordinance 01-08 and the 2000 Master Plan, and approved and recommended adoption of ordinance 01-06, notwithstanding those inconsistencies. [*49] Relating to the OP-2 Zone in particular, the Village Planning Board noted the following consistencies and inconsistencies:

> 1. The OP-2 zone northward to U.S. Route 46 and westward to the N.J. Turnpike instead of the highway commercial zone indicated in the master plan.
> Comment: From a planning point of view, the OP-2 zone would be more appropriate than a zone which will likely maintain one principal use.
> . . . .
> 5. The master plan recommended that the old Lincoln Paper Company property be classified DS a redevelopment area. The 2000 master plan takes note that the area be designated a blighted area in need of redevelopment. This was accomplished and a site plan was approved under the auspices of the OP-2 zone district.
> Comment: The OP-2 zone district and the redevelopment classification are considered consistent with one another.

Thereafter, consistent with *N.J.S.A.* 40:55D-62(a), the full authorized membership of the governing body voted to adopt ordinance 01-06. The governing body detailed its reasons for so acting in two resolutions dated August 14, 2001. With respect to the inconsistency concerning the boundaries of the OP-2 Zone, in particular, the governing body stated:

> 1. In the Land Use Element Plan of [*50] the Master Plan, a portion of the OP-2 Zone included a highway commercial district along the south side of Route 46 east of the ramp from the New Jersey Turnpike to Route 46 and the Route 46 Overpeck Creek bridge between Ridgefield Park and Ridgefield.
> The OP-2 Zone in the Zoning Ordinance will extend to all property east of the New Jersey Turnpike to the Overpeck Creek and south of Route 46. We believe after reflecting upon this entire matter, the designation of the entire area as an OP-2 Zone is the most appropriate zoning for this area and would maintain the OP-2 district as an integral unit and zone. Indeed most of the area opposite this OP-2 Zone along the south [sic] side of Route 46 is also zoned for an office park as an OP-1 district, therefore, the two zones will complement each other. Furthermore, we believe the designation of this area as an OP-2 Zone will encourage and promote highway safety along the south side of Route 46 in this area.
>
> *We also note, the Master Plan on p. 141 recommended that the Village should encourage the development of the Route 46 frontage to complement the recent development at the Overpeck Office Center which is on the north side of Route 46. This [*51] further justifies designating thin entire area as an OP-2 Zone in the zoning ordinance*. We, therefore, have not included any of this property in the Commercial Highway District zone.
> [Emphasis added.]
> With respect to the consistency of the zoning changes with the redevelopment classification applicable to RPOC's property, the governing body stated:
>
> > 2. While the Master Plan recommended the Lincoln Paper Property be classified as a redevelopment area and this area was designated as a blighted area in need of redevelopment by the Planning Board, the Governing Body believes the preparation of a Redevelopment Plan for this area is a district [sic] and separate action which is taken pursuant to *N.J.S.A.* 40:12-1 et. seq.
> >
> > At the present time, the OP-2 Zone and redevelopment classification are consistent with each other. The Governing Body will continue to monitor and study the entire situation in the future. We believe that the proposed zoning for the entire OP-2 Zone is consistent with the proposals in the Master Plan. At the same time, the Governing Body will continue to review the proposed development in the future and take such steps in the future as we believe are necessary to promote the entire redevelopment of [*52] this area including the property now owned by the New Jersey Turnpike which is largely vacant. We will encourage the use and development of this entire parcel in a manner which will promote the public health, safety and general welfare of the residents of the Village and those persons who may be employed at this site in the future or utilizing this site or traveling on roads in this area and which may lead to the entire OP-2 District.

These determinations are entitled to "deference and great weight" by us. *Manalapan Realty, L.P. v. Tp. Comm. of the Tp. of Manalapan, supra*, 140 N.J. at 383. What they reflect is precisely what we have already concluded. Ordinance 01-08 does not contain any "substantial inconsistencies" with the 2000 Master Plan. The few inconsistencies that exist were adequately addressed by the Village.

c.

