

HEROLD LAW, P.A.

Robert F. Simon, Esq. (009461992)
25 Independence Boulevard
Warren, New Jersey 07059
Telephone: (908) 647-1022
Attorneys for Plaintiffs

JUSTINO GONZALEZ and STACEY JOY FOX,

Plaintiffs,

vs.

TOWNSHIP OF WEST WINDSOR,
TOWNSHIP OF WEST WINDSOR
PLANNING BOARD, BRIDGE POINT
WEST WINDSOR, LLC, and
CLARKSVILLE CENTER LLC,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MERCER COUNTY

DOCKET NO.: MER-L-

CIVIL ACTION

**COMPLAINT IN LIEU OF
PREROGATIVE WRITS**

Plaintiffs, JUSTINO GONZALEZ and STACEY JOY FOX (together, “Plaintiffs”), by way of Complaint against Defendants, the TOWNSHIP OF WEST WINDSOR (the “Township”), the TOWNSHIP OF WEST WINDSOR PLANNING BOARD (the “Board”), BRIDGE POINT WEST WINDSOR, LLC (the “Applicant”) and CLARKSVILLE CENTER LLC (the “Owner”) (collectively, “Defendants”), say:

NATURE OF ACTION

1. This action in lieu of prerogative writs challenges the Board’s June 29, 2022 arbitrary, capricious, unreasonable, and unlawful approval of Applicant’s Planning Board application No. PB 21-15 (the “Application”), requesting from the Board Preliminary and Final Major Subdivision approval, Preliminary and Final Major Site Plan approval (Phase I) and Preliminary Major Site Plan approval (Phase II), including waiver relief.

2. Applicant seeks to develop seven warehouse and distribution center buildings (with a total combined area of 5,563,117 sq. ft.) on 539 acres of real property located near the southeasterly corner of the intersection of Route 1 and Quakerbridge Road (County Route 533), and bisected by Clarksville Road (County Route 638) in the Township of West Windsor, County of Mercer, New Jersey, and designated on the Official Tax Map of the Township of West Windsor as Block 8, Lots 1, 2, 3, 12, 16, 20, 28, 32.01, 39, 40, 41, 45, 46, 47, 49, and Block 15.14, Lots 18, 19, 20, and 22 (collectively, the “Property”).

3. This action also challenges the Board’s November 2, 2022 adoption of a memorializing resolution approving the Application (the “Resolution”). See Resolution of Approval for Application PB 21-15, a true and accurate copy of which is attached hereto as **Exhibit “A”**.

4. Plaintiffs also challenge Township Ordinance 2020-25, which created the requirements of the Planned Commercial District (the “PCD Zone”), which was inappropriately promulgated in part due to the settlement of litigation surrounding the Township’s obligation to provide low and moderate income housing.

JURISDICTION

5. This Court has subject matter jurisdiction over Plaintiffs’ claims in this Complaint as all real property at issue is located wholly within the State of New Jersey, County of Mercer, and pursuant to the Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq. (the “MLUL”) and New Jersey Court Rule 4:69.

THE PARTIES

6. Plaintiff, JUSTINO GONZALEZ, is an individual, resident and owner of real property located at 89 Clarksville Road, West Windsor, New Jersey (depicted on the West Windsor Tax Map as Block 8, Lot 37 and Block 94, Lot 3).

7. Mr. Gonzalez also is the owner of real property located at 91 Clarksville Road, West Windsor, New Jersey (depicted on the West Windsor Tax Map as Block 8, Lot 38).

8. Plaintiff, STACEY JOY FOX, is an individual and resident of property located at 29 Berrien Avenue, West Windsor, New Jersey (depicted on the West Windsor Tax Map as Block 74, Lot 40).

9. Defendant, TOWNSHIP OF WEST WINDSOR, including the Township Council, the Mayor, Deputy Mayor, Township Manager, Council Members, and other municipal officials thereof (individually and collectively, the “Council” or the “Township”), is a municipal corporation of the State of New Jersey, having offices at 271 Clarksville Road, West Windsor, New Jersey.

10. Defendant, TOWNSHIP OF WEST WINDSOR PLANNING BOARD, is a municipal agency constituted by the Township of West Windsor pursuant to the MLUL, with offices at 271 Clarksville Road, West Windsor, New Jersey.

11. Defendant, BRIDGE POINT WEST WINDSOR, LLC, is, upon information and belief, a Delaware limited liability company, with an address of 9525 West Bryn Mawr Avenue, Suite 700, Rosemont, IL, and the proposed developer of the Property.

12. Defendant, CLARKSVILLE CENTER, LLC, is upon information and belief, a New Jersey limited liability company, with an address of 90 Woodbridge Center Drive #600, Woodbridge, New Jersey, and the owner of the Property.

THE TOWNSHIP'S AFFORDABLE HOUSING OBLIGATIONS

13. Pursuant to In re N.J.A.C. 5:96 and 5:97, 221 N.J. 1 (2015) (Mount Laurel IV), the Township, on or about July 2015, filed a declaratory action titled I/M/O Declaratory Judgment Action of Township of West Windsor, in Mercer County Superior Court, Law Division, Docket No. MER-L-1561-15 (the “Township DJ Action”), seeking, among other things, a judicial declaration that the Township’s Housing Element and Fair Share Plan satisfies its “fair share” of the regional need for low and moderate income housing pursuant to the Mount Laurel doctrine.

14. Thereafter, the Township apparently entered into a settlement agreement with Fair Share Housing Center (“FSHC”), the terms of which purportedly satisfy its “fair share” of the regional need for low and moderate income housing pursuant to the Mount Laurel doctrine (the “Settlement Agreement”).

15. The Township DJ Action was thereafter appealed in a matter titled I/M/O The Township of West Windsor (Mount Laurel Declaratory Judgement Action), Docket No. A- 005412-18 (the “Appeal”), challenging the terms of the Settlement Agreement and confirming court orders in the Township DJ Action, including:

- The Township’s court approved settlement agreement with the FSHC following a Settlement/Fairness Hearing, through which the Township and FSHC stipulated to the Township’s Housing Element and Fair Share Plan in satisfaction of the Township’s constitutional affordable housing obligation; and
- The Township’s Final Judgment of Immunity and Repose from Builder’s Remedy suits.

