M. James Maley, Jr. (019561982)
Emily K. Givens (030861993)
Erin E. Simone (019222003)
MALEY GIVENS, P.C.
1150 Haddon Avenue, Suite 210
Collingswood, New Jersey 08108
Attorneys for Defendants

BEACH HAVEN AUTOMOTIVE, INC. Plaintiff, v. BOROUGH OF BEACH HAVEN and BEACH HAVEN MUNICIPAL COUNCIL and NANCY TAGGART DAVIS, in her capacity as Mayor of Borough of Beach Haven and BOROUGH OF BEACH HAVEN LAND USE BOARD, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-A-003860-23 Civil Action On Appeal from the Superior Court of New Jersey, Law Division, Ocean County Sat Below: Hon. Francis Hodgson, Jr., J.S.C.

MERITS BRIEF OF DEFENDANTS/APPELLANTS,

On Brief: M. James Maley, Jr. (019561982)
Emily K. Givens (030861993)
Erin E. Simone (019222003)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Constitutional Provisions

TABLE OF JUDGMENTS, ORDERS AND RULINGS

PRELIMINARY STATEMENT

Decades ago, the New Jersey Supreme Court recognized that redevelopment is an integral part of the modern planning for the protection of public health, safety and welfare, and that critical to this planning is the ability to eliminate blight and return idle lands to productive use. More recently, it reaffirmed that judicial review of redevelopment designations must take into consideration these economic and social policies of the redevelopment laws.

Unfortunately, the Trial Court did not heed this directive when reviewing the redevelopment designation at issue in this case. The Trial Court inappropriately focused on the potential future impact of eminent domain on the property owner instead of the correct standard of review, which is whether there is substantial credible evidence on the record to conclude that the property satisfies one or more of the criteria set forth in N.J.S.A. 40A:12A-5. To reach its conclusion that the redevelopment designation had to be overturned, the Trial Court applied a tortuous and contorted reading of N.J.S.A. 40A:12A-5, both ignoring the plain language of the statute and rewriting the criterion to add requirements that do not exist.

In this case, the Borough of Beach Haven (the "Borough") found that property known as Block 205, Lots 1 & 2 on the official tax maps of the Borough of Beach Haven (the "Property") qualified as a condemnation area in need of

redevelopment ("Condemnation Redevelopment Area"). Specifically, the Borough found that the Property satisfied N.J.S.A. 40A:12A-5(b) because all use of the Property had been discontinued as of January 31, 2023, when the Plaintiff terminated an existing lease for an illegal use and because all legal use of the Property ceased as of the end of 2017.

The Borough also found that the Property satisfied N.J.S.A. 40A:12A-5(d) because it contained underground storage tanks ("USTs") that were leaking petroleum products such as gasoline, diesel, and motor oils. Despite official reporting of the leak in 1994, Plaintiff still has not completed investigating the extent of the contamination, having completed its first "robust" soil and water testing in May to June of 2023. Testimony from the Plaintiff's licensed site remediation specialist ("LSRP") indicated that he could not give any firm deadlines for completing remediation and could not yet opine as to the type of remediation that would be required because he did not have all of the data.

Evidence indicated that since 1994, Plaintiff routinely missed mandatory remediation deadlines and performed the bare minimum necessary to advance remediation only after municipal court actions were filed against Plaintiff. In order to return this vacant, contaminated and unproductive property back into productive use, the Borough began the process to designate the Property as a Condemnation Redevelopment Area, which resulted in the designation of the

Property on July 27, 2023. One Councilperson explained the Borough's concerns succinctly, stating "there's a contaminated site that's been there for a very long time, and there has been no remediation. There has been nothing done to clean it up. We have a vacant building at the gates of our town." (T2, 35:20-22).

During the redevelopment process, the Borough made it clear that eminent domain was not currently contemplated for the Property. The governing body even offered to enter into a redevelopment agreement with the Plaintiff.

Substantial, credible evidence on the record and the Trial Court's findings established that the Property is not currently occupied and cannot be occupied for the foreseeable future until trenching, testing and remediation of soils under the existing building have been completed. Because the former commercial use of this Property has ceased, the Property satisfies N.J.S.A. 40A:12A-5(b). Had the Trial Court applied the plain language of the statute, the redevelopment designation would have been upheld. Moreover, due to the legislative and judicial recognition of the dangers of petroleum products and benzene, there can be no question that the contamination on the Property is detrimental to the public health and safety, and the Property satisfies N.J.S.A. 40A:12A-5(d). Because the Trial Court's decision was a misapplication of the law, it must be overturned.

PROCEDURUAL HISTORY

This case began when Plaintiff, Beach Haven Automotive, Inc.

("Plaintiff"), filed a Verified Complaint and Order to Show Cause on October 5, 2023, (Da1-Da68),[1] which was denied on November 3, 2023. (Da75-Da76).

On November 3, 2023, Defendant filed a Notice of Removal to remove the matter to the United States District Court for the District of New Jersey. (Da77). An Order for Remand back to this Court was filed in this case on December 18, 2023. (Da89-Da90) A case management conference was held on January 16, 2024, and following the same, a Case Management Order was entered on January 16, 2024, allowing discovery to be filed within thirty (30) days from the date of the Order. (Da91).

Defendants filed an Answer on January 22, 2024, (Da92-Da104), and a Consent Order was entered on January 23, 2024, in which Counts III and IV were stricken with prejudice. (Da106-Da107). A Motion for a Protective Order was filed by Defendants on February 1, 2024, requesting that discovery not be had in this case, (Da108-Da109), which was granted on March 1, 2024. (Da138-Da139). A case management conference was also scheduled for March 8, 2024. (Da140). Following the case management conference, a Case Management Order was entered on March 8, 2024 which set a briefing schedule and trial date of June 28, 2024. (Da140). Trial occurred on June 28, 2024, and the Trial Court

[1] References to "Da" are to Defendants Appendix filed with this Merits Brief.

issued an oral decision in this matter the same day. (T3, 38: 8-58:22).[2] A Notice of Appeal was filed by Defendants on August 8, 2024. (Da150-Da154).

STATEMENT OF FACTS

This matter arose out of Plaintiff's challenge to the designation of the Property as a condemnation area in need of redevelopment ("Condemnation Redevelopment Area"). (Da1-Da64). The Property is owned by Plaintiff. (Da3, ¶8). Contamination has existed on the Property since at least 1991, when it was discovered that several underground storage tanks ("USTs") on the Property were leaking and impacting the groundwater. (Da144). Despite the passage of nearly 30 years since the discovery of the contamination, a plan for remediation of the Property is still not complete. (Da144 & T1, 21:7-8).

Because Plaintiff was not timely remediating the Property, the New Jersey Department of Environmental Protection ("NJDEP") issued a Notice of Violation to Plaintiff on February 28, 2019, (Da26, ¶4) and filed a Municipal Court Complaint against Plaintiff on September 16, 2020. (Da26, ¶5). This prompted NJDEP to enter into an Administrative Consent Order imposing a new deadline for completion of remediation of March 31, 2024. (Da29, ¶25 & ¶26).

---

[2] "T1" refers to the transcript of the JLUB meeting held on July 17, 2023.
"T2" refers to the transcript of the Borough Council meeting held on July 27, 2023.
"T3" refers to the transcript of the Trial Court dated June 28, 2024.

Desiring to return contaminated property back to productive use, on May 25, 2023, the Mayor and Borough Council of the Borough of Beach Haven (collectively, the "Borough Council") adopted Resolution No. 121-2023 authorizing the Beach Haven Joint Land Use Board ("JLUB") to conduct an investigation to determine whether the Property should be designated as Condemnation Redevelopment Area pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq. (the "LRHL"). (Da114).

The Preliminary Investigation Report

The JLUB's planner, Frank J. Little, Jr., P.E., P.P., C.M.E. ("Board Planner") prepared a report entitled preliminary investigation report, dated June 2023 ("Preliminary Investigation Report"), (Da36-Da49), which stated that the Property is subject to ongoing environmental remediation caused by release of Light Non-Aqueous Phase Liquids ("LNAPL") also known as gasoline, diesel, motor oils and similar materials. (Da39). It further noted that a Remedial Action Report and Remedial Action were both due to be completed by March 31, 2024. (Da39). The Preliminary Investigation Report concluded that because the Property is in need of remediation, until remediation is completed, the condition is detrimental to the health, safety and welfare of the community, and this satisfies criterion (d) of N.J.S.A. 40A:12A-5. (Da39).

The Preliminary Investigation Report stated, site photography revealed

that all uses had ceased on or around July 2017 and that the Property had been unoccupied and utilized for nearly six years. (Da39). It also noted that the building and parking lot have become unkempt and that while no code violations have been issued, the current state of the Property indicates that there are property maintenance violations. (Da39). The Preliminary Investigation Report concluded that because commercial use of the property had been discontinued, the Property satisfied N.J.S.A. 40A:12A-5(b). (Da39).

Upon receiving the Preliminary Investigation, Plaintiff submitted a lease to the Board Planner (the "Lease"). (D52-Da64). Based upon this new information, the Board Planner prepared "Addendum No.1" to his Preliminary Investigation ("Addendum"). (Da119-Da120). The Addendum stated although additional information has been received that indicates the Lease has existed on the property since 2018, the Lease expired on January 31, 2023. (Da120). As a result, the Addendum concluded that that the Board Planner's finding that the Property satisfied N.J.S.A. 40A:12A-5(b) remained unchanged. (Da120).

The Joint Land Use Board Hearing

On July 17, 2023, the JLUB held a public hearing in compliance with N.J.S.A 40A:12A-6, (see T1), at which the Board Planner testified that the Property satisfied N.J.S.A. 40A:12A-5(b) and (d) to be designated as a Condemnation Redevelopment Area. (T1, 8:12–10:5). Plaintiff also presented

evidence through statements made by Plaintiff's attorney and the testimony of the Licensed Site Remediation Specialist ("LSRP") retained by the Plaintiff.

Evidence was presented that the Lease on the Property expired in January 2023. (T1, 13:4-11). At the JLUB hearing, the Board Planner testified that the Property was unoccupied and appears to have been used as storage. (T1, 48:1-20). He explained that storage is not a permitted use in the Business District, and if the Property were being used for storage, it would require a use variance and a site plan approval, neither of which have been obtained. (T1, 48:16-24). Therefore, all legal use of the Property ended in 2017. Notwithstanding the Lease, the Property had not been used for over six (6) months.

No testimony was presented by the Plaintiff to refute this evidence. The only evidence regarding the Lease was Plaintiff's attorney's explanation that the Property could no longer be leased because the LSRP needed to trench the building in order to identify the extent of the contamination under the building. (T1, 13:8-23). She explained, "my client allowed the lease to expire so that we could get in there and dig up whatever needed to be dug up, which we're in the process of doing now." (T1, 13:21-23).

According to the Memorandum prepared by Plaintiff's LSRP, there are at least six (6) USTs on the Property which have been abandoned in place. (Da144 & T1, 12:10-13). That same report indicated that at least four (4) USTs were

impacting groundwater, and lead and petroleum was in the soil. (Da144). In December 2019, LNAPL was discovered in the soil and in November 2021, naphthalene was found in the soil. (Da144 & Da145). Testimony indicated that benzene was found in concentrations of 10 to 11 micrograms per liter when the groundwater quality standard is 1 microgram per liter. (T1, 34:7-15). Plaintiff's attorney admitted that the Property "has some contamination" and that "[i]t has an active remediation case." (T1, 21:7-8). She further stated that the LSRP is responsible for determining when the Property is cleaned up. (T1, 25:12-19).

Although contamination has existed on the Property since at least 1991, and several tons of contaminated soil have been removed from the Property in April 2018, November 2018 and April 2022 (Da144), Plaintiff's LSRP testified that he is currently unable to determine the extent of the remediation that needs to be completed. (T1, 32:13-17). He explained that for the soil contamination, he is still waiting on the results of the soil investigation. Free product was discovered in the soil under the building. (T1, 13:1-3).

> So we did a rigorous investigation *last week* that included collection of upwards of 20 samples underneath the building, 20 borings underneath the building, and soil samples for laboratory analysis to try to get a three-dimensional understanding of how much soil underneath the building is impacted so that we can determine an appropriate remedial strategy for it. We should have that data in a couple of weeks.

(T1, 18:3-10) (emphasis added). For groundwater data, the time for investigation

will be even longer. Plaintiff's LSRP explained, "[w]hat will dictate the length of time for the remediation will be the results of that groundwater monitoring. We expect that to go for at least two years with samples collected on a quarterly basis." (T1, 18:15-18). The reason for the two years is that NJDEP requires a minimum of two (2) years of data to determine if the proposed remediation technique, such as natural attenuation, is effective. (T1, 18:24-19:3).

Previously, in December 2019 and December 2020, respectively, a soil investigation was conducted within the interior of the building and a vapor intrusion investigation was completed. (Da144). Based on this preliminary data, the LSRP testified, "[t]he concentrations that we've identified on the site **at this point** do not represent a vapor intrusion threat…" (T1, 39:16-18). However, he further admitted that "last week was our **first**, say, **robust** soil investigation." (Id. at T1, 29:18-19) (emphasis added). Plaintiff's LSRP would not have the data from this soil investigation for a few weeks after the JLUB hearing. (T1, 18:3-10). Plaintiff's LSRP admitted that depending upon the levels of contaminates found under the building, the building may have to be removed in order to excavate the soil underneath. (T1, 28:20-29:5). He explained that currently he does not have all of the data on the soil and that the "soil data will help us quantify the impact in advance." (T1, 37:17-20). Plaintiff's LSRP testified that,

> The preliminary data says that there's impact underneath the building, and we need to figure out what volume of material is

> impacted and that will drive how the remediation is conducted. So it could be leave it in place and put a low permeability cap over it, like a building foundation or a concrete driveway. It could be something where we do some type of in-situ treatment, injection of a chemical oxidant into the ground to oxidize the contaminants in place, physical removal by excavation and offsite (indiscernible). But again, the process is iterative, and it's all based on what the data shows.

(T1, 32:21-33:6).

As to groundwater impacts, Plaintiff's attorney suggested that there was "really not anything to be concerned about" because the contamination is in the "upper aquifer" and the drinking wells are "100 feet down and separated by an impermeable layer." (T1, 14:11-20). She also indicated that the drinking well is one (1) mile away. (T1, 14:21-24). Although Plaintiff's LSRP asserted that most of the "potential receptors" are too far away to be of concern, (T1, 39:17-22), he acknowledged, "we don't have a book of groundwater data to evaluate concentration trends." (T1, 34:7-8). This is because he undertook the "first groundwater sampling in May" and aquifer testing in June. (T1, 29:17-18).

Plaintiff's LSRP suggested that natural attenuation might be appropriate. (T1, 18:24-19:3). "Natural attenuation is a process by which the contaminants naturally degrade over time based on bacteria present -- conditions that are present beneath the site." (T1, 19:17-19). He stated, "there's already been a period of natural attenuation over time…" (T1, 38:10-12). However, the contamination first occurred in 1991, and still exists today, thirty (30) years later.

(Da144 & T1, 21:7-8). Even if natural attenuation is attempted, Plaintiff's LSRP made clear that it would be at least two (2) years before he was able to determine if such a process effectively removed the contamination. (T1, 18:24-19).

The Mayor, an epidemiologist and pathologist, expressed concern that the Property's contamination created a health risk due to the association with cancer. (T1, 26:18-27:1). Ultimately, the JLUB voted to recommend designating the Property as a Condemnation Redevelopment Area pursuant to criterion (b) and (d) but proposed that condemnation not be used unless the Plaintiff failed to timely remediate the Property. (T1, 52:1–53:11 & Da128-Da129).

