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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3786-21**

**DONALD WHITEMAN,
PATRICIA A. DOLOBACS,
JUDITH A. ERDMAN, and
282 OTHER PETITION SIGNERS
OF SOUTH SEASIDE PARK
HOMEOWNERS & VOTERS
ASSOCIATION,**

Plaintiffs-Respondents,

v.

**TOWNSHIP COUNCIL OF
BERKELEY TOWNSHIP and
TOWNSHIP OF BERKELEY,**

Defendants-Appellants.

Argued December 5, 2023 – Decided June 17, 2024

Before Judges Summers, Rose and Perez Friscia.

On appeal from the Superior Court of New Jersey, Law
Division, Ocean County, Docket No. L-2667-20.

Gregory P. McGuckin argued the cause for appellants
(Dasti, Murphy, McGuckin, McNichols, Connors,
Anthony & Buckley, attorneys; Gregory P. McGuckin,

of counsel; Kelsey A. McGuckin-Anthony, on the briefs).

Joseph Michelini argued the cause for respondents (O'Malley, Surman, & Michelini, attorneys; Joseph Michelini, on the brief).

PER CURIAM

Plaintiffs Donald Whiteman, Patricia A. Dolobacs, Judith A. Erdman, and 282 other petition signers of South Seaside Park Homeowners & Voters Association petitioned defendant Township of Berkeley (Township) to deannex South Seaside Park (hereinafter South Seaside to minimize confusion with Seaside Park; we mean no disrespect) from the Township as a prerequisite to seeking annexation by the Borough of Seaside Park. After taking over four years to complete hearings, the Berkeley Township Planning Board (Board) recommended a year later that the Township deny the deannexation petition. The following month, defendant Township Council of Berkeley Township (Township Council or Council) rejected the petition based on the Board's findings.

Plaintiffs filed a complaint in lieu of prerogative writs with the Law Division to overturn defendants' decision.¹ After conducting argument, the trial judge issued an order and written decision in plaintiffs' favor, approving South Seaside's deannexation from the Township and, thereby, allowing plaintiffs to petition Seaside Park to annex their community. The judge determined the Township Council's denial of plaintiffs' petition was arbitrary, capricious, and unreasonable because the Council's outcome was predetermined as evidenced by the biased hearings. The judge further found plaintiffs satisfied the legal standard for deannexation set forth in N.J.S.A. 40A:7-12.1, by showing that refusing deannexation is harmful to most South Seaside residents and deannexation would cause insignificant economic harm and no social detriment to the Township.

Defendants appeal, arguing the judge erred because the weight of the evidence supported the Township Council's denial of South Seaside's deannexation. We disagree, concluding the judge properly applied the law and her factual findings were supported by credible evidence in the record. We therefore affirm.

¹ Although plaintiffs were considered "petitioners" prior to the institution of this action, for consistency, we refer to them as plaintiffs throughout this opinion.

I.

In September 2014, plaintiffs, who live in South Seaside, petitioned the Township to deannex South Seaside from the Township. Beginning on January 8, 2015 and ending on February 7, 2019, the Board conducted thirty-eight hearings. Those hearings revealed the following.

A. The Past

In 1875, the Township was incorporated after deannexing from what is now Toms River Township. Twenty-three years later, Seaside Park de-annexed from the Township while the adjacent South Seaside community remained part of the Township.

In the 1970s, South Seaside petitioned and obtained trial court approval to deannex from the Township without the Township's consent as a prelude to seek annexation by Seaside Park. See S. Seaside Park Voters & Taxpayers Ass'n, Inc. v. Twp. Comm. of Twp. of Berkeley, No. L-9604-75 (Law Div. July 20, 1978). However, Seaside Park denied the request for annexation, thereby keeping South Seaside Park as part of the Township.

B. The Present – The Township

The Township consists of approximately 55.8 square miles, including 12.9 square miles of water. It has ten miles of oceanfront, consisting mostly of Island

Beach State Park, and including White Sands Beach in South Seaside,² and eighteen miles of bay frontage. The Township is divided into a mainland section, located west of Barnegat Bay, and a non-contiguous barrier island section consisting of Pelican Island, located in Barnegat Bay, and South Seaside, located east of Barnegat Bay. The Township's mainland section, where the heartbeat of the Township takes place, is becoming suburban and is home to more than ninety-nine percent of its 41,255 residents. The mainland houses the Township's municipal buildings, most of its parks and recreational facilities, preserved open space, farmland, cultural and historic sites, and locations where senior citizen programs and recreational events are held—except for one summer beach party. All Township governance meetings are held on the mainland, except for a few zoning meetings held in Seaside Park in the winter of 2016 and 2017, after the deannexation petition had been filed.

