

ROUTE 440 DEVELOPERS, LLC,

Plaintiff-Appellant,

v.

PLANNING BOARD OF THE CITY OF  
JERSEY CITY,

Defendant-Respondent.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

Docket No.: A-003600-23

**CIVIL ACTION**

ON APPEAL FROM LAW DIVISION:  
HUDSON COUNTY

Docket No.: HUD-L-932-23

Sat Below: Hon. Anthony V. D’Elia,  
J.S.C.

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**BRIEF OF APPELLANT, ROUTE 440 DEVELOPERS, LLC**

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## **PRELIMINARY STATEMENT**

Plaintiff-Appellant, Route 440 Developers, LLC (“Route 440”), brings this appeal from the Trial Court’s decision to uphold the Planning Board of the City of Jersey City’s (the “Planning Board” or the “Board”) rejection of Route 440’s subdivision application and dismissal without hearing Route 440’s site plan application - leading to the improper denial of the development of Route 440’s three-phase residential project (the “Project”). The real property itself consists of 8.29 acres in Block 21701, Lots 1, 13, 14, 17, 24 and 25 on the Official Tax Map of the City of Jersey City (the “Property”).

The Project would bring a transformative, multi-phase development with mixed-use, high-rise commercial and residential buildings to a blighted area near Route 440 in Jersey City. The Project is subject to the Route 440-Culver Redevelopment Plan (the “Plan”) and is within the Route 440-Culver Redevelopment Area (the “Redevelopment Area” or “Area”). The proposed subdivision would divide the Property into five lots, creating and/or realigning several rights-of-way and would grant New Jersey Transit (“NJT”) a substantial easement to allow a Hudson Bergen Light Rail (“HBLR”) extension right-of-way, all in accordance with the Plan. The Project would also create open space, including public and private open space areas within the Redevelopment Area.

The undisputed testimony at the hearing established that the subdivision would be an **as-of-right** subdivision establishing a new street grid, the HBLR easement and the proposed open space, all consistent with the requirements of the Plan. Further, the Project would achieve the Plan’s goals and objectives. Despite the benefits of the Project to the City and the Redevelopment Area, the Planning Board has acted with continuous bad faith toward Route 440, first in delaying consideration of Route 440’s application for *more than two years* prior to even scheduling a hearing, then belatedly imposing a new requirement that Route 440 be designated as a Redeveloper, despite no requirement in the Plan or any requirement of other previously approved developers within the Area that they be designated. Indeed, once a Redeveloper application was submitted for the sole purpose of moving Route 440’s application along, both the Jersey City Redevelopment Agency (“JCRA”) and the City of Jersey City— to this day—have refused to even review Route 440’s application. Finally, the Planning Board arbitrarily and capriciously denied Route 440’s as-of right subdivision application and refused to even hear its site plan application. The Planning Board’s denial of the application is baffling because Route 440’s proposed development required no variances or deviations from the applicable redevelopment plan and is fully conforming to all relevant ordinances.

After issuing a belated Resolution (the “Resolution”) baldly stating that Route 440 “failed to meet the burden of proving compliance with the 440 Culver



Redevelopment Plan”, the Planning Board made bold new claims at the Trial Court not set forth in its Resolution - that its denial was based on a concern that no specific parcel of property was identified for the HBLR extension, and that Route 440 failed to get designated as a Redeveloper. However, new post-hoc arguments cannot be relied upon if they were not previously raised at the hearing, giving an applicant an opportunity to respond to them. In addition, the law is clear that approvals in this context should still be issued with conditions. The Trial Court gravely erred in arbitrarily accepting these belated excuses by the Planning Board without even determining if the record below provided a legitimate basis for them, which it plainly does not.

The cumulative actions of the Planning Board in delaying Route 440’s application, imposing various requirements without basis, and failing to allow Route 440 its due process rights, certainly meet the threshold for arbitrary and capricious conduct. So long as the proposed subdivision and site plans conform to the Plan and any relevant ordinances, the Planning Board has an *obligation* to approve the application as a matter of law. Here, there is no evidence in the record to support the Planning Board’s arbitrary and capricious decision to deny Route 440’s subdivision application or to dismiss its site plan application without taking any testimony. Consequently, the decision of the Trial Court, upholding the Planning Board’s denial/dismissal should be overturned.

## **PROCEDURAL HISTORY**

This matter arises from a prerogative writ action filed by Route 440 with the Superior Court seeking to overturn the Planning Board’s denial of its preliminary and final subdivision application, and a dismissal without hearing, of its site plan application. A First Amended Complaint was filed on April 14, 2023. (Pa29.) On April 26, 2023, the Planning Board submitted its Answer. (Pa61.) Followed by briefing, this matter was heard over two hearing days on January 8, 2024<sup>1</sup> and again on March 7, 2024. On June 6, 2024, Hon. Anthony V. D’Elia, J.S.C. entered an Order and Decision affirming the Planning Board’s March 21, 2023 Resolution and dismissing Route 440’s Complaint in Lieu of Prerogative Writs with prejudice. (Pa81.) On July 19, 2024, Route 440 appealed that final judgment to this Court. (Pa98.)

## **STATEMENT OF FACTS**

### **A. Background.**

Jersey City adopted the Plan for the Redevelopment Area to encourage “continued retail/commercial development along New Jersey State Route 440 while furthering improvements to the area’s function and appearance, providing for

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<sup>1</sup> All references to “IT” refer to the transcript of the oral argument held on January 8, 2024. References to “2T” refers to the transcript of the oral argument held on March 7, 2024.

extensive urban design, increased pedestrian circulation and connectivity with light rail transit stations, and protection of adjacent residential neighborhoods.” (Pa108.)

The Plan sets forth Jersey City’s redevelopment objectives for the Area, including:

- a. To recognize the significant opportunities for residential and commercial redevelopment afforded by the Area’s proximity to the West Side Avenue Light Rail Station and the anticipated Route 440 Boulevard.
- b. To preserve abandoned rail right-of-way within the Area for the anticipated extension of the Hudson Bergen Light Rail allowing it to connect to the west side of Route 440.
- c. To provide enhanced pedestrian and vehicular connections to the anticipated Route 440 Boulevard and to the existing and proposed Hudson Bergen Light Rail stations.
- d. To create new public rights-of-way within the Redevelopment Area that will improve vehicular and pedestrian circulation within the Area; preserve and extend the existing city street grid; and facilitate the development of alternate, locally accessible, vehicular north/south connections between Carbon Place and Claremont Avenue consistent with the vehicular traffic analysis for the Route 440 Boulevard Study.
- e. To enhance the pedestrian environment and general appearance of all existing and proposed roadways within the Area.
- f. To provide enhanced opportunities for bicycle circulation, parking and storage within the Area in accordance with the Circulation Element of the Jersey City Master Plan.
- g. To provide for the orderly phased conversion of vacant land and antiquated industrial land uses and buildings within the Redevelopment Area to a modern, integrated, mixed use community.
- h. To eliminate substandard, obsolete and/or dilapidated structures and remove blighting influences.
- i. To promote sustainable development and smart growth planning principles by encouraging the development of a variety of housing choices, sustainable building and site design, pedestrian friendly streets, enhanced access to mass transit and neighborhood shopping

facilities, shared parking solutions and a reduction in automobile dependency.

(Pa110-111.)

The Redevelopment Plan addresses completely new rights-of-way (“ROW”) in the Area, which include new streets and a light rail ROW extension, allowing the HBLR to cross, via elevated railway, above a portion of Appellant’s Property and then, continue on elevated rail east/west over Route 440 to ultimately land at Bayfront. (Pa 118). Bayfront is a residential development on the west side of Route 440, directly across from Appellant’s Property, heavily supported by the City. In exchange for creating the ROWs (including the HBLR ROW) and open space, the Redevelopment Plan expressly provides “bonuses” to a developer, which allow the developer to exceed certain density and height requirements of the Plan without having to apply for any deviation or variances from the Plan. (See Pa114; Pa121; Pa123.)

The Plan includes several “Urban Design” requirements regarding general building design, sustainability, parking structures, off-street parking, landscaping, streetscaping and lighting. (Pa114-117.) The Plan addresses “Circulation” and requires the creation of new blocks and “rights-of way” within the Area in order to facilitate vehicular, bicycle and pedestrian circulation, improve access to mass transit, extend the existing street grid to create linkages to surrounding areas, reduce the need for off-street parking by creating new on-street parking opportunities along

new blockfronts, and facilitate implementation of the Route 440 Boulevard Design plan. (Pa117.)

The Redevelopment Plan instructs that “any application for development of the Area shall include the reservation of land within existing Lot 14/83 for additional right-of-way for the extension of the Hudson Bergen Light Rail (HBLR).” (*Id.*) [The property referenced in the quotation is part of the Property of Appellant.] The Plan says that “all property within this Redevelopment Area that abuts or is in close proximity to Route 440 shall be developed in a manner that adheres to the setback requirements” of the City. (*Id.*) Throughout the Redevelopment Plan, there are references to a “developer”, who may engage in projects in the Area covered by the Redevelopment Plan. (*See* Pa106-137, *generally.*)

**B. The Project.**

The Property is in the Redevelopment Area, which is subject to the applicable zoning requirements in the Plan and the Jersey City Land Development Ordinance (“JCLDO”). (Pa108.) The Redevelopment Plan identifies different building districts. (Pa123-131.) Route 440’s Property is split between the “High Rise District” and the “Mid-Rise B District”. (*See* Pa106-137, *generally.*)

In its application, Route 440 sought Preliminary and Final Major Subdivision approval for Phase I of the Project and as-of-right Preliminary Subdivision approval for Phases II and III, ultimately creating five (5) lots that would accommodate a

multi-phased development containing a variety of uses, including residential, commercial retail, parking, a public park, and public rights of way. (*Id.*) To accommodate such a multi-phased Project the subdivision would, as required by the Plan, create multiple ROWs, including the HBLR extension ROW, provide open space, including public and private open space areas for locals and park areas. (*Id.*)

The detail of this Project is best explained in its phasing – Phases I, II, and III. Route 440 sought preliminary and final subdivision and site plan approval for Phase I, and only preliminary subdivision and site plan approval for Phases II and III. (*Id.*) Specifically, Phase I of the Project would consist of the development of Lot 1 on Block 21701, located within the High-Rise District of the Redevelopment Plan. (*Id.*) Phase I includes the development of a 30-story, mixed- use building, the creation of a portion of the new Grant Avenue right-of-way, and the creation of a plaza connecting Claremont Avenue to the new Grant Avenue right-of-way. (*Id.*) The mixed-use building would provide 473 residential units, 11,600 square feet of ground floor retail, 344 parking spaces, residential amenity spaces, and a 256-space bicycle storage room. (*Id.*; *see also* 1T:5:21-6:5; 1T8:10-17.)

Phase II of the Project would consist of the development of portions of Lots 13 and 14 and Lots 24 and 25 on Block 21701 on a preliminary approval basis only. It is in the High-Rise District of the Redevelopment Plan. (Pa156.) Phase II would involve the development of a two-tower, mixed-use building, including a 39-story

residential tower (1T8:15) and 55-story residential tower (1T8:16), along with the creation of a portion of the new Grant Avenue and Greenwich Drive rights-of-way, dedication of a portion of the HBLR extension ROW and Route 440 ROW widening. (Pa156.) The mixed-use building will provide 1,567 residential units, 131,712 square feet of retail, 1,118 automated parking spaces, residential amenity spaces, and three bicycle storage rooms with a total of 910 spaces. (*Id.*)

Phase III would consist of the development of portions of Lots 13, 14, and 17 on Block 21701 and is located in the Mid-Rise B District of the Redevelopment Plan and includes the creation of open space. (*Id.*) Phase III proposes, on a Preliminary approval basis, the development of a 55-story, mixed-use building, along with the creation of a portion of the new Greenwich Drive ROW, dedication of a portion of the HBLR extension ROW, and the creation of an open space connecting Mallory Avenue to the new Greenwich Drive ROW. (*Id.*)

**C. Route 440's Subdivision and Site Plan Application.**

On or about January 19, 2021, Route 440 filed an application with the City's Division of Planning ("Planning Division"), under case number P21-007 (the "Application") to obtain the proper approvals for the Project. (Pa144-812.) As of March 22, 2021, more than two months later, Route 440 had not received any information regarding its Application. Pursuant to applicable New Jersey law, if a municipality does not certify that an application is complete within 45 days of its

submission, the application is deemed complete upon the expiration of the 45-day review period. N.J.S.A. § 40:55D-1 *et seq.*; § 40:55D-46.1(a)-(b).

Finally, in a letter dated April 8, 2021 (eighty-one days after the initial filing of the application), the Planning Division notified Route 440 that it had reviewed its Application and found it incomplete (the “Incompleteness Letter”). (Pa813-818.) The Incompleteness Letter included a checklist of the specific items that the Planning Division determined did not meet the requirements of the JCLDO. (*Id.*) Notably, the Incompleteness Letter did not list as one of the deficiencies the fact that a redevelopment agreement was required, nor did it seek to require Route 440 to enter into a redevelopment agreement. (*See id.*)

On June 2, 2021, to address the Planning Division’s assertion of “incompleteness”, Route 440 submitted a revised Application with updated plans and exhibits (the “June Submission”) rectifying the specific issues set forth in the Incompleteness Letter. (Pa846-1136.)

**D. Unexplainable Delays by the Planning Board of Jersey City.**

Weeks passed and Route 440 did not receive any further communication from the Planning Division, leading Route 440 to believe under the ordinary course of business that nothing further was needed for its Application to proceed to the next steps. In accordance with statute, Route 440’s Application was automatically deemed complete on August 2, 2021, at the end of the statutory review period (*i.e.*,



sixty days after the June 2 Submission). *See* N.J.S.A. § 40:55D-1 *et seq.* Since the Application was deemed complete as of August 2, 2021, the Planning Board was required to act on it by no later than November 7, 2021 (95 days after the complete Application was submitted).

The Planning Board, however, did not act on the Application, and despite this repeated delay, Route 440 made numerous attempts through various methods, means, and channels to engage with the Planning Division and other departments of the City to have the Application heard, but was unsuccessful. (Pa1338-1347.)

***More than one year after Route 440's submission of an unacknowledged but complete application***, on June 29, 2022, the Planning Division staff finally agreed to meet with Route 440, Route 440's professional consultants and its attorneys, to discuss the Application (the "June 2022 Meeting"). (Pa1338-1339.) The parties reviewed in detail Route 440's experts' calculations for density and the required ROW dedications to NJT and Jersey City and further discussed the Application's completeness. (Pa1361-1367.)

Despite repeated inquiry, at no time at that meeting, or any other meeting for that matter, or in any official record, did any Planning Division staff member directly or indirectly state that Route 440's subdivision and site plans did not comply with the Redevelopment Plan, or assert that any variances from the Redevelopment Plan were required. Rather, almost a month later, on July 22, 2022, the Planning Division

notified Route 440, for the first time, via email, that the Application would not be deemed complete unless Route 440 entered into a Redevelopment Agreement (“RDA”) with the JCRA. (Pa1365.) By entering into an RDA with JCRA, Route 440 could be designated as a “redeveloper.” (*Id.*) This “requirement” was novel to Route 440, and is not believed to be required of any other previously approved developers in the Redevelopment Area. But again, no other deficiencies in Route 440’s June Submission were noted in the email, and Route 440 never received a second checklist noting any remaining deficiencies, including the need for an RDA. (*See id.*) Notably, entering into an RDA with the JCRA is neither a checklist item, nor is it required under the JCLDO or the Redevelopment Plan. What it did do, however, was create additional roadblocks and delay for Route 440.