The Governing Body Meeting

A Borough Council meeting was held on July 27, at which time the Borough Council deliberated on whether or not to designate the Property as a Condemnation Redevelopment area. Additional concerns were raised by the Borough Council concerning the Property. (See T2). One Councilperson noted that there were potential impacts to the water supply even though the contamination was not near the wells.

> "I take offense to the argument that our wells aren't close enough to the site to be affected. Our water pipes are. Our sewer pipes are. Our sewer pipes and our water pipes are connected by coupling. Some of them are over 100 years old. We know that we have water infiltration into our water and our sewer system."

(T2, 37:2-8). Plaintiff did not present any evidence to indicate any sampling was

done to confirm that no contaminated groundwater from the Property was entering the Borough's water and sewer pipes. The Mayor again expressed concern regarding potential health and safety impacts of the contamination.

> As a pathologist and an epidemiologist, there is a, you know, there is a danger in polluted land and there is a – there has been a huge increase in cancer associated with gas stations throughout the entire country, not just in Beach Haven or along the coastal areas. We are, I think, more vulnerable along the coastal areas. I think many oncologists would tell you that they've seen an increase in cancer in areas like this.

(T2, 38:25-39:8).

The Borough Council noted that private enterprise has not been successful in redeveloping this contaminated property. One Councilperson said, "there's a contaminated site that's been there for a very long time, and there has been no remediation. There has been nothing done to clean it up. We have a vacant building at the gates of our town." (T2, 35:20-22). The Borough Council expressed a desire to help the Property be redeveloped and returned to productive use. "This is an action in support of helping that property get cleaned up." (T2, 37:20-21). Another Councilperson explained, "[i]f they want our help to clean this site up. The Borough [of] Beach Haven, with their ability to borrow money at a very favorable rate, can assist them financial if they want to…." (T2, 36:2-6). He also noted, "[w]e want to help them. This designation of an area in need of redevelopment helps them. It gives them favorable zoning to their site.

The new buyers should be thrilled. … This is an action in support of helping that property get cleaned up." (T2, 37:15-21). As the Mayor noted, there is grant money available to help cleanup brownfield sites. (T2, 39:17-20). The Borough's redevelopment counsel explained that "a declaration of an area in need of redevelopment for a contaminated property gives you additional points towards your grant application." (T2, 45:24-46:2).

It was even suggested at the Borough Council meeting that the Borough Council would consider entering into a redevelopment agreement with the Plaintiff to allow the Plaintiff to continue remediation of the Property, which allowed a period of time to complete remediation. (T2, 39:13-16 & 40:4-9).

At the end of the Borough Council meeting, the Borough Council adopted Resolution No. 168-2023 designating the Property as a Condemnation Redevelopment Area. (T2, 34:1-48:17 & Da20-Da22). A copy of Resolution No. 168-2023 was sent to the Commissioner of the Department of Community Affairs ("DCA"), who approved designation of the Property as a Condemnation Redevelopment Area by way of letter dated August 18, 2023. (Da132). When approving the redevelopment designation, the DCA noted that although the Property is located in a sensitive planning area where redevelopment is **not** encouraged, it approved the designation because of "the currently developed nature of the area, its location within an existing sewer service area and the

conditions associated with the property…" (Da132) (emphasis added).

Notice of the designation was sent to Plaintiff on August 28, 2023. (Da9, ¶34). Plaintiff filed an appeal by way of action in lieu of prerogative writs on October 5, 2023, challenging the redevelopment area designation.

LEGAL ARGUMENTS

Substantial evidence exists on the record to conclude that the Property satisfied N.J.S.A. 40A:12A-5(b) and (d), and consequently to justify a redevelopment area designation. The Trial Court erred in concluding otherwise. This decision was based on an erroneous interpretation and misapplication of N.J.S.A. 40A:12A-5 and should be reversed.

Property can be declared a redevelopment area, whether a Condemnation Redevelopment Area or a Non-Condemnation Redevelopment Area, if the area satisfies at least one of the criteria set forth in N.J.S.A. 40A:12A-5. In this case, the Property satisfied both criterion (b) and criterion (d) because all legal use of the Property ceased by 2018 and **all** use of the Property ended January 31, 2023 when contamination on the Property required taking 20 boring samples underneath the building in order to determine the appropriate remediation activity to address the contamination. Because of the contamination on the Property, the Property had not been used for any legal use since at least 2018 and could not be used for any legal use because of the ongoing remediation.

I. Standard of Review. (See Trial Briefs).

Appellate review of municipal decisions is governed by the same standard of review as is applied by the trial court. R. Neumann & Co. v. City of Hoboken, 437 N.J. Super. 384, 391 (App. Div. 2014). Redevelopment designations are entitled to a presumption of validity and any designation "is 'entitled to deference provided [it is] supported by substantial evidence on the record.'" Malanga v. Twp. of W. Orange, 253 N.J. 291, 314 (2023)**Error! Bookmark not defined.**. "Courts 'must review the complete record' to assess whether it contains substantial evidence to support a redevelopment designation." Ibid. "'Judicial deference does not mean that a court is a rubber stamp'" and no special deference is given for statutory interpretation. Id. at 311 & 314.

However, "'[j]udicial review of a blight determination' must be informed by an understanding 'of the salutary social and economic policy' advanced by redevelopment statutes." 62-64 Main St., L.L.C. v. Mayor & Council of City of Hackensack, 221 N.J. 129, 157 (2015). In 1971, the Supreme Court explained these policies as both "protection of the individual members of the public from living conditions in slums directly threatening their health, safety and morals" and also "improvement of the economic condition of the general public through the elimination of the lack of use of idle lands and the proper utilization thereof." Levin v. Twp. Comm. of Bridgewater, 57 N.J. 506, 549 (1971). More recently,

the Supreme Court noted that redevelopment "'[has] enabled municipalities to intervene, stop further economic degradation, and provide incentives for private investment'" and that the LRHL "promotes a 'salutary social and economic policy'" which "gives municipalities the authority to rehabilitate and revitalize blighted areas for the benefit of the public -- a benefit realized through better housing and enhanced business and employment opportunities." 62-64 Main St., 221 N.J. at 163. Evaluation of Beach Haven's redevelopment designation should be undertaken with these legislative policies in mind.

A Court is not permitted to "second guess" the redevelopment designation. Forbes v. Bd. of Trs. of Tp. of S. Orange Vill., 312 N.J. Super. 519, 532 (App. Div. 1998). This means that a Court is not entitled to determine if it would have agreed with the designation. Ibid. As the Courts have repeatedly recognized,

> "Clearly the extent to which the various elements that informed persons say enter into the blight-decision making process are present in any particular area is largely a matter of practical judgment, common sense and sound discretion. It must be recognized that at times men of training and experience may honestly differ as to whether the elements are sufficiently present in a certain district to warrant a determination that the area is blighted. In such cases courts realize that the Legislature has conferred on the local authorities the power to make the determination. **If their decision is supported by substantial evidence, the fact that the question is debatable does not justify substitution of the judicial judgment for that of the local legislators."**

Concerned Citizens of Princeton, Inc. v. Mayor & Council of Borough of Princeton, 370 N.J. Super. 429, 453 (App. Div. 2004), quoting Lyons v. City of

Camden, 52 N.J. 89, 98 (1968) (emphasis added).

Applying this standard of review to the record below, substantial credible evidence existed on the record to uphold the Property's designation as a Condemnation Redevelopment Area. The Trial Court inappropriately substituted its judgment for the discretion of the Borough, simply because it disagreed with the Borough's conclusion of condemnation authority. Thus, the Trial Court's decision should be overturned.

II. In Finding Criterion (b) Inapplicable, the Trial Court Erroneously Contorted the Plain Meaning of Statutory Words and Utilized a Tortuous Explanation to Reach its Conclusion. (Not Raised Below).

Rejection of the Borough's redevelopment designation was based on an incorrect reading of N.J.S.A. 40A:12A-5(b). Review of a trial court's statutory interpretation is de novo and is not entitled to any deference. Malanga, supra, 253 N.J. at 311. When a Court interprets a statute, it should be guided by the overarching principle to "'effectuate legislative intent.'" Matter of Diguglielmo, 252 N.J. 350, 360 (2022). The starting point in determining legislative intent is always the plain language of the statute because ""'the best indicator of that intent is the plain language chosen by the Legislature."'" Ibid.

A court is not permitted to "rewrite a plainly written statute or to presume that the Legislature meant something other than what it conveyed in its clearly expressed language." Murray v. Plainfield Rescue Squad, 210 N.J. 581, 592

(2012). This, however, is exactly what the Trial Court did. In order to reach the result it wanted, the Trial Court ignored the plain language of N.J.S.A. 40A:12A-5(b) and added requirements which were not included within the statute. Because the Trial Court's decision was based on an erroneous reading of N.J.S.A. 40A:12A-5(b), it must be overturned.

A. The Record Clearly Establishes that the Commercial Use of the Property has been Discontinued. (T3, 14:4-11).

The Trial Court erred in concluding criterion (b) was not satisfied. The full language of N.J.S.A. 40A:12A-5(b) is as follows:

> b. The discontinuance of the use of a building or buildings previously used for commercial, retail, shopping malls or plazas, office parks, manufacturing, or industrial purposes**;** the abandonment of such building or buildings**;** significant vacancies of such building or buildings for at least two consecutive years**;** **or** the same being allowed to fall into so great a state of disrepair as to be untenantable.

(Emphasis added). Importantly, the language used appears to be setting forth a list of options, as evident from the use of the word "or" and the Legislature's use of semi-colons to break up the different parts of subsection (b).

Punctuation is part of a statute's plain language. Courts have recognized that, "'[p]unctuation is part of an act and may be considered in its interpretation.'" Angus v. Bd. of Educ. of Borough of Metuchen, Middlesex Cty., 475 N.J. Super. 362, 372 (App. Div. 2023). Stated differently, "'"punctuation

affords some indication of the true legislative intent" and is not ordinarily to be disregarded.'" Commerce Bancorp, Inc. v. InterArch, Inc., 417 N.J. Super. 329, 336 (App. Div. 2010).

"A 'semicolon' is a punctuation mark used to denote a degree of separation greater than the comma but less than the period." Morella v. Grand Union/New Jersey Self-Insurers Guar. Ass'n, 391 N.J. Super. 231, 241 (App. Div. 2007). It "indicates a 'separation in the relations of the thought' and sets off one phrase from another[.]" In re Estate of Fisher, 443 N.J. Super. 180, 192 (App. Div. 2015). "'When[, as here,] items in a list are joined by a comma or semicolon, with an "or" preceding the last item, the items are disjunctive'" and indicates an alternative. Angus, 475 N.J. Super. at 372. In other words, "'[t]he use of "or" plainly indicates that any of those . . . listed actions is sufficient to satisfy the . . . definition.'" Norman Int'l, Inc. v. Admiral Ins. Co., 251 N.J. 538, 554 (2022).

Based on the Legislature's use of a semi-colon and the word "or" at the end of N.J.S.A. 40A:12A-5(b), the plain language indicates a clear intention that each of those listed items separated by a semicolon is to be an independent basis to qualify a property for a redevelopment designation under criterion (b).

1. Criterion (b) is Satisfied Upon the Simple Finding of Discontinuance of a Commercial Use. (T3, 17:1-20)

The first phrase of N.J.S.A. 40A:12A-5(b) allows for designation of a property as a redevelopment area if there has been a "discontinuance of the use

of a building or buildings previously used for commercial, retail, shopping malls or plazas, office parks, manufacturing, or industrial purposes…" Merriam Webster's online dictionary defines "discontinuance" as "the act or an instance of discontinuing" and further defines "discontinuing" as "to break the continuity of: cease to operate … [or] use…" See https://www.merriam-webster.com/dictionary/discontinuance?utm_campaign=sd&utm_medium=serp&utm_source=jsonld and https://www.merriam-webster.com/dictionary/discontinuing, last visited 10/1/2024.

There is no dispute that Plaintiff discontinued all use of the Property when the Lease expired on January 31, 2023, (Da120) which was approximately six (6) months prior to designating the Property as a Condemnation Redevelopment Area. (Da22). The use of the Property ceased because the LSRP needed to dig up the slab under the building to determine the extent of contamination under the building. (T1, 13:9-23). Even though the record established that all commercial use of the Property had ceased, the Trial Court found that the Property did not satisfy criterion (b) because the Property was not unoccupied or unutilized in a way that was detrimental to the welfare of the community. (T3, 44:20-23). Such a finding is not required in order to satisfy criterion (b).

Not only did the Court attempt to rewrite the plain language of N.J.S.A. 40A:12A-5(b) by inserting additional requirements that do not exist, it also

ignored the fact that the Legislature determined that unoccupied and unutilized buildings, in and of themselves, are intrinsically detrimental to the welfare of the community. Nothing in N.J.S.A. 40A:12A-5(b) requires a separate finding that an unoccupied building is detrimental to the welfare of the community.

By contrast, a finding of detriment to the welfare of the community is a specific requirement under criterion (d). When language is used in one part of a statute but is omitted from another part, the omission demonstrates a Legislature intended the provisions to be different. Matter of Enf't of N.J. False Claims Act Subpoenas, 229 N.J. 285, 295 (2017). Stated differently, "'[c]ourts read every word in a statute as if it was deliberately chosen and presume that omitted words were excluded purposefully.'" N.J. Dep't of Children & Families, Div. of Youth & Family Servs. v. A.L., 213 N.J. 1, 21 (2013).

Here, the Legislature concluded that the mere non-use of commercial, industrial and office buildings is, in and of itself, a blighting condition. Other litigants have tried to argue that criterion (b) should include additional requirements in order to satisfy the Constitution, but this has been flatly rejected by the Supreme Court. 62-64 Main St., supra, 221 N.J. at 148. In the dissenting opinion in 62-64 Main Street, Justice Rabner asked, "[u]nder subsection (b), for example, does 'discontinuance of . . . use,' on its own, suffice to show blight in all cases?" Id. at 184. The majority opinion, however, concluded that the

Legislature granted each municipality the discretion to answer that question.

> In Wilson, we found that, for constitutional purposes, the five subsections of the Blighted Areas Act "define 'blighted area' with substantial exactitude and confine the municipal decision to those limits." We concluded that the legislative descriptions of blight sufficiently channeled the exercise of municipal authority, while acknowledging that "'the exigencies of modern government have increasingly dictated the use of general rather than minutely detailed standards in regulatory enactments under the police power.'" We noted that "[t]he area to be classed as blighted is the portion of a municipality which in the judgment of the planning board or governing body, as the case may be, *reasonably falls within the definition laid down by the Legislature*."

Id. at 148-149 (internal citations omitted) (emphasis original).

Finding the mere non-use of buildings is a detriment or blighting condition in and of itself is consistent with other Legislative declarations. The Legislature has that "[v]acant properties present numerous problems for these municipalities such as: presenting the opportunity for criminal activity, deterring neighboring property owners from improving their properties and prospective purchasers and renters from locating into these areas, and serving as a location to dispose of unwanted items…" N.J.S.A. 40A:12-15.1. A similar proclamation is made in N.J.S.A. 40A:12-75(b): "[t]he continued presence and proliferation of these vacant, abandoned, and other problem properties in the communities of this State has a negative effect on the public health and welfare, reduces property values and municipal revenues, and impedes the economic development and revitalization of the State's municipalities, particularly its older cities…"

Beach Haven was concerned with the negative impact that the vacancy at the Property was having on its community. As explained at the Borough Council meeting, "there's a contaminated site that's been there for a very long time, and there has been no remediation. There has been nothing done to clean it up. We have a vacant building at the gates of our town." (T2, 35:20-23). This finding is clearly within the discretion laid down by the Legislature to declare a property in need of redevelopment as set forth in N.J.S.A. 40A:12A-5(b).