THE TOWNSHIP'S CONCURRENT ZONING LITIGATION

16. In a separate action titled Atlantic Realty Development Corporation (f/k/a Princeton Land LLC) v. The Mayor and Council of the Township of West Windsor *et al*, Docket No. MER-L-1947-18 (the “Zoning Litigation”), the Owner’s predecessor in title challenged the Township’s failure to rezone and/or approve a residential development on certain parcels of its property.

THE TOWNSHIP'S ZONING ORDINANCE AMENDMENTS

17. In furtherance of the Appeal of the Township DJ Action and the Zoning Litigation, the parties to said actions entered into a Stipulation of Settlement and Consent Order (“SCO”), a true and accurate copy of which is attached hereto as **Exhibit “B”**, wherein, the Appeal of the Township’s DJ Action and the Zoning Litigation would be dismissed in exchange for the Township introducing and adopting proposed zoning amendments for the Property, in accordance with a “concept plan” for the Property, permitting warehouse and distribution center use thereon. See Exhibit “B”.

18. On or about November 30, 2020, the Township Council introduced on First Reading Ordinance 2020-25, titled, “An Ordinance to Amend and Supplement Chapter 200 of the Code of the Township of West Windsor (1999) by Creating the Planned Commercial District (PCD)” (“Ordinance 2020-25”), and referred same to the Board pursuant to N.J.S.A. 40:55D-26a.

19. Ordinance 2020-25 proposed to amend the Township of West Windsor Code (the “Code”) by: (a) adding new definitions to Code § 200-4; (b) amending Code § 200-143 (Zoning Map) to create and identify the boundaries of the PCD Zone; (c) creating Code § 200-207.3 to specify use regulations for the PCD Zone; and (c) creating Code § 200-207.4 to specify bulk and area regulations for the PCD Zone.

20. On or about December 9, 2020, the Board found Ordinance 2020-25 to not be inconsistent with the Township's Master Plan.

21. On or about December 14, 2020, the Council held a public hearing regarding Ordinance 2020-25, and adopted same.

THE APPLICANT'S PROPOSAL

22. In or about November 2021, purportedly in furtherance of the SCO and Ordinance 2020-25, the Applicant submitted the Application to the Board, seeking the following relief:

- Preliminary and Final Major Subdivision Approval, involving the consolidation of the twenty lots comprising the Property, then subdivision into eleven lots to accommodate first Applicant's plan to construct seven warehouse and distribution center buildings (with a combined floor area of 3,010,099 sq. ft.), and eventually, retail and commercial buildings along the frontage of U.S. Route 1 and Quakerbridge Road.
- Preliminary and Final Major Site Plan Approval for Phase I, consisting of the construction of new roads and utilities, three warehouse and distribution center buildings with a combined floor area of 3,010,099 sq. ft., and stormwater management facilities; and
- Preliminary Major Site Plan Approval for Phase II, consisting of the construction of four additional warehouse and distribution center buildings with a combined floor area of 2,553,018 sq. ft., and stormwater management facilities.

23. The Applicant sought the following design exceptions and waivers as part of the Application:

- Parking

- From Section 200-28D(2)(b), requiring a waiver to exceed the required off-street parking and loading requirements, or 1,754 spaces, whereas 2,201 parking spaces (including 200 banked spaces) are proposed;
- From Section 200-27D(l), permitting 147 loading bays, whereas 910 loading bays are proposed;
- Signage
 - From Section 200-32B(S)(c), which permits a maximum size of 2 s.f. for instructional signage, whereas instructional signage of 12 s.f. is proposed;
 - From Section 200-32B(ll)(b), which permits a maximum height of eight inches for street address signage, whereas street address signage with a height of 24 inches is proposed;
 - From Section 200-32B(3)(b), which permits a maximum sign area, including structure, of 48 s.f. for monument signs, whereas monument signage of 60 s.f., including structure, is proposed;
 - From Section 200-32B(3)(c), which permits a maximum sign height, including structure and sign area, of four feet, whereas monument signage 16 feet high, including structure and sign area, is proposed;
- Landscaping
 - From Section 200-13C(3)(e), requiring trees of five or more inches in caliper to be located and identified, whereas such trees are not being identified;
 - From Section 200-91P(5)(b)[4], requiring one 4-inch caliper tree for every 40 linear feet of building perimeter for buildings over 10,000 s.f. to be

planted within 75 feet of the building, whereas 4-inch caliper trees are proposed to be planted within 100 feet of the building;

- Storm Water Management
 - From Section 200-91P(4)(a)[1][a], which requires stormwater detention areas to be graded "creatively to blend into the surrounding landscape and imitate a natural depression with an irregular edge," whereas the proposed landscaping design does not conform strictly with this requirement;
 - From Section 200-207.4U(7), which requires that "suitably landscaped and bermed stormwater basins" may be located within any yard setbacks or landscaped buffers provided that a maximum of 50% of the basin may be located within the buffer area, whereas eight stormwater basis located entirely within a buffer area are proposed;
- Lighting
 - From Section 200-29G(l), requiring all parking areas to be lit to provide a minimum of 3.0 footcandles at driveway intersections with main roads and a total average illumination of 0.5 footcandle throughout the parking area, whereas an average light intensity for the parking areas of between 1.7 and 2.0 footcandles for passenger car parking, and between 2.2 and 2.4 for truck parking is proposed;
 - From Section 200-31K(l), requiring light levels in parking lots to be an average of 0.5 footcandles throughout, whereas average illumination of passenger parking areas is proposed to be between 1.7 and 2.0 footcandles, with 0.5 footcandles being the minimum spot illumination, and average

illumination of truck parking areas is proposed to be between 2.2 to 2.4 footcandles, with 0.5 being the minimum spot value;

- From Section 200-31K(2), requiring light levels at intersections to be 3.0 footcandles, whereas the proposed average light levels at intersections range from 3.1 to 4.4 footcandles.
- From Section 200-31K(3), requiring no more than a 1.0 intensity in footcandles at property lines, whereas greater intensity in footcandles at property lines is proposed at driveway intersections with Clarksville Road.

