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May 1, 2025

VIA E-COURTS
The Honorable Veronica Allende, J.S.C.
Somerset County Courthouse
20 North Bridge Street, First Floor
Somerville, N.J. 08876

RE: Morrisette v. Phillipsburg Town Council & Peron Construction, Inc.
Docket No.: WRN-L-378-24
LETTER BRIEF IN OPPOSITION TO MOTION FOR DISCOVERY

Dear Judge Allende:

As you are aware, this office represents Defendant Phillipsburg Town Council in the above captioned matter. Please accept this letter brief in lieu of a more formal submission opposing Plaintiffs' motion for pretrial discovery.

I. INTRODUCTION

By way of brief background, the Phillipsburg Town Council passed Ordinance 2024-14 on September 11, 2024. The Ordinance amends the town's Riverfront Redevelopment Plan to allow for industrial uses in certain areas along the riverfront. The ordinance also designates Peron Construction, Inc. as the redeveloper of the property.

On October 29, 2024, Plaintiffs filed the instant prerogative writ action to invalidate that ordinance. Count 4 of Plaintiffs' amended complaint alleges that there were disqualifying conflicts of interest held by three councilmembers who voted in favor of the ordinance: Council President

Peter Marino, Council Vice President Melissa Paulus, and Council Member Matthew Scerbo. (Am. Compl. at ¶ 53-57). Plaintiffs allege that these three councilmembers should have been disqualified from voting because of support from Douglas Steinhardt, Esq., chair of the Warren County Republican party and former law partner to Peron Construction owner Michael Perucci, Esq. (Am. Compl. at ¶ 56-57).

In the instant motion, Plaintiffs ask for the following forms of discovery relating to the alleged conflicts of interest:

> First, plaintiffs seek discovery of all redevelopment designations, redevelopment agreements and redevelopment plans that relate to Peron and Mr. Perrucci for this Site, and Council and land use board resolutions introducing or approving any aspect of Peron's involvement in redeveloping this Site.
>
> Second, plaintiffs seek discovery of Peron's agreements with other developers relating to development of this Site.
>
> Third, plaintiffs seek discovery of any Council resolution or other action relating to consideration of termination of Peron, including but not limited to any Request For Proposals or other solicitations for a redeveloper to replace Peron. This would also include any studies conducted for or by the Council or land use board regarding market conditions or demand for the uses mandated for this Site in the Master Plan and the redevelopment plans. In other words, did the Council ever seriously consider terminating Peron?
>
> [(Pl. Brief at 9)]

It is Defendant's position that these requests must be denied. Discovery in prerogative writ actions is left to the discretion of the judge, and in this case that discretion should be used to deny Plaintiffs' request for two reasons. First, the stated purpose of discovery in prerogative writ actions is to promote efficiency, and the requests here will only serve to slow down the adjudication of this matter. Second, the documents which Plaintiffs request are not relevant to this case. Finally, even if the discovery requested is relevant, the requests themselves are too vague and must be made more specific.

II. THE APPLICABLE LAW DOES NOT ENTITLE PLAINTIFFS TO DISCOVERY IN THIS PREROGATIVE WRIT PROCEEDING AND PROVIDES THIS COURT WITH THE DISCRETION TO BAR SAME.

In their motion, Plaintiffs concede that a prerogative writ action is typically limited to the record of the proceedings below, and does not feature discovery. (Pl. Brief at 2). They subsequently cite to R. 4:69-4, which reads as follows: "The scope and time to complete discovery, if any, will be determined at the case management conference and memorialized in the case management order." The comment to this rule, also cited by plaintiffs, elaborates on this, stating that discovery schedules are to be "determined by the judge on a case-by-case basis." R. 4:69-4, cmt. 5.1. The same comment that Plaintiffs cited also states that "this rule provides for special case management for actions in lieu of prerogative writs *for the purpose of expediting final disposition."* Id. (emphasis added).

The unpublished case of SJ 660 LLC v. Borough of Edgewater, 2024 WL 3770384 (App. Div. August 13, 2024)[1] sheds some helpful light on the instant request for discovery. In the case, the Appellate Division held that there was no abuse of discretion on the trial court's part in its decision not to allow discovery in a prerogative writ action. The Court's opinion reads in relevant part:

> Discovery determinations are within the discretion of the trial court. Brugaletta v. Garcia, 234 N.J. 225, 240 (2018). . . . SJ LLC argues that it was entitled to discovery to seek information concerning the interests of various Council members and whether they had personal interests that created conflicts when they signed the Settlement Agreement.
>
> We discern no abuse of discretion in the trial court's decision to deny SJ LLC's request for discovery. SJ LLC filed complaints in lieu of prerogative writs, and such actions are generally limited to the record created before a municipal board or council. *See* Willoughby v. Plan. Bd. of Deptford, 306 N.J. Super. 266, 273-74 (App. Div. 1997) (citing Kramer, 45 N.J. at 289); *see also* R. 4:69-4 . . .
>
> [Id. at 14]

Another illustrative case is Martin v. City of Bayonne, 2018 WL 2140735 (App. Div. May 10, 2018)[2]. In the case, Plaintiffs requested an extension to obtain transcripts, and the Court denied the request because the rule requires a certification that all the relevant transcripts were already ordered prior to filing the action. Id. at 3-4. The Appellate Division emphasized that the goal in

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[1] A true copy of this opinion is attached to the certification enclosed herewith consistent with Rule 1:36-3.

[2] See supra n.1.

prerogative writ actions is an efficient disposition, and held that the trial court has considerable discretion in whether it grants or denies a request for discovery. Id. at 4-5.

As such, the applicable law provides that Plaintiffs are not entitled to discovery and that this Court possesses broad discretion to deny same.

III. THE REQUESTED EVIDENCE IS IRRELEVANT TO THIS MATTER, SO DISCOVERY SHOULD NOT BE PERMITTED.

It is Defendant's position that the requested discovery is irrelevant to the instant action, and the request should therefore be denied. R. 4:10-2(a) states that "[p]arties may obtain discovery regarding any matter, not privileged, which is **relevant to the subject matter involved in the pending action**, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." (emphasis added).

The seminal case on discovery in prerogative writ actions is Schlossberg v. Jersey City Sewage Authority, 15 N.J. 360 (1954). This case emphasizes relevancy as a requirement for discovery in a prerogative writ action. Therein, Plaintiffs alleged that the Sewage Authority improperly voted on a contract award. Id. at 368. Plaintiffs then served trial subpoenas for certain checks in order to prove fraud on the part of voting members Id. at 369. The bank that was subpoenaed testified that the only copies of the checks were on microfilm and would be extremely difficult to produce. Id. at 365. The court ordered them to do so anyway, and the defense appealed that decision. Id. at 366. The Supreme Court ultimately set aside the order, holding:

> It is evident from the pretrial order in the instant prerogative writ case that the issues agreed upon to be determined at the trial, however broadly interpreted, do not embrace an issue of fraud, bad faith and corruption of Authority members in the awards of the construction contracts. Plaintiffs gain no comfort from the provision of R.R. 4:15—2 that 'When issues not raised by the pleadings and pretrial order are tried by consent or without the objection of the parties, they shall be treated in all respects as if they had been raised in the pleadings and pretrial order.' The several counsel for the defendants strenuously objected from the outset that for plaintiffs' asserted purpose the evidence embodied in the cancelled checks or the photographs thereof if produced was irrelevant because outside the issues framed by the pleadings and pretrial order.
>
> [Id. at 371]

Here, like in Schlossberg, Plaintiffs are broadly seeking to utilize discovery to dredge up evidence to support conclusory allegations of an invalid ordinance adoption. The essence of this

matter is whether the Council validly adopted the redevelopment ordinance, a discrete document that is appended to the complaint. The discovery requested at this time is clearly a fishing expedition for information related to Peron Construction's fitness as a redeveloper, Peron Construction's redevelopment plans, and information regarding the Council's strategy for redevelopment. Plaintiffs have reiterated on multiple occasions that they aim to establish that Peron is not fit to be redeveloper. This issue is not part of the pleadings, and Phillipsburg must oppose such an expedition while Plaintiffs' litigation is pending and jeopardizes the valiant redevelopment effort it seeks to foster.

Plaintiff contends that the information relating to the relationship between the Council and Peron Construction is relevant to Count 4, which alleges a conflict of interest. This is not the case. The claimed conflict of interest stems from political support by certain parties and certain legal representations by a law firm. The discovery requested in this case would shed absolutely no light on those claimed conflicts.

For these reasons, discovery should be denied in this case.

IV. IN THE EVENT DISCOVERY IS GRANTED, PLAINTIFFS' REQUESTS AS ARTICULATED ARE OVERLY BROAD AND REQUIRE OVERSIGHT FROM THIS COURT.

In the alternative, should this Court be amenable to Plaintiffs' request for discovery, Phillipsburg maintains that the categories of information sought as outlined in the current motion are overly broad to support an order that broadly authorizes discovery in this prerogative writ matter – similar to a civil case. As such, should this Court seek to grant Plaintiffs' motion, Phillipsburg requests that Plaintiffs be required to provide an amended listing of topics that will be explored along with the mechanisms for such discovery, i.e. requests for production or interrogatories. Plaintiffs would request that the Court then approve a refined request for discovery before it is formally sanctioned. If such relief is not granted, based upon the current motion record, Phillipsburg anticipates that Plaintiffs' requests will exceed the scope of the Court Rules and necessitate further motion practice.