The Trial Court, however, attempted to substitute its discretion for that of Beach Haven finding that discontinuance of the commercial use, on its own, was not sufficient to satisfy criterion (b). (T3, 44:9-19). Contrary to the Trial Court's conclusion, N.J.S.A. 40A:12A-5(b) does not include any qualifying or limiting requirement that the discontinuance of the use has to be for a specific reason. Thus, the Trial Court erred in concluding that N.J.S.A. 40A:12A-5(b) requires something more than the finding of discontinuance of a commercial use.

2. Remediation is not a Use and Remediation does not Automatically Require Discontinuance of Use. (T3, 21:13-22:4).

In concluding that criterion (b) was not satisfied, the Trial Court struggled with the question of whether use of a property is discontinued when there is active remediation occurring. (T3, 49:20-24). The Trial Court seemed to believe that remediation was a use that somehow prevented the conclusion that the

commercial use of the property had been discontinued.

Remediation is not a "use;" it is activity. When remediation is conducted in conjunction with a permitted commercial or industrial use, remediation can be classified as an accessory structure or accessory use. N.J.S.A. 40:55D-66.8. Without a primary use, such as a commercial use, retail use or industrial use, remediation is not a use at all. By its nature, an accessory use is one which is incidental and subordinate to the primary use. Mola v. Reiley, 100 N.J. Super. 343, 348 (Law Div. 1968). Without a primary use, there can be no accessory use because there is no use to which it is subordinate. Ibid.

Contaminated properties often continue to operate their commercial or industrial uses while remediation occurs. (T3, 21:15-22:4). Here, despite discovering contamination on the Property in 1994, (Da144), the Property has been used as a gas station and a commercial furniture store, (Da38), and for illegal storage under the Lease. (T1, 48:5-25). All use, both legal and illegal, of the Property ceased in January 2023 when Plaintiff terminated the Lease.

Cessation of business relating to remediation has come up in other contexts, such as valuation for property tax purposes. When contaminated property is occupied with some ongoing operations it is not entitled to a reduction of assessed value, but where the property is unoccupied and operations have ceased, it merits a reduction in value. Pan Chem. Corp. v. Hawthorne

Borough, 404 N.J. Super. 401, 412 (App. Div. 2009). In determining when a property is "in use" or "closed down" for property tax purposes, the Court has said, "[t]he degree to which a property is 'in use' or 'closed down' cannot be left to subjective standards resulting in inconsistent determinations. ISRA provides a rational, objective standard by which one can determine whether property is in use for tax purposes, as well as for determining whether the obligation to remediate has been triggered." Id. at 414.

Under ISRA, the Industrial Site Remediation Act, "closing operations" is defined to include "the termination of a lease unless there is no disruption in operations of the industrial establishment, or the assignment of a lease…" N.J.S.A. 13:1K-8(6). Thus, even under an objective standard, such as ISRA, the Property discontinued its commercial use once Plaintiff terminated the Lease. No new use is currently being made of the Property. Thus, remediation is not a use which would preclude a finding that the commercial use was discontinued.

3. Evidence of Abandonment is not Required in Order to Find Discontinuance of Use. (Not Raised Below).

In concluding that criterion (b) was not met, the Trial Court erroneously conflated discontinuance of use and abandonment. Noting that "discontinuance of use" was not a defined term and, in an effort to define "discontinuance of use," the Trial Court relied on the Abandoned Properties Rehabilitation Act, N.J.S.A. 55:19-78, et seq. (T3, 49:17-50:17). Specifically, the Trial Court relied

upon N.J.S.A. 55:19-81, which provided criteria to determine when a property may be considered "abandoned." (T3, 50:14-51:11).

A definition for determining abandonment of a property is not helpful for determining whether a property's commercial use has been discontinued. This is because abandonment is a separate consideration under N.J.S.A. 40A:12A-5(b). Under criterion (b), a property can be designated a redevelopment area if: (1) there has been a discontinuance of the use of the buildings for commercial purposes; **or** (2) there has been abandonment of such buildings. As noted above, the use of the semi-colon in N.J.S.A. 40A:12A-5(b), along with the use of the word "or" plainly indicates that the Legislature intended any one of those listed conditions to satisfy criterion (b). See Norman Int'l, supra, 251 N.J. at 554.

Since abandonment is a separate condition that would satisfy criterion (b), a statute providing guidance for determining abandonment would only be useful for determining whether the buildings on the Property were abandoned and not whether discontinuance of the commercial use has occurred. The Borough never found that the buildings on the Property were abandoned. Rather, it found that the commercial use of the buildings had been discontinued.

The Trial Court apparently agrees that the evidence establishes that the commercial use was discontinued. It found that "the property was leased and in use until the ongoing remediation required access to areas under and around the

building that prohibited continued use .... [W]ork was continuing, construction was continuing which **prevented the continued commercial use** for this period of time." (T3, 44:11-19) (emphasis added). Moreover, the Trial Court found that "the property is actively undergoing remediation and was leased until -- up until 2023 when it was determined that remediation would require access to areas that would make it untenable to continue to rent." (T3, 51:11-15).

Essentially, the Trial Court's conclusion was that because the Property was not abandoned, the lack of abandonment prevented a finding of discontinuance of the commercial use, despite the fact that the evidence established that **all** commercial use was, in fact, discontinued as of January 31, 2023. Because there was substantial, credible evidence on the record to conclude that the commercial use of the building on the Property had been discontinued, the Trial Court erred in concluding that criterion (b) had not been satisfied.

4. Illegal Vacancy is not a Commercial Use. (T, 20:12-21:9).

Evidence on the record indicated that no legal use of the Property had been made since 2017. Testimony from the Board Planner established the Property was unoccupied and appears to have previously been used as storage. (T1, 48:1-20). The Board Planner explained that storage is not a permitted use in the Business District, and if the Property were being used for storage, it would require a use variance and a site plan approval, neither of which have been

obtained. (T1, 48:16-24). Therefore, all legal use of the Property ended in 2017.

The Trial Court concluded than an illegal use under the zoning code defeats a finding that the commercial use has been discontinued because the Property was not vacant. (T3, 53:1-8). Apparently, the Trial Court believed that the Township had an obligation to put the Plaintiff on notice that the use was illegal. (T3, 53:4-8). This of course presumes the Borough knew of the illegal use. Such an interpretation is contrary to the law and to public policy.

Courts should not interpret statutes in a way that is at odds with public policy or which will lead to an absurd result. State v. Morrison, 227 N.J. 295, 308 (2016). Proposed statutory interpretations have been rejected when they conflict with public policy set forth in other statutes. See In re Adoption of N.J.A.C. 17:1-6.4, 17:1-7.5 & 17:1-7.10, 454 N.J. Super. 386, 402-03 (App. Div. 2018). Here, the Trial Court's interpretation is at odds with the public policy behind the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. ("MLUL").

"New Jersey public policy is to restrict uses which are not in accord with a zoning ordinance in order to bring about '"conformity as quickly as is compatible with justice."'" Berkeley Square Ass'n, Inc. v. Zoning Bd. of Ad. of City of Trenton, 410 N.J. Super. 255, 266 (App. Div. 2009). This is because "[a] substantial public interest exists in the preservation of the integrity of a zoning ordinance." DePetro v. Twp. of Wayne Planning Bd., 367 N.J. Super. 161, 171

(App. Div. 2004). Preservation of the zoning scheme's integrity is so important, private citizens are authorized to enforce zoning laws through lawsuits seeking to retrain, correct or abate a zoning violation. N.J.S.A. 40:55D-18.

Statutory interpretations have been rejected when such interpretation allows for subversion of the integrity of the zoning scheme. The Court has refused to grant farmland assessment status to a property where the agriculture or horticulture use was unlawful under the zoning code. See Soc'y of the Holy Child Jesus v. City of Summit, 418 N.J. Super. 365, 376-77 (App. Div. 2011).

> "[S]uperimposed upon the requisites of the [FAA] was the requirement that the agricultural or horticultural use must be lawful; it must be a permitted use under the municipality's zoning ordinance." … "Concerns of judicial integrity are implicated. The Tax Court should not passively lend its aid to a taxpayer's zoning noncompliance. Nor should it accord favored treatment to an undeserving owner of land."

Ketcherick v. Borough of Mountain Lakes Bd. of Adj., 256 N.J. Super. 647, 655 (App. Div. 1992) (internal citations omitted).

Courts have also found that laches and estoppel are not acceptable defenses to the failure of a municipality to enforce its zoning ordinance, "except in the clearest and most compelling circumstances." Universal Holding Co. v. N. Bergen, 55 N.J. Super. 103, 111 (App. Div. 1959). "[A] property owner may not, by unilateral action, 'secure a valid nonconforming use based on a violation of the zoning ordinance.' No estoppel may arise against a municipality in such

a case 'by reason of reliance on the part of the property owner or of acquiescence and laches by the municipality.'" Twp. of Fairfield v. Likanchuk's, Inc., 274 N.J. Super. 320, 331-332 (App. Div. 1994) (internal citations omitted). In this case, the Trial Court acknowledged that the Borough was not even aware that Plaintiff was using the Property illegally. (T3, 53:5-8).

The Trial Court's interpretation is at odds with the public policy of the MLUL and rewards Plaintiff for being a bad actor by not securing the appropriate land use approvals for use of the Property. In fact, Plaintiff profited by the subversion of the municipal zoning code by continuing to make money from the Property under the Lease, while at the same time failing to take prompt action to complete remediation. Allowing a property owner to benefit from the subversion of the integrity of the zoning code only encourages more property owners to subvert zoning. Like in Ketcherick, superimposed on N.J.S.A. 40A:12A-5(b) is a requirement that the use of the property must be a legal permitted use. In other words, a property owner cannot defeat a redevelopment designation with an illegal non-conforming use. Any other interpretation would lead to an absurd result and would be contrary to the public policy of the MLUL.

Because the Trial Court's decision was contrary to public policy, it must be overturned.

B. Despite Finding that the Property was Untenantable, the Trial Court Found that Criterion (b) was not Satisfied. (See Trial Briefs)

Criterion (b) can justify a redevelopment designation when buildings have fallen into such a state of disrepair as to be untenantable. N.J.S.A. 40A:12A-5(b). Despite clear evidence on the record that the current building was not tenantable because of soil borings that had to be taken, the Trial Court still concluded that there was not substantial credible evidence to satisfy criterion (b). This conclusion is contradicted by the Trial Court's own findings.

Specifically, the Trial Court found that Plaintiff's LSRP determined that more aggressive remediation was required in order to address the free product under the floor of the building. (T3, 40:12-16). Findings by the Court noted, "the property is actively undergoing remediation and was leased until -- up until 2023 when it was determined that the remediation would require access to areas that would make it untenable to continue to rent." (T3, 51:11-15). It also found that the trenching required to be done during remediation made it impossible to lease the Property. (T3, 52:15-19).

Despite these findings, the Trial Court found "insufficient evidence based on these facts and the definition of untenable." (T3, 52:15-21). Relying on Webster's definition of "untenable," which is "'not able to be occupied, untenable apartments[,]'" the Trial Court stated that "[t]he term requires disrepair that is untenable." (T3, 52:7-10).

Although the Trial Court erroneously used the word "untenable" instead

of the word "untenantable" which is actually used in N.J.S.A. 40A:12A-5(b), this is a distinction without a difference. Merrium Webster's online dictionary defines "untenantable" in nearly the same way as "untenable", which is "incapable of being occupied or lived in" https://www.merriam-webster.com/dictionary/untenantable?utm_campaign=sd&utm_medium=serp&utm_source=jsonld, last visited 10/1/2024.

Under either word, untenantable or untenable, the same concept is applied: the property must be unable to be occupied. Evidence established that Plaintiff's LSRP needed to dig under/trench the building just to determine the extent of the contamination. (T1, 13:10-23). Even after testing is done, if there are large amounts of impacted soil, the building may have to be removed entirely. (T1, 28:20-29:5). Not only is the building unable to be occupied at this time because of the scope of remediation, it is unlikely to be occupied in the near future.

Because there is substantial, credible evidence that the Property is untenantable, based on the Trial Court's own findings, the Trial Court erred in concluding that the Property did not meet criterion (b).

III. The Trial Court Erred in Concluding that the Record Lacked Substantial Credible Evidence to Satisfy Criterion (d). (Not Raised Below).

Criterion (d) allows designation of a property as a redevelopment area if the area contains buildings or improvements that are dilapidated, obsolete,

overcrowded, have faulty arrangement or design, lack ventilation, light or sanitary facilities, or have a deleterious land use or obsolete layout, and such conditions are "detrimental to the safety, health, morals, or welfare of the community." N.J.S.A. 40A:12A-5(d). This criterion has two parts: (1) one of the conditions must be present, such as obsolescence or deleterious land use; and (2) those conditions must be detrimental. (T3, 54:19-55:2).

As to the first portion of criterion (d), the Trial Court found that the USTs were "clearly improvements" and constituted dilapidated, obsolete and deleterious land uses. (T3, 55:13-20). However, the Trial Court further concluded that there was insufficient evidence on the record to support a finding that the USTs were detrimental to the public health, safety & welfare. (T3, 55:20-56:4). This finding was contrary to the record.

A. Capped Asbestos does not Pose the Same Danger as a Leaking UST. (T3, 26:3-13 & 28:6-24 & Trial Briefs).

During oral argument, the Trial Court focused heavily on Malanga and its findings regarding capped asbestos on the property at issue in that case, presuming that capped asbestos is equivalent to contaminated soil. (T3, 25:20-1). This is simply not true.

In Malanga, a consultant testified that the presence of capped asbestos did not create a danger to people who visited the library. Malanga, supra, 253 N.J. at 303. Evidence indicated that asbestos was present in materials on the interior

and exterior of the building and "would need to be abated before any renovations that might disturb them…" Id. at 300 & 322-323. Asbestos was noted to be "common in buildings of the Library's age…" Ibid. Because there was testimony that the building was safe despite the presence of asbestos, the Court concluded that there was no substantial evidence of detriment to the community's welfare. Id. at 322-323. The Court noted, "[t]o be clear, the Township does not claim the Library's condition was 'detrimental' to public 'safety.' Nor does the governing body suggest the Library posed harm to the 'health' of the community. If either were true, the Township would not have allowed thousands of people to use the Library each week." Id. at 315 (internal citations omitted).

The big difference between the capped asbestos in Malanga and the soil and groundwater contamination in this case is that the asbestos was capped and only dangerous when it the cap is disturbed. According to NJDEP's website,

> There are no state or federal laws that specifically require you to remove asbestos in your home just for the sake of getting rid of it. Most of the time, asbestos in the home is not hazardous.… If you never disturb these materials, you may be able to leave them alone. However, if you know that a needed repair or renovation will disturb the material, you may want to start planning with your consultant to abate the asbestos before the renovations begin.

https://www.nj.gov/health/ceohs/asbestos/asbestos-faq/, last visited 10/4/2024.

Capped asbestos is more akin to petroleum products when they are encapsulated within a tank. Like capped asbestos, when petroleum products are

encapsulated within an oil tank, it is not dangerous. See Ross v. Lowitz, 222 N.J. 494, 502 & 515 (2015) (confirming that maintenance of underground storage tanks is not an abnormally dangerous activity). It is only when the petroleum product is released from these tanks that it becomes dangerous.

New Jersey requires all petroleum leaks to be remediated. N.J.A.C. 7:14B-8.1(b)(4) & N.J.S.A. 58:10A-28. This is because the Legislature has declared the discharge of petroleum products to be detrimental to the public. The Spill Compensation and Control Act, N.J.S.A. 58:10A-23.11, et seq. (the "Spill Act") was enacted for the purpose of "protecting the citizens from the discharge of **petroleum products** and other hazardous substances as a threat to the public health, safety and welfare." Howell v. Waste Disposal, 207 N.J. Super. 80, 91 (App. Div. 1986) (emphasis added). In N.J.S.A. 58:10-23.11a, the Legislature declared that "the discharge of **petroleum products** and other hazardous substances within or outside the jurisdiction of this State constitutes a threat to the economy and environment of this State." (emphasis added).

