POTTER AND DICKSON
ATTORNEYS AT LAW
194 NASSAU STREET
PRINCETON, NEW JERSEY 08542
(609) 921-9555

R. WILLIAM POTTER
MEMBER N.J. AND CA. BARS

PETER D. DICKSON
MEMBER N.J. AND D.C. BARS

TELECOPIER
(609) 921-2181

July 11, 2022

The Hon. Kevin M. Shanahan, A.J.S.C.
Somerset County Courthouse
20 N. Bridge Street, 3rd Floor
Somerville, NJ 08876-1262

Re: Kormandy v. Town of Phillipsburg Town Council
WRN-L-000248-21
Amended Response to the July 8, 2022, letter of the Town of Phillipsburg
By E-filing

Dear Judge Shanahan:

This firm represents the plaintiffs in this prerogative writs action. I write in response to the letter of July 8, 2022, submitted by counsel for the defendant Town of Phillipsburg. This is yet another disingenuous stalling tactic by the Town. The court should ignore the letter and proceed according to the case management order entered on March 8, which permitted plaintiffs to file a trial brief limited to the single issue of conflicts of interest on the part of the several Town Council members. Briefing is complete and there is no reason for further delay.

To fully appreciate the lack of any merit in the July 8 letter, some background is necessary. This action challenges Phillipsburg Ordinance No 2021-14, which was approved on second reading on May 4, 2021; this action was filed on June 25, 2021. The ordinance amended a redevelopment plan to permit Peron Construction, Inc., to construct an inappropriately large truck distribution warehouse on the Town's last

undeveloped riverfront property. Our complaint raised several objections to the ordinance, but the conflicts issue is dispositive and in the interests of economy we asked that we be permitted to serve discovery on that issue first. In a September 15, 2021, case management order, the court granted that request and allowed us to serve discovery limited to the conflicts issue. That discovery was served on October 13, 2021.

The Town's gamesmanship began. First, it didn't serve answers. Next, it passed an ordinance that it claimed superseded No. 2021-14, although that vote, too, was fatally infected with the same conflicts. Its counsel used that as a further excuse not to answer the discovery. But the mayor vetoed the superseding ordinance, the council did not override that veto, and so the case returned to the challenge to Ordinance 2021-14.

When the Town finally served a response to our discovery on March 15, 2022, it was empty of any substance. Answers were evasive or non-existent and virtually no responsive documents were served. Because the briefing schedule would not allow the luxury of motions practice, plaintiffs obtained most of what had been requested in discovery by searches of court records and Open Public Records Act requests.

Michael Perrucci, Esq., is a partner in the law firm of Florio, Perrucci, Steinhardt, Capelli, Tipton & Taylor, LLC, and is also the owner of Peron Construction, Inc., the developer of the proposed warehouse. These are irrefutable facts. The Florio Perrucci firm has represented three council members (and perhaps more) in a series of lawsuits in which they were sued in their individual capacities, as well as one criminal DUI matter, another lawsuit seeking payment from the Town for legal expenses and an estate planning matter. These are also irrefutable facts. The Town offered several unsuccessful

arguments to try to overcome the clear law on such conflicts.

All of this is set forth in our trial brief and reply brief, along with conclusive law that proves Ordinance 2021-14 must be vacated for numerous and substantial conflicts of interest.

The July 8 letter thus comes after an extended period of discovery abuse and illegitimate stalling tactics. More than a year has now passed since this action was filed, and the court agreed upon two simple procedural steps: the service and answer of limited discovery and briefing limited to one issue. The Town's tactics have dragged this out. The Town has forfeited any credibility by these dilatory and inexcusable tactics. The July 8 letter is just another such tactic.

The July 8 letter and its certifications prove nothing of any value, and apparently intentionally so. The letter forwards a June 30 letter from Seth Tipton, Esq., another partner in the Florio Perrucci firm. The Tipton letter begins by stating that "[i]t has come to my firm's attention that there are several allegations regarding an alleged conflict of interest … ." Mr. Tipton implies that this is some sort of recent and startling discovery. But of course that's not true. All of the information he submits was known a long time ago. He then says this:

> Because Mr. Perrucci had no ownership interest in the Firm at the time of the council vote in May 2021 and performed no legal services during the relevant time periods, a vote by the council member in favor of the project here would not benefit the Firm, and therefore not give rise to any conflict of interest.

Mr. Tipton knows better. The conflicts issue is not whether the council vote would benefit the Firm, but Mr. Perrucci.

What Mr. Tipton doesn't say is important. Mr. Tipton does not say that Perrucci was not a partner in the Firm at the time of the council vote, and indeed doesn't say Mr. Perrucci isn't a partner of the firm today. He does not say that Mr. Perrucci didn't hold himself out to the public and to the council as a partner in the firm, and continues to do so today. To say otherwise would be rather embarrassing, because his name was and remains on the letterhead, highlighted, in fact, as a name partner, and the firm's webpage then and now designates him as a partner. Mr. Tipton does not say that Mr. Perrucci does not have any management role in the firm. (See discussion of R.P.C. 7.5 below.) Mr. Tipton does not say that the council members – or anyone else – had been informed in any way that Mr. Perrucci was supposedly no longer held any ownership in the firm or hadn't performed any legal services. While Mr. Tipton says that Mr. Perrucci retired as an "active" partner, he does not say that Mr. Perrucci has retired as a partner in any sense. Mr. Perrucci was and is a partner in the firm.

