

SAZHA ALEXANDRA RAMOS; SHANTELL
CHERRY; PRATIK PATEL; DANIEL
JACKSON; SARAH JACKSON; MATTHEW
KNOBLAUCH; RALPH JOHNSON; ZOE
SCOTTO; KAMUELA TILLMAN; and
STACI BERGER, individually and
o/b/o the PISCATAWAY PROGRESSIVE
DEMOCRATIC ORGANIZATION,
PISCATAWAY FAMILIES FOR CLEAN
AIR; and PISCATAWAY YOUTH
PROGRESSIVE ORGANIZATION,

Plaintiffs,

v.

TOWNSHIP COUNCIL OF PISCATAWAY
TOWNSHIP; and PLANNING BOARD OF
PISCATAWAY TOWNSHIP; JOHN DOES 1-
10, AND XYZ CORPS. 1-10,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX
COUNTY

DOCKET NO. MID-L-519-22

BRIEF ON BEHALF OF PLAINTIFFS

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PRELIMINARY STATEMENT

On December 14, 2021, Piscataway's Township Council passed Ordinance 2021-38 creating a new M-2 Manufacturing Zone. The M-2 Zone is comprised of three separate tax lots. Two lots to the north were carved out of the L1-5 Light Industrial Zone and are already fully developed with warehouses. The third lot to the south is a 25-acre parcel that had comprised an entire Rural Residential zoning district and is designated as Conservation/Open Space/Recreation in Piscataway's Master Plan, reexamined as recently as 2020.

The re-zoning was done solely to facilitate a private developer's interest in building warehouses in the Rural Residential district after the project was stalled by a legal challenge to a variance approval previously granted for the project. See Docket No. MID-L-003271-21. Piscataway's re-zoning of the Rural Residential district to M-2 to make warehousing a permitted use was accomplished without acknowledging any inconsistency with the Master Plan as required under New Jersey's Municipal Land Use Law. This re-zoning was substantially inconsistent with Piscataway's Master Plan and effectively constituted spot-zoning. After the zoning change, the Court in the previous challenge determined that the variance approval was

no longer needed and conditionally dismissed the case as moot. This mere fact, along with the inconsistency and statements made by the Mayor and Council at the time of the rezoning, evidence spot-zoning.

With respect to the two parcels that were gratuitously added to the new M-2 zone, their sole purpose for inclusion was to camouflage the spot-zoning of the Rural Residential district. The Township has never provided any reason for rezoning the two northern lots already filled with warehouses.

STATEMENT OF FACTS

Since 2020, M&M Realty Partners at Piscataway, L.L.C has been planning to develop a warehouse complex on a 25-acre formerly wooded parcel in the Township of Piscataway (the "Township") designated as Block 5701 Lot 2 on the Township's Tax Map with a street address of 1690 South Washington Ave. Joint Appendix ("Ja") Ja1. On March 25, 2021, M&M received a use variance to build its warehouse complex. Ja16-18. The parcel was zoned Rural Residential (RR-1), necessitating a variance to build warehouses. Ja65. At the hearing on its application for a variance, M&M stated that it was applying to build warehouses because a mixed-use project, previously approved as the result of a settlement, was not feasible due to the cost of extending the sewer service.

1Tr.4:23-5:20.¹ While the legal challenge to the variance approval was pending, the Township changed its zoning to permit the planned warehouse development. See Docket No. MID-L-003271-21; Ja85-90.

The Zoning Change

On November 4, 2021, without first receiving any recommendation from the Township's Planning Board, the Township Council passed on first reading an ordinance rezoning Block 5701 Lot 2 from "Rural Residential 1" (RR-1) to "Manufacturing 2" (M-2) to allow a warehouse use. 2Tr.; Ja24-25, Ja92-94. Block 5701 Lots 1.04 and 1.05 were also being nominally rezoned from "Light Industrial 5" (LI-5), which already permitted a warehouse use, to M-2. Id. On November 10th, the Township Planning Board (Planning Board) adopted a resolution hiring CME Associates to conduct a study of the subject property to determine if it should be rezoned. Ja36.

On December 8, 2021, the Planning Board voted unanimously to recommend rezoning relying upon a report prepared by Steven L. Gottlieb, P.P., LLA, of CME Associates ("CME Report"). 3Tr.; Ja83-

¹ "1Tr." shall refer to Township Of Piscataway Zoning Board Of Adjustment Transcript of Proceedings November 12, 2020.

"2Tr." shall refer to Township Council Township of Piscataway Transcript of Proceedings November 4, 2021.

"3Tr." shall Refer to Township of Piscataway Planning Board Transcript of Proceedings December 8, 2021

"4Tr." shall refer to Township Council Township of Piscataway Transcript of Proceedings December 14, 2021.

