SUPREME COURT OF NEW JERSEY

SHIPYARD ASSOCIATES, L.P.,	SUPREME COURT OF NEW JERSEY
	Docket No.
Plaintiff/Respondent,	App. Div. Doc. No. A-001085-17T3
vs.-	**NOTICE OF PETITION FOR CERTIFICATON**
CITY OF HOBOKEN,	
Defendant/Petitioner	Civil Action
and	Sat Below:
FUND FOR A BETTER and WATERFRONT HUDSON TEA BUILDINGS CONDOMINIUM ASSOC., INC.,	Hon. William E. Nugent, J.S.C. Hon. Susan Reisner, J.S.C. Hon. Hany A. Mawla, J.S.C.
Defendant-Intervenors/ Petitioners	

FUND FOR A BETTER WATERFRONT'S PETITION FOR CERTIFICATION

Renée Steinhagen, Esq.
Attorney ID #038691989
NEW JERSEY APPLESEED PILC
50 Park Place, Rm. 1025
Newark, New Jersey 07102
(973) 735-0523

Aaron Kleinbaum, Esq.
Attorney ID #002681991
EASTERN ENVIRONMENTAL
LAW CENTER
50 Park Place, Rm. 1025
Newark, New Jersey 07102
(973) 424-1166

Attorneys for Fund for a Better Waterfront

February 5, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

This matter arises directly from the flood waters submerging the coastline and streets of Hoboken as a result of Superstorm Sandy in late October 2012. The legal issue presented, also emerging from the presence of such waters, is primarily a statutory one that requires this Court's resolution: whether vested rights under the Municipal Land Use Law, ("MLUL"), N.J.S.A. 40:55D-49a, -52a preclude municipal enforcement of flood prevention regulations adopted after approval has been secured. The N.J. Supreme Court has never answered this question, which, due to the increasing frequency of dramatic effects caused by climate change, is likely to recur and should be addressed by this Court.

Defendant-Intervenor Fund for a Better Waterfront ("FBW"), a watch-dog advocacy organization seeking to protect Hoboken's waterfront, has participated in this litigation to support the validity, and underscore the importance, of Hoboken's Flood Damage Prevention Ordinances, Z-263 and Z-264. The organization, its members and numerous supporters are simply bewildered by the lower courts' deafness to the genuine safety issues addressed by these ordinances; a deafness, disbelief or skepticism that appears to underlie their respective decisions to **prohibit** the City from enforcing Z-263 and Z-264 against Shipyard Associates, L.P.'s ("Shipyard") proposed residential

construction on a pier jutting into the Hudson River (i.e., the "Monarch" project).

As early as 1926, the N.J. Supreme Court held:

> . . .{T]his court, when confronted with an ordinance passed in the valid exercise of power conferred upon the municipality [will] not disregard its existence and direct a permit to be granted . . . to erect a building. . ., although its erection will be a threat to public safety, merely for the reason that such ordinance was not passed until after the conclusion of the hearing before the board of adjustment and its action thereon.
> Rohrs v. Zabriskie, 102 N.J.L. 473, 475 (Sup. Ct. 1926)

Rohrs best articulates and reflects the common-law authority of a municipality to apply health or public safety ordinances to development projects, yet to be constructed though approved prior to the adoption of such measures. Such authority is recognized by states throughout the country, and FBW asserts that it is, in fact, embedded in the MLUL's provisions concerning vested rights. The Appellate Court implicitly disagreed, but failed to discuss such principle, let alone acknowledge it as an independent basis to justify application of Z-263 and Z-264 to the Monarch project.

Similarly, the Appellate Division did not give serious consideration to FBW's argument that the vested rights granted a developer pursuant to N.J.S.A. 40:55D-52a governing final site approvals incorporate the "zoning requirements applicable" to the relevant preliminary site approval previously granted, and

"all other rights conferred upon the developer pursuant" to N.J.S.A. 40:55D-49a, including the health and public safety limitation on such rights explicitly provided in Section 49a. Instead, the Panel casually noted that "even if section 52(a) were construed as implicitly including the exceptions set forth in section 49(a), appellants would not prevail in this case." (FBWa14)[1] Its reasoning rested on its interpretation of the term "modify" to mean "a change, revision or tweak" to the general terms of an approval, and not a "`revocation' of the approval in its entirety." Id. However, such a restrictive interpretation of N.J.S.A. 40:55D-49a defies the common-law prior to 1975, ignores the numerous provisions in the MLUL enshrining a municipality's power to act to promote the health and public safety, including N.J.S.A. 40:55D-10.5 (effective 2011), and is contrary to the mandates of Article IV, section 7, paragraph 11 of the New Jersey Constitution and the Home Rule Act, N.J.S.A. 40:42-4 requiring a court to construe the MLUL "most favorably" to the City of Hoboken. A municipality's authority to impose a public safety ordinance must rest on the severity of the hazard posed by a proposed development, not the extent of change to a previously granted approval that is required. The Appellate Court's finding that the "health and public safety" exception to

[1] The prefix "FBWa" refers to the appendix annexed to this petition; whereas, the prefix "Da" refers to the Appellant-Petitioner City of Hoboken's Appellate Division appendix.

vested rights applies only when minor "tweaks" are required turns the "do no harm" principle on its head, and renders it impotent to prevent serious threats to public safety, as is the case herein.

Similarly, the Appellate Division's failure to analyze the scope of N.J.S.A. 40:55D-10.5's "time of application" rule (supplanting municipal and judicial use of the "time of decision" rule in the land use context), and its applicability to this matter must be revisited. Contrary to the trial court's opinion (which was affirmed by the Appellate Division on this issue without discussion), N.J.S.A. 40:55D-10.5's "time of application" rule, with its explicit exception for "provisions of an ordinance relating to health and public safety, applies herein. N.J.S.A. 40: 55D-10.5 applies to "any decision made with regard to [an] application for development" including judicial review of such decision, and is not limited to municipal review of the application for development, as held by the trial court and affirmed by the Appellate Court.

Allowing the Appellate Division's cursory opinion to be the last word on the above legal issues of serious import will have a detrimental impact on the rule of law, the authority of a municipality to enforce public safety regulations to protect its residents, and the role of the court to determine the meaning and intent of statutory provisions in accord with established

principles of interpretation. A review of the Appellate Court's recitation of the litigation history between the parties indicates an implicit bias that this case is yet one more "political" attempt by the City of Hoboken to prevent the Monarch project; not an effort motivated by a valid public safety concern warranting serious judicial consideration. FBW was one of the many Hoboken organizations and constituents supporting the enactment of Z-263 and Z-264. It thus urgently requests this Court's review to ensure enforcement of both ordinances, which have an effect on new construction in certain flood hazard zones throughout the City, and not just on the waterfront.

QUESTION PRESENTED

1. Whether the City of Hoboken has the authority to enforce presumptively valid flood damage prevention regulations against the proposed Monarch project prior to the commencement of construction, notwithstanding the fact that the regulations were adopted within two years after the proposed development obtained final approval under the MLUL; particularly where, as here, the adoption of such safety regulations were encouraged and approved by the State of New Jersey in response to Superstorm Sandy?

STATEMENT OF FACTS AND PROCEDURAL HISTORY

FBW restates and reincorporates herein the statement of facts and procedural history set forth in the City of Hoboken's

Petition for Certification under the title, "STATEMENT OF THE MATTER INVOLVED." Hob. Pet. at 4-10. It further states the following to underscore the environmental and public safety policy issues involved in this matter that transcend the immediate dispute between the City and Shipyard.

FBW is a 28-year old New Jersey 501(c)(3) nonprofit organization, whose principle office is located in Hoboken. Its mission is focused on completing a contiguous public park along the New Jersey coastline of the Hudson River, and ensuring, through advocacy, leadership and collaboration that development in Hoboken meets the highest standards of urban design.

FBW intervened in the federal litigation initiated by Shipyard, because the litigation explicitly sought to challenge the validity of Hoboken's Flood Damage Prevention Ordinances, Z-263 and Z-264 by claiming the ordinances were politically directed at the Monarch project. As a result of that intervention, FBW, representing approximately 200 active supporters, was permitted to file an Answer in the state judicial proceeding (that is the subject of this Petition of Certification) without making an additional motion for intervention. (Da212-239)

FBW sought participation in the federal and state actions seeking to invalidate Z-263 and Z-264 (and if valid, their applicability to the Monarch project) because, pursuant to its

mission, it has been actively engaged in supporting municipal, state and federal efforts to respond to the flooding issues Hoboken faces directly due to climate change. Specifically, FBW has held seminars and attended conferences addressing the storm and flooding issues facing Hoboken and other shore municipalities, put together a team of professionals who submitted a proposal to the federal Hurricane Sandy Rebuilding Task Force's Rebuild by Design competition, and has written over 20 articles pertaining to flooding that have been posted on its website and sent to its mailing list via a monthly newsletter. (Da2603-2608) Most importantly, it was an active supporter of Z-263 and Z-264, whose implementation with respect to the Hoboken coastline, and other flood-prone areas throughout Hoboken, has been seriously jeopardized by the lower courts' actions herein.

Both Ord. Z-263, Amending Chapter §104 (FLOOD DAMAGE PREVENTION) to Reflect Updates Recommended by the New Jersey Department of Environmental Protection's Latest Revised Model Ordinance, and Ord. Z-264, Amending Chapter §196 (ZONING) Addressing Community Health, Safety and General Welfare Through Flood Hazard Mitigation Measures and Development Limitations, were adopted by the Hoboken City Council on December 18, 2013. (Da1839) Pursuant to Section four of each Ordinance, they respectively took "effect upon passage and publication as

provided by law." (Da34; Da40) Z-263 was signed by the Mayor on January 8, 2014. Z-264 was signed by the Mayor on December 20, 2013.