V: CONCLUSION

For the foregoing reasons, Phillipsburg opposes Plaintiffs' motion for discovery.

Very truly Yours,
/s Nicholas D. Hession
Nicholas D. Hession, Esq.

Enclosure
Cc: All Counsel of Record (via e-courts)

EXHIBIT A

2018 WL 2140735
Only the Westlaw citation
is currently available.

Superior Court of New
Jersey, Appellate Division.

Greta MARTIN, John R. Blum, Deborah Blum, Patricia Fromer, Timothy Fromer, Bruce D. Piggot, Vincent Drennan, Amanda White, Eileen White, Gerard Monchek, Dale Monchek, and Louise Connors, Plaintiffs–Appellants,
v.
CITY OF BAYONNE and City of Bayonne Planning Board, Defendants–Respondents,
and
975 Broadway Owner, LLC,
Defendant/Intervenor–Respondent.

DOCKET NO. A–1564–16T1
|
Argued May 1, 2018
|
Decided May 10, 2018

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L–2332–16.

Attorneys and Law Firms

Christine Finnegan argued the cause for appellants (C. Finnegan & Associates Law Firm, LLC, attorneys; Christine Finnegan, on the briefs).

Gregory K. Asadurian argued the cause for respondents City of Bayonne and City of Bayonne Planning Board (Kaufman, Semeraro & Leibman, LLP, attorneys; Gregory K. Asadurian, on the brief).

Clark E. Alpert argued the cause for respondent 975 Broadway Owner, LLC (Weiner Law Group, LLP, attorneys; Steven R. Tombalakian and Michael Miceli, of counsel; Clark E. Alpert and David N. Butler, on the brief).

Before Judges Carroll and Mawla.

Opinion

PER CURIAM

***1** Plaintiffs appeal from an October 28, 2016 order, which dismissed their complaint in lieu of prerogative writs for lack of transcripts of the proceedings before the City of Bayonne Planning Board (Board) pursuant to Rule 4:69–4. We affirm.

We have not been provided with the transcripts of the proceedings before the Board. However, we derive the facts from the resolution passed by the Board and the parties' briefs.

On March 18, 2016, defendant 975 Broadway Owner, LLC (975 Broadway), applied to the Board for preliminary and final approval to construct a mixed-use building in Bayonne. The plan for the site consisted of up to 91 residential units, ground floor commercial use, and 150 parking spaces. Defendant the City of Bayonne (City) had previously declared this area “blight[ed]”, “deteriorate[d]”, and in need of redevelopment. This declaration created a new zone, which also created new land

use regulations for the area. 975 Broadway's application to the Board met the new zoning criteria, and did not require any variances.

The application was considered at a special board meeting on April 6, 2016, at which members of the public, including two of the plaintiffs here, testified. 975 Broadway presented testimony from its engineering expert, Joseph Jaworski, P.E., regarding the site plan and its compliance with the City's redevelopment plan. Jaworski also addressed the logistics of the site such as ingress/egress, parking, storm water collection, roof run-off, landscaping, open space, and explained why the application required no need for variances to the zoning regulations. 975 Broadway also presented testimony of its architect Francis Pisani, who similarly testified no variances were needed for the project. Additionally, a traffic engineer, Joseph Staigar, P.E., testified regarding the existing site conditions, the amount of new traffic expected to be generated, and the process used to develop a safe plan.

Following the hearing, the Board passed a resolution adopting 975 Broadway's plan. The resolution was memorialized on April 12, 2017. Because we lack a transcript of the hearing, it is unclear whether plaintiffs contested the Board's conclusions.

On April 18, 2016, 975 Broadway published a "Notice of Action Taken by the Planning Board" in The Jersey Journal. This publication triggered the forty-five day period allowed under Rule 4:69–6(b)(3) to file an action challenging the approval. Plaintiffs filed their complaint in lieu of prerogative writs on June 6, 2016, four days past the June 2, 2016 deadline. Plaintiffs named as defendants the City, the Board, and various "John Does." 975 Broadway was neither named in the complaint nor given notice of the action, but intervened by way of motion.

Plaintiff's complaint was not accompanied by a certification stating all necessary transcripts of the municipal land use board have been ordered as required by Rule 4:69–4. A case management conference occurred as mandated by Rule 4:69–4, during which the motion judge addressed the lack of transcripts of the proceeding before the Board. Plaintiff's counsel assured the motion judge he would obtain the transcripts. [1]

***2** Plaintiff's counsel did not request the transcripts. As a result of the late filed complaint and the lack of transcripts or transcript request, the City filed a motion to dismiss, which 975 Broadway joined. At the initial motion hearing on October 19, 2016, plaintiff's counsel stated he thought the transcripts were ordered in "late June." The motion judge ordered the submission of sworn statements from the parties. The motion judge specifically directed plaintiff's counsel to provide a detailed description of his efforts to secure the transcripts, and to bring the transcript order form to the next motion hearing. The judge explained:

> I have to see ... when the transcripts were ordered.... [I]f the request was a couple of days after the complaint was filed, that's in violation of [Rule] 4:69–4, but ...

> what's a couple of days ...? But if [it] turns out that as we sit here on [the next hearing date] they haven't been ordered yet, that could be a serious problem.

We have not been provided with the certification submitted by plaintiff's counsel. However, we understand counsel's certification attached an email from the Bayonne City Clerk's Office dated July 15, 2016, responding to an Open Public Record Act (OPRA) request, N.J.S.A. 47:1A–1 to -13, made by plaintiff's counsel for the transcripts. The City and the Board submitted two certifications, namely, from Lillian Glazewski, the city land use coordinator, and Susan Bischoff, the Board's court reporter.

Glazewski's certification stated she did not receive a transcript request from anyone. Bischoff certified that, as the Board's court reporter, she is the only person who transcribes the proceedings before the Board, and no one ever made a request or paid a deposit for a transcript of the hearings regarding 975 Broadway's application.

At the motion hearing on October 28, 2016, the motion judge heard oral argument, and learned the transcripts had not been ordered. Addressing plaintiffs' counsel, the judge stated:

> You stand here ... telling me that of course [you ordered the transcripts] and laughing at the notion that you haven't .... You've got nothing here whatsoever to show that you ordered them, and you knew that was an issue. It was a big issue last week. I have the certification ... indicating that it hasn't been ordered. You laugh at me when I say well, it seems to me you haven't ordered it and you've got nothing to show me that you have ordered it. So ... you're still not being candid with the court[.]

After oral argument and review of the parties' submissions, the judge granted the motion to dismiss. The judge found plaintiffs had failed to comply with Rule 4:69–4 for failure to produce the transcripts. The judge found defendants had been prejudiced by the passage of five months since the initial filing, and dismissed plaintiffs' complaint with prejudice. This appeal followed.

The issue before us is a question of law. Therefore, our standard of review is de novo. State v. Hubbard, 222 N.J. 249, 263 (2015).

On appeal, plaintiffs argue the motion judge erred because plaintiffs had issued an OPRA request to the City of Bayonne, which did not yield transcripts for the proceeding. Plaintiffs assert the OPRA request sufficed as compliance with Rule 4:69–4. Additionally, plaintiffs argue that since prerogative writ actions are Track IV actions for purposes of discovery, the motion judge should have permitted them the 450

days allotted to such cases for discovery to obtain the transcripts. Plaintiffs also assert the motion to dismiss was improperly decided as a summary judgment motion, which we take to mean plaintiffs believe the judge erred by dismissing the matter with prejudice.

***3** Rule 4:69–4, entitled "The Filing and Management of Actions in Lieu of Prerogative Writs" states:

> The filing of the complaint shall be accompanied by a certification that all necessary transcripts of local agency proceedings in the cause have been ordered. All actions in lieu of prerogative writs will be assigned to Track IV. Within [thirty] days after joinder and in order to expedite the disposition of the action the managing judge shall conduct a conference, in person or by telephone, with all parties to determine the factual and legal disputes, to mark exhibits and to establish a briefing schedule. The scope and time to complete discovery, if any, will be determined at the case management conference and memorialized in the case management order.
>
> [(Emphasis added).]

The annotation to the rule states:

> This rule provides for special case management for actions in lieu of prerogative writs for the purpose of expediting final disposition. First, the complaint must be accompanied by a certification asserting that all agency transcripts have been ordered ... Second, all actions in lieu of prerogative writs are assigned to Track IV to assure single-judge management throughout, but with the discovery schedule, if any, to be determined by the judge on a case by case basis.
>
> ....
>
> Because the 450–day discovery period afforded by [Rule] 4:24–1(a) to Track IV cases is normally inappropriate in lieu of prerogative writ actions, this provision of the rule leaves the issue to the court for determination on a case by case basis.
>
> [Pressler & Verniero, Current N.J. Court Rules, cmt. 5.1 on R. 4:69–4 (2018) (emphasis added).]

Plaintiffs never submitted the certification required by Rule 4:69–4 to certify the transcripts for the April 6, 2016 Planning Board Hearing were requested, or provided proof to show the transcripts were ordered or a deposit made. Rather, the record demonstrates plaintiff's counsel misrepresented that he had ordered the transcripts. Indeed, at the initial motion hearing, the motion judge asked plaintiff's counsel: "When in fact did you order the transcripts?" Plaintiff's counsel responded: "I want to say late June." The City and the Board's counsel then stated: "Judge, the transcripts have not been ordered ... I've spoken with my clients, they have not been ordered."