90; CME Report at Ja60-82. That day, the Board adopted a resolution memorializing its recommendation. Ja83-84. According to the resolution, the Planning Board carefully reviewed the proposed zoning amendment and found it consistent with the recommendations of the 2020 Master Plan Reexamination. Id. The resolution also noted that the Planning Board had carefully examined the CME Report and concluded that the proposed zoning amendment was "reasonable and appropriate." Id.

On December 14, 2021, the Township Council adopted Ordinance 2021-38 on second reading. Ja85-90. The Ordinance contains no explanation for the rezoning. Id. While the Planning Board found the rezoning to be consistent with the 2020 Reexamination, the Township Council made no such finding. Ja83-90.

At the December 14th hearing on Ordinance 2021-38, immediately prior to their vote, the Township's Assistant Attorney David Clarkin advised the governing body about M&M's development rights on Lot 2:

First and foremost, if a warehouse is not permitted on this property then the contract purchaser, M&M Partners, would have the right, the legal right to build 101,000 square feet of retail and commercial space and 242 residential units on the property. Let me repeat that. 101,000 square feet of retail, and 242 residential units can be built on this site. This retail space and residential unit mixed use was the result of a prior Superior Court settlement.
4Tr.63:6-64:4.

Clarkin concluded "what this issue comes down to is a choice between either high density housing with a large retail and commercial component, or a warehouse." 4Tr..67:13-19.

Statements made by three councilmembers echoed Clarkin's advice. They noted that their vote on the re-zoning was a "binary choice" between high-density housing or a warehouse on the 25-acre parcel. 4Tr.70:4-71:15; 4Tr.72:10-74:1; 4Tr.78:1-7.

Two Councilmembers also commented upon the then-pending lawsuit challenging the variance approval. Councilmember Cahn commented at length:

There is a lawsuit pending. ... [A]ssuming the Court says that there was some decision by the zoning board that was inappropriate, you will see what's going to come there. The developer is not going to let it remain open space. The developer is going to build exactly what he wants there, because that's what he does.
4Tr.70:14-71:4.

Councilmember Cahill also referenced the lawsuit stating: "if we say, no, and if this lawsuit is successful in denying him the warehouse, he's got every right to go and build that residential and retail, that mixed residential and retail. He's got every right to do that." 4Tr.73:8-13.

No Councilmember acknowledged that the developer had already made clear that such project was not feasible due to the cost of extending sewer service; and no Councilmember mentioned consistency with the Master Plan, the Planning Board

recommendation or the CME Report when stating reasons for voting in favor of the zoning change.

Public Comment

At the December 14, 2021 Council meeting, nearly fifty Piscataway residents uniformly opposed the zoning change, either in writing or by calling in to the telephonic hearing. Two plaintiffs in this lawsuit, Rachel Sy, co-chair of Piscataway Families for Clean Air, and Pratik Patel, submitted written statements prior to the hearing. 4Tr.5:4-6:1; 4Tr.15:20-17:3. Plaintiffs Staci Berger, Ralph Johnson and Matt Knoblauch called in to the telephonic hearing to comment. 4Tr.24:25-28:13; 4Tr.33:8-34:14; 4Tr.43:15-46:23.

Concerns included the proliferation of truck traffic; dangerous traffic conditions for families in cars; increased commute times; the safety of schoolchildren walking to school; and, noise. Residents were also concerned about emissions; decreased air quality, and health hazards. Residents objected to the loss of open space, wooded areas and farmland and to the destruction of wetlands and wildlife habitat. Residents complained generally about the overabundance of warehouses in Piscataway. They observed that this proposed warehouse in particular was poorly sited in close proximity to Randolphville School, Lake Nelson, the headwaters of Doty's and Ambrose Brook, and the planned ecological park across South Washington Ave.

Residents were concerned about flooding, the increase in permeable surfaces and runoff. More than one resident complained that property taxes had not been previously offset by revenues from increasing industrial uses in Piscataway, as promised. 4Tr.5:4-62:15.

The Township Clerk read residents' emailed statements into the record, many of which commented:

This 25-acre parcel is currently zoned as rural/residential and is one of the last wooded areas for low density land use in our community.

[. . .]

The 1690 South Washington parcel borders the Randolphville Elementary School with 500 students and 45 teachers and staff. The town has already allowed 186 truck bays to be developed on the school's north side ignoring the risks that truck emissions pose to children's lung development and health.

This property is across the street from the long-promised ecological park, a/k/a the Halper Farm. It's just north of the Lake Nelson residential neighborhood. The parcel only has access to highways via neighborhood streets like Metlars Lane. Our community saw so much flooding after Hurricane Ida and this area contains wetlands we need for climate protection. It also provides an air quality buffer zone in an area increasingly polluted by truck emissions from Piscataway's five new warehouse complexes. 4:Tr5:4-8:7.

Keith Foos, Chair Environmental Justice Committee for the Metuchen-Edison-Piscataway Area Branch of the NAACP submitted a written statement focused upon health impacts:

As you well know, the [Randolphville] school is already in close proximity to several other warehouses. The

combined diesel exhaust from the trucks entering and exiting the neighborhood near the school presents an obvious hazard -- health hazard for the school's 500 students over the course of their four years of attendance and to the adult staff at the school for many years on end.

