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September 9, 2013

HAND DELIVERY
Honorable Thomas F. Scully, J.S.C.
Monmouth County Superior Court
71 Monument Park
Post Office Box 1266
Freehold, New Jersey 07728

Re: Angela Agazzi v. Governing Body of the Borough of Red Bank
Docket No. MON-L-3653-12

Dear Judge Scully:

Enclosed herewith please find Plaintiff's Trial Brief and Certification in Support of Plaintiff's Trial Brief with regard to the above matter.

By copy of this letter, I am forwarding a copy of same to my adversary.

Respectfully submitted,

R. S. GASIOROWSKI

RSG:jai
Encls.

cc: Daniel J. O'Hern, Jr., Esq . via hand delivery

X:\Litigation1\Agazzi vs. Governing Body of Red Bank (Ord. 2012-15, 16, 17)\Correspondence\Court\Judge Scully re trial brief and cer 9.9.13.doc

ANGELA AGAZZI,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION : MONMOUTH COUNTY
Plaintiff	:	
	:	Docket No: MON-L-3653-12
vs.	:	
	:	Civil Action
GOVERNING BODY OF THE BOROUGH OF RED BANK,	:	
	:	
Defendant	:	

TRIAL BRIEF OF PLAINTIFF, ANGELA AGAZZI

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R.S. GASIOROWSKI, ESQ.
On the Brief

DATE: September 9, 2013

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STATEMENT OF FACTS

The instant case involves a challenge to a series of Zoning Ordinances enacted by the Borough of Red Bank during the year 2013. They are identified as Ordinance Nos. 2012-15, 2012-16 and 2012-17. **(EXHIBITS P, Q & R)** This lawsuit focuses on Ordinance 2012-17 which amended the permitted uses section of the Use Regulations Controlling the (WD) Waterfront Development Districts as well as the Area, Yard and Structure Requirements. The additions and deletions to Ordinance are clearly set forth on its face. (**EXHIBIT R**) Ordinance 2012-17 increases the maximum structure height on one particular lot, Lot 1, Block 1, in the WD District to "elevation 75 feet" and also decreases the permitted height in areas where there are existing structures of a greater height, thereby making multiple existing structures non-conforming but allowing the property at Lot 1, Block 1 to be developed much more intensely than it was previously permitted. Ordinance 2012-17 also entirely "remov[ed] the overlay portion on Rector Place" in the WD Waterfront Development Zone in Red Bank (**EXHIBIT R**, p. 32) To wit, under the "permitted uses" section approximately sixteen (16) properties identified as fronting on Rector Place are deleted. Consequently, it "removed" sixteen (16) properties from the WD Zone.

Ordinance 2012-15 (**EXHIBIT P**) takes the sixteen (16) properties identified in Ordinance 2012-16 and places them in

the R-B2 Residential Zone District. Finally, Ordinance 2012-16 mandates that all future development of these sixteen (16) properties must include a twenty-five (25) foot access easement along river frontage if a development application is filed as well as provide "appropriate provisions for passive enjoyment of river views by residential and the general public," - all without compensation to the private property owners.

The genesis for the passage of these Ordinances is an application filed by an entity known as RBank Capital ("Applicant") in the year 2010 in connection with the only property that is benefitting from Ordinance 2012-17, Lot 1, Block 1 ("Subject Property") in the Borough of Red Bank. Discussion of the development application is therefore relevant to the adoption of the Ordinances. The Subject Property is approximately 1.04 acres and is located in the WD Waterfront Development Zone, with frontage along New Jersey State Highway 35 and Rector Place. On or about September 2, 2010, RBank Capital submitted an application for a 76 room, six story limited service hotel, with surface parking, indoor/outdoor swimming pool, boardwalk and public easement: a Hampton Inn and Suites Hotel. As presented by the Applicant, the proposed use required:

1. Floor area ratio ("FAR") of 1.03 where 1.0 is the maximum

2. Height variance to elevation 82.4 ft.* where elevation 75 ft. is the maximum, although the proposed elevation to the top of the equipment screen wall on the roof is elevation 90.9 ft.*

3. The application required two "special reasons" variances: FAR or d(4) and height or (d)6 as per N.J.S.A. 40:55D-70d.

4. Lastly, the Applicant bifurcated the application before the Red Bank Zoning Board of Adjustment. Wherein, if the special reasons variances are approved the Applicant will then return to the Board for site plan approval. (**EXHIBIT D, F & G**)

The physical dimensions of the proposed hotel, then until the present, have basically remained unchanged. Initially, the Planning Board determined that there was a question concerning whether or not the Planning Board had jurisdiction to hear the application. One of the issues was whether or not the property in question had frontage on Rector Place and whether uses were solely restricted to residential use under the Ordinance in Red Bank. The Subject Property has two lot frontages: approximately 44 feet on Rector Place and 408 feet on State Highway 35. Ordinance 2009-35 (**EXHIBIT C**) restricted the use of properties fronting on Rector Place to detached single family dwellings

* As per plans dated November 29, 2010.

only. The Borough's director of the Department of Planning and Zoning concluded in a memorandum dated December 23, 2010:

> *"Thus, based upon the ordinance's plan meaning, it will be necessary to obtain major site plan approval and a use "d" variance for a use not permitted from the Red Bank Zoning Board of Adjustment."*

The Applicant appealed this decision and the matter came to the Zoning Board of Adjustment for an interpretation. On or about May 19, 2011, the Zoning Board of Adjustment conducted a hearing to interpret the ordinance as to what uses were permitted on the subject property. Specifically, the question presented on the appeal was as follows:

> *Does Ordinance 2009-35 (which restricts properties fronting on/along Rector Place to detached single-family homes) apply to the property which is the subject of the within Application (i.e. 80 Rector Place, Block 1, Lot 1)?*

The Board of Adjustment concluded in a Resolution adopted July 7, 2011 that *"despite the fact that the subject property has frontage on/along Rector Place, Borough Ordinance 2009-35 does not restrict the Block 1, Lot 1 property to single family residential use."* (**EXHIBIT E**) The Applicant then came back before the Planning Board.

Thereafter, the application proceeded before the Planning Board premised upon an August 2, 2011 review letter prepared by the Planning Board Engineer which stated that the maximum

permitted height of the building on Lot 1, Block 1 was elevation 75. As will be discussed later herein, this statement was later proved to be in error.

In the "review letter" dated August 2, 2011 (**EXHIBIT F**) the Board Engineer, Christine Ballard, ("Ballard") incorrectly detailed the permitted height of buildings in the WD Waterfront Zone:

> 1.6 Section 25-10.16.e.6 of the Ordinance permits a maximum structure height of Elevation 50.00 (between the Navesink River and the line halfway between the river and Riverside Avenue) and Elevation 75.00 for the remainder of the Zone. Ordinance Section 25-5.12.c indicates that stair towers and elevator towers attached to a structure that do not exceed 15 feet shall not be included in the height calculation of said structure. In addition, Ordinance Section 25-5.12.b indicates that parapets attached to a structure that do not exceed 4 feet shall not be included in the height calculation of said structure. The roof of the proposed buildings is at an elevation of 82.25, the top of the proposed parapets is an elevation 84.75 and the top of the elevator and stair tower is at elevation 90.0. Therefore, the proposed height to be used is the top of roof at elevation 82.25, whereas, 75 feet is permitted. Therefore, a bulk 'c' variance is required. (emphasis added)

In the WD Zone, the Borough "pegs" building height to the mean sea level; it varied within the District based upon specific conditions and the height limitation ranges. Depending on those conditions, it was set at 50 feet above mean sea level, 75 feet above mean sea level and 140 feet above mean sea level.

Thus, the maximum permitted structure height in the WD District was measured from mean sea level ("MSL") and permitted structure heights to elevations of 50 feet, 75 feet and 140 feet above MSL. The permitted height is thus variable depending upon the location within the WD District, the height of buildings adjacent to the property and the location of the building in relations to the Navesink River and the nearest parallel roadway. Ballard simply misread the Zoning Ordinance and therefore determined the wrong elevation; she determined it was Elevation 75 when really the location of Lot 1, Block 1 meant it was Elevation 50. The Ordinance provided in pertinent part as follows:

> *(6) Maximum structure height. The elevation of the highest point of any flat roof deck (parapet elevation to use if parapets exceed 30 inches in height); of the mean height level between the eaves and ridge for gable or hipped roofs or of the deck line for mansard roofs shall not exceed:*
>
> > *(a) Elevation 50 (Use & GS Datum MSL=0) between the Navesink River and a line halfway between the Navesink River and the nearest parallel roadway (Front Street, Riverside Avenue, Rector Place, or Shrewsbury Avenue).* (**Underlined streets omitted from initial review letter) (emphasis added)
> >
> > *(b) Elevation 75 (US & GS Datum MSL=0) in the remainder of the Zone.*
> >
> > *(c) Further, and notwithstanding any other provisions of this subsection, any property within this zone may build to an elevation not to exceed*

140 feet (USC & GS Datum MSL=0) inclusive of all chimneys, ventilators, skylights, tanks, stair towers, elevator and mechanical penthouses, noncommercial radio and television antennas, HVAC equipment and other similar rooftop appurtenances, and provided further that:

[1] The property to be developed has buildings with a structure height of not less than elevation 100 feet (USC & GS Datum MSL=0) located within 600 feet of both sides of the property (as measured along the road right-of-way from the sidelines of the property to be developed); and

[2] That the principal structure of any proposed building shall comply with the rear yard setback requirements of Subsection F(3) of this section; and

[3] Any portion of a proposed principal building and use which extends more than three feet above the average street elevation measured along the center line of the right-of-way and between the sidelines of the property to be developed shall be set back at least 60 feet from the right-of-way. (**EXHIBIT C**)

Because the Board Engineer determined that the permitted elevation is 75 feet as to Lot 1, Block 1 and the increase based on the proposed roof elevation of 82.25 was only 10% or less, she incorrectly opined that only a bulk variance, or "C" variance was required and that the Planning Board did have jurisdiction to hear the case. Had she initially correctly used the proper Elevation 50 in her calculation, the increase would be greater than 10% requiring a "D" or use variance, which only

the Zoning Board has the power to grant under N.J.S.A. 40:55D-70.1(d)(6).

The Planning Board Engineer simply misread the Ordinance. The reason was very simple. When the Engineer transformed the written language of the Ordinance to the review letter, she only referred to that portion of the Ordinance pertaining to the area between the Navesink River and Riverside Avenue. This was simply a mistake on her part.

Unfortunately, the Planning Board initially relied upon that review letter and the matter remained before the Planning Board for a series of meetings. Ultimately, the attorney for the Objector noticed the mistake in Ballard's review letter when compared to the Ordinance. He determined that the letter of Ballard was simply in error and advised Ballard and the Planning Board at one of the public hearings for the application.

As a result, on January 6, 2012, (**EXHIBIT G**) Ballard wrote another letter to the Administrative Officer of Red Bank along with an enclosure which is attached. In this letter Ballard stated:

> "The existing site, (Block 1, Lot 1)consisting of approximately 1.04 acre and is located in the WD Waterfront Development Zone with a frontage along New Jersey State Highway 35 (NJSH Route 35) and Rector Place. The lot also has frontage along the Navesink River. Based upon a review of the documents, I have

> determined that there is insufficient information to make a clear determination of proposed height conditions. The Applicant should provide a written response with site plan and/or architectural elevation plan clearly depicting the height of the building to justify conformance with the following requirements of Ordinance 25-10.16(e)(6) as follows for the maximum height structure:
>
> "The mean height level between the eaves and ridge for gable or hipped roofs or of the deck line for mansard roofs shall not exceed:
>
> (a) Elevation 50.00 USC & GS Datum MSL = 0) between the Navesink River and a line hallway between the Navesink River and the nearest parallel roadway (Front Street, Riverside Avenue, Rector Place, or Shrewsbury Avenue)." (emphasis added)

Thus, the Engineer Ballard realized her prior mistake and correctly considered the parallel streets as well as Front Street, Rector Place or Shrewsbury Avenue to determine the appropriate elevation - which would be elevation 50; whereas initially she had incorrectly only referred to that property between the Navesink River and Riverside Avenue.

