JEANNE DALY, POLISH AMERICAN STRATEGIC INITIATIVE, INC., AND POLISH AMERICAN STRATEGIC INITIATIVE EDUCATIONAL ORGANIZATION, INC., Appellants,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-004021-23
v.	CIVIL ACTION ON APPEAL FROM
EXCHANGE PLACE ALLIANCE DISTRICT MANAGEMENT CORPORATION AND JERSEY CITY PLANNING BOARD, Respondents.	SUPERIOR COURT, LAW DIVISION HUDSON COUNTY DOCKET NO. HUD-L-2076-22 Sat below: Hon. Joseph A. Turula, P.J.

BRIEF OF APPELLANTS JEANNE DALY, POLISH AMERICAN STRATEGIC INITIATIVE, INC., AND POLISH AMERICAN STRATEGIC INITIATIVE EDUCATIONAL ORGANIZATION, INC.

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I. PRELIMINARY STATEMENT

The present matter concerns the relevant standards for a Section 31 courtesy review under the Municipal Land Use Law. The Jersey City Planning Board considered an application under Section 31 in 2022 for a capital improvement project for Exchange Place Plaza in Jersey City. The Board decided not to recommend the application. Since the Section 31 review process is a courtesy review, the Board's decision was not binding on the applicant, and the applicant could have continued to build the project. However, the applicant then asked the Board for a reconsideration hearing, and two weeks later the Board changed its decision, voting to recommend the application. During this reconsideration hearing, the Board considered new substantive information submitted by the applicant. The Board did not permit any public comment. The Board also considered brand new comments from the Board Planner that were submitted the same day of the reconsideration hearing.

Appellants filed a lawsuit in 2022 challenging these issues with the decision to recommend the application, along with additional issues including the lack of notice sent to neighbors before the reconsideration hearing and the recommendation to allow a large private corporate access roadway over a public pedestrian plaza without ordinance authorization. The Court in July 2024 held that the Board's decision was not arbitrary, capricious and unreasonable. However, the Court's

decision did not consider several issues that Appellants raised, including the access roadway, equitable estoppel regarding notice, net opinion issues concerning the Board Planner's testimony, the Appellants' own planning report, and what effect the submission of substantive additional evidence had on the reconsideration hearing.

Although the Section 31 review process is nonbinding, it plays an important role in the State statutory structure for review of capital improvement projects. While municipalities do not have to go before the planning board for site plan review for capital improvement projects, they do need to consult the Planning Board before beginning the project. If the Board's review did not matter because it is nonbinding, then the review process would not have a role in the Municipal Land Use Law. However, this process has an important role. Appellants seek a decision from the Appellate Division remanding this matter to the Law Division for complete assessment of all legal issues raised below.

II. STATEMENT OF FACTS

On April 26, 2022, Respondent Exchange Place Alliance District Management Corporation ("EPADMC" or "EPA"), a corporate entity that is also a public agency of Jersey City, appeared before Respondent Jersey City Planning Board (the "Board") for a courtesy review of an application for the Exchange Place Pedestrian Plaza Improvements Project under N.J.S.A. 40:55D-31. Before the hearing, EPADMC mailed out notice to all property owners within 200' of the plaza.

4T22:24-4T23:2. The application proposed landscaping improvements and other alterations to the public pedestrian plaza at Exchange Place, under N.J.S.A. 40:55D-31, which requires that a planning board review any application by a public agency that wishes to spend public funds on a project when the planning board has adopted a relevant portion of the master plan. Aa108. Under N.J.S.A. 40:55D-31, the public agency may not act on its project until it either receives the recommendation of the planning board to proceed, or until 45 days elapse without receiving the recommendation.

In particular, the EPADMC application proposed a large bench that would encircle the existing Katyn Monument at the pedestrian plaza; landscaping around the monument; and a private access road across approximately 40% of the pedestrian plaza for private property access adjacent to the plaza for cars. Aa108-115. The Exchange Place Pedestrian Mall was authorized by Jersey City Ordinance 20-062, on Sept. 11, 2020. Aa170-Aa175. The Ordinance's Operating Plan stated that a private access road would be established at "the southernmost edge of Exchange Place." 4T37:16-4T38:2.

The April 26, 2022 meeting of the Planning Board considered the application. Aa226. At the April 26, 2022 meeting, Mr. Alampi, the Board's counsel, asked EPA's counsel, "Mr. Pepe, are we going to hear with respect to the master plan and the – what appears to me the obvious concept of pedestrian friendly in lieu of

vehicular traffic?" Aa230, 1T20:18-21.[1] In response, Mr. Pepe, EPA's counsel, stated: "Counsel, I had not planned on presenting any testimony with respect to the compatibility with the master plan" (emphasis added)." Aa230, 1T20:22-24. Mr. Pepe then continued: "I believe, you know, one of the Vision Zero is a big impetus for the city right now, and an important aspect of the master plan itself, which is to provide for pedestrian safety." Aa231, 1T21:2-6. Board Counsel Mr. Alampi replied: "Without a shadow of a doubt, Counsel." Aa231, 1T21:7-8. Mr. Pepe continued: "And those are elements that we're – you know, that we're accomplishing, clearly." Aa231, 1T21:9-10.

Board Planner Mallory Clark stated that the project is "consistent with the goals of the master plan, and the Open Space Element, and the larger OurJC vision." Aa242, 1T65:17-19. She testified: "they're not changing the inherent use of the site from what it is today, which is a public plaza; this is more of just a design and aesthetic upgrade from the current conditions." Aa242, 1T65:20-23. Planner Clark also stated that "the traffic safety measures that they've coordinated with the office of engineering do improve pedestrian safety and are consistent with the Vision Zero

[1] Transcript of Planning Board Hearing, April 26, 2022: 1T
Transcript of Planning Board Hearing, May 10, 2022: 2T
Transcript of Oral Argument before Judge Lynes, May 25, 2023: 3T
Transcript of Oral Argument before Judge Turula, March 19, 2024: 4T
Transcript of Decision, Judge Turula, July 12, 2024: 5T

goals of the city." Aa242, 1T65:24-2T66:2. Planner Clark did not testify as a traffic safety expert.

A number of members of the public commented in opposition to the project. Appellant Jeanne Daly testified during the public comment period and stated that the application did not comply with the Jersey City Master Plan. Aa237, 1T46:1-1T48:25. Edward Jesman, President of Appellant Polish American Strategic Initiative, Inc., also testified against the application during the public comment period. Aa240, 1T60:20-1T61:9. The Planning Board declined to recommend the application of EPADMC. Aa244, 1T75:6-7.

EPADMC then requested that the Board "reconsider" its application, via a letter sent to the Board on April 29. Aa367. The letter suggested that the Board had not applied the correct standard for a review under N.J.S.A. 40:55D-31, included new claims as to the application, and added as an attachment a newspaper article about the project. Aa367-370. The April 29 letter specifically stated:

> "Upon rehearing, the Applicant intends to introduce additional evidence that clearly demonstrates its thoughtful engagement with several neighboring property owners, stakeholders, various City offices and the general public to develop the final plaza designs[.]…Most significantly, upon rehearing, the Applicant will introduce evidence demonstrating that … it met repeatedly with the Committee for the Conservation of the Katyn Monument & Historic Objects ("CCKMHO") and others…Had the Board been privy to this information at the prior hearing, it would have been clear to the Board that any concerns over the treatment of the Katyn Monument were fully and satisfactorily addressed to the satisfaction of the CCKMHO, notwithstanding the self-serving,

> false comments made by certain members of the public to the contrary[.]"

Aa367-370 (emphasis added).

On May 10, Planner Clark submitted new comments to the Board. Aa091-Aa092. The same day, the Board held a reconsideration hearing of the application at its regularly held meeting. Aa262. EPADMC did not send out new notice to property owners within 200'. At the May 10 meeting, the Board did not allow public comment. Aa264. The Board attorney stated: "We had some comments from Mallory on behalf of the Planning Division, and they went through the master plan, and the question is does the board find it to be consistent with the master plan; if not, why not?" Aa263, 2T7:9-13. The Board attorney also stated that the applicant "is not asking to present any additional evidence or testimony, but, rather, he is asking the board to reconsider the manner in which the vote was taken, and the basis for the vote." Aa263, 2T5:8-11. The Board Chairman stated: "[W]e are not hearing any new testimony on this action tonight, unless the board – anybody from the board needs new testimony. I think I'd prefer to let the record speak for itself on the last – the last application." 2T11:11-15. The Board then changed its prior decision and, in contrast to its April 26 decision against recommendation, recommended the application to proceed. Aa265-266, 2T16:25-2T17:1.

III. PROCEDURAL HISTORY

Appellants Jeanne Daly, Polish American Strategic Initiative, Inc. and Polish American Strategic Initiative Educational Organization, Inc. filed suit in an action in lieu of prerogative writs on June 24, 2022. Aa001. The Complaint included two counts - Count I: Arbitrary, Capricious, and Unreasonable Conduct, arguing the Board's recommendation of the project was arbitrary and unreasonable; and Count II: Violation of the Open Public Meetings Act, N.J.S.A. 10:4-1 - 10:4-21, arguing that the EPADMC should have sent notice to property owners within 200' of the plaza. Aa001-Aa013. Subsequent to the suit being filed, EPADMC modified its plans but did not submit those modified plans to the board for review. Aa371-372.

On January 13, 2023, Appellants filed a motion to amend the Complaint to add additional facts concerning: 1) information obtained from a transcript of the April 26, 2022 hearing, 2) new plans and renderings submitted since the complaint was filed, and 3) information about the private access road. Aa016. The amended complaint also added claims that the EPADMC did not present sufficient evidence of compliance with the Jersey City master plan, the Board approved the private access road without previous authorization from the City. Aa016-032. The amendment also added Count III, Violation of the Municipal Land Use Law. The new count alleged that EPADMC violated the Municipal Land Use Law by not bringing its new, different plans to the Board for a new hearing. The motion to amend was granted on February 3, 2023. Aa014-015.

EPA filed a motion to dismiss the case for failure to state a claim on April 12, 2023. Aa069. EPA argued that Counts II and III should be dismissed because EPADMC had no obligation to give notice for the May 10 meeting, 3T5:11-3T6:9, 3T6:20-3T7:8. Judge Martha Lynes denied the motion to dismiss the case on July 5 and entered a clarifying order on July 18, 2023, clarifying her intent to deny the motion to dismiss. Aa071.

On January 12, 2024, EPADMC filed a second motion to dismiss Counts II and III. Aa075. The Board joined the motion. Aa073. The Court held oral arguments on the motion to dismiss, and trial arguments, on March 19, 2024. On the motion to dismiss, EPA argued that Counts II and III should be dismissed on grounds of mootness since all the improvements had been made and the project was complete, 4T8:21-4T9:3, and any new review conducted by the Board would not result in any change to the plaza, 4T11:1-8.

On March 19, 2024, the Court denied EPADMC's motion to dismiss. Aa077. The Court held that, since the renovation of the Plaza had been completed, "the Court cannot provide any effective relief to the plaintiff as to Counts One and Two of the complaint, unless there is a substantial importance to the public interest." 4T17:18-25. The Court held that there was "a substantial interest in this matter, so the fact that the matter is completed does not render the claim moot. Okay? When they undertook the project, there was litigation pending. They were aware of that; they

chose to go forward. The case is not moot because of the substantial importance of the process and/or of the plaza itself." 4T18:1-8.

After denying the motion to dismiss, the Court heard trial arguments on March 19. In support of their case in chief, Appellants argued that the Board Planner's comments to the Board constituted a net opinion (Aa080-084), that the letter requesting reconsideration constituted new substantive information that should have been open to public comment and question (4T21:22-4T22:3), that the public had no opportunity for notice and comment on new plans made several months after the May 10 hearing (4T23:15-4T24:1), and that the applicant was bound to send notice to property owners within 200' of the application (4T22:24-4T23:14). Appellants submitted a report by professional planner Carlos Rodrigues, P.P. in support of their case. Aa304. Appellants also argued that it was arbitrary and capricious for the Board to approve the project with the private access roadway. 4T22:13-23. Appellants argued before the Court that the plaza plan exceeded the Board's authority; however, the Court did not make any decision concerning this issue. Appellants argued:

> [T]he board approved the application with a private access road that takes up a large portion of the plaza. It's not only on the edge of the – of the plaza, but – but takes up a significant portion of it, and – and precludes pedestrian public access. The 2020 ordinance which stated that there could be a public access road on the edge of the plaza, did not state that it could take up a large proportion of the plaza. And so therefore, the board lacked the authority to approve that road without further authorization from the governing body. 4T22:13-23.

The Court mentioned this argument in the July decision while listing Appellants' arguments. "Plaintiff also [indiscernible] the approval of the private access road proposed in the application is contrary to not only the master plan, but Ordinance 20-062, claiming the road only serves private interests and encompasses approximately 40 percent of the Plaza." 5T11:22-T12:2.

