HARTZ MOUNTAIN INDUSTRIES, INC., LLC, H-CRANFORD CONDUIT LP, and H-CRANFORD CREDIT LP, Plaintiffs, v. TOWNSHIP OF CRANFORD, TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANFORD, and THE PLANNING BOARD OF THE TOWNSHIP OF CRANFORD, Defendants.	SUPERIOR COURT OF NEW JERSEY UNION COUNTY – LAW DIVISION DOCKET NO. UNN-L-3679-19 (PW) CIVIL ACTION

TRIAL BRIEF IN SUPPORT OF ACTION IN LIEU OF PREROGATIVE WRITS OF PLAINTIFFS HARTZ MOUNTAIN INDUSTRIES, INC., H-CRANFORD CONDUIT, LP, AND H-CRANFORD CREDIT, LP

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PRELIMINARY STATEMENT

Following two years and over fourteen (14) public hearings, the Township of Cranford ("Township") denied Plaintiffs Hartz Mountain Industries, Inc., H-Cranford Conduit, LP, and H-Cranford Credit LP (collectively, "Plaintiff" or "Hartz")'s rezoning application by Resolution of the Planning Board, which was summarily adopted in its entirety by the Township Committee. See Exh. 1, Planning Board Resolution dated September 4, 2019; Exh. 2, Township Committee Resolution dated September 11, 2019. In addition, the Township Committee took no action on Hartz's petition seeking a redevelopment designation of the Property. Pursuant to Cranford's Land Use Ordinance § 255-56, et seq. ("Township Ordinance"),[1] Hartz sought to secure a rezoning that would allow it to develop its 30.5 acre property as a multi-family residential development for 766 market rate units that would generate 139 affordable housing units (i.e., 15% set aside) (the "Inclusionary Development Proposal" and/or "Rezoning Application").

In its Rezoning Application, Plaintiff presented substantial evidence and uncontroverted testimony by its experts that it satisfied the Review Standards for the purpose of granting a rezoning pursuant to Township Ordinance §§ 255-61 and 255-64. Notwithstanding these proofs submitted over a two (2) year period, the Planning Board arbitrarily denied Hartz's request and recommended that the Township decline to rezone the Property. The Planning Board improperly found that the residential zoning of the Property was inconsistent with the old 2009 Master Plan, and did not recommend an amendment of the Master Plan to include residential use of the Property, nor did the Planning Board recommend any modifications to the rezoning sought by Plaintiff. The

[1] The Planning Board Resolution erroneously cites to the Township Ordinance §136-59 et seq. However, the section was superseded by §255-56 et seq. in or around 2018. Therefore, Plaintiff will continue to cite to the currently adopted ordinance.

Township Committee's blind adoption of the factual findings and conclusions without any further consideration, and without making its own findings, was also arbitrary and capricious. Most notably, the Township ignored Hartz's uncontroverted proofs that the Inclusionary Development Proposal represents a viable and productive use of the property, and serves the general welfare through partial satisfaction of the Township's large regional affordable housing need for the Third Round 1999-2025 housing period.

The Planning Board's and Township Committee's denial did not occur in a vacuum, and the Township Committee's actions subsequent to the denial of the Rezoning Application are most damning. Hartz is a party in the Township's Mount Laurel affordable housing litigation ("DJ Action")[2] where it had likewise proposed the Inclusionary Development to assist the Township in satisfying its 440 affordable housing unit obligation. In that DJ Action, the Township has claimed that land for affordable housing in the Township is scarce, resulting in a substantial unmet need of 289 affordable housing units. In September 2019 when the Township denied Hartz's request to rezone the Property for an Inclusionary Development, the Township was simultaneously negotiating a settlement with Fair Share Housing Center ("FSHC") in the DJ Action. In November 2019, the Township Committee agreed and filed the final Settlement Agreement with the Court representing it to be fair and reasonable, and seeking its approval at a Fairness Hearing (the "Settlement Agreement").[3] The Settlement represents an unprecedented and draconian act, whereby the Township commits to rezone or redevelop the Hartz property: (i) for a multi-family inclusionary development; and (ii) to allow a redevelopment designation with the power to condemn.

[2] UNN-L-3976-18

[3] A copy of the Settlement Agreement is attached as Exh. A to the Certification of Kimberly Bennett, Esq. ("Bennett Cert.").

The terms of the Settlement Agreement, particularly its treatment of Hartz's property, negate the findings and conclusions that the Planning Board and the Township reached concerning Hartz's Rezoning Application. By way of example, the Resolution states:

> The Board finds that the Applicant failed to show that the proposed request for rezoning will further the purposes of the Master Plan where the proposed rezoning will include the demolition and removal of all of the commercial buildings and eliminate jobs rather than encourage the development of a desirable economic base that generates employment growth as set forth under Goal 7.
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> * * *
>
> The Board in submitting its report, for the reasons set forth above, finds that the proposed rezoning is inconsistent with the Master Plan and the Board finds, for the reasons set forth above, that it is not in the best interest of the Township to amend the Master Plan; and, accordingly, the Board's report will not include recommendations regarding amendments to the Master Plan.

See Exh. 1, September 4, 2019 Planning Board Resolution, p. 32, 40.[4]

While the Court has not yet ruled on the fairness of the settlement, two months after denying the Rezoning Application and determining ***not*** to rezone the Hartz property for an inclusionary development, the Township conceded in the Settlement Agreement that**: (i) the Hartz property is suitable for residential development; (ii) the Hartz property is suitable for inclusionary development; and (iii) a redevelopment area designation is suitable.** Moreover, the Township's representation in the Settlement Agreement that it reasonably believes that the Property will qualify for a redevelopment designation, is also at odds with many of the findings and conclusions reached in the Planning Board Resolution as adopted by the Township Committee. As a result, the denial of the Rezoning Application therefore is unsupported, and renders the Township's decision arbitrary and capricious – if not outright bad faith.

[4] References to exhibits not included in this submission shall correspond to those exhibits previously submitted on behalf of Hartz pursuant to the Case Management Order dated February 4, 2020.

Due to the Township's failure to "turn square corners" and attempt to achieve an unwarranted advantage in the DJ Action, the denial of the Rezoning Application cannot stand. The Township's gamesmanship in this litigation alone is egregious. However, when considering the additional role that the Township has to comply with its constitutional mandate, the Township must be held to a higher standard. Given the concessions made by the Township in the Settlement Agreement, it would be fair and reasonable for the Court to reverse the Township's denial of the rezoning for an inclusionary development and remand to the Township with direction to adopt an ordinance to permit the Inclusionary Development Proposal on the Hartz Property.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[5]

On or about March 27, 2017, Hartz filed an application with Defendants Township of Cranford ("Township"), Township Committee of Cranford ("Township Committee"), and Planning Board of Cranford ("Planning Board") (collectively, "Township Defendants") to rezone Applicant's property pursuant to the Township Ordinance §255-56, et seq.

The application requested the following: (1) a rezoning of Hartz's property from C-3 to eliminate the office and warehouse use in favor of; (2) creating a new zone permitting construction of 766 multi-family market-rate units, and a substantial amount of low and moderate-income housing (i.e., 139 affordable units); or in the alternative, (3) for the Township to consider Hartz's property for a designation for redevelopment under N.J.S.A. 40A:12A-1 et seq. (the "Rezoning Application"). See Exh. 3, Rezoning Application. See also Exhs. 13 and 14, Engineering plan set prepared by Stonefield Engineering and Design LLC entitled "Zoning Plan for Hartz Mountain Industries, Inc. proposed residential redevelopment plan, dated May 24, 2017 and last revised November 27, 2018; Exh. A-3, Phase 1 concept plan prepared by Minno & Wasko; Exh. A-4,

[5] 1T shall refer to Transcript of the Township Committee meeting of June 27, 2017;
2T the Transcript of the Township Committee meeting of July 18, 2017;
3T shall refer to Transcript of the Planning Board hearing dated May 16, 2018;
4T the Planning Board hearing dated July 18, 2018;
5T the Planning Board hearing dated August 1, 2018;
6T the Planning Board hearing dated September 5, 2018;
7T the Planning Board hearing dated September 12, 2018;
8T the Planning Board hearing dated October 17, 2018;
9T the Planning Board hearing dated November 28, 2018;
10T the Planning Board hearing dated December 5, 2018;
11T the Planning Board hearing dated January 30, 2019;
12T the Planning Board hearing dated March 6, 2019;
13T the Planning Board hearing dated March 20, 2019;
14T the Planning Board hearing dated April 3, 2019;
15T the Planning Board hearing dated May 8, 2019;
16T the Planning Board hearing dated May 15, 2019;
17T the Planning Board hearing dated June 5, 2019; and
18T the Township Committee meeting of September 10, 2019.

Applicant's proposed Phase 2 concept plan prepared by Minno & Wasko (Exhibits 13, 14, A-3, and A-4 collectively referred to herein as the "Concept Plan").

Despite two (2) years and fourteen (14) public hearings before the Planning Board, Hartz's rezoning request was denied for the reasons set forth in Exh. 1, Planning Board Resolution dated September 4, 2019 ("2019 September Board Resolution"), as adopted in its entirety in Exh. 2, Township Committee Resolution dated September 11, 2019 ("2019 September Township Resolution"). Despite Hartz's requests, the Township Committee took no action on Hartz's petition seeking a redevelopment designation of the Property. *See generally,* 2T, Transcript of the Township Committee Meeting dated July 18, 2017.

