RBANK CAPITAL, LLC

Plaintiff,

vs.

THE PLANNING BOARD OF THE BOROUGH OF RED BANK

Defendants.

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY

LAW DIVISION

DOCKET NO: **MON-L-2766-19**

CIVIL ACTION

RESPONDING TRIAL BRIEF ON BEHALF OF DEFENDANT PLANNING BOARD OF THE BOROUGH OF RED BANK

Michael R. Leckstein, Esquire
Attorney Id # 257511969
Leckstein & Leckstein, LLC
463 Prospect Avenue
Post Office Box 231
Little Silver, New Jersey 07739
732-530-6500
michael@lecksteinlaw.com

On the Brief:
Marc A. Leckstein, Esquire
Attorney Id # 000421999

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PRELIMINARY STATEMENT

The matter before the Court presents the unique situation wherein the Defendant Planning Board action being challenged has not caused the Plaintiff any harm whatsoever.

Typically when judicial review of a Planning Board's decision is being requested by an applicant, it is due to the Board having denied an application for development. That is not the case here.

Plaintiff, RBANK Capital, LLC, received its approval to construct a 76 room, 6 story hotel from the Defendant Planning Board of the Borough of Red Bank back in 2017. Absolutely nothing has changed since the granting of that approval, on a municipal level, which would prevent the Plaintiff from immediately proceeding with construction.

What is being challenged here is the Planning Board's refusal, pursuant to N.J.S.A. 40:55D-52, to grant the Plaintiff protection from any future zoning ordinance changes that might be enacted by the Red Bank Borough Council. That refusal occurred by way a vote which took place more than nine (9) months ago, on April 15, 2019, and was memorialized by way of a resolution adopted over seven (7) months ago, on June 17, 2019.

Since the decision not to extend zoning protection was made back in April 2019, there has not been any action taken by the Red Bank Borough Council to amend its zoning ordinance. The approvals granted back in 2017 thus continue to be in full force and effect.

Nothing occurring on the municipal level is preventing the Plaintiff from proceeding with its project. Instead, the primary obstacle has been its continuing failure to submit a plan which is acceptable to the New Jersey State Department of Environmental Protection (DEP). In fact, according to the Plaintiff's trial brief, it is currently in the process of appealing that agency's denial of an Upland Waterfront Development Individual Permit.

As evidenced by the permit denial letter issued by the DEP back on August 2, 2019, the agency has been advising the Plaintiff since as early as 2011 on what needs to be provided in order to receive state approval. Despite this, the required information has not been submitted and the agency has therefore concluded that the Plaintiff is responsible for its own delays.

The Borough of Red Bank has remained patient throughout this entire process, standing by its existing zoning ordinance, while the property which has already been approved by the Planning Board for the hotel construction continues to languish in disrepair with a long ago abandoned gas station sitting upon it, serving no purpose other than to act as a significant eyesore along State Highway 35 at the gateway into the Borough from the Township of Middletown.

The Defendant Planning Board asks the Court to keep the above facts in mind when considering this appeal.

COUNTER STATEMENT OF FACTS

On May 1, 2017, the Defendant Planning Board of the Borough of Red Bank memorialized by Resolution its decision "Granting Preliminary & Final Major Site Plan Approval with Bulk C Variances" to the Plaintiff Rbank Capital, LLC in order to permit the construction of a 76 room, 6 story hotel along with associated uses and site improvements upon property located at 80 Rector Place which is officially designated as Block 1, Lot 1 on the official tax map of the Borough of Red Bank. (A copy of the Resolution is attached to Plaintiff's Trial Brief as Exhibit "A")

It is not a coincidence that the property is Block 1, Lot 1 on the Borough's Tax Map. It is such because the site is the very first property one encounters when entering into Red Bank across the Coopers Bridge from the Township of Middletown along State Highway 35.

The lot is located within the Borough's Waterfront Development "WD" Zone and is bordered on the north and west by the Navesink River. Currently, the site is encumbered by a long ago abandoned gasoline station.

As set forth within the May 1, 2017 Resolution, the approved hotel is a permitted use within the WD Zone. (Paragraph 5, May 1, 2017 Resolution) Additionally, the Planning Board found that the Borough would benefit from the construction of such a permitted use as it would eliminate the aforesaid abandoned gas station, which is

a pre-existing non-conforming use and "...is, essentially, an eyesore as one enters the Borough from the north on State Highway 35 and also presents a unsightly condition to the adjoining residential neighbors." (Paragraph 41, May 1, 2017 Resolution)

The 2017 application for the hotel was actually the successor application to one brought before the Planning Board back in 2011. That original application had not been followed through with however due to litigation by objectors and due to consideration of various revisions made to the Red Bank Zoning Ordinance.(Paragraph 9, May 1, 2017 Resolution)

In conjunction with its original 2011 Planning Board application, the Plaintiff also had commenced discussions with the New Jersey DEP on the potential of the hotel project. This was specifically noted by the DEP in its August 2, 2019 correspondence denying the Plaintiff's application for a "Waterfront Development Individual Upland Permit" wherein the following was written:

> However, it should be noted that the applicant's chosen project has contributed to the perceived hardship. The subject project could be developed with a project that is situated entirely within the actively disturbed portions of the riparian zone in compliance with the requirements of N.J.A.C. 7:13-11.2. **It is important to note that the Division has been in communication with the applicant regarding this project since 2011.** The requirements and limitations for riparian zone vegetation disturbances within the inner 150' were specifically identified at that time. **The applicant continued to pursue this project without addressing these requirements, and thus contributed to the perceived hardship.** (Emphasis added)
>
> (See Page 9 of the DEP's August 2, 2019 correspondence attached as Exhibit "G" to Plaintiff's Trial Brief)

