

**KEITH FRANKEL, DENNIS KLEIN,
and ALBA PENNISI,**

Plaintiffs-Appellants,

v.

**BOROUGH OF NORTH CALDWELL
and GREEN BROOK REALTY
ASSOCIATES, LLC,**

Defendants-Respondents.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION**

Docket No. A-0000696-24

Civil Action

**On appeal from two Orders of the
Superior Court, Essex County,
Law Division**

Docket No. ESX-L-6344-23

Sat below:

Hon. Russell J. Passamano, J.S.C.

Date of submission:

March 5, 2025

**AMENDED BRIEF OF PLAINTIFFS-APPELLANTS
KEITH FRANKEL, DENNIS KLEIN, AND ALBA PENNISI**

BOCCHI LAW LLC

8 Hillside Avenue, Suite 208

Montclair, NJ 07042

T:(862) 213-0509

abocchi@bocchilaw.com

Attorneys for Plaintiffs-Appellants

Keith Frankel, Dennis Klein and Alba Pennisi

Of Counsel and On the Brief:

Anthony S. Bocchi, Esq. (Atty ID #005602006)

Jennifer L. Bocchi, Esq. (Atty ID #014002003)

Mark A. Fantin, Esq. (Atty ID #025492005)

Ryan P. Duffy, Esq. (Atty ID #379452022)

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS	iii
TABLE OF AUTHORITIES.....	iv
PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY.....	4
STATEMENT OF FACTS	5
LEGAL ARGUMENT	14
I. THE MOTION COURT ERRED IN DISMISSING PLAINTIFFS’ AMENDED COMPLAINT PURSUANT TO R. 4:6-2(e) BECAUSE IT FAILED TO APPLY THE LIBERAL PLEADING STANDARD AND IGNORED COGNIZABLE, INDEPENDENT CLAIMS. (T45:17-56:7).....	14
A. Plaintiffs’ Amended Complaint States Legally Sufficient, Actionable Claims (T55:18-24).....	16
B. The Trial Court’s Collateral Attack Rationale Is Flawed. (T52:4-18).....	21
C. A Dismissal Without Prejudice Does Not Cure the Error. (T55:18-24).....	22
II. THE MOTION COURT’S DISMISSAL WAS NOT WARRANTED BECAUSE UNDER <u>EAST/WEST VENTURE v. BOROUGH OF FORT LEE</u>, THE MOTION COURT WAS REQUIRED TO CONSOLIDATE PLAINTIFFS’ JUSTICIABLE AND MERITORIOUS PREROGATIVE WRIT CLAIMS WITH THE AFFORDABLE HOUSING MATTER. (T45:17-56:7).....	22
CONCLUSION	26

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Order dated September 25, 2024, granting Defendant Green Brook Realty Associates LLC’s Motion to Dismiss pursuant to R. 4:6-2(e)..... Pa001

Order dated September 25, 2024, granting Defendant Borough of North Caldwell’s Motion to Dismiss pursuant to R. 4:6-2(e) Pa002

TABLE OF AUTHORITIES

Cases

<u>Burg v. State</u> , 147 N.J. Super. 316 (App. Div.), <i>certif. denied</i> , 75 N.J. 11 (1977).....	14
<u>Donato v. Moldow</u> , 374 N.J. Super. 475 (App. Div. 2005).....	14, 20
<u>East/West Venture v. Borough of Fort Lee</u> , 286 N.J. Super. 311 (App. Div. 1996).....	22-25
<u>Printing Mart–Morristown v. Sharp Electronics Corp.</u> , 116 N.J. 739 (1989).....	12, 14, 15, 19, 20, 21, 22
<u>Riggs v. Township of Long Beach</u> , 109 N.J. 601 (1988).....	24
<u>Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel</u> , 92 N.J. 158 (1983).....	24
<u>State v. Cherry Hill Mitsubishi</u> , 439 N.J. Super. 462 (App. Div. 2015).....	14
<u>Toll Bros., Inc. v. Township of West Windsor</u> , 334 N.J. Super. 77 (App. Div. 2000)	17
<u>Leon v. Rite Aid Corp.</u> , 340 N.J. Super. 462 (App. Div. 2001)	20, 21
<u>Livingston Builders, Inc. v. Livingston Township</u> , 309 N.J. Super. 370 (App. Div. 1998)	17
<u>Worthington v. Fauver</u> , 88 N.J. 183 (1982).....	16

Statutes

<u>N.J.S.A. 40A:11-1</u> , <i>et seq.</i>	2, 11
<u>N.J.S.A. 40A:11-4(a)</u>	18
<u>N.J.S.A. 40A:12-1</u>	10
<u>N.J.S.A. 40A:12-13(a)</u>	18

N.J.S.A. 40:55D-26.....9, 16

Court Rules

N.J. Court Rule 4:6–2(e).....1, 4, 11, 14, 19, 20-22

Other Authorities

Pressler, Current N.J. Court Rules, comment 4.1.1 on R. 4:6–2(e) (2025).....14

PRELIMINARY STATEMENT

Plaintiffs appeal from orders dismissing their action in lieu of prerogative writs Amended Complaint under Rule 4:6–2(e) for failure to state a claim upon which relief can be granted. The motion court’s dismissal constitutes reversible error because it misapplied the stringent Rule 4:6-2(e) standard, improperly commingled Plaintiffs’ independent statutory and common-law claims with a collateral attack on an Affordable Housing Consent Order, and failed to consolidate the action as required by precedent. This Court should reverse and reinstate the Amended Complaint in its entirety.

The primary basis for the motion court’s dismissal was that Plaintiffs’ Amended Complaint was, in effect, a “collateral attack” on a Consent Order entered by the Law Division in the Borough of North Caldwell’s (“the Borough”) affordable housing matter, In the Matter of the Application of the Borough of North Caldwell, bearing docket number ESX-L-4696-15 (“the Affordable Housing Matter”). Through a Consent Order entered in the Affordable Housing Matter (“the Affordable Housing Consent Order”), the Borough amended its prior affordable housing settlement agreement, which included significant material changes to the previous settlement agreement entered into by the Borough in 2019 that was previously approved by the court

after a duly noticed fairness hearing. The motion court ruled that any relief pertaining to the Affordable Housing Consent Order was more appropriately sought in the Affordable Housing Matter. Noting that Plaintiffs were seeking to intervene in the Affordable Housing matter, the motion court reasoned that the effect of a dismissal of the prerogative writs matter would be non-prejudicial because the relief sought, from the motion court's perspective, focused on upending the Affordable Housing Consent Order, and Plaintiffs could seek that relief, if appropriate, in the Affordable Housing Matter.

Ultimately, the motion court failed to properly consider Plaintiffs' justiciable and meritorious claims that are separate and distinct from the viability of the Affordable Housing Consent Order. For instance, the Amended Complaint timely challenged, amongst other things, whether the Borough's actions in adopting a resolution that awarded a contract to defendant Green Brook Realty Associates LLC ("Green Brook") for \$1.5 million in improvements to municipal property – without public bid – was in violation of the Local Public Contracts Law, N.J.S.A. 40A:11-1, et seq. Additionally, the Amended Complaint timely challenged whether a resolution authorizing the Borough to relinquish its property interest in twelve contiguous buildable acres of property was legally conveyed in accordance with the Local Lands and

Buildings Law, which requires public bidding. Further, the Amended Complaint challenged whether a certain zoning ordinance was violative of the Municipal Land Use Law (“MLUL”) because the Borough failed to identify or explain certain deviations from its Master Plan, as is required by the MLUL. The motion court ignored these typical prerogative writ challenges and instead pointed Plaintiffs in the direction of the Affordable Housing Matter because, in the motion court’s view, all these matters ultimately flowed from the Affordable Housing Consent Order.

Importantly, the motion court failed to properly consider that Plaintiffs only sought limited intervention in the Affordable Housing Matter that challenged the effect of the Affordable Housing Consent Order on procedural due process grounds. As proposed intervenors, Plaintiffs questioned whether significant material changes to the Borough’s affordable housing settlement agreement could be made by consent order rather than by properly noticing a fairness hearing to the public and others, as required by law, and as was previously done by the Borough. In the end, Plaintiffs Amended Complaint, while related to the Affordable Housing Consent Order, sufficiently pleads separate and distinct cognizable legal claims. Therefore, a reversal is warranted, and the Plaintiffs’ Amended Complaint should be reinstated in its entirety.

PROCEDURAL HISTORY

Plaintiffs commenced this action by filing a Complaint in Lieu of Prerogative Writs against the Borough and Green Brook on September 29, 2023. (Pa004). Green Brook filed its Answer on December 12, 2023. (Pa013). On January 15, 2024, Plaintiffs filed an Amended Complaint. (Pa019). The Borough and Green Brook filed Answers to the Amended Complaint on February 14, 2024. (Pa040; Pa055).

The Borough and Green Brook filed Motions to Dismiss the Amended Complaint Pursuant to R. 4:6-2(e) on May 23, 2024. (Pa074; Pa088). Plaintiffs filed a single opposition to both Motions to Dismiss on July 17, 2024. (Pa258).

On August 28, 2024, Plaintiffs filed a Motion to Intervene and Consolidate in the Affordable Housing Matter. (Pa305). On September 19, 2024, Green Brook filed a Cross-Motion to Intervene in the Affordable Housing Matter. (Pa308). As of the date of this appeal, Plaintiffs' Motion to Intervene and Consolidate and Green Brook's Cross-Motion to Intervene remain pending before the Honorable Richard R. Sules, J.S.C.

On September 24, 2024, the Honorable Russell J. Passamano, J.S.C. entered two Orders granting the Borough and Green Brook's Motions to Dismiss. (Pa001).

STATEMENT OF FACTS

A. Plaintiffs' Amended Complaint

Plaintiffs' Amended Complaint alleges multiple unlawful actions by the Borough tied to its dealings with Green Brook, owner of the Green Brook Country Club ("GBCC"). As alleged, GBCC entered into a Settlement Agreement dated December 11, 2018, (Pa094) related to the development of GBCC, which would include an affordable housing component. Amended Complaint at ¶7 (Pa020). The Settlement Agreement obligated GBCC to dedicate twelve contiguous acres of buildable open space from the GBCC Property to the Borough suitable for future municipal use ("the Land Dedication"). (Am. Compl. ¶9, Pa021).

The terms of the Settlement Agreement, including the Land Dedication, were incorporated into an "Order Approving Settlement Agreements Between the Borough of North Caldwell and Fair Share Housing Center and the Borough of North Caldwell and Green Brook Realty Associates, LLC," entered on February 19, 2019, by the Honorable Robert H. Gardner, J.S.C., In the Matter of the Application of the Borough of North Caldwell, County of Essex, Docket No. ESX-L-4696-15 ("the 2019 Order") (Pa135), which modified an earlier settlement agreement resolving the Borough's affordable housing obligations dated December 11, 2018 (Pa111). (Am. Compl. ¶10, Pa021).

Subsequent Borough actions undermined GBCC's obligation under the Settlement Agreement. The Amended Complaint alleges that on July 21, 2020, the Borough adopted Ordinance No. O-8-20 (Pa266), which created the Inclusionary Residential Overlay Zone incorporating the terms of the Settlement Agreement and the 2019 Order, including the dedication of twelve acres to the Borough (the "IRO Zoning"). (Am. Compl. ¶12, Pa022). Four years later, on August 15, 2023, the Borough adopted Resolution R-157-2023, "A Resolution Authorizing the Execution of a Memorandum of Understanding with Green Brook Realty Associates, LLC in Connection with the Future Redevelopment of Green Brook Country Club." (Pa288). The Memorandum of Understanding ("MOU") was executed as of the effective date of August 16, 2023. (Pa161). The MOU authorized by R-157-2023 would require the Borough to repeal the IRO Zoning to, amongst other things, relieve Green Brook of the obligation to dedicate twelve contiguous acres of buildable open space to the Borough. (Am. Compl. ¶15, Pa023). The MOU further obligates the Borough to repeal the IRO Zoning and replace it with the SIRO Zoning Ordinance. (Pa161).

Under the MOU and the proposed SIRO Zoning Ordinance, Green Brook's "compensation" for the Borough's loss of the Land Dedication would include, amongst other things, Green Brook's agreement to provide construction

work to the Borough equal to approximately \$1,500,000.00 in value. (Am. Compl. ¶16, Pa023). On September 29, 2023, Plaintiffs filed a Complaint in Lieu of Prerogative Writs challenging the MOU. (Pa004).

Thereafter, on November 13, 2023, the Borough adopted Resolution R-222-2023 (Pa168), repealing Resolution R-157-2023 (Pa288) and the Borough's authorization of the MOU. The Amended Complaint alleges that contemporaneously with the adoption of R-222-2023 (Pa168), the Borough adopted Resolution R-216-2023 (Pa170), which authorized the Mayor to execute a Discharge of Right to Acquire Land and Service Agreement between the Borough and Green Brook (the "Discharge Agreement") (Pa241); (Am. Compl. ¶21, Pa024). The Discharge Agreement was executed by the parties and became effective on November 27, 2023. (Pa241)

The Amended Complaint specifically alleges that the Discharge Agreement is "silent as to why or how the Borough determined that 'it no longer requires' twelve contiguous and buildable acres of GBCC Property, or how it was determined that \$1.5 million in improvements to municipal facilities is adequate consideration for relinquishing the Borough's contractual rights to the Land Dedication." (Am. Compl. ¶26, Pa026). The Amended Complaint further

alleges that the Borough accepted \$1.5 million in exchange for twelve acres of contiguous buildable in North Caldwell. (Am. Compl. ¶27, Pa026).

The Amended Complaint alleges that on November 23, 2023, the Borough adopted R-215-2023, “A Resolution Authorizing the Execution of an Amended and Restated Settlement Agreement with Green Brook Realty Associates, LLC, in Connection with the Future Redevelopment of Green Brook Country Club.” (Pa172); (Am. Compl. ¶29, Pa026). The Amended and Restated Agreement was executed by the parties as of the effective date of November 27, 2023 (the “Amended Settlement Agreement”) (Pa192). The Amended Complaint further alleges that the Amended Settlement Agreement required the Borough, “as an essential term of this settlement,” to introduce the SIRO Zoning ordinance within 30 days of the agreement’s effective date.” (Am. Compl. ¶37, Pa028).

The Amended Complaint alleges that the Amended Settlement Agreement acknowledges that the “Borough and Fair Share Housing Center (‘FSHC’) shall amend the FSHC Settlement Agreement to incorporate the Development and said agreement may be required to be approved by the Court via an Order.” (Am. Compl. ¶40, Pa028). To this end, the Amended Complaint alleges that on December 28, 2023, the Borough filed an executed consent order with the Affordable Housing Court in Docket No. ESX-L-4696-15 and that “[n]o notice

of the filing was provided to plaintiffs, despite their obvious interest in the modification of the 2019 Order.” (Am. Compl. ¶41, Pa028). The Amended Complaint notes that the Affordable Housing Consent Order was entered on January 11, 2024, by the Honorable Richard R. Sules, J.S.C. (Pa078); (Am. Compl. ¶42, Pa028).

The First Count of the Amended Complaint claims that the Borough’s actions were arbitrary, capricious and unreasonable. It alleges, amongst other things, that “[a]ll actions taken by the Borough which combined to relinquish the Borough’s right to the Land Dedication and alter zoning for GBCC, as set forth herein, including the MOU, the Discharge Agreement, the Amended Settlement Agreement, the enactment of the SIRO Zoning Ordinance and the repeal of the IRO Zoning, were arbitrary, capricious and unreasonable.” (Am. Compl. ¶54, Pa030).

The Second Count alleges violation of the Municipal Land Use Law. The Second Count specifically alleges that the SIRO ordinance was enacted in violation of the Municipal Land Use Law. (Am. Compl. ¶63, Pa033). It specifically references the Borough’s statutory requirement, pursuant to N.J.S.A. 40:55D-26, to ensure that the Planning Board transmit a report to the Borough Council within thirty-five days after the ordinance was referred to it,

which report was to identify any provisions of the ordinance “inconsistent with the master plan.” (Am. Compl. ¶56, Pa031). The Amended Complaint alleges that “no report was transmitted by the Planning Board prior to the adoption of the SIRO Zoning Ordinance on December 19, 2023, the 36th day after introduction of the ordinance.” (Am. Compl. ¶57, Pa032).

The Third Count of the Amended Complaint sounds in contract zoning. It alleges that the Borough’s Master Plan, and specifically the Land Use Element and the Housing Element, was not amended by the Planning Board prior to the adoption of the SIRO Zoning. (Am. Compl. ¶66, Pa034). The Amended Complaint alleges that the Siro Zoning ordinance constitutes illegal contract zoning. (Am. Compl. ¶¶65-67, Pa033-034).

The Fourth Count of the Amended Complaint is for violations of the Local Lands and Buildings Law, N.J.S.A. 40A:12-1, *et seq.* It alleges that the Borough’s interest in the GBCC Property could only be legally conveyed in accordance with the Local Lands and Buildings Law, which requires public bidding. (Am. Compl. ¶70, Pa035). It specifically alleges “[b]y executing the Dedication Agreement and repealing the IRO Zoning, the Borough conveyed its right to the Land Dedication, and thus its interest in real property, through negotiation without public bid.” (Am. Compl. ¶72, Pa035). The Amended

Complaint further alleges that the Borough conveyed its interest in the Land Dedication to Green Brook for less than fair value. (Am. Compl. ¶73, Pa035).

Lastly, the Fifth Count of the Amended Complaint alleges violation of the Local Public Contracts Law, N.J.S.A. 40A:11-1, *et seq.* It alleges that R-216-2023 and the Dedication Agreement “evidence that the Borough awarded a contract to Green Brook for \$1.5 million in improvements to municipal property without public bid. (Am. Compl. ¶76, Pa036). It further alleges that “[t]he value of the contract awarded by the Borough to Green Brook exceeds the bid threshold established by the Local Public Contracts Law. (Am. Compl. ¶77, Pa036).

B. Defendants’ Motions to Dismiss Pursuant to Rule 4:6-2(e) and the Trial Court’s Decision

On May 23, 2024, Defendants filed motions to dismiss pursuant to R. 4:6-2(e). (Pa074; Pa088). On September 25, 2024, the trial court dismissed Plaintiffs’ Amended Complaint on the basis that it was a challenge to the Affordable Housing Consent Order and found that “a challenge to the validity of the consent order that had been entered by Judge Sules in January of [2024] is not a matter properly brought before this Court, that would be a matter to be brought to the attention or before Judge Sules in the Mount Laurel litigation.” (T49:24-50:3).

The trial court specifically reasoned and held as follows:

But what the Court sees is, one, that the Court would agree with the defendants that the matters even looked at in the somewhat liberal or very liberal pleading standard analysis under Printing Mart, they – they state or – they purport to state claims that impact on the not – the isolated events, but looking at the isolated events sort – sort of all rolls back into the settlement agreement, the consent order.

And as the Court mentioned, there was even going through the prayers for relief in the amended complaint and matching it against what is in the consent order, the – the settlement agreement, amended settlement agreement, it all rolls back into that and its not so easily separated as Mr. Bocchi would – would – would argue.

But to say that it would deprive the plaintiffs of the ability to challenge really would ask the Court to ignore the fact they – they – these plaintiffs are seeking to intervene in the Mount Laurel proceeding. And if the judge that hears the motion to intervene in the Mount Laurel proceedings finds that it's appropriate for the plaintiffs to have the ability to challenge the manner in which some of the aspects of the Mount Laurel requirements or – developments area going forward and being acted on by the defendants in this case, then – then, you know, that's a decision for the judge in the Mount Laurel proceeding.

And certainly the Court in this case would not say that to – to dismiss the complaints, the prerogative writs action, would deny the plaintiffs an opportunity to be heard is – would – would be to ignore the fact that the judge in the Mount Laurel proceeding will make a determination as to what – whether and to what extent the plaintiffs in this case have the ability to be heard and to what issues they have the ability to be heard.

So the Court would not find that a dismissal of this case would leave plaintiffs without a remedy because the

remedy would be that which the judge in the Mount Laurel case determines appropriate. If any.

