EDEN LANE CONDOMINIUM ASSOCIATION, INC., Plaintiff, -vs- TOWNSHIP OF HANOVER, a Municipal Corporation of the State of New Jersey, AYSHA AND SHAHIDA AKBAR, et al., Defendants.	**SUPERIOR COURT OF NEW JERSEY, LAW DIVISION – MORRIS COUNTY** **CIVIL ACTION** DOCKET NO.: MRS-L-000413-23
TOWNSHIP OF HANOVER, a municipal body of politic and corporate governed and organized under the laws of the State of New Jersey, and AFFORDABLE UNIT OWNERS, Counterclaim Plaintiffs, -vs- EDEN LANE CONDOMINIUM ASSOCIATION, INC, Counterclaim Defendant.	

BRIEF IN OPPOSITION TO EDEN LANE'S REQUEST FOR DECLARATORY RELIEF AND IN SUPPORT OF DEFENDANTS' COUNTERCLAIMS

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PRELIMINARY STATEMENT

Sixty-three (63) of the sixty-six (66) owners of the Affordable Housing Units ("Affordable Owners" or "Defendants") located in the Eden Lane common interest community submit this brief in opposition to Plaintiff Eden Lane Condominium Association's ("Eden Lane" or the "Association") request for declartory relief and in support of their counterclaims alleging fiduciary violations.

The Association's action constitutes a direct challenge to the authority of the Township of Hanover ("Hanover" or "Township.") and the right of the Affordable Owners to extend the affordable housing deed restrictions on their units for an additional thirty (30) years. All the Defendants posit that the declaratory relief the Association is requesting violates and is inconsistent with the Uniform Housing Affordability Controls ("UHAC") and Council on Affordable Housing ("COAH") regulations; Hanover's Resolution No. 132A-18, its R-M District zoning ordinances and §72-13c of its Affordable Housing Code; the Final Judgement of Repose and Compliance, dated May 3, 2021, In the Matter of the Application of the Township of Hanover for a Determination of Mount Laurel Compliance, Docket No. MRS-L-1635-15; the New Jersey Condominium Act, N.J.S.A. 46:8B-1 *et seq.*; and certain provisions of Eden Lane's own Master Deed that remain unmodified by the proposed amendment. Accordingly, the Township's refusal to permit the Association to eradicate distinctions between the Town House and Manor Home Units and the Affordable Units—in this case, equalize assessments—is authorized by and consistent with state statutes, state regulations, local ordinances, and the Master Deed; its decision and ordinances are thus valid and should be upheld.

Specifically, the Affordable Owners deny that the Association is entitled to (i) any

judgment that voids the Township of Hanover's affordability controls applicable to their low- and moderate-income units within the Eden Lane inclusionary development; (ii) any relief that permits the Association to increase or otherwise "equalize" the maintenance fees/assessments on the 66 Affordable Units to those of the existing 232 market-rate Town House and Manor Home Units (together "Market Rate Units") located within that development; (iii) any relief to increase or otherwise "equalize" the ownership percentage of common interest property between the two classes of property without the approval of all owners, including the individual Affordable Owners; and (iv) any such additional relief that otherwise harms the Township's existing Affordable Housing Stock, and in particular, the ability of the Affordable Owners to extend the affordability restrictions on their own units in order to assure their personal well-being, safety and housing security.

Furthermore, the Association's misrepresentations to its members during the election process regarding the ability of the Affordable Owners to sell their units at market rate if restrictions expired and assessments were equalized, and their decision to promote the equalization of the monthly assessments of all members, despite substantial differences in square footage, access to limited common property and percentage of interest in common property between the Market Rate and Affordable Units, violates their fiduciary duty to the Affordable Unit owners and the duty of care, which are owed to all members of the Association.

STATEMENT OF FACTS

The Affordable Housing Owners incorporate the factual allegations set forth in the Township's and Fair Share's respective briefs as if fully set forth herein**.** We add the following:

The Final Judgement of Compliance and Repose, in the Township's 2015 Third-Round Action, dated May 3, 2021, approved the Township's extension of affordability controls on the

66 Affordable Units in Eden Lane Condominium Association. (J-25) As a condition of compliance, the Township enacted Chapter 72 of its Code ("Affordable Housing Code") in 2019. (Stip. F. 69). Pursuant to §72-13c, the master deeds of inclusionary developments "shall provide no distinction" bedween the condominium association fees and special assessments paid by affordable unit purchasers and market-rate purchasers, "unless the master deed for the inclusionary project was executed prior to the enactment of UHAC," as is the case herein. (Stip. F. 73).

Also, at the direction of the Court and Special Master, during the 2015 Third-Round Action, the Township had adopted, on July 12, 2018, Resolution No.:132A-18, whereby the Township rejected the repayment option on all 66 of the Affordable Units, and instead extended the affordability controls for an additional 30-year term. (J- 22). Over a period of time thereafter, 30 Affordable Owners signed a deed restriction with the Township to extend the affordability controls by execution of a deed restriction either at resale of the Affordable Unit or through the Township's affordability control extension program, which was approved by the Court in accordance with the Township's court-approved Housing Element and Fair Share Plan. (Stip. F. 67). More recently, one additional owner executed such deed restriction (Stip. F. 87); and an additional thirty-four (34) owners have expressed an interest in also executing such a deed restriction reflecting the Township's extensions of the affordability controls for an additional 30 years on the same terms as previously offered by the Township to the Affordable Owners. (Steinhagen Cert., ¶3).