In its Trial Brief, the Borough requested that the Trial Court take judicial notice of the fact that the discharge of petroleum products and benzene into the environment above NJDEP acceptable levels was detrimental to public health. Courts have recognized that benzene and petroleum-based products are a health hazard to humans. See Mehlman v. Mobil Oil Corp., 153 N.J. 163, 190 (1998);

and see James v. Bessemer Processing Co., 155 N.J. 279, 308 (1998). Plaintiff's LSRP testified that the benzene levels on site were at concentrations 10 times the acceptable limit, where one microgram per liter is the standard and 10 to 11 micrograms per liter are on the Property. (T1, 34:7-13).

Beach Haven's Mayor noted the cancer concern caused by the Property's contamination, explaining, "there does seem to be a lot of cancer on these barrier islands. And it's a concern. I mean, I think that's my concern that I want it cleaned up for health reasons. (T1, 26:24-27:1). She also noted that "[a]s a pathologist and an epidemiologist, there is a, you know, there is a danger in polluted land and there is a -- there has been a huge increase in cancer associated with gas stations throughout the entire country, not just in Beach Haven or along the coastal areas. We are, I think, more vulnerable along the coastal areas. I think many oncologists would tell you that they've seen an increase in cancer in areas like this. So it's a real problem." (T2, 38:24-39:9).

The Trial Court erroneously rejected this information, concluding that "[t]he Mayor's comments were specifically not addressed to the specific detriment from the site but were – in the context of a more general comment as to the risk of soil contamination as to cancer and were not subject to cross-examination as testimony ordinarily would be." (T3, 57:1-6). Studies, however, have shown a causal link between benzene and cancer for decades.

In James, the expert presented studies dating back to 1928 which noted the causative link between benzene found in petroleum products and cancer. James, supra, 155 N.J. at 294. That case also recognized that "'[a]nimal studies . . . have clearly and without question demonstrated the carcinogenic effects of benzene. . . .'" Ibid. The James Court noted, "[a] 1948 report from the American Petroleum Institute indicated that 'it is generally considered that the only absolutely safe concentration for benzene is *zero.*'" Id. at 304. Presumably, this is why the Spill Act findings specifically call out the hazards of petroleum products and the need to remediate the same. N.J.S.A. 58:10-23.11a.

Thus, unlike capped asbestos, which is not required to be remediated, there has been legislative and administrative determinations that the release of petroleum products into the environment is detrimental to the public health, safety and welfare. This is why NJDEP requires remediation. There can be no question that the existence of benzene and free petroleum products in the soil and groundwater is dangerous to the public health and safety.

The New Jersey Legislature has declared that "strict remediation standards are necessary to protect public health and safety and the environment" and "that these standards should be adopted based upon the risk posed by discharged hazardous substances…" N.J.S.A. 58:10B-1.2. Pursuant to N.J.S.A. 58:10B-12(c)(1), NJDEP is tasked with developing soil standards for both

nonresidential and residential properties that are "protective of public health and safety." Importantly, NJDEP is not permitted to require implementation of a remedial action workplan unless sampling reveals the existence of a contaminant above applicable remediation standards. N.J.S.A. 58:10B-12(i). Thus, the mere presence of contamination above NJDEP acceptable levels is a determination that the contaminants pose a detriment to public health and safety.

The Board Planner testified that based on the Property's need for remediation, if the remediation is not completed, the contamination poses a detriment to the public health and safety of the community. (T1, 8:23-9:3). This conclusion is appropriate as a matter of law. Thus, the Trial Court erred in concluding that there was no substantial, credible evidence of detriment.

B. The Trial Court Erred in Concluding that the Evidence on the Record Indicated that the Property was Safe. (See Trial Briefs).

In concluding that the substantial detriment portion of criterion (d) had not been satisfied, the Trial Court's erroneous held that "the LSRP has testified that the property is safe and that they have not impacted surface water or drinking water." (T3, 59:18-20). Importantly, the LSRP never testified that the Property was safe. Rather, the LSRP testified as follows:

> "The concentrations that we've identified on the site **at this point** do not represent a vapor intrusion threat and we haven't found any impacts to surface water or drinking water supply because we're delineating very close to the property.

> And any potential receptors other than the surface water in the bay, which groundwater flows away from the bay or a great distance that were not of concern.

(T1, 39:12-23) (emphasis added). The LSRP included these qualifying words because he had just recently been retained and only done the first round of testing in the weeks before his testimony. In fact, when the Property is ultimately determined to be safe, the LSRP will issue a document called a Response Action Outcome ("RAO"), which will set forth the LSRP's opinion that the Property has been remediated in accordance with applicable standards and is now "protective of public health and safety and the environment." N.J.S.A. 58:10C-14(d). Plaintiff's attorney advised that the LSRP was responsible for determining when the property was cleaned up. (T1, 25:12-19).

No such RAO can be issued at this time because the LSRP has not finished its environmental investigation. The ACO with NJDEP required the LSRP to issue a RAO for soils by March 31, 2024. (Da7, ¶26). That could not happen because the LSRP had not completed the necessary testing to determine what remedial action was required. The LSRP testified, "we did our first groundwater sampling in May. We did some aquifer testing in June, and then last week was our first, say, robust soil investigation." (T1, 29:17-19). Data from this testing was not available for several weeks after the JLUB hearing and would not be provided to the Borough's LSRP until Mid-August 2023. (T1, 18:9-16).

The missing data is necessary to determine the type of remediation needed and the time to complete the same. Plaintiff's LSRP noted, "[w]hat will dictate the length of time for the remediation will be the results of that groundwater monitoring." (T1, 18:15-16). He explained that he cannot determine whether an active or passive remedy is needed because he must determine what needs to be for groundwater first. (T1, 19:21-24). He explained that currently he does not have all of the data on the soil and that the "soil data will help us quantify the impact in advance." (T1, 37:17-20). Plaintiff's LSRP explained,

> The preliminary data says that there's impact underneath the building, and we need to figure out what volume of material is impacted and that will drive how the remediation is conducted. So it could be leave it in place and put a low permeability cap over it, like a building foundation or a concrete driveway. It could be something where we do some type of in-situ treatment, injection of a chemical oxidant into the ground to oxidize the contaminants in place, physical removal by excavation and offsite (indiscernible). But again, the process is iterative, and it's all based on what the data shows.
> MAYOR DAVIS: How long will it take to know that? I mean, if the (indiscernible) the rate you're going now, what do you think?
> MR. PACHUCA: So depending on what the remedy is, if the remedy is to leave material in place, minimum two years of groundwater monitoring.

(T1, 32:21-33:12). It is even possible that the building will need to be removed as part of the remediation. (T1, 28:18-29:5).

The Trial Court erroneously assumed that because some soil had been remediated and the contaminated water had not yet reached the municipal

aquifer that this meant the Property was safe. (T3, 56:10-17). This was simply not true. The reality is that the LSRP simply did not have enough data to reach any conclusions regarding the safety of the Property. "[W]e don't have a book of groundwater data to evaluate concentration trends." (T1, 34:7-8). This is because he undertook the "first groundwater sampling in May" and aquifer testing in June. (T1, 29:17-18). Plaintiff's LSRP testified that NJDEP needs two additional years of quarterly groundwater monitoring just to determine if Plaintiff's chosen method of remediation, natural attenuation, was effective. (T1, 18:24-19:3). If NJDEP cannot make the determination that the Property is safe without that data, how can Plaintiff's LSRP make that determination?

Pursuant to N.J.A.C. 7:26E-1.15(a)(2), a receptor evaluation and vapor intrusion investigation is required to be conducted if free product is identified within 30 feet of a building that is petroleum hydrocarbon based. Testimony before the JLUB was that there was free product in the soil under the building. (T1, 13:1-3). A claim that the concentration levels "at this time" do not pose a vapor intrusion concern is of little comfort when that data does not take into account any information regarding the levels of contamination under the building. Thus, the LSRP cannot say with any certainty that the contamination under the building is at levels where vapor intrusion is not a threat and certainly cannot say with any certainty that the contamination on the Property is safe.

Finally, the record indicates that water pipes and sewer pipes are near the Property and that some of these pipes are over 100 years own and prone to water infiltration into the water and sewer system. (T2, 37:2-8). Plaintiff's LSRP did not present any evidence to refute the claims that contaminated groundwater from the Property could be entering the Borough's water and sewer pipes.

Because "municipal bodies are composed of local citizens who are far more familiar with the municipality's characteristics…[,]" First Montclair Partner, L.P. v. Herod Redevelopment I, L.L.C., 381 N.J. Super. 298, 302 (App. Div. 2005), the Trial Court should have given deference to the Borough's concerns. This is especially true because these facts were undisputed.

IV. The Trial Court Erroneously Focused on Future Potential Condemnation Rather than on Whether there was Substantial Credible Evidence that the Statutory Criteria were Satisfied. (T3, 30:10-31:21)

One reason the Trial Court rejected the Borough's redevelopment designation is that the Trial Court found the potential for condemnation of the Property to be unfair. It was concerned that condemning a property undergoing active remediation would be unreasonable because it would discourage expenditures for cleanup and would disincentivize remediation work. (T3, 51:15-24). Whether or not condemnation is appropriate, however, is not the standard for determining whether a property qualifies as a redevelopment area.

A property is allowed to be designated as a Condemnation Redevelopment

Area whenever a municipality establishes by substantial credible evidence that the area satisfies one of the criteria set forth in N.J.S.A. 40A:12A-5. Although the propriety of the actual taking is not a valid consideration at the redevelopment designation stage, it may be an appropriate consideration when the municipality decides to move forward with condemnation.

Redevelopment is a multi-step process. Designation of a property as a Condemnation Redevelopment Area does not automatically result in the taking of a property. Before property can be acquired by eminent domain under the LRHL, certain steps must be taken. The first step is to designate the area as a redevelopment area pursuant to N.J.S.A. 40A:12A-5. Designation of a Condemnation Redevelopment Area does nothing more than establish the public purpose required in the event a municipality chose to acquire property by eminent domain. See N.J.S.A. 40A:12A-6(c) and Borough of Glassboro v. Grossman, 457 N.J. Super. 416, 428 (App. Div. 2019) (stating "[a] municipality's designation of property within its borders as a redevelopment area satisfies the constitutional "public purpose" requirement for eminent domain under the Blighted Areas Clause, N.J. Const. Art. VIII, §3, ¶1").

Once a property has been designated, the municipality must adopt a redevelopment plan, setting forth a plan for development of the redevelopment area and identification of property to be acquired, N.J.S.A. 40A:12A-7 &

N.J.S.A. 40A:12A-8, and must identify a project to be undertaken pursuant to that redevelopment plan, before it is authorized to exercise eminent domain. Borough of Glassboro, 457 N.J. Super. at 430-431 & 435.

Protection continues to be available, even after designating a property as a Condemnation Redevelopment Area. Property owners whose property is taken by way of eminent domain continue to have the right of payment of just compensation for any land that is taken. 62-64 Main St., supra, 221 N.J. at 155. A property owner is also free to pursue a redevelopment agreement with the municipality to undertake redevelopment of their own property. Id. at 161-162.

Here, Plaintiff is also free to pursue a redevelopment agreement with Beach Haven. The Borough Council expressed a clear willingness to consider such a redevelopment agreement. (T2, 39:9-40:9). The Borough noted it has no intention of acquiring the Property at this time and has no specific project for which acquisition of the Property would be required. See Borough of Glassboro, 457 N.J. Super. at 430-431 & 435. The JLUB specifically recommended that condemnation not be used unless the Plaintiff did not remediate the Property timely. (T1, 52:1–53:11). The governing body shared that sentiment.

> We as Council right now with this resolution, are not doing anything to affect the owners of this property. We're not taking over the job of cleaning up this property. What we're doing is telling the owners of this property that there's a contaminated site there that's been there for a very long time, and there has been no remediation. There has been nothing done to clean it up.

(T2, 35:15-22). Another Councilperson agreed, explaining:

> We are not taking the property. No one wants to take the property. This is really difficult. I would say that sort of in response to the email we received today, to the best of my knowledge, we haven't had sufficient information yet from their LSRP at this time, to warrant a postponement.
> We made it clear at the meeting when we met with you all that, we all know that DEP is famous for postponing and postponing and postponing, and we made it clear that we weren't, as a council, interested in postponements at this time, just because we wanted to continually move forward and to be able to ensure that it continually moves forward…

(T2, 41:7-17).

In addition, the law provides protections from arbitrary acquisition of properties undergoing remediation. Ordinarily, a municipality that has acquired a property by eminent domain is granted qualified immunity from liability for cleanup costs to complete remediation. N.J.S.A. 58:10-23.11g(d)(4). No liability protection is granted if a governmental entity acquires property by eminent domain when it is "being remediated in a timely manner at the time of the condemnation or eminent domain action." N.J.S.A. 58:10-23.11g(d)(4). Because the law disincentivizes acquisition of property that is actively and timely being remediated, the Trial Court's concerns regarding condemnation are unwarranted.

By conflating designation of the Property as a Condemnation Redevelopment Area with the actual exercise of the power of eminent domain, the Trial Court relied upon inapplicable considerations for determining whether

the Property satisfied one or more criteria under N.J.S.A. 40A:12A-5. Consideration was limited to whether the redevelopment designation was supported by substantial, credible evidence on the record. Because substantial, credible evidence exists to conclude that the Property satisfied criterion (b) and (d), the Trial Court erred in invalidating the redevelopment designation.

V. Plaintiff has not Timely complied with its Remediation Obligations. (T3, 11:18-12:3 & 32:22-33:3 & Trial Briefs)

Designation of the Property as a Condemnation Redevelopment Area, as opposed to a Non-Condemnation Redevelopment Area, was designed to incentivize expeditious remediation. This Property has been contaminated for over thirty (30) years, and Plaintiff has failed to meet nearly every remediation deadline imposed upon it.

In overturning the redevelopment designation, the Trial Court erroneously found that "Plaintiff certifies it remains in compliance with the terms of the ACL (sic)." (T3, 40:23-24). No such certification was ever filed. The only statement in the record regarding compliance with the Administrative Consent Order ("ACO") is a statement in the verified Complaint that said, "Plaintiff has been compliant with the terms of the ACO from its execution **through the date of this Complaint**." (Da4, ¶15) (emphasis added). The Verified Complaint failed to contain the language required in affidavits that "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing

statements made by me are willfully false, I am subject to punishment." R. 1:4-4(b). (Da17). See R. 4:67-2(a) (requiring Orders to Show Cause be brought by "complaint, verified by affidavit made pursuant to R. 1:6-6…")

A finding that Plaintiff was timely remediating the Property and was in compliance with the ACO is not supported by evidence. The Trial Court's reliance on the Verified Complaint as evidence of compliance with the ACO was inappropriate because: (1) the verified complaint was not certified as to the truthfulness of the facts under penalty of perjury (Da17); and (2) the truthfulness of the facts was only valid as of October 5, 2023, and not as of the date of Trial.

Although contamination on the Property was first discovered in 1991, Plaintiff missed the first remediation deadline that required completion of a remedial investigation by May 7, 2014. (Da26, ¶6). Plaintiff took absolutely no action until July 2014 when it hired its first LSRP, which prompted NJDEP to take direct oversight. (Da144). After hiring the LSRP, Plaintiff had until May 6, 2019, to file a final remedial action report. (Da26, ¶7). Again, Plaintiff failed to take timely action to submit a Remedial Investigation Report to the NJDEP, resulting in NJDEP filing a Complaint in Beach Haven Municipal Court on September 16, 2020. (Da26, ¶4 & ¶5). Plaintiff did not submit the Remedial Investigation Report to DEP until December 2, 2020. (Da, ¶9).