24. The Applicant sought the following submission waivers as part of the Application:

- Subdivision Checklist
 - From Section 200-53C(l) (partial waiver), which requires a key map at a scale not smaller than 1" = 1,000', showing the relationship of the entire tract to the neighborhood at least 1,000 feet beyond its boundaries, whereas a map at a scale of 1" = 2,000' was provided;
 - From Section 200-53C(4)(a) (temporary waiver), which requires at least two permanent bench marks to be established for each 50 acres of the tract to be subdivided;
 - From Sections 200-53C(19) and (23), requiring submission of a New Jersey Department of Environmental Protection (NJDEP or DEP) Letter of interpretation indicating the presence or absence of freshwater wetlands on the Site;

- From Section 200-54C(10)(partial waiver), requiring final construction plans showing proposed utility layouts and connections to existing or proposed utility systems;
 - From Section 200-54C(11)(a)(partial waiver), requiring a final drainage plan;
 - From Section 200-54C(12)(partial waiver), requiring a Soil Erosion Plan to be submitted;
 - From Section 200-54C(13)(a) and (b)(partial waivers), requiring a proposed grading plan to be submitted;
 - From Section 200-54C(14)(partial waiver), requiring a copy of the preliminary approval resolution to be provided; and
 - From Section 200-54C(18)(a) and (b)(partial waivers), requiring an as-built lot grading plan to be submitted.
- Site Plan Checklist
 - From Section 200-14C(1)(a), requiring the approved preliminary site plan to be submitted;
 - From Section 200-14C(1)(b)[1], requiring final plans to include construction details specified at the time of preliminary approval; and
 - From Section 200-14C(1)(b)[5], requiring a final landscape plan substantially conforming to the approved preliminary landscape plan to be submitted.
25. The Application was heard before the Board on May 18, 2022, May 25, 2022, June 1, 2022, and June 29, 2022, at which time the Board approved the Application.

26. The Resolution of Approval of the Application (the “Resolution”) was adopted on November 2, 2022, with notice of same being published on or about November 9, 2022.

COUNT I

**THE TOWNSHIP COUNCIL FAILED TO PROVIDE ALL REQUIRED NOTICES OF
ORDINANCE 2020-25, LACKED JURISDICTION TO HOLD HEARINGS OR VOTE
ON THE ADOPTION OF ORDINANCE 2020-25, WHICH ALSO RESULTED IN
DEPRIVING PROPERTY OWNERS OF DUE PROCESS.**

27. Plaintiffs repeat and re-allege the allegations of the preceding paragraphs of the Complaint as if set forth at length herein.

28. The Township failed to provide all required notices pursuant to N.J.S.A. 40:55D-62.1 prior to holding hearings on Ordinance 2020-25.

29. N.J.S.A. 40:55D-62.1 requires that individual mailed notice “of a hearing on an amendment to the zoning ordinance proposing a change to the classification or boundaries of a zoning district” must be provided to all owners of real property within 200 ft of the District’s boundaries.

30. Ordinance 2020-25 proposed a change to the boundaries of a zoning district because it purported to create a new zoning district out of a portion of the ROM-1 zoning district.

31. The creation of the PCD Zone resulted in new zone boundaries, thereby requiring individual mailed notice under N.J.S.A. 40:55D-62.1.

32. Ordinance 2020-25 also proposed a change to the classification of the zoning district.

33. This is most apparent by the fact that Ordinance 2020-25 purported to re-zone the Property from the ROM-1 Zone, which is classified as one of the Township’s “Research / Office

/ Manufacturing” Districts, into the PCD Zone, classified as one of the Township’s “Business” Districts.

34. West Windsor Code Chapter 200, Part 4 (“Zoning”) separates the Township’s Zoning districts into four different classifications:

- Residence Districts;
- Business Districts;
- Research/Office/Manufacturing, Research/Office and Research and Development Districts; and
- Educational Districts.

35. Each of these classifications has its own Article in Part 4 of the Land Use Chapter of the Code, setting forth the use and bulk regulations for that classification’s zoning districts. See Code Chapter 200, Articles XXVII through XXX, respectively.

36. The ROM-1 Zone is classified as a “Research / Office / Manufacturing” district (Article XXXIX), and the PCD Zone is classified as a “Business” district (Article XXVII).

37. Given Ordinance 2020-25 rezoned property located in a Research / Office / Manufacturing zoning district into a newly created zone in a Business zoning district, the Township Code itself makes it evident that Ordinance 2020-25 resulted in a change in the classification of the zone.

38. The fact Ordinance 2020-25 changed the classification of the Zone is also evident from the changes it implemented to the uses permitted in the Zone.

39. Ordinance 2020-25 purported to permit several new principal uses which were previously prohibited, including, but not limited to warehousing and distribution centers.

40. The ROM-1 district does not permit distribution centers as principal uses, accessory uses, or conditional uses under any circumstances. See Code § 200-209.

41. The ROM-1 district does not permit warehousing as permitted uses or conditional uses under any circumstances. See id.

42. The sole and limited circumstances when warehousing is permitted in the ROM-1 district, is as an accessory use, but only to the limited extent that “Warehouse facilities and wholesale storage [are used] within a completely enclosed building, the latter being incidental and accessory to a permitted or conditional use.” See id.

43. As a result of the above, and except for the limited circumstances in which warehousing is an accessory use to a different permitted use, both warehousing and distribution centers are prohibited uses in the ROM-1 Zone, and therefore were prohibited at the Property prior to Ordinance 2020-25. See Code § 200-145 (A) (“Any use not permitted by this Part 4 shall be deemed to be prohibited.”)

44. In addition, numerous other previously prohibited uses at the Property became permitted uses through Ordinance 2020-25, including:

- Finishing and assembly of products;
- Personal service establishments;
- Taverns offering alcoholic beverages for sale and consumption on the premises;
- Brew pubs;
- Fast food restaurants with or without drive- through lanes;
- Gas stations in conjunction with a convenience store and/or vehicle wash;
- Performing art facilities;
- Legitimate theaters;

- Motion-picture theaters;
- Cultural facility buildings or structures;
- Senior day care centers;
- Medical offices;
- Urgent care medical facilities;
- Outpatient surgical facilities;
- Breweries;
- Wineries;
- Distilleries;
- Pet day care facilities;
- Mixed use planned developments pursuant to Section 200- 209A.(8), except for affordable housing; and
- A community landmark sign serving as a gateway to the community and which may include an electronic sign with changeable type, which shall display information regarding municipal, civic, and community events as well as emergency messaging. It may also display on-premises and off-premises advertising.