C. The Present – South Seaside

South Seaside is located on the barrier island east of Barnegat Bay, sandwiched between Island Beach State Park to the south and the Seaside Park to the north. It shares a zip code with Seaside Park, which often leads to confusion that South Seaside and Seaside Park are one municipality.

² South Seaside comprises the only oceanfront controlled by the Township.

South Seaside, approximately 150 acres or a quarter square mile in size, has 2,900 linear feet of oceanfront and 5,000 linear feet of bay front. Its 490 year-round residents comprise about one-tenth of one percent of the Township's total population. South Seaside is entirely built-out, leaving no room for growth. It contains about 1,400 housing units consisting of single-family homes and multi-family condominium complexes, and a few businesses—a hotel, a motel, three restaurants, two bars with restaurants, and a retail marine supply store. There are only two public parks located in South Seaside: a basketball court without bathrooms, bleachers, shade, trees, lights, or parking; and White Sands Beach, comprising 1,000 feet of oceanfront, with no showers or changing facilities, no food vendor, and no parking lots, but having one water fountain, a male restroom, and a female restroom. White Sands Beach is farther from mainland residents than other beaches, including bay beaches in the Township and other municipal ocean beaches situated north of South Seaside.

Plaintiffs contend the Township has failed to: develop South Seaside's bayside beach; adequately upgrade and maintain South Seaside's roads; provide adequate garbage and recycling collection, especially in the summer; and provide adequate police and emergency services. As a result, they rely heavily on Seaside Park for services.

Travel between the Township's mainland and South Seaside requires a 13.5-to-16.2 mile drive through seven municipalities.³ By car, it takes approximately forty-five minutes during the summer and twenty-four minutes during other parts of the year to travel between these locations. There is no public transportation between South Seaside and the mainland. The travel distance is more acute for South Seaside's less mobile elderly residents. These impediments, according to plaintiffs, cost them time and money and negatively impact their ability to participate in the Township's civic life, such as attending meetings, obtaining governmental services (e.g., licensing, and beach tags and parking permits) and engaging in recreational activities. Consequently, South Seaside residents are part of the social fabric of the neighboring Seaside Park. Moreover, the inconvenience for South Seaside residents to attend municipal meetings on the mainland is exacerbated by their inability to watch the cable television broadcasting of those meetings because they have a different cable provider.

³ To get to the Township's mainland, South Seaside residents must travel through Seaside Park, Seaside Heights, Toms River, South Toms River, Beachwood, Pine Beach, and Ocean Gate.

D. Expert Testimony

1. Plaintiffs' Experts

Licensed professional planner Scott Bauman opined that defendants have historically neglected South Seaside in planning and zoning issues, economic development, and providing public services. He stated deannexation would socially and economically benefit most of South Seaside's residents but would not cause significant economic or social injury to the Township. Noting the average income of residents was higher in South Seaside than in the Township, but the residents of the Township's mainland bayside neighborhoods have substantially the same careers and income levels and high property values as South Seaside residents, Bauman professed de-annexation would not deprive the Township of a substantial portion of its wealthiest residents, open space, recreation facilities, and cultural activities. Bauman opined that because South Seaside's housing stock consisted mostly of bungalows and mobile homes, de-annexation would not result in the Township losing a substantial portion of its wealthiest residents or its most prestigious homes.

Due to Bauman's illness, Barbara Allen Woolley-Dillon testified in his stead to rebut the Township planner's testimony. She contended the Township planner's opinion, as noted below, that the Township would be harmed by

deannexation was based on flawed data. Woolley-Dillon reaffirmed Bauman's testimony that the Township would not be harmed by deannexation, but South Seaside residents would be harmed if deannexation did not occur.

Kenneth Moore, a certified public accountant and a registered municipal accountant, testified regarding the financial implications of deannexation. He asserted South Seaside represented 10.68 percent of the Township's total net assessed value of property; thus, deannexation would cost the Township a loss of annual municipal tax revenue of \$3,318,173 from its total municipal tax revenue of \$31,067,136. However, Moore stated that without South Seaside, the reduction of police services provided by the Township would reduce or eliminate the tax impact on the Township's taxpayers. He testified that South Seaside's annexation to Seaside Park would financially benefit the taxpayers of both communities: Seaside Park taxpayers would experience a tax reduction of ten percent while South Seaside taxpayers would see a forty percent decrease in their taxes.

