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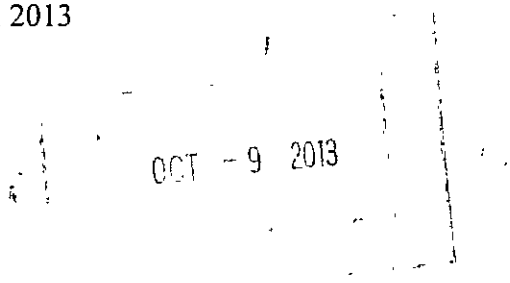
October 8, 2013



VIA FEDERAL EXPRSS
Hon. Thomas F. Scully, J.S.C.
Superior Court of New Jersey, Monmouth County
Monmouth County Courthouse
71 Monument Park
Freehold, NJ 07728

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

Dear Judge Scully:

This firm represents Defendant Borough of Red Bank (the "Borough") in the above matter, which is scheduled for a trial before Your Honor on October 17, 2013. In accordance with the Amended Pre-Trial Order entered in this matter, enclosed is an original and one copy each of: (1) the Borough's Trial Brief; and (2) Identification Certification of Daniel J. O'Hern, Jr.

Respectfully yours,

DANIEL J. O'HERN, JR.

DJO:jb

cc: R.S. Gasiorowski, Esq. (Federal Express, w/enc.)

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Attorneys for Defendant Governing
Body of the Borough of Red Bank

ANGELA AGAZZI,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY
Plaintiff,	DOCKET NO. MON-L-3653-12
v.	
	Civil Action
GOVERNING BODY OF THE BOROUGH OF RED BANK,	**IDENTIFICATION CERTIFICATION OF DANIEL J. O'HERN, JR.**
Defendant.	

I, Daniel J. O'Hern, Jr., of full age, do hereby certify as follows:

1. I am the Red Bank Borough Attorney and my firm represents the Defendant Governing Body of the Borough of Red Bank in the above captioned matter.

2. I make this Certification for the sole purpose of identifying certain documents that are referenced in the Defendant's Trial Brief.

3. Annexed hereto as exhibit "A" is a true and accurate copy of a Memorandum Dated July 17, 2012 from Donna Barr, Director of Zoning and Planning Department to the Mayor and Council of the Borough of Red Bank, Regarding Report of Ordinance Review.

4. Annexed hereto as exhibit "B" is a true and accurate copy of a letter dated August 6, 2013 from Daniel J. O'Hern, Jr. to the Honorable Thomas F. Scully

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

Date: October 8, 2013

DANIEL J. O'HERN, JR.

Borough of Red Bank

DEPARTMENT OF PLANNING AND ZONING
90 Monmouth Street
Red Bank, NJ 07701

Donna Smith Barr
Director

Tel: (732) 530-2752
Fax: (732) 530-2766
Email: dsbarr@redbanknj.org

MEMORANDUM

DATE: July 17, 2012

TO: Mayor Pasquale Menna and Council Members

FROM: Donna Barr, Director, Planning & Zoning Dept

Re: Report of Ordinance Review

At the July 16, 2012 Planning Board Meeting, the Board reviewed the ordinances listed below:

Review of Ordinance #2012-15 Amending the Borough of Red Bank's Zoning Map to re-classify the residential properties located on Rector Place from the WD Waterfront Development District to the RB-2 Residential Zone District

Review of Ordinance #2012-16 "Amending and Supplementing Chapter XXV, Planning & Development Regulations, Section 25-10.7 "Regulations Controlling RB-2 Residential Zone District"

Review of Ordinance #2012-17 "Amending and Supplementing Chapter XXV, Planning and Development Regulations 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"

The Board discussed the ordinances and found that they are in conformance with the Master Plan and recommends adoption by the governing body.

C: M. Leckstein, Board Attorney
C. Ballard, PE, Borough Engr.
S. Sickels, Borough Administrator
P. Borghi, Borough Clerk

A

Byrnes, O'Hern & Heugle, LLC
Attorneys at Law

Sean F. Byrnes
Daniel J. O'Hern, Jr.
Robert L. Heugle, Jr.*
Lauri Bini
Shawn Wallach

Certified by The Supreme Court of NJ
as a Civil Trial Attorney

August 6, 2013

Hon. Thomas F. Scully, J.S.C.
Superior Court of New Jersey, Monmouth County
Monmouth County Courthouse
71 Monument Park
P.O. Box 1266
Freehold, NJ 07728

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

Dear Judge Scully:

This firm represents Defendant Borough of Red Bank (the "Borough") in the above matter.

We are in receipt of the Amended Pre-Trial Order, which was amended based upon a letter dated July 17, 2013 from Plaintiff's counsel in which he requested that an issue be added to the list of issues to be determined at trial. Specifically, Plaintiff's counsel requests that an issue be added regarding whether the subject Ordinance was part of "Contract Zoning" with the owner of the subject property. For the reasons set forth herein, the Borough objects to the addition of this issue to Paragraph 7 of the Amended Pre-Trial Order ("Issues to be Determined at Trial").

By way of brief background, this lawsuit primarily involves a challenge to an Ordinance Adopted by the Borough that clarified the height requirements of structures in the Borough's Waterfront Development ("WD") Zoning District (the "Height Ordinance"). Since the adoption of the Height Ordinance, an application has been filed with the Borough's Planning Board to develop a Hampton Inn Hotel at Block 1, Lot 1 (the "Property"), which Property is located in the Borough's WD Zone. In connection with that application, Plaintiff's counsel contends that there was testimony from the applicant regarding upgrades to the property in connection with a waterfront easement, including a possible boardwalk installation along the River. Plaintiff also contends that the applicant proposes to enter into an agreement with the Borough regarding this proposed work.

The Borough contends that the pending Hampton Inn Application bears no relevance to the question of whether the Borough's adoption of the Height Ordinance was lawful. Moreover, absent evidence of an actual agreement between the Borough and the applicant regarding the

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alleged work- indeed, no such agreement exists-, it is premature for this Court, or any Court, to address the alleged "Contract Zoning" issue.

The "Contract Zoning" issue would only be ripe for adjudication if, and when, the applicant and the Borough entered into an agreement in that regard. *See Cox & Koening, New Jersey Zoning and Land Use Administration*, (Gann 2012), § 34-8.2 (b) ("Essentially contract zoning represents an attempt by the governing body of a municipality, by contract with a property owner, to authorize the property owner to use his property in contravention of the zoning ordinance and without compliance with the statutorily established procedures for obtaining a zoning variance or an amendment to the master plan and zoning ordinance.")(emphasis supplied). Thus, "Contract Zoning" typically involves the re-zoning of property by agreement. Plaintiff does not contend that there is an agreement between the Borough and the applicant to re-zone the Property, but rather alleges that the applicant proposes an agreement with the Borough to make certain off-site improvements to the easement area. Moreover, as noted above, in the absence of any such agreement between the Borough and the applicant, that issue is simply not ripe for adjudication; and it is certainly not an issue that can be decided by this Court in the context of this lawsuit

The issue of the proposed off-site improvements to the easement area is properly before the Planning Board and should only be resolved in that proceeding. Even if there was evidence of an agreement to re-zone the Property, not until the Planning Board decides the application would the record be sufficiently developed to allow a court to decide whether "Contract Zoning" had occurred. For example, Courts have held that contract agreements between developers and a municipality are lawful "where it was shown that all the necessary steps were taken by the planning board and municipality to rezone the property as required by statute." See *See Cox & Koening, at* § 34-8.2 (b).

For all of the foregoing reasons, the Borough respectfully requests that the issue of "Contract Zoning" be removed from the Pre-Trial Order as an "Issue to Be Determined at Trial."

Respectfully yours,

DANIEL J. O'HERN, JR.