See Ordinance 2020-25 and Code § 200-209.

45. Ordinance 2020-25's addition of numerous permitted uses in the PCD Zone resulted in a change in the basic character of the Zone, and thereby resulting in a change in the zoning "classification" of the Property for the purposes of N.J.S.A. 40:55D-62.1.

46. N.J.S.A. 40:55D-62.1 requires individual mailed notices to be provided to all affected property owners or property owners within 200 feet of the affected property, at least 10

days prior to any hearing on a proposed zoning ordinance that would change the boundaries or classification of that zone.

47. Despite changing both the zoning classification and boundaries of zone, the Township failed to send the individual mailed notices to property owners, thereby resulting in a violation of N.J.S.A. 40:55D-62.1.

48. Upon information and belief, the public notices published by the Township upon First and Second Readings were improperly and illegally vague.

49. Upon information and belief, the public notices published by the Township upon First and Second Readings were materially defective because they failed to inform the public of the nature of the matters to be considered.

50. Upon information and belief, the public notices published by the Township upon First and Second Readings failed to meet the minimum requirements for public notice as set forth under the MLUL.

51. Given the Council failed to provide all required notices under the MLUL, it was deprived of jurisdiction to hold hearings on Ordinance 2020-25.

52. The failure to provide all statutorily required notices to property owners is an issue of constitutional magnitude, because this failure was a violation of the property owners' constitutional rights to due process.

53. It is manifest that the interest of justice requires an enlargement of time within which to bring this action challenging the adoption of Ordinance 2020-25, for reasons including but not limited to substantial and novel constitutional questions raised that affect due process, and an important public interest raised which requires adjudication or clarification.

54. Ordinance 2020-25, permitting warehouse and distribution center use in the PCD Zone, was not based on a proper, independent investigation or deliberations in accordance with law, including the MLUL, the Code and the Township Master Plan.

55. As such, the adoption of Ordinance 2020-25 without jurisdiction was arbitrary, capricious, unreasonable, contrary to law, *ultra vires*, invalid, and should be voided by this Court.

WHEREFORE, Plaintiffs demand judgment against the Defendants as follows:

- a. Finding that the Township's actions concerning the adoption of Ordinance 2020-25 were arbitrary, capricious, unreasonable, *ultra vires*, and unlawful;
- b. Invalidating Ordinance 2020-25 as null, void, and without effect;
- c. Finding that the Board's actions concerning the approval of the Application were arbitrary, capricious, unreasonable, *ultra vires*, and unlawful;
- d. Invalidating the approval of the Application and the Resolution as null, void, and without effect;
- e. Enjoining and restraining Defendants from taking any further action with regard to the development of the Property in furtherance of the Board's approval of the Application;
- f. Awarding attorneys' fees, costs of suit and interest; and
- g. Awarding any and all such other relief this Court deems equitable and just.

COUNT II

ORDINANCE 2020-25 WAS IMPROPERLY ADOPTED, IS INCONSISTENT WITH THE SCO, AND MUST THEREFORE BE SET ASIDE.

56. Plaintiffs repeat and re-allege the allegations of the preceding paragraphs of the Complaint as if set forth at length herein.

57. Ordinance 2020-25 was inappropriately adopted inconsistent with the terms of the SCO, including the concept plan incorporated therein.

58. The SCO improperly considered the Township's Affordable Housing obligations as a justification to adopt Ordinance 2020-25 to permit Applicant and Owner to develop the Property without the need for variance relief.

59. The Property is not appropriate for warehouse and distribution center use.

60. Ordinance 2020-25 was improperly adopted without evidence that the Property was appropriate for warehouse and distribution center use.

61. There was no zoning or planning justification to adopt Ordinance 2020-25 to permit warehouse and distribution center development at the Property.

62. The adoption of Ordinance 2020-25 violated N.J.S.A. 40:55D-62, which requires zoning ordinances to be consistent with or designed to effectuate a comprehensive plan for development of land within a municipality.

63. Ordinance 2020-25 was not consistent with the existing Land Use Element and Housing Element of the Township's Master Plan.

64. In adopting Ordinance 2020-25, the Township failed to provide adequate reasons for acting inconsistent with, and not designed to, effectuate the Land Use Element of the Township's Master Plan.

65. Ordinance 2020-25 does not advance the health, safety and welfare of the Township's residents and property owners.

66. Ordinance 2020-25 failed to take into consideration the character of the Property and its particular suitability for particular uses or to encourage the most appropriate use of land.

67. As such, the adoption of Ordinance 2020-25 was arbitrary, capricious, unreasonable, contrary to law, *ultra vires*, and invalid, and should be voided by this Court.

68. It is manifest that the interest of justice requires an enlargement of time within which to bring this action challenging the adoption of Ordinance 2020-25, for reasons including but not limited to substantial and novel constitutional questions raised that affect due process, and an important public interest raised which requires adjudication or clarification.

WHEREFORE, Plaintiffs demand judgment against the Defendants as follows:

- a. Finding that the Township's actions concerning the adoption of Ordinance 2020-25 were arbitrary, capricious, unreasonable, *ultra vires*, and unlawful;
- b. Invalidating Ordinance 2020-25 as null, void, and without effect;
- c. Finding that the Board's actions concerning the approval of the Application were arbitrary, capricious, unreasonable, *ultra vires*, and unlawful;
- d. Invalidating the approval of the Application and the Resolution as null, void, and without effect;
- e. Enjoining and restraining Defendants from taking any further action with regard to the development of the Property in furtherance of the Board's approval of the Application;
- f. Awarding attorneys' fees, costs of suit and interest; and
- g. Awarding any and all such other relief this Court deems equitable and just.

COUNT III

THE ADOPTION OF ORDINANCE 2020-25 WAS INVALID BECAUSE IT RESULTED FROM AN IMPROPER AND ILLEGAL *QUID PRO QUO*.

69. Plaintiffs repeat and re-allege the allegations of the preceding paragraphs of the Complaint as if set forth at length herein.

70. The Township entered into an agreement with the Owner, its predecessor in title, and/or the Applicant to permit warehousing at the Property in exchange an agreement not to construct affordable housing at the Property.