It – it may be that the defendants in this case oppose intervention in the Mount Laurel case, that Fair Share Housing opposes intervention. I – that’s not before the Court. The Court is simply saying that it doesn’t deprive plaintiffs of a remedy. It just – that the assertion of that remedy in a separate prerogative writs action in circumstances where the final judgment of repose has been entered. That as by Judge Gardner back in August 2020.

[T52:4-54:2]

The Court finds that it doesn’t effectively state a cause of action for relief in prerogative writs and also has the effect of being a collateral attack on the – sort of the whole – I don’t want to say the whole proceedings in the Mount Laurel Litigation but – but would have the effect of allowing the litigants in a very isolated time frame, an isolated municipal act prerogative writs complaint to impact on – in a way that has the effect of a collateral attack on the whole proceedings in the Mount Laurel Litigation.

[T55:8-17].

On November 8, 2024, Plaintiffs filed a Notice of Appeal of the September 25, 2024, Orders dismissing their Complaint. (Pa069).

LEGAL ARGUMENT

POINT I

THE MOTION COURT ERRED IN DISMISSING PLAINTIFFS' AMENDED COMPLAINT PURSUANT TO R. 4:6-2(e) BECAUSE IT FAILED TO APPLY THE LIBERAL PLEADING STANDARD AND IGNORED COGNIZABLE, INDEPENDENT CLAIMS. (T45:17-56:7)

Plaintiffs' prerogative writs Amended Complaint was dismissed under Rule 4:6-2(e). The standard of review on appeal of a dismissal under Rule 4:6-2(e) is *de novo*, meaning that the appellate court is to apply the same legal standard as the trial court when reviewing its reasoning. Donato v. Moldow, 374 N.J. Super. 475, 483 (App. Div. 2005). That legal standard is well established.

A motion to dismiss a complaint under Rule 4:6-2(e) for failure to state a claim must be denied if, giving the plaintiffs the benefit of all their allegations and all favorable inferences, a cause of action has been made out. Printing Mart–Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989); Burg v. State, 147 N.J. Super. 316, 319–20 (App. Div.), certif. denied, 75 N.J. 11 (1977). “The inquiry is limited to ‘examining the legal sufficiency of the facts alleged on the face of the complaint.’” State v. Cherry Hill Mitsubishi, 439 N.J. Super. 462, 467 (App. Div. 2015) (quoting Printing Mart–Morristown, *supra*, 116 N.J. at 746). Dismissals under Rule 4:6-2(e) generally are without prejudice. *Pressler, Current N.J. Court Rules*, comment 4.1.1 on R. 4:6-2(e) (2025). Printing Mart requires that the inquiry be

limited to the legal sufficiency of the facts alleged on the face of the complaint, and the trial court was compelled to undertake this analysis in a searching manner that is “generous and hospitable.” Printing Mart, supra, 116 N.J. at 746. On such a motion, facts alleged by the plaintiff are held up to the applicable law to determine whether a cause of action is suggested thereby. Id. A plaintiff's obligation on such a motion is not to prove the case but only to make allegations which, if proven, would constitute a valid cause of action. Id.

Here, the trial court abandoned this standard, erroneously dismissing the Amended Complaint as a collateral attack on the Affordable Housing Consent Order rather than confining itself to evaluating each count's independent viability. The trial court improperly characterized Plaintiffs' Amended Complaint – in a severely limiting manner – as a challenge to the Affordable Housing Consent Order and found that “a challenge to the validity of the consent order that had been entered by Judge Sules in January of [2024] is not a matter properly brought before this Court, that would be a matter to be brought to the attention or before Judge Sules in the Mount Laurel litigation.” (T49:24-50:3).

Instead of applying the required indulgent standard to the Amended Complaint, by reading it with great liberality and in a searching manner that is “generous and hospitable,” the motion court did exactly the opposite – and viewed

the Amended Complaint in a severely narrow and restrictive manner as applied to the Affordable Housing Consent Order. (T55:8-17). This misstep demands reversal.

A. Plaintiffs' Amended Complaint States Legally Sufficient, Actionable Claims. (T55:18-24)

Each of the five counts pleaded in the Amended Complaint is grounded in specific factual allegations and legal theories that are sufficiently independent of the Affordable Housing Consent Order.

In Count One, Plaintiffs allege the Borough's relinquishment of the twelve acres and alteration of the SIRO Zoning Ordinance that authorized an impermissible ratio of age-restricted units when compared with non-age-restricted units, was arbitrary, capricious and unreasonable. (Am. Compl. ¶54, Pa030). This standard prerogative writ claim requires only a showing of governmental action lacking a rational basis, a threshold easily met here. See Worthington v. Fauver, 88 N.J. 183, 204-05 (1982).

In Count Two, Plaintiffs allege the SIRO Ordinance's enactment without a Planning Board report violates N.J.S.A. 40:55D-26 (Am. Compl. ¶¶56-57, Pa031-032). Specifically, N.J.S.A. 40:55D-26(a) provides:

Prior to the adoption of a development regulation, revision, or amendment thereto, the planning board shall make and transmit to the governing body, within 35 days after referral, a report including identification of any provisions in the proposed development regulation, revision or amendment which are

inconsistent with the master plan and recommendations concerning these inconsistencies and any other matters as the board deems appropriate.

[Id.]

Paragraph 57 of the Amended Complaint alleges, “[u]pon information and belief, no report was transmitted by the Planning Board prior to the adoption of the Siro Zoning ordinance on December 19, 2023, the 36th day after introduction of the ordinance.” This statutory breach claim is legally sufficient, irrespective of the Affordable Housing Consent Order.

In Count Three, Plaintiffs allege the SIRO Ordinance suggests illegal contract zoning since the Borough’s Master Plan, and specifically the Land Use Element and the Housing Element, was not amended by the Planning Board prior to the adoption of the SIRO Zoning. (Am. Compl. ¶¶64-68, Pa034). As observed by this Court, “[c]ontract zoning is illegal when, pursuant to an agreement, the municipality rezones property without complying with prescribed procedures for amending the master plan and zoning ordinance.” Toll Bros., Inc. v. Township of West Windsor, 334 N.J. Super. 77, 94 (App. Div. 2000)(citing Livingston Builders, Inc. v. Livingston Township, 309 N.J. Super. 370, 381-82 (App. Div. 1998)). Thus, Count Three states a valid cause of action.

In Count Four, Plaintiffs allege that the Borough's relinquishment of the twelve acres without public bidding violates N.J.S.A. 40A:12-13. (Am. Compl. ¶¶70-74, Pa035). N.J.S.A. 40A:12-13 sets forth the procedure that must be followed by a municipality for the sale real property. Subsection a. states, in pertinent part, that such sales shall be made:

[b]y open public sale at auction to the highest bidder after advertisement thereof in a newspaper circulating in the municipality or municipalities in which the lands are situated, by two insertions at least once a week during two consecutive weeks, the last publication to be not earlier than seven days prior to such sale.

[N.J.S.A. 40A:12-13(a)].

As alleged in Count Four, by repealing the IRO Zoning and relieving Green Brook of the obligation to dedicate the twelve acres of land, the Borough conveyed its right to the Land Dedication, and thus its interest in real property, through negotiation without public bid and for less than fair value. (Am. Comp., ¶¶69-74, Pa034-035). Accordingly, Count Four is sufficiently pleaded to withstand a motion to dismiss.

In Count Five, Plaintiffs allege that the Borough's award of a \$1.5 million improvements contract without bidding violates N.J.S.A. 40A:11-4. (Am. Compl. ¶¶75-80, Pa036). Specifically, N.J.S.A. 40A:11-4(a) provides

Every contract awarded by the contracting agent for the provision or performance of any goods or services, the cost of which in the aggregate exceeds the bid threshold, shall be awarded only by resolution of the governing body of the contracting unit to the lowest responsible bidder after public advertising for bids and bidding therefor, except as is provided otherwise in this act or specifically by any other law. The governing body of a contracting unit may, by resolution approved by a majority of the governing body and subject to subsections b. and c. of this section, disqualify a bidder who would otherwise be determined to be the lowest responsible bidder, if the governing body finds that it has had prior negative experience with the bidder.

[Id.]

The Amended Complaint alleges that “Resolution R-216-2023 and the Dedication Agreement evidence that the Borough awarded a contract to Green Brook for \$1.5 million in improvements to municipal property without public bid.” (Am. Comp., ¶¶76, Pa036). It further alleges that the value of the contract exceeds the bid threshold established by the Local Public Contracts Law, and the municipal improvements required by the Dedication Agreement to be completed by Green Brook could not be awarded without public bidding. (Am. Comp., ¶¶77-78, Pa036). Thus, Plaintiffs stated a statutory claim upon which relief can be granted.

Under the standard applied on a Rule 4:6-2(e) motion, these allegations must be accepted as true, and Plaintiffs must be given the benefit of a liberal interpretation of their Amended Complaint. Printing Mart, supra, 116 N.J. at 746;

Donato, *supra*, 374 N.J. Super. 483. The trial court’s failure to analyze each count’s sufficiency—focusing instead on the Affordable Housing Consent Order—contravenes Printing Mart.

In Leon v. Rite Aid Corp., 340 N.J. Super. 462, 471 (App. Div. 2001), the Appellate Division reversed a trial court’s dismissal of a Consumer Fraud Act complaint on Rule 4:6-2(e) grounds where “the trial judge did not confine herself to an evaluation of the complaint.” The Appellate Division held the trial court’s dismissal of the complaint was inappropriate in the context of an R. 4:6–2(e) evaluation. *Id.* at 471-72. Noting the general and liberal reading a court must employ in the Rule 4:6-2(e) context, the Appellate Division held “Plaintiff’s detailed complaint...is more than sufficient to withstand attack under R. 4:6–2(e), even if the claim is construed as a failure to specify an omitted material fact.”

Relative to the court’s confinement to the facts alleged in a Complaint on a Rule 4:6-2(e) motion, the Appellate Division in Leon noted that where statutory based claims area implicated, the importance of giving a liberal interpretation of a complaint is even more important. Specifically, the court stated:

Where the applicable law is a statute, such as the Consumer Fraud Act, which our courts have consistently held should be given a liberal interpretation in favor of consumers, then the “generous and hospitable” approach of a R. 4:6–2(e) analysis takes on an even greater significance.

[Id. at 472].

Here, Plaintiffs’ Amended Complaint implicates multiple statutory schemes, particularly the Municipal Land Use Law, the Local Lands and Buildings Law, and the Local Public Contracts Law. Consequently, as in the Leon case, the “generous and hospitable” approach under Printing Mart takes on even greater significance here and militates in favor of reinstatement of Plaintiffs’ Amended Complaint. Accordingly, reversal is warranted.

B. The Trial Court’s Collateral Attack Rationale Is Flawed. (T52:4-18)

The trial court asserted that Plaintiffs’ claims “roll back” into the Consent Order (T52:4-18), but this ignores their individual nature. For example, Plaintiffs’ claim in Count Five of the Amended Complaint hinges on the Borough’s contract award process, not the Consent Order’s validity. (Am. Compl. ¶¶75-80, Pa036). In fact, all of Plaintiffs’ claims, as demonstrated above, have a standalone nature.

Furthermore, the trial court’s focus on Plaintiffs’ Motion to Intervene in the Affordable Housing Matter further exceeded the scope of Rule 4:6-2(e), which limits review to the complaint’s face. The motion court gave short shrift to the necessary Rule 4:6-2(e) analysis, and instead improperly shifted the burden to Plaintiffs to seek relief only in the Affordable Housing Matter. Therefore, reversal is warranted.

C. A Dismissal Without Prejudice Does Not Cure the Error. (T55:18-24)

The trial court suggested Plaintiffs could seek relief via intervention (T55:18-24), but this speculative remedy does not excuse its failure to apply Rule 4:6-2(e). Dismissal, even without prejudice, improperly shifts the burden to Plaintiffs to re-litigate viable claims elsewhere, contravening Printing Mart's protective purpose. Consequently, this Court should reverse the trial court's Orders and reinstate Plaintiffs' Amended Complaint.

POINT II

THE MOTION COURT'S DISMISSAL WAS NOT WARRANTED BECAUSE UNDER EAST/WEST VENTURE v. BOROUGH OF FORT LEE, THE MOTION COURT WAS REQUIRED TO CONSOLIDATE PLAINTIFFS' JUSTICIABLE AND MERITORIOUS PREROGATIVE WRIT CLAIMS WITH THE AFFORDABLE HOUSING MATTER. (T45:17-56:7)

In opposition to Defendants' Motions to Dismiss, Plaintiffs argued that the court should not dismiss the case, but that consolidation under East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311 (App. Div. 1996) was warranted. The motion court failed to abide by the clear mandate in East/West relative to consolidation of these matters.

At oral argument, Plaintiffs' counsel raised the import of East/West in the context of the still pending Motion to Intervene. Specifically, the following was noted:

We are here to ensure that when the Borough takes actions it follows -- as we recited Supreme Court case law, government is required to turn square corners. You can't take shortcuts. You can't make fundamental changes to a settlement agreement of public importance, where East/West Ventures makes clear that a fairness hearing is required, and you can't shortcut that process by strategically limiting public participation on that by entering the consent order.

But again, that's only one facet of this case. There are four other counts in the complaint that speak to whether or not the Borough's actions with respect to the adoption of the ordinance, with respect to the relinquishment -- relinquishment of the land dedication, with respect to whether or not there was a legal contract zoning, these are all issues that were responded to within the 45-day period as prescribed by our rules, rules of court. So the action is timely.

The -- the arg -- the arguments with -- excuse me. The arguments with respect to intervention respectfully are moot. We have moved to intervene, just like Green Brook has moved to intervene. What counsel has failed to indicate to you, Your Honor, is in connection with that motion to intervene we're also actually seeking to consolidate the actions because we agree all these actions are related.

So, if anything, what I'm trying to avoid --I don't want two separate actions with two separate sets of orders. That's exactly what has happened up to this point. So we're seeking to consolidate these matters, whether it's before you, whether it's before Judge Sules, however the Court wants to determine it.

[T23:7-24:13].

In East/West, the Appellate Division considered a challenge to the Borough of Fort Lee’s ordinances related to affordable housing. See East West, 286 N.J. Super. at 320. Relevant to this appeal, the Appellate Division held that the trial court erred in dismissing the plaintiff’s complaint, which included prerogative writs challenges to the ordinances. Ibid. The court ruled that the challenges to the ordinances should have been consolidated with the affordable housing matter, rather than dismissed. Id. at 329. Specifically, the court held:

If the municipal action is challenged in a separate prerogative writs action, **the judge should consolidate that action with the pending proceeding** and hear and decide the challenge prior to entry of a final judgment of compliance. The judge must decide whether passage of the master plan amendment and ordinance, aside from the affordable housing issues raised in the prior fairness hearing, constitutes a valid exercise of the township's zoning power and is otherwise procedurally and constitutionally valid. See Riggs supra, 109 N.J. at 611–12. Of course, at that point, the ordinance will enjoy a presumption of validity. Id. at 610–11. If the municipal action is sustainable, a final judgment of compliance should be entered. **Thus, resolution of all issues relevant to the settlement and to the municipality’s fair share obligation will be resolved in a single proceeding.**

This procedure is, in our view, consistent with the directive of our Supreme Court in Mount Laurel II. There, the Court made clear that the remedies authorized by its opinion were intended to achieve compliance with the constitutional mandate “without interminable trials and appeals.” Mount Laurel II,

supra, 92 N.J. at 290.

[Id. at 328-329 (Emphasis added)].

Thus, in East/West, the Appellate Division made clear that “*all* issues relevant to the settlement and to the municipality's fair share obligation will be resolved in a single proceeding.” Id. The court reasoned that “[s]uch a procedure allays the fear that the municipal governing body, presumably protecting the public at large, ‘may be bargaining away its legislative duties without public scrutiny or political accountability.’” Id. at 325 (citations omitted).

Here, consolidation, as requested by Plaintiffs, was warranted and mandated on this record and the motion court’s decision to dismiss the case without prejudice was reversible error. The motion court improperly dismissed Plaintiffs’ Amended Complaint when the less draconian remedy of consolidation was warranted, especially to ensure that all matters with respect to the case be resolved in a single proceeding.

For these reasons, it is respectfully submitted that the Orders entered dismissing Plaintiffs’ Amended Complaint be reversed and that Plaintiffs’ Amended Complaint be reinstated and consolidated with the Affordable Housing Matter.

CONCLUSION

For the reasons set forth above, it is respectfully requested that this Court reverse the September 25, 2024, Orders granting Defendants' Motions to Dismiss and enter an order reinstating Plaintiffs' Amended Complaint.

Respectfully submitted,

BOCCHI LAW LLC

*Attorneys for Plaintiffs-Appellants,
Keith Frankel, Dennis Klein, and Alba Pennisi*

By: s/ Anthony S. Bocchi
Anthony S. Bocchi

Dated: March 21, 2025

Superior Court of New Jersey

Appellate Division

Docket No. A-000696-24

KEITH FRANKEL, DENNIS KLEIN,
and ALBA PENNISI,

Plaintiffs-Appellants,

v.

BOROUGH OF NORTH CALDWELL
and GREEN BROOK REALTY
ASSOCIATES, LLC,

Defendants-Respondents.

CIVIL ACTION

On Appeal From:
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, ESSEX COUNTY

Docket No. ESX-L-6344-23

Sat Below:
Hon. Russell J. Passamano, J.S.C.

Date of Submission: April 28, 2025

BRIEF ON BEHALF OF DEFENDANT-RESPONDENTS

BOROUGH OF NORTH CALDWELL

Of Counsel & On the Brief

JARRID H. KANTOR, ESQ.

Attorney ID# 03532-2006

On the Brief

MICHAEL A. SABONY, ESQ.

Attorney ID# 31987-2020

ALYSSA M. BLUE, ESQ.