On October 21, 2019, Hartz filed its Complaint in Lieu of Prerogative Writs against the Township Defendants challenging the various improper and unlawful actions of the Defendants in connection with the ultimate denial of Hartz's Rezoning Application alleging the following Counts: (1) Arbitrary and Capricious Action by the Planning Board; (2) Arbitrary and Capricious Action by the Township Committee; (3) Violation of the Federal Fair Housing Act, 42 U.S.C. §3601-19 (Intentional Disparate Treatment); (4) Violation of the Federal Fair Housing Act, 42 U.S.C. §3601-19 (Discriminatory Effect); (5) Violation of the Federal Civil Rights Act of 1983, 42 U.S.C. §1983; (6) Violations of the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c); (7) Violations of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, *et seq*.; and (8) Inverse Condemnation. Pursuant to the Order dated February 4, 2020, the Court determined that it would hold Counts 3 through 8 in abeyance pending its determination of Counts 1 and 2.

1. The Current Zoning and 2019 Reexamination of the Master Plan

Hartz is the owner of a 30.5 acre triangular shaped parcel located at 750 Walnut Avenue in the southern portion of the Township of Cranford, designated on the Tax Map of the Township of Cranford as Block 541, Lot 1 (the "Property"). Exh. 1, 2019 September Board Resolution, at Fact No. 2. The Property is located within Cranford's "Commercial - 3 District (C-3)," which is a commercial zone isolated from other commercial zones by the surrounding residential neighborhoods. 3T8:2-3; 6T17:19 to 18:2. According to the 2009 Master Plan[6], the C-3 Zone is "intended to provide for Class A office space in a campus-like setting." The current C-3 zoning is planned primarily for office, research and distribution uses. 3T8:3-6; 6T20:13-19. Hartz's Property, along with Cranford Township's portion of the adjacent golf course, are the only properties located within the C-3 zone, thus, the Property is the only commercial property in the Township subject to the C-3 zone standards. 6T18:11-16.

See Exh. A-1, Aerial Photo of Site.

[6] Attached as Exh. B to the Bennett Cert. *Note that excerpts of the 2009 Master Plan were introduced by the Planning Board during the course of the hearings as "Exhibit Planning-2."*

The Property, at its rear northwest portion borders a common carrier freight rail line, the eastern portion of the Property is bounded by Walnut Avenue, and the southern and south eastern portions of the Property are bounded by Hyatt Hills Golf Course. See, 3T8:1-3; 6T17:17-18; Exh. 1, 2019 September Board Resolution, at Fact Finding ¶ 2. Single-family homes are located on the other side of the common freight rail lines. 6T17:22 to 18:2. There is an existing berm, created by Hartz, along a portion of the Property that bounds the Walnut Avenue frontage. 6T59:22 to 60:6.

Traveling along Walnut Avenue into Clark Township, there are several commercial and retail shopping malls in close proximity, including an Acme Market, Shop Rite, Whole Foods Market, LA Fitness, Target, and a significant variety of national chain as well as local restaurants. The New Jersey Garden State Parkway is approximately less than one-half (0.5) miles away from the Property directly along Walnut Avenue. See Exhibit A-1, Applicant's Aerial Photograph of the Property.

Hartz purchased the Property in 1988. 3T25:10-12. Prior use of the Property included manufacturing uses. 3T8:15-22. Following its purchase of the Property, Hartz completed improvements including the construction of an extension to an existing structure as well as an improvement to change a portion of the building (approximately 163,000 square feet) to provide for office use. 3T26:1-18, 36:10-14. Further, Hartz completed a subdivision to create seven (7) commercial condominium units. See Exh. 1, 2019 September Board Resolution, Fact Finding ¶ 4. Each of Hartz's tenants utilized their leaseholds for principally permitted uses as either warehouse, office, and storage uses until each of these lease agreements expired without being renewed despite efforts by Hartz to retain each tenant and simultaneously market to potential new tenants. *See generally*, 3T23:18 through 3T41:2.

Pursuant to N.J.S.A. 40:55D-89 and -89.1, the Township is required to reexamine its Master Plan every ten (10) years in order to maintain the presumption of validity of its zoning ordinances. In order to do so, the Planning Board appointed Maser Consulting ("Maser") as the planner to conduct the Master Plan Reexamination ("Reexamination Report") at the Planning Board hearing on March 20, 2019.[7] The Planning Board continued to monitor the status of Maser's progress on the Reexamination Report consistently throughout subsequent Planning Board meetings, specifically: May 8, 2019, May 15, 2019, June 5, 2019, and June 19, 2019.[8] The Planning Board then reviewed a draft of the Reexamination Report during the August 5, 2019 Workshop Portion of the Planning Board meeting.[9] Notably, these discussions regarding the status of the Reexamination Report, as well as review of the draft Reexamination Report, were being conducted by the Planning Board contemporaneous with the Planning Board's review of Hartz's Rezoning Application.

With respect to multi-family housing, the 2019 Reexamination Report[10] recounted that the recommendation of the 2009 Master Plan was to "maintain the existing multi-family residential land use areas as currently zoned." See Reexamination Report, p. 48. The Reexamination Report confirmed the status of multi-family housing as "Changes to the R-6 zones had taken place and the zones were expanded." Id. Rather than performing a comprehensive review of the prior Master Plan, most of the Reexamination Report merely attaches survey responses from Cranford residents. A substantial number of residents responded to the survey stating that there were insufficient

[7] See, Agenda and Minutes of Planning Board dated March 20, 2019, attached as Exh. C to the Bennett Cert.

[8] See, Agendas of Planning Board dated May 8, May 15, June 5, June 19, 2019, attached as Exhibits D through G to the Bennett Cert.

[9] See, Agenda of Planning Board dated August 5, 2019, attached as Exh. H to the Bennett Cert.

[10] See, 2019 Master Plan Reexamination Report, adopted September 18, 2019, attached as Exh. I to the Bennett Cert.

housing options available, citing the lack of affordable housing for younger people, for those looking to downsize, and affordable housing for families. See Reexamination Report, p. 196-201. Despite these responses, the Reexamination Report makes no further recommendations with respect to multi-family housing or expanding the availability of affordable housing.

2. Applicant's Request to Re-Zone the Property

On May 30, 2017, representatives of Hartz met informally with representatives of the Township, including its municipal attorney and redevelopment attorney, to discuss the possibility of proceeding via the redevelopment request rather than a rezoning of the Property. In reliance on this informal communication with Township officials, Hartz postponed the scheduled June 7, 2017 hearing before the Planning Board and instead sought the opportunity to make a presentation directly before the municipal governing body. See Exh. 27, May 31, 2017 letter from Hartz to Planning Board Administrator.

On June 21, 2017, Hartz made a written request seeking to be placed on the Township Committee's agenda for purposes of discussing redevelopment of the Property. See Exh. 28, June 21, 2017 letter from Hartz to the Township, Mayor, and Township Committee. The Township Committee was nonresponsive, thereby compelling Hartz to attend the Township Committee's July 5, 2017 meeting to renew its request. At that time, the Township Committee announced that it would put the request on its agenda for the meeting of July 18, 2017.

At the July 18, 2017 Township Committee meeting, Hartz appeared and made a detailed presentation, including presentations by its consulting planner, engineer, architect, and traffic engineer. *See generally,* 2T, Transcript of the Township Committee Meeting dated July 18, 2017. The presentation and Hartz's efforts up to that point were to no avail as the Township Committee ultimately failed to act on the request to consider the Property as a potential area in need of

redevelopment as proposed by Hartz, resulting in Hartz continuing to pursue the rezoning application before the Planning Board for relief on the Property.

On September 11, 2019, after two (2) years and fourteen (14) hearings before the Planning Board, the Township Committee improperly relied upon and summarily adopted the Planning Board's Resolution denying the rezoning of the Property for a multi-family inclusionary development. See Exh. 1, September 4, 2019 Planning Board Resolution; Exh. 2, September 11, 2019 Township Committee Resolution. During those lengthy Planning Board hearings, Hartz presented extensive testimony from the following experts: Matthew McDonough, New Jersey Commercial Real Estate Broker; Bruce Englebaugh, Architect; Jeffrey M. Martell, Civil Engineer; Keenan Hughes, Professional Planner; William J. Sitar, Jr., expert on northern New Jersey industrial real estate market; Karl Pehnke, Traffic Engineer; and also testimony from a fact witness, Charlie Reese, Vice President of Sales and Leasing at Hartz Mountain. During the end of the final hearing before the Planning Board on May 8, 2019, Hartz presented two rebuttal witnesses, Mr. Martell, professional engineer, and Mr. Hughes, professional planner, who each responded to the conclusions proffered by the Planning Board's experts.

3. Hartz's Inclusionary Development Proposal

Hartz proposed an inclusionary development, which would have assisted the Township in meeting its substantial affordable housing obligation, that would be constructed in two (2) separate phases with a total density of 30 residential units per acre with a 15% set-aside for affordable housing, for a total of 905 residential units of which 766 will be market rate and 139 were proposed to be designated as affordable units. 3T11:4-6. The Property would be subdivided into two (2) separate lots. Phase 1/Lot A would consist of approximately 15.5 acres that would front on Walnut Avenue (CR 632), with two (2) 5-story buildings with: (a) 365 market rate units (198

one-bedroom; 12 one-bedroom with den; 155 two-bedroom), and (b) 68 affordable housing units (14 one-bedroom units; 40 two-bedroom units; 14 three-bedroom units). Phase 2/Lot B would consist of approximately 15 acres that would front on both Walnut Avenue (CR 632) and the Consolidated Rail Corporation right-of-way (ROW) with three (3) 5-story buildings with: (a) 401 market rate units (154 one-bedroom, 16 one-bedroom with den, 231 two-bedrooms); and (b) 71 affordable housing units (14 one-bedroom; 42 two-bedroom; 15 three-bedrooms). Exh. 1, 2019 September Board Resolution, p. 10; Exh. 13, 14, A-3, and A-4 (Concept Plan).