DJO:jb

cc: R.S. Gasiorowski, Esq. (via regular mail and facsimile, w/enc.)
732-212-9980

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

TRIAL BRIEF OF DEFENDANT, GOVERNING BODY OF THE BOROUGH OF RED BANK

Daniel J. O'Hern, Jr., Attorney ID#027771991
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28 Leroy Place
Red Bank, New Jersey 07701
(732) 219-7711
Attorneys for Defendant Governing Body of the Borough of Red Bank

Daniel J. O'Hern, Jr., Esq.
ON THE BRIEF

Date: October 8, 2013

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PRELIMINARY STATEMENT

This lawsuit involves a challenge to a municipal zoning ordinance adopted by the Governing Body of the Borough of Red Bank (the "Borough"), which lawsuit is being funded by a business competitor of proposed Hampton Inn located in the Borough's Waterfront Development Zone ("WD Zone"). Because this case is being funded by a business competitor, Plaintiff quite naturally, but incorrectly, wants to make this case about the Hampton Inn. It is not.

This case is about the Governing Body acting in a reasonable and prudent manner in response to a request by one it its professionals to clean up and clarify a terribly ambiguous, confusing and difficult height ordinance in the WD Zone. That professional, the attorney for the Borough's Zoning Board of Adjustment ("ZBA"), had sat through four (4) nights of contentious hearings regarding an interpretation request made by the objector to the Hampton Inn regarding the height standard in the WD Zone. At the conclusion of those hearings, the ZBA attorney submitted a letter to the Governing Body requesting that it consider amending the height ordinance to eliminate the ambiguities and difficulties in the ordinance that led to the interpretation request and multiple hearings on that issue.

In response that request, the Borough sought the advice and recommendation of its Planner. The Planner issued a report to the Governing Body recommending that the height ordinance be amended to create a uniform and concise height standard of 75 feet; the existing ordinance allowed 3 heights: 50, 75 and 140, based on different conditions. The Planner found that this change was consistent with the Borough's Master Plan, as did the Borough's Planning Board.

Based on the recommendation of its Planner and with support of its Planning Board, the Governing Body adopted Ordinance 2012-17, which created a uniform height allowance of 75 feet in the WD Zone.

Under well settled principles applicable to judicial review of municipal zoning action, this Court can only set aside the ordinance if it finds that the Governing Body's actions were arbitrary, capricious or unreasonable. This is a heavy burden to overcome, and one that Plaintiff cannot meet here. As set forth herein and as the evidence will show at trial, not only was the Borough's adoption of the ordinance not arbitrary and capricious, but it was eminently reasonable and necessary. In fact this Governing Body acted exactly how one would hope any prudent governing body would act if faced with a similar request by one of its professionals.

Moreover, when, as here, the Planning Board has found that the proposed zoning change is consistent with the Master Plan, that finding is entitled to great deference and can only be set aside by the Court if there are clear and uncontroverted facts that establish a substantial inconsistency with the Master Plan. Plaintiff, once again, cannot meet that burden in this case.

As will be further established at trial and herein, the ordinance was adopted in compliance all of the requirements and criteria for the adoption of zoning ordinance pursuant to the Municipal Land Use Law, including the applicable notice requirements.

While Plaintiff and her experts may question the wisdom of the Borough's choices regarding this ordinance, the fact that the Borough's decision may debatable is not grounds to set aside the ordinance. This Court cannot substitute its' wisdom for that of the Governing Body.

Accordingly, for the reasons set forth herein and as will be established at trial, the subject ordinance should be upheld as valid and lawful municipal action.

Statement of Facts

Stephen Mitchell and Tinton Falls Lodging Realty, filed an interpretation request with the Red Bank Zoning Board of Adjustment ("ZBA") in connection with an application by the Hampton Inn to develop property located within the Borough at Block 1, Lot 1 (the "Property"). Specifically, the ZBA was asked to render and interpretation regarding the Borough's Planning and Development Regulations with respect to Height/Elevation requirements for the Property, which is located in the Borough's Waterfront Development Zone District (the "WD Zone")

The height requirements for the WD zone at the time of the interpretation request were contained within Section 25-10.16(e), subparagraph 6 of the Borough's Planning and Development Regulations (hereinafter the "Height Ordinance"), which provided that:

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 roofs 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).

(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.

The ZBA conducted a series of public hearings on the interpretation request on March 1, 2012, March 15, 2012, April 19, 2012 and May 17, 2012. RBank Capital (the Developer of the proposed Hampton Inn)participated in the interpretation hearings and was represented by counsel.

On May 17, 2012, The ZBA issued an interpretation that the fifty (50) foot elevation requirement contained in the Height Ordinance applied to the Property. The ZBA's interpretation of the Height Ordinance was memorialized in Resolution No. 2012-20, which was adopted by the ZBA on June 21, 2012 (the "Interpretation Resolution"). A copy of the Interpretation Resolution is annexed as exhibit "L" to the Certification of R.S. Gasiorowski ("Gasiorowski Cert.") submitted in support of Plaintiff's Trial Brief. Although the ZBA found that Property was subject to a (50) foot height elevation, the Interpretation Resolution contained extensive findings regarding the ambiguous and confusing nature of the existing Height Ordinance in the WD Zone. Without limitation and by way of example, the Interpretation Resolution contained the following findings:

- As written, the existing ordinance is confusing and vague.
- Over the course of 3 months, the Red Bank Zoning Board members have heard persuasive arguments from opposing counsel, testimony from a variety of opposing/experienced engineers/planners, and studied/analyzed approximately 58 pieces of evidence- and, despite the same, there is no universally accepted, or even remotely universally accepted, consensus as to how the vague height/elevation standards of the subject ordinance are to be applied, and under what circumstances.
- The confusing height/elevation standards in the subject ordinance, with its (3) three potential variations, has proven difficult to read, comprehend, interpret and/or apply.

- The existing ordinance is technically confusing - and a literal reading of the same leads a reasonable person into an architectural /engineering quagmire/ abyss.

- The absence of a clearly defined ordinance which identifies the maximum allowable structure height in the zone has caused, and will continue to cause, confusion amongst the Borough's Zoning Office, developers, objectors and the public at large.

- In light of the confusion, the Zoning Board will consider the possibility of requesting the Borough Council of the Borough of Red Bank to clarify the confusing ordinance (as the same relates to the Height/Elevation Standards).

Following the ZBA's interpretation of the Height Ordinance, the attorney for the ZBA sent a letter to the Borough clerk dated June 25, 2012 in which he requested, on behalf of the ZBA, that the Governing Body consider an official review of the Height Ordinance to determine if it should be amended to address the problems that arose during the interpretation hearings. *See* exhibit "M" to the Gasiorowski Cert. The ZBA's attorney indicated in his letter that during the interpretation deliberations, multiple ZBA Board Members commented on the very confusing/ambiguous nature of the Height Ordinance. In this regard, the ZBA's attorney advised the Governing Body that due to the confusing and ambiguous nature of the Height Ordinance, the public hearings associated with the interpretation were long, technical and at times, contentious. *See Id.*

Based on the request of the ZBA's attorney, the Borough requested that a professional planner, Richard S. Cramer of T&M Associates, review the Height Ordinance to determine if any changes should be made. Mr. Cramer was also asked to consider whether certain residential properties located on Rector Place that were the subject of another interpretation be moved into a residential zone district from the WD Zone.

On June 21, 2012, Mr. Cramer issued a report and recommendation to the Governing Body in which he recommended that the Height Ordinance be amended to set a single maximum permitted height elevation of seventy (75) five feet (USC 7 GS Datum MSL=0) within the WD Zone and eliminate the two other height standards of 50 feet and 140 feet were contained within the Height Ordinance. *See* June 21, 2012 Report of Richard S. Cramer annexed as exhibit "K" to the Gasiorowski Cert. In his report, Mr. Cramer opined that "[s]implifying the maximum permitted building height of the WD zone to a maximum elevation of 75 feet above the MSL would apply a uniform standard throughout the zone, clarify how it is to be administered, and thereby resolve the interpretative difficulties the Borough has experienced." *See Id.* In addition, Mr. Cramer opined that a uniform height of 75 feet "would satisfy the compatibility standard recommend by the Master Plan for the zone, since at 75

feet above MSL, building heights of five to six stories would, depending upon the ground elevation of property, continue to be achievable within the zone." *See Id.*

In his report, Mr. Cramer also made recommendations regarding 16 residential properties located in the Rector Place overlay zone of the WD-Zone. *See Id.* By Ordinance 2009-35, the Borough had previously restricted the uses of these properties that fronted on Rector Place to detached single family dwellings only. After reviewing the Master Plan and the intent and purpose of the Rector Place Zone, and the other uses permitted in the WD Zone, Mr. Cramer opined that the Borough's planning intent as demonstrated by the planning reexamination reports and the enactment of Ordinance 2009-35 is to conserve the residential character of this area rather than altering with the mixed used and multifamily uses emphasized by the Master Plan for the WD zone. *See Id.* Accordingly, Mr. Cramer recommended that those properties located in the Rector Place overlay zone be included on the Borough's zone map as part of the RB-2 residential zone district. *See Id.*

Based on the recommendations contained in Mr. Cramer's report, the Governing Body introduced Ordinance No. 2012-17, which amended the Height Ordinance to apply the uniform height standard of 75 feet throughout the WD Zone (the "Height

Ordinance ").[1] The Borough also introduced Ordinance No. 2012-15, which moved the 16 properties from the WD Zone to the R-B2 Zone (the "Rector Place Ordinance").