On September 28, 2022, a critical meeting in the chronology of Route 440’s application was held at Jersey City’s City Hall (the “September 2022 Meeting”). (Pa1704.) The September 2022 Meeting included the City’s Corporation Counsel, the Executive Director of Housing and Economic Development, the Director of the Planning Division, Route 440’s counsel, and representatives of Route 440. (*Id.*) Despite it not being a legal requirement, to implore the Planning Board to move forward on Route 440’s Application, Route 440 nevertheless, as a gesture of accommodation, informally agreed to enter into an RDA with the JCRA as a condition of the site plan approval from the Planning Board. Still, at no time did any

representative of the City indicate that either the subdivision or the site plan Application submitted by Route 440 was in any way deficient. Also, based on the Planning Division and Route 440's agreement at the above meetings on the Project, on October 6, 2022, Route 440 in good faith and in reliance on the City's representations paid all outstanding site plan application fees, in the amount of \$197,250.50 to ensure the Application would proceed. (Pa1441.) Thereafter, Route 440's Application was finally placed on the Planning Board's calendar for a hearing on November 15, 2022, six-hundred and sixty-five (665) days after the filing of its first Application. (*See* Pa144-812.) The Application pending before the Planning Board sought the following: (i) preliminary and final subdivision approvals for Phase I; (ii) preliminary subdivision approval for Phases II and III; (iii) preliminary and final site plan approvals for Phase I; and (iv) preliminary site plan approvals for Phases II and III. (*Id.*) But the City's bad faith did not abate. On October 26, 2022, notices were mailed to all property owners within 200 feet of the subject property, as required, by Plaintiff-Appellant's counsel to inform them of the public hearing. (Pa1389-1435.) On October 28, 2022, notice of Route 440's Application was published in the Jersey Journal, also as required. (*See id.*) The hearing before the Planning Board was then rescheduled from November 15, 2022 to November 29, 2022. (*See* Pa1690-1694.)

On November 29, 2022, Route 440 finally had the opportunity to appear before the Planning Board to present its Application, but the Planning Board immediately began by asking Route 440 if it had taken steps to become a designated “redeveloper.” (Pa1691.) Route 440 confirmed that it had indeed applied to the JCRA for that designation, despite there being no requirement to do so. (Pa1692.) The Planning Board, however, remarkably, and contrary to the explicit discussion at September 2022 Meeting, refused to proceed with hearing the Application without more information about the status of Route 440’s designation. (Pa1693.) All this information was, of course, not relevant to the Application but, nevertheless, fully discussed and well within the knowledge of the Planning Division and the JCRA, both governmental arms of the City. It also appeared, despite the lapse of 22 months since filing, that the Planning Board indicated that it could not hear the Application due to missing engineering comments, so they would need to adjourn the meeting again without hearing any substantive information regarding the Application. (Pa1693.) As noted, these alleged “deficiencies” were not set forth in any incompleteness letters or even made known to Route 440 ahead of this meeting. Route 440 was then placed on the Planning Board’s calendar for January 10, 2023. (Pa1694.)

To appease the Planning Board’s requests, Route 440 resubmitted its complete revised application for designation as a redeveloper to the JCRA on January 5, 2023.

(Pa1478-1675.) Because it had already submitted a redevelopment application to the JCRA on July 14, 2020, twenty-eight (28) months before, which was updated on May 11, 2021, at the JCRA's request, all that was required in the January 5, 2023 revisions were updated financials and updated information to make it current. (*Id.*) Notably, in terms of the Project, the latest redevelopment application was essentially identical to the one Route 440 previously submitted more than two years prior. (*See id.*) Route 440 updated the financial information for the third time, because the JCRA failed to review Route 440's first two applications within a reasonable amount of time. (*Id.*)

At the January 10, 2023 hearing, Route 440 provided an update to the Planning Board on the status of its submission to the JCRA and explained in detail the documents that it had submitted (and resubmitted) to the JCRA. (Pa1697.) Route 440's counsel also noted that the Application could be heard with a condition placed on approval for a redevelopment agreement, which is typical and standard practice of the Planning Board and further codified by statute. (Pa1698.) Route 440 again attempted to present its Application for the Preliminary and Final Major Phase I subdivision and site plan approvals, but the Planning Board once again still refused to hear the Application. (Pa1701.) This time, the Planning Board said it could not proceed because: (1) Route 440's documents were provided to the JCRA less than 10 days before the January 10th hearing, ignoring all the prior submissions to the

JCRA; and (2) the Planning Board needed the JCRA, a City agency, to communicate to them that it had received Route 440's Application and was "working on it", neither of which "requirement" was ever previously communicated to Route 440 or its counsel. (Pa1698.)

Route 440 emphasized to the Planning Board that it was obligated to hear Route 440's application, regardless of the JCRA's process by specifically directing the Board's attention to and even quoting the applicable statute, N.J.S.A. 55D-22(b), which reads:

In the event that development proposed by an application for development requires an approval by a governmental agency other than the municipal agency, **the municipal agency shall, in appropriate instances, condition its approval upon the subsequent approval of such governmental agency;** provided that the municipality shall make a decision on any application for development within the time period provided in this act or within an extension of such period as has been agreed to by the applicant unless the municipal agency is prevented or relieved from so acting by the operation of law.

N.J.S.A. § 40:55D-22(b). (Pa1698.) (Emphasis added.)

The statute was blithely ignored as of no consequence. Instead, the Planning Board demanded and was adamant about Route 440 "needing" this "redeveloper" designation, even though it could not point to any provision in the Route 440-Culver Redevelopment Plan or to any applicable statute or Jersey City ordinance requiring that a developer have this designation. (Pa1700.) In fact, Route 440 is aware of at

least four other developers within the Redevelopment Plan that do not have this “redeveloper” designation. (*Id.*) Route 440 disagreed with the Planning Board’s position and recounted the repeated delays with its Application. (Pa1699.) The Planning Board asserted that it still had time under the statute to act on the Application, and, once again, it refused to go forward with the hearing. (Pa1697.) Route 440’s application was adjourned, unbelievably once again, to January 24, 2023. (Pa1698.)

Two years after having first submitting an “as of right” subdivision and site plan application, on January 24, 2023, the Planning Board finally heard testimony on Route 440’s subdivision Application. (*See* Pa1702-1710.) At the start of hearing, it was agreed that Route 440 would bifurcate the testimony so that the Planning Board could hear its subdivision Application first, and the site plan Application, second. (Pa1703.) Route 440 began by explaining the Application and the approvals it was seeking. (*Id.*) The Planning Board immediately interrupted Route 440 to ask for an update on its status with the JCRA, and its request to be designated as a Redeveloper. (*Id.*) Route 440 said there was no news on its application from JCRA and continued with presenting testimony and describing the Project. (*Id.*)

**E. Route 440’s as-of-right Application is finally presented to the Planning Board.**

As Route 440 explained at the hearing, its Subdivision and Site Plans for the Project met all of the requirements of the Redevelopment Plan. (Pa1704.) The

application was consequently “as of right” because no variances from the Redevelopment Plan were needed. (1T38:23-25-39:1-2.) The Project proposed to subdivide the property, creating new blocks and rights-of-way consistent with the Rail and Street Network Plan and requirements of the Redevelopment Plan. (Pa1705.) Route 440’s Subdivision Plan proposed the following: (1) Phase I development parcel will be 41,009 square feet; (2) Phase II development parcel will be 102,280 square feet; and (3) Phase III development parcel will be 51,554 square feet. (Pa829-830.) Route 440’s subdivision plan also proposed to create a 70,626 square foot parcel for open space and two lots for proposed rights-of-way. (*Id.*) The two new lots for rights-of-way would include the new Grant Avenue extension, Route 440 widening, new Greenwich Drive extension, and the remainder of the Hudson Bergen Light Rail extension. (*Id.*) Route 440’s project takes advantage of the Redevelopment Plan’s bonus provisions to exceed certain floor-area ratios and building height restrictions in all three phases of the Project. (*Id.*)

Therefore, as mentioned, no variances or deviations from the Plan were needed or requested in Route 440’s Application, which means Route 440’s application should have automatically been preliminarily approved as-of-right. Additionally, Phase I of the Project did not have any bearing whatsoever on NJT’s involvement in the Project, meaning any ongoing discussions with NJT at this Phase were irrelevant to the approvals for Phase I because the easement sought by NJT



(and the City) was nowhere near the Phase I portion of the Project, and was on different lots at the other end of the Property. (1T4:1-3.)

To provide more background regarding the subdivision application, Section VIII.B.3. of the Redevelopment Plan states that:

whenever a **subdivision or dedication of private property for the creation of a new or expanded right-of-way is required in accordance with the Rail and Street Network Plan . . . including the HBLR extension**, a development project within the Area shall be permitted a maximum allowable floor area equal to 120% of the development rights rounded to the nearest whole number, permitted under Section VIII.B.I, Floor Area Ratio, for the applicable zone in which the property is located, based on the gross land area of their property prior to subdivision or dedication. (Pa125-126 (emphasis added).)

Once the allowable floor area has been calculated using the above standards based on the gross land area prior to subdivision, any development project within the Area **shall be permitted to exceed the maximum allowable building height** for the applicable district by the exact number of stories and floor area, rounded to the nearest whole number, necessary to achieve the maximum allowable floor area build-out at a factor of 120% and/or to achieve the Open Space Bonus. (*Id.*)

The Redevelopment Plan also calls for certain principal uses in the High-Rise District: “High-Rise apartment buildings in accordance with the Ground Floor Frontage Regulating Plan - may include flats, duplexes, and/or loft style apartments, including work/live units. (*Id.*) Residential units are permitted on all floors except the ground floor of Route 440 frontage.” (Pa126.)

The Ground Floor Frontage Regulating Plan of the Redevelopment Plan indicates the specific frontages where retail is required, retail/commercial is

optional, and residential only is permitted. (*Id.*) Route 440's project meets these specifications:

- Phase I proposes retail along Route 440 where retail is required; retail and residential along Claremont Avenue where retail/commercial is optional; and retail along a portion of the new Grant Avenue frontage extending from Route 440 where retail is optional and residential where only residential uses are required. (Pa832.)
- Phase II proposes retail along Route 440 where retail is required; retail along a portion of the new Grant Avenue frontage extending from Route 440 where retail is optional and residential where only residential uses are permitted; and residential along the new Greenwich Drive frontage where only residential uses are permitted. (Pa833.)
- Phase III proposes retail along Culver Avenue and extending along the new Greenwich Drive frontage where retail/commercial is optional, residential along the portion of the new Greenwich Drive frontage where only residential uses are permitted, and residential along Pollock Avenue where only residential uses are permitted. (*Id.*)

While the verbal description of the Project can be daunting, it can all be visually grasped by reviewing the colorized drawings as part of the Appendix. (Pa137-143.)

There are also bulk standards that need to be met when developing projects, but these standards are not applicable to the proposed project. (Pa833.) With regard to parking, the Redevelopment Plan has a minimum parking requirement of 0.5 parking spaces per dwelling unit and a maximum parking requirement of 0.9 parking spaces per dwelling unit for “Mid-Rise Apartment Buildings” in the Mid-Rise B and High-Rise Districts. (*Id.*) There is no parking requirement specifically for “high-rise apartment buildings.” (*Id.*) The parking requirement for retail uses is a maximum of one space per 1,000 square feet of gross floor area. (*Id.*) There is no minimum parking requirement for retail uses. (*Id.*) Route 440’s plan meets each of these parking specifications.

Additionally, in his testimony regarding the subdivision portion of the Application, Route 440’s engineering expert concluded that the proposed subdivision is consistent with all requirements of the Redevelopment Plan and would be an **as-of-right** subdivision. (Pa1706.) The expert also testified that Route 440’s plan achieves several of the Redevelopment Plan’s objectives by preserving ROWs for the extension of the HBLR; creating new public ROWs; and consolidating and re-subdividing the property within the Redevelopment Plan. (*Id.*) The expert further testified that Route 440 has been in discussions with NJT regarding the HBLR and that its Application and plans were “consistent with the plans that NJT [has given to

Route 440].” (Pa1705.) Regardless, these discussions did not have anything to do with the preliminary site plan approvals Route 440 sought.

**F. Route 440 Sufficiently Addresses Community and Planning Board Concerns.**

Route 440 also engaged in further discussions with the community about the Project to address any legitimate concerns of any member. It had already engaged in community discussions on seven prior occasions. (*See* Pa1478-1479.) Meetings had taken place with (1) New Jersey City University, as they are adjacent to the property; (2) a neighboring owner; (3) the West Side Special Improvement District; (4) NJT (on multiple occasions); (5) Urban Edge, mall owners of the Hudson Mall, located across from Route 440; (6) representatives of The Lofts and Westside Station Condominiums; and (7) representatives of the Townhomes at Westside Station. (Pa1704.) There was also a meeting scheduled with the Westside City Alliance, however, the Councilperson for the district cancelled. Most notably, on January 4, 2023, a community meeting was held to continue ongoing dialogues with various stakeholders in the neighboring area who would be most affected by the Project. (*Id.*) The meeting was also live streamed on a webpage for others to easily access. In achieving this latter meeting, Route 440’s representatives closely coordinated with Councilwoman Prinz-Arey for Ward B, who represents the West Side of Jersey City, where the Project is located, for her help with this outreach. (Pa1707.) The community meeting was a two-and-a-half-hour video conference conducted over

Zoom with over eighty participants. (Pa1704.) Participants were informed about the Project, the anticipated Planning Board hearing, and Route 440's experts were available to answer all of the participants' questions. (*Id.*) None of the comments were specific to Route 440's proposed subdivision, which was the subject of that portion of the hearing. (*Id.*)

During the Planning Board hearing, one or more commissioners also raised their concerns (most of which centered on the property earmarked for the HBLR), but counsel for Route 440 reminded them that the Application before them, as it related to Phases II and III, was only seeking *preliminary* Subdivision and Site Plan approval at this time and noted that it could not seek "final" approval until the NJT easement was resolved. (Pa1707-1708.) In closing, Route 440 repeated that neither the subdivision nor the site plan would require any variances or Plan deviations, and that both the subdivision and the site plans complied with the specifications laid forth in the Redevelopment Plan. (Pa1708.)