[. . .]

According to the American Lung Association, diesel exhaust is a mixture of many gases and ultra small particles containing more than [sic] 40 toxic air contaminants, including benzene [sic], arsenic and formaldehyde. These substances penetrate deeply into lungs and the bloodstream and can contribute to cell mutations that cause cancer. In fact, long-term exposure to diesel exhaust particles poses the highest cancer risk of any toxic air contaminants evaluated by the Office of Environmental Health Hazard Assessment. 4Tr.15:18-21:3.

The Mayor's Letter to the Editor

Ten days later, on December 24, 2021, a Letter to the Editor entitled "Mayor Wahler Responds to Residents' Concerns with 1690 South Washington Ave. Property" appeared in the online publication TAPintoPiscataway.² The Mayor wanted "to help clear up some of the issues about this particular tract of land" that had been raised at the most recent Township Council meeting. Id. (emphasis added). The Mayor noted that 1690 South Washington Ave. "is private property under contract to be purchased by M&M Partners which wants to develop it." According to Mayor Wahler "[u]nder the property's

²Letter to the Editor at: <https://www.tapinto.net/towns/piscataway/sections/government/articles/mayor-wahler-responds-to-residents-concerns-with-1690-south-washington-ave-property> and Ja98-99.

existing zoning approval, M&M Partners could choose to build 101,000 square feet of retail and commercial space and 242 residential units. In fact, this very sizable mixed use was the result of a lawsuit filed by M&M Partners against the Township."

The Mayor then presented various scenarios for 1690 South Washington Ave., defending the Township's ultimate decision "enabling M&M Partners to build a state-of-the-art logistics center." Ja98-99. Mayor Wahler is a member of the Planning Board who voted to recommend the zoning change to the Council. Ja83-84.

M&M's Settlement Development Option

Despite statements by the Mayor and Council regarding the alleged "binary choice" between the so-called settlement development option and the warehouse project, by 2020 M&M had already determined that the settlement development option was not feasible due to the high cost of extending the sanitary sewer service. In November 2020, when M&M previously applied for a variance approval for its warehouse project, its lawyer Douglas Wolfson began his presentation to the Zoning Board by explaining why M&M had decided not to move forward with the mixed-use project. He explained:

We're dealing with a property which some of you may recall because it does have sort of a story history with this Board. It's a 24-and-a-half acre piece; it's on Washington Avenue. It originally was in the RR-1 Zone, but you may recall, for those of you who were on the Board back in 2016, that there was an application made earlier by this entity, or an affiliate entity, for a

site plan of a development that was rejected in the early part of 2017 that resulted in some litigation.

But that litigation was ultimately settled after the Board conducted a Whispering Woods hearing sometime right in the middle of 2018 with a Resolution adopted by the Board, drafted by Mr. Kinneally and adopted by the Board in June of 2018 that effectively made the property appropriate for 242 multi-families and somewhere between 80 and a hundred thousand square feet of retail on that property.

Ultimately, sewer capacity became an issue having to go all the way out to Metlars Lane because of the size of the flow and et cetera...
1Tr.4:23-5:20.)

At that hearing, a member of the public asked Wolfson "Okay, so it's the sanitary sewer, so the nearest lift station is too far to connect to; it's cost prohibitive for a residential development?" Wolfson answered: "Yes, the cost makes it economically unreasonable; it makes the property not reasonably adaptable for those uses or frankly without great difficulty, the settlement agreement as well." 1Tr.120:11-19).

Based upon M&M's presentation, the Township's Zoning Board made a finding that "the property, as zoned through the litigation settlement, could not be reasonably adaptable for 242 dwelling units and associated retail because of the economic hardship of providing adequate sewer service." Ja16-18.

Given M&M's apparent decision to abandon its settlement development approval due to cost, coupled with the fact that the 2018 site plan approval for the mixed-use project was set to expire

after two years³, the Mayor's and the Council's statements regarding the binary choice are deceptive and false.

PROCEDURAL HISTORY

This prerogative writ action is the successor to a prior prerogative writ action challenging a use variance for M&M's warehouse project, *Sazha Ramos et al. v M&M Realty Partners at Piscataway, LLC and Zoning Board of Adjustment of Piscataway Township* (Docket No. MID-L-3271-21).

After the prior case was briefed but not yet decided, the Township Council passed Ordinance 2021-38. The rezoning eventually precipitated a conditional dismissal of the prior action, subject to reinstatement depending upon the outcome of this case, as set forth in Judge McCloskey's Order and Statement of Reasons filed May 27, 2022. Ja100-112.