The attorney for the Applicant, Martin McGann, still insisted despite this letter that the Planning Board had jurisdiction to do two (2) things. First, he argued the Planning Board had the ability to interpret the language of the Ordinance and secondly, the Planning Board had the jurisdiction to hear this case. He argued that the property did not front on Rector Place.

The Board Attorney, Michael Leckstein, took the questionable position that the Planning Board could in fact interpret the language of the Ordinance; however, Pasquale Menna, the Mayor, made a Motion that the matter be referred to the Zoning Board of Adjustment for an interpretation since the Zoning Board, pursuant to the Municipal Land Use Law ("MLUL") was the municipal agency with the jurisdictional authority to interpret the Ordinance. The matter was then referred to the Zoning Board of Adjustment for yet a second time.

It should be noted that in the review letter of January 6, 2012, there is no confusion with regard to whether or not the property was in a zone which provided for a maximum height based on elevation 50, but rather the problem was that the Applicant did not provide sufficient information for the Engineer to make a clear determination of the "proposed height conditions." The Engineer called upon the Applicant to provide an elevation plan depicting the height of the building to be in conformance with Ordinance 25-10.16(e)(6)(a) for the permitted maximum structure height which she now determined to be based on "elevation 50." The plan which the Applicant had submitted was at elevation 75.

In the August 2, 2011 letter, the Engineer originally incorrectly opined that for all properties other than those

between the Navesink River and Riverside Avenue, elevation 75 would be applicable. When the Engineer then recognized her mistake in that the Ordinance also provided for properties between the Navesink and Rector Place she then advised the Applicant that the building could not exceed the height of elevation 50. When the Applicant did not provide that information to reflect the true height of the building she called for additional information and when the Applicant refused to change his plans, the matter was referred to the Zoning Board of Adjustment by the Planning Board for a second time because an Objector filed a Petition with the Zoning Board of Adjustment seeking an interpretation of the language of the Ordinance. (**EXHIBITS H, I, J & L**)

The Zoning Board of Adjustment was requested to interpret the WD Zone District height regulations or maximum allowable structure height. The Board concluded in a resolution dated June 21, 2012 (**EXHIBIT L**) that based upon and for the other reasons set forth during the lengthy Public Hearing process, the Board is of the opinion that:

a. The subject property has frontage along the roadway commonly identified as "Rector Place";

b. The subject property is subject to the provisions of Ordinance 490-150, currently being codified as Ordinance No.: 25-10.10 and/or 25-10-16;

c. *The maximum 50 foot elevation applies to the subject property.* *(emphasis added)*

Any other interpretation (other than as set forth herein) would seem to be counterproductive.

Any other interpretation (other than as set forth herein) would be contrary to sound Planning and Zoning principles.

Any other interpretation (other than as set forth herein) would not advance the intent of the Master Plan. (emphasis added)

Any other interpretation (other than as set forth herein) would, under the circumstances, defy common sense. (emphasis added)

The result of this interpretation was that the RBank Capital application for a Hampton Inn Hotel violated the 50 ft. elevation limit and consequently, would be required to return to the Zoning Board of Adjustment for a d(6) "special reasons" height variance as per N.J.S.A. 40:55D-70d(6). Notably, a conforming height hotel (elevation 50 ft.) would reduce the number of floors from six (6) to three (3) and would proportionally significantly reduce the number of rooms. Using elevation 75 would greatly increase the size and intensity of the building and use.

The Zoning Board's decision was essentially two-fold. It determined (1) that the property fronted on Rector Place, and (2) that the applicable maximum height permitted on the property

in question was elevation 50 not elevation 75. What this meant is that if the Applicant wished to construct the proposed hotel as requested, the Applicant would have to appear before the Zoning Board of Adjustment to seek a use variance.

It should be noted, that the Applicant RBCapital never filed a prerogative writs suit challenging that decision.

On or about June 25, 2012, Kevin E. Kennedy, Esq., attorney to the Zoning Board of Adjustment sent a letter to the Red Bank Borough Clerk. (**EXHIBIT M**) The letter stated, in part, the following:

> 1. *The Red Bank Zoning Board was recently called upon to render an interpretation regarding the Borough's Height/Elevation Ordinance involving the Borough's Waterfront Development Zone.*
>
> 7. *The Zoning Board rendered an interpretation on or about May 17, 2012. The said interpretation included the following:*
>
> a. *The subject property has frontage along the roadway commonly identified as "Rector Place";*
>
> b. *The subject property is subject to the provisions of Ordinance 490-150, currently being codified as Ordinance No.:25-10.10 and / or 25-10-16;*
>
> c. *The maximum 50 foot elevation applies to the subject property.*
>
> *Per the recent authority of the Zoning Board, it is* therefore requested that the Borough Council promptly *consider an official review of the Ordinance so as to*

ascertain if the same can or should be clarified. (emphasis added)

For some inexplicable reason, Kennedy talked in terms of "clarifying" when the ordinance was clear on its face and the Zoning Board pointed out that any other interpretation would "defy common sense".

At this juncture, the Borough Council had several alternatives available to it; including the following:

- Deny the request, and thereby conclude that the Zoning Ordinance stands was clear,
- "Clarify" the ordinance language, as requested by the Zoning Board Attorney.

The Borough Council instead opted a third alternative - it changed the height limit to elevation 75 feet from elevation 50 feet and lowered the elevation in other areas of the WD Zone from 140 ft. to 75 ft - creating numerous non-conforming buildings, an absurd result. At the same time, it removed the sixteen single family houses on Rector Place and with Ordinance 2012-15 and 2012-16 placed those properties in another zone and made requirement as to passive open space and easement to the river. The subject Ordinances were introduced and adopted collectively by the Borough. The Planning Board considered the Ordinances on July 16, 2002. (**EXHIBIT N**) At that time, the Planning Board directly discussed the Hampton Inn application on

the Subject Property. (**EXHIBIT N**, p. 5-7) John Oradell ("Oradell") one of the owners of the residential homes directly adjacent to the Subject Property, Block 1, Lot 2, also spoke and voiced his concern. Oradell directly questioned the Planning Board as to how high the Hampton Inn building would be. (**EXHIBIT N**, p. 14-15) He points out that as a result of the Ordinances, his property and the other homeowners located in the direct vicinity will suffer because "it kinda makes [my] property and other peoples useless because not many people are going to want to live on Rector Place..." (**EXHIBIT N**, p. 18) He explains that the "problem" is that now the Borough will be putting a motel on the Subject Property which will be very high. (**EXHIBIT N**, p. 19) He points out as follows:

> "but my big issue is (in audible) put a motel there on stilts, I know it probably isn't the place to say that, but you're going to have a swimming pool in my backyard and a building on stilts and I think that's, when you come up off that Red Bank bridge, and you look our beautiful river out here to your left, and you'll see this thing hitting you in your face, I'm very concerned about that. Because the only other building you could see really is Grandview Towers, visiting nurses kinda hidden, Oyster Point which they mentioned is way down low. Starts high so you don't get that impact. The Molly Pitcher isn't that big. The Bell Tower up there makes it look big. These two monstrosities here when you are out in the river ice boating and look at those and I just, I want to shake my head (in audible) I'm just concerned about that height issue on that. I think that's way too high for the particular spot and I'm concerned and now you

> kinda limited my property which is basically, even though it's residential, is in a business zone. And I know there's some pretty houses there that, like I said you fix them up, but Maple Avenue is the same way where the houses are kept really nice and there's still offices and businesses." (**EXHIBIT N**, p. 20-21)

Ballard, the Township Engineer, also points out that right now single family residential is in the WD Zone because there is an "overlay zone". At the conclusion of the hearing, Ballard confirms that Ordinance 2012-17 does two (2) things: it changes the height in the WD Zone and it also removes "the overlay portion on Rector Place and that's in the WD Zone." (**EXHIBIT N**, p. 31-32)

Plaintiff alleges that the Borough committed multiple procedural errors in adopting these Ordinances. For example, despite the fact the Ordinance 2012-17 amends and supplements Subsection 25-10.16(a), "Use Regulations Controlling the Waterfront Development District" (Permitted Uses) and specifically deletes the overlay for sixteen (16) properties which front exclusively on Rector Place, thereby deleting those uses from the Waterfront Development District and changing the boundaries of the WD Zone, and further, allows a maximum structure height of "Elevation 75 ft. (US and GS Datum MSL=0), the Borough failed to provide personal notice to all affected property owners within 200 feet in all directions of the

boundaries of the district as well as those properties within the Zone as mandated by N.J.S.A. 40:55D-62.1. Similarly, the Borough chose not to provide notice to affected property owners as to Ordinance 2012-16, despite the fact that the Ordinance will substantially limit the use of those properties if a development application is filed. The Borough only gave notice to property owners as to Ordinance 2012-15.

N.J.S.A. 40:55D-62.1 requires the Borough to provide notice to the affected property owners of the time and date of the hearing when the Borough would consider the Ordinances at a public hearing as well as what zoning districts would be affected and the nature of the matters that would be considered. Adjoining municipalities would also require notice.

Ordinance No. 2012-17 clearly amended the use regulations and boundaries controlling the Waterfront Development District relating not only to deleting the overlay zone for properties that front on Rector Place, but also by significantly and substantially changing the maximum structure height and elevation as follows:

> SECTION ONE: Subsection 25-10.16(a), "Use Regulations Controlling the Waterfront Development District", "Permitted Uses", is hereby amended and supplemented as follows (strikeouts denote deletions, underlined text denote additions):

25-10.16 Use Regulations Controlling the Waterfront Development District

a. Permitted Uses

~~1. For the following properties that front exclusively on Rector Place, detached single family dwellings only:~~

~~Block 1, Lot 2;~~
~~Block 1, Lot 3;~~
~~Block 1, Block 4;~~
~~Block 1, Lot 4.01;~~
~~Block 1, Lot 5;~~
~~Block 1, Lot 5.01;~~
~~Block 1, Lot 6;~~
~~Block 1, Lot 7;~~
~~Block 1, Lot 8;~~
~~Block 1, Lot 9;~~
~~Block 1, Lot 10;~~
~~Block 1, Lot 10.01;~~
~~Block 1, Lot 11;~~
~~Block 1, Lot 12;~~
~~Block 1, Lot 13;~~
~~Block 1, Lot 14~~

~~2. For all other properties located within the zone:~~

1. Detached single family dwellings.

2. Multi-family dwellings known as garden apartments or apartment houses at a density not to exceed sixteen (16) units per gross acre; provided, however, that those properties adjoining the Navesink River and fronting on Riverside Avenue may have a density subject to all other provisions of this Chapter not to exceed forty (40) units per gross acre.