In accordance with the Municipal Land Use Law ("MLUL"), the subject ordinances were referred to the Borough's Planning Board for review and recommendation. At its July 16, 2012 meeting, the Planning Board reviewed the subject ordinances and found them to be in conformance with the Borough's Master Plan and recommended their adoption by the Governing Body. *See* July 17, 2012 Memorandum from the Director of the Borough's Planning and Zoning Department to the Mayor and Council, annexed as exhibit "A" to the Certification of Daniel J. O'Hern, Jr. ("O'Hern Cert.").

Prior to the Public Hearing on the subject ordinances, the Borough provide notice to those interested parties pursuant as required by the MLUL. *See* Exhibit "S" to the Gasiorowski Cert. Because the Rector Place Ordinance affected a boundary change, the Borough provided personal notice to all properties within

[1] Even though Plaintiff makes references to ordinances 2012-15 and 2012-16 in her Trial Brief, she does not appear to make any serious or legitimate challenges to these ordinances. In fact, in her Trial Brief she acknowledges that this "lawsuit focuses on Ordinance 2012-17". Plaintiff's Brief at P. 1. As a result, the Borough's primary focus in its brief is on Ordinance 2012-17. While it does not appear that Plaintiff has expressly abandoned it challenges to the other ordinances, it does appear that primary focus of the trial will be on Ordinance No. 2012-17. Depending upon the proofs presented at trial, the Borough, however, reserves all rights and defenses regarding Ordinances 2012-15 and 16.

the Rector Place Zone and to all property within 200 feet of the zone boundaries. *See* Exhibit S3 to the Gasiorowski Cert. With respect to both ordinances, the Borough also provided the required notice to the Monmouth County Planning Board and to all neighboring municipalities. *See* exhibit S1 to the Gasiorowski Cert.

The Public Hearing on the ordinances was held on July 25, 2012. Mr. Cramer testified at the Public Hearing. R. S. Gasiorowski Esq. represented the objector (Stephen Mitchell) at the hearing and cross-examined Mr. Cramer. In addition, the objector retained his own Planner, Gordon Gemma, who presented testimony at the public hearing. The Plaintiff in this lawsuit, Angela Agazzi, did not appear at the Public Hearing. During the public hearing, Mr. Gasiorowski acknowledged that the objector's legal fees and costs were being funded by the owner of another hotel in the area, Tinton Falls Lodging.

Following the public hearing, the Governing Body voted unanimously to adopt the amendments to the Height Ordinance.

LEGAL ARGUMENT

POINT I

ORDINANCE NOs. 2012-15 AND 2012-17 WERE ADOPTED BY THE BOROUGH IN COMPLIANCE WITH THE NOTICE REQUIRED BY THE MLUL

Plaintiff contends that Ordinance No. 2012-17 must be invalidated because the Borough did not provide notice to all property owners within the WD Zone. Plaintiff is wrong. The Borough was not required to give individualized notice in the case of Ordinance No. 2012-17 because the zoning changes contained therein did not constitute a change in the classification in the WD Zone. Ordinance 2012-17 simply modified the height requirements in the WD Zone in a manner that did not dramatically or substantially impact the use, character or the intensity of the use of the properties in that zone. Nor did Ordinance 2012-17 change the boundaries of the WD Zone. Rather, it was Ordinance No. 2012-15 that re-classified a small group of properties that were located in the Rector Place Residential Overlay zone from the WD Zone to the BR-2 Zone. In the case of that Ordinance, all property owners located within the Rector Place Zone and all property owners within 200 feet of the zone were given individual notice, which is all that is required under the MLUL. Because this re-classification only

affected the property owners in the Rector Place Zone and the property owners in proximity that Zone, there was no need, and indeed no legal requirement to provide notice to all the property owners in the WD zone.

1. Ordinance 2012-17 Did Not Change the Classification of the WD Zone.

Plaintiff contends that the Borough should have provided notice pursuant to *N.J.S.A.* 40:55D-62.1, which directs that all property owners within a zoning district shall receive personal notice if the municipal body seeks to change the classification or boundaries of a zoning district. The statute provides in pertinent part:

> Notice of a hearing on an amendment to the zoning ordinance proposing a change to the classification or boundaries of a zoning district, exclusive of classification or boundary changes recommended in a periodic general reexamination of the master plan by the planning board pursuant to [N.J.S.A. 40:55D-89], shall be given at least 10 days prior to the hearing by the municipal clerk to the owners of all real property as shown on the current tax duplicates, located, in the case of a classification change, within the district and within the State within 200 feet in all directions of the boundaries of the district, and located, in the case of a boundary change, in the State within 200 feet in all directions of the proposed new boundaries of the district which is the subject of the hearing.

" Unlike many terms found in the MLUL, 'classification' is not defined. " *Pacilli v. Township of Woolwich*, 394 N.J. Super. 319, 329 (App. Div. 2007). " ' In the absence of any explicit indication of special meaning, words of a statute are to be

given their ordinary and well understood meaning." ", *Id.*, *quoting*, *Levin v. Twp. of Parsippany-Troy Hills*, 82 N.J. 174, 182, 411 A.2d 704 (1980). It has therefore been left to the courts to determine if there has been a change in classification that requires individual notice.

The *Woolwich* case is the most recent and leading case on this subject. The Plaintiff gives great weight to the *Woolwich* case in its brief and argues that is directly on point. From the standpoint of precedential legal authority, the Borough agrees that *Woolwich* is on point. Factually, however, *Woolwich* is clearly distinguishable and does not support Plaintiff's argument that Ordinance 2012-17 constitutes a change in classification in the WD zone.

The issue in *Woolwich* involved whether " a proposed ordinance to change density and bulk standards and to increase the amount of open space and greenway land requirements for subdivisions within three residential zones triggered the person notice requirements of *N.J.S.A.* 40:55D-62.1." *Id.* at 321-322. The Township's stated intentions with respect to the proposed ordinances was clear: to preserve the agricultural, natural resources, scenic vistas and rural landscape of the Township in conjunction with the development of single family detached dwellings and other permitted in the rural zones of the

Township. *Id.* at 324. Quite simply, by the proposed ordinances, the Township was dramatically limiting the density and type of residential development that could take place in these zones to ensure that the rural character and landscape were maintained. Regarding the proposed ordinances, the Court observed that:

> As can be readily discerned, the proposed amendment made material changes in the bulk and density requirements in the R-1 and R-2 Residential Zone. For new subdivisions, the ordinance as amended, expressed development preferences that effectively 'down zoned' these residential zones.

Id. at 326 (emphasis supplied).

The Court undertook an analysis of whether these material changes in the bulk and density requirements were a change in "classification" that required notice pursuant to N.J.S. A. 40:55D-62.1. The Court began its analysis by considering the ordinary meaning of term classification. In this regard, the Court noted that "[c]lassification is ordinarily defined as 'a systematic arrangement in groups or categories according to established criteria.' *Id.* at 33, *quoting Merriam Webster's Collegiate Dictionary*, 211 (10th ed.1996). The Court further observed that:

> In the context of land use and regulation, classification is typically synonymous with the broad general uses permitted in a designated area, such as residential, commercial, retail and industrial, and extends to sub-categories within those general categories, such as single-family residential, highway commercial, and neighborhood retail. Generally, the sub-

> categories of uses are distinguished by the intensity of the permitted use. 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 use or uses permitted or prohibited in the district or zone.