On January 28, 2022, Plaintiffs filed a Complaint in Lieu of Prerogative Writs challenging Ordinance 2021-38. Plaintiffs' five-count Complaint claims: (1) that Ordinance 2021-38 is inconsistent with the 2005 Master Plan and the 2020 Reexamination Report; (2) that Ordinance 2021-38 is invalid because it is spot zoning; (3) that Ordinance 2021-38 is invalid because it is fiscal

³Under the Township of Piscataway Municipal Code §24-402.3 entitled "Time Limit for Final Approval and Extensions" a "Final approval shall expire two years from the date of final approval unless the applicant has secured a building permit to commence construction."

zoning; (4) that Ordinance 2021-38 is invalid because the Council's findings are factually unsupported; and (5) that Ordinance 2021-38 is invalid due to the failure to provide notice to affected property owners pursuant to N.J.S.A. 40:55D-62.1.⁴ Due to these deficiencies, Plaintiffs requested that the decision to adopt Ordinance 2021-38 be ruled arbitrary, capricious and unreasonable and that the Ordinance be declared void *ab initio*.

Defendants Township Council of Piscataway and the Planning Board of Piscataway filed their answers on April 20, 2022 and April 26, 2022, respectively.

Plaintiffs' expert report was filed February 7, 2023 and Defendants' expert report was filed March 13, 2023.

STANDARD OF REVIEW

"As a general principle, a municipal ordinance is afforded a presumption of validity, and the action of a board will not be overturned unless it is found to be arbitrary and capricious or unreasonable, with the burden of proof placed on the plaintiff challenging the action." Grabowsky v. Twp. of Montclair, 221 N.J. 536, 551 (2015) (citing Price v. Himeji, LLC, 214 N.J. 263, 284 (2013)). Although a court's role with respect to the power to zone is generally limited, a court may declare an ordinance invalid

⁴Discovery provided by Defendants after the Complaint was filed (Ja 38-59, 92-97) indicates that notice was provided. Accordingly, Plaintiffs are withdrawing this claim.

if in enacting the ordinance the municipality has not complied with the requirements of the statute. Taxpayer Ass'n of Weymouth Township v. Weymouth Township, 80 N.J. 6, 21 (1976). 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. 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.

LEGAL ARGUMENT

I. Piscataway's Newly Created M-2 Manufacturing⁵ Zone Is Substantially Inconsistent With Its Master Plan.

N.J.S.A. 40:55D-62(a) provides that the zoning ordinance or amendment "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 . . ." unless the requirements of that statute are otherwise satisfied. When an ordinance amends zoning requirements in a way that is inconsistent with the Master Plan it is invalid unless accompanied by a resolution **setting forth the reasons for the inconsistency.** N.J.S.A. 40:55D-62(a); Riya Finnegan v. S. Brunswick Tp., 197 N.J. 184, 192 (2008); Willoughby v. Planning Bd., 326 N.J. Super. 158, 163-165 (App. Div. 1999); E. Mill Assoc. v. E. Brunswick Twp., 241 N.J. Super. 403 (App. Div. 1990) .

Ordinance 2021-38 rezoning Lot 2 in Block 5701 is substantially inconsistent with Piscataway's 2005 Master Plan Revision and its 2020 Reexamination Report (collectively, the "Master Plan") as is clear from the Master Plan itself and as set

⁵Although Defendants and their experts have referred to "M-2" as an industrial zone, the "M" likely denotes manufacturing as set forth in the Rich Report, and shall be referred to that way herein.

forth in the report prepared by Plaintiffs' Planning Expert Damon Rich. See Analysis of Rezoning Block 5701 Lot 2, 1690 South Washington Avenue, Township of Piscataway, Middlesex County, New Jersey, Prepared Damon Rich, PP AICP of HECTOR urban design ("Rich Report"). The Master Plan contains three significant provisions applicable to Lot 2: (i) the overall scheme of Planning Area C separates industrial/commercial uses to the north and residential/neighborhood uses to the south with an open space buffer zone where Lot 2 is located; (ii) Lot 2 was specifically designated as conservation, open space or recreation areas in the 2005 Master plan; and (iii) Lot 2 is part of a larger open space project, denoted as P-35, along both sides of South Washington Avenue. Additionally, nothing in the 2020 Reexamination altered the planned land use for Lot 2, nor did it recommend implementing a zoning change for Lot 2. Furthermore, a review of Ordinance 2021-38's changes to development regulations reveals inconsistency with the Master Plan and negative effects upon the zone plan.

A. The Township's Master Plan Clearly Designates Block 5701 Lot 2 for "Parks, Recreation, Open Space and Conservation Areas."

As observed by Plaintiffs' planning expert, Damon Rich PP AICP of Hector Urban Design, Piscataway's overall land use scheme in Planning Area C shows industrial and commercial uses concentrated along the I-287 corridor to the North and residential uses to the South. See Rich Report, pp. 4-6 and Figure 1. The

industrial and commercial uses to the North and the residential uses to the South are separated by a variety of buffering properties, generally designated as parks, recreation, open space or conservation. Id. Lot 2 is situated in that buffering area. Id. at Figure 1. Separating major land use types, imposing boundaries and buffering incompatible uses are fundamental to land use zoning and planning. Id. at 5-6.