71. The agreement to re-zone the Property allowed Applicant to side-step the requirement to obtain significant variance and other relief necessary for the construction of its proposed warehouse and distribution center buildings.

72. The public was not provided with any individual notice of the settlement of any litigation that resulted in the introduction and adoption of the Ordinance

73. The construction of over 5.3 million square feet of warehouse and distribution center space bears no reasonable relationship to the Township's obligation to meet its affordable housing obligations.

74. There is no legal nexus between spot-zoning a single contiguous tract of land to permit construction of a seven warehouse and distribution center buildings and the Township's constitutional obligation to affordable housing and protect low and moderate-income households under state and federal law.

75. Providing favorable non-residential zoning requirements in exchange for agreeing not to construct affordable housing amounts to an illegal *quid pro quo*.

76. The agreement between the Township and Applicant represents an impermissible and illegal *quid pro quo* to award Applicant and Owner with favorable zoning requirements at the Property in exchange for agreements unrelated to the development of the Property.

77. Alleging violations of the Township's constitutional affordable housing obligations via a builder's remedy lawsuit to extract favorable non-residential zoning requirements subverts the intent and purpose of proper zoning, and is contrary to law.

78. The adoption of Ordinance 2020-25 by the Council was arbitrary, capricious, unreasonable, and *ultra vires*.

79. It is manifest that the interest of justice requires an enlargement of time within which to bring this action challenging the adoption of Ordinance 2020-25, for reasons including but not limited to substantial and novel constitutional questions raised that affect due process, and an important public interest raised which requires adjudication or clarification.

WHEREFORE, Plaintiffs demand judgment against the Defendants as follows:

- a. Finding that the Township's actions concerning the adoption of Ordinance 2020-25 were arbitrary, capricious, unreasonable, *ultra vires*, and unlawful;
- b. Invalidating Ordinance 2020-25 as null, void, and without effect;
- c. Finding that the Board's actions concerning the approval of the Application were arbitrary, capricious, unreasonable, *ultra vires*, and unlawful;
- d. Invalidating the approval of the Application and the Resolution as null, void, and without effect;
- e. Enjoining and restraining Defendants from taking any further action with regard to the development of the Property in furtherance of the Board's approval of the Application;
- f. Awarding attorneys' fees, costs of suit and interest; and

g. Awarding any and all such other relief this Court deems equitable and just.

COUNT IV

ORDINANCE 2020-25 CONSTITUTES ILLEGAL SPOT ZONING.

80. Plaintiffs repeat and re-allege the allegations of the preceding paragraphs of the Complaint as if set forth at length herein.

81. The PCD Zone is comprised of multiple lots, all under common ownership by Defendant Owner, and all part of the same development plan from Applicant.

82. The Application seeks Major Subdivision Approval to consolidate all of the lots included into the PCD Zone into a single lot, prior to subdividing into separate lots.

83. Ordinance 2020-25 is designed to benefit only the Applicant and/or the Owner, who together seek to develop the Property as part of the same venture.

84. Ordinance 2020-25 improperly and illegally singled out the Property for rezoning under the guise of a settlement agreement related to the Township's affordable housing obligations and the SCO, and therefore constitutes impermissible "spot zoning" and must be set aside.

85. Ordinance 2020-25 and the process by which it was adopted, are contrary to law, including, but not limited to, the provisions and requirements of the MLUL.

86. The Township bestowed illegal favoritism on Applicant and Owner by improperly manipulating the public process that led to the adoption of Ordinance 2020-25.

87. The adoption of Ordinance 2020-25 was intended to improperly bestow a private benefit upon Applicant and Owner, and was arbitrary, capricious, unreasonable, unconstitutional, and contrary to law.

88. Ordinance 2020-25 improperly treats the Property more favorably than other properties in the Township.

89. The changes to the zoning requirements for the Property include, but are not limited to the following loosening of restrictions to accommodate Applicant and Owner's proposed development of the Property:

- Allowing Warehousing and Distribution Centers as permitted principal uses, and thereby avoiding the need for d1 use variance relief;
- Eliminating the maximum floor area ratio for the Property (formerly 0.22 for one-story buildings and 0.3 for multistory buildings), and thereby avoiding the need for d4 FAR variance relief;
- Eliminating the minimum lot area requirement;
- Reducing the minimum lot frontage requirement from 350 ft to 300 ft;
- Reducing the minimum lot width requirement from 400 ft to 300 ft;
- Reducing the minimum front yard requirement from 125 ft with a 75 ft landscape area, to varying distances from 50 ft to 100 ft;
- Reducing the minimum side yard size from 40 ft to 25 ft (for buildings less than or equal to 40 ft tall);
- Reducing the minimum yard size increase for yards abutting residential districts from 35 ft to 25 ft;
- Reducing the minimum setback 500 ft to 300 ft (for warehouse and distribution facilities along US Rt 1 or Quakerbridge Rd), and eliminating the minimum setback requirement for other buildings;
- Eliminating or revising numerous other requirements related to setbacks, berthing, and landscaping;
- Increasing the maximum improvement coverage from 50% to 70%;

- Increasing the maximum building height for warehousing and distribution facilities from 45 ft to 60 ft;
- Permitting car parking and trailer parking in the front, rear, and side yard setbacks;
- Setting new minimum numbers of parking spaces required;
- Eliminating the requirement for acceleration and deceleration lanes in certain locations;
- Permitting impervious cover within 200 ft of certain streams, ditches and watercourses;
- Permitting the removal of trees; and
- Eliminating the requirement for bicycle parking.

90. Ordinance 2020-25 does not maintain a relationship of mutual benefit among different land uses.

91. Ordinance 2020-25 does not serve the common good or the general welfare.

92. Ordinance 2020-25 is not compatible with and does not further a legitimate comprehensive land use scheme or plan for the zoning of the Township.

93. Ordinance 2020-25 does not serve the purposes of zoning set forth in the MLUL.

94. In adopting Ordinance 2020-25, the Township failed to provide adequate reasons in a resolution for acting inconsistent with, and in a manner not designed to effectuate the Land Use Element of the Master Plan.

95. The adoption of Ordinance 2020-25 constitutes an example of improper favorable treatment of and accommodations to Applicant and Owner by the Township to the detriment of the surrounding neighborhood and the general welfare of the community.