As a result of the dispute over this fundamental pre-condition of perfecting the action, the motion judge adjourned oral argument and required the certifications we noted above. When the matter returned for oral argument, the only proof plaintiffs submitted was an email from the city clerk's office dated July 15, 2016, in response to an email sent

by plaintiff's counsel, stating "The Planning & Zoning Office has advised they have no transcripts for the requested hearing[.]" Plaintiffs never provided the motion judge with their original email, which they claimed contained the transcript request. Moreover, the subject-line of the response email demonstrated plaintiff's counsel had made an OPRA request to determine if anyone else had ordered the transcripts, but did not actually order the transcripts themselves.

***4** The motion judge addressed this important difference during the second hearing on October 28, 2016.

> I wish [plaintiff's counsel] had the e-mail ... that [the City's employee] apparently was responding to.
>
> [The response is] literally saying there simply are no transcripts, the reason being that nobody ever ordered them.
>
> ....
>
> I'll accept that you were asking for the transcripts, because she says, "Has advised they have no transcripts." But, transcripts don't automatically appear. Somebody ... has to request that the recording be transcribed. Then a typist types it up and then the recording ... becomes a transcript[.]
>
> ....
>
> And as I sit here right now you ... show me nothing that indicates even as of late October that you've ordered them.

The judge concluded:

> This complaint was filed in early June. It's now late October.... [I]t's already been five months and I am satisfied [the transcripts have] still not been ordered. There's a reason why when someone challenges a governmental agency, either a planning board or a zoning board or others, that ... there's a [forty-five] day time limit as opposed to a two-year statute of limitations or a six-year statute of limitations. Those people who are involved have a right to know pretty quickly whether or not this ... project is really going to be stayed or not by the prerogative writ.
>
> ....
>
> I'm going to dismiss your complaint with prejudice because you should have ordered those transcripts back in June.... [Rule] 4:69–4 says the complaint shall be accompanied [by the certification of the transcript request].
>
> ... I suppose, even though it says shall, there could be under some circumstances relaxing it a few days, but here we are ... almost five months later and you still haven't ordered it. Despite ... a letter that you sent me saying that you ordered it back in July you're referencing court last week saying you ordered it in June, you never ordered it.

There is no basis to disturb the motion judge's decision. The judge referenced his discretion to enlarge the time period necessary for plaintiffs to order the transcripts. Although Rule 4:69–4 does not provide for the ability to do so, arguably Rule 4:69–6 does. This rule addresses the enlargement of the time period for filing a complaint in lieu of prerogative writs and

other "particular actions." R. 4:69–6(b). The rule states: "The court may enlarge the period of time provided in [Rule 4:69–6](a) or (b) ... where it is manifest that the interest of justice so requires." R. 4:69–6(c). Thus, although Rule 4:69–6(c) does not expressly reference Rule 4:69–4, because the certification required by the latter is an integral part of the complaint referenced by the former, the enlargement of time to file a complaint also enlarges the time to file the certification of the transcript request.

We have broadly interpreted the ability of a trial court to enlarge the time period for filing of a complaint in lieu of prerogative writs. See Cohen v. Thoft, 368 N.J. Super. 338, 345–47 (App. Div. 2004) (holding the "interest of justice" standard under Rule 4:69–6(c) exceeded the category of case previously identified as subject to enlargement, namely, cases involving: "(1) important and novel constitutional questions; (2) informal or [e]x parte determinations of legal questions by administrative officials; and (3) important public ... interests which require adjudication or clarification" (quoting Brunetti v. Borough of New Milford, 68 N.J. 576, 586 (1975))). Notably, in Cohen, we reversed a trial court's dismissal of a complaint in lieu of prerogative writs where the failure to file the complaint in a timely manner was caused by misinformation given by a zoning officer to a plaintiff regarding the published notice of approval for setback and coverage variances granted to defendants to expand their home. Id. at 347. We held the trial court should have enlarged the period of time for the filing of plaintiff's complaint because plaintiff reasonably relied on the zoning officer's representations and "plaintiff did not 'slumber on [his] rights[.]' " Ibid. (alteration in original) (quoting Schack v. Trimble, 28 N.J. 40, 49 (1958)). Also, we noted the lack of prejudice to defendants by the filing of the complaint, which was filed only three days out of time. Ibid.

***5** Our Supreme Court has interpreted Rule 4:69–6(c) in a similar fashion. Citing our decision in Cohen, the Court observed "the broad language of the enlargement provision belies the suggestion that the intent of the rule is to restrict enlargement to one of those three categories. See [Rule] 4:69–6(c) (brooking no limitation as to circumstances that may require enlargement in interests of justice)." Hopewell Valley Citizens' Grp., Inc. v. Berwind Prop. Grp. Dev. Co., LP, 204 N.J. 569, 584 (2011). The facts of Berwind also entailed a plaintiff who was "inadvertently misled" to file a complaint six days late by a planning board's secretary. Id. at 584–85.

The facts here are entirely dissimilar, and anathema to the purpose of Rule 4:69–6(c) and the mode of discovery contemplated by Rule 4:69–4. Indeed, the record demonstrates plaintiffs were not innocent parties who inadvertently perfected their complaint in an untimely fashion because of misinformation provided by the City or the Board. Rather, we are convinced plaintiffs were at all times aware of their obligation to order the transcripts, misrepresented to the motion judge they had ordered the transcripts, but never did so. Moreover, by allowing five months to elapse and still not having ordered the transcripts, plaintiffs not only "slumbered" on their rights, but far exceeded and delayed the reasonable time period for adjudication of their complaint,

thereby prejudicing defendants, particularly 975 Broadway.

For these reasons, we affirm the dismissal with prejudice of plaintiffs' complaint. To the extent we have not addressed the other arguments of plaintiffs, it is because they lack merit warranting further discussion in a written opinion. R. 2:11–3(e)(1)(E).

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2018 WL 2140735

Footnotes

1 Plaintiff's counsel who appeared before the motion judge is not the attorney who represents plaintiffs on this appeal.

EXHIBIT B

2024 WL 3770384
Only the Westlaw citation
is currently available.

Superior Court of New
Jersey, Appellate Division.

SJ 660 LLC, Plaintiff-Appellant,
v.
BOROUGH OF EDGEWATER, a
municipal corporation of the State of
New Jersey, Defendant-Respondent,
Borough of Cliffside Park,
Plaintiff/Intervenor-Respondent,
v.
Borough of Edgewater and 615 River Road
Partners, LLC, Defendants-Respondents,
and
Edgewater Zoning Board of
Adjustment and John Candelmo,
Land Use Administrator, Defendants.
SJ 660 LLC, Plaintiff-Appellant,
v.
Borough of Edgewater, a municipal
corporation of the State of New Jersey,
Borough of Edgewater Planning
Board, and 615 River Road Partners,
LLC, Defendants-Respondents,
and
Borough of Edgewater Council, Defendant.
Borough of Cliffside Park, Plaintiff,
v.
Borough of Edgewater,
Defendant-Respondent.

DOCKET NO. A-0788-22
|
Argued June 3, 2024
|
Decided August 13, 2024

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket Nos. L-8788-19, L-4882-20, and L-5095-20.

Attorneys and Law Firms

Steven G. Mlenak argued the cause for appellant (Greenbaum, Rowe, Smith & Davis LLP, attorneys; Steven G. Mlenak, of counsel and on the briefs; Michael J. Coskey, on the briefs).

Joseph Mariniello and John A. Stone argued the cause for respondent Borough of Edgewater (Hartmann, Doherty, Rosa, Berman & Bulbulia and DeCotiis, Fitzpatrick, & Giblin, LLP, attorneys; John A. Stone, of counsel and on the brief; Joseph Mariniello, on the brief).

Roger Plawker argued the cause for respondent 615 River Road Partners, LLC (Pashman Stein Walder Hayden, PC, and Greenberg Traurig, LLP, attorneys; Justin P. Walder, of counsel; Roger Plawker, and Cory Mitchell Gray, of counsel and on the brief; Howard Pashman, on the brief).

Craig Bossong argued the cause for respondent Borough of Edgewater Planning Board (Florio Perrucci Steinhardt Cappelli Tipton & Taylor, LLC, attorneys; Craig Bossong and Chad Klasna, on the brief).

Before Judges Gilson, DeAlmeida, and Berdote Byrne.

Opinion

PER CURIAM

***1** This appeal arises out of disputes related to long-standing efforts to develop a property in the Borough of Edgewater (the Borough). After years of litigation and related applications for zoning variances, 615 River Road Partners, LLC (RR Partners), which owns the property, entered into a settlement agreement with the Borough (the Settlement Agreement). The Settlement Agreement provided that (1) a parcel of the property would be designated as an area in need of redevelopment in accordance with the governing law; (2) a redevelopment plan would be adopted allowing RR Partners to build 1,200 residential units, including affordable housing units; (3) RR Partners would be appointed as the redeveloper; and (4) RR Partners would give another parcel of the property to the Borough so that the Borough could build a school and a recreational facility. Thereafter, in accordance with the procedures set forth in the Local Redevelopment and Housing Law (the LRHL), N.J.S.A. 40A:12A-1 to -89, a parcel of the property was designated as an area in need of redevelopment, the Borough adopted a redevelopment plan, and RR Partners was appointed as the redeveloper.