The Township's 2005 Master Plan designation of Block 5701 Lot 2 for "Parks, Recreation, Open Space and Conservation Areas" is highlighted as a major land use action in the plan:

An additional Land Use Plan revision incorporates two existing farm tracts as Conservation / Open Space / Recreation. These two lots [Lot 2 and Lot 11 to its south] comprise an approximate total area of 64 acres, are traversed by overhead power lines and contain wetlands. They are located directly across South Washington Avenue from additional open space, which is also depicted on the Land Use Plan and will provide a logical and valuable extension to the township's open space and recreation inventory.

Id. at 6-7 (quoting 2005 Master Plan, p. 45)

According to Rich, Lot 2 in Block 5701 is not only designated for "Conservation / Open Space / Recreation" to increase the amount of conserved open space *generally* in the township, but more importantly, because it is *specifically* situated near other designated open space "directly across South Washington Avenue." "This contiguity and position within a larger conservation and open space plan, while creating ecological and habitat benefits, also serves the larger land use plan described above" Id. at 6-

7. Under the Master Plan, Lot 2 contributes to the conservation and open space plan and to the larger buffering territory between north and south. Id.

This clear plan for the future land use of Block 5701 Lot 2 is corroborated by its treatment in the Recreation and Conservation Plan Element of the same 2005 Master Plan Revision. Block 5701 Lot 2 is included in a specific open space project labeled "P-35 Proposed Open Space." Id. at 7-9. As described in the Master Plan: "Open Space preservation is proposed in the central, eastern portion of the township along South Washington Avenue. This open space area consists of three separate large individual parcels of land along both sides of the roadway, and is identified as P-35 on the Recreation and Conservation Plan, and on Table 29." 2005 Master Plan, p. 63. "This proposed open space area comprises a total area of 138.5 acres, and will compliment [sic] the proposed Middlesex County Ambrose and Doty's Brook Park." Id.

As noted in the Master Plan, the connection between the three properties in P-35 to the Middlesex County Ambrose and Doty's Brook Park marked P-32, shows how selecting "this specific property for "Open Space Preservation" is in part based on the specific ecological functions connected to its specific location, and the potential benefit of its conservation due to the locational role it plays in a larger network of open spaces among other land uses." Rich Report at 9. According to Rich, Block 5701 Lot 2 is "located

at the watershed divide between these two small streams, and its development could have a significant impact on the ecological and hydrological functions of the property and beyond compared to a similarly sized parcel elsewhere.” Id. at 10. The parcel connects already preserved areas of open space “with a greater potential to act as a connective habitat corridor than any other remaining undeveloped parcel in the region.” Id.

The Master Plan Reexamination Report adopted December 23, 2020 (the “2020 Reexamination”) did not change the 2005 recommendation that Block 5701 Lot 2 be used for conservation, open space or recreation. As noted by Rich, the 2020 Reexamination contained a positive update on the P-35 Proposed Open Space project described in the 2005 Conservation and Recreation Element: “Two open space/recreation areas are proposed along both side [sic] of South Washington Avenue, north of the Metlars Lane intersection. The area along the west side of South Washington includes two parcels and has not yet been developed. The Township now owns both lots.” Id. at 11 (quoting p. 10 of the 2020 Reexamination.) The 2020 Reexamination also continued support for connection of future open space including Block 5701 Lot 2 to the planned County open space system: “Proposed Middlesex County Ambrose and Doty’s Brook Park system will provide more active and passive recreation opportunities”. . . “[t]he Township is exploring funding options in order to purchase additional private land to supplement this

Middlesex County Park facility and create further opportunities for active and passive recreational activities." Id. (quoting p. 9 of the 2020 Reexamination.)

In contrast, the Reexamination specifically recommended changing the zoning of an adjacent parcel (Block 5701, Lot 11) also zoned RR-1. Although Lot 11 had also been designated as Conservation/Open Space/Recreation in the 2005 Master Plan and as part of the P-35 Open Space Project, the 2020 Reexamination recommending rezoning Lot 11 for senior housing, to SCH. See 2020 Reexamination, pp. 58-59, 62 (Plate 2), 63). The Township Council implemented the zoning change from RR-1 to SCH for Lot 11 along with a host of other zoning changes at its meeting on February, 9, 2021. Ja7. Had a similar change been contemplated for Block 5701 Lot 2, it would have been recommended in the recent 2020 Reexamination Report and the Township Council would have implemented it at the time of the change for the adjacent lot.