Notice

The Law Division invalidated ordinance 01-08 because personal notice of the pending adoption of the ordinance, as required under *N.J.S.A.* 40:55D-62.1, was not given. We conclude such notice was not required.

The relevant notice statutes are *N.J.S.A.* 40:55D-62.1 and *N.J.S.A.* 40:55D-63. *N.J.S.A.* 40:55D-62.1 states, in pertinent part:

> Notice of a hearing on *an amendment to the zoning ordinance proposing a change to the classification or boundaries of a zoning district, exclusive of*

> *classification or boundary changes recommended [*53] in a periodic general reexamination of the master plan by the planning board pursuant to . . . [N.J.S.A. 40:55D-89]*, shall be given at least 10 days prior to the hearing by the municipal clerk to the owners of all real property as shown on the current tax duplicates, . . . located, in the case of a boundary change, in the State within 200 feet in all directions of the proposed new boundaries of the district which is the subject of the hearing.
> [Emphasis added.]

Similarly, *N.J.S.A.* 40:55D-63 states, in pertinent part:

> Notice of the hearing on an amendment to the zoning ordinance proposing a change to the classification or boundaries of a zoning district, exclusive of classification or boundary changes recommended in a periodic general reexamination of the master plan by the planning board pursuant to . . . [*N.J.S.A.* 40:55D-89], shall be given prior to adoption in accordance with the provisions of . . . [*N.J.S.A.* 40:55D-62.1]. A protest against any proposed amendment or revision of a zoning ordinance may be filed with the municipal clerk, signed by the owners of 20% or more of the area either (1) of the lots or land included in such proposed change, or (2) of the lots or land extending 200 feet in all directions therefrom inclusive of street space, whether within [*54] or without the municipality. Such amendment or revision shall not become effective following the filthy of such protest except by the favorable vote of two-thirds of all the members of the governing body of the municipality.
> [Emphasis added.]

We interpreted these statutes in *Gallo v. Mayor & Twp. Council of Lawrence Twp.*, 328 N.J. Super. 117, 744 A.2d 1219 (App. Div. 2000). We held that zoning changes at issue in *Gallo*, which would create a higher density residential zone located adjacent to a landowner's property, and which had been recommended pursuant to the six-year review of a master plan mandated by *N.J.S.A.* 40:55D-69, did not require personal notice under *N.J.S.A.* 40:55D-62.1. *Id.* at 119. In reaching this conclusion, we found that in defining the notice required for zoning changes the Legislature intended to distinguish between an isolated zoning change, requiring notice, and a broad-based review of a municipality's entire zoning scheme, not requiring notice. *Id.* at 124-27.

Here, it is undisputed that ordinance 01-08 altered the boundaries of the OP-2 Zone by extending the western boundary of the OP-2 Zone to include land owned by the New Jersey Turnpike Authority. The Turnpike Authority's land was previously part of the industrial, I-1 zone. Given this boundary change, personal notice of the zoning change was required under *N.J.S.A.* 40:55D-62.1 and *N.J.S.A.* 40:55D-63, unless [*55] the change was "recommended in a periodic general reexamination of the master plan by the planning board" in accordance with *N.J.S.A.* 40:55D-89. That is what occurred here. Specifically, in issuing public notice of ordinance 01-08, the Village announced that the ordinance was being 'adopted as a result of a re-examination of the Master Plan by the Planning Board of the Village of Ridgefield Park," required under *N.J.S.A.* 40:55D-89. We see no reason to disregard this statement.

Hartz argues, however, that the boundary change in the OP-2 Zone cannot be viewed as "recommended in a periodic general reexamination of the master plan by the planning board" such' that personal notice was *not* required, because neither the 1996 Reexamination Report nor the 2000 Master Plan, specifically recommended that the boundaries of the OP-2 Zone be changed. Therefore, those documents cannot serve as public notice of the changes wrought to the OP-2 Zone by ordinance 01-08, replacing the personal notice required under *N.J.S.A.* 40:55D-62.1 and *N.J.S.A.* 40:55D-63.