The author of the DEP letter, Ryan J. Anderson, Manager of the Bureau of Coastal Regulation, Division of Land Use Regulation, takes pains to make clear his frustration over the lack of attention being given to the project by the Plaintiff since conversations began in 2011. As noted in the above cited paragraph, he states his belief that the applicant has contributed to its own problems. Additionally, he notes on sixteen other occasions in the letter as to the deficiencies submitted by the Plaintiff.[1] These are as follows:

# 1 Page 3	"In order to demonstrate compliance with 12.5(b)1 above, the applicant must submit a certification, signed and sealed by a NJ Licensed Professional Engineer that the building is adequately designed to resist hydrostatic and hydrodynamic loads and effects of buoyancy resulting from flooding to at least one foot above the flood hazard area design flood elevation. **This certification was not provided.**" (Emphasis added)
# 2 Page 4	"However, **the submitted plan does not show the proposed building is designed to meet these standards,** such as having a foundation system that is designed to minimize forces acting on it, and designing to minimize damages to the foundation and elevated structures to the supporting soils. Secondly, it could not be determined that the foundation system is free of obstructions and attachments that will transfer flood forces to the structure system or that it will not restrict or eliminate free passage of high velocity flood waters and waves during design flood conditions. **Based on the above, compliance with this rule has not been demonstrated.**" (Emphasis added)

[1] The Defendant Planning Board recognizes that the Plaintiff is appealing the denial of the DEP Permit. This is established by the letter dated September 18, 2019 which is attached as Exhibit "I" of Plaintiff's Trial Brief. This letter has been allowed into these proceedings as a supplemental record pursuant to this Court's Pre-Trial Order entered on October 23, 2019.

# 3 Page 4	"All development located within a flood hazard area has to meet the standards of the Flood Hazard Control Act Rules at N.J.A.C. 7:13 and the Uniform Construction Code (UCC), N.J.A.C. 5.23, in accordance with N.J.A.C. 7:7-9.25(f). Because the proposed project is located within the flood hazard area of the Navesink River, it must comply with these rules. **However, based upon review of the submitted information the applicant has not demonstrated compliance with this section of the rule, as outlined above.**" (Emphasis added)
# 4 Page 8	"**The applicant has not demonstrated** that the proposed disturbance to the riparian zone vegetation for the construction of the hotel has been eliminated or minimized, in accordance with NJAC 7:13-11.2(b)." (Emphasis added)
# 5 Pages 8&9	"**The applicant has not demonstrated** that there is no practicable alternative to the current design, such as reducing the scope of the project or providing an alternative design or project situated greater than 150-feet from the Navesink River, or situating a development completely within the actively disturbed area. **The applicant has additionally not provided a project design** that results in a minimum feasible alteration of the inner 150-feet of the riparian zone, such as reconfiguring the building and parking and/or reducing the footprint of the overall development. Further, the applicant has not justified how the proposed disturbance of the inner 150-feet of the riparian zone is in the public interest. **Therefore, the project does not comply with N.J.A.C. 7:13-11.2(d).**" (Emphasis added)
# 6 Page 9	N.J.A.C. 7:13-11.2(y)2 & 3 both require the applicant to demonstrate that either disturbance to riparian zone has been minimized to the maximum extent practicable or that an alternative project or design that is situated outside of the riparian zone is practicable. **As discussed above, the applicant has not sufficiently addressed these alternatives.** It appears that the site could be developed with a project that could be situated entirely within actively disturbed portions of the riparian zone. (Emphasis added)

# 7 Page 9	Lastly, **the applicant is required to mitigate for riparian zone disturbances** proposed under (y), in accordance with N.J.A.C. 7:13-11.2(e) and as outlined at N.J.A.C. 7:13-13.4. **A mitigation proposal was not submitted.** (Emphasis added)
# 8 Page 9	The submitted compliance statement did request a Flood Hazard Area hardship exception from the strict provisions of the riparian zone requirements in the inner 150 feet of a 300 foot riparian zone. However, the report did not address this section of the rule, N.J.A.C. 7:13-15.1. **Specifically, N.J.A.C. 7:13-15.1(e) states the requirements for submission. The application did not include this information.** Therefore the Division cannot determine if the project meets the requirements for a hardship. (Emphasis added)
# 9 Page 11	A portion of the proposed project is on a coastal bluff. **The compliance statement did not identify the coastal bluff on site as a special area and subtract it from the total land area on site,** in accordance with N.J.A.C. 7:13.3(e). **Therefore, in accordance with N.J.A.C. 7:7-13.3(e), the Division cannot determine if the proposed project is in compliance with this rule.** (Emphasis added)
# 10 Page 12	As discussed above in compliance with N.J.A.C. 7:7-13.3, the applicant failed to identify the coastal bluff on site and subtract it from the total land area. **Therefore, <u>the impervious cover limit identified in N.J.A.C. 7:7-13.13(b) was incorrectly calculated</u>** based on the net land area multiplied by the percentage listed in Table E. **Therefore, in accordance with N.J.A.C. 7:7-13.13(b), the Division cannot determine if the proposed project is in compliance with this rule.** (Emphasis added)
# 11 Page 13	As discussed above in compliance with N.J.A.C. 7:7-13.3, the applicant failed to identify the coastal bluff on site and subtract it from the total land area. Therefore, **<u>the vegetative cover percentages identified in N.J.A.C. 7:7-13.14 were incorrectly calculated</u>** based on the net land area multiplied by the percentage listed in Table G. (Emphasis added)