3. Multi-family dwellings known as townhouses at a density not to exceed ten (10) units per gross acre.

4. Professional offices;
5. Business offices;

6. Home professional offices.

7. Primary food service establishments.

8. Hotels, motels, and owner-occupied beds and breakfast.

9. Essential services

SECTION TWO: Subsection 25-10.16(e). subparagraph 6, "Use Regulations Controlling the Waterfront Development District", "Area, Yard, and Structure Requirements", "Maximum Structure Height" is hereby amended and supplemented as follows (*strikeouts denote deletions, underlined text denote additions*)

(6) Maximum structure height. The elevation of the highest point on any flat roof deck (parapet elevation to be used if parapets exceed 30 inches in height); of the mean height level between the eaves and ridge for gable or hipped roffs or of the deck line for mansard roofs shall not exceed:

~~(a) Elevation 50 (USC & GS Datum MSL=0) between the Navesink River and a line halfway between the Navesink River and the nearest parallel roadway (Front Street, Riverside Avenue, Rector Place, or Shrewsbury Avenue).~~

(a~~b~~) Elevation 75 (US & GS Datum MSL=0) ~~in the remainder of the zone.~~

~~(c) Further, and notwithstanding any other provisions of this subsection, any property within this zone may build to an elevation not to exceed 140 feet (USC & GS Datum MSL=0) inclusive of all chimneys, ventilators, skylights, tanks, stair towers, elevator and mechanical penthouses, noncommercial radio and television antennas, HVAC equipment and other similar rooftop appurtenances, and provided further that:~~

~~[1] The property to be developed has building with a structure height of not less than elevation 100 feet (USC & GS Datum MSL=0) located within 600 feet of both sides of the property (as measured along the road right of way from the sidelines of the property to be developed); and~~

~~[2] That the prinicipal structure of any proposed building shall comply with the rear yard setback requirements of Sebsection F(3) of this section; and~~

~~[3] Any portion of a proposed prinicipal building and use which extends more than three feet above the average street elevation measured along the center line of the right of way and between the sidelines of the property to be developed shall be set back at least 60 feet from the right of way.~~

For whatever reason, the Borough did provide the required **(EXHIBIT R)** enhanced notice to property owners in connection with Ordinance 2012-15, (**EXHIBIT S**, document 3) but chose not to provide the same notice in connection with Ordinances 2012-17 and Ordinance 2012-16.

The Planning Board considered the Ordinances collectively on July 16, 2002. (**EXHIBIT N**) The Mayor Pasquale Menna ("Menna"), actually referred to an objector to the development of Lot 1, Block 1 as a "patsy" for another hotel which was afraid of competition. The public hearing in connection with the three Ordinances was July 25, 2013 and clearly shows the

continued hostility and bias of the Borough against any party who was not a proponent of the hotel which was slated to be developed on the Subject Property and over which the Borough was jumping hoops to accommodate. (**EXHIBIT O**)

At the beginning of the hearing, Mayor Menna indicates that on July 17, 2013 the Planning Board determined that all three (3) ordinances were found to be in conformance with the Master Plan and recommended positive adoption as a matter of policy. (**EXHIBIT O**, p. 4-5) Richard Cramer, the Township Planner, testified in connection with a letter he wrote dated July 21, 2012 **(EXHIBIT K)**, relating to the three Ordinances. At that time, Councilman Michael DuPont made an attempt to claim that Ordinance 2012-17 would actually be reducing the height in the WD Zone, and reducing the size of the building, when in actuality everyone at the hearing and the Planning Board recognized that the Zoning Board already determined that the elevation in relation to the Subject Property which would be used to determine the height was elevation 50, not elevation 75, as used by the Applicant and as was ultimately effected by Ordinance 2012-17. (**EXHBIT O**, p. 11) Although Councilman Dupont was well aware of the history of the Hampton Inn application and directly referenced an objector, who at that time was Steven

Mitchell, as being funded by "another hotel in the immediate area", thereby clearly acknowledging he was well aware that these ordinances were a result of the Hampton Inn application, he now took the position that during the hearing absolutely no reference could be made to hotels other than of course himself making reference to it. In fact, Cramer's letter directly referenced Lot 1, Block 1 and the Hampton Inn Application yet, DuPont insisted that property had nothing to do with the zoning changes which would control it - a ludicrous position. This Ordinance was a clear attempt by DuPont and the other members to clear the path for RBank Capital and their proposed hotel which would be at "elevation 82 feet" (ASL RSL) where previously only elevation 50 ft. was permitted. This was designed to eliminate the need for RBank Captial to appear before the Zoning Board.

Councilman Dupont directly discussed on the record the Planning Board hearings relative to the Hampton Inn as well as the fact that the objector to the application was being funded by a competitor hotel. (**EXHIBIT O**, p. 12-28) Despite this, when counsel for the objector sought to introduce exhibits which would show the height of what a building developed on Lot 1, Block 1 would be relative to other buildings in the area, he was prevented from doing so. DuPont refused to allow the exhibits

to even be identified, refused to allow any questioning of the Board's engineer as to the exhibits and was further extremely rude and dismissive of any opposition to the ordinances. (**EXHIBIT O**, p. 28-61) The position of Dupont was non-sensical. He clearly stated on the record that the objections posed to the Ordinances were in his opinion subject to less credence because they were being funded by the owner of a hotel or business objector of the Hampton Inn, yet by the same token, he then refused to listen to any comment in relation to the Hampton Inn or Lot 1, Block 1. The Township attorney, Daniel J. O'Hern, Jr., Esq. also specifically refused to allow any line of questioning as to "that specific piece of property." (**EXHIBIT O**, p. 29)

Councilman DuPont, although sitting as a Councilmember, for some reason took a personal interest in refusing to allow the objector to even utilize photographs or exhibits to cross-examine Cramer as to his support for the proposed Ordinances. (**EXHIBIT O**, p. 29, l. 11-23) Even more egregious is the fact that the Township attorney and Dupont made constant reference to some sort of "problems associated with interpretation of the ordinances" when the Zoning Board, in its resolution (**EXHBIT L**), had absolutely no problem applying the Ordinance, claiming that it was "common sense." (**EXHIBIT L**)

The Borough adopted Ordinances 2012-15, 2012-16 and 2012-17 on July 25, 2012. Ordinance 2012-17 provided for "revisions" and "changes" to the WD District that not only increased the maximum structure height to "*elevation 75 ft. (USC & GS Datum MSL=0)*" but reduced it from 140 to 75 in other areas of the Zone. The changes are substantial and are prefaced in the Ordinance, as follows:

> *WHEREAS, the Waterfront Development District ("WD District) has been the subject of three recent interpretation requests to the Borough's Zoning Board of Adjustment ("ZBA"); and*
>
> *WHEREAS, the ZBA has recommended that the Governing Body clarify the zoning issues raised by the interpretation requests, including issues regarding the maximum structure height requirements in the WD District; and*
>
> *WHEREAS, the Borough's Planner has prepared a report dated June 21, 2012 for the Governing Body with Planning and Zoning Recommendations for revisions to the WD District, which report is incorporated herein by reference; and*
>
> *WHEREAS, the proposed change in zoning in the WD District has been recommended by the Borough's Planner; and*
>
> *WHEREAS, the proposed changes are consistent with the intent of the Borough's Master Plan; and*
>
> *WHEREAS, these changes are made for zoning and planning purposes as described in relevant New Jersey Statutes.*

Ordinance 2012-17 rezoned the subject property wherein the maximum height changed from elevation 50 feet to elevation 75 feet, thus allowing the Applicant to appear before the Planning Board rather than the Zoning Board of Adjustment. The practical effect of that increase in height would be to add at least two (2) additional stories to the proposed structure and increase the density both as to the square footage of the building as well as to drastically increase the number of units to be constructed within it. Without the new Ordinance 2012-17, the maximum height would be reduced to 4 stories and approximately 45 units - a dramatic diminution of the size and square footage of the building. Ordinance 2012-17 substantially changed the bulk standard throughout the WD Zone, yet the Borough failed to give notice to property owners within 200 feet of the affected zone as mandated by N.J.S.A. 40:55D-62.1(c)

Plaintiff shall call David Zimmerman, P.P. as an expert to testify at trial as to his report dated March 25, 2003. **(EXHIBIT V)** Plaintiff incorporates the Factual Background of that report herein, including Zimmerman's summary of the Master Plan documents. The inconsistency of the Ordinance with the Master Plan and how utterly arbitrary Ordinance 1012-17's provisions are when considered against the facts - the

surrounding properties of the Planning and Zoning documents of the Borough. Specifically, the 1995 Master Plan makes only brief reference to height in the WD Zone as follows: "*Set height limits that are compatible with the adjacent areas of downtown and the mixed-use neighborhoods.*" ***(EXHIBIT A)***

Zimmerman "tested" this objective by comparing the new WD height to those zones contiguous to the WD Zone:

Maximum Permitted Height in
Zone Districts Contiguous to the
WD Zone District

Zone District	Hotels Permitted	Maximum Permitted Height
BR-1	Yes	40 ft.
BR-2	No	35 ft. and not exceeding 2.5 stories
CCD-2	Yes	40 ft. and not exceeding 4 stories
MS	No	Varies
RA	No	35 ft. and not exceeding 2.5 stories
R-B2	No	35 ft. and not exceeding 2.5 stories
WD	**Yes**	**75 ft.**

Zimmerman's report establishes the new WD height is clearly incompatible with heights in surrounding zones. Indeed, the WD height is 35 feet taller or almost 50% taller than the two zones (BR-1 and CCD-2) where hotels are permitted. There is a limit

in the CCD-2 Zone to 4 stories, whereas there is no limit to stories in the WD Zone.

Zimmerman opines in his report that given the highly visible gateway location of the subject hotel property, the incompatibility is even more pronounced. The Hampton Inn application called for over one dozen waiver/variances as set forth in the Ballard review letter. He notes this exceptionally tall building will be on small property, only 1.1 acres in size. It is isolated by the Route 35/Rector/Bridge/Riverside intersection. It is decidedly incompatible with the 1.5 and 2.5 story single family residences fronting Rector Place. It will be seen from the river and vehicles at the intersection as a hotel built in the style of an "obelisk". That is, an exceptionally tall, skinny structure out of character and incompatible with its surroundings. Adding insult to injury, the 75 feet is the tallest height allowed in any zone in Red Bank with perhaps, the hospital, MS Zone, being the exception.

Additionally, Zimmerman performed an analysis of all zones that permit hotels, as shown in the table below.

Zone Districts In
Red Bank that Permit
Hotels and Motels

Zone District	Maximum Permitted Height

BR-1	40 ft.
BR-2	40 ft.; 3 stories
HB	40 ft.
CCD-2	40 ft. not exceeding 4 stories
WD	**75 ft.**

The above table shows this hotel application is given a height, intensity, stories and density "bonus" unavailable to a prospective or existing hotel in any other zone in Red Bank.

Zimmerman concludes this special treatment is not supported by any narrative in the 1995 Master Plan or subsequent reexamination documents, and opines that Ordinance 2012-17 is not consistent with nor does it implement, nor effectuate the height objective for the WD Zone in that 1995 Master Plan. In fact, the Cramer letter of June 21, 2012 (**EXHIBIT K**) does not opine that the new height is substantially consistent with the 1995 Master Plan.

In his report, Zimmerman further details the Borough's complete disregard for the notice requirements of the MLUL. Specifically, the result of the changes effected by Ordinance 2012-17 relate to bulk and intensity requirement within zones that effect a substantive change in future development in the WD Zone. Zimmerman points out the effect of the height change:

> The increase in height is a significant change in the WD Zone District. There are extremely few properties in WD Zone that are 75 feet to the roof and 90.9 feet to the equipment screen. As Cramer correctly pointed

out (June 21, 2012) "*the number of buildings that are more than five or six stories appear to be few, and many buildings are less.* Field inspection confirms the Cramer conclusion. The vast majority of properties in the WD Zone are 2.5 and 3 stories in height.