Attorney ID# 42334-2023

ANTONELLI KANTOR RIVERA PC

354 Eisenhower Pkwy, Suite 1000

Livingston, New Jersey 07039

Tel.: 908-623-3676

Fax: 908-866-0336

jkantor@akrlaw.com

msabony@akrlaw.com

ablue@akrlaw.com

*Attorneys for Defendant-Respondent,
Borough of North Caldwell*

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
TABLE OF JUDGMENTS, ORDERS AND RULINGS	iv
TABLE OF TRANSCRIPTS.....	v
PRELIMINARY STATEMENT.....	1
PROCEDURAL HISTORY	3
COUNTER-STATEMENT OF FACTS.....	4
LEGAL ARGUMENT	6
I. STANDARD OF REVIEW.....	6
II. THE TRIAL COURT DID NOT COMMIT ANY ERRORS IN GRANTING THE BOROUGH’S MOTION TO DISMISS FOR FAILURE TO STATE CLAIM PURSUANT TO RULE. 4:6-2(E) AND DISMISSING APPELLANTS’ AMENDED COMPLAINT.	7
III. THE MOTION COURT’S DISMISSAL WAS WARRANTED AND THE MOTION COURT WAS NOT REQUIRED TO CONSOLIDATE THE APPELLANTS’ PEROGATIVE WRIT CLAIMS WITH THE AFFORDABLE HOUSING MATTER.....	17
CONCLUSION	20

TABLE OF AUTHORITIES

Cases

<u>Alexander's Dep't. Stores of N.J., Inc. v. Paramus</u> , 243 N.J. Super. 157 (App. Div. 1990)	12
<u>Alexander's Dep't. Stores v. Paramus</u> , 125 N.J. 100 (1991)	12
<u>Banco Popular N. Am. v. Gandi</u> , 184 N.J. 161 (2005)	6, 7
<u>Baskin v. P.C. Richard & Son, LLC</u> , 246 N.J. 157 (2021)	6
<u>Chesterbrooke Ltd. P'ship v. Plan. Bd. of Chester</u> , 237 N.J. Super. 118 (App. Div. 1989)	12
<u>Colucci v. Thomas Nicol Asphalt Co.</u> , 194 N.J. Super. 510 (App. Div. 1984) .	9
<u>Craig v. Suburban Cablevision, Inc.</u> , 140 N.J. 623 (1995)	6
<u>Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, PC</u> , 237 N.J. 91 (2019)	6
<u>East/West Venture v. Borough of Fort Lee</u> , 286 N.J. Super. 311 (App. Div. 1996)	17, 18
<u>Edwards v. Prudential Prop. & Cas. Co.</u> , 357 N.J. Super. 196 (App. Div. 2003)	7
<u>Hoffman v. Hampshire Labs, Inc.</u> , 405 N.J. Super. 105 (App. Div. 2009)	6
<u>Homes of Hope, Inc. v. Eastampton Twp. Land Use Plan. Bd.</u> , 409 N.J. Super. 330 (App. Div. 2009)	16
<u>Homes of Hope, Inc. v. Mount Holly Zoning Bd. of Adjustment</u> , 236 N.J. Super. 584 (Law. Div. 1989)	16
<u>In Re Adoption of N.J.A.C. 5:96</u> , 221 N.J. 1 (2015)	4
<u>In re Liquidation of Integrity Ins. Co.</u> , 214 N.J. 51 (2013)	8
<u>Leon v. Rite Aid Corp.</u> , 340 N.J. Super. 462 (App. Div. 2001)	9, 10

<u>Lum v. Bank of Am., 361 F.3d 217 n.3 (3d Cir. 2004)</u>	7, 10
<u>New Jersey Sports Productions, Inc. v. Bobby Bostick Promotions, LLC, 405 N.J. Super. 173 (Ch. Div. 2007)</u>	7
<u>Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511 (2006)</u>	8, 9
<u>S. Burlington N.A.A.C.P. v. Mount Laurel Twp., 67 N.J. 151 (1975)</u>	16
<u>Schulman v. Wolff & Samson, P.C., 401 N.J. Super. 467 (App. Div. 2008)</u>	6
<u>Selective Ins. Co. v. McAllister, 327 N.J. Super. 168 (App. Div. 2000)</u>	9
<u>Tri-State Ship Repair & Dry Dock Co. v. City of Perth Amboy, 349 N.J. Super. 418 (App. Div. 2002)</u>	16
<u>Warner Co. v. Sutton, 270 N.J. Super. 658 (App. Div. 1994)</u>	12, 18
<u>Winters v. N. Hudson Reg'l Fire & Rescue, 212 N.J. 67 (2012)</u>	8

Rules

<u>R. 4:33-1</u>	13
<u>R. 4:6-2(e)</u>	6, 8

TABLE OF JUDGMENTS, ORDERS AND RULINGS

ORDER DATED SEPTEMBER 25, 2024, GRANTING DEFENDANT GREEN
BROOK REALTY ASSOCIATES LLC’S MOTION TO DISMISS PURSUANT
TO R. 4:6-2(E)

.....Pa1

ORDER DATED SEPTEMBER 25, 2024, GRANTING DEFENDANT
BOROUGH OF NORTH CALDWELL’S MOTION TO DISMISS PURSUANT
TO R. 4:6-2(E)

.....Pa2-Pa3

TABLE OF TRANSCRIPTS

TRANSCRIPT OF SEPTEMBER 20, 2024, ORAL ARGUMENT.....1T

PRELIMINARY STATEMENT

This appeal from the trial court’s Order dismissing Plaintiffs-Appellants’, Keith Frankel, Dennis Klein, and Alba Pennisi (collectively, “Appellants”) Amended Complaint should be denied as it is without merit. Appellants’ arguments arise from a challenge by residents of the Borough of North Caldwell (the “Borough”) to a Court-approved Post Judgement Consent Order (“PJCO”) amending a Final Judgment between the Borough of North Caldwell (the “Borough”) and Green Brook Realty Associates, LLC (“Green Brook”) in connection with the Borough’s affordable housing obligations related to the Mount Laurel doctrine.

Appellants’ improper efforts to cloak a Mount Laurel challenge outside the Borough’s Mount Laurel action were properly rejected by the trial court. As Appellants were not parties to the Mount Laurel action, the trial court rightfully barred Appellants from challenging the Amended Settlement Agreement in this separate, unrelated action based on the principles of collateral estoppel and res judicata. Simply, Appellants’ failure to timely intervene in the Borough’s Mount Laurel action or object at the Borough’s January 25, 2019, Fairness Hearing. Moreover, Appellants’ requested relief in this action would lead to inconsistent orders between the Mount Laurel action and this matter. Such inconsistencies would lead to repetitive litigation, a waste of judicial

resources, and impede the overarching goal of developing affordable housing. In addition, inconsistent orders would jeopardize the likelihood of the Borough satisfying its housing obligations. Case law and public policy mandate Appellants cannot collaterally attack a judicially endorsed settlement agreement through this separate action. Therefore, it is respectfully submitted the Appellate Division affirm the trial court's Orders in full.

PROCEDURAL HISTORY

On September 29, 2023, Appellants commenced this action by filing a Complaint in Lieu of Prerogative Writs against the Borough and Green Brook, bearing docket number ESX-L-006344-23. [Pa4-Pa12]. Green Brook filed its Answer on December 12, 2023. [Pa13-Pa18]. On January 15, 2024, Appellants filed an Amended Complaint. [Pa19-Pa39]. Both the Borough and Green Brook filed Motions to Dismiss the Amended Complaint Pursuant to R. 4:6-2(e) on May 23, 2024. [Pa74-Pa87, Pa88-Pa257]. On July 17, 2024, Appellants filed a single opposition to both Motions to Dismiss. [Pa258-Pa300]. On September 24, 2024, the Court entered two Orders granting the Borough's and Green Brook's respective Motions to Dismiss. [Pa1, Pa2-Pa3].

On August 28, 2024, Appellants filed a Motion to Intervene and Consolidate in the Borough's Mount Laurel action, bearing Docket No. ESX-L-4696-15. [Pa305-Pa307]. In response, Green Brook filed a Cross-Motion to Intervene in the Mount Laurel action on September 19, 2024. [Pa308-Pa310]. As of the date of this submission, Appellants' Motion to Intervene and Consolidate and Green Brook's Cross-Motion to Intervene remain pending before the Court.

COUNTER-STATEMENT OF FACTS

By way of background, on July 10, 2015, the Borough filed a Mount Laurel declaratory judgment action in response to In Re Adoption of N.J.A.C. 5:96, 221 N.J. 1 (2015) (“Mount Laurel IV”) seeking a Final Judgment of Compliance and Repose (“JOR”) formally approving the Borough’s Housing Element and Fair Share Plan (the “Mount Laurel action”).

On February 15, 2019, the Court entered an Order approving the settlement agreements between the Borough and Fair Share Housing Center (“FSHC”), and the Borough and Green Brook, finding the settlement agreements were fair, reasonable, and adequately protected the interest of low- and moderate-income households. [Pa135-Pa142]. On January 25, 2019, the Court conducted a duly noticed Fairness Hearing. Thereafter, the Court entered an Order on February 15, 2019, memorializing the Court’s approval of the settlement agreements.

In part, the February 15, 2019, Order approved a project whereby a portion of the Green Brook Country Club (“GBCC”) would be developed into affordable housing, in partial fulfillment of the Borough’s Mount Laurel affordable housing obligations. In furtherance of the order, the Borough was to create a Green Brook Golf Course Overlay Zone to permit the construction of affordable housing (the “IRO Zoning”). Following a Compliance Hearing,

the Court issued a Conditional Judgment of Compliance and Repose. On August 3, 2020, issued a JOR approving the proposed developments and satisfaction of the Borough's affordable housing obligations. [Pa152-Pa154].

Green Brook later approached the Borough about a desire to alter certain details in the settlement. On November 27, 2023, the Borough and Green Brook entered into an Amended Settlement Agreement to modify the IRO Zoning. [Pa192-Pa240]. The modifications included in the Amended Settlement Agreement are permitted by the JOR and are necessary to ensure that the fifty units of affordable housing actually get built.

On January 11, 2024, the Court entered a PJCO determining the modified zoning and amended development is consistent with the amended Housing Element and Fair Share Plan of the Borough's Master Plan and the Amended Green Brook Settlement Agreement. [Pa78-Pa84]. Furthermore, the PJCO stated the change in the development was consistent with and would be deemed to be part of the 2020 JOR.

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

“Rule 4:6-2(e) motions to dismiss for failure to state a claim upon which relief can be granted are reviewed de novo.” Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021) (citing Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, PC, 237 N.J. 91, 108 (2019)).

On a motion to dismiss for failure to state a claim pursuant to R. 4:6-2(e), “the test is whether the alleged facts suggest a cause of action.” Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 626 (1995). In that connection, New Jersey law is clear that to defeat a motion to dismiss the claimant must “make allegations, which, if proven, would constitute a valid cause of action.” Schulman v. Wolff & Samson, P.C., 401 N.J. Super. 467, 473-74 (App. Div. 2008). By the same token, however, “[a] complaint may be dismissed for failure to state a claim if it fails to articulate a legal basis entitling plaintiff to relief.” Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 112 (App. Div. 2009).

Obviously “if the complaint states no basis of relief and discovery would not provide one, dismissal is the appropriate remedy.” Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005). Specifically, “[a] motion to dismiss ‘may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiff’s claim must be apparent from the

complaint itself.” New Jersey Sports Productions, Inc. v. Bobby Bostick Promotions, LLC, 405 N.J. Super. 173, 178 (Ch. Div. 2007) (quoting Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003)).

Generally, material outside of the pleadings may not be relied upon in deciding a R. 4:6-2(e) motion to dismiss. An exception permits courts to consider “exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.” Banco at 183 (2005) (quoting Lum v. Bank of Am., 361 F.3d 217, 221 n.3 (3d Cir. 2004)). Here, all documents submitted in support of the Borough’s Motion to Dismiss Appellants’ Complaint for Failure to State Claim are matters of public record and documents that form the basis of Appellants’ claims. Therefore, the inclusion of same was permitted for the Borough’s Motion to Dismiss Appellants’ Complaint.

II. THE TRIAL COURT PROPERLY GRANTED THE BOROUGH’S MOTION TO DISMISS AND DISMISSED APPELLANTS’ AMENDED COMPLAINT. (PA2-PA3)

The trial court’s decision was proper and should be affirmed in its entirety. Simply, Court did not err in applying the R. 4:6-2(e) standard. Appellants’ attempts to intervene and challenge the PJCO were untimely and amounted to a collateral attack on the order of another court. Thus, dismissal of Appellants’ Amended Complaint was proper and should be affirmed.

A. The Trial Court Correctly Held Appellants' Amended Complaint Amounted to a Collateral Attack Necessitating Dismissal. (T49:22-55:24)

The trial court did not err in dismissing Appellants' Amended Complaint. At the time of the filing of the Appellants' Complaint, the causes of action alleged by Appellants had already been expressly identified and approved by the PJCO. As Appellants failed to timely intervene in the Mount Laurel action and challenge the PJCO, the trial court properly determined Appellants could not collaterally attack the PJCO through this separate action.

Collateral estoppel is an equitable remedy that bars re-litigation of any issue that was determined in a prior action. In re Liquidation of Integrity Ins. Co., 214 N.J. 51, 66 (2013). Collateral estoppel applies when:

(1) [t]he issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

[Winters v. N. Hudson Reg'l Fire & Rescue, 212 N.J. 67, 85 (2012) (quoting Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 521 (2006)).]

“[T]he application of collateral estoppel is an issue of law to be determined by a judge in the second proceeding after giving appropriate weight to the factors bearing upon the issues.” Selective Ins. Co. v. McAllister,

327 N.J. Super. 168, 172 (App. Div. 2000) (quoting Colucci v. Thomas Nicol Asphalt Co., 194 N.J. Super. 510, 518 (App. Div. 1984)). In determining whether to apply collateral estoppel, courts should consider the following factors: “conservation of judicial resources; avoidance of repetitious litigation; and prevention of waste, harassment, uncertainty and inconsistency.” Olivieri, 186 N.J. at 521-22.

The Mount Laurel IV process is a bifurcated process. Once a settlement agreement is entered into between a municipality and FSHC/a developer, the agreed upon Fair Share Obligations are judged at a Fairness Hearing to determine if the settlement agreement is fair and reasonable to low- and moderate-income households and creates a realistic opportunity for the creation of affordable housing pursuant to the Mount Laurel Doctrine. After the Fairness Hearing, the Court conducts a Compliance Hearing to determine if the municipality complied with its affordable housing obligations. If the municipality complies with its affordable housing obligations, the municipality receives a JOR.

In the instant matter, Appellants essentially seek to overturn the decisions of two Courts: the Mount Laurel action and the trial court in this action. Appellants cite to Leon v. Rite Aid Corp. arguing “the trial judge did not confine herself to an evaluation of the complaint.” Leon, 340 N.J. Super. 462, 471 (App.

Div. 2001). However, the trial court properly considered documents from the Mount Laurel action in reaching its decision in this matter.

Although a R. 4:6-2(e) motion to dismiss is typically confined to the complaint, courts are explicitly permitted to consider “exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.” Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005) (quoting Lum v. Bank of Am., 361 F.3d 217, 221 n.3 (3d Cir. 2004)). The documents considered by the trial court included pleadings, orders, and public land use and municipal records. Therefore, the Mount Laurel action documents reviewed by the trial court are expressly within the exemption as matters of public record and were properly considered.

In this matter, the issues raised by Appellants relate solely to the issue of the development of GBCC and its inclusion in the Borough’s Housing Element and Fair Share Plan. Clearly, the development of GBCC is essential to the JOR as it is necessary to satisfy the Borough’s affordable housing obligations. Importantly, Appellants were not parties to the Mount Laurel action and failed to timely intervene or challenge the PJCO. Accordingly, case law and public policy expressly prohibit Appellants from collaterally attacking the PJCO in this separate action.

As has been stated, the issue of the development of GBCC was previously litigated and is essential to the JOR, which is a final judgment that satisfies the Borough's affordable housing obligations. The trial court was correct in finding, **“going through the prayers for relief in the amended complaint and matching it against what is in the consent order, . . . [the] amended settlement agreement, it all rolls back into that** and it's not so easily separated as Mr. Bocchi would . . . argue.” 1T, 52-13 to -18 (emphasis added).

Appellants' continuing and legally baseless efforts to collaterally attack Court Orders has led to a waste of judicial resources, repetitious litigation of the Mount Laurel action, and potentially an inconsistent order with the PJCO. Therefore, the trial court appropriately found Appellants are barred from collaterally attacking the PJCO in a separate action.

Moreover, Appellants did not timely seek intervention or object at the Fairness Hearing in the Mount Laurel action, despite having had unlimited opportunities to do so. An essential requirement for an individual to intervene to challenge the outcome of a case, or a court action within a case, is that the individual has standing to do so. In this context, Appellants were not a party to the Mount Laurel action as required to make such arguments. This is because **residents, like Appellants, have never been granted standing in a Mount**

Laurel action, especially in the context of challenging developments that provide affordable housing.

Intervention is governed by R. 4:33-1, which requires the movant to:

(1) claim an interest relating to the property or transaction which is the subject of the action, (2) show he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, (3) demonstrate that the applicant's interest is not adequately represented by existing parties, and (4) make a timely application to intervene.

[Warner Co. v. Sutton, 270 N.J. Super. 658, 662 (App. Div. 1994) (quotation marks omitted) (quoting Chesterbrooke Ltd. P'ship v. Plan. Bd. of Chester, 237 N.J. Super. 118, 124 (App. Div. 1989)).]

In that connection, in Alexander's Dep't. Stores v. Paramus, the New Jersey Supreme Court affirmed the Appellate Division's holding that:

[I]n its Mount Laurel opinions, the Supreme Court has made it very clear that the housing rights of low- and moderate-income persons can be asserted only by the persons themselves, by public interest organizations representing their interests, and by developers offering to build affordable housing.

Neighbors and taxpayers have never been accorded Mount Laurel standing. They cannot claim protection against zoning that unconstitutionally deprives others of housing opportunities, and they have an insufficient stake in the outcome of a suit to enforce the Mount Laurel rights of others.

[Alexander's Dep't. Stores of N.J., Inc. v. Paramus, 243 N.J. Super. 157, 165 (App. Div. 1990) (emphasis added).]

Thus, as Appellants were not parties in the Mount Laurel matter and failed to intervene on or challenge the PJCO, Appellants were rightfully barred from challenging the Amended Settlement Agreement between the Borough and Green Brook. Additionally, with regard to the Mount Laurel action, Appellants failed to timely intervene or challenge the PJCO entered by the Court on January 11, 2024. Therefore, the relief sought in Appellants' collateral attack through this action continues to waste judicial resources through the repetitious litigation of the Mount Laurel action, and potentially inconsistent Court Orders.

Moreover, the trial court was also correct in addressing the Appellants failure to intervene previously, holding "to say that [dismissal] would deprive [Appellants] of the ability to challenge really would ask the Court to ignore the fact . . . these [Appellants] are seeking to intervene in the Mount Laurel proceeding." 1T, 52-19 to -23.

Additionally, since dismissal of the Amended Compliant, Appellants have moved to intervene in the Fair Share Housing action, seemingly conceding such proceeding was the proper venue to assert the within claims. As the trial court went on to state, "the Court would not find that a dismissal of this case would leave [Appellants] without a remedy because the remedy would be that

which the judge in the Mount Laurel case determines appropriate. If any.” 1T, 53-15 to -18. Here, the Appellants do not have standing to intervene or challenge the Amended Settlement Agreement, nor should Appellants have been afforded standing to challenge the amended settlement agreement or PJCO in a separate action. Therefore, the trial court’s decision should be affirmed in its entirety.

B. Appellants’ Amended Complaint Fails to State Valid Claims and Was Properly Dismissed. (T49:22-55:24)

The Trial Court was correct in determining that the claims within Appellants’ Amended Complaint amounted to a collateral attack on the Order entered by the Court in the Mount Laurel action. Appellants’ arguments on appeal are without merit, as the claims asserted within their Amended Complaint were correctly rejected by the trial court as collateral attacks on the PJCO. Appellants’ claims all stem from the alleged actions of the Borough in carrying out their Mount Laurel requirements, which were approved by the Mount Laurel court after significant litigation and efforts by all involved.

As previously stated and emphasized by the trial court, all claims in the Amended Complaint relate back to the Mount Laurel action. The actions alleged by the Appellants in their Complaint include: (1) the Borough’s alleged illegal relinquishment of the twelve acres and alteration of the SIRO Zoning Ordinance; (2) the enactment of the SIRO Ordinance without a Planning Board report;

(3) illegal contracting through the creation of the SIRO Ordinance; and (4) the Borough's award of a \$1.5 million improvements contract.

However, these steps were taken by the Borough in compliance with the JOR and PJCO, both approved and entered by the court in the Mount Laurel action. In fact, the Court specifically stated within the PJCO that it is "Declared, Ordered and Adjudged" that:

1. The Amended Development is consistent with the amended Housing Plan Element and Fair Share Plan Element of the Master Plan and the Amended Green Brook Settlement Agreement.
2. The Amended Green Brook Settlement Agreement is fair and reasonable as it adequately protects the interests of low-and moderate-income households by satisfying, in part, the Borough's constitutional obligation to provide affordable housing.
3. The SIRO Zoning will provide land use regulations that conform to the constitutional obligation to provide affordable housing.
4. The change in the Development from the Original Development to the Amended Development is consistent with and shall be deemed to be part of the 2020 Final Judgment.
5. Other than the post-judgment change ordered above, the terms and conditions of the 2020 Final Judgment remain unchanged and the 2020 Final Judgement remains in full force and effect.

Thus, the Court again approved the JOR and further approved the PJCO. Both the parties as well as the Mount Laurel Court worked over the course of multiple years to reach the agreements which Appellants claim were arbitrary,

capricious and unreasonable. Thus, the trial court was correct in determining that the claims within Appellants' Amended Complaint amounted to a collateral attack on prior Court Orders, thereby requiring dismissal.