Execution of the ACO with NJDEP was required to resolve Plaintiff's past

violations. (Da25-Da33). Under the ACO, Plaintiff was required to complete remediation, submit a final remediation report for soils, and apply for a remedial action permit for groundwater by March 31, 2024 (Da29, ¶25 & ¶26). Testimony by Plaintiff's LSRP indicated that even this deadline would not be satisfied.

Evidence established that not only was Plaintiff's prior remedial investigation incomplete because additional testing needed to be done (T1, 18:3-10 & 29:17-19 & 34:7-8), but also that Plaintiff could not complete remediation by the March 31, 2024, deadline. Plaintiff's LSRP testified that for groundwater alone it would take at least two years before remediation can be complete. (T1, 33:7-12). He explained, "[w]hat will dictate the length of time for the remediation will be the results of that groundwater monitoring. We expect that to go for at least two years with samples collected on a quarterly basis." (T1, 18:15-18). Plaintiff's attorney said it would not be until summer of 2024 until they had the soil contamination "under control" and the LSRP "knows what needs to be done…" (T1, 39:4-11). Clearly, if the soil contamination was not going to be "under control" until at least the summer of 2024, Plaintiff was in no position to comply with the obligation in the ACO to complete remediation of the soils by March 31, 2024.

Although Plaintiff asserts that it was in compliance with the ACO as of October 5, 2023, the date of the Complaint, evidence established that Plaintiff

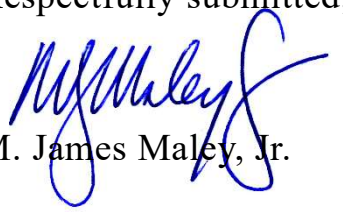
would be out of compliance with the ACO by March 31, 2024. No updated certification from Plaintiff was ever filed after March 31, 2024, and before the June 28, 2024 trial to prove that Plaintiff was still in compliance with the ACO. Presumably, this is because any such certification would be untrue.

Evidence on the record fully supports the Borough's conclusion that Plaintiff has failed to timely remediate the Property. Thus, the Trial Court erred in concluding that Plaintiff was timely remediating the Property and that it was in compliance with the ACO. Because the Trial Court's decision was predicated upon factual findings that were against the weight of the evidence, the Trial Court's decision must be overturned.

CONCLUSION

For the reasons set forth above, Defendants, Borough of Beach Haven, Beach Haven Municipal Council, Mayor Nancy Taggart Davis, and the Borough of Beach Haven Land Use Board respectively request that the decision of the Trial Court below be reversed and the designation of Block 205, Lots 1 & 2 on the official tax maps of the Borough of Beach Haven be upheld.

Respectfully submitted,



Dated: October 7, 2024

M. James Maley, Jr.

BEACH HAVEN AUTOMOTIVE, INC.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION APPELLATE DOCKET #A-003860-23
PLAINTIFF/RESPONDENT	:	
vs.	:	CIVIL ACTION
BOROUGH OF BEACH HAVEN and	:	APPEAL FROM ORDER OF THE SUPERIOR COURT, OCEAN COUNTY LAW DIVISION DATED JUNED 28, 2024
BEACH HAVEN MUNICIPAL COUNCIL and	:	SAT BELOW: HON. FRANCIS R. HODGSON, JR., A.J.S.C.
NANCY TAGGART DAVIS, in her capacity as Mayor of Borough of Beach Haven and	:	TRIAL COURT DKT NO: L-2290-23
BOROUGH OF BEACH HAVEN LAND USE BOARD	:	
DEFENDANTS/APPELLANTS	:	

BRIEF OF RESPONDENT BEACH HAVEN AUTOMOTIVE, INC.
DATED: November 6, 2024

Weir LLP
On the Brief: Steven E. Angstreich, Esquire
On the Brief: Caroline J. Bojarski, Esquire
Attorney I.D. Nos.: 019441979/331365
20 Brace Road, Suite 201
Cherry Hill, NJ 08034
(856) 429-7750
sangstreich@weirlawllp.com
cbojarski@weirlawllp.com

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, RULINGS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES & CODES

Rules

I. PRELIMINARY STATEMENT

Plaintiff, Beach Haven Automotive, Inc., brought this action seeking to declare the Borough of Beach Haven's Resolution 168-2023 ("Resolution") designating their Property in need of redevelopment invalid and stricken. In enacting the Resolution, Defendants determined that the conditions set forth in N.J. Stat. Ann. §§ 40A:12A-5(b) and (d) (the "LRHL") necessary for such a declaration were extant at the Property. The trial court disagreed, struck the Resolution and declared it invalid. In their Appellate Brief, Defendants mischaracterize the trial court's reasoning in order to persuade this Court to reverse the trial court's Order.

Defendants contend that the trial court erred by failing to give deference to their designation of the Property as a redevelopment area. Such designations are only entitled to deference if supported by "substantial evidence on the record" showing that the statute's criteria have been met. The trial court found that Defendants' designation was not based on substantial credible evidence and instead, was arbitrary, capricious, unreasonable, and contrary to law. The trial court properly found that the mere existence of ongoing environmental remediation pursuant to a Consent Order with the NJDEP does not support a §12A-5(d) finding that the property is detrimental to the safety, health, morals, or welfare of the community.

Further, ongoing remediation is not factual support for a conclusion that the Property and building are "dilapidated, obsolete, overcrowded, improperly arranged

or designed, or lacking ventilation, light and sanitary facilities." And, finally, the uncontroverted evidence of record confirms the trial court's finding that the Property does not present a detriment to the public safety, health morals or welfare of Borough residents. For these reasons, and the reasons discussed in depth below, Plaintiff requests that the Court affirm the trial court Order finding Resolution 168-2023 invalid and stricken.

II. PROCEDURAL HISTORY

Plaintiff adopts and concurs with the Procedural History set forth in Appellant's Brief, p. 3-5.

III. COUNTERSTATEMENT OF FACTS

Since 1972, Plaintiff has owned the Property located at 1200 North Bay Avenue, Beach Haven, NJ 08008 and 305 Twelfth Street, Beach Haven, NJ 08008 (the "Property"). Commencing in July 2014, the Property has been subject to environmental remediation under the New Jersey Department of Environmental Protection (NJDEP) Licensed Site Remediation Professional (LSRP) program. (Da143-145). In that year, Plaintiff retained an LSRP to investigate and determine a remediation plan for the Property. Under the LSRP's direction between 2014 and 2022, Plaintiff excavated over 59.97 tons of contaminated soil from the Property, conducted groundwater sampling to confirm that contamination originating from the

Property was not reaching offsite receptors, and submitted various reports to NJDEP. (Da143-145; T1, 12:9-17).

In early 2022, Plaintiff and NJDEP entered into an Administrative Consent Order (ACO) for the purpose of establishing new case-specific timeframes for completing the remediation due to the difficulty in remediating contamination under the two (2) concrete layers which form the floor of the building. (T1, 12:18-21). The Consent Order did not require Plaintiff to conduct further testing of off-site receptors (the Borough's drinking water production wells are potential receptors) based upon the data Plaintiff had submitted which showed that the contamination had not migrated off site. (Da29 – ACO).

For over 50 years, the Property had been actively operated by Plaintiff. Most recently relevant to this proceeding, on January 26, 2018, Plaintiff entered into a commercial lease with an initial term of five years expiring on January 31, 2023, and an option for a five-year renewal period (the "Lease"). (Da51; T1,13:6-10). In January 2023, Plaintiff retained a new LSRP, Mark Pietrucha from Woodard & Curran. (Da143-145; T1, 29:12-15). In January 2023, Mr. Pietrucha determined that more aggressive remediation might be necessary to address free product that had been discovered under the floor of the building on the Property. (T1, 13:16-20). In order to guarantee the unfettered access to the building interior, Plaintiff decided not to renew the lease. (T1, 13: 21-23). Between February and April of 2023, Mr.

Pietrucha continued to collect data from the Property and monitor conditions and developed a scope of work for evaluating remediation options for soil and groundwater at the Property. (Da145). Plaintiff remains in compliance with the terms of the ACO.

Land Use Board Investigation

On May 25, 2023, the Mayor and Council adopted Resolution 121-2023, directing the Joint Land Use Board and the Borough of Beach Haven to conduct an investigation to determine whether the Property should be designated as a Condemnation Area in Need of Redevelopment based on the criteria set forth in Section 5 of the LRHL, N.J.S.A. 40A:12A-5. The Land Use Board's investigation consisted entirely of commissioning and then reviewing the Preliminary Investigation Report with Addendum prepared by Frank J. Little, Jr., P.E., P.P., C.M.E., in June 2023 (the "Report"). (T1, 7:22-8:8; Da35-50).

The Report submitted stated that all uses of the Property were discontinued around July 2017.[1] (Da39). The Report states that the discontinued use satisfied the criteria for designation of the Property as a Condemnation Area in Need of Redevelopment set forth in N.J.S.A. 40A: 12A-5(b). (Da39). Further, the Report

[1] The correct information that the property was unoccupied for only 6 months before the hearing was presented thereafter, but that did not alter the conclusion that the property was unoccupied for a sufficient period of time to meet the criteria.

states that the building on the Property is in so great a state of disrepair as to be "untenantable." (Da39).

The Report also summarized the ongoing environmental remediation at the Property and alleged that the remediation makes the Property eligible for designation as a Condemnation Area in Need of Redevelopment based on the criteria set forth in N.J.S.A. 40A: 12A-5(d). (Da39). The Report does not make any findings or statements about the effect, if any, of the contamination at the Property on the surrounding Borrough, but simply states that the Property is subject to remediation and therefore the criteria in subsection (d) is satisfied. (Da39).

Land Use Board Hearing

On July 17, 2023, the Land Use Board conducted a public hearing to vote on whether to recommend to Borough Council that the Property met the criteria listed in N.J. Stat. Ann. § 40A:12A-5 and should therefore be designated a condemnation redevelopment area. (T1, 6:21-7:9). At the Land Use Hearing, copies of the Report were given to all Land Use Board members to consider when voting whether to recommend that the Borough Council adopt the Report's findings. (T1, 7:22-24).

At the Land Use Hearing, Mr. Pietrucha and Plaintiff's environmental attorney, Catherine Ward, presented evidence contradicting the "facts" alleged in the Report. Contrary to the Report's statement that the Property had not been in use since July 2017, Ms. Ward stated that the Property was the subject of a commercial

lease executed on January 26, 2018, with an initial term of five years expiring on January 31, 2023, and an optional five-year renewal period. (T1, 12:9-14:3). Ms. Ward further stated that, in January 2023, Mr. Pietrucha found that additional remediation was needed under the floor of the building on the Property. (T1, 13:16-20). Plaintiff then notified the tenant that the Lease would not be renewed in order to allow for the possibility of a more aggressive remediation of contamination underneath the building. (T1, 13: 21-23).

Mr. Pietrucha testified at the Land Use Hearing that the condition of the Property has not caused any contamination of the Borough drinking water supply. (T1, 39:12-23 ("The concentrations that we've identified on the site at this point do not represent a vapor intrusion threat and we haven't found any impacts to surface water or drinking water supply"). Ms. Ward presented evidence that, because of the structure of the municipal drinking water wells, it is virtually impossible for contamination from the property to impact the drinking water supply. (T1, 14:7-25 ("…where this contamination [at the Property] is is in the upper aquifer. It's a layer of water if you will. Where the municipal drinking water wells are is 100 feet down and separated by an impermeable layer."). Ms. Ward also stated that the municipal groundwater supply is almost a mile away from the Property and there is no way that the contamination has or could travel that far or travel deep enough into the soil to reach the municipal water supply. (T1, 14:21-24 ("Plus [the municipal water supply]

is almost a mile away. So there is literally no way that whatever the minor contamination is that is just within feet of our property line can go that far [away] and that far down".); (*See also* T1, 23:6-24:8).

Despite this testimony showing that the Property poses no risk to the safety of Borough residents, the Borough did not have its own LSRP/consultant testify to the contrary. All that the Borough offered was the concerns Mayor Davis voiced about health risks posed by the Property. (T1, 26:18-27:1 ("I'm the mayor so I'm…we're concerned. I'm also an epidemiologist…and I, having read the book Tom's River, and knowing a lot about epidemiology doesn't really show cause and effect but it does show association. And there does seem to be a lot of cancer on these barrier islands."). Mayor Davis then stated that she wants to designate the Property as a redevelopment area in order to give the Borough control over the pace at which the ongoing remediation proceeds. (T1, 26:25-27:4) ("I think that's my concern that I want it cleaned up for health reasons…I just want to make sure that it's cleaned up in a timely manner"). Mayor Davis stated that her dialogue at the Land Use Hearing with Mr. Pietrucha was her first ever discussion about the Property with an expert. (T1, 28:18-20).

Other testimony from the Land Use Hearing shows that Board members wished to speed up the pace of the ongoing remediation of the Property. (T1, 34:18-25) (Moderator: "I think the Borough got frustrated that things weren't moving

along. And in order to quote light a fire under the applicant they went with this procedure."). James Maley, Jr., the Borough counsel addressed the Land Use Board before the vote saying, "You just need to help…move the [remediation] project along". (T1, 44: 3-4). Maley then re-focused the Land Use Board on the evidence they were to consider in voting on the recommendation. (T1, 44:14-17) ("What matters is Frank [Little's] report. Does it fit under either one of those criteria today."). Maley did not encourage the Board to consider the testimony they had just heard establishing that the Property does not present a health risk to the Borough. Just before the Board voted to approve the redevelopment recommendation, Mayor Davis stated, "I think we're obligated to vote for rehab…because it does meet that criteria" without citing any evidence showing that the criteria had been met. (T1, 46:2-8). Ultimately, the Land Use Board relied upon the Report and voted to recommend a condemnation redevelopment designation of the Property to Borough Council. (T1, 52:1-53:12).

Borough Council Meeting

On July 27, 2023, Borough Council held a public hearing to address the Board's recommendation. (*See* T2). Council Members and Mayor Davis mischaracterized the evidence presented by Plaintiff at the Land Use Hearing, and shared with the Borough's LSRP/consultant that the condition of the Property could not impact the town drinking water supply. (T2, 37:2-12 (Council Member Battista:

"I take offense to the argument that our wells aren't close enough to the site to be affected."); 38:4-40:19 (Mayor Davis: "there has been a huge increase in cancer associated with gas stations throughout the entire country... We are, *I think*, more vulnerable along the coastal areas. *I think* many oncologists would tell you they've seen an increase in cancer in areas like this") (emphasis added)). Again, there was no proffer from the Borough's own LSRP/consultant. The Borough Council voted to approve the redevelopment designation by enacting Resolution 168-2023. (T2, 48:4-17; Da19-22).

IV. LEGAL ARGUMENTS

A. Standard of Review.

Under the LRHL, before a property or delineated area may be determined to be in need of redevelopment, "the governing body of the municipality must find at least one of the conditions set forth in N.J.S.A. 40A:12A–5." *Hirth v. City of Hoboken*, 337 N.J. Super. 149, 161 (App. Div. 2001); N.J. Stat. Ann. § 40A:12A-5. Those conditions include:

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

and

> d. Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community. N.J. Stat. Ann. § 40A:12A-5(d).

