SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2268-23

WESTFIELD ADVOCATES FOR RESPONSIBLE DEVELOPMENT, FRANK FUSARO, CARLA BONACCI, ALISON CAREY, WILLIAM FITZPATRICK AND ANTHONY LAPORTA.

CIVIL ACTION

Plaintiffs-Appellants,

vs.

TOWN OF WESTFIELD,

Defendant-Respondent,

and

SW WESTFIELD, LLC.

Intervenor.

On Appeal from a Final Order of the Superior Court, Law Division, Union County
Docket No. UNN-L-1011-23

Sat Below:
HONORABLE Daniel Lindemann, J.S.C.(without a jury)

APPELLANTS' AMENDED BRIEF IN SUPPORT OF APPEAL TO REVERSE JUDGMENT AGAINST PLAINTIFFS

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PRELIMINARY STATEMENT

In February 2023, the Town of Westfield Council adopted Ordinance #2023-03 approving a redevelopment "plan" authorized by the Local Redevelopment Housing Law ("LRHL") 40A:12A-1 et. seq. That Ordinance incorporated the 157-page report of the Town's expert, Topology, but was based upon an outdated 2020 "study" nearly three years old. Three relevant sections of the LRHL, Sections 5, 7 and 14 were not properly analyzed or applied in the written opinion of the Trial Judge. The failure to apply statutory requirements of the LRHL renders this "plan" invalid as a matter of law. Accordingly, the Trial Court's decision must be reversed by this Court.

The "plan" provides for the redevelopment of approximately 14 acres: 7 acres in the General Business District 2 ("GB2") which is the Lord & Taylor ("L & T") site in the west zone and 7 acres in the Central Business District ("CBD") which are the sites in the north and south zones of the plan. Within those 14 acres, only 1 site meets the statutory requirements of the LRHL: the abandoned Lord & Taylor ("L&T") department store which consumes approximately 7 acres in the west zone: 5 acres for the store and 2 acres for parking. Of the remaining 7 acres in the "plan," none meet the statutory requirements of the LRHL and none are necessary for or connected to the redevelopment of the L&T site.

Before the adoption of the "plan" by ordinance, residential housing was prohibited in the GB2 zone. The Topology report noted that the GB2 zone prohibited residential uses. By adopting the plan, this ordinance was legally on its face "inconsistent" with the Master Plan of Westfield. The LRHL requires analysis by the Planning Board and the Council to determine whether the proposed redevelopment "plan" is "consistent" or "inconsistent" with the existing Master Plan. The Town's expert, Topology, the Planning Board, and the Council all reached the erroneous legal conclusion of consistency, notwithstanding that while the ordinance expressly revoked all zoning standards within the 3 zones of the "plan," the then existing local zoning ordinances and Master Plan prohibited residences within the General Business District.

The remaining 7 acres are located on municipally owned land consisting of parking lots now fully utilized and rights of way. By employing the technique of an "overlay" zone which, under Section 14 of the LRHL, declares that the entire Town of Westfield needs to be redeveloped or rehabilitated, the "plan" proposes to build massive structures in all three zones. Those structures include garages, 310,000 square feet of office space approximately 50,000 square feet of retail uses and 205 multi-family residential units. The Town, through the mechanism of the overlay zone, avoids the usual statutory requirements of disposing of its municipally owned property. Section 14 of the LRHL, however, requires that the purpose of any

"overlay" zone be that such redevelopment is necessary to prevent "further deterioration" of the housing stock, water, and sewer infrastructure. None of these statutory requirements are met in this "plan."

While the Trial Court analyzed the ordinance under the usual "arbitrary, capricious and unreasonable" standard, this analysis is not reached when the "plan" fails to meet the threshold substantive statutory standards required by Sections 5, 7 and 14 of the LRHL.

For these reasons, the judgment of the Trial Court must be reversed.

PROCEDURAL HISTORY

On January 31, 2023, the Town Council introduced Ordinance 2023-03 for a redevelopment plan. (Pa0108) The proposed ordinance was referred to the Planning Board which, on February 6, 2023, held a hearing to determine whether the proposed redevelopment plan was "consistent" or "inconsistent" with the Master Plan. (Pa0350-Pa0551 *not being appealed from but consists of evidence sought to be admitted at trial hearing; R. 2:5-1(g)) Thereafter, on February 9, 2023, the Planning Board transmitted a memorandum to the Council finding that the plan was "consistent" with the Master Plan. (Pa0110) On February 14, 2023, the Town Council held a public hearing on the Ordinance. (Pa0594-Pa0649 *not being appealed from but consists of evidence admitted at trial hearing R. 2:5-1(g)) At that hearing the Ordinance was adopted. (Pa0648-Pa0649) In adopting the ordinance, the

Council incorporated by reference the voluminous report (Pa0193-Pa0352) of its expert, Topology, dated January 26, 2023. That expert report also reached the erroneous conclusion that the proposed ordinance was "consistent" with the Master Plan. (Pa0109, Pa0315)

The redevelopment "plan" under Section 7 of the LRHL could not have been adopted unless a redevelopment "study" was conducted first under Section 5 of the LRHL. That "study" was conducted by the Town's expert planner and approved by the Town Council through a series of resolutions in early 2020. The procedure for the "study" is like the procedure for the adoption of a "plan" under the LRHL. The proposal must first be sent to the Planning Board for review which the Council did by Resolution 77-2020 on March 10, 2020. (Pa0077, Para. 11). After review by the Planning Board, the Council, by a series of resolutions, then designated several parcels as "non-condemnation areas in need of redevelopment." Resolution 145-2020 (June 30, 2020) (Pa0077, Para. 12; Pa0348); Resolution 180-2020 (August 11, 2020). (Pa0077, Para. 13, Pa0346). It is important to note that the Town chose not to exercise the power of condemnation for any site within this "plan," even though under LRHL, it could do so. Then the Town Council created the "overlay" zone by Resolution 225-2020 (October 13, 2020) (Pa0077, Para. 14, Pa0343) which designated the entire Town as "area in need of rehabilitation."

On March 29, 2023, plaintiffs filed this prerogative writ suit. (Pa0001) Answers were filed by the Town (Pa0057) and intervenor SW Westfield, LLC. (Pa0064) On October 6, 2023, the Trial Court denied intervenor's motion to "settle the record" regarding exhibits. (Pa0072) Trial took place on January 26, 2024.[1] (Pa0076) The WARD memo (Pa0008-045) (which identified 38 clear inconsistences between the redevelopment plan and the Master Plan) and the Planning Board transcript of February 6, 2023 (Pa0350-0551 *not being appealed from but consists of evidence sought to be admitted at trial hearing R. 2:5-1(g)) were excluded from evidence by the Trial Court. (T34-6, T45-9 to T47-4) Those rulings of exclusion are part of this appeal. On February 26, 2024, the Trial Court issued a written opinion upholding the ordinance for the "plan" and dismissing the complaint with prejudice. (Pa0074-0098) This appeal followed on April 1, 2024. (Pa0099)

[1] The "trial" in this PW action consisted of oral argument by counsel as well as the resolution of what documents the Trial Judge should consider as part of the "record" below. That issue concerning documents is part of this appeal because the Town Council in adopting the redevelopment ordinance is not required to make specific findings of fact and conclusions of law. *See* *Cox & Koenig*, *New Jersey Zoning and Land Use Administration,* Sec. 41-5 (Gann 2023) No witnesses testified before the Trial Judge in this case.

STATEMENTS OF FACTS

The description of the "plan" is fully set forth in the Topology report of January 26, 2023. (Pa0193-0314) Summarized, the "plan" divides the project into three zones.[2]

The Plan calls for redevelopment in three zones: North, West and South, plus the "overlay" properties.[3] The West Zone consists of three lots, one of which is the L&T lots. (*Id.*, at 19, Pa0215). The principal permitted uses in the West Zone will be: age restricted multifamily residential rental and restaurant/bar. [4]Permitted accessory uses will be: skyway, parking structure, amenity areas and any customary uses incidental to the permitted principal use. The L&T site (235,000 sq. ft.) will contain three buildings: (1) The West Building with six floors; (2) the Central Building with four stories and rooftop use consistent with existing Section of 18.21 the Municipal Land Use Ordinance, plus the added permitted principal use of medical office; (3) the East Building with six stories. The configuration of these three buildings is schematically depicted in the Topology Report at page 21

[2] There are several "stipulations" recited in the Trial Courts opinion at pages 4-6 which are essentially procedural steps and identification of exhibits. (Pa0077-0079)

[3] With one stroke of the pen, this Redevelopment Plan "supersedes" the existing Downtown Scattered Site Redevelopment Plan last amended in April 2022. (Topology Report at 5) (Pa0201) (Ordinance #2023-03 at Page 2)(Pa0109)

[4] Multiple principal permitted uses on one site are permitted. (Topology Report at Page 22 n.1, Pa0218)

(Pa0217). The upper floors of these buildings will have "step backs" as the floors go higher. (Pa0221)

Across from the L&T site, the West Zone on North Avenue, Block 2502, Lot 14 site (42,000 sq. ft.) will have four principal structures, one accessory use structure with 16 age restricted townhouses and a park.

The West Zone also includes the Clark Avenue site, Block 2506, Lot 1 (25,000 sq. ft.), which will have four principal structures, one accessory structure with 16 townhouses and a park.

The North Zone will have a mixed-use area for one building on a portion of Lot 7, Block 3103 with an office lot area ranging from of 2,500 square feet up to 12,500 square feet for retail, restaurant/bar and 35 multifamily residences five stories tall. (Topology Report at 41-42) (Pa0237-Pa0238) The fifth story will also have a step back. (*Id.*, at 42, Pa0238) The parking structure, an accessory use, is depicted in the Topology Report. (*Id.*, at 44, Pa0240) The remainder of the North Zone on the other portion of Lot 7 will contain up to four buildings for residential rental, restaurant/bar, train station, public plaza, and surface and garage parking. (*Id.*, at 46, Pa0242).

The South Zone is a portion of Block 3101, Lot 5, fronting on South Avenue West. The principal permitted uses for the South Zone will be: public plaza, parking structure, surface parking, restaurant/bar, retail and train station. There will be two

sub-zones in the South Zone: (1) an office subzone of two structures each up to five stories with step backs beginning on the third story, the concept of design for these two buildings as depicted at page 54 of the Topology report; (Pa0250) and (2) a public area subzone with four structures on minimum lot sizes of 50,000 square feet which will also contain a public plaza adjacent to the existing N.J. Transit train station. One structure will be a parking multi-level building. (Topology Report at 50, Pa0243).

The Overlay Properties consist of eight properties located between North Avenue West and South Avenue West, as depicted at pages 4-5 and 55 of the Topology report (Pa0200-Pa0201, Pa0251).

The redevelopment plan calls for the addition of two stories to the top of the existing L&T building, the creation of large parking garages, and the development of 310,000 square feet of office space with the hope that someone will commute to these new offices in Westfield. This proposed oversized redevelopment will change the character and essential idyllic nature of Westfield forever.

LEGAL ARGUMENT

I. THE TRIAL COURT FAILED TO APPLY THE THREE SUBSTANTIVE SECTIONS OF THE LRHL TO THE REDEVELOPMENT PLAN AND STUDY, THEREBY REQUIRING THAT THE REDEVELOPMENT ORDINANCE MUST BE VACATED (Pa0074-Pa0098)

A. PRELIMINARY STATEMENT OF LAW

Can a municipality create a valid redevelopment "plan" which follows the statutory procedural steps but fails to meet the substantive criteria required by the applicable sections of the "LRHL?" To pose this question is to answer it. A municipality's redevelopment "plan," to be legally valid, must satisfy the substance all of the applicable sections of the LRHL.

The Trial Court failed to apply and analyze three key provisions of the LRHL law which must be satisfied to have a valid redevelopment "plan." First, Section 7a (plan) requires that the "criteria" of Section 5 (study) be applied to any redevelopment "plan." Second, Section 5h (study) requires that any redevelopment "plan" under Section 7 be "consistent with smart growth planning principles." Third, Section 14 requires that a redevelopment "plan" which has an "overlay" zone for an entire town must aim at preventing "further deterioration" of the sewer and water infrastructures and housing stock more than 50 years old. The only site in the Westfield redevelopment "plan" which satisfies any of these three mandatory statutory criteria is the abandoned L&T department store under Section 5b (discontinued use of a building for commercial purposes). Accordingly, under these circumstances, the redevelopment "plan" must be vacated so that the Town can create a legally valid "plan" which satisfies the substance of all applicable statutes.

This case also raises the issue of whether the redevelopment "study" adopted three years before the "plan" can form the legal basis of that "plan" when, during that three-year gap, the COVID epidemic altered drastically (and probably permanently) the way most people work and live. This consideration is especially relevant in this case because the "plan" calls for the construction of 310,000 square feet of new office space where none previously existed. Where is the data to support the concept that there will be enough workers who will occupy that space when COVID has caused many employees to work from home?

Probably most disturbing in the Trial Court opinion is the lack of any analysis to these applicable statutes and then failing to apply the criteria of those statutes to the redevelopment plan of the Town of Westfield. Instead, the Trial Court applied only the "presumption of validity" to the redevelopment ordinance. This standard is never reached because the substantive requirements of the LRHL are not satisfied.

Equally troubling is the Trial Court's failure to understand or analyze the statutorily required interplay of the Municipal Land Use Law ("MLUL") 40:55D-1 and redevelopment plans. The MLUL requires a Master Plan, a periodic re-examination of the Master Plan and the adoption of zoning ordinances which, for the most part, further the aims and goals of that Master Plan.

In this case, the Trial Judge failed to grasp these essential principles and totally mis-characterized the Plaintiffs' correct analysis and application of these principles.

The reason for this important legal requirement is that Section 5 of the LRHL requires that all studies and plans be based upon "smart growth planning principles." The Trial Court upheld the "overlay zone" for the entire town of Westfield which allows for redevelopment anywhere in Westfield. This "overlay zone" allows the creation of new structures in two other zones within the "plan" which are not connected in any way to the L&T site, the only site in this "plan" which meets the statutory standards. Under Section 14 of the LRHL, the "overlay zone" must aim to "prevent further deterioration" of housing, sewer, and water infrastructures. The entire Town of Westfield is decidedly not "in need" of rehabilitation or redevelopment.

The redevelopment "plan" is markedly "inconsistent" with the current Master Plan which prohibits residential housing in the GB2 zone.

The only site within the plan which meets the statutory criteria of Section 5b is the abandoned L&T department store site. The Town's expert Topology report (incorporated into the redevelopment plan by ordinance) agrees abandoned department stores can be re-developed into productive and desirable sites (Pages 25-26, Pa0224-0225). However, the creation of oversized structures in this plan in other areas not connected to the abandoned store does not comply at all with the substance of the redevelopment statutes. Such additional sites can only be redeveloped "if

necessary for the rehabilitation of a larger area." None of the other areas of this plan are "necessary" to the redevelopment of the L&T site.

For these reasons, the decision below must be reversed.

B. APPELLATE STANDARD OF REVIEW (Not Raised Below)

There are no factual disputes or factual issues in this appeal. The factual information in the Topology report incorporated into the ordinance reveals all of the factual details of the redevelopment "plan" for Westfield: (1) the areas of redevelopment which consists of three different zones and north, west and south; (2) the buildings and structures to be created in each zone; and (3) the bulk standards for each structure in those zones. The issues of law in this appeal are: (1) were the details of this "plan" consistent with Sections 5, 7 and 14 of the LRHL? and (2) were certain exhibits (the WARD memo and the transcript of the February 6, 2023, Planning Board meeting) offered by plaintiffs properly excluded from the record?