96. The Township improperly demonstrated favoritism toward Applicant and Owner to the detriment of the public in adopting Ordinance 2020-25.

97. Ordinance 2020-25 was not drawn with reasonable consideration to the character of each district in the Township and its particular suitability for particular uses and to encourage the most appropriate use of land.

98. Ordinance 2020-25 constitutes illegal spot zoning.

99. The adoption of Ordinance 2020-25 was arbitrary, capricious, unreasonable, and contrary to law.

100. Ordinance 2020-25 is therefore void, of no effect, and invalid.

101. Ordinance 2020-25 is to be declared void and without effect.

102. It is manifest that the interest of justice requires an enlargement of time within which to bring this action challenging the adoption of Ordinance 2020-25, for reasons including but not limited to substantial and novel constitutional questions raised that affect due process, and an important public interest raised which requires adjudication or clarification.

WHEREFORE, Plaintiffs demand judgment against the Defendants as follows:

- a. Finding that the Township's actions concerning the adoption of Ordinance 2020-25 were arbitrary, capricious, unreasonable, *ultra vires*, and unlawful;
- b. Invalidating Ordinance 2020-25 as null, void, and without effect;
- c. Finding that the Board's actions concerning the approval of the Application were arbitrary, capricious, unreasonable, *ultra vires*, and unlawful;
- d. Invalidating the approval of the Application and the Resolution as null, void, and without effect;
- e. Enjoining and restraining Defendants from taking any further action with regard to the development of the Property in furtherance of the Board's approval of the Application;
- f. Awarding attorneys' fees, costs of suit and interest; and

g. Awarding any and all such other relief this Court deems equitable and just.

COUNT V

THE PLANNING BOARD'S CONSISTENCY REVIEW OF ORDINANCE 2020-25 AND APPROVAL OF THE APPLICATION VIOLATED PLAINTIFFS' CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

103. Plaintiffs repeat and re-allege the allegations of the preceding paragraphs of the Complaint as if set forth at length herein.

104. The Planning Board did not provide any meaningful opportunity for public participation during its consistency review of Ordinance 2020-25, because it failed to provide any opportunity for remote access to the hearing.

105. The Township regularly holds public meetings of the Township Council, the Planning Board, Zoning Board of Adjustment, plus eight Township Committees, Commissions, or agencies (Affordable Housing Committee, Agricultural Advisory Committee, Environmental Commission, Parking Authority, Recreation Commission, and Shade Tree Commission).

106. Ten of these eleven boards and agencies provided for remote public participation at their meetings during the pandemic via online services such as Zoom.

107. The sole exception not providing for remote public participation was the Planning Board, which required physical attendance at its meetings throughout the pandemic.

108. It is indisputable that the Planning Board had the capability to provide for remote public participation—given all ten of the Township's other agencies did so—but made a decision not to provide for remote public participation.

109. Ordinance 2020-25 was introduced on November 30, 2020.

110. On that date the Ordinance was referred to the Planning Board to determine consistency with the West Windsor Master Plan.

111. The Planning Board performed its consistency review of the Ordinance at its December 9, 2020 meeting.

112. This occurred at the height of the COVID-19 pandemic, and the meeting was held two days prior to the FDA's December 11, 2020 approval of the Pfizer/BioNTech vaccine.

113. The Board's decision not to permit remote public participation at its meetings unfairly required members of the public (including the elderly, immunocompromised, and people at high risk of COVID infection) to break quarantine and attend Planning Board meetings in person in order to participate in those hearings, including the Board's December 9, 2020 consistency review of Ordinance 2020-25.

114. The decision of the Board not to permit remote public participation at its December 9, 2020 consistency review of Ordinance 2020-25, when it was fully capable of doing so, deprived the public of a meaningful and realistic opportunity to participate in the consistency review, and in so doing violated the public's constitutional rights to procedural due process, substantive due process, and equal protection.

115. It should also be noted that although the December 9, 2020 hearing was supposed to have been recorded, the recording is not available online, even though most other Planning Board meetings are available.

116. The Board's violation of the public's constitutional rights in connection with Ordinance 2020-25's consistency review was arbitrary, capricious, unreasonable, and it makes the Board's determination of consistency with the Master Plan invalid, null, and void.

117. In light of the Board's deprivation of the public's constitutional rights of participating in the consistency review, the Council's December 14, 2020 adoption of Ordinance

2020-25 was arbitrary, capricious, unreasonable, and *ultra vires*, thereby requiring invalidation of Ordinance 2020-25.

118. In addition, the Council's December 14, 2020 adoption of Ordinance 2020-25 without having received a valid consistency review report was a violation of N.J.S.A. 40:55D-26, was arbitrary, capricious, unreasonable, and *ultra vires*, thereby requiring invalidation of Ordinance 2020-25.

119. It is manifest that the interest of justice requires an enlargement of time within which to bring this action challenging the adoption of Ordinance 2020-25, for reasons including but not limited to substantial and novel constitutional questions raised that affect due process, and an important public interest raised which requires adjudication or clarification.

WHEREFORE, Plaintiffs demand judgment against the Defendants as follows:

- a. Finding that the Township's actions concerning the adoption of Ordinance 2020-25 were arbitrary, capricious, unreasonable, *ultra vires*, and unlawful;
- b. Invalidating Ordinance 2020-25 as null, void, and without effect;
- c. Finding that the Board's actions concerning the approval of the Application were arbitrary, capricious, unreasonable, *ultra vires*, and unlawful;
- d. Invalidating the approval of the Application and the Resolution as null, void, and without effect;
- e. Enjoining and restraining Defendants from taking any further action with regard to the development of the Property in furtherance of the Board's approval of the Application;
- f. Awarding attorneys' fees, costs of suit and interest; and
- g. Awarding any and all such other relief this Court deems equitable and just.

COUNT VI

**THE BOARD'S APPROVAL OF THE APPLICATION WAS ARBITRARY,
CAPRICIOUS, UNREASONABLE, AND CONTRARY TO LAW.**

120. Plaintiffs repeat and re-allege the allegations of the preceding paragraphs of the Complaint as if set forth at length herein.

121. The Applicant failed to present the proofs required to establish entitlement to necessary exception relief, preliminary and final major subdivision relief, and both preliminary and final major site plan relief, for the Application under applicable law, including, *inter alia*, the MLUL and the Code.