The issues discussed by the Planning Board members during their deliberations all concerned the property earmarked for the HBLR and whether what was presented met the requirement for setting it aside. (Pa1709.) Importantly, none of the Planning Board's comments relating to the HBLR were in any way relevant to the Preliminary and Final Subdivision approval of Phase I (or in any way relevant to the Preliminary and Final Major Site Plan approval of Phase I, which was

scheduled to occur in the second part of Route 440's presentation to the Board), since no part of Phase I included the HBLR ROW or involved a transfer of property to NJT for that purpose in that Phase, and even if it was, that stipulation could have been conditioned. (*See id.*)

**G. The Planning Board's Improper Denial.**

At no time during the hearing did any of the Planning Board members raise any concerns or issues regarding how the subdivision failed to comply with the Redevelopment Plan or regarding the Application's compliance with the JCLDO. (*Id.*) Importantly, Route 440 already owns all of the property that is to be developed in the Project, not needing any acquisition of private property to complete it. Route 440 also has the financial ability to develop the project and is a seasoned national developer. At the end of the deliberations, the Planning Board still voted to deny the subdivision without any sufficient basis. (Pa1710.)

The Planning Board's attorney stated, "[I]n light of the vote of the board to deny the subdivision, I would say that the site plan application, obviously, can't go forward." (*Id.*) He told the Chairman that he could "either entertain a motion to dismiss the site plan and call the roll or you could entertain a motion to deny the site plan," but he thought the "appropriate measure for the board" would be to dismiss the site plan Application. (*Id.*) Despite Route 440's counsel's protests of

unlawfulness and improper procedure, the Planning Board followed the dismissal and tossed Route 440's Site Plan Application without basis. (*Id.*)

Because the hearing was held on January 24, 2023, the Planning Board was required by law to memorialize a resolution setting forth its decision and the reasons for it by March 10, 2023. *N.J.S.A.* 40:55D-10(g)(2). The Planning Board failed to memorialize a resolution by that date. (1T15:3-24.) The resolution was not signed until March 21, 2023. (Pa1684-1689.) In fact, the Planning Board only memorialized the Resolution regarding the denial and dismissal of Route 440's application after being served with Route 440's original complaint and becoming aware that Route 440 was seeking relief with respect to the Resolution. (*See id.*) In every due process instance, as explained throughout the foregoing, the Planning Board failed to fulfill its statutory obligations or behave judiciously because it arbitrarily did not want the Project to proceed.

### **STANDARD OF REVIEW**

Where there is a challenge to a determination of a municipal agency, an appellate court reviews the rulings of law and issues regarding the applicability or interpretation of laws, statutes, or rules on a de novo basis, and "is bound by the same scope of review" as the trial court. *In re Ridgefield Park Bd. of Educ.*, 244 N.J. 1, 17 (2020); *Charlie Brown of Chatham, Inc. v. Bd. of Adj. for Chatham Tp.*, 202 N.J. Super. 312, 321 (App. Div. 1985). Although a local land use board's decision

is entitled to a presumption of validity, boards are not immune to challenges concerning their legal functions and determinations. *Cell S. of N.J. v. Zoning Bd. of Ad. of West Windsor*, 172 N.J. 75, 81-82 (2002); *Toll v. Bd. of Chosen Freeholders*, 194 N.J. 223, 256 (2008); *Kramer v. Bd. of Adjustment of Sea Girt*, 45 N.J. 268, 296-97 (1965). The Court defers to the factual findings of the board unless they are “arbitrary, capricious and unreasonable”, *Jacoby v. Zoning Bd. of Adjustment of Borough of Englewood Cliffs*, 442 N.J. Super. 450, 462 (App. Div. 2015), but deference to the factual findings of the board is only given if those facts are “grounded in evidence in the record”. *Id.*; *see also*, *Kramer*, 45 N.J. at 296 (if the Court finds the factual support does not qualify as substantial evidence, the proof requirements are not met). “The purpose of judicial review is for the court to determine whether or not the board acted within the statutory guidelines and properly exercised its discretion.” *Fallone Properties, L.L.C. v. Bethlehem Twp. Planning Bd.*, 369 N.J. Super 552, 561 (App. Div. 2004). “When it comes to the review standard for a board’s decision regarding questions of law, that decision will be subject to a *de novo* review by the courts and is afforded no deference.” *Pond Run Watershed Association v. Twp. of Hamilton Zoning Bd. of Adjustment*, 397 N.J. Super. 335, 350 (App. Div. 2008) (*citing TWC Realty Partnership v. Zoning Bd. of Adj. of Twp. of Edison*, 315 N.J. Super. 205, 211 (Law Div. 1998), *aff’d*, 321 N.J. Super. 216 (App. Div. 1999)).



## LEGAL ARGUMENT

### POINT I

#### THE TRIAL COURT ERRED IN HOLDING THAT THE PLANNING BOARD'S DECISION WAS NOT ARBITRARY, CAPRICIOUS AND UNREASONABLE (Raised Below: 1T:5-46; 2T:4-52; Pa82-Pa93)

The Planning Board acted arbitrarily and capriciously in denying an as-of-right application for which they had no discretion to deny. The Trial Court, in reviewing the Planning Board's decision, erred by relying on *post hoc* reasonings for the denial that were not in the record below and by finding that the Planning Board was allowed to deny an application that merely needed contingencies. In addition to allowing the Planning Board to get away with flagrantly missed statutory deadlines, the Lower Court also allowed the Planning Board to require a "redeveloper" designation where no designation is required. This clear arbitrariness cannot be overlooked and requires reversal of the decision below.

#### **A. The Trial Court failed to address the Planning Board's bad faith actions throughout the entire process of reviewing Route 440's Application. (This issue was not addressed by the Lower Court.)**

The Lower Court erroneously failed to see the multitude of delays at the hands of the Planning Board that appeared to be without any rhyme or reason. The Planning Board arbitrarily decided that the Application would be reviewed on its own timeline, rather than the statutory timelines under the Municipal Land Use Law ("MLUL") that governs this action.

This matter dates back more than four years to January 19, 2021, when this Application was first filed with the Planning Board. The MLUL, N.J.S.A. 40:55D-1 *et seq.*, provides that a planning board shall grant or deny site plan approval within **45 days** after an applicant submits a complete application or within such further time as may be consented to by an applicant, and, under N.J.S.A. § 40:55D-46.1(a) and (b), failure to act within that period constitutes an approval. Thus, if a planning board delays approving a site plan, the consequence is not a violation of some constitutionally-protected interest of an applicant, but it is, in fact, an approval of the applicant's plans. *Anastasio v. Planning Bd. of West Orange*, 209 N.J. Super. 499 (App. Div.), *certif. denied*, 107 N.J. 46 (1986). This statute was ignored by the Planning Board, because even as of March 22, 2021 (more than 45 days following its submission), Route 440 had not heard anything regarding its Application.

On April 8, 2021, an Incompleteness Letter was finally sent to Route 440. (Pa813.) A checklist was provided indicating that certain requirements of the JCLDO were not met. But that checklist stated nothing about requiring entry into an RDA or being designated as a redeveloper. (*Id.*) On June 2, 2021, Route 440 submitted its June Submission, which rectified all of the issues set forth in the Incompleteness Letter. (Pa846.)

As of August 2, 2021, because nothing further was received from the Planning Division, Route 440 safely assumed that its Application was complete and under

review. *See* N.J.S.A. § 40:55D-1 et seq. Since the Application was deemed complete as of August 2, 2021, the Planning Board was required to act on it by no later than November 7, 2021 (95 days after the complete Application was submitted).

Instead, Route 440 heard nothing from the Planning Board until almost a year later, and on July 22, 2022, the Planning Division for the first time informed Route 440 that it was requiring Route 440 to enter into an RDA with the JCRA to be designated as a “redeveloper”. (Pa1365.) This arbitrary requirement was not a checklist item, was not part of the Redevelopment Plan, and is not required under the JCLDO. No other deficiencies in the June Submission were identified.

At the September 2022 Meeting, Route 440, in an attempt to have the Board move forward reviewing its Application, informally agreed to enter into an RDA with the JCRA. Beyond this, no deficiencies were identified, nor were any other issues raised. A hearing was finally scheduled for November 15, 2022, but was adjourned multiple times – further evidence that the Planning Board never truly planned to give Route 440 a fair hearing at all. At the November 29, 2022 hearing, the Board arbitrarily shifted the focus to the status of being designated as a “redeveloper,” and - despite Route 440 informing the Board that the Application was pending before the JCRA and any approval could be contingent on redeveloper

designation<sup>2</sup> - refused to hear the application. (*See* Pa1690-1694.)

On January 10, 2023, the Planning Board again refused to hear the Application, stating that it could not proceed because Route 440's documents were provided to the JCRA less than 10 days before; and the Planning Board needed the JCRA to communicate to them that it had received Route 440's Application and was "working on it", neither of which "requirement" under the law. (Pa1698.) N.J.S.A. § 40:55D-22(b), provides that in the event that development proposed by an application for development requires an approval by a governmental agency other than the municipal agency, the municipal agency shall, in appropriate instances, condition its approval upon the subsequent approval of such governmental agency. When directed to the statutory provisions of the MLUL, the Planning Board still refused to go forward with the hearing. (*See* Pa1695-1701.)

On January 24, 2023, the Planning Board finally heard testimony on Route 440's subdivision Application. (*See* Pa1702-1710.) Route 440 began by explaining the Application and the approvals it was seeking. (Pa1703.) The Planning Board immediately interrupted Route 440 to ask for an update on its status with the JCRA, and its request to be designated as a Redeveloper. (*Id.*) Route 440 said there was no

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<sup>2</sup> To this day the JCRA has failed and refused to even consider Route 440's Redeveloper Application.

news on its application and continued with presenting testimony and describing the Project. (*Id.*)

There can be no doubt that the Planning Board took it upon itself to create arbitrary and capricious requirements to delay any hearing on the Application because it never intended to approve it. The Court's decision below, while similarly setting forth a timeline of events, seemingly ignores the delays by the Planning Board. Instead, it erroneously agrees with the Board that Route 440 is estopped from raising the argument concerning delays because it ultimately did move forward with its Application and was heard by the Board. This is in stark contrast to the requirements and time periods set forth in the MLUL. Indeed, taking this argument to its logical conclusion, any developer seeking approval should not move forward with their application when faced with delay and immediately file suit. This argument merely prejudices applicants who are seeking approval for their projects.

Statutory time limits for action on land use applications, with provisions for automatic approval in the event of governmental failure to act, were enacted by the Legislature to avoid governmental inaction. *Lizak v. Faria*, 96 N.J. 482, 492, 496 (1984). Despite the mandatory language of such provisions, our courts have sometimes denied automatic approval of development applications when governmental inaction was "technical or inadvertent, and where there is no evidence of intentional delay or inattention to the application." *Eastampton Ctr. LLC v.*

*Planning Bd. of Tp. of Eastampton*, 354 N.J. Super. 171, 193 (App. Div. 2002); *see also Fallon Props., L.L.C. v. Bethlehem Twp. Planning Bd.*, 369 N.J. Super. 552 (App. Div. 2004). That is simply not the case here. The Planning Board has offered no explanation as to why the review of the Application was repeatedly delayed. It also offered no substantive explanation that would explain the need for a “redeveloper” designation. Accordingly, the decision below is facially flawed in ignoring the Planning Board’s blatant theme of arbitrariness.

**B. The Planning Board is prohibited from relying on new reasonings for denying the Application that were not addressed at the hearing or in the Resolution. (This issue was not addressed by the Lower Court.)**

As an initial matter, the Trial Court failed to address that the Planning Board’s reasons at trial for denial of the Application were belatedly raised issues, not addressed at the hearing, or more importantly, set forth in its Resolution.

A board’s review is limited to the record below. It is well settled that the Board may not act upon facts which are not part of the record. *See Russell v. Tenaftly Bd. of Adjustment*, 31 N.J. 58 (1959); *162 Kempner v. Edison Tp.*, 54 N.J. Super. 408 (App. Div. 1959). For this reason, a Board is required to adopt a comprehensive resolution setting forth its findings, analysis, and the reasons for its determination to grant or deny each aspect of the application because the resolution is critical for the court’s review of the matters raised on appeal. *See Price v. Himeji, LLC*, 214 N.J. 263, 273 (2013).

Resolutions of municipal boards should reflect the deliberative and specific findings of fact necessary to sustain the board's conclusions that statutory requirements for relief were or were not met. *Harrington Glen, Inc. v. Mun. Bd. Adj. Bor. Leonia*, 52 N.J. 22, 27-28 (1968); *Pagano v. Zoning Bd. of Adjustment*, 257 N.J. Super. 382 (Law Div.1992). The point of such a requirement is to allow a reviewing court to determine fairly whether the board acted properly and within the limits of its authority in granting or refusing to grant an application. *Harrington Glen, Inc.*, supra, at 28. "Local boards and their counsel should take pains to memorialize their decisions in resolutions that explain fully the basis on which the Board had acted, with ample reference to the record and the pertinent statutory standards." *Commercial Realty & Res. Corp. v. First Atl. Props. Co.*, 122 N.J. 546, 566–67 (1991) (internal citation omitted). "[A] mere recital of testimony or conclusory statements couched in statutory language" is insufficient. *N.Y. SMSA, L.P. v. Bd. of Adj. of Twp. of Weehawken*, 370 N.J. Super. at 319, 332–33 (App. Div. 2004) (internal citations omitted). The resolution must contain sufficient findings, based on the proofs submitted, to satisfy a reviewing court that the board has analyzed the applicant's request in accordance with the statute and in light of the municipality's master plan and zoning ordinances. *Cf. Medici v. BPR Co.*, 107 N.J. 1, 23 (1987). Without such findings of fact and conclusions of law, the reviewing court has no

way of knowing the basis for the board's decision. *Morris Cty. Fair Hous. Council v. Boonton Tp.*, 228 N.J. Super. 635, 646 (Law Div. 1988).

Here, the Board's decision must be reversed because the Resolution and even the transcripts of the relevant hearings fail to support the Board's newly stated purported reasons for denial of Route 440's application. As explained below, because the Board's reasons for denying the application are against the weight of the evidence, the decision cannot be supported and is arbitrary, capricious, and unreasonable and an abuse of the Board's discretion.

It is undisputed that on appeal, a party cannot rely on determinations that were not set forth in the board's decision and were not part of the record below and the resolution of a board is the "official statement of the board's findings and conclusions." *Scully-Bozarth Post #1817 v. City of Burlington*, 362 N.J. Super. 296, 311 (App. Div. 2003). The Trial Court relied on the Board's argument that Route 440 utilizes property from Phase II of its development application in Phase I as a rationale for denial. (*See, generally*, Pa81-93.) However, the record, including the Resolution, is devoid of any mention of this fact or conclusion, and thus, it is improper for the Board to create, post-hoc, new conclusions for the purpose of bolstering its argument, or for the Trial Court to rely on them.

Rather, the Board merely concluded in the Resolution that:

[T]he applicant has failed to meet the burden of proving compliance with the 440 Culver Redevelopment Plan to



justify the granting of the requested subdivision. The Board finds that the granting of the **subdivision as presented by the Applicant would, in no way, advance any of the purposes of the 440 Culver Redevelopment Plan and in fact, would contradict the objectives, intent, spirit and language of the 440 Culver Redevelopment Plan.**

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The Board finds from the evidence and testimony presented that the granting of the subdivision as presented by the Applicant would impair the objectives, goals, intent and purpose of the 440 Culver Redevelopment Plan and would have a substantial detrimental impact on the surrounding area

(Pa1688.) (emphasis added).