Ordinance Z-263 is an environmental regulation that targets new construction and substantially improved residential and commercial structures in certain flood-prone areas throughout the City. (Da30-31) It was expressly enacted pursuant to the general police power, has a separate permit requirement that is administered by the Floodplain Administrator, and contains comprehensive construction and building standards for such flood-prone areas, including certain areas of Hoboken's coast. (Da2188, Da2193) Ordinance Z-264 is a zoning ordinance that applies only to new construction and substantial improvement of existing docking and shipbuilding and repair facilities located in certain flood-prone coastal areas of Hoboken. The ordinance effected a limited amendment to the City's zoning ordinance to restrict new construction on any pier or platform that is built waterward the mean high tide line. (Da38) The Ordinance provides for the continuation of non-conforming uses, (Da39), and it specifically states that "it is not intended to repeal, abrogate or annul any building permit,. . . or other lawful permit issued and in full force and effect on the effective date of this chapter or any subsequent amendment." §196-103.2 (Da38)(codified as §196-4).

In its decision, the Appellate Court acknowledges in a footnote that "there is no dispute that the ordinances in this case were of a general type recommended by DEP to address potential flooding issues in the wake of Superstorm Sandy." (FBWa12) See also FBWa34-35 (where trial court found that there is "ample evidence to show that the Ordinances relate to health and public safety;" were modeled on NJDEP's Model Flood Damage Prevention Ordinance; and were enacted to protect its residents' safety following the "impact of Hurricane Sandy.") However, the lower courts both erroneously try to separate the question of validity of the ordinances as public safety ordinances from the question of whether they can be retroactively applied to the Monarch project.[2] This analytical mistake is fatal to their respective decisions.

FBW asserts that the MLUL and common-law permit a municipality to retroactively apply a valid public safety ordinance to the detriment of a developer's vested rights if it is reasonably related to the hazard, damage or risk it is trying to prevent; that is, a municipality may intervene with, limit or otherwise impair vested property rights when it is seeking to

[2] It should be noted that Shipyard's Complaint in this matter included separate causes of action challenging the validity of Z-263 and Z-264 (Counts 1-3) and a claim that the application of such Ordinances constituted a taking requiring due compensation. (Count 6). Shipyard voluntarily dismissed such counts upon securing partial summary judgment on Counts 4 and 5.

protect the health and public safety of its residents. Both lower courts appear to begrudgingly acknowledge Z-263's and Z-264's status as valid flood prevention safety ordinances designed to respond to a real problem. Nonetheless, the Appellate Division's opinion, in particular, evinces a belief that permitting the Monarch project to go forward would not pose a safety risk to the future occupants of the proposed residential towers, emergency response workers and other impacted residents in the event of another hurricane. See FBWa12-13. That is, in the Appellate Division's view, the Ordinances are merely discretionary, and are not necessary to prevent a known hazard. It is inappropriate for such personal opinions to overwhelm a court's understanding and interpretation of the law. A municipality's authority to act to protect public safety as well as the legal principles that govern a municipality's legitimate interference with vested property rights are at stake. This is not just about one proposed residential development, as the Appellate Division assiduously insists, but about the future of development in New Jersey in the face of climate change.

REASONS TO GRANT CERTIFICATION/COMMENTS ON THE APPELLATE DECISION

I. THE APPELLATE PANEL FAILED TO APPRECIATE THAT UNDER COMMON-LAW VESTED RIGHTS DO NOT TRUMP ENFORCEMENT OF VALID PUBLIC SAFETY REGULATIONS.

The Appellate Division's ruling seriously damages several Principles undergirding the interpretation of the MLUL, including the common-law authority of a municipality to enforce public safety regulations that are enacted to address serious, known hazards, such as flooding. Despite the lower courts' lip service to the fact that Hoboken adopted Z-263 and Z-264 "in response to Federal and State efforts to prevent future flood damage following Hurricane Sandy," (FBWa34), both the trial court and Appellate Panel cite to the issuance of other government permits so as to imply that the "safety" of the proposed Monarch project has been assured, thus obviating the sole rationale for enforcement. However, neither court discusses the scope of such permits nor addresses whether they dealt with flood hazards, which is the target of the Hoboken ordinances at issue herein.

In addition to this shared defect, both courts fail to discuss the common-law authority of municipalities, pursuant to their police power, to enforce newly amended building codes, sewage regulations, and other environmental regulations related to health and safety that may impact "where, how or what" structures may be built, prior to the commencement of construction. As the N.J. Supreme Court held in Rohrs v. Zabriskie, 102 N.J.L. 473 (Sup. Ct. 1926):

> . . .[W]ill this court, when confronted with an ordinance passed in the valid exercise of power conferred upon the municipality disregard its existence and direct a permit to be granted . . . to erect a building. . ., although its erection will be a threat to the public safety, merely for the reason that such ordinance was not passed until after the conclusion of the hearing before the board of adjustment and its action thereon. We have no doubt but that this question should be answered in the negative. Admitting that the ordinance does not have a retroactive effect, so far as buildings in the course of construction are concerned, it is clearly applicable where the process of construction has not yet been begun. Id. at 475 (emphasis added)

Other states share New Jersey's common law rule permitting municipalities, pursuant to the police power, to enforce changed health and safety ordinances, including zoning ordinances, after site plan approvals have been obtained, but prior to the commencement of construction. See e.g., Davidson v. County of San Diego, 49 Cal. App. 4th 639, 56 Cal. Rptr. 2d 617 (Ca. App. 1996)(where zoning ordinances at time of application applied, court held that rights created by either a development agreement or a vesting map did not prevent local agency from applying subsequent zoning regulations to a project if it determined that such regulations were necessary to prevent the operation of a crematorium from being a danger or nuisance to the public); McNaughton Co. v. Witmer, 613 F.2d 104 (Pa 1992), aff'd, 46 F. 3d 1120 (3d. Cir. 1994)(in contest challenging the validity of an ordinance declaring a moratorium on the issuance of sewage permits, the court denied developer's claim that he had a vested

right to a sewage permit by virtue of town's approval of his subdivision plans; ordinance found to be an emergency public safety ordinance); Ford v. Bellingham-Whatcom Cty., Dist. Bd. of Health, 558 P.2d 821 (Wa. 1977) (where septic tank regulations changed, developer not entitled to application of the regulations in effect at the time site division plan was approved); Metropolitan Dade County v. Rosell Const. Corp., 297 So. 2d 46, 48 (Fla. 1974) (court held that change in zoning may effectively revoke a building permit, if municipality can show some new peril to health and safety of the municipality has arisen between granting of building permit and subsequent change of zoning to the detriment of landowner); and Belle Harbor Realty Corp. v. Kerr, 323 N.E. 2d 697 (N.Y. 1974)(where City revoked prior approvals to construct a 4-story nursing home based on finding of inadequate sewer connections, court held that City must establish that it acted in response to a health emergency and that its actions were reasonably circumscribed by the exigencies of the problem). See also KOB-TV, L.L.C. v. City of Albuquerque, 111 P.3d 708 (N.M. 2005)(permitting City to revoke permit allowing construction of helicopter pad based on zoning amendment enacted to protect health and safety even though such pad had already been constructed).

These courts recognize, as did the 1926 N.J. Supreme Court, that private development interests, such as Shipyard's interest

in developing the Monarch project pursuant to its site plan approvals, may be subordinate to the public interest advanced by subsequently adopted health and safety regulations. And, in such circumstances, retroactive application of such regulations does not unconstitutionally interfere with rights otherwise vested under law.[3] See e.g., New Jersey Dept. of Envtl. Prot. C. Ventron Corp., 94 N.J. 473, 498-99(1983)(applying Spill Act amendment enacted subsequent to judgment of trial court); Rothman v Rothman, 65 N.J. 219 (1974)(police power enactments to promote public safety may "validly curtail[]" private rights).

This important common-law principle dealing with municipal authority to protect its residents has gotten lost throughout this litigation; it should have been front and center, especially when the lower courts discussed Ordinance Z-263, an environmental regulation, which was explicitly adopted pursuant to the general police power. It was not, and thus this matter deserves this Court's attention and review.

II. THE APPELLATE COURT ERRED IN DETERMINING THAT THE "HEALTH AND PUBLIC SAFETY" EXPLICITLY STATED IN N.J.S.A.40:55D-49(a) IS NOT INCORPORATED INTO N.J.S.A. 40:55D-52(a).

Similarly, this Court must definitively resolve whether a developer's vested rights that are associated with preliminary

[3] The question of whether Shipyard is entitled to some value of compensation for such curtailment of vested rights is a separate question, which is not raised by this appeal though is the subject of Count 6 of Shipyard's Complaint.

and final approval under the MLUL include immunity from changes to zoning and other regulations, which are adopted to address specific public health and safety hazards, including safety from flood and other natural and man-made disasters. The Appellate Court granted Shipyard such shield, and further held that "even if section 52(a)[regarding final approval] were construed as implicitly including the [health and public safety] exceptions set forth in section 49(a)[regarding preliminary approval], appellants would not prevail in this case." (FBWa14) This decision has significant legal and policy implications beyond this case, and deserves a more thorough and thoughtful consideration of the MLUL than that which was given by the courts below.

At its heart, this matter concerns the interpretation of the MLUL; and as the City of Hoboken has so methodically presented, the New Jersey Constitution and Home Rule Act require all courts to "liberally" construe the MLUL "most favorably" to the City in determining whether the MLUL precludes the City from enforcing Z-263 and Z-264 against Shipyard's yet to be constructed project. See Hob. App. Br. at 33-39. The court's "task in statutory interpretation is to determine and effectuate the Legislature's intent." Bosland v. Warnock Dodge Inc., 197 N.J. 543, 553 (2009). In order to do so, words are to be given their generally accepted meaning, no words in a provision can be

ignored, and all provisions of a statute are to be read together in light of the general intent of the law. See FBW App. Br. at 19-21. The courts below ignored these rules of statutory construction and held that section 52(a) did not include an exception for health and public safety regulations.