Appellants argued that the Board considered information outside the record by considering both the April 29 letter requesting reconsideration and the Planner's May 10 written comments. 4T21:2-10.

A. <u>Judge's Oral Decision – July 12, 2024</u>

On July 12, 2024, the Court read a decision into the record stating that the Board's decision was not arbitrary or capricious, as the Board clearly limited the testimony on the application to the April 26 hearing and did not need to hear public comment on May 10. The Court also held that the Municipal Land Use Law was not violated because it did not apply to an application under N.J.S.A. 40:55D-31, which the Court said was not an "application for development." 5T18:5-11. The Court further held that the notice was adequate under the Open Public Meetings Act. 5T18:24-5T19:3.

The Court did not address in its decision: whether the Board Planner's comments were a net opinion; whether the Court was considering Mr. Rodrigues's report; whether it was proper for the Board to consider the Board Planner's May 10

comments or the letter for reconsideration without public comment; whether the private roadway could be approved by the Board; and whether the applicant was bound by equitable factors to send notice to property owners within 200' of the plaza.

The Court explained that Appellant claimed no expert planning testimony was given by Respondent EPA to show compliance with the Jersey City Master Plan. 5T11:13-15. The Court explained that Appellant argued "the testimony of the Board planner during the May 10th, 2022 hearing is insufficient to show compliance with the master plan because it is a net opinion. Plaintiff also [indiscernible] the approval of the private access road proposed in the application is contrary to not only the master plan, bur Ordinance 20-062, claiming the road only serves private interests and encompasses approximately 40 percent of the Plaza." 5T11:19-1T12:2.

The Court held:

> "The Court finds that the Jersey City Planning Board clearly limited their reconsideration to the standard or review and the testimony from the April 26th, 2022 meeting, which I stated previously, the planner, Mr. Car, testified the plan was constructed with the intention to fit the master plan. And this is sufficient testimony for the Board to base its decision on." 5T17:11-18.

The Court made the following findings concerning the EPA's compliance with the Jersey City Master Plan:

> The Jersey City master plan – the master plan vision is an initiative by the planning department and the Jersey City Planning Board, amongst other objectives, to create productive landscapes along the waterfront. This is Goal 30 of the JC 10 plan open space element.

> During the April 26th, 2022 hearing, city planner Mallory Clark testified that the EPA's plan was consistent with the master plan. You have to see the transcript. It's entitled, 1, Transcript, Page 65, Lines 17 through 25, and Page 66, Lines 1 through 7. …
>
> … The Court finds that the Jersey City Planning Board clearly limited their reconsideration to the standard of the review and the testimony from the April 26th, 2022 meeting, which I stated previously, the planner, Mr. Car, testified the plan was constructed with the intention to fit the master plan. And this is sufficient testimony for the Board to base its decision on.

5T15:21-17:18.

EPA never presented testimony from a professional planner. EPA presented testimony from Mr. Carman, a landscape architect, on April 26, 2022. He did not provide any testimony regarding the master plan and is not a planner. The only statements given on behalf of EPA concerning the Master Plan were given by EPA's counsel, Mr. Pepe. EPA never presented a planner or any planning testimony.

Appellants argued before the Court concerning notice required for the May 10 application:

> "Section 31 does not provide its own notice requirements, but as a matter of function and as a matter of fairness, the applicant provided that notice for the first hearing. And, respectfully, in terms of the way that the public of Jersey City interacts with capital improvement projects with the planning board, with district management corporations, we need to act in accordance with reality and – and pragmatically, concerning the fact that they rely on that notice and that was not given." 4T38:4-13.

Regarding the notice issue set forth by Appellants, the Court held that the matter "is a review under NJSA 40:55(d)-31. So the notice to people owning property within 200 feet of the area is not applicable." 5T18:12-15.

Appellants submitted a report by Carlos Rodrigues, F.A.I.C.P./P.P., as an exhibit to the certification of counsel filed on February 24, 2023, in support of the action in lieu of prerogative writs. The report, dated February 20, 2023, included Mr. Rodrigues's analysis and conclusions regarding whether the Section 31 review conducted by the Board was adequate and whether the EPA's plans violate New Jersey's public trust doctrine. Aa306-Aa331. Mr. Rodrigues concluded that elements of the proposal are inconsistent with the intent and purpose of the Jersey City Master Plan, in particular its Open Space element. Aa331. However, the Court did not mention Mr. Rodrigues's report at all in the July 2024 decision, either to refer to the information contained in it, or to state that it was not being considered.

The Court held that the Board had not considered any new submissions between the April 26 hearing and May 10 rehearing, and that as a result the Board's decision was not arbitrary, capricious or unreasonable. To support its decision, the Court paraphrased the Board Chairman's statement on May 10: "We are not hearing any new testimony on this action tonight unless the Board wants it." 5T16:17-21, citing Aa264, 2T11:11-15 ("[W]e are not hearing any new testimony on this action tonight, unless the board – anybody from the board needs new testimony. I think I'd

prefer to let the record speak for itself on the last – the last application."). To quote the Court:

> "[P]laintiff says that … the EPA did not meet with the … Paulus Hook Association, but just members and had – and also that there were – at this meeting, there was [sic] comments by the planner. The Court finds that the Jersey City Planning Board clearly limited their reconsideration to the standard of the review and the testimony from the April 26th, 2022 meeting … The fact that the EPA submitted a news article and stated that they met with a monument group … apparently was not considered by the Jersey City Planning Board. The testimony and the submissions apparently were not considered. They were submitted, but not – they were not considered. Therefore, the Board did not act arbitrary and capricious and unreasonable." 5T17:11-1T18:4.

IV. LEGAL ARGUMENT

The legal standard applicable to a trial court's review of a land use board's decision under N.J.S.A. 40:55D-31 is whether the decision was arbitrary, capricious and unreasonable. The Court considered the present matter under the same standard.

"A reviewing court's analysis must focus on the validity of the Board's action[.]" CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd., 414 N.J. Super. 563, 578 (App. Div. 2010). "[W]hen the action of a municipal land use agency is challenged in a prerogative writ action, a trial court must make specific factual findings and conclusions of law to support its decision." L.I.M.A. Partners v. Northvale, 219 N.J. Super. 512, 519 (App. Div. 1987).

A. The Court committed reversible error in finding that the Board's April 26 record was sufficient to justify the recommendation of the plan

because the Court did not address the nature of Board Planner Mallory Clark's testimony as a net opinion. (Raised Below: Aa082-Aa084)

"An expert opinion must be supported by facts or data either in the record or of a type usually relied on by experts in the field. N.J.R.E. 703. An expert opinion that is not factually supported is a net opinion or mere hypothesis to which no weight need be accorded." Nextel of New York, Inc. v. Borough of Englewood Cliffs Bd. of Adj., 361 N.J. Super. 22, 43 (App. Div. 2003). "Opinions that lack a foundation are worthless. However, if an expert provides the whys and wherefores rather than bare conclusions it is not considered a net opinion." Beadling v. William Bowman Assocs., 355 N.J. Super. 70, 87 (App. Div. 2002).

Although technical rules of evidence do not apply strictly to land use boards under the Municipal Land Use Law, N.J.S.A. 40:55D-10(e), courts have held that land use boards should not have relied on certain "expert" testimony due to its lack of basis or foundation. In Board of Educ. of City of Clifton v. Zoning Bd. of Adj. of City of Clifton, 409 N.J. Super. 515 (App. Div. 2006), the Court found that the objector's environmental expert's testimony before the Zoning Board, concerning negative impacts that a proposed school would experience from diesel trucks nearby, constituted a net opinion. The expert had not examined the proposed plans for the development before the Board and had no knowledge about the presence of important factors such as distance from industrial traffic to the proposed school. His

testimony amounted to "bare conclusions, unsupported by factual evidence, based only on estimations and guessing" and "could not be properly relied upon by the Zoning Board." Id. at 541-542.

In another case, New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. of Adj., 160 N.J. 1 (1999), the court found that an objector's planner's opinion that a monopole would "derail" development of the local zone constituted a "net opinion that could not reasonably support the Board's findings that the monopole would substantially impair the zone plan and zoning ordinance," because "he did not support his opinion with any studies or data." Id. at 16.

Rule 1:7-4(a) requires that 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[.]" "A trial court must make adequate findings of fact 'so that the parties and the appellate court may be informed of the rationale underlying his conclusion[s].'" Ducey v. Ducey, 424 N.J. Super. 68, 74 (App. Div. 2012), quoting Esposito v. Esposito, 158 N.J. Super. 285, 291 (App. Div. 1978). "Naked conclusions do not satisfy the purpose of R. 1:7-4. Rather, the trial court must state clearly its factual findings and correlate them with the relevant legal conclusions." Curtis v. Finneran, 83 N.J. 563, 570 (1980).

In this case, Planner Clark did not support her opinion given on April 26 with any studies or data, and as a result her testimony given on that day constitutes a net

opinion. In her testimony, Planner Clark stated that the project is "consistent with the goals of the master plan, and the Open Space Element, and the larger OurJC vision." Aa242, 1T65:17-19. She did not specify which goals of the master plan it was consistent with, what parts of the Open Space element, or the OurJC vision. She also did not explain why this was consistent with those policies. She testified: "they're not changing the inherent use of the site from what it is today, which is a public plaza; this is more of just a design and aesthetic upgrade from the current conditions." Aa242, 1T65:20-23. However, Planner Clark did not explain how the "upgrade" would be compliant with these policy documents.

Section 31 review does not include as a standard that a project should be recommended by the Board if it is "not changing the inherent use". Planner Clark did not provide any background explaining that if a project is "not changing the inherent use" of a site, it is consistent with the Master Plan. Rather, she proffered this opinion without any supporting facts or analysis. As a result it is a net opinion that cannot be considered by the Board as a basis for a decision.

Planner Clark also stated that "the traffic safety measures that they've coordinated with the office of engineering do improve pedestrian safety and are consistent with the Vision Zero goals of the city." 1T65:24-T66:2. However, she did not show support for her opinion by specifying any particular traffic safety measures

or how they were "consistent with the Vision Zero goals[.]" In addition, Planner Clark did not testify as a traffic safety expert.

The Court's decision did not touch on Appellant's arguments concerning the insufficiency of Planner Clark's testimony. The Court's decision stated that "the planner, Mr. Car, testified the plan was constructed with the intention to fit the master plan. And this is sufficient testimony for the Board to base its decision on." 5T17:11-18. However, as stated above, Mr. Carman is an architect and did not give testimony about the master plan. The only professional who testified about the master plan on April 26 was Planner Clark. The Court's decision did not make a ruling either way on whether Planner Clark's testimony is a net opinion. While the Court referenced the fact that "city planner Mallory Clark testified that the EPA's plan was consistent with the master plan," 5T16:2-4, the Court did not give any explanation or evaluation of Planner Clark's testimony or its sufficiency.

Because the Court did not make any ruling or determination regarding the sufficiency of Planner Clark's testimony, and because this is one of the reasons why Appellants challenged the Board's decision before the Court, the Court's decision was arbitrary and capricious. "A trial court must make adequate findings of fact 'so that the parties and the appellate court may be informed of the rationale underlying his conclusion[s]." Ducey v. Ducey, 424 N.J. Super. at 74. The Appellate Division

should remand this decision to the Court for a complete finding as to whether Ms. Clark's testimony constituted a net opinion.

B. The Court did not address whether Mr. Rodrigues's report was considered in the Court's opinion. (Raised Below: Aa380-Aa384)

Appellants submitted a report by Carlos Rodrigues, F.A.I.C.P./P.P., as an exhibit to the certification of counsel filed on February 24, 2023, in support of the action in lieu of prerogative writs. The report, dated February 20, 2023, included Mr. Rodrigues's analysis and conclusions regarding whether the Section 31 review conducted by the Board was adequate and whether the EPA's plans violate New Jersey's public trust doctrine. Mr. Rodrigues concluded that elements of the proposal are inconsistent with the intent and purpose of the Jersey City Master Plan, in particular its Open Space element. Aa331.

Appellants' brief in support of the prerogative writ action included significant detailed discussion of Mr. Rodrigues's report. Aa380-384.[2]

[2] Under Rule 2:6-1(a)(2), briefs submitted to the trial court shall not be included in the Appellate appendix, unless the brief is referred to in the court's decision, "or the question of whether an issue was raised in the trial court is germane to the appeal, in which event only the material pertinent to that issue shall be included." R. 2:6-1(a)(2). In this case, the submission of Appellants' report by Mr. Rodrigues is germane to the appeal, as Mr. Rodrigues's report was submitted as part of

The Court did not mention Mr. Rodrigues's report at all in the July 2024 decision, either to refer to the information contained in it, or to state that it was not being considered. It is therefore entirely unknown whether the Court considered Mr. Rodrigues's extensive planning report. Under Rule 1:7-4(a) the Court "shall…find the facts and state its conclusions of law thereon in all actions tried without a jury[.]" Findings of fact are required for parties to understand the rationale behind a Court's decision. Ducey v. Ducey, 424 N.J. Super. at 74. See also Curtis v. Finneran, 83 N.J. 563, 570 (1980).