The Board states this with no specifics as to what is in contradiction to the Plan, what about the Project would “impair” the Plan’s objectives, or why the purposes of the Plan would not be advanced. *Id.* Moreover, what is entirely lacking from the Resolution is any mention of bonuses being used from other phases for Phase I – which is not correct, issues with the property boundaries that are being created, or any reasoning for a decision that Phase I was not as of right. Indeed, one of the findings of fact in the Resolution is that “Proposed Redevelopment Actions IV(A) of the 440 Culver Redevelopment Plan specifically states that the Plan is to provide for the “acquisition, consolidation and re-subdivision of land within the Redevelopment Area into suitable parcels for development.” (Pa1687.) Yet this is

exactly what Route 440 is attempting to do, and there is no explanation for how Route 440's Project contradicts this goal.

In contrast, the Planning Board -for the first time at trial - attempted to assert that concerns about the bonuses and the HBLR ROW drove the Board's decision, and the Trial Court erroneously relied on these concerns in its decision. (Pa92.) But the Board failed to demonstrate how the bonuses sought or the ROW that is explicitly called for in the Plan would "contradict the objectives" of the Plan. The comments of the Board members never raised the bonus issue or phasing, but rather addressed irrelevant hypotheticals, such as what if the "economy crashes," or "somebody else wants to develop something there," or "what happens if [the whole project] doesn't [finish]?" Taken together, the reasons *actually in the record* demonstrate an arbitrary and capricious decision, and the Board cannot now change its justification for denial.

New arguments post-hoc cannot be relied upon if they were not previously raised at the hearing, giving the applicant an opportunity to respond to them. For this reason alone, the Trial Court's decision should be reversed.

**C. The Court erred in not finding that the Application should have been granted as of right pursuant to applicable law. (Raised Below: 1T:5-46; 2T:4-52; Pa82-Pa93)**

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It is true that municipalities possess the power to regulate the use of land through zoning and subdivision, but only to the extent that the Legislature has

granted it to them. *Pizzo Mantin Group v. Township of Randolph*, 137 N.J. 216, 223 (1994) (citing *Riggs v. Township of Long Beach*, 109 N.J. 601, 610 (1988)). The statutory grant from the State of the municipal power to zone and to control the subdivision of property is provided by the MLUL. *Id.* The MLUL provides that, “the planning board shall, if the proposed subdivision **complies with ordinance and this act**, grant preliminary approvals to the subdivision.” N.J.S.A. 40:55D-48(b) (**emphasis added**). In other words, if a proposed subdivision or site plan satisfies all of the applicable requirements, and no variances are requested or required, pursuant to the MLUL, the subdivision application shall be approved “as of right,” which means that the planning board must approve the application because it conforms to the standards set forth in the local zoning and land use requirements. *See* N.J.S.A. 40:55D-46(b); 40:55D-48(b); 40:55D-50(a).

In these circumstances, New Jersey case law is clear that the Planning Board’s review of a subdivision application is circumscribed to assure compliance with the applicable redevelopment plan. The Planning Board must review a subdivision application within the framework of and in accordance with the standards of the municipality’s subdivision ordinance and, when applicable, its zoning ordinance; if an application satisfies standards of local ordinances and provisions of the MLUL, it must be approved. *See Pizzo Mantin Group, supra*, at 226 (“the MLUL specifically provides that ‘[t]he planning board shall, if the proposed subdivision

complies with the [subdivision] ordinance and this act, grant preliminary approval to the subdivision”” (*citing* N.J.S.A. 40:55D-48); *see also Gandolfi v. Town of Hammonton*, 367 N.J. Super. 527 (App. Div. 2004) (characterizing a subdivision application that met all of the ordinance standards as a “by-right” application). “Assuming that an application for subdivision approval meets all requirements of the subdivision and zoning ordinances, the applicant is generally entitled to approval.” Cox & Koenig, *New Jersey Zoning And Land Use Administration*, §24-3.4 (GANN, 2022) (*citing* N.J.S.A. 40:55D-48).

Here, Route 440’s Application for preliminary and final subdivision approval of Phase I and preliminary subdivision approval of Phases II and III of the Project met all the standards set forth in the Redevelopment Plan and the JCLDO, and no variances were needed. Additionally, the Property included in Phase I of the Project did not touch upon any NJT, bonus or light rail issues, and thus was a straightforward subdivision, with acreage and lot size being completely consistent with the Redevelopment Plan. Because the subdivision for Phase I is fully conforming to the Redevelopment Plan and requires no deviation from the Redevelopment Plan or variance, the preliminary and final subdivision approval should have been granted as-of-right and was improperly denied by the Board with no basis.

**i. The Court below erred by not granting Route 440’s subdivision Application for Phase I.**

Even before reaching Phases II and III of the Application, Phase I subdivision application should have been granted without question. Route 440's proposed subdivision plan and its site plan for Phase I fully comply with the standards set forth in the JCLDO and in the Redevelopment Plan. Specifically, the Redevelopment Plan states, "[a]ny subdivision of lots and parcels of land within the Redevelopment Area shall be in accordance with this Plan's requirements and the requirements pertaining to subdivision contained in the Jersey City Land Development Ordinance." (*See* Pa110.) This was confirmed by counsel who stated, "Our intent is to be compliant with the plan. We have a subdivision that does not require any variances[.] We have a site plan that requires no variances. So, our intent throughout is to be complaint with the plan."

The Planning Board arbitrarily based its decision on items irrelevant to the actual Application before them. The Planning Board's decision to deny Route 440's preliminary and final Subdivision Application for Phase I was unsupported by the factual record before it and was not based on adequate findings or conclusions as required by law. In fact, the majority of the questioning by the Board and their comments centered around NJT, which again, had nothing to do with Phase I. The Board also attempted to discount Route 440's Application by stating, "[e]verybody that came to this board, and every time I went to a meeting for a project in Journal Square, their intent was to build. Every time. That's been going on for almost 40, 30

years now.” Clearly, the Board did not base their conclusions on anything actually in the factual record, but rather on hypotheticals and generalized concerns that are not legally permissible to be considered by the Board. This is because under the MLUL, “a planning board does not have the broad authority to consider a subdivision application in light of the general welfare or of the purposes of zoning under the MLUL or general principles of sound planning **apart from the standards of applicable local subdivision and zoning ordinances.**” *Pizzo*, at 228 (emphasis added).

In *Pizzo*, the Court remanded a planning board’s determination denying a subdivision application that was compliant with all bulk variances and therefore an as-of right application, based on the board’s concerns for the general welfare of the community, holding that if a proposed subdivision complies with local ordinances and the MLUL, then a planning board “shall . . . grant preliminary approval.” *Id.* (internal citations omitted). The *Pizzo* Court continued that the MLUL “did not give planning boards the general power to require that subdivisions not pose a danger to public health or safety.” *Rather*, N.J.S.A. 40:55D-2, which sets forth the general purposes of the MLUL, “was not a codification of standards for the purpose of guiding planning boards **in the review of particular subdivision applications.** *Rather*, it provides a framework, together with N.J.S.A. 40:55D-48, from which general guidelines and particular standards should be **devised by the governing**

**body** [(i.e, in implementing the zoning ordinances and redevelopment plans)].” *Id.* (emphasis added).

Similarly, here, the Planning Board was arbitrary in relying on reasons wholly beyond the analysis of whether Route 440 had met all the requirements of the Redevelopment Plan and JCLDO. It is not reasonable to attempt to review Phase I approvals based on any concerns about ROWs or the light rail that only effect Phases II and III; indeed, as a stand-alone project, Phase I’s residential tower is a “by-right” application that the Board lacked discretion to deny, and the Court below failed to acknowledge this. *See Gandolfi v. Town of Hammonton, supra*. But that is exactly what the Board did.

Defendant also contended that the Planning Board cannot grant final subdivision approval for Phase I without also granting final subdivision approval for Phase II; this is entirely false and misconstrued. Phase I of the Project should be granted preliminary and final subdivision approvals because it meets all of the standards for a subdivision applicable to Route 440’s property. *See Mantin Grp. v. Twp. of Randolph*, 137 N.J. 216, 221 (1994). Despite what the Defendant says, the subdivision, by itself, is entirely unrelated to any development bonuses the Plan may contain, and any argument that there were bonuses from Phases II or III of the development used in Phase I is a red herring. The subdivision application contained

no request for bonuses, and the Planning Board had not heard, and ultimately refused to hear, any testimony related to the site plan portions of the Route 440's application.

The request before the Planning Board was a simple one that is regularly approved when no variances are required: to take a portion of a lot, subdivide the lot, and create new lots, which could then be used for the phased development of a project. This simple request warrants subdivision approval. Rather, the Board conflated Route 440's request for a subdivision with Route 440's requests for site plan, for which the Board never even took testimony and acted arbitrarily and capriciously. For these reasons, Route 440's preliminary and final major subdivision application for Phase I should have been granted as a matter of law, and the Board's denial should be vacated.

**ii. The Court below erred by not finding that the Planning Board's refusal to hear testimony concerning the site plan application for all Phases was improper.**

Rather than giving Route 440 the opportunity to present its full Application, the Planning Board improperly declined to even hear testimony regarding the site plan approval. The Court below never addresses the Board's blatant failure to act on the site plan application, which was presented to the Board at the same time as Route 440's subdivision application.

The Planning Board has no authority to ignore its due process obligations and dismiss a site plan application without hearing testimony – upon submission of an



application for preliminary and final site plan approval, the application must be “granted or denied” within the statutory time frame. N.J.S.A. 40:55D-46.1. However, with no regard to the statutory requirements, the Planning Board improperly dismissed Route 440’s site plan application without even hearing it.

Route 440’s Application was deemed complete on October 6, 2022, with the submission of the last payment made to the Planning Division, and the Board’s time to review and either grant or deny the Application expired on January 9, 2023. The Planning Board’s failure to grant or deny Route 440’s Application results in an automatic approval of Route 440’s Application. (Failure of the Planning Board to act within the 95-day time period results in automatic approval by the Board. *See* N.J.S.A. 40:55D–48(c)).

For example, where a land developer was never advised of any deficiencies in its application for preliminary subdivision approval *vis a vis* local ordinance requirements, but the developer was expressly advised on July 23 by a designee of the township development review advisory board that its application was complete, the 95-day period within which a planning board is required to grant or deny preliminary approval of a complete application for a subdivision began to run on July 23 and since the planning board took no action within the 95-day period, the subdivision application was entitled to be deemed approved. *Id.*; *see*, N.J.S.A. 40:55D-61 (providing that failure of a planning board to act within the period

prescribed “shall constitute approval of the application.”); *see also Neu v. Planning Bd.*, 352 N.J. Super. 544, 552-53 (App. Div. 2002). The aim of the statute providing for automatic preliminary approval of a developer’s completed subdivision application based upon planning board’s failure to grant or deny application within enumerated time is to prevent boards from delaying or harassing developers in order to extract unwarranted conditions from legitimate development plans. *Gunthner v. Planning Bd. of Borough of Bay Head*, 335 N.J. Super. 452, (Law Div. 2000).

Even if the dismissal was ultimately a rejection of the site plan application, such a rejection was arbitrary and capricious. The site plan approvals should have been granted as a matter of right because the Project met the standards set forth in the Redevelopment Plan and the JCLDO, and no variances were needed for the Project. As previously stated, if a proposed site plan satisfies all of the applicable requirements, and no variances are requested or required, the subdivision application shall be approved “as of right.” *See* N.J.S.A. 40:55D-46(b); 40:55D-48(b); 40:55D-50(a). As such, the Planning Board’s dismissal of Route 440’s site plan application without any hearing was completely improper.

The site plan proposed by Route 440 for Phase I met all the specifications of the Redevelopment Plan. Phase I is clearly as-of-right because the Project proposes retail along Route 440 where retail is required; retail and residential along Claremont Avenue where retail/commercial is optional; and retail along a portion of the new

Grant Avenue frontage extending from Route 440 where retail is optional; and residential where only residential uses are required. There was no basis for this portion of the Application to be denied,

In addition, Phases II and III create and/or realign several ROWs, including the HBLR extension ROW, in accordance with the Redevelopment Plan, and would create open space, including public and private open space areas that did not require any variances or deviations.

Because Route 440's entire application was an as-of-right application, the Planning Board lacked discretion to deny the approvals, including the preliminary approvals that could have been granted with conditions pursuant to statute. Nothing in the record supports the Board's arbitrary and capricious reasoning for denying the Application. Rather, their decision was based on fabricated concerns of the "economy crashing" or events that occurred at Journal Square that have nothing to do with Route 440. Therefore, the Court below should have found that the Planning Board's decision must be vacated, and Route 440's application for preliminary and final major subdivision and site plan approval for Phase I, and preliminary subdivision and site plan approval for Phases II and III should be granted.

Additionally, the Board should have granted preliminary approval and conditioned final approval on the other necessary governmental agency approvals. N.J.S.A. § 40:55D-22(b). For example, this Court has held that a planning board

*should grant preliminary approval* of a development application even though a necessary drainage easement was not yet in hand and that, instead of denying the application, the board should condition its approval upon acquisition of the necessary easement. W.L. Goodfellows and Co. of Turnersville, Inc. v. Washington Tp. Planning Bd., 345 N.J. Super. 109, 117-18 (App. Div. 2001).

Indeed, this was raised by counsel at the hearing with regard to Redeveloper designation when he said:

There's a statute on the subject -- and I'll recite the statute for you, for the record, it's N.J.S.A. 55D-22(b). I'll read it to you, because it's in writing. It says, "In the event that a development proposed by an application for development requires an approval by a governmental agency ... other than the municipal agency -- which is you -- the municipal agency shall, in appropriate instances, condition its -- condition its approval upon the subsequent approval of such governmental agency..." (Pa1698.)

Here, the proposed HBLR ROW was clearly feasible and in its final stages – Route 440 provided the Board with all information on its talks with NJT and advised the Board that the agreement on the ROW was close to completion. (Pa1705.) Despite the Trial Court's erroneous contention that there was Defendant was correct to find that "failure of Plaintiff's proposal to deed a specifically identified parcel of property to be utilized for the Hudson/Bergen Light Rail extension, in and of itself, was a basis to deny the application" (Pa88), the site plans had the *near final route* for the HBLR ROW. It was proper, and in fact necessary, in this instance, for the Board to grant the preliminary approvals conditioned on a final agreement with NJT.

**D. The Court below erroneously found that Route 440 was required to have a designation as a “redeveloper”. (Raised Below: 1T:5-46; 2T:4-52; Pa82-Pa93)**

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The Trial Court erroneously found that the Planning Board had the right to require a redeveloper designation. But the Court failed to acknowledge that the reason the designation was not completed was because of JCRA’s failure to timely act on Route 440’s application. Instead, the Court found that the term “developer” in the Redevelopment Plan was impliedly meant to be “redeveloper.” This reasoning had no factual basis, no support from the record below, was entirely illogical, and arbitrary and capricious on its face.

