

**Judge Miller's Opinion dated April 21, 2014
concerning the validity of Lopatcong Township's
Ordinances 2011-07 and 2011-15.**

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Court's Decision

Prior Ordinance:

Asphalt Manufacturing was a permitted use under Lopatcong's prior zoning ordinance. 25

Notice:

Township's Notice of the Ordinance 2011-15 was proper. 50

Personal Notice to property owner's within 200 feet of the affected area was not required. 50

Even though Lopatcong was not required to provide personal notice of the ordinance, all the property owners who would have been required to receive notice did receive notice. 55

The substance of the Township's public notice was in substantial compliance with the statute. 67

Compliance with MLUL:

The Township's enactment of Ordinance 2011-15 was in compliance with the Municipal Land Use Law. 67

The Township has offered valid and supportive zoning and planning reasons for the adoption of the ordinances. 67

The process and requirement for the report and transmission of a consistency report from the Board to the Township Council was properly accomplished in accordance with the requirements of the MLUL. 68

Ordinance 2011-15 is substantially consistent with the land use element of the Township's Master Plan.	75
The Planner's Consistency Report is rationally related to the guidelines and goals of the Township's Master Plan and the purposes of zoning.	75
The Township's position is not "per se" inconsistent with the Master Plan.	75
A specific reference to "Asphalt Manufacturing" is not required in the Master Plan in order for it to be a "substantially consistent" use.	79
The Township's Planner properly and appropriately reviewed the Township's Master Plan in preparing his consistency report for Ordinance 2011-15.	81
There is no evidence that an asphalt plant is an inherently beneficial use. The Township did not indicate any such intention that such was the basis for its passage.	83
The inclusion of the solar and voltaic use provision should not be considered to be inconsistent with the Master Plan because the Township Council met both statutory requirements for passage of inconsistent ordinances under N.J.S.A 40:55D-62a	84
Even if the solar and photovoltaic provisions of the ordinance are deemed inconsistent with the Master Plan and even if the Township Committee is deemed to have failed to comply with requirements for inconsistent ordinances, the severability of the ordinance would be given effect preserving the separate and distinct balance of the ordinance relating to asphalt and concrete manufacturing facilities.	92
Spot Zoning:	
Ordinance 2011-15 does not constitute spot zoning.	95
Plaintiffs did not meet their burden concerning whether Ordinance 2011-15 was substantially consistent with the Master Plan.	99
Ordinance 2011-15 did not "single out" the defendant's parcel for special treatment because it also benefits Plaintiff Precast's property and the ordinance furthers the goals of the Master Plan and the purpose of zoning.	100
The Ordinance is part of a comprehensive plan. The purpose of the plan is to encourage industrial development in appropriate areas of the Township. The Township's goal was to devise an ordinance that would improve the prospect of attracting development to that area to stabilize the ratable tax base for the bedroom community.	102

Uniformity:

The ordinance does not violate the uniformity provisions of the MLUL. 105

Conflicts of Interests:

There are no conflicts of interests in this case. 111

Elizabeth McKenzie does not have a conflict of interest. 113

Mayor Steinhardt recused himself from all actions and proceedings involving this matter and he acted appropriately. There is no evidence to the effect that Mayor Steinhardt exerted any direct or other influence on any public officials in Lopatcong. Plaintiff's claims to the contrary were based upon surmise, shadow and speculation which the court likened to that of conspiracy theorists. 114

Conflict of interest rules are important and are imposed and enforced to discourage improper activity and ensure the public trust. That does not give license to an attack by pure speculation upon a public official where there is not a scintilla of evidence to suggest any wrongdoing or improper influence. 114

Bad Faith and Square Corners Doctrine:

All plaintiffs are interested parties with rights under the law. 115

The Township and Planning Board acted in an appropriate manner. They have offered valid, plausible and reasonable explanations of their actions which support their claim that the actions were in the public interest and just because those actions didn't conform with the wishes of the plaintiffs does not mean the Township acted inappropriately. 116

There is no evidence to support Plaintiff's position that the Township and Developer formed an "unholy alliance" to facilitate the proposed development. The Township acted consistently and appropriately in a matter that it determined to be in its best interest and 189 Stryker acted appropriate within the bounds of the law to promote its commercial business interest to develop the property. 117

Plaintiff Precast principal Fischer personal concerns, although heartfelt, do not provide a basis to overturn the Township's actions. 117

Plaintiff Marinelli's testimony regarding not knowing who was funding the litigation on his behalf appeared truthful but the Court found the vagueness to be "troubling". This troubling testimony gave the Court concern that the plaintiffs were arguing a lack of good faith by the Township when their own hands may be unclean. 117

There is insufficient credible evidence to make a finding that the action taken by the governmental defendants in this case was not forthright, fair or appropriate so as to disrupt or overturn their actions. 118

Conclusion:

Court finds in favor of Defendants and dismisses the complaints filed by the intervening plaintiffs as those complaints pertain to the challenges of the validity of Lopatcong Township Ordinance 2011-15. 118

Bifurcated portions of the case will subsequently be separately addressed by the Court. 118

FILED

APR 21 2014

CIVIL CHAMBERS

ENZO and YOLA MARINELLI and
JOHN and GENNA JAMES
Plaintiffs,

and

PRECAST MANUFACTURING
COMPANY, LLC and GPF LEASING,
LLC

Intervening Plaintiffs

v.

TOWNSHIP OF LOPATCONG, et al
Defendants

ENZO and YOLA MARINELLI and
JOHN and GENNA JAMES
Plaintiffs,

and

PRECAST MANUFACTURING
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Plaintiffs,

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LLC

Intervening Plaintiffs

v.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: WARREN COUNTY

DOCKET NO. WRN-L-374-11

Civil Action

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: WARREN COUNTY

DOCKET NO. WRN-L-517-11

Civil Action

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: WARREN COUNTY

DOCKET NO. WRN-L-32-12

Civil Action

TOWNSHIP OF LOPATCONG
PLANNING BOARD
Defendants

CHRISTIE VICTOR, et al
Plaintiffs,

v.

TOWNSHIP OF LOPATCONG
PLANNING BOARD and 189
STRYKERS ROAD ASSOCIATES, LLC
Defendants

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: WARREN COUNTY**

DOCKET NO. WRN-L-290-12

Civil Action

OPINION

PRELIMINARY STATEMENT

Plaintiffs have brought this action challenging the adoption of two Ordinances in 2011 by the Township of Lopatcong, specifically Ordinances 11-07 and 2011-15. The Ordinances in question sought to enact certain amendments to the Retail/Office and Manufacturing Zone (“ROM”) of the Township Zoning Ordinances. A separate action, which has been consolidated with this action, challenged the granting of approvals by the Township of Lopatcong Planning Board to 189 Stryker Road Associates (hereinafter “189 Stryker”) for site plan approval to erect an asphalt and concrete manufacturing plant within the “ROM” zone consistent with the new amendments adopted in the previously referred to Ordinances. The Ordinances in question, among other things, purported to allow, inter alia, asphalt manufacturing plants as conditional uses, pursuant to N.J.S.A. 40:55D-67. The matters have been bifurcated so that the issue before the Court in this initial proceeding is to determine whether the alleged procedural deficiencies and violations of the Municipal Land Use Law invalidate the enactment of Ordinances 11-07 and 2011-15. The issues concerning the validity of those Ordinances are the subject of this opinion.

A. THE PARTIES

Plaintiffs, Enzo Marinelli, Yola Marinelli, John James, and Gena James (collectively, “Plaintiffs”) reside and are taxpayers in the Township. Intervening Plaintiffs are comprised of GPF Leasing, LLC (owner of 187 Strykers Road) and Precast Manufacturing Company, LLC (Business operating at 187 Strykers Road and 220 Strykers Road) (collectively “Intervening

Plaintiffs”) (also referred to separately as “Marinelli” or “Precast”) Plaintiffs and Intervening Plaintiffs are interested parties per the provisions of the MLUL , N.J.S.A. 40:55D-4¹.

The Township of Lopatcong (hereinafter the “Township” or “Defendant Township”) is a body corporate organized under the laws of New Jersey and governed by Mayor and Council, (hereinafter, “Mayor and Council” or “Defendant Council”). The Planning Board of the Township is the municipal agency responsible under the MLUL, N.J.S.A. 40:55D-1, et. seq. for, *inter alia*, reviewing land use ordinances for Master Plan consistency, and for ruling on certain applications for development and variance relief (hereinafter “Planning Board” or “Defendant Planning Board”).

Defendant 189 Strykers Road Associates, LLC, (hereinafter, “Defendant 189 Strykers” or “189 Strykers”) is contract purchaser of property known as 189 Strykers Road, Lopatcong Township, which is also known as Block 100, Lot 6 (hereinafter referred to as the “Property”) and which property is located in the “ROM” Zone. “189 Strykers” was the Applicant under a single Re-Application for Preliminary and Final Major Subdivision Approval, Conditional Use Approval, and related Preliminary and Final Site Plan Approval together with variance relief in accordance with N.J.S.A. 40:55D-60c (variance relief from N.J.S.A. 40:55D-35 under N.J.S.A. 40:55D- 36), all discussed herein².

The Defendant Township of Lopatcong Planning Board (hereinafter “Planning Board” or “Defendant Planning Board”) is the Township’s local Planning Board formed pursuant to N.J.S.A. 40:55D-1, et seq. The “Planning Board” served several notices in the passage of the Zoning Ordinances that have been challenged in this matter and the approval of the land use applications of “189 Strykers”, all in accordance with its statutory responsibilities.

B. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Township of Lopatcong (“Lopatcong”) is located off Interstate 78 and New Jersey Route 22 in Warren County in western New Jersey. The Township is bordered by Phillipsburg and Pohatcong Townships to the south; Greenwich and Franklin Townships to the east, and Harmony Township to the north. A portion of the Township’s western border is formed by the

¹ Plaintiffs, Marinelli, James OPF Leasing, Precast and victor have joined together in their arguments and positions in this matter and thus are interchangeably referred to as Plaintiffs in this opinion.

² The Defendant Township and “189 Strykers” have joined together in their arguments and positions in this matter and are interchangeably referred to as Defendants.

Delaware River which forms the border between New Jersey and Pennsylvania. Over the past 30 years, Lopatcong indicates that it has had a boom of residential development. While this development has brought great growth to the Township, Lopatcong claims that the growth has also placed great stress on the municipal services and annual budgets of Lopatcong because there has been very little industrial or commercial growth to offset this residential boom. In order to relieve this stress, Lopatcong asserts that it has focused on encouraging greater growth in its commercial and industrial areas. To this end the Lopatcong Planning Board has adopted Master Plans, amendments thereto and corresponding ordinances designed to encourage more of the types of development that encourage appropriately located ratable growth.

Lopatcong is approximately 7.45 sq. miles in area. The industrial zone occupies approximately 10% of this area. In 2000, in a continuing attempt to encourage commercial and industrial development, and as envisioned by its comprehensive 2000 Reexamination Report, the Lopatcong Planning Board adopted an ordinance renaming and designating Lopatcong's "I" Industrial zone as a "ROM" (Research, Office and Manufacturing) zone. This "ROM" zone was broken up into three distinct, non-contiguous sections. The largest of these is the southern "ROM" zone, located south of the Norfolk Southern Railroad Right of Way, which comprises approximately 78% of Lopatcong's entire "ROM" zone. (Exhibits P-2, 3, 31, 32, 33, 34, 37, 39)

Lopatcong's 1989 Master Plan, as amended by the 2000, 2004 and 2005 Reexamination Reports³ (collectively the "Lopatcong Master Plan"), through numerous provisions in its Land Use, Circulation and Economic Development sections, sought to infuse Lopatcong's "I" Industrial (hereinafter "I Zone") and then "ROM" Zone, especially that portion of the "ROM" Zone south of the long-existing Norfolk-Southern Railroad Line, with additional industrial development. (Exhibits P-2, 3, 34, 37, 39) As stated in the Lopatcong Master Plan, the purpose of these provisions was to encourage the development of the industrial zone within Lopatcong for purposes of providing a favorable fiscal balance, a stable tax base, to develop employment opportunities and to ensure the industrial district becomes a stable, long term asset to the community. (Exhibits P-2, 3)

Lopatcong's Master Plan focuses repeatedly and specifically on the area in Lopatcong's "ROM" Zone that is south of the Norfolk-Southern Railroad for such integrated development.

³ The Lopatcong Planning Board enacted resolutions to adopt each of these Reexamination Reports as amendments to the Lopatcong Township Master Plan pursuant to N.J.S.A.40:55D-13.

That focus is also apparently due to the southern “ROM” zone’s proximity and access to Route 22 and I-78. Also, that area is comprised of a larger area and larger lot sizes which make it most suitable for large scale industrial development. To improve the prospects of attracting such development, and as contemplated and suggested in Lopatcong’s Master Plan, Lopatcong has engaged in capital improvement projects to upgrade the southern “ROM” zone, such as improvements to Strykers Road (which cuts across the southern “ROM” zone). The improvements consist of upgrading Strykers Road to major collector status, realigning the reverse curve on this roadway, improving its intersection with the railroad and Route 57 and, with the assistance of Warren County, reconstructing a bridge on Strykers Road to accommodate truck traffic. (Exhibits P-2, 3, 31, 34)

Each of the 2000, 2004 and 2005 Reexamination Reports reflect concern over the inability of Lopatcong to more fully develop its industrial district, especially the portion south of the Norfolk Southern Railroad, in light of the rapid residential development within Lopatcong and corresponding tax burden on Lopatcong’s residents. The reports indicate an intent to reverse that trend and an encouragement of zoning to encourage the results that were desired by the Township. (Exhibits P-36, 37, 39, 34)

Defendants argue that the asphalt manufacturing use was permitted under the predecessor zoning ordinance. In that regard, Defendants contend that the Lopatcong Zoning Ordinance does not set forth an exhaustive list of the industrial uses permitted in the “ROM” zone. Instead, Defendant asserts that the Lopatcong Zoning Ordinance sets forth a list of illustrative uses permitted in the zone. (Exhibit P-1) Prior to the adoption of Ordinances 11-07 and 2011-15, the “ROM” zone’s list of permitted uses included “Industry, which involves only the processing, assembly, packaging or storage of previously refined materials, such as but not limited to the following industries:” In 2003, the Lopatcong Township Council revised section (b) thereunder to specifically include cement and concrete, to provide as follows: “(b) fabrication of products made of metal, wood, paper, **cement or concrete.**” In that regard, Defendant offers that “asphalt” is a form of concrete known as bituminous concrete. In fact, the Defendants point out that § 243-64.2 of the Lopatcong Land Use Ordinance, which addresses outdoor bulk storage and outdoor display of merchandise, specifically lists asphalt as a product that may be stored as an accessory use. The Defendants offer that by its inclusion as a product that may be stored outside that it should also be self-evident that bituminous concrete or “asphalt” cannot be stored separate from the processing of this product. (Exhibits P-1, 45; D-48)

Consistent with the desire expressed in the Lopatcong Master Plan for greater industrial development, the Lopatcong Planning Board has, over several years, referred, and the Township Council has enacted, numerous ordinances adding uses that would be expressly considered permitted uses within the zone. For example, in 1999 cell towers were designated as a specific use permitted in Lopatcong's industrial zone except for the area along Belview Road. (Exhibits P-34, 37)

In April, 2011, in response to New Jersey legislation that mandated that renewable energy facilities (i.e. solar and photovoltaic) were to be permitted uses in all industrial zones statewide and were also to be facilities that were to be considered as "inherently beneficial uses" under the Municipal Land Use Law ("MLUL"), Lopatcong began consideration of an amendment to its zoning ordinance to bring it into conformance with these laws. The Lopatcong Township Council, at its April 6, 2011 meeting, initially reviewed proposed Ordinance 11-07 which proposed to address solar and photovoltaic facilities. (Exhibit P-4)

Shortly thereafter the Defendant, "189 Stryker" entered into an agreement to purchase and develop a lot located at 189 Strykers Road (the "Subject Property") which is located within the "ROM" zone south of the Norfolk Southern Railroad. The purpose of the Defendants' proposed purchase and development of that property was for use as an asphalt plant. "189 Strykers Road Associates" offered testimony that the proposed development was thought to be ideal from a planning perspective due to the Subject Property's proximity and access to Route 22 and I-78 and the fact the operation did not require municipal sewage which is unavailable in the "ROM" zone south of the Norfolk Southern Railroad (the absence of which had been a factor inhibiting prior development of this portion of the "ROM" zone). (Exhibit P-5) The Defendants contend that even though the Township's Ordinance provisions demonstrated that asphalt and concrete plant were permitted uses in the "ROM" zone even before the enactment of Ordinances 11-07 and 2011-15, the Defendants all contend that Lopatcong Township wanted to make it "crystal clear" and beyond all question that the asphalt plant and related uses proposed by "189 Strykers Road Associates" were permitted uses. (Exhibits D-10, 20) Lopatcong Township also asserts that it wanted to place greater restrictions on these uses than applied throughout the entire "ROM" zone, and therefore it made these uses conditional⁴ upon adhering to certain strict

⁴ In other words, a conditional use as contemplated by N.J.S.A. 40A:55-67.

standards and confining them to the area south of the Norfolk Southern Railroad Right of Way. By so doing, the Township purportedly imposed greater restrictions on such uses than that was applied to asphalt and concrete manufacturing facilities under the pre-existing ordinance. As a result, Lopatcong Township added asphalt and concrete facilities to the prior version of Ordinance 11-07 which initially addressed only renewable energy facilities.

On July 6, 2011, the Lopatcong Township Council passed this combined version of Ordinance 11-07 on its second reading. As a result of the filing on August 30, 2011 of an action in lieu of prerogative writs challenging the enactment of Ordinance 11-07 on procedural grounds, the Planning Board and Township Council indicates that they decided to enact a “do-over” ordinance to cure the procedural defects alleged regarding the passage of Ordinance 11-07. (Exhibit P-10)

Lopatcong’s “do-over” ordinance for 11-07 was Ordinance 2011-15, both of which are the subject of the challenges brought in this action. (Exhibit P-20) Prior to the public hearing on Ordinance 2011-15, the Lopatcong Township Council referred Ordinance 2011-15 to the Planning Board for review and comment, as required by the Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq. (hereinafter “MLUL”). On September 26, 2011, George Ritter, the Planner for the Lopatcong Township Planning Board (and author of the 2004 and 2005 Reexamination Reports) sent a five page single spaced report addressing both the renewable energy and asphalt/concrete components in proposed Ordinance 2011-15 and their consistency with the Lopatcong Master Plan. (Exhibits P-21A, 21B) The minutes of the September 28, 2011, meeting of the Lopatcong Planning Board declare that the Board reviewed Mr. Ritter’s report in connection with the proposed ordinance and voted 8-0 to refer the proposed ordinance to the Township Council for consideration. (Exhibit P-19) Based on the September 28, 2011 meeting, Mr. Ritter revised and updated his consistency report and sent a revised consistency report dated September 29, 2011 to the Planning Board. (Exhibits D-21A, 21B)

At its October 5, 2011 meeting, the Lopatcong Township Council revised proposed Ordinance 2011-15 to delete the requirement that any lot proposed for the “permitted conditional uses” have frontage on Strykers Road⁵ for asphalt and concrete manufacturing facilities and sent it back to the Planning Board for its consideration of the Ordinance 2011-15 as revised. At its

⁵ The former version required that the lot have some frontage on Strykers Road. The property located at 189 Strykers Lane does have frontage on Strykers Road.

October 6, 2011 meeting, the Lopatcong Planning Board gave instructions for Mr. Ritter's report to be revised to reflect the change made by the Township Council and voted 5-0 to send Mr. Ritter's report and proposed Ordinance 2011-15 to the Township Council for its consideration. (Exhibit P-24) On October 7, 2011, Mr. Ritter incorporated the minor revision needed in his consistency report in accordance with instructions from the Planning Board and forwarded it to the Township Council. (Exhibits P-21B, D-26)

In his October 7, 2013 report, Mr. Ritter devoted five pages of analysis regarding the consistency of Ordinance 11-07 with the Lopatcong Master Plan. Mr. Ritter concluded that "Ordinance No. 2011-15 is substantially consistent with the Land Use Plan Element of the Master Plan and furthers State legislation regarding renewable energy facilities." (Exhibits P21A, 21B)

At its November 2, 2011 meeting, the Lopatcong Township Council acknowledged its review of Mr. Ritter's consistency report and, after concluding the public hearing on proposed Ordinance 2011-15 (and with counsel for the two Intervening Plaintiffs in attendance), enacted Ordinance 2011-15 by vote of 3-0, with the Township Council's remaining two members (Mayor Steinhardt and Councilman Curry) abstaining. (Exhibit P-27)

Based on the enactment of Ordinance 11-07, 189 Strykers Road Associates applied for and received major site plan approval for its asphalt plant development in the fall of 2011. (Exhibits P-14, 29, 30) Given the filing of the prerogative writs action challenging the validity of Ordinance 11-07 and the subsequent enactment of the "do-over" Ordinance 2011-15, 189 Strykers Road applied for and received a corresponding "do-over" major site plan approval for its asphalt plant development after five lengthy public hearings in the spring of 2012. The plan proposed for the second site plan application was, for all practical purposes, essentially identical to the first plan previously approved by the Lopatcong Planning Board. (Exhibits P-14, 29, 30)

On May 23, 2012, the Lopatcong Planning Board unanimously adopted a 38 page memorializing resolution relating to its spring, 2012 approval of 189 Strykers Road Associates' application for major site plan approval for the operation of an asphalt plant on Strykers Road in Lopatcong's southern "ROM" zone. (Exhibit P-30)

On August 30, 2011, Enzo and Yola Marinelli and John and Gena James, residents of Lopatcong, through their attorneys Price Meese Shulman & D'Arminio, P.C. (the "Marinelli Plaintiffs"), filed a complaint in lieu of prerogative writs under Docket No. WRN-L-374-11, challenging the enactment of Ordinance 11-07. On December 19, 2011, the Marinelli Plaintiffs

filed a separate complaint in lieu of prerogative writs under Docket No. WRN-L-517-11, challenging the enactment of Ordinance 2011-15. On January 23, 2012, the Marinelli Plaintiffs filed a separate complaint in lieu of prerogative writs under Docket No. WRN-L-32-12, challenging the fall, 2011 approvals obtained by 189 Strykers Road Associates granting it major site plan and conditional use permit for development of an asphalt plant under Ordinance 11-07 and naming as defendants the Lopatcong Planning Board and 189 Strykers Road Associates.⁶ On July 31, 2012, the Marinelli Plaintiffs filed a third amended complaint in lieu of prerogative writs in the pending action bearing Docket No. L-32-12, challenging the spring, 2012 approvals obtained by 189 Strykers Road Associates granting it major site plan and conditional use permit approval for development of an asphalt plant under Ordinance 2011-15, as memorialized in the Lopatcong Township Planning Board's May 23, 2013 resolution. In sum, the Marinelli Plaintiffs filed six complaints aggregating over 200 pages of allegations in three separate Law Division actions.

Pursuant to permission granted at the Court's March 12, 2012, Case Management Conference, on or about April 18, 2012, Intervening Plaintiffs Precast Manufacturing Company, LLC and GPF Leasing, LLC, through their attorneys Archer & Greiner, P.C. (the "Precast Plaintiffs") filed three separate complaints in lieu of prerogative writs in each of the three actions filed by the Marinelli Plaintiffs, thereby joining their challenge to Ordinance 11-07 (enacted in July, 2011), Ordinance 2011-15 (enacted in November, 2011) and the site plan approvals granted to 189 Strykers Road Associates for its asphalt plant development in the fall of 2011. The Precast Plaintiffs have long operated and continue to operate a precast concrete manufacturing operation on the lot adjoining the Subject Property.

The Court consolidated the three separate cases referenced above, as well as a fourth case filed on July 13, 2012 by Christie Victor and nine other individuals through their attorneys Weiner and Lesniak, LLP (the "Victor Plaintiffs").⁷

⁶ The Marinelli Plaintiffs subsequently filed two amended complaints in this action to add their challenge to the companion subdivision approval granted by the Lopatcong Planning Board to 189 Strykers Road in the fall of 2011 under Ordinance 11-07 and other claims challenging the fall, 2011 approvals granted to 189 Strykers Road Associates.

⁷ The complaint filed by the Victor Plaintiffs challenges only the spring, 2012 approvals obtained by 189 Strykers Road Associates granting it major site plan and conditional use permit for development of an asphalt plant under Ordinance 2011-15, as memorialized in the Lopatcong Township Planning Board's May 23, 2013 resolution. The Victor Plaintiffs' complaint does not challenge the enactment of Ordinance 11-07 or Ordinance 2011-15.

