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ANDREW REGER	:	
	:	SUPERIOR COURT OF NEW JERSEY
Plaintiffs,	:	LAW DIVISION
	:	MONMOUTH COUNTY
vs.	:	
	:	Docket No.
PLANNING BOARD OF THE BOROUGH	:	
OF FAIR HAVEN and FAIR HAVEN	:	<u>Civil Action</u>
RETAIL, LLC	:	
	:	COMPLAINT IN LIEU OF
Defendant.	:	PREROGATIVE WRITS
	:	
	:	

PLAINTIFF, ANDREW REGER, with an address of 52 Battin Road, Fair Haven, New Jersey, County of Monmouth, State of New Jersey, by way of Complaint against the Defendants, Planning Board of the Borough of Fair Haven and Fair Haven Retail, LLC, states as follows:

IDENTIFICATION OF PARTIES AND ALLEGATIONS COMMON TO ALL COUNTS

1. Plaintiff, Andrew Reger ("Plaintiff") is a resident of the Borough of Fair Haven and the owner of property located at 52 Battin Road, Fair Haven, New Jersey. As such, Plaintiff is a proper party having standing under the Municipal Land Use Law ("MLUL") of the State of New Jersey.

2. Defendant, Planning Board of the Borough of Fair Haven ("Planning Board"), is an appointed Municipal Body organized and existing pursuant to the laws of the State of New Jersey maintaining its principal office at 748 River Road, Fair Haven, New Jersey 07704.

3. Defendant, Fair Haven Retail, LLC, with an address of 88 Hickory Lane, Lincroft, New Jersey 07738 ("Applicant") filed an application with the Planning Board in connection with 598 River Road, Fair Haven, New Jersey 07704 (Block 32, Lot 02, Tenant A) known as Zoning Permit Application ZP#18-123 for a change of use of the Tenant Location A (formerly the Lairds Stationary - Retail Store) to a new proposed Dunkin' Donuts.

4. The Applicant had previously filed a Zoning Permit Application seeking a commencement/change of use of the Tenant Location A (formerly the Lairds Stationary - Retail Store) to a new proposed Dunkin' Donuts. The Application was denied by the Fair Haven Zoning Officer by letter dated June 11, 2018. In the Denial Letter, the Zoning Officer determined that the Applicant proposed a new proposed use of a restaurant (Dunkin' Donuts) in corner tenant space of the ACME shopping center previously occupied by Lairds Stationary and Printing. The Zoning Officer also made the finding as follows:

"The Dunkin' Donuts Restaurant as described can be classified as a Restaurant-Category Two per Fair Haven Land

Use and Development Regulation definitions and the proposed use is a permitted use in the B-1 Zoning District as part of the Shopping Center."

The Zoning Officer also determined that the change of use from previous "retail use" to the new "restaurant use" has not established the necessary criteria to be classified as an exempt development of the same or less restrictive as detailed in Section 30-2.4 Exempt Developments and further that the details have not been provided regarding how the change of occupancy/change of use does not adversely affect previously approved site plan or increase traffic circulation, relationship of buildings, buffering, and parking requirements or other considerations that need to be submitted for site plan review.

5. Accordingly, the Zoning Officer determined that the Zoning Permit Application for commencement and change of use cannot be administratively approved as submitted and would require an amended site plan to be provided for review and approval by the Planning Board.

6. The Applicant filed an Application for classification as an "exempt development" pursuant to the Borough's Land Use Ordinance Section 30-2.4 or, in the alternative, for amended preliminary and final major site plan approval and for such other site plan approval to permit a change of use of a tenant location, formerly the Lairds Stationary Store to a proposed

Dunkin' Donuts at the property known as 560 River Road and more formerly identified as Block 32, Lot 2 on the Borough's Tax Map.

7. The property consists of approximately 4.36 acres in the Borough's B-1 Business Zoning District. In the notice, the Applicant identified the proposed Dunkin' Donuts as a permitted use.

8. Fair Haven's Land Use Ordinance Sections 30-5.1 and 30-5.2, entitled "Scheduled Permitted Uses and Permitted and Prohibited Uses" sets forth the permitted use and prohibited use.

9. As set forth in Section 30-5.3, "Permitted and Prohibited Uses" of the Borough of Fair Haven Development Regulations posits at Sub-Section (p) "Permitted Principal Uses, accessory uses and conditional uses within each Zone District are set forth in the Schedules of Permitted Uses." The letter "P" means that the use is a permitted principal use in the Zone. The letter "C" means the use is a permitted conditional use. The letter "A" means permitted accessory use in the Zone. Any use, except for essential services, which is not specifically listed as a permitted use, an accessory use, or a conditional use on the Schedule of Uses shall be a prohibited use. Moreover, Sub-Section B provides "prohibited uses shall include but not

limited to" the following: ***22. Restaurants, Category Three, as defined in Section 30-2 of this chapter.