Indeed, Route 440 completed the requirements for the site plan approvals and had standing to seek such approval without “redeveloper” status. Simply because Route 440 reluctantly agreed to obtain a redeveloper designation as requested by the Board **is not** synonymous with being required to obtain such a designation pursuant to the Redevelopment Plan. Undoubtedly, the Planning Board requiring a condition that is nowhere to be found in the Redevelopment Plan **is** synonymous to it arbitrarily placing unnecessary requirements on the applicant developer to sabotage its Project. The Planning Board had no legal authority, nor could the Defendant or the Lower Court point out anything on paper that would require Route 440 to be designated as a redeveloper or to enter into an RDA with the JCRA before it would consider

approving Route 440's Application. Accordingly, the Court's decision must be vacated.

A redeveloper is defined as an entity "that shall enter into or propose to enter into a contract with a municipality or other redevelopment entity for the redevelopment ... of an area in need of redevelopment...." *Jersey Urban Renewal, LLC v. City of Asbury Park*, 377 N.J. Super. 232, 238–39 (App. Div. 2005) (citing N.J.S.A. 40A:12–3). Relevant case law provides that a municipality can only require a redeveloper designation for a site plan application if that municipality's zoning ordinance **expressly** requires such a designation, as in *Jersey Urban Renewal, supra*; or if the applicable redevelopment plan implies that designation is required.

In *Applied Monroe Lender*, the Court held that such a designation could be implied by the language used in the plan and past practice. Indeed, such a designation cannot even be implied by the Plan here. The facts in *Applied Monroe*, are quite different than those before the Court now. There, the City of Hoboken's redevelopment plan did not define redeveloper, despite its repeated use of the term, and did not explicitly state that an entity must be designated a redeveloper in order to submit a site plan. 2018 WL 1219453, at \*4 (App. Div., Mar. 9, 2018). Although a municipality can require a redeveloper designation for a site plan application without an express requirement from the municipality's zoning ordinance, such a requirement must still be implied by the relevant redevelopment plan or ordinance.

Notably, in addition to the express language in the plan, the Court in *Applied Monroe* looked to the common practice of the municipality for the redevelopment area at issue, stating “[t]here was no master redeveloper for the Northwest redevelopment area; however, there were specific redevelopers designated for various properties within the redevelopment area, including plaintiff’s particular parcel.” *Id.*

In contrast, here, a simple and plain review of the Redevelopment Plan shows that there is no designated redeveloper listed in the Plan for the Property, and there is no need to be designated as a “redeveloper” to work within the Area or in accordance with the Redevelopment Plan. (Pa110.) In fact, precedent shows that the Planning Board has previously approved other developers in the Area that do not have the “redeveloper” designation. (Pa1700.)

More importantly, we note that the Incompleteness Letter that was sent to Route 440 did not indicate that the lack of a redeveloper designation was reason for the application being denied. (Pa813-818.) Nor is “redeveloper designation” a line item contained in the City’s application checklist, which is adopted by ordinance. Instead of pointing out this alleged deficiency, Defendant accepted the application, and, ultimately, held a hearing, and issued a decision. The Planning Board cannot raise this alleged requirement months after the submission and Planning Division’s review of the application, but then arbitrarily state on the date of the hearing that a designation is required to be approved.

Conditioning the preliminary approvals on this empty and false requirement is arbitrary and capricious and an improper *ultra vires* exercise of the Planning Board's power. There is no provision in the ordinance adopting the Redevelopment Plan, in the Redevelopment Plan itself, or in past practice of the City requiring such a redeveloper designation as a condition of developing one's own property within the Area. This condition was unexpectedly placed on Route 440 was therefore arbitrary and capricious, and void, and the lower court should have concluded as such.

### **CONCLUSION**

For all of the reasons set forth above, Route 440 respectfully requests that the Court overturn the Lower Court's decision affirming the Resolution of the Planning Board, and grant Route 440's preliminary and final subdivision and site plan application for Phase I and its preliminary subdivision and site plan application for Phases II and III. In addition, Route 440 requests that the Court declare as a matter of law that Route 440 need not be designated as a "redeveloper" to develop its own Property in the Redevelopment Area.

Respectfully submitted,

**GENOVA BURNS LLC**  
*Attorneys for Plaintiff-Appellant,*  
*Route 440 Developers, LLC*

Dated: March 13, 2025

By: /Jennifer Borek  
JENNIFER BOREK



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|----------------------------|---|-------------------------------|
| ROUTE 440 DEVELOPERS, LLC, | : | SUPERIOR COURT OF NEW JERSEY  |
|                            | : |                               |
| Appellant,                 | : | APPELLATE DIVISION            |
|                            | : |                               |
| v.                         | : | Docket No. A-003600-23        |
|                            | : |                               |
| PLANNING BOARD OF THE      | : | <b><u>On Appeal From:</u></b> |
| CITY OF JERSEY CITY,       | : | Law Division Hudson County    |
|                            | : | Docket No. HUD-L-932-23       |
|                            | : |                               |
| Respondents.               | : | <b><u>Sat Below:</u></b>      |
|                            | : | Anthony V. D’Elia, J.S.C.     |
|                            | : |                               |

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BRIEF OF RESPONDENT  
PLANNING BOARD OF THE CITY OF JERSEY CITY

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## **PRELIMINARY STATEMENT**

The Planning Board of the City of Jersey City rejected Plaintiff's subdivision application seeking preliminary and final subdivision of "Phase I" and preliminary subdivision of "Phases II and III" because while the project may be constructed in phases, the Route 440 Culver Redevelopment Plan and density bonuses Plaintiff seeks to utilize under the Redevelopment Plan require preliminary and final subdivision approval of the entire project. As a result of the interdependence and connectedness of the lots and parcels, the Board concluded that the project could not be subdivided in phases as presented. Plaintiff's application was fragmented, confusing, unworkable and overly-complicated. The Board did not act unreasonably, arbitrarily or capriciously in concluding that the entire project required simultaneous preliminary and final subdivision approval, which Plaintiff did not want.

Further, because of the location of the site within the Route 440 – Culver Redevelopment Area, it was entirely reasonable for the Board to conclude that Plaintiff was required to be designated a redeveloper by the Jersey City Redevelopment Agency ("JCRA"), and thereafter, enter into a redevelopment agreement with the JCRA. Plaintiff's proposed project utilizes the substantial bonus provisions contemplated by the Redevelopment Plan in exchange for required public benefits of various rights-of-ways, public land, public green spaces and the Hudson



Bergen Light Rail Extension. The complexity of the project in the redevelopment area requires a Redevelopment Agreement to ensure the City has the ability to implement the crucial public benefits to be realized under the Redevelopment Plan, the ultimate goal of N.J.S.A. 40A:12A-1 et. seq., the Local Redevelopment and Housing Law (“LRHL”). Without the benefits of “Phase II and Phase III” Plaintiff’s Project does not satisfy the goals of the Redevelopment Plan.

Requiring Plaintiff to execute a Redevelopment Agreement clearly delineating Plaintiff’s obligations to facilitate and implement the subsequent Phases of the Project is entirely within the Board’s legal authority and is reasonably calculated to promote the goals of the Redevelopment Plan. Given the complexity of the project and the dependence on the Bergen-Hudson Light Rail component, the Planning Board’s actions were reasonable.

### **PROCEDURAL HISTORY**

On January 24, 2023, Plaintiff appeared before the Planning Board of the City of Jersey City seeking preliminary and final subdivision of “Phase I” and preliminary subdivision of “Phases II and III” of a complicated project that spans 8.29 acres (approximately 361,101 square feet) and across six lots (Lots 1, 13, 14, 17, 24 and 25) on Block 21701. Pa32¶14. The Property falls within the Route 440 – Culver Redevelopment Plan, which allows for increased height and density in all phases of the project if certain conditions are satisfied. Pa106. After reviewing the proposed

plans and hearing testimony from the Plaintiff's engineer, the Board concluded that the project could not be subdivided in phases as presented because most of the benefits of the Project contemplated by the Redevelopment Plan would not be realized until "Phases II and III". Da1; Pa1684.

Plaintiff filed a Complaint in Lieu of Prerogative Writ on March 15, 2023 in the Superior Court of New Jersey, County of Hudson. Pa1. Plaintiff filed an Amended Complaint on April 14, 2023. Pa29. The Board filed its Answer on April 26, 2023. Pa61. A trial was conducted over two days, on January 8, 2024 and March 7, 2024. 1T; 2T. An Order and Decision affirming the Planning Board's Resolution and dismissing the Complaint with prejudice was entered by the Hon. Anthony V. D'Elia on June 6, 2024. Pa81. This appeal followed.

### **STATEMENT OF FACTS**

Plaintiff filed an application before the Planning Board of the City of Jersey City seeking preliminary and final subdivision approval of "Phase I" and preliminary subdivision approval of "Phases II and III." Plaintiff's property is located within the Route 440 – Culver Redevelopment Plan and is subject to the Redevelopment Plan. As Plaintiff's property is integral to the Redevelopment Plan, the entirety of Plaintiff's property is also subject to acquisition pursuant to the Redevelopment Plan. Pa106. Plaintiff's proposed project spans across six lots (Lots 1, 13, 14, 17, 24 and 25) on Block 21701 and consists of 8.29 acres (approximately 361,101 square

feet). Pa32¶14. The entire study area is 30.5 acres. Pa109. Plaintiff's property is more than 25% of the study area.

A significant component of the Route 440 – Culver Redevelopment Plan is connectivity with the light rail that will allow for the extension of the Hudson Bergen Light Rail. Pa109, Pa110, Pa111, Pa118. The Redevelopment Plan requires that “*any* application for development involving Block 21701/(fka) 1775.1 shall include the reservation of land within existing Lot 14/83 for additional right of way extension of the Hudson Bergen Light Rail (HBLR).” Pa118. (emphasis added). To develop Block 21701, Lot 1 (“Phase I”), Plaintiff requires the reservation of land in Lot 14 that falls within the “Phase II” boundary of Plaintiff's project. Pa. 118.

Indeed, Plaintiff recognized the importance of the critical infrastructure, particularly the Hudson Bergen Light Rail Connection, in the very beginning of its presentation to the Board:

Plaintiff's Counsel: And would you agree that the goals of the plan include preservation of rights-of-way for the extension of the Hudson-Bergen Light Rail?

Plaintiff's Engineer: Yes, that's correct.

\* \* \*

Q: And does it also call for the reservation of land for the new Hudson-Bergen Light Rail extension, as well as pedestrian and vehicular rights-of-way?

A: Yes, it does.

Q: With regard to the redevelopment plan, finally, does it specify that proposed rights-of-way are considered approximate, and shall be further refined by engineering survey?

A: Yes, that's correct.

Q: So with regard to that, is it true that you have met with New Jersey Transit?

A: Yes.

Q: and you have met with New Jersey Transit with regard to the Hudson-Bergen Light Rail extension?

A: Yes, we have.

Q: And will the plans that you're showing this evening, will they demonstrate or will they be indicative of those discussions with New Jersey Transit?

A. Yes, the right-of-way shown on our subdivision plan is consistent with the plans that New Jersey Transit has given us.

Da4 (13:7-14:24).

Further, to create the right of way depicted in "Phase I", Plaintiff requires portions of lots 13, 23 and 24 (contained in "Phase II"), which all form part of rights-of-way depicted in Plaintiff's proposed "Phase I" subdivision plan.<sup>1</sup> 2T11:25-12:9; Pa1442-1443.

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<sup>1</sup> Plaintiff's counsel conceded that "Phase I" requires land from "old Lot 13 . . . and this piece of lot --- let's call it Lot 25. He [the Board Attorney] indicated it was 23 and 24. It's actually currently Lot 25." 2T11:25-12:9.

Recognizing the interdependence of the Phases, Plaintiff elected to submit a single application for development instead of three separate applications. Da1, 1T22:15-24:5. During the hearing before the Board, Plaintiff's engineer presented the project as a single, unified project and showed the Board a map outlining the entire 8.29 acres. Da5 (17:24-18:8) and Pa1442-1443. In addition, at the conclusion of his presentation, Plaintiff's engineer again showed the Board the full 8.29 acre project drawing and stated: "and the last exhibit here is a culmination of all those, which has been highlighted, so you can see the – we have the various things that are overlapping, which basically, ties into the redevelopment plan, which we're pretty much consistent with that redevelopment plan, with the slight variation of the ultimate right-of-way for the New Jersey Transit Line." Da5 (20:13-21).

The very benefits and purpose of the Redevelopment Plan are only realized if Plaintiff develops "Phases II and III" of the project. In other words, standing alone "Phase I" does not advance the goals of the Redevelopment Plan or promote public health, safety, convenience and general welfare of the City. Pa1684.

### **STANDARD OF REVIEW**

The Appellate Division is "bound by the same standards as . . . the trial court." Jacoby v. Zoning Bd. of Adjustment of Borough of Englewood Cliffs, 442 N.J. Super. 450, 462 (App. Div. 2015) (quoting Fallone Props., L.L.C. v. Bethlehem Twp. Plan. Bd., 369 N.J. Super. 552, 562 (App. Div. 2004)).

The role of the Court is to evaluate whether the Board’s decision “is founded on adequate evidence [,]” Burbridge v. Governing Body of Twp. of Mine Hill, 117 N.J. 376, 385 (1990). “The record made before the Board is the record upon which the correctness of the Board’s action must be determined, . . .” Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 289 (1965). Boards, “because of their peculiar knowledge of local conditions, must be allowed wide latitude in the exercise of the delegated discretion.” Id.

The Court’s “role is to defer to the local land-use agency’s broad discretion and to reverse only if we find its decision to be arbitrary, capricious, or unreasonable.” Bressman v. Gash, 131 N.J. 517, 529 (1993). “Even when doubt is entertained as to the wisdom of the action, or as to some part of it, there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved.” Kramer, 45 N.J. at 296.

The party challenging a board's decision bears the burden of overcoming its presumption of validity. Cell South of N.J., Inc. v. Zoning Bd. of Adj., W. Windsor Twp., 172 N.J. 75, 81 (2002). Plaintiff must show that there is no evidence whereby the Board could have made its factual findings and conclusions. Burbridge, 117 N.J. at 376; Rowatti v. Gonchar, 101 N.J. 46 (1985). The Court is to consider this issue with deference to the Board and its unique ability to observe each witness, to examine all exhibits and to make decisions based on its own peculiar knowledge of

the community, with such determinations to be given a presumption of validity. Burbridge, 117 N.J. at 386.

## **LEGAL ARGUMENT**

### **POINT I**

#### **THE TRIAL COURT CORRECTLY FOUND THAT THE PLANNING BOARD ACTED REASONABLY (1T6:17-25; 1T25:13-30:4; 1T36:13-23:10; 2T22:11-27:23; 2T 33:2-39:14; Pa87-88)**

The Trial Court found that the Planning Board acted reasonably in denying Plaintiff's multi-phased partially preliminary and partially final subdivision application "due to the extremely complicated, interrelated nature of the various lots and blocks" involved with Plaintiff's project. The Court noted that the entire purpose of the Redevelopment Plan "is to ensure that there is an orderly and structured redevelopment of the entire zone, to align with an extension of the Hudson Bergen Light Rail line." Pa92. The Trial Court found that it was not arbitrary or capricious for the Planning Board to conclude that the application as presented would not further the intent of the Redevelopment Plan as only "Phases II and III" of Plaintiff's project advanced the goals of the Redevelopment Plan. Pa82.