First, the new height now permits the Applicant, Hampton Inn to apply to the Planning Board rather than the Zoning Board, as the project does not need a d(6) "special reasons" height variance. Indeed, study of the proceedings, minutes, and ordinance changes promulgated make it clear that the Borough Council was, at least, mindful of the application, as well as, accommodating their ordinances to assist the application. It further is exactly the height needed for the Hampton Inn project. Namely, a height allowing 76 hotel rooms rather than a significantly lower height producing a lesser number of rooms. The consequence is a significant increase in the density of hotel rooms, persons occupying the hotel rooms, needed parking traffic, etc.

Second, the new height allows any property in the WD Zone District to be developed and/or redeveloped for a greater density and intensity than previously allowed. The overwhelming number of properties in the WD Zone are at or less than the previous 50 feet height limit.

The change has the potential to substantially affect the intensity of use, character and visual impact of the WD Zone. It has the potential to promote the most dense uses in the Borough.

As a consequence of the above described change in height classification contained in Ordinance 2012-17, public notice as required in NLUL 40:55D-62.1 "Notice of Hearing On Amendment to Zoning Ordinance" applies. *In the case of classification...change notice...within the district and within the State within 200 feet in all directions of the boundaries of the district...must be given...*

Thus, absent a recommendation in the Periodic Master

> Plan Reexamination, Red Bank must notify all property owners in WD Zone District; as well as property owners in abutting municipalities with 200 feet of the zone district. Such notice was not made. No such notice to property owners within the WD was made.
>
> **The conclusion is that the above statutory requirement for notice was not followed by the Borough Council in adopting Ordinance 2012-17.**
>
> In summary, an ordinance of this nature is either a "classification" or "spot zoning". Given the scope of the change it must be one or the other.

More importantly, for a property owner who has an existing building in excess of elevation 75 ft., he would now have a non-conforming structure, and yet he was never given notice of Ordinance 2012-17.

Plaintiff shall also call planner, Gordon Gemma, P.P. ("Gemma") who testified at the Borough hearing where the three (3) Ordinances were adopted. **(EXHIBIT O)**. Gemma's testimony was obviously truncated by DuPont's refusal to allow the objector to utilize the exhibits he had prepared, even in Gemma's direct examination. Yet, Gemma's testimony is substantially consistent with the report ultimately prepared by planner Zimmerman in this litigation.

LEGAL ARGUMENT

POINT ONE

ORDINANCE 2012-17 EFFECTED A CHANGE OF CLASSIFICATION AND A CHANGE OF BOUNDARIES IN THE AFFECTED ZONE THEREBY TRIGGERING THE PERSONAL NOTICE REQUIREMENTS OF N.J.S.A. 40:55D-62.1

Pursuant to N.J.S.A. 40:55D-62.1, notice must be given to all property owners within 200 feet "in all directions of the boundaries of the district" where there is a change to the classification or boundaries of a zoning district unless the ordinance is adopted pursuant to a reexamination of the Master Plan. Ordinance 2012-17 was not adopted pursuant to a re-examination of the Master Plan but effected substantive changes to the WD Zone and changed the boundaries of the WD Zone. Therefore, notice to affected property owners was required.

N.J.S.A. 40:55D-62.1 also outlines the requirements which must be followed by a municipality for such a zoning ordinance amendment in pertinent part:

> "A notice pursuant to this section **shall** state the date, time and place of the hearing, the nature of the matter to be considered and an identification of the affected zoning districts and proposed boundary changes, if any, by street names, common names or other identifiable landmarks, and by reference to lot and block numbers as shown on the current tax duplicate in the municipal tax assessor's office.

> Notice **shall** be given by: (1) serving a copy thereof on the property owner as shown on the said current tax duplicate, or his agent in charge of the property, or (2) mailing a copy thereof by certified mail and regular mail to the property owner at his address as shown on the said current tax duplicate. In the case of a change involving a military facility situated within or in proximity to the district as provided herein, notice shall be given by serving a copy thereof on the military facility commander who has registered with the municipality pursuant to section 1 of P.L. 2005, c. 41 (C.40:55D-12.4) or mailing a copy by certified mail to the military facility commander at the address shown on the registration form...(emphasis added)

The statute clearly provides that compliance with its requirements for notice is mandatory as the directive "shall" is used. The use of the term "shall" indicates a mandatory requirement, and the term 'may' indicates permissive action. New York v. Borough Council, 382 N.J. Super. 541 (App. Div. 2006) Further, as noted by the Appellate Division in Nouhan v. Bd. of Adj. of Clinton, 392 N.J. Super. 283 (App. Div. 2007), "any ordinance regulating land use that is not adopted in accordance with these requirements is invalid."

Ordinance 2012-17 triggered the enhanced notice under both prongs of the statute. It not only changed the boundaries of the WD Zone but also effected a change in classification. Because Ordinance 2012-17 removed sixteen (16) properties from the WD Zone

it unquestionably changed the boundaries of the WD Zone thereby triggering the requirement of notice to property owners with the zone. What constitutes a "change in classification" requiring personal notice relates to the substantive effect of the amendment rather than the name given to the zone. Pacilli v. Twp. of Woolwich, 394 N.J. Super. 329 (App. Div. 2007) Changes in bulk and intensity requirement within a zone(s) can effect a substantive change in future development within a zone without any attention to the label applied to the zone. The test is not the number of changes, but the substance of the changes. See, Pacilli at 333. Clearly, Ordinance 2012-17 drastically both increases and decreases the permitted height in various areas of the WD Zone and thus required notice. For existing buildings that are in excess of elevation 125, they will now become non-conforming structures. For areas where elevation 50 is the maximum, it will now be elevation 75. Multiple existing buildings in excess of elevation 100 are now non-conforming structures. Further, sixteen (16) residential properties are removed from the WD Zone by virtue of Ordinance 2012-17, drastically altering the character of the WD Zone as well as changing the boundaries of the Zone.

Clearly, the creation and changing of the maximum height contained in certain areas of the WD Zone and decreasing it in

others is a change in classification and the deletion of properties from a zone is a change in the boundaries of the zone. The Township's own planner, Ballard, spoke at the Planning Board's consideration of Ordinance 2012-17 and agreed that it removed the "overlay portion on Rector Place," thus, the Borough concedes the change to the Zone's boundary. Yet, the Borough did not provide the required notice.

Agazzi's planners, Zimmerman and Gemma, will provide testimony that the amendment creation and addition of the maximum height and elevation is a change in classification of uses in the relevant WD Zone. Zimmerman finds substantiation for his opinion, in the New Jersey Zoning & Land Use Administration (2011) which directs as follows:

> (c) Classification of uses. The drafting of zoning ordinances involves the creation of classification of uses by district. (Section 34-7.6; page 805)[1]

The Appellate Division in Pacilli has also squarely addressed what constitutes "zone classification" triggering personal notice to surrounding property owners. Pacilli is on point because in that case, the Court considered whether a proposed ordinance to change only density and bulk standards and to increase the amount of open space and greenway land

[1] Cox, Williams M. and Koenig, Stuart R. New Jersey Zoning & Land Use Administration, 2011 Edition; Gann Law Books, Newark, N.J.

requirements for subdivisions within three residential zones triggered the personal notice requirements of N.J.S.A. 40:55D-62.1. After considering what is meant by the term "zone classification," the Court determined that such a proposed ordinance triggered the personal notice requirement.

In fact, the Court's decision in Pacilli is directly on point that not only changes to ordinances affecting the boundaries of zoning district requires the enhanced notice but also changes to the classification of a zoning district. There can be no plausible argument made by the Defendants that Ordinance 2012-17 does not affect a change to the classification of a zoning district or effect the boundaries of it since it removes sixteen (16) residential lots and blocks from the zone. The court in Pacilli pointed out that "classification" is not defined in the MLUL; thus, its ordinary meaning should control:

> "**This meaning is also consistent with the current approach to and purpose of zoning, which consists of the creation of districts or zones and the designation of the uses or uses permitted or prohibited in the district or the zone**. 2 Robert M. Anderson, American Law of Zoning Sec. 9.02 (4th ed. 1996); 8 Eugene McQuillin, Municipal Corporations Sec. 25.86 (3d ed. 2000)" (emphasis added)

Ordinance No. 2012-17 certainly is an Ordinance which effectuates the "designation of the uses or uses permitted or

prohibited in the district or the zone" in that it increases the "density" on some lots and "decreases" it on others.

The Pacilli Court also looked to the MLUL for guidance:

> "The MLUL authorizes the governing body to 'adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon.' N.J.S.A. 40:55D-62. This section also directs that '[t]he regulations in the zoning ordinance shall be uniform throughout each district for each class or kind of buildings or other structures or uses of land...' Ibid. N.J.S.A. 40:55D-65 also authorizes a zoning ordinance to limit and restrict buildings and structures 'according to their type and the nature and extent of their use.' as well as to 'regulate the nature and extent of the use of land for trade, industry, residence, open space or other purposes." See also, N.J.S.A.40:55D-3. . .
>
> This examination of the MLUL confirms that in its most general sense, classification refers to the use permitted in a zoning district, such as residential, commercial or industrial, as well as sub-categories within the broader uses, such as single-family residential and high-density residential, highway commercial and neighborhood retail. We also encounter uses that may be permitted under certain conditions within a generally designated category. A change in any of these broad categories and subcategories has the capacity to fundamentally alter the character of a zoning district." (emphasis added)

Id. at 16-17. The Court in Pacilli determined that "classification" has been assumed to include changes to the density, bulk and height standards and conditions applicable to designated uses. Id. at 18. This is directly on point in the instant case.

Clearly, an ordinance which either adds density or decreases density of the use to add multiple stories and units to a hotel where the density was previously not permitted on the face of the ordinance, or even existed in the Borough, or vice-versa represents the type of "zone classification" contemplated in Pacilli. Further, were a zone previously permitted an elevation of 140 feet and it is now reduced to 75 feet, this is a dramatic change. Similarly, an ordinance that deletes sixteen (16) properties from a zone substantially changes the boundaries of the Zone.

With the adoption of Ordinance No. 2012-17, a new density and height was created despite the fact that this is not even referred to in the Master Plan documents was where the boundaries of the zone changed. This fundamental change mandates notice pursuant to N.J.S.A. 40:55d-62.1 - just as much as the obvious change to the boundaries of the zone by deleting the overlay portion on Rector Place - the sixteen (16) lots with residential homes on them.

In addition, the effect of this amendment is substantial because the one lot it was obviously created for required multiple variances and waivers. It is within the jurisdiction of the Zoning Board to determine whether or not to grant a variance

pursuant to N.J.S.A. 40:55D-70(d)(3); Coventry Square v. Westwood Zoning Board of Adj., 138 N.J. 285 (1994). Generally, uses which do not comply with all of the conditions are treated as a prohibited use, imposing on an applicant the same burden as for a use variance. Id. at 297. With Ordinance 2012-17, the Hampton Inn no longer requires a use variance. This shows how the intensity of the use is affected by the Ordinance change. The adoption of Ordinance No. 2012-17 altered the intensity of the use within each of the zones by adding a more intensive use on some and a diminished use on others in addition to changing the boundaries of the WD Zone by removing many properties from the Zone. The Borough's failure to give proper notice renders Ordinance 2012-17 invalid as a matter of law.

A. The Changes Were Not Recommended In A Periodic Re-Examination Of The Master Plan By The Planning Board

The only time changes to the classification or boundary of a zone do not require personal notice to affected property owners is if the change in classification or boundaries is recommended in a periodic general re-examination of the Master Plan. See N.J.S.A. 40:55D-62.1. Because the changes made by Ordinance 2012-17 were not recommended in a Periodic Reexamination of the Master Plan by the Planning Board, the enhanced notice provisions of N.J.S.A. 40:55d-62.1 are

triggered. The last Periodic Master Plan Reexamination was in 2009. (**EXHIBIT Z**) The Borough was obviously aware that there was no recommendation in a periodic re-examination of the Master Plan because it did provide notice to affected property owners for Ordinance 2012-15 and noted its duty to do so in the Ordinance itself. (**EXHIBIT S**, Document 3).