10. As set forth in Table A, (Sub-Section 30-5.1) the Schedule of Permitted Uses in Non-Residential Districts, only Restaurant, Category One and Restaurant, Category Two, are permitted used in the B-1 Zone.

11. A restaurant, Category Three, is defined as follows:

"Restaurant, Category Three Restaurant means a restaurant whose primary function is the preparation and services by employees of food or drink to customers as part of an operation which may be designed with carry-out service; delivery services; self-service; on-premises consumption; or customer pick-up service utilizing a vehicular drive-thru."

12. Moreover, a Drive-In Restaurant is described as follows:

"Drive In Restaurant means an establishment where the majority of the patrons purchase food, soft drinks, ice cream, and similar confections for takeout or consumption on the premises but outside the confines of the principal building, or in automobiles parked upon the premises, regardless of whether or not, in addition thereto, seats or other accommodations are provided for the patrons."

13. Neither Category Three Restaurants or Drive-In Restaurants are identified as permitted uses in the B-1 Zone. Pursuant to Section 30-2, Definitions, the definition of each classification of restaurants are as follows:

Restaurant, Category One. Category One Restaurant means a restaurant which is designed for and whose primary function and operation is the preparation and

service by employees of meals to a customer or customers seated at the table at which the meal is consumed. A category one restaurant operates without substantial carry-out service; with no delivery service; with no drive-thru, drive-in or service in vehicles; and without service at counters or bars unless the restaurant is licensed to serve alcoholic beverages.

Restaurant, Category Two. Category Two Restaurant means a restaurant whose primary function is the preparation and service by employees of food or drink to customers as part of an operation which may be designed with carry-out service; delivery service; self-service; or on-premises consumption except that no drive-in, drive-thru, or service in vehicles is permitted.

Restaurant, Category Three Restaurant means a restaurant whose primary function is the preparation and services by employees of food or drink to customers as part of an operation which may be designed with carry-out service; delivery services; self-service; on-premises consumption; or customer pick-up service utilizing a vehicular drive-thru."

"Drive In Restaurant means an establishment where the majority of the patrons purchase food, soft drinks, ice cream, and similar confections for takeout or consumption on the premises but outside the confines of the principal building, or in automobiles parked upon the premises, regardless of whether or not, in addition thereto, seats or other accommodations are provided for the patrons."

14. The first public hearing in connection with the application commenced on February 19, 2019. At that time, many residents of the Borough of Fair Haven appeared to voice objection to the application and in particular, multiple residents retained the services of attorneys. Plaintiff, through counsel, appeared at the hearing and placed an objection

to the Applicant proceeding on the basis that the Board lacked jurisdiction to proceed where the proposed use is not permitted in the B-1 Zone. Plaintiff pointed out that the Dunkin' Donuts Restaurant is a Category Three Restaurant which is not permitted in the B-1 Zone.

15. Significantly, the objection was placed after the Applicant proceeded with testimony and its own expert supported Plaintiff's position that the proposal should be classified as a non-permitted use.

16. The Planning Board erroneously determined that it did not have jurisdiction to decide whether or not a use was permitted and allowed the Application to proceed.

17. Thereafter, the matter was stayed pending a Zoning Board of Adjustment appeal filed by Plaintiff (as well as another citizen) on or about March 4, 2015 as to the Zoning Officer's determination in the Zoning Permit Denial Letter that the proposal was for a Category Two Restaurant (and a permitted use) and in the alternative, seeking an interpretation regarding Borough Ordinance provision.

18. The Planning Board stayed the hearings pending the processing and determination by the Zoning Board of the Appeal/Interpretation by the Plaintiff and the other citizen.

19. The Zoning Board ultimately determined that the Dunkin Donuts Restaurant as proposed at the site is a Category Two Restaurant and as such is a permitted use and that the Zoning Officer did not err in making the same determination in his Zoning Permit Denial Letter, adopting a Resolution which was memorialized on June 11, 2019.

20. Plaintiff is currently challenging the Zoning Board's determination in the matter entitled Reger vs. Fair Haven Zoning Board of Adjustment, et als., Docket No. MON-L-00259-19.

21. The Planning Board thereafter conducted public hearings on the application on February 19, 2019, June 18, 2019, July 16, 2019 and September 17, 2019. The Zoning Board ultimately granted approval for Amended Final Site Plan/Change in Use, for Block 32, Lot 2, River Road" for the Applicant Fair Haven Retail ("Applicant") as memorialized on September 17, 2019. A copy of the Resolution is attached hereto and incorporated herein as **EXHIBIT A**.

22. Plaintiff is challenging the actions of the Planning Board in connection with the approval/Resolution with this action in lieu of prerogative writs.

FIRST COUNT

1. Plaintiff repeats and reiterates each and every allegation of the previous Paragraphs of the Complaint as if set forth herein and at length.

2. In the Resolution, the Planning Board considered multiple Exhibits and Documents as set forth in the Resolution (**EXHIBIT A**) and identified as Items "a" through "nn".