# 12 Page 14	**The 2011 "will serve" letters that were submitted with this application are 8-years old.** Construction of the proposed onsite development would create an increase in water and sewer demand. **Without confirmation of a public water supply** the project may generate adverse impacts to the surrounding region's water supply through excessive groundwater withdrawal. **In addition, without confirmation of sewer capacity,** the project may result in generating sewage that cannot be treated in accordance with State regulations. (Emphasis added)
# 13 Page 14	**In addition, the traffic report is also from 2011 with an amendment done in 2016.** The proposed hotel will result in an increase of traffic in the area. **Because up to date traffic information was not provided, the potential traffic impact cannot be determined.** (Emphasis added)
# 14 Page 15	N.J.A.C. 7:7-15.14(b)3 requires that the longest lateral dimension of each component that is more than six stories or more than 60 feet in height as measured from existing preconstruction ground level must be oriented perpendicular to the beach or coastal waters. **Based upon the submitted plans the proposed hotel is not oriented so that the longest lateral dimension is oriented perpendicular to the coastal waters. Therefore in accordance with N.J.A.C. 7:7-15.14(b), the proposed project does not comply with the High-rise structures rule.** (Emphasis added)
# 15 Page 16	As discussed above, **updated "will serve" letters were not submitted with the application** demonstrating that there is adequate capacity to service the site for sewer. **Therefore, the Division cannot determine if the project is consistent with an approved Water Quality Management Plan and cannot determine compliance with this rule.** (Emphasis added)
# 16 Page 17	A review of the revised Traffic Impact Study revealed that the intersection currently functions at a level of service of F and that the level of service will not change as a result of the proposed hotel. The amendment stated nothing has changed from the original study. **However, an updated traffic study was not provided. Therefore the Division cannot determine compliance with this rule.** (Emphasis added)

As seen above, the August 2, 2019 letter denying the "Waterfront Development Individual Upland Permit" from the DEP is replete with examples of how the Plaintiff had not been responsive to the agency's previous requests nor to the agency's rules and regulations. Of course, none of this was known to the Defendant Planning Board when the Plaintiff appeared before it on the evening of April 15, 2019 seeking an extension, pursuant to the provisions of N.J.S.A. 40:55D-52, of its 2017 zoning approval.[2]

Pursuant to the provisions of N.J.S.A. 40:55D-52, the rights conferred upon a developer shall not be changed for a period of two years after the date on which the resolution of final approval is adopted. The statute, pursuant to subsection (a), states that a planning board "...**may extend** such period of protection for extensions of one year but not to exceed three extensions." (Emphasis added)

The statute further provides, pursuant to subsection (d):

> The planning board **shall grant** an extension of final approval for a period determined by the board but not exceeding one year from what would otherwise be the expiration date, **if the developer proves to the reasonable satisfaction** of the board that the developer was barred or prevented, directly or indirectly, from proceeding with the development because of delays in obtaining legally required approvals from other governmental entitles and the developer applied promptly for and diligently pursued these approvals. (Emphasis added)

[2] The DEP denial letter was not received by the Borough until August 15, 2019. It has been allowed as a supplemental record in these proceedings pursuant to the Court's Pre-Trial Order entered on October 23, 2019.

In its presentation before the Planning Board on April 15, 2019, the Plaintiff presented the testimony of one witness in support of its extension request, its principal, Larry Cohen.

During his testimony, Mr. Cohen explained that following the grant of municipal approval the Plaintiff had first gone before the New Jersey's Department of Transportation (DOT) rather than the DEP for approvals because he believed, based upon previous discussions with the DEP, that it would be the preference of the latter agency to know where DOT stood on the project. (T6-14)[3]

According to Mr. Cohen during the hearing, the DOT application was filed sometime in October of 2017. (T8-16)[4] Although no date was given that evening as to when the DEP application was actually filed, it has been subsequently learned that it was not submitted to the agency until June 4, 2018, over a year after approval had been granted for the project by the Planning Board on May 1, 2017.[5]

While the date of submission was not revealed during the public hearing, Mr. Cohen did state that the Plaintiff had learned the DEP was going to deny their application. As a result, they

[3] All references to the transcript within this trial brief are to the Transcript of the Planning Board hearing held on April 15, 2019. A copy of the Transcript is included as Exhibit "J" to the Plaintiff's Trial Brief.

[4] In actuality, the DOT application was filed on November 7, 2017 per the submission letter attached to Plaintiff's Trial Brief as Exhibit "C". This letter was not provided to the Planning Board prior to its hearing on April 15, 2019. It has been allowed as a supplemental record pursuant to this Court's Pre-Trial Order entered on October 23, 2019.

[5] The June 4, 2018 submission date is derived from Exhibit "E" of the Plaintiff's Trial Brief which has been allowed as a supplemental record pursuant to this Court's Pre-Trial Order.

"decided to pull the application temporarily to preserve our application fee." (T7-13) The withdrawal was ultimately revealed to have occurred on October 11, 2018.[6]

According to Mr. Cohen, it would not be until about three weeks before the April 15, 2019 Planning Board hearing that re-submission of the application to the DEP occurred. (T7-15)[7]

The above information consists of the entirety of the affirmative presentation made to the Planning Board by the Plaintiff in search of its extension of the zoning protection period afforded by N.J.S.A. 40:55D-52. No documentation or any other form of evidence was provided to the Board in support of its request.

Additional information gleaned during the hearing revealed that the Plaintiff had not been diligent in tending to the maintenance of the actual site where the approved hotel was to be located. As noted during an exchange between Board Members Barbara Boas, Mayor Pasquale Menna and Mr. Cohen beginning at T9-23:

Ms. Boas: I'm concerned about the condition of that lot. Its been sitting looking like --

Mr. Cohen: For 20 years.

Ms. Boas: Yeah.

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[6] The October 11, 2018 date is derived from page 2 of correspondence dated March 28, 2019 written on behalf of the Plaintiff to the DEP. This letter is attached to the Plaintiff's Trial Brief as Exhibit "E" and has been allowed as a supplemental record pursuant to this Court's Pre-Trial Order.

[7] Per Exhibit "E", the actual date of re-submission to the DEP was March 28, 2019.

Mr. Cohen: For 20 years, it's been like that.