The statute is clear on its face and requires, unless the ordinance is recommended in a "periodic general re-examination of the Master Plan", notice to all owners "within the district and within the State within 200 feet in all directions of the boundaries of the district." This means notice to all owners of property in the WD Zone Districts. Such notice was not given. Absent a recommendation in the Periodic Master Plan Reexamination, the Borough must notify all property owners in the WD Zone District as well as property owners in abutting municipalities within 200 feet of the zone district. Such notice was not made. Thus, the statutory requires of N.J.S.A. 40:55D-62.1 were not followed. Consequently, the adoption of Ordinance 2012-17 is procedurally invalid.

Common sense lends support to why notice to affected property owners is not required when an ordinance is adopted pursuant to a re-examination of the Master Plan. The procedure

for adopting a master plan or amendment to a plan are quite extensive, as discussed by William Cox at Section 40-3 of his treatise, *New Jersey Zoning & Land Use Administration* (2013). Extensive notice is required (40:55D-10a and 13) as are certain requirements of a re-examination of the Master Plan. (N.J.S.A. 40:55D-89). A re-examination report may reach the conclusion that no changes are necessary to the existing master plan in which event no further action is required or if specific changes are recommended the master plan must be amended following the elaborate procedural requirements including notice. Only changes made in an Ordinance as a result of a master plan re-examination are not subject to the statutory requirement for the giving of personal notice to property owners within a district of a zoning ordinance amendment proposing a change to the classification or boundaries of a zoning district. See, N.J.S.A. 40:55D-62.1. In fact, the Appellate Division has affirmed that the Legislative intent to exclude only changes made as a result of a master plan re-examination from the personal notice provision is justified because of the extended nature of the re-examination process coupled with the general public notice provided and the general opportunity for public input. See,

Gallo v. Mayor and Tp. Council, 328 N.J. Super. 117, 125-127 (App. Div. 2000)

Failure to recommend a change in a Periodic Reexamination of the Master Plan means not only that the Ordinance is unreasonable, arbitrary and capricious, but also that the Ordinance cannot be adopted by the governing body, as it was, without adherence to N.J.S.A. 40:55D-62.1. Thus, the Borough failed to comply with required statutory notice and procedures that consequently invalidate Ordinance No. 2012-17.

B. Defective Notice Mandates Invalidation Of A Zoning Ordinance Because Adequate Notice To The Public Is A Jurisdictional Prerequisite To The Municipality's Authority To Act

The importance of notice, including that required pursuant to N.J.S.A. 40:55D-62.1, has also squarely been addressed by the Appellate Division:

> "When the common sense of the situation is considered, the Legislature's reasons for preferring uniformity in rules governing the scope and method of notice are apparent. The 200-foot rule strikes a balance between the interest of property owners in the vicinity of land to be developed and the interests of the developers. The Legislature could have chosen a rule more sensitive to local interests that may vary with topography, population density, or the nature of the development, but it opted for a bright line rule that is easily understood and applied. A rule of that sort facilitates compliance and enforcement, and the Legislature has opted to apply the 200-foot rule for notice throughout the

> MLUL. See, N.J.S.A. 40:55D-12e(notice to the county planning board); N.J.S.A. 40:55D-13(3)(amendments to the master plan involving property within 200 feet of an adjoining municipality); N.J.S.A. 40:55D-15 (notice of development regulations involving property within 200 feet of an adjoining municipality); N.J.S.A. 40:55D-62.1 (notice of hearings on proposed changes in zoning districts)." (emphasis added)

New York v. Borough Council, 382 N.J. Super. 541, 548-549 (App.Div. 2006). These principles were later re-affirmed in Pacilli where the Appellate Division noted that:

> "The MLUL recognizes that the development of property in a municipality affects the interests of a property owner in that municipality and in adjoining municipalities. N.J.S.A. 40:55D-2; NY SMSA - LTD Plaintiff v. Borough Council of Edison, 382 N.J. Super. 541,54 and 49. (App. Div. 2006)"

Thus, the importance of notice to property owners and adjoining municipalities has been recognized by our Courts over and over again. Yet, the Borough of Red Bank ignored the procedure mandated by statute.

The underlying principle requiring the invalidation after defective notice is the preservation of the basic right of the public in this democratic society---to be informed and participate in public government. The right is perhaps of foremost and direct effect upon the average citizen in zoning matters. This State, and our Courts, has always placed great weight upon the rights of citizens to open and participatory

government, particularly in zoning matters. This concern is perhaps exemplified by the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. See Polillo v. Deane, 74 N.J. 562, 566-568 (1977) (there is "a strong tradition both in this state and in the nation favoring public involvement in almost every aspect of government"), e.g. In re Application of County of Monmouth, 156 N.J. Super. 188 (App. Div. 1978). The reason for the requirement of proper notice is aptly best stated by the Washington Supreme Court in Glaspey & Sons, Inc. v. Conrad, 521 P2d 1173, 1176 (Wash. 1974):

> Adequate notice of a public hearing has another, more subtle reason that goes beyond merely enabling the opposition to give vent to its feelings. It is important that a board have an opportunity to reach an "informed" decision. That reason is thwarted if interested parties are prevented from preventing their views because of a board's failure to adequately disclose the true "purpose of the hearing". In short, failure properly to disclose the purpose of the hearing will create a potential information vacuum. Unfortunately, the interested parties as well as the public at large will be deprived of an "informed" resolution of problems that are the subject of the hearing . . .

The Borough's failure to comply with N.J.S.A. 40:55D-62.1 is fatal to the validity of Ordinance No. 2012-17. Without notice as mandated by statute, the Borough had no authority to act and the action becomes a nullity.

Based on the foregoing, notice pursuant to N.J.S.A. 40:55D-62.1 was not adhered to thereby necessitating a ruling that Ordinance No. 2012-17 is void.

POINT TWO

THE ADOPTION OF ORDINANCE 2012-17 VIOLATED THE PROCEDURES MANDATED BY MUNICIPAL LAND USE LAW WHERE IT IS INCONSISTENT WITH THE MASTER PLAN AND NOT ACCOMPANIED BY AN EXPLANATORY RESOLUTION

It is well-settled that courts have established four criteria for determining the validity of a land use ordinance. First, the ordinance must advance the MLUL's declared purpose of promoting the public health, safety, morals and general welfare; second, the ordinance must be "substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements;" third, the ordinance must "comport with the constitutional constraints on the zoning power, including those pertaining to due process;" and finally, the ordinance must be adopted in accordance with the statutory and municipal procedural requirements. See, Med. Ctr. v. Princeton Tp. Zoning, 343 N.J. Super. 177, 213-214(App. Div.2001).

The MLUL emphasizes the importance of a master plan and considers it the underlying basis for a municipality's zoning ordinance. One leading commentator has explained that "today there is no question but that the master plan is the cornerstone supporting the zoning of a municipality, and its importance cannot be overestimated." William M. Cox, New Jersey Zoning and

Land Use Administration, § 40-3 at 854 (2004). Cox further instructed that "[u]nder the M.L.U.L., a prerequisite of the exercise of the zoning power by a municipality is the preparation and adoption of a master plan." Cox, New Jersey Zoning and Land Use Administration, § 34-2.2 at 709.

The New Jersey Legislature has also emphasized the role that a master plan plays in local zoning by requiring that zoning ordinances be "substantially consistent" with a master plan. In the event that an ordinance is not substantially consistent, the deviation there from must be clearly documented in the public record. N.J.S.A. 40:55D-62. New Jersey courts have similarly instructed that the "law requires that municipalities have a master plan and that zoning ordinances ordinarily be substantially consistent with that plan." East Mill Associates v. Borough Council of Tp. of East Brunswick, 241 N.J. Super. 403, 406 (App. Div. 1990). In fact, the New Jersey Supreme Court has advised that the requirement that a zoning ordinance be substantially consistent with a master plan should be "strictly enforced." Riggs v. Long Beach Tp., 109 N.J. 601, 619-622 (1988) (concurring opinion).

New Jersey courts have repeatedly held that an ordinance both inconsistent with the master plan and not accompanied by an

explanatory resolution is void. See, N.J.S.A. 40:55D-62(a). An inconsistency is not fatal, but rather triggers two procedural requirements. Willoughby v. Planning Bd. of Tp. of Deptford, 326 N.J. Super. 158, 165 (App. Div. 1999). First, "a municipality may adopt a zoning ordinance amendment inconsistent with the master plan if it follows the procedures required by section 62a [N.J.S.A. 40:55D-62(a)]." Willoughby, 326 N.J. Super. at 165. Second, the reasons for deviating from the master plan "must be expressed in a resolution and recorded in its minutes." Id. Thus, "[a] zoning ordinance need not be consistent with the [master] plan, provided the inconsistency is the result of a reasoned decision to deviate." East Mill Associates, 241 N.J. Super. at 406.

These procedures are not optional and a municipality's failure to comply constitutes a denial of due process. See Pop Realty Corp. v. Springfield Bd. of Adjust. of Springfield Tp., 176 N.J. Super. 441, 454 (App. Div. 1980) (explaining "attempts to exercise the local zoning power in contravention to procedural requirements contained in the enabling statute have been considered to be ultra vires or a denial of due process.")

Even if the resolution sets forth reasons for the amendment, it has been held that there is insufficient

compliance with the statute if the governing body does not first acknowledge that there is an inconsistency to be accounted for. Willoughby v. Wolfson Group ,Inc., 332 N.J. Super. 223, 229 (App. Div.) certif. den. 165 N.J. 603 (2000) In this case, the Borough did not comply with these statutory procedures, rendering Ordinance No. O-11-47 void.

A. Conformance To The Master Plan

N.J.S.A. 40:55D-62a. requires:

> The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon. Such ordinance shall be adopted after the Planning Board has adopted the Land Use Plan Element and The Housing Plan Element of a Master Plan, and all of the provisions of such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with The Land Use Plan Element and the Housing Plan Element of the Master Plan or designed to effectuate such plan elements.

Absent an ordinance being substantially consistent with the Land Use Plan Element of the Master Plan or Periodic Reexamination, the governing body, as outlined in N.J.S.A. 40:55D-62a could still adopt the ordinance with an "affirmative vote of a majority of the full authorized membership of the governing body, with the reasons…for so acting set forth in the resolution..." However, the Red Bank Borough Council did not follow that process. One could assume the Borough Council did

not as they thought the ordinance was substantially consistent with the Master Plan; however, the Zoning Board of Adjustment Resolution says the exact contrary. To wit, the Zoning Board already determined that the maximum 50 feet elevation applied to Lot 1, Block 1 (Subject Property being rezoned by Ordinance 2012-17) and that "any other interpretation would not advance the intent of the Master Plan..." (**EXHIBIT L**, p. 20, para. 18) It found that a height greater than 50 feet would be contrary to the Master Plan and contrary to good zoning. That decision was not appealed by RBank Capital or the Governing Body of the Borough of Red Bank.

Pursuant to an OPRA request, the Borough was requested to produce all documentation upon which it relied in adopting the amendment. (**EXHIBIT S**) Copies of the documents are provided and along with the transcript clearly establish that the Borough relied upon no reports whatsoever, other than the Cramer letter when adopting the Ordinance, contrary to N.J.S.A. 40:55D-62a. Yet, Cramer, at the Council meeting admits he never looked to any of the Borough's Planning documents. This inconsistency is inescapable. The only thing the recommendation (**EXHIBIT N**) from the Planning Board establishes is that in fact the Planning Board similarly failed to read its Master Plan and instead

issued a response which is meaningless and in derogation of its statutory duty.