2. The Township's Experts

Township Planner Stanley Slachetka presented a starkly different picture of deannexation. He testified that the Township did not neglect South Seaside, particularly in its recent planning documents. He claimed deannexation of South

Seaside would cost the Township almost seven percent of its housing stock. He opined that losing South Seaside's oceanfront neighborhood would be socially significant, and it would not be mitigated by the fact that the larger oceanfront property of Island Beach State Park would remain in the Township because as a state park it was not under the Township's control. Regarding plaintiffs' complaint about the lack of maintenance of and recreational facilities at South Seaside's bay beaches, Slachetka proffered that there might be difficulties in developing a bay beach in South Seaside due to riparian rights.

Frederick C. Ebenau, a Certified Municipal Finance Officer, testified regarding the financial implications of deannexation. He disagreed with Moore's opinion that the Township could save a significant amount of money on policing due to deannexation, because he assumed no police officers would be terminated. Ebenau projected deannexation would result in a tax increase of \$253 for the average single-family home in the Township. He further testified that based upon the Township's projected \$50 million in new development coupled with use of the Township's surplus funds, and "rais[ing] taxes a little bit," it would take "[p]robably less than five years" for the Township to recover from the deannexation of South Seaside.

3. The Board's Expert

The Board retained professional planner Stuart Wiser of Remington & Vernick Engineers to coordinate its hearings and prepare a Report of Findings at the hearing's conclusion for its consideration. Wiser's 399-page report concluded the petition should be rejected.

Wiser acknowledged the physical distance between South Seaside and the Township's mainland and the communities were socially diverse. He opined deannexation would cause economic injury to the Township, and a loss of its better-educated and wealthier residents would damage the Township's prestige. He calculated deannexation would increase the average Township taxpayer's total annual municipal tax by \$65. He testified the Township neither neglected nor failed to invest in South Seaside, and plaintiffs' concerns could be addressed through the Township entering municipal services agreements with Seaside Park to avert deannexation.

Wiser, accepting the projection of plaintiffs' financial expert of "a first-year post-deannexation tax increase for the remaining residents of Berkeley Township of 3.1 [percent]," stated: "Such percentage translates to increased property tax payments ranging from \$19 for a home assessed at \$100,000 to \$35 for the average Berkeley Township home assessed at \$183,600 to \$94 for a home

assessed at \$500,000." Moreover, Wiser projected "[t]hese increases will be subject to a compounding [effect] as the impact of deannexation extends in perpetuity." He accepted plaintiffs would experience a forty-percent tax reduction from deannexation, noting: "While [plaintiffs] have testified that their motives in pursuing deannexation is not tax shopping, the implication of a [forty percent] reduction is difficult to ignore."

Wiser further concluded that "while [plaintiffs] may experience inconvenience and frustration in being part of [the] Township, they do not suffer the kinds of 'long term, structural and inherently irremediable detriment' that the Legislature had in mind when it adopted the [a]nnexation [s]tatute." Deannexation would cause "long term, structural and inherently irremediable detriment" to the Township, according to Wiser.

E. Due Process Concerns

About three months after the petition for deannexation was filed and prior to the Board's hearings, Wiser met with several Township officials to provide an overview of the deannexation process. Among those attending were the Township's mayor and its planner, Slachetka, who later testified before the Board for the Township. In a memo relating to the meeting, Wiser advised, among other things:

[Plaintiffs] will undoubtedly testify that being a part of [the] Township is causing them social and economic harm that will be alleviated if they are permitted to de-annex and join . . . with Seaside Park. It is likely that they will provide testimony as to hardships they face as part of [the] Township. And some of these hardships might be viewed by the [T]ownship and/or board members as being exaggerated or worse.

He counseled Board members "to fight the natural tendency to argue with witnesses."

Four months into the Board's hearings, Christopher Reid, the Township's Administrator, sent an email to numerous Township officials, the Board's attorney Gregory McGuckin and Wisner, noting their prior communications and seeking to organize a meeting and "create a strategy" for the Township to "refute" plaintiffs' testimony. The email stated:

Greg, Stuart, Rodney, Jim, and Stan:

Thank you for the courtesy of your time during our most recent conversations. As you are aware the deannexation of [South Seaside] is a critical issue to the [Township]. Please plan a meeting to identify the material issues, review the completed hearings, and create a strategy for the [Township] portion of the hearing, including but not limited to, material items to refute from applicant testimony, documentation required, priority of testimony/witnesses for [the Township].