Ms. Boas: And it's -- it gets worse and worse every day. I mean --

Mr. Cohen: We -- we've been notified by the fire marshal. Every time -- there's been graffiti. I won't -- I won't deny that. I've gone personally down there and painted the front and the back of the building. I've -- and I've --

Ms. Boas: How about cutting the grass?

Mr. Cohen: We have a landscaper come in every two weeks.

Ms. Boas: Yeah?

Mr. Cohen: If there's something that is not being done, you tell us and we'll get it done. I mean, the landscaper is there every two --

Ms. Boas: You're paying him?

Mr. Cohen: I'm sorry?

Ms. Boas: You're paying them, huh?

Mr. Cohen: Absolutely.

Ms. Boas: Well, it is not being kept well at all. And it is -- it is really disgraceful that when people come in to Red Bank, that's the first thing they see. So I would appreciate it if you would make sure that whoever is in charge of your -- watching your landscaper, please do that because - -

Mr. Cohen: I'll go out there personally.

Ms. Boas: Thank you.

Mayor Mena: I'm sort of -- I'm sort of upset because Tom Welsh is not here tonight because I would have liked to have reviewed the number of notices of violations that the property has had in the past two years.

Mr. Cohen: Two or three.

Mayor Mena: Well, then -- then, there's a problem with code, because I can tell you right now that the neighbors on Rector Place and others along Bridge Avenue have been complaining much more than two or three times. Not just about graffiti, but as Ms. Boas says, the -- the overgrowth is only attended to when somebody from code gives notifications. That's inexcusable for one of the prime properties at the entrance of the town. The fact that it's been like that for 20 years really doesn't -- doesn't - -

Mr. Cohen: I would - - I would agree with you. Are you talking the overgrowth below, close to the water, or are you talking about --

Mayor Menna: No, no. From the street.

Mr. Cohen: I will personally take a look at that and I will get the landscape guy to basically -- if I have to waylay the entire area.

Following this exchange there were some additional comments by members of the public (T12-5 to T16-8). Councilman Michael Ballard, a member of the Board, next advised that based upon traffic concerns, he would not have supported the application when it was originally heard. (T16-9 to T17-13). Thereafter a motion was made to deny the application. (T19-21)

During discussion on the motion, Mayor Pasquale Menna, a member of the Board, reiterated concerns voiced by Ms. Boas over the lack of maintenance of the subject site. At T20-18 he noted:

> Because there's been nothing -- nothing done. Not even - not even securing the property and putting up a fence around it to prevent the extraordinary maintenance issues that have resulted. And even though there were only three violations, I know that there were more than three complaints over the time.

During his comments the Mayor also advised that based in part upon the lack of attention to the property by the applicant, the Borough was in the early stages of creating a redevelopment agency. (T20-10) He then went on to advise as to his belief that the "area begs for redevelopment of a positive nature." (T20-24)

When the vote was finally taken on the motion to deny the extension request, it passed unanimously. (T19-21)

The reasons for the denial were ultimately memorialized within the Board's Resolution adopted on June 17, 2019.[8] These stated reasons did not include the comments made during the hearing by the members of the public nor did it include the comments made by Councilman Ballard. Instead, the specific reasons as to why the extension request was denied are contained in Paragraphs 11 through 18 of the Resolution.

The resolution reveals a Board very much concerned with the lack of attention to maintenance of the subject property since the granting of site plan approval in 2017. Paragraphs 11, 15 and 16 of the Resolution express this frustration as follows:

> 11. Many of the reasons for granting the variances required for this site plan passage centered on the need to remove a serious eyesore from the site, at the northern entrance of the Borough.

[8] A copy of the June 17, 2019 Resolution of Denial is attached to Plaintiff's Trial Brief as Exhibit "B".

15. It was revealed that throughout the process involving the subject lot going back to the initial proposal in 2010 that the site was poorly maintained and in fact remained in an unsightly condition throughout the approval process. Even on the eve of the Applicants request for an extension the property remained overgrown and unsightly.

16. The Borough is presently in the process, due in part to the slow movement of the Applicant in meeting the conditions of the approval, to reconsider and possibly adopt redevelopment proposals for the northern portions of the Borough along and near the Navesink River. Redevelopment is necessary due to the conditions of the subject site as well as to fulfil other Borough obligations for affordable housing and redevelop recently vacant structures in the same zoning districts.

Beyond maintenance issues associated with the property, the Board also made clear the Plaintiff had not been diligent in pursuing its approvals before the state agencies. This rationale is found in Paragraphs 12, 13 and 14 of the Resolution as follows:

12. Throughout the 2-year statutory protection period afforded by N.J.S.A. [40:55D-52], the Applicant was given substantial opportunity to seek the approvals of the outside State Agencies. The general outline of the project was known to the Applicant for a period of almost 7 years prior to the May 1, 2017 approval.

13. The public hearing at the April, 2019 Planning Board Hearing revealed that the Applicant had not been diligent in pursuing its DEP and DOT approvals. In fact, it was revealed that after almost 2 years of waiting the Applicant was first applying again to the agencies for approval after determining that the original applications were being denied.[9]

[9] The reference to "denied" in this Paragraph is to Mr. Cohen's comment during the hearing that the Plaintiff had withdrawn the DEP application on October 18, 2018 because they knew it was going to be denied. (T7-13 & footnote 6 at Db11 above) As previously noted in footnotes 2 (Db9) and 7 (Db11), the Planning Board would not learn until August 15, 2019, almost two months after the Resolution of June 17, 2019 had been adopted, that the new DEP application, which had not been submitted to the DEP until March 28, 2019, had been denied.

14. The Applicant presented no testimony to demonstrate that it has been diligent in pursuing the necessary outside approvals.