4. Township's Improper Denial of Rezoning Application and Redevelopment Designation

Applications for rezoning are evaluated pursuant to Township Ordinance § 255-56, et seq., Applications for Rezoning. The Planning Board is required to evaluate Rezoning Applications pursuant to **§255-61 (Review by Planning Board),** which provides:

> After hearing the application, the Planning Board shall determine whether any action other than rezoning will properly protect the interest of the community or the municipality. The Planning Board shall review the application in light of the existing Master Plan, the conditions existing within the community and the expertise of the Planning Board in matters of land development to determine whether the applicant's proposal should be favorably recommended to the Township Committee. The Planning Board shall make specific detailed findings of fact and conclusions of law concerning the applicant's proposal as it relates to the review standards set forth below **[in Township Ordinance §255-64].** It shall be the applicant's burden of proof to present sufficient credible evidence to the Planning Board for the Board to make appropriate findings, conclusions and recommendations. (emphasis added).

In connection with the Rezoning Application, Hartz proposed the zone change together with proposed design standards to include an inclusionary multi-family development in the C-3 zone, where such use is not currently a principal or conditionally permitted use. With respect to both its request for a redevelopment designation as well as a rezoning of the Property, Hartz presented significant and detailed presentations with extensive expert testimony to support these

requests. Hartz's presentation established the following related to the standards under Ordinance § 255-64:

> **§ 255-64 Review standards.**
> Each application for rezoning shall comply with and address the following standards:
>
> **A. Necessity.** No application for rezoning shall be granted if the relief sought could be granted through an application for development other than one pursuant to N.J.S.A. 40:55D-70d.
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> **B. Master Plan.** In submitting its recommendations, the Planning Board shall submit a report in accordance with N.J.S.A. 40:55D-26. The governing body shall comply with such section in acting on the application. If the proposed rezoning is inconsistent with the Master Plan, the Planning Board shall include in its recommendation whether it is in the best interest of the municipality to amend the Master Plan in accordance with the Municipal Land Use Law.
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> **C. Modification.** In making its recommendations, the Planning Board may recommend that the application for rezoning be granted, in whole or in part, or be modified. If the Planning Board recommends the granting of the application with modifications or conditions, the Planning Board shall set out such modifications or conditions in detail, including findings, conclusions and recommendations.
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> **D. Effect of current zoning**. The applicant shall demonstrate by proper proof that, absent rezoning, there is a substantial likelihood that the zoning regulations currently in existence will zone the property into inutility or that the rezoning shall substantially and meaningfully benefit the municipality and further the purposes of the Municipal Land Use Law, including purposes set forth in N.J.S.A. 40:55D-2.
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> **E. Municipal services.** In demonstrating that the proposed rezoning will substantially benefit the municipality and will advance the purposes of the Municipal Land Use Law, the applicant shall demonstrate that the proposed rezoning will not unduly burden the planned and orderly development of the municipality or place an undue burden upon community services and facilities. Where deemed appropriate by the Planning Board, the Board may require traffic studies, fiscal impact studies or such other information as it requires to be produced either by the applicant or for the Board at the applicant's expense.

Township Ordinance § 255-64(A-E). See also 3T6:13-23; 3T10:21-24.

(A) Necessity for Rezoning Procedure. The parties agree that this proposal was substantive enough to warrant rezoning/ redevelopment treatment pursuant to this section. A use variance was not appropriate, as the Hartz property constituted the entirety of the C-3 zone. 6T18:11-16; 6T36:3 to 37:10. There is no dispute among the parties that the application was necessary for Hartz to achieve a zone change, as any form of residential uses are not permitted under the C-3 zoning regulations. (See Exh. 1, Planning Board Resolution at Factual Finding ¶14 and Legal Conclusions ¶2(i)). Accordingly, the Board found that Hartz's request for a recommendation to rezone the Property is by necessity properly before the Board under Township Ordinance §255-64(A).

(B) Consistency with the Master Plan. The Township Ordinance specifically provides that, where the Planning Board finds that the rezoning is inconsistent with the Master Plan, "the Planning Board shall include in its recommendation whether it is in the best interest of the municipality to amend the Master Plan in accordance with the Municipal Land Use Law." Township Ordinance §255-64(B). The Planning Board recommended denial of the Hartz application finding it inconsistent with the stale 2009 Master Plan (which was being updated by the Planning Board). The Township Committee adopted the Planning Board's recommendation to deny the Rezoning Applicaiotn on September 11, 2019, and a week later, the Planning Board superseded the Master Plan with 2019 Reexamination Report. A mere ***two months*** later, the Township executed the Settlement Agreement with FSHC providing for a residential inclusionary development on the Hartz property. It is abundantly clear that the Township and Planning Board actions in denying the Hartz proposal were a mere pretext, which was subsequently overruled by the Settlement Agreement.

(C) Rezoning Modification. The Ordinance provides that, "the Planning Board may recommend that the application for rezoning be granted, in whole or in part, ***or be modified***. If the Planning Board recommends the ***granting of the application with modifications or conditions***, the Planning Board shall set out such modifications or conditions in detail, including findings, conclusions and recommendations." Township Ordinance §255-64(C). (emphasis added). Township Ordinance §255-61 further supplements the scope of the Planning Board's review and requires that:

> (1) The Planning Board shall determine whether any action other than rezoning will properly protect the interest of the community or the municipality;
>
> (2) The Planning Board shall also determine whether the applicant's proposal should be favorably recommended to the Township Committee in light of: (a) the existing Master Plan; (b) the conditions existing within the community; and (c) the expertise of the Planning Board in matters of land development; and
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> (3) The Planning Board shall make specific detailed findings of fact and conclusions of law concerning the applicant's proposal as it relates to the review standards set forth in Township Ordinance §255-64.

The Planning Board made no modification, no recommendation to Hartz to adjust its Inclusionary Development Proposal, notwithstanding the fact that contemporaneously with the Rezoning Application, the Township and FSHC were negotiating and proposing to modify the Inclusionary Development Proposal without any disclosure of its intent to Hartz and without the Planning Board making any recommendation to the governing body. Notably, the Ordinance specifically provides that "after hearing the application, the Planning Board shall determine whether any action other than rezoning will properly protect the interest of the community or the municipality" § 255-61. The Planning Board made no recommendation to the modification of the Rezoning Application, yet, the Township continued to move forward with its negotiations and ultimate Settlement Agreement with FSHC.

(D) Effect of current zoning.

(1) Substantial and Meaningful Benefit

Under this standard, the Township Ordinance requires proof that "the rezoning shall substantially and meaningfully benefit the municipality and further the purposes of the Municipal Land Use Law, including purposes set forth in N.J.S.A. 40:55D-2." Township Ordinance §255-64(D). There is no disputing that affordable housing will provide the Township a substantial and meaningful benefit and that the adequacy of the proofs at the hearings demonstrated this benefit, particularly because the Township adopted its own modified version of the Inclusionary Development Proposal as part of the Settlement Agreement with FSHC.

Specifically, Hartz's professional planner also provided significant testimony demonstrating that the Rezoning Application benefits the Township and furthers the purposes of the MLUL. Mr. Keenan Hughes, P.P., testified the following goal is furthered by the Inclusionary Development: (a) Encouraging municipal actions to guide the appropriate use for development of all lands in the State in a manner that will promote the public health, safety, morals and general welfare. N.J.S.A. 40:55D-2(a). Mr. Hughes explained that the proposed rezoning will advance this goal by facilitating the transition of a fading suburban office site into a vibrant, multi-family residential community that will include both market rate and affordable housing opportunities for the community. 6T41:21 to 42:7. Mr. Hughes further testified that this rezoning would encourage onsite recreational amenities, provide a shuttle to and from the local train station, ensure adequate separation from surrounding land uses, and facilitate necessary traffic improvements to traffic circulation along Walnut Avenue. 6T42:7-13. "Changing the use would not have a material off-site traffic impact," 7T113:2-20, further supporting the conclusion that the proposed multi-family use is appropriate. Moreover, the transition to residential use will remove a potentially noxious

use from a largely residential neighborhood. 7T36:12-19. Importantly, the market for rental apartments is strong, (4T87:9-13), so rezoning the Property for such use will promote the general welfare and furthers the purpose listed in subparagraph 2(a) of the MLUL.

In addition, Mr. Hughes testified that the following goal of the MLUL would also be advanced by the Inclusionary Development: (e) Promoting the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment. [N.J.S.A. 40:55D-2(e)]. Pursuant to the rezoning, the proposed density would be 30 units per acre, which is less than the average density assigned to other inclusionary projects in Cranford. Mr. Hughes offered his opinion that the proposed density is appropriate for the community and can be accommodated on the site. 6T42:16 to 43:3. Likewise, Mr. Hughes testified that the proposed density on the Property would not generate more traffic than would result from full operation of the existing improvements. 7T113:2-20.