About a year later, the Township and Board representatives met again to discuss the deannexation proceedings. Wisner attended two meetings early in the proceedings, recalling: "The meetings . . . were project coordination meetings that talked about . . . the testimony that had been offered to date. The testimony that was likely to be proffered by the [p]etitioners and who the individuals or the departments were that were best suited to answer that."

Wiser also assisted in preparing Township witnesses for their testimony before the Board by providing them with annotated transcripts of prior hearing testimony relevant to the subject matter of their anticipated testimony, which included his editorial commentary and questions. Wisner tried to mitigate his involvement, stating his commentary on the annotated transcripts were "just thoughts," and "suggestions that would clarify the record."

The record also reflects bias and pre-determination of the petition by a few Board members. An anti-deannexation sign was placed on the property line of one Board member's property. He denied ownership of the sign, stating it was not on his property and he did not put it up.⁴ At an Italian-American Club meeting in the summer of 2015, a Board member and Councilman John A.

⁴ Without citation to the record, defendants maintain the Board member at issue, Richard Callahan "abstained from the vote on the petition."

Bacchione advised senior citizens to come to the meetings "because if South Seaside . . . becomes [part of] Seaside Park, your taxes are going to go up."⁵

About nine months before the last Board hearings, and more than two years before the Board issued its resolution recommending denial of the petition and the Township issued its resolution denying the petition, then-Township Administrator John Camera, who succeeded Reid and had been present at the noted Township/Board meetings, provided commentary and opinions on the evidence adduced thus far. He criticized the petition, dismissed the concerns of plaintiffs, who he characterized as elitist, and explicitly rejected the prospect of deannexation. The Board rejected plaintiffs' objection to Camera's testimony as argumentative.

Lastly, eight months before the hearings were completed, Board member Nick Mackres provided his personal opinions on a factual question before the Board—the financial implications of deannexation, apparently anticipating the Township's denial of the petition with a subsequent appeal to the trial court.

⁵ These incidents were addressed at Board hearings on May 5, 2016 and June 2, 2016.

II.

In August 2020, about six years after plaintiffs petitioned the Township, the Board recommended by resolution that the Township Council deny plaintiffs' petition for deannexation. The Board was unpersuaded by plaintiffs' contentions and principally accepted the entirety of Wiser's report. The essence of the Board's thirteen-page resolution is distilled in its last two pages stating:

While there are certainly social and economic benefits to the residents of South Seaside . . . if they were to become residents of Seaside Park, it is clear to the Board that the greatest benefit would be an approximate 40 percent reduction in their property taxes. As a result, clearly[,] refusal to consent could detrimentally affect this potential cost savings to South Seaside . . . residents. Likewise, the ability of South Seaside . . . residents to participate in a greater degree in local government affairs in Seaside Park, if they are members of that community, would be increased if deannexation were to occur and, consequently, it can certainly be argued that refusal to consent to such deannexation would be to their detriment. However, the Board finds that, while there is certainly an economic benefit, the social well-being prong of this analysis is much more speculative and, ultimately, unclear. Is it a benefit for the richest, most homogenous, most well-educated residents of South Seaside . . . to become part of a very similar municipality, or is their social well-being advanced through their participation in Berkeley Township matters, which contains a more diverse population, economic class and geographic area. As a result, whether the petitioners have established this element is unclear.

However, there can be no question that, if de-annexation were to occur, a significant injury would be imposed upon the remaining residents of Berkeley Township. These injuries cover economic, financial, social and more ephemeral losses. The loss of more than 10 percent of the Township's tax base cannot be underestimated and, in fact, would be catastrophic to the rest of the municipality. The loss of the most wealthy, most educated, nicest neighborhood of the community would, likewise, be irreparable. The potential loss of an ocean beach, when so few municipalities have the opportunity to own and control such a facility for its[] residents, would, likewise, be irreplaceable. The loss of the Township's oceanfront neighborhood, the only oceanfront beach it controls, a tax impact in perpetuity compounded every year, clearly represents the type of significant injury recognized by the statute. For these reasons and the reasons set forth herein in the attached Exhibit A, the Berkeley Township Planning Board reports to the Township Council of the Township of Berkeley that it is its[] recommendation that the petition for de-annexation be denied.

In September 2020, a month after the Board rejected plaintiffs' petition, the Township Council agreed with the Board, issuing a short, two-page resolution denying the petition for deannexation, citing "the well-supported findings detailed within" the Board's resolution.

III.

Seeking reversal of the Township's decision, plaintiffs filed a complaint in lieu of prerogative writs in the Law Division. After considering the parties'

arguments, the trial judge entered an order authorizing South Seaside's deannexation from the Township so that plaintiffs can pursue annexation by Seaside Park.