Id., citing 2 Robert M. Anderson, American Law of Zoning § 9.02 (4th ed.1996); 8 Eugene McQuillin, Municipal Corporations § 25.86 (3d ed.2000).

The Court then looked to the MLUL for further guidance in discerning the meaning of classification. *Id.* The Court's examination of the MLUL confirmed 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 commercial, and highway retail 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 sub-categories has the capacity to fundamentally alter the character of a zoning district." *Id* at. 330-331. (emphasis supplied).

In addition, the Court concluded that the term "classification," " at least for purposes of section 62.1 and section 63,3 has been assumed to include changes to the density, bulk and height standards and conditions applicable to designated uses." *Id.* at 331.

Based on its analysis, the Court ultimately concluded that "the type of notice to be provided on the occasion of a proposed amendment to a zoning ordinance should focus on the substantive effect of the amendment rather than the appellation given to the zone." *Id.* at 332.

Applying this standard, the Court turned its attention back to the ordinances at issue and found that:

> Here, the scope of the changes to the R-1 zone affected by the 2005 amendment is illustrated simply by focusing on the maximum gross density per acre feature of the R-1 zone. The 2003 ordinance generally allowed a minimum lot size of two acres and a maximum density of .5 units per acre under certain circumstances. According to the 2005 amendment, the maximum gross density is one unit per two acres under Option 1 and one unit per ten acres under Option 2. Although continuing the "conventional" R-1 zoning with its associated bulk and density requirements, the 2005 amendment expresses a preference for development pursuant to Option 1 or Option 2. This change within the R-1 classification effects a fundamental alteration of the character of this zoning district. One dwelling unit for every ten acres, as encouraged by Option 2, transforms a zoning district of generous lots to one of manorial proportions. The changes in the R-2 zone are as sweeping in character.

Id. (emphasis supplied).

The *Woolwich* Court, however, was "hesitant to adopt a rule that leaves governing bodies, residents and other affected parties to guess what constitutes a substantial change and what notice may or may not be required." *Id.* at 332-333. But given that the zoning changes at issue indisputably and without

question substantially changed the character of the zoning districts and future development in those districts, it concluded that for purposes of its decision in that case it was therefore not necessary to " explore the limits of this rule …" *Id.* at 333 Thus, the Court held that, because the " changes effected within the R-1 and R-2 zones dramatically altered the intensity of the residential use within each zone and promised to affect the character of the future development in both zones", the Township was required to follow the notice requirements of *N.J.S.A.* 40:55D-62.1. *Id.* at 333(emphasis supplied).

The *Woolwich* decision, therefore can be reasonably interpreted to be applicable only to those cases where it is clear that the zoning change has "dramatically altered" the intensity of the use in the zone.

That is not the case here. Ordinance No. 2012-17 does not dramatically alter the intensity of the uses within the WD Zone. Nor can the changes to height standards by any definition be considered "sweeping in character". The *Woolwich* case is clearly distinguishable and does not support Plaintiff's argument that personal notice should have been given to every property owner in the zone.

First, Ordinance 2012-17, does not in any way affect, restrict or change the permitted uses in the WD Zone. Thus, there has been no change in the categories and sub-categories of permitted uses that could fundamentally alter the character the WD Zone. *Id* at. 330-331.

Second, the amendments to the height standard in the WD Zone will have little or no affect on the density of the zone. The Borough simply created a uniform height ordinance of 75 feet, where 75 feet was already a permitted height in the zone for certain properties under certain conditions. Third, given that the existing heights in the WD Zone were 50, 75 or 140 feet, the creation of a uniform height requirement of 75 feet does not and will not dramatically alter the intensity of the uses within the zone or affect the future character of development within the zone.

Finally, these limited modifications to the height requirements can hardly be considered sweeping in character. It is not as if the Borough reduced the overall height to 30 feet, or increased the overall height to 200 feet. Indeed, given that there were three (3) different heights existing, the recommendation of the Borough's Planner to utilize the middle number of the 3 existing heights was reasonable solution to the difficulties encountered by the ZBA in interpreting the

existing height requirements and affects the least amount of change or impact on the zone.

Since Ordinance 2012-17 does not and will not dramatically alter the character of the WD Zone and future development in the WD zone, the changes do not change the "classification" of the WD Zone, and therefore the Borough was not required to give personal notice to all property owners in the zone pursuant to *N.J.S.A.* 40:55D-62.1.

2. The Borough Provided Personal Notice to All Property Owners within the Rector Place Overlay Zone and all Property Owners within 200 Feet of the Zone Boundaries.

Plaintiff erroneously suggests in her brief that a municipality is required to give notice to all property owners in zone when there is a change to the boundaries of the zone. *See* Plaintiff's Trial Brief at p. 32-33. *N.J.S.A.* 40:55D-62.1 is clear, however, that in the case the case of a boundary change, notice need only be given to those properties "within 200 feet in all directions of the proposed new boundaries of the district which is the subject of the hearing." Plaintiff also erroneously suggests that the Borough was required to give a boundary change notice in connection with Ordinance 2012-17 because it removed 16 residential properties from the Rector Place Overlay Zone to RB-2 Zone. Once again, Plaintiff is wrong.

It was Ordinance 2012-15 and not Ordinance 2012-17 that affected the re-classification of the 16 residential properties from the Rector Place Overlay Zone to the RB-2 Zone. As required by *N.J.S.A.* 40:55D-62.1, the Borough gave personal notice to all affected property owners, including all 16 property owners in the Rector Place Zone and all property owners within 200 feet of the boundaries of the zone. *See* Letter Dated July 9, 2012 providing notice of Ordinance No. 212-15 to all affected property owners by certified and regular mail, annexed as exhibit S3 to the Gasiorowski Cert.

Since the Borough gave the required notice to all affected property owners of Ordinance No. 2015-12, there was no need, and indeed it would have been duplicative, to send to send the same notice based on Ordinance 2012-17.

Accordingly, the Borough has complied with all statutory notice requirements in connection the re-classification of the 16 properties from the Rector Place Overlay Zone to the RB-2 zone.

POINT II

THE BOROUGH's ADOPTION OF ORDINANCE NO. 2012-17 WAS CONSISTENT WITH THE BOROUGH'S MASTER PLAN AS DETERMINED BY THE BOROUGH'S PLANNING BOARD AND CANNOT BE SET ASIDE BY THE COURT

Plaintiff contends that the Governing Body's adoption of Ordinance No. 2012-17 violated the MLUL because no resolution was adopted explaining the adoption of a zoning ordinance inconsistent with the Master Plan. This argument, however, erroneously presupposes that the Ordinance was inconsistent with the Master Plan. n this case, there was no need for the Governing Body to conclude that an explanatory resolution was necessary given that the Borough's Planning Board and the Borough's Planner both found that the Ordinance was consistent with the Master Plan. The Planning Board's finding of a consistency with the Master Plan is entitled to great weight and deference. Accordingly, the Plaintiff's argument that the Governing Body's adoption of Ordinance No. 2012-17 did not comply with the MLUL is entirely without merit.

1. The Zoning Changes Contained In Ordinance No. 2012-17 Are Substantially Consistent with the Borough's Master Plan.

One of the criteria for the adoption of a zoning ordinance is that be "substantially consistent with the land-use plan element and housing plan element of the Master Plan …."

Manalapan Realty, L.P. v. Township Committee of the Township of Manalapan, 140 N.J. 366 N.J. 380 (1995), *citing N.J.S.A.* 40:55D-62a.

" The MLUL, *N.J.S.A.* 40:55D-5, defines a master plan as 'a composite of one or more written or graphic proposals for the development of the municipality as set forth in and adopted pursuant to [N.J.S.A. 40:55D-28].' " *Manalapan Realty*, 140 N.J. at 382. " A planning board is charged with the responsibility of preparing, adopting and amending a master plan 'to guide the use of lands within the municipality in a manner which protects public health and safety and promotes the general welfare.' " *Id., quoting, N.J.S.A.* 40:55D-28a. " A master plan must contain two elements: 1) 'objectives, principles, assumptions, policies and standards upon which the constituent proposals for the physical, economic and social development of the municipality are based,' and 2) '[a] land use plan element.' " *Id., quoting N.J.S.A.* 40:55D-28b.