**C. New Jersey Public Policy and Public Interest
Significantly Weigh in Favor of the Trial Court's
Dismissal Being Upheld.**

As stated earlier, case law and public policy mandate Appellants cannot collaterally attack a judicially endorsed settlement agreement through this separate action. Therefore, Appellants' Amended Complaint was properly dismissed with prejudice.

“The public policy of this State has long been that persons with low and moderate incomes are entitled to affordable housing.” Homes of Hope, Inc. v. Eastampton Twp. Land Use Plan. Bd., 409 N.J. Super. 330, 337 (App. Div. 2009). The New Jersey Supreme Court has “recognized that the furnishing of housing for minority or underprivileged segments of the population inherently served the public welfare.” Homes of Hope, Inc. v. Mount Holly Zoning Bd. of Adj., 236 N.J. Super. 584, 588 (Law. Div. 1989) (quotation marks omitted). “It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation.” S. Burlington N.A.A.C.P. v. Mount Laurel Twp., 67 N.J. 151, 179 (1975). Furthermore, “the importance of

stability and finality to public actions.” has long been recognized by the New Jersey courts. Tri-State Ship Repair & Dry Dock Co. v. City of Perth Amboy, 349 N.J. Super. 418, 423 (App. Div. 2002).

Here, the trial court was correct in denying Appellants’ attempts to overturn the long-fought agreements entered into with respect to the Borough’s Mount Laurel obligations. To allow Appellants, who were not parties to the Mount Laurel action and did not timely intervene or challenge same, would be in direct conflict with the public policies recognized by the New Jersey courts. Granting this appeal would no doubt extend the time before the Borough is able to comply with its Mount Laurel obligation, aggravating the need for affordable housing within the Borough. Thus, the trial court’s dismissal of Appellants’ Amended Complaint, should be affirmed in its entirety.

III. THE TRIAL COURT’S DISMISSAL WAS PROPER AND CONSOLIDATION WITH THE MOUNT LAUREL IS INAPPROPRIATE.

In the Mount Laurel action, notice of the Fairness Hearing was provided pursuant to the requirements set forth in East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311 (App. Div. 1996). At the conclusion of the Fairness Hearing, the Mount Laurel court determined: (i) the settlement had apparent merit; (ii) that notice of the Fairness Hearing was properly made; (iii) the hearing was conducted on the settlement where those affected had

sufficient time to prepare; and (iv) that the settlement is “fair and reasonable to members of the protected class.” As such, the development of the GBCC had already been litigated and approved as fair and reasonable. Therefore, the Borough received a JOR based on the development of the GBCC. [Pa86-Pa87].

Despite Appellants’ arguments, the trial court correctly determined the claims presented within the Complaint ultimately roll back to the PJCO. Moreover, Appellants’ improperly point to East/West as showing the trial court erred in the dismissal should be rejected. While East/West addressed the consolidation of pending actions, Appellants’ own citation states “the judge should consolidate that action with the pending proceeding **and hear and decide the challenge prior to entry of a final judgment of compliance.**” Id. at 328-29 (emphasis added). Additionally, the Court in East/West affirmed the narrow holding that “a consent order settling land-use litigation involving a **substantial amendment** to the municipality’s zoning ordinance constituted unlawful contract zoning.” Id. at 324-25 (emphasis added) (citing to Warner Co. v. Sutton, 274 N.J. Super. 464, 479-80 (App. Div. 1994)).

Here, a JOR was issued on August 3, 2020, with respect to the Appellants’ allegations. Even considering the PJCO entered on January 11, 2024, the Court determined the modified zoning and amended development were consistent with the amended Housing Element and Fair Share Plan of the

Borough's Master Plan and the Amended Green Brook Settlement Agreement. Moreover, Appellants failed to allege a substantial amendment which would warrant the trial court having found an unlawful contract as provided in East/West. Therefore, Appellants' Amended Complaint fails to state valid claims and the trial court's dismissal of the Amended Complaint was correct and should be affirmed in full.

CONCLUSION

Based upon the foregoing, the Borough respectfully submits the trial court's decision must be affirmed in its entirety.

ANTONELLI KANTOR RIVERA PC

354 Eisenhower Pkwy, Suite 1000

Livingston, New Jersey 07039

Tel.: 908-623-3676

Fax: 908-866-0336

Attorneys for Defendant-Respondent

Borough Of North Caldwell

By: /s/ Jarrid H. Kantor

Jarrid H. Kantor, Esq.

Date: April 28, 2025

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-000696-24**

KEITH FRANKEL, DENNIS KLEIN, and
ALBA PENNISI,

Plaintiffs-Appellants,
v.

BOROUGH OF NORTH CALDWELL
and GREEN BROOK REALTY
ASSOCIATES, LLC,

Defendants-Respondents.

: Civil Action
:
: On Appeal from Two September 25,
: 2024 Orders Granting Motions to
: Dismiss
:
: Superior Court of New Jersey
: Law Division, Essex County
:
: Docket No. ESX-L-6344-23
:
: Sat Below:
: Hon. Russell J. Passamano, J.S.C.

**BRIEF ON BEHALF OF RESPONDENT
GREEN BROOK REALTY ASSOCIATES, LLC**

Of Counsel and on the Brief:
C. John DeSimone, III, Esq. (035101997)

On the Brief:
Stephen R. Catanzaro, Esq. (073402013)

DAY PITNEY LLP
One Jefferson Road
Parsippany, New Jersey 07054
(973) 966-6300
Attorneys for Respondent
Green Brook Realty Associates, LLC

TABLE OF CONTENTS

PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY	4
COUNTERSTATEMENT OF FACTS	5
I. The Green Brook Property and the Parties.....	6
II. The Declaratory Judgment Affordable Housing (Mount Laurel) Action and Resulting Settlement Agreements	6
A. The Initial Settlement Agreement – December 11, 2018	7
B. The January 25, 2019 Fairness Hearing and Resulting Order	9
C. The September 13, 2019 Compliance Hearing and Resulting Conditional and Final Judgment of Compliance and Repose.....	9
D. The Green Brook Settlement Agreement is Revised Between 2022-2023 to Address Concerns Raised by Municipal Officials and the Public, as Well as Changing Market Conditions	10
E. The ML Action Court Approves the Amended GB Settlement Agreement	15
III. This Lawsuit	16
IV. Appellants Never Sought to Intervene in the ML Action or Take Any Other Steps to Object to the Various Municipal and Court Actions That Culminated in the Entry of the Consent Order.....	17
V. Appellants Finally File a Motion to Intervene in the ML Action on June 21, 2024 – Six Months After the Consent Order Was Entered and Only After Respondents Filed Their Dismissal Motions in This Case	21
IV. The Trial Court Grants Respondents’ Dismissal Motions	22
STANDARD OF APPELLATE REVIEW.....	24

LEGAL ARGUMENT	25
I. THE TRIAL JUDGE CORRECTLY DISMISSED COUNTS 1-5 OF APPELLANTS’ COMPLAINT BY GRANTING THE DISMISSAL MOTION (DA28-DA32)	25
A. The Legal Standard for the Dismissal Motion	26
B. The Motion Judge Correctly Ruled That Appellants’ Claims are an Impermissible Collateral Attack on the Settlement of and the Final Judgment Entered in the ML Action (T49:22- 55:24)	26
1. The Amended Complaint is an Impermissible Attack on the Judicially Endorsed Settlement of the ML Action.....	28
2. Appellants’ Attempt to Paint Their Claims as “Independent” from the Consent Order and ML Action Fails, Which Renders Their Focus on the Supposed Viability of Their Claims as a Red Herring.....	30
3. The Motion Judge Correctly Applied the R. 4:6-2 Standard, Despite Appellants’ Arguments to the Contrary	32
4. The Motion Judge Correctly Rejected Appellants’ Argument That Dismissal Would Prevent Them From Challenging the Challenged Actions By Holding That The ML Action Judge Will Decide if Appellants Can Bring Their Claims Through the Intervention Motion	33
C. Appellants’ Argument For Consolidation Must be Rejected as Procedurally Improper and Substantively Deficient (Argument Not Raised by Appellants Below)	36
1. Appellants’ Consolidation Argument is Procedurally Improper and Barred on Appeal Because They Failed to Cross-Move or Assert Any Argument for Consolidation Below.....	37

2.	The Motion Judge Correctly Deferred to the ML Action Judge to Determine Which of Appellants' Claims, If Any, Will Be Heard	39
II.	ALTERNATIVELY, THIS COURT HAS AT ITS DISPOSAL SEVERAL OTHER GROUNDS FOR AFFIRMING THE TRIAL COURT'S DISMISSAL OF APPELLANTS' CLAIMS (Raised by Green Brook Below – But Not Addressed by the Trial Court).....	40
A.	Three Private Landowners Cannot Disturb the Judicially Endorsed Settlement of the ML Action, Which Resolved Years of Litigation and is Keyed to Bringing the Borough in Compliance With its Affordable Housing Obligation	41
1.	Appellants Failed to Follow the Precise Procedures for Setting Aside Judgments or Appealing Court Rulings.....	42
2.	Case Law and Public Policy Mandate That These Plaintiffs Cannot Collaterally Attack a Judicially Endorsed Settlement	44
3.	Public Policy Recognizes the Importance of the Settlement Agreements and Resulting Consent Order, Which Greatly Weighs Against Appellants' Claims	46
4.	It Would Be Improper to Undo the Consent Order Adopted by Judge Sules and Prior Efforts of Judge Gardner	47
5.	Appellants' Claims Run Afoul of New Jersey's Public Policy Concerning the Construction of Affordable Housing	48
	CONCLUSION	50

TABLE OF AUTHORITIES**Page(s)****Cases**

<i>In re Arlinghaus' Est.</i> , 158 N.J. Super. 139 (App. Div. 1978)	43
<i>Banco Popular N. Am. v. Gandi</i> , 184 N.J. 161 (2005)	26
<i>Camden Cnty. Energy Recovery Assocs., L.P. v. N.J. Dep't of Env't Prot.</i> , 320 N.J. Super. 59 (App. Div. 1999), <i>aff'd</i> , 170 N.J. 246 (2001)	25
<i>Catabene v. Wallner</i> , 16 N.J. Super. 597 (App. Div. 1951)	29
<i>East/West Venture v. Borough of Fort Lee</i> , 286 N.J. Super. 311 (App. Div. 1996)	37
<i>First Union Nat'l Bank v. Penn Salem Marina, Inc.</i> , 190 N.J. 342 (2007)	43
<i>Grillo v. State</i> , 469 N.J. Super. 267 (App. Div. 2021)	36
<i>Homes of Hope, Inc. v. Eastampton Twp. Land Use Plan. Bd.</i> , 409 N.J. Super. 330 (App. Div. 2009)	47
<i>Homes of Hope, Inc. v. Mount Holly Twp. Zoning Bd. of Adjustment</i> , 236 N.J. Super. 584 (Law. Div. 1989)	47
<i>Isko v. Plan. Bd. of Livingston</i> , 51 N.J. 162 (1968)	39
<i>Liebeskind v. Mayor & Mun. Council of Bayonne</i> , 265 N.J. Super. 389 (App. Div. 1993)	39
<i>Morris Cnty. Fair Hous. Council v. Boonton Twp.</i> , 197 N.J. Super. 359 (Law. Div. 1984), <i>aff'd</i> , 209 N.J. Super. 108 (App. Div. 1986)	46

<i>Myska v. N.J. Mfrs. Ins. Co.,</i> 440 N.J. Super. 458 (App. Div. 2015)	26
<i>In re N.J.A.C. 5:96 & 5:97,</i> 221 N.J. 1 (2015)	6
<i>Nieder v. Royal Indem. Ins. Co.,</i> 62 N.J. 229 (1973)	36
<i>Printing Mart-Morristown v. Sharp Elecs. Corp.,</i> 116 N.J. 739 (1989)	25
<i>Puder v. Buechel,</i> 183 N.J. 428 (2005)	45
<i>In re Ridgefield Park Bd. of Educ.,</i> 244 N.J. 1 (2020)	24
<i>Romero v. Gold Star Distrib., LLC,</i> 468 N.J. Super. 274 (App. Div. 2021)	42
<i>S. Burlington Cnty. N.A.A.C.P. v. Mount Laurel Twp.,</i> 67 N.J. 151 (1975)	47
<i>S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel,</i> 92 N.J. 158 (1983)	48
<i>State v. Harris,</i> 181 N.J. 391 (2004)	25
<i>State v. Lenihan,</i> 219 N.J. 251 (2014)	30
<i>State Highway Comm'r ex rel. State v. Speare,</i> 86 N.J. Super. 565 (App. Div. 1965)	43
<i>Tri-State Ship Repair & Dry Dock Co. v. City of Perth Amboy,</i> 349 N.J. Super. 418 (App. Div. 2002)	43

Statutes

Fair Housing Act of 1985, N.J.S.A. 52:27D-301 to 52:27D-329.20	6
Local Lands and Buildings Law, N.J.S.A. 40A:12-1, <i>et seq.</i>	15

Local Public Contracts Law, N.J.S.A. 40A:11-1, *et seq.*15

Municipal Land Use Law, N.J.S.A. 40:55D-2.....13

Rules

R. 2:4-1.....43

R. 4:6-2.....26

R. 4:49-2.....41, 42

R. 4:50-1.....41

R. 4:50-2.....42

Other Authorities

Pressler & Venriero, *Current N.J. Court Rules*, cmt. 4.1.1 on R. 4:6-2 (GANN
2024)25

TABLE OF ORDERS/JUDGMENTS/RULINGS

September 25, 2024 Order Granting Borough Motion to Dismiss Pa001

September 25, 2024 Order Granting Green Brook Motion to Dismiss. Pa002

PRELIMINARY STATEMENT

The motion judge was correct to dismiss the claims asserted by plaintiffs/appellants Keith Frankel, Dennis Klein, and Alba Pennisi (“Appellants”) against defendants/respondents Green Brook Realty Associates, LLC (“Green Brook”) and the Borough of North Caldwell (the “Borough”) (collectively, “Respondents”). In short, the motion judge properly determined that Appellants’ lawsuit was an impermissible collateral attack on the final judgment that was entered in the Borough’s *Mount Laurel* affordable housing declaratory judgment action at Docket No. ESX-L-4696-15 (the “ML Action”), and that the issue of whether Appellants’ claims should be heard should be decided by the judge in the ML Action as part of Appellants’ currently pending intervention motion in that case.

In December 2018, Green Brook, the Borough, and Fair Share Housing Center (“FSHC”) entered into a pair of settlement agreements that resolved the ML Action and memorialized the Borough’s *Mount Laurel* affordable housing compliance plan, with Green Brook agreeing to convert its golf club into a 50 affordable unit inclusionary development. A Final Judgment of Compliance was entered in August 2020. Despite being aware of the settlements, Appellants never sought to intervene in the ML Action to challenge any aspect of the settlements.

Between 2022 and 2023, Green Brook and the Borough negotiated an amendment to the Green Brook settlement and the proposed development that still

included the 50 affordable units but changed the development to include 267 age-restricted townhomes. The first municipal action in this regard was an August 2023 Memorandum of Understanding, which Appellants challenged by filing their initial Complaint in this action in September 2023. In November 2023, the Borough adopted a series of resolutions and ordinances, culminating in Green Brook, FSHC, and the Borough executing an amendment to their settlement agreement. In January 2024, a Consent Order was entered by the Court in the ML Action amending the August 2020 Final Judgment. The Consent Order constitutes a final judgment.

Appellants then filed an Amended Complaint in this action on January 15, 2024 – four days after entry of the Consent Order. In that pleading, Appellants expressly acknowledged the entry of the Consent Order in the ML Action, yet did not challenge it either in the Amended Complaint or through an intervention motion in the ML Action. Instead, Appellants in this action challenge the resolutions, ordinances, and settlement agreement that inform and are approved by the Consent Order. On this front, Appellants are lodging a collateral attack on the Consent Order (despite failing to assert a direct claim against it) by challenging each of the component parts that were already approved by the Court in the ML Action.

In light of the above, Respondents filed dismissal motions in May 2023 pursuant to R. 4:6-2, asserting various arguments regarding Appellants' improper collateral attack on the Consent Order. While the dismissal motions were pending,

Appellants in late June 2024 filed a motion to intervene and consolidate in the ML Action. That motion is still pending.

Following argument, the motion judge dismissed Appellants' Amended Complaint *without* prejudice, ruling that Appellants' claims were an impermissible collateral attack against the Consent Order. He further held that the issues raised in the Amended Complaint should have been brought in the ML Action and, in light of the then (and still)-pending intervention motion in that case, the ML Action judge would determine whether Appellants' claims should be permitted. That is why the motion judge dismissed the case without prejudice – so that Appellants can attempt to prosecute their claims in the appropriate forum, i.e. to the court in the ML Action.

In a surprising approach, Appellants' brief gives short shrift to the collateral attack issue, which was the core of the motion judge's ruling. Instead, Appellants argue that the Court misapplied the R. 4:6-2 standard because the judge's review supposedly required a detailed analysis as to whether Appellants' claims asserted legally cognizable causes of action. That argument is wrong and a red herring. The motion judge determined as a threshold issue that the claims were brought before the wrong court and, therefore, whether Appellants pled *prima facie* causes of action was irrelevant to the inquiry. On that front, the motion judge was also right to defer to the judge in the ML Action to decide whether to allow Appellants to bring their challenges to the Consent Order and the various municipal actions it approved.

PROCEDURAL HISTORY

On September 29, 2023, Appellants filed their initial Complaint in Lieu of Prerogative Writs. (Pa004a-012a.) On January 15, 2024, Appellants filed their Amended Complaint. (Pa019a-Pa039a.) The Amended Complaint asserts five (5) causes of action: Count One alleges that the Borough's actions were arbitrary, capricious and unreasonable; Count Two alleges violation of the MLUL; Count Three alleges Contract Zoning; Count Four alleges violation of the Local Lands and Buildings Law, N.J.S.A. 40A:12-1, *et seq.*; and Count Five alleges violation of the Local Public Contracts Law, N.J.S.A. 40A:11-1, *et seq.* (*Id.*)

On May 23, 2024, Respondents each filed motions seeking the dismissal of Appellants' Amended Complaint. Oral argument was heard on those motions on September 20, 2024. (T1-44.) Following argument, the Hon. Russell J. Passamano, J.S.C. issued his oral decision granting Respondents' motions. (T45-56.) He issued corresponding Orders later that day dismissing Appellants' Amended Complaint without prejudice (the "Dismissal Orders"). (Pa001; Pa002.)

On November 8, 2024, Appellants filed their Notice of Appeal, challenging the Dismissal Orders. (Pa069.) On March 21, 2025, Appellants filed their Amended Opening Brief. This timely Respondent Brief follows.

COUNTERSTATEMENT OF FACTS

Appellants' brief provides the Court with an alarmingly narrow summary of the facts and procedural history that informed and justified the motion judge's dismissal of the Amended Complaint. It is clear that Appellants are trying to hide from the history of the ML Action, as well as their own procedural missteps, in an effort to undermine the motion judge's well-reasoned decision.

At its core, this case is an attack on the finality of judgments, settlement agreements, and judicial and municipal action – all in the context of *Mount Laurel* litigation. Through this Counterstatement of Facts, Green Brook will highlight the extensive factual and procedural history – all of which are a matter of public record.

The below explores the following: (I) the Green Brook Property and the history of the parties; (II) the *Mount Laurel* declaratory judgment action, including the negotiated and judicially endorsed settlement agreement that would have Green Brook develop an inclusionary development with a substantial contribution towards the Borough coming into compliance with its Third Round Obligation; (III) Appellants' prerogative writ action; (IV) Appellants' initial failure to intervene or otherwise challenge the various steps that culminated in the ML Action court judicially endorsing the settlement, (V) Appellants' belated intervention and consolidation motion in the ML Action, which is still pending; and (VI) Respondents' dismissal motions and the Court's reasoning for granting same. Each

of these categories assist in informing this Court as to why the motion judge properly granted Respondents' dismissal motions.