In accordance with N.J.S.A. 40A:7-12.1 of the deannexation statute, N.J.S.A. 40A:7-12 to -25, the judge first determined whether the Township's decision was arbitrary and unreasonable based on plaintiffs' allegations of bias, prejudice, and collusion between the Board and the Township Council. The judge found there were "undisputed facts" showing that "the outcome of [the deannexation] process was in fact predetermined." The judge stated:

Both elected officials and Board members, . . . were demonstrative in their opposition to this petition. Rather than conducting a fact[-]finding hearing, the members of the . . . Board became part of the adversarial process. The Board's planner, Stuart B. Wisner, P.P., reviewed transcripts of hearings and privately advised the . . . Board how to respond to the concerns raised. Since Wisner was not produced as a witness at the hearings, [plaintiffs] were denied the right to cross examine Wisner, although his recommendations impacted the decision making of the Board. His comments and recommendations were shared with other witnesses, members of the . . . Board, and Township officials. The . . . Board and Township Council held joint meetings to discuss strategy to deny the petition.

. . . .

. . . Clearly the obligation of the . . . Board to conduct an unbiased and independent review of the petition, as set forth in the statutory scheme, was thwarted by the pattern of conduct among the . . . Township officials and the failure to adhere to the statutory scheme [for] conducting an impartial and fair hearing. . . . [P]lanning boards are not . . . permitted to act in opposition to a petitioner or [on] behalf of a municipality.

Addressing the merits of the petition, the judge recognized that by a large majority, South Seaside residents supported deannexation. The judge determined the geographic isolation of South Seaside from the Township's mainland "as a matter of common sense militates in favor of deannexation," as it costs South Seaside residents money and time to travel to conduct business at the Township's police department, municipal offices, and municipal court. Although deannexation would cause the Township to lose a public ocean beach, it "represent[ed] only 5.4 percent of the Township's 28 miles of shoreline most of which is located in [state-owned] Island Beach State Park and within the Township." The Township's mainland residents would still have use of closer public beaches, such as Ortley Beach, Seaside Heights, and Seaside Park. In addition, the judge noted the Township would retain "significant waterfront residential and commercial development on the waters of the west side of

Barnegat Bay" areas comparable to the social-economic, race/ethnicity, and property values of South Seaside Park.

The judge further pointed out that if South Seaside were annexed by the adjacent Seaside Park, the money and travel time costs would be relatively non-existent. Given that South Seaside residents more frequently engage with their Seaside Park neighbors, the judge reasoned "Township [residents] would incur little if any social detriment with the loss of South Seaside." The judge did not place much stock in plaintiffs' complaints that they received inadequate municipal services from the Township, but found even if municipal services were adequate, that alone would not be a sufficient basis to deny consent to deannexation.

Regarding the financial consequences of deannexation, the judge disagreed with the Board that the motivation behind the petition was to reduce their property taxes. Instead, the judge found plaintiffs were "motivated more as a result of the feeling of isolation and neglect by this community as opposed to 'tax shopping.'" Recognizing that South Seaside accounts for only one percent of the Township's population but about ten percent of its property tax ratables, the judge acknowledged deannexation would increase taxes for the remaining

Township residents.⁶ The judge rejected the Township's claim that the average Township home would incur an annual tax increase of \$200 because it failed to recognize cost savings associated with deannexation.

The judge decided "[t]he court is satisfied that the impact on . . . Township residents is not so substantial as to be a basis to deny deannexation. The benefit to the residents of South Seaside, by comparison, would be quite substantial." Considering the long-term financial impact of de-annexation, the judge did not project fiscal doomsday for the Township. She noted: the elimination of costs associated with providing municipal services to South Seaside; the potential for additional ratables from growth in the mainland neighborhoods; and the fact that South Seaside had "virtually no potential for growth or expansion," such that the Township would not lose the benefit of any new ratables in that community.

The Township appeals, arguing the judge erred in applying the deannexation statute. It contends the Board's resolution denying deannexation was not predetermined due to the Township's biased conduct and plaintiffs did not meet their burden to warrant deannexation from the Township.

⁶ The judge cited Wisser's calculations which the Board relied upon.

IV.