The standards for this appellate court to consider in resolving these legal issues are well established. An appellate court's review of rulings of law for the applicability, validity and interpretations of laws is *de novo*. *In re Ridgefield Park Bd. Of Educ.,* 244 N.J. 1, 17 (2020). A "trial court's interpretation of the law and the legal consequences that follow from established facts are not entitled to any special deference." *Rowe v. Bell & Gossett Co.,* 239 N.J. 531, 529 (2019) (*quoting Manalapan Realty LP v. Twp. of Manalapan,* 140 N.J. 366, 378 (1995)). If a judge

acts under a misconception of the applicable law or misapplies that law, that action becomes an arbitrary act that is not subject to usual deference by an appellate court. *Summit Plaza Assocs. v. Kolta,* 462 N.J. Super. 401, 409 (App.Div. 2020) In such a case, the appellate court must adjudicate the dispute *de novo* under the applicable law to avoid a manifest denial of injustice. *State v. Lyons*, 417 N.J. Super. 251, 258 (App. Div. 2010).

In this case, the failure of the Trial Court to apply the controlling standards of Sections 5, 7 and 14 means that the decision below is not entitled to any "deference." This Court must review and apply those statutory standards.

C. THE APPLICABLE RELEVANT LRHL SECTIONS (Pa0074-Pa0098)

Section 7 of the LRHL specifically requires that any redevelopment plan meet the requirements of Section 5, that is the provision which controls a redevelopment study. This means that when any redevelopment plan is adopted, a study must have been completed first and the plan must meet the criteria for a study.

Section 7a states:

> No redevelopment project shall be undertaken or carried out except in accordance with a redevelopment plan adopted by ordinance of the municipal governing body, upon its finding that the specifically delineated project area is located in an area in need of development or in an area in need of rehabilitation or both according to the criteria set forth in Section 5 or Section 14 of P.L. 1992, C.79

N.J.S.A. 40A:12A-7a.

Section 5 states:

> A delineated area may be determined to be in need of development, if after investigation notice and hearing as provided in Section 6 of P.L. 1992, C.79 (N.J.S.A. 40A:12A-6) the governing body of the municipality by resolution concludes that within the delineated area any of the following conditions is found:
> …b. The discontinuance of the use of buildings previously used for commercial manufacturing or industrial purposes," …

Section 5h states:

> The designation of the delineated area is consistent with smart growth planning principles adopted pursuant to law or
> regulation.

Section 40A:12A-5(h).

Section 14a states:

> A delineated area may be determined to be in need of rehabilitation if the governing body of the municipality determines by resolution that a program of rehabilitation, as defined in Section 3 of P.L. 1992, C.79, (N.J.S.A. 40A:12A-3) may be expected to prevent further deterioration and promote the overall development of the community; and that there exists in that area any of the following conditions such that (1) significant portions of structures therein are in a deteriorated and substandard condition;(2) more than half of the housing stock in the delineated area is at least 50 years old;…(6) a majority of the water and sewer infrastructure in the delineated area is at least 50 years old and is in need of repair or substantial maintenance. Where warranted by consideration of the overall conditions and requirements of the community, a finding of need for rehabilitation may extend to the entire area of a municipality.

N.J.S.A. 40A:12A-14(a).

None of these relevant statutes were analyzed at all to apply to the Westfield plan. The Trial Court's failure to do so warrants reversal. The legal standard of

"arbitrary, capricious or unreasonable" need not be reached at all if these legal substantive standards of the LRHL are not first satisfied.

D. NON-BLIGHTED AREAS IN ANY PLAN MUST BE NECESSARY TO DEVELOP BLIGHTED AREAS (Pa0074-Pa0098)

The general rule is that "non-blighted" areas may be included in a redevelopment plan "**IF NECESSARY** for rehabilitation of a larger blighted area." [Emphasis Added].*62-64 Main Street v. Mayor*, 221 N.J. 129, 158 (2015) *quoting Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, 191 N.J. 344, 372 (2007). It is unmistakable that in this case that only one site in the entire redevelopment plan meets the statutory criteria of blight: the L&T abandoned department store. All the other sites in the Westfield "plan" are **NOT NECESSARY** for the redevelopment of that store. [Emphasis Added]. The proof is in the Topology report, which cites several other department stores in other parts of the country which were rehabilitated. (Topology Report at 25-26, Pa0221-Pa0222) Most retail shopping now occurs "online" such as Amazon, so this L&T site easily qualifies as "abandoned for commercial purposes" under Section 5b of the LRHL.[5] However, the remaining structures proposed for development in this "plan" are **NOT NECESSARY** for the 7-acre L&T site which contains 2 acres on its site for parking. The L&T site is wholly

[5] Lord & Taylor decided to abandon this site in late 2020. (Topology Report at pg. 9, Pa0205).

contained and has its own space for adequate parking. The simple fact is that there is no other single site within the plan which meets the substantive criteria of Section 5b.

This principle is commonly known as the "doughnut hole" theory. If, for example, a larger area easily satisfies the need for rehabilitation under Section 5b but there is in that area a single or other separate lots that do not meet the Section 5b criteria, the plan may still be approved. *See 62-64 Main Street, supra,* at 58, *quoting Levin v. Township Committee of Bridgewater*, 57 N.J. 506, 539 (1971) ("The fact that single parcels in the area are useful and could not be declared blighted if considered in isolation is basis for neither excluding such parcels nor for invalidating the designation."); *See also, Forbes v. Board of Trustees,* 312 N.J. Super. 519, 531-32 (App. Div.), certif. denied, 56 N.J. 411 (1998).

In *62-64 Main Street*, the owners challenged the "study" which designated their lots as being "in need of rehabilitation." To be sure, that challenge was destined to fail because the four lots contained "two vacant boarded up dilapidated buildings with crumbling masonry and a decayed parking lot." *62-64 Main Street, supra,* at 159. The adjacent lot contained "crumbling" pavement with "no marking for parking spaces, no lighting, no landscaping." *Id.* at 160. Notwithstanding the vigorous dissent by the Chief Justice based on a theory of unconstitutional "taking" because the intent of the municipality was to redevelop these lots by condemnation, (*Id.*, at 165-191), the majority upheld the designations, because the statutory definitions were satisfied. In

this case there will be no taking by condemnation but there is no other site beyond L&T that satisfies the Section 5 requirements. The redevelopment of those other sites is **NOT NECESSARY** for the redevelopment of the L&T site. Indeed, nothing in the 157 pages of the Topology report offers justification under Section 5 for any portion of the "plan" beyond the L&T site.

The "doughnut hole" theory for municipal redevelopment is not merely a principle established by the New Jersey case law. It is an express requirement of Section 3 of the LRHL:

> "a redevelopment area may include lands, buildings, or improvements which of themselves are note detrimental to public health, safety or welfare but the inclusion of which is found NECESSARY, with or without significant change in their condition, for effective redevelopment of the area of which they are a part." [Emphasis added].

N.J.S.A. 40A:12-3; *see Forbes, supra, at 531,* stating that "not every property within the redevelopment area must be shown to be itself substandard." But in this case the sites other than the L&T site are **NOT NECESSARY** to the redevelopment of the abandoned, vacant, former department store.

In *62-64 Main Street*, the Chief Justice was concerned that the area to be redeveloped was not shown to have an adverse effect on the surrounding areas (*Id.*, at 176) sufficient to justify the use of condemnation, especially since the owners had spent "hundreds of thousands of dollars" (*Id.,* at 165) to improve the properties. These concerns are not present at all in this case.

Likewise in *Levin*, there existed a 120-acre site that was "stagnant, undeveloped and unproductive," except for the "construction of a few scattered homes." *Levin*, *supra,* at 538. Those 120 acres were indeed "an economic wasteland." *Id.* No such comparable considerations are involved in this case.

The most important and relevant case to the application of the substantive criteria of Section 5 is the recent case of *Malanga v. Twp. of West Orange*, 235 N.J. 291 (2023). That case involved a "study" to redevelop the municipal library located on municipal property. The trial court and appellate court both found that Section 5 was satisfied. Yet the Supreme Court reversed that finding because the attempt to redevelop the municipal library did not meet the necessary elements of Section 5. This case, although cited and argued in plaintiff's briefing, was not addressed at all by the Trial Court in this case which is another reason to reverse the Trial Court's decision. This case is relevant, and perhaps dispositive, because the explicit statutory standards of Section 5 are required to be applied to any Section 7 redevelopment "plan." The specific language, as quoted hereinabove, provides in Section 7:

> no redevelopment…plan shall be undertaken or carried out except… according to the criteria set forth in Section 5.

N.J.S.A. 40A:12A-7a.

In *Malanga*, the issue was whether the municipal library "suffered from obsolesce" under Section 5. *Malanga*, *supra,* at 317. In an opinion by Chief Justice, the Supreme Court found that the specific criteria of Section 5 was not satisfied in

response to plaintiff Malanga's complaint. (*Id.* at 305). The Chief Justice also pointed out that using LRHL is a proper mechanism to avoid the pitfalls of the public bidding laws for the redevelopment of public property. (*Id.* at 308-10)(*citing* N.J.S.A. 40:12-1 to 30). In this case, the use of the "overlay" zone for the sites other than the L&T site avoids this issue of disposal of public land by municipality. There are no sites being condemned by the municipality to effectuate this redevelopment plan. (Resolution 180-2020, Pa0346; Resolution 145-2020, Pa0348)

Another important, relevant, and binding case is *Hirth v. City of Hoboken*, 337 N.J. Super. 149 (App. Div. 2001). In that case, plaintiff, who had contracted to purchase several lots for 80 residential units, challenged both the "study" and the "plan." The plan adopted by the Council in Hoboken excluded any residential uses thereby rendering plaintiff's contract invalid. The plaintiff was permitted to challenge both the study and the plan in one lawsuit. *Id.*, at 160; *see also, Forbes, supra*, 312 N.J. Super. at 522.

Here, plaintiffs clearly are challenging both the plan and the study because only one site meets the criteria of Section 5 ("study"): the L&T abandoned department store. Those criteria of Section 5 are specifically incorporated into Section 7 as noted hereinabove. This challenge is narrow and in a very limited nuanced manner dealing with the application of 3 statutes to the plan. No doubt the west zone (L&T site) satisfies the LHRL criteria as an abandoned commercial site.

No doubt more than fifty percent of the housing stock and water/sewer infrastructure is more than 50 years old satisfying the LHRL criteria for an overlay zone for the entire town. But all the sites in the north and south zones do not meet any criteria of the LRHL. These two zones rely solely upon the mechanism of the "overlay" zone. What this means is that such an application of the requirements of the LRHL would permit a municipality to declare the whole town as in need of rehabilitation and then proceed to redevelop any sites anywhere in town without regard to any other requirements under the LRHL.

The plan here allows the Town to construct projects that have no connection whatsoever to the redevelopment of the L&T site. These sites are being redeveloped just because they are located within the municipality. Then too, the specific expressed statutory purpose of the creation of the "overlay" zone (as set forth hereinabove) is to prevent "further deterioration" of the housing stock, water and sewer infrastructures. Yet none of the portions of this Westfield plan have anything to do with preventing "further deterioration" within the "overlay" zone. The Topology report is lacking any foundation at all to apply the statutory criteria of the "overlay" zone to this plan. (Topology report at 4-5, Pa0200-Pa0201; Topology report at 55, Pa0251-Pa0253)

Finally, the Trial Court failed to correctly perceive the importance of the Municipal Land Use Law (MLUL). That law has a mechanism to provide "smart

growth principles" under Section 5 of the LRHL. That mechanism is the Master Plan and the required periodic review and re-examination report. N.J.S.A. 40:55D-26 (Pa0132; Topology Report at 7, Pa0203). The MLUL, as applied over time, is designed to have municipalities grow and plan rationally, rather than by granting variances to the local zoning laws. Using that Master Plan process, a municipality can choose, for example, to increase lots sizes in some zones, and reduce lot sizes in other zones, increase or decrease commercial office and retail uses still in other zones. *Kaufmann v. Planning Board of Warren Twp.,* 110 N.J. 551 (1988). That is why the planning board is a mandatory part of process for LRHL. That board must also evaluate the redevelopment study and plan as "consistent" or "inconsistent" with the Master Plan.

The LRHL allows the redevelopment plan to supersede all the existing municipal land regulations, but such plans must be consistent with "smart growth planning principles" under Section 5h. N.J.S.A. 40A:12A-5h. That is why the usual MLUL procedures of a master plan and the re-examination and report of the master plan every 10 years are critical to the development and redevelopment of municipalities into the future. Municipalities should not develop by the continual use of variances. *See Cox & Koenig*, *supra,* at Sec. 19:6-1 (every variance to some extent "presumptively" creates "some detriment" to a town's zoning ordinance). This land use principle is particularly important, because the LRHL allows the

municipality to eliminate all existing zoning ordinances within the redevelopment plan sites. For this reason, the LRHL requires a very careful and thoughtful comparison of the existing master plan with the redevelopment plan by both the planning board and the town governing body.

In all land use matters, the Supreme Court has recognized the importance of the master plan in relation to all applications to develop or redevelop sites within any municipality. *See Kaufmann, supra,* at 557. There, our Supreme Court instructed municipalities about the importance of analyzing the trends of development periodically to determine if the master plan and zoning ordinance should be changed. *Id.,* at 557 ("We have increasingly emphasized that planning, not *ad hoc* discussion making, is the cornerstone of SOUND GOVERNMENT OR POLICY in this area") (O'Hern, J.) [emphasis added]. For example, some towns may choose to increase the lot sizes so that larger lots are created to prevent overcrowding. *See Cicchino v. Berkley Heights T.P.,* 237 N.J. Super. 175, 182 (App. Div. 1989).

In this case the Trial Judge simply ignored these controlling principles, thereby permitting the plan to be declared valid even though on its face, the plan was "inconsistent" with the master plan. This legal error must be corrected by the Court in this appeal. And this can be accomplished only by a decision finding for plaintiffs as a matter of law without the need for remand. The legal issues are clear requiring no further hearings.

In this case, the plan is "inconsistent" with the existing Master Plan in Westfield, because its proposal to put residential units within the GB2 is prohibited by the existing zoning ordinance and Master Plan. There are 38 additional inconsistencies set forth in the WARD document, the testimony before the Planning Board and Town Council. The legal conclusion that the redevelopment plan is "consistent" with the existing Master Plan is simply incorrect as a matter of law. That erroneous legal conclusion provides another basis to reverse the judgment of the Trial Court.

II. PLAINTIFFS' OFFERED EXHIBITS SHOULD HAVE BEEN INCLUDED IN THE RECORD (T45-9 to T47-4) (Pa0079-Pa0080)

The Trial Court wrongfully excluded the Planning Board Transcript *not being appealed from but consists of evidence sought to be admitted at trial hearing R. 2:5-1(g) and the WARD memo (Pa0008, T41-13, T46-11, Exh.P-5), a document created by Plaintiffs which summarized a review of the Master Plan compared to the proposed redevelopment plan.[6] (T45-9 to 47-4) Such documents should have become part of the record to be reviewed by the Court.

[6] The Trial Court asserts that the issue of the exhibits was not properly briefed (Pa0079-80). However, page 8, footnote 1 of plaintiffs' reply trial brief sets forth their reliance on the brief submitted to oppose intervenor's motion to settle the record. (Pa0131). Attached to that reply brief is an itemized chart establishing the basis for each and every exhibit offered. (Pa0112). Under these circumstances, there was no need to submit additional briefing as the justification for the offer of

The Trial Court relied upon an erroneous view of the *Hirth* case by quoting the portion which said "there ORDINARILY is no administrative record other than whatever report the planning board may have submitted to the governing body and a transcript of the quasi-legislative hearing before the governing body.' [Emphasis Added] *Hirth, supra* at 165. (Pa0080). Yet a closer reading of *Hirth* demonstrates that Judge Skillman's opinion shows that in several instances, the "complete" records should be considered by the Trial Court in a Section 7 challenge to a redevelopment plan. *Id.,* at 157-158, 167.