122. The Application failed to obtain all necessary exception and variance relief required by law, including under the MLUL and the Code.

123. The Board improperly failed to consider testimony and evidence presented by members of the public and their experts prior to approving the Application.

124. Code § 200-207.3(a) sets forth the intent of the PCD, as follows:

The intent of the PCD is to support a wide variety of nonresidential uses to facilitate the redevelopment of the tract, while also ensuring that any such development will be complementary to the surrounding area, protect existing environmental constraints, minimize undue strain on the Township's community facilities, and avoid any substantial adverse impacts to the existing traffic and circulation patterns of Clarksville Road, Quakerbridge Road, and the US Route 1 corridor. Retail, service commercial, entertainment and hospitality uses are to be located along Quakerbridge Road and US Route 1 in order to maintain the commercial character of those corridors. Warehouse and distribution uses are encouraged within the remainder of the district. The PCD is also intended to promote an attractive comprehensive integrated design and encourage a high level of investment.

125. During the June 29, 2022 hearing on the Ordinance, Board Member Allen Schectel gave a statement on the record identifying that the proposed development of the Property does not promote a desirable visual environment, and criticizing the enormity of the proposed development,

including “the mass of the buildings, and the lack of varying setbacks, [and] the small spacing between buildings” and would present an unpleasant view.

126. The Board erred by failing to adequately or appropriately consider the visual impact of the proposed development, as well as the fact that it will not be complementary to the surrounding area.

127. The Applicant’s air quality study was materially deficient, including, but not limited to the fact that the study failed to consider the health impacts of increased diesel emissions on the residents of the Township.

128. The Board erred by failing to adequately or appropriately consider the deficiencies in the air quality study, and by failing to adequately or appropriately consider the ways in which the proposed development would not “protect existing environmental constraints”.

129. In his statement, Board Member Schectel identified substantial issues and inadequacies with the increased noise pollution caused by the development, including steep grade changes in the area near the Property which will add delays, congestion, and significant noise from trucks shifting gears and breaking, as well the fact that Applicant failed to appropriately evaluate impacts of noise pollution on two schools and local residents whose homes line the two-lane Clarksville Road where tractor trailers will be traveling 24/7.

130. The Board erred by failing to adequately or appropriately consider the noise pollution that would be generated by the proposed development.

131. As set forth in a letter dated July 26, 2022, the Watershed Institute analyzed the Application and determined it would significantly increase the risk of flooding in the area, including exacerbating existing problems, as well as its proximity to delineated flood hazard areas, and NJDEP’s proposed emergency rules which would raise design flood elevations by two feet.

132. The Board erred by failing to adequately or appropriately consider the increased risk of flooding resulting from the proposed development.

133. As indicated during public remarks on the Application, the New Jersey State Planning Commission proposed draft guidance on warehouse siting (which has since been finalized).

134. The draft guidance on warehouse siting estimates that a typical 1,000,000 sq. ft. warehouse has an average daily traffic rate of 1,740 trips.

135. The Application proposes constructing approximately 5,500,000 sq. ft. of warehouse and distribution center space.

136. Based on the draft guidance, this would result in an estimated 9,570 new truck trips per day traveling into and out of the Property.

137. Applicant's expert witness incorrectly testified only 4,000 - 4,100 total vehicle trips were estimated per day for the Property.

138. In addition to being inconsistent with the amount of warehousing space proposed, Applicant's proposed traffic impact studies are inconsistent with the number of parking spaces and loading docks proposed and are based on the proposed facilities operating at a very low rate of usage.

139. The Board erred by failing to adequately or appropriately consider the amount of truck traffic resulting from the proposed development.

140. The Board erred by failing to adequately or appropriately consider the risk that automobile accidents will increase substantially as a result of the increased level of truck traffic, and the danger that the Project will impose on the residents of the Township.

141. Applicant's proposed traffic projections also were based on the construction of the new Coleman Road, which would provide direct access to U.S. Route 1, despite the fact that Applicant is proposing construction to start prior to obtaining all required permits for the new road.

142. The Board erred by failing to adequately or appropriately consider the risk that Applicant may be unable to obtain permits for construction of the proposed new road, which permit denial would result in a massive increase in traffic on existing infrastructure.

143. The Board erred by failing to adequately or appropriately consider the risk that the Application does not avoid any substantial adverse impacts to existing traffic and circulation patterns of Clarksville Road, Quakerbridge Road, and the U.S. Route 1 corridor.

144. The Board erred by failing to adequately or appropriately consider the fact that no traffic impact studies were done regarding the intersections at the High School on Penn Lyle and Clarksville Road, at North Post and Clarksville Road, Meadow Road and Clarksville Road, all of which will see increased truck traffic resulting from the project.

145. The Board erred by failing to adequately or appropriately consider the fact that Applicant's traffic engineer failed to evaluate the traffic impact outside of peak periods.

146. The Board erred by failing to adequately or appropriately consider the fact that the Project fails to advance the purpose of zoning that the location and design of transportation routes which will promote the free flow of traffic while discouraging the location of facilities and routes that will result in congestion.

147. The Board failed to make sufficient findings of fact to justify its approval of a design waiver permitting 910 loading docks, where only 147 are permitted.

148. The Board improperly relied on contradictory testimony and evidence including that concerning onsite truck traffic, on the one hand accepting the Applicant's assertion of a low

projected truck traffic volume purely for the purpose of meeting the noise level regulation, and on the other hand projecting a much a higher traffic volume for the purpose of justifying the waiver relevant to the loading bay limit exceedance.

149. The Board failed to make sufficient findings of fact to demonstrate or establish its approval of the Application was based on sufficient evidence, as required under the MLUL and the Code.

150. The Board failed to properly consider and analyze whether the Application satisfied the legal requirements for exception relief under the MLUL and the Code.

151. The Board failed to properly consider and analyze whether the Application satisfied the legal requirements for major preliminary and final site plan approval.

152. The Board failed to properly consider the fact that, despite the fact that the PCD Zone was created specifically to meet the needs of the Applicant's proposed development, the Application required twelve design waivers, twelve submission waivers, and eighty-two conditions of approval, and that the sheer number of waivers and conditions of approval demonstrate that approval of the Application was palpably unreasonable, arbitrary, and capricious.