According to Mr. Hughes' testimony, the proposed density would contribute to the well-being of persons looking for alternative housing types in Cranford (whether for financial or lifestyle reasons, consistent with the survey results in the 2019 Reexamination Report, Exh. I to Bennett Cert.), where rental apartments comprise only a small percentage of the local housing stock. Furthermore, the proposed population density will facilitate the housing of a larger quantity of people within a smaller area, assisting in the preservation of open space. Lastly, the overall impervious coverage of the Property would be reduced as would other bulk requirements with a development of the type proposed in Hartz's concept plan, further preserving the environment. These factors support the proposed rezoning as furthering the purpose listed in subparagraph 2(e) of the MLUL.

Mr. Hughes further testified that the Inclusionary Development would advance the following goal of the MLUL: (g) Providing sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, to meet the needs of all New Jersey residents [N.J.S.A. 40:55D-2(g)]. Mr. Hughes explained that the Property is in an appropriate location to create a self-contained, multi-family residential community. 6T45:3-5. The Property is separated from the surrounding residential areas by both the existing rail line and the berm (to be expanded) along Walnut Avenue, and is bounded to the south by a golf course. 6T45:5-13. The site is 30.5 acres, and represents sufficient space for the proposed residential uses.

The Property currently has 65.5% impervious coverage with two above-ground stormwater management basins that assist in managing stormwater runoff. Exh. 13, 14, A-3, and A-4 (Concept Plan). Importantly, the Concept Plan proposed to reduce the impervious coverage of the Property because the existing structures now located at the Property would be demolished in favor of constructing new uniform residential apartments throughout the Property. 5T10:20-22, 5T79:23-24, 5T121:11-14; 6T45:14-16. Reducing the coverage while also providing above-ground amenity decks on some of the buildings results in the provision of additional open space. The testimony shows that the rezoning proposal furthers the purposes of subparagraph 2(g) of the MLUL.

In addition, Mr. Hughes testified that the following goal of the MLUL would also be advanced by the Inclusionary Development: (h) Encouraging the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes which will result in congestion or blight. N.J.S.A. 40:55D-2(h). The unopposed proofs before the Board demonstrate that there will not be a net increase in traffic should

the proposed zoning be implemented. 7T113:2-20. On the contrary, putting the Property to industrial use will result in the proliferation of truck traffic in the immediate neighborhood, which would only aggravate congestion. In addition, the inclusion of a shuttle, as proposed by Hartz, will further enhance the free flow of traffic.

Mr. Hughes further testified that the Inclusionary Development would advance the following goal of the MLUL: (i) Promoting a desirable visual environment through creative development techniques and good civic design and arrangement. N.J.S.A. 40:55D-2(i). As noted by Mr. Hughes, the proposed rezoning is intended to create a planned residential community with a sense of place defined by high quality architectural and landscape features, including an expanded berm along Walnut Avenue and generous landscaping buffers. Moreover, the majority of the parking will be enclosed, promoting a more attractive and pedestrian-oriented environment. 6T46:12-19.

(2) Substantial Likelihood of Inutility

In the alternative, the Township Ordinance requires the applicant to demonstrate that there is a "substantial likelihood" that the current zoning will eventually result in inutility. Township Ordinance §255-64(D). Hartz provided detailed testimony[11] of multiple experts qualified in conditions of commercial real estate markets and office leasing to show that the uses permitted by the current zoning regulations will likely not be sustainable going forward. *See generally*, 3T34:8-20; 4T29:2 to 39:5, 4T57:1-11, 4T60:13-24, 4T74:16-20; 6T19:22 to 20:6; 6T38:2-5; 7T27:1-16 to 31:2-7.

[11] Hartz presented (1) Mr. Charlie Reese, Vice President of Sales and Leasing at Hartz as a fact witness; (2) Mr. Matthew McDonough, a New Jersey Commercial Real Estate Broker as a commercial real estate expert specialized in office leasing; (3) Mr. William Sitar, Jr. as an expert in the conditions of the Northern New Jersey Industrial Real Estate Market; and (4) Mr. Keenan Hughes, a professional planner. Hartz presented additional witnesses relative to the site design itself, such as a civil engineer, architect, and traffic engineer.

The Planning Board's expert, Mr. Brunette, a real estate broker, even acknowledged the many challenges with the existing building and site and admitted that much of what Hartz's experts stated about the Property is true, including poor site access for an industrial use, and that there are not many large users in the market today. 3T16:11-15, 21:5-7, 96:7 to 97:8, 55:12-17. Mr. Brunette, summarized the situation as follows: "The office market is the toughest market that is out there. And I concur with all the experts they [Hartz] had here. It is very difficult to find big block users that are out there at the moment." 3T055:12-17. Consequently Hartz provided substantial evidence that the Planning Board was not free to ignore that there was a "substantial likelihood" that the Property will become unusable as zoned.

(E) No Undue Burden on Municipal Services. In demonstrating that the proposed rezoning will substantially benefit the municipality and will advance the purposes of the MLUL, the Planning Board determined that the Inclusionary Development would unduly burden the planned and orderly development of the municipality and/or place an undue burden on upon community services and facilities. Township Ordinance §255-64(E). Every application obviously presents a "burden" in some way. The focus is on whether "the proposed rezoning" creates an "undue burden," and where affordable housing is involved, whether the municipality could affirmatively reduce that burden. The Planning Board in its determination that municipal services will be unduly burdened failed to consider the Township's obligation to affirmatively plan for infrastructure expansion and rehabilitation if necessary to assure the achievement of the municipality's fair share of low and moderate income housing. See N.J.S.A. 52:27D–311(a).

Hartz demonstrated that the proposed Inclusionary Development would not unduly burden the planned and orderly development of the municipality or otherwise place an undue burden upon the community. The current zoning will in and of itself create more intense use of the Property

than a residential use. For example, there was testimony that a large industrial facility will generate substantial truck traffic in and around the nearby residential neighborhoods. 7T36:12-19. Even if a user may distribute deliveries with small box trucks, large tractor-trailers are still required to deliver the inventory to the facility. 7T48:2-7.

Hartz presented the testimony of a professional traffic engineer accepted by the Board as an expert in his field, Mr. Karl Pehnke, who opined that the traffic to be generated by the Concept Plan would not have an undue off-site traffic impact relative to the traffic impacts that would result from a fully operational project that complies with the existing zoning. 7T113:2-20. Mr. Pehnke proposed some off-site traffic improvements that would provide an overall benefit to the community, including a traffic signal in front of the project and a widening of Walnut Avenue, as well as a shuttle for residents to the downtown area. 8T34:8-21, 63:22 to 64:2; 11T10:4-8. Mr. Pehnke's conclusions with respect to off-site traffic impacts were not questioned or opposed by a professional traffic engineer retained by the Board to review Mr. Pehnke's work.

To facilitate the flow of traffic coming into and out of the Property in a post-development scenario, Mr. Pehnke proposed the installation of a traffic signal on Walnut Avenue, which would operate at a high level of service and allow for safe pedestrian crossing of Walnut Avenue that does not presently exist. 8T34:8-21, 63:22 to 64:2; 11T10:4-8. The traffic signal would be programmed to prioritize the easy flow of traffic on Walnut Avenue such that the signal would clear traffic on Walnut Avenue on every cycle. 11T10:9-15, 45:9-21. The Board's traffic consultant had no objection to such a signal, though he did suggest in his review report that the signal may be better situated at another location. Furthermore, Mr. Pehnke proposed widening Walnut Avenue to facilitate the safe passage of traffic. 8T123:18 to 124:25. Thus, Hartz's expert demonstrated through testimony that a development constructed in accordance with the proposed rezoning would

not burden the local roadways any more than full operation of the existing improvements and would likely ease existing conditions.

With respect to fiscal impacts, Mr. Keenan Hughes engaged in a comprehensive analysis—updated throughout the course of the lengthy proceedings to incorporate current data—of the impacts that the rezoning would have on municipal finances. Mr. Hughes concluded, using accepted techniques, that a multi-family project constructed to the maximum extent allowed under the proposed zoning would yield 110-135 school children at full build-out, depending on which of two accepted methodologies is employed, and about half of that after only the first phase of development is completed. 11T61:3-8, 63:11-15. As noted by Mr. Hughes, these students would not all enter the school system at once and would be distributed throughout the various grades and schools in town. 11T83:1-12. Mr. Hughes found no need for additional school facilities, contrary to testimony presented by the Planning Board's experts. 11T83:9-12.

Based on that number of students, Mr. Hughes was able to extrapolate the financial impact to the local school district using existing budget figures made available by the Town and the Board of Education. Ultimately, Mr. Hughes concluded that the net annual financial impact would be +$660,084 to the Town and +$2,108,901 to the school district at full build out, assuming 110 additional students in the district. 11T66:10-22. Alternatively, he concluded that the net annual financial impact would be +$660,084 to the Town and +$1,754,426 to the school district, assuming 135 additional students in the district. 11T67:2-12. Depending on which methodology is relied upon, the aggregate net benefit to the community is projected to range from approximately $2,410,000 to $2,770,000 annually. This takes into account the additional municipal expenditures that would result from the additional residents. Thus, the rezoning would not burden, much less *unduly burden*, municipal services, rather, it will generate a net fiscal benefit to the community.

As such, when compared to what the Township ultimately agreed to in the Settlement Agreement, the proofs submitted by Hartz show that the Inclusionary Development Proposal would not unduly burden the Township.