Our Legislature has created a process and standards upon which "[l]and in one municipality may be annexed to another municipality to which said land is contiguous." N.J.S.A. 40A:7-12. Once a petition is "signed by at least 60% of the legal voters" of the section of a municipality seeking deannexation and served upon the municipality to lose land, the municipality's governing body "shall, . . . refer the petition to its planning board, which shall . . . report to the governing body on the impact of the annexation upon the municipality." Ibid. Given its knowledge of local conditions, a municipality's determination regarding a deannexation petition is presumed valid. Seaview Harbor Realignment Comm., LLC v. Twp. Comm. of Egg Harbor Twp., 470 N.J. Super. 71, 94 (App. Div. 2021), certif. denied, 252 N.J. 189 (2022).

"In giving or withholding consent to deannexation, governing bodies have traditionally been afforded discretion, but discretion nonetheless subject to judicial review." Avalon Manor Improvement Ass'n, Inc. v. Township of Middle, 370 N.J. Super. 73, 90 (App. Div. 2004) (citing West Point Island Civic Ass'n v. Township Comm. of Dover Twp., 54 N.J. 339, 347-48 (1969)). Should a municipality deny deannexation, the petitioners may seek judicial review. They must satisfy a three-prong test by establishing: (1) "refusal to consent to

the petition was arbitrary or unreasonable"; (2) "refusal to consent to the annexation is detrimental to the economic and social well-being of a majority of the residents of the affected land"; (3) and "the annexation will not cause a significant injury to the well-being of the municipality in which the land is located." N.J.S.A. 40A:7-12.1.⁷ A trial court's review of a municipality's deannexation decision is for arbitrariness or unreasonableness. N.J.S.A. 40A:7-12.1. The same standard applies to appellate review of the trial court's deannexation order. Fallone Props., L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004).

For the following reasons, application of these guidelines supports the trial judge's order granting plaintiffs' petition to deannex from the Township and allowing them to petition for annexation to Seaside Park.

A. Whether The Township's Deannexation Refusal Was Arbitrary Or Unreasonable.

Defendants argue there was no basis in the record for the trial judge's findings that "the [Board's] hearings were improper and were the result of bias,"

⁷ Prior to a 1982 amendment of the deannexation statute, the burden of proof had been on the municipality opposing deannexation. Avalon Manor, 370 N.J. Super. at 90 (citing L. 1982, c. 182, § 2).

and that they "acted arbitrarily, capriciously and unreasonably." We are unpersuaded.

The judge held the Township Council's resolution was arbitrary or unreasonable under N.J.S.A. 40A:7-12.1 because plaintiffs were denied due process. She reasoned the Board's role as a neutral factfinder to make a recommendation on the deannexation petition to the Township Council was tarnished due to the Township Council's influence and opposition to deannexation. The Board must develop a factual record to present to the Township Council, which may participate in the Board's proceedings by presenting evidence in support of or in opposition to the petition. E.g., Russell v. Stafford Twp., 261 N.J. Super. 43, 45-46 (Law Div. 1992). A municipality's decision "is neither purely a ministerial act nor a purely political judgment reviewable only upon a showing of fraudulent abuse of discretion." Ryan v. Mayor & Council of Borough of Demarest, 64 N.J. 593, 601 (1974). A municipality must exercise its discretion, acting fairly and reasonably, with proper motives and for valid reasons that are expressed in its resolution. See id. at 601-02, 604; W. Point Island, 54 N.J. at 345-47.

The Board proceedings were fraught with unfair and biased conduct due to the Board and the Township Council's coordination of the record to achieve

a pre-determined result of denying deannexation. There was collusion between the Board and the Township Council through Wisner, the Board's professional planner, who actively participated in meetings to prepare Township witnesses for their testimony before the Board to discredit the testimony of the plaintiffs' witnesses. Although the judge was incorrect in finding plaintiffs were unable to cross-examine Wisner to expose the collusion, the cross-examination of Wisner does not mitigate the collusion. Wisner's involvement with the Township's witnesses was tantamount to a court-appointed expert participating in strategy sessions and witness preparation meetings for a party appearing before a court, thereby shaping the record that was developed and attempting to skew it in favor of one of the parties. Regardless of the multitude of hearings or plaintiffs' ability to examine and cross-examine witnesses, the collusion constitutes a clear denial of due process and a violation of the doctrine of fundamental fairness. Doe v. Poritz, 142 N.J. 1, 108 (1995) (noting New Jersey's doctrine of fundamental fairness, which protects against unjust and arbitrary governmental action).

In addition to Wisner, the conduct of Board members Callahan, Bacchione, and Mackres clearly indicated their bias against deannexation. See Piscitelli v. City of Garfield Zoning Bd. of Adjustment, 237 N.J. 333, 349-51 (2019) (explaining that "[t]he overall objective 'of conflict of interest laws is to ensure

that public officials provide disinterested service to their communities' and to 'promote confidence in the integrity of governmental operations'" (quoting Thompson v. City of Atlantic City, 190 N.J. 359, 364 (2007))). Township Administrator Camera also crossed the line in testifying before the Board regarding his negative opinions about the petition and plaintiffs. See ibid.