3. The Subject Property is located within an existing shopping center of approximately 4.4 acres located in the B-1 Business District in Fair Haven, which is located at 5998 River Road.

4. The property is developed as the Fair Haven Shopping Center and is occupied by tenants. At the time of the Application and as set forth in the Resolution, the Board determined that six (6) storefronts that occupy approximately 18% of the shopping center's total floor area (44,843 s.f.) are vacant and that the property is abutted by other retail, restaurant and service uses. There are a mixture of single family detached homes and service oriented businesses to the rear of the property and across River Road are other retail, restaurant and services uses.

5. The Dunkin Donuts as proposed will be located in an area formally occupied by Lairds Stationary Store, a significantly less intense use than a Dunkin Donuts.

6. The use will occupy approximately 18,000 s.f. (interior dimension) consisting of 14 seats at 5 tables with two handicapped accessible lavatory facilities. The store hours will be 5:30 a.m. to 10:00 p.m. with deliveries occurring at the rear parking lot prior to the hours of operation and said delivery to be from a 16 foot box truck with approximately 16 employees working at the facility during peak hours and 2 to 3 employees during off-peak hours.

7. The Board made the finding in its Resolution based on the testimony that no baking or cooking will occur on the premises and that the operation will consist of convection ovens for reheating frozen muffins and sandwiches.

8. A significant issue which was raised before the Planning Board by multiple members of the public, including the Plaintiff, after the Zoning Board determined that the proposed use is a Restaurant Category Two use and permitted in the Zone, pertained to parking requirements and/or traffic circulation.

9. The Planning Board made the following findings in the Resolution:

14. The site is conforming as to parking requirements, providing 250 parking spaces

wherein 180 are required. The breakdown of the existing parking is 70 spaces fronting on River Road; 40 spaces along what is describe as the Smith Street area; and 138 parking stalls on what is described as the Forman Street area.

15. Though the Board recognizes that there is adequate on-site parking, concern was expressed during the course of the hearings from the public and objectors concerning what was anticipated to be a high-traffic use impacting traffic and pedestrian circulation principally in the River Road parking area (identified for this Resolution as the parking area located along River Road and the front façade of the shopping center)
16. To the extent that this was a pre-existing shopping center, Applicant's counsel did not undertake a traffic impact study; however, they did provide traffic counts which noted that at peak hours of operation, between 7 am and 10 am, it is anticipated that between 70-80 vehicles would be within the parking area. The site is underutilized during Dunkin' Donuts' peak activity time. The parking analysis indicates that more than 48 parking spaces will be available in the River Road area during the early and midmorning periods. The peak hours of operation, however, would coincide with high rates of pedestrian traffic.
17. The Board recognizes that its authority in reviewing the application for site plan approval is limited to determining whether the development plan conforms to the Zoning Ordinance and the applicable phases of the Site Plan Ordinance. Overall, the Planning Board's objective in its site plan review is to ensure that the site will be used in accordance with the regulations of the Site Plan Ordinance.
18. Its limited review notwithstanding, the Board took into consideration the comments of the public and objectors concerning site circulation relative to ingress and egress onto River Road

and creating areas of pedestrian refuge and safe pedestrian crossing.

19. As a pre-existing fully developed site, the Board was cognizant of limitations posed upon it by the Municipal Land Use Law; however, the Board found that the analysis undertaken by the Borough's consultant engineer, Dolan & Dean, was instructive and found that the recommendations accepted by the Applicant arising out of the recommendations by Dolan & Dean resulted in a sound strategy to effectuate safe movement of pedestrian and traffic circulation at the site. To that end, the recommendation to limit the easternmost driveway to an egress only was accepted by the Board. Though there was considerable debate as to whether or not the egress only should be a right turn only or continue to allow as it presently operates, to travel both east and west (right and left), the Board opted to continue the present egress pattern allowing traffic circulating out of the site to proceed either east or west. The Board finds that the elimination of an ingress access at the easternmost entry will greatly reduce the potential for unsafe conditions.

10. The Planning Board's reliance on a traffic analysis by the Borough's consultant engineer, Dolan & Dean, was unreasonable and impressible where the matter before the Planning Board involved the Dunkin Donuts and Dunkin Donuts is a private client of the engineering firm Dolan & Dean, thereby creating an impermissible conflict and/or the appearance of same and an irreparable taint on the proceeding.

11. The Planning Board determinations with respect to the site circulation relative to ingress and egress onto River Road as well as the Planning Board's decision not to require the

Applicant to undertake a traffic impact study given the change in the intensity of the use from the stationery store to a Dunkin Donuts, as well as reliance on Dolan & Dean was arbitrary, capricious, unreasonable and otherwise void and/or not supported by the record.

12. The Planning Board's reliance on the Applicant's traffic counts especially as relates to the Board's finding that the site is underutilized during Dunkin Donuts peak activity time as well as with respect to the amount of available parking spaces available in the River Road area during the early and mid-morning periods is not supported in the record and/or the Planning Board was not supplied with information to make this determination..