The Court entered Case Management Orders in this consolidated case on March 26, 2012; August 29, 2012; October 11, 2012; November 21, 2012; December 19, 2012; February 8, 2013; May 23, 2013; August 19, 2013 and November 13, 2013. The parties have exchanged responses to Notices to Produce Documents and Interrogatories.⁸ On February 14, 2013, counsel for the Precast Plaintiffs filed a motion to extend discovery to, among other things, name and serve an expert report on the ordinance issues beyond the expired deadlines set forth in prior Case Management Orders. On February 28, 2013, the Court granted the motion by the Precast Plaintiffs and permitted them to name and serve the report of their named expert on the ordinance issues, Steven Lydon, while providing Defendants the opportunity to thereafter serve rebuttal expert reports of their respective experts, Elizabeth McKenzie and George Ritter, and for the completion of depositions of these three experts.

The Precast Plaintiffs and their predecessors in interest, M&M Concrete, have long operated a precast concrete manufacturing operation on the lot adjacent to the Subject Property. On August 16, 2012, 189 Strykers Road Associates made a motion for partial summary judgment seeking to establish that the manufacture of concrete and asphalt was a permitted use in Lopatcong's "ROM" zone even before the enactment of Ordinance 11-07 and Ordinance 2011-15. This motion was primarily based on the wording of the preexisting ordinance containing an illustrative list of permitted uses in the "ROM" zone and the fact that asphalt storage is listed as an accessory use within that zone (asphalt can only be stored immediately after production).⁹ The motion was supported by the sworn testimony of Lopatcong's Planner and Engineer before the Lopatcong Planning Board confirming that asphalt and concrete manufacturing were prior permitted uses and that Ordinances 11-07 and 2011-15 were enacted to clarify this fact and to restrict these permitted uses to the "ROM" zone south of the Norfolk Southern Railroad Right of Way, as well as to subject these uses to other beneficial restrictions. Judge Amy O'Connor, then sitting in the Superior Court Law Division of Warren County, denied the Defendants' summary judgment motion, ruling, *inter alia*, that fact issues precluded pre-trial adjudication of this issue.

The subsequent responses by the Precast Plaintiffs to Defendants' Requests for Admissions and testimony of Gary Fischer, the owner of Precast, have established that during

⁸ Lopatcong Township alone has apparently produced over 1,900 pages of documents in discovery.

⁹ § 243-64.2 of the Lopatcong Township Zoning Ordinance.

each of the preceding ten (10) years the Precast Plaintiffs have produced concrete on its site adjacent to the Subject Property. As a part of that concrete plant, the Precast Plaintiffs have operated a concrete mixer and using sand, stone and other additives to help concrete cure faster. The Defendants contend that the manufacture of “regular” concrete is an “almost identical process” to the manufacture of bituminous concrete (a/k/a asphalt), the difference being simply the type of material (portland cement vs. asphaltic cement) mixed with the aggregate stone. Plaintiffs contend that the manufacturing processes of the two products are materially different and those differences support their position that asphalt manufacture should not be considered a permitted use under the prior Zoning Ordinance.

Also, during the pendency of this matter, 189 Strykers Road Associates propounded discovery on the Marinelli Plaintiffs and the Precast Plaintiffs seeking the identity of the individuals or entities (other than Plaintiffs) who were funding the prosecution of these challenges and whether such individuals or entities were involved in the production of asphalt in New Jersey. Both sets of Defendants refused to provide the requested information. The Court denied the subsequent motion by 189 Strykers Road Associates to compel the production of information revealing the identity of Plaintiffs’ funding sources, ruling such information was not available to defendants under the Noerr-Pennington doctrine.

To this point 189 Strykers Road Associates has not been able to proceed with the development of its proposed approved asphalt site in Lopatcong because of the pendency of this litigation which has lasted for more than two years.

Ordinances – Facts, History and Positions

The Land Use and Zoning Ordinance of the Township of Lopatcong, Chapter 243 (hereinafter the “Township Land Use Ordinance”) provides development regulations including certain provisions relative to development properties located within the “ROM” Zone. (See Exhibit P-1). Along with certain other provisions of the Ordinance, Article XIV, §243-75 governs the type of uses that are permitted, accessory, or conditional within the “ROM” Zone. Article XV of the Ordinance governs the conditions that are required to be met for certain conditional uses permitted in the “ROM” Zone. It should be noted (as it is one of the issues in this case) that the Zoning Ordinance establishes different requirements for properties that are located south of the railroad tracks in the “ROM” Zone, to wit: 1) the building height feet requirements in the “ROM” Zone are 45 feet but if a property is south of the railroad tracks in the “ROM” Zone, the permitted building height is 60 feet; 2) the building height stories requirements is 3

stories in the “ROM” Zone but in the “ROM” Zone south of the railroad tracks a building 4 stories in height may be built; and 3) the permitted floor area ratio in the “ROM” Zone is 25% unless the property is south of the railroad tracks in the “ROM” Zone, it is 30%. Prior the adoption of Ordinance 2011-15, the two most recent Township Master Plans were dated May 24, 1989 (hereinafter the “1989 Plan”) and June 14, 1976 (hereinafter the “1976 Master Plan”). (See Exhibits P-2, 3).

On April 6, 2011, the Defendant Council undertook a first reading of Ordinance No. 11-07 to supplement and amend Chapter 243, entitled “Zoning and Land Use,” to regulate solar and photovoltaic facilities, specifically as permitted uses within the “ROM” Zone. The Ordinance sought to regulate the use and placement of alternative energy facilities in light of the current trend toward development of renewable energy and its impact on valuable natural resources and farmland in the Township. On April 27, 2011, the Defendant Board reviewed Ordinance No. 11-07, which they claim was in accordance with the MLUL, N.J.S.A. 40:55D-64 (See Exhibit P-10) and issued correspondence on April 28, 2011 advising the Defendant Council of its recommended revision to Ordinance No. 11-07. Correspondence dated April 28, 2011, addressed to the Township of Lopatcong Mayor and Council from Township of Lopatcong Planning Board regarding Ordinance 11-07). A month later, on May 25, 2011, Defendant Board apparently discussed a version of Ordinance No. 11-07 that purported to supplement and amend the “ROM” Zone to permit solar and photovoltaic facilities and asphalt/concrete manufacturing facilities. The Board noted general support of the Ordinance “as is” with minor changes to be made as addressed by the Board Engineer and Board Planner. (See Exhibit P-7)

Plaintiffs claim, however, that as of May 25, 2011, at the time of Board review of an amended ordinance, the Township Council had not yet introduced this version of Ordinance No. 11-07 according to available public records. Plaintiffs claim that there are no references in any of the approved Minutes of the Defendant Council to provide a reason or justification for the addition of “asphalt and concrete facilities” as permitted uses to an Ordinance. Plaintiff claims that the sole purpose of Ordinance 11-07 was to further renewable energy alternatives, i.e. solar and photovoltaic facilities, to the Ordinance No. 11-07. Plaintiffs claim that the purpose of Ordinance 11-07 was originally conceived to further renewable energy alternatives but the scope and purpose was subsequently expanded to include the addition of asphalt/concrete facilities as permitted conditional uses.

Plaintiff also claims that the Ordinance was not revised in a manner to show to the public that it had been revised. Defendant Council undertook a first reading of Ordinance No. 11-07 to supplement and amend Chapter 243, entitled “Zoning and Land Use,” to add Asphalt and Concrete Manufacturing Facilities as a Conditional Use in the “ROM” Zone South of the Norfolk Southern Railroad Right-of-Way; Solar-Photovoltaic Facilities as a Permitted Use in the “ROM” Zone, and Solar Facilities as an Accessory Use Permitted in the “ROM” Zone and HB Zone South of the Norfolk Southern Railroad Right-of-Way (hereinafter the “Initial Ordinance Amendment”). (See, Exhibit P-10)

The Initial Ordinance Amendment added the following conditional uses to the Research Office and Manufacturing Zone: 1) Asphalt Manufacturing Facilities; 2) Concrete Manufacturing facilities; and 3) Resource Recycling Facilities. The Conditional Use requirements of asphalt and concrete manufacturing facilities include, but are not limited to, the following: 1) being located in the “ROM” Zone south of the Norfolk Southern Railroad Right-of-Way on a lot or lots having frontage on Strykers Road; 2) the facility is able to operate as necessary on a 24-hour, seven (7) days a week basis; 3) the facility can include tanks and storage bins okay up to eighty-five (85) feet in height.

On July 6, 2011, the Defendant Council conducted a second reading and public hearing on the aforementioned Ordinance. Available minutes reflect that Defendant Council adopted Ordinance No. 11-07 on July 6, 2011. (See Exhibit P-9). No comment from the public was received for this action and adoption (hereinafter the “Initial Adoption”). (See Exhibit P-7, 9).

On August 30, 2011, Plaintiffs filed a challenge to the validity of the Ordinance Amendment, and the Initial Adoption process on substantive and procedural grounds. Subsequently and in apparent reaction to the Plaintiff’s challenge, the Defendant Township took certain actions relative to a re-adoption of the Ordinance Amendment purportedly to “correct” procedural deficiencies relating to the Initial Adoption.

On September 28, 2011, Defendant Board discussed a draft version of Ordinance 2011-15. (See Exhibits P-20, 12) Apparently, on the same evening, the Defendant Board also granted conditional use approval and related Preliminary and Final Site Plan Approval to permit the construction and operation of an asphalt manufacturing facility for Defendant 189 Strykers. (See Exhibit P-12).

In that regard, Defendant 189 Strykers is owned by the principals of Intercounty Paving¹⁰. Certain records produced by the Township in response to Open Public Records Request (OPRA) filed by Plaintiffs indicate that escrow funds were deposited with the Township by “Intercounty Paving Associates” as early as May 2011 for professional review of development plans. (See Exhibit P-16).

On September 29, 2011, George Ritter (“Ritter”), P.P., of Ritter & Plante Associates, LLC., prepared a report in his capacity as the Township Planner. Plaintiffs contend that the Ritter Report does not specifically indicate that Ritter reviewed the Land Use Element of the Master Plan in preparation of the consistency report (“September Consistency Report”). (See Exhibits P-21A, 21B). The September Consistency Report indicates that the provisions of the proposed Ordinance No. 2011-15 providing for the construction of solar photovoltaic facilities was not consistent with the Township’s Master Plan. (See Exhibits P-21A, 21B)

On October 5, 2011, the Township Council introduced for first reading Ordinance No. 2011-15 entitled “An Ordinance of the Township of Lopatcong, County of Warren, State of New Jersey to Amend Chapter 243, “Zoning & Land Use”, to add asphalt and concrete manufacturing facilities as a conditional use in the “ROM” Zone South of the Norfolk Southern railroad right-of-way; solar-photovoltaic facilities as a permitted principal use in the “ROM” zone; and solar photo-voltaic facilities as an accessory use permitted in the “ROM” zone and the HB zone South of the Norfolk Southern railroad right-of-way”. (See Exhibit P-19).

Ordinance No. 2011-15 eliminated certain language regarding one of the conditional provisions for an asphalt and/or concrete manufacturing facility as set forth in 243-77.6(C) to read as follows: “Asphalt and/or concrete manufacturing facilities may only be located in the “ROM” Zone south of the Norfolk Southern Railroad Right-of-Way on a lot or lots having frontage on Strykers Road. (See Exhibit P-20). The Township Council introduced Ordinance No. 2011-15 on first reading at its October 5, 2011 hearing and referred it back to the Board. The Plaintiffs contend that the minutes of the October 5, 2011 Planning Board meeting fail to reveal any amendments or changes to the Ordinance as introduced (hereinafter the “Second Adoption”). (See Exhibits P-19, 24).

¹⁰ The testimony that was provided to the Court indicated that some, but perhaps not all, of the principals of Intercounty Paving were also the principals of 189 Strykers.

Plaintiffs theorize that on October 7, 2011, the September 29, 2011 Consistency Report was revised by Ritter. However, the revised report fails to reveal any review by the Planning Board before it was submitted to the governing body as a new report (“October Consistency Report”). (See Exhibit P-21B). Defendant Board met on October 6, 2011 but Plaintiffs claim did not review the October Consistency Report.

In that regard, Plaintiffs contend that as of October 7, 2011, the Defendant Board could only have reviewed the September Consistency Report and not the October Consistency Report as they claim that the latter report was not created until the day after their October 6, 2011 meeting. (See Exhibit 21B).

On October 6, 2011, the Defendant Board referred Ordinance 2011-15 back to Defendant Council. (Exhibits P-19, 48, D-26)

The October Consistency Report changed the permitted location for asphalt and concrete manufacturing facilities and resource recycling facilities to be sited as conditional uses. The October Consistency Report finds that different sections of the proposed ordinance contain sections that are both consistent and inconsistent with the Master Plan. (See Exhibit P-21B). Plaintiffs also claim that the September and October Consistency Reports fail to indicate that the land use element of the Master Plan was reviewed to determine if the proposed ordinance was consistent with the Master Plan. (See Exhibit P-21B). The Plaintiff postulates that the September and October Consistency Reports suggest that Ritter reviewed a different ordinance than Ordinance No. 2011-15 and that the Defendant Board failed to adopt the October Consistency Report that was ultimately transmitted to and reviewed by the Township Council. The September and October Consistency reports refer to an Ordinance that contains language contained in Ordinance No. 11-07 which is not contained in Ordinance 2011-15. Plaintiff points to the fact that Ritter references language “and the lot to be so developed has frontage on Strykers Road” but that the frontage requirement was removed from Ordinance No. 2011-15. The September and October Consistency reports reference the planner’s review of a series of documents. However, Plaintiff points out that the documents referenced in the reports are not Master Plans or Amendments to Master Plans. (See Exhibits P-21A, 21B). Plaintiffs also indicate that the adoption of photovoltaic facilities could not have been consistent with the 1989 Plan since those facilities were not part of planning literature in 1989. (See Exhibits P-21A, 21B).

Plaintiff contends that the 1989 Master Plan makes no recommendations to amend the zoning ordinance to permit asphalt and/or concrete manufacturing facilities or resource recycling

facilities in a portion of the “ROM” Zone. (See Exhibit P-2, 1989 Plan). Similarly, Plaintiff points out that the 1989 Plan makes no recommendation concerning increasing height limitations for silos containing materials used in the asphalt and/or concrete manufacturing process or for silos storing the product of the asphalt and/or concrete manufacturing process. (See Exhibit P-2, 1989 Plan). In fact, the planning document is silent concerning the installation of solar and photovoltaic facilities. (See Exhibit P-2, 1989 Plan).

Plaintiff further indicates that in their view, the 1989 Plan only refers to industrial uses which were similar to those in the Industrial Zone in 1989 which were “light industrial” in nature. (See Exhibit P-2, 1989 Plan). Plaintiff offers that the 1976 and 1989 Plans fail to contain any specific recommendation regarding addition of asphalt manufacturing facilities, concrete manufacturing facilities or resource recycling facilities. (See Exhibits P-2, 3). Plaintiff claims that the adoption of Ordinance 2011-15 is not consistent with the goals and objectives of the 1989 Plan and that the governing body should have but failed to adopt a resolution detailing the reasons for adopting an ordinance that is inconsistent with the Township of Lopatcong’s master plans as required by law. Minutes of Meeting. Ordinance 2011–15 indicates “**WHEREAS** it has been brought to the attention of the Lopatcong Township Planning Board that Asphalt and Concrete Manufacturing Facilities are not permitted in the Township.” (See Exhibit P-20, Ordinance 2011-15). Pursuant to Ordinance 2011-15 asphalt and/or concrete manufacturing facilities may only be located in the “ROM” Zone south of the Norfolk Southern Railroad. Ordinance 2011-15 also institutes modifications to height restrictions which are applicable only to storage silos for asphalt and concrete manufacturing facilities. (See Exhibit P-20, Ordinance 2011-15). Pursuant to Ordinance 2011-15 resource recycling facilities are permitted in the “ROM” Zone only south of the Norfolk Southern Railroad, and as such, Plaintiff offers that these uses are not permitted throughout the “ROM” Zone. (See Exhibit P-20, Ordinance 2011-15). Pursuant to Ordinance 2011-15, only asphalt and/or concrete type manufacturing facilities are permitted to have silos of 85 feet. (See Exhibit P-20, Ordinance 2011-15).

On November 2, 2011, Defendant Council adopted Ordinance No. 2011-15 (introduced on October 5, 2011) (hereinafter the “Second Adoption”). (See Exhibit P-27, Township of Lopatcong Mayor and Council minutes for November 2, 2011). Available minutes reflect that there was an objection placed on the record by counsel representing the adjacent property owner, Precast Manufacturing Company, LLC and GPF Leasing, LLC, before the Defendant Council

voted to adopt Ordinance No. 2011-15 on November 2, 2011. (*See*, Exhibit P-27, Township of Lopatcong Mayor and Council minutes for November 2, 2011).

Available public records reflect that notice of the decision of the Defendant Council's actions relative to the Second Adoption was published on November 4, 2011. (*See* Exhibit P-28, Affidavit of Publication for Ordinance No. 2011-15 dated November 4, 2011). On November 30, 2011, the Defendant Board granted Preliminary and Final major subdivision approval with variances to permit construction and operation of an asphalt manufacturing facility to Defendant "189 Strykers". (*See* Exhibit P-28, Resolution of Preliminary and Final Major Site Plan Approval, Preliminary and Final Major Subdivision, Conditional Use Approval and approval for a permit under N.J.S.A. 40:55D-36 granted to Applicant known as 189 Strykers Road Associates, LLC and received on November 30, 2011). On December 19, 2011, Plaintiffs challenged the actions of Defendants Township, Council and Board, that related to the passage of Ordinance 2011-15. Their challenge, which is the subject of this action, details a host of "claimed" substantive and procedural defects relating to same.

On March 5, 2012, the Defendant Board granted what it called a "re-approval" for all of the approvals to 189 Strykers. (*See* Exhibits P-29, 30, Resolution of Preliminary and Final Major Site Plan Approval, Preliminary and Final Major Subdivision, Conditional Use Approval and approval for a permit under N.J.S.A. 40:55D-36 granted to Applicant known as 189 Strykers Road Associates, LLC and received on March 5, 2012).

The Township of Lopatcong Master Plan – Facts, History and Positions

i) 1959 Master Plan

On June 30, 1959, the Township of Lopatcong adopted its first master plan (hereinafter, the "1959 Plan"). This 1959 Plan provided for needed major public improvements that could be foreseen to the year 1965, including street improvements, school sites, parks and playgrounds, a municipal building, and site for fire station and sewage treatment plant along with a basis for an official map. It stated that the impact on the increase of traffic on U.S. Route 22 and a suburban trend created a new face of the Township as well as the potential trend towards new office and industrial plan construction to locate in the open countryside, calling for "new opportunities, yet at the same time calling for caution and guidance". The 1959 Plan acknowledged that business establishments be regulated and controlled and industries be restricted as to location with non-residential uses being subject to reasonable safeguards for the protection of adjoining properties with emphasis on ensuring compatibility with Lopatcong's traditional rural identity. It also

characterized Lopatcong as being in the “threshold” of a trend to construct new offices and industrial plants “in the open countryside” and opined that the Township might well expect to “attract major projects of this kind, greatly benefiting the economy of the Township”. At that time it was recognized that approximately 644 acres of the Township were recommended to be zoned industrial in an effort to capture such development, despite the fact that existing industrial uses only totaled 32.9 acres. The areas recommended to be zoned industrial were in the same general locations as the current “ROM” Zoned areas. The document defines certain prohibited uses as nuisance industries. (See Exhibit P-31; see also P-1)

ii) 1976 Master Plan

The Defendant Board subsequently adopted its next master plan in 1976 (the “1976 Plan”), which, in part, described the location of particular industrial development occupying approximately 85 acres of land but those uses were described as widely scattered and generally located adjacent to less intenuous land uses. The 1976 Plan described three industrial zones, one of which is the present Research Office and Manufacturing (ROM) Zone. The boundaries of each industrial zone was modified and reduced in size from the 1959 Plan. The area south of the railroad line was again identified for industrial uses. The 1976 Plan identified the need for improvement to Lower Strykers Road to eliminate certain hazard roadway conditions. (See Exhibit P-3, 1976 Plan).

The 1976 Basic Planning Studies and Master Plan also included discussion of the need for additional sewerage capacity as parts of the Township had been sewerred in the 1960s with treatment provided by the Phillipsburg Plant.

iii) 1982 Periodic Reexamination and Update

Adoption of a Periodic Reexamination and Master Plan followed in 1982 (hereinafter the “1982 Re-Exam”). The 1982 Re-Exam outlined the Planning Board’s goals focusing on residential, parks and recreation, commercial development and public facilities rather than industrial uses. (See Exhibit P-32). It was noted that Industrial uses comprised approximately fifty-four (54) acres the Township or a little over one (1) percent of the total land area. It further noted that most of the commercial/industrial development was concentrated in certain areas of the Township.

The document recognized that the portion of the Township that was devoted to industrial uses, including auto body shops, truck terminals, a sprinkler installation company, print shops, a marble processing plant, a cabinet maker, heavy construction contractor, various light

manufacturing concerns, warehousing and distribution facilities, chemical manufacturers, concrete manufacturers, junk yards and repair shops. It also noted that “[a]lthough the existence of Route 78/22 Corridor should place Lopatcong Twp. squarely within the path of inevitable future growth, that growth was not occurring.” Again, the plan focused on improvements needed to provide sanitary sewerage to areas of the Township intended for growth.

iv) 1989 Master Plan

In 1989, Defendant Board subsequently adopted a new master plan (hereinafter “1989 Plan”) amending the 1976 Plan and providing, in part, an objective: 1) to “[e]ncourage the integrated development of the Industrial District South of Route 57 to insure adequate services and accessibility”; 2) to “[i]mprove access to the Industrial District between Route 22 and 57 to increase its attractiveness to development”; 3) to “[d]evelop densities and intensities of land use compatible with the physical limitations of the land and the present and future infrastructure capacity”; 4) to “[e]ncourage flexible development techniques which will minimize disturbance of sensitive area and incorporate natural features into the project design”; 5) to “[p]romote design standards which allow mixed use zoning while minimizing adverse impacts and potential conflicts between adjoining divergent uses”; 6) to “[i]mprove access to the Industrial District between Routes 22 and 57 to increase its attractiveness to development”; 7) to “[p]romote land uses which will provide favorable fiscal balance and a stable tax base; 8) to “[e]ncourage development of local employment opportunities within the Township”; and 9) to “[e]nhance the attractiveness and accessibility of the Industrial District to insure the development of a stable long term asset to the community”. Much of the focus of the 1989 Master Plan was on the anticipated completion of Route 78 and the development pressure attendant to that new infrastructure. At that time the sewerage treatment plant was the subject of an NJDEP moratorium. Also, the document expressed the need for improved accessibility to the Industrial Zone to make it more attractive to “major users”. Several improvements were proposed to Strykers Road including upgrading it to collector status. According to the Plaintiffs, the 1989 Plan apparently reflected a reduction in the Industrial zone south of Route 57 and the railroad line. (*See* Exhibit P-2, 1989 Plan).

v) 1996 Reexamination Report

The Defendant Board adopted a master plan reexamination report in 1996 (hereinafter the “1996 Re-examination”) and noted that between 1990 and 1996, the unfavorable economy resulted in little economic development in the Township. Defendant Board concluded that the

goals and objectives of the 1989 Master Plan were still valid guidelines for development within the Township. (See Exhibit P-33).

The report noted that “the most significant problems still outstanding in the Township relate to economic development, fiscal balance, and stability...” The report also noted that the sewer moratorium had been lifted and all additional treatment capacity had been allocated to approved projects. The need for the planned expansion of the sewerage treatment plant would have to provide the additional capacity need to support the areas zoned and intended for future development.

vi) 2000 Reexamination Report and Update

The Defendant Board subsequently adopted a Re-examination of Municipal Plans and Regulations on September 20, 2000 (hereinafter the “2000 Re-examination”). The 2000 Re-examination recommended that the Industrial Zone be renamed as a Research Office and Manufacturing Zone and included a series of proposed zoning amendments. (See Exhibit P-34).

Concern was noted over the lack of non-residential development and employment opportunities and the continued need to “encourage development in the industrial district south of Route 57 while providing appropriate infrastructure for this development”. It also noted that non-residential development had not kept pace with residential growth.

[a]lthough the 1989 Master Plan focused considerable attention on the Industrial zone along Route 22, north of Route 57, very little development has taken place there over the last decade.

Without the non-residential growth to balance the residential development, taxes have continually increased to pay for the required governmental and educational services in the community. Rising taxes coupled with rising home prices have made it increasingly more expensive to live in the Township. This trend is especially hard on the older residents of the community, living on fixed incomes, often forcing long-time residents to move out of the area ...

The Township has had little opportunity to effectuate its goals and objectives relating to the non-residential growth and development. Although the regional economy has recovered from the recession, development in the Industrial District has been very limited; and much of the large commercial growth to serve the growing population of Lopatcong and Greenwich has taken place further east on Route 22 in Greenwich and Pohatcong.

The Township has, however, begun to take steps to enhance the attractiveness and accessibility of the Industrial Zone. Plans are underway for the improvement of Hens Foot (Strykers) Road from Route 57 south to the municipal boundary with Greenwich ... At the same time, the County is discussing the possible

construction of a new road [through the Industrial Zone] linking the Ingersoll-Dresser property to Routes 22, 57 and 519 ...

The most significant problems still outstanding in the Township relate to the type and location of growth, economic development, fiscal balance, environmental protection and recreation.

(p. 11-14)

In an Appendix to the Report, the Planning Board concluded its recommendations for various zoning changes with the following:

The Township has striven to balance its residential growth with non-residential development, to help balance the tax burden. In the past decade, there has been limited commercial and industrial growth to offset the rapid residential growth. The Township has a large industrially zone area that offers a tremendous opportunity for non-residential development. The use is hindered by limited accessibility and lack of sewer.

Steps are now being taken to improve the main access road and to provide alternate access to the area. The critical remaining issue is access to public sewer. With the expansion of the Phillipsburg treatment plant, Lopatcong will have the opportunity to expand sewer service in the community; and the Township should develop a plan for the extension of sewer service, including the areas to be served, priorities for allocation, methods of service (e.g. location and size of major collector lines and pump stations) and methods of funding and installation. This plan should be based on the amount of the available new capacity, existing planning objectives and zoning, and the need for additional capacity that might arise within the existing service area. The report recommends that first priority for any new capacity be given to the industrial zone north of Route 22 and that the sewer service area be modified to include this area.

(p. 25)

Thereafter, Defendant Board's planner, Ritter, prepared a planning study which examined the "ROM" zone (lying south of Route 57 and the Norfolk Southern Railroad line), the HB zone (lying along both sides of the Route 57 between Strykers Road and County Route 519), the zoning for both zones and the problems created by both *vis a vis* negative impact upon the increased residential growth that had occurred in the Township in preceding years.

vii) 2004 Planning Study and Reexamination

A 2004 Re-examination was in fact adopted which, in part, separated the HB (Highway Business) and “ROM” Zone¹¹ into two (2) distinct and separate zones (hereinafter the “2004 Reexamination”).

The 2004 Re-examination identifies the permitted uses in the “ROM” zone as: 1) Farms; 2) Warehouse and Distribution Centers; 3) Light Industry; 4) Offices; 5) Computer and Data Processing Centers; 6) Research Laboratories; 7) Integrated Industrial/Office Park Development; and 8) Telecommunication Facilities. All uses within the “ROM” zone were to be located on parcel with a minimum of 20 acres except for farms, which require 5 acres. The floor area ratio is limited to 20% of gross tract area, with a maximum building coverage of 15% and lot coverage of 50%. It is noted in the 2004 Reexamination that the Planning Board determined that two additional uses should be specifically permitted principal uses in the “ROM” zone, but at that time neither of the new specifically permitted uses were asphalt plants or concrete plants. (See Exhibits P-34, 36, 37).

The study also recapitulated the history of zoning and development in the “ROM” Zoned portion of the study area and expressed the Township’s frustration at not seeing its Master Plan goals for economic development implemented in that part of the Township. It noted that the “ROM” Zoned area suffered from chronic traffic circulation and sewer issues that plagued its efforts to attract economic development that was needed to balance the disproportionate residential growth.

Again, the Plan recommended improvements to the sewerage service area (to include the entirety of the “ROM” Zone south of Route 57 and the Norfolk Southern Railroad line) and specific and significant traffic improvements to Strykers Road to improve circulation and allow trucks to be accommodated.

¹¹ One of the results of the 2004 Planning Study was the elimination of the HB-“ROM” designation and additional of two separate “ROM” and HB zones. (See, Exhibits P-36, 37, 2004 Planning Study). The Land Use Plan section of the 2004 Reexamination, describes the “ROM” Research Office Manufacturing Zone occurring in three locations within the Township and comprised of 338.6 acres of land: 1) South of the Route 57 between the Jersey Power & Light Company easement easterly to the Overlook at Lopatcong multi-family development (contains 255.8 acres); 2) Both sides of Belview Road between Strykers Road and Route 57, which is further bounded by the Township’s border with Harmony Township on the north and residential development to the south (contain 34 acres); and 3) Northwest region of Lopatcong between Lower Belvidere Road and the Delaware River (contains 48.8 acres). (See, Exhibit P-37, 2004 Reexamination and See, Exhibit P-38, Resolution Adopting 2004 Reexamination of the Lopatcong Township Master Plan).

The 2004 Reexamination Report was explicitly intended to amend and update the 1984 Master Plan and was noticed, heard and adopted as a Master Plan Amendment.

viii) 2005 and Subsequent Reexamination

The Defendant Board subsequently adopted amendments to the Master Plan on June 22, 2005, December 6, 2006, December 12, 2005, and May 26, 2010. (See Exhibit P-39).

The Report addressed a specific policy change relating to the provision of age-restricted housing.

ix) 2012 Master Plan Reexamination

Thereafter, on February 8, 2012 and at a time that post-dated adoption of Ordinance No. 11-07 and 2011-15, Defendant Board adopted a Re-examination Report (hereinafter the “2012 Re-examination”) that described the impact of the Highlands regulation on policies and objectives for development in the Township. The planning documentation recommended certain “ROM” Zone regulations to: 1) Increase allowable height of principal buildings to a maximum of 60 feet and 4 stories; 2) Increase allowable height of accessory buildings and structures to a maximum of 40 feet; and 3) Increase the allowable Floor Area Ratio (FAR) to 30%. This report was referenced in expert testimony but not admitted into evidence.

The Report also noted that subdivision and variance approvals had been granted for land in the “ROM” Zone. It also described improvements that had been made to Strykers Road between 2005 and 2008.

x) 2013 Master Plan Reexamination

Most recently (and subsequent to the enactments which are in issue in this litigation) in March 2013 Highlands Master Plan Element (hereinafter the “2013 Master Plan Highlands Element) was adopted together with a Re-examination Report (hereinafter the “2013 Master Plan Re-examination Report), addressing specific revisions purportedly necessary to bring the Township Master Plan and development regulations in conformance with the Highlands Regional Master Plan. This re-examination was referenced in testimony but not admitted into evidence.

The Township of Lopatcong Zoning Ordinance

As of 1999, the Township’s Industrial Zone (hereinafter “I Zone) permitted the following principal uses: 1) farms; 2) industrial park developments; 3) warehouse and distribution centers; 4) industry involving only the processing, assembly, packaging or storage of refined materials, such as, but not limited to the following industries: a) manufacturing of light machines; b)

fabrication of metal, wood, and paper products¹²; c) assembly of electronic components; d) apparel manufacture; e) dairy, fruits, vegetable, baked goods, cereals, and grains; and f) printing and publishing. The only permitted conditional uses in the I Zone were advertising signs. The minimum lot size was 5 acres except for industrial parks containing 15 acres or more the minimum lot size was permitted to be reduced to 2.5 acres. The maximum height for nonfarm uses was 3 stories/45' and the maximum lot coverage limit was 65% with no limit on building coverage within that 65%. The Industrial Zone included the three areas previously mentioned herein but the I zone south of Route 57 and the Norfolk Southern Railroad line was confined to the area east of the power line easement lying between Strykers Road and Route 22. (See Exhibits P-1, 10, 20).

In 2000, the Township adopted Ordinance 2000-28, which renamed the I Zone to "ROM" Zone ("ROM" Zone"). In early 2002, the list of permitted uses in the "ROM" eliminated apparel manufacture added the following: 1) offices for business, executive professional, and administrative purposes; 2) computer and data processing centers; 3) scientific engineering and/or research laboratories; and 3) integrated industrial and office park development. By 2000, the minimum lot requirement for the "ROM" for all uses, except with an Industrial/Office Park had been increased to 20 acres, maximum building coverage was added at 15%, and maximum lot coverage was reduced to 50%. (See Exhibit P-1).

Ordinance 2003-19 thereafter regulated for outdoor bulk storage and outdoor display of merchandise and, also, in the "ROM" zone, amended the list of permitted uses to permit "fabrication of products made of metal, wood, paper, cement, or concrete (See Exhibit P-1). In 2004, Ordinance 2004-18 added mini-warehouse/self-storage facility (on a 15 acre lot) and a flexible office/warehouse as permitted uses in the "ROM" Zone. Ordinance 2004-18 also added provisions for Planned Development Overlay District. (See Exhibit P-1).

Ordinance 2006-30 amended the bulk "ROM" requirements, including but not limited to, mandating a minimum lot area of 5 acres Ordinance 2008-02 limited the height of accessory buildings to 20', except on a farm. (See Exhibit P-1).

¹² It is noted that although the Expert Report prepared by the Board Planner states that this Zone permitted the processing of previously refined materials and fabrication of products made of wood, paper, cement, or *concrete*, there is no mention of concrete as of the 1999 Township's Land Use and Zoning Ordinance (See Exhibit P-1).

COURT'S DECISION

POINT I

IS THE CONSTRUCTION OF AN ASPHALT PLANT PERMITTED UNDER THE PRE-EXISTING ORDINANCE?

A) Contentions, Arguments and Positions

As an opening argument, the Defendants contend that Plaintiffs' entire challenge to Ordinance 2011-15 is effectively irrelevant due to the fact that construction and operation of an asphalt plant was a permitted use in the pre-existing version of the Lopatcong Land Use Ordinance. In fact, Defendants argue that the enactment of Ordinance 2011-15, actually placed more restrictions on asphalt plants because Ordinance 2011-15 limited asphalt plants to be only a conditional use, whereas previously an asphalt plant was a permitted principal use. Thus, the Defendants assert that (consistent with the testimony of Lopatcong Township Planner and Engineer), the Lopatcong Township Council actually tightened the regulations concerning asphalt plants by allowing Lopatcong Township the right to place conditions on the use which could not previously be imposed.

As noted in the "Procedural History" section of this opinion, "189 Strykers Road Associates" previously brought a motion for partial summary judgment seeking a ruling that asphalt was a permitted use prior to the enactment of Ordinance 2011-15. That motion was denied without prejudice by Judge O'Connor. Defendants contend that Judge O'Connor denied the Defendants' Motion, not because the language of the pre-existing zoning requirements did not support the conclusion that an asphalt plant fit within the definition of a permitted use, as she, in fact, found that asphalt could fit within that definition. Rather, Defendants argue that Judge O'Connor found there was a fact issue concerning the "legislative" intent which was created by language in the preamble of Ordinance 2011-15, which left open an issue as to the zoning board's intent. First, the Defendants submit that the intent of the current zoning board has no effect upon the interpretation of a pre-existing ordinance. In any event, the Defendants also contend that the prefatory language in Ordinance 2011-15 was a mere scrivener's error¹³, and there is neither doubt as to the fact the asphalt plants were a pre-existing permissive use, nor is

¹³ Defendants' position was supported by the testimony of Township Planner, George Ritter, who acknowledge that his office prepared the Ordinance but they simply made a mistake when they included that language.

there any real question but that the intent of Ordinance 2011-15 was, in fact, to make a pre-existing permitted use a conditional use instead.

The Reasons attached to Judge O'Connor's Order of April 16, 2013 which denied the Defendants' motion for summary judgment read, in pertinent part, as follows:

To fabricate means to build, especially by assembling parts, or to manufacture. Strykers wants to produce the product known as asphalt, and asphalt is produced when sand, gravel (which is made up of pebbles and rock, which are merely forms of stone) and asphaltic cement are combined. Asphalt is a form of concrete, as concrete is a building material made of sand and gravel which is bonded together with cement. (emphasis added)

The issue is whether Strykers will be fabricating a product made of concrete. Strykers argues it will be assembling the necessary ingredients to make the product known as asphalt, which is a form of concrete, and therefore what it plans to produce is the fabrication of a product made of concrete. Plaintiffs argue that the ordinance contemplated that one could fabricate a product made of concrete but not produce concrete itself. That is, the end product Strykers intends to produce is concrete, not merely a product made of concrete.

As the language in the ordinance is susceptible to more than one interpretation, the court needs to know what the drafter's intent was or what the municipality's informed interpretation of the subject ordinance is. The court has gone through the exhibits provided by the parties and finds that there is a question of fact as to what the Township Committee's intent was when it passed ordinance 243-74(3)(b). This question of fact precludes granting Stryker's motion for summary judgment. (emphasis added)

Strykers did point out that, during the hearing on the re-application for the subject approvals, the board's planner and engineer testified that what Strykers proposed to build was already a permitted use before ordinances 2011-07 and 2011-15 were passed. The planner and the engineer further testified that in order to better control the kind of facilities Strykers wanted to build, the latter two ordinances were passed to make asphalt manufacturing and resource recycling facilities conditional rather than permitted uses.

...

The preamble to both 2011-07 and 2011-15 states as follows:

Whereas, it has been brought to the attention of the Lopatcong Township Planning Board that Asphalt and Concrete Manufacturing Facilities are not permitted in the Township; and

Whereas, the omission of Asphalt and Concrete Manufacturing Facilities inhibits development of the ROM Zone; ...

The preamble indicates that the board perceived that asphalt and concrete manufacturing facilities were not permitted uses. The preamble also indicates that it was the desire of the Township Committee to correct the fact that such facilities were not allowed and to permit such uses, why it passed ordinances 2011-07 and 2011-15.

As there is a question of fact as to what the drafter's intent was, the court cannot at this time grant the relief Strykers seeks. There is evidence that the Township adopted the amendments not to restrict what was already a permitted use in the ROM zone but to allow new uses, specifically, asphalt and concrete manufacturing facilities.

Notably, the issue as to legislative intent which caused Judge O'Connor to deny summary judgment arose from Introductory Language in the Ordinance 2011-15, which was quoted above in the excerpt from Judge O'Connor's opinion.

Defendants contend that the "interlocutory" language was, quite simply, accidentally carried over from another ordinance when standard prefatory language was being created for Ordinance 2011-15. In effect, the Defendants argue that the above language is simply a word processing error.

Plaintiffs counter that Mr. Ritter has failed to provide credible evidence that he (or anyone else) made such a mistake. Plaintiffs note that Mr. Ritter has failed to provide any electronic evidence to confirm his claim that the language was carried over from other source.

In support of their position, the Defendants offer various arguments. First, as opposed to "mere prefatory language", the Lopatcong Township Planner and Engineer both specifically testified that asphalt plants were a permitted use under the former Ordinance and that the intent of the Planning Board and the Township was to make that use "conditional". Moreover, Plaintiffs contend that if the Plaintiffs' argument is taken to its logical conclusion, then the Ordinance language also must be read to indicate that concrete manufacturing is not permitted in Lopatcong Township. It is undisputed that Intervening Plaintiff-Precast Manufacturing Company, LLC, which is the next door neighbor to the Subject Property (which is owned by 189 Stryker Road Associates), manufactures concrete on its adjacent property in the same "ROM" zone so that such an interpretation would make their existing use nonconforming and probably "unapproved" as well.

Defendants also argue that § 243-75 of the Township of Lopatcong's zoning and land use ordinance addresses the "ROM" Zone. The Defendants note that § 243-75, as it read prior to the

2011 amendments, provides that the production of bituminous concrete, as well as cement type concrete plants are permitted uses. Plaintiffs, of course, urge that the Ordinance provisions “clearly” does not permit the construction of an asphalt manufacturing plant and the resource recovery facility for which the Defendants eventually sought approval.

Specifically, § 243-75 read (and still reads) as follows:

Permitted uses shall be as follows: ...

(3) Industry which involves only the processing, assembly, packaging or storage of previously refined materials, such as but not limited to the following industries:

...

(b) fabrication of products made of metal, wood, paper, cement or concrete.

Defendants offered testimony that the product commonly known as asphalt to the general public is, in fact, “bituminous concrete”. Making or processing of bituminous concrete occurs through the use of a previously refined petroleum product known as asphaltic cement. Defendants contend that the processing of bituminous concrete fits squarely within the definition of a completely permitted use under § 243-75.

Plaintiffs also argue that the manufacturing of concrete and asphalt are “clearly different” processes. Asphalt products are manufactured by mixing and maintaining at elevated temperature asphalt cement and aggregate which is mixed, transported and placed at an elevated temperature, and then hardens as it cools. Concrete product is manufactured by the chemical reaction of cement and water mixed with aggregate which then hardens during a “curing process” (as opposed to a “heating process”).

Plaintiffs indicate that asphalt cement and asphalt product must be heated to, and maintained transported and placed at temperature of at least 300°F presenting a risk of burns. Cement and the concrete products that are manufactured using cement are stored and mixed at ambient temperatures with no risk of temperature burns.

Plaintiffs also offer that other differences between the products are also significant. Asphalt cement and asphalt product can release hydrogen sulfide gas which can be immediately dangerous to life and health. Concrete production does not produce any hazardous gas. Asphalt cement is, during its storage and use, a combustible material. Concrete production does not create a combustible product. In addition, asphalt cement and asphalt product produce, in their heated state, fumes that can cause irritation to the eyes, skin and respiratory system. However, concrete production and elements produce no irritating fumes.

The Defendants also contend that their interpretation is corroborated by reference to § 243-64.2 of the Lopatcong Land Use Ordinance, which addresses outdoor bulk storage and outdoor display of merchandise. Section A of the above ordinance provides as follows:

Outdoor Bulk Storage. Outdoor bulk storage is defined as the stock piling or warehousing of vehicles, merchandise materials and machinery outside the enclosed confines of the building including but not limited to sand, gravel, dirt, **asphalt**, lumber, pipes, plumbing supplies, metal, concrete, insulation, construction equipment, construction vehicles, construction materials, storage trailers and containers. In zoning districts where outdoor bulk storage is permitted as an accessory use, the following requirements shall apply. [emphasis added]

Defendants point out that bituminous concrete (asphalt) cannot be stored separate from the processing of the product. It is a product which, when processed, is stored only briefly, as a hot product. The product, by its nature, depends upon the loading of the hot product on trucks for the delivery of the still hot product to the customer for immediate use. The product can only be used and applied in its “hot” form. Once it cools, the product is not marketable for its usual uses. In that regard, the Defendants note that asphalt or bituminous concrete is not purchased like a length of lumber which may be stored in inventory. It is stored after processing only for the limited purpose of immediate delivery to the customer. Otherwise the product is a “useless lump”, as would be the case with all concrete. Accordingly, Defendants argue that the permitted storage of asphalt must, as a matter of “ineluctable reasoning”, be accessory to the processing of the product¹⁴.

Defendants also point to § 243-64.2A(4) which provides that “outdoor bulk storage shall be allowed only in conjunction with the principal use conducted on the property.” Thus, the Defendants argue, the storage of asphalt, which is clearly permitted, is only allowed in conjunction with the principal permitted use of the property, which can only be the processing of bituminous concrete or asphalt. By virtue of that logical sequence, the Defendants contend that the production of asphalt “must have been permitted” under the prior zoning scheme.

Plaintiffs further contend that the use of the word “asphalt” in §243.64.2 in the bulk storage provision does not support the Defendants’ position but in fact corroborates Plaintiffs’

¹⁴ In fact, Plaintiffs’ expert, Mr. Lydon, acknowledged that the purpose of “storing” asphalt was primarily for the manufacture or reuse of the unused or reused portion of the asphalt product.

view that the drafter of the Ordinance knew and designated asphalt as a distinct product from that of concrete yet asphalt manufacture was not included within the principle permitted uses while it could have been. Also, Plaintiffs contend that “outdoor bulk storage” was merely a permitted “accessory” use that was only to be used in conjunction with a permitted use. Plaintiffs claim that the Defendants cannot be permitted to “bootstrap” additional non-specified uses to be permitted uses simply because they were mentioned within the accessory sections. Notably, Plaintiffs’ expert did not provide a logical explanation why an ordinance would permit asphalt storage if the production of asphalt was not permitted.

Plaintiffs argue that the interpretation that is offered by Defendants is “baseless” and in any event “not necessary” and “outside of the parameters of the subject litigation”.

Plaintiffs contend that Defendants’ interpretation is “overly broad” and the plain language does not permit the uses for which the Defendants sought approval. Plaintiffs concede by inference that, at most, the Ordinance may only allow the Defendants’ proposed use as “accessory” but not permissive.

Moreover, the Defendants point out that the reason for the amendments to the Zoning Ordinance, and the clear understanding by the Township that bituminous concrete or asphalt was already a permitted use, is illuminated by the record of hearings before the Lopatcong Planning Board. For instance, the May 23, 2012 resolution approving the site plan and subdivision of the Subject Property contains the following recitation concerning the site’s history:

Planning Board planner George A. Ritter and Township Planning Board Engineer Paul Sterbenz testified and the Board finds that the “ROM” Zone has allowed the manufacturing of asphalt and resource recycling facilities as permitted uses. In order to better control these facilities, on or about July 6, 2011 the mayor and counsel of the Township of Lopatcong adopted Ordinance 11-7 which regulated asphalt manufacturing and resource recycling facilities by making them conditional uses in the “ROM” Zone south of the Norfolk Southern Railroad right of way, with specific limitations and controls.

Defendants also note that portions of the transcript of the site plan application by “189 Strykers Road Associates” before the Lopatcong Planning Board provide illumination as to the Township’s position on this issue.

There was specific testimony at the hearings before the zoning board as to these same conclusions:

MR. STERBENZ¹⁵: It's my opinion, as well, as Mr. Ritter's opinion that this particular use was permitted in this particular zoning district, that the ordinance didn't create this use, it was already permitted because this particular zoning district allows a wide variety of manufacturing uses in it.

If you look at your community and the type of manufacturing uses that you have in this community—and just so you're aware, there are three "ROM" districts in your community. There's one along Bellview Road, there's one along Lower Belvidere Road and there's one along Strykers Road, and that's where this particular site that we're talking about tonight is located, and in these particular zones we have a variety of uses. I know there's a pharmaceutical manufacturing facility that's split between Phillipsburg and Lopatcong and that particular "ROM" district and the one that we're talking about tonight, there's a plastics manufacturing operation across the street, there's a trucking operation, several properties over from here, right next to this property, there's Precast Manufacturing. They're taking concrete and casting and making precast concrete for drainage structures and structures for septic systems, so we have a variety of uses in our "ROM" district. the three "ROM" districts in this particular municipality.

So it's my opinion, and I'll let George speak for himself right now, it's our opinion that this use was always permitted and it's also my opinion that I think the ordinance that went in actually improved the situation because we severely restricted where this type of use could go. We downgraded its status from a principal permitted use to a conditional use and we put standards for buffering and some other things associated with site development and I'll let George speak.

MR. RITTER¹⁶: Thank you. Well, I think Paul covered most of the history of the district, but the industrial district in this portion of the town has been here for many, many years, long before the ordinance, and as he indicated, it has been quite diverse types of uses that have been permitted within that district. It was our opinion back when this ordinance was originally considered that the asphalt plant was a permitted use but, quite frankly, we wanted to clarify and make the standards, quite frankly, more stringent than what the existing district standards were and that's really why we turned this into a conditional use and went through the different standards for setbacks and area of the bulk standards were addressed by the planning board and put forth. So I don't think, at least in our minds, it was never a question of whether this use was permitted. The real purpose in doing the ordinance was to try to set up standards that were more a stringent than the ones that were in the existing code, make this type of use a conditional use and try to provide a better set of guidelines for the development of such facilities.

¹⁵ Mr. Sterbenz is the Lopatcong Township Engineer.

¹⁶ Mr. Ritter is the Lopatcong Township Planner.

Plaintiffs object to the reference to the opinions of Mr. Ritter and Mr. Sternberg as nothing more than an attempt to usurp the Court's role and duty to provide a de novo interpretation of the Statute. The Plaintiffs argue that the Court should not rely upon, or for that matter give any weight to, the interpretation of the Ordinance by individuals who are simply not qualified to interpret the Ordinance.

Defendants counter that the language of the pre-existing ordinance is clear in and of itself, but in any event, the testimony of the Lopatcong Township Planner and Engineer flesh out the entire purpose of the amendments, which was not to create a new permitted use, but to clarify, and to place additional restrictions upon, what was clearly a permitted use.

Plaintiffs criticize the Defendants' "resort to extrinsic interpretative aids" when the statutory language is unambiguous and susceptible to only one interpretation. Lozano v. Frank DeLuca Const., 178 N.J. 513, 522 (2004). On the other hand, if there is an ambiguity in the statutory language that leads to more than one plausible interpretation then the Court is able to turn to extrinsic evidence. Cherry Hill Manor Assoc. v. Faugno, 182 N.J. 64, 75 (2004). Also, extrinsic evidence may be used as an aid in an interpretation if plain reading of the statute leads to an absurd result. DiProspero v. Penn, 183 N.J. 477, 492-93 (2005). In this case, Plaintiffs argue that the Court should not defer to the two individual's testimony about their personal interpretation of the Ordinance.

Plaintiffs argue that the Defendants' intended use, which was described with more particularity in its Planning Board application, does not conform to the "former" Ordinance. The Planning Board Resolution described the asphalt manufacturing plant as follows:

The current application is to develop an asphalt manufacturing plant and resource recycling facility on Remainder Lot 6. The asphalt manufacturing plant and resource recycling facility will include a two (2) story office/laboratory/control building containing 3,600 square feet, a +/- 4032 square foot storage building, a bag house whose filter will capture dust particulars and emissions, feed bins, conveyors, silos, and tanks associated with production of bituminous concrete material stockpile areas, trucking parking areas, paved driveways and a scale.

p. 10, ¶ 23.

Plaintiffs claim that a plain reading of Ordinance 243-75 simply does not support the Defendants' legislative construction. Plaintiffs contend that the Ordinance permits the "[F]abrication of products made of ... concrete" but that it simply does not permit the manufacture of asphalt. Plaintiffs argue that asphalt is not the same as concrete despite the Defendants' arguments to the contrary. Plaintiffs indicate that the common definition of those

two products as considered by the general public are not the same. The Plaintiffs find it significant that the Legislative body, in this case former Township Councils, easily could have included the word “asphalt” in the Ordinance but they chose not to.

Additionally, the Plaintiffs contend that it is actually irrelevant what the planning board in 2011 considered the zoning scheme enacted years before permitted, or did not permit, when it enacted a new zoning ordinance. Plaintiffs argue that if, as Defendants contend, Ordinance 2011-15 was validly enacted, then the objective meaning of the ordinance controls. The Defendants point out that if, on the other hand, this Court invalidates Ordinance 2011-15 for any of the reasons offered by the Plaintiffs, then the objective meaning of the pre-existing zoning ordinance would govern.

Certainly principles of judicial restraint weigh against Court decisions that are offered on matters not before the Court. However, the consideration of this issue does have relevance and significance so as to warrant discussion. First, if the Court were to invalidate the Ordinances that have been challenged by the Plaintiffs in this litigation, then the parties will be left with the pre-existing zoning legislation. Also, the pre-existing legislation may have some bearing on the Court’s review of the Township’s intent and whether their resultant actions are in compliance with applicable standards. For those reasons, the Court will consider and address the issue of whether asphalt manufacturing was permitted in the former iteration of the “ROM” Zone.

B. Court’s Decision

i) General Standard of Review

As a general rule, the interpretation of an ordinance is a legal issue decided by the Court with no deference to the Board below. Atlantic Container v. Planning Board, 321 N.J. Super. 261, 269 (App. Div. 1999). New Jersey Courts have interpreted that the words of a statute must be based upon their ordinary meaning and significance, Lane v. Holderman, 23 N.J. 304, 313 (1957). They should be read in the context of related provisions so as to give sense to the legislation as a whole. Chasin v. Montclair State Univ., 159 N.J. 418, 426-27 (1999).

ii) Import of the Preamble Section

Consistent with the above, the preamble or policy portion of a statute is ordinarily simply a prefatory statement preceding the entitlement clause. Asbury Park Press v. Ocean County Prosecutor’s Office, 374 N.J. Super. 312, 324 (Law Div. 2004). Ordinarily, the contents of the preamble are not given substantive effect, particularly where the enacting portion of the ordinance is expressed in clear and unambiguous terms. Blackman v. Isles, 4 N.J. 82, 91 (1950);

Ace Bus Transp. Co. v. S. Hudson County Blvd. Bus Owners Ass'n, 118 N.J. Eq. 31, 48 (Ch. Div. 1935).

The preamble is ordinarily used only to discern legislative intent. Brown v. Eric R. Co., 87 NJL 487, 491 (1954). “[W]here the enacting part of the statute is unambiguous, its meaning will not be controlled or affected by anything in the preamble or recitals.” Id. Plaintiffs argue that the preamble should be read in harmony with the Statute that it introduces whenever possible. In re Passaic County Util. Auth., 164 NJ. 270 (2000). “[E]ach part or section [of the statute] should be construed in connection with every other part or section so as to produce a harmonious whole ...” quoting Norman J. Singer, Sutherland Statutory Construction, §46.05 at 103 (5th Ed. 1992). State v. Breen, 62 N.J. 547, 554 (1973). In that regard, the Court should make an effort to harmonize the law relating to the same subject matter, if possible and rational.

The statements of a bill's sponsors can be a helpful tool in understanding legislative intent; nevertheless, such extrinsic evidence has limitations. Deaney v. Linen Thread Co., 19 N.J. 578, 584-85 (1955). It seems to be established that in cases of doubt as to the proper construction of the body of a statute, resort must be had to the preamble or recitals for the purpose of ascertaining the legislative intent. While the enacting clause of a statute may be extended by the preamble, it cannot be restrained by it. DiProspero v. Penn., 183 N.J. 477, 499 (2005); Den v. Urison, 2 N.J.L. 212, 224 (1807); James v. Dubois, 16 N.J.L. 285 (1837); Quackenbush v. State, 57 N.J.L. 18, 21 (1894).

In Cooper Hospital v. Camden, 70 N.J.L. 478 (1904), it is set forth by the Supreme Court that to ascertain the intention of the legislature, we must look at the preamble of the act, citing from Pott. Dwar. Stat. 265, as follows:

"The preamble states with more or less accuracy the object of a law and the occasion of its making. Its first legitimate and unquestioned use is to ascertain what the cases are to which the act was intended to apply. It has never been disputed that the preamble to an act may properly be used to ascertain and fix the subject-matter to which the enacting part is to be applied."

Cooper Hospital v. Camden, 70 N.J.L. 478 (1904)

Judge O'Connor's summary judgment opinion (quoted earlier) noted that the language in the Preamble section created a factual issue concerning the content and meaning of the Ordinance. Contrary to Plaintiffs' arguments, the Court does not believe that Judge O'Connor denied the Defendants' motion so that the effect of her decision should be dispositive concerning

the disputed issue in favor of either party. Judge O'Connor left the issue open for determination by the trial court, after all of the evidence as considered. The Preamble section will thus be considered by the Court in its analysis in accordance with the legal principles recited above.

iii) General Principles of Construction for Ordinances

The legal principles governing interpretation of Zoning Ordinances are the same as those that govern the interpretation of other Ordinances and Legislation. Tp. of Pennsauken v. Schad, 160 N.J. 156, 170 (1999); AMN, Inc. v. So. Bruns. Tp. Rent Leveling Bd., 93 N.J. 518, 524-525 (1983). Certainly the primary goal must be given to the fundamental purpose of the Legislation. In that regard, the intent or "sense" of a law is sought to be gathered from its purpose or object, the nature of its subject matter, the context of its setting, the history of the Legislature and the reading of other Statutes in pari materia. Tp. of Pennsauken, supra. at 170.

As always in a matter of statutory interpretation, the Court begins with the plain language of the Ordinance. TAC Assocs. V. N.J. Dept. of Env'tl. Prot., 202 N.J. 533 (2010). Chief Justice Rabner writing for the Court in Burnett v. County of Bergen, et al, 198 N.J. 408, 415 (2009) reaffirmed the commonsense approach to statutory construction and interpretation:

At the outset of New Jersey's statutory code, the Legislature reminds us that a statute's "words and phrases shall be read and construed within their context" and "given their generally accepted meaning." N.J.S.A. 1:1-1. To that end, "statutes must be read in their entirety; each part or section should be construed in connection with every other part or section to provide a harmonious whole." Bedford v. Riello, 195 N.J. 210, 224, 948 A.2d 1272 (2008) (citing In re Distribution of Liquid Assets, 168 N.J. 1, 17-18, 773 A.2d 6 (2001)); see also 2A Sutherland on Statutory Construction § 46:05 (6th ed. 2002). When the language in a statute "is clear and unambiguous, and susceptible to only one interpretation," courts should not look "to extrinsic interpretative aids." Lozano v. Frank DeLuca Constr., 178 N.J. 513, 522, 842 A.2d 156 (2004) (citation and internal quotations marks omitted). However, "if there is ambiguity in the statutory language that leads to more than one plausible interpretation, we may turn to extrinsic evidence, 'including legislative history, committee reports, and contemporaneous construction.'" DiProspero, supra, 183 N.J. at 492-93, 874 A.2d 1039 (quoting Cherry Hill Manor Assocs. v. Faugno, 182 N.J. 64, 75, 861 A.2d 123 (2004)). Courts "may also resort to extrinsic evidence if a plain reading of the statute leads to an absurd result." Id. at 493, 874 A.2d 1039

In a decision regarding interpretation of local ordinance by a local planning board for construction of a cement plant, the court in Galanter v. Planning Board of the Township of Howell, 211 N.J. Super. 218, 221 (App. Div. 1986) denominated the doctrine of the right and reasonable result:

Finally, statutes are to be read sensibly rather than literally, Schierstead v. Brigantine, 29 N.J. 220, 230 (1959), and interpretations which lead to absurd or unreasonable results are to be avoided. State v. Gill, 47 N.J. 441, 444 (1966).

In this case, where a literal reading of the Legislation will lead to a result not in accord with the essential purpose and design of the act, the spirit or the purpose of the act controls. Id. at 170. N.J. Builders, Owners and Managers Ass'n v. Blair, 60 N.J. 330 (1972). The Court is to use the language of the Ordinance and other competent evidence on the subject to ascertain the probable intent of the drafters. DePetro v. Tp. of Wayne Planning Bd., 367 N.J. Super. 161, 174 (App. Div.), cert. den. 181 N.J. 544 (2004). In that process, the title of the Ordinance or Legislation may cast some light on its purpose, but the title generally should not be used to expand or enlarge upon the plain meaning of the language employed. State v. Greene, 33 N.J. Super. 497, 500 (App. Div. 1958).

In Trust Co. of N.J. v. Planning Bd., 224 N.J. Super. 553, 560-561 (App. Div. 1990), an Ordinance contained a preamble that provided that it was intended to effect a rezoning of for the purpose of permitting a bank facility to be constructed. The recitals in the preamble were held to be helpful in interpreting the Legislative intent. A title is never controlling as to the interpretation of an Ordinance as it is only some evidence of intent. For instance, in Atlantic Cont. v. Eagleswood Bd., 312 N.J. Super. 213, 218 (Law Div. 1977), rev'd on other grounds sub. nom. 321 N.J. Super. 261 (App. Div. 1999), the court held that the fact that an Ordinance was entitled "limited manufacturing: and the plaintiff's use was not "manufacturing" did not answer in and of itself whether plaintiff's use was permitted or not. The court held that a "right" which was only allowed to in a preamble but which is not supported by a subsection of the Ordinance will not support in order to compel the enforcement of that "right". See Bubis v. Kassin, 323 N.J. Super. 601, 617-618 (App. Div. 1999).

It is also a rule of law affecting statutory construction that specific provisions in an Ordinance or Statute take precedence over general provisions where one is of a general nature. W. Kingsley v. Wes Outdoor Advertising Co., 55 N.J. 336, 339 (1970); Lawrence v. Butcher, et al, 130 N.J. Super. 209 (App. Div. 1974); Zoning Bd. of Adj. v. Service Elec. Cable T.V., 198 N.J. Super. 370 (App. Div. 1985).

Ordinances and other Legislative enactments dealing with the same subject matter which are in pari materia should be read or construed together as forming one Legislative enactment.

Clifton v. Passaic County Board of Taxation, 28 N.J. 411, 421 (1958); Key Agency v. Continental CIS Co., 31 N.J. 98, 103 (1959).

With regards to zoning ordinances in particular, zoning ordinances are to receive a reasonable construction and are to be liberally construed in favor of the municipality. State, Twp. of Pennsauken, supra. at 171; Atlantic Container, supra. at 270; Turner v. Spyco, Inc., 226 N.J. Super. 532, 539 (App. Div. 1998); L&L Clinics, Inc. v. Irvington, 189 N.J. Super. 332, 336 (App. Div. 1983), cert. den. 94 N.J. 540 (1983). A legal interpretation of a zoning ordinance involves a question of law so that a Board's interpretation is not necessarily binding on the Courts. Atlantic Container, supra. at 269. While a municipality's informal interpretation of an ordinance is entitled to deference, that deference is not limitless and the Court's review of questions of law are conducted de novo. Dowel Assocs. V. Harmony Twp. Land Use Bd., 403 N.J. Super. 1, 29-30 (App. Div. 2008). With interpretation of zoning ordinances, the goal is to discover and effectuate the local legislative intent and the intent must be found in the language used. Atlantic Container, supra.; Trust Co. of N.J. v. Planning Bd., supra.; White Castle v. Planning Bd., 244 N.J. Super. 688, 690-92 (App. Div. 1990), cert. den. 126 N.J. 320 (1991).

Ordinances are to receive a reasonable construction and application, to serve the apparent legislative purpose. We will not depart from the plain meaning of language which is free of ambiguity, for an ordinance must be construed according to the ordinary meaning of its words and phrases. These are to be taken in the ordinary or popular sense, unless it plainly appears that they are used in a different sense. Sexton v. Bates, 17 N.J. Super. 246, 253 et seq. (Law Div. 1951) aff'd on opinion below 21 N.J. Super. 329 (App. Div. 1952); 6 McQuillan, Municipal Corporations (3rd ed. 1949), paragraph 20.47, P. 114; cf. R.S. 1:1-1.

In fact, where a Board of Adjustment or an Administrative Office of a Municipality has construed a particular zoning ordinance or provision in a certain way over a period of time, the Court should consider the local construction and provide it some deference. In that regard, the Court must be careful not to use the de novo standard to completely disregard a municipality's long standing interpretation of its ordinance. Fallone Prop., LLC v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 561 (Ap. Div. 2004). Our Courts recognize that, particularly in the context of planning board interpretations of ordinances, that local officials who are "thoroughly familiar with their comments, 'characterizations and interests' are best suited to make judgments concerning local zoning regulations." Id. at 561. As a result, "planning boards are granted 'wide latitude in the exercise of the delegated discretion' due to their 'peculiar knowledge of local

conditions’.” Id. at 561; Burbridge v. Mine Hill Tp., 117 N.J. 376, 385 (1990). For instance, in DePetro v. Tp. of Wayne Planning Bd., supra. at 175, the court found evidence of intent regarding permitted uses in the Planning Board’s recognition that the use had previously been allowed in the particular District. See also Loveladies Prop. Owners Ass’n, Inc. v. Raab, 137 N.J. Super. 179, 184 (App. Div. 1975); American National Red Cross v. Shotmeyer Bros., Inc., 70 N.J. Super. 436, 442-443 (App. Div. 1961); White Castle, supra. where there was a controversy as to whether a lot width was to be measured at the “building line” or at the actual set back line of a building, the court accepted the practical interpretation of the City’s Planning Consultant who took the position that the lot width was to be measured at the building line. Those kind of practical constructions do have limitations, however, and will not be upheld if they are in direct contravention of clear terms of a particular ordinance which have been established as meanings in the law of zoning.

In determining the intent of the governing body in enacting a Zoning Ordinance, however, testimony of intent given by members of the governing body is not admissible. American National Red Cross, supra¹⁷. Nor is the meaning or intent of an Ordinance to be gleaned from the general statement of purpose of the Ordinance where the regulatory portion of the Ordinance is expressed in clear and unambiguous terms. PRB Enterprises, Inc. v. South Brunswick Planning Bd., 205 N.J. Super. 225 (App. Div. 1985), aff’d on other grounds 105 N.J. 1 (1987).

In this case, Plaintiffs object to the Defendant’s reference to the opinions of the Town’s consultant, Mr. Ritter, with regards to their interpretation of the zoning provision that is in issue. Plaintiffs contend that their opinions are nothing more than an attempt to usurp the Court’s role and duty to provide a de novo interpretation of the Statute¹⁸. The Court acknowledges that its de novo interpretation controls.

¹⁷ In this case, although the Mayor of Lopatcong Township was called as a witness, he was not called upon to opine concerning the intent of the Ordinance in question.

¹⁸ Notwithstanding Plaintiffs’ argument, Plaintiff offered the testimony of its own expert planner, Mr. Lydon, who opined that in his opinion, as a professional planner, Ordinance 2011-15 was “arbitrary, capricious and unreasonable”. The Court permitted and considered the opinion of each of the experts on the subject even though it “embraced the ultimate issue to be decided by the Court”. NJRE 704. The Court did not consider the expert opinions determinative on the issue. Jacobs v. St. Peters Medical Center, 128 N.J. 475, 497 (1992).

Notwithstanding the Plaintiff's argument, while a Planning Board has not been granted authority under the MLUL to interpret the provisions of land use ordinances, it is within the inherent jurisdiction of the Board to determine the meaning of an ordinance that is before it in a pending application. See Fallone Prop. v. Bethlehem Plan. Bd., 369 N.J. Super. 552, 566-567 (App. Div. 2004) where the Appellate Division upheld the planning board's interpretation of the subdivision regulations dealing with cluster development and required open space, pointing out that "we give deference to a municipality's informal interpretation of its ordinance due to their 'peculiar knowledge of local conditions'" quoting from Burbridge v. Mine Hill Tp., 117 N.J. 376 (1990); see also Galanter v. Planning Bd. of Tp. of Howell, 211 N.J. Super. 218 (App. Div. 1986)¹⁹. Testimony was offered to the effect that the property now owned by the Plaintiff, "Precast", was formerly owned by a predecessor company known as M&M Concrete. The evidence indicated that M&M was approved for a site plan to operate a concrete manufacturing facility on that site by Resolution of the Planning Board dated May 27, 1987 (Exhibit D-5). That Resolution of approval indicated that the Board considered the proposed concrete manufacturing use to a permitted use at that time. Mr. Lydon, Plaintiffs' expert, confirmed that the description of the permitted uses in the Township's Zoning Ordinance had not changed from 1987 until Ordinance 2011-15 was adopted when the Township clarified the permitted and conditional uses²⁰ in the "ROM" Zone.

The Township Planner, George Ritter, confirmed that during his twelve years as the Township's Planner that he always considered the concrete and asphalt uses to be permitted. He considered the processes for concrete and asphalt production to be substantially similar except for the immaterial distinction that their manufacture uses "binding agents".

The record before the Court indicates that the Defendant Township's Land Use Planning policies have been unwavering with respect to the industrial (now known as "ROM") located south of Route 57. That area has been consistently designated in the Township's Master Plans as

¹⁹ Plaintiffs' expert, Mr. Lydon, testified that he agreed with such a proposition. Defendants' expert, Mr. Ritter, also confirmed that deference is generally given to the interpretation of local boards. He also confirmed that in Lopatcong the Zoning Ordinance as it pertains to what is considered to be a permitted use within the zone is "permissively" interpreted. In other words, if the proposed use fits within the category of the permitted uses, it is determined to be a permitted use even though the use is not specifically referenced.

²⁰ Mr. Lydon also confirmed that the 1976 Master Plan recognized that a concrete company (Staekel Concrete) had been approved as an acknowledged industrial use within the Township (Exhibit P-3; pg. 7).

an area for growth and economic development. The Township demonstrated an acute awareness that in order to achieve a stable tax ratable base and resultant financial stability that this area was key in attracting appropriate industrial development.

The Township Master Plans, revisions and reexaminations demonstrate a clear intent to facilitate industrial ratables within the Township. While the Township recognized certain inherent locational advantages, it also noted and lamented that several other factors negatively impacted its ability to attract those kind of ratables, including competition from sites in other contiguous municipalities or regions, the lack of availability of sewer and the inadequate state of local infrastructure (mostly roads) to be competitive.

The opinions of the Township Engineer and the Township Planner, although not determinative, corroborate the interpretation of the prior Ordinance regarding the subject at hand. The Court finds that the opinions of these professionals are consistent with the language on the Master Plans and the Zoning Ordinance.

The Township devised its Ordinance to proscribe permitted uses in a permissive manner so that it could attract a wide array of users. This was done logically and rationally in order to make it competitive in the quest for industrial type ratables. Ordinances drafted in such a permissive manner should be read in accordance with the principle of “ejusdem generis”; that is, as long as the specific use fits within the general category of approved uses, it should be considered to be a “permitted use specifically prohibited by the terms of the legislation”²¹. McBoyle v. United States, 283 US 25, 26, 27 (1931). In this case, the Township also recognized that its field of available users was limited by the fact that public sewer availability was severely limited as it was controlled by outside forces like a neighboring municipality (Phillipsburg) and a State Agency (NJDEPE). In this case, it is not surprising that the Township supports the proposition that its prior Ordinance was intended to encompass users like the Defendant “189 Strykers” as it offers a significant industrial tax ratable that does not depend on public sewer.

Over the years, the Township has adjusted to changes by adopting new and better strategies for meeting those goals. In the past, this was accomplished by responding to growth

²¹ The Township Planner referred to this “type” as “such as” Ordinances. He credibly testified that the Township has consistently found that concrete manufacturing was considered within the ambit of the permissive language. He also indicated that asphalt manufacturing would also be considered to be a permitted use in the Township in his view.

opportunities by supplanting or recognizing permitted uses in the zone as well as other incentives to attract new businesses.

The Defendant Township has also “tweaked” their zoning ordinance to accommodate the expansion and reflect the actual operation of existing permitted uses. In fact, Ordinance 2003-19 which clarified the “fabrication of products made from cement or concrete: to be a permitted use in the zone is an example of the Township’s willingness to act proactively to attract and retain industry. Interestingly, that same Ordinance also allowed outdoor storage, including the storage of asphalt, in the “ROM” Zone. (Exhibit P-45)

Also, the Court finds that the Plaintiffs’ position that the proposed use of “189 Stryker Associates” was not permitted anywhere in Lopatcong Township prior to the adoption of 2011-15 is not correct. In fact, the Plaintiff, Precast Concrete (or its predecessor, M&M Custom Concrete) submitted five separate development applications long before the enactment of 2011-15 which were all heard and approved by the Planning Board. In other words, the Township considered the Plaintiffs’ use to be a permitted use for its initial approval and for all subsequent applications even though the permitted uses that were specifically enumerated in the Zoning Ordinance at that time did not specifically permit the manufacture and/or fabrication of concrete.

This Court recognizes that the evidence supports the proposition that the “ROM” Zone that is located south of Route 57 has consistently been designated for growth and economic development. The ROM Zone designed certain specifically permitted uses such as “offices for business, executive and professional and administration purposes” or “computing and data processing centers” or “integrated industrial/office park development”.

When it came to industrial uses, the permitted array of uses as defined as:

- (3) Industry which involves only the processing, assembly, packaging or storage of previously refined materials, such as but not limited to the following industries:
 - (a) Manufacturing of light machines.
 - (b) Fabrication of products made of metal, wood, paper, cement or concrete. [Amended 12-3-2003 by Ord. No. 2003-19]
 - (c) Assembly of electronic components.
 - (d) Dairy foods, fruits, vegetables, baked goods, cereals and grains.
 - (e) Printing and publishing.

With regards to industrial uses, the Ordinance makes specific reference and use of a “permissive” arrangement by allowing for not only specifically enumerated uses (ie. the publication of such materials as metal, wood, paper, cement or concrete) but also other uses within those categories that may not be specifically enumerated. The use of such language allows

the Township to not constrain its application of permitted uses to only specifically enumerated uses which would require it to exhaustively list all possibilities of potential acceptable uses. By so doing, the Township has demonstrated an intent to encompass all uses that are reasonably determined to be within those category of uses as being permitted. Thus, the language in the Ordinance suggests that the type of uses to be considered to be permitted should be broadly construed²².

Much was made during the trial of whether the asphalt plant should be considered to be a “light” or “heavy” industrial use. The Planning experts on both sides differed as to whether the asphalt manufacturing use can be classified as a “light industrial use”. The term “light industrial” was used as a descriptive term in the 2004 Reexamination report that was prepared by Mr. Ritter. Notably, the Township Zoning Ordinance does not make reference to the term “light industrial” in the defined terms for ordinance (Exhibit P-1, §243-5) or in the industrial use section itself (Exhibit P-1, §243-75).

In any event, Mr. Lydon opined that the asphalt manufacturing use was “heavy industry” while Mr. Ritter saw it as “light industry”. Certainly Mr. Ritter’s position has been adopted in the past by the Defendant Township. That position is certainly rational and supportable and deserves deference. The Court finds that persuasive evidence supports the proposition that the use in question is the type of industrial use that is appropriate for this area and was of the class that was intended by the Township to be included as a permitted activity.

In fact, the Township’s handling of the prior applications of the Plaintiff Precast (and its predecessors) confirm that it has consistently applied the ordinance language in that manner. Even prior to the 2003 Ordinance Amendment that added cement or concrete as a permitted type of fabricated product, the Township and its Planning Board considered the manufacture of concrete and concrete products to be permitted. That construction was applied even though “concrete” was not specifically permitted as it was considered to be within the category of uses that was within those referred to as “but not limited to” the general category of approved uses.

Both parties provided extensive fact and expert testimony concerning the similarities and differences between concrete and asphalt (bituminous concrete). The products are similar in that

²² In his report, Plaintiffs’ expert, Mr. Lydon, confirmed that he excised the permissive language from his recital of permitted uses. He acknowledged, however, that the list of uses was illustrative only.

they are prepared using the ingredients of stone (aggregate), sand and water along with a “binding agent”. Both are used as products in the construction industry. Each product is manufactured through the use of large specialized equipment. The manufacturing process involves safety and health issues that necessitates safety equipment (gloves, hard hats, ear muffers) and safety guidelines that are regulated by governmental entities such as OSHA. The products can also be used interchangeably for certain specific uses including for construction of hard surfaces (for vehicular or pedestrian uses and for commercial or recreational uses) and curbs.

Certainly the products are not identical. The bonding agents used in each is different (cement vs. asphaltic cement). The binding agents originate from different sources as cement is made of limestone and gypsum while asphaltic cement is refined from crude oil. Concrete (as demonstrated by Plaintiff, Precast’s business) can be used to construct boxes, culverts, pipes and other like structures while asphalt is not conducive for those purposes. Asphalt is produced by heating the mixture of products to about 300°F while concrete is generally prepared at normal temperatures through a curing process. Both products can be mixed together with other products to effect its grade or preparation. While both products emit some distinctive odor, those odors are different. Both require transportation by truck, but apparently asphalt uses requires more intensive truck usage.

Each party pointed to the similarities of the products (the Defendants) or the differences (the Plaintiffs) as their needs supported their position. In the Court’s view, the differences in the products are distinctions without substantive difference. More importantly, the manufacture of each product is encompassed within the language and the spirit of the uses that are permitted within the zone. Both concrete and asphalt manufacture are processes that refine materials to fabricate industrial products. The uses simply are encompassed within the ambit of the Ordinance definition. Of note, Plaintiffs’ representative, Mr. Fischer, testified that his company was a member of the National Precast Concrete Association (NPCA). Even that organization recognizes defined terms which it includes within a self-described “authoritative glossary for cement and concrete technology” which includes many different types of concrete which include, but are not limited to, “portland cement concrete” (which uses portland cement as a binder) and bituminous concrete (cement) which uses asphalt cement as a binder. The Court believes that the inclusion of both types products can be appropriately determined to be “concrete” within the meaning of the Ordinance. The Planning Board, the Township and their

consultants have corroborated such an interpretation in this matter and before the filing of this matter. The manner in which the Planning Board has applied this interpretation to the adjoining site with the Defendant Precast and their predecessor confirms that finding.

Plaintiffs also question why the Township would pass 2011-15 if they really believed that asphalt plants were already permitted. The Court disagrees with the inference that the Plaintiffs draw from the Defendants' actions however. The passage of an Ordinance like 2011-15 is logical and rational under the circumstances²³.

The effect of Ordinance 2011-15 was to confirm and therefore eliminate any doubt that concrete and asphalt manufacture were permitted activities. The Ordinance also provided a mechanism for more careful regulation of those uses and also for resource recycling facilities. By treating such uses as conditional uses, the Township was able to provide comfort and assurance to prospective applicants ("189 Stryker Associates") and current businesses ("Precast Concrete") that use variances and the accompanying burdens would not be necessary for the initial approval and any future expansion of a non-conforming use, yet at the same time the Township could more carefully regulate those uses in that Zone. Ironically, the Plaintiff Precast and the Defendant Township acted similarly in 2003 when it clarified the permitted uses in the ROM Zone to specifically include concrete manufacture (Exhibit D-5). It can be said with some certainty that the 2003 Ordinance Amendment provided the Plaintiff Precast with some comfort and assurance regarding the Township's future interpretation of its activities. To remove any doubt for the vagaries of different interpretations by different (future) municipal officials or even by objectors to future development applications (and by clever attorneys for those objectors) is clearly prudent and justified. By treating those uses as conditional uses, the Township could exert enhanced control over the location and development of these uses to better fit its goals and objectives for the "ROM" Zone.

For all of the reasons offered above, the Court finds that asphalt manufacturing was a permitted use under Lopatcong's prior Zoning Ordinance.

Lastly, as for the conflicting language within the Preamble to Ordinance 2011-15, Mr. Ritter acknowledged that his office authored the language which "mistakenly" provided that asphalt manufacturing was not previously considered as a permitted use within the ROM Zone.

²³ All of the planning experts in the case agreed by clarifying the permitted uses, and permitted conditional uses, was prudent under the circumstances.

Mr. Ritter acknowledged his mistake as an “embarrassing error” for which he was ultimately responsible. The Court finds that Mr. Ritter’s testimony on the subject to be a credible explanation for the obvious inconsistency between the language in the Preamble and the other documented opinions of Mr. Ritter and prior Planning Boards on the issue.

POINT II

THE STANDARD GOVERNING PLAINTIFFS’ CHALLENGE AND PLAINTIFFS’ CHALLENGES IN THIS CASE

The governing body of Lopatcong Township, defined as “the chief legislative body of the municipality,” (N.J.S.A. 40:55D-4), is vested with broad power by the state Constitution. Article IV, Section 7, paragraph 11 of the New Jersey Constitution provides:

The provisions of this Constitution and of any law concerning municipal corporations formed for local government ... shall be liberally construed in their favor. The powers of ... such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.

Courts have consistently read this constitutional provision as a mandate to liberally construe powers granted to municipalities, either by express terms or by implication, in their favor. Township of Berkeley Heights v. Board of Adjustment, 144 N.J. Super. 291, 296 (Law Div. 1976) (finding that this constitutional provision compels the courts " 'to interpret statutes liberally in favor of the existence of local power to deal with local needs.' ") (quoting Whelan v. New Jersey Power & Light Co., 40 N. J. 237, 251; See also Fanelli v. City of Trenton, 135 N.J. 582, 591 (1994) (holding the legislature's delegation of authority to municipalities is to be interpreted broadly).

Zoning is a police power that is vested in the legislative branch of government. Id. That branch, in turn, is authorized to delegate to municipalities the power to adopt zoning ordinances. N.J. Const. art. 4, § 6, ¶ 2; Taxpayer Ass'n of Weymouth Township v. Weymouth Township, 80 N.J. 6, 20 (1976), appeal dismissed and cert. denied sub nom., Feldman v. Weymouth Township, 430 U.S. 977 (1977).

In 1976, the Legislature enacted the Municipal Land Use Law, N.J.S.A. 40:55D-1 to -136 (“MLUL”), a comprehensive statute that allows municipalities to adopt ordinances to regulate land development “in a manner which will promote the public health, safety, morals and general

welfare" using uniform and efficient procedures. Levin v. Township of Parsippany-Troy Hills, 82 N.J. 174, 178-79 (1980).

The Municipal Land Use Law ("MLUL") grants the governing body of each municipality the power to "adopt or amend the zoning ordinance." N.J.S.A. 40:50 5D-62 (a). The New Jersey Supreme Court has "recognized that the role of courts in evaluating such enactments is 'circumscribed' so as to 'effectuate [] that broad... power.'" Riva Finnegan LLC v. Township of South Brunswick, 197 N.J. 184, 191 (2008) (quoting Pheasant Bridge Corp. v. Twp. of Warren, 169 N.J. 282, 289 (2001)).

N.J.S.A. 40:55D-2 sets forth the goals underlying the MLUL which must be considered in the adoption of the ordinance. It is basic that every zoning ordinance must advance one or more of these goals. Damurjian v. Board of Adjustment of Colts Neck, 299 N.J. Super. 84, 93 (App. Div.1997) (citing Riggs, *supra*, 109 N.J. at 611 (noting that zoning ordinances must foster at least one of stated purposes of MLUL)).

A plaintiff attacking the validity of a zoning ordinance bears a "heavy burden." 515 Assocs. v. City of Newark, 132 N.J. 180, 185 (1993); Ward v. Montgomery Twp., 28 N.J. 529, 539 (1959). In fact, an ordinance will be upheld unless there is "no discernable reason" to justify its enactment. Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 385 (1995). Moreover, in a situation where the validity of an ordinance is debatable, the ordinance must be upheld. *Id.* The Court has a limited role in reviewing the validity of an ordinance, and may not "question the wisdom of the ordinance." Mt. Olive Complex v. Twp. of Mt. Olive, 340 N.J. Super. 511, 533 (App. Div. 2001), reaffirmed on remand, 356 N.J. Super. 500 (App. Div. 2003).

Plaintiffs can only overcome a zoning ordinance's strong presumption of validity by demonstrating that the ordinance is "clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the [zoning] statute." Riggs v. Township of Long Beach, 109 N.J. 601, 611 (1988). A zoning ordinance is arbitrary, capricious or unreasonable only "when it bears no rational and reasonable relationship to the purposes of zoning." Hyland v. Morris, 130 N.J. Super. 470 (App. Div.), affirmed, 66 N.J. 31 (1974).

Thus, the judicial role in the review of zoning ordinances adopted by a municipality is "tightly circumscribed." Harvard Enter., Inc. v. Bd. of Adjustment of Twp. of Madison, 56 N.J. 362, 368 (1970). Such ordinances are cloaked with a presumption of validity, and this presumption will only be overcome by a clear showing that the municipality has engaged in

action that is arbitrary, capricious or unreasonable. Id. The presumption may also be overcome where the municipality's action is "plainly contrary to fundamental principles of zoning or the [zoning] statute." Sartoga v. Borough of West Paterson, 346 N.J. Super. 569, 579 (App. Div.), cert. denied 172 N.J. 357 (2002) (quotation and internal quotation marks omitted), cert. denied 172 N.J. 357 (2002).

A zoning ordinance may be invalid if it was not enacted in compliance with the requirements of the MLUL. Riggs, supra, 109 N.J. at 611. Further, an ordinance must advance at least one of the fifteen general purposes identified at N.J.S.A. 40:55D-2. Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 380 (1995); Riggs, supra, 109 N.J. at 611. The "fundamental question in all zoning cases 'is whether the requirements of the ordinance are reasonable under the circumstances.'" Pheasant Bridge Corp. v. Twp. of Warren, 169 N.J. 282, 290 (2001) (quoting Vickers v. Twp. Comm. Of Gloucester Twp., 37 N.J. 232, 245 (1962), appeal dismissed and cert. denied, 371 U.S. 233 (1963)).

A Court has a limited role in reviewing the validity of a zoning ordinance, however, a court may declare an ordinance to be invalid if it determines that the municipality failed to comply with the MLUL when it was adopted. See, Taxpayers Ass'n of Weymouth Twp. V. Weymouth Twp., 80 N.J. 6, 21 (1976). In addition to advancing one of the purposes of the Municipal Land Use Law as set forth in N.J.S.A. 40:55D-2. (Riggs, supra, 109 N.J. at 611) The ordinance must be "substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements," N.J.S.A. 40:55D-62, unless the requirements of that statute are otherwise satisfied. Id. at 611. Also, the ordinance must comport with constitutional constraints on the zoning power, including those pertaining to due process, Riggs, supra, 109 N.J. at 611-612; Home Builders League of S. Jersey, Inc. v. Township of Berlin, 81 N.J. 127, 137 (1979); equal protection, Southern Burlington County N.A.A.C.P. v. Mount Laurel Township, 92 N.J. 158, 208-09 (1983); and the prohibition against confiscation, AMG Assocs. v. Township of Springfield, 65 N.J. 101 (1974). Finally, the ordinance must be adopted in accordance with statutory and municipal procedural requirements. Id. at 612.

The standard of review has been characterized by the New Jersey courts as "highly deferential" (Bonnabel v. Twp. of River Vale, 2013 WL 3213806 (App. Div. 2013) (citations omitted), posing a "formidable threshold" (Hillsborough Properties, LLC v. Tp. Comm. of Tp. of Hillsborough, 2013 WL 1845222 (App. Div. 2013) (citations omitted) and requiring a "heavy

burden" to overcome the presumption of validity (Witt v. Borough of Maywood, 328 N.J. Super. 432, 442 (Law Div. 1998) (citations omitted).

At the heart of Plaintiffs' arguments that Ordinance 2011-15 is inconsistent with the Lopatcong Master Plan is its policy view that this particular industrial development should not be permitted in Lopatcong's "ROM" zone, even if it is confined to the portion of the "ROM" Zone south of the Norfolk Southern Railroad Right of Way. Judicial review of the policy determination such as that made by the Lopatcong Township Council in enacting Ordinance 2011-15 is exclusively a legislative function. Berk Cohen Assocs. at Rustic Village, LLC v. Borough of Clayton, 199 N.J. 432, 446 – 447 (2009). As stated by the New Jersey Supreme Court in Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366 (1995):

The judiciary cannot evaluate such a policy determination based on the private views of judges. The wisdom of a zoning ordinance or an amendment thereto "is reviewable only at the polls." Kozesnik, supra, 24 N.J. at 167, 131 A.2d 1; see also Clary v. Borough of Eatontown, 41 N.J. Super. 47, 69-70, 124 A.2d 54 (App. Div. 1956). Where the validity of an ordinance is debatable, the validity of the ordinance must be upheld under the "no discernible reason" standard. Zilinsky, supra, 105 N.J. at 369, 521 A.2d 841; Bow and Arrow Manor, Inc., supra 63 N.J. at 343, 307 A.2d 563. The amendments under consideration are at least debatable [upholding governing body's amendment to zoning ordinance excluding particular use in retail zone].

Id. at 385.

A municipality can decide to have a light industrial zone and not permit heavy industry. See Atlantic Container, Inc. v. Township of Eagleswood Planning Bd., 321 N.J. Super. 261, 274 (App. Div. 1999), Franklin Contracting Co. v. Deter, 99 N.J.L. 22, 24-25, 122 A. 600 (Sup.Ct.1923). A municipality may distinguish between light and heavy industry, and may permit one and prohibit the other. See, e.g. Duffcon Concrete Products, Inc. v. Borough of Cresskill, 1 N.J. 509, 515 (1949); H. Behlen & Bros., Inc. v. Mayor and Council of Town of Kearny, 31 N.J. Super. 30, 33, (App.Div.1954); Newark Milk & Cream Co. v. Parsippany-Troy Hills Tp., 47 N.J. Super. 306, 328 (Law Div.1957).

The MLUL confers the responsibility for determining a municipality's land use plan upon the governing body, composed of the people's elected representatives. N.J.S.A. 40:55D-62. A planning board is a subordinate municipal agency whose role is limited "to effectuate[ing] the goals of the community as expressed through its zoning and planning ordinances." Kaufman v.

Planning Bd. for Township of Warren, 110 N.J. 551, 564 (1988); *see also* PRB Enters., Inc. v. South Brunswick Planning Bd., 105 N.J. 1, 7-8 (1987).

The Court will evaluate the arguments and positions of the parties based upon the standards enumerated above.

The adoption of Ordinance 2011-15 is a legislative act that is cloaked with a “presumption of validity” so that the Court’s review will be “tightly circumscribed” so that its validity can only be overcome by surmounting the formidable threshold of demonstrating a clear showing that it is arbitrary, capricious or unreasonable.

In that regard, the Plaintiffs have offered various arguments to support the proposition that the Court should invalidate the Ordinances at issue.

In this case, Plaintiff contends that the Ordinance Amendment does not advance any of the purposes of the MLUL, as set forth in N.J.S.A. 40:55D-2. Plaintiffs’ claim that even though the Ordinance was originally crafted as allowing for “renewable energy generating facilities” , it was modified and by its modification it was really intended solely to benefit a specific piece of property. Plaintiffs also argue that the Ordinance is not substantially consistent with the land use plan element and housing plan element of the Master Plan, nor was it designed to effectuate those plan elements.

Plaintiff also argues that permitting asphalt and concrete manufacturing as a conditional use while at the same time permitting development of renewable energy generating facilities is “counter-intuitive” and the “end result of allowing the construction of an asphalt plant does not justify the means in the pending issue before the Court”. Plaintiff urges that Defendants’ actions relative to the adoption of amendments to the Township Ordinance are contrary to fundamental principles of sound planning and violate the spirit and intent of the MLUL and governing law. Plaintiff indicates that the Defendants have improperly and incorrectly related and postured the addition of “asphalt and concrete manufacturing facilities” as related to installation of “renewable energy facilities”, the latter having been considered inherently beneficial uses. In support of their argument, Plaintiff indicates that the solar-photovoltaic facilities addressed by Ordinance 2011-15, which are in fact renewable energy facilities bear no relationship to asphalt and concrete manufacturing uses, which are not inherently beneficial.

The Defendants have offered testimony and other evidence to the effect that Ordinance 2011-15 was enacted to improve Lopatcong’s land use scheme, to encourage responsible

commercial growth, to reflect changes in state law which had, de facto, amended land use ordinances throughout the state, and was enacted in a procedurally sound and accepted manner.

Plaintiffs claim that both of the Ordinance Amendments (No. 11-07 and 2011-15) were adopted for the sole benefit of Defendant, 189 Strykers, and they lack any valid zoning purposes.

The arguments raised by the parties concerning the validity of the Ordinances shall be addressed below.

POINT III

DID THE TOWNSHIP CLEARLY PROVIDE THE REQUIRED STATUTORY NOTICES?

A. General Contentions

Plaintiffs contend that the Lopatcong Township's adoption of Ordinance 2011-15 must be invalidated because: (i) certain property owners within 200-feet of the "ROM" zone did not receive personal service of the proposed ordinance; and (ii) the content of the public notice related to Ordinance 2011-15 was allegedly insufficient to meet the statutory criteria. Plaintiffs' contentions, however, are seriously flawed from both a factual and legal perspective.

Defendants counter that (a) notice to property owners was not even legally required because Ordinance 2011-15 was not a change to the classification or boundaries of a zoning district; but that; (b) appropriate notice was given in any case.

With respect to Plaintiffs' contention of a faulty publication of the proposed ordinance, the evidence addressed at trial indicates that the full text of Ordinance 2011-15 was published prior to the hearing on this ordinance and a summary of the Ordinance was published after Ordinance 2011-15 was enacted, all in accordance with law.

B. Was Lopatcong Township Required to Provide all Property Owners within 200-Feet of the Affected Area with Proper Service of Personal Notice of the Proposed Ordinance, and if so, was it Properly Provided?

i) Was Personal Notice Required in this Instance?

N.J.S.A. 40:55D-62.1 requires that "notice of a hearing on an amendment to a zoning ordinance" under certain circumstances. The first issue to consider is whether notice to property owners within 200 feet of the Affected Area was required in this case.

Defendants acknowledge that, under certain circumstances, personal notice is required to be provided to property owners within 200-feet of a zoning district for which a zoning

amendment has been proposed but ,the Defendants urge, that a review of the entire pertinent statutory section should be conducted in this case.

The applicable statutory sections provide:

NOTICE OF A HEARING OR PROPOSED CHANGE TO CLASSIFICATION OR BOUNDARIES OF A ZONING DISTRICT

- a. Notice of the hearing on an amendment to a zoning ordinance proposing a change to the classification or boundaries of a zoning district, exclusive of classification or boundary changes recommended in a periodic general reexamination of the Master Plan by the planning board pursuant to N.J.S. 40:55D-89, must be given *to all affected property owners*. Such notice must be given by the Municipal Clerk at least ten days prior to the hearing to the owners of all real property as shown on the current tax duplicates, located, in the case of a classification change, within the district and within the State within 200 feet in all directions of the boundaries of the district, and located, in the case of a boundary change, in the State within 200 feet in all directions of the proposed new boundaries of the district which is the subject of the hearing.....The statute requires that the notice shall state the date, time and place of the hearing, the nature of the matters to be considered and an identification of the affected zoning districts and proposed boundary changes, if any, by street names, common names, or other identifiable landmarks, and by reference to lot and block numbers as shown on the current tax duplicate in the Municipal Tax Assessor's Office.

The statute further provides that:

Notice shall be given by: (1) serving a copy thereof on the property owner as shown on the said current tax duplicate, or his agent in charge of the property, or (2) mailing a copy thereof by certified mail and regular mail to the property owner at his address as shown on the said current tax duplicate. The last paragraph of the section provides that the Municipal Clerk must execute affidavits of proof of service of the notices required by the section and shall keep the affidavits in the file along with proof of publication of the notice of the required public hearing on the proposed zoning ordinance change.

N.J.S.A. 40:55D-62.1

Plaintiffs have alleged that Lopatcong Township failed to comply with the above statutory criteria because with regards to Ordinance 11-07 the Defendants failed to provide personal notice to any property owners and with regards to Ordinance 2011-15, although the Defendant Township attempted to provide personal notice, the notice was defective in that it was not provided to approximately 5 property owners who owned property within 200 feet of the

boundaries of the effected zone. In fact, Plaintiffs indicate that only when they raised this legal issue in its complaint challenging the initial Ordinance adoption (11-07) did the Township correct the “defect” by providing notice for Ordinance 2011-15.

Plaintiffs contend that the proposed zoning amendments dramatically altered the intensity of the uses within the “ROM” Zone and thus affects the character and future development in the “ROM” Zone. Plaintiffs offer, therefore, that the Defendant Township was obligated to follow the notice requirements of N.J.S.A. 40:55D-62.1 and their failure to do so is, by itself, a basis for invalidation of the Ordinances.

The Defendants contend that neither Ordinance 11-07 nor Ordinance 2011-15 changed the “zoning classification” or boundaries as defined by N.J.S.A. 40:55D-62.1 so that personal notice to property owners was not required in any event.

A review and analysis of the applicable law is warranted.

In this case, Lopatcong Township contends that by their adoption of Ordinances 11-07 and 2011-15 converted a permitted use, which was subject to the general standards of the zone, a conditional use requiring more stringent standards. Thus, the question before the Court is whether the personal notice statute is actually inapplicable under the circumstances of this case. For instance, in East Windsor Group, LLC v. Tp. Council of Tp. of Toms River, 2011 WL 4088598 p. 3 (App. Div. 2011) (The Appellate Division held:

“[w]e are in complete agreement with Judge Grasso’s application of the governing legal principles. Notice is only required when the amendment ‘propos[es] a change to the classification or boundaries of a zoning district.’ N.J.S.A. 40:55D-62.1. We have previously interpreted the word ‘classification,’ as used under the MLUL, as ‘typically synonymous with the broad general uses permitted in a designated area, such as residential, commercial, retail and industrial, and extends to sub-categories within those general categories, such as single-family residential, highway commercial, and neighborhood retail.’ Robert James Pacilli Homes, L.L.C. v. Twp. of Woolwich, 394 N.J. Super. 319, 330, 331 (App. Div. 2007). Thus, notice is required when ‘[a] change in any of these broad categories and sub-categories has the capacity to fundamentally alter the character of a zoning district.’”

Plaintiffs, on the other hand, point to the case of Pacilli v. Tp. of Woolwich, 394 N.J. Super. 319 (App. Div. 2007), where the plaintiffs therein claimed that the adoption of an ordinance which significantly changed bulk and density standards in two residential zones amounted to a reclassification triggering the personal notice requirements of N.J.S.A. 40:55D-

62.1. *Id.* at 326. The township in that case argued that the amended ordinance did not change the permitted uses within the districts and, therefore, did not effect a change in classification. *Id.* at 333. The court, however, agreed with plaintiffs, opining that "the type of notice to be provided on the occasion of a proposed amendment to a zoning ordinance should focus on the substantive effect of the amendment rather than the appellation given to the zone." *Id.* at 332. The Court concluded that the significantly changed bulk and density standards when an amendment "dramatically" alters the intensity of a use within a zone and likely affects the character of future development within that zone, personal notice is required. *Id.* at 333. Per *Pacilli*, when dealing with land uses, classification "is typically synonymous with the broad general uses permitted in a designated area, such as residential, commercial, retail and industrial, and extends to sub-categories within those general categories, such as single-family residential, highway commercial, and neighborhood retail. Generally, the sub-categories of uses are distinguished by the intensity of the permitted use." *Id.* at.330. *See also*, Robert M. Anderson, *American Law of Zoning* §9.02 (4th ed.1996); 8 Eugene McQuillin, *Municipal Corporations* §25.86 (3d ed.2000).

The purpose of the notice provision is to require personal notice in those cases which the Legislature determined were so significant that nearby property owners should be provided with personal notice in order to be able to review, consider, analyze and provide input on the subject that likely affects their property interest. On the other hand, notice is not required in all cases as the Legislature determined that it was either unnecessary, onerous, burdensome and/or unduly expensive to require notice where the changes were not determined to be so dramatic or significant. The "line" drawn by the Legislature limits personal notice to only those cases where the zone change modifies zone classification or boundaries.

The Court notes that the Township's own 1976 Master Plan "classified" and defined industrial uses as the "production of durable goods". Certainly the asphalt manufacturing plant can be reasonably classified as the production of durable goods. Each of the planning experts in this case have admitted as much. The Court agrees that there is substantial support for the position that Ordinance 2011-15 did not alter the classification of the zone as the uses defined therein are rightly classified as industrial uses in the Lopatcong Township zoning scheme.