5. Contemporaneous Affordable Housing Litigation

Hartz's Rezoning Application seeking to build an Inclusionary Development cannot be reviewed in a vacuum as the Township has had a long and tortured history of non-compliance with its Mount Laurel obligation, which continues concerning its Prior Round obligations for 1987-1999 to this day before the Appellate Division. See Cranford Dev. Associates, LLC v. Twp. of Cranford, 445 N.J. Super. 220, 224–25 (App. Div. 2016); Bennett Cert., Exh. J, 2018, HEFSP and Exh. K, Township's Amended Case Information Statement dated March 21, 2019 and Order dated January 2019. In connection with two (2) builder's remedy lawsuits, the Court executed an order dated March 20, 2009 finding non-compliance with its fair share housing obligation of 410 housing units for the Prior Round. In December 9, 2011, the Township was ordered to amend its 2008 Housing Element and Fair Share Plan, which was updated and adopted by the Planning Board on May 2, 2012. The Township ultimately received a Judgement of Compliance in 2013 for its Second Round that was due to expire in 2018.

Despite the award of a builder's remedy to Cranford Development Associates ("CDA"), the Township subverted the Court's Order by buying the CDA project and approving a development that produced 20 affordable housing units less than the amount which was Court ordered. The Court entered an order requiring the Township to fill the 20 unit gap, which the Township has since appealed and is pending before the Appellate Division.

Because the Judgement of Compliance was scheduled to expire in 2018 and trial courts have succeeded to the role of the Council on Affordable Housing ("COAH") in accordance with

In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 25 (2015) ("Mount Laurel IV"), the trial judge ordered the Township to file a separate declaratory judgment action in connection with the Township's Third Round obligation and compliance therewith, while the issue concerning the 20 unit gap is being litigated before the Appellate Division. Due to COAH's failure to adopt valid Third Round regulations despite several attempts, Mount Laurel IV directed courts the apply COAH's Second Round regulations, N.J.A.C. 5:93-1, et seq. (and N.J.A.C. 5:97, to the extent not invalidated by In re: N.J.A.C. 5:96 and 5:97, 215 N.J. 578 (2013)), in determining whether a municipality's proposed compliance mechanisms would create a realistic opportunity for the development of affordable housing.

On November 20, 2018, the Township filed this declaratory judgment action, captioned In the Matter of the Application of the Township of Cranford, County of Union, Docket No. UNN-L-3976-18 ("DJ Action"), seeking immunity and a judgement of compliance from builders remedy lawsuits in connection with its affordable housing obligation for the Third Round (1999-2025). The Township also filed a proposed 2018 housing element and fair share plan, which indicated that the Township would make its determination once the Planning Board made a decision on the Rezoning Application. Hartz intervened and filed its Answer in this DJ Action on December 19, 2018, during the hearings concerning Hartz's Rezoning Application.

As discussed above, the Township was engaged in negotiations with FSHC regarding its obligation while the hearings in connection with the Rezoning Application were proceeding. The Settlement Agreement was signed in November 2019 and is the subject of an upcoming fairness hearing pursuant to East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 328 (App. Div. 1996); Morris Cty. Fair Hnous. Council v. Boonton Twp., 197 N.J. Super. 359, 367-69 (Law Div. 1984), aff'd o.b. 209 N.J. Super. 108 (App. Div. 1986). Hartz presented objections

to many of the elements of the Settlement Agreement because they are contrary to COAH regulations, particularly as to the rezoning/ redevelopment of its property, which will be subject of an upcoming fairness hearing.

Pursuant to the November 2019 Settlement Agreement, the Township and FSHC agreed that Cranford's regional affordable housing obligation is 440 low and moderate-income units for the Third Round. However, the Township seeks a very large downward adjustment of its fair share obligations due to an alleged lack of developable land, but it does so in a way that is contrary to the New Jersey Fair Housing Act, N.J.S.A. 52:27D-301 to 329 ("FHA"), and COAH regulations. The Settlement Agreement proposes to develop only 157 affordable units, not the entire 440-unit obligation. Despite the Township's claims that it lacks sufficient vacant land to satisfy its entire Third Round obligation, the Township will be left with an unconscionably large unmet need of between 289 and 309 affordable housing units – without any clear means to satisfy this "unmet need."

Notwithstanding Hartz's offer of its property to create 139 affordable units and the Township's claims that it lacks sufficient vacant land, the Settlement Agreement contemplates an economically deficient plan for the Hartz Property at a relatively low density, which will only generate between 45 and 49 affordable units. **In the Settlement Agreement, Cranford proposes to either: (1) <u>rezone</u> Hartz's site at a density of 9 units per acre, yielding 45 affordable units; or (2) designate this property as a <u>redevelopment area</u> with the power of condemnation, which would then permit a density of 10 units per acre, yielding 49 affordable units.**

On February 25, 2020, the Township Committee adopted Resolution No. 2020-159 requesting the Planning Board to evaluate the Property to determine whether it should be

designated as a condemnation area in need of redevelopment.[12] Subsequently, on March 18, 2020, the Planning Board reviewed options for consulting planners to perform the necessary investigation as to whether the Property should be designated as an area in need of redevelopment.[13] The study will be performed by the same planners, Maser Consulting, that the Planning Board relied upon in support of its 2019 reexamination of the Master Plan, where no recommendation was made to designate Hartz's Property as an area in need of redevelopment.

The Township has admitted it does not have any supporting economic analysis to justify a density of 9 to 10 units/acre, which is key and required by N.J.S.A. 52:27D-307(e) (As part of petition for substantive certification, municipality must demonstrate economic feasibility of proposed rezoning of non-residential zoned property to residential zoned property). In addition, municipalities are required to make a determination of the total residential zoning necessary to assure that the municipality's fair share is achieved and plan for infrastructure expansion and rehabilitation if necessary to assure the achievement of the municipality's fair share of low and moderate income housing. N.J.S.A. 52:27D–311(a). The reason for this obligation is to satisfy COAH (and now the trial courts) that the proposal presents a "realistic opportunity" for the creation of affordable housing – the benchmark of the Mount Laurel Doctrine. Therefore, without any financial analysis, the Township has held the Hartz Property is realistic and suitable for multi-family residential, is entitled to a rezoning (albeit at an unsustainably low density), and "predetermined" that the Property does qualify for redevelopment.

As a reference point, the average density of the other affordable housing compliance mechanisms in the Settlement Agreement is about 33 units per acre. Moreover, in preparing its

[12] See Bennett Cert., Exh. M, Agenda of Township Committee Meeting February 25, 2020 and Resolution No. 2020-159.

[13] See Bennett Cert., Exh. N, Agenda and Minutes of Planning Board Meeting March 18, 2020.

Realistic Development Potential (RDP) analysis pursuant to N.J.A.C. 5:93-4.2, the Township represents that a suitable density for the Hartz's site is 18 units per acre, which is double of that proposed in the Settlement Agreement (and even then improperly based on only 24.5 out of the full 30.5 acres). The Settlement, therefore, represents a gross reduction in the amount of not only the affordable housing proposed by Hartz (139), but also less affordable housing than the RDP the Township assigns to the site (88).

The terms of this settlement are unlike any other that have been reached by FSHC. As part of the settlement with FSHC, the Township's plan is to condemn Hartz's property and redevelop it with less than half of the affordable housing proposed by Hartz. This aspect of the Township and FSHC settlement is unprecedented, and Hartz submits that using eminent domain **to reduce** affordable housing is an abuse of the eminent domain power. In addition, this unprecedented aspect of the FSHC settlement demands an analysis of whether the Township's proposal is economically feasible. Consequently, at the same time that the Township denied Hartz's application to change the use from a commercial property and made its "findings" concerning why the property should not be rezoned to accommodate multi-family housing with affordable housing, the Township was negotiating with FSHC, and ultimately agreed to rezone the property to accommodate a multi-family development with affordable housing, or alternatively, to designate the Property as an area in need of redevelopment – the precise relief that Hartz has requested in its application since early 2017.

LEGAL ARGUMENT

POINT I

STANDARD OF REVIEW

Pursuant to N.J. Ct. R. 4:69-1, actions of a municipal body must be overturned when its exercise of discretion is arbitrary, capricious or unreasonable, not supported by evidence, or otherwise contrary to law. See Cell v. Zoning Board of Adjustment, 172 N.J. 75, 81-82 (2002), Rivkin v. Dover Township Rent Leveling Board, 277 N.J. Super. 559, 569 (App. Div. 1994), aff'd, 143 N.J. 352, 378 (1996). However, a court's review of a board's application and conclusions of law is de novo. Wyzykowski v. Rizas, 132 N.J. 509, 522 (1993).

While the scope of review of a local governmental agency decision is circumscribed, it is "not simply a pro forma exercise in which [the court] rubber stamp[s] findings that are not reasonably supported by the evidence." CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd., 414 N.J. Super. 563, 578 (App. Div. 2010) (internal quotations and citations omitted). The court's authority and duty in determining whether a municipality's action is arbitrary, capricious and unreasonable entails "a nearly simultaneous reading of the entire verbatim transcript and analysis of documentary evidence presented as exhibits before the board" and "involves a searching review of the points of error highlighted by the parties in their arguments in briefs and at trial." Witt v. Borough of Maywood, 328 N.J. Super. 432, 453 (Law Div. 1998). See also Burbidge v. Mine Hill Twp., 117 N.J. 376, 385 (1990). The Court here may also consider items outside of the formal "record" because the documents were generated by the Township on the issue of planning and zoning and are of public record and/or filed with the Court. Downtown Residents v. Hoboken, 242 N.J. Super. 329 (App. Div. 1990) ("[d]ocuments submitted in a related but not congruent suit before the same trial judge [may be] made part of the present record").