I. The Green Brook Property and the Parties

Green Brook is the owner of property located at 100 West Greenbrook Road, North Caldwell, New Jersey 07006, which is Block Lot 1600, Lot 1 on the official tax maps for the Borough of Caldwell (the "Property"). The Property was previously developed as a golf course known as the Green Brook Country Club. The Property is 99.96 total acres in North Caldwell, with an additional 71.2 acres located in the adjacent municipality of the Township of Fairfield. As detailed below, Green Brook intends to redevelop the Property with an inclusionary development.

Appellants are the purported owners of real property located within the Borough. (See Pa019a at ¶¶ 1-3.) Upon information and belief, at least two were members of the Green Brook Country Club.

II. The Declaratory Judgment Affordable Housing (Mount Laurel) Action and Resulting Settlement Agreements

Exploring the genesis of the settlement of the *Mount Laurel* action is critical to informing the Court's understanding of the extraordinary relief Appellants seek through their Amended Complaint and why the trial court dismissed their claims.

On July 2, 2015, the Township filed a declaratory judgment action in Superior Court of New Jersey, Essex County, under Docket No. ESX-L-4696-15 (the ML Action). Through the ML Action the Township sought a declaration of its

compliance with the *Mount Laurel* doctrine and the Fair Housing Act of 1985 (N.J.S.A. 52:27D-301 to 52:27D-329.20), in direct response to the New Jersey Supreme Court's ruling in *In re N.J.A.C. 5:96 & 5:97*, 221 N.J. 1 (2015) (*Mount Laurel IV*). The ML Action was a complex, multi-party litigation.

Over the course of the next several years, the Township and FSHC negotiated the terms of the Township's affordable housing obligations. The ML Action was presided over by Robert H. Gardner, J.S.C. and Richard T. Sules, J.S.C.

A. The Initial Settlement Agreement – December 11, 2018

On December 11, 2018, Green Brook and the Borough entered into a Settlement Agreement, whereby Green Brook agreed to build an inclusionary development on the Property (the "Initial GB Settlement Agreement"). (Pa094a-110a.) Under the terms of the Initial GB Settlement Agreement, the proposed development consisted of 99 non-age restricted townhomes, 160 age-restricted townhomes, 117 assisted living units, a total of fifty (50) affordable housing units (comprised of 13 assisted living units, 25 non-age restricted rental units, and 12 age-restricted rental units), as well as rights to maintain and operate the existing

clubhouse (for the Green Brook Country Club) as a restaurant and catering facility (the “Original Development”). (*Id.*)¹

Also on December 11, 2018, the Borough and FSHC entered into an Amended Settlement Agreement to resolve the ML Action (the “Amended FSHC Settlement Agreement”). (Pa111a-134a.) The Amended FSHC Settlement Agreement amended an earlier version of the agreement that had been entered into back in September 2017, before Green Brook approached the Borough about a possible inclusionary development on the Property. (*Id.*) The Amended FSHC Settlement Agreement provides, among other things, that the Borough will adopt an Inclusionary Residential Overlay Zone to allow for Green Brook to develop the Property (the “IRO Zoning”). (Pa114a-115a at ¶ 8(d).)

In essence, the Amended FSHC Settlement Agreement resolved the ML Action by establishing a plan for the Borough to come into compliance with its Third Round *Mount Laurel* affordable housing obligation, with the Green Brook development playing a significant role.

¹ The redevelopment of the Green Brook Country Club is also vital for the Township of Fairfield to meet its affordable housing obligations, as the site is also part of Fairfield’s compliance plan.

B. The January 25, 2019 Fairness Hearing and Resulting Order

On February 15, 2019, following a January 25, 2019 fairness hearing, Judge Gardner entered an Order approving the Initial GB Settlement Agreement and Amended FSHC Settlement Agreement (the “Initial Settlement Order”). (Pa135a-142a.) The Initial Settlement Order provides, among other things, that (i) the agreements are fair, reasonable and adequately protect the interest of low and moderate income households, (ii) the Borough shall adopt and submit a Housing Element and Fair Share Plan (“HEFSP”) within 120 days, with a Compliance Hearing to follow to consider approval of the HEFSP and the issuance of a Judgment of Compliance and Repose, and (iii) a significant portion of the Borough’s Third Round Obligation shortfall will be cured through Green Brook’s Original Development. (Pa138a-141a.) The Initial GB Settlement Agreement and Amended FSHC Settlement Agreements are attached to and made part of the Initial Settlement Order. (Pa139a.)

C. The September 13, 2019 Compliance Hearing and Resulting Conditional and Final Judgment of Compliance and Repose

In accordance with the Initial Settlement Order, the Borough prepared a HEFSP and supporting documentation, which was adopted by the Borough’s Planning Board on August 12, 2019 and endorsed by the Borough Council on August 13, 2019. (Pa146a.) The Borough’s HEFSP specifically references the Green Brook

Golf Course Overlay Zone and the Original Development and attaches the Initial GB Settlement Agreement as an exhibit. (Pa153a-154a.)

On September 13, 2019, the Court held a Compliance Hearing. (Pa147a.) On October 8, 2019, the Court entered a Conditional Judgment of Compliance to approve the HEFSP (the “Conditional Judgment”). (Pa147a-148a.) The Conditional Judgment specifically references the Original Development as contributing towards the Borough’s unmet *Mount Laurel* Third Round Obligation and otherwise set various conditions to be met before a final judgment would enter. (Pa150a-151a.)

On August 3, 2020, the Court entered an Order Finalizing the Borough’s Judgment of Compliance and Repose (the “Final Judgment”), which held that all of the conditions of the Conditional Judgment had been satisfied. (Pa153a-154a.) The Final Judgment further held that the Court in the ML Action would retain jurisdiction for certain limited purposes. (*Id.*)

D. The Green Brook Settlement Agreement is Revised Between 2022-2023 to Address Concerns Raised by Municipal Officials and the Public, as Well as Changing Market Conditions

At the time of the Initial GB Settlement Agreement, both municipal officials and residents raised concerns about the planned Green Brook Country Club development including: (1) additional school age children in the market rate homes, impacting a crowded school system; (2) four-story buildings on the site; (3) a large assisted living building located near existing residential homes; and (4) the

continuation of the restaurant/catering facility at the existing Green Brook Country Club clubhouse.

Green Brook began to evaluate opportunities to revise the concept plan and address the concerns raised by the Borough. In or around 2022, Green Brook approached the Borough with a plan to construct 100% active adult housing (55+) (no school age children), construct only townhomes and two-story flats, and eliminate both the permitted restaurant/banquet use and the assisted living facility. The proposal had the added benefit of less peak hour traffic since active adult residents typically have peak traffic times different than the overall road system. Borough public officials preferred the newly proposed plan, especially because it (1) reduced the overall number of residential units on the site, and (2) preserved the agreed upon 50 affordable units promised in the Settlement Agreement. The revised plan also tracked changes in market conditions by providing much-needed senior housing to the community. As a result, Green Brook, the Borough, and FSHC negotiated revisions to the agreements and, ultimately, agreed upon a framework for an amended development proposal.

On August 15, 2023, the Borough adopted Resolution R-157-2023, entitled “A Resolution Authorizing the Execution of a Memorandum of Understanding with Green Brook Realty Associates, LLC in Connection with the Future Development of Green Brook Country Club” (the “MOU Resolution”). (Pa162a-167a.) The MOU

Resolution provides, among other things, that the Borough would repeal the IRO Zoning to remove the age-targeted housing, the assisted living use, all three- and four-story buildings, and the restaurant/banquet use, and replace it with 100% age-restricted housing as recognized under the Federal Fair Housing Act, and with the same affordable housing obligation. (*Id.*) The IRO Zoning would be repealed and replaced with a new Senior Inclusionary Residential Overlay Zone (the “SIRO Zoning”). (*Id.*)

Under the MOU Resolution and the proposed SIRO Zoning, the Borough’s officials determined that these revisions to the development plans would benefit the Borough by (i) restricting the development to a 100% active adult community, with the intention to eliminate school age children from the non-affordable housing development and reduce peak hour traffic, (ii) eliminate all three- and four-story buildings, over parking, condo flat buildings, and (iii) eliminate public use of the restaurant/banquet facility. (Pa162a-167a.) In addition, Green Brook would no longer be required to donate 12 acres of land, instead agreeing to provide services, monetary support, work and materials to the Borough valued at \$1.5 million. (*Id.*)²

² Appellants’ initial Complaint was filed on September 29, 2023 and challenged the adoption of the MOU, as discussed further below.

On November 11, 2023, the Borough adopted a series of resolutions and introduced an ordinance in furtherance of the efforts to amend its agreement with Green Brook:

- **Resolution R-222-2023** (the “MOU Repeal Resolution”) – This Resolution repeals the MOU resolution, citing the Borough and Green Brook having negotiated an amendment to the Initial GB Settlement Agreement, which will supersede the MOU. (Pa169a.)
- **Resolution R-216-2023** (the “Discharge Resolution”) – This Resolution authorizes the Mayor to execute a discharge of Right to Acquire Land and Service Agreement between the Borough and Green Brook. That agreement will memorialize the Borough’s agreement to no longer require Green Brook to donate the 12 acres of land in exchange for services, monetary support, work and materials to the Borough valued at \$1.5 million. (Pa171a.)
- **Resolution R-215-2023** (the “Amended GB Settlement Resolution”) – This Resolution authorizes the Borough to execute an Amended and Restated Settlement Agreement with Green Brook. (Pa173a.)
- **Ordinance O-25-2023** (the “SIRO Zoning Ordinance”) – This Ordinance proposes to repeal and replace the IRO Zoning with the new SIRO Zoning.³ (Pa175a-191a.)

On November 27, 2023, in accordance with the series of resolutions adopted November 13, 2023, the Borough and Green Brook entered into an Amended and Restated Settlement Agreement (the “Amended GB Settlement Agreement”). (Pa192a-240a.) As noted above, the Amended GB Settlement Agreement (and the

³ A hearing was held on the SIRO Zoning Ordinance on December 19, 2023, at which a vote was held and approved the adoption of the ordinance. (Pa175a-191a.)

SIRO Zoning Ordinance) provides for the same number of affordable units (50) but modifies the overall development plan. (*Id.*) Specifically, the amended development plan consists of a reduced number of market-rate units (267 age-restricted townhomes or flats) but continues to provide the 50 affordable units comprised of 25 non-age restricted rental units and 25 age-restricted rental units, with the same bedroom distribution and recreation amenities for the units as had been previously provided (the “Final Development”). (*Id.*) To be clear, both the Original Development and the Final Development contemplated the Green Brook Country Club being converted from a golf course into an inclusionary development benefitting two towns, so that aspect has never changed.

The Amended GB Settlement Agreement was entered into after extensive negotiations and considerations by both Green Brook and the Borough, with the Borough determining that the SIRO Zoning is more consistent with the Borough’s planning objectives and the purposes of zoning under the Municipal Land Use Law, N.J.S.A. 40:55D-2 (“MLUL”). (Pa174a-191a; Pa192a-240a.)⁴

⁴ Also on November 27, 2023, in accordance with the Discharge Resolution, the Borough and Green Brook executed a Discharge of Right to Acquire Land and Service Agreement. (Pa241a-247a.)

E. The ML Action Court Approves the Amended GB Settlement Agreement

On December 28, 2023, counsel for the Borough submitted to the court a proposed Post-Judgment Consent Order on behalf of all of the parties to the ML Action. (Da002-Da009.) In the service letter, the parties requested that the court determine that the SIRO Zoning and Amended GB Settlement Agreement is consistent with the amended HEFSP and that the change from the original IRO Zoning to the SIRO Zoning is consistent with the Final Judgment. (*Id.*) Even though the submittal of the proposed Post-Judgment Consent Order was publicly available, Appellants never sought to intervene or object.

Two weeks after its submittal, on January 11, 2024, Judge Sules entered the Post-Judgment Consent Order (the “Consent Order”). (Pa078a-084a.) The Consent Order goes into extensive detail about the procedural history of the ML Action and the efforts made by the parties and the Court to resolve the case bring the Borough into compliance with its affordable housing obligation. (*Id.*) After the recitals, the Court states that it is “Declared, Ordered and Adjudged” that:

1. The Amended Development is consistent with the amended Housing Plan Element and Fair Share Plan Element of the Master Plan and the Amended Green Brook Settlement Agreement.
2. The Amended Green Brook Settlement Agreement is fair and reasonable as it adequately protects the interests of low-and moderate-income households by satisfying, in part, the Borough’s constitutional obligation to provide affordable housing.

3. The SIRO Zoning will provide land use regulations that conform to the constitutional obligation to provide affordable housing.
4. The change from the Original Development to the Final Development is consistent with and shall be deemed to be part of the 2020 Final Judgment.
5. Other than the post-judgment change ordered above, the terms and conditions of the 2020 Final Judgment remain unchanged and the 2020 Final Judgment remains in full force and effect.

(Pa083a-084a.) In essence, the Consent Order operated to amend the previously entered Final Judgment, with the primary change being the modifications from the Original Development to the Final Development (but keeping the same number of affordable units).

III. This Lawsuit

Appellants filed their initial Complaint in Lieu of Prerogative Writs on September 29, 2023. (Pa004a-012a.) On January 15, 2024, four days after the filing of the Consent Order, Appellants filed their Amended Complaint. (Pa019a-Pa039a.)

Appellants' Amended Complaint challenges and seeks to overturn the MOU Resolution (even though it is moot by virtue of the MOU Repeal Resolution), the SIRO Zoning Ordinance, the Discharge Resolution and Discharge Agreement, and the Amended GB Settlement Agreement (collectively, the "Challenged Actions"). (*Id.*) Notably, the Amended Complaint does not directly challenge the Consent Order – just each of its component parts.

At paragraph 42 of the Amended Complaint, Appellants specifically acknowledge the then-recent filing of the Consent Order. The paragraph reads:

42. The consent order was entered on January 11, 2024 by the Honorable Richard R. Sules, J.S.C.

(*Id.*) Notwithstanding, even though at that time there was sufficient time to move to intervene and to seek reconsideration of the Consent Order, or even to move to intervene and appeal, Appellants did not do so. Instead, they continued to pursue this litigation which as will be discussed below, is a blatant indirect and collateral attack on the finality of the Consent Order – as found by the motion judge. (*Id.*)

IV. Appellants Never Sought to Intervene in the ML Action or Take Any Other Steps to Object to the Various Municipal and Court Actions That Culminated in the Entry of the Consent Order

A critical fact to the dismissal motions and this appeal is that the Appellants are trying to unravel years of *Mount Laurel* litigation despite their blatant failure to engage in the ML Action. A pointed examination of Appellants’ conduct in this regard is informative and explains why their claims were dismissed.

Appellants failed to seek to intervene or object in the ML Action until June 21, 2024 – after Respondents filed their dismissal motions. This includes:

- Appellants never sought to intervene in the ML Action and otherwise never challenged the resolution authorizing or the Borough’s entry into the December 11, 2018 Initial GB Settlement Agreement and FSHC Settlement Agreement.

- Appellants never sought to intervene in the ML Action and otherwise never objected at the January 25, 2019 Fairness Hearing.
- Appellants never sought to intervene in the ML Action and otherwise never challenged the Court's entry of the February 15, 2019 Initial Settlement Order, which approved the Initial GB Settlement Agreement.
- Appellants never sought to intervene in the ML Action and otherwise never objected at the September 13, 2019 Compliance Hearing.
- Appellants never sought to intervene in the ML Action and otherwise never challenged the Court's entry of the October 8, 2019 Conditional Judgment.
- Appellants never sought to intervene in the ML Action and otherwise never challenged the Court's entry of the August 3, 2020 Final Judgment.
- Appellants never sought to intervene in the ML Action and otherwise never challenged any of the aforementioned actions between August 2020 and September 2023.

Appellants' first challenge to any aspect of the Green Brook development came by way of its initial Complaint on September 29, 2023. At this point, it had been **almost 5 years** since the Initial GB Settlement Agreement and Amended FSHC Settlement Agreement had been executed, and **more than 3 years** since the Court entered the Final Judgment.

Now, Appellants seek to challenge various actions taken by the Borough in connection with the adoption and implementation of the November 2023 Amended

GB Settlement Agreement and resulting amended Final Judgment (i.e. the Consent Order). Notably, however, Appellants chose to assert its challenges to the MOU Resolution, the SIRO Zoning Ordinance, the Discharge Resolution and Discharge Agreement, and the Amended GB Settlement Agreement in a brand new prerogative writ lawsuit instead of seeking to intervene in and raise them in the ML Action. Appellants never sought to intervene in or challenge the entry of the Consent Order, which explicitly approves of each of the actions Appellants challenge in this lawsuit. In this regard, Appellants seek to challenge the components of an already entered Order but have never challenged the Order itself.

On or about March 28, 2024, more than two months after admitting their awareness of the Consent Order and beyond the time to challenge the Consent Order through motion practice or an appeal, prior counsel for Appellants sent a letter dated March 27, 2024 to Green Brook's counsel via FedEx Overnight Mail (the "March 2024 Letter"). (Pa250a-Pa252a.) The letter is addressed to Judge Sules, citing that it is being sent in connection with both this action and the ML Action. (*Id.*) For some unknown reason, Appellants never filed the letter on eCourts. (*Id.*)

In the March 2024 Letter, Appellants requested that the Consent Order be vacated. (Pa252a.) The asserted basis for the requested relief was apparently the filing of this lawsuit, which Appellants argued should have caused Green Brook, the Borough, and FSHC to not file the Consent Order with the Court. (*Id.*)

The March 2024 Letter opens with the concession that the Challenged Actions in Appellants’ prerogative writ action “formed the basis for [the Consent Order].” (Pa251a) (emphasis added.) In the letter, Appellants’ counsel states: “I do not litigate affordable housing matters and thus am not familiar with the unique procedural requirements that govern participation or intervention in [the ML Action].” (*Id.*) Appellants sent the letter as a cover for their failure to intervene and timely challenge the entry of the Consent Order. Indeed, the letter closes asking for legal advice from the Court, stating that they are “request[ing] some direction as to whether a motion to intervene is required or there is some other mechanism for having the Court reconsider its entry of the [Consent Order].” (*Id.*)

On April 2, 2024, Green Brook’s counsel sent a letter in response to the March 2024 Letter. (Pa255a-257a.) In that letter, Green Brook objected to the March 2024 Letter and the requested relief because (i) it was not filed via eCourts, as is required, (ii) the letter impermissibly requests legal advice from the Court, (iii) Appellants had not intervened in the ML Action and, therefore, cannot seek affirmative relief, and (iv) substantively, the request was way out of time, having being filed more than 80 days after the entry of the Consent Order. (*Id.*) Lastly, the letter notes that Appellants clearly knew about the ML Action, because it is specifically referenced in Appellants September 29, 2023 original Complaint – almost two (2) months before the filing of the proposed Consent Order.

The Court in the ML Action properly did not take any action with respect to Appellants' March 2024 Letter. Appellants then waited an additional three (3) months before moving to intervene in the ML Action.

V. Appellants Finally File a Motion to Intervene in the ML Action on June 21, 2024 – Six Months After the Consent Order Was Entered and Only After Respondents Filed Their Dismissal Motions in This Case

Respondents filed their dismissal motions on May 23, 2024. (Pa074a-Pa075a; Pa088a-Pa090a.)⁵ On June 21, 2024, Appellants filed a motion in the ML Action seeking to intervene in the ML Action and consolidate it with this action. (1T16:5-9.) That motion, as well as Green Brook's cross-motion to intervene for the purpose of defending against any claims asserted or arguments raised by Appellants, were denied without prejudice. Appellants refiled their motion in the ML Action on August 28, 2024, and Green Brook refiled its cross-motion on September 19, 2024. (Pa305a-307a; Pa308a-310a.) Those motions are still pending.

⁵ On May 3, 2024, the motion judge entered a Case Management Order that authorized Respondents to file dispositive motions to determine whether the case should proceed. (Da001.)