13. The Planning Board's decision to continue the present egress pattern allowing traffic circulating out of the site to proceed either east or west presents a significant dangerous situation relating to site circulation relative to ingress and egress onto River Road as well as a hazard to pedestrian crossing and ingress and egress to the site.

14. The Planning Board's finding that an elimination of an ingress access at the eastern most entry will greatly reduce the potential for unsafe conditions is arbitrary, capricious, and/or

otherwise unreasonable and is further not supported by the record.

15. The Planning Board made further findings which related to the "present uses" in the River Road parking area without consideration to the site as a whole.

16. The Planning Board's approval of the application for amended site plan/change in use for the property located at Block 32, Lot 2 was arbitrary, capricious, unreasonable and/or otherwise void as a matter of law.

WHEREFORE, Plaintiff demands judgment against the Defendants as follows:

- (a) For an Order vacating and setting aside the Resolution
- (b) For an Order vacating and setting aside any and all relief granted by the Defendant Planning Board to the Applicant as memorialized in the Resolution.
- (c) For an Order enjoining the Planning Board from asserting jurisdiction over the subject application.
- (d) Granting such other and further relief as this Court may deem proper.

SECOND COUNT

1. Plaintiff repeats and reiterates each and every allegation of the previous Paragraphs of the Complaint as if set forth herein and at length.

2. The Applicant published and served a notice(s) in connection with the public hearings informing the public that it

was seeking a classification as an "exerpt development" pursuant to the Borough's Land Use Ordinance Section 30.2.4 or in the alternative for amended preliminary and final major site plan approval to permit a change of use for the tenancy formerly operating as the Laird's Stationary Store on a portion of the property commonly known as the Fair haven Shopping center at 560 River Road.

3. The Applicant failed to inform the public and/or surrounding property owners that it was proposing change(s) to the access/egress; to which the Planning Board had previously approved in connection with the shopping center as sufficient to afford a reasonable means of ingress and egress for emergency vehicles as well as all that it is likely to need or desire access to the property in its intended use and/or to be a safe, efficient and orderly movement of traffic.

4. The Applicant presented a revised site plan purportedly incorporating adjustments to access and circulation elements of the existing shopping center including a revision to the easterly driveway to an exit only driveway.

5. Despite the known revision to the site plan and the traffic circulation and pedestrian circulation as memorialized in the Resolution and accepted by the Planning Board as to significant issues, no notice was provided as to same.

6. The notice failed to identify the proposal so that the public would be made aware of what this Applicant was proposing, rendering the application void.

WHEREFORE, Plaintiff demands judgment against the Defendants as follows:

- (a) For an Order vacating and setting aside the Resolution
- (b) For an Order vacating and setting aside any and all relief granted by the Defendant Planning Board to the Applicant as memorialized in the Resolution.
- (c) For an Order enjoining the Planning Board from asserting jurisdiction over the subject application.
- (d) Granting such other and further relief as this Court may deem proper.

THIRD COUNT

1. Plaintiff repeats and reiterates each and every allegation of the previous Paragraphs of the Complaint as if set forth herein and at length.

2. As detailed in the Resolution, the Planning Board required the Borough Engineer Dolan & Dean to undertake an analysis relating to traffic circulation on the site and specifically determined that the changes accepted by the Planning Board was out of that analysis.

3. The Dolan & Dean identified Dunkin Donuts as a client of its engineering firm, representing an impermissible conflict in Dolan & Dean's review of the subject application.

4. Dolan & Dean possess a bias and should not have participated in the application considered with the well-established proposition that objectors as well as applicants are entitled to a fair hearing consistent with the fundamental standard of due process.

5. Dolan & Dean's participation poisoned the spirit of impartiality with which the Planning Board' quasi-judicial proceedings are required to be governed.

6. Dolan & Dean's participation represents the actual existence as well as the appearance of a conflict of interest and a bias in favor of approval of the application involving a Dunkin Donuts, requiring that the Planning Board's action be voided.

WHEREFORE, Plaintiff demands judgment against the Defendants as follows:

- (d) For an Order vacating and setting aside the Resolution
- (e) For an Order vacating and setting aside any and all relief granted by the Defendant Planning Board to the Applicant as memorialized in the Resolution.
- (f) For an Order enjoining the Planning Board from asserting jurisdiction over the subject application.
- (d) Granting such other and further relief as this Court may deem proper.

FOURTH COUNT

7. Plaintiff repeats and reiterates each and every allegation of the previous Paragraphs of the Complaint as if set forth herein and at length.

8. Plaintiff is challenging the Zoning Board Interpretation/Appeal determination and if successful, the Planning Board did not have jurisdiction to consider the Application where the use is not permitted.

WHEREFORE, Plaintiff demands judgment against the Defendants as follows:

- (g) For an Order vacating and setting aside the Resolution
- (h) For an Order vacating and setting aside any and all relief granted by the Defendant Planning Board to the Applicant as memorialized in the Resolution.
- (i) For an Order enjoining the Planning Board from asserting jurisdiction over the subject application.
- (d) Granting such other and further relief as this Court may deem proper.