The Legislature did not define "what is meant by 'substantially consistent' with a master plan." *Manalapan Realty*, 140 N.J. at 384. However, in *Manalapan Realty*, the Supreme Court " made it clear that some inconsistency is permitted 'provided that it does not substantially or materially undermine or distort the basic provisions and objectives of the

Master Plan." *Cox & Koening, New Jersey Zoning and Land Use Administration* (Gann 2011) § 34-2.2, *quoting Manalapan Realty*, 140 N.J. at 384, *see also Recchia Res. Construction v. Cedar Grove*, 338 N.J. 242, 251-252 (App. Div. 2001 (Because the "intent of the master plan is to provide recommendations to guide the governing body in establishing the zoning ordinance [internal citation omitted]… a " partial inconsistency between the land use map and the zoning ordinance does not render the ordinance invalid.")

Where, as here, the "Planning Board has determined that the Master Plan and proposed zoning ordinance are consistent, such determination of consistency by the Board is entitled to ' deference and great weight'" *Cox, supra, quoting Manalapan Realty*, 140 N.J. at 383 (emphasis supplied). "This is particularly true where the Master Plan itself is not clear and where the Governing Body is able to articulate reasonable planning considerations not entirely inconsistent with the Master Plan in enacting the ordinance." *Cox, supra, citing Witt v. Borough of Maywood*, 328 N.J.Super. 433-445-448 (Law Div. 1998), *aff'd o.b.* 328 N.J.Super 343 (App. Div. 2000).

a. The Planning Board's Finding that Ordinance No. 2012-17 Is Consistent with the Master Plan Must Be Given Great Weight and Deference.

Following the Governing Body's introduction of Ordinance No. 2012-17, as required under the MLUL, the ordinance was referred to the Borough's Planning Board for determination as to whether the Ordinance was consistent with the Borough's Master Plan. On July 16, 2012, the Planning Board conducted a hearing on the proposed ordinance and found that the ordinance was consistent with the Borough's Master Plan. *See* Transcript of Planning Board Hearing annexed as exhibit "N" to the Gasiorowski Cert. In a Memorandum dated July 17, 2012, the Borough's Director of Planning and Zoning advised the Mayor and Council that the Planning Board had considered Ordinance 2012-17 " and found that [it] was in conformance with the Master Plan and recommend[ed] adoption by the Governing Body. *See* July 17, 2012 Memorandum, Re Report of Ordinance Review, annexed as exhibit "A" to the O'Hern Cert.

The Planning Board's finding of consistency with the Master Plan must be given "deference and great weight" by this Court per the mandate of the Supreme Court in *Manalapan Realty*. *Manalapan Realty*, 140 N.J. at 383.

As discussed below, Plaintiff has not put forth any facts or arguments that would allow this Court to disregard the findings of the Planning Board.

b. The Borough's Planner Found that the Proposed Amendments to the Height Ordinance Were Consistent with the Master Plan and It Was Not Abitrary, Capricious or Unreasonable for the Governing Body to Adopt the Recommendations of Its Planner.

In an effort to persuade this Court that the Borough acted in an arbitrary and capricious manner in adopting Ordinance No. 2012-17, the Plaintiff has completely and unfairly mischaracterized the findings, recommendations and testimony of the Borough's Planner, Richard Cramer.

In this regard, Plaintiff contends that in adopting the Ordinance the "Borough relied upon no reports whatsoever" and sought to improperly characterize Mr. Cramer's as simply a "letter". *See* Plaintiff's Brief at P. 49. These arguments are specious.

In response to formal request by the attorney for the ZBA that the Governing Body amend the height standards in the WD Zone, the Mayor and Council sought the advice and recommendation of the Borough's Planner, as any responsible Governing Body would do in similar circumstances. In response to that request, the Borough's Planner conducted a review of the Height Ordinance that was memorialized in a report and recommendation to the

Mayor and Council dated June 21, 2013. *See* Planning and Zoning Recommendation for the Revision of the WD Waterfront Development District dated June 21, 2012 annexed as exhibit "K" to the Gasiorowski Cert.

This was not just a letter, but a detailed report that reviewed the existing ordinance, reviewed the Borough's Master Plan, and that made specific recommendations regarding changes to the height standards in the WD Zone that Mr. Cramer found were consistent with the Borough's Master Plan. The clear purpose and intent of the report was to provide guidance and make recommendations to the Governing Body regarding changes to the height standards in the WD Zone.

Thus, contrary to the arguments of Plaintiff that Mr. Cramer did not review the Borough's Planning Documents, it is clear from the face of Mr. Cramer's report that he reviewed and analyzed the Master Plan and found the proposed changes to be substantially consistent with the Master Plan.

Plaintiff further seeks to unfairly and inaccurately discredit Mr. Cramer's recommendations to the Governing Body by mischaracterizing his testimony at the public hearing on the Ordinance. In her brief, Plaintiff incorrectly suggests that Mr. Cramer testified that he never looked at the Borough's Planning documents. *See* Plaintiff's Brief, at p. 49. Plaintiff conveniently fails to mention that the planning documents that

Mr. Cramer was questioned about at the Public Hearing involved the documents submitted to the Borough's Land Use Boards in connection with the Hampton Inn Application. Mr. Cramer, however, was not tasked to give any consideration to the Hampton Inn Application, nor should he, and was simply tasked to opine and give recommendations regarding the Height Ordinance as it affected the entire WD Zone, and not just one property in that zone. The fact that Mr. Cramer did not review the Hampton Inn Planning documents is entirely irrelevant to the question of whether the zoning changes were consistent with the Master Plan.

Elected Officials necessarily rely upon their professionals for advice and recommendations, this is particularly so in the area of zoning and planning. When confronted with a request by the ZBA to consider making changes to the height standards in the WD Zone, the Red Bank Governing Body acted prudently and appropriately in seeking the advice and recommendation of its Planner. When the Borough's Planner advises the Governing Body that a proposed zone change is consistent with the Master Plan, it is certainly reasonable for the Governing Body to rely upon that recommendation. In light of the circumstances surrounding Borough's adoption of Ordinance No. 2012-17 and the information and recommendations relied upon by the Governing Body, Plaintiff's argument that the Governing Body did not determine

that the zoning changes in the Ordinance were consistent with the Master has no basis and should be rejected by the Court.

c. The Plaintiff's Proofs Do Not Establish that Ordinance No. 2012-17 Is Entirely Consistent with the Master Plan.

Plaintiff has a high burden to overcome to set aside the Ordinance based upon an inconsistency with the Master Plan, and she cannot meet that burden in this case. A court may only set aside a zoning ordinance amendment based upon an inconsistency with the master plan where the "facts are clear" that the proposed amendment is in conflict with the master plan. *Cox, supra*, at § 34-2.2. Here, the facts are far from clear that there is disqualifying conflict with the Borough's Master Plan. Moreover, the Supreme Court "has made clear that some inconsistency is permitted 'provided that it does not substantially or materially undermine or distort the basic provisions and objectives of the Master Plan.'" *Cox,supra*, § 34-2.2, *quoting Manalapan Realty*, 140 N.J. at 384. The creation of a uniform height standard of 75 feet in the WD zone, where 75 feet was already permitted in much of the Zone, does not substantially or materially undermine or distort the basic provisions of the Master Plan.

Indeed, the Borough's 1995 Master Plan does not set any express height requirements for the WD Zone that provide the

specificity that would allow for a finding of a "clear' inconsistency. The Master Plan simply states that the zoning regulations in the WD Zone should, among other things, do the following: "Set height limits that are compatible with the adjacent areas of downtown and the mixed use neighborhoods." *See* 1995 Master Plan, at p. 10, annexed as exhibit "AA" to the Gasiorowski Cert. As noted by the Borough's Planner in his report, [o]ther than the recommendation for compatibility, the Master Plan does not further quantify the height standard for the WD Zone." *See* Planner's June 21, 2012 Report. Thus, the Borough's Master Plan is not clear as to the specific heights to be permitted and at most provides the Governing Body with general guidance based on compatibility with adjacent neighborhoods.