The parties to this matter both acknowledge that personal service to property owners within 200 feet was not provided as a part of the passage of Ordinance 11-07. When the Plaintiffs filed their initial challenge to the Zoning Ordinance, the Defendant Township introduced and passed Ordinance 2011-15 purportedly to combat the procedural challenge that

was raised by the Plaintiffs even though the Defendants contend that their position always was that notice was not necessary.

The fact that the Township attempted to “do the ordinance process over” but does not mean that the Court should be necessarily influenced to adopt the Plaintiffs’ position in this matter²⁴. The Defendants’ attempt to eliminate this issue from the Court’s consideration does not change the Court’s view on the purpose and need for the notice in this case nor upon the Court’s interpretation of the statutory provisions.

The Plaintiffs also contend that other material changes that were effectuated by Ordinance 2011-15 requires it to be determined as a “change in classification”. Plaintiffs argue, for instance, that by allowing the new conditional use to be permitted seven days per week, twenty four hours per day was a major change that should be deemed to be a classification change. In fact, the record reflects that the Lopatcong Township Ordinance does not impose a time restriction on any uses within the Township, including for any other commercial or industrial pursuits. The Township Clerk, Margaret Dilts, testified that other business activities in the Township already operate on such a basis, including at least one other manufacturing operation that is located directly across the street from the subject property.

The court finds that neither Ordinances 11-07 nor 2011-15 constitutes classification changes that necessitate and trigger personal notice requirements. The Ordinances effectively constitute clarification and restrictions concerning certain industrial uses that were already permitted with the ROM (industrial) zone. For the Court to expand the meaning of “zone classification” to include a subjective element as to whether an affected property owner (or the Court for that matter) believes that the amendments materially affect requirements and conditions within the Zone that are normally addressed within the site planning approval process, creates a dangerous and perverted misinterpretation of the notice statute. To require the Municipality to determine if the change is “substantial enough” to warrant notice imposes undue, unfair and onerous discretionary burdens upon the Municipality. It also invites challenge by displeased objectors or parties which places a cloud and burden upon the passage of even routine

²⁴ Much was made by the Plaintiffs concerning the term “do over” ordinance which the Plaintiffs criticized as a term that is not used in common planning or legal parlance and was invented for this action. In fact, the process is recognized in other statutory schemes (i.e. the Open Public Meetings Act at N.J.S.A. 10:4-15) as a cure of defective or potentially defective actions so as to avoid the need to uselessly engage in expensive and time consuming litigation.

amendments. The statutory scheme established by the Legislature appropriately limited the notice requirement to these cases where the broad general uses within an area (residential, commercial, retail, industrial, etc.) are changed by the Ordinance. Such is not the case here. The Ordinance in question simply clarifies the scope and type of uses within the already existing ROM classification. Such a change does not trigger notice under N.J.S.A. 40:55D-62.1.

For all of the reasons expressed above, the Court finds that personal notice to property owners within 200 feet, although prophylactic, was not required in this case.

ii) Was Personal Notice Provided in this Case?²⁵

In what the Defendants call a “self-described overabundance of caution”, Lopatcong Township decided both to reintroduce Ordinance 11-7 as Ordinance 2011-15, by attempting to provide all property owners within 200-feet of the “ROM” District personal notice.

Longtime Township Clerk, Margaret Dilts, testified that the notices in question were prepared by her office and at her direction. She obtained the list of property owners in and within 200 feet of all three ROM Zones in Lopatcong Township from the Tax Assessor of Lopatcong Township and from the Assessors of affected adjoining municipalities. N.J.S.A. 40:55D-12. The parties stipulated to the list that was used by Ms. Dilts which was marked as Exhibit P-50 in evidence. Apparently the mailing list indicated over 1,000 affected owners.

Plaintiffs continue to contend, however, that the Defendants have not provided proper notice as a “review of the list of all real property to be noticed or shown on the current tax duplicate with the Township of Lopatcong” alongside of the certified receipts provided by the Township for each property owner listed indicates that proper notice was not provided. Plaintiffs point out that there is no proof of mailing to five separate parties via certified mail receipts to wit:

1. On Site Brake & Spindle, Inc.²⁶
198 Strykers Road
Phillipsburg, NJ 08865

²⁵ The Court will address this issue “in the alternative” as based upon its conclusion in Point III(B)(i) above, notice was not required.

²⁶ This Property is located in the “ROM” Zone and within the subject zone which the Ordinance Amendment is altering.

2. Conklin, Sandra
4 Overlook Drive
Stewartsville, NJ 08886
3. Scenic Investment Group, LLC
390 Amwell Rd, Bldg 5 S507
Hillsborough, NJ 08844
4. Consumers New Jersey Water Co²⁷
10 Black Forest Road
Hamilton, NJ 08691-1810
5. Winters, Irwin [also referred to as “Erwin”]
1087 River Road
Phillipsburg, NJ 08865

Township Clerk, Margaret Dilts, testified that she believed that she served everyone on the lists of property owners that were prepared by the Tax Assessors (Exhibits P-50 and P-61), but she acknowledged that neither the “white nor green” certified mail receipts for those five property owners could not be located in the Township files²⁸.

Defendants provided certain information concerning some of the property and property owners for which certified mail receipts could not be produced, to wit:

1. With regards to Irwin [Erwin] Winters, Ms. Dilts provided a Final Judgment of [Tax] Foreclosure which indicated that the Township foreclosed upon. The Final Judgment indicates that it was filed with the Warren County Court, Chancery Division, on January 25, 2011 and which Judgment was recorded in the Warren County Clerk’s Office on March 11, 2011 (Exhibit D-17).

By virtue of the Judgment of Foreclosure, Lopatcong Township was the owner of the property formerly owned by Mr. Winters as of January 25, 2011 (and the record owner as of March 11, 2011). The Court acknowledges that even though the party charged with servicing notice can rely upon the Tax Assessor’s list as complete when serving or providing notices to

²⁷ This property is located in the “ROM” zone as well, but not in the ROM “south” area where the Defendants’ property is located.

²⁸ Stamped “white” certified mail receipts are obtained from the Post Office when certified mailings are delivered to the Post Office. “Green” certified mail receipts are returned after they are signed by the person or entity receiving the mailing or returned as being undelivered or undeliverable for some reason. The parties acknowledged that the green receipts are not required in order to provide proof of mailing.

property owners that the Assessor's list is not exclusively determinative. The proofs before the Court indicate that Mr. Winters was not the owner of 1087 River Road, Phillipsburg, New Jersey when notice was served so that notice to him was not required. Since the Township was then the owner of the "Winters" property, it was entitled to the notice. Since the Township was the party providing the notice, it should not be required to provide notice to itself. As such, the failure to provide notice to Mr. Winter or to the Township as the owner of 1087 River Road does not constitute a defect that would invalidate the Ordinance.

2. With regards to Consumers Water Company, Ms. Dilts testified that Consumers Water Company which is also known as Aqua New Jersey, Inc. and/or Aqua America in Lopatcong Township is the exclusive provider of public water within all of Lopatcong Township. Ms. Dilts did produce a property tax record indicating that Block 4.04, Lot 1 was owned (at that time) by Consumers New Jersey Water Company (Exhibit D-19). Ms. Dilts also produced a certified mail green card that was addressed to and signed (as received) by Aqua America and Consumers New Jersey Water Co. Both Consumers and Aqua are located at 10 Black Forest Road, Hamilton, New Jersey. Also business records produced from the New Jersey Department of Treasury indicates that Aqua New Jersey has been approved to use the "associated name" of Consumers New Jersey Water Co. (Exhibits D-33, 34) Effectively, Aqua and Consumers are one and the same company. As such, the Court finds that notice to Aqua and Consumers was effectively made as evidenced by Exhibits D-19, 33, 34.

3. With regards to Scenic Investment Group, LLC (Scenic), Ms. Dilts produced three separate certified mail (green card) receipts that were acknowledged and signed by Lopatcong Corner Assoc., LLC (Lopatcong Corner), Lopatcong Associates and West End Investment Group, LLC (West End). The tax records indicate that all four of those entities (including Scenic) were located at the same property address, to wit: 390 Amwell Road, Building 5, Suite 507, Hillsborough, New Jersey (Exhibits D-23, D-24 and D-25). Ms. Dilts testified that all of the entities (Scenic, Lopatcong Associates, Lopatcong Corner and West End) are owned by Lawrence Gardner, a well-known developer in the Township.

Additionally, the Defendants produced corporate status reports for all four entities (Lopatcong Corner, Lopatcong Associates, West End and Scenic) which the Defendants received from the New Jersey Department of Treasury's Office. The documents were consensually admitted into evidence by consent and pursuant to NJRE 803(c)(8). The corporate status reports indicate and the Township records confirm that all of four entities are located at the same

Hillsborough, New Jersey address and that each has the same registered agent, Lawrence W. Gardner. (Exhibits D-35, 36, 37, 40, 17, 23, 24, 25)²⁹

Notice to a corporation or like entity may be made upon its president, vice-president, secretary or other person authorized by appointment to accept service on behalf of the corporation. N.J.S.A. 40:55D-12(b). In this case, it is undisputed that Lawrence Gardner was the authorized representative to accept service on behalf of all four entities. N.J.S.A. 14:14A-2.

One of the questions that is presented is whether the notice served upon Mr. Gardner, for his other entities, was sufficient to constitute notice to “Scenic” as the entity for which proof of service would not be found or produced. The Court holds that the mailings to Mr. Gardner for the other three entities constitute adequate notice for the purpose of the Statute. Mr. Gardner is the person who was “appointed by Statute” to receive notice for Scenic as well as the other entities. N.J.S.A. 14A:4-2. To require that four notices to Mr. Gardner had to be sent instead of the three notices that were sent to him would create an absurd result that does not comport with the meaning and purpose of the notice provision.

A second issue is whether the three other separate mailings that were made to Scenic as the owner of other properties within 200 feet of zone constitutes notice to Scenic in any event. This Court holds that it does. Mr. Gardner is the person appointed to receive notice for Scenic so that his receipt of three other notices addressed to that entity certainly constitutes effective notice.

Additionally, the Court finds that Plaintiffs do not have standing to complain about the form of notice that Scenic or Mr. Gardner could or should have obtained.

For all of these reasons, the Court finds that the notices to Mr. Gardner for his other entities constitutes notice to Scenic as well.

4. With regards to On Site Brake & Spindle, Inc., the Defendants produced the certified mail green card for a company known as “On-Site Crossings, LLC” located at 1480 Rattlesnake Bridge, Bedminster, New Jersey. Ms. Dilts testified that both of the “On-Site”

²⁹ Interestingly, a review of Exhibit P-50 which was the compilation of the list of property owners to which notice was mailed indicates that 41 separate notices were mailed to 390 Amwell Road, Building 5, Suite 507, Hillsborough, NJ. The notices were not only mailed to the companies referred to by the Defendants but also other apparent Gardner owned companies including Chapel Creek Investors, Kohler Investment Group, Riverside Investors, Baltimore Street Associates and West End Investment. Exhibit P-50 also indicates that four separate notices were mailed to Scenic for other properties owned by Scenic even though the Plaintiffs apparently only claim that one of those notices was not sent.

companies are owned by the same family (Exhibit D-21). Certified records from the State of New Jersey, Department of Treasury indicate that the registered office of both companies is located at 1480 Rattlesnake Road, Bedminster, New Jersey. Also, the registered agent for both companies is and was John Angeleri. (Exhibits D-38, 39) The issue raised as to this property owner is analogous to the issue involving the “Gardner” companies as indicated above. Was notice to “On-Site Crossings” effective notice to “On-Site Spindle” given the fact that they are all owned by the same family or same person.

The Defendants called John Angeleri, Jr. who is principal for On Site and Spindle, Inc.³⁰ Mr. Angeleri testified that his company is involved in the business of automobile repair which it conducts at 198 Strykers Road. Mr. Angeleri convincingly and credibly testified that he received notice of the zoning ordinance in issue for his company.

Mr. Angeleri also testified that the related company, “On Site Crossing” was owned by his father, John Angeleri, Sr. The witness acknowledged that he does not own any portion of On Site Crossing. He also indicated (without indicating the specifics of a conversation between himself and his father) that his father had also received notice of the zone change.

In any event, On Site Crossing was apparently provided with notice as the Defendants produced the certified mail green card for that company (Exhibit D-21).

The Court is convinced that witness John Angeleri, Jr., provided credible and believable testimony that as the principal of that company he received appropriate notice of the zone change. Even though the production of certified mail receipts would have created a presumption that the mailing had been effectuated the certified mail receipts are not the only evidence of notice that a Court may consider. In this case, the Court finds that the testimony of the owner of the affected company to be credible and compelling proof that notice had been provided.

5. With regards to Sandra Conklin, the Defendants presented the testimony of Township Engineer, Paul Sterbenz, Mr. Sterbenz testified that he has been the Township Engineer for 13 ¼ years.

At the Township’s request, Mr. Sterbenz conducted an investigation as to whether property owner Sandra Conklin owned a property that was within 200 feet of the ROM Zone

³⁰ Records from the Department of Treasury confirm that Mr. Angeleri, Jr. is the President of On Site Brake and Spindle

line³¹. He determined that Ms. Conklin owned a condominium unit that was located in the contiguous AH/R-150 Zone which is known as the “Affordable Housing Development Zone”.

Mr. Sterbenz uncovered that Ms. Conklin’s unit was not located within 200 feet of the Zone boundary and thus was not entitled to notice. He produced Exhibit D-63 to demonstrate his finding. He also pointed out that the most recently adopted Township Zoning Map indicates that the line that forms the boundary between the RM and AHR/R-150 Zones runs along the middle of the Norfolk Southern Railroad line. By measuring the distance from that line (point), Ms. Conklin’s property is not located within 200 feet and thus she would not be entitled to notice³².

Mr. Sterbenz provided credible testimony to the effect that the list of properties to be provided with notice was conservatively prepared so as to avoid issues. As a result, certain property owners like Ms. Conklin may have been included on the list but not actually be entitled to notice. In any event, the Court finds Mr. Sterbenz’s testimony and prepared exhibit as credible evidence to demonstrate that Ms. Conklin was not entitled to notice. The failure of the Township to serve her (or provide proof of service) is thus not fatal to its position that notice had been provided.

Plaintiffs argue that the Defendants’ failure to serve any one of the listed property owners is such a defect that, by itself, is enough for the Court to declare that the Ordinance (2011-15) is invalid. Riggs v. Township of Long Beach, 109 N.J. 601, 611 (1988) (citing Taxpayer Ass’n of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6, 21 (1976), cert. den. Sub. Nom. 403 US 977 (1977)). See also East Windsor Group, LLC vs. Township Council of Township of Toms River, 2011 WL 4088598 (App. Div. 2011), “[A]lthough the judicial role is circumscribed, a court may declare an ordinance invalid if in enacting the ordinance the municipality has not complied with the requirements of the statute.”

However, based upon the Court’s review and consideration of each of the five property owners that were allegedly not properly served, the Court finds that even though Lopatcong Township was not required to provide personal notice of Ordinance 2011-15 pursuant to

³¹ The property is known as Lot 86, Block 99 on the Lopatcong Tax Map and also known as 4 Overlook Drive.

³² Mr. Sterbenz indicates that prior zoning maps may have provided for the zone line to be along the southerly line of the railroad line which would have materially changed his finding. The current zoning map which was most recently revised on May 15, 2010 confirms the zone boundary used by Mr. Sterbenz. The Zoning Map attached as part of Exhibit P-1 confirms that the zoning map with the date of May 15, 2010 is the most current, and thus, valid map.

N.J.S.A. 40:55D-62.1, for the reasons expressed above, the Township has demonstrated that all property owners who would have been required to receive personal notification pursuant to this statute.

C. Were the Contents of the Township’s Public Notice for Ordinances 11-07 and 2011-15 Defective?

Plaintiffs also argue that Lopatcong Township’s public notices were substantively deficient under the provisions of N.J.S.A. 40:49-2 because they allegedly failed to inform the public of “the nature or extent of the change or whether it was consequential enough to warrant their attendance at, and participation in, the ensuing public hearing.” The notices of publication relied upon by the Plaintiffs were published on July 14, 2011 and November 4, 2011 (Exhibit P-28).

The New Jersey Courts generally hold that a public notice that does “not frustrate the core purpose of the publication requirement to inform the public of the nature and purpose of the ordinance and the proceedings by which it might be adopted” is sufficient to satisfy statutory requirements despite technical violations contained in the notice.³³

Plaintiffs argue, however, that Lopatcong Township, instead of publishing a full text of Ordinance 2011-15, published a summary of the action to be taken by the Township Council and that the summary language was defective or inadequate. On the other hand, Defendants contend that Lopatcong Township published, in its official newspaper, and delivered to the 200-foot list, a summary of Ordinance 2011-15 that complies with applicable law.

³³ As Judges Graves and Ashrafi wrote in their per aniam opinion, “We agree with the trial judge’s conclusion that the ‘technical’ violation of the statute ‘did not frustrate the core purpose of the publication requirement’ to inform the public of the nature and purpose of the ordinance and the proceedings by which it might be adopted. The notice fairly conveyed sufficient information to allow plaintiff and other members of the public to make ‘an informed determination as to whether they should participate in the hearing or, at the least, look more closely at the plans and other documents on file.’ deficiency of the public notice is not a sufficient basis to invalidate the fair share ordinance. Nor does the Township’s failure to include a printed copy of the entire ordinance at the time the first ordinance was adopted render the completed fair share ordinance invalid. When alerted to the printing error, the Township followed required procedural steps in correcting the error. It immediately introduced and adopted the second ordinance, with proper notice and a public hearing. As of the adoption of the second ordinance on May 24, 2010, the entire fair share ordinance had been publicly considered by the council and mayor, with an opportunity for any objections and comments to be voiced and discussed.” Bonnabel v. Township of River Vale, 2013 WL 3213806 p.3 (App. Div. 2013) (citing Perlmart of Lacey, Inc. v. Lacey Twp. Planning Bd., 295 N.J. Super. 234, 237, 238 (App.Div.1996) (describing as jurisdictional proper notice pursuant to N.J.S.A. 40:55D-11, the MLUL’s parallel of N.J.S.A. 40:49-2).

The general statutory requirements for the enactment of ordinances are found in N.J.S.A. 40:49-2. The following procedural steps must be followed:

- (1) Every ordinance must be introduced at a meeting of the governing body and passed at first reading;
- (2) After the ordinance has been introduced, it must be published in its entirety or by title and summary at least once in a newspaper published and circulated in the municipality. A notice must be inserted stating the time and place when and where it will be further considered for final passage, and a clear and concise statement prepared by the Clerk of the Governing Body setting forth the purpose of the ordinance and the time and place when and where a copy of the ordinance can be obtained without cost by any member of the general public who wants a copy of the ordinance;
- (3) The Governing Body must publish at least one week prior to the time fixed for further consideration of the ordinance for final passage;
- (4) Prior to the second reading, a copy of the ordinance shall be posted on the bulletin board or other place upon which public notices are customarily posted in the principal municipal building of the municipality and copies of the ordinance shall be made available to members of the general public of the municipality who shall request such copies;
- (5) At the time and place stated in the notice, a hearing (second reading) must be held on the ordinance and interested persons must be given an opportunity to be heard. The statute provides that the opportunity to be heard shall include the right to ask pertinent questions concerning the ordinance by any resident of the municipality or any other person affected by the ordinance. The final passage shall be at least ten days after the first reading;
- (6) Upon the opening of the hearing, the ordinance shall be given a second reading, which reading may be by title, or by title and summary, and at the conclusion of the hearing it may be passed with or without amendments or rejected; and
- (7) Upon passage, every ordinance or the title, or the title and a summary thereof together with notice of date of passage or approval or both shall be published at least once in a newspaper circulating in the municipality. This is known as a "notice of passage."

Compliance with statutory notice requirements is generally considered jurisdictional so that any nonconformity renders the resulting action a nullity. Rockaway Shoprite v. Linden, 424 N.J. Super. 337, 352 (App. Div. 2011). See also, Cotler v. Township of Pilesgrove, 393 N.J.

Super. 377, 386, (App. Div.2007) (the notice must identify the subject property, and must inform the reader that the ordinance would result in substantive changes to the municipality's zoning).

The issue in this case is whether Lopatcong Township's notices were defective because they failed to satisfy the requirements of N.J.S.A. 40:49-2.1(a), which provides for an alternate form of notice that is specifically applicable to Zoning Ordinance amendments. That section states, in pertinent part, as follows:

In the case of any ordinance adopted pursuant to the "Municipal Land Use Law," P.L.1975, c. 291 (C. 40:55D-1 et seq.), including any amendments or supplements thereto, or revisions or codifications thereof, which is in length six or more octavo pages of ordinary print, the governing body of any municipality may, notwithstanding the provisions of R.S. 40:49-2, satisfy the newspaper publication requirements for the introduction and passage of such ordinance in the following manner:

a. The publication of a notice citing such proposed ordinance by title, giving a brief summary of the main objectives or provisions of the ordinance, stating that copies are on file for public examination and acquisition at the office of the municipal clerk, and setting forth the time and place for the further consideration of the proposed ordinance.

N.J.S.A. 40:49-2.1(a).

In support of their argument that the Township's notice failed to meet the requirements of N.J.S.A. 40:49-2.1(a), Plaintiffs point to the case of Rockaway Shoprite, *supra*, where "instead of the 'brief summary of the [ordinance's] main objectives and provisions' clearly and plainly mandated by the statute, the public notice merely advised that the zoning is being amended as to the properties identified by common name and by lot and block number. The Court there held that general, standardized language provides no real notice apprising the public of what exactly is being proposed." *Id.* at 349. The notice in Rockaway Shoprite was found to be defective because the information provided in the notice "clearly" failed to advise the public of that proposed rezoning would affect the "substantial and fundamental alteration in the character of the district by creating entirely new zones with different uses." *Id.* And, see Cotler v. Township of Pilesgrove, 393 N.J. Super. 377, 385-388 (App. Div. 2007) (holding that the published notice in that case did not comply with N.J.S.A. 40:49-2.1(a) because it failed to provide specific information regarding the global nature and scope of the proposed changes); and also, Carbone v. Borough of North Haledon, 2013 WL 5416897 (2013) (the Court found the notice insufficient

because it failed to state that the ordinance amendment involved *the creation* of a new zoning district, nor did it state, in even the briefest terms, what was permitted in the new zoning district).

In PC Air Rights v. Mayor and City Council of City of Hackensack, 2006 WL 2035669 (2006), the notices published with respect to the 2005 zoning ordinance failed to comply with this clear statutory mandate. Plaintiffs claim that the PC Air Rights case is instructive as to the situation in this case in that notice published did not constitute a brief summary of the main objectives or provisions of proposed amendment and the court concluded that “it was not sufficient to alert a reasonably intelligent reader as to the nature and import of the substantial changes in the zone plan proposed by the City. A notice of a proposed change in the zoning laws must be reasonably sufficient and adequate to inform the public of the essence and scope of the proposed changes” which Plaintiffs claim was not met in this case.

Plaintiffs contend that the second notice of the Initial Amendment (11-07) which was published July 14, 2011 and the second notice of the Second Amendment (2011-15), which was published November 4, 2011 merely advised that the new ordinance proposed will amend the Zoning Ordinance in order to add “Asphalt and Concrete Manufacturing Facilities as a conditional use in the “ROM” zone south of the Norfolk Southern Railroad Right-of-Way and Solar Photovoltaic Facilities as a permitted principal use in the “ROM” zone and Solar Photovoltaic Facilities as an accessory use permitted in the “ROM” Zone and the HB Zone South of the Norfolk Southern Railroad Right-of-Way”. (See Exhibit P-11, July 14, 2011 Affidavit of Publication and See Exhibit P-28, November 8, 2011 Affidavit of Publication)). Plaintiffs argue that there was “nothing” in these two notices that “informed interested persons of the nature or extent of the change or whether it was consequential enough to warrant their attendance at, and participation in, the ensuing public hearing.” In that regard, Plaintiffs claim the notice was deficient as it failed to “focus on the substantive effect of the amendment....” Pacilli, Supra. at 332. Plaintiffs urge that the “generic notice” in this case fails to satisfy the minimum requirement. Plaintiffs note that the Ordinance Amendments themselves provide, in part, that “Asphalt and/or concrete manufacturing facilities may operate as necessary on a “24-hour basis seven (7) days a week” and allow for a structure height of 85 feet. Plaintiffs argue that the Defendants failed to provide adequate and proper notice for these amendments for Ordinance review and adoption. Plaintiffs further advocate that with that type of substantial and intensified new use within a zone, the notice should have alerted the public of the fact that this proposed use

would be operating in such a manner as to affect the quality of life of the residents and also create a significant visual impact.