The Court did not make specific findings of fact regarding the analysis contained in the report, particularly Mr. Rodrigues's analysis of the Jersey City Master Plan. The compliance of the application with the Master Plan is a substantive factual issue in this case and warrants specific factual findings. As a result, respectfully, the Court's decision was arbitrary, capricious and unreasonable and the Appellate Division should remand this matter.

C. The Court committed reversible error because its decision was based at least in part on an erroneous factual basis that the applicant provided testimony from a professional planner when in fact the applicant did not provide testimony from a professional planner. (Not Raised Below)

Appellants' trial court case but was not acknowledged by the Court in the Court's decision. Only the material pertinent to that issue has been included.

The Court made the following findings concerning the EPA's compliance with the Jersey City Master Plan:

> The Jersey City master plan – the master plan vision is an initiative by the planning department and the Jersey City Planning Board, amongst other objectives, to create productive landscapes along the waterfront. This is Goal 30 of the JC 10 plan open space element.
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> During the April 26th, 2022 hearing, city planner Mallory Clark testified that the EPA's plan was consistent with the master plan. You have to see the transcript. It's entitled, 1, Transcript, Page 65, Lines 17 through 25, and Page 66, Lines 1 through 7. …
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> … The Court finds that the Jersey City Planning Board clearly limited their reconsideration to the standard of the review and the testimony from the April 26th, 2022 meeting, which I stated previously, the planner, Mr. Car, testified the plan was constructed with the intention to fit the master plan. And this is sufficient testimony for the Board to base its decision on.

5T15:21-17:18 (emphasis added).

Respectfully, the Court's finding that EPA presented testimony from a professional planner is erroneous. EPA never presented testimony from a professional planner. EPA presented testimony from Mr. Carman, a landscape architect, on April 26, 2022. He did not provide any testimony regarding the master plan and is not a planner. In fact, at the April 26, 2022 meeting, Mr. Alampi, the Board's counsel, asked EPA's counsel, "Mr. Pepe, are we going to hear with respect to the master plan and the – what appears to me the obvious concept of pedestrian friendly in lieu of vehicular traffic?" Aa230, 1T20:18-21.[3] In response, Mr. Pepe,

[3] Transcript of Planning Board Hearing, April 26, 2022: 1T
Transcript of Planning Board Hearing, May 10, 2022: 2T
Transcript of Oral Argument before Judge Lynes, May 25, 2023: 3T

EPA's counsel, stated: "Counsel, I had not planned on presenting any testimony with respect to the compatibility with the master plan" (emphasis added)." Aa230, 1T20:22-24. Mr. Pepe then went on to make his own statement about what he believed was compliance with the Master Plan.

The only statements given on behalf of EPA concerning the Master Plan were given by EPA's counsel, Mr. Pepe. EPA never presented a planner or any planning testimony. The Court based its decision on the factual finding that "the planner, Mr. Car[man], testified the plan was constructed with the intention to fit the master plan. And this is sufficient testimony for the Board to base its decision on." 5T17:14-18. However, respectfully, Mr. Carman was not a planner; he did not testify regarding the master plan; and EPA presented no professional planning testimony regarding the master plan. EPA's counsel even stated that they had not planned on presenting any testimony regarding compatibility with the master plan. As a result, since the Court's decision was based at least in part on an erroneous finding of fact not based in the record, the Appellate Division should reverse and remand this matter to the trial court for further findings of fact and conclusions of law.

D. The Court committed reversible error in finding that the Board did not consider extraneous evidence on May 10 because the Court did not address the fact that the Board Planner Mallory Clark's report was dated

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Transcript of Oral Argument before Judge Turula, March 19, 2024: 4T
Transcript of Decision, Judge Turula, July 12, 2024: 5T

May 10 or the arguments about the fact that the letter for reconsideration was considered. (Raised Below: 4T21:22-4T22:3)

The Court's decision on July 2024 did not address Appellants' arguments concerning the Board Planner's May 10 report being submitted the same day of the rehearing, nor did it address Appellants' arguments concerning the Board's reading the letter requesting reconsideration. Both of these arguments speak to the Board's consideration of new information for the May 10 rehearing, not only basing their decision on the April 26 record.

1. **The Court's decision that the Board had not considered any new submissions was not based on correlated findings of fact and did not address Appellants' arguments concerning the fact that the letter for reconsideration was considered by the Board.**

The Court held that the Board had not considered any new submissions between the April 26 hearing and May 10 rehearing, and that as a result the Board's decision was not arbitrary, capricious or unreasonable. To support its decision, the Court paraphrased the Board Chairman's statement on May 10: "We are not hearing any new testimony on this action tonight unless the Board wants it." 5T16:17-21, citing Aa264, 2T11:11-15 ("[W]e are not hearing any new testimony on this action tonight, unless the board – anybody from the board needs new testimony. I think I'd prefer to let the record speak for itself on the last – the last application."). To quote the Court: ad

> "[P]laintiff says that … the EPA did not meet with the … Paulus Hook Association, but just members and had – and also that there

> were – at this meeting, there was [sic] comments by the planner. The Court finds that the Jersey City Planning Board clearly limited their reconsideration to the standard of the review and the testimony from the April 26th, 2022 meeting … The fact that the EPA submitted a news article and stated that they met with a monument group … apparently was not considered by the Jersey City Planning Board. The testimony and the submissions apparently were not considered. They were submitted, but not – they were not considered. Therefore, the Board did not act arbitrary and capricious and unreasonable." 5T17:11-1T18:4.

However, the Court did not explain how it reached the conclusion that the Board had not considered the submissions from EPA or from Planner Clark. No findings of fact were made to support the conclusion that the submissions "were not considered." "Naked conclusions do not satisfy the purpose of R. 1:7-4. Rather, the trial court must state clearly its factual findings and correlate them with the relevant legal conclusions." Curtis v. Finneran, 83 N.J. at 570.

Respectfully, one issue with the Court's decision is that in order to even grant the reconsideration hearing for May 10, the Board would have had to review the EPA's April 29 letter requesting reconsideration. In turn, in reviewing that letter, the Board would have had to review the entirety of the letter, which included new information not previously included in the April 26 meeting record. The April 29 letter specifically stated:

> "Upon rehearing, the Applicant intends to introduce additional evidence that clearly demonstrates its thoughtful engagement with several neighboring property owners, stakeholders, various City offices and the general public to develop the final plaza designs[.]…Most significantly, upon rehearing, the Applicant will

> introduce evidence demonstrating that … it met repeatedly with the Committee for the Conservation of the Katyn Monument & Historic Objects ("CCKMHO") and others…Had the Board been privy to this information at the prior hearing, it would have been clear to the Board that any concerns over the treatment of the Katyn Monument were fully and satisfactorily addressed to the satisfaction of the CCKMHO, notwithstanding the self-serving, false comments made by certain members of the public to the contrary[.]"

Aa367-370 (emphasis added).

Initially, it is clear that the letter was written to the Board with the intention of presenting new evidence to the Board. EPA wrote several times in the letter that it would introduce new evidence that the Board had not previously seen or heard. In order to determine whether to grant the rehearing, a request which was contained in this letter, the Board would have had to review the entire letter. The letter also included attachments. The Board must have reviewed this additional evidence – at least the letter if not the attachments – in order to grant reconsideration. This is information that was outside the April 26 record. As a result, it was arbitrary, capricious and unreasonable for the Court to hold that the Board had not reviewed any other evidence outside the April 26 record.

2. **The Court did not address the Appellants' arguments concerning the fact that the Board Planner submitted a written planning report to the Board on May 10, and the Court's holding that the Board did not consider extraneous information outside the record was arbitrary and capricious given that the Board did consider the Board Planner's comments.**

In addition, the Court did not address the fact that the Board Planner Mallory Clark submitted a written planning report to the Board on May 10, the same day as

the rehearing. The Board attorney stated on May 10: "We had some comments from Mallory on behalf of the Planning Division, and they went through the master plan[.]" 2T7:9-13. This statement refers to the written comments that "went through the master plan" that were dated May 10. This information going "through the master plan" was not submitted until May 10. The Board stated that it was not reviewing new information, but this sentence shows that in fact they were considering Planner Clark's new comments from that same day. This document was not in the April 26 record; however, the Board considered it. The comments were also listed on the Jersey City Planning website along with the other documents that made up the application. The Board considered information outside the record, and did not allow public comment on it. As a result, the Board's action was arbitrary, capricious and unreasonable.

The Court did not address the May 10 planning report and whether or not it was proper. The Court did not make a finding of fact as to whether the Board considered that May 10 report or whether it was part of the record. As a result, the Court's decision did not resolve all issues raised that are determinative of the case, and respectfully, the case should be remanded.

E. The Court committed reversible error because the Court did not address whether the Board had authority to approve the private access road as part of the plaza plan. (Raised Below: 4T22:13-23)

Appellants argued before the Court that the plaza plan exceeded the Board's authority; however, the Court did not make any decision concerning this issue. Appellants argued:

> [T]he board approved the application with a private access road that takes up a large portion of the plaza. It's not only on the edge of the – of the plaza, but – but takes up a significant portion of it, and – and precludes pedestrian public access. The 2020 ordinance which stated that there could be a public access road on the edge of the plaza, did not state that it could take up a large proportion of the plaza. And so therefore, the board lacked the authority to approve that road without further authorization from the governing body. 4T22:13-23.

The Court mentioned this argument in the July decision while listing Appellants' arguments. "Plaintiff also [indiscernible] the approval of the private access road proposed in the application is contrary to not only the master plan, but Ordinance 20-062, claiming the road only serves private interests and encompasses approximately 40 percent of the Plaza." 5T11:22-T12:2. However, the Court did not address this argument in its legal conclusions or discuss it further after listing it. As a result, respectfully, the Court's decision was arbitrary, capricious and unreasonable, and the Appellate Division should remand.

F. The Court committed reversible error because the Court did not address whether the applicant was bound to send 200' notice on the second time when they had sent it the first time applying to the Board. (Raised Below: 4T38:4-13)

In the Court's decision on July 12, the Court held that the "notice to people owning property within 200 feet of the area is not applicable" under N.J.S.A.

40:55D-31, but the Court did not address Appellants' argument that the EPA should have published notice to people within 200 feet for equitable reasons. 5T18:5-15. Appellants argued before the Court:

> "Section 31 does not provide its own notice requirements, but as a matter of function and as a matter of fairness, the applicant provided that notice for the first hearing. And, respectfully, in terms of the way that the public of Jersey City interacts with capital improvement projects with the planning board, with district management corporations, we need to act in accordance with reality and – and pragmatically, concerning the fact that they rely on that notice and that was not given." 4T38:4-13.

Appellants' arguments concerning equitable reasons for notice, and the EPA being equitably estopped from not giving notice for the reconsideration hearing, were not addressed by the Court. The Court stated only that the statutory 200' notice requirement is not applicable. However, resolution of the equitable estoppel argument concerning notice is necessary for resolution of the case. Therefore, respectfully, the Court's decision was arbitrary, capricious and unreasonable, and Appellants submit that the Appellate Division should remand this matter.

V. CONCLUSION

For the reasons set forth herein, Appellants respectfully submit that the Court's decision upholding the Jersey City Planning Board's May 2022 recommendation of the Exchange Place Plaza application was arbitrary, capricious and unreasonable and requests that the Appellate Division reverse and remand.

Respectfully submitted,

LIEBERMAN BLECHER & SINKEVICH, P.C.

Attorneys for Appellants

Dated: December 26, 2024

/s/ Zoe N. Ferguson

Zoe N. Ferguson, Esq.

JEANNE DALY, POLISH AMERICAN STRATEGIC INITIATIVE, INC., AND POLISH AMERICAN STRATEGIC INITIATIVE EDUCATIONAL ORGANIZATION, INC., Plaintiffs/Appellants, v. EXCHANGE PLACE ALLIANCE DISTRICT MANAGEMENT CORPORATION AND JERSEY CITY PLANNING BOARD, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-4021-23 SUPERIOR COURT OF NEW JERSEY, ON APPEAL FROM LAW DIVISION, HUDSON COUNTY DOCKET NO. HUD-L-2076-22 SAT BELOW: HON. JOSEPH A. TURULA, P.J. CV. Civil Action

BRIEF OF DEFENDANT/RESPONDENT EXCHANGE PLACE ALLIANCE DISTRICT MANAGEMENT CORPORATION

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PRELIMINARY STATEMENT

On April 26, 2022, the Planning Board of the City of Jersey City ("Board") recommended against the proposal of Exchange Place Alliance District Management Corporation ("District") for capital improvements to the Exchange Place Pedestrian Plaza, the Hudson River Waterfront Walkway, J. Owen Gundy Park, and the Exchange Place Path Station in the area of Montgomery Street and Exchange Place. At the request of the District, a second hearing was conducted on May 10, 2022, at which the Board recommended in favor of the project. Those improvements have now all been completed.