The Trial Court concluded that the Board's actions were reasonable because: (1) Plaintiff submitted a single application for one unified project that had to be considered as a whole; (2) Plaintiff could not subdivide "Phase I" without

subdividing “Phases II and III” at the same time; (3) the subdivision plan as proposed in phases would have a negative impact on the overall intent and purpose of the redevelopment plan insofar as the required Hudson-Bergen Light Rail obligations would only be satisfied in “Phases II and III” where Plaintiff sought only preliminary subdivision approval and provided no assurances to the Board that “Phases II and III” would be developed.

Although presented as a “phased project”, there is no dispute that Plaintiff submitted a single application to the Planning Board that it attempted to split into three parts. 2T22:11-23:21. Rather than submit three separate applications, Plaintiff elected to submit a single application for development. Plaintiff’s engineer presented the project as a single, unified project. Da5 (17:24-18:8; 20:13-21). Indeed, even in its brief, Plaintiff touts the benefits of all three phases of the project as one project. Pb1. Ironically, although Plaintiff submitted a single application, refers to one project and touts the benefits of the project as a whole, Plaintiff criticizes the Board for relying on the interdependence of the phases and treating the application as one application.

In reviewing the application, the Board concluded that because the proposed “Phase I” subdivision involved Block 21701, the Plan required reservation of land in Lot 14/83, which Lot is **not** included in Phase I. Pa1687 ¶¶o and ¶p. The



Redevelopment Plan requires that subdivision of lots and parcels be done in accordance with the Plan's requirements:

H. Any subdivision of lots and parcels of land within the Redevelopment Area shall be in accordance with this Plan's requirements and the requirements pertaining to subdivision contained in the Jersey City Land Development Ordinance.

Pa112.

The Plan's Urban Design Requirements Include:

**D. Circulation and Creation of New Rights-of-Way**

1. The creation of new blocks and rights-of-way within the Area, as shown on the Rail and Street Network Plan (Map 3), is required pursuant to the following provisions in order to facilitate vehicular, bicycle and pedestrian circulation within the Area, improve access to mass transit, extend the existing street grid to create linkages to surrounding areas, . . .
2. In addition to the above, **any application for development of Block 21701/(fka)1775.1 shall include the reservation of land within exiting Lot 14/83** for additional right-of-way for the extension of the Hudson Bergen Light Rail (HBLR). . . .

Pa118 (emphasis added).

All three phases, including "Phase I" of Plaintiff's project include lots contained within Block 21701. "Phase I" includes Block 21701, Lot 1 and portions of additional Lots within "Phase II". "Phase I" does not include Lot 14. Pa1442-1443.

Plaintiff cannot obtain final major subdivision approval for "Phase I" (Block 21701, Lot 1) without inclusion of the reservation of land within Block 21701, Lot

14, which is contained within “Phases II and III.” Pa106; Pa1687 ¶¶o and ¶¶p. In other words, based on the plain language of the Redevelopment Plan Plaintiff cannot submit an independent application with respect to Block 21701 Lot 1 (“Phase I”) without including the Lot 14 reservation of land that may eventually be part of “Phase II” or “Phase III.” This is why Plaintiff submitted a single application for the “three Phases” and why Plaintiff’s engineer touted the benefits of “Phases II and III” when testifying as to why the Board should grant final major subdivision approval for “Phase I.”

“[W]ords of a statute or ordinance cannot be considered to exist in a vacuum.” Terner v. Spyco, Inc. 226 N.J. Super. 192 (App. Div. 1988). “The purpose of the court in construing ordinances, like statutes, is to determine the legislative intent.” Id. “[Z]oning ordinances are to be liberally construed in favor of the municipality.” Id. Here, the Redevelopment Plan is clear that any application for development in Block 21701 requires the reservation of land within existing Lot 14 for the right-of-way for the extension of the Hudson Bergen Light Rail. “Phase I” of Plaintiff’s project does not provide for the reservation of land within existing Lot 14. “Phases II and III” provide for this. Da6;Da7 (23:15-25:4). There is no doubt that the primary purpose of the Redevelopment Plan is to provide for the extension of the Hudson-Bergen Light Rail. Pa106.

The Planning Board highlighted the significance of the Hudson-Light Rail Extension in its Resolution of Denial:

- “The Board finds that the Hudson-Bergen Light Rail and the extension of the Hudson-Bergen Light Rail is critical transit infrastructure that cannot be understated.” Pa1687.
- “The Board finds that the extension of the Hudson-Bergen Light Rail under the Route 440 Culver Redevelopment Plan is a requirement that cannot be understated.” Pa1688.
- “The Board finds that the main objective of the Route 440 Culver Redevelopment Plan **with respect to Block 21701** is the extension of the Hudson-Bergen Light Rail in order to connect all areas of the City.” Pa1687.
- “The Board finds that the Route 440 Culver Redevelopment Plan requires the dedication of land for the Hudson-Bergen Light Rail at the time of subdivision of the Property.” Pa1688.
- “The Board finds from the evidence and testimony presented that the applicant has failed to meet the burden of proving compliance with the 440 Culver Redevelopment plan to justify the grating of the requested subdivision.” Pa1688.

Plaintiff’s application for preliminary and final major subdivision approval of “Phase I” and preliminary (only) subdivision approval of “Phases II and III” failed to comply with the Redevelopment Plan requirements. Plaintiff’s “Phase I” application was wholly dependent upon the dedication of Lot 14 in “Phases II and III.” It is “Phases II and III” of Plaintiff’s project that provide the required land to develop Block 21701. Plaintiff’s application for final subdivision approval of “Phase I” and preliminary subdivision approval of “Phases II and III” provided no

assurances to the Board concerning Lot 14 and the Hudson Bergen Light Rail infrastructure that was critical to the Redevelopment Plan. Therefore, it was entirely reasonable for the Planning Board to deny Plaintiff's preliminary and final subdivision proposal with respect to "Phase I."

In addition, even if Plaintiff could overcome this failure, as admitted by Plaintiff, "Phase I" as presented required the inclusion of portions of lots contained within "Phase II" for the rights of way depicted in the expert's plans. 2T11:25-12:9; Pa1442-1443. As a result, the Board concluded that it could not grant final subdivision approval for "Phase I" without also granting final subdivision approval of "Phases II." To create the rights of way depicted on Plaintiff's "Phase I" subdivision plan, portions of Lots 13, 23 and 24 (located in "Phase II") are required. 2T11:25-12:9; Pa1442-1443. "Phase I" includes the proposed development of a 30-story mixed use building that is only permitted under the Redevelopment Plan if Plaintiff creates the rights of way, which requires the use of land currently in the "Phase II" portion of the property.

Because "Phase I" involves the development of Block 21701 requiring dedication of Lot 14 and because "Phase I" requires the inclusion of portions of lots contained within "Phase II", the Board's conclusion that Plaintiff could not subdivide "Phase I" without subdividing the entire project at once was reasonable and supported by substantial evidence in the record. Plaintiff did not apply for final

subdivision approval of “Phases II and III” because Plaintiff is not prepared to do so and has not determined how it will reserve the land in Lot 14 as required by the Plan.

The Trial Court found that “the entire purpose of the Rt. 440 – Culver Redevelopment Plan is to ensure that there is an orderly and structured redevelopment of the entire zone, to align with an extension of the Hudson Bergen Light Rail Line.” Pa92. The Board and the Trial Court concluded that Plaintiff’s failure to account for the dedication of Lot 14 in its phased application “would not further the intent of the Redevelopment Plan but, rather would harm the objectives of the Plan.” Pa92. The Trial Court held that it was not arbitrary or capricious for the Jersey City Planning Board . . . to conclude that the plan (whether approving subdivision approvals relating to Phase 1 or preliminary approvals for Phases 2 and 3) would have a negative impact on the overall intent and purposes of the Redevelopment Plan.” Pa92.

## **POINT II**

### **PLAINTIFF’S APPLICATION WAS NOT AN “AS OF RIGHT” APPLICATION (2T 33:2-39:14)**

Before the Planning Board, trial court and this Court, Plaintiff continues to assert that the application for preliminary and final major subdivision of “Phase I” of the project is “as of right.” Plaintiff’s application was not “as of right.”

Plaintiff seeks to develop a 30-story mixed use building with 473 residential units, 11,600 square feet of ground floor retail, 344 parking spaces, amenity spaces

and a 256 space bicycle storage room as part of “Phase I” of its project. Pb.8. To develop a the 30-story mixed use building, Plaintiff’s application with respect to “Phase I” relies on the bonus provisions of the Redevelopment Plan. Therefore, while it is true that Plaintiff does not require any variances to develop the 30-story mixed use building that comprises “Phase I” of the project, Plaintiff must comply with the Redevelopment Plan to do so. Therefore, to the extent Plaintiff does not comply with the requirements of the Redevelopment Plan, Plaintiff’s application for preliminary and final major subdivision of “Phase I” of the project is not “as of right.”

As set forth above, to qualify for the bonus provisions upon which Plaintiff relies, Plaintiff must dedicate space to rights of way in “Phase I.” To do so, Plaintiff must use portions of Lots that are currently part of “Phase II.” Further, as set forth above, any application for development of any lot in Block 21701 required dedication of Lot 14 for the Hudson-Bergen Light Rail extension. As Plaintiff’s application with respect to “Phase I” (Block 21707, Lot 1) did not comply with this requirement of the Redevelopment Plan, it was not compliant with the Plan and was not an “as of right” application. Pa106; Pa1684.

Plaintiff cannot satisfy the requirements of the Redevelopment Plan based solely on “Phase I.” Therefore, the Board cannot do what Plaintiff is asking without also considering and granting final subdivision approval for “Phases II and III.” As

Plaintiff cannot satisfy the requirements of the Redevelopment Plan from the lots contained solely within “Phase I,” Plaintiff’s “Phase I” application is not “as of right.” While no variances are required, Plaintiff relies on bonus provisions in the Redevelopment Plan that are unavailable to Plaintiff with the “phased subdivision application.”

### **POINT III**

#### **THE PLANNING BOARD DID NOT RELY ON NEW REASONS FOR DENIAL BEFORE THE TRIAL COURT**

**(Da5 (13:7-14:24); Da5 (17:24-20:21); Da6 (22:1-33:9); Da9 (35:2-36:25); Da10 (37:1-38:16); Da11 (42:13-44:4); Da17 (67:1-67:6); Da18 (71:6-23); Da19 (75:1-79:21); Da20 (80:23)- Da21(81:18); Da23 (90:22-92:5); Pa1442-1443; Pa1684; 1T43:11-45:7; 2T21:7-20)**

Plaintiff refuses to accept that its application is deficient. The Planning Board was clear in its bases for denial of the application and has never waived in its positions. At the hearing, in its Resolution and in its briefing and argument to the Trial Court, the Planning Board repeatedly informed Plaintiff that final subdivision plan approval of “Phase I” required final subdivision plan approval of “Phases II and III” because of (1) the interdependence of “Phase I” on land in “Phase II”; (2) the need for the dedication of Lot 14 for the Hudson-Bergen Light Rail and (3) the need for a redevelopment agreement making Plaintiff a designated developer given the complex nature of the application and dependence of the Phases on one another. Plaintiff chooses to ignore these concerns. None of these concerns or arguments are new and none of them were hidden from Plaintiff.

The Board heard testimony from Plaintiff's engineer about the "single project" and the benefits to be achieved in "Phases II and III" in connection with the presentation of "Phase I." Plaintiff touted the benefits of the whole project and did not isolate specific benefits with respect to "Phase I" in its presentation to the Board. Further, the Board heard testimony from the Jersey City Planning Department that the height bonuses for Phase I were triggered by "the dedication of right of way. So the streets in that particular part of the plan." Da17 (67:1-67:6). Plaintiff's expert presented plans showing the rights of way and use of land from "Phase II" to form the rights of way. Da5 (17:24-20:21); Pa1442-1443. The Board is entitled to rely on Plaintiff's expert's testimony.

It is beyond the pale for Plaintiff to argue that "the Planning Board – for the first time at trial – attempted to assert that concerns about bonuses and the HBLR ROW [Hudson-Bergen Light Rail Right of Way] drove the Board's decision." Pb. at 35. As this Court can clearly see from this brief, the testimony of Plaintiff's expert at the hearing and the Board's Resolution, the issue with dedication of Lot 14 for the Hudson-Bergen Light Rail Extension was front and center in the Redevelopment Plan, at the hearing and in the Board's Resolution. Da1; Pa106; Pa1684. Indeed, the second question Plaintiff's counsel asked of Plaintiff's engineer at the Planning Board meeting was about the light rail extension:



Plaintiff's Counsel: And would you agree that the goals of the plan include preservation of rights-of-way for the extension of the Hudson-Bergen Light Rail?

Plaintiff's Engineer: Yes, that's correct.

Da4 (13:7-10).

Further, counsel as well as members of the Board continued to question Plaintiff's engineer about the Hudson-Bergen Light Rail Extension throughout the evening. Da4 (13:7-14:24); Da5 (20:5-21); Da6-Da8 (22:1-32:5); Da9 (35:2-36:25); Da10 (37:1-38:16). There was testimony from one of the City Planner's that the Redevelopment Plan requires the dedication of land in Lot 14 for the Hudson Bergen Light Rail when there is an application for development of Block 21707 as well as some discussion as to whether an "easement" is "dedication" or whether "designation of air rights" is "dedication of land." Da11 (42:13-44:4). The Board was clear in their comments and Resolution that without the designation of land for the Hudson Bergen Light Rail, Plaintiff does not comply with the Redevelopment Plan. Da19-Da21 (75:18-79:21; 80:23-81:18).

In addition, the Board's Resolution cites to Plaintiff's engineer's testimony concerning the Hudson-Bergen Light Rail Extension. Pa1685-1686.. It also references the Hudson-Bergen Light Rail Extension in 12 of the 21 Findings of Fact and in 8 of the 10 Conclusions of Law. Pa 1686-1687. Indeed, it is clear from the Resolution that the Board concluded that granting the subdivision would contradict

the objectives and intent of the Redevelopment Plan because Plaintiff's application did not satisfy the Plan with respect to the Hudson-Bergen Light Rail Extension. Pa 1684.

The Trial Court specifically noted the Board's concern about the phased approach and impact on the Hudson-Bergen Light Rail Extension:

A fair reading of the comments of the various Board members revealed that they were extremely concerned that Plaintiff had not yet received any commitment from N.J. Transit for building a light rail stop at the site. Most of their comments focused upon the questionable plans relating to HBLR and all essentially expressed concerns, but they could not approve this single application that had been submitted by the Plaintiff because it was so dependent upon resolution of the issues regarding the HBLR development which would necessarily impact – and be impacted by – all three phases of Plaintiff's project.

Pa86.

There can be no doubt that the phased application and concerns about the assurances for the dedication of land for the Hudson-Bergen Light Rail Extension were not only of critical importance to the Board but emphatically expressed to the Plaintiff from the start.