153. Given the failure of the Applicant to meet its burden of proof for exception relief, submission waivers, preliminary and final subdivision approval, and both preliminary and final site plan approval relief required for the Application, the Board erroneously granted the Application.

154. The Board's actions in granting the Application were arbitrary, capricious, unreasonable, contrary to law, and unsupported by the record of the Application before the Board.

155. As a result of the above, the Board's approval of the Application, as memorialized in the Resolution, was arbitrary and capricious, unreasonable, contrary to law, and the Resolution is null and void, and of no effect.

WHEREFORE, Plaintiffs demand judgment against the Defendants as follows:

- a. Finding that the Township's actions concerning the adoption of Ordinance 2020-25 were arbitrary, capricious, unreasonable, *ultra vires*, and unlawful;
- b. Invalidating Ordinance 2020-25 as null, void, and without effect;
- c. Finding that the Board's actions concerning the approval of the Application were arbitrary, capricious, unreasonable, *ultra vires*, and unlawful;
- d. Invalidating the approval of the Application and the Resolution as null, void, and without effect;
- e. Enjoining and restraining Defendants from taking any further action with regard to the development of the Property in furtherance of the Board's approval of the Application;
- f. Awarding attorneys' fees, costs of suit and interest; and
- g. Awarding any and all such other relief this Court deems equitable and just.

COUNT VII

APPLICANT'S FAILURE TO PROVIDE PROPER NOTICE DIVESTED THE BOARD OF JURISDICTION TO HOLD HEARINGS ON THE APPLICATION.

156. Plaintiffs repeat and re-allege the allegations of the preceding paragraphs of the Complaint as if set forth at length herein.

157. The Public Notice provided by Applicant of the hearings on the Application was materially defective because it failed to meet the minimum requirements for public notice as set forth under the MLUL.

158. Upon information and belief, Applicant's Public Notice was materially defective because it failed to inform the public of the nature of the matters to be considered.

159. Upon information and belief, Applicant's Public Notice was materially defective because it failed to identify all required relief and the identified relief sought.

160. Upon information and belief, Applicant's Public Notice was materially defective and failed to contain all information required by law.

161. The notice requirements of N.J.S.A. 40:55D-12 are jurisdictional, and failure to comply strictly with such requirements deprives a zoning board of its jurisdiction to hold hearings on an application.

162. Given the fact Applicant failed to comply with N.J.S.A. 40:55D-12, the Board lacked jurisdiction to hear the Application.

163. Despite Applicant's failure to provide the required public notice, and despite lacking jurisdiction, the Board nevertheless impermissibly held hearings on the Application on May 18, May 25, June 1, and June 19, 2022.

164. The actions of Board in holding the Hearings without the requisite notice being provided and without jurisdiction were arbitrary, capricious, and contrary to law.

165. Said lack of jurisdiction and actions of the Board rendered the Board's approval of the Application and enactment of Resolution as invalid, null, and void.

WHEREFORE, Plaintiffs demand judgment against the Defendants as follows:

- a. Finding that the Township's actions concerning the adoption of Ordinance 2020-25 were arbitrary, capricious, unreasonable, *ultra vires*, and unlawful;
- b. Invalidating Ordinance 2020-25 as null, void, and without effect;

- c. Finding that the Board's actions concerning the approval of the Application were arbitrary, capricious, unreasonable, *ultra vires*, and unlawful;
- d. Invalidating the approval of the Application and the Resolution as null, void, and without effect;
- e. Enjoining and restraining Defendants from taking any further action with regard to the development of the Property in furtherance of the Board's approval of the Application;
- f. Awarding attorneys' fees, costs of suit and interest; and
- g. Awarding any and all such other relief this Court deems equitable and just.

COUNT VIII

APPLICANT FAILED TO APPLY FOR AND OBTAIN ALL RELIEF REQUIRED FOR APPROVAL OF THE APPLICATION.

166. Plaintiffs repeat and reallege the allegations contained in the preceding paragraphs as if set forth at length herein.

167. Applicant failed to apply for all the relief required from the Code, the MLUL, and other applicable law for approval of the Application.

168. Applicant failed to obtain, and the Board failed to grant, any waiver or relief from Code § 200-27.D, which requires that the Township's Environmental Commission review the Applicant's Environmental Impact Statement for completeness.

169. Upon information and belief, Applicant failed to apply for additional relief not otherwise specified herein.

WHEREFORE, Plaintiffs demand judgment against the Defendants as follows:

- a. Finding that the Township's actions concerning the adoption of Ordinance 2020-25 were arbitrary, capricious, unreasonable, *ultra vires*, and unlawful;

- b. Invalidating Ordinance 2020-25 as null, void, and without effect;
- c. Finding that the Board's actions concerning the approval of the Application were arbitrary, capricious, unreasonable, *ultra vires*, and unlawful;
- d. Invalidating the approval of the Application and the Resolution as null, void, and without effect;
- e. Enjoining and restraining Defendants from taking any further action with regard to the development of the Property in furtherance of the Board's approval of the Application;
- f. Awarding attorneys' fees, costs of suit and interest; and
- g. Awarding any and all such other relief this Court deems equitable and just.

HEROLD LAW, P.A.
Attorneys for Plaintiffs

By: /s/ Robert F. Simon
Robert F. Simon

Dated: December 22, 2022

DESIGNATION OF TRIAL COUNSEL

Pursuant to Rule 4:25-4, Robert F. Simon, Esq. is hereby designated as trial counsel for Plaintiffs.

HEROLD LAW, P.A.
Attorneys for Plaintiffs

By: /s/ Robert F. Simon
Robert F. Simon

Dated: December 22, 2022

CERTIFICATION PURSUANT TO RULE 4:5-1

I hereby certify that there are no related matters currently pending in any Court of competent jurisdiction. I further certify that I know of no other parties who should be joined in this matter at the present time.

HEROLD LAW, P.A.
Attorneys for Plaintiffs

By: /s/ Robert F. Simon
Robert F. Simon

Dated: December 22, 2022

CERTIFICATION PURSUANT TO RULE 4:69-4

I hereby certify that all necessary transcripts of local agency proceedings in this case have been ordered.

HEROLD LAW, P.A.
Attorneys for Plaintiffs

By: /s/ Robert F. Simon
Robert F. Simon

Dated: December 22, 2022