The actions of the Board and the District were in strict accordance with Section 31 of the Municipal Land Use Law ("MLUL"). N.J.S.A. 40:55D-31. All decisions under Section 31 are "advisory" only. Plaintiffs in their brief fail to cite any case law confirming this undisputed clear principle of statutory law. The Board only gives advice to a public entity before the expenditure of public funds for any capital improvements. In fact, if the Board under Section 31 fails to act within forty-five (45) days of its receipt of the referral, the public entity may proceed with capital improvements without waiting for the Board's review. The Board only "reviews and recommends" capital improvement plans under the express language of Section 31.

Nowhere is this legal principle cited in appellants' brief. Murnick v. Board of Educ., 235 N.J. Super. 225, 227 (App. Div. 1989). The failure to acknowledge this case law and statutory language is fatal to plaintiffs' appeal.

The only legal issue before this Court is whether the Board's actions were "arbitrary, capricious or unreasonable." The Trial Judge adequately and properly applied this legal standard to the Board's actions. Having done so, the Trial Judge's legal judgment should be affirmed.

The arguments of Plaintiffs concerning the "record" in this matter are inconsistent and contradictory. On the one hand, Plaintiffs assert that they are entitled to present to the Trial Judge an affidavit of an expert submitted to the Court nearly a year after the Board reviewed the capital improvement plan. On the other hand, Plaintiffs complain that the Board improperly relied upon the report of a licensed landscape architect, Thomas Carmen, which was submitted to the Board on May 10, 2022 (the date of the second hearing). The case law is clear that the "record" for prerogative writ review by courts includes all documents on file with the Board at the time of the Board's hearing. The case law is equally clear that an affidavit submitted to the Trial Judge a year after the Board's actions is not part of the "record" that trial courts review in a prerogative writ case challenging a Board's actions. Accordingly, these claims of Plaintiffs in this appeal are without merit.

Plaintiffs also complain that the "notice" of the second hearing was deficient. This contention is also without merit. A Section 31 review is not an "application for development" under the MLUL requiring notice to landowners within 200 feet. N.J.S.A. 40:55D-3 and 12.

Plaintiffs' also incorrectly contend in their brief that the principles of "equitable estoppel" apply to these two public entities. The case law is equally clear and consistent that "equitable estoppel" does not apply to the actions of the Board in this case. Plaintiffs also wrongly attempt to apply "equitable estoppel" because the District gave notice to nearby landowners for the first hearing. In fact, by statute, no specific notice (other than the Board's annual notice for the schedule of its regular meetings) is required for a Section 31 review because such reviews are not "application(s) for development."

A cursory examination of each of the legal issues raised by plaintiffs, therefore, demonstrates that none of them are meritorious. Accordingly, the judgment of the Trial Court must be affirmed.

PROCEDURAL HISTORY

On April 26, 2022, the District appeared before the Board for a Section 31 review of the proposed improvements to the Exchange Place Pedestrian Plaza. At the conclusion of that public hearing, the Board approved a motion to recommend against these proposed public improvements. (1T68:22-24 – 1T75:7). The District

requested a rehearing which occurred on May 10, 2024. (2T12:9 – 2T16:25). At the conclusion of that rehearing, the Board approved a motion to recommend approval of the proposed public improvements. Plaintiffs filed a prerogative writ action on June 24, 2022. (Aa001).

The Board filed a Motion to Dismiss Count Two of the Complaint on the issue of notice to the property owners with 200 feet of the proposed improvements. Judge Martha D. Lynes heard oral argument on May 25, 2023. (2T4:21 – 2T11:15). That Motion was denied on March 15, 2024. (Aa77).

Briefs were filed and the trial proceeded by oral argument on March 19, 2024. (4T). Judge Joseph A. Turula issued an oral Opinion on July 12, 2024. (5T5:21 – 5T19:10). Judge Turula then prepared and filed a final Order dismissing Plaintiffs' Complaint. (Aa375). This appeal then followed.

STATEMENT OF FACTS

The relevant facts can be found in the administrative record reviewed by the Trial Judge. In this prerogative writ case, the Trial Judge is not required to make independent findings of fact because his function is limited to reviewing the administrative record and transcripts produced from the Board.

The Exchange Place Special Improvement District was created in December 2016 by Ordinance 16-176. Then Exchange Place Alliance District Management Corporation was designated by Ordinance 69-23 as the management corporation for

the District. As the management corporation, the District, by Ordinances 16-176 and 69-74, were given the authority to: (1) make improvements for the safety and attractiveness of the District; (2) designate an area for a pedestrian mall; and (3) fund vehicular and pedestrian safety improvement as well as cosmetic upgrades.

The pedestrian plaza is located within an open area with the proposed improvements now completed. Those newly constructed improvements include cosmetic upgrades with a new pavement design, security bollards, and vehicular and pedestrian striping. Landscaping, plantings and benches have been installed by the District. Before the District's referral to the Board, the area was an open, hardscaped plaza without a specifically designated areas for either pedestrian or vehicular use.

At hearing before the Board on April 26, 2022, the District introduced the testimony of Mr. Thomas Carman, a licensed landscape architect, who designed the project. Mr. Carman's testimony was supported by a 21-slideshow presentation of the proposed improvements to the Exchange Place Pedestrian Plaza, which was marked as Exhibit A-1. Mr. Carman described the existing conditions at the Exchange Place Pedestrian Plaza. Mr. Carman testified, "here what we are seeing, also, is the ability for vehicles to freely drive within the space, circulate around, not really defining pedestrian circulation, which can create plenty of pedestrian conflicts" (1T11:13-17) and "again, we're seeing how cars can stack and park down in this area, and really, pedestrian circulation is a leftover for the cars." Id.

Mr. Carman testified that the objective of the proposed plan was to bring defined spaces to the plaza for pedestrian and vehicle uses. For example, Mr. Carman provided testimony that:

> "the overall design being proposed, "controlling the vehicular circulation coming in, what we're doing is still respecting the boulevard nature that comes down along Montgomery, and providing a clear access point in to circulate to the Hyatt House, as well as channelized vehicular area to get to the service area and to the court to the east . . ." (1T12:12-19). "Now overall place space, we're defining a zone to the west over here. We're providing great flexibility for a stage to be put over there for open nature, for tents to be put up for flexibility, having the ability to put some tables and chairs to gather within these areas, but also providing good, clear pedestrian circulation to the PATH Station" (1T12:22-25; 1T13:1-4).
>
> "one of the requirements from the Port Authority is to secure the PATH Station, and by implementing some bollards and some planters along the southern edge here, we have this large, free expanse of public plaza space. Additionally, incorporating some green, where the existing Katyn Monument is, and defining the plaza space with a larger oval of decorative pavers, that opens up to the existing waterfront walkway. The monument space itself includes a larger curvilinear seat wall that also defines the space." (1T13:7-17).
>
> "The child's play area is located just to the south of the PATH Station. The waterfront walkway is in compliance with the DEP requirements, in terms of the widths and circulation. CitiBikes located just adjacent to the north side of the Exchange Place center here. And then, defining a crossing for the pedestrians along the waterfront walkway." (1T:10-25).

Over the course of several years the Division of City Planning and the Planning Board have created a Master Plan initiative known as the Master Plan Vision. The Master Plan Vision included elements and plans well beyond the

requirements of N.J.S.A. 40:55-28. The Jersey City Master Plan contains an Open Space Element, with specific guidelines for Waterfront Parks as well as guidelines for JC Walks Pedestrian Enhancement Plan, and the JC Vision Zero Action Plan. The adoption of these Master Plan updates was the result of several years of studies and hearings.

The Jersey City Open Space Element of the Master Plan contains three distinct themes and thirty-four specific goals. *Jersey City Master Plan, Open Space Element, Page 106.* The Open Space Element seeks to enhance every part of the City, and create an environment for investment in a resilient future. Id., at 106. In order to "enhance every square inch" of the City, the revised Master Plan seeks to design parks to be welcoming and accessible (Goal 9), collaborate across City agencies (Goal 11), expand the number, mix and distribution of programs (Goal 14), and reflect contemporary tastes and trends in parks and open space (Goal 15). To "strengthen connectivity," the revised Master Plan seeks to install facilities proximate to parks that separate pedestrian and bicyclists from traffic as much as possible (Goal 21), connect parks and open spaces through the city street network with fully accessible biking and walking facilities (Goal 22), implement JC Pedestrian Enhancement Plan and Let's Ride JC Plan with a focus on access to parks and schools (Goal 24), invest in community resources, and create links close to existing or future transit stations and stops (Goal 25). The revised Master Plan seeks

to create productive landscapes in underutilized or interstitial space and along the waterfront shorelines (Goal 30) and to expand tree coverage throughout the City (Goal 32).

With respect to design guidelines for Waterfront Parks, such as the Exchange Place Plaza, the revised Master Plan states, "Waterfront Parks represent the largest parks in the City. Because of their size, these parks can handle higher traffic and larger recreation areas. Making sure that these parks are catering to the most recent recreational trends is important to supporting active lifestyles. These parks also provide public access to the water and should connect with other waterfront parks where possible to allow for a continuous trail system. Finally, waterfront parks are at the front line of resilience and should directly integrate resilience features and education." *Jersey City Master Plan, Open Space Element, Chapter 10, Design Considerations, Page 161*.

The JC Walks Pedestrian Enhancement Plan seeks to make the City safer for pedestrians by enhancing or adding crosswalk markings and providing adequate maintenance. The Walks Pedestrian Enhancement Plan also seeks to ensure ADA depressed curbs. The JC Vision Zero Plan aims at eliminating traffic-related deaths and serious injuries. *See Jersey City Walks Pedestrian Enhancement Plan and Jersey City Vision Zero Plan*.

At the April 26 hearing, City Planner Mallory Clark testified:

> "I would say this is consistent with the goals of the master plan, and Open Space Element and the larger Our JC vision. You know, they're not changing the inherent use of the site from what it is today, which is a public plaza, this is more of just a design and aesthetic upgrade from the current conditions. I would say that the traffic safety measures that they've coordinated with the office of engineering do improve pedestrian safety and are consistent with the Vision Zero goals of the City. They've been in an interactive process with the engineering office and other emergency response teams throughout the City, to ensure that, you know, everything is operated safely while prioritizing the pedestrian experience in the plaza." (1T65:17-25; 1T66:1-7).

These facts are important and relevant to this case because the intent of Section 31 review is to have the Planning Board consider the proposal for capital improvements by local entities in relation to all of the aspects of the Master Plan.

LEGAL ARGUMENT

POINT I

SECTION 31 HEARINGS ARE ADVISORY ONLY

When a planning board conducts a hearing on a proposal for a capital improvement project under Section 31, it is only required to provide an "advisory" opinion to the public entity. See Cox & Koenig, New Jersey Zoning and Land Use Administration, Sec. 15-33 (Gann 2023). The advisory opinions of a planning board can "express its concerns" about any proposed capital improvements, but "in making these recommendations" such opinions are "non-binding" upon the public entity.

Board of Educ. of City of Clifton v. Zoning Bd. of City of Clifton, 409 N.J. Super. 515, 534 (Law Div. 2009)[1].

The most important and relevant case in this appeal is Murnick v. Bd. of Educ., 235 N.J. Super. 225 (App. Div. 1989)[2]. The Court stated plainly that in a Section 31 review: "The role of the local planning board is only advisory." Id., at 227 (emphasis supplied). In that case, the local board of education proposed to build two new schools, one at Bond Street and the other at Bradley Street. A funding referendum was approved by the voters, so the Board of Education notified the Planning Board of the proposed construction of the two schools under Section 31. The Planning Board then adopted a resolution disapproving the Bond Street school but made no mention of the Bradley School. Id., at 227-28. Plaintiff Murnick, the owner of the Bond Street site then sued, claiming that school sites must be subject to planning board review for site plan approval and satisfaction of all local zoning requirements. His suit was dismissed. Id. The Appellate Court reviewed the requirements of Section 31 and correctly held that the local Board of Education may not act on its proposal for improvements "without first reviewing the planning

[1] Plaintiffs' brief cites this case for its claim regarding the opinion of experts while ignoring this case for its only relevance here: the advisory and non-binding nature of a planning board's Section 31 review. (Pb15).

[2] No mention or citation to this case is found in Plaintiffs' brief.

board's recommendation, or until forty-five days have elapsed without the receipt of any recommendation."[3] Id., at 229.

In relevant part, Section 31 provides:

> **Review of capital projects.** Whenever the planning board shall have adopted any portion of the master plan . . . [a] public agency having jurisdiction over the matter, before taking any action necessitating the expenditure of any public funds, incidental to the character, location or extent of such project, shall refer the action involving such project to the planning board for review and recommendation in conjunction with such master plan and shall not act thereon, without such recommendation or until 45 days have elapsed after such reference without receiving such recommendation. This requirement shall apply to action by a housing, parking, highway, special district or other authority, redevelopment agency, school board or other similar public agency, state, county or municipal . . . .