N.J.S.A. 40:55D-52(a) reads in relevant part:

> The zoning requirements applicable to the preliminary approval first granted and all other rights conferred upon the developer pursuant to section 37 of P.L. 1975, c. 291 (C.40:55D-49), whether conditionally or otherwise, shall not be changed for a period of two years after the date on which the resolution of final approval is adopted. . . Notwithstanding any other provisions of this act, the granting of final approval terminates the time period of preliminary approval pursuant to section 37 of P.L. 1975, c.291 (C.40:55D-49) for the section granted final approval. (emphasis added).

According to the express words of this provision, the vested rights granted a developer pursuant to the MLUL incorporate the "zoning requirements applicable" to the relevant preliminary site approval previously granted, and "all other rights conferred upon the developer pursuant" to N.J.S.A. 49(a). In this way, a developer's vested rights from changes in zoning amendments expressly provided in 49(a) are carried over and incorporated into 52(a), including any limitation on or qualification of such rights. Specifically, N.J.S.A. 40:55D-49(a) qualifies the protection against changes in zoning ordinances as follows:

> . . .; except that nothing herein shall be construed to prevent the municipality from modifying by ordinance such general terms and conditions of preliminary approval as relate to public health and safety.

Standing alone, this provision makes clear that a developer who has received preliminary site approval is protected during the three-year repose period (plus any extensions granted) from non-safety related ordinance changes. D.L. Real Estate Holdings, L.L.C. v. Point Pleasant Beach Planning Bd., 176 N.J. 126, 135 (2003). Standing together with N.J.S.A. 40:55D-52(a), it is equally clear that such health and safety limitation to vested rights is also applicable to final site approvals, because of subsection 52(a)'s direct reference to all rights conferred under N.J.S.A. 40:55D-49. To interpret these two connected MLUL provisions otherwise would be to defy the common law prior to 1975, when these two provisions --49(a) and 52(a)-- were first enacted employing similar if not identical language, and to ignore the numerous provisions in the MLUL enshrining municipal power to act to promote the public health and safety. See Hob. App. Br. at 50-51.

Indeed, the Appellate Division indirectly conceded the validity of this statutory construction, but went on to say that "the term `modifying' suggests a change, revision or tweak to the `general terms and conditions' of a preliminary approval, not the revocation of the approval in its entirety." (FBWa14) To

insist that the modification rendered to a site approval must be nothing more than a "tweak" is contrary to the common usage of the word "modify". Typical synonyms are alter, remake, revamp, restructure, change, redo, or revise; and in the context of law, the ability to modify a contract is the ability to change the terms and scope of the contract. As often as the term is employed to connote a minor change, it is also employed to mean "make a basic or fundamental change to give a new orientation or serve a new end." www.merriam-webser.com/dictionary/modify. Cf. R. 4:49-2 (Motion to Alter or Amend a Judgment or Order permits "revocation" of order upon reconsideration) Because section 49(a) does not specify the extent of change that a public safety ordinance is permitted to render, the Appellate Division's interpretation of the health and public safety exception in section 49(a) cannot be sustained.

Moreover, the court did not test the consistency of its conclusion that municipal enforcement of a public safety ordinance is dependent on the extent of change that is required with other provisions of the MLUL; and in particular, N.J.S.A. 40:55D-10.5, which the Appellate Division did not discuss at all. For a full discussion of the relevance of N.J.S.A. 40:55D-10.5 to this matter see FBW App. Br. 27-30.

In general, the enactment of N.J.S.A. 40:55D-10.5 supports the above interpretation of N.J.S.A. 40:55D-49(a) and -52(a). In

2010, the N.J. legislature enacted N.J.S.A. 40:55-10.5 adopting the "time of application rule" whereby "those development regulations which are in effect on the date of submission of an application for development" govern both the review of any development application and "any decision" made with respect to that decision. See Jai Sai Ram, LLC v. Planning/Zoning Bd. of Bor. Of So. Toms River, 446 N.J. Super. 338 (App. Div. 2016)(discussing the legislative intent behind N.J.S.A. 40:55D-10.5) The Legislature made an exception to this rule, however; it explicitly stated that "[a]ny provisions of an ordinance, **except those relating to health and public safety**, that are adopted subsequent to the date of submission of an application for development, shall not be applicable to that application. . .." Id. (emphasis added). In other words, the Legislature balanced the equities involved -- i.e., municipality's zoning interest against the developer's interest in protection against any change in use, set-back or other zoning requirement -- and determined that when health and public safety ordinances are involved, the "time of decision rule," which previously had been the general rule governing development applications and judicial review of decisions concerning those applications, serves a beneficial purpose and thus applies; not the newly imposed "time of application rule." Such equities are equally applicable to preliminary and final approvals. Accordingly, the Appellate

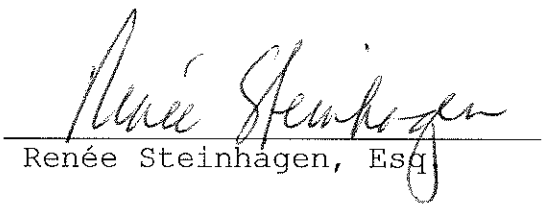
Division erred when it failed, at minimum, to consider whether N.J.S.A. 40:50D-10.5 was relevant to this matter and was consistent with its interpretation of N.J.S.A. 40:55D-52(a).

CONCLUSION

Allowing the Appellate Division's ruling to go uncorrected would create serious damage to the authority of a municipality, such as the City of Hoboken, to respond to climate change and enforce an essential public safety ordinance against a developer who had received final approval prior to the emergence of the problem addressed by the ordinance. There is little doubt that the ruling thus impermissibly restricts the City of Hoboken from satisfying its obligation to protect its residents from genuine safety risks; and because the Appellate Division's interpretation is contrary to the explicit words and intent of N.J.S.A. 40:55SD-10.5, -49(a) and -52(a) read together -- a determination that this Court has yet to resolve, the Petition for Certification should be granted.

Respectfully submitted,

NEW JERSEY APPLESEED PUBLIC INTEREST LAW CENTER



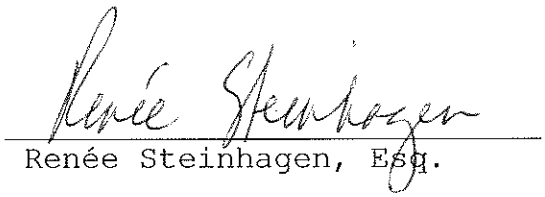
Dated: February 5, 2019 By: Renée Steinhagen, Esq.

CERTIFICATION

The undersigned counsel certifies that this Petition presents a substantial question and is filed in good faith and not for the purposes of delay.

Respectfully submitted,

NEW JERSEY APPLESEED PUBLIC INTEREST LAW CENTER



Dated: February 5, 2019 By: Renée Steinhagen, Esq.

SUPREME COURT OF NEW JERSEY

Renée Steinhagen, Esq.
Attorney ID #038691989
NEW JERSEY APPLESEED PLLC
50 Park Place, Rm. 1025
Newark, New Jersey 07102
(973) 735-0523

Aaron Kleinbaum, Esq.
Attorney ID #002681991
EASTERN ENVIRONMENTAL
LAW CENTER
50 Park Place, Rm. 1025
Newark, New Jersey 07102
(973) 424-1166

Attorneys for Fund for a Better Waterfront

SHIPYARD ASSOCIATES, L.P.,	SUPREME COURT OF NEW JERSEY
	Docket No.
Plaintiff/Respondent,	App. Div. Doc. No. A-001085-17T3
vs.-	**NOTICE OF PETITION FOR CERTIFICATON**
CITY OF HOBOKEN,	
Defendant/Appellant,	Civil Action
and	Sat Below:
FUND FOR A BETTER and WATERFRONT HUDSON TEA BUILDINGS CONDOMINIUM ASSOC., INC.,	Hon. William E. Nugent, J.S.C. Hon. Susan L. Reisner, J.S.C. Hon. Hany A. Mawla, J.S.C.
Defendants-Intervenors/ Respondents.	

To: Heather Joy Baker, Clerk
Supreme Court of New Jersey
Richard Hughes Justice Complex
25 Market Street

FBWa1

P.O. Box 970
Trenton, NJ 08625-0970

Joseph Orlando
Clerk, Appellate Division
Richard Hughes Justice Complex
25 Market Street
P.O. Box 006
Trenton, NJ 08625-0006

Kevin Coakley, Esq.
Nicole B. Dory, Esq.
CONNELL FOLEY LLP
56 Livingston Avenue
Roseland, N.J. 07068

Joseph J. Maraziti, Esq,
Christopher D. Miller, Esq.
MARAZITI, FALCON & HEALEY
150 John F. Kennedy Parkway
Short Hills, N.J. 07078

Craig Hilliard
STARK & STARK
993 Lenox Drive, Bldg. 2
Lawrenceville, N.J. 08648-2316

NOTICE HEREBY IS GIVEN that the undersigned attorney for Defendant-Intervenor/Respondent, Fund for Better Waterfront, shall petition the New Jersey Supreme Court pursuant to R. 2:13-3(a) for Certification to appeal and review all aspects of the decision and final judgment of the Superior Court, Appellate Division in this matter, as set forth in that Court's decision and Order dated and entered on January 7, 2019.

PLEASE TAKE FURTHER NOTICE that this application is timely filed, in that the final judgment of the Appellate Division was entered on January 7, 2019.

Respectfully submitted,

EASTERN ENVIRONMENTAL LAW
CENTER

and

NEW JERSEY APPLESEED
PUBLIC INTEREST LAW CENTER
Attorneys for FBW

By: Renée Steinhagen
Renée Steinhagen, Esq.

Dated: January 25, 2019

SUPREME COURT OF NEW JERSEY

Renée Steinhagen, Esq.
Attorney ID #038691989
NEW JERSEY APPLESEED PILC
50 Park Place, Rm. 1025
Newark, New Jersey 07102
(973) 735-0523

Aaron Kleinbaum, Esq.
Attorney ID #002681991
EASTERN ENVIRONMENTAL
LAW CENTER
50 Park Place, Rm. 1025
Newark, New Jersey 07102
(973) 424-1166

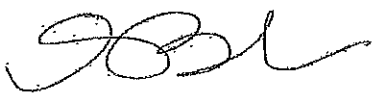
Attorneys for Fund for a Better Waterfront

SHIPYARD ASSOCIATES, L.P.,	SUPREME COURT OF NEW JERSEY
	Docket No.
Plaintiff/Respondent,	App. Div. Doc. No. A-001085-17T3
	CIVIL ACTION
vs.-	
	CERTIFICATION OF SERVICE
CITY OF HOBOKEN,	
Defendant/Appellant,	
and	Sat Below:
FUND FOR A BETTER and WATERFRONT HUDSON TEA BUILDINGS CONDOMINIUM ASSOC., INC.,	Hon. William E. Nugent, J.S.C. Hon. Susan L. Reisner, J.S.C. Hon. Hany A. Mawla, J.S.C.
Defendants-Intervenors/ Respondents.	

I, Amy B. Koehler, do state and certify as follows:

1. I am a legal assistant at Eastern Environmental Law Center, attorneys for Defendants/Intervenors-Respondents in this matter. I have personal knowledge of the facts hereof.
2. On January 25, 2019, I caused one (1) copy of the following documents to be served upon all parties via regular mail to all counsel on the attached service list:
   - Notice of Petition for Certification; and this
   - Certification of Service.
3. On January 25, 2019, I caused one (1) copy of the above-listed original documents to be filed, via Federal Express, with the Clerk of the Supreme Court at R.J. Hughes Justice Complex, Supreme Court Clerk's Office, P.O. Box 970, Trenton, NJ 08625-0970.
4. On January 25, 2019, I caused one (1) copy of each of the above-listed documents to be filed, via regular mail, with the Clerk of the Appellate Division at R.J. Hughes Justice Complex, Appellate Division Clerk's Office, 25 West Market Street, P.O. Box 006, Trenton, NJ 08625-0006.
5. These statements are true. I am aware that if any of these statements are willfully false, then I may be subject to punishment.

Date: January 25, 2019



Amy B. Koehler

FBWa5

SERVICE LIST

Kevin J. Coakley, Esq.
Connell Foley LLP
56 Livingston Ave.
Roseland, NJ 07068
Attorneys for Shipyard Associates, LP

Christopher D. Miller, Esq.
Maraziti Falcon, LLP
150 John F. Kennedy Parkway
Short Hills, NJ 07078
Attorney for City of Hoboken

Craig S. Hilliard, Esq.
Stark & Stark
993 Lenox Dr., Building 2
P.O. Box 5315
Lawrenceville, NJ 08543-5315
Attorneys for Respondent Hudson Tea Buildings Condo. Assn. Inc.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1085-17T3

SHIPYARD ASSOCIATES, LP,

Plaintiff-Respondent,

v.

CITY OF HOBOKEN,
A municipal corporation of
the State of New Jersey,

Defendant-Appellant,

and

FUND FOR A BETTER WATERFRONT
and HUDSON TEA BUILDINGS
CONDOMINIUM ASSOCIATION, INC.,

Defendants/Intervenors-Respondents.

Argued November 28, 2018 – Decided January 7, 2019

Before Judges Nugent, Reisner and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-1308-16.

Christopher D. Miller argued the cause for appellant (Maraziti Falcon, LLP, attorneys; Joseph J. Maraziti, Jr., of counsel; Christopher D. Miller, on the briefs).

Kevin J. Coakley argued the cause for respondent (Connell Foley LLP, attorneys; Kevin J. Coakley, of counsel; Nicole B. Dory and Michael J. Affrunti, on the brief).

Renée W. Steinhagen argued the cause for intervenor-respondent Fund for a Better Waterfront (New Jersey Appleseed Public Interest Law Center and Eastern Environmental Law Center, attorneys; Renée W. Steinhagen and Aaron Kleinbaum, on the brief).

Craig S. Hilliard argued the cause for intervenor-respondent, Hudson Tea Buildings Condominium Association, Inc. (Stark & Stark, PC, attorneys, join in the brief of appellant City of Hoboken).

PER CURIAM

Defendant City of Hoboken (City), joined by intervenors Fund for a Better Waterfront (FBW) and Hudson Tea Buildings Condominium Association, Inc. (Hudson Tea), appeal from an October 17, 2017 order granting summary judgment in favor of plaintiff Shipyard Associates, LP (Shipyard). Our review of the trial court's decision is de novo, using the Brill standard. See Globe Motor Co. v. Igdalev, 225 N.J. 469, 479-80 (2016); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). After reviewing the record in light of that

standard, we affirm, substantially for the reasons stated by the trial judge in his written opinion issued with the order. We add the following comments.

This case is the most recent in a series of lawsuits over the proposed construction of two eleven-story high-rise residential buildings on the Hoboken waterfront. The history is detailed in the trial court's opinion and in our prior opinions. See In re Shipyard Assocs. LP Waterfront Dev. Permit & Water Quality Certificate No. 0905–07–0001.2 WFD 110001, Nos. A–4873–13 and A–5004–13 (App. Div. Feb. 3, 2017), certif. denied, 230 N.J. 397, 401 (2017) (Shipyard I); Shipyard Assocs., L.P. v. Hoboken Planning Bd., Nos. A-4504-14, A-4637-14, A-4763-14 (App. Div. Aug. 2, 2017), certif. denied, 232 N.J. 106, 133, 148 (2018) (Shipyard II).[1] A brief summary will suffice here.

Shipyard obtained land use approvals to build a large residential development on waterfront land, plus some indoor tennis courts to be constructed on a pier extending into the Hudson River. After completing most of the project, Shipyard proposed to construct two additional high-rises on the pier, instead of building the tennis courts. The City and the intervenors strenuously attempted to block that portion of the project, citing the importance

[1] Although they do not constitute precedent for purposes of any other case, we cite our prior unpublished opinions because they are part of the history of this case. See R. 1:36-3.

of open space and recreation opportunities, the loss of their water views, and other concerns. They opposed Shipyard's application to the Department of Environmental Protection (DEP) for a waterfront development permit, sued Shipyard for alleged violations of a developer's agreement, convinced the local planning board to refuse to hear Shipyard's site plan application for the two new high-rises, and convinced the county planning board to deny Shipyard's county-level land use application. Ultimately, those efforts failed.

In Shipyard I, we affirmed DEP's decision to issue the waterfront development permit conditioned on Shipyard extensively reinforcing the pier and implementing other safety measures. In Shipyard II, we affirmed trial court orders dismissing the litigation over the developer's agreement, and reversing the county board's decision. Most significant to the current appeal, in Shipyard II we also affirmed the trial court's decision that the planning board's unlawful refusal to hear Shipyard's application resulted in automatic approval of the preliminary and final subdivision application for the new high-rises. We affirmed the decision that the approvals were effective as of 2012, when the planning board refused to hear the application. Shipyard II (slip op. at 14-15). As a result, Shipyard has the vested rights associated with final land use

approvals. Ibid. However, due to the City's continued efforts to block the project, Shipyard has not yet been able to start construction.

In December 2013, while the above-described litigation was in progress, the City adopted two ordinances, prohibiting construction of buildings on waterfront piers, except for low-rise recreational uses. The City characterized one enactment as a zoning ordinance (Ordinance Z-264), and the other as a flood control ordinance (Ordinance Z-263). However, both ordinances prohibited virtually all uses in a zone where residential construction was previously permitted. If applied to the Shipyard project, the ordinances would vitiate the final approval ordered by the trial court and affirmed by this court.

In the current litigation, Shipyard filed suit to prevent the City from enforcing the ordinances to block construction of its project. To be clear, the issue before the trial court (as on this appeal) was not whether the ordinances

themselves were valid.[2] The issue was whether the ordinances could be retroactively applied to this project, which had final land use approval.[3]

In a thorough opinion, the trial judge determined that, regardless of the way the City chose to characterize Ordinance Z-263, in substance it operated as a zoning ordinance. The judge reasoned that the Municipal Land Use Law (MLUL) prohibited a local government from applying newly-enacted zoning ordinances, such as Z-263 and Z-264, to a project that had already received final site plan approval. See N.J.S.A. 40:55D-52(a). The judge declined to read into N.J.S.A. 40:55D-52(a) an exception for later-adopted zoning amendments designed to protect health and safety, when the Legislature included no such language in 52(a). The judge held that the public health and safety exception in

---

[2] Indeed, we have previously upheld ordinances banning construction close to the water's edge. See McGovern v. Bor. of Harvey Cedars, 401 N.J. Super. 136, 147-48 (App. Div. 2008). There was no dispute that the ordinances in this case were of a general type recommended by DEP to address potential flooding issues in the wake of Superstorm Sandy. However, DEP defended the issuance of Shipyard's waterfront development permit on appeal, after Sandy occurred. In affirming the issuance of the permit, we agreed that post-Sandy developments did not require DEP to suspend or revoke the permit. Shipyard I (slip op. at 21-22).

[3] Illustrating the narrowness of the issue, at oral argument counsel confirmed that there are no other developments approved for construction on waterfront piers in Hoboken. In that respect, the Shipyard project is sui generis in Hoboken, and this opinion is not intended as precedent with respect to any as-yet-unapproved developments.

N.J.S.A. 40:55D-10.5 (the time of application rule) did not apply here, because that section addresses pending applications, not applications that have already received final approval.

The judge considered that DEP, the Federal Emergency Management Agency (FEMA), and the Army Corps of Engineers had all reviewed the Shipyard project and none had concluded that the project was unsafe. The judge noted that DEP issued a waterfront development permit despite public comments "regarding flooding and safety." He also noted that DEP "regulations . . . have specific criteria for building a structure on a pier or platform and the [Shipyard] [p]roject was deemed to comply with those criteria."

We conclude that the trial judge reached the correct result, and little further discussion is required. In affirming, we add one caveat. This case does not require us to decide whether or to what extent, under some circumstances, a zoning ordinance affecting health and safety might be applied to modify a previously-granted final approval. That is not what Hoboken proposes here. Rather, Hoboken seeks to retroactively apply ordinances that completely change the permitted uses in the zone. If applied here, the ordinances would require the revocation of a previously-granted final approval, a result contrary to the plain wording of N.J.S.A. 40:55D-52(a).

Moreover, even N.J.S.A. 40:55D-49(a), on which appellants rely so heavily, does not support the far-reaching exception for which they argue. Section 49(a) states in pertinent part: "nothing herein shall be construed to prevent the municipality from modifying by ordinance such general terms and conditions of preliminary approval as relate to public health and safety." (Emphasis added). The term "modifying" suggests a change, revision, or tweak to the "general terms and conditions" of a preliminary approval, not the revocation of the approval in its entirety. Hence, even if section 52(a) were construed as implicitly including the exceptions set forth in section 49(a), appellants would not prevail in this case.

We agree with Shipyard that appellants misplace reliance on New Jersey Shore Builders Association v. Township of Jackson, 199 N.J. 38 (2009), and Sparroween, LLC v. Township of West Caldwell, 452 N.J. Super. 329 (App. Div. 2017). Jackson approved the enforcement of a general municipal ordinance concerning the removal of trees. The Court concluded that the ordinance was a "generic environmental regulation" that was "not subject to the specific limits in the MLUL." 199 N.J. at 54. Similarly, Sparroween involved an ordinance adopted by a municipal board of health, limiting the smoking of tobacco products inside tobacco retail stores. We concluded that the smoking ordinance

was a health regulation and not a "land use ordinance." 452 N.J. Super. at 339. Neither case involved an ordinance that completely changed the permitted use of property in a zone and would have required revocation of a previously-granted final site plan approval.

Appellants' arguments on this appeal are without sufficient merit to warrant additional discussion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

CONNELL FOLEY LLP
85 Livingston Avenue
Roseland, New Jersey 07068
(973) 535-0500
Attorneys for Plaintiff,
Shipyard Associates, L.P.

SHIPYARD ASSOCIATES, LP., Plaintiff, v. CITY OF HOBOKEN, a municipal corporation of the State of New Jersey, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY DOCKET NO. HUD-L-1308-16 CIVIL ACTION ORDER GRANTING SUMMARY JUDGMENT AS TO COUNTS IV AND V OF THE COMPLAINT

The above matter having been opened to the Court upon Motion by Connell Foley LLP, attorneys for Shipyard Associates, L.P., for an Order entering partial summary judgment as to Counts IV and V of the Complaint; and the Court having considered the moving papers and arguments of counsel; and for good cause shown;

It is on this 17th day of Oct., 2017,

ORDERED that Shipyard Associates, L.P.'s motion for entry of judgment as to Counts IV and V of the Complaint is hereby granted; and it is further

ORDERED that City of Hoboken Ordinance Z-263, entitled An Ordinance Amending Chapter section 104 (Flood Damage Prevention), and Ordinance Z-264, entitled An Ordinance Amending Chapter 196 (Zoning) Addressing Community Health, Safety and General Welfare Through Flood Hazard Mitigation Measures and Development, shall

not be applied to the development of plaintiff Shipyard Associates, L.P.'s property, known as Block 264.2, Lot. 1 in Hoboken, New Jersey as shown on the Tax Assessment Map of the City of Hoboken ("Property"), pursuant to the plans that were initially submitted to the Hoboken Planning Board with the site plan application filed on August 25, 2011, which were dated August 23, 2011 and were last revised June 5, 2012; and it is further

ORDERED the City of Hoboken shall not to delay or restrict the development of plaintiff's Property pursuant to the plans that were initially submitted to the Hoboken Planning Board with the site plan application filed on August 25, 2011, which were dated August 23, 2011 and were last revised June 5, 2012; and it is further

ORDERED that a copy of this Order be served upon all counsel within seven days after receipt of this Order from the Court.

pdb

HON. PETER F. BARISO, A.J.S.C.

✓ Motion Opposed

____ Motion Unopposed

all remaining Counts in Complaint are dismissed as moot
all cross-motions to Dismiss Counts IV + V are Denied.
See attached Opinion
Uploaded in Court

4106377-1

FBWa17

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY
DOCKET NO. L-1308-16

SHIPYARD ASSOCIATES, L.P.,

Plaintiff,

v.

CITY OF HOBOKEN

Defendant.

Civil Action

OPINION

ARGUED: October 13, 2017

DECIDED: October 17, 2017

Kevin J. Coakley, Esq. and Nicole D. Dory for plaintiff Shipyard Associates, L.P. (Connell Foley LLP, attorneys)

Joseph J. Maraziti, Jr. Esq. and Christopher D. Miller Esq. for defendant City of Hoboken (Maraziti Falcon, LLP, attorneys).

Craig S. Hilliard, Esq. and Eric S. Goldberg, Esq. and Matthew Taylor, Esq. for intervenor-defendant Hudson Tea Buildings Condominium Association, Inc. (Start & Stark, attorneys)

Renée Steinhagen, Esq. and Aaron Kleinbaum, Esq. for intervenor-defendant Fund for Better Waterfront (New Jersey Appleseed Public Interest Law Center, attorneys)

Bariso, A.J.S.C.

This matter comes before the court by way of a motion and cross-motions for summary judgment as to Counts IV and V of the complaint. Based on the following findings of fact and conclusions of law, this court decides that Ordinances Z-263 and Z-264, enacted in January and February of 2014 do not apply to the Shipyard project that was granted final approval in July of 2012.

Factual Background and Procedural History

Plaintiff Shipyard Associates, LP ("Shipyard") is the owner and developer of several pieces of property along the northern Hoboken waterfront, abutting the Hudson River. On August 21, 1997 the Planning Board adopted a Final Site Plan Resolution consisting of multi-story residential buildings on Blocks A through F. Block G, the subject of the present litigation (the "Property") was proposed as a commercial tennis facility.

On December 7 1997, Shipyard entered into a Developer's Agreement with Defendant City of Hoboken ("Hoboken") reflecting the application approved by the Planning Board. The Developer's Agreement states that "no subsequent alterations, amendments, or changes to this Agreement shall be binding upon either party unless reduced to writing and signed by each party." Cert. in Support Ex. 6 at ¶ 16.

Shipyard developed Blocks A through F in substantial accordance with the 1997 plan. On August 25, 2011, Shipyard filed an application seeking to amend the site plan approvals to develop residential high-rises on the Property. On October 13, 2011 in

response to a letter from Shipyard indicating that the time period for action on the completeness of the application had expired pursuant to N.J.S.A. 40:55D-10.3, the Planning Board passed a resolution deeming Shipyard's application complete. In accordance with comments by the Board, Shipyard revised and resubmitted its application several times. The application was originally scheduled for a hearing on February 7, 2012. Subsequent comments necessitating changes to the application pushed the scheduled hearing back several months.

On March 7, 2012 Hoboken filed suit against Shipyard to compel the completion of the project in accordance with the 1997 site plan approvals. Hoboken based this suit on its interpretation of the Developer's Agreement, which it believed granted an interest in the property such that the City's approval was necessary for Shipyard to apply for amendment with the Planning Board. On June 11, 2012, the Planning Board requested that Shipyard voluntarily withdraw its application in light of the pending litigation. Shipyard refused and advised N.J.S.A. 40:55D-22 required the Planning Board to hear the application without regard to pending litigation.

After significant back and forth communication between Shipyard and the Planning Board as to the necessity of certain variances for the application, as well as adjournments of the hearing date and revisions of the application, Shipyard received a letter on June 21, 2012 indicating that the application would require five variances for approval. Shipyard responded that it had determined no such variances were necessary and, if the Planning Board did not hear the application it would pursue automatic approval. On June 29, 2012 the Planning Board's attorney stated he would advise the Board to dismiss Shipyard's application without prejudice due to the pending litigation as well as the five incomplete variances.

On July 10, 2012, after several previous adjournments of a public hearing, the Planning Board convened what was supposed to be a hearing on the merits of Shipyard's application. However, Shipyard was not given an opportunity to present its application to the Board. Following a recommendation from the Planning Board's attorney, the Planning Board voted to deny Shipyard's application without a hearing because of (1) concern that it lacked jurisdiction, (2) the pendency of litigation regarding jurisdiction, and (3) variance issues. The Planning Board issued a resolution dated August 7, 2012 memorializing this decision.

Shipyard filed the original action on November 16, 2012 which the court ultimately consolidated with Hoboken's action to enforce the Developer's Agreement. These matters were then consolidated with Shipyard's action against the Hudson County Planning Board for administrative ease. The court also granted motions from both Hudson Tea Building Condominium Association ("Hudson Tea") and the Fund for a Better Waterfront ("FBW") to allow them to intervene in this matter.

On June 21, 2013 Judge Patrick J. Arre rendered a decision granting summary judgement to Shipyard and dismissing Hoboken's suit relying on Toll Bros. Inc. v. Bd. Of Chosen Freeholders of Cnty. Of Burlington, 194 N.J. 223 (2008) that the Developer's Agreement did not grant the City an interest in the Property.