As before, when things about Mr. Perrucci are being bandied about, there is no sworn proof from Mr. Perrucci himself, a fatal omission.

Most critically for this court, as far as the council members (and anyone else) were concerned, they were voting on a redevelopment plan amendment which would substantially benefit Mr. Perrucci, a partner in the law firm that had rendered very substantial and valuable legal services individually to three council members.

R.P.C. 7.5(d) reinforces this. It states that "[l]awyers may state or imply that they practice in a partnership only if the persons designated in the firm name and the principal members of the firm share the responsibility and liability for the firm's

performance of legal services." Although the Florio Perrucci firm is an LLC., R. 1:21-1A(c) makes R.P.C. 7.5 applicable to such limited liability entities.

That is the end of the court's inquiry. [1]

Although entirely unnecessary for the court, we note the specific claims on the certifications are also very incomplete and carefully hedged, no doubt intentionally so. We refer the court to the leading cases of Farris v. Farris Engineering Co., 7 N.J. 487 (1951), and the oft-cited Fenwick v. U.C.C. of N.J., 133 N.J.L. 295 (E&A 1945). These cases and many others establish that there is no one test for a partnership or a partner.

In Fenwick, our then highest court said:

> There are several elements that the courts have taken into consideration in determining the existence or non-existence of the partnership relation. The first element is that of the intention of the parties and here, of course, the agreement itself is evidential although not conclusive.
> [Fenwick, 133 N.J.L. at 297.]

> Another element of partnership is the right to share in profits and clearly that right existed in this case. However, not every agreement that gives the right to share in profits is, for all purposes, a partnership agreement... . Another factor is the obligation to share in losses, and this is entirely absent in this case ... . Another is the ownership and control of the partnership property and business..... . The next is community of power in administration ... . Another element is the language in the agreement ... . The conduct of the parties toward third persons is also an element to be considered ... . Another element is the rights of the parties on dissolution .... .
> [Fenwick, 133 N.J.L. at 298-299.]

In Farris, the Supreme Court said:

> A partnership is generally said to be created when persons join together

[1] Defendant's counsel doesn't appear to have much faith in Mr. Tipton's letter; counsel's letter of July 8 only says that "the enclosed contentions appear directly relevant and perhaps contradictory to the legal claims asserted by Plaintiffs... ." (Emphasis added.)

> their money, goods, labor or skill for the purpose of carrying on a trade, profession, or business, and where there is a community of interest in the profits or losses, but there can be a partnership for income tax purposes where the community of interest does not extend to the sharing on an equal basis of the assets and losses of the corporation.
> [Farris, 7 N.J. at 498-499.]
>
> The fact of partnership, as well as the right, duties and obligations of partners, arise wholly from the terms of the contract, and as to third persons and creditors the same rule prevails, except where the persons concerned have held themselves out as partners and have acted ostensibly as interested in the business as if they were partners in it.
> . . . .
> While the statute, R.S. 42:1-7, creates a prima facie presumption of a partnership where the profits are shared, not every agreement that gives the right to share profits is for all purposes a partnership agreement.
> [Farris, 7 N.J. at 502-3, citations omitted.]
>
> The mere ownership of property or part ownership of property used in a business does not of itself establish a partnership, R.S. 42:1-7, and it is not inconsistent for partners having different capital investments to share the profits on an equal basis.
> [Farris, 7 N.J. at 503, citations omitted.]

The certifications with the Tipton letter address only two of the indicia cited in the Fenwick and Farris opinions address only two of the factors, "active" partner status, and certain and inconclusive indicia of ownership. Neither certification supports the claim in Mr. Tipton's letter that Mr. Perrucci "sold his ownership interest;" there is no sworn proof of that.

Again, while this is not necessary for the court, we note the increasing use of the status of "non-equity partner" in New Jersey law firms, and indeed, nationally.

In the end, the single most important and irrefutable fact is that whatever Mr. Perrucci's actual undisclosed status was and is in the firm, he and the firm held him out and still hold him out to be a partner in the firm. That is what the Phillipsburg Council

members would have understood when Ordinance 2021-17 was adopted and what they and everyone else, no doubt, still understands today.

The Town's July 8 letter requests a pre-trial conference and a trial date. Since the conflicts issue will still conclusively dispose of this case, the request is simply a delaying dodge. The case is ripe for decision on the conflicts issue.

Respectfully submitted,

POTTER AND DICKSON

By /s/ Peter Dickson
Peter Dickson
NJ Attorney ID No. 001661979

Cc: (by efiling): Michael Collins, Esq., counsel for defendant Town of Phillipsburg