B. Failure to Comply with N.J.S.A. 40:55D-62a and N.J.S.A. 40:55D-26

Plaintiff shall call David Zimmerman, P.P. as an expert to testify at trial as to his report dated March 25, 2003. **(EXHIBIT V)** Zimmerman shall testify to the inconsistency of the Ordinance 2012-17 with the Master Plan and how utterly arbitrary Ordinance 1012-17's provisions are when considered against the facts - the surrounding properties of the Planning and Zoning documents of the Borough. Specifically, the 1995 Master Plan makes only brief reference to height in the WD Zone as follows: "*Set height limits that are compatible with the adjacent areas of downtown and the mixed-use neighborhoods.*" **(EXHIBIT AA)**

The Borough adopted the zoning amendment with Ordinance 2012-17 to establish a uniform height in the WD Zone despite the fact that there was an existing Ordinance that permitted heights of elevation 50 feet, 75 feet and 140 feet. As a result, there are numerous buildings in excess of elevation 75 which will now become non-conforming; Lot 1.01,

Zimmerman "tested" the objective set forth in the plan by comparing the new WD height to those zones contiguous to the WD Zone:

Maximum Permitted Height in
Zone Districts Contiguous to the
WD Zone District

Zone District	Hotels Permitted	Maximum Permitted Height
BR-1	Yes	40 ft.
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R-B2	No	35 ft. and not exceeding 2.5 stories
WD	**Yes**	**75 ft.**

Zimmerman's report establishes the new WD height is clearly incompatible with heights in surrounding zones. Indeed, the WD height is 35 feet taller or almost 50% taller than the two zones (BR-1 and CCD-2) where hotels are permitted. There is a limit in the CCD-2 Zone to 4 stories, whereas there is no limit to stories in the WD Zone. Zimmerman opines in his report that given the highly visible gateway location of the subject hotel property, the incompatibility is even more pronounced. The Hampton Inn application called for over one dozen waiver/variances as set forth in the Ballard review letter. He notes this exceptionally tall building will be on small

property, only 1.1 acres in size. It is isolated by the Route 35/Rector/Bridge/Riverside intersection. It is decidedly incompatible with the 1.5 and 2.5 story single family residences fronting Rector Place. It will be seen from the river and vehicles at the intersection as a hotel built in the style of an "obelisk". That is, an exceptionally tall, skinny structure out of character and incompatible with its surroundings. Adding insult to injury, the 75 feet is the tallest height allowed in any zone in Red Bank with perhaps, the hospital, MS Zone, being the exception.

Additionally, Zimmerman performed an analysis of all zones that permit hotels, as shown in the table below.

Zone Districts In
Red Bank that Permit
Hotels and Motels

Zone District	Maximum Permitted Height
BR-1	40 ft.
BR-2	40 ft.; 3 stories
HB	40 ft.
CCD-2	40 ft. not exceeding 4 stories
WD	**75 ft.**

The above table shows this hotel application is given a height, intensity, stories and density "bonus" unavailable to a prospective or existing hotel in any other zone in Red Bank.

Zimmerman concludes this special treatment is not supported

by any narrative in the 1995 Master Plan or subsequent reexamination documents, and opines that Ordinance 2012-17 is not consistent with nor does it implement or effectuate the height objective for the WD Zone in that 1995 Master Plan. In fact, the Cramer letter of June 21, 2012 (**EXHIBIT K**) does not opine that the new height is substantially consistent with the 1995 Master Plan.

The MLUL further provides that once the governing body reviews the report of the planning board it "may disapprove or change any recommendation by a vote of a majority of its full authorized membership and shall record in its minutes the reasons for not following such recommendation". See, N.J.S.A. 40:55D-26. None of this was adhered to in the matter at hand. Despite the blatant inconsistency of the Ordinance with the Master Plan, neither the Planning Board or the Borough Council addressed the inconsistency.

There is no evidence that the Borough Council took the time to even read the relevant sections of the Master Plan or ask their planner exactly what they said especially since Cramer admits in this case he looked to none of those documents. Consequently, the Borough could not, and indeed did not,

determine whether the Master Plan was consistent with the changes effectuated by the Ordinance.

C. Failure To Comply With N.J.S.A. 40:55D-62a

There is no question that both the Borough and Board failed to adopt a resolution explaining the inconsistencies, nor are there minutes explaining the inconsistencies or a report recognizing or making recommendations concerning those inconsistencies. This is fatal to Ordinance 2012-17.

Courts have consistently held ordinances void under similar circumstances. In East Mill Associates, the Appellate Division strictly construed the MLUL and invalidated an ordinance. There, East Brunswick adopted an ordinance rezoning the plaintiff's property and thus precluded its plans for a 150 unit residential development. East Mill Associates, 241 N.J. Super. at 405. However, because the ordinance was inconsistent with the master plan, East Brunswick's failure to timely adopt a resolution explaining the inconsistency invalidated the ordinance. Id. While the issue in East Mill Associates dealt with the Borough's delay in adopting the resolution, the principal remains, "if the requirements of the Law have not been satisfied, it is [the court's] role to declare it [the ordinance] invalid." East Mill Associates, 241 N.J. Super. at 408.

Similarly, in Route 15 Associates v. Jefferson Tp., the Appellate Division strictly construed the MLUL and found a zoning amendment invalid due to the governing body's failure to comply with N.J.S.A. 40:55D-62(a). Route 15 Associates v. Jefferson Tp., 187 N.J. Super. 481, 488 (App. Div. 1982). In particular, the court determined that the notes attached to the minutes of the meeting at which the amendment was adopted did not constitute sufficient compliance with N.J.S.A. 40:55D-62(a). Route 15 Associates, 187 N.J. Super. at 487-488.

The requirement that municipalities either adopt zoning ordinances consistent with their master plan or adequately explain the departure is not a rote and purposeless obligation. The Supreme Court of this State and every notable commentary on modern planning embrace the fundamental principal that good zoning follows good planning. A municipal master plan affords a comprehensive analysis of local land uses and makes recommendations for orderly and reasoned growth. Without the "big picture", zoning becomes random and disorderly. This is exactly what occurred when the Borough hastily and illegally adopted the Ordinance. It is precisely this process that the Supreme Court and the MLUL are designed to avert. Ordinance

2012-17 is hopelessly inconsistent with the Master Plan. Consequently, the ordinance is void and ineffective.

POINT THREE

THE ADOPTION OF ORDINANCE 2012-17 REPRESENTS SPOT ZONING

Where a zone change is designed to relieve a property owner from the burden of a general regulation it will be stricken as unacceptable "spot zoning." Cresskill v. Dumont, 15 N.J. 238 (1954); Palisades Properties, Inc. v. Brunetti, 44 N.J. 117, 134(1965). Spot zoning is the use of the zoning power to benefit particular private interests rather than the collective interests of the community. Taxpayers Assn. Of Weymouth Tp. v. Weymouth Tp., 80 N.J. 6, 18 (1976).

"Spot zoning" is a particularly unique zoning term that is a "judge-made" doctrine in contrast to a statutory requirement. (**EXHIBIT V**) It gives the courts a way to hold invalid certain zoning changes that, for various reasons, are arbitrary, capricious and unreasonable. From the perspective of planning and zoning principals, it is basically the opposite, if not antithesis, of comprehensive-based planning and zoning. Basically, the latter comes from the statute, and the former adopted by courts to describe zoning that courts consider invalid. Plaintiff's expert, Zimmerman, explains as follows:

> "...There are tests or criteria applied to "spot zoning" as found in: treatises, definitions and court decisions. Although, the test or criteria adopted in

this report represents a fair summary of these expert opinions; it is this report's criteria.

The clearest description is one of the earliest: "spot zoning is the antithesis of planned zoning".[2] An example of a "spot zoning" definition is that offered by Moskowitz and Lindbloom[3]: "Rezoning of a lot or parcel of land to benefit an owner for a use that is incompatible with surrounding land uses and does not further the comprehensive plan" (p. 378). Cox/Koenig succinctly defines it as: "it is the use of the zoning power to benefit particular private interests rather than the collective interest of the community".[4]

Also, from Moskowitz and Lindbloom:

Hagman (1975) states that spot zoning is invalid only when all the following factors are present: (1) A small parcel of land is singled out for special and privileged treatment; (2) the singling out is not in the public interest but only for the benefit of the land owner; and (3) the action is not in accord with a comprehensive plan. See Kozesnik v. Borough of Montgomery, 24 N.J. 154, 131 A.2d1 (1957); Borough of Cresskill v. Borough of Dumon, 15 N.J. 238, 104 A.2d 441 (1954); and Jones v. Zoning Board of Adjustment of Long Beach Twp., 32 N.J. Super. 397, 108, 498 (1954)[5]..." (**EXHIBIT V**)

Ordinance 2012-17 meets all of the criteria of "spot zoning". There is no substantiation in any of the Borough's Land Use Plan Elements or Comprehensive Master Plan or Reexaminations for the Ordinance. The omission of any such reference in the elements renders the ordinance substantially

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[2] Jones v. Zoning Board of Adjustment of Borough of Long Branch, 32 NJ Super 397 (1954).
[3] Moskowitz & Lindbloom, The latest Illustrated Book of Development Definitions. Rutgers University, 2004. P. 378
[4] P. 810 "2011 Edition New Jersey Zoning and Land Use Administration"
[5] Moskowitz & Lindbloom, The latest Illustrated Book of Development Definitions. Rutgers University, 2004. P. 378

inconsistent with those documents. In addition to this obvious fact, the resolution of the Zoning Board Of Adjustment came to a similar conclusion. Namely, that the RBank Capital use will substantially impair the zone plan and ordinance. (**EXHIBIT L**)

Second, the ordinance only really benefits one owner/applicant: RBank Capital. Most telling to this conclusion is the timing of the ordinance's adoption. It was adopted immediately after an objector Stephen Mitchell made application for an interpretation as to the height ordinance in the RB Zone which was ruled favorably upon by the Zoning Board of Adjustment and on the heels of Mitchell's Petition for Interpretation. Indeed, one can reasonably assume that all the errors by the Borough in this process were the result of its rush to accommodate the Developer, RBank Capital, rather than following a more deliberate path as outlined in the statute. Moreover, Zimmerman will testify that for all intents and purposes, the only property benefiting from this is the Subject Property since it is the only vacant lot in this zone.

Third, as further witness to spot zoning and the singular uniqueness of this ordinance is a consequence that now the RBank Capital Applicant can appear before the Planning Board. Committeeman Michael DuPont's statements at the public hearing

on the Ordinance are simply absurd. (**EXHIBIT O**) Everyone knew why this Ordinance was being pushed through. It was for the Borough to cultivate a piece of property lying fallow into a significant tax ratable and to have the Developer pay for the improvements for a public easement. The over building of this site with a building at elevation 75 and a total height of 90 feet in no way benefits the general welfare of the community.

Fourth, there is no public interest promoted by the ordinance. The ordinance was implemented for the benefit of a developer to get around the earlier decision of the Zoning Board. (**EXHIBIT L**) To wit, the Zoning Board specifically determined that "...the interpretation issue herein will not prevent RB Capital/Hampton Inn representation (or any other Applicant) from applying for, seeking relief from, and/or deviating from the maximum 50 foot elevation (providing appropriate relief is officially granted.) (**EXHIBIT L**, p. 19) RBank Captial did not want to go before the Zoning Board nor did the Borough want it to because it could never justify the need for a use variance. The hearing transcripts before the Borough Council all show this. Lastly, it is a use proposed for a neighborhood that is residential in character. A 6 story hotel

is incompatible with existing and proposed land use in this neighborhood.