In circumstances such as this where the Planning Board has found that the proposed amendment is consistent with the Master Plan and "where the Master Plan itself is not clear" a Court should not set aside the Ordinance if " the Governing Body is able to articulate reasonable planning considerations not entirely inconsistent with the Master Plan in enacting the ordinance." *Cox, supra, citing Witt v. Borough of Maywood*, 328 N.J.Super. 433-445-448 (Law Div. 1998), *aff'd o.b.* 328 N.J.Super 343 (App. Div. 2000).

As set forth in Point III herein, the Governing Body has articulated reasonable planning considerations not entirely inconsistent with the Master Plan for the adoption of the Ordinance, including first and foremost establishing a uniform height standard that is easy to interpret and apply so as to eliminate the interpretive difficulties that resulted in multiple days of contentious and difficult interpretation hearings before ZBA.

Despite the reasonableness of the Governing Body's actions, Plaintiff's expert Planner contends that the uniform height standard of 75 feet is substantially inconsistent with Master Plan because compared with the height standards in the adjacent neighborhoods, the 75 foot height standard is incompatible with the adjacent permitted heights. That approach, however, is too simplistic and ignores existing heights of buildings in the WD Zone, as well as the fact that the WD Zone does not set any specific height standards, which gives the Governing Body some latitude in setting a height standard in that Zone.

It also ignores the fact that the Height Standard in the WD Zone is measured from mean sea level (MSL), and not the property elevation. *See* Transcript of Planning Board Hearing dated July 16, 2012, at p. 7. Lines 21-25, p. 8., lines 1-6. As result, 75 feet in the WD Zone, which is measured from the MSL,

is significantly different from 75 feet in one of the adjacent districts. Even assuming there is some inconsistency, the inconsistency is permitted provided that it does not "substantially or materially undermine or distort the basic provisions and objectives of the Master Plan" *Cox, supra,* § 34-2.2, *quoting Manalapan Realty,* 140 N.J. at 384. Given that 50, 75 and 140 feet were already permitted and existing[2] in the WD Zone, the Governing Body's selection of a uniform height standard of 75 feet does not substantially or materially undermine or distort the basic provisions and objectives of the Master Plan. If anything the creation of a uniform height and elimination of the 140 height standard, provides more consistency with the Master Plan, not less.

In sum, the evidence at trial will establish Ordinance No. 2012-17 is substantially consistent with the Master Plan and that there is no basis for the Court to set it aside.

[2] The Oyster Point Hotel is at elevation 80 feet; the Visting Nurses Association Building is at 74 feet; the Molly Pitcher Hotel is at 71 feet, the Atrium Building is at 138.5 feet; and Riverview Towers is approximately the same height as the Atrium. *See* Transcript of Planning Board Hearing dated July 16, 2012, at p. 8,lines 5-25, page 9 lines 1-7.

POINT III

THE BOROUGH's ADOPTION OF ORDINANCE NO. 2012-17 SATISFIES ALL OF THE CRITERIA FOR THE ADOPTION OF A ZONING ORDINANCE; AS SUCH IT WAS NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE

Plaintiff argues that the Governing Body acted in an arbitrary and capricious manner in amending the height ordinance in the WD Zone, notwithstanding that the amendment will bring uniformity and clarity to a confusing and ambiguous ordinance that has wasted valuable Borough and private resources. As addressed below, the Governing Body's action was not only reasonable, but absolutely appropriate and necessary given the circumstances of this case. Plaintiff's attempt to turn this case into a referendum on the Hampton Inn application is a red herring and should be rejected by the Court. It was purely coincidental that the Hampton Inn application gave rise to the interpretive difficulties that caused the ZBA's attorney to request a zoning change. It could have been any developer in the WD Zone that might have confronted this issue. The Borough acted not out of a desire to clear the path for the Hampton Inn, but in response to a request by one of its professionals to clean up and clarify a problematic zoning ordinance.

"The Legislature has enabled municipalities, through the exercise of the police power, to enact and amend zoning ordinances." *Manalapan Realty,* 140 N.J. at 380, *citing Riggs v. Township of Long Beach,* 109 N.J. 601, 610, 538 A.2d 808 (1988); *Taxpayers Ass'n of Weymouth Township v. Weymouth Township*, 80 N.J. 6, 20, 364 A.2d 1016 (1976), *appeal dismissed* and *cert. denied,* 430 U.S. 977, 97 S.Ct. 1672, 52 L.Ed.2d 373 (1977). " A presumption of validity attaches to a zoning ordinance that may be overcome only if an opponent of the ordinance establishes the ordinance is 'clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the [zoning] statute.'" *Id., quoting, Bow & Arrow Manor, Inc. v. Town of West Orange,* 63 N.J. 335, 343, 307 A.2d 563 (1973). "An ordinance or amendment thereto must advance one of the fifteen general purposes of the MLUL specified in *N.J.S.A.* 40:55D-2." *Id., citing, Riggs, supra,* 109 N.J. at 611, 538 A.2d 808. " Where, as here, an ordinance does not infringe upon a fundamental right, there is no requirement that it recite 'tangible, specific objectives promoted by the ordinance in order to be valid.' " *Id., quoting, Zilinsky v. Zoning Bd. of Adj. of Verona, 105 N.J. 363, 371.*

1. The Borough's Adoption of the Subject Ordinances Was Not Only Reasonable, But Necessary.

As noted above, there is a clear difference of opinion as to why the Borough adopted the subject Ordinances. Plaintiff argues that the Ordinances were adopted solely to benefit the developer of the Hampton Hotel. Plaintiff could not be more wrong. The Borough adopted the ordinance because one its professionals- the attorney for the ZBA - practically begged the Governing Body to take action to clarify and clean up the height standards in the WD Zone. The ZBA's attorney made this request as a result of an interpretation hearing before the ZBA regarding the height regulations in the WD Zone that was requested by the applicant for the Hampton Inn. There were four (4) days of hearings, which as described the ZBA's attorney in his memorializing resolution, were contentious, difficult, confusing, all as a result of the imprecise and ambiguous nature of the existing height ordinance. *See* ZBA Resolution 2012-20, attached as exhibit "L" to the Gasiorowski Cert. The ZBA attorney also noted that the "absence of a clearly defined ordinance which identifies the maximum allowable height structures in the zone, has caused, and will continue to cause, confusion amongst the Borough's Zoning Office, developers, objectors and the public at large. " *See* Resolution 2012-20, at p. 20.

If the Governing Body took no action in response to this request, it would be criticized for failing to act. Faced with a request by one of its professionals to clean up an ambiguous and confusing zoning ordinance that has wasted valuable Borough and private resources, the Governing Body did what one would hope any responsible Governing Body would do: it amended the Ordinance to provide the much needed uniformity and clarity. Indeed, this very lawsuit, which is causing the Borough to continue to incur costs and expenses, is the product of the confusing nature of the height ordinance.

Given these facts, the Governing Body's decision to amend the subject Ordinance was clearly not arbitrary, capricious or unreasonable. To the contrary, the Governing Body's actions were eminently reasonable and based upon the recommendations of its Planner. Based on that recommendation, the Governing Body made a sound policy determination that a uniform height standard of 75 feet would eliminate the confusion and ambiguity in the existing ordinance, while at the same time maintaining substantial consistency with the Master Plan and the existing heights in the WD Zone.

It is not for the Court to question the wisdom of the Governing Body's decision in this regard. *See Manalapan Realty,*

140 N.J. at 385(" The judiciary cannot evaluate such a policy determination based on the private views of judges."). "The wisdom of a zoning ordinance or an amendment thereto 'is reviewable only at the polls.'" *Id., citing Kozesnik v. Township of Montgomery*, 24 N.J. 154, 167(1957). " Where the validity of an ordinance is debatable, the validity of the ordinance must be upheld under the 'no discernible reason' standard." *Id, quoting, Zilinsky, supra*, 105 N.J. at 369, 521 A.2d 841; *see also Bow and Arrow Manor, Inc., supra*, 63 N.J. at 343, 307 A.2d 563.

While the Plaintiff may disagree with the Governing Body's choice of the 75 foot height standard, the amendment is "at least debatable" and therefore must be upheld. *Manalapan Realty*, 140 N.J. at 385.