In this case, the Planning Board completely fulfilled its statutory duties by conducting two reviews and making two different recommendations. Having done so, the District properly went ahead and completed the capital improvements. The advisory recommendations were considered by the District, but since the Planning Board met all of the requirements of Section 31, the Trial Judge here properly dismissed Plaintiffs' Complaint. There simply is no cause of action when both the Planning Board and the District strictly complied with their statutory obligations.

[3] School Boards are also required to seek approval from the State Board of Education under N.J.S.A. 18A:18A-16, which is not at issue here, but the Court's analysis of the Section 31 is applicable here.

POINT II

THE RECORD BELOW WAS COMPLETE AT THE TIME OF SUIT SO THAT THE TRIAL JUDGE APPLIED THE CORRECT LEGAL STANDARDS FOR THE REVIEW OF THE BOARD'S ACTIONS

Matters outside the record of the proceedings before municipal boards may not be considered in a prerogative writ case appealing the actions of such boards. Cox & Koenig, supra, Sec. 42-2.3, citing Gayatriji v. Borough of Seaside Heights, 372 N.J. Super. 203, 207 (Law Div. 2004). The factual determinations of the municipal board are presumed valid. Cox & Koenig, supra, Sec. 42-2.1 at 620, citing Dunbar Homes, Inc. v. Zoning Bd., 233 N.J. 546, 588 (2018). Unless the Board's actions are "arbitrary, capricious or unreasonable," the Superior Court must affirm. Id. This "arbitrary and capricious" standard is "analogous" to the substantial evidence standard. Cox & Koenig, supra, Sec. 42-2.1 at 621, citing Cell v. Zoning Bd., 172 N.J. 75, 89 (2002). Judicial review of a Board's action is, therefore, solely a determination of the Board's action based upon the record before the Board, so that the trial judge may not substitute his own judgment. CBS Outdoor v. Lebanon Plan. Bd., 414 N.J. Super. 563, 578 (App. Div. 2010). Generally, a municipal board can consider information supplied by municipal employees of agencies within the municipality. Cox & Koenig, supra, Sec. 18-4.4(c) at 266, and Sec. 21-1 at 313. If a municipal board must make individualized "fact findings" to support a decision, it must be "grounded" in the "sufficient" or "substantial evidence" in the record.

PADNA v. City Council of Jersey City, 413 N.J. Super. 322, 332 (App. Div. 2010), citing Infinity Broad. Corp. v. N.J. Meadowlands Comm'n., 377 N.J. Super. 209, 224-228 (App. Div. 2005), rev'd on other grounds, 187 N.J. 212 (2006). However, there are other proceedings under the MLUL which are discretionary and require no specific findings of fact, and the review by the Superior Court of such actions is limited to the "arbitrary/capricious/unreasonable" standard. PADNA, supra, at 332, citing Infinity Broad. Corp., supra, at 225; Downtown Residents for Same Div. v. City of Hoboken, 242 N.J. Super. 329, 332 (App. Div. 1990).

Applying these principles of law to this case, several conclusions become apparent. First, the Board met its statutory duties. The Board first considered the District's referral for an advisory opinion. The Board held a public hearing, considered the application and heard testimony of both the public and the licensed landscape architect who designed the improvements. At the end of that public hearing, a motion was approved to recommend against the proposed improvements. The District then sought reconsideration and submitted a May 10, 2024 report of Mallory Clark, Senior Planner of the City of Jersey City, a licensed professional planner[4]. Such reports can be considered as part of the application. Cox & Koenig, supra, Sec. 21-1 at 313. The reconsideration hearing resulted in a motion to

[4] As noted above, (infra at 8-9) Ms. Clark, a licensed professional planner employed by the City of Jersey City testified at the April 26 meeting that the proposed improvements were consistent with the Master Plan. (1T65:18).

recommend approval of the proposed amendments. In conducting these hearings, the Board complied with Section 31. It had factual information upon which to base its recommendations. Burbridge v. Mine Hill Township, 117 N.J. 376, 385 (1990); Rowatti v. Gonchar, 101 N.J. 46, 51 (1985).

Second, the scope of the Trial Court's review of the Board's decision is extremely limited: a legal review of the record before the Board to determine only if the Board's action were "arbitrary, capricious or unreasonable." Medici v. BPR Co., 107 N.J. 1, 15 (1987), citing Kramer v. Board of Adjustment of Sea Girt, 45 N.J. 268 (1965). The Trial Court does not take testimony, receive evidence outside of the administrative record, or make any determination regarding the credibility of any of the witnesses before the Board. See, El Shaer v. Planning Board, 249 N.J. Super. 323, 329 (App. Div. 1991).

Unless the Board had "abused its authority or departed from the law," the prerogative writ judge must affirm the Board's actions and may not substitute its judgment for that of the local Board. Kramer, supra, 45 N.J. at 285; Beck v. Board of Adjustment of the City of East Orange, 15 N.J. Super. 554, 563 (App. Div. 1951). Here, the trial judge correctly applied all of the legal principles governing prerogative writ reviews of local land use boards' actions. (2T:13-14, 16-20). Therefore, Plaintiffs' contentions regarding the record and the trial judge's findings are without merit.

POINT III

THE PUBLIC NOTICE MET ALL STATUTORY REQUIREMENTS

Referrals to a Planning Board for a Section 31 review and advisory opinion is not an "application for development." Cox & Koening, supra, Sec. 15-3.3 at 217. The requirements of notice under 40:55D-12 to property owners within 200 feet of the site under Section 12 of the MLUL simply do not apply here. Rather, the Open Public Meeting Act applies because "no public body shall hold a meeting unless adequate notice has been provided to the public." N.J.S.A. 10:4-9(a).

On November 23, 2021, the Board adopted a schedule for regular meetings of the Board for the calendar year 2022. It is undisputed that the meetings of April 26 and May 10, 2022, were on that list which was published according to law.

Therefore, the plaintiffs' contentions (Pb27-28) about the notice for the Board's two meetings to conduct the Section 31 review for the District are without merit.

POINT IV

EQUITABLE ESTOPPEL DOES NOT APPLY TO THE PUBLIC ENTITIES IN THIS CASE

There are some instances under the MLUL when the principles of equitable estoppel can be applied, but the circumstances of this case do not present any opportunities for such a doctrine.

For example, when an applicant disregarded the clear zoning ordinance requirements for the height of a single-family home and proceeded to construct a single-family home much higher than permitted by ordinance, notwithstanding advice from the town's construction official, a variance was required. The claim of equitable estoppel against the town and the town's construction official could not be applied to allow the height of the home to remain in violation of the zoning ordinance. Grasso v. Spring Lake Heights, 375 N.J. Super. 187, 194-201 (L. Div. 2003), aff'd, 375 N.J. Super. 41 (App. Div. 2004). Yet, equitable estoppel can apply if "an administrative officer in good faith . . . makes an erroneous and debatable interpretation of the [zoning] ordinance." Id., at 195, citing Jantausch v. Borough of Verona, 41 N.J. Super. 89, 94 (L. Div. 1956), aff'd, 24 N.J. 326 (1957). "Hardship" and "no discernible damage" can also become a factor for the application of equitable estoppel, especially where, after the improvements are constructed, a municipal board grants the homeowner a variance. See, Grasso, supra, 375 N.J. Super. at 199-200, citing Hill v Bd. of Adjust. of Eatontown, 122 N.J. Super. 156 (App. Div. 1972).

Plaintiffs cite no cases in support of their equitable estoppel claim. None of the circumstances identified in the case law support any basis for the application of equitable estoppel against either public entity in this case the Planning Board or the

District. See, Grosso, supra, 375 N.J. Super. at 47-48; see also, Cox & Koenig, supra, Sec. 12-1.4 at 178-80.

POINT V

THE DISTRICT PROPERLY DESIGNED A PORTION OF THE IMPROVEMENTS FOR VEHICLES

Plaintiffs' brief (Pb26-27) claims that the Trial Court erred by not properly adjudicating their claim about the District's roadway improvements. This claim is baseless.

The specific ordinance which grants authority to the District to create vehicular access is found in the Plaintiffs' appendix. (Aa170-175). That ordinance allows for vehicular use as specified in the Ordinance and as well as in the rules and regulations adopted by the District. (Ord. 20-062, Sec. 2-3, A, B, Aa171). That ordinance permits the creation of parking spaces as well as limited vehicular use. (Id. at Sec. E.B. (5) and (6)).

Local vehicle traffic is authorized for:

> "deliveries, pick-ups, and drop-offs of business patrons or employees and/or other loading and unloading of personnel materials or other goods to be used directly or indirectly by a business and/or residence along the pedestrian mall." Id.,

The District's design for the creation of a roadway for these limited purposes is expressly authorized by the City of Jersey City in this ordinance. Nowhere is the size or design or placement of such vehicular access limited in any way. Therefore,

the plaintiffs have no basis whatsoever to claim that the size or location of such improvements should be limited in any manner. Accordingly, this legal claim of plaintiffs must be rejected.

CONCLUSION

For all the foregoing reasons, the final judgment of the Trial Court should be affirmed.

Respectfully submitted,

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Attorneys for Defendant/Respondent,
Exchange Place Alliance District
Management Corporation

By: */s/ Donald M. Pepe*
DONALD M. PEPE, ESQ.

Dated: February 14, 2025

JEANNE DALY, POLISH AMERICAN STRATEGIC INITIATIVE, INC., and POLISH AMERICAN STRATEGIC INITIATIVE EDUCATIONAL ORGANIZATION, INC.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
	:	DOCKET NO.: A – 4021 – 23
	:	**On Appeal From:**
	:	Law Division – Hudson County
Appellants	:	Docket No.: HUD – L – 2076 - 22
-v-	:	
EXCHANGE PLACE ALLIANCE DISTRICT MANAGEMENT CORPORATION, and JERSEY CITY PLANNING BOARD,	:	**Sat Below:**
	:	Hon. Joseph A. Turula, P.J.S.C.
Respondents,	:	

BRIEF OF RESPONDENT - JERSEY CITY PLANNING BOARD

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Dated: February 19, 2025

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PRELIMINARY STATEMENT

Plaintiffs challenge the Jersey City Planning Board's (hereinafter "Board") actions in connection with a Section 31 courtesy review pursuant to N.J.S.A. 40:55D-31. Relying on general principles more akin to site plan review applications, Plaintiffs fail to appreciate or understand the limited role played by the Board in connection with a Section 31 courtesy review. The Board's sole objective and assignment is to determine whether the Exchange Place Alliance District Management Corporation's proposed improvements to the Exchange Place Pedestrian Plaza are consistent with the City's Master Plan.

PROCEDURAL HISTORY

The Planning Board conducted its statutory review at the April 26, 2022 public hearing of the Board. Aa226;1T. At the conclusion of the April 26, 2022 hearing, the Board voted not to recommend the matter. Aa226; 1T. Thereafter, Exchange Place sought reconsideration of the Board's decision, which was considered by the Board at its next regular public hearing on May 10, 2022. Aa367; Aa262; 2T. After reconsidering its decision, the Board, noting that most of its comments were related to design preference and not the goals of the Master Plan, found unquestionably that the proposed improvements were consistent with the Master Plan. Aa262; 2T.

Plaintiffs filed an action in lieu of prerogative writs on June 24, 2022. Aa001. After several rounds of motions relating to the pleadings, the Trial Court heard trial

arguments on March 19, 2024. 4T. On July 12, 2024, in an oral decision, the Trial Court found that the Board did not act arbitrarily, unreasonably or capriciously in granting reconsideration or in concluding that the proposed improvements were consistent with the City's Master Plan. 5T; Aa375.

STATEMENT OF FACTS

In December of 2016, the City of Jersey City adopted Ordinance 16-176 creating the Exchange Place Special Improvement District. Under Jersey City Code 69-70, the Exchange Place Special Improvement District is managed by a district management corporation. Under Jersey City Code 69-73, the Exchange Place Alliance District Management Corporation ("EPA") is the district management corporation for the Exchange Place Special Improvement District. Ordinance 16-176 specifically provides for the EPA to undertake improvements designed to increase the safety and attractiveness of the district and designating the area a pedestrian mall.

Under Jersey City Code 69-74, "Powers of the District Management Corporation" the EPA may:

> Fund the improvements for the exterior appearance of properties in the District (69-74(G); Fund the rehabilitation of properties in the District (69-74(H); Undertake improvements designated to increase the safety or attractiveness of the district to businesses which may wish to locate there or to visitors to the District including, but not limited to, litter clean-up and control, landscaping,

> parking areas and facilities, recreational and rest areas and facilities, pursuant to pertinent regulations of the City of Jersey (69-74(l.).

On April 26, 2022, the EPA appeared before the Jersey City Planning Board (hereinafter "JCPB" and/or "Board") pursuant to N.J.S.A. 40:55D-31 seeking a review of proposed improvements to the Pedestrian Plaza located at the foot of Montgomery Street directly adjacent to 10 Exchange Place, the Hudson River Waterfront Walkway, J. Owen Grundy Park and the Exchange Place Path Station. Aa226, 1T. The Pedestrian Plaza is located within the larger Exchange Place Special Improvement District.