Municipalities derive their zoning power solely from the authority delegated to them by the Legislature. Manalapan Realty v. Tp. Committee, 140 N.J. 366, 380 (1995); Riggs v. Township of Long Beach, 109 N.J. 601 (1988). A zoning ordinance is entitled to a presumption of validity as a standard for legal review of zoning ordinances because it presupposes that municipalities will faithfully follow the substantive planning principles and procedural formalities established by the Legislature when adopting these ordinances. Riggs, *supra* at 610. The presumption of legal validity can be overcome when a plaintiff landowner proves that the particular zoning ordinance is "arbitrary, capricious or unreasonable." Pheasant Bridge v. Twp. of Warren, 169 N.J. 282, 289-90 (2001), *cert. den*. 535 U.S. 1077 (2002).

Hartz Rezoning Application was premised in part on rebutting the presumption that the existing C-3 zoning was reasonable. There are instances where government action is not afforded a presumption of validity; but rather, *the municipality bears the burden* to present sufficient evidence to rebut the presumption of invalidity. N.J.S.A. 40:55D–89.1 establishes "a rebuttable presumption that the municipal development regulations are no longer reasonable" where a planning board fails to conduct a reexamination of the master plan and development regulations every 10 years and/or the reexamination report does not otherwise conform with N.J.S.A. 40:55D–89. Vidal v. Lisanti Foods, Inc., 292 N.J. Super. 555, 566–67 (App. Div. 1996). See also Elon Associates, LLC v. Tp. of Howell, 2005 WL 6708811 (Law Div. Jan. 21, 2005). For the reasons discussed herein, the Township's reliance on the "validity" of the 2009 Master Plan and current C-3 zone was improper particularly because the 2019 Reexamination Report was being considered and adopted immediately after Hartz's Rezoning Application was denied.

In certain specific circumstances, municipal land use and zoning decisions and actions are not entitled to any deference. One such time is when the exercise of the municipal land use power

is used to achieve an improper purpose. Riggs v. Township of Long Beach, 109 N.J. 601 (1988) One of the hallmarks of the "turn square corners" doctrine is that its application is not dependent upon a finding of bad faith, but focuses the judicial inquiry upon whether government seeks an unfair "litigation advantage." CBS Outdoor, Inc., 414 N.J. Super. at 586–87 (citing F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426 (1985) (prohibiting a municipality from taking litigation advantage of another party under the "turn square corners" doctrine). To the extent a local government attempts to capitalize on "litigation advantage" by succeeding upon mere tactics rather than substance, courts "decline to become an instrument of mischief by denying all of the previous proceedings [as] mere exercises in futility." CBS Outdoor, Inc., 414 N.J. Super. at 586-87 (App. Div. 2010) (citations omitted). See also Klumpp v. Borough of Avalon, 202 N.J. 390, 414 (2010) ("Government should not be permitted to invoke a legal theory only to abandon it later in favor of another"); Bronze Shields v. City of Newark, 214 F. Supp. 2d 443, 449-450 (D.N.J. 2002). Therefore, where the municipal party has succeed in persuading a court to accept an earlier position, and the municipal party seeks to assert an inconsistent position, the party would derive an unfair advantage and impose an unfair detriment on the opposing party if not estopped.

The standard of "turning square corners" is critical to this prerogative writ action. On the one hand, the Township and Planning Board denied Hartz Rezoning Application. Yet only two months later, in separate litigation, the Township and FSHC submit to the court a settlement that finds as part of the settlement that: (i) the Hartz property is suitable for residential development and; (ii) the Hartz property is suitable and beneficial for inclusionary development; and (iii) a redevelopment area designation is suitable**. This is precisely what the doctrine of "turning square corners" is designed to prohibit.** The Township and Planning Board denied Hartz its request to rezone, yet then turned around – with ***no*** change in the underlying facts or law- and

approved and adopted the core relief Hartz requested as part of its Rezoning Application, all to gain a litigation advantage to settle with an unrelated third party (FSHC). Such litigation gamesmanship should not be tolerated by the judiciary.

POINT II

TOWNSHIP DENIAL OF HARTZ'S REZONING WAS ARBITRARY BECAUSE IT CONTRADICTED CONTEMPORANEOUS PLANNING ACTIONS TAKEN BY THE TOWNSHIP

The Planning Board and Township's denial of the Rezoning Application are the epitome of arbitrary conduct, which are evidenced and later revealed by the carefully orchestrated adoption of the 2019 Reexamination Report, November 2019 Settlement Agreement, and the referral in 2020 for a Redevelopment Study. The Court should not silently condone this type of gamesmanship, and be used as an instrumentality in the Township's malfeasance. It should require the Township to "turn square corners" particularly where a public's trust in government is involved and where the Mount Laurel Doctrine, which is a constitutional mandate, is at stake.

The Township's denial of Hartz's Rezoning Application was arbitrary, capricious and unreasonable because Hartz presented evidence that overwhelmingly satisfied the Township Ordinance §§255-61 and 255-64 Review Standards, which will be addressed, *infra*., Point III. Hartz's Inclusionary Development Proposal represents a viable and productive use of the property, and serves the general welfare by partly satisfying the Township's unmet affordable housing need without presenting an "undue" burden upon the municipality. Finally, Hartz proposed to redevelop its property with 766 multi-family market rate units and 139 affordable units, and provided the only substantive evidence of economic feasibility of the proposal. At this density, Hartz presented sufficient evidence to the Planning Board that this density was appropriate and met the standards of Ordinance § 255-64(C),(D).

However, the arbitrary and capricious actions by the Township are underscored and further revealed following the adoption of the Planning Board's Resolution in September 2019. Concurrently with its adoption of the Planning Board Resolution, the Township was negotiating a settlement in the DJ Action with FSHC, which resulted in the Settlement Agreement dated November 2019. In that Settlement, the Township represented to the Court that the Hartz Property would be rezoned for a residential inclusionary development, or in the alternative, would be designated an area in need of redevelopment with condemnation authority reserved for the Township. Therefore, a mere two months following the denial of the Hartz Rezoning Application, the Township approved the same residential use, the same inclusionary relief in the FSHC Settlement, albeit at a lower density that is not economically feasible. This conduct was directly related to achieving a settlement with an unrelated party in separate litigation in which Hartz intervened as party defendant.

Then, on February 25, 2020, the Township Committee adopted Resolution No. 2020-159 requesting the Planning Board to evaluate the Property to determine whether it should be designated as a condemnation area in need of redevelopment, and on March 18, 2020, the Planning Board reviewed options for consulting planners to perform the necessary investigation as to whether the Property should be designated as an area in need of redevelopment. See Bennett Cert., Exhs. M and N. The study will be performed by the same planners, Maser Consulting, that the Planning Board relied upon in support of its 2019 reexamination of the Master Plan, where no recommendation was made to designate Hartz's Property as an area in need of redevelopment.

In stark contrast, the low density ascribed to the Hartz Property in the Settlement Agreement by the Township is not based on any studies or economic feasibility analysis even though the Township has a statutory obligation to justify the economic feasibility of rezoning any

non-residential property to provide for affordable housing under N.J.S.A. 52:27D-307(e) (As part of petition for substantive certification, municipality must demonstrate economic feasibility of proposed rezoning of non-residential zoned property to residential zoned property).

Municipalities are required to consider "[r]ezoning for densities necessary to assure the economic viability of any inclusionary developments." N.J.S.A. 52:27D–311(a)(1). See also Hollyview Dev. Corp. v. Twp. of Upper Deerfield, A-4449-13T2, 2016 WL 7232378, at *8 (N.J. Super. Ct. App. Div. Dec. 14, 2016). N.J.S.A. 52:27D-311 of the FHA requires: "[t]he housing element shall contain an analysis demonstrating that it will provide such a realistic opportunity, and the municipality shall establish that its land use and other relevant ordinances have been revised to incorporate the provisions for low and moderate income housing." Courts also recognize that the Mount Laurel doctrine requires a municipality to take marketability and market demand into consideration in providing for a realistic opportunity for the development of affordable housing. See also Toll Bros., Inc. v. Township of West Windsor, 173 N.J. 502, 551-54 (2002) (relying on the FHA, N.J.A.C. 5:93-3.5(a) and N.J.A.C. 5:93-5.6(b)) (citing Mount Laurel II, 92 N.J. at 260-61) (holding that realistic opportunity for the development of affordable housing generally requires that the sites be economically viable)).

The Township and Planning Board have conceded that the Hartz Property is suitable for rezoning for a residential inclusionary project through the submission of the Settlement Agreement. Because the only evidence of economic feasibility was presented by Hartz, the Court should grant the requested relief of mandating the rezoning of the Hartz property at the requested 30 unit per acre density, with the proposed 15% affordable housing set aside. The Township and Planning Board never submitted or recommended any alternative density modification during the two-year long process of evaluating the Hartz Rezoning Application. Instead, without any analysis

of economic feasibility, in November 2019 the Township and FSHC agreed to a rezoning at one-third of the economically feasible density. Because the Planning Board never proposed any alternative to the 30 unit per acre density proposed by Hartz, it should be barred from any further consideration as to an alternative density. The time for the Planning Board to have made alternative density recommendations was during the hearing process. This is precisely what Ordinance §§ 255-61, 255-64(C), and 255-64(D) provide. Because the Township elected not to consider Hartz's redevelopment request and the Planning Board elected to not evaluate density, it cannot now argue for a "second bite at the apple."

In light of the fact that there is no alternative density analysis undertaken by the Township and/or Planning Board, Hartz must be entitled to the relief requested. Therefore, this Court should reverse the denial of the Rezoning Application, and remand it for the adoption of a rezoning ordinance to permit the Hartz Inclusionary Development Proposal.