Zimmerman will testify that there is universal agreement that "spot zoning" is defined by its omission from the comprehensive or master plan process. Red Bank Master Plan document is the Land Use Plan.

Given the total lack of "reasons" in the Master Plan, it would be reasonable for one to assume that such rationale would be included subsequently in the later Master Plan. However, this too was not done. Neither planning document on either side of the ordinance passage offers any "reasons" or justification for the use introduced.

Zimmerman discusses in his report, as he will at trial, that given the substantial nature of this change is standard. and the consequent impact upon a neighborhood and community, its "ad hoc" change in bulk standard, without any comprehensive planning reasons as one normally would encounter in the master plan process, is the absolute antithesis of planned zoning; thus, Ordinance No.2012-17 fails the comprehensive plan test.

POINT FOUR

ORDINANCES 2012-15, 2012-16 and 2012-17 ARE ARBITRARY, CAPRICIOUS AND UNREASONABLE AND FAIL TO PROMOTE ANY OF THE PURPOSES OF THE MLUL, DO NOT SERVE THE PUBLIC INTEREST AND ARE NOT SUPPORTED BY PROPER ZONING PURPOSES

It is well-settled that where an ordinance provision fails to promote any of the purposes of the MLUL as set forth in N.J.S.A. 40:55D-2, it will probably be invalidated. A zoning ordinance enjoys a presumption of validity. However, the presumption may be overcome by a showing that the ordinance is "clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the [zoning] statute." Riggs, 109 N.J. at 610-611; Manalapan Realty, 140 N.J. at 380; McNeill v. Plumsted Tp., 215 N.J. Super. 532, 537 (App. Div. 1987) (stating "[a] zoning ordinance which is arbitrary or unreasonable cannot stand"). The party attacking an ordinance bears the burden of overcoming the presumption, Ward v. Montgomery Tp., 28 N.J. 529, 539 (1959), and in meeting that burden, it may rely on extrinsic evidence. Bellington v. East Windsor Tp., 32 N.J. Super. 243, 248 (App. Div. 1954), aff'd, 17 N.J. 558 (1955).

In Riggs, this State's highest court set forth the court's role when reviewing a challenged ordinance and explained:

> "Although the judicial role is circumscribed, a court may declare an ordinance invalid if in enacting the ordinance the municipality has not complied with the requirements of the statute. … Generally, a zoning ordinance must satisfy certain objective criteria. First, the ordinance must advance one of the purposes of the Municipal Land Use Law as set forth in N.J.S.A. 40:55D-2...Second, the ordinance must be substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements, … unless the requirements of that statute are otherwise satisfied. Third, the ordinance must comport with constitutional constraints on the zoning power, including those pertaining to due process,...equal protection,...and the prohibition against confiscation,...Fourth, the ordinance must be adopted in accordance with statutory and municipal procedural requirements."

Riggs, 109 N.J. 611-12 (citations omitted). A court should also determine "whether factors other than the public interest and welfare have influenced the governing body's legislative action" and that that action "must be viewed in light of the present factual context, in order to ascertain the quality of those acts." Howell Properties, Inc., v. Borough of Brick, 347 N.J. Super. 573, 580 (App. Div.), cert. denied, 174 N.J. 192 (2002).

1. The Ordinances are Arbitrary and Capricious and Not the Result of Fair and Impartial Hearings

In this case, the Borough enacted Ordinance No. 2012-17 solely in response to the Zoning Board's determination that the

existing Ordinance only permitted an elevation of 50 feet as to Lot 1, Block 1. By doing so, the Borough acted arbitrarily and unreasonably because the amendment does not advances the goals of the MLUL and was rushed through the enactment process. At the same time, the Borough adopted Ordinances 2012-15 and 2012-16 to address the sixteen (16) properties that were removed from the WD Zone by Ordinance 2012-17.

The records show the application of the hotel was the reason for the ordinance. Any attempt by the Borough to disagree with this is without merit. The hotel application permeated the Ordinance hearings and the next neighbor appeared and spoke out against it, only her comments were ignored. By virtue of the Ordinance, RBank Capital's property was re-zoned to allow this use solely to increase the tax ratables, also an improper zoning purpose. Trust Co. of N.J. v. Planning Bd., 244 N.J. Super. 553, (App. Div. 1990).

Where the governing body zones a particular area for a certain use knowing that the area is inappropriate for that use, such action is ad hoc decision making because it runs counter to the requirement of the MLUL that the zoning ordinance must reflect the underlying purposes set forth in a duly adopted

master plan. Glen Rock, etc., v. Bd. of Adjust., etc., Glen Rock, 80 N.J. Super. 79 (App. Div. 1963).

A review of the record below the Governing Body on the hearing for the passage of the Ordinances will further confirm that the Plaintiff's attorney and his arguments and positions were repeatedly interrupted or demeaned by certain Councilman, particularly Councilman Michael DuPont. In Bonsall v. Township of Mendham, 115 N.J. Super. 337 (App.Div.) cer't denied 59 N.J. 529 (1971), the Court commented with regard to a Board hearing that where certain members were impatient and/or discourteous towards a party, it might be construed as an absence of an open mind and those members would serve best by stepping down. In this case, the comments of Committeeman Michael Dupont boarded on hostility. Evidently, Councilman DuPont was running for re-election and seemingly sought to simply make a number of comments that he thought would be beneficial to his coming election. Despite speaking continually of what to do, what is best for the community, when confronted with the comments of the party living next door stated she had no desire to walk out of her front door and look at a 75 foot hotel, for the first time Councilman DuPont was silent.

During the hearing, he continually berated Attorney Gasiorowski both criticizing and interrupting him and genuinely behaving in a totally unprofessional fashion. The attorney below had openly admitted that in addition to representing the then objector Stephen Mitchell, he also represented a competing hotel owner; Committeeman DuPont was intent on attempting to paint a picture that this had never been disclosed when in reality it had been from the very beginning of the original application by RBank Capital. Committeeman DuPont made statements that were demeaning. Additionally, despite the fact that it is apparent to everyone, that the genesis of this Ordinance was the RBank Capital application, the attorney below was deprived of the opportunity not only to introduce copies of the plans of the proposed hotel but even preventing from having them marked for identification so that they could be preserved for the purposes of trial.

Similarly, when the Ordinances were before the Planning Board for recommendation, Mayor Menna commenced the hearing with the following unbelievable introduction:

> "...If we had really studied it the way we should have, we probably would have excluded it then and put it the designation of the properties immediately across the street. So I think it's a logical, it's the same elimination of the ping pong and is it going to keep us out of the Courts, no. We're already in court

anyhow and nothing is going to stop somebody from an adjacent municipality who's afraid of competition from continuing to spend their money and the taxpayers' money to keep out competition for his hotel and using a patsy in Red Bank to accomplish that.

So I still think these particular ordinances should be moved forward. They resolve ambiguity and I think it would create some degree of order to the existing ordinances." (**EXHIBIT N**, p. 6, l. 10-24)(emphasis added)

When drawing on the analogous right of party participants to a fair trial our Courts have recognized of a litigant's "fundamental right of trial by a fair and impartial jury" in civil matters. Wright v. Burnstein, 23 N.J. 284, 296 (1957); Panko v. Flint Co., 7 N.J. 555, 61 (1951). Because an unprejudiced trier of fact is integral to a fair trial it has been held that the trier of fact must be "as nearly impartial" as the State v. Singletary, 80 N.J. 55, 62 (1979) in quoting State v Jackson, 41 N.J. 148, 158 (1964), cer't denied; Ravenell v. New Jersey, 379 U.S. 982 (1965). The Governing Body in passing upon an Ordinance had to present to all citizens a fair hearing and lay aside any preconceptions and render a decision that was based on the facts before it. That was not the case here.

This Governing Body, because of their desire, for whatever reason, to secure this hotel cast all reason aside, altered the

entire zoning balance of the WD Zone, created non-conforming structures for buildings that existed for decades. The response of Mayor Menna was they could apply for a use variance if they wanted to change the building. The Borough also made a zone for sixteen (16) properties while severely limiting the private use to accommodate the public.

The fact of the matter here is that the Zoning Board of Adjustment clearly pointed out that the Applicant could come back before it for a use variance to build a hotel higher than what was permitted in the Zone. Realizing that such an application would never meet the standards for the granting of a use variance, the Applicant as well as the Governing Body here passed this Ordinance. Consequently, the Ordinances are arbitrary and capricious.

2. Under the MLUL, Municipalities Lack the Authority to Zone a Parcel or a Portion Thereof for Open Space

The arbitrariness of these Ordinances, hastily adopted to accommodate the Hampton Inn application, is further reflected in the regulations attached to the R-B2 Zone.

Ordinance 2012-16 provides in pertinent part as follows:

> **SECTION ONE:** Subsection 25-10.7, "Regulations Controlling 'R-B2" Residential Zone District", is hereby amended and supplemented with the addition of the following section: (*strikeouts denote deletions, underlined text denote additions)*:

F. Special requirements:

(1) All applications for development in this zone on properties abutting or contiguous with the Navesink River and which require submission of a major site plan, will be accompanied by an Environmental Impact Report (EIR) as provided for in § 25-8.3 of this chapter.

(2) All applications for developments in this zone on properties abutting or contiguous with the Navesink River and which require submission of a major or minor site plan or major subdivision, will include maximum practical provisions for public access to the Navesink River, Unless waive by the Municipal Agency, these provisions will include:

(a) An access easement of 25 feet minimum width along with all river frontage and

(b) Appropriate provisions for passive enjoyment of river views by residents and the general public. (**EXHIBIT Q**)

With the adoption of Ordinance 2012-15, property owners of these properties in the R-B2 Zone who seek to develop their property are imposed with an illegal limitation on their property -- an access easement of 25 feet minimum and provisions for a "passive enjoyment of river view by residents and the general public." The municipality has not been delegated the authority by the MLUL to limit the use of private property by zoning to open space and public park type use. Consequently, Ordinance 2012-16 is invalid as being outside of the delegated authority of the Land Use Law.

Municipalities possess the power to zone only to the extent delegated to the municipalities by the Legislature in the MLUL. Any zoning ordinance must find its life and authority in the MLUL, or it is beyond the municipal authority and is consequently not valid. Municipalities must exercise their powers relating to zoning and land use in a manner that will strictly conform with that statute's provisions. Toll Bros., Inc. v. Bd. of Chosen Freeholders, County of Burlington, 194 N.J. 223, 243 (2008); see Avalon Home & Land Owners Ass'n v. Borough of Avalon, 111 N.J. 205, 212 (1988) (invalidating ordinance that exceeded authority to permit restoration of destroyed nonconforming uses); N.J. Builders Ass'n v. Bernards Twp., 108 N.J. 223, 237-38, 528 A.2d 555 (1987) (invalidating ordinance requiring contribution to off tract improvements).

The MLUL does not provide authority for a municipality to zone a parcel of land for open space or public recreation use. The issue, and the validity of the subject ordinance under the current MLUL, was conclusively decided in the recent New Jersey Shore Builders Ass'n v. Township of Jackson, 401 N.J. Super. 152 (App. Div. 2008) aff. 199 N.J. 449 (2009). There two municipalities (Jackson Township and Egg Harbor Township) had zoning ordinances that required property owners to set-aside and

devote portions of their property for open space or recreation areas and facilities --- or pay an assessment in lieu of such a set-aside --- as a requirement and condition of development approval on the balance of their property. Both the Appellate Court and the Supreme Court invalidated those ordinances mandating the use of a portion of the owner's property for open space or recreation as not being within the municipal powers specified by the MLUL. The Court stated:

> Our review of the applicable provisions of the MLUL compels us to conclude that the Legislature, although recognizing the benefits to be derived from open space, and although including its preservation among the enumerated purposes of the MLUL, see N.J.S.A. 40:55D-2(c), 2(g), 2(j), limited the manner in which municipalities may demand that it be made available. That is, the Legislature did not include in the MLUL a general mechanism for effectuation of those stated goals but created specific means through which the municipalities are empowered to achieve the Act's purposes.