Plaintiff SJ 660 LLC (plaintiff or SJ LLC), which owns an adjacent property, filed a series of actions in lieu of prerogative writs, challenging the Settlement Agreement, the redevelopment designation and plan, and the appointment of RR Partners as the redeveloper. Following a bench trial, the court rejected plaintiff's challenges and entered a judgment dismissing plaintiff's complaints with prejudice. Plaintiff now appeals from that judgment. Having reviewed the record and governing law, we reject all of plaintiff's arguments and affirm.

I.

The property, located at 615 River Road in Edgewater, was previously owned by the Hess Corporation (Hess), which operated an oil terminal on the property until 2013. The property consists of two parcels of land divided by River Road. The eastern parcel is designated Block 76, Lots 1 and 5, borders the Hudson River on its eastern side, and consists of approximately fourteen acres of land (the Eastern Parcel). The western parcel is designated Block 77, Lot 1, and consists of approximately five acres of land (the Western Parcel).

In December 2014, RR Partners purchased both parcels from Hess for approximately $26 million. At that time, the Eastern Parcel was zoned B-3, which allows commercial uses. The Western Parcel was zoned OR-1, which allows office and industrial uses.

In 2015, RR Partners applied to the Edgewater Zoning Board of Adjustment (the Zoning Board) for variances to allow it to develop the property for residential purposes. RR Partners sought to construct multiple high-rise buildings with over 1,800 residential units. RR Partners' application was deemed incomplete, and RR Partners filed suit seeking default approval of the application (the Zoning Board Action). Thereafter, the court overseeing the Zoning Board Action granted summary judgment in

favor of the Zoning Board and remanded the application. RR Partners then filed two additional applications, one for each parcel, again seeking variances to develop the property for residential purposes. The Zoning Board denied both of those applications without addressing the merits.

***2** Thereafter, years of litigations ensued. Those litigations included a suit brought by RR Partners challenging the denial of its applications for variances. The Borough also passed a resolution and ordinance authorizing the taking of the Eastern Parcel by eminent domain. RR Partners then sued the Borough in federal court, alleging that the Borough had violated its constitutional and civil rights by favoring another developer who had been unsuccessful in purchasing the property (the Federal Action).

There were also several suits involving the Borough's compliance with its affordable housing requirements. The Fair Share Housing Center (FSH Center) brought a suit to compel the Borough's compliance with its affordable housing obligations. The Borough also filed a declaratory judgment action concerning its affordable housing obligations. RR Partners brought its own affordable housing actions against the Borough and intervened in one of the other affordable housing actions because the property was one of the last properties in Edgewater eligible for redevelopment.

In late 2019, after extensive negotiations and mediation, RR Partners and the Borough resolved all their disputes and agreed to enter into the Settlement Agreement. Thereafter, the Borough's Council conducted an open public meeting and adopted a resolution authorizing the Settlement Agreement, which was then fully executed on December 19, 2019.

Under the Settlement Agreement, RR Partners and the Borough settled all the claims in the Federal Action, the Zoning Board Action, and the affordable housing actions. The Borough also agreed to end its efforts to condemn and take the Eastern Parcel by eminent domain. In dismissing the Federal Action, the federal court retained jurisdiction to enforce the Settlement Agreement.

Substantively, the Settlement Agreement details a series of actions the parties agreed to undertake to facilitate development of the property. In that regard, the Settlement Agreement states:

> 1. RR Partners would convey the Western Parcel to the Borough so that a school and recreational facility could be built;
>
> 2. The Borough "shall (i) in accordance with its April 2017 Master Plan Re-Examination Report, designate the Eastern Parcel as an Area in Need of Redevelopment as provided by [the LRHL], upon receipt of a recommendation to that effect from the Edgewater Planning Board, (ii) adopt a Redevelopment Plan for the Eastern Parcel substantially in the form annexed hereto as Exhibit H, (iii) designate [RR Partners] as the Redeveloper of the Eastern Parcel[,] and (iv) enter into a Redevelopment Agreement with [RR Partners] for the Eastern Parcel substantially in the form annexed hereto as Exhibit E," (boldface omitted);

> 3. RR Partners agreed to reduce its proposed development from 1,873 residential units to 1,200 units;
>
> 4. RR Partners committed to set aside at least fifteen percent of the residential units for rent and at least twenty percent of the residential units for sale as affordable housing units; and
>
> 5. RR Partners agreed to undertake various infrastructure improvements and upgrades, including constructing a bus stop, and received the right to construct various additional improvements, including an elevated walkway across River Road and a new ferry stop.

Various provisions in the Settlement Agreement required RR Partners and the Borough to follow statutory and legal review processes. In that regard, the Settlement Agreement provides:

> [T]he settlement herein will, in part, provide [RR Partners] with an opportunity to develop the Eastern Parcel in accordance with this Agreement, conditioned on [RR Partners'] compliance with the criteria and procedure provided in the Municipal Land Use Law, N.J.S.A. 40:55D-1 [to -163] [(the MLUL)], [the LRHL], Affordable Housing Law, and other law and regulation where applicable.
>
> ***3** ....
>
> ... The parties hereto agree that this Agreement is not in conflict with the MLUL, the LRHL[,] and/or the municipal ordinances of [the Borough] and that nothing herein is or shall be deemed by the Parties to be in derogation thereof or of [the Borough's] and the Planning Board's obligations and duties thereunder.
>
> ....
>
> ... Upon execution of this Agreement, the Parties and their respective counsel shall cause to be filed a joint Motion requesting approval, after a Mount Laurel Fairness Hearing, of [RR Partners'] agreement to provide an affordable housing component as set forth in Paragraph 4 hereof pursuant to this settlement.

Separately, the Borough and FSH Center settled their affordable housing litigations. In July 2020, the court overseeing those litigations conducted a fairness hearing and conditionally approved the Borough's compliance plan, which included the affordable housing set aside in the Settlement Agreement. The final compliance hearing was conducted in October 2021, and, the following month, a final judgment of compliance and repose with conditions was entered in the affordable housing litigations.

Meanwhile, in December 2019, the Borough's Council requested the Edgewater Planning Board (the Planning Board) to investigate whether the Eastern Parcel qualified as an area in need of redevelopment in accordance with the LRHL. Shortly thereafter, the Planning Board undertook an investigation and conducted several public hearings between February and June 2020. SJ LLC appeared at those hearings represented by counsel.

At the first hearing, which was conducted on February 11, 2020, SJ LLC objected to the Mayor's and one councilperson's participation

in the Planning Board's consideration, alleging that they had conflicts of interest because, although they had not been named as defendants, there had been allegations made about them in the Federal Action. The Planning Board's attorney opined that the Mayor and councilperson did not need to recuse themselves, but the Mayor and councilperson decided to recuse themselves.

During the hearings, the Planning Board heard testimony from several experts, including Paul Grygiel, Kathryn Gregory, and Peter Steck. Grygiel had previously provided consulting services to RR Partners in connection with its planning for the development of the property. Grygiel had been asked to prepare a report during the settlement negotiations as to whether the Eastern Parcel was an area in need of redevelopment. Ultimately, Grygiel was appointed a "special planner" to the Planning Board, and he presented a report, which he updated at various times. In that regard, Grygiel had initially prepared the report in July 2019 at the request of RR Partners. He thereafter presented the report to the Borough in December 2019 and updated it in March 2020.

According to Grygiel, the Eastern Parcel was formerly used for storage, transfer, and distribution of petroleum products. He explained that the site had been contaminated and, thereafter, remediated. Ultimately, Grygiel opined that there were grounds for finding the Eastern Parcel was an area in need of redevelopment under subsections (b) and (d) of N.J.S.A. 40A:12A-5. Grygiel opined that the buildings that had been removed from the Eastern Parcel had been removed for health and safety reasons and, therefore, the Eastern Parcel qualified as an area in need of redevelopment under N.J.S.A. 40A:12A-5(b). Grygiel also opined that the Eastern Parcel had a deleterious effect on the surrounding residential and commercial properties because it was partially paved with asphalt, had overgrown vegetation, contained abandoned equipment, and was surrounded by a chain link fence topped with barbed wire. Grygiel concluded the "obsolete and deleterious conditions ... [were] detrimental to the safety, health, and welfare" of the community and, therefore, the Eastern Parcel was an area in need of redevelopment under N.J.S.A. 40A:12A-5(d).

***4** The Planning Board also heard testimony from its own planner, Gregory. Gregory submitted a report and testified. She stated that in two Master Plan Re-Examinations in 2012 and 2014, the Planning Board had recommended that the Eastern Parcel be considered for designation as an area in need of redevelopment. Gregory expressed the view that N.J.S.A. 40A:12A-5(b) allowed consideration of buildings that had previously existed on the site, as well as remaining improvements. According to Gregory, because some of the buildings that previously existed had contained asbestos, the Eastern Parcel was deleterious to the public health and safety. Gregory also expressed the view that the structures still on the Eastern Parcel were an attractive nuisance and, therefore, a safety hazard. Gregory agreed with Grygiel's opinion that the Eastern Parcel was an area in need of redevelopment under both subsections (b) and (d) of N.J.S.A. 40A:12A-5.