The Board then stated its final conclusions in Paragraphs 17 and 18 of the Resolution which read as follows:

17. It is the Planning Boards conclusion that the Applicant has had a substantial period of time to complete the application process and the Borough should not and cannot continually delay the upgrading of the entire area due to conditions that existed 10 years ago but now have changed.

18. For the reasons set forth above and for good planning considerations the application for an extension of the time period under N.J.S.A. 40:55D-52 must be denied.

With the adoption of these findings and conclusions by Resolution on June 17, 2019, the Planning Board's denial of the Plaintiff's application for an extension of their N.J.S.A. 40:55D-52 protection period from zoning changes had been memorialized.

The Plaintiff has now applied to this Court, via a Complaint filed on August 7, 2019, for a determination that the Planning Board's actions in denying its request was arbitrary, capricious and unreasonable. The Defendant Planning Board has responded in kind, via an Answer filed on August 30, 2019, denying the allegations raised against it.

Now, for all of the reasons to be argued hereafter, it is respectfully submitted that the determination of the Defendant Planning Board of the Borough of Red Bank should be affirmed on all counts and the Plaintiff's Complaint should therefore be dismissed in its entirety.

LEGAL ARGUMENT

POINT I

THE DEFENDANT PLANNING BOARD ACTED APPROPRIATELY IN ITS DENIAL OF THE PLAINTIFF'S N.J.S.A. 40:55D-52 EXTENSION REQUEST

Located at N.J.S.A. 40:55D-52, entitled **Effect of final approval of a site plan or major subdivision**, the State Legislature has set forth the rules as to what powers a Planning Board possesses when dealing with an applicant requesting extension of a final approval that has previously been granted. In the usual course of events, the law provides a developer should act upon a granted final approval within a two year period. During this time, pursuant to N.J.S.A. 40:55D-52(a), a site plan is protected from any changes in a municipality's zoning scheme that might occur.

To be clear, an applicant's final approval does not expire after the two year period. As recognized by the New Jersey Supreme Court in Palatine I vs. Planning Board, 133 NJ 546, 553 (1993), *overruled on other grounds* by DL Real Estate Holdings vs. Planning Board, 176 NJ 126 (2003)[10]:

> [T]he site plan is given protection, or vested rights, against a change in zoning for said period, but if at the expiration of the two years there has been no change in zoning, the site plan continues to be in full force and effect until such time as the developer determines to proceed with the development.

[10] In DL Real Estate, 176 NJ at 135, the Court held a municipality could adopt an ordinance requiring an applicant to seek final approval within three years of a grant of preliminary approval. Absent such an ordinance, the effect of final approval has not changed.

Although a final approval does not expire on its own, the Legislature nevertheless recognized that as the municipality does have the power to modify its zoning ordinance, a mechanism should be put into place wherein a developer who is not able to act within the permitted statutory time period, would have the ability to request that the Planning Board extend the two year protection period for time frames of "one year but not to exceed three extensions". The statute, N.J.S.A. 40:55D-52(a), is quite clear that such a grant is discretionary on the Planning Board's part however as it utilizes the words "**may** extend such period of extension" rather than the words "**shall** extend such period of extension".

Extensions of approval remain discretionary since one of the prime purposes of the State's zoning laws is "to encourage municipal action to guide the appropriate use of development of all lands in this state." (*citing* N.J.S.A. 40:55D-2(a))

Accordingly, while a developer is automatically protected from any zoning changes for a two year period, a municipality which has decided to change its zoning scheme should not be forced to forever after carry the weight of an approval which may have once made sense for the municipality but based upon changing circumstances no longer fits into the character of the community.

However, while the Legislature believes that a municipality should have the above discretion in planning and zoning matters it

has also determined that a diligent developer should not be punished when the lack of action during the two year period of statutory protection has been the result of governmental requirements rather than anything that had been under the developer's control. It would be quite unfair in such a situation for the developer to lose its approvals simply because two years have passed and the municipality has decided to take its zoning plans in another direction.

The Legislature therefore enacted subsection (d) of N.J.S.A. 40:55D-52, taking away Board discretion over whether to grant an extension of final approval in cases where a developer has been prevented from acting due to delays in obtaining legally required approvals. Still, despite this change, the burden of establishing that outstanding approvals have been diligently pursued falls upon the developer. Per the statute, it is the responsibility of the applicant to prove "to the reasonable satisfaction of the Board" that the reason for the lack of development was due to (1) "delays in obtaining legally required approvals from other governmental entities" and that (2) "the developer applied promptly for and diligently pursued these approvals."

Regardless of whether the applicant is seeking a "discretionary extension" pursuant to N.J.S.A. 40:55D-52(a) or a "mandatory extension" pursuant to N.J.S.A. 40:55D-52(d), "...a court reviewing the denial of such an extension must determine

whether there is sufficient credible evidence in the record to support the planning board's findings that the applicant failed to establish the facts that would entitle it to an extension. If the record contains such evidence, the board's decision must be upheld." Knowlton Riverside Estates, Inc. vs. Planning Board of the Township of Knowlton,347 NJ Super. 362, 369-379 (App. Div. 2002).