At the time of the Board hearing, the Pedestrian Plaza was an open, unorganized hardscaped plaza with little amenities and both vehicular and pedestrian traffic (the EPA improvements have since been installed). Aa226, 1T11:8-12:6. The EPA's proposed (now installed) improvements included cosmetic upgrades with a new pavement design, security bollards, at-grade vehicular and pedestrian striping for designated service drive, and various landscaping, plantings, benches and other amenities. Aa226, 1T12:7-17:7.

At the April 26, 2022 planning board hearing, EPA presented testimony from landscape architect Thomas Carman and civil engineer Gabrielle Gronelli. Mr. Carman's testimony was supported by a 21 slideshow presentation of the proposed improvements to the Exchange Place Pedestrian Plaza, which was marked as A-1 at

the hearing. In addition, the Board considered comments from 16 members of the public as well as testimony from Jersey City planner, Mallory Clark.

Mr. Carman testified that the then existing Plaza provides more priority to vehicles than pedestrians "with the ability for vehicles to freely drive within the space, circulate around; not really defining pedestrian circulation, which can create plenty of pedestrian conflicts." 1T9:12-21; 11:8-17. He further testified: "again, we're seeing how cars can stack and park down in this area, and really, pedestrian circulation is a leftover for the cars." 1T12:4-6.

Mr. Carman testified that the new design would "provide pedestrian safety, flexibility for events, and to respect the existing Katyn Monument." 1T9:12-21. Specifically, he testified that:

- the overall design being proposed, "controlling the vehicular circulation coming in, what we're doing is still respecting the boulevard nature that comes down along Montgomery, and providing a clear access point in to circulate to the Hyatt House, as well as channelized vehicular area to get to the service area and to the court to the east…" 1T12:12-19. "Now overall place space, we're defining a zone to the west over here. We're providing great flexibility for a stage to be put over there for open nature, for tents to be put up for flexibility, having the ability to put some tables and chairs to gather within these areas, but also providing good, clear pedestrian circulation to the PATH Station" 1T12:22-25; 1T13:1-4.

- "one of the requirements from the Port Authority is to secure the PATH Station, and by implementing some bollards and some planters along the southern edge here,

> we have this large, free expanse of public plaza space. Additionally, incorporating some green, where the existing Katyn Monument is, and defining the plaza space with a larger oval of decorative pavers, that opens up to the existing waterfront walkway. The monument space itself includes a larger curvilinear seat wall that also defines the space. 1T13:7-17.

- "The child's play area is located just to the south of the PATH Station. The waterfront walkway is in compliance with the DEP requirements, in terms of the widths and circulation. CitiBikes located just adjacent to the north side of the Exchange Place center here. And then, defining a crossing for the pedestrians along the waterfront walkway." 1T:10-25.

At the April 26 planning board hearing, City Planner Mallory Clark testified, "I would say this is consistent with the goals of the master plan, and Open Space Element and the larger Our JC vision. You know, they're not changing the inherent use of the site from what it is today, which is a public plaza, this is more of just a design and aesthetic upgrade from the current conditions. I would say that the traffic safety measures that they've coordinated with the office of engineering do improve pedestrian safety and are consistent with the Vision Zero goals of the City. They've been in an interactive process with the engineering office and other emergency response teams throughout the City, to ensure that, you know, everything is operated safely while prioritizing the pedestrian experience in the plaza. 1T65:17-25; 1T66:1-7.

Notwithstanding Ms. Clark's testimony, at the conclusion of the April 26, 2022 planning board hearing, the Board voted unanimously to not recommend the matter. Aa226, 1T68:20-75:7. During the meeting and vote, several Board members provided comments and reasons for declining to recommend the improvements, all of which focused on design elements and not conformity with the Master Plan. Aa226, 1T66:18-75:7.

Following the Board's vote, Defendant EPA requested reconsideration asserting that the Board applied the wrong review standard. By letter dated April 29, 2022, the EPA sought reconsideration of the Board's decision specifically asserting that "the colloquy surrounding the vote made it clear that the Board took issue with the design of the proposed improvements, specifically the treatment of the Katyn Monument. The Board made no findings as to consistency with the City of Jersey City Master Plan nor did the Board relate the design concerns noted to the goals and objectives of the Master Plan, an oversight that the Applicant feels strongly must be addressed." Aa365.

At its next regular public hearing, May 10, 2022, the JCPB reconsidered its April 26, 2022 decision and concluded that its decision was in error insofar as the proposed improvements were consistent with the Master Plan of the City of Jersey City even though the Board had reservations about certain design elements. 2T, Aa262.

STANDARD OF REVIEW

The Appellate Division is "bound by the same standards as . . . the trial court." Jacoby v. Zoning Bd. of Adjustment of Borough of Englewood Cliffs, 442 N.J. Super. 450, 462 (App. Div. 2015) (quoting Fallone Props., L.L.C. v. Bethlehem Twp. Plan. Bd., 369 N.J. Super. 552, 562 (App. Div. 2004)). The role of the Court is to evaluate whether the Board's decision "is founded on adequate evidence [,]" Burbridge v. Governing Body of Twp. of Mine Hill, 117 N.J. 376, 385 (1990). "The record made before the Board is the record upon which the correctness of the Board's action must be determined, . . ." Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 289 (1965). Boards, "because of their peculiar knowledge of local conditions, must be allowed wide latitude in the exercise of the delegated discretion." Id.

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

The party challenging a board's decision bears the burden of overcoming its presumption of validity. Cell South of N.J., Inc. v. Zoning Bd. of Adj., W. Windsor Twp., 172 N.J. 75, 81 (2002). Plaintiff must show that there is no evidence whereby

the Board could have made its factual findings and conclusions. Burbridge, 117 N.J. at 376; Rowatti v. Gonchar, 101 N.J. 46 (1985). The Court is to consider this issue with deference to the Board and its unique ability to observe each witness, to examine all exhibits and to make decisions based on its own peculiar knowledge of the community, with such determinations to be given a presumption of validity. Burbridge, 117 N.J. at 386.

Additionally, it is axiomatic that where a Board has a choice of accepting or rejecting testimony of witnesses, the choice, where reasonably made, is conclusive on appeal. Allen v Hopewell Tp. Zoning Board., 227 N.J. Super. 547, 581 (App. Div. 1988). The Board can weigh the qualifications of the witness, as well as his or her demeanor when testifying, to which a Court is bound, unless totally arbitrary and unreasonable.

"[M]unicipal action is not arbitrary and capricious if exercised honestly and upon due consideration, even if an erroneous conclusion is reached." Bryant v. City of Atlantic City, 309 N.J. Super. 596, 60 (App. Div. 1998).

LEGAL ARGUMENT

POINT I

A SECTION 31 REVIEW IS NOT A SITE PLAN APPLICATION (4T26:10-24; 27:17-28:9; 31:9-24; 32:2-33:1)

The Prerogative Writ action and appeal pending before this Court do not involve site plan review or developmental approvals. Rather, the Planning Board was conducting a Section 31 Review pursuant to N.J.S.A. 40:55D-31. A Section 31 Review is not an application for development under the MLUL.

"Application for development" means the application form and all accompanying documents required by ordinance for approval of a subdivision plat, site plan, planned development, cluster development, conditional use, zoning variance or direction of the issuance of a permit pursuant to section 25 or section 27 of P.L. 1975, c. 291 (C. 40:55D-34 or C. 40:55D-36) of capital projects.

N.J.S.A. 40:55D-31 requires the Planning Board to review the proposed action in conjunction with the Master Plan and, to the extent the proposed action does not comply with the Master Plan, to make recommendations for how the proposal can comply with the Master Plan. The Board's determination in a Section 31 Review is not binding on the applicant who may act despite the Board's recommendation.

N.J.S.A. 40:55D-31 entitled "Review of Capital Projects" states:

> a. whenever the planning board shall have adopted any portion of the master plan, the governing body or other public agency having jurisdiction over the subject matter, before taking action necessitating the expenditure of any public funds, incidental to the location, character or extent of such project, shall refer the action involving such specific project to the planning board for review and recommendation in conjunction with such master plan and shall not act thereon, without such recommendation or until 45 days have elapsed after such reference without receiving such recommendation.

Thus, the sole question before the Board in a Section 31 review is whether the proposal comports with the Master Plan.

POINT II

THE PROPOSED IMPROVEMENTS COMPORT WITH THE GOALS OF THE MASTER PLAN (4T28:16-29:21)

Although the Planning Board initially voted not to recommend the EPA's proposed improvements, the Planning Board, upon reconsideration, agreed with the EPA that its vote was not based on the appropriate standard. Therefore, upon consideration, the Board unanimously agreed to recommend the proposal as consistent with the Master Plan. The Planning Board is familiar with the Master Plan for the City of Jersey City and the Master Plan Vision. Further, the Planning Board is familiar with the local zoning ordinances and the special improvement districts. Indeed, New Jersey law recognizes the concept of local boards localized

knowledge and the Court's deference to same. See e.g. Burbridge v. Governing Body of Twp. of Mine Hill, 117 N.J. 376 (1990).

For the past several years, the Division of City Planning and the Planning Board have undertaken a substantial Master Plan initiative known locally as the Master Plan Vision. The Master Plan Vision included various elements and plans, far in excess of what is required under N.J.S.A. 40:55D-1 et. seq. The Jersey City Master Plan contains an Open Space Element, including specific guidelines to Waterfront Parks as well as works in conjunction with the JC Walks Pedestrian Enhancement Plan, and the JC Vision Zero Action Plan. The adoption of the Master Plan Update was the result of several years of studies and hearings. Aa405; Aa594; Aa681.

The vision of the Jersey City Open Space Element of the Master Plan contains three (3) themes and thirty-four (34) enumerated goals. Aa510. Specifically, the Open Space Element seeks to enhance every square inch of the City, strengthen connectivity of the City and invest in a resilient future. Aa510. In order to "enhance every square inch" of the City, the Plan seeks to design parks to be welcoming and accessible (Goal 9), collaborate across City agencies (Goal 11), expand the number, mix and distribution of programs (Goal 14), reflect contemporary tastes and trends in parks and open space (Goal 15). To "strengthen connectivity," the plan seeks to install facilities proximate to parks that separate pedestrian and bicyclists from traffic

as much as possible (Goal 21), connect parks & open spaces through the city street network with fully accessible biking and walking facilities (Goal 22), Implement JC Pedestrian Enhancement Plan and Let's Ride JC Plan with a focus on access to parks and schools (Goal 24), link to and invest in community resources close to existing or future transit stations and stops (Goal 25). To achieve an "investment in a resilient future," the plan seeks to create productive landscapes in underutilized or interstitial space and along the waterfront shorelines (Goal 30), expand tree coverage equitably throughout the City (Goal 32).

With respect to design guidelines for Waterfront Parks, such as the one in question here, the Plan states, "Waterfront Parks represent the largest parks in the City. Because of their size, these parks can handle higher traffic and larger recreation areas. Making sure that these parks are catering to the most recent recreational trends is important to supporting active lifestyles. These parks also provide public access to the water and should connect with other waterfront parks where possible to allow for a continuous trail system. Finally, waterfront parks are at the front line of resilience and should directly integrate resilience features and education." Aa565. Waterfront Parks should support active lifestyles, make parks welcoming, understand community needs and highlight unique features.

The JC Walks Pedestrian Enhancement Plan seeks to make the City safer for pedestrians by enhancing and/or adding crosswalk markings and maintenance. The

Walks Pedestrian Enhancement Plan also seeks to ensure ADA depressed curbs. The JC Vision Zero Plan aims at eliminating traffic-related deaths and serious injuries. Aa681.

The testimony and evidence presented at the hearing – that the improvements would create more delineated space, provide pedestrian protection, enhance the cultural monument, reduce vehicular access, provide gathering spaces, create play areas and green space in a then existing 100% impervious area – is consistent with the Master Plan and Master Plan Vision for the City of Jersey City. Aa405; Aa594; Aa681. The decision to recommend the improvements as consistent with the Master Plan was not arbitrary, capricious or unreasonable.

The Board was entitled to rely on the professional opinion of Professional Planner Mallory Clark, an employee in the Jersey City Planning Department. Like the Board, the Jersey City Planning Department is intimately familiar with the Master Plan, Master Plan Vision, zoning ordinances and special improvement districts within the City of Jersey City. Against this backdrop Ms. Clark's opinion was not a net opinion. The Board is entitled to rely on the opinion of the City's professional planning staff.

Appellants essentially claim that Ms. Clark's opinion is a "net" opinion because "she did not support her opinion given on April 26 with any studies or data." Appellants' Brief at 16. Appellants' arguments are misplaced. First, studies or data

are not required to analyze whether a proposed improvement complies with a specific Master Plan – knowledge of the Master Plan and an understanding of the proposed improvements is all that is required. Appellants ignore Ms. Clark's personal knowledge of the Jersey City Master Plan, Master Plan Vision, zoning ordinances and special improvement districts.