The Board expressed its position concerning the Redevelopment Agreement at the hearing as well. Da8-Da9 (30:12-33:9); Da23 (90:22-92:5). The Board members expressed concerns that approval of "Phase I" without a redeveloper agreement provided no assurances to the Board or City that Plaintiff or any successor

of Plaintiff would dedicate Lot 14 to the City for the Hudson-Bergen Light Rail Extension. The Board repeatedly questioned Plaintiff's expert and counsel about execution of a redeveloper's agreement to ensure that the Hudson-Bergen Light Rail component, which Plaintiff proposed would be dedicated during "Phase II," would be dedicated regardless of whether "Phase II" was developed. Da8-Da9 (30:12-33:9); Da19 (75:1-17). The need for a redevelopment agreement is not a new argument or reason for denying the application. It was also addressed in the Resolution. Pa1684.

Throughout the hearing, the Board candidly expressed its concerns, opinions and positions with Plaintiff specifically that without the aforementioned assurances, commitment and provisions by Plaintiff, Plaintiff's application does not promote the goals of the Redevelopment Plan. Plaintiff ignored the Board's concerns.

#### **POINT IV**

**THE TRIAL COURT CORRECTLY DETERMINED THAT  
IT WAS REASONABLE AND AUTHORIZED BY THE  
REDEVELOPMENT PLAN FOR THE PLANNING BOARD  
TO REQUIRE PLAINTIFF TO BE DESIGNATED AS A REDEVELOPER  
UNDER THE REDEVELOPMENT PLAN  
(1T45:6-46:8; 2T40:15-41:11)**

Due to the complexity and phased approach of Plaintiff's project in the Redevelopment Area it was reasonable to require Plaintiff to be designated a redeveloper by the Jersey City Redevelopment Agency ("JCRA"), and thereafter, to enter into a redevelopment agreement with the JCRA.

Plaintiff currently owns and controls more than 25% of the land within the Route 440 – Culver Redevelopment Area. Plaintiff’s project consists of 8.29 acres of the 30.5 acre Study Area. Pa32¶14; Pa109. This is a substantial portion of the Study Area. Plaintiff’s property is a critical component of the Redevelopment Area. Plaintiff submitted a single application for phased subdivision of its property. Plaintiff’s expert testified at the hearing before the Planning Board that the Phases “overlap” and the project as a whole “ties into the redevelopment plan, . . .” Da5 (20:13-21). In addition, Plaintiff’s property falls exclusively within Block 21701, which, under the Redevelopment Plan, requires “the reservation of land within exiting Lot 14/83 for additional right-of-way for the extension of the Hudson Bergen Light Rail (HBLR). . . .” Pa32¶14; Pa109.

Plaintiff criticizes the Board’s conclusions that without the “Phase II and Phase III” portions of the application, the proposal does not advance the purposes of the Plan; however, throughout the trial proceeding and Board hearing, Plaintiff identified “connectivity with the light rail” and other benefits of “Phase II” development as “proof” that Plaintiff’s subdivision application for “Phase I” complies with the Redevelopment Plan. 2T16:1-17. Plaintiff conceded at the hearing before the Planning Board (and the Trial Court) that the substantial benefits to the City of Jersey City for the Project will occur during “Phases II and III.” Da 5 (19:21-20:21); 2T4:24-5:18. There is no dispute that “Phases II and II” contain the

land required to extend and connect the light rail system and create the green space for the City, the exact public benefit the Redevelopment Plan sought to secure for the City and a hallmark purpose of the Redevelopment Plan. Under these circumstances, it was more than reasonable to require Plaintiff to be a designated redeveloper.

Given the size of Plaintiff's overall Project and phased subdivision approach, the Planning Board wanted assurances that "Phases II and III" would eventually be developed as it is those portions of Plaintiff's Project that contain the critical infrastructure and components that satisfy the purpose of the Redevelopment Plan. The Planning Board expressed reservations about Plaintiff's phased applications and development plans, particularly in light of the failure to dedicate Lot 14. As articulated by the Board, Plaintiff could sell the land that comprises "Phases II or III." Plaintiff could decide not to develop the remainder of the project.

A Redevelopment Agreement provides the assurances required to permit Plaintiff to proceed with the phased approach Plaintiff proposes. A redevelopment agreement to ensures that the City has the ability to implement the crucial public benefits to be realized under the Redevelopment Plan, the ultimate goal of N.J.S.A. 40A:12A-1 et. seq., the Local Redevelopment and Housing Law ("LRHL"). The Board's insistence that the Redevelopment Plan requires Plaintiff be designated a redeveloper by the JCRA and execute a Redevelopment Agreement clearly

delineating Plaintiff's obligations and facilitating and implementing the project is entirely within its legal authority and is reasonably calculated to promote the goals of the Redevelopment Plan.

Further, the Redevelopment Plan contemplates compliance with the Plan through agreement:

## V. GENERAL ADMINISTRATIVE PROVISIONS

The following provisions shall apply to all property located within the Route 440-Culver Redevelopment Area:

\* \* \*

C. The regulations and controls in this section may be implemented, where applicable by appropriate covenants, or other provisions, or through agreements for land disposition and conveyances executed thereto.

Pa114.

Despite having first sought redeveloper designation and a redevelopment agreement in July of 2020, and although counsel for Plaintiff repeatedly assured City Planning and the Planning Board that Plaintiff would enter into a Redevelopment Agreement with the JCRA, Plaintiff has failed to do so and has continually taken the position that it is not required to do so.

Without a redevelopment agreement, fundamental elements of Plaintiff's application were left unresolved. The Board is not required to provide conditional approval for a preliminary subdivision application where "fundamental elements are

left unresolved before preliminary approval, leaving them instead for an unspecified later date.” See Field v. Township of Franklin, 190 N.J. Super. 326, 332-333 (App. Div. 1983) (holding that “if the applicant fails to provide sufficient information on fundamental elements of his plan, preliminary approval should be denied”). The time to impose terms and conditions for protection of public interest is at the preliminary approval stage. See D’Anna v. Planning Board of Washington Township, 256 N.J. Super. 78 (App. Div. 1992).

Here, with all of the moving parts, phased construction, confusion and required obligations in “Phases II and III”, approval of “Phase I” with conditions is untenable. A redevelopment agreement is appropriate to ensure that the fundamental elements of the Redevelopment Plan and Plaintiff’s application are satisfied. The only way to ensure that the phased development accomplishes the purposes and goals of the Redevelopment Plan is through the use of a Redevelopment Agreement. There is nothing arbitrary or capricious about requiring Plaintiff to enter into one.

## **POINT V**

### **PLAINTIFF WAIVES ANY ARGUMENT CONCERNING AUTOMATIC APPROVAL BECAUSE THE ARGUMENT WAS NOT PRESENTED AT TRIAL**

Although Plaintiff cites to N.J.S.A. 40:55D-46.1(a) in support of its argument of “the Planning Board’s blatant theme of arbitrariness,” Plaintiff does not request

that this Court grant it “automatic approval” N.J.S.A. 40:55D-46.1(a). Pb 27-32. Nonetheless, Plaintiff is not entitled to such relief.

The Planning Board denies that there was any delay on the part of the Planning Board or City Planning. Plaintiff claims that its application was placed on the Planning Board’s calendar for a hearing on November 15, 2022 “665 days after the filing of its first application” and uses this argument to support its claim of delay on the part of the Planning Board. Of note, Plaintiff concedes that it paid all outstanding site plan application fees on October 6, 2022, less than 40 days before November 15, 2022. Pb13. An application is not properly before a Board until the application fee is tendered and any statutory time frames do not begin to run until the fees are paid. City of South Amboy v. Gassaway, 101 N.J. 86 (1985).

Plaintiff has not carried its burden of proof. Plaintiff has not demonstrated below or to this Court that it has complied with all statutory requirements for such alleged relief. Moreover, Plaintiff is estopped from raising this argument. Plaintiff moved forward with its application before the Board thereby waiving any arguments concerning automatic approval.

Automatic approval is a drastic and draconian remedy that should not be granted lightly. Our courts have repeatedly indicated that such automatic approval provisions “should be applied with caution.” Star Enterprises v. Wilder, 268 N.J. Super. 371, 374 (App. Div. 1993). Not all delay by a board in acting on a land use



application is subject to automatic approval. An applicant may consent to an extension of the time within which to act. Further, in circumstances where an applicant does not consent to an extension, courts have declined to grant automatic approval where automatic approval “would not advance the legislative goals underlying the statute.” Manalapan Holding Co. v. Planning Board of Hamilton, 92 N.J. 466 (1983). Requiring a hearing on the merits “better serves the public interest and does not treat the applicant unfairly. The holding of a public hearing also reasonably meets the MLUL’s statutory ends since the municipality here did not engage in untoward delaying tactics, simply to frustrate or forestall the applicant, an evil which the statute was specifically designed to overcome.” Id. at 477-478.

Plaintiff elected to proceed with the hearing on the merits and, therefore, even if there was delay on the part of the Planning Board, which the Planning Board denies, Plaintiff is estopped from pursuing automatic approval.

### **CONCLUSION**

As Plaintiff’s proposed phased application for final subdivision approval of “Phase I” and preliminary (only) subdivision of “Phases II and III” do not comply with the components of the Redevelopment Plan and do not achieve the goals of the Redevelopment Plan, the Board acted reasonably in denying the application. Plaintiff’s property comprises more than 25% of the Redevelopment Area and development of “Phases II and III” with the dedication of Lot 14 for the Hudson

Bergen Light Rail Extension and proposal of “Phase III” open space components are critical aspects of the Project (as a whole) and are what support the goals of the Redevelopment Plan and promote the public welfare and benefit. “Phase I” alone does not. Plaintiff recognizes this and, therefore, did not submit an independent application for subdivision of “Phase I.” The interdependence of “Phase I” with “Phases II and III” of Plaintiff’s project require Plaintiff to execute a Redevelopment Agreement to achieve the orderly and structured development of the Redevelopment Area and, particularly, the Hudson-Bergen Light Rail Extension. Due to the complicated nature of Plaintiff’s project and interrelated and dependent nature of the Phases of the Project, the Planning Board’s decision to deny the application as presented was reasonable and supported by substantial evidence in the record.

Respectfully submitted,

*s/ Santo T. Alampi*

**SANTO T. ALAMPI**

Dated: April 11, 2025

ROUTE 440 DEVELOPERS, LLC,

Plaintiff-Appellant,

v.

PLANNING BOARD OF THE CITY OF  
JERSEY CITY,

Defendant-Respondent.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

Docket No.: A-003600-23

**CIVIL ACTION**

ON APPEAL FROM LAW DIVISION:  
HUDSON COUNTY

Docket No.: HUD-L-932-23

Sat Below: Hon. Anthony V. D’Elia,  
J.S.C.

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**REPLY BRIEF OF APPELLANT, ROUTE 440 DEVELOPERS, LLC**

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**Date of Filing: April 30, 2025**

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### **PRELIMINARY STATEMENT**

Respondent Planning Board's opposition to Appellant's brief sets forth myriad purported reasons it claims to have denied Plaintiff's "as of right" application. However, none of these reasons were discussed at the hearing below or set forth in its Resolution. Therefore, as a threshold matter, the Planning Board was prohibited from raising these "post hoc" reasons before the Trial Court, and this Appellate Court now. Indeed, such a belated rationale for denial merely highlights the arbitrary and capricious nature of the Board's decision and demonstrates that the record below is in fact insufficient to sustain the Trial Court's holding.

Moreover, even if the Court were to see fit to entertain the Planning Board's post-hoc arguments, these arguments still fail on their merits. The fact that Plaintiff sought in a subdivision application to realign lot lines to accommodate a proposed phased project and, in doing so, changed the lot line of an adjacent lot within the Project, is the very point and purpose of a subdivision. A "subdivision" by definition seeks to alter and rearrange lot lines. Plaintiff, who owns all the property encompassed by the Project, would naturally pursue appropriate lot lines, not only to meet the needs of each phase of the Project, but also to accommodate the roadways that provide circulation within the Project as contemplated by the Plan.

Undoubtedly, Phase I of the subdivision was as of right and should have been addressed as such. In addition, Defendant makes the entirely baseless assertion that

the fundamental elements of Plaintiff's plan were not provided, thereby requiring denial of Plaintiff's subdivision application and dismissal of the site plan application without testimony or hearing. But Defendant merely states that imposition of conditions on this application was "untenable" because it involves phased construction (commonly occurring in Jersey City), "confusion", and "required obligations in Phase II and Phase III", with the "obligations" unspecified in any way. Effectively, Defendant makes the rare argument that Plaintiff's proposed Project is too big and too confusing to be approved. This is untrue. The City has seen and approved projects of at least equal complexity and magnitude over the last decade.

Further, Defendant's arguments as to obtaining a redeveloper designation fail as a matter of law. Plaintiff demonstrated in its briefing that the case law cited by Defendant was inapposite here, and Defendant failed to address Plaintiff's arguments that multiple developers in the last several years have been granted site plan approval in the Area – indeed on neighboring lots with Plaintiff – without such a designation. Nor does Defendant bother to address the provisions of N.J.S.A. 40:55D-22(b) which exactly applies here.

Despite numerous unnecessary impediments, Plaintiff has patiently persevered with its Application, yet instead of receiving its "day in court", the Planning Board arbitrarily and capriciously denied the Application without any reasonable rationale for its decision. For these reasons, and the reasons set forth in



Plaintiff's moving brief, the Trial Court's decision to uphold the Planning Board's decision should be vacated and reversed.

### **ARGUMENT**

#### **I. The Planning Board Cannot Rely on New Reasonings for Denying an Application that Were not Explicitly Addressed at the Hearing or in the Resolution.**

A resolution of a planning board is its final decision, and the purpose of a resolution is to set forth a board's findings of fact and conclusions of law. See New York SMSA v. Bd. of Adjustment of Tp. of Weehawken, 370 N.J. Super. 319, 333 (App. Div. 2004); Scully–Bozarth Post #1817 of the VFW v. Planning Bd. of City of Burlington, 362 N.J. Super. 296, 311 (App. Div. 2003). Here, the Board's<sup>1</sup> decision must be reversed because, as a threshold issue, the Resolution and even the transcripts of the relevant hearings fail to support the Board's newly stated purported reasons for denying Plaintiff's application. Because the Board's reasons for denying the application are against the weight of the evidence, the decision cannot be supported and is arbitrary, capricious, and unreasonable and an abuse of the Board's discretion.

On appeal, a party cannot rely on determinations that were not set forth in the board's decision and were not part of the record below. Moreover, the resolution of

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<sup>1</sup> All capitalized terms retain the original meaning given in Plaintiff's moving Trial Brief.

the board is the “official statement of the board's findings and conclusions.” Scully-Bozarth, at 311. In Defendant’s brief, it repeatedly argues as a rationale for denial that Plaintiff utilizes property from Phase II of its development application in Phase I. However, the record, including the Resolution, is devoid of any mention of this fact or conclusion, and thus, it is improper for Defendant to create post-hoc, manufactured conclusions for the purpose of bolstering its argument.

A board’s review is limited to the record below. It is well settled that the Board may not act upon facts which are not part of the record. See Russell v. Tenaflly Bd. of Adjustment, 31 N.J. 58 (155 A.2d 83) (1959). For this reason, a Board is required to adopt a comprehensive resolution setting forth its findings, analysis, and the reasons for its determination to grant or deny each aspect of the application because the resolution is critical for the court’s review of the matters raised on appeal. See Price v. Himeji, LLC, 214 N.J. 263, 273, 69 A.3d 575, 581 (2013). The Board here adopted a Resolution, and Defendant is certainly estopped from creating new alleged reasons for denial that are outside of the Board’s findings set forth in the Resolution.

Resolutions of municipal boards should reflect the deliberative and specific findings of fact necessary to sustain the board’s conclusions that statutory requirements for relief were or were not met. Harrington Glen, Inc. v. Mun. Bd. Adj. Bor. Leonia, 52 N.J. 22, 27-28 (1968); Pagano v. Zoning Bd. of Adjustment, 257 N.J. Super. 382 (Law Div.1992). The point of such a requirement is to allow a

reviewing court to determine fairly whether the board acted properly and within the limits of its authority in granting or refusing to grant an application. Harrington Glen, Inc., supra, at 28. “Local boards and their counsel should take pains to memorialize their decisions in resolutions that explain fully the basis on which the Board had acted, with ample reference to the record and the pertinent statutory standards.” Commercial Realty & Res. Corp. v. First Atl. Props. Co., 122 N.J. 546, 566–67 (1991) (internal citation omitted). “[A] mere recital of testimony or conclusory statements couched in statutory language” is insufficient. N.Y. SMSA, L.P. v. Bd. of Adj. of Twp. of Weehawken, 370 N.J. Super. at 332–33 (internal citations omitted). The resolution must contain sufficient findings, based on the proofs submitted, to satisfy a reviewing court that the board has analyzed the applicant’s request in accordance with the statute and in light of the municipality’s master plan and zoning ordinances. Cf. Medici v. BPR Co., 107 N.J. 1, 23 (1987). Without such findings of fact and conclusions of law, the reviewing court has no way of knowing the basis for the board’s decision. Morris Cty. Fair Hous. Council v. Boonton Tp., 228 N.J. Super. 635, 646 (Law Div. 1988).

Here, the Board vaguely concluded in its Resolution that:

[T]he applicant has failed to meet the burden of proving compliance with the 440 Culver Redevelopment Plan to justify the granting of the requested subdivision. The Board finds that the granting of the **subdivision as presented by the Applicant would, in no way, advance any of the purposes of the 440 Culver Redevelopment Plan**

**and in fact, would contradict the objectives, intent, spirit and language of the 440 Culver Redevelopment Plan.**

\*\*

The Board finds from the evidence and testimony presented that the granting of the subdivision as presented by the Applicant would impair the objectives, goals, intent and purpose of the 440 Culver Redevelopment Plan and would have a substantial detrimental impact on the surrounding area. (Pa1688) (emphasis added).

The Board states this with no specifics as to what is in contradiction to the Plan, what about the Project would “impair” the Plan’s objectives, or why the purposes of the Plan would not be advanced. Id. Notably, what is entirely lacking from the Resolution is any mention of the reasons the Board now cites as reasons for its determination *i.e.*, the bonuses being used from other phases for Phase I, issues with the property boundaries that are being created, or any reasoning for a decision that Phase I was not as of right.

Indeed, one of the findings of fact in the Resolution is that “Proposed Redevelopment Actions IV(A) of the 440 Culver Redevelopment Plan specifically states that the Plan is to provide for the ‘acquisition, consolidation and resubdivision of land within the Redevelopment Area into suitable parcels for development.’” (Pa1687). Yet this is exactly what Plaintiff is attempting to do, and there is no explanation in the Resolution for how Plaintiff’s Project contradicts this goal. Defendant further fails to explain in its Resolution how the bonuses sought or the ROW that is explicitly called for in the Plan would “contradict the objectives” of the Plan. (Def. Br. at p. 19). The reasons *actually in the record* demonstrate an arbitrary

and capricious decision, and the Board cannot now change its justification for denial by reciting its reasons in its briefing.

Further, Defendant's contention that the Board cannot grant final subdivision approval for Phase I without also granting final subdivision approval for Phase II is entirely false and misconstrued. Phase I of the Project should have been granted preliminary and final subdivision approvals because it met all of the standards for a subdivision applicable to Plaintiff's property. See Mantin Grp. v. Twp. of Randolph, 137 N.J. 216, 221 (1994). The subdivision, by itself, is unrelated to any development bonuses the Plan may contain, and any argument that there were bonuses from Phases II or III of the development used in Phase I is a red herring. The subdivision application contained no request for bonuses. Rather than act on the Plaintiff's simple request, Defendant conflated Plaintiff's request for a subdivision with Plaintiff's requests for site plan approval, for which the Board never even took testimony, acted arbitrarily and capriciously, and now raises the argument that a portion of Phase II is being utilized for Phase I, despite never raising this concern previously.

Defendant cannot simply state facts without basis that are entirely unsupported by the record or by the Board's Resolution, which undoubtedly serves as the Board's final decision.

## **II. The Planning Board is Incorrect that the Application for Phase I was not “As of Right”.**

Regardless, Defendant is factually incorrect that Phase I relied on bonuses or conditions from Phases II or III, which resulted in the application not being “as of right.” Defendant’s entire argument erroneously rests upon the fact that Plaintiff submitted the application - albeit in three phases - as one application, and the Board is proper in reviewing all three phases together to determine whether to grant preliminary approvals for even Phase I, in part because Phase I relies on bonuses or conditions from Phase II or Phase III. The bonus Defendant is referencing was not taken from Phase II. If Plaintiff were to receive any bonus for its development of the Phase I project, it was indeed from Phase I itself.

However, if the Court wishes to rule upon this specific issue, it is clear from a review of the Plan and Plaintiff’s site plans that the bonuses Plaintiff would have received for its building in Phase I were in exchange for creating a right of way **in Phase I** based on the Redevelopment Plan. The bonus provisions would come into effect after the right of way was created, which would have been during the development of Phase I. Phase I includes the development of a 30-story building, along with the creation of a portion of the new Grant Avenue right-of-way. As illustrated below, and as testified to at the hearing, the ROW that permitted Phase I’s bonus was completely unrelated to any other phases of the Project.

Specifically, Phase I utilizes, as it is permitted to do, the Redevelopment Plan's Bonus Provision for Creation of New Rights of Way. The Redevelopment Plan includes a height provision that allows for the proposed buildings to exceed the maximum number of stories in the High-Rise District and Mid-Rise B District, which Phase I is within. In relevant part, the Redevelopment Plan states:

In the event that the Open Space Bonus Provision found at Section VII.G.1 and/or the Bonus Provision for Creation of New Rights-of-Way found at Section VIII.B.3. shall apply, the development project may, as-of-right, exceed the maximum allowable height for the applicable district shown in the table below by the exact number of stories and floor area, rounded to the nearest whole number, necessary to achieve the Open Space Bonus Provision and/or the Bonus Provision for Creation of New Right-of-Way. (Pa124.)

Because of the proposed creation of the Grant Avenue Right of Way in Phase I, the multi-story building being built in Phase I is entitled to additional stories. (Pa1708.) Accordingly, the Phase I right of way has nothing to do with Phase II or Phase III, and the bonus was not taken from Phase II to use in Phase I. Therefore, the additional number of stories proposed are permitted and Phase I as a stand-alone project is as-of-right. Defendants' claims are factually incorrect.

**III. The Trial Court Acted Arbitrarily and Capriciously Because the Application was a Routinely Approved Multi-Phased Application.**

The Planning Board argues that the Project was submitted as a single application for development and was presented to the Board as a single, unified project. (Def. Br. p. 9.) However, while there was one application form, this Project

was always presented to the Board as a “phased” project, which is evidenced by the historical documents submitted for this application. (See Pa144; Pa1137.) In fact, such a “phased” development is quite common, and it is therefore somewhat perplexing that the Planning Board here found Plaintiff’s application so “complex”, or that Plaintiff presented “conflicting information” (Def. Br. p. 9), when Plaintiff’s plans never changed. See, e.g., Toll Bros. v. Bd. of Chosen Freeholders of Cnty. of Burlington, 194 N.J. 223, 235 (2008) (Moorestown Planning Board granted Toll Brothers preliminary and final site plan approval for Phase 1A and preliminary approvals for Phases 1B and 1C); Friends of Peapack-Gladstone v. Borough of Peapack-Gladstone Land Use Bd., 407 N.J. Super. 404, 409 (App. Div. 2009) (Board granted approvals, authorizing the project to be developed in the two Phases, as set forth in the application); Sharbell Bldg. Co., LLC v. Plan. Bd. of Twp. of Robbinsville, No. A-3181-11T2, 2013 WL 692085, at \*1 (N.J. Super. Ct. App. Div. Feb. 27, 2013) (developer submitted an application for development of a multi-faceted, phased mixed-use project; and after four public hearings conducted between July and October 2006, the Board granted preliminary and final major subdivision and preliminary site plan approval for two phases).

In the present case, Plaintiff seeks to do nothing different. Plaintiff simply sought preliminary and final approvals for Phase I of the Project but only preliminary approvals for Phase II and III of the Project, which the Board had no reason to deny,



as evidenced at the hearing by Plaintiff's engineer. (Pa1706.) Mr. Ward clearly stated,

"I will show the subdivision plans that were submitted. This is Phase 1, final subdivision plan that was provided. ... This is the Phase 1 final subdivision map, which is 80 Water Street, which is in the upper left-hand quadrant of this map. The highlighted area is the dedicated right-of-way. The second map that was submitted of the subdivision is the preliminary subdivision for Phases 2 and 3, Phase 2 being the westerly portion and Phase 3 being the southerly portion adjacent to Culver Avenue. This map also shows the light rail right-of-way that we've coordinated with Jersey Transit and also shows Lot 4 being an open space lot that's to be dedicated." (Da5.)

Additionally, Defendant should have granted preliminary approval and conditioned final approval on the other necessary governmental agency approvals. N.J.S.A. 40:55D-22(b). For example, this Court has previously held that a planning board *should grant preliminary approval* of a development application even though a necessary drainage easement was not yet in hand and that, instead of denying the application, the board should condition its approval upon acquisition of the necessary easement. W.L. Goodfellows and Co. of Turnersville, Inc. v. Washington Tp. Planning Bd., 345 N.J. Super. 109, 117-18 (App. Div. 2001).

Indeed, this was raised by counsel for Plaintiff at the hearing, when he said,

There's a statute on the subject -- and I'll recite the statute for you, for the record, it's N.J.S.A. 55D-22(b). I'll read it to you, because it's in writing. It says, "In the event that a development proposed by an application for development requires an approval by a governmental agency ... other than the municipal agency -- which is you -- the municipal agency shall, in appropriate instances, condition its -- condition its approval upon the subsequent approval of such

governmental agency, provided that the municipality shall make a decision on any application for development within the time period provided in this act.” (Pa1698.)

Defendant cites Field v. Mayor & Council of Franklin Twp., 190 N.J. Super. 326, 332–33 (App. Div. 1983), and argues that the Board is not required to provide conditional approval for a preliminary subdivision application where an applicant fails to provide sufficient information on fundamental elements of his plan. However, in Field, which dealt with sewer lines to support the Project, the record before the Court was sparse as to sewer feasibility. Id. Here, the proposed ROW was clearly feasible and in its final stages, Plaintiff provided the Board with all information on its discussions with New Jersey Transit and advised the Board that the agreement on the ROW was close to completion. (Da4; Da7.) Indeed, the site plans had the near final route for the HBLR ROW. It was proper, and in fact necessary, in this instance, for the Board to grant the preliminary approvals conditioned on a final agreement with New Jersey Transit.

Accordingly, Defendant’s argument that the Board was proper in denying preliminary and final subdivision approval for Phase I and denying preliminary subdivision approval for Phases II and III is unconvincing. Naturally, each Phase of a large redevelopment project would inherently be somewhat related to the other Phases as it is one Project. But that is the purpose of developing a large project in phases, as was presented to the Board. This is not to mean that the Board should

view and decide the Phases as one with respect to planning approvals, but that the Phases should be approved preliminarily, and final approval should be granted to later Phases when the development of each next Phase is finalized.

**IV. Plaintiff is Entitled to a Declaration that It Does Not Need to be Designated a Redeveloper.**

Defendant argues that because Plaintiff is not designated as a redeveloper and because there is no redevelopment agreement, its application is rightfully denied. Defendant, among other things, relies on the fact that Plaintiff owns and controls more than 25% of the land within the Redevelopment Area. But this was never raised as a concern previously. There is no doubt that the Incompleteness Letter sent to Plaintiff did not indicate that the lack of a redeveloper designation was reason for the application being denied. (Pa813-818.) Nor is redeveloper designation an item contained in the City's application checklist, which is adopted by ordinance. Instead, Defendant accepted the application, and, ultimately, held a hearing, thereafter issuing the decision which is at issue in this appeal. The Board cannot raise this alleged requirement to be a designated redeveloper months after the submission and Planning Division's review of the application, but then state on the date of the hearing that a designation is required.

Further, despite Defendant's arguments stating otherwise, the language, or lack thereof, in the Redevelopment Plan is clear. The Redevelopment Plan does not use the word redeveloper on more than one occasion. Even then, the term is only

used in reference to eminent domain procedures. (Pa134.) Defendant cannot simply assume what the Redevelopment Plan contemplates or insist that the Redevelopment Plan meant to refer to a Redevelopment Agreement which means a designation should be required, without the Redevelopment Plan explicitly stating so. This reasoning is illogical. The failure to use the word “redeveloper” anywhere in the Plan regarding actual projects or developments evidences the City’s intent not to require such a designation, and Defendant cannot create new requirements where they do not exist. Moreover, as previously stated and nowhere refuted, the City of Jersey City’s course of conduct has consistently been to permit other project in the Redevelopment Area and has not asserted the need for a redevelopment agreement-except inexplicably here.

Accordingly, Defendant’s arguments relating to the redeveloper designation are misplaced and have no bearing on this matter because there is no requirement for Plaintiff to obtain a redeveloper designation in order to work in the Area. The Redevelopment Plan simply does not indicate – expressly or impliedly - that a redeveloper designation is required.

**V. The Planning Board Does Not Address Its Failure to Act On Plaintiff’s Site Plan Application.**

Defendant never addresses its blatant failure to act on Plaintiff’s site plan application - which was presented to the Board at the same time as Plaintiff’s subdivision application - and therefore does not dispute Plaintiff’s claims in that

regard. Regardless, upon the submission of an Application for preliminary and final site plan approval, a planning board's approval is to be "granted or denied" within the statutory time frame set forth by law. Failure of the Planning Board to act within the 95-day time period results in automatic approval by the Board. See N.J.S.A. 40:55D-48(c). Here, the Planning Board improperly "dismissed" Plaintiff's site plan application without hearing it or ruling on it. Plaintiff's Application was complete on October 6, 2022, with the submission of the last payment made to the Planning Division, and the Board's time to review and either grant or deny it expired on January 9, 2023. The Planning Board's failure to grant or deny Plaintiff's application results in an automatic approval of Plaintiff's application. Even if the dismissal was ultimately a rejection of the site plan application, such a rejection without an opportunity for hearing was arbitrary and capricious.

### **CONCLUSION**

For all of the reasons set forth above, Plaintiff respectfully requests that the Court reverse the Trial Court's decision in this matter.

Dated: April 30, 2025

Respectfully submitted,  
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