Individually, these indicia of bias viewed individually might be considered inconsequential and not warrant a finding of arbitrariness or unreasonableness. See, e.g., Seaview Harbor, 470 N.J. Super. at 105; Avalon Manor, 370 N.J. Super. at 99. However, in light of the cumulative evidence of bias and collusion, we conclude the Township's denial of the deannexation petition was a pre-determined conclusion notwithstanding the thirty-eight hearings and the six years it took to make a decision.

Accordingly, the judge's determination of bias was not arbitrary or unreasonable and is supported by the record. Also, as discussed below, the judge reasonably concluded that the Board and Township's actions disregarded the deannexation circumstances. Seaview Harbor, 470 N.J. Super. at 94.

B. Whether Refusal Of Deannexation Is Detrimental To The Economic And Social Well-Being Of A Majority Of South Seaside Residents.

Defendants argue "the [judge] erred in finding that refusal to consent to deannexation is detrimental to the well[-]being of the majority of residents of South Seaside." They argue "there was absolutely no testimony or evidence provided to show or even suggest that South Seaside . . . residents are deprived of the opportunity to participate in those types of activities within [the] Township." They rely upon Avalon Manor, where this court found that the plaintiffs, a beach community seeking deannexation from the mainland municipality, were not entitled to deannexation because they socially associated more with their neighboring beach towns. 370 N.J. Super at 80. We are unpersuaded.

As the judge held, the record demonstrates that the well-being of South Seaside residents is best served by deannexing from the Township for several reasons. Due to the geographical remoteness — South Seaside's location on a barrier island, separated by seven municipalities from the Township — South Seaside residents incur a significant amount of travel time and expense to use the Township's mainland-located municipal facilities. This distance also minimizes the contact South Seaside residents have with the mainland residents.

In turn, South Seaside residents primarily take advantage of the recreation, public safety, and other government functions in neighboring Seaside Park. Plus, South Seaside residents cannot watch municipal meetings on cable television like mainland residents.

Support for deannexation due to a community's geographic isolation that would not appreciably alter the character of the deannexed municipality is found in West Point Island. Our high court held:

West Point Island is on the other side of Barnegat Bay, isolated from the schools as well as the governmental, business and shopping areas of Dover Township. The residents of West Point Island naturally look to the contiguous Borough of Lavallette as the focus of community interest and activity. The record shows that the West Point Islanders use Lavallette recreation facilities, and the Lavallette Borough Hall for community meetings. Since Dover Township is not being economically or socially injured by the deannexation, and the geography is so pointedly in favor of allowing it, on the facts of this case there is no reason to deny the overwhelming majority of voters and taxpayers on West Point Island the opportunity of joining the Borough of Lavallette. We therefore agree with the judgment of the Appellate Division which upheld Judge Martino's determination that the withholding of consent to the deannexation was not based on reasonable grounds, and which affirmed his order that the Township signify its consent to plaintiffs' application.

[W. Point Island, 54 N.J. at 349-50.]

Although there is no dispute that plaintiffs' taxes would decrease if South Seaside were annexed to Seaside Park, the record supports the judge's finding that tax benefits were not the primary reason for the petition, which was principally due to South Seaside residents' claim that defendants' lack of investment in their community made them feel like second-class citizens and that the residents feel they would have more influence in their community if they were able to become part of Seaside Park. The judge's determination was anchored in the noted testimony of plaintiffs' experts Bauman and Woolley-Dillon that deannexation benefits most South Seaside residents, both socially and economically.

C. Deannexation Will Not Cause A Significant Injury To The Well-Being Of The Township.

Defendants contend the judge "erred in finding that the economic harm to the [Township] was insignificant" and "that there would be no social detriment to the remaining residents of [the]Township as a result of deannexation." They cite our decisions that rejection of deannexation petitions were not arbitrary, capricious, or unreasonable because municipalities' loss of 2.5 percent or 2.6 percent tax ratables, Avalon Manor, 370 N.J. Super. at 81, and 2.4 percent tax ratables, Seaview Harbor, 470 N.J. Super. at 90-91, constituted significant injury. Defendants further contend the Township's loss of tax revenue from

deannexing South Seaside cannot be offset by "recouping the costs of deannexation by items that already were to be realized by the municipality." Avalon Manor, 370 N.J. Super. at 88, 98; Seaview Harbor, 470 N.J. Super. at 100.