A governing body's determination that a property is in need of redevelopment is subject to judicial review to determine whether the body's factual findings are "supported by substantial evidence" or whether their findings are "arbitrary, capricious, and unreasonable" and "contrary to law". N.J. Stat. Ann. § 40A:12A-6(b)(5)(c); *Hirth*, 337 N.J. Super. at 161; *Willoughby v. Plan. Bd. of Twp. of Deptford*, 306 N.J. Super. 266, 273 (App. Div. 1997); *Spruce Manor Enterprises v. Borough of Bellmawr*, 315 N.J. Super. 286, 293 (Law. Div. 1998). A governing body's designation of a property as a redevelopment area is only entitled to deference from the court if such designation is supported by "substantial evidence on the record" showing that the LRHL criteria have been met. *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 191 N.J. 344, 372 (2007). Governing bodies and planning boards "have an obligation to *rigorously comply* with the statutory criteria for determining whether an area is in need of redevelopment." *62-64 Main St., L.L.C. v. Mayor & Council of City of Hackensack*, 221 N.J. 129, 156 (2015) (emphasis added).

To support a redevelopment designation, a municipality "must establish a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met". *Gallenthin*, 191 N.J. at 373. The record

must instead contain substantial credible evidence that the designation satisfies the requirements of the LRHL. *Malanga v. Twp. of W. Orange*, 253 N.J. 291, 314 (2023) (citing *ERETC, L.L.C. v. City of Perth Amboy*, 381 N.J.Super. 268, 277 (App.Div.2005)). "The standard requires not just 'some evidence in the record' to support a need-of-redevelopment determination but substantial evidence." *Township of Cinnaminson v. Cove House*, LLC, 2023 WL 8368761, *4 (App.Div. 2023) (not reported). The substantial evidence standard is not met if a municipality's decision is supported by only the net opinion of an expert. *Gallenthin*, 191 N.J. at 373 (citing *ERETC*, 381 N.J.Super. at 277-81).

An Appellate Court's role in assessing a redevelopment designation is to review the decision of the trial court to ensure that the trial court did not commit an error of law. N.J. Ct. R. 1:7-4(a) ("The court shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon in all actions tried without a jury"); *Est. of Doerfler v. Fed. Ins. Co.*, 454 N.J. Super. 298, 301-02 (App. Div. 2018) (finding that the trial court's obligation to set forth factual findings and legal conclusions exists because the function of the appellate court "is to review the decision of the trial court, not to decide the motion *tabula rasa*"); *Shazo v. Zoning Bd. of Adjustment of Borough of Tenafly*, 2023 WL 8427012, *2 (App. Div. 2023) (applying the finding in *Doerfler* to an appeal from a decision on a complaint in lieu of prerogative writ) (not reported).

Defendants claim that the Property meets the criteria set forth in N.J. Stat. Ann. §§ 40A:12A-5(b) and (d), but the trial court properly applied the above-described legal standard and determined that Defendants' claims are not supported by substantial credible evidence and the designation of the Property as a redevelopment area is arbitrary, capricious, unreasonable, and contrary to law.

B. The Arguments in Sections II.A.3 and III of Defendants' Brief Were Not Raised Before the Trial court and are Therefore Waived.

"An issue not raised below will not be considered for the first time on appeal." *N. Haledon Fire Co. No. 1 v. Borough of N. Haledon*, 425 N.J. Super. 615, 631 (App. Div. 2012) (citing *Brock v. Pub. Serv. Elec. & Gas Co.*, 149 N.J. 378, 391, (1997)); *State v. Walker*, 385 N.J. Super. 388, 410 (App. Div. 2006) ("Generally, issues not raised below, even constitutional issues, will not ordinarily be considered on appeal unless they are jurisdictional in nature or substantially implicate public interest."). Courts have declined to consider objections to the constitutionality of a statute or common law rule when such objections are raised for the first time on appeal, finding that these objections do not constitute "important matters of public concern". *Alan J. Cornblatt, P.A. v. Barow*, 153 N.J. 218, 247 (1998) (superseded on other grounds); *Ferraro v. Demetrakis*, 167 N.J. Super. 429, 431 (App. Div. 1979) (superseded on other grounds).

Defendants raise for the first time on appeal the arguments in Sections II.A.3 and III of their Brief. In Section II.A.3, Defendants argue for the first time that the

trial court based its ruling in part on its determination that the Property was not abandoned, even though a finding of abandonment is not necessary to determine that the Redevelopment Designation criteria in N.J.S.A. 40A:12A-5(b) has been met. In Section III, Defendants argue for the first time that the trial court erred in finding that the record lacked substantial evidence to support a finding that the Property satisfies the criteria in N.J.S.A. 40A:12A-5(d). Defendants admit that they failed to raise either of these arguments before the trial court, and, therefore, Plaintiff submits, these arguments should not be considered on appeal.

C. Defendants' Argument that 5(b) is Satisfied Fails.

1. Defendants Misstate the Trial court's Findings Related to Discontinuance of Use.

Defendants mischaracterize the trial court's holding regarding discontinuance of use as set forth in N.J.S.A. 40A:12A-5(b). Defendants erroneously claim that the trial court found that the criteria in N.J.S.A. 40A:12A-5(b) was not met because the Property was "not unoccupied or unutilized in a way that was detrimental to the welfare of the community". (Db21) However, the trial court only applied the "detrimental to the welfare of the community" criteria from Subsection 5(d) to the lack of occupation/utilization of a building criteria in Subsection 5(b) in the introductory sentence cited by Defendants. (T3, 44:20-23) In the trial court's actual analysis of whether the N.J.S.A. 40A:12A-5(b) criteria were supported by substantial evidence, it did not address the issue of a detriment to community

welfare. (T3, 49:7-53:8). Rather, the trial court addressed the meaning of the statutory phrases "discontinuance of use" and "significant vacancies" (T3, 49:17-51:11), considered the policy implications of determining that discontinuance of use may be found where a property is undergoing construction or remediation (T3, 49:20-51:25), assessed the evidence in the record in support of Defendants' argument that the Property was "untenantable" (T3, 52:1-23), and ruled on Defendants' argument that the Property was substantially vacant to warrant designation under Subsection 5(b) (T3, 52:24-53:8).

At no point in the Subsection 5(b) analysis and ruling did the trial court consider whether the Property constitutes a detriment to the welfare of the community. Rather, the trial court properly considered the "detrimental to the welfare of the community" criterion only in relation to its analysis of N.J.S.A. 40A:12A-5(d).

In its analysis of whether the Property satisfies the criteria in N.J.S.A. 40A:12A-5(b), the trial court properly considered only whether the record contained substantial evidence to support the Township's argument that the Property was subject to redevelopment designation based on discontinuance of use or significant vacancies and found that these criteria had not been met. Defendants' argument that the trial court committed an error of law is unavailing.

2. The Trial Court Properly Found that Defendants' Argument Related to Remediation as Use is Irrelevant.

Defendants argue that remediation is an "accessory use" of a property only while a "primary use" is ongoing. (Db24-26). According to Defendants, once the "primary use" has ceased or "closed down", remediation can no longer be considered a "use" of the property when occurring on its own. (Db25-26). Defendants did not raise this argument before the trial court but rather raised the argument that the Property *could* have been used despite the ongoing remediation. (T3, 21:15-22:4 (Court: My first question was during the period of… remediation, can we really consider the property as being discontinued as being used? It can't be used. Defendant's counsel: …Absolutely. People use their properties during remediation all the time. All the time… remediation happens on businesses and properties that are in operation all the time.)). Despite the opportunity to do so, Defendants did not argue before the trial court that remediation in and of itself does not constitute a use of the Property. Instead, Defendants argued that Plaintiff could have continued to use the Property for other purposes during all stages of the ongoing remediation. This Court need not consider Defendants' argument in Section A.2 because Defendants failed to raise this argument before the trial court.

If this Court decides to consider Defendants' argument in Section A.2, Defendants' dissection of "accessory" versus "primary" use is irrelevant to the question of whether the criteria for redevelopment designation set forth in N.J.S.A.

40A:12A-5(b) are supported by substantial credible evidence. The existence of ongoing remediation is not one of the enumerated criteria under Subsection 5(b) or any other section of the statute. As discussed above, N.J.S.A. 40A:12A-5(b) states that a property may be found in need of redevelopment based on:

> The discontinuance of the use of a building or buildings previously used for commercial, retail, shopping malls or plazas, office parks, manufacturing, or industrial purposes; the abandonment of such building or buildings; significant vacancies of such building or buildings for at least two consecutive years; or the same being allowed to fall into so great a state of disrepair as to be untenantable.

At the July 17, 2023 Land Use Hearing, Plaintiff provided uncontroverted evidence that the Property was the subject of a five (5) year commercial lease executed on January 26, 2018 that did not expire until January 31, 2023. (T1, 12:9-14:3). And the reason that the five-year option had not been exercised and the lease continued was Plaintiff's decision to address remediation of the area below the building floor. Ms. Ward testified that the environmental remediation consultant hired by the Property owners found that additional remediation was needed under the floor of the building on the Property. (T1, 13:16-20). As a result, Plaintiff notified the tenant that it would not be renewing or extending the lease so it would not disturb the tenant if aggressive remediation were needed. (T1, 13: 21-23). However, the remediation was only temporary and, thus, the building could be relet when the temporary condition warranted.

Prior to the end of January 2023, the Property remained actively operated and occupied. Council's determination on July 27, 2023 that the criteria in subsection (b)—discontinuance of use of the Property for at least two years—existed was therefore not supported by credible evidence, but rather was entirely based on the net opinion of Little who was simply wrong and who failed to incorporate the correct facts supplied by Plaintiff prior to the Board's formal consideration of the Report.

3. To the Extent that this Court Considers Defendants' Argument Regarding Evidence of Abandonment, Defendants Mischaracterize the Trial Court's Consideration of the Definition of "Abandoned".

Defendants claim that the trial court determined that lack of abandonment of the Property prevents a finding of discontinuance of commercial use. (Db28). Defendants mischaracterize the trial court's findings. As stated in Section IV.B., above, Defendants' argument in Section A.3 of their Brief is waived because it is raised for the first time on appeal. Should this Court determine that this argument is not waived, Plaintiff addresses same below.

The trial court pointed out Defendants' reliance on the "discontinuance of use" criteria and stated that "discontinuance of use" is not defined in the LRHL. (T3, 49:7-19). The trial court stated that its aim was to determine whether "discontinuance of use" may be found where a property is actively undergoing remediation of an environmental hazard. (T3, 49:20-24). In order to determine the definition of "discontinuance of use," the trial court turned to definitions found in

the Abandoned Properties Rehabilitation Act ("APRA"), which includes definitions specifying when a property is considered abandoned for APRA purposes. (T3, 50:14-19). The trial court specifically stated, "*while this court recognizes the distinction between abandonment and the terms used [in the LRHL]*, it is this Court's view that the definition [of abandonment] has application in this case". (T3, 20-23) (emphasis added). The trial court simply referenced the APRA as an extrinsic aide in determining the meaning of an undefined term in the LRHL—namely "discontinuance of use"—and determined that discontinuance of use is not an appropriate finding where active remediation is ongoing. (T3, 50:23-51:21).

The trial court did not require a finding of abandonment in order to determine that use of a property has been discontinued, but rather used the definition of "abandoned property" as found in a different statute—the APRA—to interpret the phrase "discontinuance of use" as it appears in the LRHL and correctly concluded that there had been no discontinuance of use.

4. The Trial Court Correctly Found that the Property does not Exhibit Significant Vacancies.

Defendants argue that the use of the Property for storage does not qualify as "use" of the Property because such a use constitutes a zoning violation. (Db28-29). The trial court addressed this argument and found that, "[a]lthough it may be true that the use for storage was not in accordance with the land use law the property was not vacant." (T3, 53:1-3) This conclusion is not an error of law as Subsection 5(b)

of the LRHL requires that a property exhibit "significant vacancies of [a] building or buildings for at least two consecutive years" in order to be properly designated as an area in need of redevelopment. N.J. Stat. Ann. § 40A:12A-5(b). The trial court looked at the evidence in the record showing that the Property had been leased and used by the tenant for storage and determined that this evidence did not support a finding of "significant vacancy". (T3, 53:1-8).

Even if the Property were used for storage, this is not an illegal use under the Borough of Beach Haven Zoning Code. The relevant zoning ordinance-- § 212-14 Use Regulations: BD Business District—does not list storage as a prohibited use. § 212-14(B) (The ordinance prohibits "fish packing, shipping, canning, processing or storage", meaning only storage associated with processing fish is prohibited). This ordinance defines the permitted uses in the Business District broadly as "Any retail shopping facilities or service establishment which supplies commodities or performs a service primarily for residents of the surrounding neighborhood". § 212-14(A)(2). Providing storage facilities is a service and therefore a permitted use of property in the Business District.

In addition, the Property owners themselves were not the ones operating the Property. The Property owners were leasing the property until January 2023, and, while they were aware that the Property was not being used as a retail establishment due to the ongoing remediation, they were not aware of the nature of their tenants'

use of the Property. Regardless, the trial court correctly concluded that Defendants had not presented credible evidence establishing "substantial vacancies."

5. The Trial Court Correctly Found that the Property is not Untenantable.

Defendants allege that the Property satisfied the "untenantable" criteria in Subsection 5(b) because occupancy of the building on the Property was not possible while the LSRP needed to dig up the slab under the building. (Db40). The trial court found that Defendants' argument that the Property was untenantable was not supported by substantial evidence, saying "although the board planner testified that there was a basis for issuance of [a] summons for failure to maintain the property, the code enforcement officer had not [issued a summons]… Further, [Plaintiff was] remediating the property which required trenching and the removal of large amounts of contaminated soil… during this phase it was impossible to lease the premises. It is this Court's conclusion that… [t]here is insufficient evidence in the record for the board to have concluded that the disrepair was untenantable". (T3, 52:10-23) The extent of Defendants' evidence that the Property was untenantable is the unsupported testimony of the board planner that "there was a basis" for issuance of a summons that had not in fact been issued. Plaintiff's testimony at the Land Use Hearing further establishes that occupancy of the building was possible and, in fact, that the tenant wanted to renew the lease in January 2023, but Plaintiff declined and allowed the lease to expire until the remediation at the building was completed. (T1,

13:6-10 ("A lease has been in place since… five years ago… We allowed it to expire.")).

Plaintiff did not testify that the LSRP would need to "dig up the slab under the building." Rather, Plaintiff testified that, in late 2022, the LSRP "had been going in[to the building] to… try to see what was under the slab… it became pretty clear… that there was some additional work that needed to be done… So we allowed the lease to expire so that we could get in there and dig up whatever needed to be dug up". (T1, 13:11-23). Plaintiff testified to a need to "dig up whatever needed to be dug up." There is no evidence that this excavation included digging up the slab under the building as Defendants claim.

Rather, Mr. Pietrucha, Plaintiff's LSRP testified that, as of July 17, 2023, he still had not yet determined the best way to remediate the area underneath the building. (T1, 32:21-33:6 ("[The method of remediation] could be leave it in place and put a low permeability cap over it, like a building foundation or a concrete driveway. It could be something where we do some type of in-situ treatment, injection of a chemical oxidant into the ground to oxidize the contaminants in place, physical removal by excavation… But again, the process is iterative, and it's all based on what the data shows.")). Further, Plaintiff could have performed this remediation work while extending the lease that had been in place since 2018 but chose not to in order to facilitate easier access to the site. (T1, 13:6-10). The mere

fact that Plaintiff made the decision to let the lease expire in order to more readily continue remediation does not establish that the Property was in such a state as to be "untenantable" in the manner contemplated by the LRHL.

D. Defendants' Argument that the Property Meets the Criteria Set Forth in Subsection 5(d) is Not Supported by Substantial Credible Evidence.