GASIOROWSKI & HOLOBINKO
Attorneys for Plaintiff,
Andrew Reger

BY:

R.S. GASIOROWSKI, ESQ.

Dated: October 31, 2019

TRIAL DESIGNATION

Pursuant to Rule 4:25-4, R.S. Gasiorowski, Esq., is designated as Trial Counsel.

GASIOROWSKI, & HOLOBINKO
Attorneys for Plaintiff,
Andrew Reger

BY:

R.S. GASIOROWSKI, ESQ.

Dated: October 31, 2019

CERTIFICATION PURSUANT TO R. 4:5-1

R.S. Gasiorowski, hereby certifies as follows:

1. I am an attorney at law in the State of New Jersey and attorney for the Plaintiff herein.

2. To the best of my knowledge, information and belief, the matter in controversy is not the subject of any action pending in any other court, or of a pending arbitration proceeding, nor is it the subject of any other action or proceeding contemplated by the Plaintiff, except for Reger v. Fair Haven Zoning Board of Adjustment, et als, Docket No. MON-L-2591-19.

3. To the best of my knowledge, information and belief there are no other parties who should be joined herein.

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

GASIOROWSKI & HOLOBINKO
Attorneys for Plaintiff,
Andrew Reger

BY:

R.S. GASIOROWSKI, ESQ.

Dated: October 31, 2019

CERTIFICATION PURSUANT TO R.4:69-4

R.S. Gasiorowski, an attorney-at-law of the State of New Jersey, hereby certifies:

1. I am counsel for the plaintiff herein.
2. I have caused to be ordered all necessary transcripts of local agency proceedings relative to the above matter.

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.

GASIOROWSKI & HOLOBINKO
Attorneys for Plaintiff,
Andrew Reger

BY:

R.S. GASIOROWSKI, ESQ.

Dated: October 31, 2019

EXHIBIT A

PBB 19-00

BOROUGH OF FAIR HAVEN PLANNING BOARD RESOLUTION

**GRANTING APPROVAL FOR AMENDED FINAL SITE PLAN/CHANGE IN USE, FOR
BLOCK 32, LOT 2, RIVER ROAD**

WHEREAS, Fair Haven Retail, LLC, (hereinafter referred to as the Applicant), is the owner of property located at Block 32, Lot 2, as shown on the Tax Map of the Borough of Fair Haven, with an address of 598 River Road, in the Borough of Fair Haven, County of Monmouth, State of New Jersey; and

WHEREAS, the Applicant seeks Final Site Plan approval for a proposed change of use, amending the previously approved site plan for the Fair Haven Shopping Center, to permit a Dunkin' Donuts in one of the vacant store fronts formerly housing Laird's Stationery Store; and

WHEREAS, the proposed use will be developed with preparation/storage areas, walk-in cooler and freezer, an office, sales area, two (2) handicapped-accessible bathrooms and five (5) tables with fourteen (14) seats; together with signage consisting of one (1) internally illuminated 35.42' sq. foot sign, facing the River Road parking area; and

WHEREAS, the proposed retail use and signage are permitted within the B1 Business District wherein the property is located; and

WHEREAS, after proper notice, a public hearing on the application was heard on February 19, 2019, and thereafter stayed pending a Zoning Board of Adjustment appeal and reconvened on June 18, 2019, carried to July 16, 2019 at which time the hearing was adjourned at the request of the Applicant and carried to August 20, 2019; and

WHEREAS, the Board considered:

- a. Borough of Fair Haven – Standard Development Application Form and checklist, dated September 6, 2018, marked Exhibit A-1;
- b. Architectural Plans prepared by GK&A, professional engineers, dated April 30, 2018, consisting of 21 pgs., marked Exhibit A-2;
- c. Undated colorized renderings, consisting of three (3) pgs., marked Exhibit A-3;
- d. Parking and circulation study, dated August 20, 2018, consisting of 25 pgs., marked Exhibit A-4;