Here the WARD memo and Planning Board transcript revealed the "apparent justifications" of plaintiffs' position that the plan was "inconsistent" with the Master Plan. The Trial Court should have been aware of those "justifications" when considering the challenge to the plan, according to Judge Skillman's opinion. *Id.*, at 167. The same result should occur here because the Trial Court read the *Hirth* opinion too narrowly.

As Judge Skillman also points out, the Planning Board is "ORDINARILY" [emphasis added] where the basic record made. *Id*., at 162. Thus, supplementing the prerogative writ record may be allowed. *Id.* Here that record should include not only the Planning Board transcript but also the WARD memo presented to both the

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plaintiffs' exhibits was explicitly and previously identified for the convenience of the Trial Judge. R. 2:6-1(a)(2).

Planning Board and Council to dispute the legal contention asserted in the Topology report that the proposed plan is "consistent" with the Master Plan.

Hirth allows such evidence even though Council's hearing on the ordinance to approve the plan is "quasi-legislative in nature" and as such "the governing body does not ORDINARILY make findings of fact to justify its actions." [Emphasis added] *Id.*, at 162, 166, *citing* *Gardens v. City of Passaic*, 130 N.J. Super. 369, 377-378 (Law Div. 1974), *aff'd o.b.*, 141 N.J. Super. 436 (App. Div. 1976).

Appellate courts "typically" review evidentiary rulings under a "deferential standard." *State v. Trinidad*, 241 N.J. 425, 448 (2020). Absent a showing of "abuse of discretion," the ruling below should be upheld. *Id.* However, if it fails to apply the proper legal standard, the appellate court "can review the evidentiary ruling de novo." *Id.* (trial court failed to apply N.J.R.E. 403, but instead relied upon N.J.R.E. 401). *See also*, *State v. Garrison,* 228 N.J. 182 (2017) (failure to apply "other-crime" evidence under N.J.R.E. 404(b)).

In cases where authentication is an issue, however, the better practice is to admit the document "leaving to the jury more intense review of the documents." *State v. Hannah*, 448 N.J. Super. 78, 89 (App. Div. 2016), *quoting* *Konop v. Rosen*, 425 N.J. Super. 391, 411 (App. Div. 2012). In *Hannah*, the appellate court suggested that the "better practice" is to admit the documents and focus on the process of

weighing those documents "for consideration by the judge as a fact finder." *Hannah*, *supra,* at 90 *quoting* *State v. Tormasi*, 443 N.J. Super 146, 156-157 (App. Div. 2015).

In this case, the Trial Judge had no facts to find. No testimony was taken from any witness. The only issue is whether the Trial Judge should have considered the WARD memo submitted to the Planning Board and the hearing transcript before the Planning Board as part of the "record below" to determine the legal issue of whether those municipal bodies correctly found that the redevelopment plan "consistent" with the municipal Master Plan. Under these circumstances, this is solely a question of law which should be reviewed by this Court *de novo*.

There have been other instances in land use prerogative writ actions that materials outside the hearing transcript have been properly admitted for consideration to the trial court. As noted above, in *Malanga* plaintiff successfully challenged a study to redevelop the municipal library. 253 N.J. at 297. The trial court and appellate court determined erroneously that the substantive criteria of Section 5(d) of the LRHL (N.J.S.A. 40A:12A-5(d) had been satisfied. The Supreme Court, however, reversed the finding in favor of the plaintiff because proper scrutiny of the substantive elements of the LRHL law revealed that those criteria were **NOT** satisfied based upon the information before the Board and Council. *Id.*, at 297. However, relevant to this appeal is the fact that in all the proceedings before the case reached the Supreme Court, the record did not contain any information about the

operating hours of the library. The *Malanga* case was argued on October 24, 2022, but the opinion of the Chief Justice was not filed until March 13, 2023. One of the relevant issues in that case was the use of the library. On March 8, 2023, between oral argument and before the filing of the opinion, the Chief Justice went on the library's public website which disclosed all of the library's operating hours. *Id.*, at 320 n.ll.

Therefore, as applied to this case, the WARD memo and the Planning Board transcript should be part of this record simply to demonstrate that both the Planning Board and Town Council should have considered the WARD document when each body considered the "consistency" or "inconsistency" between the redevelopment plan and Master Plan. If the Supreme Court can look at a municipal website during its deliberative process of determining whether the substantive criteria of the LRHL are met, then this Court should accept the WARD memo document and Planning Board transcript as part of the record to determine in this appeal whether the substantive criteria of the LRHL were satisfied.

The second important and relevant case on point is *Fieramosca v. Twp. of Barnegat*, 335 N.J. Super. 526 (Law Div. 2000). In that case, plaintiffs obtained in 1996 site plan approval for the development of their marina, but the resolution of approval by the Planning Board failed to mention that, as a condition of approval, plaintiffs must install a drainage pipe. In the prerogative writ action before the

Assignment Judge of Ocean County, that Judge considered an exchange of letters in 1998 and 1999 between the plaintiffs' engineer, the Board's attorney, and the Township's engineer. *Id.*, at 530-531. Obviously, none of those 1998-1999 letters appeared in the transcript of the planning board's 1996 hearing. Yet, at the prerogative writ trial, the trial judge considered those 1998-1999 letters to confirm that at the 1996 hearing, the plaintiffs had knowledge of the mandatory condition of the approval that plaintiffs must install a drainage pipe at their marina. *Id.*, at 535.

Applying these cases to this appeal, this Court can determine that the WARD legal memo and Planning Board transcript were improperly excluded as part of the record and should be considered by this Court as part of the record to find that the legal conclusion of consistency between the plan and the master plan by both bodies was erroneous.

CONCLUSION

For all the foregoing reasons, the judgment of the court below must be reversed so as to allow the Town to create a new study and plan that complies with all of the statutory criteria of all of the applicable statutes of the Local Redevelopment and Housing Law.

Dated June 27, 2024

Scarinci Hollenbeck, LLC.

By: ***/s/ Robert E. Levy***
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September 11, 2024

VIA E-Courts Appellate
The Honorable Judges of the Appellate Division
Richard J. Hughes Justice Complex
PO Box 006
Trenton, New Jersey 08625

RE: Westfield Advocates for Responsible Development, *et al* v. Town of Westfield and SW Westfield, LLC
Docket No. UNN-L-1011-23

Docket No. A-2268-23

Dear Honorable Judges of the Appellate Division:

This firm serves as Redevelopment Counsel to the Town of Westfield and is co-counsel to Defendant/Respondent Town of Westfield. Please accept this Letter Brief in lieu of a more formal Memorandum of Law in opposition to Appellant's Brief. In lieu of submitting a separate Brief and Appendix, the Town joins and adopts the Brief and Appendix filed by Respondent/Intervenor SW Westfield, LLC ("SW Westfield"). This Letter Brief is respectfully submitted to summarize the Town's position in this matter and amplify certain points in SW Westfield's Brief.

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The Town joins and adopts the Procedural History set forth in SW Westfield's Brief.

STATEMENT OF FACTS

The Town joins and adopts the Statement of Facts set forth in SW Westfield's Brief.

LEGAL ARGUMENT

APPELLANTS MISREPRESENT THE FACTS AND LEGAL ISSUES IN THIS APPEAL (Pa0098)

Fundamentally, Appellants' Brief disturbingly misrepresents the legal issues presented for the Appellate Division's consideration, starting with the standard of review. The issue before the Appellate Division is the Town's decision to adopt a Redevelopment Plan. A "presumption of validity" attaches to the adoption of a redevelopment plan with deference given to a governing body in making such a determination. Downtown Residents for Sane Dev. v. City of Hoboken, 242 N.J. Super. 329, 332 (App. Div. 1990). To set aside an approved redevelopment plan, the challenger must prove that the "legislative decisions made must be more than debatable, they must be shown to be arbitrary or capricious, contrary to law, or unconstitutional." Id. at 332 (citing Hutton Park Gardens v. Town Council of W. Orange, 68 N.J. 543, 564 (1975)). Even if "two actions are open

to a municipal body, municipal action is not arbitrary and capricious if exercised honestly and upon due consideration, even if an erroneous conclusion is reached." Bryant v. City of Atlantic City, 309 N.J. Super. 596, 610 (App. Div. 1998).

Appellants attempt to avoid this high threshold by submitting a newly constructed baseless argument that the Appellate Division must first determine whether the Redevelopment Plan adopted on February 14, 2024 satisfies Sections 5, 7, and 14 of the Local Redevelopment Housing Law ("LRHL"), N.J.S.A. 40A:12A-1 et seq. before it can reach the review of the Redevelopment Plan. They even go so far as to assert that "the failure of the Trial Court to apply the controlling standards of Sections 5, 7, and 14 means that the decision below is not entitled to any 'deference.'" (Pb13.) This is creative lawyering gone wrong. Appellants' absurd argument misapplies the LRHL and is contrary to the well-established record in this matter. Sections 5 and 14 of the LRHL have no relevance to this matter. Section 5 relates to the criteria for the designation of an area in need of redevelopment.[1] Section 14 relates to the criteria for designation of an area in need for rehabilitation. It is mystifying why Appellants cite to these Sections when there is absolutely no

[1] Appellants' citation to "smart growth planning principles" is inapplicable to a review of a redevelopment plan because these principles are only relevant to Section 5, which, as noted above, is inapplicable to this matter. (Pb9, 11, 19, 21.)

basis for Appellants to challenge the designations on appeal, yet this argument is repeated throughout the Brief (Pb1 3, 9, 12-14, 17.)

The Town designated the redevelopment area properties as one in need of redevelopment or rehabilitation in 2020. (Pa127.) On June 30, 2020, the governing body adopted Resolution No. 145-2020, which designated the following parcels as areas in need of redevelopment: Block 3101, Lot 5, and Block 3103, Lot 7. (Id., ¶12.) On August 11, 2020, the governing body adopted Resolution No. 180-2020, which designated the following parcels as areas in need of redevelopment: Block 2502, Lot 14; Block 2506, Lot 1; and Block 2508, Lot 11 ("Lord and Taylor Redevelopment Lots"). (Id., ¶ 13.) On October 13, 2020, the governing body adopted Resolution No. 225-2020, which designated the entirety of the Town and certain properties owned by the Town as areas in need of rehabilitation. (Id., ¶14, 16.)

The time to challenge these designations has long expired. See R. 4:69-6(b)(3); N.J.S.A. 40A:12A-6(b)(7) (45-days). Appellants conceded that point no less than two times – first, when their Complaint failed to include any challenge to the designations, and second, when they determined at trial not to pursue a challenge to the validity of the 2020 designations. (Pa126 at ¶¶11-16; Pa90; see gen. Pa46-53; T36:14-37:2; T38:19-39:1; Pa80.) Yet, for purposes of this appeal, Appellants have re-written history and now base their entire appeal on a challenge to blight

designations that was previously never raised due to the incontrovertible time bar prohibiting such a challenge.

The blight designation, contrary to what Appellants would have the Appellate Division believe, is not at issue here. What is at issue is a review of a redevelopment plan, which is governed by Section 7 of the LRHL. Section 7 permits a municipality to adopt a redevelopment plan that is either: (1) "substantially consistent with the municipal master plan" or (2) "designed to effectuate the master plan." N.J.S.A. 40A:12A-7(d). The blight designation and the review of a redevelopment plan are two separate and independent municipal actions with different applicable standards. Powerhouse Arts Dist. Neighborhood Ass'n v. City Council of City of Jersey City ("PADNA"), 413 N.J. Super. 322, 334 (App. Div. 2010); compare N.J.S.A. 40A:12A-5(d), with N.J.S.A. 40A:12A-7. PADNA is dispositive on this issue – there is no need to reevaluate designations during the review of a redevelopment plan. PADNA, 413 N.J. Super. at 335.

Appellants misrepresent the holdings in a number of cases, all of which are discussed in SW Westfield's Brief. However, Appellants' manipulation of Hirth v. City of Hoboken, 337 N.J. Super. 149 (App. Div. 2001) calls for special emphasis. Appellants rely on Hirth to support the flawed argument that a challenge to a blight designation can occur concurrently with a challenge to a redevelopment plan.

(Pb19.) In Hirth, two separate challenges were before the Appellate Division – a blight designation and the adopted redevelopment plan. Id. at 161, 164. Since the challenges were made within weeks of one another, there was no time-bar issue that is present in this matter. Id. at 155-56. The Hirth Court took special pains to undertake two separate reviews for both the blight designation and the adoption of the redevelopment plan. Id. at 164. In its review of the adoption of the redevelopment plan, the Hirth Court confirmed that Section 7 – not Section 5 and not Section 14 - of the LRHL was the appropriate statutory standard to apply. Id. at 164-66. The case law could not be more clear that there are two separate standards for reviewing a blight designation and adoption of a redevelopment plan. However, for their appeal, Appellants persist in combining the two standards, which demonstrates either a fundamental misunderstanding of the law or a disturbing effort to mislead the Appellate Division as to the validity of its arguments.

Appellants further argue that "[t]he Town, through the mechanism of the overlay zone, avoids the usual statutory requirements of disposing of its municipally owned property." (Pb2.) There was no such attempt to shirk the Town's statutory obligations and the suggestion that the Town would engage in such nefarious misconduct is offensive. Once an area is designated as an area in need of redevelopment under the LRHL, the municipality has the powers afforded under the

LRHL. In Malanga v. Twp of W. Orange, 253 N.J. 291 (2023), the Court recognized that municipalities are often faced with circumstances that would benefit from the awesome power granted under the LRHL. However, the Court distinguished between the desire, and the right, to use the powers vested under the LRHL, writing "[t]owns faced with situations like the one here have a number of options," including the power of redevelopment, but only if the property can "satisfy the specific standards" under the LRHL. Id. at 323.

Here, there was a well-planned, disciplined, and carefully effectuated analysis, study and investigation that "satisf[ied] the specific standards under the LRHL" to allow for a comprehensive redevelopment of many properties within Westfield's downtown. Indeed, the record is replete with evidence that the Town ensured that the Redevelopment Plan was consistent with the Master Plan. Pursuant to N.J.S.A. 40:55D-28(a), a planning board is charged with creating a master plan. Here, the Mayor commented that there was "no group more intimately familiar with the Master Plan than the Planning Board." (Pa639 at 90:11-91:6.) The Planning Board's determination that the Redevelopment Plan was indeed, consistent with the Master Plan is forceful evidence of the Town's compliance with its statutory obligations under the LRHL. (Pa645 at 102:3-7.)

The temerity with which Appellants are playing fast and loose with the record and the law is startling. It is clear that the basis of Appellants' objection to the Redevelopment Plan is that they simply do not like it. See Pb8 ("This proposed oversized redevelopment will change the character and essential idyllic nature of Westfield forever.") Since that alone cannot be a basis for overturning the Redevelopment Plan, Appellants have concocted a toxic stew of alternate timelines of blight designation challenges, kitchen-sink statutory citations that are wholly irrelevant to the review of a redevelopment plan, and mix-and-match case law in a bid to obtain victory at any cost. Appellants have fallen woefully short of demonstrating that the Town acted arbitrarily, capriciously, and unreasonably in adopting the Redevelopment Plan. This Court should dismiss the Appeal and affirm the Judgment below.

CONCLUSION

For all of the foregoing reasons and the reasons set forth in SW Westfield's Brief, the Town respectfully requests that this Court dismiss the Appeal and affirm the Judgment below.

Thank you for Your Honors' attention to this matter.

Respectfully,

/s/ Robert S. Goldsmith

cc: All Counsel of Record (via E-Courts Appellate)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2268-23

Westfield Advocates for Responsible Development, Frank Fusaro, Carla Bonacci, Allison Carey, William Fitzpatrick, and Anthony LaPorta, Plaintiffs-Appellants, v. TOWN OF WESTFIELD, Defendant-Respondent, and SW WESTFIELD, LLC., Intervenor-Respondent.	CIVIL ACTION On Appeal from a Final Order of the Superior Court, Law Division, Union County Docket No. UNN-L-1011-23 Sat Below: HONORABLE Daniel Lindemann, J.S.C.