Counsel for SJ LLC cross-examined both Grygiel and Gregory. SJ LLC also presented its own expert, Steck. Steck prepared and presented a report dated February 10, 2020, and a supplemental planning evaluation report dated May 29, 2020. Steck disagreed with the opinions of Grygiel and Gregory and testified that the Eastern Parcel did not satisfy the conditions to be an area in need of redevelopment under N.J.S.A. 40A:12A-5(b) or (d). Steck also asserted that Grygiel's report was biased because he had originally prepared the report for RR Partners. Additionally, Steck expressed the view that the Planning Board had been biased by the Settlement Agreement.

On June 10, 2020, the Planning Board also heard testimony from David Puchalski, a Licensed Site Remediation Professional who had been involved in the ongoing monitoring and remediation at the property. Puchalski detailed the remediation that had already occurred on the property and explained that some remediation and monitoring was still needed at the property.

That same day, the Planning Board voted to recommend to the Borough's Council that the Eastern Parcel met the statutory redevelopment criteria. In that regard, four Planning Board members voted in favor of that designation, two abstained, and one voted against the designation. Approximately a month later, on July 8, 2020, the Planning Board memorialized its decision in a written resolution. That resolution provided, in part:

> [A]fter considering all the evidence presented, the testimony provided by all the experts, the factual witness and the public, and the cross-examination and presentation of Objector's counsel, a majority of the Board determined that the testimony of Ms. Gregory and Mr. Grygiel was more credible than Mr. Steck, and that the delineated area, known as Block 76, Lots 1 & 5, met the statutory criteria as an area in need of redevelopment in accordance with criteria "b" and "d" of the [LRHL], N.J.S.A. 40A:12A-5[,] as the study area contains a number of improvements that are dilapidated, obsolete, and are detrimental to the safety and welfare of the community, and the study area was formerly developed with industrial buildings whose use was discontinued prior to being removed for health, safety[,] and public welfare reasons and voted to recommend to the Mayor and Council, pursuant to N.J.S.A. 40A:12A-6(b)(5), that the area should be declared an area in need of redevelopment.
>
> [(Citations reformatted).]

Shortly thereafter, the Borough's Council adopted a resolution accepting the Planning Board's recommendation that the Eastern Parcel be designated as an area in need of redevelopment. That same day, the Council introduced an ordinance requesting the Planning Board to review the proposed redevelopment plan as a consistency review required under the LRHL and MLUL.

The Planning Board then held a special public meeting on August 26, 2020, to review the proposed redevelopment plan. At that hearing, the Planning Board heard testimony from its engineer, Dennis Harrington, and its planner, Gregory. According to Gregory, the redevelopment plan furthered several goals of the Master Plan because the

redevelopment plan would include a waterfront walkway, maintain easterly views, promote the appropriate level of development of piers along the Hudson River waterfront, and encourage pedestrian use by constructing sidewalks, byways, and a bridge.

***5** The Planning Board agreed with Gregory's opinions and concluded that the redevelopment plan was substantially consistent with the Borough's Master Plan and Re-Examination reports. The Planning Board then voted to recommend the adoption of the redevelopment plan but also recommended that the Council impose eleven conditions on the redevelopment plan.

At a public hearing on September 29, 2020, the Borough's Council adopted the redevelopment plan, including seven of the Planning Board's recommended conditions (the Redevelopment Plan). The Council did not accept four of the eleven conditions recommended by the Planning Board. The Council then enacted an ordinance adopting the Redevelopment Plan, subject to the seven new conditions, and adopted a resolution naming RR Partners as the redeveloper.

In response to the Borough's actions, SJ LLC filed two actions in lieu of prerogative writs. SJ LLC operates a hotel and spa on a property located at 660 River Road. SJ LLC's property is adjacent to the Eastern and Western Parcels and currently has views of the New York City skyline.

The first action was filed in December 2019 and thereafter amended. In that action, SJ LLC challenged the Borough's adoption of the Settlement Agreement and sought to void the Settlement Agreement. RR Partners and the Borough of Cliffside Park (Cliffside Park), a municipality located along the western border of the Borough of Edgewater, intervened in that action.

SJ LLC also filed a second complaint in lieu of prerogative writs against the Borough, RR Partners, the Planning Board, and the Borough's Council. In that action, in which SJ LLC also amended its complaint, it sought to challenge and vacate the designation of the Eastern Parcel as an area in need of redevelopment, the Redevelopment Plan, and the designation of RR Partners as the redeveloper.

Cliffside Park also filed a separate complaint in lieu of prerogative writs against the Borough seeking to vacate the designation of the Eastern Parcel as an area in need of redevelopment. The trial court consolidated those three matters.

On August 6, 2021, the trial court denied SJ LLC's and Cliffside Park's request for discovery, reasoning that the requested discovery sought to delve into the mental processes of Borough officials concerning why they signed the Settlement Agreement. The trial court also denied motions for reconsideration of that decision.

On July 21, 2022, the trial court conducted a bench trial on the consolidated matters. Thereafter, on October 4, 2022, the trial court issued a detailed opinion and judgment dismissing all the complaints in lieu of prerogative writs with prejudice. In its written opinion, the trial court analyzed the various

challenges to the actions of the Borough and the Planning Board and determined that there were no grounds for invalidating the Settlement Agreement, the designation of the Eastern Parcel as an area in need of redevelopment, the Redevelopment Plan, or the designation of RR Partners as the redeveloper. Accordingly, the court dismissed all the complaints in lieu of prerogative writs with prejudice.

SJ LLC and Cliffside Park appealed from the judgment. Thereafter, Cliffside Park filed a stipulation of dismissal and withdrew its appeal.

II.

On appeal, SJ LLC presents nine arguments, some with subparts, for our consideration. Three of those arguments challenge the Settlement Agreement. In that regard, SJ LLC contends that the Settlement Agreement did not comply with the LRHL, constituted illegal contract zoning, and violated the holding in Whispering Woods at Bamm Hollow, Inc. v. Township of Middletown Planning Board, 220 N.J. Super. 161, 172 (Law Div. 1987). Two of the arguments attack the designation and the Redevelopment Plan: SJ LLC asserts that the record does not support the Borough's designation of the Eastern Parcel as an area in need of redevelopment under subsection (b) or (d) of N.J.S.A. 40A:12A-5; and that the trial court erred in finding that there was substantial, credible evidence supporting the Borough's adoption of the Redevelopment Plan. SJ LLC also raises three ethical arguments. It alleges that the Mayor and Council members had conflicts of interest and should not have been involved in the approval of the Settlement Agreement; and that both Grygiel and Gregory violated the Local Government Ethics Law (the Ethics Law), N.J.S.A. 40A:9-22.1 to -22.25, by participating in the review of the Eastern Parcel as an area in need of redevelopment. Finally, SJ LLC argues that the trial court erred in denying its request for discovery.

A. Our Standard of Review.

***6** The Legislature has delegated to municipalities the power to regulate local land use through the MLUL. In the LRHL, the Legislature also gave municipalities the authority to designate an area as in need of redevelopment, provided the municipality follows the processes and procedures set forth in the LRHL and MLUL. See N.J.S.A. 40A:12A-5 to -8.

Municipal governing bodies and planning boards "have an obligation to rigorously comply with the statutory criteria for determining whether an area is in need of redevelopment." 62-64 Main St., L.L.C. v. Mayor & Council of Hackensack, 221 N.J. 129, 156 (2015). "[A]fter the municipal authorities have rendered a decision that an area is in need of redevelopment, that decision is 'invested with a presumption of validity.' " Id. at 157 (quoting Levin v. Twp. Comm. of Bridgewater, 57 N.J. 506, 537 (1971)). The New Jersey Supreme Court has instructed that courts are "to interpret the powers granted to the local planning board liberally and to accept its exercise of the powers so long as a necessarily indulgent judicial eye finds a reasonable basis, [i.e.], substantial evidence, to support the action taken." Levin, 57 N.J. at 537. In that regard, "[r]edevelopment designations,

like all municipal actions, are vested with a presumption of validity." ERETC, L.L.C. v. City of Perth Amboy, 381 N.J. Super. 268, 277 (App. Div. 2005) (citing Levin, 57 N.J. at 537). Accordingly, "judicial review of a redevelopment designation is limited solely to whether the designation is supported by substantial credible evidence." Ibid. Moreover, courts "typically recognize that municipal bodies, 'because of their peculiar knowledge of local conditions, must be allowed wide latitude in the exercise of their delegated discretion.' " Wilson v. Brick Twp. Zoning Bd. of Adjustment, 405 N.J. Super. 189, 196 (App. Div. 2009) (quoting Booth v. Bd. of Adjustment of Rockaway, 50 N.J. 302, 306 (1967)).

We review issues involving the "interpretation of the law and the legal consequences that flow from established facts" de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Therefore, we accord no deference to a trial court or municipal bodies when reviewing legal issues, including statutory interpretation. 388 Route 22 Readington Realty Holdings, LLC v. Township of Readington, 221 N.J. 318, 338 (2015).