We agree with defendants that the judge erred in relying on the Township's future potential growth in the mainland to offset any lost tax revenue should South Seaside deannex from the Township. Any revenue from future economic growth in the Township's mainland should not be considered to offset deannexation. Seaview Harbor, 470 N.J. Super. at 100; Avalon Manor, 370 N.J. Super. at 98. Yet, considering South Seaside is entirely built-out with no room for development to increase tax ratables, there would be no loss of any potential growth should deannexation occur.

Besides, the record reflects the loss of South Seaside's tax revenue could be substantially or entirely offset through de-annexation cost savings, particularly due to fewer police services needed to be provided to South Seaside residents. See W. Point Island, 54 N.J. at 348-49 ("While it is true that the deannexation of West Point Island would reduce the ratables of Dover Township by 1.737%, the trial court found, and we agree, that this loss would be offset by an equivalent reduction in cost of municipal services to the Township."). Upon

de-annexation, the two police vehicles and the officers who use them to patrol South Seaside and auxiliary officers hired in the summer months would no longer be necessary. According to plaintiffs' financial expert Moore, the cost savings would reduce or eliminate the Township's lost tax revenue from de-annexation. Defendants' claim that the two police officer positions would not be eliminated, and they would be reassigned, demonstrates its police force has been understaffed, and the other Township neighborhoods will benefit through having more police service available without the expense of hiring new officers.

As for the increased tax burden attributed to deannexation, the Board and defendants adopted Wiser's calculations based on the elimination of one police vehicle, which the Board characterized as plaintiffs' "best case scenario." As noted, Wiser testified this would result in a \$19 municipal tax increase for a home assessed at \$100,000, a \$35 increase for the average home assessed at \$183,600, and a \$94 increase for a home assessed at \$500,000. The judge's determination that these increases would not be a significant economic stress on the Township's residents is not arbitrary or unreasonable. Further, this consequence is fairly less than the deannexation tax impact in Seaview Harbor, where we concluded a \$122.78 tax increase for the average mainland home with an assessed value of \$208,100, was a significant economic consequence

compounded by the Egg Harbor Township's state of economic stress due to state mandates. 470 N.J. Super. at 88, 99-100. Here, there is nothing in the record indicating the Township is suffering from fiscal problems due to other circumstances beyond its control.

Defendants contend plaintiffs did not show deannexation would cause a social detriment to the Township. They claim the judge failed to recognize deannexation would diminish the Township's social diversity, and deannexation would "reduce the overall education level of Township residents, remove a significantly higher income cohort from the Township and thereby reduce the overall income of Township residents, remove high median value real estate[,] and reduce the Township's overall [c]ivilian [l]abor [f]orce." Defendants also assert deannexation would cause it to "lose the active participation of South Seaside . . . residents in the [Township's] civic life" and "a true beach community with direct access to the ocean and bay."

The trial judge's determination that deannexation would not cause social detriment to the Township was not arbitrary or unreasonable as it was supported by credible evidence in the record. Based on the noted travel time and distance between South Seaside and the mainland, the Township's residents have little interaction with South Seaside residents. Consequently, South Seaside residents

have minimal interaction with the mainland's residents. While White Sands Beach is located within South Seaside, the Township's mainland residents do not regularly use the beach because it is farther away than the Township's bay beaches and other municipalities' ocean beaches on the barrier island north of South Seaside, and White Sands Beach has few amenities. Moreover, while South Seaside Park has high property values due to its oceanfront location, its primary housing stock of small bungalows or mobile homes do not represent the most prestigious, nor the most affluent neighborhood in the Township.

V.

In conclusion, the record supports the trial judge's determination that the conduct of defendants and the Board deprived plaintiffs a fair hearing before the Board, which was legally required to be a neutral fact finder. The Board's expert consultant coached and counseled the testimony of the Township's witnesses before the Board to oppose deannexation. Some Board members publicly revealed their displeasure with the petition before the Board completed its hearings and resolved that the Township Council should deny deannexation. Given defendants' bias against deannexation, a remand for them to renew process anew is illogical. There is no reasonable basis to believe that new hearings would not be biased against deannexation as was the six-year process

under review. The record also supports the trial judge's determination that denial of deannexation is detrimental to the economic and social well-being of the majority of South Seaside residents and it will not significantly injure the well-being of the Township. Considering the due process violations and the respective consequences of deannexation to the residents of South Seaside and the Township, plaintiffs have met their burden under N.J.S.A. 40A:7-12.1 to justify deannexation.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION