Fund for a Better Waterfront, Plaintiff, vs. Township of Weehawken, Mayor, Council of the Township of Weehawken, and Hartz Mountain Industries, Inc. (as Intervenor) Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY DOCKET NO. HUD-L-354-20 CIVIL ACTION

PLAINTIFF FUND FOR A BETTER WATERFRONT'S TRIAL BRIEF IN SUPPORT OF ITS PREROGATIVE WRIT ACTION CHALLENGING THE ADOPTION OF ORDINANCE 32-2019 BY WEEHAWKEN TOWNSHIP

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PRELIMINARY STATEMENT

This action challenges the adoption by the Township of Weehawken ("Township") of Ordinance 32-2019 ("Ordinance 32-19"), a rezoning ordinance that epitomizes everything that has gone wrong with the planning and development over forty years of Weehawken's Lincoln Harbor Planned Development ("LHPD"), an approximately 50-acre area along the southern Hudson River waterfront oft described as the Township's "crown jewel" for its spectacular waterfront views and prime location. A zoning ordinance is presumptively valid if its goals and methods to achieve them are reasonable and relate to legitimate zoning purposes under the Municipal Land Use Law (N.J.S.A 40:55D-1 *et seq*.) ("MLUL"), and it meets all statutory procedural prerequisites. Ordinance 32-19 fails each test. Its principal aim is to exact free public parking spaces from a developer in exchange for higher residential density within the LHPD, and it uses the pretext of discretionary density bonuses to justify these improper municipal actions. No factual basis or proper planning analysis support its significant departures from the existing zoning regulations and the Township's Master Plan, and it violates the most basic principles of comprehensive zoning in favor of codifying a history of *ad hoc* poor planning. Its rushed adoption was the haphazard result of a failed development application that revealed the fault lines of Weehawken's outdated planned development regulations, but which Ordinance 32-19 has not served to address properly. The resulting LHPD has become a soulless patchwork quilt of isolated development projects piecemealed over time through a dizzying array of redevelopment plans, financial agreements, amendments and site plan approvals that make it all but impossible to pin down the existing bulk standards, yet continues to invite spasmodic attempts by the Township to resuscitate its laudable but butchered goals of improving public access, waterfront preservation and economic vitality with each development application that comes along. For the reasons that follow, this Court must find

the adoption of Ordinance 32-19 to be arbitrary, capricious and unreasonable, that the Ordinance violates the statutory separation of powers, is void for vagueness, based on improper purposes, and should be vacated. The Township should be required to "reset the clock" by updating its 1984 Master Plan and do a comprehensive study of current and projected land use in the LHPD that begins with an accurate calculation of the current floor area ratio (FAR) across the entire LHPD as well as for each development site within it, and then comprehensively examines traffic, public and private infrastructure, stormwater management, open space and the relationship of commercial and residential development on its prized waterfront.

STATEMENT OF FACTS

The Property

The LHPD is an approximately 50-acre area (exclusive of riparian rights) along the Hudson River waterfront at the southern end of Weehawken, bordering Hoboken, owned almost entirely by Hartz Mountain Industries, Inc. ("Hartz").

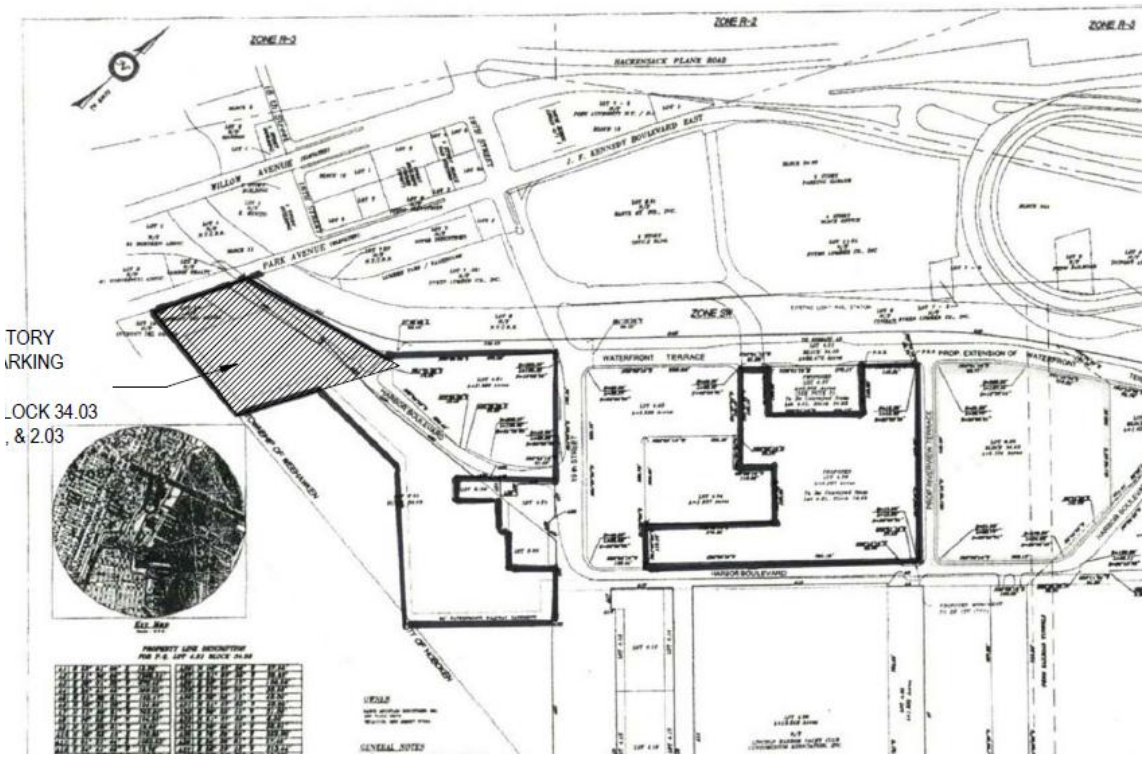
Map A: Lincoln Harbor Planned Development[1]

[1] Hand rendering based upon Lincoln Harbor aerial prepared by Melillo+Bauer Associates, dated June 25, 2019.

The LHPD is part of a larger area of the Weehawken waterfront designated the SW Special Waterfront Zone ("SW District"), the use and regulations for which were established in 1986 and are set forth in §23-10 of the Zoning Ordinance ("SW/PD Regulations," or "SW/PD Standards and Criteria").

The Planned Development and Redevelopment

The Township approved the planned development of the LHPD in 1985 and Hartz has since developed substantial parts of the area with office buildings, retail, multifamily projects, a hotel, restaurants and associated parking structures. However, because a significant portion of the LHPD remained vacant and substantially unproductive, the Township, pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 *et seq*., designated multiple parts of the LHPD as being "areas in need of redevelopment." Baillie Cert., Exh. B, ¶ B of resolution.



Map B: LHPD Redevelopment Area (from Redevelopment Plan)

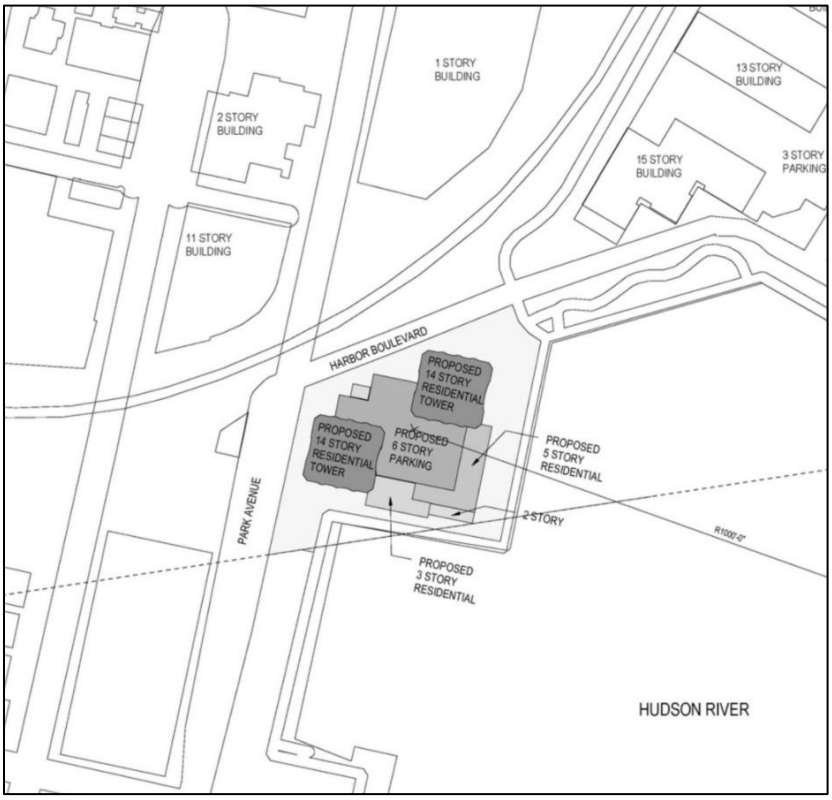
Three separate redevelopment plans were approved setting forth the Township's goals for the newly designated redevelopment areas (the "Redevelopment Plans"). These incorporate by reference the SW/PD Regulations and purport to "supplement and supersede the Zoning Ordinance requirements to the extent set forth [in the Redevelopment Plans]." Of these Redevelopment Plans, the most relevant to this litigation is the one referred to as the "Other Lots Redevelopment Plan"[2] (the "Redevelopment Plan" or "Plan"), approved by the Township on February 24, 2016, which encompasses the project within the LHPD area known as "ATIR," described further below. Baillie Cert., Exh. C. The Redevelopment Plan initially and improperly purported to give the Planning Board the rule-making authority to modify the SW/PD Regulations, including the authority to "determine the maximum number and density of residential units permitted to be developed within the [Redevelopment] Area," and, "the authority to determine the number of buildings over 50 feet to be developed within the [Redevelopment] Area," rule-making authority that only the governing body has under the MLUL. Id., Section 4, ¶ 1. As if realizing its mistake, Weehawken's governing body amended the Plan to modify these impermissible provisions so that the Board now has the authority to "recommend" standards such as number of residential units, height of buildings and building square footage rather than the authority to "determine" these standards. Baillie Cert., Exh. D, Sec. 1, ¶1.

Hartz's first ATIR development application

In March 2019, Hartz filed an application for development of the so-called ATIR site ("first ATIR development application"), a 2.2-acre portion of the southernmost area of the LHPD,

[2] The "Other Lots Redevelopment Plan" covers Block 34.03, Lots 1.01, 1.02, 2.03, 4.01, a portion of 4.21 and a portion of 4.28.

bordering Hoboken. [3]



Map C: ATIR development area[4]

Hartz sought preliminary and final site plan approval for an 18-story, 334-unit multifamily apartment building consisting of two towers each 200 feet high, including a seven-story parking garage to accommodate all the residents' parking needs. The application was heard over seven sometimes contentious meetings between May and October during which several objectors appeared and Board members expressed concern that the ATIR development proposal made the site largely inaccessible to the public and that the buildings were too high. The Township's desire for and intent to extract free public parking from Hartz as a condition of development also became apparent during the hearings, but because of the inescapable reality that the existing zoning

[3] The ATIR site consists of block 34.03 Lots 1.01, 1.02 a portion of 2.03 and a portion of 4.21.
[4] From Cover Sheet & Zoning Information, ZO-001.00, prepared by CetraRuddy, dated November 14, 2019 in connection with Hartz's second ATIR development application.

ordinance could not possibly permit Hartz's proposed height and density increases, the Board on October 29, 2019 denied the application on the basis that Hartz's proposed height was "in excess of an appropriate height." Baillie Cert., Exh. E., eighth Whereas clause. Although Hartz claimed that its redevelopment agreement with the Township permitted its proposed development, the SW/PD Regulations limited the height of most buildings in the southern part of the LHPD to 50 feet, and residential uses to a maximum density of 300 units. §23-10.4.e. No notice of the Board's denial of Hartz's first development application appears to have been published in the Township's official newspaper, as required.

The September 17, 2019 shake down

The Township's intent to extract from Hartz a free parking space contribution coalesced at a public Planning Board meeting held on September 17, 2019, unrelated to Hartz's first ATIR development application, although timed to occur after Hartz's presentation on its application but prior to the Planning Board's denial of the application on October 29, with Hartz required to attend. See, generally, Baillie Cert., Exh. M (transcript of September 17, 2019 Planning Board meeting[5]). What had been noticed on the meeting agenda as a hearing "to assess compliance with prior approvals" (9/17/19 PB Meeting transcript, p.7/15-18) instead played out more like a public inquisition of Hartz by a growing chorus of accusations by the Planning Board members, including Mayor Turner, that it had somehow reneged on an implied promise of indefinitely providing free public parking because it had not charged drivers for the use of LHPD parking spaces in the past, while Hartz pointed out, correctly, that none of the Redevelopment Plans actually required such free public parking exaction. Indeed, the Township engineer, Donald J. Norbut, commented, "I think what I've been hearing over the past number of hearings related to Lincoln Harbor project is

[5] Referred to herein as "9/17/19 PB Meeting transcript."

that the way the development has developed piecemeal, really a lot of thought wasn't going into public parking and overall parking plan, and it seems to be that that's something that has kind of fallen through the cracks here with the overall project." Id., T66:12-19. Ignoring the procedural implications of this comment, Mayor Turner responded by proposing the following off-the-cuff formula to determine the parking space requirement:

> So I would say 270. And there's a ratio, and you said it before. There's 368 parking spaces in the north that has now been asked to be enforced in Port Imperial by the parking authority. The township council's agreed to enforce it. So we took the best of ratios we can, your area versus their area, and we came up with actually 300, but, you know, we'll go with 270; 70 for residents and 200 for the general public.
>
> Id., T67:7-16

He then purported to make a motion to "authorize the Township Council to amend the Redevelopment Plan to provide for public parking down there that would consist of four hours free to anybody," Id., p.70:7-13, a motion that unanimously carried. Id., p.73:7-23. The Redevelopment Plan amendment correcting the designation of the Planning Board's jurisdiction to "recommend" rather than "determine" building requirements in the LHPD was disregarded in full public view here by the Mayor and the Board, as a planning board cannot legally "authorize" the governing body to do anything. Yet, Weehawken continued hurtling towards the bigger mess that would result from the passage of Ordinance 32-19.

Ordinance 32-2019 Rezoning

The Planning Board's denial of Hartz's first ATIR development application shortly after the September 17, 2019 Planning Board meeting was the prelude to the rezoning introduced by Ordinance 32-19. Indeed, in the same resolution memorializing the denial of Hartz's application,

the Board also recommended to the Council that "an ordinance be considered to conform the development regulations applicable to the LHPD to all of the various Prior Approvals (defined as "all prior Resolutions [not defined] of the Planning Board with respect to the LHPD approving and in several instances amending the planned development and granting approvals within the LHPD")" and that the Council "limit the height of any development for the Atir Site and the other portions of the LHPD within the areas covered by Redevelopment Plans." Baillie Cert., Exh. E., ¶ 2. However, the Township's desire for free parking spaces in the LHPD had by this point become the central purpose of Ordinance 32-19, while Hartz's desire for significantly increased density for the ATIR development had become the means to effectuate this goal. The need for any real planning analysis to effectuate the goal was disregarded entirely, as evidenced by the haphazard process that followed.

Barely two weeks after the denial of Hartz's first ATIR development application, on November 13, 2019, the Township Council introduced Ordinance 32-19. Baillie Cert., Exh. A. Notably, Ordinance 32-19 does not amend the Other Lots Redevelopment Plan itself, but rather the underlying SW/PD Regulations, covering the entirety of the LHPD area, including property not subject to any redevelopment plan.

The notable changes Ordinance 32-19 makes are that it:

- More than triples the permissible height for development on several sites within the LHPD, from 50 to 160 feet, including the ATIR site;
- More than doubles the number of buildings permitted to be over 50 feet within the LHPD from six to at least 14;
- Almost triples the number of permitted dwelling units from 850 to over 2,339[6];
- Eliminates the 909,500 square foot limit on residential development while capping the permitted overall gross floor area within the LHPD at the previously established 3,120,127 square feet, but retains the Planning Board's discretion to increase the

[6] As Ordinance 32-19 does not include specific numbers of units of all the developments it exempted from the maximum number of units, the actual number cannot be determined from the Ordinance, as further discussed herein.

density as an incentive for development of public facilities that a developer is willing to provide, such as public recreational facilities, fire stations, hospitals and parking spaces;

- Requires each[7] development application within the LHPD to provide public parking spaces as follows, at a location to be determined by the Planning Board: 200 parking spaces free of charge for 4 hours for anyone, and 70 contiguous parking spaces for use by Weehawken residents who do not live or work in the LHPD.[8]

The Ordinance's second reading and adoption had been scheduled for November 25, 2019, but when it was pointed out that the governing body had failed to refer the Ordinance to the Planning Board for a so-called "Master Plan consistency review," an essential and required procedural step, it rescheduled the November meeting while the Planning Board hastily scheduled its review, which occurred on December 3, 2019, a mere week before the Council's final consideration of Ordinance 32-19. In its Resolution (Baillie Cert., Exh. F), accompanied by a report by the Township Planner, Jill A. Hartmann, also dated December 3, 2019 (Baillie Cert., Exh. G), the Board recognized that Ordinance 32-19 was not consistent with the Township's 1984 Master Plan "in that the Master Plan limited residential development in the southern section of the waterfront to 300 units and 321,000 square feet," and limited to six the number of buildings over 50 feet high in the area south of the King's Bluff Dividing Line (i.e. the LHPD). Baillie Cert., Exh. F, ¶2; and Exh. G. It noted that the Township's re-examination reports prepared in 1991 and 2003 did not address the need for changes in the land use and building requirements of the LHPD. The Board's Resolution further opines that the same Master Plan is consistent with Ordinance 32-19 in that the Master Plan recommended mixed use development for the waterfront and recognized that "mass transit facilities…depend on a significant residential development component in order to run efficiently and cost-effectively." Id., ¶2. Despite the inconsistencies of Ordinance 32-19 with the

[7] It is not clear whether the 270 free parking spaces is the total overall number or number per development application.
[8] This provision was subsequently amended by the Township following legal challenge by Hartz, as noted herein, to reduce the amount of free parking spaces required as a condition of development approval.

Township's Master Plan and existing regulations, the Planning Board recommended it for adoption by the Township Council. However, neither the Resolution nor Ms. Hartmann's report make any independent findings or recommendations as to the adoption of Ordinance 32-19; they merely repeat, mostly verbatim, what is in the Ordinance itself.

The Township Council adopted Ordinance 32-19 at a public meeting on December 11, 2019 in the face of several objectors represented by counsel, including Plaintiff, and Hartz itself, and significant concerns expressed by members of the public. Among the many public comments were that there had been little to no transparency in the process of Ordinance 32-19 being introduced and adopted, that the process had been extremely rushed, that the Ordinance represented poor planning in that there were no infrastructure reports or engineering analyses to back up the dramatic increases in density and construction, that the public would not have proper access despite the provisions for public parking given the increased traffic and resulting congestion, that the consideration of parking unfairly biased the process in favor of Hartz, and that no attempt had been made to integrate the waterfront with neighboring Hoboken. See generally, Transcript of December 11, 2019 Township Council hearing on Ordinance 32-2019.[9] Hartz, through counsel, vociferously complained that the free parking requirement was a "quid pro quo" and was "unlawful" and "illegal." T60:19-20. It described the ordinance as "an illegal effort to codify the action that the Planning Board attempted to impose on Hartz for the ATIR site" and that the Ordinance effectively required that "neither Hartz's ATIR site nor any other development within Lincoln Harbor will be approved unless Hartz agrees to provide 270 public parking spaces free of charge in perpetuity at a location to be determined at the whim of the Planning Board." T61:2-9. Hartz also agreed with one of the other objectors that the hearing procedure was "irregular" due to the lack of transparency

[9] "T" herein refers to the Transcript of the Township of Weehawken meeting on December 11, 2019, filed in ecourts with a Rule 4:69-4 Certification on August 12, 2015 (LCV20252237512).

around the introduction of the new Ordinance. T53-3 to10. Hartz had made many of these arguments to the Township before, in a letter dated November 22, 2019, in which it described the attempt by Ordinance 32-2019 to condition development approval on the provision of free public parking as an "illegal exaction" and its factual underpinnings as being "constructed on a foundation of sand." Baillie Cert., Exh. H. The Township ignored Hartz's substantive challenges to Ordinance 32-19 but apparently heeded its warning as to procedural defects in initially failing to obtain a Planning Board report of consistency prior to scheduling the Council's vote.

What was abundantly clear is that Ordinance 32-19 had been intended to facilitate the Hartz ATIR project by allowing increased height and residential density on that site. What the Township evidently did not anticipate was the extent of resistance from Hartz itself to the free public parking space mandate.

Ordinance 32-19 challenges and hasty amendment

Four lawsuits by objectors challenging Ordinance 32-19 followed, including the present action (Baillie Cert., Exh. I) and a suit by Hartz, which strenuously objected to the free public parking space requirements, calling them an unlawful taking of private property by the Township in demanding the provision of off-site parking on private property for public use unrelated to a development application. Baillie Cert., Exh. J, Count Two. Hartz argued that all the parking needs generated by the ATIR project would be satisfied by improvements set forth in the site plan and that no professional reports or analyses of the LHPD parking needs had been done to justify the Township's demands for free parking as part of its development application. Id., ¶43.

Hartz and the Township subsequently entered discussions and negotiations to work out a plan for development of the ATIR site involving the provision of unrelated free public parking spaces by Hartz. Reflecting this agreement, the Township introduced an amendment to Ordinance

32-19 barely two months after its adoption, via Ordinance 02-2020 ("Ordinance 02-20"), which purported to "readopt" Ordinance 32-19 with amendments to the parking provisions. Baillie Cert., Exh. K. Like the parking provisions in Ordinance 32-19, the parking provisions in Ordinance 02-20 conditioned the benefit of greater density and building height now available to Hartz on Hartz agreeing to provide 180 public parking spaces, reduced from the previous 270, and additionally agreeing to pay the Township $220,000 for the purchase of two shuttle buses for general use by the Township. The Township Council adopted Ordinance 02-20 on February 26, 2020. Several objectors again filed prerogative writ actions challenging Ordinance 02-20, but Hartz did not do so this time. In fact, Hartz had already submitted its second ATIR development application ("second ATIR development application") before Ordinance 02-20 had even been adopted, evidencing its backroom agreement with the Township.

Hartz's second ATIR development application

Similar to the first application for preliminary and final major site plan approval, Hartz in its second ATIR development application proposed two towers consisting of 14 stories nearly 160 feet high, and 261 dwelling units (see Map C, supra). At the time of the second application, Ordinance 32-19 was in effect and its terms and conditions applied to the new application filed by Hartz, modified only by Ordinance 02-20. As provided by both Ordinances, the increased density for ATIR would not be available to Hartz "unless all of the terms and conditions, requirements and limitations of the SW/PD Criteria and Standards authorized [therein] are satisfied in the application with respect to that planned development," including the provision of the free public parking spaces. Baillie Cert., Exh. A, Sec. 8 and Exh. K, Sec. 5. After several months of hearings on the second application, the Planning Board approved it, subject to certain conditions, including the

provision by Hartz of "a chart containing FAR summaries for the entire Lincoln Harbor planned development," although that information is necessary when the Planning Board reviews a development application in the LHPD. In other words, the Planning Board approved the second ATIR development application without knowing the existing FAR of the LHPD. Plaintiff and several other objectors again filed prerogative writ actions challenging the Board's approval as arbitrary and capricious. Many of the issues with the Planning Board's approval flowed from the issues with Ordinance 32-19 described herein.

Procedural history

Plaintiff timely challenged Ordinance 32-19 with this Prerogative Writ challenge filed on January 27, 2020 ("Ordinance Challenge"). Baillie Cert., Exh. I. Significant delay in the litigation followed due to several factors, including the Covid-19 pandemic, which considerably slowed some court proceedings. Throughout the delay, several requests by the litigants were made to the then-assigned judge for case management conferences to move the litigation along, to little avail. On February 7, 2025, under a newly assigned judge, Plaintiff obtained a Consent Order to consolidate its Prerogative Writ actions, permit Hartz to intervene in the Ordinance Challenge (as Hartz was not initially named), and set a briefing schedule ("Consent Order")(LCV2025332454). Pursuant to the Consent Order, the Township and Hartz filed motions to dismiss Plaintiff's Ordinance Challenge, arguing that the Township's re-adoption and amendment of Ordinance 32-19 via Ordinance 02-20 had rendered Ordinance 32-19 moot and that Ordinance 02-20 remained the only governing law. (LCV2025493642; LCV2025496115). Dismissing these motions, the Court agreed with Plaintiff that this was not the case, as Ordinance 02-20 clearly establishes the interdependence of the two Ordinances and only amends two provisions in Ordinance 32-19 without restating the rest of Ordinance 32-19, and that the validity of Ordinance 02-20 therefore depends on the validity of Ordinance 32-19. Baillie Cert., Exh. L. Thus, if the court agrees that

Ordinance 32-19 is void and of no effect, Ordinance 02-20 necessarily fails also.

LHPD: Summary of Key Standards before and after Ordinance 32-19

Standard[10]	**Before Ordinance 32-19**	**After Ordinance 32-19**
Building height	≤ 50 feet, except that 6 buildings higher than 50 feet but no greater than 160 feet per permitted south of the King's Bluff Dividing line	160 feet, and confirming the already existing buildings over 50 feet and future developments, or at least 14 buildings
Max. number of dwelling units	300	2,339+ [11]
Max. FAR	1.85	same
Max. Gross Floor Area	3,120,127 sf	same
Min. Open Space	20%	same

LEGAL ARGUMENT

POINT I
STANDARD OF REVIEW

Zoning ordinances are entitled to a presumption of validity, but this presumption can be overcome by showing that the ordinance is arbitrary, capricious or unreasonable, or plainly contrary to the fundamental principles of zoning or the zoning statute. Riggs v. Long Beach Twp., 109 N.J. 601 (1988). Where the purpose of the ordinance is not to promote the purposes of zoning set forth in the statute, but is designed to achieve some unauthorized purpose through subversion of

[10] For entire LHPD area.

[11] See Point II A for more detailed discussion. Ordinance 32-19 specifically provides that the cap of 850 units does not include the following, which increase the maximum: 350 (ATIR), 150 (400 Harbor), 180 (Estuary IV) as well as the units not specified but publicly available for Hamilton Cove, 573 and Pier D, 236. The sum of 2,339 is calculated as follows: 850+350 (ATIR) + 150 (400 Harbor) + 180 (Estuary IV) + 573 (Hamilton Cove) + 236 (Pier D) = **2,339**. The "+" in the table refers to the discretionary density bonus increases, which are not defined.

the zoning power, the ordinance is invalid. Id., 613. Both the purpose and the method for achieving it must be reasonable. Id., 601; Damurjian v. Board of Adjustment of the Twp. of Colts Neck, 299 N.J. Super. 84, 94 (App. Div. 1997); Home Builders League of South Jersey, Inc. v. Berlin Twp., 81 N.J. 127, 138-39 (1979). When an ordinance is inconsistent with the municipality's master plan, failure by the municipality to record its reasons for adopting it notwithstanding the inconsistency is fatal. Riya Finnegan LLC v. Township Council of Twp. of South Brunswick, 197 N.J. 184 (2008). Ordinance 32-19 fails on both procedural and substantive grounds.

POINT II

ORDINANCE 32-2019 IMPERMISSIBLY DELEGATES ZONING BOARD POWERS TO THE PLANNING BOARD AND IS ARBITRARY AND CAPRICIOUS

A. The Municipal Land Use Law does not permit a planning board to exercise zoning board powers

Only the governing body can legislate density and only a board of adjustment can grant variances from such zoning regulations as density and other standards that relate to the intensity of use. A planning board cannot be given open-ended power to increase density. Ordinance 32-19's attempt to do so must be struck down.

Section 2 of Ordinance 32-19 amends the residential use provisions of the SW/PD Regulations by providing as follows:

> Maximum: Eight hundred fifty (850) Dwelling Units; provided however that the residential units in the 800 Harbor Boulevard (Hamilton Cove) (Block 34.03, Lot 4.01), in the Pier D (Block 34.03, Lot 4.05), in the proposed development of not to exceed 350 units on the ATIR site (Block 34.03, part of Lot 2.03 and Lots 1.01 & 1.02), in the proposed development of not to exceed 150 units on the 400 Harbor Boulevard Site (Block 34.03, Lot 2.03; also called Site C), and in the proposed development of not to exceed 180 units on the Estuary IV Phase (Block 34.03, Lot 4.28) shall *not* count against the total number of residential units permitted in the planned development; and provided further however, *the square footage of the excluded residential units for these listed five parcels,* Hamilton Cove, Pier D, ATIR, Site C and Estuary IV, ***shall count*** *in determining whether a*

proposed project remains within the limitation on the total amount of square footage approved for the planned development. The total Gross Floor Area approved by the Planning Board in the March 17, 2009 Resolution approving the Eighth Amendment to Preliminary Approval and Amended Phase II Final Planned Development Approval, that is 3,120,127 square feet, shall be the maximum permitted density that the Planning Board has authority to approve for the Planned Development, unless the Planning Board shall determine that certain incentives provided in the future would allow the Board to approve an increase in that number, based on the SW/PD Criteria and Standards. (Underline, per original, indicates the amended language.)(Amended language is underlined, per original.)

The maximum number of permitted dwelling units cannot be determined from this provision as it does not include a number for Hamilton Cove (800 Harbor Boulevard, Block 34.03, Lot 4.01) or Pier D (Block 34.03, Lot 4.05), and it is unclear if and to what extent any existing units not specifically mentioned are included in the 850 cap. The Estuary VI development, for example, is an existing development, described in public reports as having 589 units, and it would appear that the 180 units set forth in the Ordinance is in addition to that.[12] Pier D is also an existing development located at 1500 Harbor, with 236 units, while Hamilton Cove, at 800 Harbor, has 573 units. [13] These numbers were known at the time Ordinance 32-19 was adopted, so there is no reason they should not have been specified unless Weehawken were trying to deliberate obfuscate the extent of the increases from the existing regulations and the Master Plan. Comments by Weehawken's Mayor, Richard Turner, at the December 11, 2019 hearing at which the Council adopted Ordinance 32-19 suggest that was the intent, as for example from an exchange with a concerned resident during which he appeared to evade questions about the increase in residential development within in the LHPD. T133-135.

Calculating the increased maximum number of units from the numbers that are provided brings the total to 1,530 (850 plus 350 (ATIR), 150 (400 Harbor), 180 (Estuary IV)), but if the numbers that are publicly available for Hamilton Cove, 573, Estuary, 589, and Pier D, 236, are

[12] See, Joshua Burd, "A decade after pivoting, Hartz Mountain has created a residential destination in Weehawken, Real Estate New Jersey (February 4, 2021), https://re-nj.com/a-decade-after-pivoting-hartz-mountain-has-created-a-residential-destination-in-weehawken.

[13] Id.

added to this sum, the total is close to 3,000, an extraordinary increase over the initial cap of 850, and significantly more than the 1,660 number of units cited by Mayor Turner at the December 11, 2019 hearing. T134:6. But 3,000 is not a real number either. While the maximum number of units per development specifically identified in Section 2 of the Ordinance (§23-10.4.e of the SW/PD Regulations) must be within the total Gross Floor Area[14] for the LHPD of 3,120,127 square feet, the section goes on to say that this number is subject to any determination the Planning Board may make that "certain incentives provided in the future would allow the Board to approve an increase in that number, based on the SW/PD Criteria and Standards." Baillie Cert., Exh. A, Section 2 (amending §23-10.4.e of the SW/PD Regulations). The provision most likely alluded to here is §23-10.4 (Criteria and Standards for Planned Development), subsection (f) (Floor Area), which provides that,

> [t]he Planning Board may, in its discretion, permit an increase in the floor area of a planned development if the developer thereof provides public or quasi-public land…or facilities such as, but not limited to schools, municipal offices, fire stations, police stations, hospitals, swimming pools, tennis courts or other public recreation facilities, parking spaces for Weehawken residents other than those living in the planned development, view plazas or other similar facilities.

While the Ordinance refers to "density" and this provision refers to "floor area ratio," ("FAR") they appear to mean the same thing in this context, a measure of the density (or intensity) of development. Effectively, the Ordinance permits the Planning Board to increase the floor area ratio of the LHPD by an indeterminate amount, a power only the governing body has, by establishing FAR limits as a zoning standard, or the zoning board has, by granting an FAR variance from existing standards.

The MLUL sets forth the powers of a planning board, zoning board of adjustment, and the

[14] Gross Floor Area is defined in the Weehawken ordinance as the "total of all floor space within a building, including walls, cellar, basement and any portion of an attic with a floor and measuring at least six (6') feet in height."

governing body. See, generally, N.J.S.A. 40:55D-25, -60, -62, -69.2, -70. Only the governing body can enact zoning ordinances (N.J.S.A. 40:55D-62) while land use boards fulfill a quasi-judicial role by interpreting and applying the ordinances to land development applications and are empowered to grant variances in certain circumstances. Whereas there is some overlap in the functions and powers of a planning board and zoning board (for example the power to grant "c" variances from certain zoning requirements), only a zoning board can grant so-called "d" variances, which relate to use, FAR, density and height above a certain threshold (N.J.S.A. 40:55D-70d). These types of variances go the intensity of land use and are therefore generally more difficult to obtain because they involve more significant departures than "c" variances from the governing body's determinations as to appropriate zoning and land use. Put more dramatically, these variances "can pose a greater threat to the zone plan and public good than other dimensional controls, which are regulated by subsection (c) [of N.J.S.A. 40:55D-70]." Cox & Koenig, New Jersey Zoning and Land Use Administration (GANN, 2025) § 35-2, p. 517.

The MLUL provides that "[a]ny power expressly authorized by this act to be exercised by (1) planning board or (2) board of adjustment shall not be exercised by any other body, except as otherwise provided in this act. N.J.S.A. 40:55D-20. In recognizing this statutory allocation of legislative and quasi-judicial functions, courts have routinely affirmed the exclusive jurisdiction of zoning boards with respect to "d" variances. See for example, PRB Enterprises, Inc. v. South Brunswick Planning Bd., 105 N.J. 1 (1987), in which the Supreme Court struck down an ordinance in which a provision improperly delegated to the planning board the power to determine whether or not certain uses were permitted in the C-1 zone; and Najduch v. Township of Independence Planning Bd., 411 N.J. Super. 268 (App. Div. 2009), in which the court struck down a planning board's attempt to condition site plan approval on the applicant obtaining a use variance or change in zoning, finding that the zoning board's exclusive authority cannot be circumvented by an

applicant simply declining to apply for a use variance. As the court summarized in Najduch, "Where a use is not permitted by the zoning ordinance, the [MLUL] permits applicants to seek use variances from the board of adjustment. (d). This power is exclusive; a planning board lacks authority to grant a use variance." Id. The prohibition extends to all variances under subsection d(4): "Variances from FAR controls may be granted only by boards of adjustment under subsection d(4) and not by planning boards." Cox, at §35-2, p. 517.

Ordinance 32-19 violates this statutory scheme by purporting to authorize the Planning Board to increase the FAR of the LHPD by an undetermined amount based on "discretionary incentives."

B. The Local Redevelopment and Housing Law does not provide any exemption from the exclusive jurisdiction of the governing body or zoning board

The designation of the LHPD as an area in need of development that now is governed by the Redevelopment Plan does not suspend the statutory separation of powers, notwithstanding the broad flexibility that the Local Redevelopment and Housing Law (LRHL) provides for municipalities to implement redevelopment efforts. A redevelopment plan can supersede or supplement a local zoning ordinance by establishing different zoning requirements and a different land use plan for the development area, since, it must be emphasized, a redevelopment plan is adopted by the governing body and how it interacts with the underlying zoning ordinance is a function of its terms. N.J.S.A. 40A:12A. Similarly, there is no basis for altering the exclusive jurisdiction of the zoning board to grant "d" variances. N.J.S.A. 40A:12A-7. On the contrary, in recognizing that neither the MLUL nor LHRL specifically addresses variances from a redevelopment plan (indeed, the LHRL is altogether silent on variances), courts have upheld the jurisdiction of land use boards to grant variances from a redevelopment plan in the normal way of obtaining a variance under the MLUL, as the only alternative would be requiring applicants to

obtain an amendment to the redevelopment plan, which courts have recognized would be onerous. See for example, Weeden v. City Council of the City of Trenton, 391 N.J. Super. 214 (App. Div. 2007) (in which the court upheld the determination of a zoning board to exercise jurisdiction to grant a use variance from a redevelopment plan, concluding that "although the MLUL is more specific in dealing with zoning exceptions, we construe the two statutes [MLUL and LHRL] *in pari materia*." At 228). Indeed, the Redevelopment Plan itself expressly provides that the Planning Board may grant "c" (or bulk) variances and waivers, as permitted under the MLUL, but notably does not expressly extend this power with respect to "d" variances.

Ordinance 32-19 disregards these limitations, continuing a pattern of procedural and jurisdictional overreach and defiance revealed by the history of the Redevelopment Plan. Moreover, while the Board's Resolution recommending adoption of the Ordinance (Baillie Cert., Exh. F) refers to amendment of the Redevelopment Plans, the Ordinance does not actually amend any of the Redevelopment Plans but rather the underlying SW/PD Regulations, which are purportedly incorporated by reference into the Redevelopment Plans. That means that Ordinance 32-19 captures non-redevelopment area parts of the LHPD thereby subjecting those non-redevelopment area sites (for example, Pier D and Riva Point) to redevelopment plan requirements that may not relate to them at all, most glaringly the free parking mandates. At the same time, these sites do not all benefit from the increased density that Ordinance 32-19 purports to grant to only some of the sites, resulting in an unequal treatment of sites within the LHPD, not all of which are owned or developed by Hartz.

Thus, even if hypothetically the LRHL could be invoked as a legal framework for granting the Planning Board more flexibility to increase residential density, Ordinance 32-19 is technically not a redevelopment ordinance at all, and being "incorporated by reference" into the Redevelopment Plans does not make it so. Ordinance 32-19's elaborate references to the

Redevelopment Plans and history again only serve to obfuscate the procedural and jurisdictional irregularities revealed in every aspect of its adoption.

C. The offending provisions of the Ordinance cannot be severed given the express non-severability provision

Ordinance 32-19 cannot be rescued by a severability provision because it expressly provides the opposite in a lengthy non-severability provision that emphasizes the "interdependence" of its terms and conditions with the SW/PD Regulations. Section 8 of Ordinance 32-19, entitled "Non-Severability" provides as follows:

> **Section 8**. Non-Severability. This Ordinance is enacted as a comprehensive response to changing conditions that have affected the SW District and its terms and conditions are *inter*dependent [emphasis in original], and therefore in order to make an application for a revised planned development approval, the applicant must agree to comply with all of the terms and conditions, requirements and limitations set forth in this Ordinance, including but not limited to the requirements for free public parking contained herein. When the amended provisions of the SW/PD Criteria and Standards are codified in the Zoning Ordinance (which terms are incorporated by reference in the Redevelopment Plans), the codification will make clear that the amended provisions are not applicable for any planned development unless all of the terms and conditions, requirements and limitations of the SW/PD Criteria and Standards authorized in this Ordinance are satisfied in the application with respect to that planned development; in a similar manner, changes will be made, and/or will be deemed made, as and if necessary to the Zoning Schedule and other provisions of the Zoning Ordinance to conform and to be consistent with the provisions of this Ordinance.

This non-severability provision was again included, almost verbatim, in Ordinance 02-20. Baillie Cert., Exh. K, Sec. 5. The Whereas clauses of Ordinance 32-19 illustrate the "interdependence" of its terms by reference to multiple redevelopment plans and amendments to them and the intent to "consolidate and clarify the SW/PD Criteria and Standards" included in them, without actually specifying which of the standards these are. See, for example, Baillie Cert., Exh. A, 17th Whereas Clause. Thus, even an attempt to sever a provision of the Ordinance would be an impossible task that could not be accomplished due to the stated goals of tying the free parking requirements to applications for increased density, and to how murky – to put it generously

– the Ordinance and related provisions are.

POINT III

ORDINANCE 32-19 IS VOID FOR VAGUENESS

A. The Ordinance provision authorizing the Planning Board to increase FAR is void for vagueness as there are no clear criteria or definitions to guide the Board's discretionary powers

A law is void if persons of common intelligence must guess at its meaning and it invites arbitrary enforcement. Twp. of Pennsauken v. Schad, 160 N.J. 156, 181 (1999). Ordinance 32-19 fails both tests.

(i) What counts as an "incentive"? Section 2 of the Ordinance permits the Planning Board to "determine that certain incentives provided in the future would allow the Board to approve an increase in [the maximum permitted density of 3,120,127 square feet], based on the SW/PD Criteria and Standards." While it is not clear which of the SW/PD Criteria and Standards are being referenced here, the most likely is §23-10.4.f.3, "Floor Area Increases Permitted with "Discretionary Incentives." That provision reads as follows:

> Floor area increases permitted with "discretionary" incentives.
>
> (a) The Planning Board may, in its discretion, permit an increase in the floor area of a planned development if the developer thereof provides public or quasi-public land, (other than that otherwise required under any other section of this chapter), or facilities such as, but not limited to schools, municipal offices, fire stations, police stations, hospitals, swimming pools, tennis courts or other public recreation facilities, parking spaces for Weehawken residents other than those living in the planned development, view plazas, or other similar facilities.
>
> (b) In no event shall the aggregate increase in floor area ratio for all such facilities exceed 0.30 measured over the development area.
>
> (c) In determining the floor area increase for each such facility for which an incentive is herein allowed, the Planning Board shall consider: (1) the value of the facility to the Township; (2) the estimated cost of the facility to the developer; and (3) such other factors as the Planning Board may deem relevant. §23-10.4.f.3 of the Weehawken Land Use Code.

Subsection (c) provides no criteria whatsoever for determining the amount of increased floor area based on either "value" of the facility to the Township, whether monetary or otherwise, or "estimated" cost, which could be vastly different from the actual cost. The Board's discretion is therefore virtually unbounded in its determination of density increases for future LHPD developments. It is also completely unconstrained by the list and type of "facilities" that it may consider to grant increased density, given the words "or other similar facilities" at the end of subsection (a).

(ii) How is the .03 FAR aggregate measured? Determining whether the aggregate increase in floor area ratio for any facilities deemed acceptable incentives by the Planning Board exceeds 0.3 measured over the development area (per subsection (b)) cannot be determined by the Ordinance, but only by evaluating the approved floor area of each and every previous development of the LHPD to determine whether the maximum permitted 3,120,127 square feet (as per the March 17, 2009 Resolution approving the Eighth Amendment to Preliminary Approval and Amended Phase II Final Planned Development Approval) has been reached. Baillie Cert., Exh. A, Sec. 2 (amending §23-10.4.e of the SW/PD Regulations). Further muddying this calculation is that, while Floor Area Ratio "for a planned development" is defined by the Weehawken ordinance as the "total floor area of the planned development divided by the development area," where Floor Area does not include "mechanical equipment space and floor space devoted to required parking places and the circulation therefore," the maximum permitted floor area in the Ordinance is the total Gross Floor Area," which means "the total of all floor space within a building, including walls, cellar, basement and any portion of an attic with a floor and measuring at least six feet in height." § 23-3.1 of the SW/PD Regulations (Definitions). Thus, determining whether either the aggregate increase in floor area ratio from discretionary density bonuses has reached 0.3 or the

overall FAR limitation of 1.85 has been reached means backing out square footage of mechanical equipment and floor space devoted to required parking places and associated circulation in accordance with the definition of Floor Area. Yet another thorny question arises as to whether "floor space devoted to required parking places" captures the required free public parking spaces or whether those should be excluded from such calculation. Ordinance 32-19 does not attempt to clarify any of these questions.

(iii) Who gets how much density, and why? Neither Ordinance 32-19 nor the underlying SW/PD Regulations provide any formula tying the concept of public value or cost to the density a developer would be awarded by providing the public facility incentives. Thus, applicants cannot know "the price" of additional FAR, while the Planning Board can arbitrarily decide this based on its determination of the value of the facility to the Township, its estimated cost or any other factor it deems relevant. Even if it wanted to apply some criteria consistently in the exercise of its discretion to grant density increases, the Planning Board could not point to any criteria provided in the Ordinance.

To survive judicial scrutiny, ordinances must meet the "test of certainty and definiteness." Morristown Road Associates v. Boro of Bernardsville, 163 N.J. Super. 58, 67 (App. Div. 1978). "If the ordinance fails this test, it must be invalidated as impermissibly vague and indefinite." Id., at 68. A zoning ordinance "must be clear and explicit in its terms, setting forth adequate standards to prevent arbitrary and indiscriminate interpretation by local officials." Lionshead Woods Corp. v. Kaplan Bros., 250 N.J. Super. 545, 549 (Law Div. 1991) (citing 8 McQuillin, Municipal Corporations (3d ed. 1991), Sec. 25.59). Simply put, its terms must be "capable of being understood." Id.

In Morristown Road Associates v. Boro of Bernardsville, the court found that ambiguity in an ordinance invited official interpretation or effectuation of procedures that could be arbitrarily

devised or changed. The ordinance was intended to promote development design standards, for example requiring proposed structures to relate "harmoniously" with their surroundings. But, as the court found, the standards in the ordinance were not limited by "any concepts of congruity held so widely that they are inseparable from the enjoyment and hence value of property." Id., at 67 (citing United Advertising Corp. v. Metuchen, 42 N.J. 1, 5 (1964). Similarly, the architectural standards did not "adequately circumscribe the process of administrative decision nor does it provide an understandable criterion for judicial review. It vests the design review committee, as well as the planning board, with too broad discretion, and permits determinations based upon whim, caprice or subjective considerations." Id.

Similarly, the concept in §23-10.4.f.3 of "value" to the Township of a public facility is subjective and does not meet the test of certainty and definiteness required of zoning regulations. The "estimated cost of the facility to the developer" is an equally unstable test, as estimates often do not reflect real cost in land use, and raises a serious concern that tying a developer's ability and willingness to pay for public facilities to the Board's willingness to grant increased density invites quid pro quo bargaining and improper purposes. Finally, the catchall provision allowing the Board to consider "such other factors as the Planning Board may deem relevant" is a carte blanche that admits of no criteria at all.

Vague and unclear ordinance provisions implicate due process and property rights because they invite arbitrary and capricious actions by officials that can result in the unequal application of law. Notwithstanding its oversized influence as the majority owner and developer of the LHPD, Hartz is entitled to the protections of due process and equal treatment that land use controls are supposed to ensure. But Ordinance 32-19 extends to other smaller property owners in the area as well as non-redevelopment parts of it, heightening the potential for unfair treatment as they do not all benefit from the increased density Ordinance 32-19 grants for Hartz developments. For the

foregoing reasons, the court must find Ordinance 32-19 void for vagueness.

POINT IV

ORDINANCE 32-19 IS PLAGUED BY IMPROPER PURPOSES

To be valid, an ordinance must not only have a proper legislative goal but the manner in which the goal is to be achieved must also reasonably relate to that goal. Damurjian v. Board of Adjustment of the Twp. of Colts Neck, 299 N.J. Super. 84, 94 (App. Div. 1997). The ordinance must also comport with constitutional constraints on zoning power, including those pertaining to due process, which are not limited to the need for clear and precise legislative drafting, addressed above. Riggs v. Long Beach Twp., 109 N.J. 601, 611 (1988). Ordinance 32-19 fails these tests in multiple ways.

A. Ordinance 32-19, as amended by Ordinance 02-20, imposes illegal exactions by requiring free parking spaces as a condition of development approval

Ordinance 32-19 requires developers to provide 270 free parking spaces as a condition of any development application (Baillie Cert., Exh. A., Sec. 1) although no connection exists between the exaction and the development, violating the requirement that a zoning ordinance must have a proper legislative goal and the method to achieve it must be reasonably related to that goal. The free parking provision was hastily amended by Ordinance 02-20, which reduced the required free parking to 180 spaces and imposed an additional arbitrary requirement on the developer to pay $220,000 for the purchase of two shuttle buses for the Township's general use, but made no other changes. The provisions read:

> To expand upon and clarify that meaningful access for the residents and visiting public to the recreational and community facilities and other public and private improvements, the developer/redeveloper of the Planned Development shall be required to amend its Planned Development Approval to a) require that $220,000 shall be paid to the Township for the purchase of two shuttle buses at the time of completion

> of the next phase of the Planned Development, which is anticipated to be at the time of the issuance of the Certificate of Completion for the first building of the 800 Harbor Boulevard project. At that time, the developer/redeveloper shall also be required to provide a contribution of an additional $220,000 for replacement of those buses at a future time, as determined by the Township.
>
> Consistent with the purpose of §23-10.4(i)1(k), the developer/redeveloper of the Planned Development shall be required to amend its Planned Development Approval to require that the following free public parking shall be permanently provided: a) at least eighty (80) surface parking spaces which shall be made available to the public at large for a period of two (2) consecutive hours and at no charge, and b) at least one hundred (100) parking spaces within parking structures within the Planned Development for the use of those Weehawken residents who do not live or work in the Planned Development, which shall be made available for a period of three (3) consecutive hours and at no charge. The locations and any other conditions of all such required parking shall be such as are approved by the Planning Board in its discretion.