B. The Settlement Agreement.

The LRHL governs the process a municipal governing body must follow to designate an area as being in need of redevelopment. See N.J.S.A. 40A:12A-5 to -8; see also Bryant v. City of Atlantic City, 309 N.J. Super. 596, 602-03 (App. Div. 1998) (describing the procedures under the LRHL for designating an area as in need of redevelopment). First, the governing body of a municipality must, by resolution, "authorize the planning board to undertake a preliminary investigation to determine whether the proposed area is a redevelopment area according to the criteria set forth in section 5" of the LRHL. N.J.S.A. 40A:12A-6(a). Next, in conducting its investigation, the planning board must give public notice and conduct a public hearing. Ibid. An important part of that notice is to inform the public if a municipality will be using its power of eminent domain in a redevelopment area. N.J.S.A. 40A:12A-6(b)(3)(b) to (c). At the public hearing or hearings, the planning board "shall hear all persons who are interested in or would be affected by a determination that the delineated area is a redevelopment area." N.J.S.A. 40A:12A-6(b)(4). Moreover, all "objections to such a determination and evidence in support of those objections, given orally or in writing, shall be received and considered and made part of the public record." Ibid.

***7** After completing its investigation, the planning board "shall" make a recommendation to the municipal governing body as to whether the area, or any part thereof, should be designated for redevelopment. N.J.S.A. 40A:12A-6(b)(5)(a). Thereafter, the municipal governing body "may adopt a resolution determining that the delineated area, or any part thereof, is a redevelopment area." N.J.S.A. 40A:12A-6(b)(5)(b).

If an area is designated, then the municipal governing body is to adopt a redevelopment plan by local ordinance. N.J.S.A. 40A:12A-7. That plan "may include the provision of affordable housing in accordance with the 'Fair Housing Act.' " N.J.S.A. 40A:12A-7(b). A municipality can also contract with

a redeveloper. See N.J.S.A. 40A:12A-8(f); Bryant, 309 N.J. Super. at 603.

The trial court found that the Settlement Agreement expressly required the Eastern Parcel to be reviewed in accordance with the LRHL and MLUL. The trial court then found that:

> [B]ased upon the extensive record presented, the review of the Eastern Parcel as an area in need of redevelopment and ultimate approval of the Redevelopment Plan (inclusive of designation of [RR Partners] as the redeveloper) was proper, statutorily compliant[,] and [is] clearly supported by substantial credible evidence at every step of the process.

The trial court's findings in that regard are supported by the substantial, credible evidence in the record. The record establishes that the Borough and the Planning Board followed the procedures required by the LRHL and MLUL. On December 16, 2019, through a resolution, the Borough's Council directed the Planning Board to investigate whether the Eastern Parcel should be designated as an area in need of redevelopment. Thereafter, the Planning Board undertook that investigation, gave notice, conducted public hearings, and made a recommendation to designate the Eastern Parcel as an area in need of redevelopment. The Borough's Council then adopted that recommendation in a resolution. Finally, the Council requested the Planning Board to review the proposed redevelopment plan, adopted the Redevelopment Plan through an ordinance, and designated RR Partners as the redeveloper through a resolution.

1. Whether the Settlement Agreement Complied with the LRHL.

SJ LLC contends that the process was not in compliance with the LRHL because it was pre-determined in the Settlement Agreement. We reject that argument for both factual and legal reasons.

Factually, a review of the Settlement Agreement establishes that it did not mandate a result. While the Settlement Agreement clearly delineated that the Borough would seek to designate the Eastern Parcel as an area in need of redevelopment, it did not mandate the designation. Instead, in several provisions, the Settlement Agreement expressly stated that the process for designating the Eastern Parcel as an area in need of redevelopment had to comply with the LRHL and MLUL. In that regard, the Settlement Agreement stated:

> [T]he settlement herein will, in part, provide [RR Partners] with an opportunity to develop the Eastern Parcel in accordance with this Agreement, conditioned on [RR Partners'] compliance with the criteria and procedure provided in [the MLUL], [the LRHL], Affordable Housing Law, and other law and regulation where applicable.
>
> ....

> ... The parties hereto agree that this Agreement is not in conflict with the MLUL, the LRHL[,] and/or the municipal ordinances of [the Borough] and that nothing herein is or shall be deemed by the Parties to be in derogation thereof or of [the Borough's] and the Planning Board's obligations and duties thereunder.

***8** While the Settlement Agreement included a draft of the Redevelopment Plan, a designation of RR Partners as the redeveloper, and a proposed redevelopment agreement with RR Partners, those agreements and designation were all conditioned on the Borough and the Planning Board following the procedures required by the LRHL. Moreover, the Settlement Agreement recognized that there could be judicial review of whether the contemplated designations satisfied the criteria of the LRHL and MLUL.

SJ LLC argues that in an unpublished opinion, we voided an agreement between a municipality and a developer because it constituted a binding contract for redevelopment entered before following the required procedures to adopt a redevelopment plan. So, SJ LLC contends we should void the Settlement Agreement in this matter. We reject this argument for several reasons. First, the case SJ LLC cites is unpublished and, therefore, not precedential or binding. R. 1:36-3. Second, the facts of that case are distinguishable. In that case, the municipality never passed an ordinance approving a redevelopment plan for the subject property and failed to comply with the procedural requirements of the LRHL. Additionally, the parties' contract in that case granted the redeveloper the exclusive right to enter a contract with the municipality to redevelop the subject property for three years and prohibited the municipality from negotiating with other developers. Third, and most importantly, we reject SJ LLC's argument that, effectively, any settlement agreement that contemplates a future course of action is void.

Initially, we note that the validity of the Settlement Agreement is not clearly before this court. The court in the Federal Action retained jurisdiction over the Settlement Agreement. Accordingly, the issue before us is whether the Settlement Agreement dictated a result that violated the LRHL or MLUL so that the designation should be vacated. As we have already explained, the Settlement Agreement contemplated a process and bound the Borough to follow that process. The Settlement Agreement did not, however, mandate the result. In other words, a settlement agreement can require parties to follow procedures. The validity of the result will depend on whether those procedures were properly followed and were consistent with the law.

In addition, we reject SJ LLC's blanket argument concerning settlement agreements because it would be inconsistent with well-established law. The New Jersey Supreme Court has repeatedly held that settlement agreements are an appropriate way to resolve disputes and generally are to be encouraged and enforced. Gere v. Louis, 209 N.J. 486, 500 (2012); Brundage v. Est. of Carambio, 195 N.J. 575, 601 (2008); see also Rodriguez v. Raymours Furniture Co., 225 N.J. 343, 359 (2016). Accordingly, numerous affordable housing cases and land use matters are resolved with agreements setting forth how a

municipality and a developer or an advocacy group will proceed to undertake steps to develop affordable housing. See, e.g., Friends of Peapack-Gladstone v. Borough of Peapack-Gladstone Land Use Bd., 407 N.J. Super. 404, 422-23 (App. Div. 2009); E./W. Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 328 (App. Div. 1996). Those settlement agreements, like the Settlement Agreement in this matter, were not illegal because they require future processes. Instead, the validity of those agreements turns on whether the future processes comply with the law. See Friends of Peapack-Gladstone, 407 N.J. Super. at 422-23; E./W. Venture, 286 N.J. Super. at 328 (explaining the requirements for a settlement agreement to be approved by the court in an affordable housing matter).

***9** SJ LLC also cites to N.J.S.A. 40A:12A-8 and argues that a municipality can only begin to implement a redevelopment plan after it has adopted a redevelopment plan. SJ LLC then goes on to argue that because the Settlement Agreement had already appointed RR Partners as the redeveloper, it violated the LRHL because the Redevelopment Plan was only adopted after the Planning Board conducted its investigation and made its recommendation.

The law is clear that a "municipality must adopt a redevelopment plan before the redevelopment project can be undertaken." Vineland Constr. Co. v. Township of Pennsauken, 395 N.J. Super. 230, 252 (App. Div. 2007). Only after adoption of the redevelopment plan is the municipality "afforded broad statutory authority" to carry out the redevelopment project, including the authority to select a private developer. Ibid. Here, however, the Borough did not begin redevelopment until it had complied with the process for designating the Eastern Parcel as an area in need of redevelopment and adopted the Redevelopment Plan. The Settlement Agreement stated that RR Partners would be the redeveloper provided that the Eastern Parcel was designated as an area in need of redevelopment, and provided that the Borough adopted a redevelopment plan. In other words, while the Settlement Agreement clearly contemplated and required RR Partners to be named the redeveloper, RR Partners only became the redeveloper after the Borough and the Planning Board had complied with the processes, procedures, and criteria of the LRHL and MLUL.

2. Whether the Settlement Agreement Constituted Contract Zoning.

"Zoning is an exercise of the police power to serve the common good and general welfare." V. F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment of Summit, 8 N.J. 386, 394 (1952). "It is elementary that the legislative function may not be surrendered or curtailed by bargain or its exercise controlled by the considerations which enter into the law of contracts." Ibid. So, a municipality cannot vest in a property owner "by contract a special privilege or exemption to use its premises in violation of the general rule binding upon all other landowners within the zone." Id. at 395. Therefore, when a contract effectively bargains away a municipality's "delegated legislative function," the contract will be voided as contract zoning. Suski v. Mayor & Comm'rs of Beach Haven, 132 N.J. Super. 158, 164 (App. Div. 1975); Midtown Props., Inc. v. Township of Madison, 68 N.J. Super. 197, 207-08 (Law

Div. 1961). In short, contract zoning occurs when a municipality makes a contract with a private developer or property owner to suspend the zoning law for the benefit of that developer or property owner. See Livingston Builders, Inc. v. Township of Livingston, 309 N.J. Super. 370, 381-82 (App. Div. 1998); see also Toll Brothers, Inc. v. Township of W. Windsor, 334 N.J. Super. 77, 94 (App. Div. 2000); Warner Co. v. Sutton, 274 N.J. Super. 464, 471 (App. Div. 1994).