It is true that the 1998 Reexamination Report may not be a model of what the Legislature intended, since it does not identify "[t]he specific changes recommended for the master plan or redevelopment regulations, if any." *N.J.S.A.* 40:55D-89(d). Significant [*56] with respect to this case, the Reexamination Report does not contain any specific recommendation that the Turnpike Authority's lands be included in the OP-2 Zone, or that the OP-2 Zone be expanded.

However, the 1998 Reexamination Report states, as a general objective, "[t]o encourage the commercial redevelopment of the rest of Route 46 frontage of the Village, extending and complementing the recent development at the Overpeck Office Center. This includes the Lincoln Paper Company and slated properties . . . ." Further, the OP-2 Zone is addressed more generally and redevelopment plans for the property owned by RPOC are noted, including the need to improve traffic access to RPOC's property, entailing consultation with the New Jersey Turnpike Authority and use of the Turnpike Authority's lands. These references

to the Turnpike. Authority's lands' in the context of the redevelopment of RPOC's property are sufficient to warrant referring to the boundary changes in ordinance 01-08 as "recommended in a periodic general reexamination of the master plan by the planning board.' Therefore, personal notice of ordinance 01-08 was not required under either *N.J.S.A.* 40:55D-62.1 or 40:55D-63.

Even if such notice were required, we do [*57] not believe the ordinance should be invalidated. First, it is undisputed that the Village gave public notice of the proposed adoption of ordinance 01-08. Individual notice was also given to the New Jersey Turnpike Authority, the landowner directly affected by the boundary change, as well as the New Jersey Department of Transportation. Neither the Turnpike Authority nor the Department of Transportation opposed the ordinance.

Second, while the Village did not give personal notice of the change to the OP-2 Zone boundaries to all landowners within 200 feet in all directions of the proposed new boundaries, the record does not reflect that either Hartz or Exxon fit within that category of landowners. Hartz does not claim to be within 200 feet of the Turnpike Authority's land; and, Exxon presumably is not, since its land is separated from the Turnpike Authority's land by the Hampton Inn. The only adjacent landowners to the Turnpike Authority's lands are RPOC and the Hampton Inn; they have not opposed the zoning change, and the Hampton Inn has not opposed RPOC's proposed development.

Third, even if Hartz and Exxon were entitled to personal notice of ordinance 01-08, the record does not support [*58] a conclusion that either Hartz or Exxon, alone or combined, could have prevented the proposed zoning changes to the OP-2 Zone, to which they now object. *N.J.S.A.* 40:55D-63 provides that a formal protest to a zoning amendment may be lodged by: (1) the owners of 20% or more of the area of the lots or land included in the proposed change; or (2) the owners of 20% of more of the land extending 200 feet in all directions from the land included in the proposed change. Where such a protest has been lodged, the ordinance must be passed by a two-thirds majority of the governing body. *Ibid.* Here, the owner of the land included in the proposed change — the Turnpike Authority — does not contest the zoning changes. Furthermore, RPOC owns the vast majority of the land adjacent to the Turnpike Authority's land. As such, it is highly unlikely that either Exxon or Hartz, even combined, could make out the 20% ownership necessary to lodge a formal protest to the zoning change. Still further, even if Hartz and Exxon were entitled to file a protest to the zoning changes, their protest most likely would have been, overcome, because ordinance 01-08 was passed by a unanimous vote of the Village's governing body.

IV.

*Conclusion [*59]*

We reverse the judgment of the Law Division in part and reinstate the development approvals issued by the Village And County Planning Boards and the Freeholders. We reverse the invalidation of ordinance 01-08. We affirm the judgment of the Law Division that the public right-of-way over the Challenger, Road Extension encompasses RPOC's proposal.

Table1 (Return to related document text**)**

Maximum Coverage (percent)	Number of Stories
40	1 to 5
36	6 to 8
32	9 to 11
28	12 to 14
24	15 to 17
20	18 plus

Table1 (Return to related document text**)**