RESPONDENT-INTERVENOR SW WESTFIELD, LLC'S BRIEF IN OPPOSITION TO APPELLANTS' APPEAL BRIEF

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PRELIMINARY STATEMENT

Respondent-Intervenor SW Westfield, LLC ("SW" or "Respondent") submits this brief in opposition to Plaintiffs-Appellants' ("Appellants") appeal from the Trial Court's judgment upholding a decision by Respondent-Defendant Town of Westfield (the "Town" or "Westfield") to adopt Ordinance #2023-3 (the "Ordinance"), which adopted a Redevelopment Plan on February 14, 2024.

Appellants' challenge is based on their desire to have a different redevelopment plan that is more to their liking. While Appellants certainly have the right to their views on the redevelopment, it provides no legal basis to upend the years long interactive process through which the Governing Body of the Town properly and in accordance with law approved the Ordinance and a Redevelopment Plan, which sets forth guidelines for improvement of the Town's downtown area in a manner that is consistent with the Town's Master Plan. In doing so, the Governing Body scrupulously followed the law, and nothing has been proven to the contrary. Thus, New Jersey law requires more than mere disagreement with type or scope of the plan and instead imposes a heavy burden to interfere with municipal approval of redevelopment plans to ensure consistency and fairness.

Appellants fail to meet their heavy burden and have not shown a failure to comply with the applicable legal standard of arbitrary, capricious or

unreasonable conduct by the Governing Body. To the contrary, the undisputed facts show that the Governing Body complied with their procedural and substantive obligations in adopting the Ordinance. Appellants may disagree with the Town's plans; but that, in and of itself, is not enough as a matter of well-established law.

A municipality may adopt a redevelopment plan that is either "substantially consistent with the municipal master plan" or "designed to effectuate the master plan." N.J.S.A. 40A:12A-7(d). Given the great weight and deference afforded to municipal actions of this type under well-established case law, Appellants had the "heavy burden of overcoming the presumption of validity accorded the decision of the Governing Body by showing that it was 'arbitrary, capricious, and unreasonable.'" (Pa92.) Appellants did not introduce any evidence showing that the Redevelopment Plan failed to meet the standard of substantial consistency or effectuating the Master Plan. Rather, the trial evidence shows that the Redevelopment Plan was, in fact, consistent with the Master Plan. Nor did Appellants introduce any evidence whatsoever of arbitrary, capricious or unreasonable conduct by the Governing Body. Again, the only evidence shows that the Governing Body complied with its obligations throughout the process of approval without a hint of any improper conduct.

Without any basis to reverse the Governing Body's action, Appellants seek to have this Court apply the standard of review for municipal designation decisions, which is a completely different process from adoption of the redevelopment plan and has no relevance here. Indeed, the Governing Body already designated the property at issue in 2020 without any challenge or objection. Thus, Appellants' attempt to resurrect a decision made years ago and apply the wrong legal standard to the Redevelopment Plan should be rejected.

Appellants also seek to overturn the Ordinance by referencing a self-serving document that purportedly identifies inconsistencies between the Redevelopment Plan and the Master Plan. Appellants never sought to introduce this document into evidence, and even if they had tried, there would have been no evidentiary basis to admit it. Their attempt to rely on it now highlights the absence of any genuine or legitimate basis to reverse the Trial Court's or Governing Body's decisions.

PROCEDURAL HISTORY

A. PRETRIAL

On March 29, 2023, Plaintiffs filed a Complaint in Lieu of Prerogative Writs against Westfield to invalidate its adoption of the Ordinance. (Pa1-7.) On May 3, 2023, Plaintiffs filed an Amended Complaint (the "Complaint") that added two individual Plaintiffs, but did not otherwise substantively amend their

claims. The Complaint does not name the Planning Board and did not challenge the Planning Board's recommendation to approve the Ordinance or its finding that the Redevelopment Plan is not inconsistent with the Master Plan. (Pa126 at ¶9; Pa90; see gen. Pa46-53.) The Complaint set forth a single count substantially claiming that the Governing Body's approval of the Ordinance was "arbitrary, capricious, and unreasonable." (Pa50 at ¶26; Pa90.) The Complaint did not challenge the 2020 decisions designating the redevelopment areas in need of redevelopment and rehabilitation (nor could it have, as any such challenged were time-barred). (Pa126 at ¶¶11-16; Pa90; see gen. Pa46-53.)

The parties agreed that there was no need for discovery, witnesses, or experts and that the trial would move forward based on the record below as presented in trial briefs and oral argument. (Pa75.) The parties submitted Joint Exhibits and Stipulations of Fact. (Pa125-128; Pa76-79.) During the pretrial period, Plaintiffs had identified potential additional documents (outside of the Joint Exhibits) that they may want to use at trial ("Proposed Exhibits"). (Pa73-74.) SW disputed that the Proposed Exhibits should be used at trial and filed a pretrial motion to settle the record, asking the Trial Court to confirm that Plaintiffs' Proposed Exhibits were not, in fact, part of the Governing Body's record and should not be considered in any judicial review thereof. (Pa75.)

On October 6, 2023, the Trial Court denied SW's motion to settle the record without prejudice and deferred its determination until the trial. (Pa75.) This decision was consistent with Plaintiffs' opposition to SW's motion, arguing that the motion was procedurally improper and should be postponed until trial. (Pa75 at n.2; Pa79.) Further, "as a matter of record, all exhibits that any party intended to be used at trial, whether included as Joint Exhibits or any of Plaintiffs' proposed and disputed exhibits [i.e., Proposed Exhibits], **had to be included in the trials briefs** as the trial briefs and oral arguments highlighting the arguments in the trial briefs were the stipulated form, scope and content of the record for trial." (Pa79 (emphasis added).) Thus, all the parties had sufficient "notice and opportunity that the January 26, 202[4] trial would address all arguments regarding exclusion of **any proposed** and disputed [Plaintiffs' Proposed Exhibits] before commencing oral argument that was stipulated as being the form of hearing, i.e., the trial was stipulated as being limited to trial briefs and oral argument." (Pa75 at n.2 (emphasis added).)

B. THE TRIAL

Plaintiffs filed their opening/case-in-chief trial brief on October 18, 2023, Defendant and Intervenor filed their opposition trial briefs on October 18, 2023, and Plaintiffs filed their rebuttal trial brief on November 30, 2023. (Pa75; Pa76.) Plaintiffs' trial briefs failed to reference any of their Proposed Exhibits at all,

except for two: the WARD Memo, discussed infra; and a document not at issue on this appeal (the Planning Board transcript). (Pa79.) The trial, based on those briefs, was held on January 26, 2024. (Pa75; Pa76.)

1. The Evidentiary Issues

The parties agreed that evidentiary issues would be decided first, followed solely by argument based on the trial briefs (i.e., no witnesses or evidentiary hearing). (T5:23-25; T6:9-16; T6:24-7:1.) The Trial Court reiterated the "ground rules" that it and the parties had "talked about throughout the case" "several times" at "every hearing": "We're here to put in our briefs and then argue about the briefs. … **If it's not in your brief, don't talk about it**." (T10:25-11:4 (emphasis added); T14:7-15.) The Trial Court reemphasized that the parties were required to address any relevant exhibits in their trial briefs. (T12:17-13:1 ("You don't give a box of stuff to the Court and say figure out how it matters, especially in a case like this where it's not a trial where there's witnesses … and things come up that you don't expect.")). The Trial Court then found that eighteen of Plaintiffs' Proposed Exhibits were never referenced in the briefing and therefore were excluded from trial. (Id. 14:12-16.)

The Trial Court also addressed the only two Proposed Exhibits that were referenced in Plaintiffs' trial briefing, only one of which is raised on this appeal. That one Proposed Exhibit, referred to as, P-5, was a 38-page document

addressed to the Westfield Planning Board, from Plaintiff Westfield Advocates for Responsible Development ("WARD"), dated February 6, 2023 (the "WARD Memo"). (T19:21; Pa79.)[1] Notably, the WARD Memo was not pre-marked as an exhibit or presented into evidence at trial. (T19:23-24.)

As SW explained, the WARD Memo is nothing more than argument drafted by the Plaintiff WARD itself that was raised without any witness to cross-examine or even authenticate the document. (T22:7-23:4.) Instead, Plaintiffs sought to use the WARD Memo through a general, fleeting reference in their brief to try to prove alleged inconsistencies between the Redevelopment Plan and the Master Plan. This attempted use, in addition to violating the Trial Court's directions and the parties' agreement, is hearsay and not admissible under the New Jersey Rules of Evidence. (Id.) SW maintained that Plaintiffs were required to either make any such permissible arguments in their trial briefs or to have designated the appropriate witness(es), if qualified, to testify and be subject to cross-examination, as it was not required to defend against a hearsay document at trial.[2] (Id.) Moreover, as there was no evidentiary hearing held before the Governing Body, the WARD Memo was not part of that record; but

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[1] While Plaintiffs seek to include the WARD Memo in their Appendix (Pa8-45), SW has sought to strike the same, which motion is pending before this Court.

[2] At no time pretrial or at trial did Plaintiffs try to introduce the Master Plan, which would have been necessary to prove any alleged inconsistency therewith.

to the extent it was considered, it would be in the transcript of the Governing Body meeting, which was a Joint Exhibit. (T23:5-25; T25:16-26:9; Pa130 at ¶6.)

In response, Plaintiffs admitted and represented that the WARD Memo "isn't being presented for the truth of the matter asserted[,]" but was being presented as allegedly part of the record below because it was **not** considered by the Governing Body. (T28:15-29:9 ("THE COURT: Okay. So it's not whether it's a document that Hirth would say is part of the record, it's – you say they should have considered it and they didn't …. [PLAINTIFFS' COUNSEL]: Yes, Your Honor.").) SW explained that any such basis was irrelevant given that the Governing Body's decision is presumed to have factual support; thus, Plaintiffs bear a "heavy burden" to surmount that presumption, which could be "overcome only by proofs that preclude the possibility that there … could have been any set of facts known to the legislative body that would rationally support a conclusion that the enactment is in the public interest." (T30:2-20.)

In finding that there was no basis for admitting the WARD Memo into evidence, the Trial Court relied on the standards set by the Appellate Division:

> "The only hearing required before adoption of a redevelopment plan, as with any other municipal ordinance, is a legislative hearing before the governing body. See N.J.S.A. 40:49-2b. Consequently, if an action is brought challenging a redevelopment plan, there ordinarily is no administrative record other than whatever report the planning

> board may have submitted to the governing body and a transcript of the quasi-legislative hearing before the governing body," and that's Hirth [v. City of Hoboken], 337 N.J. Super. [149,] 165 [(App. Div. 2001)].
>
> So what Hirth is saying, ordinarily, there is ordinarily no administrative record, other than. So in other words, if it's not ordinary, there's something other than an administrative record. And we're not talking about there being something other than an administrative record. What we're talking about here is plaintiff seeking to have something in the -- for use at a hearing controlled by Hirth and controlled by what the record requires in Hirth that just doesn't fit within the Hirth scope of what's at play here for the Court to consider in evaluating the application.

(T31:21-32:17.)

The Trial Court also found that Plaintiffs' trial briefing did not define what was in the record below or identify the documents they wanted to use. (T32:18-33:5.) The Trial Court further elaborated that Plaintiffs did not explain how the WARD Memo showed how the Governing Body's actions were "capricious, arbitrary, or unreasonable …." (T32:25-33:3.)

The Trial Court reiterated that there were no witnesses and that any such arguments had to be in Plaintiffs' papers to give Respondents proper notice:

> This is on the papers. So you had to put it in the papers for it to be arguable in the record. And to the extent that's in there, I'll hear plaintiff point to it, and I'll consider whether to reconsider. But for now, and for the record, for purposes of moving forward, I'm barring it because it's not part of the Hirth record, period. And it's -- we went to a lot of length in our various hearings to talk about the nature of how this was going to be on the papers.

> And it's a trial by ambush if it gets used here where it hasn't been used as it -- if it had some meaning to this hearing, then I will hear it argued from where it's cited in the brief, either the initial brief and, perhaps, from the reply brief. Although the opposition brief, which is not the one people are seeking to ban, the opposition brief took the position we don't expect this -- and they said it in anticipation, in the defendant's brief.

(T33:25-34:18.) Based on this, the Trial Court found that the trial record was limited to the Joint Exhibits. (T35:12-13.)

Thereafter, Plaintiffs sought reconsideration of certain proposed exhibits, including the WARD Memo. (T46:10-16.) SW reiterated its objections and further noted that to the extent the memo was being offered for notice purposes only (and not the truth of the matter asserted), then whatever was in the Governing Body's transcript, a Joint Exhibit, was the record of any such notice or not. (T44:12-17.) In denying reconsideration, the Trial Court again found that if Plaintiffs wanted to include those exhibits in their argument, they needed to have cited them in their briefs. (T46:1-16.) As Plaintiffs were unable to do so, including as to the Planning Board transcript (P-13), the Trial Court stood by its original decision.[3] (T45:17-46:19.)

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[3] Plaintiffs had also referenced in their argument only (but not in their briefs) a hearsay, unauthenticated email, P-15, which was not admitted. Despite not challenging that ruling on appeal, Plaintiffs filed a motion to supplement the appellate record with that document, which was denied. Plaintiffs nonetheless included P-15 in their appendix (at Pa121), which is subject to SW's pending motion to strike.

2. Plaintiffs Conceded that the 2020 Designations Were Not Being Challenged

SW also sought to confirm that the 2020 designations of the redevelopment area being in need of redevelopment or rehabilitation were not an issue in the instant lawsuit or at trial. (T36:14-37:2). After a recess, Plaintiffs conceded that they were not seeking to invalidate the 2020 designations in this action and that the trial was limited to challenging the 2023 Ordinance approving the Redevelopment Plan. (T38:19-39:1; Pa80.)

3. The Substantive Issues

In presenting their case, Plaintiffs acknowledged their "high burden" to demonstrate that the Governing Body's actions were "arbitrary, capricious, and unreasonable" and that the standard is "deferential" to the Governing Body. (T55:24-56:4; T90:9-12.) Without addressing that burden, Plaintiffs sought to argue against the "scale and scope" of the project. (T56:4-8.) Plaintiffs stated that while "[n]o one argues really that the Lord & Taylor property should be redeveloped," they were critical of the square footage of office space contemplated. (T56:7-12.) Plaintiffs also proposed their interpretation of the standard set forth in Hirth, which they misapply here. (T53:21-54:8.) Other than wanting a different plan, Plaintiffs pointed to no evidence that the Governing Body acted in an arbitrary, capricious and unreasonable manner.

In upholding the Town's decision-making, SW argued, among other things, that Plaintiffs were asking the Trial Court to apply the wrong standard, which was applicable to designation decisions, not approvals of redevelopment plans. (T57:20-58:10; 60:2-61:10.) SW explained that the governing standard for redevelopment plans was Section 7 of the LRHL, which requires that a redevelopment plan be either "substantially consistent" with the Master Plan or "designed to effectuate" the Master Plan. (T58:8-60:3.) SW noted that differing opinions and even the existence of "more preferable alternatives" are insufficient grounds on which to disturb a Governing Body's deferential decision to approve a Redevelopment Plan, which if "exercised honestly and upon due consideration, it is not arbitrary and capricious." (T59:14-19; see also T59:20-75:22.)

The Town similarly rebutted Plaintiffs' arguments and misapplication of the applicable standards in failing to carry their burden. (T76:1-82:19.)