All 66 Affordable Units are "95/5 units," as defined under N.J.A.C. 5:80-26.2 of the New Jersey Housing and Mortgage Finance Agency's "Uniform Housing Affordability Controls." ("UHAC") (Stip. F. 77); and are located in several garden apartment buildings situated in an area of Eden Lane separate and apart from the Town Houses and Manor Homes. (Stip. F. 13). These

units are substantially smaller in square footage and size than the Market Rate Units, (Stip. F. 14); and, unlike the Market Rate Units, do not have garages, attics, or central air-conditioning. Section 5.02 of Master Deed. (J- 14). The Affordable Owners have minimal storage space, and their decks, if any, are significantly smaller than the decks and patios owned by the Market Rate Units. (Steinhagen Cert., ¶2, Ex. A, Certifications of Affordable Owners). These differences in size and access to limited common property are reflected in the different percentage of interest in the common property held by the Market Rate Units and the Affordable Owners. (Stip. F. 42). Since its incorporation, Section 11.25 of the Recorded Master Deed, entitled "Maintenance Fees," has stated, in part, that "the allocation and assessment of the Assocation Expense shall be predicated upon the percentage of interest of each Unit in the Common Elements of the Condominium Property." (Stip. F. 45). Similarly, "the respective undivided interest in the Common Elements established and to be conveyed with the respective Units shall have a permanent character and shall not be altered or changed without the acquiescence of all of the Unit owners of all of the Units in the Condominium Property."

On March 8, 2023, the Association notified all its members that it had filed a legal civil action seeking declaratory relief, a day earlier, in order to "pursue . . . potentially valuable benefits for the Association and its members" as a result of the alleged expiration of the Affordable Housing Plan on March 10, 2022, a full year earlier. (J-38: H-16). The following day, the Board sent out a proposed Amendment to Sec. 11.49(7) of the Master Deed with a ballot, stating its belief that "APPROVAL" of this Amendment, in conjunction with a successful judgment on the corresponding complaint filed against Hanover Township, will provide a substsantial financial benefit for either all, or the overwhelming majority, of unit owners." (J-38:H-15). These two correspondences included deceptive information stating that upon expiration of the deed

restrictions, the Affordable Owners would be able to sell their units at market rate and keep the full sale price (minus any outstanding mortgage). (J-38). They intentionally failed to mention that were the Affordable Owners to sell their units for market rate, 95% of any profit above the maximum sale price would be recaptured by the Township to replenish its Affordable Housing Trust Fund.

In the following days, the Board also sent out several coercive emails telling all unit owners to hurry up and Vote "Yes" to change the Master Deed, stating that such change will benefit everyone including the Affordable Owners. *See, e.g.,* March 13, 2023 Email entitled "Clarification of the Complaint," and March 16, 2023 Email March 24, 2023 Email both entitled "Mail Your Ballot on Master Deed Amendment." (J-38:H-18, 19, 20).

Pursuant to Sec. 11.42 of the Master Deed, amendments to the Master Deed must be approved by 67% of the total allocated votes in the Association entitled to vote. (J-14). The 66 Affordable Units constitute 28% of the total 298 dwelling units comprising Eden Lane.

The proposed Master Deed amendment, which was voted upon by the Association members in June 2023, provides. that "Except as expressly set forth in these Amendments . . . the provisions of the Master Deed and Affordable Housing Plan of the Eden Lane Condiminum Association, Inc. will not be otherwise deemed modified." The proposed Master Deed amendment does not explicitly refer to, replace or repeal Sec. 11.25 of the Master Deed. (J-38:H-15).

If the proposed equalization of assessments were permitted to go into full effect, the new monthly charge would be $404.86, based on current monthly assessments; meaning, the monthly charge for Affordable Units would increase by $246.54, while the Town House Units and Manor Home Unit assessments would decrease by $70.14. (Stip. F. 83-86). Such an increase is simply unsustainable for the Affordable Owners, amounting to an imminent threat to Affordable Owners'

housing security that foreseeably could result in the Affordable Owners' loss of their homes (even if the percent increase is staggered over three years as is proposed). (Steinhagen Cert., ¶6).

PROCEDURAL HISTORY

Eden Lane filed its Complaint on March 7, 2023, seeking a declaratory judgment invalidating the Township's extension of affordable housing restrictions on the 66 affordable housing units in its inclusionary community, and compelling the Township to approve the Association's decision to amend Sec. 11.49(7) of the Master Deed and the Affordable Housing Plan to equalize maintenance assessments between the Affordable and the Market Rate Units over time. Each of the Affordable Owners was named as a defendant, and 63 of them filed an Answer collectively on May 17, 2023. Hanover filed an Order to Show Cause seeking to enjoin the election, at which time Eden Lane members would vote on the Board's proposed Master Deed amendments. A hearing was held in June 2023. The Court permitted the election to go forward only after receiving a commitment from the Association that, if approved, the amendment would not go into effect until the Court ruled on the Association's request for relief.

On November 30, 2022, the Association made a motion for summary judgment, which was opposed by the Township, Fair Share and the Affordable Owners on February 2, 2023. Plaintiffs filed a Reply Brief on February 26, 2023 and oral argument was held on April 26, 2023. On August 5, 2023, the Court denied summary judgment. Document discovery ensued, and the deposition of the Association Chairman, James Neidhardt, occurred on January 9, 2025**.**

The Affordable Owners are incorporating all of the Township's and Fair Share's legal arguments as if fully set forth herein. We seek to avoid duplication; thus, the Owners are focusing their legal argument on establishing, as a legal matter, that Eden Lane's decision to ignore the Affordable Owners' decision to extend the affordability restrictions on their units and, instead, to

amend Sec. 11.49(7) of the Eden Lane Master Plan to equalize maintenance assessments (over three years) among all units regardless of differences in square footage, access to limited common property and percentage of ownership in common property, violates certain provisions of the N.J. Condominium Act, the Planned Real Estate Development Full Disclosure Act ("PREDFDA"), other provisions of the Master Deed and principles of fair dealing.

LEGAL ARGUMENT

Standard of Review

This is a declaratory judgement action effectively seeking to invalidate several Township ordinances, resolutions and regulations as they apply to Eden Lane Condominium Association, and to reverse the Township's decision to deny the Association permission to equalize assesments between the Market Rate Units and Affordable Units.