VI. The Trial Court Grants Respondents' Dismissal Motions

The motion judge's decision was detailed and well-reasoned. (T45-56.) To briefly summarize, Judge Passamano determined that Appellants' Amended Complaint and the relief sought therein was an impermissible collateral attack on the Consent Order, and whether such an attack should be heard should be left to the sound discretion of Judge Sules in the ML Action (referring to the pending intervention motion). (T49-T55.) Specifically, the motion judge first held that the items raised in this case should have sought to be brought in the ML Action:

The Court would agree with the arguments advanced by Mr. Kantor and Mr. Catanzaro that a challenge to the validity of the consent order that had been entered by Judge Sules in January of this year [2024] is not a matter properly before this Court, that would be a matter to be brought to the attention or before Judge Sules in the Mount Laurel litigation.

(T49:22-50:3.) He continued by rejecting Appellants' argument that the Amended Complaint raises claims isolated from the Consent Order and ML Action:

Now, Mr. Bocchi argues or presented the argument that the amended complaint really focused on that 45-day period and that the defendants had not really looked at the – or addressed in their motions what would be the . . . my word again, the pure motion to dismiss standard. You look at the pleadings and determine whether or not the fundament of a cause of action has been stated. . . Rule 4:62 does allow the Court in certain circumstances to consider matters outside the pleadings. And most of the items that are advanced . . . and contained in the motion record are either prior orders or agreements that were entered in the Mount Laurel litigation. But looking at even the counts of the complaint and the prayers for relief . . . it looks to declare certain actions by the Borough . . . to have been inappropriate and declaring them void and of no force and effect.

What the Court sees in this case . . . this is not a . . . typical prerogative writ action where it's a challenge to a particular event or ordinance or action taken by a governmental authority. There is the long history of dealings and the procedural history and the orders that were entered and the agreements made in the Mount Laurel litigation.

[W]hat the Court sees is . . . that the matters even looked at in the somewhat liberal or very liberal pleading standard analysis under Printing Mart . . . they purport to state claims that impact . . . isolated events, but looking at the isolated events . . . all rolls back into the settlement agreement, the consent order.

(T50:4-52:11) (emphasis added.) The motion judge then rejected Appellants' argument that a dismissal would deprive them of the ability to challenge the municipal actions:

[T]o say that [dismissal] would deprive the plaintiffs of the ability to challenge really would ask the Court to ignore the fact . . . these plaintiffs are seeking to intervene in the Mount Laurel proceeding. And if the judge that hears the motion . . . finds that it's appropriate for the plaintiffs to have the ability to challenge the manner in which some of the aspects of the Mount Laurel requirements or . . . developments are going forward . . . then . . . that's a decision for the judge in the Mount Laurel proceeding. And certainly the Court in this case would not say that . . . to dismiss the . . . prerogative writs action, would deny the plaintiffs an opportunity to be heard . . . would be to ignore the fact that the judge in the Mount Laurel proceeding will make a determination as to what - - whether and to what extent the plaintiffs in this case have the ability to be heard and as to what issues they have the ability to be heard. **So the Court would not find that a dismissal of this case would leave plaintiffs without a remedy because the remedy would be that which the judge in the Mount Laurel case determines appropriate. If any.**

The Court is simply saying that it doesn't deprive plaintiffs of a remedy. It just – that the assertion of that remedy in a separate prerogative writs action in circumstances where the final judgment of repose has been entered . . . by Judge Gardner back in August of 2020. There was the final consent order, and if plaintiffs in this case wish to challenge the veracity of the consent order . . . then the Court would not find that this would be the appropriate forum[.]

(T52:19-54:11) (emphasis added.) The motion judge then closed by summarizing why Appellants' claims are so clearly a collateral attack on the finality of the ML Action:

The Court finds that [the Amended Complaint] doesn't effectively state a cause of action for relief in prerogative writs and also has the effect of being a collateral attack on the - - sort of the whole - - I don't want to say the whole proceeding in the Mount Laurel litigation but – would have the effect of allowing the litigants in a very isolated time frame, an isolated municipal act prerogative writs complaint to impact on - - in a way that has the effect of a collateral attack on the whole proceedings in the Mount Laurel litigation. So for these reasons the Court grants the motion to dismiss . . . without prejudice . . . and the parties can . . . proceed with their motions in the Mount Laurel litigation.

(T55:18-24.)

STANDARD OF APPELLATE REVIEW

This appeal raises several claims and arguments that, as the motion judge found, can be swiftly dismissed as a matter of law. It is well-recognized that all rulings of law and issues regarding the applicability, validity, or interpretation of laws, statutes, or rules is governed by a “de novo” standard of review. *In re*

Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020). Thus, all findings made as a matter of law by the motion judge are subject to the “de novo” standard.

Of note, the motion judge considered the myriad filings from the ML Action – all of which are a matter of public record - in making his determination that Appellants’ Amended Complaint was legally deficient. To the extent this Court considers the motion judge’s consideration of same to be findings of fact, that would create a situation in which there are mixed questions of fact and law. In such cases, the court gives “deference . . . to the supported factual findings of the trial court, but review[s] de novo the lower court's application of any legal rules to such factual findings.” *State v. Harris*, 181 N.J. 391, 416 (2004).

LEGAL ARGUMENT

I. THE MOTION JUDGE CORRECTLY DISMISSED APPELLANTS’ AMENDED COMPLAINT BY GRANTING GREEN BROOK’S AND THE BOROUGH’S DISMISSAL MOTIONS (1T45:17-56:3)

The motion judge’s dismissal of Appellants’ Amended Complaint, without prejudice, through the Dismissal Order was legally sound, supported by the motion record, and should be affirmed. Appellants’ brief tries to explain away their procedural missteps and how their claims are supposedly legally distinct from the ML Action and the Consent Order, but those efforts are futile.

A. The Legal Standard for the Dismissal Motion

Rule 4:6-2(e) permits a party to move for dismissal, in lieu of answering the complaint or otherwise, when the complaint fails to state a claim upon which relief can be granted. *See Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 745 (1989). When deciding such a motion, a court must search the complaint “in depth and with liberality,” giving plaintiff all “reasonable inference[s].” *Pressler & Venriero, Current N.J. Court Rules*, cmt. 4.1.1 on R. 4:6-2 (GANN 2024). Although admittedly liberal, this standard of review is not limitless. *E.g., Camden Cnty. Energy Recovery Assocs., L.P. v. N.J. Dep’t of Env’t Prot.*, 320 N.J. Super. 59, 64-65 (App. Div. 1999) (holding that a complaint must be dismissed, “no matter how ‘generously’ or ‘indulgentl[y]’ [it is] scrutinized,” if it fails to state a basis for relief), *aff’d*, 170 N.J. 246 (2001).

Here, the motion judge properly relied upon the Amended Complaint, documents referenced therein, and publicly recorded land records in granting the Dismissal Motion. *See* R. 4:6-2; *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 183 (2005); *Myska v. N.J. Mfrs. Ins. Co.*, 440 N.J. Super. 458, 482 (App. Div. 2015).

B. The Motion Judge Correctly Ruled That Appellants’ Claims are an Impermissible Collateral Attack on the Settlement of and the Final Judgment Entered in the ML Action (T49:22-55:24)

The motion judge reached an obvious conclusion in dismissing Appellants’ Amended Complaint – Appellants’ claims are an impermissible collateral attack on

a Final Judgment entered by another judge in a nearly decade old *Mount Laurel* litigation. On that front, the motion judge properly held that everything about this case touches on the enforceability of the Consent Order, that the proper forum for Appellants' claims is the ML Action, that Appellants have a pending intervention motion through which the ML Action judge will decide whether Appellants can pursue their claims (and if they don't like the result they can appeal), and that a plain reading of the Amended Complaint evidences that this case is an attempt to overturn the Consent Order. (1T49:22-55:24.)

Appellants' brief here puts forth a meager attack on the motion judge's collateral attack ruling. In fact, Appellants' challenge on this point is effectively limited to a sentence in the preliminary statement, one paragraph on page 15, and one paragraph on page 21. (Pb2, 15, 21.) Perhaps recognizing their vulnerabilities on that issue, Appellants instead try to shift this Court's attention to a red herring argument that each of the five counts in their Amended Complaint are legally viable. But that misses the point entirely. The motion judge was not concerned with whether Appellants' claims are cognizable; he was concerned with whether the claims should have been brought in the ML Action. Put another way, there is no need to analyze the viability of the claims when the claims were brought to the wrong judge in the wrong case.

Therefore, each of Appellants' arguments on the collateral attack issue should be rejected and the dismissal affirmed because: (i) Appellants' Amended Complaint is, as the motion judge found, a collateral attack on the judicially endorsed settlement of the ML Action; (ii) Appellants' focus on the viability of their claims is a red herring argument that should be ignored, as should their attempt to isolate those claims from the Consent Order, (iii) the motion judge correctly applied the R. 4:6-2 standard, despite Appellants' arguments to the contrary, and (iv) the motion judge correctly held that the issues raised by Appellants belong in the ML Action and should be decided there as part of the pending intervention motion.

1. The Amended Complaint is an Impermissible Attack on the Judicially Endorsed Settlement of the ML Action

The motion judge engaged in an extensive and thorough analysis, concluding that Appellants' Amended Complaint must be dismissed for several straightforward, procedurally fundamental reasons.

The ML Action judge – through the Consent Order – has already approved of each one of the Challenged Actions asserted by Appellants in each count of their Amended Complaint. That is precisely why the motion judge highlighted that the “prayer for relief” as to each count in the Amended Complaint seeks to declare that action (whether the MOU, the Discharge Agreement, the Amended Settlement Agreement, or the SIRO Zoning Ordinance) as void and without effect. (See 1T50:20-51:7.) The motion judge specifically found that “matching [the prayers

for relief in the Amended Complaint] against what is in the Consent Order . . . the settlement agreement, amended settlement agreement, it all rolls back into that[.]” (1T52:12-16.)

Appellants’ brief devotes little effort explaining how the motion judge’s determination was wrong. In fact, almost all of the arguments on this point are nothing more than conclusory and self-serving statements rather than any real analysis. For example, Appellants state in conclusory fashion in their Preliminary Statement that their claims are “distinct from the viability of the Consent Order.” (Pb2.) This approach continues in a single paragraph on page 15 where Appellants argue that the motion judge “improperly characterized Plaintiffs’ Amended Complaint – in a severely limiting manner – as a challenge to the Affordable Housing Consent Order[.]” (Pb15.) The final argument on this point is found in a paragraph on page 21 where Appellants claim that the motion judge’s “roll back” into the Consent Order ruling “ignores [the claims’] individual nature,” citing the allegations in Count Five supposedly hinging on the Borough’s contract award process rather than the Consent Order’s validity. (Pb21.)

None of Appellants’ arguments offer any real explanation as to how their claims can be determined to be *not* attacking the Consent Order, and they cite no case law. That is because no such explanation exists and the case law does not

support Appellants' position.⁶ The Consent Order approved of each of the Challenged Actions, so a lawsuit comprised exclusively of claims seeking to overturn the Challenged Actions necessarily also challenges the Consent Order itself. That is what the motion judge ruled and that ruling should be affirmed.⁷

2. Appellants' Attempt to Paint Their Claims as "Independent" from the Consent Order and ML Action Fails, Which Renders Their Focus on the Supposed Viability of Their Claims as a Red Herring

The majority of Appellants' brief focuses on the specific allegations and legal theories underlying Appellants' claims. (Pb16-21.) This is all done as part of Appellants' argument that their claims are "distinct" or "independent" from the issues in the ML Action and Consent Order. (Pb2-3, 16.) According to Appellants, their claims are legally cognizable as pled, and they should survive because certain

⁶ Appellants likely cite no case law in support of their limited challenge to the collateral attack ruling because it is well recognized that asserting a challenge in a new lawsuit to an order or judgment entered in a prior proceeding is an impermissible collateral attack. *See, e.g. Catabene v. Wallner*, 16 N.J. Super. 597, 601 (App. Div. 1951) ("[A]ny attempt in a separate and independent proceeding to question the integrity and validity of any adjudication in another proceeding and challenge its existence as valid and binding constitutes a collateral attack," which is improper unless there is a claim of fraud or other collusion (not at issue here).)

⁷ Any attempt by Appellants to raise new arguments or cite to case law in reply that was not included in their opening brief should be rejected by the Court as improper. *See State v. Lenihan*, 219 N.J. 251, 265 (2014) (stating that "rais[ing] an issue initially in a reply brief is improper"), quoting *Twp. of Warren v. Suffness*, 225 N.J. Super. 399, 412 (App. Div.), *certify. denied*, 113 N.J. 640 (1988).

aspects of them touch upon matters not at issue in the ML Action. (Pb16-21.) Appellants' argument is misplaced and is a red herring.

As addressed in detail above, it is impossible for Appellants' claims to be considered "distinct" or "independent" from the Consent Order because the Consent Order represents a judicial approval of each of the Challenged Actions. Faced with that reality, Appellants' efforts to use cherry picked allegations from their Amended Complaint as evidence of some unique aspect of the case that is independent from the ML Action must fail. To put it bluntly, they are trying to walk a line that is not walkable. That is why the motion judge ruled that the claims are not "isolated" from the Consent Order and are "not so easily separated as Mr. Bocchi . . . would argue." (Pb52:4-18.) By asserting claims that challenge municipal actions completed in furtherance of a *Mount Laurel* settlement – each of which was already sanctioned by the judge in that *Mount Laurel* action - Appellants filed a lawsuit that, as a matter of law, cannot be separated from the ML Action.

With their requested distinction impossible, Appellants' analysis of the supposed legal viability of their claims is nothing more than a red herring that is irrelevant to this Court's analysis on appeal. Even if each of Appellants' claims allege a *prima facie* case of action, they would still have to be dismissed because they were brought in the wrong action, as the motion judge correctly held. (See e.g. T49:22-50:3, 52:19-54:11.)

3. The Motion Judge Correctly Applied the R. 4:6-2 Standard, Despite Appellants' Arguments to the Contrary

Appellants also argue that the motion judge “abandoned” the R. 4:6-2 standard for dismissal motions. (Pb14-15.) Specifically, Appellants argue that the court “viewed the Amended Complaint in a severely narrow and restrictive manner” instead of the “required indulgent standard.” (Pb15-16.) They claim this standard required the motion judge to engage in a focused review of the allegations to determine whether a viable claim has been pled. As noted above, however, this argument is misplaced as a matter of law because neither Respondents’ dismissal arguments nor the motion judge’s ruling had anything to do with the sufficiency of the claims, nor were the claims dismissed *with prejudice*.

Respondents’ dismissal motions contained several arguments, but the heart of those arguments was that these Appellants cannot collaterally attack the court-approved settlement of the ML Action and the Consent Order. Respondents did not challenge the sufficiency of the pleadings from a *prima facie* pleading sufficiency perspective. Instead, Respondents argued that the trial court does not even get to that layer of analysis because the Amended Complaint, on its face, was directly attacking municipal actions that had already been approved by another judge in another case and, as a result, collaterally attacking the final order that approved of such actions. With a determination that the case was an impermissible collateral

attack that should have been brought in the ML Action, there was no reason or need to engage in the viability analysis Appellants beg this Court to now engage in.

The motion judge recognized this and made specific findings on this point in his ruling, including ruling that “the Court would agree with the defendants that the matters even looked at in the somewhat liberal or very liberal pleading standard analysis under *Printing Mart* . . . they purport to state claims that impact . . . isolated events . . . but looking at the isolated events . . . sort of all rolls back into the settlement agreement, the consent order.” (See 1T52:52-11.) So the judge knew the standard, he applied it, and he correctly held that with this case being an impermissible collateral attack on the Consent Order there was no need to engage in any further analysis as to each individual claim.

4. The Motion Judge Correctly Rejected Appellants’ Argument That Dismissal Would Prevent Them From Challenging the Challenged Actions By Holding That The ML Action Judge Will Decide if Appellants Can Bring Their Claims Through the Intervention Motion

Appellants also argue that the motion judge’s dismissal *without prejudice* to allow Appellants to pursue their claims in the ML Action “does not cure the error” because it is a “speculative remedy” that “improperly shifts the burden to [Appellants] to relitigate viable claims elsewhere.” (Pb22.) This argument is confined to a two-sentence paragraph on page 22 with no real analysis or case law cited. The Court should swiftly reject this argument as well.

Appellants made a similar, albeit slightly different argument to the motion judge, claiming that a dismissal would deprive them of the ability to challenge the Challenged Actions. The motion judge rejected that argument, highlighting that Appellants are seeking to intervene in the ML Action and if the ML Action judge “finds that it’s appropriate for the plaintiffs to have the ability to challenge some of the aspects of the Mount Laurel . . . developments . . .that’s a decision for the judge in the Mount Laurel proceeding.” (T52:19-53:5.) The motion judge continued that a dismissal without prejudice would not “deny Appellants the opportunity to be heard” because the judge in the ML Action will decide whether and to what extent such challenges are appropriate under the circumstances. (T53:6-18.)

On this point it is also important to highlight the context in which Appellants brought these claims and the procedural failures they made along the way, including their failure to directly challenge the Consent Order in this case (only its component parts), as well as their failure to timely seek intervention in the ML Action to challenge the Consent Order (despite their admitted knowledge of the ML Action and the Consent Order). It is those missteps (or, perhaps intentional actions in an effort to exact maximum delay to the affordable housing project) that caused the motion judge to imply that the ML Action judge may end up deciding to deny Appellants’ intervention motion. To briefly summarize:

- **Appellants Knew About the ML Action:** The public record established that Appellants knew about the ML Action in September

2023 at the very latest, as evidenced by their reference to same in their initial Complaint. (Pa004a-Pa012a at ¶ 10.) And, they likely knew much earlier since Appellant Klein and Appellant Frankel were members of the golf club since 1981 and 2006, respectively, and voted on the sale of the Property.

- **Appellants Knew About the Consent Order:** The public record established that Appellants admit to knowing about the Consent Order being entered January 11, 2024 no later than January 15, 2024, as evidenced by their reference to same in their Amended Complaint. (Pa019a-Pa039a at ¶¶ 41-42.)
- **Appellants Knew What The Consent Order Approved:** The public record established that Appellants knew that the Consent Order approves of the Amended GB Settlement Agreement, including each of the Challenged Actions in this PW Action. (*Id.*)
- **Appellants Failed to Challenge the Consent Order:** The public record established that that Appellants' Amended Complaint failed to directly challenge the Consent Order in this action or in the ML Action, as evidenced by any allegations or causes of action regarding same and no motion filed in the ML Action. (*Id.*)
- **Appellants Admit to Failing to Intervene:** The public record established that despite Appellants' knowledge of the ML Action and Consent Order, they failed to try to intervene until June 21, 2024 – five (5) months after entry of the Consent Order.
- **Appellants Admit They Should Have Intervened Earlier:** The public record established that Appellants in their March 2024 Letter conceded that their claims “formed the basis” for the Consent Order and asked for it to be vacated, conceding at the time that they should have tried to intervene to challenge it. Yet, they waited another three (3) months before trying to do so (and only after Respondents' dismissal motions), with that filing being a further admission that they were required to do so in the first place.

Whether Appellants engaged in procedural gamesmanship or made inadvertent errors is irrelevant because the simple fact is that Appellants' proper recourse was to attempt to challenge the Consent Order through a timely intervention in the ML Action. That is what the motion judge correctly held, and his dismissal *without prejudice* was appropriate to allow Appellants' ultimate fate to be decided by the judge in the ML Action, which is where Appellants' claims always belonged.

C. Appellants' Argument For Consolidation Must be Rejected as Procedurally Improper and Substantively Deficient (Argument Not Raised by Appellants Below)

Appellants devote considerable time arguing that the motion judge erred by not consolidating this case with the ML Action. (Pb22-25.) This is surprising because Appellants did not move for consolidation or make any argument for consolidation below, which renders Appellants' argument procedurally improper and closes the door on this issue on appeal. And, even if the issue had been raised below, the motion judge correctly deferred to the judge in the ML Action to decide which claims, if any, that court would hear in light of Appellants' procedural failures noted above.

1. Appellants' Consolidation Argument is Procedurally Improper and Barred on Appeal Because They Failed to Cross-Move or Assert Any Argument for Consolidation Below

Appellants' consolidation argument should be rejected outright as procedurally improper because they did not raise the issue to the trial court:

It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.⁸

Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973); *Grillo v. State*, 469 N.J. Super. 267, 279 (App. Div. 2021) (quotation marks omitted).