C. THE FEBRUARY 26, 2024 TRIAL COURT DECISION

On February 26, 2024, the Trial Court issued a thorough Decision and Judgment Dismissing Action with Prejudice ("Decision") finding that Plaintiffs had not met their heavy burden to vacate the Ordinance and Redevelopment Plan. (Pa74-98.) The Decision reiterated that Plaintiffs' trial briefs "failed to address or even mention any of Plaintiffs' proposed, disputed exhibits" except

two. (Pa79.) The Decision went on to explain that "by failing to use, reference or argue from any of the other 'P' exhibits, the Court held for the reasons set forth on the record on January that Plaintiffs effectively waived the right to use them 'at trial,' where the 'trial' consisted – by stipulation – solely of trial briefs and oral arguments from the trial brief." (Pa79.) The Decision also summarized the Trial Court's decision barring all the Proposed Exhibits finding that, in addition to waiving any possible right to seek their inclusion, the Proposed Exhibits were not part of the record below before the Governing Body and thus were not appropriately part of the trial record. (Pa80.)

The Decision reviewed the factual and procedural history, including specific references to the Stipulated Facts showing that the parties stipulated to the proper designation of the properties at issue in 2020. (Pa81.) The Decision also referenced the Redevelopment Plan prepared by Topology NJ, LLC ("Topology"), the Town's Redevelopment Planner. (Pa82.) The Decision examined the Redevelopment Plan including, significantly, Section 9.1, which included a "detailed examination of its attempt to be consistent with the Master Plan." (Pa83 (citing Pa311-32)). The Decision reviewed the Governing Body proceedings, the detailed presentations, and the opportunities given to members of the public to express their opinions. (Pa83-87.) The Decision relied on the Planning Board reviewing the Redevelopment Plan and that it "did not identify

any provisions ... which were inconsistent with the Master Plan." (Pa87 (citing Pa110-11)). The Decision noted that the Ordinance was raised at a second reading, during which the Town's professionals reaffirmed such consistency and the Governing Body approved it. (Pa88-90.)

In its Legal Analysis, the Trial Court found that Plaintiffs "failed to meet their burden" and that the "record demonstrates that the subject action of the Defendant Town of Westfield, here, the Governing Body, was not arbitrary capricious or unreasonable, and was appropriately and adequately supported by the record." (Pa98.) The Trial Court, therefore, entered judgment in favor of Defendant and Intervenor and dismissed the Complaint with prejudice. (Pa98.)

The Trial Court found that Plaintiffs "bear the heavy burden of overcoming the presumption of validity according the decision of the Governing Body by showing that it was 'arbitrary, capricious, and unreasonable.'" (Pa92) (citations omitted). The Trial Court cited to Section 7(d) of the LRHL as the appropriate standard for approving a Redevelopment Plan, i.e., that it either be "substantially consistent" or "designed to effectuate" the Master Plan. (Pa92 (citing N.J.S.A. 40A:12A-7(d)). The Trial Court found that Plaintiffs failed to specify how the Redevelopment Plan failed to meet the Section 7(d) standard. (Pa92) The Trial Court also pointed to Plaintiffs' concession that the substantial consistency standard Redevelopment Plan "does allow for 'some

inconsistency.'" (Pa93 (citing Plaintiffs' trial brief admitting same).) The Decision addressed Plaintiffs' generalized complaints about the Redevelopment Plan, such as increased building heights and traffic, noting that there was "no record support" for such contentions. (Pa93.) To the contrary, the Redevelopment Plan addressed all such criteria and demonstrated how they were consistent with the Master Plan. (Pa93.)

The Decision found that even if Plaintiffs demonstrated that the Redevelopment Plan was not substantially consistent with the Master Plan, they still had the burden to show the Governing Body was arbitrary and capricious, which they did not do. (Pa94.) Rather, the Trial Court found that the Stipulated Facts demonstrated an "appropriately supported and developed, well-reasoned, careful, and sound decision." (Pa94-95.) The Trial Court noted that even "the record beyond the Stipulated Facts further demonstrates an appropriate decision, far from arbitrary and capricious." (Pa95-96.)

The Decision also addressed Plaintiffs' contention that the Redevelopment Plan conflicted with previous zoning requirements and restrictions. (Pa96.) In that regard, the Decision explained that, as a matter of law, the Redevelopment Plan "supersedes and amends any existing zoning…." (Pa96 (citing Hirth, 337 N.J. super at 165).) Further, the Trial Court responded to and rejected Plaintiffs' argument that the Municipal Land Use Law, N.J.S.A.

40:55D-1 et seq. ("MLUL"), applies and would specifically limit the Redevelopment Plan to only the five acres of the Lord & Taylor site. (Pa97.) Citing Hirth, the Trial Court correctly found that the MLUL does not apply to a challenge to a redevelopment plan. (Pa24.)

D. APPELLATE DIVISION'S DENIAL OF PLAINTIFFS' MOTION TO SUPPLEMENT THE APPELLATE RECORD

On May 8, 2024, Plaintiffs filed a motion to supplement the appellate record with two emails that were among Plaintiffs' Proposed Exhibits. Appellant's Motion [Trans. ID E1626277-05082024]; (Pa735-36.) Intervenor opposed the motion, explaining that the exhibits were the two, one-page emails, designated as P-14 and P-15, that were allegedly sent to the Planning Board and Governing Body. See Intervenor's Brief in Opposition [Trans. ID E1630807-05202024] at 5-6; (Pa735-36.) The Trial Court had denied Plaintiffs' motion to include these exhibits on the grounds that they had waived their right to include them because they were not referenced in the trial briefing nor were they part of the record below before the Governing Body. See Intervenor's Brief in Opposition [Trans. ID E1630807-05202024] at 5-6; (Pa79; Pa735-36.) On June 12, 2024, this Court denied the motion on the grounds that at least one of the Plaintiffs was aware of the emails at the time of the trial and Plaintiffs did not show that inclusion of the emails was likely to affect the outcome of the appeal. (Pa735-36.)

STATEMENT OF FACTS

Pursuant to Local Redevelopment and Housing Law, N.J.S.A 40A:12A-1 to -49 ("LRHL"), the Town is authorized to designate areas within its boundaries as being in need of redevelopment, rehabilitation, or both. (Pa126 at ¶10.) The parties stipulated and agreed that all the properties comprising the "Redevelopment Area" had been designated as areas in need of redevelopment or rehabilitation by October 13, 2020. (Pa127.) As noted above, Appellants admitted that they were not seeking to invalidate those designations in this action, nor could they as the time to do so had long expired (discussed more fully infra). (See, supra; see also Pa50 (challenging only Ordinance).) None of the Appellants reside or claim to own any property in the Redevelopment Area. (Pa126, Nos. 1-6.)

In June 2021, the Westfield Planning Board modified and updated the Unified Land Use and Circulation Element of the Master Plan (the "ULUC" or "Master Plan"), which included its vision for downtown Westfield. (Pa311.)

On January 26, 2023, Topology NJ, LLC ("Topology"), the Town's Redevelopment Planner, prepared and submitted to the Governing Body a redevelopment plan ("Redevelopment Plan"). (Pa128 at ¶17.) Topology was hired by the Town as its Redevelopment Planner. (Pa657.) The Redevelopment Plan incorporated public input and sets forth "a series of new solutions to help

keep Downtown Westfield vibrant and relevant for future generations" by reimagining "three critical areas in and around downtown that will contribute to the continued vitality of the community." (Pa193 (outlining its background and years of preparation leading to its issuance).) Thereafter, SW was ultimately designated as the Redeveloper for this project. (Pa126 at ¶8).

The Redevelopment Plan was prepared with scrupulous adherence to both the vision and details set forth in the Master Plan. (Pa194, Pa311-22.) The Redevelopment Plan also applies "the guiding principles set forth in the Town's Master Plan, to contribute to a thriving and accessible core." (Pa201.) The Redevelopment Plan is a well-reasoned plan that is the result of substantial expert analysis, research, and public input. (Pa193-349.)

Section 9.1 of the Redevelopment Plan is a detailed examination of its consistency with the Master Plan. (Pa311-22.) Section 9.1 documents that Topology made substantial efforts to ensure that every aspect of the Redevelopment Plan was entirely consistent with the Master Plan. (Id.)

At its regularly scheduled meeting on January 31, 2023, the Governing Body introduced and provided the first reading of the Ordinance to adopt the Redevelopment Plan (the "First Reading"). (Pa128, No. 18.) The meeting included presentations by consultants, as well as public comment. (Da1-105.)

The Town's Planner and Redevelopment Planner provided detailed presentations as to how each of the specific zones of the Redevelopment Area was consistent with the Master Plan and its recommendations. (Da12-33, at 12:20-13:3; Pa654-55; Pa664-92; Pa147-238.) The presentation also addressed building design, parking, sidewalks and streetscapes, traffic, and other aspects of the Redevelopment Plan, responding to inquiries from the Governing Body members and demonstrating their consistency with the Master Plan. (Da20-32, at 38:11-62:7; Pa684-93.)

The Governing Body introduced the Ordinance by a vote of 7-1, with one Councilmember absent. (Da103-05, at 205:23-207:3.) After the introduction and approval of the Ordinance, the Ordinance and the Redevelopment Plan were referred to the Planning Board for its review and recommendations pursuant to Section 7(e) of the LRHL. (Pa128 at ¶18); N.J.S.A. 40A:12A-7(e).

Following that referral, the Planning Board conducted its consistency review pursuant to Section 7(e) of the LRHL during its regular meeting on February 6, 2023. (Pa128 at ¶19; Pa110-11.) In doing so, the Planning Board "did not identify any provisions in the [Redevelopment] Plan which were inconsistent with the Master Plan." (Pa111.) The Planning Board voted to adopt Topology's conclusions set forth in Chapter 9 of the Redevelopment Plan, find that the Redevelopment Plan was consistent with the Master Plan, and

recommend adoption of the Redevelopment Plan by the Governing Body with no changes. (Id.)

On February 9, 2023, the Planning Board submitted its Report to the Mayor and Governing Body, which concluded that it "did not identify any provisions in the [Redevelopment] Plan which were inconsistent with the Master Plan nor did the [Planning] Board make any recommended revisions to the [Redevelopment] Plan to the Town Council." (Pa128, No. 20; Pa111.) Accordingly, the Planning Board Report confirmed its "recommendation that the [Redevelopment] Plan is consistent with the Master Plan and should be adopted by the Town Council." (Pa110.)

At its regularly scheduled meeting on February 14, 2023, the Governing Body conducted a Second Reading and approval of the Ordinance to adopt the Redevelopment Plan, along with comments and questions during the public hearing on the Ordinance (the "Second Reading"). (Pa594-649.) In her opening remarks, the Mayor recounted how the One Westfield Place proposal, the provisional name given to the project, was the "culmination of four years of planning and collaboration" with input from numerous community groups and the proposed redeveloper, SW. (Pa596, at 4:17-20.) The Mayor noted that "[t]here is no such thing as a perfect project, but we have strived to find a balanced proposal that addressed long-standing challenges that have gone

ignored for decades while mitigating any potential negative impacts." (Pa597, at 6:3-7.) Members of the public were given the opportunity to present their views on the development. (Pa599, at 11-57.) Westfield's consultants, planners, and officials addressed those comments in great detail in addressing the rationale and support for the Redevelopment Plan. (Pa623-48, at 67:10-71:16; 84:23-24; 86:9-88:31.) The Mayor also noted that there was "no group more intimately familiar with the Master Plan than the Planning Board," which had determined that the Redevelopment Plan was consistent with the Master Plan. (Pa638, at 90:11-91:6; Pa645, at 102:3-7.)

The members of the Governing Body clearly articulated the rationale for their approval, showed great respect for various viewpoints, and noted that public feedback had "already been incorporated in the Redevelopment Plan…." (Pa623-43, at 59:14-66:7; 91:23-92:3; 94:6-95:15; 98:1-99:24.) The Town adopted the Ordinance by a vote of 7-1, thereby approving the Redevelopment Plan. (Pa128 at ¶21; Pa648-694, at 109:15-110:6.)

LEGAL ARGUMENT

I. THE TRIAL COURT APPLIED THE APPROPRIATE STANDARD TO UPHOLD THE ORDINANCE

A. Standard of Review of the Trial Court's Decision

"When reviewing the decision of a trial court that has reviewed municipal action, [the Appellate Court] is bound by the same standards as was the trial

court." Fallone Props., LLC v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004); see also Bryant v. City of Atlantic City, 309 N.J. Super. 596 (App. Div. 1998). A court's "review of the adoption of a redevelopment plan is limited." 240 Half Mile Rd., LLC v. Twp. of Middletown, 2022 N.J. Super. Unpub. LEXIS 1002 at *28 (App. Div. June 7, 2022). A "presumption of validity attaches to the adoption of a redevelopment plan" with "deference" given to a governing body in making such a determination. Downtown Residents for Sane Dev. v. City of Hoboken, 242 N.J. Super. 329, 332 (App. Div. 1990). In reviewing a redevelopment plan approval, "'[i]t is wholly inappropriate for any court to substitute its judgment for that of the legislative body of the city in an area appropriate for legislative determination, or to interpose, without clear and convincing reason to do so[.]'" Id. at 340 (citation omitted).

To set aside an approved redevelopment plan, the challenger must prove that the "legislative decisions made must be more than debatable, they must be shown to be arbitrary or capricious, contrary to law, or unconstitutional." Downtown., 242 N.J. Super. at 332 (citing Hutton Park Gardens v. Town Council of W. Orange, 68 N.J. 543, 564 (1975)); Powerhouse Arts Dist. Neighborhood Ass'n v. City Council of City of Jersey City ("PADNA"), 413 N.J. Super. 322, 332 (App. Div. 2010) (citation omitted). To that end, "[w]hen

two actions are open to a municipal body, municipal action is not arbitrary and capricious if exercised honestly and upon due consideration, even if an erroneous conclusion is reached." Bryant, 309 N.J. Super. at 610. "The mere fact that there may be other methods, even more preferable, to achieve the same end does not dictate that the method selected by this governing body is invalid. … The court cannot supplant the local legislature's discretion with its own opinion of alternative methods…." Gardens v. Passaic, 130 N.J. Super. 369, 379 (Law Div. 1974), aff'd o.b., sub nom., Iafelice v. Passaic, 141 N.J. Super. 436 (App. Div. 1976) (citation omitted).

In assessing a challenge to a redevelopment plan, a court's review of the record is "not merely to inquire whether there are legitimate bases for differing opinions, but in the context of whether the objectors have produced enough facts to raise a possibility that the legislative determination was clearly unrelated to valid municipal concerns and thus arbitrary, capricious or illegal." Downtown, 242 N.J. Super. at 338, 340 (questioning "wisdom" of redevelopment plan insufficient). Thus, arguing for alternative or even better options or otherwise disagreeing with the Governing Body's decision to adopt a Redevelopment Plan **cannot**, as a matter of law, be a basis to overturn that decision.

Appellants do not even attempt to satisfy the arbitrary, capricious and unreasonable standard required to invalidate the Governing Body's action.

Rather, Appellants take the position, without any case citation, that the arbitrary, capricious, or unreasonable "legal standard . . . need not be reached at all" if the substantive standards of the LRHL "are not first satisfied." (Pb at 13-14.) This is not correct. Even if the Governing Body did not satisfy the LRHL standards, which is did in this case, Appellants still would need to meet the arbitrary, capricious and unreasonable standard to void the Ordinance. It is clear from their papers and arguments that Appellants did not even attempt to prove arbitrary, capricious or unreasonable conduct and on that basis alone, this Appeal should be dismissed.

B. Appellants Failed to Satisfy Their Burden of Proof to Invalidate a Redevelopment Plan Adopted Pursuant to Section 7 of the LRHL

Appellants do not meet their heavy burden of proving that the Redevelopment Plan deviated from the governing standards set forth in Section 7. A governing body's approval of a redevelopment plan is governed by Section 7 of the LRHL, which permits a municipality to adopt a redevelopment plan that is either: (1) "substantially consistent with the municipal master plan" or (2) "designed to effectuate the master plan." N.J.S.A. 40A:12A-7(d). Since either permits approval, Plaintiffs must show that the Redevelopment Plan was not "substantially consistent" with **and** not "designed to effectuate" the Master Plan. Further, "the concept of 'substantially consistent' permits some

inconsistency, provided it does not substantially or materially undermine or distort the basic provisions and objectives of the Master Plan.'" Myers v. Ocean City Zoning Bd. of Adj., 439 N.J. Super. 96, 104 (App. Div. 2015) (quoting Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 384 (1995)).