When reviewing municipal actions or ordinances, New Jersey Courts generally apply an "arbitrary, capricious, or unreasonable" standard. First Peoples Bank of New Jersey v. Twp. of Medford, 126 N.J. 413, 418 (1991) (challenge to adoption of an ordinance); Vineland Const. Co., Inc. v. Twp. of Pennsauken, 395 N.J. Super. 230, 256 (App. Div. 2007)(challenge to designation of redeveloper). Municipal actions that violate state or federal law, state regulations or local ordinances are deemed to be unreasonable. Courts accord municipal ordinances, like most municipal actions, a presumption of validity, First Peoples Bank of New Jersey, *supra*, 126 N.J. at 418; *see also* Concerned Citizens of Princeton, Inc. v. Mayor and Council of Princeton, 370 N.J. Super. 429, 452-53 (App. Div.), *certif. denied*, 182 N.J. 139 (2004) ("Redevelopment designations, like all municipal actions, are vested with a presumption of validity."). They also give significant deference to municipal bodies, recognizing their discretion in local governance, and, as a result,

the challenger of municipal action bears the "heavy burden" to prove otherwise. Bryant v. City of Atlantic City, 309 N.J. Super. 596, 610 (App. Div. 1998).

In this matter, Affordable Owners have also stated counterclaims against the Board of Eden Lane Association for breach of its fiduciary duty to govern on behalf of all its members, and not to discriminate against one class of owners on the basis of income or housing status. Defendants also state that the Board breached its fiduciary duty of care, by failing to conduct a "fair and open election", but rather one that was fueled with misrepresentations and prejudicial community postings to all members. The standard of review for Association decisions, regulations or amendments to governing documents is a bit less clear, although most New Jersey courts state that they are applying the business judgment rule. Such rule consists of a two-pronged test to determine whether an association has breached its fiduciary duty: (1) whether the Association's actions were authorized by statute or its own master deed or bylaws, and if so, (2) whether the action is fraudulent, self-dealing or unconscionable. Chin v. Coventry Square Condo. Ass'n, 270 N.J. Super. 323, 328-29 (App. Div.1994).

However, a closer look at some cases indicates that the courts are in actuality applying a reasonableness test. For example, in Papalexiou v. Tower W. Condominium, 167 N.J. Super. 516 (Ch. Div. 1979), the court stated that a rule of reasonableness must be applied to ascertain the integrity of a condominium association's decision to impose sanctions against those unit owners who failed to pay their fair share of a special assessment. Notwithstanding this unequivocal assertion, the court proceeded to apply the business judgment rule. Similarly in Owners of the Manor Homes of Whittingham v. Whittingham Homeowners Ass'n, Inc., 367 N.J. Super. 314 (App. Div. 2004), the court seemingly applied a reasonableness test with strands of the business judgment rule when it said:

> If more than one method [to calculate square footage] is suitable, the Board has a choice. However, such discretion is not to be exercised unreasonably or arbitrarily. The courts will intervene in the case of such an abuse.

Id. at 322. *See also Id*. at 323 (nothing in the record indicates that the measurements were "fraudulent or unreasonable").

Most pertinent to this matter is the case of Mulligan v. Panther Valley Prop. Owners Ass'n, 337 N.J. Super. 293 (App. Div. 2001). In Mulligan, the Appellate Division explicitly adopted a "reasonableness" test to evaluate a challenge to the Association's adoption of several amendments to the Declaration of Restrictions that was effected through a vote of its membership. The court specifically found that because none of the terms to which plaintiff objected were contained within the Declaration and bylaws to which she had given her assent when purchasing a home at Panther Valley, such amendments, "were not entitled to the `very strong presumption of validity' that some courts have attached to restrictions imposed by a common interest community from the outset of its development." *Id*. at 302. Noting that a majority of jurisdictions outside New Jersey employ the reasonableness standard, they held that "in the context of this case the appropriate test to measure the validity of these amendments [to the Declaration] is that of reasonableness." *Id.*

I. PLAINTIFF'S REQUESTS FOR RELIEF ARE NOT AUTHORIZED BY THE CONDOMINIUM ACT AND ITS MASTER DEED AND ARE THUS INCONSISTENT WITH ITS FIDUCIARY DUTY TO ITS AFFORDABLE HOUSING MEMBERS.

It is a fundamental principle of common-interest communities, such as condominiums, that the association authorized by statute to manage the community is a "representative body that acts on behalf of the unit owners"; and its powers are constrained by the association's governing documents (*i.e.*, Master Deed and Covenant of Restrictions and By-laws), applicable statutory provisions and relevant local ordinances. Thanasoulis v. Winston Towers 200 Assoc., 110 N.J. 650, 656 (1988). The association stands in a fiduciary relationship to its owners, which means that

in dealing with unit owners, it "must act reasonably and in good faith." Glen v. June, 344 N.J. Super. 371, 380 (App. Div. 2001). *See also* Thanasoulis, *supra*, 110 N.J. at 657 (fiduciary relationship); Siller v. Hartz Mountain, 93 N.J. 370, 382-83 (1983) (same). It also must treat all members on "fair and equal terms." Kim v. Flagship Condo. Owners Ass'n, 327 N.J. Super. 544, (App. Div.), *certif. denied*, 164 N.J. 190, (N.J. 2000) (the association had a fiduciary obligation to protect each member's right to participate in management's hotel-type rental program on fair and equal terms) And, by statute, an association, like local governments, is tasked with exercising its powers "in a manner that protects and furthers or is not inconsistent with the health, safety, and general welfare of the residents of the community." N.J. Condominium Act ("Condo Act"), N.J.S.A. 46:8B-14(j); PREDFDA, N.J.S.A. 45:22A-44(b). *See also* Fox v. Kings Grant Maint. Ass'n, 167 N.J. 208, 220 (1999)(the Condo Act says that an association must "act on behalf of its owners").