Here, Appellants did not file an application for consolidation to the trial court. There was no separate motion or a cross-motion against Respondents' dismissal motions. In addition, Appellants made no argument for consolidation in their opposition to the dismissal motions or at oral argument. (*See* 1T1-55.)⁹ Indeed, the

⁸ There is no matter of "great public interest" to Appellants here. To the contrary, the public interest is that of the low- and moderate-income individuals that the finality of the ML Action is designed to promote.

⁹ Green Brook represents that Appellants did not raise the aforementioned argument in their brief to the motion judge. Confirming this fact would require Green Brook to include in its Appendix the entirety of Appellants' brief. While Green Brook considers this permissible pursuant to R. 2:6-1(a)(2), Green Brook understands that the Court prefers to not have full briefs included in parties' appendices. Therefore, based upon the direction of the Court, Green Brook has not included the brief in its Appendix but will provide a copy to the Court upon request.

only references to consolidation in Appellants' opposition brief concern the intervention and consolidation motion filed by Appellants in the ML Action. (See p37 n9, supra.) In fact, Appellants even went so far as to argue that "any arguments asserted by [Respondents] as to [Appellants'] intervention in the ML Action is properly addressed on [Appellants'] Motion to Intervene and Consolidate and not on these Motions to Dismiss." (*Id.*)

It was not surprising then when Appellants made no argument for consolidation to the motion judge. Indeed, the word "consolidate" appears in the transcript only two times, which were Appellants' counsel commenting on the pending intervention and consolidation motion in the ML Action and stating that "we're seeking to consolidate these matters, whether it's before you, whether it's before Judge Sules, however the Court wants to determine it." (1T24:1-13.)

Lastly, it is worth mentioning that Appellants' entire argument on this point is tied to this Court's decision in *East/West Venture v. Borough of Fort Lee*, 286 N.J. Super. 311 (App. Div. 1996). Yet, Appellants' only mention of that case in their opposition brief was a passing reference in the context of the issue of *res judicata*. (See p37 n9, supra.) Then, at oral argument, the only reference to the *East/West Venture* case was in the context of Appellants' argument that a fairness hearing should have been held in connection with the Consent Order. So not only did Appellants never make the argument they never cited the law they now rely on.

If Appellants wanted the motion judge to consider consolidation they were required to file a motion, which they did not do. Or perhaps they could have argued for consolidation, which they did not do. As a result, they are foreclosed from making the argument on appeal.

2. The Motion Judge Correctly Deferred to the ML Action Judge to Determine Which of Appellants' Claims, If Any, Will Be Heard

Appellants' consolidation argument is also substantively flawed because the motion judge correctly deferred to the ML Action judge to decide these issues. With Appellants' failure to move for consolidation, Appellants' argument is essentially that the motion judge should have *sua sponte* consolidated the cases. That argument is wrong for the straightforward reason that the motion judge determined that it was not his place to be deciding issues that touch upon rulings made by a different judge in a different case. The motion judge, therefore, rightly deferred to the ML Action judge to decide the issues of intervention and consolidation, which, even though filed months late, were (and still are) pending before the judge in the ML Action.

II. ALTERNATIVELY, THIS COURT HAS AT ITS DISPOSAL SEVERAL OTHER GROUNDS FOR AFFIRMING THE TRIAL COURT’S DISMISSAL OF APPELLANTS’ CLAIMS (Raised by Green Brook Below - But Not Addressed by the Trial Court)¹⁰

Appellants made several other arguments to the motion judge that justify dismissal of Appellants’ Amended Complaint. While the motion judge’s determination that the Amended Complaint is an improper collateral attack on the Consent Order made it unnecessary to address each of Appellants’ other arguments, those arguments provide this Court with further grounds to affirm the motion judge’s ruling. *See Isko v. Planning Bd. of Livingston*, 51 N.J. 162, 175 (1968), *abrogated on other grounds* (“[I]f the order of the lower tribunal is valid, the fact that it was predicated upon an incorrect basis will not stand in the way of its affirmance.”); *Liebeskind v. Mayor & Mun. Council of Bayonne*, 265 N.J. Super. 389, 400 (App. Div. 1993) (disagreeing with the trial court’s summary judgment based on *res judicata*, but affirming on the basis that the claim could not “succeed on the merits”).

¹⁰ Green Brook represents that it raised each of the arguments referenced in this Section II in its brief to the motion judge below. Confirming this fact would require Green Brook to include in its Appendix multiple pages from its brief. While Green Brook considers this permissible pursuant to R. 2:6-1(a)(2), Green Brook understands that the Court prefers to not have multiple brief pages included in parties’ appendices. Therefore, based upon the direction of the Court, Green Brook has not included the brief but will provide a copy to the Court upon request.

Here, even if this Court disagrees with the motion judge's ruling, there are ample other grounds for affirming dismissal. Such arguments are a mix of well-settled legal principles and matters of important public policy and constitutional importance. Each is addressed below.

A. Three Private Landowners Cannot Disturb the Judicially Endorsed Settlement of the ML Action, Which Resolved Years of Litigation and is Keyed to Bringing the Borough in Compliance With its Affordable Housing Obligation

At its core, Appellants are trying to set aside the Court-endorsed settlement of the ML Action. After years of litigation and negotiations, in August 2020 the ML Action was concluded by virtue of the Initial GB Settlement Agreement, the Amended FSHC Settlement Agreement, the Initial Settlement Order, and the Final Judgment. Years later, the Final Judgment was amended by the Consent Order, which approved each of each of Appellants' Challenged Actions. Appellants now seek to vacate and/or overturn each of the Challenged Actions, which will necessarily undo the Consent Order and impact the overall Final Judgment.

This attack is improper for many reasons, including (1) none of these Appellants were parties to the ML Action and the time to intervene and challenge the Consent Order has now expired; (2) case law and public policy mandate that Appellants cannot collaterally attack the Consent Order; (3) public policy recognizes the importance of enforcing settlement agreements; (4) this Court should not undo a settlement that was judicially endorsed; and (5) reversing the Consent Order would

violate the public policy of facilitating the construction of affordable housing. Each is addressed in turn below.

1. Appellants Failed to Follow the Precise Procedures for Setting Aside Judgments or Appealing Court Rulings

While the most fundamental deficiency of Appellants' Amended Complaint is that they are seeking to collaterally attack the Consent Order, as the motion judge found, Appellants did have at their disposal several options for properly trying to attack the Consent Order. They failed to do so, which means their case is really an untimely appeal of the component parts of an already final judgment.

There do exist mechanisms for seeking to set aside a judgment, such as a motion to reopen or set aside a judgment under R. 4:50-1, a motion for rehearing or reconsideration under R. 4:49-2, or an appeal under R. 2:4-1. Appellants' failure to pursue any of these court-approved mechanisms is another basis to dismiss their Amended Complaint, and any attempt to do so now would be untimely.

First, R. 4:50-1 sets out the procedures by which a party can seek to reopen or set aside a judgment, providing: "[o]n motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order."¹¹ Appellants failed to file any such motion, perhaps owing to

¹¹ Green Brook also notes that even if Appellants had followed the appropriate procedure to set aside a judgment, it would not meet the required reasons for setting

their failure to timely intervene and establish any rights in the ML Action while it was still pending. Regardless of the reasons, Appellants' failure to timely bring its Consent Order challenge to the court in the ML Action is a fatal flaw.

Second, and alternatively, a party can move for rehearing or reconsideration to alter or amend a judgment or final order under R. 4:49-2. Any such motion must "state with specificity the basis on which it is made, including a statement of the matters or controlling decisions that counsel believes the court has overlooked or as to which it has erred." Here, Appellants did not seek to intervene and file a R. 4:49 motion in the ML Action until six (6) months after entry of the Consent Order.

Third, a party can appeal from a final judgment to the Appellate Division pursuant to R. 2:4-1. Here, Appellants never sought to timely intervene and file a timely appeal of the Consent Order.

Critically, the time for Appellants to take any of the above actions long expired before Appellants filed their currently pending intervention and consolidation motion in the ML Action. For example, a R. 4:50 motion must be brought within "a reasonable time." R. 4:50-2. "[A] reasonable time is determined based upon the totality of the circumstances." *Romero v. Gold Star Distrib., LLC*, 468 N.J. Super. 274, 296 (App. Div. 2021) (quoting *Orner v. Liu*, 419 N.J. Super.

aside a judgment under R. 4:50-1 and so is even further not entitled to relief on those grounds.

431, 437 (App. Div. 2011)). Clearly, it would be unreasonable to allow these three individuals to intervene post-judgment and untimely attack a final judgment that took more than eight (8) years to have finalized. By way of further example, R. 4:49-2 motions must be brought within twenty days (with few exceptions that do not apply here). And, lastly, appeals from final judgments must be brought within 45 days. R. 2:4-1(a). Here, any attempt by Appellants to file one of the mentioned motions or to appeal would be denied as out of time (even if intervention is granted).

2. Case Law and Public Policy Mandate That These Appellants Cannot Collaterally Attack a Judicially Endorsed Settlement

Appellants' collateral attack of the Consent Order is also a flagrant violation of New Jersey's long-established public policy protecting the finality of judgments.

New Jersey courts have long recognized "the importance of stability and finality to public actions." *Tri-State Ship Repair & Dry Dock Co. v. City of Perth Amboy*, 349 N.J. Super. 418, 423 (App. Div. 2002). "Public policy and sound jurisprudence dictate that there must be a finality to judgments and an end to litigation." *State Highway Comm'r ex rel. State v. Speare*, 86 N.J. Super. 565, 585 (App. Div. 1965). "The law contemplates that when a controversy between parties is once fairly litigated and determined it is no longer open to relitigation." *In re Arlinghaus' Est.*, 158 N.J. Super. 139, 147 (App. Div. 1978).¹² Among other reasons,

¹² The courts' emphasis on the importance of the finality of judgments is further underscored by the fact that New Jersey has several doctrines dedicated to

this allows the governmental entity and other involved parties to rely upon the judgment¹³.

The Consent Order came years after entry of the Final Judgment, which was the result of a monumental effort by the parties to the agreement and the ML Action court to resolve the ML Action. As of the entry of the Final Judgment, the ML Action had been pending for five (5) years. The parties' negotiation of the Initial GB Settlement Agreement and Amended FSHC Settlement Agreement was the convergence of various moving parts, culminating in the parties agreeing to and the Court signing off on the Initial Settlement Order and Final Judgment in August 2020. Then, in January 2024, the Court entered the Consent Order, which approves of each of the Challenged Actions, including the SIRO Zoning Ordinance and the Amended GB Settlement Agreement. The Consent Order specifically amends (in limited fashion) the previously entered Final Judgment and, in that regard, is considered a final judgment within the meaning of the Court Rules.

Here, Appellants are trying to upend the finality of the ML Action by collaterally attacking the Consent Order. Put simply, the Consent Order is the

preventing re-litigation of issues or claims that have already been decided, such as collateral estoppel, issue preclusion, and res judicata. *First Union Nat'l Bank v. Penn Salem Marina, Inc.*, 190 N.J. 342, 352 (2007).

¹³ Indeed, in this case, both the Borough and Green Brook have already been relying upon the Consent Order.

equivalent of a final judgment, and the case law is clear that such a judgment should not be disturbed.

3. Public Policy Recognizes the Importance of the Settlement Agreements and Resulting Consent Order, Which Greatly Weighs Against Appellants' Claims

Appellants' claims also seek to disturb New Jersey's public policy supporting the settlement of litigation.

"For nearly forty-five years, New Jersey courts have found that the settlement of litigation ranks high in the public policy of this State. Therefore, our courts have actively encouraged litigants to settle their disputes." *Puder v. Buechel*, 183 N.J. 428, 437–38 (2005) (quotation marks, alteration marks, and citations omitted). This is especially true for the settlement of affordable housing litigation:

These policies favoring settlement are operative in *Mount Laurel* litigation. The Court observed in *Mount Laurel II* that "[t]he length and complexity of [*Mount Laurel*] trials is often outrageous, and the expense of litigation is so high that a real question develops whether the municipality can afford to defend or the plaintiffs can afford to sue." [*S. Burlington NAACP v. Twp. of Mount Laurel*, 92 N.J. 158, 200 (1983)]. Consequently, the Court expressed a desire "to simplify litigation in this area" and "to encourage voluntary compliance with the constitutional obligation." *Id.* at 214. In a similar spirit, it said that "the Mount Laurel obligation is to provide a realistic opportunity for housing, not litigation." *Id.* at 352. The settlement of *Mount Laurel* litigation is a mechanism for addressing these concerns; it will avoid trials, save litigation expenses, provide a vehicle for consensual compliance with *Mount Laurel* and result in the construction of housing for lower income persons rather than interminable litigation.

Morris Cnty. Fair Hous. Council v. Boonton Twp., 197 N.J. Super. 359, 366–67 (Law. Div. 1984) (first two alterations in original), *aff'd*, 209 N.J. Super. 108 (App. Div. 1986).

Here, not only did the Consent Order amend the already resolved ML Litigation that had been pending for years, but it also involved *Mount Laurel* litigation. This is the precise scenario in which public policy mandates that New Jersey courts endorse, not disturb, a valid settlement agreement.

4. It Would Be Improper to Undo the Consent Order Adopted by Judge Sules and Prior Efforts of Judge Gardner

Appellants also seek to undo the efforts of Judge Gardner and Judge Sules to resolve the ML Action and bring the Borough into compliance with its affordable housing obligation. This is equally improper.

It would set a dangerous precedent for the court in this case to disrupt the efforts of its judicial colleagues who worked tirelessly presiding over and facilitating the settlement of the ML Action. If such a challenge were permitted from three individuals that were not parties to the ML Action, it would send a message to all potential litigants that they can challenge any action of any judge regardless of that litigants' involvement in the action they challenge. This motion judge correctly elected to not send this dangerous message and could have easily dismissed the case *with* prejudice to endorse the actions of its fellow judges.

5. Appellants' Claims Run Afoul of New Jersey's Public Policy Concerning the Construction of Affordable Housing

Appellants' claims also run contrary to New Jersey's public policy supporting the construction of affordable housing.

"The public policy of this State has long been that persons with low and moderate incomes are entitled to affordable housing." *Homes of Hope, Inc. v. Eastampton Twp. Land Use Plan. Bd.*, 409 N.J. Super. 330, 337 (App. Div. 2009). The New Jersey Supreme Court has "recognized that the furnishing of housing for minority or underprivileged segments of the population inherently served the public welfare." *Homes of Hope, Inc. v. Mount Holly Twp. Zoning Bd. of Adjustment*, 236 N.J. Super. 584, 588 (Law. Div. 1989) (quotation marks omitted). "It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation." *S. Burlington Cnty. N.A.A.C.P. v. Mount Laurel Twp.*, 67 N.J. 151, 179 (1975).

In *Mount Laurel II*, the New Jersey Supreme Court discussed the importance of affordable housing actually being built, and the need for strong judicial management to ensure it happens:

The obligation is to provide a realistic opportunity for housing, not litigation. We have learned from experience, however, that unless a strong judicial hand is used, *Mount Laurel* will not result in housing, but in paper, process, witnesses, trials and appeals.

We intend by this decision to strengthen it, clarify it, and make it easier for public officials, including judges, to apply it.

S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel, 92 N.J. 158, 199 (1983). The

Court continued:

Judicial management of a *Mount Laurel* trial, however, is as important to the constitutional obligation as our substantive rulings today. Confusion, expense, and delay have been the primary enemies of constitutional compliance in this area. This problem needs the strong hand of the judge at trial as much as the clear word of the opinion on appeal.

Id. at 292.

Here, the ML Action concerned the Borough's plan for affordable housing compliance. Through the Initial GB Settlement Agreement, the Amended FSHC Settlement Agreement, the Initial Settlement Order, the Conditional Judgment, the Final Judgment, the Amended GB Settlement Agreement, and the Consent Order, the parties and the Court coordinated and finalized a resolution to help facilitate a Court-approved plan for *Mount Laurel* compliance. In order to prevent these Appellants from undermining the stated goal of promoting and ensuring that affordable housing actually gets built, the Court should exercise the "strong judicial hand" discussed in *Mount Laurel II* to prevent these Appellants from belatedly challenging the Court's entry of the Consent Order.

CONCLUSION

Based on the foregoing and the sound reasoning of the motion judge, Green Brook respectfully requests that the Court affirm the dismissal of Appellants' Amended Complaint with prejudice.

Respectfully submitted,

DAY PITNEY LLP
One Jefferson Road
Parsippany, New Jersey 07054
(973) 966-6300
Attorneys for Respondent
Green Brook Realty Associates, LLC

By: /s/ C. John DeSimone, III
C. JOHN DeSIMONE, III
Attorney ID: 035101997
STEPHEN R. CATANZARO
Attorney ID: 073402013

Dated: May 8, 2025

**KEITH FRANKEL, DENNIS KLEIN,
and ALBA PENNISI,**

Plaintiffs-Appellants,

v.

**BOROUGH OF NORTH CALDWELL
and GREEN BROOK REALTY
ASSOCIATES, LLC,**

Defendants-Respondents.