B. The Change from RR-1 to M-2 Is In Conflict With the Master Plan.

Before proceeding to examine the rezoning of Block 5701 Lot 2 from "Rural Residential 1" (RR-1) to "Manufacturing 2" (M-2), it should be noted that the two parcels to the north, Lots 1.04 and 1.05, were previously designated in the 2005 Master Plan as "Light Industrial" and zoned as "Light Industrial 5" (LI-5). "These lots are situated to the north of the boundary created between

industrial and commercial uses to the north and neighborhood uses to the south.” Rich Report at 13. As explained by Rich, these parcels were “nominally” rezoned as M-2, however, the development regulations for the prior zoning of “Light Industrial 5” do not functionally differ from those for the new zoning of “Manufacturing 2.” Id. This nonfunctional change “slightly diminishes the appearance of the inconsistency of the rezoning action that creates the entirely new zone of “Manufacturing 2.” Id. Despite the change in zoning label, these parcels retain the same designation for industrial use with the same regulations and their rezoning remains consistent with both the prior zoning as well as the Master Plan. This is also evident because Lots 1.04 and 1.05 are already fully developed with warehouses, a conforming use both before and after the new zoning. Id.

In reviewing the changes to the development regulations, Rich observed that in terms of permitted principal uses, “Rural Residential 1 (RR-1) is the least intensive residential zone of the 35 zones created by the Piscataway Township Zoning Ordinance (Chapter 21-502.2), which does not include specific zones for less intensive uses such as parks or open space conservation.”

The permitted principal uses in the RR-1 zone, allowing parks, farms and single-family houses on minimum one-acre lots, is substantially consistent with the Master Plan, in their low intensity character and preservation of the land as a low intensity

buffer between industrial and commercial uses to the north, and neighborhood and residential uses to the south. Id. at 14-15.

In contrast, the Manufacturing 2 (M-2) zone permits a much wider and more intense set of principal land uses. Id. at 16-18. There is little doubt that the zoning change from RR-1 to M-2 creates regulatory inconsistencies and potential land use conflicts. Id. at 18. Plaintiffs' expert offers four examples of existing adjacent or nearby residential neighborhood land uses that will foreseeably experience negative impacts from industrial and commercial development on Block 5701 Lot 2 including: (i) Randolphville School, (ii) Byrne Park, (iii) Residences along Woodland Road, Suttie Avenue and nearby streets; and, (iv) Ambrose Brook, Doty's Brook and Lake Nelson. Rich Report at 18-25.

C. The CME Report Relied Upon By The Planning Board Does Not Substantiate That The M-2 Is Consistent.

The CME report relied upon by the Planning Board concludes that the rezoning is consistent with the Master Plan, but CME's analysis does not support this conclusion. The CME report is mostly descriptive — describing existing site conditions, easements, wetlands, the zoning ordinance, surrounding roads and uses. Ja60-72. In its discussion of the Master Plan, the CME report is in agreement with Rich Report stating that Lot 2 is to be located in Parks, Recreation or Conservation Areas (Ja73); that the 2020 Reexamination does not change the land use for Lot 2

(Ja75); and that there are still two proposed open space recreation areas along both sides of South Washington Ave that are moving forward as shown by the acquisition of property along the western side of South Washington (Ja74).

CME suggests the M-2 would be a better "transitional zone" than the RR-1. However, the M-2 eliminates the low intensity buffering effect of the RR-1 and "simply allows industrial/commercial development to come closer to residential and neighborhood uses." Rich Report at 27.

Instead of explaining how the rezoning is consistent the Master Plan, the CME report explains why the rural residential zoning is not appropriate for Lot 2 and why the warehouses permitted by the M-2 would be more appropriate. CME's arguments that the RR-1 zoning is not appropriate due to location, vehicular access, sewer capacity and low density do not justify the conclusion that rezoning to M-2 is consistent with the Master Plan. Rich Report at 29.

Significantly, the Planning Board "found the proposed amendments to be consistent with the most recently adopted recommendations of the [2020] Master Plan Reexamination." Ja83. By implication, this finding suggests that the Planning Board did not find the proposed zoning change to be consistent with the 2005 Master Plan. However, the 2020 Reexamination "upholds and advances the clear and specific designation" of Block 5701 Lot 2 in the

2005 Master Plan for "Parks, Recreation, Open Space and Conservation Area." Rich Report at 12.

The CME report refers to certain "changed circumstances" from the 2020 Reexamination, however, a changed circumstance supporting this zoning change would have had to have occurred after 2020. Notwithstanding this temporal problem, the changed circumstances CME mentions do not support this zoning change. The first changed circumstance noted by CME is that Lots 1.04 and 1.04 were built out with conforming warehouses under the pre-existing LI-5 zoning. Ja73-74. This fact does not support a zoning change. On the contrary, it supports leaving the pre-existing LI-5 zoning in place and respecting the open space buffer in the Master Plan. The second changed circumstance noted by CME are that the parcels on the opposite side of South Washington Ave. were acquired. Id. This changed circumstance supports that the P-35 Project in the Master Plan is being fulfilled, meaning the low-density RR-1 should not be changed in a way that would impede the P-35 Project. A final changed circumstance was the rezoning of Lot 11, which was specifically recommended and implemented as opposed to Lot 2. Id. at 74. Despite these "changed circumstances" the 2020 Reexamination never recommended any zoning change for Lot 2, nor did it alter the Master Plan's continuing plan for open space on Lot 2.