POINT III

TOWNSHIP DENIAL OF HARTZ'S REZONING WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE BECAUSE HARTZ PRESENTED OVERWHELMING EVIDENCE MEETING EVERY ELEMENT OF ORDINANCE 255-61 and 255-64

The Township's action in denying the Hartz Rezoning Application, then adopting a contrary position in the FSHC Settlement, is also dispositive of the fact that Hartz presented overwhelming evidence that satisfied every element of Township Ordinance §§255-61 and 255-64. This evidence was so compelling that within two months of rezoning denial, the Township adopted the core elements of the Rezoning Application, albeit at a density that has not been proven to be economically feasible. The fact the Planning Board ignored Hartz's compelling evidence, yet two months later adopted the same relief requested by Hartz, is facially arbitrary. Cell v. Zoning Board of Adjustment, 172 N.J. 75, 81-82 (2002).

As shown in the following point by point analysis, in all respects and on every element of the proofs required by The Township Ordinance §§255-61 and 255-64, Hartz met its burden of proof in the Rezoning Application submissions and testimony.

A. Necessity. No application for rezoning shall be granted if the relief sought could be granted through an application for development other than one pursuant to N.J.S.A. 40:55D-70d.

There is no dispute among the parties that the application was necessary, as any form of residential uses are not permitted under the C-3 zoning regulations. (See Exh. 1, Planning Board Resolution at Factual Finding ¶14 and Legal Conclusions ¶2(i)). The Board held that the Zoning Board of Adjustment could not grant the relief under N.J.S.A. 40:55d-70d(1) because it would abrogate the power of the governing body to adopt zone plans. Accordingly, the Board found that Hartz's request for a recommendation to rezone the Property is by necessity properly before the Board under Township Ordinance §255-64(A). In addition, the application was necessary because the C-3 zone was no longer an appropriate planning designation for this property. The Township's reliance on the 2009 Master Plan as the planning basis for the continuation of the C-3 zone was erroneous. In fact, the Planning Board action on the Hartz proposal occurred ***before*** the adoption of the 2019 Master Plan Reexamination Report. Therefore, the application was necessary to address the impact of the continuation of the C-3 zone in the face of changes market conditions.

B. Master Plan. In submitting its recommendations, the Planning Board shall submit a report in accordance with N.J.S.A. 40:55D-26. The governing body shall comply with such section in acting on the application. If the proposed rezoning is inconsistent with the Master Plan, the Planning Board shall include in its recommendation whether it is in the best interest of the municipality to amend the Master Plan in accordance with the Municipal Land Use Law.

In addition to determining consistency with the Master Plan and whether to amend the Master Plan pursuant to Township Ordinance §255-64(B), Section 255-61 further makes it

mandatory for the Planning Board to determine and make appropriate recommendations whether any action other than rezoning will properly protect the interest of the community or the municipality. See Township Ordinance §255-61.

On September 11, 2019, the Township Committee's adoption of the Planning Board's Resolution recommendation to continue the C-3 zone was arbitrary and capricious. Both the Planning Board and Township Council concluded that the Rezoning Application was inconsistent with the "stale" 2009 Master Plan pursuant to N.J.S.A. 40:55D-26 and the Property should not be rezoned to accommodate an inclusionary development. See Exh. 1, Planning Board Resolution at Factual Finding ¶15 and Legal Conclusions ¶2(ii)).

Specifically, the Resolution states:

> The Board finds that the Applicant failed to show that the proposed request for rezoning will further the purposes of the Master Plan where the proposed rezoning will include the demolition and removal of all of the commercial buildings and eliminate jobs rather than encourage the development of a desirable economic base that generates employment growth as set forth under Goal 7.
>
> * * *
>
> The Board in submitting its report, for the reasons set forth above, finds that the proposed rezoning is inconsistent with the Master Plan and the Board finds, for the reasons set forth above, that it is not in the best interest of the Township to amend the Master Plan; and, accordingly, the Board's report will not include recommendations regarding amendments to the Master Plan.

See Exh. 1, Planning Board Resolution, p. 32, 40. Moreover, pursuant to the rezoning standards in the Township Code, upon concluding that the inclusionary development was inconsistent with the Master Plan, the Planning Board was obligated to make a recommendation to the Township Committee regarding whether the Township's best interests would be served by such an amendment to the Master Plan. Township Code § 255-64. However, in its Resolution of September 4, 2019, the Planning Board outright stated that "it is not in the best interest of the

Township to amend the Master Plan." Resolution, p. 40. These determination cannot be reconciled with the Township's contemporaneous negotiations with FSHC to rezone the Property for a multi-family residential use and/or designate the Property as an area in need of redevelopment *with the power of eminent domain* pursuant to N.J.S.A. 40A:12A-1, *et seq*. Therefore, in settling the DJ Action with FSHC by agreeing to a residential rezoning for inclusionary development, albeit at a density that is not feasible, the Township acted arbitrarily and capriciously.

Contemporaneously with these recommendations, the Planning Board was preparing the 2019 Reexamination Report, which it adopted on September 18, 2019 (a week after the Township Committee adopted the Planning Board Resolution to deny the Rezoning Application). The reexamination review of the master plan and the zoning ordinances is required every 10 years under N.J.S.A. 40:55D-89 in order to retain a presumption of validity for the Township's current zoning scheme. N.J.S.A. 40:55D–89.1 provides that the planning board's failure to conduct a reexamination of the master plan and development regulations in conformity with N.J.S.A. 40:55D–89 establishes "a rebuttable presumption that the municipal development regulations are no longer reasonable." Vidal v. Lisanti Foods, Inc., 292 N.J. Super. 555, 566–67 (App. Div. 1996).

The Planning Board rendered its decision concerning the Rezoning Application based on the stale 2009 Master Plan and a zoning scheme that had not been reviewed in the past 10 years. Bordering on bad faith, the Planning Board did not adopt the 2019 Reexamination Report until September 18, 2019, immediately **after** rejecting Hartz's Rezoning Application on September 4, 2019 and the Township Committee's adoption of that rejection on September 11, 2019. However, even as the Planning Board reviewed Hartz's Rezoning Application, the Reexamination Report lacks any recommendation to amend the Master Plan with regard to Hartz's Property. Therefore,

the 2019 Reexamination as adopted is in direct contravention to the representations made to the Court and FSHC regarding the residential zoning committed to in the Settlement.

Moreover, the Planning Board's 2019 Reexamination Report did not contain the details and considerations that the Legislature envisioned would occur each decade pursuant to N.J.S.A. 40:55D-89. Most notable, in light of Hartz's Rezoning Application and the FSHC Settlement, the Reexamination Report should have included: (1) "significant changes in the assumptions, policies, and objectives forming the basis for the master plan or development regulations as last revised, with particular regard to the density and distribution of population"; nor did it contain (2) "specific changes recommended for the master plan or development regulations, if any, including underlying objectives, policies and standards, or whether a new plan or regulations should be prepared"; nor did it provide (3) any "recommendations of the planning board concerning the incorporation of redevelopment plans adopted pursuant to the "Local Redevelopment and Housing Law," [N.J.S.A. 40A:12A-1 et al.]. The MLUL requires that a planning board perform a reexamination of the current zoning and make recommendations in light of any **new changes objectives, and/or policies** that affect the Township, which the Planning Board failed to do in its 2019 Reexamination Report. The 2019 Reexamination Report ignores all the evidence presented by Hartz and most important, failed to recognize changes in the zoning of the Property to residential. The 2019 Reexamination Report was a slapdash effort to push through a Master Plan amendment after the fact to justify the Planning Board's denial.

To add insult to injury, the Township filed its DJ Action in the Fall of 2018 and received temporary immunity based on the representations it made to the Court in its motion and the proposed 2018 Housing Element and Fair Share Plan ("HEFSP"). In those pleadings, the Township represented that it would wait for Planning Board's assessment and recommendations with regard

to the Rezoning Application before it would consider Hartz's Property for an inclusionary development. By agreeing to the terms of the settlement as it relates to Hartz's Property, the Township did ***not*** follow the recommendations of the Planning Board Resolution nor did the Township follow the Planning Board's 2019 Reexamination Report, which did not recommend any amendments to the Master Plan in connection with Hartz's Property. On its face, the Township misrepresented the actions it would take in 2018 by proposing a residential inclusionary zone for the Hartz Property, in direct contravention to the Planning Board recommendation adopted in September 2019. Then, a mere two months later, the Township includes the Hartz property as an inclusionary residential development in the FSHC Settlement. Such inconsistency is the essence of capricious action.

Moreover, the Planning Board also acted arbitrarily by concluding that the inclusionary development was inconsistent with the Master Plan because it failed to consider the substantial amount of evidence presented by Hartz that an inclusionary development on its Property would be consistent with the Master Plan and/or in the best interest to recommend an amendment thereto. Hartz provided expert testimony from its professional planner, Keenan Hughes, that the proposed inclusionary development was consistent with the Master Plan based on other stated goals, such as minimizing oversized housing and providing appropriate infill development, as well as the numerous purposes of the MLUL furthered by the proposed development (N.J.S.A. 40:55D-2(a), (e), (g), (h), and (i)). The Settlement Agreement included the Property as a location for multi-family housing by way of either the redevelopment or rezoning processes. Thus, the Township's own actions indicate that regardless of the Planning Board's finding of inconsistency with the Master Plan, the best interests of the Township would be served by amending the Master Plan to allow for a multi-family inclusionary development on the Hartz Property.