The Court concluded that, although the MLUL recognized the benefits to derive for open space or recreational space, it limited the manner in which municipalities could demand it be made available from landowners. The Court noted that municipalities in their Master Plan may designate area for a variety of public purposes. N.J.S.A. 40:55D-28. "As part of that grant of authority, however, the Legislature has required the payment of just compensation to the owner of the affected parcel

as a means of acquiring the land so designated for that public purpose N.J.S.A. 40:55D-44."

As the Supreme Court has definitively established that the MLUL does not permit a municipality to require by zoning that a developer utilize a portion of his property for open space or recreation as a condition of developing the remainder, it is beyond dispute that a municipality similarly does not have the authority under the MLUL to require by zoning ordinance that a property owner utilize his entire property for open space or public recreation. As detailed in Shore Builders, if the municipality wishes to dedicate property to open space or limited recreation use, the Legislature in the MLUL has specified that the means to that public end for the municipality is to acquire the property with payment of just compensation, and not to zone the property as open space.

Consequently, zoning Ordinance 2012-16 specifying "special requirements" for development to ensure enjoyment of "river views" by residents and the general public is clearly beyond the authority delegated to the municipality under the MLUL and consequently is invalid.

POINT FIVE

THE PASSAGE OF THIS ORDINANCE WAS CONTRACT ZONING

Contract zoning is an attempt by the governing body, by contract with a property owner, to allow the property owner to use his property in contravention of the Zoning Ordinance and without statutorily established procedure for obtaining an amendment. See Lynch v. Hillsdale, 136 N.J. Super. 129 (S. Ct. 1947)

The transcripts of the Planning Board hearing of July 16, 2012 where the subject Ordinances were considered and the Planning Board forwarded its recommendation to the Governing Body as well as the more recent July 15, 2013 transcript of the most recent Planning Board hearing dealing with the re-application of RBank Capital site after the rezoning for the hotel is illuminating. (See, **EXHIBIT W**, p. 11, l 6-25; p. 12, l. 1-25; p. 13) To wit, the Applicant's engineer describes the "benefit" to Red Bank as follows:

"**Q:** But the details of the improvement are really not set forth on the plan because it is an easement to the benefit of the Borough of Red Bank.

A: The plans show relatively detailed proposals. However, it's my understanding that the applicant will remain flexible and bend to the Capital's wishes on how that easement is to be treated." (**EXHIBIT W**, p. 11, l. 22-25; p. 12, l. 1-3)

The transcript before the Planning Board on July 15, 2013 reveals the fact that both the Engineer for the Applicant as well as Mayor Menna confirmed the fact that a significant portion of the Subject Property, Lot 1, Block 1, is being developed and paid for by the developer for the benefit of the Borough of Red Bank. In fact, the Borough is illegally seeking a similar "bonus" from the owner of the sixteen (16) properties being rezoned as a result of Ordinances 2012-16 and 2012-17, with the illegal zoning of the private property for a public easement and open space for the benefit of the public.

Located on Lot 1, Block 1 is a public easement which was granted over 20 years ago. (**EXHIBIT A**) This public easement, for a width of 25 feet - strikingly similar to the "easement" achieved by Ordinance 2012-16 runs along the shoreline of the Navesink River. It is part of an earlier project to create a public access way for the benefit of the community at large. Whether or not this plan in fact satisfies that goal is questionable; however, what is a fact is that the Developer has agreed to bear the entire cost of this improvement. (**EXHIBIT W**, p. 12) In the engineer's words, the Applicant's will essentially "bend" to the wishes. The improvement is shown on the plans (**EXHIBIT D**) and the cost of same while unknown is clearly in

excess of $100,000. Accordingly, as a result of this, the Borough of Red Bank will not have to bear the cost of same but rather in exchange for this rezoning, they are having it paid for by the Developer. This is contract zoning and consequently, illegal.

CONCLUSION

Based on the foregoing, Ordinances 2012-16 and 2012-17 is unreasonable, capricious and arbitrary. Further, they are void due to procedural defects or illegal zoning.

Consequently, the Ordinances must be invalidated.

GASIOROWSKI & HOLOBINKO
Attorney for Plaintiff Angela Agazzi

BY: _____
R.S. GASIOROWSKI, ESQ.

DATE: September 9, 2013
RED BANK, NEW JERSEY

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Attorneys for Plaintiff

ANGELA AGAZZI, Plaintiff vs. GOVERNING BODY OF THE BOROUGH OF RED BANK, Defendant	SUPERIOR COURT OF NEW JERSEY LAW DIVISION : MONMOUTH COUNTY Docket No: MON-L-3653-12 Civil Action CERTIFICATION OF R.S. GASIOROWSKI, ESQ IN SUPPORT OF TRIAL BRIEF OF PLAINTIFF

R.S. GASIOROWSKI, ESQ. hereby certifies as follows:

1. I am an Attorney at Law of the State of New Jersey with the firm of Gasiorowski & Holobinko, attorneys for the Plaintiffs in the within captioned matter. As such, I am fully familiar with the facts and circumstances of this matter.

2. I attach thereto true and accurate copies of the documents which are contained in my file:

EXHIBIT A	July 23, 1992	Easement and Right of Way between Exxon Corporation and the Borough of Red Bank
EXHIBIT B	February 1, 2008	Zoning Map of the Borough of Red Bank
EXHBIIT C	June 1, 2010	Pertinent portion of Red Bank Planning and Development

		Regulations
EXHIBIT D	June 13, 2011	Site Plan prepared by John R. Martinez, P.E., KZA Engineering, P.A., revised 3/29/11 and 6/13/111
EXHIBIT E	July 7, 2011	Resolution Z 2011-14 - Interpretation of Zoning Ordinance adopted July 7, 2011
EXHIBIT F	August 2, 2011	Review Letter from Christine A. Ballard, P.E., T & M Associates
EXHIBIT G	January 6, 2012	Review Letter from Christine A. Ballard, P.E., T & M Associates
EXHIBIT H	January 27, 2012	Correspondence from Kevin E. Kennedy, Esq. to R. S. Gasiorowski, Esq. and Martin McGann, Jr., Esq.
EXHIBIT I	February 15, 2012	Correspondence from Kevin E. Kennedy, Esq. to Martin A. McGann, Jr., Esq.
EXHIBIT J	February 24, 2012	Correspondence from Kevin E. Kennedy, Esq. to R. S. Gasiorowski, Esq. and Martin McGann, Jr., Esq.
EXHIBIT K	June 21, 2012	Review Letter from Richard S. Cramer, P.P., A.I.C.P., T & M Associates to Mayor Manna
EXHIBIT L	June 21, 2012	Resolution No. 2012-20 Interpretation of Zoning Ordinance (Height/Elevation)
EXHIBIT M	June 25, 2012	Correspondence from Kevin E. Kennedy, Esq.. General Counsel to Red Bank Zoning Board of Adjustment, to Pamela Borghi, Red Bank Clerk
EXHIBIT N	July 16, 2012	Transcript of Planning Board

		Hearing
EXHIBIT O	July 25, 2012	Transcript of Hearing before Red Bank Borough Council regarding Ordinance Nos. 2012-15, 2012-16, and 2012-17
EXHIBIT P	July 25, 2012	Ordinance 2012-15 adopted July 25, 2012
EXHIBIT Q	July 25, 2012	Ordinance 2012-16 adopted July 25, 2012
EXHIBIT R	July 25, 2012	Ordinance 2012-17 adopted July 25, 2012
EXHIBIT S	August 16, 2012	Correspondence from Pamela Borghi, Municipal Clerk, in response to OPRA request of R. S. Gasiorowski, Esq. and attached documents relating to Ordinance Nos. 2012-15, 2012-16 & 2012-17: 1. Correspondence dated July 5, 2012 from Bonnie K. Thomas, Deputy Municipal Clerk to Monmouth County Planning Board enclosing certified copies of Ordinance Nos. 2012-15, 2012-16 & 2012-17 2. June 17, 2012 Monmouth County Planning Board confirmation of receipt of Amending Zoning Map to reclassify properties on Rector Place from WD Waterfront Development District to R-B2 Residential Zone District re: Ordinance 2012-15 3. July 9, 2012 certified & regular mail enclosing Ordinance 2012-15 4. Affidavit of Publication dated July 9, 2012 for first reading of Ordinance 2012-15

5. Correspondence dated July 30, 2012 from Bonnie K. Thomas, Deputy Municipal Clerk to Monmouth County Planning Board enclosing certified copies of Ordinance Nos. 2012-15, 2012-16 & 2012-17

6. August 8, 2012 Monmouth County Planning Board confirmation of receipt of Amending Zoning Map to reclassify properties on Rector Place from WD Waterfront Development District to R-B2 Residential Zone District re: Ordinance 2012-15

7. List of Property Owners from Red Bank Tax Assessor's Office

8. Affidavit of Publication dated July 9, 2012 for first reading of Ordinance 2012-15

9. July 17, 2012 Monmouth County Planning Board confirmation of receipt of Amending Section 25-10.7 "Regulations Controlling R-B2 Residential Zone District" re: Ordinance 2012-16

10. August 8, 2012 Monmouth County Planning Board confirmation of receipt of Amending Section 25-10.7 "Regulations Controlling R-B2 Residential Zone District" re: Ordinance 2012-16

11. Affidavit of Publication dated July 9, 2012 for final reading of Ordinance 2012-16

12. Affidavit of Publication dated July 9, 2012 for first

		reading of Ordinance 2012-17
		13. July 17, 2012 Monmouth County Planning Board confirmation of receipt of Amend Section 25-10-16, "Use Regulations Controlling the Waterfront Development District", Section a. "Permitted Uses" and Section e. "Area, Yard, and Structure Requirements", Sub Paragraph 6. "Maximum Structure Height" re: Ordinance 2012-17
		14. Affidavit of Publication dated August 1, 2012 for first reading of Ordinance 2012-17 and Affidavit of Publication for Final Reading
		15. August 8, 2012 Monmouth County Planning Board confirmation of receipt of Amend Section 25-10-16, "Use Regulations Controlling the Waterfront Development District", Section a. "Permitted Uses" and Section e. "Area, Yard, and Structure Requirements", Sub Paragraph 6. "Maximum Structure Height" re: Ordinance 2012-17
EXHIBIT T	August 31, 2012	Complaint in Lieu of Prerogative Writs, Case Information Statement, Track Assignment Notice
EXHIBIT U	March 25, 2013	Planning and Zoning Report prepared by P. David Zimmerman, P.P., Community Planning Consultant
EXHIBIT V	June 12, 2013	Review Letter from Christine A. Ballard, P.E., T & M Associates
EXHIBIT W	July 15, 2013	Transcript of Planning Board hearing

EXHIBIT X	2002	Memorialization Resolution Adopting Re-Examination of Master Plan and Land Development Regulations
EXHIBIT Y	December 17, 2008	Re-Examination of the Master Plan, Planning & Development Regulations, revised December 17, 2008
EXHIBIT Z	March 10, 2009	Re-Examination of the Master Plan, Planning & Development Regulations, revised March 10, 2009
EXHIBIT AA	1995	1995 Master Plan of Red Bank

I certify that the foregoing statements made by me are true to the best of my knowledge. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

GASIOROWSKI & HOLOBINKO

BY: _____
R.S. GASIOROWSKI, ESQ.
Attorney for Plaintiff, Angela Agazzi

DATE: September 9, 2013