The Planning Board has also obtained a new expert report from Keenen Hughes of Phillips Preiss Grygiel Leheny Hughes, submitted to the Court April 3, 2023 (Transaction ID: LCV2023888880), which reconfigures the CME report but is not significantly different. The report relies heavily upon the inclusion of Lots 1.04 and 1.05 as evidence that the rezoning was consistent. Though unacknowledged in the report, Lots 1.04 and 1.05 were not effectively rezoned because the new M-2 zoning did not functionally differ from the prior LI-5 zoning. Rich Report at 13, 31.

Though not relied upon by the Township Council in adopting Ordinance 2021-38, as discussed further below, CME's consistency analysis and the Planning Board recommendation do not support a finding of consistency.

II. The Township Council's Failure To Strictly Adhere To N.J.S.A. 40:55D-62(a) And N.J.S.A. 40:55D-26(a) Make Its Decision To Approve Ordinance 2021-38 Arbitrary And Capricious And Render It Void *Ab Initio*

The Courts are clear that the requirement pursuant to N.J.S.A. 40:55D-62(a) that a governing body expressly acknowledge an ordinance's 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 does not exonerate the governing body from its responsibility 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, 197 N.J. at 193.

At the outset, on November 4, 2021, the Township Council adopted the M-2 zoning amendment on first reading before referring the matter to the Planning Board for review and recommendation. This was nearly a month before CME prepared its report and the Township Council received the Planning Board's recommendation, suggesting that the ordinance was pre-ordained. This violates N.J.S.A. 40:55D-64, which provides: "[p]rior to the hearing on adoption of a zoning ordinance, or any amendments thereto, the governing body shall refer any such proposed ordinance or amendment thereto to the planning board"

Even after receiving the Planning Board's recommendation, Ordinance 2021-38 makes no reference to the Township Council's review of the CME Report or the Planning Board recommendation. The "Statement of Purpose" appended to the Ordinance says only "[t]he purpose of this ordinance is to rezone certain lots to a newly created M-2 zone and establishing bulk and parking standards for the M-2 zone." Ja91. The Township Council made no finding of

consistency, and did not acknowledge the obvious inconsistency as required by N.J.S.A. 40:55D-62(a).

The reasons given by the Council members at the time they voted to rezone Lot 2 were exclusively about M&M's development rights, the false "binary choice" presented by its attorney and the potential negative outcome of the litigation challenging M&M's prior variance approval. No council member mentioned the CME report or consistency with the Master Plan, indicating that the governing body failed to review the report and recommendations of the Planning Board pursuant to N.J.S.A. 40:55D-26(a). From the record presented "the governing body abdicated its duty to legislatively review the Planning Board's handiwork." Jennings v. Borough of Highlands, 418 N.J. Super. 405, 423 (2011). "This willful disregard is contrary to the MLUL." Id.

The reasons given by the Council members about their binary choice and M&M's development rights are also problematic in that they were not founded on substantial evidence. As discussed above, M&M had already made representations before the Piscataway's Zoning Board of Adjustment that it was not proceeding with its mixed-use project due to cost. This representation became a finding made by the Zoning Board: "[t]he Board, after carefully considering the evidence ... has made the following factual findings: ... [t]he Applicant presented evidence that the property, as zoned through the litigation settlement, could not be

reasonably adaptable for 242 dwelling units and associated retail because of the economic hardship of providing adequate sewer service." Ja16-18. The Township Council's decision-making is in contradiction to evidence adduced before its Zoning Board, unfounded on evidence and therefore arbitrary and capricious.

Even if CME's planning report had adequately justified the M-2's consistency, it would not absolve the Township Council of its statutory duty to review the Planning Board recommendation and its consultant's report and make its own finding of consistency.

These numerous failures on the part of the Township Council demonstrate that its decision was arbitrary and capricious, rendering Ordinance 2021-38 void *ab initio*.

III. Piscataway's Newly Created M-2 Manufacturing Zone Constitutes Spot-Zoning.

Spot-zoning is the use of the zoning power to benefit particular private interests rather than the collective interests of the community. Taxpayers Assn. of Weymouth Tp., 80 N.J. at 18. "[T]he test is whether the particular provision of the zoning ordinance is made with the purpose or effect of furthering a comprehensive scheme or whether it is designed merely to relieve a lot or lots from the burden of a general regulation." Riya Finnegan LLC, 197 N.J. at 196 (quoting Palisades Props., Inc. v. Brunetti, 44 N.J. 117, 134 (1965)).

The M-2 is inconsistent with the Master Plan and therefore not in accordance with a comprehensive scheme as discussed in I. above. The uniform public comment opposing the rezoning along with the Rich Report also evidence how the M-2 does not benefit the collective interests of the community by siting a warehouse in close proximity to residential and neighborhood uses and by summarily dispensing with the long-standing plan to protect and increase open space and conserve environmentally-sensitive land.