- e. Request for property owners within 200', dated July 13, 2018, marked Exhibit A-5;
- f. Letter of Borough Tax Collector, dated July 17, 2018, marked Exhibit A-6;
- g. Form W-9, completed by Applicant, dated July 13, 2018, marked Exhibit A-7;
- h. Draft notice of public hearing, dated August 30, 2018, marked Exhibit A-8;
- i. Proposed floor plan/front elevation/sign detail, consisting of two (2) pgs., dated April 30, 2018, marked Exhibit A-9;
- j. Letter of Applicant's counsel, with attachment inclusive of Planning Board Resolution entitled *Granting Site Plan Approval with Variance and Design Waiver Relief Replacement of a Monument Sign, Block 32, Lot 2, 560 River Road*, dated November 8, 2018, consisting of nine (9) pgs., marked Exhibit A-10;
- k. Letter from Applicant's counsel, consisting of three (3) pgs., dated November 29, 2018, marked Exhibit A-11;
- l. Letter from Applicant's counsel, consisting of two (2) pgs., dated December 21, 2018, marked Exhibit A-12;
- m. Letter from Applicant's counsel, consisting of two (2) pgs., dated February 8, 2019, marked Exhibit A-13;
- n. Colorized photo of an example of site interior, undated, consisting of two (2) pgs., marked Exhibit A-14;
- o. Notice published by Applicant, marked Exhibit A-15;
- p. Colorized exhibit depicting present and vacant uses at the site, prepared by Metro Commercial Real Estate, Inc., marked Exhibit A-16;
- q. Copy of Borough of Fair Haven Planning Board's Resolution [Granting Approval for Amended Preliminary and Site Plan Approval, Together with Variance and Design Waiver Relief for Block 32, Lot 2, 560 River Road], memorialized by the Planning Board on April 27, 2017, consisting of 11 pgs., marked Exhibit A-17;
- r. Site Plan used for prior approvals, dated April 18, 2017, marked Exhibit A-18;
- s. Letter from Langan Engineering over the signature of Karl A. Pehnke, dated July 3, 2019, marked Exhibit A-19;

- t. Letter from Langan Engineering over the signature of Karl A. Pehnke, dated August 6, 2019, marked Exhibit A-20;
- u. Site Plan prepared by Dynamic Engineering, revised per Township comments, revision date August 5, 2019, marked Exhibit A-21;
- v. Colorized rendering of revised site plan of August 5, 2019, marked Exhibit A-22;
- w. Draft papers for appeal purportedly to be filed by objector's counsel (marked for identification only), marked Exhibit OBRG-1;
- x. Copy of *Lakewood Realty Associates v. Lakewood Township Planning Board, et al*, marked Exhibit OBRG-2;
- y. Captured image purportedly from the Dolan and Dean website, dated July 18, 2019, depicting Dunkin' Donuts as a client, marked Exhibit OBRG-3;
- z. Exhibits submitted by objector's counsel, Michael Convery, dated February 15, 2019, Exhibits A-E, 24 pgs., marked Exhibit OBMC-1;
- aa. Submission by objector's counsel, dated February 15, 2019, consisting of 19 pgs., marked Exhibit OBMC-2;
- bb. Trip Generation Summary prepared on behalf of Tracey Cole, marked Exhibit OBTC-1;
- cc. Letter prepared by Borough of Fair Haven Zoning Officer, over the signature of Nicolas J. Poruchynsky, PE, PP, CME, consisting of three (3) pgs., dated June 11, 2018, marked Exhibit PB-1;
- dd. Letter of Planning Board Engineer, Richard Gardella, PE, PP, CME, CPWM, dated October 26, 2018, marked Exhibit PB-2;
- ee. Letter of Planning Board Engineer, Richard Gardella, PE, PP, CME, CPWM, dated February 13, 2019 (with attachment), marked Exhibit PB-3;
- ff. Letter prepared by Fair Haven Planning Board Consultant, HGA, over the signature of Fred Heyer, PP, AICP, CUD, LEED-AP ND. CNUa and Elena Gable, PP, AICP, CFM, inclusive of eight (8) photographs in and about the area, dated February 13, 2019, marked Exhibit PB-4;
- gg. Letter of Dolan & Dean Engineering Consultant, over the signature of Elizabeth Dolan, P.E., dated February 12, 2019, marked Exhibit PB-5;

- hh. Letter of Dolan & Dean Engineering Consultant, over the signature of Elizabeth Dolan, P.E., dated February 14, 2019, marked Exhibit PB-6;
- ii. Zoning Board of Adjustment Resolution *Interpreting the Ordinance to Find and Conclude that the Dunkin' Donuts Restaurant in Question is a Category Two Restaurant; and Affirming the Determination of the Zoning Officer Regarding Same, and Denying the Appeal Therefrom*, dated July 11, 2019, marked Exhibit PB-7;
- jj. Letter of Dolan & Dean Engineering Consultant, over the signature of Elizabeth Dolan, P.E., dated July 12, 2019, consisting of four (4) pgs., together with attachments separately marked, marked Exhibit PB-8;
- kk. Colorized site plan undated but utilized by Dolan & Dean, marked Exhibit PB-9;
- ll. Hand marked site plan prepared by Dynamic Engineering, dated June 21, 2019, marked Exhibit PB-10;
- mm. Colorized Site Plan "Concept 3", dated July 10, 2019, marked Exhibit PB-11;
- nn. Colorized Site Plan "Concept 4", dated July 10, 2019, marked Exhibit PB-12;