On January 23, 2014 Judge Nesle Rodriguez issued an Opinion finding that the Planning Board's denial of Shipyard's application without a hearing on the merits constituted an impermissible delay rather than an "action" for the purposes of the Municipal Land Use Law ("MLUL") automatic approval provisions. Accordingly, Judge Rodriguez ruled the Planning Board's delay triggered the automatic approval provisions of the MLUL and entered an Order finding Shipyard's application automatically approved. Miller Cert. Ex. XX.

On March 14, 2014 Judge Rodriguez heard oral argument on a motion for reconsideration filed by the Planning Board and a motion to intervene from Hoboken. During the pendency of these motions, Hoboken commissioned Princeton Hyrdo LLC., to create a report detailing specific threats to certain flood-prone areas in Hoboken. Id. at Ex. Z.

In addition, Hoboken passed two new city ordinances, Z-263 and Z-264 (the "Ordinances") changing certain flood regulations in Hoboken. Ordinance Z-263 amended Chapter 24 of Hoboken's Municipal Code to reflect the Federal Emergency Management Agency's Advisory Flood Hazard Map dated February 22, 2013. Id. at Ex. FF. It also restricts construction and development depending on which "zone" applies to the Property. Ordinance Z-264 is a zoning ordinance, which was adopted pursuant to MLUL, N.J.S.A. 40:55D-1. Ordinance Z-264 bars new construction on piers and in certain flood zones, requiring compliance with applicable restrictions found in Z-264, Chapter 104.

On May 9, 2014 Judge Rodriguez issued an opinion denying the motion to reconsider and granting the motion to intervene. Id. at Ex. UU. Judge Rodriguez noted the thrust of the Planning Boards argument, namely the failure to consider the Princeton Hyrdo, LLC report, was irrelevant to the automatic approval of Shipyard's application. Based on a plain reading of the statute, Judge Rodriguez noted the Planning Board failed to adequately provide Shipyard a hearing on its application. Consequently, as per statutory requirements, Shipyard's application is deemed approved as of July 2012. However, Judge Rodriguez noted, "[p]resently, the Court makes no determination whether the [Ordinances] retroactively abrogate prior approvals by the Planning Board." Id. Ex. UU at 27. The three trial court orders were appealed in June, 2015.

Shipyard had filed a separate action in Federal Court to challenge the Ordinances. However, on March 14, 2016 the Federal court dismissed Shipyard's Complaint without prejudice, allowing Shipyard to refile their Complaint in New Jersey State Court which was filed on March 28, 2016. Shipyard filed this motion on March 21, 2017 and oral argument was scheduled for April 28, 2017. On the date of oral argument the court decided that the action be stayed pending the decision from the Appellate Division and denied the motion without prejudice.

The Appellate Court consolidated the three appeals and on August 2, 2017 affirmed Judge Arre's and Judge Rodriguez's decisions adding that the result in the case is controlled by well-established legal principles, set forth in Amerada Hess Corp. v. Burlington Cty. Planning Bd., 195 N.J. 616 (2008). Shipyard Assocs., L.P. v. Hoboken Planning Bd., 2017 N.J. Super. Unpub. LEXIS 1960 (App. Div. August 2, 2017). In Amerada, the Court extended relief to municipal land use boards, and clarified the narrow circumstances in which a board may obtain relief from the automatic approval provisions of the MLUL. Ibid. Following the Appellate Court decision Shipyard requested a case management conference, which was held on August 17, 2017. The court lifted the stay that was previously entered and permitted the parties to file motions in the normal course.

Shipyard has re-filed its motion for Summary Judgment on Counts IV and V. Hoboken, the Fund for Better Waterfront, and the Hudson Tea Buildings Condominium Association, Inc. have filed cross-motions for Summary Judgment dismissing Counts IV and V. All of the parties have also filed opposition to their adversaries' motions for Summary Judgment.

Shipyard's Argument

Shipyard argues that it is entitled to judgement on Counts IV and V.

Count V

Summary Judgment, as to Count V, should be granted because Ordinances Z-263 and Z-264 cannot apply to the July 2012 final approval for the monarch project pursuant to the MLUL. Shipyard states that as a matter of law the Monarch application received vested final approval rights pursuant to N.J.S.A. 40:55D-52(a) as of July 2012. Thus, the Ordinances that became effective in January and February of 2014, were enacted within the two year period of protection afforded to the application and cannot apply retroactively to defeat the project. Under the MLUL, final site plan approval insulates a project for two years from changes in the zoning law. See N.J.S.A. 40:55D-52(a). Shipyard cites to Britwood Urban Renewal, L.L.C. v. Asbury Park, 367 N.J. Super. 552 (App. Div. 2005); in which a planning board granted approval for a waterfront property in connection with a redevelopment plan. Immediately after approval was granted, the municipality adopted an ordinance requiring off-tract improvement and applied the ordinance to the previously-granted approval. The Appellate Division found that "once the final site plan application was approved, [the developer's] rights were vested and the [municipality] could not thereafter impose further conditions on that approval. Id. at 570. Additionally, in CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd. v. Bd. of Adjustment, 414 N.J. Super. 563 (App. Div. 2010), the court further supported the findings in Britwood. There, the Appellate Division, referring to N.J.S.A. 40:55D-52(a), noted "when one party has obtained a vested right under the prior law, the later law may not be applied if this will divest that right." Id. at 589. Shipyard also cites the unpublished Vauxhall case, that noted, it would be unfair to have a subsequently enacted ordinance deprive an applicant of its prior deemed development approval. Vauxhall Assocs. V. Manalapan Twp.

Planning Bd., 2007 N.J. Super. Unpub. LEXIS 1390, 23-24 (App. Div. July 13, 2007).

Count IV

Shipyard maintains it is entitled to judgement on Count IV since applying the Ordinances to Shipyard's application would violate the plain language of the time of application rule and its legislative purpose. Under the MLUL 2010 revision, regulations in effect "on the date of submission of an application for development" govern the review of that application. N.J.S.A. 50:55D-10.5. This statute specifically reversed the old "time-of-decision" rule mandating courts apply ordinances at the time they decided their opinion, not at the time of submission. Here, Shipyard submitted its application on August 25, 2011 and was deemed complete on October 13, 2011. Therefore, the court must apply those regulations which were in effect in 2011. Hoboken passed the Ordinances in January and February of 2014, more than two years after Shipyard submitted its application. Shipyard further argues that the ordinances cannot be applied retroactively because its application was not pending when the ordinance became effective.

Additionally, this period of protection has been tolled pursuant to N.J.S.A. 40:55D-21 as a result of the litigation regarding the project. The litigation in this matter has restricted Shipyard's ability to complete the project. Although Shipyard has been ready, willing, and able to proceed, the present litigation has forced it to delay moving forward. As recognized in the statute, Hoboken's litigation tolls the two-year period of protection from subsequent municipal ordinances.

Shipyard points out that the vested rights for its approval of the application as of July, 2012 was recently affirmed by the Appellate Division: "Shipyard's application was automatically approved, and that automatic approval occurred by the operation of

law when the statutory period set forth in N.J.S.A. 40:55D-61 expired." Shipyard Assocs., L.P. v. Hoboken Planning Bd., 2017 N.J. Super. Unpub. LEXIS 1960 (App. Div. August 2, 2017).

In the alternative, Shipyard argues there is no exception to the time of application rule in this case. Multiple other independent agencies including ACOE, FEMA, and NJDEP have approved the project and concluded it does not implicate the flooding concerns the Ordinances purport to address. FEMA's Conditional Letter of Map Revision ("CLMOR") stated the project, when constructed, will be located in a Shaded X Zone on FEMA's effective National Flood Insurance Program map. Cert. in Support Ex. 55. Local floodplain ordinances do not apply to Zone X. NJDEP granted the project a Waterfront Development Permit after considering 48 written comments, including contentions regarding flooding and safety. Id. at Ex. 12. Shipyard further argues that the Ordinances do not apply to the Project because, once it is constructed, it will not be located in the V zone as a result of the Conditional Letter of Map Revision ("CLMOR") issued by FEMA last year. The CLMOR is a site specific letter of map revisions that amends and updates the FEMA map once a project is complete. FEMA's CLMOR stated the project, when constructed, will be located in a Shaded X Zone on FEMA's effective National Flood Insurance Program map. Cert. in Support Ex. 55. Local floodplain ordinances do not apply to Zone X. NJDEP granted the project a Waterfront Development Permit after considering 48 written comments, including contentions regarding flooding and safety. Ex. 12.

For these reasons, Shipyard asks the court to grant its Motion on Counts IV and V and that the remaining claims in the Complaint be dismissed as moot so that it may proceed with development of the project.

Hoboken's Argument

Hoboken in Opposition to Shipyard's Motion for Summary Judgment and in support for its Cross-Motion for Summary Judgment, asks the court to deny Shipyards Motion and grant its Motion to dismiss Counts IV and V.

Hoboken starts its argument by offering a counter statement of facts mainly contesting Shipyard's statement regarding the city's intent in adopting the ordinances. Hoboken asserts that Judge Arre dismissed with prejudice Shipyard's claims of bad faith against the city finding the record to be lacking any evidence of a bad faith motive on the part of the city: "the Court finds that the record lacks any evidence on which a rational jury could determine that Hoboken acted in bad faith in attempting to enforce the developer's agreement" Ex. XX 53: 17-54:9.

Hoboken offers a description of the detrimental effects of Hurricane Sandy, the response to the storm, and the NJDEP encouraging municipalities to prohibit construction in costal hazard areas. Hoboken goes on to cite an October 2013 expert flood hazard report that recommended the city restrict development on the piers. The report references that when structures are added to a pier that occupants of the building are greatly restricted to upland evacuation. Ex. Z. at 7-9. Hoboken argues that they adopted the ordinances restricting development on the piers based upon this expert report.

Hoboken asserts that Ordinance Z-263 is a general environmental regulation enacted pursuant to the police power and therefore is not subject to the MLUL. Hoboken points to New Jersey Shore Builders Ass'n v. Twp. of Jackson, 199 N.J. 38 (2009) in which the Court ruled general environmental ordinances adopted pursuant to the police power are "not subject to the specific limits in the MLUL." Id. at 54. In Jackson, the Court held that a municipal regulation regarding tree removal was a general

environmental regulation not subject to the MLUL. Furthermore, Hoboken enacted the Ordinances through its police power. Miller Cert. Ex FF at §104-1. Thus, Ordinance Z-263 is a general environmental ordinance similar to Jackson. Hoboken wrote the Ordinances using language virtually identical to the Model Flood Damage Protection Ordinances published by NJDEP. Hoboken cites that in respect to ordinance Z-263 NJDEP did approve the ordinance because it meets the DEMA minimum requirements.

Hoboken maintains that the New Jersey Constitution requires the court to liberally construe both the police power, and the provisions of the MLUL, in favor of the City. N.J. Const. Art IV. Sec. 7 par. 11. Courts consistently interpret this provision of the state constitution to liberally construe the power granted to municipalities. Paruszewski v. Township of Elsinboro, 154 N.J. 45, 52 (1998). Additionally, N.J.S.A. 40:42-4 specifically states that the courts shall construe police power and the MLUL most favorably to the city.

According to Hoboken, Ordinance Z-263 is not subject to N.J.S.A. 50:55D-52(a) because it did not amend the zoning requirements of the Property. The Property is located in I-1(W) zoning sub-district. The zoning requirements applicable to this sub-district are contained in the §§ 196-17 and 196-5. Miller Cert. Ex. KK. Ordinance Z-263 did not change any of these zoning requirements nor did it otherwise amend the zoning ordinance. Rather, Z-263 is a general police power regulation directed at flood damage prevention requirements. None of the cases Shipyard cites have interpreted N.J.S.A. 50:55D-52(a) to extend beyond zoning requirements or preclude enforcement of general police power regulations addressing public safety. Hoboken also makes a public policy argument stating that local government must be able to exercise its police power in order to protect the public health

and that this interest predominates over Shipyard's interest in building the project.

Hoboken also asserts N.J.S.A. 40:55D-52(a) includes an implied public safety exception. Despite the fact that there is nothing in N.J.S.A. 40:55D-52(a) that specifically contains a health and safety exception, Hoboken asserts that the court should construe this exception because it is the clear overriding purpose of the statutory framework and that it is not proper to confine interpretations to the one section of a statue to be construed. In re Distribution of Liquid Assets Upon Dissolution of Union County Reg'l High School Dist. No. 1, 168 N.J. 1, (2001). The overriding purpose of the MLUL is to guide land use in a manner that will promote public health and safety and to secure safety from floods and other natural and man-made disasters. Additionally, Hoboken asserts that section 10.5 of the MLUL provides that subsequently adopted health and public safety regulation shall apply to any decision made with regard to a development application. N.J.S.A. 40:55D-10.5. Several sections of the MLUL include exceptions for municipalities where it relates to health and public safety. Against this backdrop, it is clear the Legislature did not intend unconstructed development projects to be exempt from valid health and public safety requirements. The fact Shipyard plans to build a residential high rise building in an area which was inundated during Hurricane Sandy must be considered when discussing the Legislature's intent in passing the MLUL.

Hoboken maintains the Ordinances apply under N.J.S.A. 40:55D-10.5 as they relate to health and public safety. Specifically, the statute exempts ordinances related to health and public safety. Here, the Ordinances unquestionably relate to health and public safety given the significant damage caused by Hurricane Sandy and recent State and Federal agencies' efforts to reduce development

in flood-prone areas. The terms of the Ordinances themselves also point to a strong correlation to health and public safety.

Hoboken asserts that Shipyard has mischaracterized Judge Rodriguez's opinion and by implication the August 2, 2017 opinion of the Appellate Court. Judge Rodriguez made abundantly clear in her Opinion she made no determination whether the Ordinances retroactively abrogate prior Planning Board approvals. Miller Cert, Ex. WW at 27. The Appellate Court likewise did not assess whether the ordinances retroactively abrogate the prior Planning Board Approval. Shipyard Assocs., L.P. v. Hoboken Planning Bd., 2017 N.J. Super. Unpub. LEXIS 1960 (App. Div. August 2, 2017). Thus Shipyard fails to meet the standard for collateral estoppel, although that does not appear to be an argument brought up in Shipyard's motion for Summary Judgment, it is unclear if this is still a contested issue. Finally Hoboken argues that Shipyard incorrectly points to several other agencies' decisions regarding the project, none of which exempt Shipyard from the requirements of the ordinances. In fact, all of them have specific language requiring compliance with local municipal rules and regulations. Many of these decisions were also rendered prior to Hurricane Sandy and could not possibly have taken this natural disaster into account. For these reasons, Hoboken asks the court deny the Motion.

FBW's Argument

FBW submitted a letter brief in opposition to Shipyards motion for summary judgement. A large portion of its brief reasserts the arguments presented by Hoboken. Specifically FBW joins in Hoboken's Opposition arguing the Ordinances relate to health and public safety. FBW's unique argument is that Shipyard's rights have not vested under N.J.S.A. 40:55D-52(a) because it has not secured or published a certificate indicating its receipt of default approval. A planning board's failure to hear an

application does not give automatic final approval based on the statutory framework. Instead, the party receiving default approval must still undergo certain requirements in order to receive a certificate of final approval. N.J.S.A. 40:55D-47(b), 55D-50(b), and 55D-76(c). However, the ruling in Shipyard Assocs., L.P. v. Hoboken Planning Bd., Supra, LEXIS 196, has made this point moot as the court held that Shipyard "obtained vested rights associated with preliminary and final site plan approval."

Hudson Tea's Argument

Hudson Tea also submits a separate brief joining in FBW and Hoboken's Oppositions and cross motions. Hudson Tea points to Shipyard's long efforts to ignore promises it made during the negotiation of the initial Development Agreement to make the Property into commercial tennis courts and argues allowing the project to move forward will breed distrust between developers and municipalities. Hudson Tea submits the Certification of Nicholas Rossi, a local resident who photographed the flooding which took place during Hurricane Sandy at the Property. Finally, Hudson Tea states that it would be premature to grant summary judgment in favor of Shipyard because the appellate division decision is currently being appealed to the New Jersey Supreme Court, which could potentially make the entire matter moot.

Summary Judgment Standard

The motion for summary judgment is made pursuant to R. 4:46-1 et seq. A court should grant summary judgment when:

> [T]he pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-

moving party, would require submission of the issue to the trier of fact.

R. 4:46-2(c).

This Rule requires a court to "deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates 'a genuine issue as to any material fact challenged.'" Brill v. The Guardian Life Ins. Co. of America, 142 N.J. 520, 542 (1995) (quoting R. 4:46-2). As such, a non-moving party will see their opposition fail if they merely rely on any fact in dispute which is in the totality immaterial or of an insubstantial nature. Id. at 530 (quoting Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954)) (citation omitted). In their analysis, the motion judge is required to view the facts in a light most favorable to the non-moving party. Parks v. Rogers, 176 N.J. 491, 494 (2003).

Legal Conclusion

Summary judgment is appropriate when there is no genuine issue of material fact. R. 4:46-2(c). An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact. Id. It is recognized that the non-moving party is entitled to all legitimate inferences in their favor. Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995). If the court after viewing the submitted material in the light most favorable to the non-moving party, find there is no reasonable doubt as to whether a fact is in dispute, then summary judgment is appropriate. However, the non-moving party must come forward with competent affidavits, setting forth facts based on personal knowledge, which establish a genuine issue of material fact. Brae Assets Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999).

The key issue here is whether the Ordinances retroactively apply to Shipyard's application. Judge Rodriguez's opinion, and the Appellate Court's affirmation, clearly states Shipyard

received final approval in July of 2012 for the Planning Board's failure to provide a timely hearing. Subsequent to this hearing, Hoboken passed the Ordinances in line with Federal and State guidelines in order to address flood damage as a protective measure after witnessing the damage caused by Hurricane Sandy.

Hoboken has provided sufficient support to show the Ordinances were likely passed in response to Federal and State efforts to prevent future flood damage following Hurricane Sandy. Hoboken has argued that the plain language of the MLUL shows a municipality can retroactively apply ordinances to pending applications for development as long as they relate to health and public safety. When interpreting a statute, the goal "is to ascertain and effectuate the Legislature's intent." Cashin v. Bello, 223 N.J. 328, 335 (2015). When the plain language is clear on its face, "the sole function of the courts is to enforce it according to its terms." Ibid. Preliminary approval of a major subdivision confers protection from changes in zoning ordinances for two-years. N.J.S.A. 40:55D-49. However, "nothing herein shall be construed to prevent the municipality from modifying by ordinance such general terms and conditions of **preliminary approval** as relate to public health and safety." Ibid. Furthermore, "[a]ny provision of an ordinance, **except those relating to health and public safety**, that are adopted subsequent to the date of submission of an application for development, shall not be applicable to that application for development." N.J.S.A. 40:55D-10.5 (emphasis added). The Legislature adopted N.J.S.A. 40:55-10.5 with the clear purpose of assisting developers by obviating the previous "time of decision" rule which required the government and courts to review approved projects using all ordinances enacted at the time of the court's decision. Jai Sai Ram, LLC v. Planning/Zoning Bd. of the Borough of S. Toms River & Wawa, Inc., 446 N.J. Super. 338, 343-44 (App. Div. 2016). Instead,

the statue implemented a "time of application" rule requiring the government and courts to review an application under ordinances at the time the developer submitted its application. See Ibid. The time of application rule found in N.J.S.A. 40:55D-10.5 provides that regulation that are in effect the date of submission for an application to develop will govern the review of the application. Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of the Tp. of Franklin, 448 N.J. Super. 583, 588 (App. Div. 2017). This marked a crucial shift from the time of decision rule previously used by the courts, where a land use decision was based on the ordinance as it existed at the time the application or appeal was being decided. Id. at 586 (citing Jai Sai Ram, LLC v. Planning/Zoning Bd. of the Borough of S. Toms River & Wawa Inc., 446 N.J.Super. 338, 343, 131 A.3d 407 (App. Div.), certf. denied, 228 N.J. 69, 154 A.3d 696 (2016).