This mandate to act on behalf of its owners—implying all of its owners—has a corollary directive: the association cannot amend its Master Deed, or adopt by-laws or rules that discriminate against or disadvantage a discrete class of members, such as the Affordable Owners in this matter. *See, e.g.*, Brandon Farms Prop. Owners Ass'n v. Brandon Farms Condo. Ass'n, 180 N.J. 361 (2004)(holding that the disproportionate allocation of common expenses forced on Class C members, including affordable housing owners, violated the "letter and spirit of the Act"); Thanasoulis, *supra*, 110 N.J. at 650 (parking space rule exceeded authority under the Condo Act prohibiting "discrimination against nonresident owners."); Micheve, LLC v. Wyndam Place at Freehold Condo. Ass'n, 381 N.J. Super. 148 (App. Div. 2005)(discriminatory capital contribution assessed only against a class of unit owners prohibited under Condo Act).

Accordingly, because the proposed Master Deed amendment seeks to equalize the assessments, without any rational basis, thus disproportionally burdening the Affordable Owners to the benefit of the Town House and Manor Home owners, it would violate (if implemented) the Condo Act, PREDFDA and Eden Lane's Master Deed provisions regarding allocation of maintenance fees, percentage of ownership in the common property, and control of a unit. As such, the Association's proposed Master Deed amendment, even if adopted by 67% of unit owners, would violate its duty to govern the community on behalf of all the members, and not to discriminate against any class of owner on the basis of income or housing status.[1]

A. INCREASING OR EQUALIZING MONTHLY MAINTENANCE AND SPECIAL ASSESSMENTS WOULD VIOLATE N.J.S.A. 46:8B-17 AND SEC. 11.25 OF EDEN LANE'S MASTER DEED.

There is no ambiguity; both the Condo Act and Eden Lane's Master Deed mandate that the expense of the common elements be allocated proportionately among all owners, determined on the basis of a unit's proportionate undivided interest in the common elements. N.J.S.A. 46:8B-3(e); Section 11.25 of the Master Deed (states that "the allocation and assessment of the Association Expenses shall be predicated upon the percentage of interest of each Unit in the Common Elements of the Property."); Section 2.07 of the Master Deed (defines "common

[1] The Association's request to the Court to permit them to adopt a Master Deed that is inconsistent with and in direct violation of Township Resolution No. 132A-18 (extending the affordability controls on all 66 Affordable Units located within Eden Lane for an additional 30 years in accordance with N.J.A.C. 5:80-26.5 and -26.25 of the UHAC), several Township zoning ordinances, the May 3, 2021 Final Judgement of Repose and Compliance, the Township's R-M District Code, and Affordable Housing Code (all of which were approved by this Court and are presumed valid and lawful in accordance with state law, regulation and policy regarding affordable housing) also gives rise to a claim of breach of fiduciary duty. Such claim was set forth in the Affordable Owners' Answer as Counterclaim II, but will not be discussed herein, because the substance of such claim is the focus of Fair Share's and the Township's briefs. However, there is no doubt that the duty of care requires Association Boards to follow the law, whether federal, state or local ordinances.

expenses" as "those expenses (including reserves) for which the Unit owners are proportionately liable"); Thanasoulis, *supra*, 110 N.J. at 659. Neither section of the Master Deed authorizes the proposed effort by the Association to amend Sec. 11.49(7), which incorporates the Affordable Housing Plan, in order to equalize the monthly maintenance and special assessments among all owners in such a way that the Affordable Owners would be liable for more than their proportionate interest in the common elements, while the Market Rate Unit owners would be liable for less than their allocated share. This is the case since the proposed amendment explicitly states that it is not intended to repeal or modify any other provision of the Master Deed, "except as expressly set forth in these Amendments." (J-38:H-15).

Pursuant to N.J.S.A. 46:8B-17,

> The common expenses shall be charged to unit owners according to the percentage of their respective undivided interests in the common elements as set forth in the master deed and amendments thereto, or in such other proportions as may be provided in the master deed or by-laws.

Although the statute makes clear that an association's documents may provide an alternative method of calculating common expenses other than percentage of ownership of common elements, in this case, Eden Lane has not done so. Owner of Manor Homes of Whittingham v. Whittingham Homeowners Ass'n, Inc. *supra*, 367 N.J. Super. at 314 (a portion of the common expenses determined by square footage).

Specifically, Section 11.25 of the Master Deed states:

> Maintenance Fees. That the owner or co-owners of each Unit are (i) personally bound to contribute to the Common Expenses of administration and of maintenance, repair or replacement of the Common Elements and expenses of administering and maintaining the Association and all of its real and personal property **in the proportions set forth hereinafter** and in such amounts as shall, from time to time, be fixed by the Trustees of the Association, and to any other expenses that may be lawfully agreed upon. The Association shall commence the collection of Common Expenses, including reserves, upon the closing of title to the first Unit in the Condominium. **The allocation and assessment of the Association**

> **Expenses shall be predicated upon the percentage of interest of each Unit in the Common Elements of the Condominium Property.** No Owner may exempt himself from contributing toward such expenses by waiver of the use or enjoyment of the Common Elements or by abandonment of the Unit owned by him.

(Stip. F. 45). Accordingly, Eden Lane's Master Deed makes clear that the "allocation and assessment of the Association Expenses" is based exclusively on "the percentage of interest of each Unit" in the common property. The proposed Master Deed amendment does not refer to or cite Sec. 11.25, and thus neither modifies nor repeals it in accordance with the language of the amendment itself. (J-38:H-15).