as well as presentation and/or testimony by or on behalf of the Applicant from Dominic Sequeira (operator); Dan Hughes, principle of Fair Haven Retail, LLC; Matthew Kelly, Sr. Vice President of Fair Haven Retail, LLC; Karl A. Pehnke, P.E., PTLE, Langan Engineer and Environmental Services, Inc.; Cynthia Fall, AIA of GK&A Architects, PC; Robert Freud, P.E. of Dynamic Engineering; as well as presentation by Ronald S. Gasiorowski, Esq. on behalf of objector Andrew Reger; Michael J. Convery, Esq. on behalf of objector Tracey Cole; inclusive of testimony from Michael Dannemiller, P.E.; and Michael Simpson, P.E.; together with presentation and/or testimony from members of the public: Tracey Cole, Karen Jackson, Kirk Donaldson, Ann Dixon, Nancy Freeman, Bennett Coleman, Andrew Reger, Susan Boos, Robin Candria, Megan Christner-Keefe, Lee Riker, Skip Laufer, Rachel Stellar, Diane Mevorach, Ruth Blaser, Sam Skinner, Mike Nitka, Mike Wiehl, Nancy Sutsko and Terry Simboli; and

WHEREAS, after carefully considering the evidence presented to it, the Board has made the following findings of fact:

1. The site of the application is located at 598 River Road, within an existing shopping center of approximately 4.4 acres located in the B1 Business District.
2. The property is currently developed with the Fair Haven Shopping Center and is occupied with tenants, including Acme Food Mart, Chase Bank (with a drive-thru) and UPS store.
3. Six (6) store fronts which occupy approximately 18% of the shopping center's total floor area (44,843 sq. ft.) are vacant. The property is abutted by other retail, restaurant and service uses. Across River Road are other retail, restaurant and service uses. To the rear of the property are a mixture of single-family detached homes and service-oriented businesses.
4. The site is to be developed with a Dunkin' Donuts located in the area formerly occupied by Laird's Stationery Store.
5. The use will occupy approximately 18,000 sq. feet (interior dimension), consisting of 14 seats at five (5) tables with two (2) handicapped-accessible lavatory facilities.
6. The store hours will be 5:30 am to 10 pm, with deliveries occurring at the rear parking lot prior to the hours of operation. Deliveries will be daily from a 16' box truck. Approximately 16 employees will be working at the facility during peak hours and 2-3 employees during off-peak hours.
7. There is a designated area for trash and recycling in the rear; recycling consists of glass, cardboard and plastic.
8. Fourteen (14) seats are at 5 tables proposed within the interior of the facility.
9. No baking or cooking will occur on premises; operation will consist of convection ovens for reheating frozen muffins and sandwiches; however, there will be no baking on premises.
10. The HVAC unit will be on top of the existing structure.
11. There will be no additional lighting on the exterior other than the lit sign. The sign will be composed of individual internally lit letters; letters will be approximately 30", the sign 170" long, consisting of 35.7 sq. feet and is conforming to the Zone requirements; Applicant has chosen to place a smaller

sign than permitted. There will be one (1) window sign of approximately 1' x 3', located within the 42.7 sq. ft. window.

12. No variance relief is required.

13. During the course of the proceedings, a request for interpretation of the Zoning Ordinance was made, resulting in an appeal to the Zoning Board of Adjustment. The Zoning Board of Adjustment concluded that Dunkin' Donuts is a Restaurant 2 use and permitted in the Zone, affirming the determinations made by the Zoning Officer in this instance.

14. The site is conforming as to parking requirements, providing 250 parking spaces wherein 180 are required. The breakdown of the existing parking is: 70 spaces fronting on River Road; 40 spaces along what is described as the Smith Street area; and 138 parking stalls on what is described as the Forman Street area.

15. Though the Board recognizes that there is adequate on-site parking, concern was expressed during the course of the hearings from the public and objectors concerning what was anticipated to be a high-traffic use impacting traffic and pedestrian circulation principally in the River Road parking area (identified for this Resolution as the parking area located along River Road and the front façade of the shopping center).

16. To the extent that this was a pre-existing shopping center, Applicant's counsel did not undertake a traffic impact study; however, they did provide traffic counts which noted that at peak hours of operation, between 7 am and 10 am, it is anticipated that between 70-80 vehicles would be within the parking area. The site is underutilized during Dunkin' Donuts' peak activity time. The parking analysis indicates that more than 48 parking spaces will be available in the River Road area during the early and midmorning periods. The peak hours of operation, however, would coincide with high rates of pedestrian traffic.

17. The Board recognizes that its authority in reviewing the application for site plan approval is limited to determining whether the development plan conforms to the Zoning Ordinance and the applicable phases of the Site Plan Ordinance. Overall, the Planning Board's objective in its site plan review is to

ensure that the site will be used in accordance with the regulations of the Site Plan Ordinance.

18. Its limited review notwithstanding, the Board took into consideration the comments of the public and objectors concerning site circulation relative to ingress and egress onto River Road and creating areas of pedestrian refuge and safe pedestrian crossing.