Here, although the Ordinances were passed two years after Shipyard's application received final approval, there is ample evidence to show the Ordinances relate to health and public safety. First, evidence shows the Ordinances are part of a larger push by State and Federal agencies to deal with issues relating to Hurricane Sandy. Additionally, following Superstorm Sandy the Federal Emergency Management Agency ("FEMA") provided public guidance documents for New Jersey communities that recommended floodplain management. In January 2013, the New Jersey Department of Environmental Protection ("NJDEP") adopted amendments into its regulations to incorporate FEMA's advisory flood maps and in determining flood hazard areas. The NJDEP issued a public guidance in July of 2013, encouraging municipalities to pass an ordinance that would adopt FEMA's advisory flood maps. Hoboken's ordinances were modeled from the NJDEP's Model Flood Damage Prevention Ordinance. On April 6, 2017 a NJDEP representative advised that Ordinance Z-263 substantially complied with the NJDEP guidelines.

This evidence tends to show that Hoboken passed the Ordinances in part for the general welfare and to protect its resident's health and safety following the impact of Hurricane Sandy. However, even if a zoning ordinance has an effect on health and public safety, or is motivated by health and public safety concerns, that does not re-characterize a zoning ordinance as a general police power ordinance. New Jersey Shore Builders Ass'n v. Twp. of Jackson, 199 N.J. 38 (2009). When an ordinance is premised upon a planning or zoning initiative that ordinance necessarily implicates the MLUL. Id. at 54.

Additionally, nothing in N.J.S.A. 40:55D-52 mentions a health and public safety exception:

> a. The zoning requirements applicable to the preliminary approval first granted and all other rights conferred upon the developer pursuant to section 37 of P.L.1975, c.291 (C.40:55D-49), whether conditionally or otherwise, shall not be changed for a period of two years after the date on which the **resolution of final approval is adopted;** provided that in the case of a major subdivision the rights conferred by this section shall expire if the plat has not been duly recorded within the time period provided in section 42 of P.L.1975, c.291 (C.40:55D-54). If the developer has followed the standards prescribed for final approval, and, in the case of a subdivision, has duly recorded the plat as required in section 42 of P.L.1975, c.291 (C.40:55D-54), the planning board may extend such period of protection for extensions of one year but not to exceed three extensions. Notwithstanding any other provisions of this act, the granting of final approval terminates the time period of preliminary approval pursuant to section 37 of P.L.1975, c.291 (C.40:55D-49) for the section granted final approval. N.J.S.A. 40:55D-52(a) (emphasis added).

Counsel for FBW, asserted during oral argument that N.J.S.A. 40:55D-49 requires this court to retroactively apply the Ordinances to Shipyard. N.J.S.A. 40:55D-49 references public health and safety, is incorporated by reference in N.J.S.A. 40:55D-

52(a), and permits the retroactive application of ordinances for public health and safety. However, N.J.S.A. 40:55D-49 deals exclusively with preliminary approval and does not have any bearing on this matter, as the Appellate Court held that Shipyard obtained final approval in July, 2012. Shipyard Assocs., L.P. v. Hoboken Planning Bd., 2017 N.J. Super. Unpub. LEXIS 1960 (App. Div. August 2, 2017).

The plain language of N.J.S.A. 40:55D-52 does not contain a health and public safety exception after final approval. Hoboken argues that this court should infer a public safety exception into N.J.S.A. 40:55D-52 because the overriding purpose of the MLUL is to guide land use in a manner that will promote the public health and safety and secure safety from floods and other disasters. See N.J.S.A. 40 55:D-2a; N.J.S.A. 40:55D-28. However, the plain language of a statute should be used when looking for legislative intent. Frugis v. Bracigliano, 177 N.J. 250, 280 (2003).

Additionally, the clear language of N.J.S.A. 40:55D-10.5 does not apply to final approval, but rather to an application for approval:

> Notwithstanding any provision of law to the contrary, those development regulations which are in effect on the date of submission of an **application for development shall govern the review of that application for development and any decision made with regard to that application for development.** Any provisions of an ordinance, except those relating to health and public safety, that are adopted subsequent to the date of submission of an **application for development,** shall not be applicable to that application for development. N.J.S.A. 40:55D-10.5 (emphasis added)

Judge Rodriguez held in her opinion that Shipyard's application was deemed approved in 2012 and "subsequent changes in law have no effect on the site plans to which the Board has alread

granted approval, and that are no longer properly characterized as "applications."" Dory Cert. Ex 47 at 20-22.

As was recently reiterated in Dunbar, the legislature's explicit purpose in enacting N.J.S.A. 40:55D-10.5 was to, "protect landowners and developers from the inequity that occurred when application and approval efforts and expenses were rendered futile by subsequent changes to the ordinance." Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of the Twp. of Franklin, 448 N.J. Super. 583, 588 (App. Div. 2017) (citing Assemb. 437, 214th Leg., Reg Sess: (N.J. 2010) (Sponsors statement)). Public entities are granted their authority to zone by the legislature through its police power, the legislature intended the MLUL to simplify and standardize the zoning board approval process to limit the potential for harassment of applicants and bring statewide uniformity and consistency. Id. at 597.

Although it appears that public safety may have been a motivating factor behind the Ordinances, they are also fundamentally changing the zoning of land where the project was to be built. The Ordinances now restrict the property to recreation use, which has the same effect as a zoning ordinance. Ordinance Z-264 is explicitly a zoning ordinance, which was adopted pursuant to Municipal Land Use Law, N.J.S.A. 40:55D-1. Ordinance Z-264 created the general restriction that "All construction shall be landward of the mean high tide established and updated from time to time by the appropriate governmental agency., and no new construction or substantial improvements of existing structures shall be permitted on piers or platforms projecting into the Hudson River or Weehawken Cove." Miller Cert. Ex. GG. Ordinance Z-263 is a regulation that Hoboken asserts was enacted pursuant to its police power, but as pointed out by Shipyard this Ordinance in many ways acts as a zoning ordinance. In addition to restricting property to recreational use the ordinance also restricts elevated

buildings lowest floor height, changes to improved or unimproved real estate and has a special provision for water uses and historic structures. Dory Cert. Ex. 1 at Ex. A. This is unlike the case of New Jersey Shore Builders Ass'n v. Twp. of Jackson, 199 N.J. 38 (2009), where the court found that a tree removal ordinance is outside of what is typically considered land use controls. The Court went on to state that it was an environmental regulation and not a planning or zoning initiative and was thus not subject to the specific limits under the New Jersey Municipal Land Use law. Ibid. The Court discussed general police powers that touch on the use of land, but are not zoning ordinances, such as "health codes, environmental regulations, building codes, and laws regulating the operation of particular businesses." Id. at 54. An ordinace that does more than touches upon the land and operates inside of what is typically considered land use controls operates as a zoning ordinance. Ibid. Here the Z-263 ordinance does much more than just touch upon the use of land, as a tree removal ordinance would. It actually effects what and where structures can be built similar to what a typical zoning ordinance does and thus would be subject to the MLUL's, insulation of a project for two years from changes in the zoning law. N.J.S.A. 40:55D-52(a); See Britwood Urban Renewal, L.L.C. v. Asbury Park, 367 N.J. Super. 552 (App. Div. 2005).

Since both Ordinances affect zoning the court finds they would be subject to the specific limits in N.J.S.A. 40-55D-1 to -10, which would insulate Shipyard from having to comply with this. Alternatively, even if Ordinance Z-263 was considered a general environmental regulation N.J.S.A. 40:55D-10.5 does not apply to projects that have already been given final approval.

Shipyard has obtained three required nationwide permits from the U.S. Army Corps of engineers including a report that was issued on June 9, 2017. NJDEP granted the project a Waterfront Development

Permit after considering 48 written comments, including contentions regarding flooding and safety. The NJDEP has regulations that have specific criteria for building a structure on a pier or platform and the Project was deemed to comply with those criteria.

Shipyard's Motion for summary judgement on Counts IV and V is GRANTED since there are no material facts in dispute as to whether or not ordinances, Z-263 and Z-264 can retroactively apply to Shipyard's vested rights that were automatically given final approval in July of 2012. There was no pending development application in January and February of 2014 when the Hoboken Ordinances were enacted. The Appellate Division affirmed Judge Rodriguez's opinion that Shipyard's application was automatically given final approval in July, 2012. Hoboken may have enacted the Ordinances, in part, using its general police powers for health and public safety, but Ordinances Z-263 and Z-264, enacted in January and February of 2014 cannot apply to the Shipyard project that was granted final approval in July of 2012. There is no health and public safety exception under N.J.S.A. 40:55D-52 and N.J.S.A. 40:55D-10.5 does not apply to projects that have been given final approval. Permitting these ordinances to apply to Shipyard's application would essentially turn the function of vesting rights on its head. Although there may be some facts in dispute all of the material facts necessary for this court to reach its decision are undisputed. All cross-motions to dismiss Count IV are V are DENIED. The remaining Counts of the Complaint are dismissed as moot.