2. The Governing Body's Adoption of Ordinance 2012-17 Advances The Purpose of the MLUL.

One of the criteria for the adoption of a zoning ordinance is that it advance one of the general purposes of the MLUL as set forth in N.J.S.A. 40:55D-2. *Manalapan Realty*, 140 N.J. at 380.[3]

As set forth below, the Ordinance No 2012-17 advance the following general purposes of the MLUL:

[3] "The objectives of the ordinance amendments need not be stated in the ordinance but may be provided, as occurred here, when the ordinance is attacked." *Manalapan Realty, supra*, 140 N.J. at 383.

a. The ordinance promotes the general welfare by enacting a uniform height limit and a clearly stated height standard within the WD zone. *See N.J.S.A.* 40:55D-2 a. The ordinance will enable the public to clearly understand the maximum height permitted within the zone. It eliminates conflicting height regulations within the district thereby eliminating possible confusion over the height limit applicable to any location within the zone. Moreover, the MLUL requires uniformity of regulation within a zone district . See N.J.S.A . 40:55D-62. Uniformity is better achieved by enacting a uniform 75' height for the WD zone. In addition, the ordinance in accordance with N.J.S.A. 40:55D-62, promotes the substantial consistency of the Borough zone regulations with the Master Plan land use element by eliminating a standard to permit buildings as high as 140'. The 140 height limit is too high because it conflicts with the Master Plan recommendation for the WD land use area: "Set height limits that are compatible with the adjacent areas of downtown and the mixed use neighborhoods"

b. The ordinance advances purpose of providing adequate light. *See* N.J.S.A. 40:55D-2 c. Reduction in building height from 140' to a uniform 75' in the WD reduces the potential of taller buildings casting shadow and blocking light to adjoining areas and buildings.

c. The height reductions resulting from the ordinance promote a desirable visual environment consistent with the civic design and arrangement expressed by the Master Plan for height limits along the waterfront that are compatible with the adjacent areas of downtown and the mixed use neighborhoods. *See* N.J.S.A. 40:55D-2 i.

d. The uniform and concise height limits established by the ordinance reduce uncertainty over the applicable height standard. This will help expedite the design and review process thereby reducing the time and cost expended on the preparation, review, and hearing of development applications. *See* N.J.S.A. 4055D-2 m.

POINT IV

THE PUBLIC HEARING BEFORE THE GOVERNING BODY WAS FAIR AND IMPARTIAL and PLAINTIFF WAS AFFORDED THE OPPORTUNITY TO CROSS-EXAMINE THE BOROUGH'S WITNESSES AND PRESENT TESTIMONY IN OPPOSITON TO THE ORDINANCE.

Contrary to Plaintiff's contentions, the Public Hearing before the Governing Body on Ordinance No. 2012-17 was conducted in a fair and impartial manner and had nothing to do with Hampton Inn. The issue before the Governing Body was the adoption of an amendment to the height standards in the WD Zone that was initiated by the request of the attorney for the ZBA. The proposed amendment was zone wide, and did not just affect the property where the proposed Hampton Inn would be located if approved. Despite this, Plaintiff's counsel sought to introduce exhibits from the Planning Board hearing on the Hampton Inn, in effect attempting to turn the public hearing on the ordinance into a planning board hearing. While he was not permitted to do so on relevance grounds, he was afforded every opportunity to cross-examine the Borough's Planner regarding the findings and recommendations in his report and to present testimony from his own expert. As such, he was not in any way deprived of the

opportunity to present relevant evidence in opposition to the ordinance.

Plaintiff's Counsel also takes exception to questioning by one of the Council Members regarding the true identity of the objector. The Councilman was well within his rights to confirm for himself and the other members of the Council the true identity of the objector. As discussed below, this information was highly relevant and something that the Governing Body had the absolute right to inquire into. While Plaintiff's counsel may have been uncomfortable with this line of questioning given that he had to acknowledge that the lawsuit was being funded by an economic competitor to the Hampton Inn, the Governing Body did not in any way deprive him or his client of the opportunity to be heard or treat him in a discourteous manner.

1. Exhibits Pertaining to the Hampton Inn Are Irrelevant to the Ordinance No. 2102-17 and Beyond Scope of the Report and Testimony of the Borough's Planner.

In adopting Ordinance No. 2012-17, the Borough relied upon the report and recommendations of its Planner and his testimony at the Public Hearing. n his report, the Planner does not discuss or in any way mention the property where the proposed Hampton Inn would be located. Nor did he testify about that property at the public hearing.

Thus, when Plaintiff's counsel sought to utilize exhibits regarding the Hampton Inn to cross examine the Borough Planner, members of the Governing Body and the Borough attorney objected to the use of these exhibits on relevancy grounds and instructed Plaintiff's counsel to limit his cross-examination to the Planner's report and his testimony. *See* Transcript of Public Hearing, exhibit "O" to Gasiorowski Cert, at p. 27-30. This was not an unreasonable position by the Borough and consistent with the Rules of Evidence. *See* N.J.R.E. 611 (cross-examination should be limited to the subject matter of the direct examination). Moreover, it is within the discretion of the Governing Body or its attorney to "limit … testimony as to irrelevant matters." *Cox, supra,* at § 27-3.4, *citing Shim v. Washington Tp. Planning Board,* 298 N.J.Super. 395, 412-414 (App. Div. 1997).

Also, where, as here, the true objector is " distant property owner who is in the same business and would be in direct competition with a successful applicant," it is not unreasonable to limit such objector to "cross-examination" only. *Cox, supra,* at § 27-3.5. Given that it was disclosed at the Public Hearing that this litigation was being funded by Tinton Falls Lodging, which is a hotel that would be in competition with the proposed Hampton Inn (see Transcript of Public Hearing,

exhibit "O" to Gasiorowski Cert, at p. 12), it would have been entirely reasonable to limit Plaintiff's counsel to cross-examination of the Borough's Planner. But the Governing Body allowed him to present testimony from his own planner expert. In these circumstances, it cannot be said that the Plaintiff was not afforded a fair and impartial hearing.

2. The Governing Body Had the Absolute Right to Inquire of Plaintiff's Counsel About The Party Funding this Lawsuit.

Plaintiff Counsel's suggestion that he was treated in a hostile manner by the Governing Body is entirely without merit. Quite naturally, the Governing Body wanted - and was entitled - to know the name of the party who was funding this lawsuit and fact that Plaintiff's counsel was aggressively questioned about this issue cannot be interpreted that the Governing Body acted with bias. On the contrary, the true identity of the objector is highly relevant for several reasons. First, the identity of the competitor is relevant for purposes of any potential disqualifying conflict. Second, the identity of the objector goes to the issue of standing. And finally, the true identity of the objector goes to how much weight the Governing Body should give to the objector's evidence.

The Plaintiff in name resides in Red Bank, but she did not appear at the Public Hearing with her counsel. While the nominal Plaintiff may have standing as in interested party under the

MLUL, the true objector, who is corporate entity located outside of Red Bank, would not. As noted in *Cox, supra*, § 27-2:

> Though the definition of an interested party is broad, a business competitor of an applicant for development does not always have interested party standing to appear before a municipal agency to challenge the application especially where, other than to increase competition, the municipal action would have no impact upon the present or prospective rights of the party seeking to challenge.

Because Tinton Falls Lodging is not an interested party under the MLUL, it had to find a Plaintiff within Red Bank to file this lawsuit. While the practice of an objector being funded by third party has not been prohibited by the courts, it has been recognized that the funding of an objector by an economic competitor is a factor to be considered by the municipal agency in weighing the evidence presented by the objector. *Cox, supra, at § 27-3.4, citing Village Supermarket v. Mayfair*, 269 N.J.Super. 224, 233-237 (Law Div. 1993).

As a result, it was entirely appropriate for the Governing Body to aggressively question Plaintiff's counsel about the party funding this lawsuit and view with some skepticism the basis for the objection. Indeed, it is important that both the Governing Body and the public at large be aware of the true basis for the objection so that

they can give the appropriate weight and consideration to the evidence presented.