19. As a pre-existing fully developed site, the Board was cognizant of limitations posed upon it by the Municipal Land Use Law; however, the Board found that the analysis undertaken by the Borough's consultant engineer, Dolan & Dean, was instructive and found that the recommendations accepted by the Applicant arising out of the recommendations by Dolan & Dean resulted in a sound strategy to effectuate safe movement of pedestrians and traffic circulation at the site. To that end, the recommendation to limit the easternmost driveway to an egress only was accepted by the Board. Though there was considerable debate as to whether or not the egress only should be a right turn only or continue to allow as it presently operates, to travel both east and west (right and left), the Board opted to continue the present egress pattern allowing traffic circulating out of the site to proceed either east or west. The Board finds that the elimination of an ingress access at the easternmost entry will greatly reduce the potential for unsafe conditions.

20. Exhibit A-21 depicts the areas of existing curb removal to provide for a landscaped island and pedestrian refuge and crossing areas. A proposed striped crosswalk within the area will highlight pedestrian movement and allow for safer crossing of pedestrians at the site. The inclusion of a railing with consecutive horizontal and vertical bars along the sidewalk in front of the Dunkin' Donuts, traversing from the stop sign to the internal pedestrian crosswalk referenced within the depictions of Concepts 3 and 4, PB-11 and 12, respectively, will further assist in separating pedestrian from vehicular traffic.

21. The Board accepts the reports of the Applicant's consultant and the Borough's consultant that the parking will be adequate at the site and will be appropriate for all present uses in the River Road parking area.

22. The Planning Board finds that the application, as proposed and as modified, will meet the present needs of the commercial development of the site, has a simple and logical pattern, which will allow for the safe movement of pedestrian/vehicular traffic; and

WHEREAS, the Board finds that the granting of the amended site plan approval, inclusive of the change in use, will not be a detriment to the public or result in a substantial impairment to the intent and purposes of the Zone Plan and Zoning Ordinances;

NOW, THEREFORE, BE IT RESOLVED that the Planning Board of the Borough of Fair Haven hereby approves the application for amended site plan/change in use for the property located at Block 32, Lot 2, subject to the following conditions:

- A. Publication by the Applicant of a notice of this decision in the official newspaper serving the Borough of Fair Haven and return of proof of publication to the Secretary of the Planning Board.
- B. Payment of all taxes and assessments to date. No building permits or certificates of occupancy are to be issued until proof is furnished to the Secretary of the Planning Board that there are no taxes or assessments due or delinquent on the property in question.
- C. The Applicant agrees to construct the improvements in accordance with the approvals granted and in a manner consistent with the Board's findings of fact.
- D. Applicant shall submit a plan detail depicting the rail type, striping of the fire lane, proposed signage specific to "no stopping or standing", "stop" sign, "egress only", "no ingress" for the Borough Engineer's review prior to placement of the same.
- E. Applicant agrees to resubmit site plan specifically depicting the extension of the railing placement and crosswalk areas, final design for the proposed landscape areas and pedestrian refuge, providing details for the same concerning construction and landscaping materials.
- F. The Applicant shall comply with any and all of the requirements of the Borough of Fair Haven and/or government subdivisions as set forth in the laws,

ordinances or regulations and will obtain any permits or approvals required thereunder.

G. Prior to the commencement of construction, the Applicant shall post performance guarantees and inspection fees in a form and in amounts recommended by the Borough Engineer and Borough Attorney and thereafter approved by the governing body to ensure that the provision of the work and placement of all utilities, landscaping, sidewalks, curbs, handicapped drop curbs for sidewalks, parking, sewer/water lines and mains, drains, storm water improvements, hydrants and/or other improvements to the area and/or of a similar kind associated with the project and/or removal of existing structures and/or facilities are provided for. Said performance guarantees are to be forfeited in the amount of the cost incurred, in the event the work and/or improvements are not satisfactorily completed.

H. Exterior façade shall be constructed and placed in a manner consistent with the Applicant's approvals and as set forth in the revised submissions of the Applicant as referenced hereinabove.

I. The Applicant shall submit an Affidavit of Compliance showing the condition that each document satisfies.

J. If any agency having jurisdiction over the project grants a waiver or a variance to the Applicant that affects the approvals granted herein, and/or is inconsistent with the Board's findings of fact and/or conditions of approval, then the Board shall have the right to review such waiver or variance as it relates to the approval and modify approvals granted hereinabove.

K. The Applicant shall comply with all the conditions and restrictions and approvals and findings of fact set forth in the paragraphs hereinabove; each being deemed a specific condition of the Board's approval.

BE IT FURTHER RESOLVED that a copy of this Resolution certified by the Secretary of the Planning Board to be a true copy to be forwarded to the Borough Clerk, the Borough Construction Official, the Borough Engineer, the Borough Tax Collector, the Borough Tax Assessor, the Water and Sewer Department and the Borough Attorney and the Applicant herein;

BE IT FURTHER RESOLVED that this Resolution be and herewith is effective
on September 17, 2019.

The foregoing Resolution was offered by

and seconded by

and adopted by a roll call vote:

In Favor:

Opposed:

Abstained:

Ineligible:

Absent:

The foregoing is a true copy of a Resolution adopted by the Planning Board of the
Borough of Fair Haven on this 17th day of September, 2019.