Second, the Board is not bound by the technical rules of evidence. Faced with similar challenges to a professional planning opinion as being "net", the Appellate Division in Concerned Citizens of Princeton, Inc. v. Mayor & Council of Borough of Princeton, 370 N.J. Super. 429, 462–64 (App. Div. 2004) noted that

> Here, plaintiffs' challenges to the Planning Board's reliance on the report of The Atlantic Group are based, in part, upon the erroneous assumption that the rules of evidence apply to proceedings before municipal planning boards. To the contrary, N.J.S.A. 40:55D–10(e), which governs the conduct of hearings before planning boards relating to land use, explicitly provides that "technical rules of evidence shall not be applicable" to such hearings.

Id.

Third, Appellants ignore Ms. Clark's testimony about how traffic and pedestrian safety are improved (1T65:24-66:2); how impermeability is increased (1T25:12-17); how the proposed design provides for community events, local festivals and similar accommodations (1T26:3-9).

Finally, Appellants ignore that the Board heard testimony from Mr. Carman about the existing conditions and the effect the improvements would have on pedestrian safety, green space and public use of the area.

Given the Board's independent knowledge of its Master Plan and Master Plan Vision, the testimony of Mr. Carman, the Board's familiarity with the pedestrian plaza and traffic issues, as well as the opinion provided by Ms. Clark, the Board's ultimate determination that the proposed improvements were consistent with the Master Plan is supported by the record and was not arbitrary, capricious or unreasonable.

POINT III

THE PLANNING BOARD IS PERMITTED TO RECONSIDER ITS DETERMINATIONS (4T29:22-31:24)

"The breadth of an agency's authority encompasses all express and implied powers necessary to fulfill the legislative scheme that the agency has been entrusted to administer." In re Virtua-West Jersey Hospital, 194 N.J. 413, 422-423 (2008). "Administrative agencies have the inherent authority to reopen, modify, or rehear even final orders, *a fortiori,* they like courts, possess the right to reopen or continue hearings prior to the entry of a final order." In re Kallen, 92 N.J. 14 24 (1983). See also Handlon v. Town of Bellville, 4 N.J. 99, 106-107 (1950) (holding "administrative tribunals possess the inherent power of reconsideration of their

judicial acts, except as qualified by statute. . . . The denial to such tribunals of the authority to correct error and injustice and to revise its judgments for good and sufficient cause would run counter to the public interest. The function cannot be denied except by legislative fiat; and there is none such here. The power of correction and revision, the better to serve the statutory policy, is of the very nature of such governmental agencies").

Appellants' assertions that the Board considered additional evidence on May 10, 2022 when it reconsidered the action taken on April 26, 2022 is unsupported by the record. For example, the May 10, 2022 transcript reflects that no witnesses testified and no exhibits were introduced into evidence. 2T 3:2-11. Further, on the record, the Board counsel advised the Board specifically that it would be inappropriate for the City planner to supplement her April 26, 2022 testimony. 2T7:18-8:10. The Board attorney further informed the Board that "this is a purely legal argument, with the board reconsidering its prior decision, and how it arrived at that decision. So there's no further testimony. The public comment stands. The testimony stands. It's just a reconsideration of the legal standing [sic standard] applied in the matter." 2T 11:18-24.

Indeed, the Board Chairman confirmed that the City Planner's April 26, 2022 testimony was sufficient and that no additional testimony or evidence would be considered by the Board:

> CHAIRMAN LANGSTON: Okay. Yeah, just being that we're in a board deliberation, that it's not really a full-blown review here, I think we can just take her comment on the last hearing of this matter, and we can run with those.
>
> * * *
>
> And once again, we are not hearing any new testimony on this action tonight, unless the board -- anybody from the board needs new testimony. I think I'd prefer to let the record speak for itself on the last -- the last application.
>
> 2T 8:11-15.

Simply put, not only is there no evidence that the Board relied on any information outside the record presented on April 26, 2022, but the evidence directly contradicts Appellants' assertions and reflects that the Board did not consider any additional or extraneous evidence when it reconsidered its decision on May 10, 2022.

For the foregoing reasons, the trial court properly rejected Appellants' argument that the Board considered extraneous evidence when it reconsidered the April 26, 2022 decision: "The Court finds that the Jersey City Planning Board clearly limited their reconsideration to the standard of review and the testimony from the April 26th, 2022 meeting, ..." 5T 17:11-18. Based on the statements on the record cited above, the Court concluded that to the extent additional submissions were made to the Board, they were not considered by the Board. Appellants' arguments that the Court failed to explain how it reached its conclusion must be rejected.

POINT IV

NOTICE PURSUANT TO OPMA IS PROPER (4T26:10-24; 27:17-28:9)

Because a Section 31 Review is not an application for development, the notice requires of N.J.S.A. 40:55D-12 do not apply. Rather, the Open Public Meeting Act requirements govern.

N.J.S.A. 40:55D-12 states, "Public notice of a hearing shall be given for an extension of approvals for five or mor years under subsection d. of section 37 of P.L. 1975, C. 291 (C.40:55d-49) and subsection b. of section 40 of P.L. 1975, c. 291 (C.40:55D-52); for modification or elimination of a significant condition or conditions in a memorializing resolution in any situation wherein the application for development for which the memorializing resolution is proposed for adoption required public notice, and for any other application for development, with the following exceptions: (1) conventional site plan review pursuant to section 34 of P.L. 1975, C.291 (C.40:55D-46), (2) minor subdivisions pursuant to section 35 of P.L. 1975, C. 291 (c. 40:55d-47) OR (3) final approval pursuant to section 38 of P.L. 1975, C. 291 (c. 40:55d-50).

N.J.S.A. 10:4-9(a) the Open Public Meetings Act states, "no public body shall hold a meeting unless adequate notice thereof has been provided to the public." On November 23, 2021, the Planning Board adopted a schedule of regular meetings of the Board for the 2022 Calendar Year. The May 10, 2022 Public Hearing was a

regularly scheduled meeting of the Board held in accordance with the meeting schedule set by the Board at its November 23, 2021 public meeting. As the May 10, 2022 was a regularly scheduled public hearing date for the Board, it was held in compliance with the Open Public Meetings Act. Aa393; Aa400. In addition, the Section 31 Review was identified on the public agenda for the May 10, 2022 meeting.

As a result of the foregoing, the applicable Notice requirements were satisfied.

POINT V

MR. RODRIGUES'S REPORT IS IRRELEVANT

Appellants claim that this matter must be remanded to the Trial Court for clarification as to whether the Trial Court considered a February 24, 2023 report by professional planner Carlos Rodrigues, which post-dates the April 26, 2022 Section 31 Review hearing and May 10, 2022 determination of the Board. The Planning Board argued in its trial brief that the report postdated the Board's determination and, as such should be disregarded by the trial court as "extraneous, new information outside the record for review." That the trial court did not cite to the report reflects that the Court did not give it any consideration, which is proper as the Court's review was limited to whether the Board's ultimate determination that the application was consistent with the Master Plan based on the evidence presented to the Board on

April 26, 2022. There is no basis to remand the matter to the Trial Court for confirmation that the Trial Court did not rely on the improper and extraneous report.

POINT VI

APPELLANTS' EXPLOITATION OF THE TRANSCRIPT DISCREPANCIES SHOULD BE SEEN FOR WHAT THEY ARE

Appellants attempt to discredit the Trial Court based on Appellants (mis)interpretation of the transcript setting forth the Court's determination. 5T. As this Court is aware, the transcript is created from the Court recording system. It is an imperfect system. Indeed, the transcriber specifically noted the difficulty with the transcription and stated in the transcript: "*Please note: White the Court is reading its decision, at times there is very loud paper rustling. There is some indiscernible speech." 5T3:21-23.

For example, Appellants argue that "as the Court's decision was based at least in part on an erroneous finding of fact not based in the record, the Appellate Division should revers and remand." Appellant's Brief at page 22. The "erroneous fact" is an alleged reference to the professional planner. The transcript refers to "the planner, Mr. Car (phonetic)," which Appellants assert is a reference to Mr. Carman, the EPA landscape architect. See e.g. Appellant Brief at pages 18; 21-22.

Based on prior statements of the Court, it is clear the Court knew that the only planner to provide testimony was Ms. Clark. The Court noted that the Board heard unrefuted expert testimony that the "plans provided by the applicant would provide

good clean pedestrian circulation to the PATH station, Light Rail station and the surrounding area." 5T 7:24-8:2. "During the April 26th, 2022 hearing, city planner Mallory Clark testified that the EPA's plan was consistent with the master plan. You have to see the transcript. It's entitled, 1, Transcript, Page 65, 6 Lines 17 through 25, and Page 66, Lines 1 through 7." 5T 16:2-6.

Further, as the transcriber input the term "phonetic", the use of Mr. Car as opposed to Ms. Clark, cannot be imputed to the Court. Appellants' efforts to exploit the transcription as an erroneous finding of fact by the Court must be rejected.

CONCLUSION

The Board had jurisdiction to hear the application and perform the Section 31, Courtesy Review. The Board's election to reconsider its prior decision was both reasonable and appropriate. The Planning Board's ultimate determination that the proposed improvements were consistent with the Jersey City Master Plan was reasonably based on its knowledge of the City's Master Plan, Master Plan Vision, zoning ordinances and special improvement districts, as well as the testimony and evidence presented to it. For the foregoing reasons, this Court should not substitute its judgment for the Board's and should uphold Board's review.

Respectfully Submitted,

SANTO T. ALAMPI

Dated: February 19, 2025

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March 5, 2025

VIA ECOURTS

Joseph H. Orlando, Clerk
Superior Court of New Jersey
Appellate Division
P.O. Box 006
Trenton, NJ 08625
Attn: Susan Brown, Case Manager

RE: Jeanne Daly, Polish American Strategic Initiative, Inc. and Polish American Strategic Initiative Educational Organization, Inc. v. Exchange Place Alliance District Management Corporation and Jersey City Planning Board
Docket No. A-4021-23

Dear Mr. Orlando:

This firm continues to represent Appellants Jeanne Daly, Polish American Strategic Initiative, Inc., and Polish American Strategic Initiative Educational Organization, Inc. ("Appellants"). Please accept this letter brief in lieu of a more formal brief in reply to the briefs filed by Respondents Jersey City Planning Board ("Board") and Exchange Place Alliance District Management Corporation ("EPA").

Preliminary Statement

This is a matter that concerns fundamental fairness. At the heart of this case is the importance of keeping public meetings transparent. Here, the Jersey City

Planning Board reopened an application for capital improvements under N.J.S.A. 40:55D-31, known as Section 31, that they previously decided not to recommend, for significant changes to a public pedestrian plaza proposed by a District Management Corporation. After the Board decided not to recommend the project, the Corporation asked the Board to reconsider and sent in new information. Then, on the day of the reconsideration hearing, the Board's planner submitted a brand-new set of comments, with analysis that she did not previously testify to the Board about in the original hearing. With this new information, and the new Board planner comments, the Board held a quick reconsideration hearing, barred the public from asking questions or making comments, and reversed course, deciding to recommend the project per the Corporation's request.

The Board and the Corporation insist that this process was done transparently and there was nothing improperly considered. However, it is clear from an examination of the proceedings that there was information considered, after the original hearing, that was not made public. For this reason, as well as several other issues with the proceedings, this matter should be remanded to the Trial Court.

1. The Court's decision was arbitrary and capricious because the Board relied on information outside the record in its decision.

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Respondent EPA argues that the May 10 report of Mallory Clark is an admissible part of the record and a justifiable source for the Board to make its May 10 decision to recommend the project. This directly contradicts the Board's account of the proceedings. The Board claims that "there is no evidence that the Board relied on any information outside the record presented on April 26, 2022[.]" Rb17. Yet EPA argues that the May 10 report should be considered part of the application:

> "The District then sought reconsideration and submitted a May 10, 2024 report of Mallory Clark, Senior Planner of the City of Jersey City, a licensed professional planner." Rb13.[1]
>
> "Plaintiffs complain that the Board improperly relied upon the report of a licensed landscape architect, Thomas Carmen, which was submitted to the Board on May 10, 2022 (the date of the second hearing). The case law is clear that the 'record' for prerogative writ review by courts includes all documents on file with the Board at the time of the Board's hearing." Rb2.[2]

EPA also argues that the May 10 hearing was a new substantive hearing rather than simply a reconsideration of the standard applied – a "second hearing". Rb2.. EPA argues that Ms. Clark's May 10 report can be considered because it was "on file with the Board at the time of the Board's hearing" *on May 10*. In addition, EPA states:

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[1] The report is dated May 10, 2022, not 2024.

[2] The report was from Jersey City Planner Mallory Clark, not landscape architect Thomas Carman.

> "The District requested a rehearing which occurred on May 10, 2024. … At the conclusion of that rehearing, the Board approved a motion to recommend approval of the proposed public improvements." Rb3-4.
>
> "At the request of the District, a second hearing was conducted on May 10, 2022, at which the Board recommended in favor of the project." Rb1.
>
> "[T]he Planning Board completely fulfilled its statutory duties by conducting two reviews and making two different recommendations." Rb11.