As established in the Statement of Facts section of this trial brief, the evidence submitted to the Planning Board on behalf of the Plaintiff in support of its extension request was sparse at best. It did not include any documentation whatsoever and instead relied solely upon the testimony of the Plaintiff's principal, Larry Cohen. As recited at Db10 to Db11, the totality of the testimony was that the Plaintiff decided to first proceed before the DOT rather than DEP. (T6-11) Later, they did submit to the DEP, but upon learning the application was going to be denied, they then withdrew the application to preserve their application fee. (T7-13) Finally, about three weeks before the April 15, 2019 hearing before the Planning Board, they resubmitted their application to the DEP. (T7-15). That was the entire presentation given.[11]

All of this led the Board to its inevitable conclusion that the Plaintiff was not being diligent in its efforts to pursue approvals, having only submitted its application to the DEP three

[11] It is recognized that the Plaintiff had copied the Township Engineer on various pieces of correspondence to the state agencies.

weeks before the hearing despite having been working on the project since at least 2010.[12]

The only other information before the Planning Board on the date of the public hearing was, as recounted at Db11 through Db13 of this trial brief, the fact that the site on which the Plaintiff's project was to be built had been left in a state of complete disrepair. In fact, as acknowledged by Mr. Cohen, it had been in such a condition for twenty years. (T10-3)

It was the observation of the Board Members that this site, which is located at one of the major gateways into the Borough of Red Bank, was being absolutely neglected by the Plaintiff as it had become overgrown with vegetation. This was understandably a matter of extreme concern for the Board Members.(T10-10 through T11-22)

Amazingly, Mr. Cohen seemed to be completely ignorant of what was happening at the property, indicating he relied upon his landscaper to take care of the grounds. (T10-19 through T10-25)

Based upon the state of the property, and the lackluster response given by Mr. Cohen, the Board was left with no choice but to conclude the Plaintiff had all but abandoned the site, allowing it to remain an overgrown eyesore until such time as approvals might be granted from the relevant state agencies permitting

[12] See ¶'s 12 through 15 of the June 17, 2019 Resolution of the Planning Board, attached as Exhibit "B" of the Plaintiff's Trial Brief and transcribed in full at Db15 and Db16 of this brief.

construction of the sought after hotel.[13]

The condition of the site had grown so concerning, that the Borough had been brought to the point where it was considering declaring the property part of an area in need of redevelopment in order to take matters out of the Plaintiff's hands and put it under the control of someone who would care for the premises. (T20-10)[14]

These observations by the Board, as memorialized within the Resolution of Denial, should be given great weight by the Court. After all, a Board's final determination is to be afforded a presumption of validity based upon a recognition of the "peculiar knowledge of local conditions" which a Board holds. Price vs. Himeji, LLC, 214 NJ 263, 284 (2013), (*citing* Kramer vs. Bd of Adjustment, 45 NJ 268, 296 (1965)).

The information gleaned from the testimony on the night of April 15, 2019, should be more than sufficient to support the conclusion ultimately reached by the Board. In its trial brief, the Plaintiff does not actually argue that there was sufficient information present. Instead, it attacks the action of the Board, relying upon the Appellate Division's opinion in Jordan Developers vs. Planning Board of the City of Brigantine, 256 NJ Super. 676 (App. Div. 1992) as the basis for its inferred argument that it was

[13] See ¶'s 11 & 15 of the June 17, 2019 Resolution of Denial as attached as Exhibit "B" to Plaintiff's Brief and recited above at pages Db14 through Db15 of this Brief.

[14] See ¶ 16 of the June 17, 2019 Resolution of Denial which is recited above at page Db15 of this Brief.

incumbent upon the Planning Board, rather than the Plaintiff, to establish why the extension should not be granted. According to the Plaintiff, if the Board had concerns about continued neglect of the subject property, the proper remedy was to require maintenance at the site as a condition of the approval. (Pb12) With all due respect to the Plaintiff, this is not what Jordan Developers or any of the established case law actually states.

Jordan Developers, 256 NJ Super. at 680, is a case which supports the right of a Planning Board to either grant or deny an extension request. It notes that the Board is empowered to weigh "...the public interest in the implementation of the zoning change, the developer's interest in extended protection, and the circumstances in which the need for extension arose."

Of course, in this case, there has not been an actual zoning change enacted by the Borough. Instead, there has simply been an indication by the Mayor that the Borough is considering declaring the property as part of a redevelopment area. (T20-10)

For the sake of this argument, the Defendant Board acknowledges that the threat of future redevelopment is as weighty as an actual zoning change would be. As such, the cited language of Jordan Developers is relevant, it just doesn't say what the Plaintiff would ask the Court to believe it does. Instead, it is submitted that in the context of this matter, the Planning Board was certainly entitled to conclude the fact that the long neglected

conditions of the subject property, at the gateway into the borough, does outweigh the developer's interest in extended protection. There is absolutely no language within the Jordan decision which should lead the Court to conclude otherwise.

Additionally, in Knowlton Riverside Estates, Inc. vs. Planning Board of Knowlton,347 NJ Super. at 368, the Appellate Division has made clear that to receive an extension pursuant to N.J.S.A. 40:55D-52, it is the burden of the developer to establish to the "reasonable satisfaction" of the Planning Board that the requested relief is warranted. It is certainly not, as the Plaintiff has argued, the Planning Board's responsibility to formulate an extension which will make the developer happy. No decision, by any court, has ever ruled anything of the sort.

As previously stated, the information presented by the Plaintiff during the hearing on April 15, 2019 was sparse at best. It was definitely not sufficient enough to rise to a level where the Planning Board could be "reasonably satisfied" the Plaintiff's required burden under N.J.S.A. 40:55D-52 had been met. Furthermore, when one begins to examine the post hearing supplemental documents, admitted into evidence by way this Court's Pre-Trial Order of October 23, 2019, the complete lack of diligence on the Plaintiff's part becomes all the more glaring.

Nothing speaks more to the lack of diligence by the Plaintiff than the DEP's August 2, 2019 correspondence denying the

Plaintiff's application for a "Waterfront Development Individual Upland Permit". (Exhibit "G" of Plaintiff's Brief)

At Db5 through Db8 of this brief, sixteen (16) examples of deficiencies within the Plaintiff's DEP application, as outlined in the August 2nd correspondence authored by Ryan J. Anderson, Manager of the Bureau of Coastal Regulation, Division of Land Use Regulation, have been identified. One might not think much of these deficiencies in a normal application context, but this is not a normal case. This application was not the Plaintiff's first communication with the agency.