**SUPERIOR COURT OF NEW
JERSEY
APPELLATE DIVISION**

Docket No. A-0000696-24

Civil Action

**On appeal from two Orders of the
Superior Court, Essex County,
Law Division
Docket No. ESX-L-6344-23**

**Sat below:
Hon. Russell J. Passamano, J.S.C.**

Date of submission: May 22, 2025

**REPLY BRIEF OF PLAINTIFFS-APPELLANTS,
KEITH FRANKEL, DENNIS KLEIN, AND ALBA PENNISI**

BOCCHI LAW LLC
8 Hillside Avenue, Suite 208
Montclair, NJ 07042
T:(862) 213-0509
abocchi@bocchilaw.com
*Attorneys for Plaintiffs-Appellants
Keith Frankel, Dennis Klein, and Alba
Pennisi*

Of Counsel and On the Brief :
Anthony S. Bocchi, Esq. (Atty ID #005602006)

On the Brief:
Jennifer L. Bocchi, Esq. (Atty ID #014002003)

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS	ii
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
LEGAL ARGUMENT	2
I. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS’ AMENDED COMPLAINT AS A COLLATERAL ATTACK, AS THE CLAIMS ARE NOT BARRED BY COLLATERAL ESTOPPEL OR RES JUDICATA.....	2 (T49:22-50:3; T55:8-17)
II. THE TRIAL COURT’S FAILURE TO EVALUATE THE SUFFICIENCY OF PLAINTIFFS’ INDEPENDENT CLAIMS UNDER R. 4:6-2(e) WAS REVERSIBLE ERROR.....	8 (T52:4-18)
CONCLUSION	15

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Order dated September 25, 2024, granting Defendant Green Brook Realty Associates LLC's Motion to Dismiss pursuant to R. 4:6-2(e)Pa001

Order dated September 25, 2024, granting Defendant Borough of North Caldwell's Motion to Dismiss pursuant to R. 4:6-2(e)..... Pa002

TABLE OF AUTHORITIES

Cases

<u>Banco Popular N. Am. v. Gandi,</u> 184 N.J. 161 (2005).....	9
<u>Baskin v. P.C. Richard & Son, LLC,</u> 246 N.J. 157 (2021).....	9-11
<u>Catabene v. Wallner,</u> 16 N.J. Super. 597 (App. Div. 1951).....	3
<u>Donato v. Moldow,</u> 374 N.J. Super. 475 (App. Div. 2005).....	10
<u>Edelstein v. City of Asbury Park,</u> 51 N.J. Super. 368 (App. Div. 1958).....	3-9, 14
<u>First Union Nat’l Bank v. Penn Salem Marina, Inc.,</u> 190 N.J. 342 (2007).....	5-6
<u>Homes of Hope, Inc. v. Eastampton Twp. Land Use Plan. Bd.,</u> 409 N.J. Super. 330 (App. Div. 2009)	12
<u>Isko v. Plan. Bd. of Livingston,</u> 51 N.J. 162 (1968).....	10
<u>Leon v. Rite Aid Corp.,</u> 340 N.J. Super. 462 (App. Div. 2001)	8-9
<u>Morris Cnty. Fair Hous. Council v. Boonton Twp.,</u> 197 N.J. Super. 359 (Law Div. 1984), aff’d, 209 N.J. Super. 108 (App. Div. 1986)	13
<u>Nieder v. Royal Indem. Ins. Co.,</u> 62 N.J. 229 (1973).....	12
<u>Pace v. Kuchinsky,</u> 347 N.J. Super. 202 (App. Div. 2002).....	6

<u>Printing Mart-Morristown v. Sharp Elecs. Corp.,</u> 116 N.J. 739 (1989)	8-11
<u>S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel,</u> 67 N.J. 151 (1975)	12
<u>S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel,</u> 92 N.J. 158 (1983)	14, 15
<u>Stonehurst at Freehold, Section One, Inc. v. Twp. Comm. of Freehold Tp.,</u> 139 N.J. Super. 311 (App. Div. 1976)	4, 6
<u>Toll Bros., Inc. v. Twp. of W. Windsor,</u> 334 N.J. Super. 77 (App. Div. 2000)	7, 13
<u>Tri-State Ship Repair & Dry Dock Co. v. City of Perth Amboy,</u> 349 N.J. Super. 418 (App. Div. 2002)	7
<u>Winters v. N. Hudson Reg'l Fire & Rescue,</u> 212 N.J. 67 (2012)	5, 6

Statutes

N.J.S.A. 40:55D-26	1, 3, 5, 12, 14
N.J.S.A. 40A:11-1, et seq.	1
N.J.S.A. 40A:11-4	3, 12
N.J.S.A. 40A:12-1, et seq.	1
N.J.S.A. 40A:12-13	3, 5, 12

Court Rules

R. 4:6-2(e)	1, 8, 9, 10
-------------------	-------------

PRELIMINARY STATEMENT

Plaintiffs-Appellants Keith Frankel, Dennis Klein, and Alba Pennisi (collectively, “Plaintiffs”) respectfully submit this reply brief in response to the opposition briefs of Defendants-Respondents Borough of North Caldwell (“the Borough” or “NC”) and Green Brook Realty Associates, LLC (“Green Brook” or “GB”) (collectively, “Defendants”). The trial court’s dismissal of Plaintiffs’ Amended Complaint under R. 4:6-2(e) was reversible error. The court erroneously characterized the claims as a collateral attack on the Post-Judgment Consent Order (“PJCO”) in the Mount Laurel Action (Docket No. ESX-L-4696-15), ignoring their distinct statutory and common-law bases under N.J.S.A. 40A:12-1, *et seq.*, N.J.S.A. 40A:11-1, *et seq.*, and N.J.S.A. 40:55D-26. Defendants’ reliance on collateral estoppel and res judicata is misplaced, as the issues were not litigated in the Mount Laurel Action, the PJCO is not an adjudication on the merits, and Plaintiffs, as non-parties, are not bound. The trial court’s failure to evaluate the claims’ sufficiency under the “generous and hospitable” R. 4:6-2(e) standard mandates reversal.

Defendants’ focus on the PJCO’s finality and affordable housing policy cannot shield the Borough’s alleged procedural violations from judicial review. The Amended Complaint’s five counts—alleging arbitrary actions, zoning

ordinance defects, illegal contract zoning, non-bid land conveyance, and non-bid contract awards—state cognizable claims independent of the PJCO’s housing compliance findings. Enforcing statutory compliance ensures transparency, complementing the public interest in affordable housing.

This Court should reverse the September 25, 2024, Orders, reinstate the Amended Complaint, and remand with instructions to consolidate with the Mount Laurel Action.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS’ AMENDED COMPLAINT AS A COLLATERAL ATTACK, AS THE CLAIMS ARE NOT BARRED BY COLLATERAL ESTOPPEL OR RES JUDICATA.

The trial court’s dismissal of the Amended Complaint as a collateral attack on the PJCO was erroneous, as the claims allege procedural violations not litigated in the Mount Laurel Action, the PJCO lacks preclusive effect, and Plaintiffs, as non-parties, are not bound by prior judgments. Defendants’ collateral estoppel and res judicata arguments (NC Db8-11; GB Db26-30) fail under controlling precedent, and their reliance on judicial finality cannot immunize municipal misconduct.

First, the trial court’s finding that the Amended Complaint constitutes a collateral attack on the PJCO (T52:13-18) misapplies the doctrine. A collateral attack challenges the “integrity and validity” of a prior judgment’s adjudication in a separate proceeding. Catabene v. Wallner, 16 N.J. Super. 597, 601 (App. Div. 1951). Here, Plaintiffs do not seek to invalidate the PJCO’s determination that the Amended GB Settlement Agreement and SIRO Zoning are consistent with the Borough’s housing obligations (Pa083-084). Instead, the Amended Complaint targets discrete municipal actions—e.g., the non-bid conveyance of a 12-acre land interest (Pa035, ¶¶69-74), the SIRO Zoning Ordinance’s adoption without a Planning Board report (Pa031-032, ¶¶56-57), and a \$1.5 million non-bid contract (Pa036, ¶¶75-80)—alleging violations of N.J.S.A. 40A:12-13, N.J.S.A. 40:55D-26, and N.J.S.A. 40A:11-4. These procedural issues were not adjudicated in the Mount Laurel Action, which focused on housing fairness, not statutory compliance.

Here, Edelstein v. City of Asbury Park, 51 N.J. Super. 368, 375 (App. Div. 1958), is controlling. In Edelstein, this Court invalidated a zoning ordinance adopted pursuant to a consent judgment because the municipality failed to comply with statutory procedures, including providing adequate notice, holding a public hearing, and referring the ordinance to the planning board, as required

by N.J.S.A. 40:55-35. The Edelstein court held that the consent judgment “has no conclusive effect” if the underlying actions were improper, as the city’s reliance on a private settlement to bypass public process constituted an improper delegation of legislative authority. Ibid. at 374-76.

Similarly, here, Count Two’s claim that the SIRO Zoning Ordinance lacked a Planning Board report (Pa031-032, ¶¶56-57) mirrors the failure in Edelstein to comply with planning board review, and Counts Four and Five’s allegations of non-bid transactions (Pa035, ¶¶69-74; Pa036, ¶¶75-80) reflect a disregard for statutory mandates akin to the notice and hearing deficiencies in Edelstein. Count Three’s contract zoning claim (Pa033-034, ¶¶64-68) parallels improper delegation in Edelstein, as the SIRO Zoning was conditioned on the Amended GB Settlement Agreement without Master Plan amendments. The PJCO, like the consent judgment in Edelstein, addressed only housing compliance, not these procedural violations, making Edelstein directly applicable.

Further support for this conclusion is found in Stonehurst at Freehold, Section One, Inc. v. Twp. Comm. of Freehold Tp., 139 N.J. Super. 311, 315 (App. Div. 1976), wherein the court permitted a prerogative writs action to challenge a zoning ordinance despite a prior consent judgment, as the procedural

defects were not addressed. Defendants’ assertion here that the claims “roll back” to the PJCO (NC Db14; GB Db28-29) ignores their independent basis. The trial court’s conflation of these issues violates Edelstein’s principle that consent judgments do not preclude challenges to underlying procedural irregularities.

Second, collateral estoppel does not apply. Collateral estoppel requires: (1) identical issues; (2) actual litigation; (3) a final judgment on the merits; (4) the issue’s essentiality to the judgment; and (5) privity with a prior party. Winters v. N. Hudson Reg’l Fire & Rescue, 212 N.J. 67, 85 (2012). These elements are absent.

As an initial matter, the issues in the Amended Complaint were not litigated in the Mount Laurel Action. The PJCO and Judgment of Compliance and Repose (“JOR”) (Pa153-154, Pa078-084) addressed the fairness of the affordable housing plan, not whether the Borough complied with public bidding (N.J.S.A. 40A:12-13, 40A:11-4) or zoning procedures (N.J.S.A. 40:55D-26). For example, Count Four alleges a non-bid land conveyance, a statutory violation outside the PJCO’s scope (Pa035, ¶¶69-74). Collateral estoppel bars only issues “actually determined,” not those that could have been raised. First Union Nat’l Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352 (2007).

Additionally, the PJCO, entered by consent without a fairness hearing, is not an adjudication on the merits. Consent judgments are “contracts” with court sanction, lacking preclusive effect absent intent to resolve specific issues. Stonehurst, supra, 139 N.J. Super. at 315; Edelstein, supra, 51 N.J. Super. at 375. The PJCO’s language (Pa083, declaring consistency with the Housing Plan Element and Fair Share Plan Element) reflects no intent to adjudicate procedural compliance, defeating the “merits” element.

Further, as non-parties to the Mount Laurel Action, Plaintiffs are not bound. Winters, supra, 212 N.J. at 85. The Borough’s virtual representation argument (NC Db10) under Pace v. Kuchinsky, 347 N.J. Super. 202, 215 (App. Div. 2002), fails, as the Mount Laurel Action did not represent Plaintiffs’ interest in transparent municipal processes. Plaintiffs’ procedural claims are distinct from the housing compliance litigated by the Borough, Fair Share Housing Center, and Green Brook.

Third, res judicata is inapplicable because it requires a final judgment on the same cause of action involving the same parties or their privies. First Union, supra, 190 N.J. at 352. The Mount Laurel Action resolved the Borough’s housing obligations, not the procedural violations alleged here. The Amended Complaint’s claims—arbitrary actions, zoning defects, contract zoning, and

non-bid transactions—arise from distinct transactional facts, precluding res judicata. Ibid. As non-parties, Plaintiffs are not bound by the JOR or PJCO, and Edelstein, 51 N.J. Super. at 375, confirms that municipal procedural errors are not shielded by prior judgments.

Lastly, the Borough's reliance on Alexander's Dep't Stores of N.J., Inc. v. Paramus, 243 N.J. Super. 157, 165 (App. Div. 1990) is misplaced. (NC Db12). Alexander's denies standing to challenge Mount Laurel housing rights, not procedural violations, which residents may contest. Toll Bros., Inc. v. Twp. of W. Windsor, 334 N.J. Super. 77, 90 (App. Div. 2000). Furthermore, Green Brook's claim that Plaintiffs' failure to pursue R. 4:50-1 or R. 4:49-2 motions in the Mount Laurel Action makes this an "untimely appeal" (GB Db42-44) is irrelevant. The Amended Complaint, filed within the 45-day prerogative writs period, timely challenges municipal actions, not the PJCO itself. Green Brook's "dangerous precedent" argument (GB Db47) is unavailing, as reinstating the claims ensures accountability without disrupting housing goals.

Defendants' judicial resource argument (NC Db9, 11) fails as well, as Tri-State Ship Repair & Dry Dock Co. v. City of Perth Amboy, 349 N.J. Super. 418, 423 (App. Div. 2002), does not shield unlawful actions. Reinstating the

Amended Complaint promotes public accountability, consistent with Edelstein, 51 N.J. Super. at 375.

POINT II

THE TRIAL COURT’S FAILURE TO EVALUATE THE SUFFICIENCY OF PLAINTIFFS’ INDEPENDENT CLAIMS UNDER R. 4:6-2(e) WAS REVERSIBLE ERROR.

The trial court reversibly erred by dismissing the Amended Complaint without assessing the sufficiency of its five counts, abandoning the “generous and hospitable” R. 4:6-2(e) standard. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). The trial court’s collateral attack finding does not excuse this obligation, and Defendants’ failure to contest viability concedes the claims’ cognizability.

Rule 4:6-2(e) mandates that courts “search the complaint in depth and with liberality” to determine if the allegations state a claim. Printing Mart, *supra*, 116 N.J. at 746; Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021). Statutory claims require protective review. Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472 (App. Div. 2001). The trial court’s reliance on Mount Laurel Action documents (T50:4-52:11) as public records does not negate its duty to evaluate the allegations. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005). In Edelstein, *supra*, this Court scrutinized procedural defects despite a

consent judgment, underscoring that R. 4:6-2(e) prioritizes the Amended Complaint's allegations. Edelstein, 51 N.J. Super. at 375.

Of critical importance, the trial court's assertion that the Amended Complaint's claims "roll back" to the PJCO (T52:13-18) erroneously relieved it of its duty to evaluate their legal sufficiency under R. 4:6-2(e). The trial court's focus on the PJCO's approval of the challenged municipal actions—such as the SIRO Zoning Ordinance and non-bid land conveyance—does not negate this obligation, as R. 4:6-2(e) prioritizes the complaint's allegations over extrinsic considerations. Baskin, supra, 246 N.J. at 171.

Defendants' contention that the claims' connection to the PJCO renders a sufficiency analysis unnecessary (NC Db14; GB Db31) contravenes settled law. The PJCO's approval of the actions as consistent with housing obligations does not immunize the Borough from independent statutory violations. Edelstein, 51 N.J. Super. at 375 (consent judgments do not shield improper municipal actions). This Court's directive in Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472 (App. Div. 2001), underscores that statutory claims like those here demand protective review. By bypassing this analysis, the trial court violated Printing Mart's mandate, warranting reversal to ensure the claims' viability is properly assessed.

Moreover, dismissing without prejudice and shifting the burden to the Mount Laurel Action, where intervention is uncertain, risks denying Plaintiffs a remedy. Donato v. Moldow, 374 N.J. Super. 475, 483 (App. Div. 2005) (dismissal without merits review may prejudice plaintiffs). The trial court's assurance that the Mount Laurel Action judge will decide the claims' viability (T52:19-54:11) is speculative and contravenes R. 4:6-2(e)'s protective standard. Baskin, 246 N.J. at 171. Even if dismissal is upheld on alternative grounds, the court's failure to evaluate sufficiency warrants reversal to ensure a merits review. Isko v. Plan. Bd. of Livingston, 51 N.J. 162, 175 (1968).

Equally important, Defendants' arguments in support of the trial court's dismissal focus almost exclusively on the doctrines of collateral estoppel and the finality of the PJCO, neglecting to engage with the sufficiency of the Amended Complaint's five counts under the governing R. 4:6-2(e) standard. (NC Db14-15; GB Db31-33). This omission is fatal to their position, as it effectively concedes that the claims—alleging statutory and common-law violations—are cognizable when evaluated under the “generous and hospitable” lens required by Printing Mart, 116 N.J. 739, 746 (1989).

It is well settled that the R. 4:6-2(e) standard is designed to ensure that plausible claims, particularly those implicating public rights, are not

prematurely dismissed. Printing Mart, 116 N.J. at 746. By sidestepping this issue, Defendants have failed to rebut the Amended Complaint's legal sufficiency, and the trial court's error in dismissing without such an analysis cannot stand. Reversal is warranted to restore Plaintiffs' right to have their claims evaluated on their merits, consistent with the principles of fairness and accountability that underpin New Jersey's pleading standards.

Defendants' reliance on the public policy favoring affordable housing to justify dismissal of the Amended Complaint misconstrues the balance between housing objectives and the equally compelling need for transparent, lawful municipal governance. (NC Db16-17; GB Db46-49). While New Jersey's commitment to providing affordable housing for low- and moderate-income residents is indisputable, this Court has consistently recognized that statutory compliance with procedural mandates—such as public bidding and zoning review requirements—serves a complementary public interest by ensuring accountability and preventing arbitrary or unlawful actions that can undermine the very housing goals Defendants champion. Reinstating the Amended Complaint aligns with these dual imperatives, promoting effective housing implementation while safeguarding the public's right to transparent governance.

The importance of affordable housing is well-established. In Homes of Hope, Inc. v. Eastampton Township Land Use Planning Board, this Court affirmed that “[t]he public policy of this State has long been that persons with low and moderate incomes are entitled to affordable housing.” 409 N.J. Super. 330, 337 (App. Div. 2009). Similarly, in Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (“Mount Laurel I”), the New Jersey Supreme Court emphasized that “proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare.” 67 N.J. 151, 179 (1975). Defendants invoke this policy to argue that the finality of the Mount Laurel Action’s PJCO and JOR precludes Plaintiffs’ claims. (NC Db16-17; GB Db46-49). However, their argument overlooks the broader public interest articulated in Mount Laurel I, which ties housing to the “general welfare”—a concept that encompasses not only the provision of housing but also the integrity of the processes by which it is achieved. See also Nieder v. Royal Indemn. Ins. Co., 62 N.J. 229, 234 (1973).

Statutory compliance with laws such as N.J.S.A. 40A:12-13 (requiring public bidding for municipal land conveyances), N.J.S.A. 40A:11-4 (mandating competitive bidding for contracts), and N.J.S.A. 40:55D-26 (requiring Planning Board review for zoning ordinances) is essential to this general welfare. These

statutes exist to ensure transparency, prevent favoritism, and protect public resources—goals that directly support the effective implementation of affordable housing by fostering trust in municipal actions. In Toll Brothers, Inc. v. Township of West Windsor, this Court upheld residents’ standing to challenge procedural irregularities in municipal actions, recognizing that such challenges promote “accountability in the zoning process.” 334 N.J. Super. 77, 90 (App. Div. 2000). Here, the Amended Complaint alleges serious procedural violations, including the Borough’s non-bid conveyance of a 12-acre land interest, adoption of the SIRO Zoning Ordinance without a Planning Board report, and award of a \$1.5 million contract without competitive bidding. (Pa035, ¶¶69-74; Pa031-032, ¶¶56-57; Pa036, ¶¶75-80). Allowing these claims to proceed ensures that municipal actions advancing affordable housing comply with statutory safeguards, preventing delays caused by unlawful conduct that could invite further litigation or public distrust.

Defendants’ citation to Morris County Fair Housing Council v. Boonton Township for the proposition that settlements in Mount Laurel litigation should be protected does not compel a different result. 197 N.J. Super. 359, 366-67 (Law Div. 1984), *aff’d*, 209 N.J. Super. 108 (App. Div. 1986). While Morris County underscores the value of settling Mount Laurel disputes to avoid

protracted litigation, it does not suggest that municipalities are exempt from statutory duties when pursuing housing objectives. To the contrary, the court noted that settlements serve to “provide a vehicle for consensual compliance with Mount Laurel and result in the construction of housing,” Ibid. at 366, a goal that is undermined if municipal actions are tainted by procedural irregularities. The Supreme Court’s directive in Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (“Mount Laurel II”) further supports this view, emphasizing that the “obligation is to provide a realistic opportunity for housing, not litigation.” 92 N.J. 158, 199 (1983). Unlawful actions, such as those alleged here, invite precisely the kind of litigation Mount Laurel II sought to avoid, as they erode public confidence and risk invalidation of housing plans.

Crucially, Edelstein, supra, establishes that a consent judgment, like the PJCO, “has no conclusive effect” if the underlying municipal actions were improper. Edelstein, 51 N.J. Super. at 375. By dismissing the Amended Complaint, the trial court effectively shielded potential misconduct under the guise of housing finality, a result at odds with Edelstein and the public interest in accountable governance. Reinstating the Amended Complaint allows the court to scrutinize the Borough’s actions without disrupting the Mount Laurel

Action's housing goals, as the claims seek to enforce procedural compliance, not to invalidate the affordable housing plan itself.

Lastly, Defendants' argument that reinstating the claims would delay housing implementation (GB Db48-49) is speculative and overstated. Ensuring statutory compliance strengthens, rather than hinders, housing efforts by fostering public trust and minimizing the risk of future challenges. Dismissing viable claims risks creating a dangerous precedent where municipalities can evade statutory duties under the banner of housing, undermining the very general welfare that Mount Laurel I seeks to promote. South Burlington, *supra*, 67 N.J. at 179.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Court reverse the September 25, 2024, Orders, reinstate the Amended Complaint, and remand with instructions to consolidate with the Mount Laurel Action.

Respectfully submitted,

BOCCHI LAW LLC

*Attorneys for Plaintiffs-Appellants,
Keith Frankel, Dennis Klein, and Alba Pennisi*

By: /s/ Anthony S. Bocchi
Anthony S. Bocchi

Dated: May 22, 2025