Plaintiffs argue that the Defendant Township's publication was deficient in that it only published the full title of the Ordinance upon passage but they did not publish a summary of the Ordinance within the meaning of the Statute. Plaintiffs contend that "[H]aving chosen not to publish the Ordinance in full upon passage, the Defendant Township, at the very least, should have provided a summary of the main objectives or provisions of the Ordinance per N.J.S.A. 40:49-2.1 Wolf v. Mayor of Shrewsbury, 182 N.J. Super. 289, 296 (App. Div.1981), certif. denied, 89 N.J. 440 (1982). See also, PC Air Rights v. Mayor and City Council of City of Hackensack, 2006 WL 2035669 (2006).

The above cited statutory section affords municipalities an alternative to N.J.S.A. 40:49-2, which calls for the publication of the full text of the ordinance. The Court recognizes that the cases upon which plaintiffs place heavy reliance in support of their contention that the Township's public notices were defective, Rockaway Shoprite v. Linden, 424 N.J. Super. 337 (App. Div. 2011) and Cotler v. Tp. Of Pilesgrove, 393 N.J. Super. 337 (App. Div. 2007), are applicable only in those instances in which a municipality chooses to publish a summary of the ordinance under N.J.S.A. 40:49-2.1(a).

While publication in full of a zoning ordinance or amendment thereto is no longer mandatory, N.J.S.A. 40:49-2.1 does require "a brief summary of the main objectives or provisions of the ordinance." Wolf v. Mayor of Shrewsbury, 182 N.J. Super. 289, 296 (App.Div.1981), certif. denied, 89 N.J. 440 (1982).

In this case, the Notice of Publication that was published by the Defendant Township provided that:

ORDINANCE NO. 2011-15

SECOND NOTICE OF AN ORDINANCE NOTICE is hereby given that at a regular meeting of the Township Council of the Township of Lopatcong, County of Warren and State of New Jersey held November 2, 2011 at the Municipal Building, 232 S. Third Street, Phillipsburg, New Jersey, the following Ordinance was presented and passed on the final reading. The Ordinance was then ordered to be published according to law by title only:

An Ordinance of the Township of Lopatcong, County of Warren, State of New Jersey to amend Chapter 243 "Zoning & Land Use to Add Asphalt and Concrete Manufacturing Facilities as a conditional use in the "ROM" Zone south of the Norfolk Southern Railroad Right of Way;

Solar permitted principal use in the “ROM” Zone and Solar Photovoltaic Facilities as an accessory use permitted in the “ROM” Zone and HB Zone south of the Norfolk Southern Railroad Right of Way ...

In this case, the Defendant Township actually published the entire title of the Ordinance to constitute its summary. The question is whether in this case the publication of the full title of Ordinance provided sufficient notice of the main objectives or provisions of the Ordinance so as to constitute compliance with N.J.S.A. 40:49-2.1.

In this case the information that was included in the title included:

- 1) The fact that the Ordinance was adopted by the Township Council
- 2) The date of passage
- 3) The notification of posting of the Ordinance with the Township Clerk
- 4) The Ordinance amended Chapter 243 of the Lopatcong Township Zoning Ordinance (the “ROM” Zone)
- 5) The new amendment would permit asphalt and concrete manufacturing facilities as conditional uses
- 6) The new conditional uses were permitted only the portion of the ROM Zone and the HB Zone that was located south of the Norfolk Southern Railroad R.O.W.
- 7) The Ordinance made solar photovoltaic uses as permitted use in that same portion of the “ROM” Zone

The Court finds that in this case the title of the Ordinance was so complete and descriptive that it provided a summary of the main objectives and provisions of the Ordinance. Even though the Plaintiffs criticize the published notice by its failure to include certain other particular provisions and conditions that were established in the amendment, the real purpose of the notice was served. The public was notified about the passage of the Ordinance and the main provisions were summarized in the publication so that any interested persons would have sufficient information so as to make further inquiry if they believed that the Ordinance affected their property rights. The notice included the basic elements of the change so as to inform the public of the essence of the changes. The notice apprises the public of the proposed changes in a manner sufficient to alert interested parties as to amendments that may affect their property interests or for members of the general public whether the changes had effect on matters of public interest. The fact that all of the elements of the new change were not contained within the summary does not mean that it is defective.

In this case, the published portion of the Ordinance did not disguise or obfuscate the main provisions of the amendment. While the Plaintiffs' criticism goes more to the form of the publication, the Court is more concerned with the substance of the information provided. In this case, the Court finds the substance of the notice to be in substantial compliance with the purpose of N.J.S.A. 40:49-2.1.

POINT IV

DID THE LOPATCONG TOWNSHIP COUNCILS' ENACTMENT OF ORDINANCE 2011-15 COMPLY WITH THE REQUIREMENTS OF THE MUNICIPAL LAND USE LAW?

A. Were the Ordinances in Question Adopted for Improper Purposes?

Defendant Township and Defendant "189 Strykers Road" assert that Ordinance 2011-15 was enacted "to improve Lopatcong's land use scheme, to encourage responsible commercial growth, to reflect changes in state law, which had de facto, amended land use ordinances throughout the State, and was enacted in a procedurally sound and accepted manner."

Certainly on the face of Ordinance 2011-15 itself, the enactment purports to promote a valid and laudable local goal, ie. to improve Lopatcong's land use scheme and encourage responsible growth. The Defendant Township also references other reasons for the enactment that support the "purposes of zoning" as well. N.J.S.A. 40:55D-2. The Defendant Township claims that the amendments sought to proactively incent new development within its industrial zone. The Township touts that the zone and its amendment were designed to promote appropriate industrial development in that zone and in particular south of the Norfolk Southern Railroad line where infrastructure improvements were in place to support those uses. By so doing, the Township sought to "encourage development for the purpose of providing fiscal balance, a stable tax base, and to develop employment opportunities and to ensure that the industrial zone becomes a stable and long term asset to the community." These purposes clearly fit within the "purposes of zoning" so that it can be said that the Ordinances were enacted for proper purposes. N.J.S.A. 40:55D-2(a)(e)(f)(g)(h) and (n). In that regard, it is not for the Court to substitute its view on those subjects. Due deference is given to the local officials to devise their zone plan to suit their local needs and concerns. Taxpayers Ass'n of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6, 21 (1976).

Although the Plaintiffs suggest that the Ordinance in question was not enacted for a “proper purpose”, the Court finds that the evidence before the Court does not support such a proposition. The Court finds that the Defendant Township has offered valid and supportable zoning and planning reasons for the adoption of the Ordinances in issue. N.J.S.A. 40:55D-2.

The Plaintiffs’ arguments do not end there, however, as the Plaintiffs also contend that Ordinance 2011-15 should be invalidated for other reasons which will be addressed by the Court.

It is well established that a Court may invalidate an ordinance adopted by a municipality if it is determined that a municipality failed to comply with the MLUL when it was adopted. See, Taxpayers Ass’n of Weymouth Twp. V. Weymouth Twp., supra. at 21. Plaintiffs contend that the record in this matter reflects that the Township did not comply with the MLUL when it adopted the Ordinance Amendments. In addition to advancing one of the purposes of the MLUL as set forth in N.J.S.A. 40:55D-2. (*Riggs, supra*, 109 N.J. at 611), the ordinance must be “substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements,” N.J.S.A. 40:55D-62, unless the requirements of that statute are otherwise satisfied. *Id.* at 611. Plaintiff contends that the record reflects that the Ordinance Amendments in question do not advance any of the purposes of the MLUL as set forth in N.J.S.A. 40:55D-2. The Plaintiffs’ position is that although the Ordinances were crafted under the guise of “renewable energy generating facilities”, in reality they were intended solely to benefit a specific piece of property and a specific owner within the Township (Block 100, Lot 6). As such, Plaintiffs argue that these ordinances are not “substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements”, and were not adopted in accordance with statutory and municipal procedural requirements.

The Plaintiffs other arguments will be addressed hereunder.

B. Did Lopatcong Township Planning Board Comply With The Requirement Under N.J.S.A. 40:55D-26a. to “Make and Transmit” To The Township Council A Report on The Consistency of Ordinance 2011-15 with the Lopatcong Master Plan?

As an initial matter, in the adoption of an ordinance such as the ordinance in question, the local Planning Board is required to comply with N.J.S.A. 40:55D-26a by making and transmitting a report to the Township Council regarding the consistency of the Ordinance with

the local Master Plan. The relevant provision of the MLUL is found in N.J.S.A. 40:55D-26 which provides as follows:

Referral powers. a. Prior to the adoption of a development regulation, revision, or amendment thereto, the planning board shall make and transmit to the governing body, within 35 days after referral, a report including identification of any provisions in the proposed development regulation, revision or amendment which are inconsistent with the master plan and recommendations concerning these inconsistencies and any other matters as the board deems appropriate. The governing body, when considering the adoption of a development regulation, revision or amendment thereto, shall review the report of the planning board and may disapprove or change any recommendation by a vote of a majority of its full authorized membership and shall record in its minutes the reasons for not following such recommendation. Failure of the planning board to transmit its report within the 35-day period provided herein shall relieve the governing body from the requirements of this subsection in regard to the proposed development regulation, revision or amendment thereto referred to the planning board. Nothing in this section shall be construed as diminishing the application of the provisions of section 23 of P.L. 1975, c. 291 (C. 40:55D-32) to any official map or an amendment or revision thereto or of subsection a. of section 49 of P.L. 1975, c. 291 (C. 40:55D-62) to any zoning ordinance or any amendment or revision thereto.

b. The governing body may by ordinance provide for the reference of any matter or class of matters to the planning board before final action thereon by a municipal body or municipal officer having final authority thereon, except of any matter under the jurisdiction of the board of adjustment. Whenever the planning board shall have made a recommendation regarding a matter authorized by this act to another municipal body, such recommendation may be rejected only by a majority of the full authorized membership of such other body.

Specifically, under N.J.S.A. 40:55D-26, prior to the adoption of this ordinance, the planning board is to make and transmit to the governing body, a report including identification of any provisions in the proposed ordinance which are inconsistent with the master plan and recommendations concerning these inconsistencies and any other matters as the board deems appropriate. N.J.S.A. 40:55D-62³⁴. Upon receipt of the report, the governing body must review the report of the board, disapprove or change any recommendation of the Board by a vote of a majority of its full authorized membership and record in its minutes the reasons for not following

³⁴ Defendants point out that the reciprocal proposition is not provided for in the Statute. In other words, the Planning Board is not required to provide a report (called a “consistency report” by Plaintiffs’ expert) if it finds the ordinance to be consistent with the Master Plan. The Court agrees that the statutory language so provides. The description of the report as a “consistency report” appears to be a misnomer, even though it is a term used to some extent by all three planning experts: Ritter, Lydon and McKenzie.

such recommendation. See N.J.S.A. 40:55D-26. If the planning board fails to submit a report within the requisite thirty-five day period, the governing body is not bound by the voting requirements of the statute concerning the planning board's recommendations addressing the inconsistencies.

The reference to the “substantiated consistency requirement” is actually found in N.J.S.A. 40:55D-62(a) which provides as follows:

Power to zone. a. The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon. Such ordinance shall be adopted after the planning board has adopted the land use plan element and the housing plan element of a master plan, and all of the provisions of such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements; provided that the governing body may adopt a zoning ordinance or amendment or revision thereto which in whole or part is inconsistent with or not designed to effectuate the land use plan element and the housing plan element, but only by affirmative vote of a majority of the full authorized membership of the governing body, with the reasons of the governing body for so acting set forth in a resolution and recorded in its minutes when adopting such a zoning ordinance; and provided further that, notwithstanding anything aforesaid, the governing body may adopt an interim zoning ordinance pursuant to subsection b. of section 77 of P.L.1975, c.291 (C.40:55D-90).

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 structure or uses of land, including planned unit development, planned unit residential development and cluster development, but the regulations in one district may differ from those in other districts.

Those sections recognize the separate functions and roles of the governing body and the Planning Board. The Planning Board is assigned the power to “plan” including the authority to make and prepare Master Plans and to review prospective zoning ordinances and amendments to the zoning ordinances to analyze their consistency of the ordinances with the Master Plan. The governing body, on the other hand, has the power to adopt the zoning ordinances and amendments. The MLUL interposes a scheme that requires that the two entities communicate with each other concerning their roles in the process. N.J.S.A. 40:55D-26(a); N.J.S.A. 40:55D-62(a).

Defendants contend that they complied with the provisions of the MLUL. The Defendant Lopatcong Planning Board claims that it directed its Planner, George Ritter, to prepare such a consistency report regarding proposed Ordinance 2011-15 which was to be submitted to the governing body. At the direction of the Board, Mr. Ritter thereafter submitted a five-page single spaced consistency report dated September 26, 2011 addressing both the renewable energy and the asphalt/concrete aspects of the proposed Ordinance 2011-15 and their consistency with the Lopatcong Master Plan. The minutes of the September 28, 2011, meeting of the Lopatcong Planning Board was offered into evidence in this matter (Exhibit P-12) states that the Lopatcong Planning Board reviewed this report in connection with the proposed ordinance 2011-15 and voted 8-0 to refer the proposed ordinance to the Lopatcong Township Council for consideration. Based on the September 28, 2011 meeting, Mr. Ritter revised and updated his consistency report and sent a revised consistency report dated September 29, 2011 to the Lopatcong Planning Board. On October 5, 2011 the Lopatcong Township Council received the draft of the proposed Ordinance 2011-15 and recommended certain changes to the text, including the elimination of the frontage requirement on Stryker Road for the newly designated conditional uses.

At its October 6, 2011 meeting, the Lopatcong Planning Board gave instructions for Mr. Ritter's report to again be revised to reflect the October 5, 2011 change made to proposed Ordinance 2011-15 by the Township Council and voted 5-0 to send Mr. Ritter's revised report and proposed Ordinance 2011-15 to the Township Council for its consideration³⁵. The "paper trail" indicated that the next morning at 5:11 a.m., Township Engineer Sterbenz emailed instructions to Mr. Ritter confirming the Board's direction to modify his "consistency report" to eliminate the frontage requirement from the new conditional use zone (Exhibit D-26). Mr. Ritter apparently then revised his consistency letter (Exhibits P-21B, D-27). Mr. Ritter transmitted the revision to Ms. Dilts, who transmitted it to the Township Council.

On October 7, 2011, Mr. Ritter incorporated the minor revision needed in his consistency report in accordance with instructions from the Planning Board and forwarded it to the Township Council (Exhibits D-26 and P-21B). The Lopatcong Township Council acknowledged the "Ritter

³⁵ The Court also does not attribute significance to the lack of specificity concerning the Board's action in their Minutes. Ms. Dilts testified credibly that the Minutes are merely summarizations of the Board's actions and they do not necessarily include all of the details which the Plaintiffs charge should be considered fatal defects. The Board's skeletal Minutes should not be held to be determinative of such an issue, particularly when the credible testimony and evidence has filled the gaps.

Report” in the minutes of its November 2, 2011 meeting (Exhibit P-27). Given these facts, it is clear that the Lopatcong Planning Board has, in fact, complied with the requirement under N.J.S.A. 40:55D-26a. to “make and transmit” such a consistency report to the Lopatcong Township Council.

Plaintiffs claim that in this case the planner’s report that was transmitted was “not a report that was reviewed and transmitted by the Board”. Rather, Plaintiffs contend that the report was revised by the Defendant Township’s planner after the Planning Board meeting so that the report that was transmitted was one that was never seen and approved by the Board. In that regard, Plaintiffs’ expert, Mr. Lydon, testified that the “normal” procedure is that the “consistency report” be in place (and in their possession) when the Planning Board acted on it.

The record before the Court indicates that the Defendant Planning Board did “make and transmit” a report to the Defendant Township concerning Ordinance 2011-15. The Court adopts the credible testimony of the Defendant’s expert witness, Ms. McKenzie, when she testified that when a Planning Board is called upon to “make and transmit” such a report, it will generally authorize the Board’s secretary to write a letter or to transmit a copy of the Minutes of the Planning Board Meeting indicating the Board’s findings with respect to the consistency of a zoning amendment with the Master Plan or it will forward a report from its planner on the subject. The credible testimony of both Ms. Dilts and Mr. Ritter clearly indicate that the Township Council and the Board were fully familiar with the Ordinance and the proposed modifications. Mr. Ritter was authorized by the Planning Board to revise his report to reflect a change in the Ordinance that had been suggested by the Township Council and concurred with by the Planning Board.

According to the Minutes of the October 6, 2011 Planning Board Meeting, the Board voted by motion to “forward the Ordinance and a Report on Ordinance No, 2011-15 Consistency with the Township Master Plan to the Township”. According to the credible testimony of Township Planner Ritter, he revised his September 29, 2011 report on the day after the October 6, 2011 Planning Board Meeting. The revisions that he made on October 7, 2011 were based upon the clear direction that he received from the Board to update the report and correct a reference to a requirement for frontage on Strykers Road which had been from the Ordinance that was introduced on October 5, 2011. Mr. Ritter then forwarded the revised report to the Township. The fact that the final draft of the report was not before the Board is not controlling. There is no authority for such a proposition other than Plaintiffs’ expert’s subjective opinion. In

this case, there appears to be no real issue about the Planning Board's action on the report and their direction to Mr. Ritter to modify it as he did in his October 7, 2011 final draft and then to transmit that final draft to the Township Council.

Plaintiffs argue that there was no acknowledgment in the record by the Lopatcong Township Council of the consistency report, citing Jennings v. Borough of Highlands, 418 N.J. Super. 405 (App. Div. 2011). The Court holds, however, that the situation in Jennings, however, cannot be compared to the present case. In Jennings, the court pointed to the "utter silence" of the governing body regarding the consistency report submitted by the planning board and its "willful disregard" without comment of eight specific recommendations therein regarding the proposed ordinance. Id. at 423-24. The Court in Jennings also made clear that a verbal discussion of the consistency report by the governing body was not necessary. Id.

Specifically, in Jennings, the Court found that:

We do not believe that the Legislature asks too much of municipal governing bodies when it insists upon a review of a planning board's report. In an analogous situation, where planning board members voted on an application for development without discussion, we held that a verbal discussion in that circumstance is not mandatory, as long as the ultimate resolution, which will serve as the official statement of the planning board's findings and conclusions is "furnished to the board members in advance of the time they will vote, to provide them ample time to study it and, if they deem it appropriate, request clarifications or modifications." Scully-Bozarth Post #1817 of Veterans of Foreign Wars of U.S. v. Planning Bd. of Burlington, 362 N.J. Super. 296, 312 (App. Div.), certif. denied, 178 N.J. 34 (2003). We further implied that members should acknowledge "on the record that they read it, understood it, and agreed with it as drafted." Id. at 313.

In similar vein, we believe that members of a governing body acting pursuant to N.J.S.A. 40:55D-26(a) owe an implied duty under the MLUL to at least acknowledge that they reviewed the planning board's report. The record in this case provides us little confidence that any review occurred. Moreover, we believe that a remand to the governing body would be futile -- a vain effort to backfill the missing acknowledgment, and we decline to order a [418 N.J. Super. 425]do-over. We therefore conclude that this material violation of N.J.S.A. 40:55D-26(a) renders Ordinance O-07-07 invalid.

It should be mentioned that the Plaintiff's expert opines that the report that was transmitted by the Board to the governing body could not have been in the possession of the Board when they voted on it on October 6, 2011, which was the day after the vote. The credible testimony of Mr. Ritter has clarified the issue and debunked the Plaintiffs' conspiracy theory.

The Board did have Mr. Ritter's September 29, 2011 report when they acted on it. The revisions that were made the next day were done at the Board's direction.

Mr. Ritter's testimony also credibly explains why the Plaintiffs' expert's opinion that the Board's action must have been as to a different version of the Ordinance was in error.

Clearly, the Township Council had "in hand" a report transmitted to it by the Planning Board when it acted to introduce Ordinance 2011-15 for passage. Certainly that fact could not have been a surprise to the Council since they addressed and passed the same Ordinance some three months before that time. The report that it had in hand clearly indicated that the Planning Board's view that Ordinance 2011-15 was consistent with the Land Use Element of the Master Plan.

The Court does not find it significant that Mr. Ritter revised the report into a final draft after the Planning Board meeting. The revisions made to the report were made with the authority and at the direction of the Board. By Plaintiffs' position, the Planning Board would not have been able to act on the final draft until its next meeting as by that time the revisions that they had directed Mr. Ritter to make would have been inserted into a final draft. To impose such stringent requirements upon volunteer Board Members so that they could meet their statutory mandate is unreasonable and onerous. The Board reasonably and appropriately authorized and entrusted the Township Planner to make the revisions and transmit the final report to the Council. The fact that the final report was not in their possession when they gave direction to the Planner is of no moment.

The Court finds that based upon these facts, the Township properly acted to adopt Ordinance 2011-15. Also, the Township was not required to wait for a full 35 days after the referral from the Planning Board as the 35 day requirement only applies in the absence of a consistency report from the Planning Board. N.J.S.A. 40:55D-26 provides, in relevant part, as to that issue:

the planning board shall make and transmit to the governing body, within 35 days after referral, a report including identification of any provisions in the proposed development regulation, revision or amendment which are inconsistent with the master plan and recommendations concerning these inconsistencies and any other matters as the board deems appropriate ...

The Court finds that the Board's report and transmittal was appropriate and proper and allowed the Township Council to introduce and adopt the Ordinance 2011-15 in the manner that was done.

The facts reveal that the Board did review the appropriate and final draft of the Ordinance and their direction to Mr. Ritter to modify his report to conform to the revised version of the Ordinance confirms that fact.

The Court concludes that the process and requirement for the report and transmission of a consistency report from the Board to the Township Council was properly accomplished in accordance with the requirements of the MLUL.

C. **Is Ordinance 2011-15 is Substantially Consistent with the Land Use Element of the Lopatcong Master Plan and Therefore Comply With This Requirement in N.J.S.A. 40:55D-62a?**

i) **Is The Planning Board's Determination that Ordinance 2011-15 Substantially Consistent with the Lopatcong Master Plan is Entitled to Substantial Deference?**

The Lopatcong Planning Board prepared and adopted the Lopatcong Master Plan. It also determined pursuant to N.J.S.A. 40:55D-26a that the portion of Ordinance 2011-15 that allowed asphalt manufacturing as a conditional use was substantially consistent with the Lopatcong Master Plan. The New Jersey Supreme Court has unequivocally stated that such a determination is "entitled to deference and great weight." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 383 (1995). Such deference is clearly applicable in this case. The Court has summarized Mr. Ritter's consistency report previously in this opinion. On its face, the Ritter report is rationally related to the guidelines and goals of the Township's Master Plan and the purposes of zoning. N.J.S.A. 40:55D-2. On its face, the Township's consistency determination as based by the Ritter report cannot be said to be, per se, arbitrary, capricious or unreasonable.

ii) **Does the Planning Board Report Support a Finding of "Substantially Consistency"?**

N.J.S.A. 40:55D-62a. requires that an amendment to a zoning ordinance be "substantially consistent" with the land use plan element of the master plan or designed to effectuate the plan elements. If the proposed amendment to the zoning ordinance is inconsistent with the land use element of the master plan, then an affirmative vote of the entire governing body along with the rationale for adoption of an inconsistent amendment of the zoning ordinance is required. Id.³⁶

³⁶ Even though the Lopatcong Planning Board and Township Council determined Ordinance 2011-15 was substantially consistent with the Lopatcong Master Plan, Ordinance 2011-15 was nevertheless passed by an (footnote continued)

The concept of “substantially consistent” permits some inconsistency, provided it does not substantially or materially undermine or distort the basic provisions and objectives of the Master Plan. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 384 (1995); Accord Victor Recchia Residential Constr., Inc. v. Zoning Bd. of Adj. of Tp. of Cedar Grove, 338 N.J. Super. 242, 251 (App. Div. 2001).

In this case, the Lopatcong Planning Board determined that Ordinance 2011-15 as it pertains to the amendments relating to the establishment of Asphalt/Manufacturing Plants as a permitted “conditional use” is substantially consistent with the land use element of the Lopatcong Master Plan. Thus, the October 7, 2011 consistency report forwarded to the Township Council concluded after five pages of detailed analysis: “Ordinance No. 2011-15 is substantially consistent with the Land Use Plan Element of the Master Plan and furthers State legislation regarding renewable energy facilities.”

Defendants contend that the determination that Ordinance 2011-15 is substantially consistent with the Lopatcong Master Plan is supported by Mr. Ritter’s detailed analysis of numerous provisions in the Land Use, Circulation and Economic Development sections of the Master Plan which set forth the goals and objectives related to additional growth and development of industrial activities in Lopatcong’s “ROM” Zone, especially that portion of the “ROM” Zone south of the Norfolk-Southern Railroad Right of Way. Mr. Ritter’s report indicates that these goals and objectives demonstrate an intention to encourage the development of the industrial zone within Lopatcong Township for purposes of providing a favorable fiscal balance, a stable tax base, the development of employment opportunities and ensuring the industrial district becomes a stable, long term asset to the community.