In its ruling entered on July 9, 2025, dismissing Hartz and the Township's Motions to Dismiss Plaintiff's Complaint, this Court confirmed that the two Ordinances are inextricably linked and the non-severability provisions in both establish mutual dependency of their terms, and, as such, Ordinance 02-20 did not supersede or repeal Ordinance 32-19. Baillie Cert., Exh. L, Memorandum of Decision.

Hartz was among four objectors, including Plaintiff, challenging the validity of Ordinance 32-19, but whereas Plaintiff and three other objectors challenged multiple substantive irregularities, Hartz focused exclusively on the free parking exaction, calling it an unconstitutional taking of private property without just compensation. Baillie Cert., Exh. J, ¶87. At the December 11, 2019 hearing on Ordinance 32-19, counsel for Hartz, Chritopher Porrino, accused the Township of breaking "years of trust and reliance between Hartz and the Township" by considering an ordinance "directly contrary to statutory and Constitutional law." T59:4-9. Describing the Ordinance as "illegal" and "unfair," Mr. Porrino urged the Board not to vote for it. Id. However, Hartz did not subsequently object to Ordinance 02-20, which reduced the free parking requirement and imposed an arbitrary monetary exaction because it had already obtained

an assurance as to the density increase it sought for the ATIR site and the Township's green light for its ATIR development application to proceed on the basis of Ordinance 32-19, as amended by Ordinance 02-20. In point of fact, Hartz had already submitted its second ATIR development application when Ordinance 02-20 was adopted. But a developer's acquiescence to a quid pro quo does not legitimize an ordinance that mandates such illegal exaction, and while Hartz did not formally challenge Ordinance 02-20, the basic substance of the free parking space quid pro quo remained the same as in Ordinance 32-10. See generally, Nunziato v. Planning Bd. of Borough of Edgewater, 225 N.J. Super. 124 (App. Div. 1988), in which the agreement by an applicant for site plan approval to the planning board's improper demand for affordable housing funds did not obviate the need for statutory authority for the monetary contribution.

A municipality's authority to condition development approvals on the developer's agreement to provide or contribute to off-site improvements is limited by N.J.S.A. 40:55D-42, which permits such contributions only with respect to street improvements and water, sewerage and drainage facilities. Twp. of Marlboro v. Planning Bd. of Twp. of Holmdel, 279 N.J. Super. 638, 642 (App. Div. (certify. denied 141 N.J. 98 1995). These limited categories are highly regulated, and there must be a real and substantial relationship between the method of exaction and intended purpose. Conditioning site plan approval on the things unrelated to the application is not permitted. See for example, N.J.S.A. 40:55D-43 ("the ordinance shall not require, as a condition of the approval of a planned development, that land proposed to be set aside for common open space be dedicated or made available for public use").

Caselaw invalidating municipalities' efforts to condition land development approvals on the provision of amenities not permitted by statute is well established. In Twp. of Marlboro v. Planning Bd. of Twp. of Holmdel, for example, the Appellate Division held that contributions for recreational facilities and for fire-fighting facilities, even those necessary for proper servicing of

the development itself, are not authorized by statute, and so a development application may not be conditioned on the developer's undertaking to provide them. 279 N.J. Super. at 642-43 and 645-49. As to the need for statutory authority and the courts' condemnation of such municipal actions based on ordinances without statutory authority, see also, for example, New Jersey Builders Association v. Bernards Township, 108 N.J. 223 (1987) ("We conclude that the plain meaning and obvious legislative intent was to limit municipal authority only to improvements the need for which arose as a direct consequence of the particular subdivision or development under review…[A]s yet, the Legislature has not delegated to municipalities the far-reaching power to depart from traditionally authorized methods of financing public facilities so as to allocate the cost of substantial public projects among new developments on the basis of their anticipated impact." At 238).

The attempt by Ordinance 32-19 to tie development standards directly to the provision of off-site free public parking is clearly the type of illegal exaction that the foregoing cases prohibit. In this case, no nexus between the free parking mandate and intended purpose exists. Ordinance 32-19 states that the Board's imposition of free parking requirements furthers the purposes and objectives of the SW/PD Criteria and Standards of providing "public access to and beautification of the Hudson River waterfront." Baillie Cert., Exh. A., Sixth Whereas clause. Even assuming that Weehawken had the statutory authority to require free parking provisions for non-residents of the development, neither the Township nor Planning Board provided any independent findings that free public parking would provide public access to the waterfront, much less how parking facilities could contribute to the "beautification" of the waterfront. Indeed, it is hard to imagine how parking spaces could beautify anything. Similarly, the other factors cited by the Township to justify the free parking exaction also bear no logical connection to the stated objectives. Ordinance 32-19 cites the increase in residential development as a reason to compel free public parking, but

residential development generates its own specific parking requirements under the SW/PD Regulations, and, as Hartz itself notes, the residential developments within the LHPD are entirely self-parked. Baillie Cert., Exhs. H; J (¶43). Nor does the Township provide any findings for its assertion, in the sixth Whereas clause setting forth the Township's purposes and objectives, that the free parking exaction is justified by the definition of "developed open space," which permits the "substitution of other public facilities…for the required developed open space" under certain limited circumstances. Even more inexplicable is the reference in that purpose clause to a provision that "provides that parks and playgrounds are to be open to the public without charge together with recreational, administrative and service buildings appurtenant thereto." Baillie Cert, Exh. A, sixth Whereas clause.

Finally, Ordinance 32-19's vague invocation of "public investment in mass transit facilities located within and in the vicinity of the LHPD," and "the incentives for the development of improvements made available by the Township due to the adoption of Redevelopment Plans for significant parts of the LHPD" as justification for the exaction of free public parking spaces is neither explained nor logical. Public investment in mass transit facilities in the LHPD should *lessen* the need for public parking, not increase it, while the reference to "incentives" makes no sense at all because the free parking spaces are being *required*, not encouraged by incentive-based density bonuses, as further discussed below. The Ordinance's attempt to ground the foregoing rationales in the Redevelopment Plan should only draw more skepticism, as the Redevelopment Plan says nothing at all about the need for public parking. Baillie Cert., Exh. C; and Exh. J, ¶26.

Again, due to the express non-severability provision in the Ordinance, the illegal free parking exactions cannot be excised such that the remainder of Ordinance 32-19 could survive. For the foregoing reasons, Ordinance 32-19 must be vacated.

B. Ordinance 32-19's reference to density bonuses was a pretext for an unlawful exaction

The Township's statement of purposes in Ordinance 32-19 that the illegal free parking space exaction is "in furtherance of the SW/PD Criteria and Standards…such as the permission for the Planning Board to approve floor area increases as a 'discretionary' incentive" is a reference to §23-10.4.f., which, as noted, sets forth the types of public facilities that could be considered by the Board if the developer is willing to provide them as an incentive for increased density. Given that Ordinance 32-19 makes the free parking space requirement *mandatory* for Hartz and other potential developers within the LHPD, not incentive based, the Township's reliance on §23-10.4.f is clearly pretextual and not supportable. Hartz's own prerogative writ action against the Township challenging the parking provision as an illegal taking amply proves the point too. Baillie Cert., Exh. J.

C. Ordinance 32-19 constitutes unlawful spot zoning

Although Ordinance 32-19 purports to affect the entirety of the LHPD, it is principally designed to relieve the burden of applicable restrictions upon Hartz for purposes of developing the ATIR site. It more than triples the permitted building height, from 50 feet to 160 feet, and almost doubles the permitted gross residential density for areas devoted to residence, from the maximum 100 dwelling units per acre to 350 units (on the ATIR site of approximately 2.2 acres). Baillie Cert., Exh. A, Section 5 (§23-10.4.l – Special regulations for residence; and §23-10.3.1 – definition of "Gross Residential Density"). In exchange for these density bonuses, Ordinance 32-19 mandated free public parking spaces, which Hartz initially objected to before acquiescing after negotiating a lower number of parking spaces with the Township, via Ordinance 02-20. Thus, the main changes to the SW/PD Regulations effectuated by Ordinance 32-19 exclusively benefited Hartz while the other changes merely codified existing conditions that did not reflect the outdated

zoning regulations.

Spot zoning is the "antithesis" of planning and zoning through the "use of zoning power to benefit particular private interests rather than the collective interests of the community." Palisades Props. Inc. v. Brunetti, 44 N.J. 117, 134 (1965); Taxpayers Ass'n of Weymouth Township v. Weymouth Township, 80 N.J. 6, 18 (1976). The test is whether the rezoning "benefits an owner for a use incompatible with surrounding uses and not for the purposes or effect of furthering the comprehensive zoning plan." Cox, §10-8.2, p. 517, citing Moskowitz, et. al., "The Complete Illustrated Book of Development Definitions," Transaction Publishers 2015. With spot zoning, "the owner of a particular parcel seeks to reap the benefit of a zoning decision, by special ordinance or by variance, which treats his or her property more favorably than the comprehensive plan would allow, to the detriment of the larger community or the immediate neighbors." Riya Finnegan, LLC 197 N.J. at 198-99.

Ordinance 32-19 is the antithesis of planning and zoning. Weehawken lacks a comprehensive zoning plan because a) it has not updated its Master Plan since 1984 while the last reexamination report was in 2003 and b) the change in market conditions and substantial obstacles to development caused Weehawken to designate much of the LHPD as an area in need of development in 2016, but its zoning did not anticipate the increased demand for residential development, as evidenced by the dramatic increases in density codified by Ordinance 32-19. Rather, Ordinance 32-19 reflects the *ad hoc* site-by-site approach to planning Weehawken has permitted while failing to address all aspects of a comprehensive scheme at once, such as the needed infrastructure, stormwater management and overall density across the LHPD. This lack of a comprehensive scheme or plan has allowed the Township and Hartz to negotiate bonus density increases out of public view in exchange for unlawful exactions and is the planning vacuum from which Ordinance 32-19 resulted.

POINT V

WEEHAWKEN'S FAILURE TO FOLLOW MLUL REQUIREMENTS WITH RESPECT TO MASTER PLAN CONSISTENCY IMPUGNS ORDINANCE 32-2019

A. Ordinances 32-19 is presumptively invalid due to Weehawken's failure to update its Master Plan

A governing body must reexamine its master plan and development regulations every ten years (N.J.S.A. 40:55D-89), while failure to adopt a reexamination report creates a rebuttable presumption that the municipal development regulations are no longer reasonable. N.J.S.A. 40:55D-89.1. That is because zoning must be rooted in legitimate planning and the keystone of this principle is master plan consistency with all zoning ordinances. Moreover, an ordinance is less vulnerable to a spot zoning challenge when it results from a periodic master plan review. Gallo v. Mayor and Twp. Council, 328 N.J. Super. 117 (App. Div. 2000) (finding that the plaintiff had not carried the burden of proving spot zoning because the zoning change in question, though it had been suggested by a particular developer and appeared to benefit that developer by allowing greater density, had emerged from the township council's reexamination and amendment of the master plan in the community interest, at 128).

Weehawken's Master Plan is now 40 years out of date and the Township's last re-examination report was in 2003, in violation of N.J.S.A. 40:55D-89. Thus, a rebuttable presumption exists that the Weehawken development regulations are no longer reasonable.

Notwithstanding this presumptive invalidity, the Planning Board provided the following conclusions regarding master plan consistency in its resolution recommending adoption of Ordinance 32-19 to the Council:

1. Policies and Objectives in the Master Plan that are consistent [sic] with the Ordinance.

The Board does recognize that the proposed Ordinance is inconsistent with the Master Plan adopted in 1984 in that although the Master Plan approved an increase in the amount of residential development for the planned development along the southern section of the waterfront, it limited the residential development to 300 units and 321,000 square feet. It is also inconsistent to the extent that the 1984 Master Plan provided that "[S]outh of King's Bluff Dividing Line the rule is that no building shall be greater than 50 feet in height, excluding mechanical penthouses. Six buildings reaching a height of 160 feet may be permitted so long as they are located at least 750 feet away from King's Bluff and are not more than 150 feet wide measured perpendicularly to the King's Bluff Dividing Line." The realization that redevelopment would be necessary to encourage development on the southern waterfront did not occur until 2010 and thus the Re-examination Reports prepared in 1991 and 2003 did not address the need for changes in the land use and building requirements.

2. Policies and Objectives in the Master Plan that are consistent with the Ordinance.

A. In the 1984 Master Plan Amendment, the Board recognized that it is necessary to provide the opportunity for mixed use development for all of the waterfront, including the southern portion of the waterfront. The Board recognized that mixed use development had been employed in many cities which had undertaken waterfront development. It specifically addressed the benefits of residential development:

> " This need [to increase the amount of residential development along the waterfront] arises from a desire to have a viable 24 hours mixed development which does not become deserted and dangerous at night as is the case with many neighboring cities. It has also been argument [sic] by the developers that an opportunity for substantial residential development is needed for a continually developing and economically feasible project because of the counter cyclical nature of the residential and office/commercial markets. Finally, the transportation analyses submitted show that mass transit facilities, which the Planning Board wants to encourage, depend on a significant residential development component in order to run efficiently and cost-effectively." Baillie Cert., Exh. F.

As noted by the Board in its point 1, the last reexamination report did not address the need for changes in the land use and building requirements, and no other comprehensive planning document or studies are cited or appear to exist to support the significant zoning ordinance changes made by Ordinance 32-19. Thus, without an updated comprehensive zone plan, the Planning Board's findings of "consistency" with the 1984 Master Plan are inherently suspect, while its findings of inconsistency are not grounded in fact or planning principles, as further discussed

below.

B. The adoption of Ordinance 32-19 failed to adhere to N.J.S.A. 40:55D-62a, requiring a written record of reasons for deviating from the Master Plan

When a zoning amendment is not substantially consistent with the master plan, the governing body may adopt it only by a majority of the full authorized membership and must contemporaneously state its reasons on the record. N.J.S.A. 40:55D-62a. Here, the Planning Board admitted inconsistencies of Ordinance 32-19 with the master plan, yet the Council provided no reasons for such departure or factual basis in its written record of adopting the Ordinance. This omission alone is fatal for Ordinance 32-19.

The MLUL's insistence on substantial consistency between the zoning ordinance and master plan shows "the enhanced role of planning and that it strengthens the planning process itself." Cox, §10-2.2, p106. "The statutory enumeration of the factors to be considered in formulating a master plan, and the statutory directive that the master plan itself include an evaluation of proposed ordinances in light of these factors, N.J.S.A. 40:55D-28b(2), serve the end of heightening the role of planning as a condition of proper zoning. It follows that the requirement that a zoning ordinance be substantially consistent with the master plan should be strictly enforced." Id. A zoning ordinance can only be adopted after the planning board has adopted the land use plan element and housing element of a master plan, and all of the provisions of the zoning ordinance are either substantially consistent with the master plan, or designed to effectuate them. N.J.S.A. 40:55D-62a.

Importantly, some inconsistency is permitted, provided "it does not substantially or materially undermine or distort the basic provisions and objectives of the Master Plan" and as long as the special procedural requirements are met. Riya Finnegan LLC, 197 N.J. at 191. Those requirements are set forth in N.J.S.A. 40:55D-62a and provide that the governing body may adopt

a zoning ordinance that is inconsistent in whole or part with the land use plan element and the housing plan element, but only by affirmative vote of a majority of the fully authorized membership of the governing body, and with the reasons of the governing body for acting set forth in a resolution and recorded in its minutes when adopting such a zoning ordinance."

Weehawken voted to adopt Ordinance 32-19 despite the Planning Board's finding of inconsistency with the Master Plan. However, it failed to document any reasons for this action. In fact, the Council's resolution adopting Ordinance 32-19 does not mention the Master Plan at all, while Township planner Jill Hartmann's December 3, 2019 consistency report and the Board's Resolution regarding inconsistency largely only reproduce the language of Ordinance 32-19 while not offering any independent planning analysis justifying the departures. Baillie Cert., Exhs. F, G. Further amplifying these deficiencies, the Board weakly attempts to excuse its lack of findings in its conclusion on the spurious basis that "[t]he realization that redevelopment would be necessary to encourage development on the southern waterfront did not occur until 2010 and thus the Re-examination Reports prepared in 1991 and 2003 did not address the need for changes in the land use and building requirements." Incredibly, in her testimony at the December 11, 2019 meeting when the Council voted to adopt Ordinance 32-19, Ms. Hartmann fails to mention a single inconsistency with the Master Plan. T18-36. In short, there are no written findings or discussion about the substantial increases in residential density or how free parking spaces reserved for the public reasonably relates to this increase. On the other hand, the Planning Board's conclusion that the 1984 Master Plan's finding that "mass transit facilities" depend on a significant residential development component in order to run efficiently and cost-effectively" as a basis for consistency is clearly inconsistent with Ordinance 32-19's main purpose to provide free public parking spaces purportedly to increase public access to the waterfront.

Courts have treated a municipality's failure to develop a factual basis for the

reasonableness of a deviation from the master plan as fatal. In Riya Finnegan LLC, for example, the Supreme Court struck down an ordinance that was inconsistent with the master plan because, although the municipality complied with all the technical requirements of the MLUL by referring the matter to the planning board for review and by including in the adopting resolution several reasons that the governing body found sufficient to explain its decision to rezone the parcel, the governing body had not actually developed a factual basis for the reasonableness of the deviation from the Master Plan. "[T]estimony must be grounded in facts and must be analyzed in light of a comprehensive plan, such as is expressed in the Master Plan. Complying with the formalities of the statute alone will not shield a decision that lacks such a basis." Id., at 193. Failing to state the reasons for adopting a zoning ordinance inconsistent with the master plan is also fatal, the Appellate Division held in Route 15 Associates v. Jefferson, 187 N.J. Super. 481 (App. Div. 1982), where notably, the court also found that the planner's report issued in connection with the rezoning did not constitute the statement of the governing body's reasons required by the statute, at 487. The importance of setting forth the reasons for deviating from the master plan was again established by the Appellate Division in East Mill Associates v. Township Council of Twp. of East Brunswick, 241 N.J. Super. 403, 407 (App. Div. 1990), in which the resolution setting forth reasons for the deviation was added over a month after the adoption of the ordinance. Explaining the legislative and constitutional rationale for requiring contemporaneous record keeping, the court concluded:

> Plainly read, the statute requires that the reasons for inconsistency be established when the inconsistent ordinance is adopted…The purpose of the reason resolutions is to inhibit inconsistency while preserving flexibility. By requiring contemporaneous passage, the law not only provides an avenue for public scrutiny of the action (including a record for judicial review) but, perhaps more importantly, ensures that the inconsistency is clearly recognized and rationalized when the action is taken. There is a significant difference between contemporaneous debate and post hoc rationalization. Id., at 407.

Ordinance 32-19 and the facts around its adoption suggest anything but the kind of transparency articulated in East Mill Associates. As noted, not a single mention of inconsistency

with the Master Plan was made throughout the hearing, while, on the contrary, Ms. Hartmann spoke misleadingly only about purported consistencies. T31-34. In his extensive comments throughout the hearing, Mayor Turner, in response to several objectors' concerns and requests for more information to substantiate the changes in Ordinance 32-19 referred *five times* to Hartz's first ATIR development application hearings, which took place over six to seven months before the Planning Board (not the governing body), as the source of the information being sought by those trying to understand the basis for Ordinance 32-19. T52:8-10; 73:14-17; 103:5-9; 136:14-16 & 19-20; 142:14-23. For example, the following exchange took place with a local resident, who commented that the process felt rushed, in response to which Mayor Turner again referenced the 6-7 months of hearings on Hartz's first ATIR development application:

> MR. ADRIANSEN: But, again, you know, everything has to do with talking these things out that are being affected. And we feel that these things are being rushed. We are interested parties.
>
> MAYOR TURNER: What do you mean rushed? You've been at every meeting, six, seven months. You have made the same point. We understand your point.
>
> MR. ADRIANSEN: But this meeting, for example, was rushed.
>
> MAYOR TURNER: The Planning Board said for six months. At the last meeting we said Hartz should come lower. They have.
>
> T136-137:10-21.

After the public comment period closed, Mayor Turner summarized things as follows:

> All right. We're now closed to the public. Thank you all for being here. Any discussion on the Council? I started to say before, everybody's talking about this being rushed. We talked about this for six months. We've discussed these issues. Nothing I've heard tonight, nothing -- I'm sure from the Council. We've had people come to Council meetings to discuss these issues. I bump into people and they discuss

> these issues. There's nothing really new. You either like a proposal or you don't, or you try and make it better.
>
> T142:12-23.

The Township attorney also chimed in (responding to public comments by Plaintiff's Executive Director, Ron Hine):

> MR. VENINO: Mayor, I think in regards to being rushed, this is largely the result of redevelopment plans which were studied, advertised, and adopted years and years ago, and a six or more month process before the Planning Board, as the Mayor said. So this is anything but rushed.
>
> T103:20-25.

These attempts by the Township's representatives to conflate the testimony and record of Hartz's first ATIR development application before the Planning Board with the non-existent record around Ordinance 32-19 before a different, now legislative body, are improper and form no basis whatsoever for the required findings with respect to Ordinance 32-19. They also tainted the procedure by obfuscating the absence of a proper record and intimating or mocking objectors who dared to question the basis for Ordinance 32-19.

The absence of a written record of a factual basis for the reasonableness of Ordinance 32-19's deviation from the Master Plan is fatal and Ordinance 32-19 must be vacated.

C. Ordinance 32-19 violates other fundamental planning principles

Ordinance 32-19 violates the MLUL's uniformity principle

The so-called "uniformity principle" provides:

> The zoning ordinance shall be drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate

> use of land. The regulations in the zoning ordinance shall be uniform throughout each district for each class or kind of buildings or other structures or uses of land, including planned unit development, planned unit residential development and residential cluster, but the regulations in one district may differ from those in other districts. N.J.S.A. 40:55D-62a.

At the heart of this requirement are the constitutional guarantees of due process and equal protection that guard against the arbitrary and unreasonable exercise of the police power. Rumson Estates, Inc. v. Mayor & Council of Fair Haven, 177 N.J. 338, 357 (2003) (citing Roselle v. Wright, 21 N.J. 400, 409-10 (1956). It does not mean that there can be no differences in the regulation of property within a zone, but similarly situated property must be treated the same. Id., 359.

Ordinance 32-19 fails this test by discriminating in the treatment of bulk standards among sites within the LHPD and the allocation of free parking spaces on sites other than the ATIR sites, resulting in massive disparities in FAR and other conditions on a per-site basis. For example, the increased FAR of the ATIR site measured either on the 2.2-acre project area or the larger 12.92 lot area is well in excess of the overall FAR limit of 1.85 applicable to the entirety of the LHPD. On the other hand, the free parking requirements that Hartz bitterly objected to before the number of required spaces was reduced could, according to Hartz, only be accommodated within a surface retail lot between a Whole Foods and Harbor Boulevard in violation of an understanding with the Township "that Hartz would build on that spot a project worth tens of millions of dollars as contemplated under the redevelopment agreement." T61:16-19. The location of the prospective parking spaces remains within the discretion of the Planning Board, according to the Ordinance, but the disproportionate impact they would have on whichever site they are ultimately located undoubtedly violates the uniformity principle.

The owner and operator of the Lincoln Harbor Yacht Club, located at 1500 Harbor Blvd., also known as "Pier D" within the LHPD, raised similar concerns about unequal treatment with

respect to parking spaces. At the December 11, 2019 hearing, Jake Israel noted that the Club is one of the few properties within the LHPD (along with Riva Pointe) not owned by Hartz, and objected that the Ordinance "creates an unfair situation for non-Hartz owners." T84:16-17; 85:1-2. He questioned, "why aren't all parking issues addressed by this ordinance? We object to the extent that marina parking is not protected in the proposed ordinance." T84":4-14.

The lack of coherent planning and unequal treatment of sites within the LHPD is evident from these comments, as is the evidence of spot zoning by Ordinance 32-19. The resulting disparities are not grounded in genuine planning principles and therefore violate the uniformity principle.

Lack of required planning elements

As noted, Weehawken's 1984 Master Plan could not form the basis for Ordinance 32-19 as it is now 40 years old and unreflective of current conditions in Weehawken, as the Master Plan inconsistency report submitted by the Planning Board on Ordinance 32-19 recognized. No studies in conjunction with or independent of a Master Plan update were prepared for Ordinance 32-19 relating to traffic, flood control, storm water and sewer infrastructure, open space, and other planning elements set forth in N.J.S.A. 40:55D-28. These planning elements required for study include the evaluation of the impact on the entire community, evaluation of the existing and proposed location, extent, and intensity of development of land to be used in the future for varying types of residential, commercial, industrial, recreational, open space, educational, and other public and private uses, a statement of standards of population density and development intensity, and strategies concerning smart growth, storm resiliency and environmental sustainability. Such planning elements were not otherwise evaluated by the Township Council. The sole report prepared in the matter, Ms. Hartmann's December 3, 2019 "consistency" memo was introduced at

the December 11, 2019 hearing on Ordinance 32-19's second reading, well after the Ordinance had been prepared and introduced. Moreover, the report largely reproduces the body of Ordinance rather than offers independent analysis of the various planning elements or findings in support of the inconsistencies (or even consistencies) with the Master Plan.

The permitted massing on the ATIR site on the waterfront is also inconsistent with municipal goals and with the goals of higher level jurisdictions. The waterfront, long recognized as an asset for the Township of Weehawken, has been undercut by Ordinance 32-19. The Ordinance permits the construction of a "mega-structure," a large assemblage of building types, connecting components and associated parking structures on a superblock. Development on this scale is atypical for Weehawken, which has mostly much smaller blocks and a traditional neighborhood fabric and street grid that affords breaks in building massing of at least 60 feet in width to accommodate street rights-of-ways every 200 feet. Ordinance 32-19 permits oversized and incongruous construction on the ATIR site of two 16-story residential towers. The goals set forth in master plan-driven planned development regulations, waterfront development rules and higher jurisdictions such as the DEP, allowing for development densities to be allocated within an overall planned development so as to encourage cultural and innovative development and provide public access to and beautification of the waterfront, are disregarded by Ordinance 32-19. Instead, the Ordinance permits additional density through higher, larger and denser buildings. An opportunity to have the waterfront as an amenity for development, therefore, was not advanced by, but rather eliminated by, Ordinance 32-19.

The southern waterfront is bisected by the Hudson Bergen Light Rail, restricting access options. Another deficiency revealed by Ms. Hartmann's testimony at the December 11, 2019 hearing is that the free public parking requirement was somehow necessitated by the existing streets and roadways within built-out segments of the LHPD being too narrow in width to

accommodate on-street parking. T29/14-19 ("So this ordinance is making interdependent connections with the Council's permission of the shift to more residential planned development, even the more residential planned development will have narrow streets and the need to reiterate the requirements for free parking public" [sic]). But having smaller independent development parcels that can accommodate new streets of full width with a more pedestrian-friendly size would ensure sufficient roadway infrastructure is in place to accommodate new development with roadway frontage and ensure safe and secure public access. Whether the existing roadway infrastructure is sufficient to support the intensity of development permitted by Ordinance 32-19, as well as storm water and sewer infrastructure to support the level of development, are not planning aspects the Township considered in the adoption of Ordinance 32-19, yet are critical for assessing the significant increases in density within the LHPD.

Ordinance 32-19 fails to require that the Rebuild by Design park and flood control facility designed under the aegis of the New Jersey Department of Environmental Protection in Jersey City, and Hoboken be continued into Weehawken in a way that support the functionality of the Rebuild by Design project. The technical engineering design of the Rebuild by Design infrastructure improvements designed by international design teams and NJDEP in conjunction with local municipalities was predicated on evaluating the local zoning and redevelopment plans. Ordinance 32-19 intensifies development of this waterfront site after this essential multi-jurisdictional regional storm infrastructure was designed, yet provides no plan for integrating it with the new zoning.

Permitted development on the ATIR is also out of character with the abutting residential neighborhood. Permitted residential density on the ATIR site is much higher, and Ordinance 32-19 does not require a continuation of the grid pattern, which permits Hudson River and Manhattan views from the neighborhood, a coherent traffic flow, access to the waterfront, integration of the

ATIR site into the broader community, and coherence of neighborhood planning.

Ordinance 32-19 makes major changes in the Weehawken waterfront zoning south of the King's Bluff Dividing Line without supporting studies or evaluation and with a now 40-year-old Master Plan in place, while a new master plan would have required a comprehensive review of the southern Weehawken waterfront and input from the public and other stakeholders in the community. The result is an ordinance that radically departs from the 1984 Master Plan and ignores the rules established by the MLUL. Without the kind of planning required by law, with a master plan guiding development in a municipality rather than the *ad hoc* decision making that Ordinance 32-19 represents, Ordinance 32-2019 is arbitrary, capricious, and unreasonable.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests judgement (i) declaring Ordinance 32-19 arbitrary, capricious and unreasonable, void in its entirety, and otherwise violative of law as set forth herein, (ii) vacatur of Ordinance 02-20 as interdependent with Ordinance 32-19, and (iii) such other relief as the Court deems just and necessary.

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Attorneys for Fund for a Better Waterfront

By:_____
Martina Baillie, Esq.

Dated: August 25, 2025