As discussed in Section IV. B., above, Defendants, by their own admission, failed to raise the argument set forth in Section III of their Brief before the trial court and therefore this argument need not be considered on appeal. To the extent that this Court wishes to consider the argument in Section III, Plaintiff addresses this argument below.

In *Malanga*, the New Jersey Supreme Court overturned an ordinance designating a public library as an area in need of redevelopment under subsection (d) of the LRHL. The Court found that the record lacked substantial evidence that the library was obsolete or suffered from faulty layout where the Township merely presented evidence that various conditions in the library needed improvements or upgrades. *Malanga* 253 N.J. at 317. The Court described the needed improvements and stated, "Those conditions are not uncommon in many older buildings in the State.…And none present code violations or pose a hazard, including the presence of capped asbestos." *Id.*). On the issue of whether the library was detrimental to the community welfare or safety, the Court again found insufficient evidence. *Id.* at 323. The Court

determined that, while the library could potentially provide more services to the community if it were renovated, this fact was insufficient to establish that the library was causing actual harm to the Township as needed to meet the criteria of subsection (d). *Id.* at 319-23. The Court specifically stated, "needed repair work does not necessarily establish actual harm… Similarly, references to asbestos did not establish actual detriment…the library was safe to visit despite the presence of capped asbestos." *Id.* at 322-23.

1. Defendants Misstate the Nature of Contamination on the Property in Order to Assert that the Property is Detrimental to the Welfare of the Community.

Defendants attempt to distinguish the soil contamination on the Property from the capped asbestos in *Malanga* by noting, correctly, that capped asbestos is contained while stating, incorrectly, that there is petroleum currently leaking from the underground tanks on the Property. (Db35-38) ("Capped asbestos is more akin to petroleum products when they are encapsulated within a tank. Like capped asbestos, when petroleum products are encapsulated within an oil tank, it is not dangerous."). The trial court reviewed the testimony from the Joint Land Use Hearing and the Borough Council meeting and, after applying the standard set forth in *Malanga*, determined:

> The testimony of the [borough] planner and comments of the mayor do not appear to be sufficient to meet the needed substantial evidence threshold. The planner indicated that 'if not remediated the condition would be detrimental to the safety… of the community.' Here, clearly the site is being remediated.

> The mayors comments were specifically not addressed to the specific detriment from the site but were in the context of a more general comment as to the risk of soil contamination. (T3, 56:20-57:4)

The trial court found that, like the asbestos in *Malanga*, the contamination at the Property does not pose a detriment to the safety of the public.

Further, contrary to Defendants' statements, there is currently no petroleum or petroleum products leaking on the property. In April 1994, an underground storage tank (UST) system then in use at the Property failed a tank tightness test and the New Jersey Department of Environmental Protection (NJDEP) was notified, resulting in the opening of case number 94-04-01-1314-15. (Da3, ¶ 9). The UST system contents were removed shortly after the tank tightness test. (*Id.*). Since that time and during the course of investigation and remediation of case number 94-04-01-1314-15, additional discharges and previously unknown USTs were identified at and in the vicinity of the Property, and investigation and remediation of these previous discharges is ongoing. (*Id.*).

In this matter, the mere fact that contaminated soil exists at the Property and remediation of same is ongoing does not establish that the Property is actually harming the Borough or its citizens. Just as the existing asbestos in *Malanga* was causing no harm to township residents, the uncontroverted testimony of Mr. Pietrucha and Ms. Ward establishes that the environmental contamination at the Property is causing no harm to residents of Beach Haven. Mr. Pietrucha testified at

the Land Use Hearing that the condition of the Property has not caused any contamination of the Borough drinking water supply and does not present a threat. (T1, 39:12-23 ("The concentrations that we've identified on the site at this point do not represent a vapor intrusion threat and we haven't found any impacts to surface water or drinking water supply")).

Plaintiff further presented evidence that, because of the structure of the municipal drinking water wells, it is virtually impossible for contamination from the property to affect the drinking water supply. (T1, 14:7-25 ("…where this contamination [at the Property] is is in the upper aquifer. It's a layer of water if you will. Where the municipal drinking water wells are is 100 feet down and separated by an impermeable layer.")). Finally, there is continued oversight by the DEP who requires testing to ensure that that is the case. DEP requires regular testing and updates to determine the potential of any offsite impact.

Further, the evidence presented was that the municipal groundwater supply is almost a mile away from the Property and there is no way that the contamination has traveled or could travel that far [away] or travel deep enough into the soil to reach the municipal water supply. (T1, 14:21-24 ("Plus [the municipal water supply] is almost a mile away. So there is literally no way that whatever the minor contamination is that is just within feet of our property line can go that far and that

far down".); *See also* T1, 23:6-24:8). As part of the ACO, the NJDEP did not require any further testing of off-site receptors such as the Beach Haven municipal wells.

The only evidence offered by Defendants to support their claims that the Property is detrimental to the welfare of the community, is the unsupported concerns voiced by Mayor Davis and inapplicable case law regarding active petroleum leaks. (Db36-37). As discussed, there are no active petroleum leaks on the Property. As for Mayor Davis' concerns, she admitted that she has no evidence to support her concerns. Mayor Davis cited only to one book at the Land Use Hearing—Tom's River: A Story of Science and Salvation, by Dan Fagin. (T1, 26:18-27:1). This book details the effects of a years' long practice of chemical companies burying thousands of chemical drums and dumping wastewater directly into Tom's River (https://www.pulitzer.org/winners/dan-fagin). The effects of this long-term pattern of large-scale chemical dumping are in no way comparable to the conditions at the Property. The effects of the environmental disaster in Tom's River are not substantial credible evidence that Plaintiff's Property poses a danger to the health, safety, morals or welfare of Borough residents.

The Mayor's concerns are not evidence and cannot be considered as part of the required substantial credible evidence needed to support the Borough's conclusions. Further, the Borough's own LSRP/consultant who was present at the hearing did not offer any testimony to support of the Mayor's concerns or to refute

any of Mr. Pietrucha's statements. In designating the Property as a redevelopment area, Council disregarded the actual facts and instead based its decision on feelings and subjective concerns which the trial court properly rejected as not credible evidence.

2. Defendants have the Burden of Proving that the Property is Detrimental to the Safety and Welfare of the Community.

Defendants argue that the LSRP "never testified that the Property was safe" and continue on to assert that, as of July 2023, further groundwater testing was required at the Property and therefore the LSRP could not determine whether the Property was "safe". (Db39-40). This argument is an attempt to shift the burden of proof onto the Property owners when the applicable law requires that a municipality designating a property for redevelopment has the burden to show that the property meets the criteria in § 40A:12A-5. *Hirth*, 161 (before a property or delineated area may be determined to be in need of redevelopment, "the governing body of the municipality must find at least one of the conditions set forth in N.J.S.A. 40A:12A–5"). To meet its burden of proof a municipality "must establish a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met". *Gallenthin* at 373. Further, the term "safe" is neither a regulatory nor industry standard which are based upon empirical data and numerical standards and not subjective words like "safe" and "clean."

It is Defendants' burden to prove that the Property is detrimental to the safety and welfare of Beach Haven Borough residents. The burden is not on Plaintiff to establish that the Property has achieved any particular stage of remediation, and the trial court has already ruled that Defendants failed to meet their burden as to detriment to the public safety and welfare. (T3, 56:20-57:4) Nevertheless, Plaintiff has set forth evidence, described in Section D.1., above, establishing that contamination on the Property, which is in the process of being remediated, has had no impact on Brough drinking water. T1, 14:21-24 ("Plus [the municipal water supply] is almost a mile away. So there is literally no way that whatever the minor contamination is that is just within feet of our property line can go that far and that far down".). Defendants further state that "the trial court should have given deference to the Borough's *concerns*." (Db43) (emphasis added). The legal standard, however, requires the Borough to not merely have concerns, but to set forth substantial credible evidence to support such concerns. Although the Borough had its own LSRP/consultant, he offered no testimony that there was any safety issues with the Property. The Borough simply did not satisfy its burden.

E. The Trial court did not Base its Ruling on Potential Future Condemnation.

Defendants cite two sentences from the trial court's nearly twenty-page opinion in an attempt to argue that the trial court ruled on a basis other than the criteria set forth in N.J.S.A. 40A:12A–5. (Db43). While the dicta cited by

Defendants does mention the effect of condemnation on ongoing remediation, such effects do not form the underlying basis of the trial court's decision. (T3, 51: 15-24). The trial court's actual bases for its decision is clearly stated in the opinion: "[i]t is this Court's conclusion for the reasons that follow that the township's designation was not supported by substantial evidence in the record; the property was leased and in use until the ongoing remediation required access to areas under and around the building that prohibited continued use, and was therefore not unoccupied or unutilized as contemplated by the statute." (T3, 44:9-16). The sentences cherry picked by Defendants constitute a brief consideration of policy implications following a lengthy analysis of whether the Property satisfies the "discontinuance of use" criteria set forth in N.J.S.A. 40A:12A–5(b). (T3, 49:7-51:24).

The trial court goes on to analyze whether the Subsection 5(b) criteria for the building "being allowed to fall into so great a state of disrepair as to be untenantable" are met (T3, 52:1-23), whether the "significant vacancies for at least two years" criteria are met (T3, 52:24-53:8), and whether the Subsection 5(d) criteria relating to detriment to the safety and welfare of the community are met. (T3, 53:13-56:6). All of these analyses support the trial court's ultimate ruling and deal with the designated criteria in the LRHL. The fact that future condemnation was mentioned somewhere in the trial court opinion does not constitute error supporting reversal.

F. Timely Compliance with Remediation Obligations is not One of the Statutory Criteria for Redevelopment Designation.

Immediately after arguing that the trial court based its decision on criteria not included in the LRHL, Defendants seek relief on the basis of Plaintiff's alleged failure to timely remediate the Property, which is not listed in the LRHL as a basis for redevelopment designation.

In early 2022, Plaintiff and NJDEP entered an ACO for the purpose of establishing new case-specific timeframes for completing the remediation due to the difficulty in remediating contamination under the two (2) concrete layers which form the floor of the building on the Property. (T1 (July 17 hearing), 12:18-21). The ACO and Plaintiff's compliance therewith have no relevance to whether the Property meets the criteria to be designated as a redevelopment area. This argument is simply a red herring and irrelevant to the ultimate issues here. Even if Defendants characterization of the evidence presented were accurate, which is not the case, testimony related to the remediation of the Property or the length of time an environmental remediation has or will take is not one of the statutory criteria that can support a redevelopment designation under the LRHL and in no way supports reversal.

V. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully submits that the trial court's decision declaring Resolution 168-2023 invalid and stricken be affirmed.

Respectfully submitted,

WEIR LLP
A Pennsylvania Limited Liability Partnership

By:*/s/ Steven E. Angstreich*
Steven E. Angstreich, Esquire (#019441979)
Caroline J. Bojarski, Esquire (#421642023)
Attorneys for Respondent

Dated: November 6, 2024

M. James Maley, Jr. (019561982)
Emily K. Givens (030861993)
Erin E. Simone (019222003)
MALEY GIVENS, P.C.
1150 Haddon Avenue, Suite 210
Collingswood, New Jersey 08108
Attorneys for Defendants

BEACH HAVEN AUTOMOTIVE, INC. Plaintiff, v. BOROUGH OF BEACH HAVEN and BEACH HAVEN MUNICIPAL COUNCIL and NANCY TAGGART DAVIS, in her capacity as Mayor of Borough of Beach Haven and BOROUGH OF BEACH HAVEN LAND USE BOARD, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-A-003860-23 Civil Action On Appeal from the Superior Court of New Jersey, Law Division, Ocean County Sat Below: Hon. Francis Hodgson, Jr., J.S.C.

REPLY BRIEF OF DEFENDANTS/APPELLANTS

On Brief: M. James Maley, Jr. (019561982)
Emily K. Givens (030861993)
Erin E. Simone (019222003)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

PRELIMINARY STATEMENT

Nothing in Plaintiff's Merits Brief refutes the conclusion that the Trial Court erred in ignoring undisputed evidence that use of the Property had been discontinued. Plaintiff admitted during oral argument before the Trial Court and in its Merits Brief that the Property's use was discontinued. Despite uncontroverted evidence that the Property is no longer being used, Plaintiff asks this Court to accept the Trial Court's tortured legal interpretation of N.J.S.A. 40A:12A-5(b) which ignores the statute's plain language. Substantial evidence existed to prove that there was a discontinuance of use. The Trial Court improperly substituted its own judgment for that of the Borough of Beach Haven and failed to give the Borough deference. Thus, the Trial Court's decision below should be overturned.

LEGAL ARGUMENT

I. Plaintiff Disingenuously Argues that Issues were "not Raised Below" and cannot be Considered on Appeal.

Plaintiff claims the following arguments were "not raised below" and therefore cannot be considered by the Court: the arguments in the Borough's Merits Brief at Section II.A.3 and Section III, (Pb12-Pb13, Pb17, Pb22), and the argument that remediation is not a use. (Pb15). These allegations are red herrings because the Court Rules clearly allow these issues to be considered on appeal.

While it is true that the Appellate Court need not address an issue not first raised with the Trial Court below, there are exceptions. If the issue was actually decided, the Appellate Division can consider it. Comment 3 to Rule 2:6-2 states, "[w]hen a trial court issues a verdict based on a theory of law not addressed by the parties, that verdict of course, is subject to review." Pressler & Verno, Current N.J. Court Rules, cmt. 3 on R. 2:6-2, at 517 (2025). See also Murphy v. Luongo, 338 N.J. Super. 260, 268 (App. Div. 2001) (emphasis added) (stating Courts will not consider issues "**not raised** or **decided** in the trial court…").

Comment 3 to Rule 2:6-2 also advises that the rule prohibiting raising issues for the first time on appeal "does not apply where an issue was raised in the trial court even if argument before the trial court was based on a different theory from that advanced in the appellate court." Current N.J. Court Rules, at 515. Appellate Courts will consider an issue "even though not specifically argued before the trial or motion judge, as long as the issue on appeal is generally the same issue presented before the trial court." Regan v. City of New Brunswick, 305 N.J. Super. 342, 355 (App. Div. 1997). See also Docteroff v. Barra Corp. of Am., Inc., 282 N.J. Super. 230, 237 (App. Div. 1995).

All the issues Plaintiff alleges were not raised below go either directly to the heart of the Trial Court's decision or are nothing more than different legal theories relating to the same issues considered by the Trial Court below. For

example, in Section II.A.3 the Borough argues that abandonment is not required in order to find discontinuance of use. (Db26-Db28). This argument was raised to address the Trial Court's finding that the Abandoned Properties Rehabilitation Act, N.J.S.A. 55:19-78, et seq., which defines abandonment, can be used to interpret "discontinuance of use." (T3, 49:17-51:11). In its Trial Brief, the Borough also argued that discontinuance of use and abandonment were independent concepts under N.J.S.A. 40A:12A-5(b) (Dsa7-Dsa10).[1]

Similarly, in Section III, the Borough argued that the Trial Court erred in concluding that the substantial credible evidence standard was not met. (Db33). Again, this issue was specifically decided by the Trial Court. (T3, 44:9-11). It is disingenuous at best to allege that the Borough did not argue that the substantial credible evidence standard had been met. At oral argument, Counsel for the Borough absolutely argued that substantial credible evidence existed to support a finding that criterion (b) and criterion (d) were satisfied. (T3, 13:24-14:16).

Lastly, as to the argument that remediation is not a use, the Borough argued below that all "use" has been discontinued for at least 6 months prior to the redevelopment designation, and that any use of the Property must be a legal use under the zoning ordinances. (T3, 20:20-24 & Dsa11-Dsa13). It is only

[1] References to "Dsa" are to Defendants' Supplemental Appendix filed with this Reply Brief.

because the Trial Court concluded that undertaking remediation prevented a finding of "discontinuance of use", that the Borough was forced to argue that remediation is not a use. (T3, 44:11-16). Even at trial, Plaintiff acknowledged that the use was discontinued, stating, "[t]he test has to be what's the credible evidence and the credible evidence says that the property was discontinued for six months…" (T3, 15:22-25).