Furthermore, Section 6 of Eden Lane's Master Deed entitled "PERCENTAGE OF INTEREST," sets forth each unit owners' percentage of ownership of common property as follows:

> In the event the Grantor adds additional sections to the Master Deed, the percentage of interest of the Units in the Project shall change in accordance with the formula set forth hereinafter. All T.H. [Town House] Units and all M.H. [Manor Home] Units shall have a value equal to "X". All A.H. [Affordable Housing] Units shall have a value equal to "Y". For purposes of calculation of the percentage of interest, each "Y" unit shall be equal to .33"X". For example, and by way of illustration, in the event that all of the sections are added to the Project, the formula would be applied as follows. There would be 232 T.H. and M.H. Units and 66 A.H. Units. Accordingly, 232X + 66Y =100. Y=.33X. 232X+ (.33X)66 =100/ X=.393; Y=.129%. **Accordingly each T.H. and M.H. Unit would have a percentage of interest of .393 and each A.H. Unit would have a percentage of interest of .129** (emphasis added)

(Stip. F. 42).

In this way, compelling a discrete class of unit owners, in this case the Affordable Owners, to pay more than their percentage of interest (.335 > .129) in the common elements requires them to pay, as set forth in the Master Deed, violates both the Condo Act, N.J.S.A. 46:8B-17 and the Master Deed. Similarly, permitting a discrete class of unit owners, *i.e.*, Town House and Manor Homes owners, to pay less than their percentage of interest (.335< .393) in the common elements

requires them to pay is also wrong. Both changes are wrong, and thus the validity of the amendment cannot be sustained by this Court. *Cf.* Thanasoulis, *supra*, 110 N.J. at 659 (parking fee assessed against only nonresident owners violated their percentage of interest in the common property set forth in the deed); Micheve, LLC, *supra*, 381 N.J. Super. at 151 (invalidating a nonrefundable capital contribution fee at the time of transfer of a unit as a discriminatory revenue raising device in violation of unit's proportional interest in common property).

Moreover, even if one were to interpret the proposed amendment to Sec. 11.49(7) of the Master Deed to modify or repeal Section 11.25, it cannot be valid under N.J.S.A. 46:8B-17. This is the case, because any alternative method to allocating common expenses among unit owners must be reasonably related to the expenses incurred by the Association associated with each unit. Many condominiums employ square footage of the members' units rather than the percentage of their undivided interest in the common property, but there must be a basis that is connected to the maintenance of the common property that the unit owner actually enjoys. Simply, allocating expenses equally among the 298 dwelling units (Stip. F. 4) is the epitome of arbitrary and capricious; it is not reasonably related to either the size and nature of the different dwelling units nor to the differential access of the respective owners to limited common property. *Cf.* Owners of the Manor Homes of Whittingham, supra, 367 N.J. Super. at 323 (where choice of Board to calculate square footage was found not to be unreasonable).

B. EFFECTIVELY CHANGING THE AFFORDABLE OWNERS' PERCENTAGE OF OWNERSHIP INTEREST IN THE COMMON PROPERTY WOULD REQUIRE THEIR APPROVAL UNDER N.J.S.A. 46:8B-11 AND ITS MASTER DEED.

Thoughout this litigation, the Plaintiff insists that it is not seeking to change its members' respective percentage of ownership interest in the common property. Perhaps, they hold such position because, as the Chair of the Board of Trustees stated in his deposition, he assumed that

"everybody had one 298th [undivided interest in the common property] up until just now, until I read [Sec. 6 of the Master Deed]." T:35:14-18 (J-37).

In effect, Eden Lane is seeking to amend the Master Deed to recalibrate all the units' percentage of interest to equal .335 (298 X=100; X =.335). Such effort, without the approval of each of the owners, including each of the Affordable Owners, would also violate the Condo Act and Eden Lane's Master Deed. N.J.S.A. 46:8B-11 provides, in part, as follows:

> The master deed may be amended or supplemented in the manner set forth therein. Unless otherwise provided therein, no amendment shall change a unit unless the owner of record thereof and the holders of record of any liens thereon shall join in the execution of the amendment or execute a consent thereto with the formalities of a deed. (Emphasis added).

The explicit language of this provision raises the question of whether a change in the percentage of interest in the common property or a mere increase in the proportional amount of assessments that a unit pays (effectively increasing the percentage of interest) constitutes a "change [of] a unit." If the answer is yes, the statute clearly states that no master deed amendment can change the unit without the affirmative consent of the unit owner. Thanasoulis, *supra*, 110 N.J. at 660.

In Asbury Park Law Ctr., LLC v. Asbury Grand Condo. Ass'n, 2015 N.J. Super. Unpub. LEXIS 2956 (N.J. Superior Ct., Law Div., Monmouth, Nov. 5, 2015), the trial judge employed standard rules of statutory interpretation to understand the meaning of the phrase "change in unit." *Id.* at *15. Noting that the Legislature did not define the term "change" as it relates to the prohibition against amendments that "change a unit" without consent, she instead focused on the word "unit," in light of the N.J. Supreme Court's ruling in Thanasoulis, stating,

> [W]e assume that the legislative intent was that a unit owner should retain essentially the same property rights originally deeded to him for as long as he owns his unit, unless he affirmatively consents to their being altered." *Id*., *supra*, 110 N.J. at 663.

Judge Gummer then turned her attention to the definition of "unit" in the relevant master deed to understand "the same **property rights** originally deeded" to the unit owner at the time of purchase. Asbury Park Law Ctr., LLC*, supra*, LEXIS 2956 *16. Similar to the Eden Lane Master Deed, the deed in Asbury Park Law Ctr., LLC "unambiguously" defined the term "Unit" to include "the proportionate undivided interest in the Common Elements assigned thereto in this Master Deed or any future amendments thereto." *Id*. *See* Section 2.22 of the Eden Lane Master Deed, which defines "unit" as

> . . . a part of the Condominium Property designed or intended for residential use, having a direct exit to a Common Element or Common Elements, to a public street or way or to an easement or right of way leading to a public street or way, and **includes the proportionate undivided interest in the Common Elements.** Units are more particularly described in Paragraph 4 of this Master Deed.