POINT V

ORDINANCE NO. 2012-17 IS NOT SPOT ZONING

Plaintiff's argument that Ordinance 2012-17 constitutes "spot zoning" has no merit. The typical spot zoning case seeks "to relieve a specific parcel of property from a zoning burden …" *Cox,supra*, at § 34-8.2 That is not what occurred here. Ordinance No. 2012-17 was adopted to create a uniform height standard in the WD zone that applies to all properties in the zone, not just the proposed Hampton Inn site. Its adoption eliminates the confusion and ambiguities in the prior ordinance that have led to multiple requests for interpretations before the ZBA and several lawsuits, including this lawsuit. The amended ordinance will provide uniformity and certainty to future applicants in the WD Zone that is beneficial to all properties in the zone and the community at large. As such, it cannot be deemed spot zoning.

"Generally, [the Supreme Court has] defined spot zoning to be 'the use of the zoning power to benefit particular private interests rather than the collective interests of the community.' " *Riya Finnegan v. S. Brunswick Tp.*, 962 A.2d 484, 197 N.J. 184,195 (N.J., 2008), quoting, *Taxpayers Ass'n of Weymouth Twp., Inc. v. Weymouth Twp.*, 80 N.J. 6, 18, 364 A.2d

1016 (1976), *cert. denied*, 430 U.S. 977, 97 S.Ct. 1672, 52 L.Ed.2d 373 (1977). The test is whether the zoning change in question is made with the purpose or effect of establishing or furthering a comprehensive zoning scheme calculated to achieve the statutory objectives or whether it is "designed merely to relieve the lot of the burden of the restriction of the general regulation by reason of conditions alleged to cause such regulation to bear with particular harshness upon it." *Conlon v. Board of Public Works of City of Paterson*, 11 N.J. 363, 366, 94 A.2d 660 (1953). "The emphasis, [however], is on the arbitrary nature of the decision rather than simply upon whether a particular parcel has received beneficial or detrimental treatment." *Riya Finnegan, supra, 197* N.J. at 197.

Here, the Governing Body adopted Ordinance 2012-17 not to benefit a particular applicant, but rather for the collective interests of the Borough and in furtherance of sound zoning principles by amending what had unquestionably proved to be an ambiguous and difficult ordinance to interpret and apply. For the same reasons that the Borough's adoption of Ordinance No. 2012-17 was not arbitrary, capricious or unreasonable, it cannot be spot zoning. As held by the Supreme Court, the emphasis cannot be on whether a particular parcel has benefited in some

way from the zoning change, but rather whether the decision was "arbitrary". *Riya Finnegan, supra, 197* N.J. at 197.

The Governing Body acted in response to a request from the ZBA attorney to consider amending the ordinance. The Governing Body sought the advice and recommendation of its Planner, who recommended the uniform height of 75 feet, which recommendation was adopted by the Governing Body. The ordinance was referred to the Planning Board who found that it was consistent with the Master Plan. As argued throughout this Brief, while Plaintiff may not agree with the Governing Body's decision, given the facts and circumstances of this case, the Governing Body's decision to adopt a uniform height standard in the WD zone was not in any way arbitrary.

POINT VI

PLAINTIFF's CONTRACT ZONING ARGUMENT IS BARRED FOR FAILURE TO TIMELY RAISE IT IN HER PRE-TRIAL MEMORANDUM, AND IN ANY EVENT IS NOT AN ISSUE THAT IS RIPE FOR ADJUDICATION

Subsequent to this submission of her pre-trial memorandum in this matter, Plaintiff requested that the issue of "contract zoning" be added to list of issues to be determined at trial. The Borough objected to Plaintiff's attempt to include this issue at trial. *See* Letter dated August 6, 2013 to the Honorable Thomas Scully, annexed as exhibit "B" to the O'Hern Cert. The Borough maintains its objection to the Court's consideration of this issue at trial on the grounds that: (1) it was not alleged in Plaintiff's complaint or identified in its Pre-trial Memorandum; (2) it is irrelevant to the Borough's adoption of the subject ordinances; and (3) it is not ripe for adjudication.

As Plaintiff noted in her Trial Brief, a prior owner of the proposed Hampton Inn site granted the Borough an access easement along the waterfront. As referenced in the Borough's Master Plan, there have been proposals to develop a Riverwalk along the banks of the Navesink River. *See* Master Plan at p. 10, annexed as exhibit "AA" to the Gasiorowski Cert. Towards that end, the Borough has also adopted waterfront development plan. While

that plan has not come to fruition, in the hope of someday accomplishing that plan, the Borough has required access easements from property owners in the WD Zone.

Since the adoption of the Ordinance 2012-17, an application has been filed with the Borough's Planning Board to develop a Hampton Inn Hotel at Block 1, Lot 1 (the "Property"), which Property is located in the Borough's WD Zone. In connection with that application, Plaintiff contends that there was testimony from the applicant regarding upgrades to the property in connection with the waterfront access easement, including a possible boardwalk installation along the River. Plaintiff also contends that the applicant proposes to enter into an agreement with the Borough regarding this proposed work.

As the Borough has consistently maintained, the pending Hampton Inn Application bears no relevance to the question of whether the Borough's adoption of the Height Ordinance was lawful. Moreover, absent evidence of an actual agreement between the Borough and the applicant regarding the alleged work - indeed, no such agreement exists-, it is premature for this Court, or any Court, to address the alleged "Contract Zoning" issue.

The alleged "Contract Zoning" issue would only be ripe for adjudication if, and when, the applicant and the Borough entered into an agreement in that regard. *See Cox & Koening, New Jersey Zoning and Land Use Administration*, (Gann 2012), § 34-8.2 (b) ("Essentially contract zoning represents an attempt by the governing body of a municipality, by contract with a property owner, to authorize the property owner to use his property in contravention of the zoning ordinance and without compliance with the statutorily established procedures for obtaining a zoning variance or an amendment to the master plan and zoning ordinance.")(emphasis supplied). Thus, "Contract Zoning" typically involves the re-zoning of property by agreement. Plaintiff does not contend that there is an agreement between the Borough and the applicant to re-zone the Property, but rather alleges that the applicant proposes an agreement with the Borough to make certain off-site improvements to the easement area. Moreover, as noted above, in the absence of any such agreement between the Borough and the applicant and approval of any plans for development of the access easement by the Planning Board, that issue is simply not ripe for adjudication; and it is certainly not an issue that can be decided by this Court in the context of this lawsuit

The issue of the proposed off-site improvements to the easement area is properly before the Planning Board and should

only be resolved in that proceeding. Even if there was evidence of an alleged agreement to re-zone the Property, not until the Planning Board decides the application would the record be sufficiently developed to allow a court to decide whether "Contract Zoning" had occurred. For example, Courts have held that contract agreements between developers and a municipality are lawful "where it was shown that all the necessary steps were taken by the planning board and municipality to rezone the property as required by statute." *See Cox & Koening, at* § 34-8.2 (b).

For the same reasons, the Plaintiff's argument the Borough does not have the authority to require the access easement for the properties that were moved from the WD Zone to the R-B2 Zone (Ordinance 2012-16)[4] is not an issue that can be decided in this action. Indeed, this Plaintiff lacks standing to assert any such claim because she does not own any of those properties and has suffered no injury or harm by Borough's adoption of an ordinance that requires the access easement. This issue would only become ripe for adjudication when a property owner objected

[4] The reason that the Borough adopted Ordinance 2012-16 was very simple. The WD-Zone standards require this access easement. The R-B2 zone does not have this requirement. Because the subject properties were previously in the WD zone, the access easement was required. To ensure continuity and flexibility regarding the development of a potential Riverwalk, when the Borough moved these properties to the R-B2 zone, it simply added the access easement requirement. This requirement has no practical effect on the Rector Place residential properties because the requirement already existed when they were in the WD Zone.

to providing the access easement as part of a development application. Until that occurs, there is no case or controversy for this Court to decide regarding that issue.

For all of foregoing reasons, the alleged contract zoning issue and access easement issue are not properly before this Court and cannot be adjudicated in this action.

CONCLUSION

For all of the foregoing reasons, Ordinance No. 2012-17 was adopted lawfully and in compliance with all procedural and substantive requirements of the MLUL. As such, it cannot be set aside and Plaintiff's complaint should be dismissed with prejudice.

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BY: _____
DANIEL J. O'HERN, JR

Dated: October 8, 2013