A governing body's consistency determination "is entitled to great weight and deference." Id. (quoting Manalapan, 140 N.J. at 383); see also Fallone, 369 N.J. Super. at 560-61 (presumption that "municipal governing bodies will act fairly and with proper motives and for valid reasons") (quoting Kramer v. Bd. of Adj., Sea Girt, 45 N.J. 268, 296 (1965)). As such, "a party challenging the validity of municipal action bears a heavy burden." Id.; Infinity Broadcasting Corp. v. N.J. Meadowlands Comm'n, 377 N.J. Super. 209, 225 (App. Div. 2005), aff'd in part, rev'd in part on other grounds, 187 N.J. 212 (2006); Bryant, 309 N.J. Super. at 610.

New Jersey Courts have repeatedly confirmed that the burden to overcome the factual presumption accorded a governing body's approval of a redevelopment plan is equally high:

> Legislative bodies are presumed to act on the basis of adequate factual support and, absent a sufficient showing to the contrary, it will be assumed that their enactments rest upon some rational basis within their knowledge and experience. This presumption can be overcome only by **proofs that preclude the possibility that there could have been any set of facts known to the legislative body … [that] would rationally support a conclusion that the enactment is in the public interest.**

Bryant, 309 N.J. Super. at 610 (emphasis added) (quoting Hutton Park, 68 N.J. at 564-65); see also Infinity, 377 N.J. Super. at 225 (same); Downtown, 242 N.J. Super. at 338 (municipality need only show "some reasonable basis for its legislative action"). "There is also no need for more elaborate findings than were made in order to facilitate judicial review, because review of a quasi-legislative exercise, especially, requires no more than an ability to understand what action the agency took and why it did so." Infinity, 377 N.J. Super. at 229 (citing In re Applic. of Howard Sav. Inst. of Newark, 32 N.J. 29, 53 (1960)).

A municipality's adoption of a redevelopment plan, which is a form of zoning ordinance, is "a discretionary decision of broader application." PADNA, 413 N.J. Super. at 332 (citation omitted). In that regard, adoption of a redevelopment plan, does not require a judicial hearing or fact finding. Id.; Hirth, 337 N.J. Super. at 165-66 ("At a hearing before a governing body concerning the proposed adoption of a municipal ordinance, there is no requirement that evidence be presented providing a factual foundation for the ordinance, and the governing body does not ordinarily make any findings of fact to justify its action.") (citation omitted); Infinity, 377 N.J. Super. at 228 (same); Gardens, 130 N.J. Super. at 378 (same). Thus, the hearing and record on appeal for an approval of a redevelopment plan are limited:

> [T]he only hearing required before adoption of a redevelopment plan, as with any other municipal ordinance, is a legislative hearing

> before the governing body. See N.J.S.A. 40:49-2b. Consequently, if an action is brought challenging a redevelopment plan, there ordinarily is no administrative record **other than whatever report the planning board may have submitted to the governing body and a transcript of the quasi-legislative hearing before the governing body**.

Hirth, 337 N.J. Super. at 165 (emphasis added); PADNA, 413 N.J. Super. at n.5 (comparing N.J.S.A. 40A:12A-6, with N.J.S.A. 40A:12A-7, and noting, of particular relevance here, that record for review of redevelopment plan is "decidedly less burdensome" than on review of blight designation).

Consequently, review in actions in lieu of prerogative writs under Rule 4:69-1 is limited to the record before the municipal agency below. See Rivkin v. Dover Tp. Rent Leveling Bd., 277 N.J. Super. 559, 569 (App. Div. 1994), aff'd 143 N.J. 352, cert. den. 519 U.S. 911 (1996); Centex Homes, LLC v. Twp. Comm. of Tp. of Mansfield, 372 N.J. Super. 186, 196 (Law Div. 2004); see also R. Neumann & Co. v. City of Hoboken, 437 N.J. Super. 384, 391 n.4 (App. Div. 2014) (finding under similar provision with 45-day planning board recommendation period: "It is important to note that it is the governing body's, not the planning board's, determination that a court reviews. … To the extent the trial court concluded that the planning board's action was under review, the court erred.") (citing Kane Prop., LLC v. City of Hoboken, 214 N.J. 199, 226-28 (2013)). In this case, the "record below" is limited to the transcripts and minutes of the First and Second Readings, the Topology Presentation, the

Planning Board Report, the Ordinance, and the Redevelopment Plan. As detailed below, there is no legal authority for expanding the record beyond these exhibits.

At the trial, Appellants failed to introduce any evidence at all that the Redevelopment Plan was both: (1) not "substantially consistent" with the Master Plan **and** (2) not "designed to effectuate" the Master Plan. See Downtown, 242 N.J. Super. at 332 (citation omitted); Manalapan, 140 N.J. at 383. In fact, the only evidence were the Joint Exhibits and Stipulated Facts that showed the great lengths to which the Town went to ensure that the Redevelopment Plan was entirely consistent with the Master Plan. The evidence also showed that the Planning Board, the entity most knowledgeable as to Master Plan consistency[4] and to which great deference such a decision is afforded, conducted its requisite analysis to confirm such consistency and made its recommendation regarding that consistency to the Governing Body. See Grabowsky v. Twp. of Montclair, 2013 N.J. Super. Unpub. LEXIS 1897, *14-15 (App. Div. July 26, 2013), rev'd on other grounds, 221 N.J. 536 (2015) ("A planning board's determination of whether proposed amendments are 'substantially consistent' with the town's master plan are 'entitled to deference and great weight.'") (citing Manalapan, 140 N.J. at 383); Fallone, 369 N.J. Super. at 561 ("[P]lanning boards are granted 'wide latitude in the exercise of the delegated discretion' due to their 'peculiar

[4] The Planning Board prepares the Master Plan. See N.J.S.A. 40:55D-28.

knowledge of local conditions.' Indeed, local officials are 'thoroughly familiar with their communities' characteristics and interests' and are best suited to make judgments concerning local zoning regulations.") (citing N.J. Supreme Court cases). Therefore, the Governing Body acted entirely appropriately in accepting the recommendations of the Planning Board and its professionals in approving the Redevelopment Plan and finding it substantially consistent with the Master Plan. See id.; 240 Half Mile Rd., 2022 N.J. Super. Unpub. LEXIS 1002,*19 (affirming o.b. trial court conclusion "that because the Committee 'relied on the testimony of a licensed professional planner and the memorandum of the Township Planner supporting its determination[,]' its decision was not arbitrary or capricious").

In contrast to that evidence, Appellants did not seek to introduce any expert testimony or other competent evidence to show that the Redevelopment Plan deviated from the Section 7 standards. Rather, Appellants contend without basis that the Redevelopment Plan was "inconsistent" with the Master Plan because "its proposal to put residential units within the GB2 is prohibited by the existing zoning ordinance and Master Plan" (Pb22). This argument is without merit as the Redevelopment Plan, as a matter of law, amends any existing zoning. 240 Half Mile, 2022 N.J. Super. Unpub. LEXIS 1002, *15-16, 31; N.J.S.A. 40A:12A-7(c); Hirth, 337 N.J. Super. at 165 (recognizing that

redevelopment plan "shall supersede" all applicable existing zoning: "Thus, one component of a redevelopment plan is the zoning or rezoning of the redevelopment area."); see also Grabowsky, 2013 N.J. Super. Unpub. LEXIS 1897, *16; Pa200-01; Pa313 at §§8.18 & 8.21 (confirming superseding zoning map as "an amendment of the Town Zoning Map").

Moreover, even if Appellants could have shown some inconsistency with the Master Plan (and they did not), that would not be enough to show the Redevelopment Plan was not "substantially consistent" with the Master Plan, which allows for inconsistency as long as it "not substantially or materially undermine or distort the basic provisions and objectives of the Master Plan." Myers, 439 N.J. Super. at 104 (quoting Manalapan, 140 N.J. at 384). While they present no proof to carry their burden, Appellants, at most, could only hope to potentially raise a "debatable" issue as to consistency, which still would fail as a matter of law. See 240 Half Mile, 2022 N.J. Super. Unpub. LEXIS 1002, *28; PADNA, 413 N.J. Super. at 332; Infinity, 377 N.J. Super. at 225; Downtown, 242 N.J. Super. at 332. Accordingly, therefore, Appellants provided no basis to overturn the Trial Court's well-reasoned and correct decision at trial.

C. Even If Appellants Could Have Shown that the Redevelopment Plan Did Not Meet the Section 7 Requirements, There Was No Evidence of Arbitrary and Capricious Conduct

Even assuming for purposes of argument that Appellants could have met their burden to show that the Redevelopment Plan did not meet the Section 7 requirements, then they **still** would have to show that the claimed erroneous decision was arbitrary and capricious, meaning it was not "exercised honestly and upon due consideration." Bryant, 309 N.J. Super. at 610. As noted above, "[w]hen two actions are open to a municipal body, municipal action is not arbitrary and capricious if exercised honestly and upon due consideration, even if an erroneous conclusion is reached." Id. In other words, even if Appellants were able to show that the Governing Body made an "erroneous" decision in approving the Ordinance, they still must show that the Governing Body's actions were "arbitrary and capricious."

Appellants did not even address the arbitrary and capricious standard because it is their position that simply showing that the Governing Body did not satisfy the LRHL requirements in approving the Redevelopment Plan is sufficient. (Pb14-15.) This is clearly not sufficient, and the appeal should be rejected on Appellants' failure to prove any arbitrary and capricious conduct. See Bryant, 309 N.J. Super. at 610 (even an "erroneous conclusion" is not arbitrary and capricious if "exercised honestly and upon due consideration….").

D. Appellants Seek to Apply an Incorrect Standard as Sections 5 and 14 of the LRHL Do Not Apply to Redevelopment Plan Approvals

At trial and on this appeal, Appellants incorrectly argued that Section 7 of the LRHL "specifically requires that any redevelopment plan meet the requirements of Section 5, that is the provision which controls a redevelopment study." (Pb12.) Appellants also quote Section 14(a) of the LRHL in their brief and contend, without explanation, that the Trial Court's failure to have "analyzed" Sections 5 and 14 warrants reversal. There is no support for this contention as Sections 5 and 14 **do <u>not</u>** apply to redevelopment plan approvals, which is a separate determination governed by Section 7. What Appellants suggest is that at the time of redevelopment plan approval, a Governing Body must again re-designate the redevelopment area as in need of redevelopment or rehabilitation. This is contrary to clear statutory construction, which does not require any second designation, and has been squarely rejected by this Court.

Section 7 of the LRHL provides, in relevant part, as follows:

> No redevelopment project shall be undertaken or carried out except in accordance with a redevelopment plan adopted by ordinance of the municipal governing body, upon its finding that the specifically delineated project area is located in an area in need of redevelopment or in an area in need of rehabilitation, or in both, according to criteria set forth in section 5 or section 14 of P.L.1992, c.79 (C.40A:12A-5 or 40A:12A-14), as appropriate.

Sections 5 and 14, while referenced in Section 7, address entirely distinct municipal actions, neither of which are implicated in this lawsuit. There is no legal basis to contend that adoption of a redevelopment plan under Section 7 requires a governing body to re-designate properties that had already been designated pursuant to prior municipal action. Designations for areas in need of redevelopment are governed by Sections 5 and 6 of the LRHL, and designations for areas in need of rehabilitation are governed by Section 14 of the LRHL.

Having failed to challenge these designations below, Appellants may not do so now on appeal. Appellants only challenged the Ordinance in their Complaint, not the designations. (Pa126 at ¶¶11-16; Pa90; see gen. Pa46-53.) This is no surprise, as those determinations were made by October 13, 2020, over three years prior, and Appellants were well outside any time to challenge such decisions. See R. 4:69-6(b)(3); N.J.S.A. 40A:12A-6(b)(7) (45-days); 240 Half Mile Rd., 2022 N.J. Super. Unpub. LEXIS 1002, *28-29 (affirming dismissal of untimely complaint filed 442 days after designation); Coal. for Friendly Envtl. Expansion, Inc. v. Bor. of Magnolia, 2011 N.J. Super. Unpub. LEXIS 2258, at *20 (App. Div. Aug. 22, 2011) (affirming dismissal of three-year "belated challenge to the initial redevelopment designation"); see also PADNA, 413 N.J. Super. at 335 (estopping belated challenge); Cliff v. City of

S. Amboy, 2008 N.J. Super. Unpub. LEXIS 340, at *10 (App. Div. Aug. 8, 2008) (affirming dismissal of late challenge).

Rather, Appellants stipulated to the facts that the Town designated the redevelopment area properties as one in need of redevelopment or rehabilitation in 2020. (Pa127.) At trial, when it appeared that Appellants might nonetheless be trying to challenge the validity of the 2020 designations, the matter was raised with the Trial Court, which gave Appellants a recess and time to consider whether to pursue such a challenge. (T36:14-37:2; T38:19-39:1; Pa80.) After that recess, Appellants decided that they were not and limited their challenge to only the Ordinance approving the Redevelopment Plan as raised in their Complaint. (Id.) Despite this concession, Appellants now see to do so, "challenging both the [redevelopment] plan and the [designation] study because only one site meets the criteria of Section 5 ...." (Pb19.)

Appellants, however, may not "induce[], encourage[] or acquiesce[] in or consent[] to" such a matter and now claim error for purposes of appeal. See State v. Santamaria, 236 N.J. 390, 408-09 (2019) (finding that party cannot "strategically" take a position at trial "only to raise the issue on appeal when the tactic does not pan out.") (citations omitted); State v. A.R., 213 N.J. 542, 561 (2013) ("[I]f a party has 'invited' the error, he is barred from raising an objection for the first time on appeal. … [It] is meant to 'prevent [parties] from manipulating the system[,]' … and it has

been applied 'in a wide variety of situations[.]'") (citations omitted); see also State v. Robinson, 200 N.J. 1, 20 (2009) ("[I]t 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) (citing Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). For these reasons, such an invited-error, when an opportunity existed to present it to the Trial Court, may not be raised on this appeal.

Even if Appellants could make this argument on appeal, it is not correct. The case law could not be clearer that the designation standards are completely different and distinct from the standards applicable to redevelopment plan approval. This Court has held that "[a] blight designation **and subsequent** adoption of a redevelopment plan are **independent** municipal actions governed by **separate** sections of the LRHL." See PADNA, 413 N.J. Super. at 332 (citation omitted; emphases added); Hous. Auth. of Newark v. Ricciardi, 176 N.J. Super. 13, 21 (App. Div. 1980) (same); Hirth, 337 N.J. Super. at 164 ("When an area is found to be blighted, the adoption of a redevelopment plan is an independent municipal action which is governed by separate provisions of the Local Redevelopment Law."). Thus, the designation and redevelopment plan processes and determinations are **separate and sequential**.

This Court explicitly rejected the claim that designations done years prior needed to be reevaluated at the time of the redevelopment plan amendment:

> As the Law Division concluded, Council's approval of an amendment to a redevelopment plan was governed by the provisions of N.J.S.A. 40A:12A-7, rather than those of N.J.S.A. 40A:12A-5, which govern only an initial blight designation. **Thus, Council need not have reevaluated any of the properties according to the criteria enumerated in the latter section while it was adopting a redevelopment plan pursuant to the former**.

PADNA, 413 N.J. Super. at 335 (emphasis added); see also id. at 336 (rejecting argument that LRHL required that properties designated under Section 5 "cannot be covered under the same redevelopment plan **unless they are first reevaluated together pursuant to N.J.S.A. 40A:12A-5**") (emphasis added).