As noted by Mr. Anderson, at page 9 of his letter:

> **It is important to note that the Division has been in communication with the applicant regarding this project since 2011.** The requirements and limitations for riparian zone vegetation disturbances within the inner 150' were specifically identified at that time. **The applicant continued to pursue this project without addressing these requirements, and thus contributed to the perceived hardship.** (Emphasis added)

Additionally, by Mr. Cohen's own admission during the April 15, 2019 Planning Board hearing, the Plaintiff knew the DEP was inclined to deny its application as early as October of 2018. Rather than deal with the concerns of the DEP at that time, the Plaintiff instead chose to withdraw its application so as to preserve its application fees. (T7-13 and see footnote 6 at Db11) The application was not re-filed with the DEP until March 28, 2019. (T7-15 and see footnote 7 at Db11)

Despite all of the time which passed since discussions with the DEP began in 2011, and despite the five (5) month interval between the withdrawal of the original application in October of 2018 and its re-submission in March of 2019, the Plaintiff never took the care to ensure that its application would be filed correctly. Instead it consisted of all of the deficiencies cited in Mr. Anderson's denial letter. When considering the amount of time which passed, there is simply no legitimate excuse for such an occurrence. As Mr. Anderson concluded in his letter, the Plaintiff contributed to its own hardships.

It is respectfully submitted that a diligent applicant, working on a project for so many years, would have taken care to ensure that its application to the DEP would have met all of the appropriate regulations so as to avoid a permit denial. While the Board appreciates that the Plaintiff is appealing that denial, it should never have come to such a point in the first place. Proper due diligence could have avoided such a situation.

Just as in the Plaintiff's case, the Knowlton Riverside Estates decision recites the story of an applicant seeking an extension request before a Planning Board based upon alleged delays in obtaining approvals from the DOT and DEP. In that case, the Board denied the request as it found a ninety (90) day gap in time for responding to agency requests was not diligent, despite the fact such a time period was allowed under the agency rules. The

Court upheld this determination, rejecting the Plaintiff's argument that it should be deemed to have "diligently pursued" a legally required approval so long as it responded to an approving agency's request before the deadline established by the rules. Knowlton, 347 NJ Super. at 370.

The Court ruled the Plaintiff "...was required to demonstrate that its delays in responding to those requests were reasonable under the particular circumstances of this case." Id. at 371.

The Court also found that it was incumbent upon the Plaintiff to establish there had been some unreasonable delay on the part of the agency which prolonged the application process. Id. at 374.

None of these things were established during the Planning Board hearing on April 15, 2019. There was no attempt to explain the five month delay between the withdrawal and re-submission of the DEP application. Additionally, Mr. Anderson's letter of August 2, 2019 makes clear that it was the Plaintiff which had created its own hardships rather than anything done by the DEP. There has been nothing submitted by the Plaintiff attempting to explain why Mr. Anderson's criticisms are unwarranted.

As recognized in Knowlton, 347 NJ Super. at 375 when upholding the Planning Board's denial of the extension request:

> In sum, the Board's finding that plaintiff failed to "apply promptly for and diligently pursue[]" the required DEP and DOT approvals and that those agencies did not unduly delay in acting upon plaintiff's applications are supported by sufficient credible evidence.

If the failure in Knowlton of the Plaintiff to respond to an agency request within an agency permitted ninety (90) day period could be legally considered a lack of proper diligence on a developer's part, then most certainly the failure to file a proper application after a five (5) month delay created in order to preserve an application fee would be as well.

Accordingly, for all of the reasons stated above, the Defendant Board submits that it acted properly in all respects in denying the Plaintiff's request for an extension pursuant to N.J.S.A. 40:55-52. All of the evidence presented demonstrates a developer who has failed to be diligent in pursuing its necessary agency approvals and that the public interest in denying the request, so as to give the Borough an opportunity to force proper utilization of the subject site via a potential redevelopment effort or other form of zoning change, outweighs the developer's interest in obtaining extended protection. As such, both the denial of the request, and its subsequent memorializing Resolution, should be affirmed in their entirety.

POINT II

IT IS THE RESOLUTION WHICH GOVERNS THE BOARD'S DECISION, NOT COMMENTS OF BOARD MEMBERS MADE DURING THE PUBLIC HEARING

Throughout Plaintiff's Trial Brief, much is made of the comments by Councilman Michael Ballard during the April 15, 2019 public hearing. During those comments, the Councilman, who is a member of the Board, makes clear that he was not a supporter of the application when it was originally heard by the Planning Board in 2017. (T16-9 through T17-13) At Pb13, the Plaintiff argues that such comments are evidence of the Board's "improper focus on immaterial factors".

It is important to note that Councilman Ballard's comments do not appear anywhere within the Resolution of Denial. This is because they only represented the Councilman's personal views on the original 2017 application and did not reflect the Board's overall rationale as to why the extension request should be denied.

As recognized by the Appellate Division in New York SMSA vs. Bd. of Adjustment of Weehawken, 370 NJ Super. 319, 333-334 (App. Div. 2004):

> Such remarks at best reflect the beliefs of the speaker and cannot be assumed to represent the findings of an entire Board. Moreover, because such remarks represent informal verbalizations of the speaker's transitory thoughts, they cannot be equated to deliberative findings of fact. It is the resolution, and not board members' deliberations, that provides the statutorily required findings of fact and conclusions.

In the end, it is the Resolution of Denial which speaks for the Board and fully explains the rationale for why its members voted as they did. It is completely unnecessary for the Board members to discuss the application at all. Instead, it is entirely sufficient that the application be either approved or disapproved by voice vote and that thereafter a memorializing resolution be adopted setting forth a clear statement of reasons for the grant or denial of the relief being requested. Scully-Bozarth Post vs. Planning Board, 362 NJ Super. 296, 312 (App. Div. 2003), *certif. den.* 178 NJ 34 (2003)).