(J-14). According to Judge Gummer, it therefore followed that the property right given in the case at hand was not a right to a specific common element, but rather a right to a "proportionate undivided interest" in the Common Elements. Asbury Park Law Ctr., LLC*, supra*, LEXIS 2956 *16. Following this reasoning, one must conclude that the change in the Affordable Owners proportionate undivided interest that would be effected if a Master Deed amendment equalizing assessments were permitted by this Court would in fact constitute a "change in unit" or a change in property rights, requiring such Owners' affirmative consent. And because the Affordable Owners do not consent to such a change in their proportionate undivided interest in the Common Elements, this is yet another reason to deny the Association's request for declaratory relief. *Cf.* Thanasoulis, *supra*, 110 N.J. at 663 (finding that revised rules did constitute a "change in unit" since the additional parking fee imposed on plaintiff's lessee confiscated a portion of his property interest that was acquired when he purchased the unit).

This conclusion is confirmed by language in Eden Lane's Maser Deed itself, which

in Section 6 of the Master Deed provides in part:

> Except as otherwise provided in the Master Deed, the respective undivided interest in the Common Elements established and to be conveyed with the respective units **shall have a permanent character** and shall not be altered or changed without the **acquiescence of all of the Unit owners of all of the Units** in the Condominium Property. . ..

(Stip. F. 42).[2]

C. REMOVING THE AFFORDABILITY CONTROLS CONTRARY TO THE AFFORDABLE OWNERS' AGREEMENT WITH THE TOWNSHIP WOULD INTERFERE WITH THEIR CONTROL OF THEIR UNITS IN VIOLATION OF N.J.S.A. 46:8B-4.

Since 2018, when the Township extended the affordability controls on Eden Lane Affordable Housing Units, thirty-one (31) owners of the Affordable Units have executed deed restrictions including such controls either at resale of the Affordable Unit or through the Township's affordability control extension program, which was approved by the Court in accordance with the Township's court-approved Housing Element and Fair Share Plan. (Stip. F. 87). These Owners signed an agreement with the Township to extend the deed restrictions and received compensation from the Township to do so. An additional thirty-four (34) owners have expressed an interest in also executing deed restrictions reflecting the Township's extensions of the affordability controls for an additional 30 years on the same terms previously offered by the

[2] Although the Affordable Owners' original percentage of interest was set in accordance with the Affordable Housing Plan in accordance with UHAC and COAH regulations, there is little doubt that the different percentage of interests in the common property between the Town House and Manor Home Units and the Affordable Units reflects physical differences in the size and nature of the units and the buildings in which they located, and the differential ownership of limited common property. *See* Section 5.02 of Master Deed (J-14); Steinhagen Cert., Ex. A. That is, even if the Affordable Units were released from affordability restrictions, it is highly likely that the percentage of interest between such apartment units would not be the same as the Town House or Manor Home. Similarly, if the Association sought to amend its Master Deed to base its assessments on square footage rather than percentage of ownership, there would be no parity between the Town House and Manor Home Units and the Affordable Units.

Township to all the Affordable Owners. (Steinhagen Cert. ¶3). Now, the Association wants to thwart, interfere or otherwise prevent the Affordable Owners from maintaining their apartments as affordable. However, such action is beyond the managerial powers of the Association under the Condo Act.

The Condo Act makes clear that an owner has "the same unfettered ownership interest in his unit as any other owner of real property does in his property." AMN, Inc. of NJ v. South Brunswick Rent Leveling Bd., 93 N.J. 518, 529 (1983)(holding that owners of two or less condominium units not subject to rent control). *See also* Fox v. Kings Grant Maint. Ass'n, *supra*, 167 N.J. at 218 (condominium unit is a separate parcel of real property that unit owner may deal with "in the same manner as is otherwise permitted by law for any other parcel of real property" (citation omitted)); and Thanasoulis, *supra*, 110 N.J. at 656 (citing Siller v. Hartz Mountain, *supra*, 93 N.J. at 375)("ownership interest constitutes a separate parcel of real property that owner may deal with as he would any parcel of real property."). This principle is embedded in N.J.S.A. 46:8B-4, which reads:

> Each unit shall constitute a separate parcel of real property which may be dealt with by the owner thereof in the same manner as is otherwise permitted by law for any other parcel of real property.

Accordingly, the Affordable Owners have an unqualified right, as any owner of any other parcel of real property, to extend the affordability restrictions on their individual units in order to assure their personal well-being, safety and housing security; a right with which the Association may not interfere.

At the time this action was filed in 2023, the Affordable Owners paid a monthly assessment of approximately $152.00, while the Town House Units and Manor Home Units paid a monthly assessment of $455.00. Starting in 2024, these assessments were increased to $158.32 and $475.00

respectively. (Stip. F. 83). Employing these recently increased monthly maintenance charges, one can calculate what Eden Lane's proposal to equalize assessments actually means for Eden Lane homeowners: The monthly assessment for Affordable Owners would total $10,449.12 ($158.32 x 66); while the monthly assessment for Town House Units and Manor Home unit owners would total $110,200.00 ($475.00 x 232). Adding the two numbers together ($120,649.12) and dividing by the total number of units (298) results in a new monthly charge of $404.86. This means that the monthly charge for Affordable Units would increase by $246.54, while the Town House Units and Manor Home Units assessment would decrease by $70.14. (Stip. F. 84-86)

Such an increase is simply unsustainable for the Affordable Owners, amounting to an imminent threat to Affordable Owners' housing security that foreseeably could result in the Affordable Owners' loss of their homes. Steinhagen Cert., ¶6 and Ex. A (Affordable Owners' Certifications). And it is for this reason, and this reason alone, that all the Affordable Owners, who are represented by counsel, have or want to maintain the affordability controls (subject to all state-imposed restrictions) on their units. The Association's request to invalidate the affordability controls included in the Affordable Owners' individual deeds is thus not only unlawful, but also highly unfair and mean-spirited.