Since all of the issues raised in the Borough's Brief go directly to the heart of the decision of the Trial Court and all issues were actually decided and addressed by the Trial Court, it is appropriate for this Court to review the same.

II. The Trial Court's Decision Clearly Shows that the Trial Court Mixed and Matched Legal Concepts to Reach its Conclusion that Criterion (b) was not Supported by Substantial Evidence.

Despite the fact that the undisputed evidence shows that the Property had not been used for at least six months, Plaintiff asks this Court to ignore the legal contortionism the Trial Court engaged in to conclude that criterion (b) was not satisfied. (Pb13-Pb14). Criterion (b) can be satisfied upon a showing of "[t]he discontinuance of the use of a building or buildings previously used for commercial, retail, shopping malls or plazas, office parks, manufacturing, or industrial purposes…" N.J.S.A. 40A:12A-5(b). Undisputed evidence shows that all use of the Property ended in January 2023, six months before the redevelopment designation. Plaintiff's counsel admitted at trial, "what we have

are the following facts; the lease terminated in January of 2023, the building was unoccupied for six months as of the time the resolution was passed and that the property is involved in remediation. Those are the only facts that the Borough has presented." (T3,5:25-6:5). He further admitted that "the credible evidence says that the property was discontinued for six months…" (T3, 15:22-25).

These admissions alone are enough to show discontinuance of use. The Trial Court even found that "the property is actively undergoing remediation and was leased until –- up until 2023 when it was determined that the remediation would require access to areas that would make it untenable to continue to rent." (T, 51:11-15). However, the Trial Court did not like that outcome because it was "unreasonable" to take an owner's property or to designate it as a redevelopment area when the owner was undertaking active remediation. (T3, 51:15-21).

In order avoid the possibility of condemnation, the Trial Court made up its own standard. Because the Trial Court failed to apply the plain language of the statute, the Appellate Division should reverse the decision of the Trial Court.

A. Other Statute's Definitions of Abandonment Cannot be Used to Interpret "Discontinuance of Use" Because Those Words have Different Plain Meanings.

Although the Borough never alleged that the Property was abandoned, and despite abandonment being an entirely separate criteria for designation under N.J.S.A. 40A:12A-5(b), the Trial Court used extrinsic aids to apply a statutory

definition of "abandoned" to interpret the word "discontinuance" (T3, 50:14-51:11), rather than apply its plain meaning. Plaintiff claims that it was appropriate for the Trial Court to use the definition of abandoned property to interpret discontinuance of use, but never explains why. (Pb18).

When interpreting a statute, "[a] statute's plain language 'is typically the best indicator of intent.'" Malanga v. Twp. of W. Orange, 253 N.J. 291, 310 (2023). If the plain meaning is clear, courts cannot resort to "'extrinsic interpretive aids.'" Hoover v. Wetzler, 472 N.J. Super. 230, 236 (App. Div. 2022) (internal citations omitted). Had the Trial Court applied the plain meaning of "'discontinuance," which means to "break the continuing of: cease to operate … [or] use…'" (see Db21), the Trial Court would have had no choice but to uphold the redevelopment designation.

"Courts also look to other parts of the statute for context." Malanga, 253 N.J. at 310. The Legislature uses of both "abandonment" and "discontinuance of use" in the same statutory provision indicates that those words have different meanings. See State v. Ferguson, 238 N.J. 78, 102 (2019) (stating "'[d]ifferent words used in the same, or a similar, statute are assigned different meanings whenever possible'"). The plain meaning of these words are clearly different. "Abandoned" means "to give up with the intent of never again claiming a right or interest in…" https://www.merriam-webster.com/dictionary/abandon, last

visited 11/15/2024. By contrast, "discontinue" means to "break the continuing of: cease to operate … [or] use…'" https://www.merriam-webster.com/dictionary/discontinue, last visited 11/15/2024.

By conflating abandonment and discontinuance of use, the Trial Court's legal analysis violated the admonition to avoid interpretations that "'render any language inoperative, superfluous, void[,] or insignificant.'" Sanchez v. Fitness Factory Edgewater, LLC, 242 N.J. 252, 261 (2020). If "discontinuance of use" was meant to be equivalent to abandonment, the Legislature would not have identified abandonment as a separate basis for designation under criterion (b). By interpreting "discontinuance of use" to be equivalent to abandonment, it renders one of those two provisions superfluous and insignificant.

The Trial Court's use of N.J.S.A. 55:19-81 to define abandonment in instead of another statutory definition was purposeful. N.J.S.A. 40:48-2.12s3(b)(8) also provides criteria for vacant and abandoned properties, but had that definition been used, the Property would have satisfied N.J.S.A. 40:48-2.12s3(b)(8)(d), (f) & (g). (See Da39 & Da44). The Trial Court focused on "abandonment" as used in N.J.S.A. 55:19-81 because the Property was obviously not abandoned under that definition. By claiming discontinuance of use is equivalent to abandonment, the Trial Court avoided application of criterion (b). (T3, 51:15-21).

Plaintiff admits that that Trial Court "considered the policy implications"

of designating a contaminated property as a redevelopment area. (Pb14). Policy considerations are for the Borough and not the Trial Court to decide. A court is not permitted to substitute its judgment for that of the local officials. 62-64 Main Street, supra, 221 N.J. 129 at 158, n. 8. It is only allowed to evaluate whether substantial credible evidence exists. Ibid. Courts are also not permitted to rewrite statutes, and it is "presume[ed] that the Legislature intended the outcome dictated by the clear language of the statute." Zabilowicz v. Kelsey, 200 N.J. 507, 513 (2009). Because Trial Court used the wrong legal standard, it erred in concluding criterion (b) was not met.

B. Vacancy and Illegal Occupancy are not the Same as Discontinuance of Use.

To overcome the undisputed fact that the Property's use was discontinued, Plaintiff focuses on another portion of criterion (b), which is "significant vacancies of such building or buildings for at least two consecutive years…" N.J.S.A. 40A:12A-5(b). (See Pb18-19). Again, this is not a basis on which the Borough relied for the designation. Plaintiff focuses on this portion of criterion (b) because it requires the vacancies to be for two years, allowing it to argue that because the Property had been used for illegal storage less than two years ago, criterion (b) cannot be met. (T3, 7:7-8:5). The Borough, however, found that there was a discontinuance of use, not significant vacancies. (Da21).

Both the Trial Court found, and the Plaintiff admits, that the Property

could not be used because of ongoing remediation. (See T3, 44:12-14, stating "the property was leased and in use until the ongoing remediation required access to areas under and around the building that prohibited continued use"). (See T3, 52:10-23 stating "during this phase it was impossible to lease the premises"). (See also Pb16, stating "Plaintiff notified the tenant that it would not be renewing or extending the lease so it would not disturb the tenant if aggressive remediation were needed" & Pb21, stating "'[s]o we allowed the lease to expire so that we could get in there and dig up whatever needed to be dug up'"). Thus, there was a discontinuance of use.

To support its "use" theory, Plaintiff also argues that storage is a permitted use, citing to the Borough Code and claiming that storage is a "service." (Pb19). Conveniently, Plaintiff leaves out an important part of the statute:

> Any retail shopping facilities or service establishment which supplies commodities or performs a service primarily for residents of the surrounding neighborhood, **such as** grocery stores, delicatessens, meat markets, drugstores, variety stores, antique and gift shops, furniture stores, bakery shops, restaurants, luncheonettes, barbershops, beauty shops, clothes cleaning and laundry pickup establishments, banks, real estate offices, business or professional offices.

https://ecode360.com/8940473?highlight=&searchId=12411646464321965#8940473, last visited 11/15/2024 (emphasis added). Plaintiff admits that it was "aware that the Property was not being used as a retail establishment due to the ongoing remediation…" (Pb19). Apparently, Plaintiff knew that the Property

could not be used for a permitted use due to the presence of contamination.

To suggest that a storage facility is the same type of "service establishment" as those items set forth in the Ordinance violates the statutory principle of *ejusdem generis*, which is "'when specific words follow more general words in a statutory enumeration, we can consider what additional items might also be included by asking whether those items are similar to those enumerated.'" Williams v. N.J. State Parole Bd., 255 N.J. 36, 53 (2023). Business storage is not at all similar to providing services to residents. (Da52). From all outside appearances, the building appeared vacant. (Da44-Da45). The Borough did not even know about the business storage use until Plaintiff provided the lease as part of the redevelopment process. (Compare Da39 & Da44-Da45 with Da120).

At the Planning Board hearing, the Board Planner testified that storage was not a permitted use. (T1, 48:11-24). Storage is not listed among the permitted uses allowed in the zoning district in which the property is located. (Da40). When interpreting zoning ordinances, "the usual rule of construction of zoning ordinances is that where a use is not expressly provided for it is prohibited." Sun Co., Inc. v. Zoning Bd. of Adj. of Borough of Avalon, 286 N.J. Super. 440, 444 (App. Div. 1996). In addition, Section 212-6.A. of the Borough Code expresses an intent that development be in strict compliance with the

Borough Code. See https://ecode360.com/8940233#8940326, last visited 11/14/2024. Business storage use is not specifically permitted, and therefore, is prohibited unless a use variance is granted.

Because all legal use of the Property had stopped, the Trial Court erred in concluding that there was no discontinuance of use under criterion (b).

C. The Property was Untenantable Because of the Remediation, not Because of the Code Violations.

Plaintiff argues that the Borough found the Property was untenantable due to code violations. (Pb20-Pb21). It also suggests that the LSRP never testified as to the need to dig up the slab under the building. (Pb21). This is contradicted by the record. At the Planning Board hearing, Plaintiff's attorney stated that the current LSRP "went in there and saw that there was some additional work that needed to be done under the floor. So we -- my client allowed the lease to expire so that we could get in there and dig up whatever needed to be dug up, which we're in the process of doing now." (T1, 13:16-23). They had to do this because "there is product in the soil under the building." (T1, 12:1-3). "We allowed it to expire -- my client allowed it to expire because at the -- in the last months of the lease, the consultant had been going in to trench the building to get in there and try to see what was under the slab." (T1, 13:10-13).

When the Mayor asked whether the building needed to be removed to get the soil out (T1, 28:20-22), Plaintiff's LSRP responded, "[i]s that a possible

outcome? It could be." (T1, 28:23-24). He explained that removal of the building will depend upon the amount of contamination. (T1, 28:23-24:4). Plaintiff's attorney explained, "once we get a handle on what's going on under the building, it's very possible that the -- **we can get that out pretty quickly as much as we are required to get out**. And then that's it. Everything can be -- can move forward. There can be, you know, somebody using that property." (T1, 17:6-10) (emphasis added). Plaintiff even admits that the lease was not renewed in order to avoid disturbing the tenant "if aggressive remediation were needed." (Pb16).

To suggest that "[t]here is no evidence that this excavation including digging up the slab under the building" is preposterous. (Pb21). Evidence clearly indicates that the Property was untenantable due to remediation activities.

III. The Mere Fact that NJDEP Requires Remediation Demonstrates a Detriment to the Public Health and Safety.

Citing to Malanga, Plaintiff contends that the mere existence of petroleum products in the soil in excess of NJDEP remediation standards fails to show detriment to the public health or safety, similar to the way that the presence of asbestos failed to show detriment in Malanga. (Pb23-Pb25). Unlike in Malanga, where the municipality admitted there was no safety issues from the asbestos, detriment was established in this case based on the evidence presented below.

In rejecting the redevelopment designation pursuant to criterion (d), the Malanga Court noted that it was never alleged that the library was detrimental

to the public safety or that it "posed harm to the 'health of the community. If either were true, the Township would not have allowed thousands of people to use the Library each week." Malanga, 253 N.J. at 315 (internal citations omitted). Expert testimony in Malanga confirmed that the mere presence of asbestos did not pose a hazard and the library was safe Id. at 303 & 322-323. An expert report noted that the asbestos would only have to be remediated if the renovations disturbed it. Id. at 322. NJDEP's agrees that capped asbestos does not require remediation. https://www.nj.gov/health/ceohs/asbestos/asbestos-faq/, last visited 10/4/2024.

By contrast, here, NJDEP made specific findings that Plaintiff had to remediate its Property. (Da27, ¶15). NJDEP has consistently found discharged petroleum products to be dangerous to the public health, safety and environment. In 2015, NJDEP stated in one of its rule adoptions that, underground storage tanks "can threaten ground water and potable water sources, and create vapor hazards that can have immediate dangers of explosion and long term health risks." 47 N.J.R. 850(a), 861 (May 4, 2015). As early as 1997, NJDEP explained,

> Early detection will also prevent other health and physical hazards, such as the spread of vapors created by the release from a gasoline underground storage tank system. Vapors can form an explosive mixture if allowed to accumulate in an enclosed area. In addition, long term inhalation of low levels of hazardous substance vapors can become a chronic health condition.

29 N.J.R. 1593(a) (May 5, 1997). Until the Property is remediated, it will pose a detriment to the community. "The purpose of a remedial action is to implement a remedy that removes, treats, or isolates contamination, and that is protective of the public health, safety and the environment." N.J.A.C. 7:26E-5.1(a).

Plaintiff contends that the contamination is safe because the contamination has not reached the aquifer or the drinking water supply. (Pb25-Pb26). This argument ignores that the Borough also expressed concern regarding contamination seeping into the water and sewer pipes (T2, 37:2-8) and that there are separate standards for soil contamination and water contamination. See N.J.S.A.58:10B-12(d) (stating that NJDEP "shall develop minimum remediation standards for **soil**, **groundwater**, **and surface** water intended to be protective of public health and safety…") (emphasis added).

The Board Planner testified that the contamination created a detriment and the Mayor, who is an epidemiologist, noted that there is a specific risk of cancer. (T1, 26:18-27 & T2, 38:25-39:8). Even Plaintiff acknowledges that it cannot sell the property or use it for retail purposes because of the active remediation. (Pb19 & T1, 20:23-24:8). It was reasonable for the Borough to conclude that the contamination was creating a detriment to the public health and safety because the contamination was impacting the soil. Additional remediation was necessary to address the impacted soil, and until complete, the public health continues to

be at risk from that contamination.

Despite this evidence, the Trial Court concluded that the testimony of the Mayor and Board Planner were insufficient because of Plaintiff's LSRP testimony regarding the drinking water. (T3, 56:28-21). Essentially, the Trial Court erroneously substituted its opinion for the Borough's. It was reasonable for the Borough to conclude that the contamination was creating a detriment to the public health and safety because the contamination was impacting the soil. Additional remediation was necessary to address the impacted soil, and until that remediation is complete, the public health continues to be at risk from that contamination. The Borough does not allege that the tanks are actively leaking. It is the prior unremediated leaks that are posing the health and safety concerns.

The Borough was free to reject the LSRP's testimony. See Kinderkamack Rd. Assocs., LLC v. Mayor & Council of the Borough of Oradell, 421 N.J. Super. 8, 21-22 (App. Div. 2011) (a local governing body is free to reject expert opinion because to hold otherwise would divest the governing body of discretion). Credibility determinations are left to the sound discretion of the planning board during preliminary investigation hearings. 62-64 Main Street, L.L.C. v. Mayor and Council of City of Hackensack, 221 N.J. 129, 158, n. 8 (2015). Because the Trial Court erroneously substituted its judgment for the Borough's, the decision should be overturned.

Respectfully submitted,

Maley Givens, P.C.

November 18, 2024

M. James Maley, Jr.