EPA's own view of the May 10 hearing belies the Board's argument that the May 10 hearing was not substantive. It is evident that the Board did in fact rely on Ms. Clark's May 10 report, which was not provided to the public in any way, and the public was not permitted to comment on it or ask questions at the May 10 hearing. The fact that EPA references "two reviews" clearly demonstrates that EPA considered the May 10 review as a separate substantive review. This undercuts both Respondents' claims that the May 10 hearing was not substantive but only a reconsideration of the legal standard. It was arbitrary, capricious and unreasonable for the Board to rely on Ms. Clark's written report[3] when the report was withheld until the day of the hearing, with no option for public questions or comment.

[3] The report is attributed to "Mallory Clark-Sokolov, PP, AICP, Senior Planner, and Tanya Marione, PP, AICP, Division Director." Aa091. Ms. Marione did not provide any testimony at either the April 26, 2022 or May 10, 2022 hearings.

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It is evident from the very text of the Board and EPA's briefs that they relied on the May 10 report from Ms. Clark, which contradicts their claims at the Trial Court level that nothing after April 26 was considered substantively. Ms. Clark's report states (The words that appear in common are in bold font):

> "Proposed Conditions: The site proposes a **cosmetic upgrade** to the existing hardscape plaza including **a new pavement design, security bollards, at-grade vehicular and pedestrian striping for a designated service drive** and hotel drop-off zone, several new planting beds for landscaping and trees, and the addition of several public amenities […]." Aa091.

The Board's brief states:

> "The EPA's proposed (now installed) improvements included **cosmetic upgrades** with **a new pavement design, security bollards, at-grade vehicular and pedestrian striping for designated service drive**, and various landscaping, plantings, benches and other amenities." Rb3.

EPA's brief also includes a paraphrase of this section of the May 10 report:

> Those newly constructed improvements include **cosmetic upgrades** with **a new pavement design, security bollards,** and **vehicular and pedestrian striping**. Landscaping, plantings and benches have been installed by the District.[4]

[4] This section of EPA's brief does not cite to any page in the Appendix to support this statement. If it were to cite to a page in the Appendix, that page would in all likelihood be Ms. Clark's May 10 report.

The Respondents' briefs' language appears to be drawn directly from the May 10 report. Pavement design was never mentioned in the April 26 transcript. Neither was at-grade vehicular or pedestrian striping.

Most importantly, the Trial Court's decision was arbitrary, capricious and unreasonable because the fact that the Board relied on other information at the May 10 hearing was apparent at the Trial Court level. The transcript of the May 10 meeting shows that the Board attorney stated, "We had some comments from Mallory on behalf of the Planning Division, and they went through the master plan, and the question is does the board find it to be consistent with the master plan; if not, why not?" Aa263, 2T7:9-13. While Ms. Clark did testify on April 26, the reference to "comments from Mallory *on behalf of the Planning Division*" appears to be a reference to the Development Application Review Staff Report submitted by Ms. Clark on May 10. Aa091. The Report itself is framed as "staff comments." Aa091.

The Court also considered the submission of EPA on April 29 requesting reconsideration. The Court held that this submission was "submitted but not considered":

> "The testimony and the submissions apparently were not considered. They were submitted, but not – they were not considered." 5T17:11-5T18:4.

The Court did not explain its basis for concluding that the submissions by EPA requesting reconsideration "were not considered." Rather, the Court relied on the Board Chairman's statement that the Board would not be hearing any new testimony on May 10. However, the Chairman's statement suggests that the Board actually did rely on the new report: "We had some comments from Mallory on behalf of the Planning Division, and they went through the master plan, and the question is does the board find it to be consistent with the master plan[.]" Aa263, 2T7:9-13. This statement shows that these comments were to be considered in answering the question of compliance with the Master Plan. The Court did not address the May 10 report, or the reference in the May 10 transcript to "comments from Mallory." As a result, Appellants respectfully submit that the Trial Court's decision was arbitrary, capricious and unreasonable.

2. Section 31 hearings are subject to the same legal standards as any public meeting.

Respondents, the Board and EPA, argue that the application is submitted pursuant to Section 31, N.J.S.A. 40:55D-31, and is an advisory process rather than an application for development. Appellants acknowledge this in their brief. The nature of the Section 31 hearing as advisory is not in dispute. Appellants stated on

the first page of their preliminary statement, "Since the Section 31 review process is a courtesy review, the Board's decision was not binding on the applicant, and the applicant could have continued to build the project." Ab1.

However, Respondents' argument continues to claim that because this is an advisory process that centers on the Master Plan, the Board fulfilled all its duties, and the decision to recommend the plan should not be disturbed. The EPA argues:

> "the Planning Board completely fulfilled its statutory duties by conducting two reviews and making two different recommendations. Having done so, the District properly went ahead and completed the capital improvements." Rb11.

The Board argues, "[T]he sole question before the Board in a Section 31 review is whether the proposal comports with the Master Plan." Rb10.

Although the Section 31 process is advisory and centers on the Master Plan, it is still a public hearing and a public process. A Section 31 application is not exempt from other requirements under the Municipal Land Use Law concerning the format of a hearing, nor is it exempt from common law standards concerning the arbitrary, capricious and unreasonable standard for challenges to land use board decisions. A Section 31 hearing must still be *fair and open to the public.* As a result, respectfully, this matter should be remanded to the Trial Court.

3. The Court did not address Mr. Rodrigues' planning report.

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The Board argues that Mr. Rodrigues's report, submitted to the Trial Court, is "irrelevant" and the Court's lack of discussion of the report "reflects that the Court did not give it any consideration[.]" Rb19. The Board argues that the Court's review must be limited to "whether the Board's ultimate determination that the application was consistent with the Master Plan based on the evidence presented to the Board on April 26, 2022." Rb19-20.

Mr. Rodrigues's report was submitted to provide an expert opinion to the Trial Court concerning the Plaza plan's compliance with the Jersey City Master Plan. The public had no opportunity to present any kind of comment or report at the May 10 meeting. This is the main difference between the May 10 Clark report and Mr. Rodrigues's report: the Board controlled what information was able to come into consideration for its own decision. Had there been an opportunity for the public to make comment or question, this type of analysis from Mr. Rodrigues or others might have come before the Board at the time of reconsideration. But the public was denied this opportunity. It is unfair, arbitrary and capricious for the Court to allow the May 10 report but not Mr. Rodrigues's report.

4. Ms. Clark's April 26 testimony constituted a net opinion.

The Board argues that they are entitled to rely on Ms. Clark's opinion and it is not a net opinion because "knowledge of the Master Plan and an understanding of the proposed improvements is all that is required." Rb14. The Board also argues that in land use proceedings, land use boards are not bound by the technical rules of evidence. Rb14. Appellants acknowledged in their brief that technical rules of evidence do not apply strictly to land use boards under the Municipal Land Use Law. Ab15. Yet, New Jersey courts have held that land use boards should not accept expert opinions that are not supported by factual evidence and are "based only on estimations and guessing." Board of Educ. of City of Clifton v. Zoning Bd. of Adj. of City of Clifton, 409 N.J. Super. 515, 541-542 (App. Div. 2006).[5]

There is no case law to suggest that a Section 31 review is not bound by the same requirements concerning the basis for testimony of experts as any other land use application. Land use boards are entitled to rely upon the opinions of their experts. However, those opinions cannot be bald assertions without any support. In this case, Ms. Clark testified on April 26 that the project was "consistent with the

[5] EPA argues that Appellants are "ignoring this case for its only relevance here: the advisory and non-binding nature of a planning board's Section 31 review." Rb10. But there is no question concerning whether a Section 31 review is advisory and non-binding. Appellants have no argument about this.

goals of the master plan, and the Open Space Element, and the larger OurJC vision," 1T65:17-19, but she did not specify which goals it satisfied, what parts of the Open Space element it satisfied, or what about it made it compatible with the OurJC vision.

The Board claims that Appellants "ignore Ms. Clark's testimony" as to several items. Rb14. Appellants are not "ignoring" any of Ms. Clark's testimony. First, as for the "testimony about how traffic and pedestrian safety are improved," Appellants cited this exact testimony in their brief, at Ab17, and explained how it was inadequate and she did not testify as a traffic safety expert. Second, as for impermeability, this was not testimony that she gave. This was a question that she asked the applicant's engineer.[6] Third, regarding the Board's claim that she provided testimony on "how the proposed design provides for community events": This is, again, a question posed to the applicant.[7] This is not testimony.

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[6] Specifically, the lines cited by the Board read as follows: "And this probably seems obvious, but just for the sake of the record, would you confirm that you are increasing the impermeability – or the permeability of the overall site from where it stands today in the proposed design?" 1T25:12-17.

[7] "And then, the only other question I had for Don's team is just for clarity for the board. can you just confirm that the current design does allow for community events, similar to what has been done in the past here with the 4th of July event, and other local festivals, can be accommodated in the proposed configuration?" 1T26:3-9.

If the testimony of Ms. Clark from April 26 is to be the only planning testimony that the Board relies on for its decision, then it must be based in specific findings of fact as to why it is consistent with the Master Plan. The May 10 report of Ms. Clark was ostensibly not included in the Board's considerations; if this is true then the minor comments offered by Ms. Clark on April 26 are insufficient to justify the recommendation of the project as consistent with the Master Plan. For example, Ms. Clark's testimony that the traffic safety measures are "consistent with the Vision Zero goals" only addresses one part of the Master Plan. Vision Zero is not the entire Master Plan.

5. Whether the Board can reconsider is not at issue; the format of the Board's reconsideration was arbitrary, capricious and unreasonable.

The Board dedicates a section of its legal argument to explaining that the Board is permitted to reconsider its determinations. Appellants make no argument that Boards are not permitted to reconsider their determinations. What is at issue here is not whether the Board has the authority to reconsider its decision, but whether the Board conducted that reconsideration properly, which they did not.

The Board explains that they granted reconsideration because, according to EPA's letter requesting reconsideration, the Board "made no findings as to

consistency with the city of Jersey City Master Plan …, an oversight that the Applicant feels strongly must be addressed." Rb6. This argument by EPA is entirely disingenuous. When Board counsel asked if EPA would be presenting testimony "with respect to the master plan," EPA counsel replied, "**I had not planned on presenting any testimony with respect to the compatibility with the master plan.**" 1T20:22-24 (emphasis added). If EPA were concerned about compliance with the Master Plan, EPA had the opportunity to present testimony about the Master Plan. They did not do so.

Whether the Board was authorized to reconsider the application is not at issue, but the way reconsideration was done was arbitrary, capricious and unreasonable. The Trial Court held that the reconsideration should be upheld. Respectfully, the Trial Court's decision was arbitrary, capricious and unreasonable in that regard.

6. The Trial Court should consider, on remand, the propriety of the Board's recommendation of the private access road.

EPA argues, for the first time, that the private corporate roadway which occupies a substantial portion of the public pedestrian plaza is permitted under Jersey City ordinances. EPA argues that Ordinance 20-062 "permits the creation of parking spaces as well as limited vehicular use." Rb17.

EPA argues, "Nowhere is the size or design or placement of such vehicular access limited in any way." Rb17. However, the Operating Plan – which is integrated by reference into the ordinance – does limit such facets of vehicular access: it states that a private access road will be established at "the southernmost edge of Exchange Place." 4T37:16-4T38:2. The plaza is for pedestrians. It is not for unfettered vehicular use. The Operating Plan limits access by cars, so that pedestrians can use the plaza for public uses, not private ones. Respectfully, this case should be remanded to the Trial Court to address the propriety of the private access road.

7. The EPA should have mailed notice of the reconsideration hearing for fairness reasons.

The language of the Municipal Land Use Law does not state that notice must be mailed to neighbors within 200 feet of a Section 31 application. However, EPA did mail such notice for the first hearing. As a matter of fundamental fairness, they should have mailed that notice again for the second hearing, because they caused neighboring property owners reasonably to rely on the expectation that they would receive notice in this manner for this application. Appellants respectfully submit that this be remanded to address this issue.

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8. The Court should address on remand any potential misimpressions concerning planning testimony provided to the Board.

The Board argues that the transcript of the Court's decision should not be read as a statement that Mr. Carman was a planner who gave testimony. The Board argues that the transcript specifically states that the Court's statement regarding "Mr. Car" is phonetic. Rb20. The Court transcript does cite "Mr. Car" as "phonetic." This statement by the Court is relevant EPA did not provide any of its own planning testimony concerning the Master Plan and then sought reconsideration due to the Board's alleged failure to consider the Master Plan. If there is any possibility that the Court was under the impression that EPA provided planning testimony, that is important to correct.

Conclusion

For the reasons set forth herein, Appellants respectfully submit that the Appellate Division should reverse and remand this matter to the Trial Court.

Respectfully Submitted,

/s/ Zoe N. Ferguson
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