Appellants' reliance on 62-64 Main Street LLC v. Mayor, 221 N.J. 129, 158 (2015), is also misplaced. The issue in 62-64 Main Street was "whether the designation of plaintiffs' properties as part of an area in need of redevelopment under N.J.S.A. 40A:12-5(a), (b) and (d) [of the LRHL] conforms to the Blighted Areas Clause of the New Jersey Constitution." Id. at 144. By Appellants own concession, designation is not an issue in this lawsuit, and Section 5 of the LRLH has no relevance to the adoption of a redevelopment plan under Section 7. 62-64 Main Street did not even address a redevelopment plan, or the Section 7 standards applicable to a redevelopment plan approval at all.

Appellants ignore the fact that Section 7 of the LRHL explicitly ***permits*** a redevelopment plan to include "an area in need of redevelopment or in an area in need of rehabilitation, or in both[.]" N.J.S.A. 40A:12A-7(a). Consistent with the statute, this Court rejected the argument that areas designated in need of redevelopment "must thereafter be treated as a discrete and indivisible bundle of lots for purposes of redevelopment pursuant to N.J.S.A. 40A:12A-7" and "cannot be covered under the same redevelopment plan….." PADNA, 413 N.J. Super. at 336. Rather, this Court confirmed that any designated area "may be joined with other areas or parts of other areas already blighted for redevelopment purposes." Id. at 336-337 (citing Hirth, 337 N.J. Super. at 164; N.J.S.A. 40A:12A-7(a)) (footnote omitted). Accordingly, Appellants' attempt to bootstrap another designation analysis into the redevelopment standard has no basis whatsoever.

In further attempts to misapply designation case law to a redevelopment plan, Appellants improperly rely on Malanga v. Twp of W. Orange, 253 N.J. 291 (2023), as being the "most important and relevant case to the application of the substantive criteria of Section 5." (Pb18.) Section 5 has no relevance to the Governing Body's approval of the Redevelopment Plan. Malanga, involved a redevelopment **designation** under Section 5, not a redevelopment plan adoption under Section 7. Malanga, 253 N.J. at 296 ("In this appeal, we consider whether

the Township of West Orange improperly **designated** the site of its public library as an area in need of redevelopment…." (emphasis added)). Thus, Malanga has no bearing on the issues in this case, and Appellants' argument that it applies has no merit or basis.

Plaintiffs also misconstrue the application of Hirth here, claiming that the plaintiff in that case was able to challenge both the "study" and the "plan." (Pb19). Hirth involved a challenge to both the blight designation **and** the adopted redevelopment plan, both of which occurred within weeks of one another. Hirth, 337 N.J. Super. at 168, 155. Given the proximity of both the blight designation and the redevelopment plan adoption, both challenges were timely, and the Planning Board also prepared the redevelopment plan at issue. Thus, Hirth involved a review of the Planning Board proceedings.

By contrast, none of those factors is present in our case. Here, the Town (and not the Planning Board) had the Redevelopment Plan prepared, and Appellants admittedly were **not** challenging the designations (nor were they within time to do so, as set forth above).

While it is unclear to what specific "study" Appellants are referencing in their briefing, the only study referenced in the Hirth decision is the "blight investigation study," which would have no relevance in the instant matter. See Hirth, 337 N.J. Super. at 163. Indeed, Appellants did not even seek to introduce

a blight investigation study at trial at all—which would have been from proceedings in **2020**. In any event, the Hirth Court first addressed the blight determination at issue under Section 5 of the LRHL. In the context of its analysis of the blight determination, the Hirth Court found that the trial court correctly determined that "the blight determination is valid and that plaintiff is not entitled to a plenary hearing to contest that determination." Id. at 164.

After upholding the blight designation, Hirth went on to address the adoption of the redevelopment plan, which is an "independent municipal action which is governed by separate provisions of the Local Redevelopment Law." Id. at 164. Hirth then explained that Section 7 of the LRHL provided the applicable standards for its review of the adoption of the redevelopment plan. Id. Indeed, the Hirth Court went to great lengths to explain how the Section 7 procedures operated with respect to adoption of a redevelopment plan. Id. at 164-66. Indeed, there is no suggestion in Hirth at all that the Section 5 standards apply to adoption of a redevelopment plan. To the contrary, the court was careful to maintain the distinction between these two types of municipal actions.

Appellants point to no legal basis for this Court to review the 2020 designations of the properties in this case as some type of prerequisite to the redevelopment plan adoption review. The designations were separate and independent decisions made years ago without challenge, and there is no basis

to review them again in connection with adoption of the Redevelopment Plan, warranting denial of this appeal.

E. The MLUL Does Not Apply Here

Appellants also claim that the Trial Court failed to "perceive the importance of the Municipal Land Use Law, N.J.S.A. 40:55D-1 to -163 ("MLUL")." (Pb20.) The MLUL does "not apply to adoption of a redevelopment plan, including the zoning component." Hirth, 337 N.J. Super. at 164; 240 Half Mile, 2022 N.J. Super. Unpub. LEXIS 1002,*20-21 (finding that MLUL "does not govern [a p]laintiff's challenge to a redevelopment plan"). Appellants rely on Kaufmann v. Planning Bd. for Warren, 110 N.J. 551 (1988), which does not address the adoption of a redevelopment plan at all. (Pb20.) Rather, Kaufmann, involved a challenge to the granting of a c(2) variance on a subdivision application before the planning board. Id. at 553-55, 563. As the Kaufmann Court explained, a c(2) variance "must actually benefit the community"—which is why the Court found: "By definition, then, no c(2) variance should be granted when merely the purposes of the owner will be advanced." Id. at 562-63. Nothing in Kaufmann addressed a governing body's adoption of a redevelopment plan, and otherwise does not support any argument that the MLUL would apply in connection with a redevelopment plan approval.

Appellants cite no case law whatsoever that the MLUL applies to the adoption of a redevelopment plan at all, much less in the context here. Accordingly, the Trial Court was correct in finding that the MLUL did not apply, and there is no basis to reverse the Trial Court's decision on that basis. (Pa97.)

F. Appellants' Unsupported Statements May Not Be Considered

In their brief, Appellants ask the Court to rely on self-serving statements dressed up as "facts," but which were not in evidence and have no support in evidence admitted at trial. See, e.g., Pb14 ("most retail shopping now occurs 'online' such as Amazon"); Pb15, 17 (the site and structures other than the L&T department store are "NOT NECESSARY" for the redevelopment); Pb15 ("L&T site easily qualified as 'abandoned for commercial purposes'"); Pb16 ("simple fact is that there is no other single site within the plan that meets the substantive criteria of Section 5b"); Pb19 ("[n]o doubt more than fifty percentage of the housing stock and water/sewer infrastructure is more than 50 years old. . ."); Pb19 ("all the sites in the north and south zones do not meet any criteria of the LRHL"). These and other conclusory statements made in Appellants briefing have absolutely no support in the record and are not before the Court. There were no fact or expert witnesses (nor expert reports). Appellants' proposed exhibits were barred from evidence. Moreover, nothing in any of the trial

exhibits support these baseless contentions. Thus, Appellants' factual arguments should be disregarded and rejected.

II. THE TRIAL COURT PROPERLY EXCLUDED APPELLANTS' PROPOSED EXHIBITS

Appellants argue that the Trial Court wrongfully excluded two of Appellants' Proposed Exhibits: the Planning Board Transcript; and the WARD Memo. Appellants are wrong on both evidentiary and substantive grounds.

A. The Planning Board Transcript Was Never Introduced as Evidence at Trial, Nor Could It Have Been

Appellants acknowledge that the Trial Court's decision to exclude the Planning Board transcript is "not being appealed from but consists of evidence sought to be admitted at trial hearing." (Pb23.[5]) The problem with this reference is that Appellants never included the Planning Board Transcript in any of their briefing, nor did they seek to introduce it at the trial. As the Trial Court noted in its Decision, Appellants' trial briefs "failed to address or even mention any of Plaintiffs' proposed, disputed exhibits," except for two exhibits, neither of which was the Planning Board Transcript. (Pa79; T 6.) The Decision further held that "by failing to use, reference, or argue from any of the other "P" exhibits, the Court held for the reasons set forth on the record on January that

[5] Appellants citation to Rule 2:5-1(g) for support here is perplexing, as that rule pertains to transcript request forms at to transcripts from the trial court proceeding from which they are appealing.

Plaintiffs effectively waived the right to use them 'at trial,' where the 'trial consisted – by stipulation -solely of trial briefs and oral arguments from the trial brief. (Pa79; T 6.) Accord Largoza v. FKM Real Estate Holdings, Inc., 474 N.J. Super. 61, 83-86 (App. Div. 2022) ("Waiver . . . involves the intentional relinquishment of a known right, and thus it must be shown that the party charged with the waiver knew of his or her legal rights and deliberately intended to relinquish them."); Fees v. Trow, 105 N.J. 330, 335 (1987) (finding failure to plead or otherwise raise claim "at any stage of the[] proceedings" results in it "having been waived"); Stewart v. N.J. Tpk. Auth., 249 N.J. 642, 658 (2022) (affirming rejection of new legal theory asserted late in litigation and noting that "[c]onsideration of that new theory at the eleventh hour 'would have redounded to the prejudice of defendants.'" (citation omitted)).

As noted below, a party may not seek to appeal an invited-error or matter it had the opportunity to raise below with the Trial Court and did not. See Santamaria, 236 N.J. at 408-09; A.R., 213 N.J. at 561; Robinson, 200 N.J. at 20 (citing Nieder, 62 N.J. at 234). Having clearly had the opportunity and been directed to introduce the Planning Board transcript via their trial briefs, and having chosen to proceed forward without even referencing it to prove their case therein, Appellants may not now appeal that decision.

Lastly, no Planning Board decision is at issue in this case. The Complaint only challenges the Ordinance, not any Planning Board decision; and the Planning Board is not a party to this action. Moreover, Appellants provide no explanation whatsoever how introduction of the Planning Board transcript is relevant to and would change the outcome in this matter. Section 7, governing Redevelopment Plan approvals, merely has the Planning Board provide the Governing Body with its "recommendation" as to the Redevelopment Plan, with the Governing Body having the ability to "approve or disapprove or change any recommendation" provided by the Planning Board. See N.J.S.A. 40A:12A-7(e). Thus, it is the Governing Body's approval of a redevelopment plan, and not the Planning Board's "recommendation," that is subject to challenge. See R. Neumann, 437 N.J. Super. at 391 n.4 (finding under similar provision with 45-day planning board recommendation period: "It is important to note that it is the governing body's, not the planning board's, determination that a court reviews. … To the extent the trial court concluded that the planning board's action was under review, the court erred.") (citing Kane, 214 N.J. at 226-28).

B. The Trial Court Did Not Err In Excluding the WARD Memo and Would Not Have Erred In Excluding the Transcript If That Issue Had Been Before It

As Appellants acknowledge, appellate courts 'typically' review evidentiary rulings under a "deferential standard." (Pb25 (citing State v.

Trinidad, 241 N.J. 425, 448 (2020)). Appellants also submit that absent a showing of an "abuse of discretion," the Trial Court's evidentiary ruling should be upheld. (Id.) Appellants point to no reason that the exclusion of the WARD Memo and Transcript were incorrect, much less an abuse of discretion.

Even if Appellants had sought to admit the Planning Board Transcript into evidence, neither the Planning Board Transcript nor the WARD Memo were part of the record before the Governing Body, and they would have been properly excluded at trial here. A court's review in actions in lieu of prerogative writs under Rule 4:69-1 generally is limited to the record before the municipal agency below; here, the Governing Body. See Rivkin, 277 N.J. Super. at 569 (explaining that prerogative writ actions challenging municipal agency decisions: "The trial court's review of the agency action is based on the record below[.]" (citations omitted)); Centex, 372 N.J. Super. at 196 ("This is an action in lieu of prerogative writs. ... The record below is controlling[.]" (citations omitted)). In Hirth, this Court explicitly stated that in an actions such as these challenging a redevelopment plan approval, "there ordinarily is no administrative record other than whatever report the planning board may have submitted to the governing body and a transcript of the quasi-legislative hearing before the governing body." 337 N.J. Super. at 165. That is all that comprises the record here, and the Trial Court correctly relied upon and applied Hirth in holding that the trial

"record was limited to the Joint Exhibits, which were the full record of the Governing Body's decision." (Pa80; T 7.)

As to the WARD Memo in particular, it is undisputed that the Governing Body hearing is not a factual or quasi-judicial proceeding, and so the memo was not received as evidence in the record. To the extent the Governing Body's consideration of the WARD Memo is relevant (and Appellants have not shown that it is), it can be gleaned from the transcript of the Governing Body hearing, which is a Joint Exhibit. Further, merely arguing that the Governing Body should have considered a document does not make it part of the record. There are countless documents that are not considered by municipal bodies when approving a redevelopment plan, and the record cannot logically include all such documents. Rather, when acting legislatively in approving a redevelopment plan, the Governing Body is presumed to act based on "adequate factual support," which may "be overcome **only** by **proofs that preclude the possibility that there could have been any set of facts known to the legislative body … [that] would rationally support a conclusion that the enactment is in the public interest."** Bryant, 309 N.J. Super. at 610 (emphasis added; citation omitted); see also Infinity, 377 N.J. Super. at 225; Downtown, 242 N.J. Super. at 338. Thus, the analysis is not what the Governing Body failed

to consider, but whether what it considered rationally supported its approval of the Redevelopment Plan.

Appellants seek to misapply Hirth to improperly expand the limited administrative record in reviewing a redevelopment plan approval. As explained above, Hirth involved a challenge to both the designation decision and the decision to approve the redevelopment plan, which had been prepared by the planning board. Appellants did not challenge the 2020 designations here, nor did the Planning Board prepare the Redevelopment Plan. As such, Hirth does not support Appellants as they suggest. Moreover, Appellants cite to a discussion in Hirth in which the court was addressing the standard on a challenge to a blight determination, not a challenge to a redevelopment plan. (Pb24-25 (citing Hirth, 337 N.J. Super. at 162)). Again, Appellants attempt to apply the standard applicable to a challenge to a blight designation to a challenge to a redevelopment plan. This obfuscation of two distinct standards is without merit.

Appellants are equally misguided in claiming that Malanga, 253 N.J. 291, and Fieramosca v. Twp. of Barnegat, 335 N.J. Super. 526 (Law Div. 2000), support their evidentiary challenge. As explained above, Malanga addressed a decision designating an area in need of redevelopment, not a redevelopment plan approval, as occurred here. These are independent municipal actions governed by separate sections of the LRHL with different applicable standards. PADNA,

413 N.J. Super. at 334; supra §I(D); compare N.J.S.A. 40A:12A-5(d), with N.J.S.A. 40A:12A-7. Malanga simply is inapplicable as the 2020 designations area are not an issue in this appeal.

The Malanga Court also never even entertained, much less decided, whether material outside a Governing Body record could be considered in a challenge to a redevelopment plan. 253 N.J. 291. Appellants seek to extrapolate from a reference in a footnote in Malanga that the Supreme Court sua sponte supplemented the record. That footnote cited a website listing the daily hours of the library (being considered as an area in need of redevelopment), which totaled 3,120 hours annually. Id. at 320, n.11. However, the Township's consultant in that case had issued a report that specifically identified those 3,120 hours. Id. at 301-2. Thus, that information was already in the record, and Appellants present nothing to support their speculation that the Supreme Court was supplementing the record with additional matters outside the Governing Body's record.

Fieramosca is also completely irrelevant here. Fieramosca was a Law Division case that involved a site plan application and has nothing to do with the determination of the "record below" on the adoption of a Redevelopment Plan. 335 N.J. Super. 526. Further, a planning board rendering a decision on a site plan application acts in a quasi-judicial capacity, which is distinct from the legislative decision of the Governing Body approving a redevelopment plan. As

such, what comprises the appropriate record in each is completely different. Id. at 530. Thus, Fieramosca has no legal applicability here.

Moreover, the dispute in Fieramosca involved an applicant trying to avoid a condition that the planning board clearly had placed on its approval, but was inadvertently left out of the memorializing resolution. Id. at 528. While the court noted that post-meeting letters also confirmed that the applicant had been aware of the condition, it explained that although a resolution is "evidential of what was considered at the hearing, it is not determinative[,]" and that "[t]he record is the best evidence of what the board considered and decided." Id. at 532, 534 (citation omitted). Given this, the trial court found that "the record of the hearing of August 27, 1996, at which time the Board made its decision, supports the conclusion that the Board intended to condition its approval …." Id. at 535. Thus, in addition to not being binding here, Fieramosca provides no factual support for Appellants' motion to expand the Governing Body's record to include the WARD Memo and the Planning Board Transcript.

C. There Is No Evidentiary Foundation for Admission of the WARD Memo or the Planning Board Transcript

As an evidential matter, Appellants do not even suggest a basis for admission of the WARD Memo or the Planning Board Transcript. Both are

hearsay and inadmissible for the truth of the matter asserted.[6] N.J.R.E. 802. As the proponent of these hearsay documents, Appellants have the burden of proving that they fall within one of the exceptions to the general rule of inadmissibility. See State v. Miller, 170 N.J. 417, 426 (2002). Appellants do not propose any hearsay exception under which these documents would fall. Moreover, because the trial did not, by stipulation of the parties, include testimony, there was no witness who could authenticate the documents or provide any foundation to establish a hearsay exception. Thus, in addition to the fact that these exhibits were not part of the Governing Body "record below" and could not have properly be considered by the Trial Court, there was no basis to introduce them into evidence at all.

CONCLUSION

For all of the foregoing reasons, Appellants respectfully request that this Court dismiss the Appeal and affirm the Judgment below.

Respectfully submitted,

Dated: September 11, 2024

/s/ Derrick Freijomil
Derrick Freijomil

[4866-7273-6189, v. 8]

[6] Appellants make no claims as to the Planning Board Transcript being used for any other purpose, and any argument that the WARD Memo is for notice purposes would be addressed, if at all, by the Governing Body transcript, which is a Joint Exhibit.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2268-23

WESTFIELD ADVOCATES FOR RESPONSIBLE DEVELOPMENT, FRANK FUSARO, CARLA BONACCI, ALISON CAREY, WILLIAM FITZPATRICK AND ANTHONY LAPORTA.

CIVIL ACTION

Plaintiffs-Appellants,

vs.

TOWN OF WESTFIELD,

Defendant-Respondent,

and

SW WESTFIELD, LLC

Intervenor.

On Appeal from a Final Order of the Superior Court, Law Division
Union County
Docket No. UNN-L-1011-23

Sat Below:
HONORABLE Daniel Lindemann, J.S.C. (without a jury)

APPELLANTS' REPLY BRIEF IN SUPPORT OF APPEAL TO REVERSE JUDGMENT AGAINST PLAINTIFFS

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Dated: September 25, 2024

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PRELIMINARY STATEMENT

Two issues are raised in this appeal. First, defendants assert that, having first properly designated certain areas of the Town of Westfield for redevelopment, the "plan" thereafter approved by ordinance adopted by the Town Council can create any development without regard to the substantive requirements of the Local Redevelopment Housing Law ("LRHL"), N.J.S.A. 40A:12A-1 et. seq. This contention is without merit. Second, defendants contend that the only information courts may consider in a prerogative suit when reviewing the administrative record used to justify the adoption of a redevelopment plan is limited to: (1) the transcript before the governing body when adopting the plan; and (2) the one-page report of the Planning Board which concludes that the proposed plan is consistent with the existing municipal master plan. This contention is also without merit.

The statutory process to adopt a redevelopment plan requires several procedural steps. Compliance with those procedural steps is not, however, sufficient, as the plan must also meet with the substantive standards set forth in Sections 3, 5, 7 and 14 of the LRHL.

In the redevelopment plan here at issue, only one site, the abandoned Lord & Taylor ("L&T") department store, satisfies the substantive criteria of the LRHL. The other parcels included within a redevelopment plan can still be redeveloped, but only if they are necessary for or otherwise connected to the qualified parcel under Section

5. The L&T site is in one zone of the plan, but the remainder of the structures to be created in the two other zones in the plan are neither necessary for, nor connected to the redevelopment of the abandoned department store.

The other two zones are part of the redevelopment plan because the Town Council also created an "overlay" zone. Under Section 14 of the LRHL, if more than half of the housing stock is at least 50 years old or a majority of the water and sewer structures are at least 50 years old, then the entire area of the municipality can be declared in need of redevelopment or rehabilitation. The statutory purpose of Section 14 is "to prevent further deterioration" of the housing stock or the water and sewer infrastructure. Neither consideration is present in the other two zones of this redevelopment plan. There are no houses being rehabilitated or removed and there are no sewers or water mains in need of repair or replacement in those other two zones.

The arguments of defense counsel to the proposition that because the procedural steps were strictly followed, the plan must be upheld without regard to whether the substantive criteria required by the statutes are met. Defense counsel further argue that these statutes do not apply. These contentions are without merit.

The second point of this appeal is the failure of the Trial Court to consider as part of the administrative record the Planning Board transcript of February 6, 2023, and WARD memo created by plaintiffs, dated February 6, 2023 and submitted to

both the Planning Board and the Town Council. Plaintiffs have provided three cases: a Supreme Court case, an Appellate Division, and a Law Division case which demonstrate that these exhibits should have been considered by the Trial Court in this case.

PROCEDURAL HISTORY

The procedural history is correctly and completely set forth in the Trial Court's Decision and Judgment dated February 26, 2024. (Pa0074-Pa0080).

In addition to the arguments presented below and in the main brief of Plaintiffs, this Court should also consider the Letter Brief of Plaintiffs dated August 2, 2024, submitted in response to Intervenor's appellate motion to strike exhibits from the Plaintiffs' Appendix. The Appellate Panel directed by Order dated August 9, 2024 that motion to be decided by this Court. (Da114-115).

STATEMENTS OF FACTS

The description of the "plan" is fully set forth in the Topology report of January 26, 2023. (Pa0193-0314). The stipulations of fact are accurately recited in the Trial Court's Opinion at pages 4-6. (Pa0077-79).

The overlay properties consist of eight properties located between North Avenue West and South Avenue West, as depicted at pages 4-5 and 55 of the Topology report (Pa0200-Pa0201, Pa0251).

The redevelopment plan calls for the addition of two stories to the existing L&T building, the creation of large parking garages, and the development of 310,000 square feet of office space with the hope that someone will commute to these new offices in Westfield. This proposed oversized redevelopment will change the character and essential nature of Westfield forever.

LEGAL ARGUMENT

POINT I

ALL REQUIREMENTS OF THE LHRL MUST BE SATISFIED

The standard for judicial review of a redevelopment plan includes a presumption of validity, but:

> "a party challenging the validity of municipal actions bears a heavy burden . . . In order for [r]esidents to prevail in setting aside the questioned [p]lan, the legislative decisions made must be more than debatable, they must be shown to be arbitrary, capricious, contrary to law or unconstitutional." (emphasis added).

Downtown Residents for Sane Dev. v. City of Hoboken, 242 N.J. Super. 329, 332 (App. Div. 1990). In this case the redevelopment plan is contrary to law. (emphasis supplied).

Any redevelopment plan must satisfy not only the procedural statutory requirements, but also meet the substantive statutory criteria, to be legally valid. While the L&T site in the West zone meets the substantive criteria of Section 5(a) of the LHRL, the structures to be created in the North and South zones do not satisfy

those standards. For the plan to be legally valid, if only one site satisfies the statutory requirements, the other sites must be "necessary" for or "connected" to the redevelopment qualified parcel or "for the rehabilitation of a larger area." This requirement is not here satisfied. 62-64 Main Street v. Mayor, 221 N.J. 129, 158 (2015) quoting Gallenthin Realty Development, Inc. v. Borough of Paulsboro, 191 N.J. 344, 372 (2007). See also, Levin v. Twp. Comm. of Bridgewater, 57 N.J. 506, 539-40 (1971); Wilson v. Long Branch, 27 N.J. 360, 391-395 (1958) (58% of the housing in the area to be redeveloped was "substandard" or "severely deteriorated" thereby justifying redevelopment of the entire area even though several other properties in the area were in "good condition."); Hirth v. City of Hoboken, 337 N.J. Super. 149, 161, (App. Div. 2001) citing N.J.S.A. 40A:12A-3. None of the other structures to be created in the other zones are "connected to" or "necessary" for the development of the L&T site.

Moreover, Section 3 of the LRHL provides:

> [a] redevelopment area may include lands, buildings, or improvements which of themselves are NOT detrimental to the public health, safety or welfare, but the inclusion of which is found NECESSARY with or without change in their condition for the effective redevelopment area of which they are a part." (emphasis supplied). N.J.S.A. 40A:12A-3.

In Hirth, once the "designation" of the redevelopment area was made by the governing body, plaintiff was also permitted to challenge in his prerogative suit the change of use to commercial for the property he had contracted to buy to construct

new residences. The redevelopment plan barred residential uses in the zone where plaintiff's property was located. Hirth, supra, 337 N.J. Super. at 161. Thus, the brief of Special Counsel in this case totally mischaracterizes the holdings and meaning of the Hirth case.[1]

The essential point in that portion of Hirth, is that even if the procedure of adopting the plan is followed, the substance of the plan can be successfully attacked in a prerogative suit. This principle is the basis of this appeal because the substance of this plan in north and south zones do not meet the requirements of Sections 3, 5, 7 and 14.

It is, however, important to understand what is not in dispute. First, the L&T department store site in the west zone satisfies the criteria of Section 5(a) of the LRHL, because it is "the discontinuance of a building . . . previously used for retail . . . purposes." Second, "more than half of the housing stock" in the town of Westfield "is at least 50 years old" and "a majority of the water and sewer system" in the Town of Westfield "is at least 50 years old" so that an "overlay" zone under Section 14 "may extend to the entire area of the municipality." N.J.S.A. 40A:12A-14. This case is not, therefore, a "designation" case and the Trial Court's statement on that point is correct. (Pa 0092 n.8).

[1] The terms "in need of redevelopment" and "blighted" are synonymous. Hirth, supra, 337 N.J. Super. at 154 n.1.

Defense counsel's briefs[2] contend essentially that because the requirements for Section 14 are met for the entire Town, the governing body is free to construct whatever buildings and/or create any uses anywhere in the Town of Westfield.

The two zones other than the zone of the L&T site rely upon the Section 14 "overlay" zone. Yet, the explicit purpose of Section 14 is to prevent "further deterioration" of the housing stock or of the water and sewer infrastructure. None of those considerations are present in the structures to be created in the north and south zones[3].

POINT II

PLAINTIFFS' DISPUTED EXHIBITS SHOULD HAVE BEEN INCLUDED IN THE ADMINISTRATIVE RECORD

The Trial Court wrongfully excluded the Planning Board Transcript of February 6, 2023, (Pa0350-0392), and the WARD memo (Pa0008, T41-13, T46-11, Exh. P-5), a document created by Plaintiffs which compared the municipal master plan to the proposed redevelopment plan. (T45-9 to 47-4). These two documents should have been a part of the administrative record reviewed by the Trial Court.

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[2] The inflammatory and personal language in brief of the Town's special counsel should be disregarded. R. 4:6-4(b).

[3] If the entire Town is subject to Section 14 (which it is), then can any place in Westfield be redeveloped without regard to the requirements of Sections 3, 5 and 7 of the LRHL? Surely not, because the Legislature surely intended all sections of the LRHL to be construed and applied consistently to any redevelopment plan.

The Trial Court asserted in its Opinion that the issue of the exhibits was not properly briefed. (Pa0079-80). However, page 8, footnote 1, of Plaintiffs' reply trial brief explicitly stated that Plaintiffs were relying upon the brief submitted to oppose intervenor's motion to settle the record. (Pa0131). Attached to that reply brief is an itemized chart establishing the basis for each exhibit to be included in the administrative record. (Pa0112). Under these circumstances, there was no need to submit an additional trial briefing about these exhibits, because the justification for each of Plaintiffs' exhibits was explicitly and previously identified for the convenience of the Trial Judge in Plaintiffs' previous brief in opposition to defendant's pretrial motion to settle the record. R. 2:6-1(a)(2). Therefore, the contentions and arguments in the Defendant Intervenor's brief about the "offer" of these exhibits as part of the administrative record are without merit.

Three cases support the inclusion of these documents into the administrative record for the Trial Court's review. First, in Hirth, supra, the plaintiff purchased a tract contingent on getting approval for eighty residential units. Hirth, Id., at 158. The plan, however, called for plaintiff's property to act as a buffer between other residences and an adjoining commercial property. The Appellate Division ruled that a remand back to the trial court was necessary to determine if this change in the use to commercial for the plaintiffs' property by the plan was arbitrary, capricious and unreasonable. However, that remand was contingent upon the Trial Court

"reviewing the complete administrative record, including transcripts of the relevant proceedings before the [Planning Board] and City Council." Id. Accordingly, in this case, the Planning Board transcript of February 6, 2023, should be part of the administrative record for any judicial review in this case.

Second, in Malanga v. Twp. of West Orange, 235 N.J. 291 (2023), plaintiff sued to contest the designation for the redevelopment of the municipal library. The case was argued, but several days before Chief Justice Rabner issued the Court's opinion, he consulted the Township's website for the operating times to determine the frequency of the use of the library. Id., at 320 n.11.

Third, in Fieramosca v. Twp.of Barnegat, 335 N.J. Super. 526 (Law Div. 2000), plaintiff's site plan application was heard by the Planning Board in 1996. Yet, when the Judge conducted the prerogative writ trial, he considered letters exchanged in 1998 and 1999, which were not (obviously) in the 1996 transcript.

The latter two cases support the admission of the WARD memo as part of the administrative record, since that memo was submitted to both the Planning Board and Town Council before their hearings but were not mentioned in the transcripts of either municipal body.

The significance of the WARD document was overlooked by the Trial Court and misconstrued by Defendant's briefs. The Topology Report offers justification for the legal conclusion that the redevelopment plan is "consistent" with the

Westfield master plan. (Pages 119-130, Pa0135-0326). The procedure for this comparison by the Planning Board first and the Town Council is required by Section 7 of the LRHL.

These two procedural steps are important because once the plan is adopted, it eliminates all the existing zoning regulations and standards within the area of the plan.

The WARD memo is like a legal brief. It points out in painstaking detail, the many inconsistencies between the redevelopment plan and the master plan. For example, the present master plan prohibits residential use in the GB-2 Zone, which is in the west zone of the plan. (Page 6, Pa0013). In the north zone of the redevelopment plan, the density and sizes of the structures is inconsistent with density principles of the master plan. (Page 7, Pa0014). In the proposed south zone, the office subzone does not comply with the master plan's height, bulk and density standards. (Page 9, Pa0016). The 42-page WARD memo was submitted to demonstrate these legal inconsistencies. Again, while the procedural step of comparison was followed by the Town, the substance of the legal conclusion is erroneous.

Accordingly, the contention in the defense counsel's briefs of the defense that the record is limited to the transcripts of the Council and the written report of the Planning Board is completely rebutted by these three cases.

CONCLUSION

For all the foregoing reasons, the judgment of the Court below must be reversed to allow the Town to create a new plan that complies with the applicable statutory criteria of the Local Redevelopment and Housing Law.

Respectfully submitted,

SCARINCI & HOLLENBECK, LLC

By: */s/ Robert E. Levy*
ROBERT E. LEVY

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