To be clear, it is not necessary to engage in a re-examination of the original 2017 zoning approval as part of this appeal. The wisdom of that approval is not questioned once in the Board's Resolution denying the Plaintiff's extension request. All that matters in this case is the basis on which that new request for relief was denied.

For the above stated reasons, this Court should reject Plaintiff's argument that the comments of Councilman Ballard should be seen as indicative of the Board's arbitrary stance in this application. To the contrary, the Court should accept that the Resolution is the definitive source of why the Board ultimately ruled as it did in this matter.

POINT III

STANDARD OF REVIEW WHEN CONSIDERING AN APPEAL FROM A PLANNING BOARD

In Point I of this Argument, there was a discussion of the balancing test described within Jordan Developers and Knowlton Riverside Estates for determining whether an extension of the protection period established under N.J.S.A. 40:55-52 should be granted. As previously explained, the Defendant Planning Board did engage in that test and ultimately determined that the public interest in denying the extension outweighed the interests of the Plaintiff in obtaining such relief. With that determination in mind, it becomes necessary to establish the standard of review by which that determination should be analyzed upon appeal.

The Courts have long recognized that zoning boards, "because of their peculiar knowledge of local conditions[,] must be allowed wide latitude in the exercise of delegated discretion." Price vs. Himeji, LLC, 214 NJ 263, 284 (2013), *citing* Kramer v. Bd. of Adjustment, 45 NJ 268, 296 (1965); *accord* Jock v. Zoning Bd. of Adjustment, 184 NJ 562, 597 (2005).

A board's decision enjoys a presumption of validity, and a court may not substitute its judgment for that of the board unless there has been a clear abuse of discretion. Price, 214 NJ at 284, *citing* Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment, 172 NJ 75, 81 (2002).

In Aronowitz vs. Planning Board of Township of Lakewood, 257 NJ Super. 347, 367-368 (App. Div. 1992), a case challenging the granting of an extension request pursuant to N.J.S.A. 40:55D-52, the Appellate Division held the following:

> In any event, it certainly cannot be said that the plaintiffs have carried the burden of demonstrating that the board's decision was arbitrary, capricious or unreasonable as they must in order to prevail in this aspect of their challenge. Kramer vs. Board of Adjustment of Sea Girt, 45 NJ 268, 212 (1965). The presumption of validity accorded such actions is sufficient to sustain the board's decision here. Rexon vs. Board of Adjustment of Haddonfield, 10 NJ 1 (1952).

The reason for the presumption of validity cited in Price and Aronowitz is quite clear. It has long been recognized that both the creation of a sound zoning plan and the power to determine when variances from that plan should be granted are best left in the hands of those representatives whom the local electorate have vested with that responsibility. Kramer, 45 NJ at 296 (1965). In fact, one of the prime purposes of the State's legislatively adopted zoning laws is "to encourage municipal action to guide the appropriate use of development of all lands in this state." (*citing* N.J.S.A. 40:55D-2(a))

Accordingly, a court's scope of review is not to suggest a decision that may be better than the one made by the Board, but to determine whether the Board could reasonably have reached its decision based upon the record. Cohen vs. Board of Adjustment of the Borough of Rumson, 396 NJ Super. 608, 615 (App. Div. 2007)

Furthermore, a greater deference must be given to a Board's denial of relief than to its issuance. D. Lobi vs. Planning/Zoning Bd. Of Sea Bright, 408 NJ Super. 345, 360 (App. Div. 2009)

All of this rests on a pragmatic assumption that local planning boards ordinally will not deny relief where the proofs incontestably establish the need for such and demonstrate no threat to the neighborhood or zone plan. Lang v. Zoning Board of Adjustment, 160 NJ 41, 58 (1999)

In the within matter, it is respectfully submitted that when considering the arguments above as well as both the record below, and the supplemental record permitted by the Court, it has been more than established that the Planning Board's determination to deny the extension relief was justified. That denial was in no way arbitrary, capricious nor unreasonable. As such, both the Board's denial, and its subsequent Resolution memorializing that decision, should now be affirmed in their entirety.

CONCLUSION

For all of the reasons argued within this trial brief, it is respectfully submitted that the Defendant Planning Board of the Borough of Red Bank acted appropriately throughout the entire application proceedings and that its Resolution denying the application was also proper in all respects.

As demonstrated by both the record presented before the Planning Board on the evening of April 15, 2019, and the supplemental records which have been permitted by the Court, the Plaintiff simply did not meet its burden toward establishing that it was entitled to an extension of its two year protection period pursuant to N.J.S.A. 40:55D-52.

The Defendant Board returns the Court to where this brief began. As we stand here today, nothing has changed on the municipal level which would prevent the Plaintiff from proceeding with its project. Although indications of possible redevelopment plans have been mentioned, none have been enacted by the Borough. Yet, despite the lack of interference by the town, the subject property remains a perpetual eyesore at one of the primary gateways into the municipality while the Plaintiff persists in appealing a denial from the DEP which that agency has proclaimed is the result of the Plaintiff's own lack of proper due diligence in having filed a more than deficient application.

It is respectfully submitted that the Plaintiff has not acted diligently throughout this entire process and that it has repeatedly demonstrated a lack of care with respect to properly maintaining its property. Based upon this reality, the public interest in denying an extension of the Plaintiff's protection period so as to give the Borough an opportunity to compel proper utilization of the property via a redevelopment process or mere zoning change, outweighs the developer's interest in obtaining extended protection. The Borough should not be prevented from enacting zoning amendments impacting the property if it wishes to do so. Accordingly, both the denial of the request, and its subsequent memorializing Resolution, should be affirmed in their entirety.

Respectfully submitted,

/s/ Michael R. Leckstein

Michael R. Leckstein, Esquire
Leckstein & Leckstein, LLC
Attorneys for Defendant
Planning Board of the Borough of Red Bank

On The Brief:
Marc A. Leckstein, Esquire

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