D. SEEKING TO AMEND THE MASTER DEED TO EQUALIZE ASSESSMENTS WITH THE KNOWN ADVERSE FINANCIAL IMPACT ON THE AFFORDABLE OWNERS VIOLATES THE ASSOCIATION'S FIDUCIARY DUTY NOT TO DISCRIMINATE ON THE BASIS OF INCOME OR HOUSING STATUS IN VIOLATION OF THE SOCIAL WELFARE MANDATE OF PREDFDA AND THE CONDO ACT.

In his deposition, the Chair of the Association, in response to a question, affirmed his commitment to "not discriminate against the Affordable Owners" and "apply the rules of the governing documents equally." T177:19-25 to 178:1 (J-37). Notwithstanding this commitment, the Board, under his leadership, decided to bring this litigation (and expend significant legal fees

borne by all owners) to get permission from the Court to amend the Master Deed in a way that clearly discriminates against the 28% who are Affordable Owners. That is, given the substantial difference in the nature and size of the Affordable Units and the Market-Rate Units, and their respective access to limited common property, equalizing the maintenance fees of units that are not the same is simply not equal treatment. The Board then moved quickly, prior to any decision by this Court, to hold an election whereby the 72% who are Market-Rate Owners, who would benefit from the amendment, would be able to prevail without receiving one affirmative vote from an Affordable Owner. These actions constitute violations of the social welfare mandates found in PREDFDA and the Condo Act.

Pursuant to PREDFDA, N.J.S.A. 45:22A-44(b), an association, not unlike a municipality, "shall exercise its powers and discharge its functions in a manner that protects and furthers the health, safety, and general welfare of the residents of the community." *See also* N.J.S.A. 46:8B-14(j)(same). Neither provision has been interpreted by the New Jersey courts, though mentioned in both the Appellate Division and Supreme Court decisions in Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n.[3] There, the Supreme Court wrote: "Although we have not yet had the opportunity to interpret N.J.S.A. 45:22A-44, restrictive covenants established by homeowners' associations that unreasonably limit speech and associational rights could be challenged under section (b) of the statute." *Id*., 192 N.J. 344, 370 (2007). The Appellate Division discussed the provision a bit more, stating:

> if [the Association] has denied a voice to challengers, thereby suppressing opposition and skewing elections, such conduct would be viewed as an improper exercise of legislatively established powers, *i.e.,* against the welfare and best

[3] Indeed, in Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71 (2014), the N.J. Supreme Court refused to interpret subsection (b) of N.J.S.A. 45:22A-44. *See also* Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482 (2012)(same).

> interests of the community's residents. Statutes are the primary manifestations of public policy, and a violation of a statute tends to frustrate the public policy underpinnings of the enactment. *See Brandon Farms Prop. Owners Ass'n v. Brandon Farms Condo. Ass'n, 180 N.J. 361, 374-75, 852 A.2d 132 (2004)*.

Id., 383 N.J. Super. 22, 42 (App. Div. 2006). If suppressing opposition and skewing elections would be viewed as an improper exercise of legislative power, it is likely that the N.J. Supreme Court would similarly view amending the Master Deed in a manner that discriminates against a Class of owners -- in this case, the Affordable Owners -- contrary to their expectations at the time of purchase.

Pursuant to Eden Lane's Master Deed, the percentage of interest in the common property of all Affordable Unit Owners is .129%. (Stip. F. 42). The percentage of interest in the common property is substantially less than the percentage of interest held by Market Rate Owners, which is .393%, resulting in the latter owners paying higher assessments than the Affordable Owners. This differential in the assessments owing between the two Classes of owners has been the *status quo* since incorporation; and was certainly the case at the time that all 66 of the Affordable Owners currently residing in Eden Lane purchased their homes. As this Court knows, the initial purchase price for the Affordable Units is calculated so that the monthly carrying costs for the units, including "principal and interest (based on a mortgage loan equal to 95% of the purchase price), taxes, homeowner and private mortgage insurance and *condominium or homeowner association fees*" (emphasis added) will not exceed 28% of the eligible gross monthly income of the appropriate household size. Uniform Housing Affordability Controls ("UHAC"), N.J.A.C. 5:80-26.6(b)(J-33); *see also* Council on Affordable Housing ("COAH"), N.J.A.C. 5:93-7.4(h)(J-32). A monthly assessment of $404.86, an 156% increase, was clearly not factored into the initial purchase price calculation when the Affordable Owners purchased their homes and assumed mortgages of a certain amount. *See* Steinhagen Cert., ¶7; (Stip. F. 82). Such increase would

certainly cause a substantial detriment to all the Affordable Owners, and would be fundamentally unfair.

By seeking to amend Master Deed to equalize monthly assessments, with the above known adverse financial impact on the 66 Affordable Unit Owners, in violation of Township Resolution No. 132A, its R-M District zoning ordinances and §72-13c of its Affordable Housing Code, the 2021 Final Judgement of Repose and Compliance, state housing regulations and the Eden Lane Master Deed's provisions regarding maintenance fees and percentage of ownership in common property, the Association and its Board have violated their fiduciary duty to govern the Association on behalf of **ALL** its members, that is embodied in N.J.S.A. 45:22A-44(b) and N.J.S.A. 46:8B-14(j).[4]

The mandate to act on behalf of its owners, which implies **all** its owners—has a corollary directive: the condominium association cannot amend its Master Deed, adopt by-laws or rules that discriminate against or disadvantage a discrete class of members, such as the Affordable Owners in this matter. *See, e.g.*, Brandon Farms Prop. Owners Ass'n, *supra*, 180 N.J. at 361 (holding that the disproportionate allocation of common expenses forced on Class C members, including affordable housing owners, violated the "letter and spirit of the Act"); Thanasoulis, *supra*, 110 N.J. at 650 (parking space rule exceeded authority under the Condo Act prohibiting "discrimination against nonresident owners."); Micheve, LLC, *supra*, 381 N.J. Super. at 148 (a discriminatory capital contribution assessed only against a class of unit owners prohibited under Condo Act).