SJ LLC argues that the Settlement Agreement should be voided because it was contract zoning. According to SJ LLC, the Settlement Agreement required the Borough to "adopt zoning changes to the Eastern Parcel without public input" in exchange for RR Partners giving the Borough the Western Parcel.

The trial court rejected that argument, reasoning that "the specific terms of the Settlement Agreement, which have been thoroughly reviewed by the court, do not rise to the level of 'contract zoning' as alleged." We agree because the Settlement Agreement specifically required the Borough and the Planning Board to comply with the LRHL and MLUL. As we have already detailed, the Borough did not suspend the zoning laws; rather, the Borough and the Planning Board went through the process of determining whether the Eastern Parcel was an area in need of redevelopment as required by the LRHL and MLUL.

3. Whether the Settlement Agreement Violated the Holding in Whispering Woods.

***10** In Whispering Woods, the Law Division considered a situation where a developer applied for approval from a municipal planning board, the planning board denied the application, the developer brought an action in lieu of prerogative writs challenging that denial, and ultimately the board and the developer settled the litigation. 220 N.J. Super. at 163-66. The question presented to the Whispering Woods court was whether that settlement was illegal. Id. at 171-72. The court reasoned:

> It would be unthinkable that a [p]lanning [b]oard, for example, charged with the proper enforcement of local planning and zoning ordinances deny an application only to turn around and negotiate a final, binding approval of it in a modified form to settle the very litigation which ensued upon the denial. If such a settlement could be final and binding that could be the hypothetical result. But it cannot be. The settlement must necessarily (as it was here) be conditioned upon a public hearing on the agreed plan —just as if a new application were being presented to the Board. In other words, any settlement must lead to a further official action by the public body. That action is subject to all of the statutory conditions necessary to vindicate the public interest—notice, public hearing, public vote, written resolution, etc. In addition, it is further subject to the complaint in lieu of prerogative writs.
>
> [Id. at 172 (citation omitted).]

Ultimately, the court in Whispering Woods found that the settlement agreement was not illegal because the agreement between the board and developer was a tentative agreement

subject to public presentation, a public hearing, and a public vote. Id. at 173.

SJ LLC argues that the Settlement Agreement in this matter violated the rationale and rule laid down in Whispering Woods because it circumvented the obligation for a public settlement hearing. The record and law do not support that argument.

Before adopting a resolution to accept the Settlement Agreement, the Borough's Council held a public meeting and heard public comment on the proposed settlement. Then, the Council adopted the Settlement Agreement by resolution. As already detailed, the Council thereafter authorized the Planning Board to engage in an investigation as to whether the Eastern Parcel was an area in need of redevelopment. That investigation involved further public hearings and more public comment. In short, the Settlement Agreement did not violate the reasoning or rule of Whispering Woods, and the trial court correctly rejected that argument.

C. The Redevelopment Designation.

The LRHL authorizes a municipality to declare property to be an area in need of redevelopment provided that the property meets one of eight criteria. See N.J.S.A. 40A:12A-5(a) to (h). After conducting its investigation, including hearing testimony from three expert witnesses, the Planning Board found that the Eastern Parcel qualified as an area in need of redevelopment under subsections (b) and (d) of N.J.S.A. 40A:12A-5.

1. Subsection (b) of N.J.S.A. 40A:12A-5.

Subsection (b) of N.J.S.A. 40A:12A-5 states that an area can be considered in need of redevelopment if the following conditions are present:

> The discontinuance of the use of a building or buildings previously used for commercial, retail, shopping malls or plazas, office parks, manufacturing, or industrial purposes; the abandonment of such building or buildings; significant vacancies of such building or buildings for at least two consecutive years; or the same being allowed to fall into so great a state of disrepair as to be untenantable.
>
> ***11** [N.J.S.A. 40A:12A-5(b).]

The Planning Board found that the Eastern Parcel qualified as an area in need of redevelopment under subsection (b) because it "was formerly developed with industrial buildings whose use was discontinued prior to being removed for health, safety and public welfare reasons." The trial court found:

> The bleak condition of the Eastern Parcel, inclusive of its environmental condition due to the petroleum storage and associated industrial use along with the current dilapidated condition of underground piping, containment walls, paved areas, derelict piers and docks (as described in each of the experts' reports and testimony) more than satisfied the threshold burden of proof

> and clearly provided substantial evidence to support the Planning Board's determination that the Eastern Parcel is an area in need of redevelopment pursuant to both N.J.S.A. 40A:12A-5(b) and [(d)] of the LRHL.

The findings by both the Planning Board and the trial court are supported by substantial, credible evidence in the record and are consistent with the plain language of the LRHL. The evidence before the Planning Board included evidence that Hess had decommissioned the site in 2013 and thereafter demolished various buildings and structures. There was also evidence supporting the trial court's finding that even after most of the buildings had been demolished, the Eastern Parcel still contained underground piping, containment walls, and paved areas.

SJ LLC argues that there were no buildings remaining on the Eastern Parcel and, therefore, the parcel did not qualify for redevelopment under subsection (b). We reject that argument for two reasons. First, as already noted, the trial court found that there were certain remaining structures and infrastructure that had been associated with Hess' use of the property as an oil terminal with buildings. Second, it would be an unduly narrow interpretation of subsection (b) to preclude its application to recently demolished buildings that had posed a public safety hazard. Indeed, to accept that interpretation would encourage property owners not to deal with public safety issues as quickly as possible.

Interpreting subsection (b) to apply to recently demolished buildings or structures is also consistent with subsection (c) of N.J.S.A. 40A:12A-5. Subsection (c) applies to "unimproved vacant land," but only if that land "has remained so for a period of ten years prior to adoption of the resolution." N.J.S.A. 40A:12A-5(c).

2. Subsection (d) of N.J.S.A. 40A:12A-5.

N.J.S.A. 40A:12A-5(d) allows land to be classified as in need of redevelopment if the following condition is present:

> Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land covered, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.

***12** The record also contains substantial, credible evidence that the Eastern Parcel satisfied the criteria under subsection (d).

Gregory's report to the Planning Board stated that "the site has been in various states of

disrepair and environmental contamination" for years, and it had various "improvements," including a pier, underground piping, containment walls, abandoned equipment, and other improvements above and below ground. Grygiel provided evidence corroborating Gregory's position. After detailing how the Eastern Parcel had previously been developed as a Hess tank farm used for the storage, transfer, and distribution of petroleum products, Grygiel's report concluded:

> Therefore, the obsolete and deleterious conditions of the study area are detrimental to the safety, health, and welfare of the residents, workers, patrons, and visitors of these nearby residential and commercial properties and publicly accessible open spaces.

The Planning Board accepted the reports and testimonies of Grygiel and Gregory that those obsolete and abandoned improvements were detrimental to the safety, health, and welfare of the community. In that regard, we note that a board may accept or reject the testimony of witnesses. See Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 288 (1965). Moreover, there really was no dispute that the Eastern Parcel contained obsolete improvements. "So long as there is substantial evidence in the record, a court may not interfere with or overturn the factual findings of a municipal board." New Brunswick Cellular Tel. Co. v. Twp. of Edison Zoning Bd. of Adjustment, 300 N.J. Super. 456, 465 (Law Div. 1997). In short, the expert testimonies of Gregory and Grygiel support the Planning Board's and Borough's determinations that the Eastern Parcel was an area in need of redevelopment under subsection (d) of N.J.S.A. 40A:12A-5.

SJ LLC also argues that Grygiel's and Gregory's expert opinions were net opinions. The trial court rejected that argument, finding that both Grygiel's reports and testimony and Gregory's report and testimony provided factual data that supported their conclusions. We agree with the trial court.

"The net opinion rule is a 'prohibition against speculative testimony.' " Ehrlich v. Sorokin, 451 N.J. Super. 119, 134 (App. Div. 2017) (quoting Harte v. Hand, 433 N.J. Super. 457, 465 (App. Div. 2013)). Expert testimony "is excluded if it is based merely on unfounded speculation and unquantified possibilities." Townsend v. Pierre, 221 N.J. 36, 55 (2015) (quoting Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997)). An expert's "bare conclusions, unsupported by factual evidence," are inadmissible. Funtown Pier Amusements, Inc. v. Biscayne Ice Cream & Asundries, Inc., 477 N.J. Super. 499, 516 (App. Div. 2024) (quoting Buckelew v. Grossbard, 87 N.J. 512, 524 (1981)).

Our review of the reports and testimonies of Grygiel and Gregory establishes that their opinions were based on specific and detailed facts. In short, the opinions were not net.

We also reject SJ LLC's argument that the Planning Board improperly delegated to Grygiel its duty to make an investigation and

did not conduct an independent investigation. It is well-established that a planning board may rely on consultants in conducting its investigation. See Concerned Citizens of Princeton, Inc. v. Mayor & Council of Princeton, 370 N.J. Super. 429, 462-63 (App. Div. 2004) (explaining that "nothing" in the relevant provision of the LRHL "suggests that a planning board may not rely on a redevelopment consultant in conducting its investigation" into whether an area is in need of redevelopment).