> **C. Modification. In making its recommendations, the Planning Board may recommend that the application for rezoning be granted, in whole or in part, or be modified. If the Planning Board recommends the granting of the application with modifications or conditions, the Planning Board shall set out such modifications or conditions in detail, including findings, conclusions and recommendations.**

In effect, this factor is further expanded by Township Ordinance §255-61, which makes it mandatory for the Planning Board to determine and make appropriate recommendations of: (1) whether any action other than rezoning will properly protect the interest of the community or the municipality; and (2) whether the applicant's proposal should be favorably recommended to the Township Committee in light of: (a) the existing Master Plan; (b) the conditions existing within the community; and (c) the expertise of the Planning Board in matters of land development.

The Planning Board concluded that, because it declined to recommend the Property to be rezoned as requested, it did not have any comments regarding modifications (in whole or in part) to Hartz's proposal. See Planning Board Resolution at Factual Finding ¶16 and Legal Conclusions ¶ 2(iii). This is clearly disingenuous as the Township then included the Property in the Settlement Agreement with FSHC for a multi-family inclusionary housing development. Aside from not turning square corners, the Township actions are unreasonable and arbitrary as the Township clearly admits that the Property should be rezoned for an inclusionary development and/or as an area in need of redevelopment. Moreover, if the intention was to include the Property as an inclusionary development, the Planning Board should have recommended an appropriate modification and/or the Township Committee should not have adopted the Planning Board's recommendations.

> **D. Effect of Current Zoning. The applicant shall demonstrate by proper proof that, absent rezoning, there is a substantial likelihood that the zoning regulations currently in existence will zone the property into inutility or that the rezoning shall substantially and meaningfully benefit the municipality and further the purposes of the Municipal Land Use Law, including purposes set forth in N.J.S.A. 40:55D-2.**

Under this standard, the Planning Board must conclude either that: (1) absent a rezoning, there is a "substantial likelihood" that the property will be zoned into inutility; or (2) the rezoning shall substantially and meaningfully benefit the municipality and further the purposes of the MLUL. While Hartz only needs to demonstrate one of the standards under factor (D), Hartz presented substantial evidence to satisfy both of these standards.

(1) Substantial Likelihood of Inutility

The review standards for a rezoning require the Planning Board to examine whether the zoning will in the future create inutility. The Planning Board erred in requiring Hartz to demonstrate that the current state of the Property had reached inutility, rather than, determine whether there was a "substantial likelihood" that the zoning regulations would zone the property into inutility, particularly because the zoning scheme had not been reviewed since 2009 and had not taken into account the changes in the circumstances, objectives and policies of the Township.

Despite the fact that Hartz provided detailed expert testimony to show that the uses permitted by the current zoning regulations are not likely sustainable in the current market, Hartz did not need to demonstrate this in order to warrant a rezoning. Therefore, regardless whether Hartz satisfied this standard, Hartz certainly demonstrated that the Inclusionary Development would substantially benefit the Township.

(2) The Inclusionary Development Will Substantially and Meaningfully Benefit the Municipality and further the purposes of the MLUL

Here, the Planning Board must consider the general purposes advanced by the MLUL and specifically, the purposes listed in N.J.S.A. 40;55D-2. The Planning Board's Resolution is replete with statements that the inclusionary development would in no way benefit the Township, which is unreasonable. Hartz's professional planner provided significant testimony demonstrating that the Rezoning Application benefits the Township and furthers the general purposes of the MLUL. Specifically, Mr. Keenan Hughes, P.P., testified that the purposes (a), (e), (g), (h), and (i) will be furthered by the Inclusionary Development. *See, e.g.*, supra. Factual Background and Procedural History at p. 17-20.

Moreover, the Planning Board was specifically instructed by its counsel to consider N.J.S.A. 40:55D-2(a) and 2(g), in connection with the Township's constitutional Mount Laurel fair share obligation. See Exh. "Flow Chart", ¶ 8. Plaintiff proposed to develop its property as an Inclusionary Development – a mix of market rate and affordable housing. Because affordable housing is an advancement of the purposes of zoning, as established by the following statutory, regulatory and case law, Hartz satisfied the goals of the MLUL and met Ordinance § 255-64(D), particularly where the Township has a 289 unit unmet need.

Inclusionary projects serve an inherently public purpose that assist the Township and the region to meet its constitutional obligation to provide for its fair share of affordable housing. Toll Bros. v. West Windsor, 173 N.J. 502, 552-554 (2002). The Supreme Court has repeatedly recognized that the rationale for the Mount Laurel Doctrine is a corollary of the constitutional obligation to zone in furtherance of the general welfare. In re Adoption of N.J.A.C. 5:96, 215 N.J. 578, 587–88 (2013) (citing S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp., 92 N.J. 158, 208-10 (1983) ("Mount Laurel II")). Several court have held that affordable housing qualifies as an

inherently beneficial use, regardless of whether the municipality has already met its fair share obligation. Homes of Hope, Inc. v. Eastampton Township, 409 N.J. Super. 330 (App. Div. 2009).

Mount Laurel I and Mount Laurel II both recognized that municipalities are required to refrain from exclusionary zoning and have a continuing "constitutional obligation to affirmatively provide a realistic opportunity for the construction of [their] fair share of the present and prospective regional need for low and moderate income housing" In re Adoption of N.J.A.C. 5:96, 215 N.J. 578, 587–88 (2013) (quoting Mount Laurel II, 92 N.J. at 205) (internal citation omitted) (emphasis added)). Similarly, the FHA and COAH regulations provide affirmative measures that a municipality must take to achieve substantive certification as well as affirmative measures it must continue to take in order to satisfy and comply with the constitutional mandate. N.J.S.A. 52:27D–311(a) (requiring a determination of the total residential zoning and plan for infrastructure expansion and rehabilitation in order to assure the achievement of the municipality's entire fair share obligation). According to the COAH rules, when suitable property becomes available for affordable housing, a township that has taken a vacant land adjustment is required to seize upon redevelopment opportunities as they become available so that its unmet need will be satisfied. N.J.A.C. 5:93-4.2(f).

The Courts and COAH regulations require as a matter of law that each municipality meet its **entire** affordable housing obligation, both the RDP and the unmet need. N.J.A.C. 5:93-4.1. Where insufficient resources such as land or access to utilities exist, Courts and COAH regulations have required municipalities in these situations to seize upon redevelopment opportunities as they arise to ensure that these rare opportunities to create affordable housing are not squandered. N.J.A.C. 5:93-4.2(f). See also N.J.A.C. 5:93-4.2(d) (COAH shall consider sites most likely to develop and are suitable); Fair Share Housing Center v. Cherry Hill, 173 N.J. 393 (2002).

Otherwise, a municipality would never be able to satisfy its regional fair share of affordable housing, and instead, pass the regional fair share need for affordable housing to other municipalities in the region or even worse leave the need unsatisfied entirely.

The Planning Board's rejection that the provision of affordable housing did not substantially benefit the Township, where it has an unmet need of 289 units (out of 440 total), underscores further its arbitrary and unreasonable decision.

> **E. Municipal Services. In demonstrating that the proposed rezoning will substantially benefit the municipality and will advance the purposes of the Municipal Land Use Law, the applicant shall demonstrate that the proposed rezoning will not unduly burden the planned and orderly development of the municipality or place an undue burden upon community services and facilities. Where deemed appropriate by the Planning Board, the Board may require traffic studies, fiscal impact studies or such other information as it requires to be produced either by the applicant or for the Board at the applicant's expense.**

This standard is relevant to the Planning Board's finding that the proposed rezoning will substantially benefit the municipality and advance the purposes of the MLUL. In the event the Planning Board reaches the portion of the analysis, the Planning Board must then determine whether the rezoning would generate an **undue burden** on municipal services. Obviously, a burden in of itself is insufficient to warrant a denial of the rezoning. Among the factors to be considered in this test are traffic impacts and fiscal impacts. Moreover, a municipality must plan for infrastructure expansion within its plans to achieve the municipality's fair share of low and moderate income housing. N.J.S.A. 52:27D–311(a). The data, analysis, and conclusions offered by Hartz illustrate a lack of an "undue burden" on municipal systems that would result from the proposed rezoning, but merely municipal services that the Township must plan for if it intends to satisfy its entire affordable housing obligation. .

The fact the Planning Board proposed NO modification to the Hartz Rezoning Application request during the almost two years of hearings means that the Planning Board failed to even consider residential zoning impacts, or weigh the evidence fairly as to the Inclusionary Development Proposal. Miraculously, a mere two months later, the Township enters into a Settlement Agreement at one third the requested density underpinning the Hartz Rezoning Application, and LESS that the 18 unit "Realistic Development Potential", again with NO economic feasibility analysis and NO traffic studies, fiscal impact studies or such other information to support this abrupt about face.

Bottom line, the Planning Board conducted a kangaroo proceeding to force Hartz to spend enormous funds and waste years pursuing a rigged process, all the while the Township intended to allow the Hartz property to be rezoned residential, to allow for an inclusionary project, and allow for a redevelopment designation, and in furtherance of the Township's pattern of avoiding affordable housing. Such conduct should not be sanctioned by the judiciary. For these reasons, this court should reverse the Planning Board resolution and finding, and remand for adoption of an ordinance to the permit the Inclusionary Development Proposal on the Hartz Property.

CONCLUSION

Based on the Township's conduct and the Planning Board's failure to adhere to proper procedure and the Municipal Land Use Law, this court should reverse the Planning Board resolution and finding, and remand to the Township for adoption of an ordinance to permit the Inclusionary Development Rezoning Application in its entirety.

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