In short, because the proposed Master Deed amendment treats differently situated owners the same by equalizing their assessments and by doing so disproportionally burdens the Affordable

[4] In addition to its duties imposed under PREDFDA, the Association has a common law fiduciary duty to all its members to exercise due care, including taking actions, such as proposing Master Deed amendments, that are authorized and consistent with state and municipal law. *See* n.1, *infra*.

Owners to the benefit of the Town House and Manor Home owners, it would violate (if implemented) both PREDFDA and the Condo Act's social welfare provision. Both provisions require the Association to exercise their legislative powers to further the general welfare of all their residents and not to discriminate against its members based on income and housing status.

II. PLAINTIFFS' MISREPRESENTATIONS AND DIRECTIVE TO VOTE "YES" ON THE MASTER DEED AMENDMENT DURING THE ELECTION PROCESS VIOLATED ITS DUTY OF CARE.

Once the Board determined to propose a Master Deed Amendment to equalize monthly fees/assessments between the Affordable Housing Units and the Market Rate Units, it lodged a campaign to convince all members that such amendment would benefit ALL members. To do so, it deliberately misinformed all Affordable Unit Owners that they would be able to sell their units at market rate, implying that they would be able to retain all profits if they did so. There is no mention that sale of a low- and moderate- income unit would still require Township approval and a certain percentage of profits would be subject to recapture by the Township. *See* Community Postings sent to all residents within Eden Lane regarding Complaint filed to equalize assessments, dated March 8, 2023 (J-38:H-16) and proposed Master Deed Amendment, dated March 10, 2023 (J-38:H-17).

As part of its campaign to ensure the adoption of the proposed Master Deed Amendment by all members of the Association, including the Affordable Unit Owners, the Board also sent out several E-mails urging and directing owners to vote "Yes" on the amendment. *See* E-mails sent to all Eden Lane Condominium owner/members dated March 14, 16, and 24, 2023. (J-38:H-18,19, and 20). This rush to hold a vote prior to a Court decision, and to pressure owners to approve the amendment caused much fear and anxiety among the Affordable Owners, who historically have felt like second-class citizens within their community. *See* Steinhagen Cert., Ex. A (Certifications

of Affordable Owners).

Pursuant to PREDFDA, N.J.S.A. 45:22A- 45.1, the Association has a statutory obligation to conduct elections for its Board of Trustees in a fair and open manner. Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 383 N.J. Super. 22, 42 (App. Div. 2006), *rev'd on other grounds,* 192 N.J. 344 (2007)(the Act does not address the conduct of association elections, but the requirement for elections must be taken to connote fair and open processes, in which opposition candidates are entitled to campaign.").[5] PREDFDA does not set forth a separate provision to govern the conduct of Master Deed or By-law amendment elections. But given the mandate of and policies embedded in N.J.S.A. 45:22A-44(b), discussed above, the requirement to employ "fair and open processes" for Board elections should also apply to all Association elections. What would a fair and open Master Deed or By-law amendment election process entail?

At minimum, it would prohibit the Association from distributing material that misrepresents facts or the law, discriminates against any position on a ballot question or seeks to compel members to vote "Yes." On the other hand, it would require, clarity, simplicity and a neutral presentation of the amendment being proposed, none of which occurred here. Like government entities, an association can provide facts that accurately represent the pros and cons of a ballot question, but it is not permitted to directly campaign and use its resources to support a particular position. *See* Citizens to Protect Public Funds et al. v. Bd. of Educ. of the Tp. of Parsippany-Troy Hills, 13 N.J. 172, 182 (1953)(where, Justice William Brennan, Jr. articulated the principle that "[it] is the expenditure of public funds in support of one side only [with respect to the merits of a referendum question] in a manner which gives the dissenters no opportunity to

[5] It should be noted that N.J.S.A. 45:22A-45.1, as currently stated, codified the Appellate Division's understanding of the "fair and open processes" that should govern Board elections.

present their side which is outside the pale.") For certain, an association cannot deliberately misrepresent the facts so as to unduly influence the vote, or show reckless disregard for the truth by simply not consulting with experts on 95/5 housing (including Township staff) prior to issuing community postings to its members.[6]

As a result of its actions with respect to the proposed Master Deed amendment election process, the Board of the Association has violated its duty of care to all members

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiff Eden Lane's Request for Declaratory Relief and reject its request to (i) invalidate the affordable housing controls on the Affordable Owners' units; and (ii) permit equalization of the Affordable Owners' maintenance assessments with those of the Townhouse and Manor Homes Units in violation of their proportionate ownership interest in the Common Elements, state law and regulation, local ordinance and this Court's May 3, 2021 Final Judgement of Repose and Compliance. In addition, this Court should grant Defendant Affordable Owners' request to find that the Association violated its fiduciary duty (i) to such owners by seeking to amend the Master Deed to equalize assessments with known adverse financial impact on them in violation of PREDFDA's and the Condo Act's social welfare mandate; and (ii) to all its members by failing to hold a "fair and open election" when placing the proposed Master Deed amendment for a vote.

Respectfully submitted,

Dated: June 27, 2025

/s/Renée Steinhagen
Renée Steinhagen, Esq.

[6] The Board Chair, in his deposition, noted his familiarity with the regulations controlling the 95/5 Affordable Units, since his long term girlfriend lives in one such unit in another Inclusionary Development also located in Hanover. T58:14-25 to 59:1-6 (J-37).