D. The Redevelopment Plan.

***13** SJ LLC asserts that the trial court erred because the record did not contain substantial, credible evidence to support the Borough's adoption of the Redevelopment Plan. The trial court found that the Borough's Council and the Planning Board heard testimony, examined the Redevelopment Plan "section by section," and considered the Redevelopment Plan's consistency with the Borough's Master Plan. Therefore, the trial court found that the adoption of that Redevelopment Plan complied with the LRHL and MLUL. Substantial, credible evidence supports the trial court's findings.

After the Council adopted the Redevelopment Plan, it sent the Redevelopment Plan to the Planning Board for a consistency review. The Planning Board then heard testimony, including testimony from Gregory. Gregory testified that the Borough's Master Plan, as well as the 2012 and 2014 Re-Examination Reports, supported the Redevelopment Plan. Moreover, Gregory testified that the Redevelopment Plan furthered several goals of the Master Plan, including preserving views and access to the Hudson River. Consequently, we discern no grounds for vacating the Redevelopment Plan.

E. The Alleged Ethical Violations.

The Ethics Law creates a statutory code of ethics that governs when a disqualifying conflict of interest arises for a local government official. So, the Ethics Law and the common law guide courts in evaluating when conflicts arise. See Piscitelli v. Garfield Zoning Bd. of Adjustment, 237 N.J. 333, 349-50 (2019); Grabowsky v. Township of Montclair, 221 N.J. 536, 552 (2015). "The overall objective 'of conflict-of-interest laws is to ensure that public officials provide disinterested service to their communities' and to 'promote confidence in the integrity of governmental operations.' " Piscitelli, 237 N.J. at 349 (quoting Thompson v. City of Atlantic City, 190 N.J. 359, 364 (2007)).

The Ethics Law provides:

> No local government officer or employee shall act in his [or her] official capacity in any matter where he [or she], a member of his [or her] immediate family, or a business organization in which he [or she] has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his [or her] objectivity or independence of judgment.
>
> [N.J.S.A. 40A:9-22.5(d).]

See also N.J.S.A. 40A:9-22.2 (setting forth the Legislature's declarations concerning the duties of local government officials).

"We must construe N.J.S.A. 40A:9-22.5(d) to further the Legislature's expressed intent

that '[w]henever the public perceives a conflict between the private interests and the public duties of a government officer,' 'the public's confidence in the integrity' of that officer is 'imperiled.' " Piscitelli, 237 N.J. at 351 (alteration in original) (quoting N.J.S.A. 40A:9-22.2(b) to (c)). Disqualification is required when a public official has (1) a direct pecuniary interest; (2) an indirect pecuniary interest; (3) a direct personal interest; or (4) an indirect personal interest. Grabowsky, 221 N.J. at 553 (quoting Wyzykowski v. Rizas, 132 N.J. 509, 525 (1993)).

" '[A] court's determination "whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case." ' " Piscitelli, 237 N.J. at 353 (quoting Grabowsky, 221 N.J. at 554). "A conflicting interest arises when the public official has an interest not shared in common with the other members of the public." Wyzykowski, 132 N.J. at 524. Accordingly, "[t]he ethics rules must be applied with caution, as '[l]ocal governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official.' " Grabowsky, 221 N.J. at 554 (second alteration in original) (quoting Wyzykowski, 132 N.J. at 523). "It is essential that municipal offices be filled by individuals who are thoroughly familiar with local communities and concerns." Ibid. Consequently, conflict-of-interest rules "do not apply to 'remote' or 'speculative' conflicts because local governments cannot operate effectively if recusals occur based on ascribing to an official a conjured or imagined disqualifying interest." Piscitelli, 237 N.J. at 353.

***14** SJ LLC argues that there were three conflicts of interest affecting the Settlement Agreement and the designation of the Eastern Parcel as an area in need of redevelopment. Concerning the Settlement Agreement, SJ LLC contends that the Mayor and Council members had conflicts of interest and should not have approved the Settlement Agreement. SJ LLC also argues that Gregory had a conflict of interest related to the Settlement Agreement and should not have been involved in the process. Regarding the designation, SJ LLC alleges that Grygiel had a conflict of interest because he had previously worked for RR Partners.

The trial court considered and rejected each of these alleged conflicts of interest. Concerning the Mayor and the Council members, the trial court found that there was no evidence that they had direct or indirect financial or personal interests that precluded them from approving the Settlement Agreement. In that regard, the trial court reasoned that the allegations against the Mayor and the Council members in the Federal Action did not create a conflict of interest because the allegations were just that—allegations.

We agree with the conclusion reached by the trial court. The current record does not allow us to assess the validity of the allegations made against the Mayor and the Council members in the Federal Action. While the allegations in the Federal Action raised questions, there were no findings of fact on those allegations. Moreover, the federal court allowed the Settlement Agreement to be entered and retained jurisdiction to enforce the

Settlement Agreement. Given those facts, we discern no basis to reverse the trial court's determinations concerning the alleged ethical violations by the Mayor and the Council members.

For similar reasons, we also reject SJ LLC's arguments concerning Gregory. Gregory did not directly participate in the approval of the Settlement Agreement. Therefore, it is not clear that her involvement in the process tainted the Settlement Agreement or the designation. Moreover, as with the allegations against the Mayor and the Council members, the allegations against Gregory in the Federal Action were never proven.

Finally, we discern no basis for vacating the redevelopment designation because of Grygiel's participation. The record is clear that Grygiel disclosed his prior affiliation with RR Partners during the investigation of the redevelopment designation. Moreover, Grygiel was appointed as a "special planner" to the Planning Board. Therefore, it is not even clear that he is governed by the Ethics Law, which applies to a "local government officer or employee." N.J.S.A. 40A:9-22.5(h). Just as importantly, it was the Planning Board that was charged with investigating whether the Eastern Parcel met the criteria for the redevelopment designation. The Planning Board had the ability to evaluate Grygiel's reports and testimony, and we discern no basis to vacate the designation because of Grygiel's involvement.

F. The Request for Discovery.

Discovery determinations are within the discretion of the trial court. Brugaletta v. Garcia, 234 N.J. 225, 240 (2018). Appellate courts use an abuse of discretion standard in evaluating trial courts' rulings on discovery issues. Cap. Health Sys., Inc. v. Horizon Healthcare Servs., Inc., 230 N.J. 73, 79-80 (2017). SJ LLC argues that it was entitled to discovery to seek information concerning the interests of various Council members and whether they had personal interests that created conflicts when they signed the Settlement Agreement.

We discern no abuse of discretion in the trial court's decision to deny SJ LLC's request for discovery. SJ LLC filed complaints in lieu of prerogative writs, and such actions are generally limited to the record created before a municipal board or council. See Willoughby v. Plan. Bd. of Deptford, 306 N.J. Super. 266, 273-74 (App. Div. 1997) (citing Kramer, 45 N.J. at 289); see also R. 4:69-4 (governing actions in lieu of prerogative writs and providing that "[t]he scope and time to complete discovery ... will be determined at the case management conference and memorialized in the case management order"). Furthermore, because SJ LLC did not demonstrate that the discovery it was seeking was relevant, granting its request would have simply led to further delays.

III.

***15** In summary, we have considered and rejected the numerous arguments presented by SJ LLC. We believe we have addressed all the arguments raised, but to the extent that there are some arguments we did not address, we deem those arguments to be without sufficient merit to warrant discussion

in a written opinion. See R. 2:11-3(e)(1)(E). We acknowledge that this has been a long process involving applications for variances from zoning ordinances, contentious litigation, and affordable housing litigation. Our review and conclusions are based on the extensive record presented on this appeal. Having reviewed the record and governing law, we discern no basis to reverse the trial court's judgment dismissing SJ LLC's complaints in lieu of prerogative writs.

Affirmed.

All Citations

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DAVID P. MORRISETTE and SANDRA S. MORRISETTE, Plaintiffs, v. TOWN OF PHILLIPSBURG TOWN COUNCIL, governing body of the municipality, Defendant. and PERON CONSTRUCTION, INC. Defendant-Intervenor.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION WARREN COUNTY DOCKET NO.: WRN-L-000378-24 Civil Action **CERTIFICATION OF NICHOLAS D. HESSION, ESQ.**

I, NICHOLAS D. HESSION, ESQ., of full age, hereby certify as follows:

1. I am an attorney-at-law of the State of New Jersey and an associate at King Moench & Collins, LLP.
2. My office represents Defendant in the above-captioned matter.
3. I submit this Certification in support of Defendant's Letter Brief Opposing Plaintiffs' Motion to Take Discovery.
4. Attached hereto as **Exhibit A** is a true and correct copy of Martin v. City of Bayonne, 2018 WL 2140735 (App. Div. May 10, 2018).

5. Attached hereto as **Exhibit B** is a true and correct copy of SJ 660 LLC v. Borough of Edgewater, 2024 WL 3770384 (App. Div. August 13, 2024).

6. Counsel is not aware of any contrary unpublished opinions

I certify the foregoing statements are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

KING, MOENCH & COLLINS, LLP
Attorneys for Defendant

/s/ Nicholas D. Hession

By: Nicholas D. Hession, Esq.

Dated: May 1, 2025