The sole remaining issue is whether the M-2 was adopted to relieve M&M as the owner of Lot 2 from the burden of the rural residential zoning. Statements made by the Township's officials at hearing on the rezoning are clear evidence that the M-2 was adopted **solely** to facilitate M&M's warehouse project.

Assistant Township Attorney David Clarkin's advised the governing body about M&M's development rights. Clarkin did not mention that M&M was applying for the warehouse approval precisely because it had already decided not to move forward with the mixed-use project due to the high cost of extending the sewer service. Therefore the 'binary choice' posited by Clarkin - "either high density housing with a large retail and commercial component, or a warehouse" - was in reality a false dichotomy designed to remove the barrier to M&M's warehouse with a zoning change. At the time of voting, Councilmembers talked exclusively about what M&M would be able to build on the site and the lawsuit challenging M&M's

approvals. Three Councilmembers stated they were left with no choice other than to approve the zoning change that would allow M&M's warehouse development to proceed.

Any lingering doubt about whether the re-zoning was spot-zoning should have been put to rest by Mayor Wahler's letter to the editor, defending the decision to rezone as "enabling M&M Partners to build a state-of-the-art logistics center." Ja97-98 This warehouse-enabling legislation is spot-zoning.

As a result of the zoning change, the prior prerogative writ action was conditionally dismissed as "moot" - another benefit to M&M.

Ordinance 2021-38 was adopted solely to benefit to M&M, is substantially inconsistent with the Master Plan, and constitutes spot-zoning. Therefore, it should be declared *void ab initio*.

IV. Ordinance 2021-38 Was Improper Fiscal Zoning And Therefore Is Void Ab Initio

"Fiscal zoning is the enactment of zoning regulations for the sole purpose of curbing population growth in order to stabilize the tax rate." Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 18 (Law Div.1971), certif. granted, 62 N.J. 185 (1972), on remand, 128 N.J. Super. 438 (Law Div.1974), mod. on other grounds and aff'd, 72 N.J. 481 (1977). Fiscal zoning is an improper zoning consideration. Id.

At the time of the Council's vote, the Assistant Township Attorney advised the Council that "the warehouse use will also further the township's master plan goal to provide for the continued expansion of the economic base and the tax base." 4Tr:66:1-67:5. While no councilmember specifically mentioned the tax base, members of the Council opined that they wanted to avoid high-density housing on the parcel. 4Tr.70:4-13; 78:1-8. Comments made by Mayor Wahler several months later were more revealing and corroborate that in zoning for a warehouse use the Township was "avoiding governmental costs incident to population expansion." Oakwood, 117 N.J. Super at 18. At the time M&M applied for a site plan approval under the new ordinance, the Mayor commented:

Before I vote I just want to make two general comments. For the members of the public, and I know the applicant knows this, there was a court settlement for I believe it was 270 townhouses out there when it was under the zoning board jurisdiction. I believe that this current application before this board is less of intensive use out there than what would have happened with the 275 units out there because you would have had a lot more trip generations coming off this site uh impacting the school system both financially, social services. This way this is not gonna we're not gonna have any impact on the social services or less municipal services, so to speak.

I know there's a lot of folks out there are disappointed they would have rather seen the housing but I respectfully disagree on this. I believe that this application would be a net positive for the town in respect for revenue and not impacting the school system overloading the classrooms with kids in the school

system of what would have happened in the court settlement so I vote yes.⁶

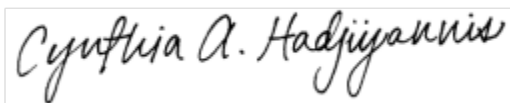
The Mayor's statements are a clear indication of fiscal zoning.

Given that Ordinance 2021-38 is inconsistent with the Master Plan, its true legislative purpose, fiscal zoning, should be taken into consideration when weighing whether the ordinance is arbitrary and capricious. Kirby v. Bedminster Twp Comm., 341 N.J. Super. 276, 290 (App. Div. 2001). Thus, in addition to constituting spot-zoning, Ordinance 2021-28 was unlawful fiscal zoning requiring the Ordinance to be declared void *ab initio*.

CONCLUSION

For the foregoing reasons, Plaintiffs request Ordinance 2021-38 be declared null and void *ab initio*.

Respectfully submitted,



Cynthia A. Hadjiyannis, Esq.

/s/ Renée Steinhagen

Renée Steinhagen, Esq.

Date: 6/1/2023

⁶Mayor Wahler's comment was made at the Piscataway Township Planning Board Meeting July 13, 2022 and is documented in the Townships video of the meeting posted on Piscataway Community TV's YouTube Channel at <https://www.youtube.com/watch?v=glOxRt74oNI>. Mayor Wahler begins this comment at 3:23:01 in the video.