The October 7, 2011 consistency report makes special note of the following factors which Defendants contend demonstrate the substantial consistency of Ordinance 2011-15 with the Lopatcong Master Plan:

- The Master Plan’s specific recognition of the benefits of promoting greater flexibility in the type and size of industrial activities that might be incorporated in the “ROM” zone;

(footnote continued from previous page)

affirmative vote of three of the five members of the Lopatcong Township Council, thereby meeting the requirement for such a majority for ordinances which are inconsistent with the Lopatcong Master Plan under N.J.S.A.40:55D-62a. The two remaining members of the Township Council, Mayor Steinhardt and Councilman Curry, abstained to avoid the appearance of a conflict of interest.

- The disparity between considerable residential growth straining municipal services and budgets and the minimal commercial and industrial development to offset such costs;
- The recommendation that zoning ordinances be adopted to encourage business development;
- The recommendation that zoning standards be modified to enhance the attractiveness of the “ROM” zone to target larger business enterprises;
- The fact that intensity of development associated with the proposed manufacturing facilities is similar to existing manufacturing facilities in the “ROM” zone south of the Norfolk Southern Railroad Right of Way;
- The fact that the proposed manufacturing facilities require limited public infrastructure to support development, of particular importance because future development in Lopatcong may be made to depend on individual subsurface disposal systems for sewage waste disposal and the limited capacity of the systems will severely restrict development opportunities in Lopatcong, thereby making less reliance on infrastructure an important consideration;
- The proposed manufacturing facilities are compatible with current manufacturing uses located in the “ROM” district south of the Norfolk Southern Railroad Right of Way;
- The inclusion of the proposed manufacturing facilities is a logical extension of the current land use pattern in the area and will not change the character of the zone district or have a significant effect on abutting residential neighborhoods; and
- The proposed ordinance incorporates new setback, buffer and landscape requirements to mitigate visual and noise impacts consistent with the land use goals set forth in the Lopatcong Master Plan.

At its November 2, 2011 meeting, the Lopatcong Township Council’s review of the consistency report transmitted from the Planning Board is memorialized in the minutes of the meeting as follows: “A Special Report has been submitted by Planner George Ritter of the Planning Board on Ordinance No. 2011-15 as to the consistency with the Township Master Plan.” After the public hearing section of the November 2, 2011 meeting on the proposed ordinance, the Lopatcong Township Council enacted Ordinance 2011-15. The text of the ordinance set forth the essence of the Township Council’s reasoning for its enactment,

concluding that Ordinance 2011-15 “will help to promote development of the HB and “ROM” districts, which is in the best interests of the citizens of Lopatcong.”

The Plaintiffs also urge that the Defendants’ have misused and mischaracterized the history of the “ROM” Zone by claiming that the “Township strongly desired the asphalt plant” while at the same time claiming that they “instituted restriction on where this type of use could be located”. The Plaintiffs argue that the Township’s position on that issue is inconsistent. And therefore unsustainable.

The Court certainly allows deference to the Township when justifying its actions in that regard. The Court does not find that the Township’s position is “per se” inconsistent. Certainly the Township can and has consistently and convincingly argued that they determined to promote and encourage the asphalt plant (for the various reasons addressed in Mr. Ritter’s report) and yet they still wanted to impose conditions upon its use. “[T]he value of a conditional use to the general public is implied by the municipality’s determination that the use should be permitted so long as it meets certain requirements. Furthermore, in the absence of any deviation from the enumerated conditions, the site is presumptively suitable.” Omnipoint v. Board of Adjustment, 337 N.J. Super. 398, 419 (App. Div.), cert. den. 169 N.J. 607 (2001). On the other hand, when a proposed conditional use does not meet the conditions, jurisdiction over such a use lies with the Board of Adjustment and the applicant must comply with an enhanced burden in order to meet the requirements of the variance pursuant to N.J.S.A. 40:55-70(d)(3). Coventry Square v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285, 295 (1994). When the Township’s actions are viewed in that context, the Township’s position is rational and consistent. In other words, the Court finds that the Township can consistently maintain that they “desired the asphalt plant” and considered it to be a use that was consistent with the purposes of the Zone yet still adopt an Ordinance that imposes conditions on where and under what circumstances this type of use can be located.

Plaintiffs also proffer that if the use was always permitted as the Defendants claim, then the Defendants’ restrictions only placed safeguards (restrictions) for the southern portion of the “ROM” Zone. Said another way, Plaintiffs contend that if the use was always permitted, then it would continue to be permitted in the other parts of the “ROM” Zone, even after the passage of Ordinance 2011-15.

Again, Plaintiffs’ argument is not sustainable. The Defendant Township claims that the applicant’s use was previously a permitted use in the “ROM” Zone. In Point I of this opinion, the

Court has concurred with that interpretation. A primary basis for their position was the permissive language of the “ROM” Ordinance which provide for principal permitted uses as follows:

- (3) Industry which involves only the processing, assembly, packaging or storage of previously refined materials including but not limited to the following industries: (emphasis added)

Now by specifically addressing the “asphalt manufacturing” use and limiting its applicability as a conditional use which is permitted on properties located south of the Norfolk Southern Railroad line (among other conditions), the Township has eliminated asphalt manufacturing as a permitted principal use in other parts of the “ROM” Zone. In any event, since that issue is not one before the Court, the Court’s view on the subject is at best dicta.

iii) Is a Specific Reference to “Asphalt Manufacturing” Required in the Master Plan in Order for it to be a “Substantially Consistent” Use?

Plaintiffs also argue that there is no reference in the Master Plan that specifically references or recommends this particular amendment to the zoning ordinance it therefore cannot be consistent. For instance, Plaintiff indicates that there is no reference to the specific uses that are contemplated in the “ROM” Zone (and as to the solar photovoltaic facilities to the AB Zone as well) in either the 1976 or 1989 Master Plans. Also, Plaintiffs indicate that the Master Plans make no reference to change in height limits for storage silos. As a result, Plaintiffs, through their expert, advocate the position that Ordinance 2011-15 must be inconsistent with the Master Plan.

In fact, Master Plans are generally not explicit as to all specific use types or design standards that may be permitted in any particular zone. The Master Plan is a policy document that contains general recommendations as to types of land uses. It generally emphasizes goals and objectives for development in each district which is to provide a foundation within which the governing body can put “flesh on the bone” to effectuate the specifics of the Plan. In fact, the statutory terms of “substantially consistent” or “designed to effectuate” is intended to provide a modicum of reasonable discretion to the governing body in the preparation of the specifics of a zoning ordinance or amendment thereto. It is more significant that the basic provisions and objectives of the Master Plan are not substantially or materially undermined or distorted rather than having all specific uses be contained within the Master Plan in order to have it be

considered to be “substantially consistent”. The Defendants’ expert, Ms. McKenzie, presented credible and persuasive testimony on this subject.

In this case, the Ritter Report was clear and unequivocal that Ordinance 2011-15 was substantially consistent with the Master Plan and would effectuate the Township’s continuing goals and objectives for its industrially zoned areas. As to the solar photovoltaic facilities, he indicated that such uses were not addressed in the Master Plan (as they had recently become fashionable and prolific). He noted that the legislature found them to be inherently beneficial uses so that permitting them would benefit the general welfare.

Mr. Ritter determined that all of the uses contemplated by Ordinance 2011-15 were “in keeping with the goals and policies of the Land Use Element of the Township Master Plan that encouraged industrial development south of Route 57 (Norfolk Southern Railroad Right of Way). Mr. Ritter also determined that the proposed manufacturing facilities (resource recovery, asphalt and concrete manufacture) were compatible with existing uses in the affected portion of the “ROM” Zone and that their inclusion would be “a logical extension of the current land use pattern in that area”.

Mr. Ritter’s revised Report of October 7, 2011 provided:

The provision of proposed Ordinance No. 2011-15 providing for the construction of solar-photovoltaic facilities are not consistent with the Township’s Master Plan. The Master Plan does not address their development. The proposed amendments are intended to bringing (sic) the Township Land Use Regulations into conformance with State policies governing the construction of such facilities. Their inclusion is in recognition of their status as an inherently beneficial use that is contributing to the welfare of the State as a whole.

The proposed amendments allowing solar-photovoltaic facilities in the HB and “ROM” zones and clarifying what types of manufacturing may be permitted in the “ROM” zone are in keeping with the goals and policies of the Land Use Element and the Township Master Plan that encourages industrial development south of Route 57 (Norfolk Southern Railroad Right of Way). Further, the proposed manufacturing facilities are compatible with existing manufacturing uses located in the “ROM” district that lies south of the railroad. Their inclusion is a logical extension of the current land use pattern in that area and will not change the character of the zone district or have a significant impact on abutting residential neighborhoods. Ordinance No. 2011-15 is substantially consistent with the Land Use Plan Element of the Master Plan and furthers State legislation regarding renewable energy facilities.

(p. 4-5, Ordinance No, 2011-15 Planning Board Report, September 29, 2011, Revised October 7, 2011)

Defendants' expert, Ms. McKenzie, opined that she concurred with Mr. Ritter's findings.

The Court finds that Mr. Ritter's report is supported by fact and policy. His report presented firm conclusions based upon a review of the policies of the Township's Master Plan as carried forward and referenced in more recently adopted Reexamination Reports and Master Plan updates. Clearly the Township was entitled to rely upon Mr. Ritter's report and by so doing their action cannot be characterized as arbitrary, capricious or unreasonable under the circumstances. The lack of specific reference to "asphalt manufacturing" in the Master Plans is not required for a zoning ordinance that includes asphalt manufacturing as one of the conditional uses that are permitted in the zone for it to be a "substantially consistent" use.

iv. Did the Township Planner Properly and Appropriately Review the Township Master Plan in Preparing his Consistency Report for Ordinance 2011-15?

Plaintiffs claim that the Township Planner's findings and conditions in his "consistency report" are not valid because Mr. Ritter did not cite to (and allegedly did not review) the 1976 or 1989 Master Plan in his report. Plaintiffs' expert, Mr. Lydon, testified that it was standard practice for Planners to refer directly to the most recent Master Plan(s) when preparing a "consistency report" and that Mr. Ritter's failure to do so undermines and invalidates his report. Plaintiffs also argue that Mr. Ritter's review was legally deficient because he only reviewed the (Master Plan) Re-Examination Reports in preparation of his report but not the Master Plan itself. Plaintiffs argue that those two documents have different functions and permissible uses.

Notwithstanding Mr. Lydon's opinion, Mr. Lydon inconsistently testified that he did not review the 1989 Township Master Plan before he issued his report that Ordinance 2011-15 was inconsistent with the Master Plan that he had not reviewed.

The Ritter report does list several documents that he did review including (1) the 2004 Reexamination of the Master Plan; (2) the 2005 Master Plan Reexamination Report; and (3) various Master Plan Amendments including the 2004 Open Space and Recreation Plan Update and the 2004 Planning Report entitled "Evaluation of the HB/"ROM" Zone Districts and Recommendation for the Creation of a Planned Commercial/Industrial Development Zone" and the Housing Element adopted on May 24, 2010. Mr. Lydon differentiates the reexamination reports that Mr. Ritter reviewed are not the equivalent of a review of the Master Plan itself. He opines that Master Plans are more forward looking" documents that would contain long and short

term planning policies and goals. He indicated that reexamination documents are designed as “report cards” or guide posts as to how to reach the Master Plan goals. Mr. Lydon also opined that the Master Plan should be reviewed prior to the preparation of any (and every) consistency report by a Planner.

The Court also notes that in rendering his report, Mr. Lydon apparently did not recognize a statement on page 2 of the Ritter Report which provided:

“[t]he 2004 Reexamination Report carried for the goals and objectives slated in the earlier Master Plans (1989, 1996 and 2000). The Master Plan identifies many goals and objectives relating to the growth and development of the Township”

The Ritter Report went on to cite, on page 3, that each of the relevant Master Plans goals and objectives were “carried forward from earlier Master Plans”. Clearly, Ritter’s consistency report contains specific references to both the 1989 Master Plan and the Master Plan Reexamination Report, 2000 update. Both Mr. Ritter and Ms. McKenzie described the Master Plans and periodic reexaminations as evolutionary documents that inherently build upon and rely upon the previous plans. Mr. Ritter credibly testified that prior to preparing his consistency report” he did review the most recent Master Plans and Master Plan updates. In fact, in Mr. Ritter’s report, his analysis and his findings confirm that he reviewed and considered the prior Master Plans as he referenced and adopted the Township’s clear and consistent desire to encourage ratable growth in the ROM Zone.

Also, the 2004 Reexamination of the Lopatcong Township’s Master Plan had been adopted as an amendment to and an update of the Master Plan. Notably, the 2004 Reexamination Report which Mr. Ritter referenced was prepared by him (See Exhibit P-37). Not only was Mr. Ritter’s reexamination report prepared as an update to the Master Plan, but the report also contained a thorough analysis and evaluation of the Township’s past and existing Master Plans including the 1976 and 1989 Master Plans and the Reexamination of Master Plans that have periodically occurred in Lopatcong Township planning history (see pages 2-5 to 2-20). (See Exhibits P-2, 3, 34, 37, 33) Effectively, by referring to his 2004 Reexamination Report, Mr. Ritter was referencing and considering all of the previous Master Plans for the Township as well. Also , it is significant to note that both the 2000 and 2004 Reexamination Reports were adopted by Resolution of the Township Council which indicated that it had been adopted pursuant to N.J.S.A. 40:55D-13. That section of the MLUL specifically references the standards of the notices and the public hearings that are held in order to adopt Master Plans. (Exhibits D-54; P-

35, 36, 37) Not only does the 2004 Reexamination incorporate by reference the prior Master Plans, it effectively constitutes a Master Plan as well.

Notably, William Cox, in his treatise on Zoning and Land Use Administration, indicates that “re-examination reports” may reach the conclusion that no changes are necessary to the existing Master Plan, in which event no further action is required. Only when specific changes are recommended that the Master Plan should be amended.

Mr. Ritter and the Defendants’ expert, Ms. McKenzie, both opine that their review of the Lopatcong Township’s Master Plan documents that the Township’s goals and objectives have remained consistent with respect to land use and economic development.

Certainly the purpose of a consistency report is to explain the relationship of the proposed zoning ordinance amendment to the Master Plan for the benefit of the governing body and the public. Mr. Ritter’s report clearly serves that purpose. The Court rejects the Plaintiffs’ position that Mr. Ritter’s failure to cite to the 1976 or 1989 Master Plan renders the Report defective so as to invalidate his report. To so find would raise form over the substance of the Ritter Report in a manner that would cause an illogical, unsupported and inequitable result.

v. Does the Township base the Ordinance Validity upon a claim that an asphalt plant is Inherently Beneficial?

Plaintiffs’ claim that the Defendants have attempted to “save” the Ordinance by claiming that an asphalt plant which has a renewable energy component is an inherently beneficial use. Plaintiffs point out that the governing body approved the Ordinance on that basis.

In fact, although inherently beneficial uses are generally non-commercial, various profit-making ventures have been deemed to be inherently beneficial. Examples of inherently beneficial commercial uses include private, for-profit senior citizen congregate-care facilities, Kunzler v. Hoffman, 48 N.J. 277, 288 (1966); Jayber, Inc. v. Township of W. Orange, 238 N.J. Super. 165, 174-75 (App. Div. 1990) (a 120-bed nursing home); Urban Farms, Inc. v. Borough of Franklin Lakes, 179 N.J. Super. 203, 212 (App. Div.), *certif. denied*, 87 N.J. 428 (1981) (a private day-care nursery); Three L Corp. v. Newark Board of Adjustment, 118 N.J. Super. 453, 457 (1972) (and a tertiary sewage treatment plant to serve a commercial trailer park); Wickatunk Village, Inc. v. Township of Marlboro, 118 N.J. Super. 445, 452 (Ch. Div. 1972).

The Court agrees that there is no evidence that an asphalt plant is an inherently beneficial use. Also, the Defendant Township did not indicate any such intention on the record that such was the basis for its passage. The Court agrees that the Defendants cannot rely on a portion of

the Ordinance that permits solar and photovoltaic uses as “inherently beneficial uses” in order to bootstrap inclusion of an asphalt plant as an inherently beneficial category of uses. The Court finds the approval of the portion of the Ordinance that pertains to the Asphalt Manufacturing uses cannot be sustained on that basis and, as such, the Court’s reasoning will not be based on the proposition that the Township claims that such a use is inherently beneficial³⁷.

vi. If, To the Extent Ordinance 2011-15 is Deemed Inconsistent with the Lopatcong Master Plan Because Renewable Energy Facilities are Not Mentioned Therein, Does Ordinance 2011-15 Meet the Requirements for the Enactment of Inconsistent Ordinances under N.J.S.A. 40:55D-62a?

Plaintiffs contend that report that was transmitted to the governing body specifically indicated that the proposed ordinance was “inconsistent” with the Master Plan. Plaintiffs argue that in those cases in which the ordinance was “inconsistent” with the Master Plan, other requirements were triggered, including: (1) the inconsistency must be acknowledged; and (2) that there is an obligation by the Township to acknowledge on the record that it was reviewed. Jennings v. Borough of Highlands, 418 NJ. Super. 405 (App. Div. 2011). By virtue of the Defendant Township’s failure to acknowledge the inconsistency, Plaintiffs urge that the Court should declare the Ordinance “a nullity”.

Plaintiffs claim that the governing body must make a record as to the reasons that they are adopting an ordinance that is not consistent with a master plan. N.J.S.A. 40:55D-62 specifies that the Defendant Township’s power to zone is restricted and limited so that and the governing body must follow certain protocol when adopting an ordinance that is inconsistent with the Master Plan. Specifically, N.J.S.A. 40:55D-62 indicates as follows:

- a. The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon. Such ordinance shall be adopted after the planning board has adopted the land use plan element and the housing plan element of a master plan, and all of the provisions of such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements; provided that the governing body may adopt a zoning ordinance or amendment or revision thereto which in whole or part is inconsistent with or not designed to effectuate the land use plan element and the housing plan element, but only by affirmative vote of a majority of the full authorized membership of the governing body, with

³⁷ In fact, the Court does not read the Defendants’ argument to support such a proposition.

the reasons of the governing body for so acting set forth in a resolution and recorded in its minutes when adopting such a zoning ordinance; and provided further that, notwithstanding anything aforesaid, the governing body may adopt an interim zoning ordinance pursuant to subsection b. of section 77 of P.L.1975, c.291 (C.40:55D-90).

Any inconsistency with the master plan requires the governing body to follow two procedural requirements: (1) a majority vote of the full authorized membership of the governing body and (2) a statement of reasons for its decision. Willoughby v. Planning Bd. of Tp. of Deptford, 326 N.J. Super. 158, 165 (App. Div. 1999). A governing body must expressly recognize the inconsistency between the zoning amendment and the master plan, and must adopt a resolution at the time it adopts the inconsistent ordinance or amendment, setting forth the reasons for adoption. Willoughby v. Wolfson Group, 332 N.J. Super. 223 (App. Div. 2000).

The statutory requirements as set forth in the MLUL must be followed in furtherance of its important goal of enhanced planning and its role in the zoning process. *See* the comprehensive review of the importance of planning under the law in Riggs, Supra. at 618-623.

Plaintiffs argue that the governing body was provided with a report from the Township Planner that clearly indicated that the ordinance was inconsistent with the Master Plan. Pursuant to N.J.S.A. 40:55D-62(a), Plaintiffs claim that the governing body was required to state its specific reasons for adopting the inconsistent ordinance provisions and to support its grounds for deviation. Route 15 Associates v. Jefferson, 187 N.J. Super. 481, (App. Div. 1982); Riya v. S. Brunswick, 197 N.J. 184, 193 (2008). By the Defendant Township's failure to do so, the Plaintiffs argue that the governing body failed to fulfill its mandatory obligations.

Plaintiffs note that by failing to timely comply with the "reason resolution" renders the ordinance invalid. East Mill Assoc. v. Township Council of East Brunswick, 241 N.J. Super. 403 (App. Div. 1990); Route 15 Associates, Supra at 487. As such, Plaintiffs urge that a resolution adopted after-the-fact should be found non-compliant with the dictates of N.J.S.A. 40:55D-2. East Mill Assoc. v. Township Council of East Brunswick, 241 N.J. Super. 403 (App. Div. 1990). Plaintiffs contend that even if the governing body can now articulate reasons for the adoption of the ordinance, it cannot save this particular ordinance from being determined to be defective and null and void for their failure to meet the statutory guidelines for passage of enactments of this kind.

The Lopatcong Master Plan does not mention solar or photovoltaic facilities as permitted uses in any of its zones, including its "ROM" zone. Defendants properly point out that "given the

recent ascendancy of such technologies such an omission is not surprising”. The New Jersey Supreme Court noted in Manalapan, *supra*, 140 N.J. at 385, that although it would be helpful for a master plan specifically to identify all uses deemed compatible and incompatible in a particular zone “in reality ‘planners and planning boards cannot think of everything and new uses come into existence fairly regularly.’ ” (citing William M. Cox, New Jersey Zoning and Land Use Administration, § 40–2 at 581 (1994 ed.)).

In 2009, New Jersey enacted a statute establishing “wind, solar or photovoltaic facilities or structures” to be among the uses recognized by the MLUL to be an “Inherently beneficial use.” N.J.S.A. 40:55D-4. At the same time, New Jersey established that “renewable energy facilities”³⁸ shall be a permitted use within every industrial district of a municipality on lots comprising 20 or more contiguous acres owned by the same person. N.J.S.A. 40:55D-66.11.

New Jersey also adopted an aggressive Renewable Portfolio Standards program requiring 22.5 percent of energy consumed in the state to be from renewable energy sources by 2021, with 2.12 percent of that requirement set aside for solar. N.J.A.C. 14:8-2.3; see also The Solar Energy Advancement and Fair Competition Act, P.L. 2009, c. 289.

In April, 2011, Defendant Township asserts that in response to the recent legislation regarding such renewable energy facilities the Defendant Township and Planning Board recognized that (i) such facilities can consume large amounts of land; and (2) that the Lopatcong Zoning Ordinance did not address such renewable energy facilities. As a result, the Lopatcong Planning Board began consideration of a draft ordinance 11-07 to address the issues presented by the rapidly ascending development possibilities. The Defendants contend that the ordinance was to “fill the void” in Lopatcong’s zoning ordinance regarding renewable energy facilities and to “adequately provide for their orderly use and development of township land”.

The Defendants tout that shortly thereafter, Lopatcong was successful in attracting the interest of Defendant “189 Strykers Road Associates” to purchase and develop a lot within the “ROM” zone south of the Norfolk Southern Railroad Right of Way for use as an asphalt plant³⁹.

³⁸ Defined as “a facility that engages in the production of electric energy from solar technologies, photovoltaic technologies, or wind energy.”

³⁹ The Plaintiffs counter that the Defendants’ claim in that regard is simply justification and corroboration that the Defendant applicant and the Defendant Township are so closely connected that it is evident that their “sole agenda” was to provide an ordinance that would benefit a single developer – the Defendant “189 Strykers”.

Defendants argue that although the asphalt manufacturing was already permitted in the “ROM” zone, Lopatcong Township wanted to make it “crystal clear” it was permitted in the “ROM” zone. The Defendants offer, however, that Lopatcong Township also wanted to put certain restrictions on the use and, as a result, the Township opted to make it a conditional use, with one of the conditions being that in order to be a “permitted conditional use” the development had to be located on a property south of the Norfolk Southern Railroad Right of Way. Thus, the Planning Board amended its draft ordinance 11-07 addressing renewable energy uses as mandated by state law and combined it with issues involved in the proposed development of an asphalt plant in the “ROM” Zone. The provisions of the amendment were to make it “crystal clear” that asphalt and concrete manufacturing were permitted (“conditional”) uses in the “ROM” zone and which, for a variety of salutary planning reasons, made the renewable energy, asphalt and concrete uses conditional upon adhering to certain strict standards and being confined to the area south of the Norfolk Southern Railroad Right of Way. Even Plaintiffs’ expert, Mr. Lydon, recognized that since the existing zoning ordinance was not specific concerning the permitted uses within the zone, that from a planning standpoint it was prudent to clarify the issue so that it would be clear that both concrete and asphalt manufacturing uses would be “permitted” conditional uses.

In his October 7, 2011 report to the Lopatcong Township Council, has been admitted into evidence (Exhibit P-21B), Township Planner George Ritter described the enactment of the renewable energy statutes by the New Jersey Legislature as cited above. Mr. Ritter further noted the absence of any reference to solar or photovoltaic facilities in the Lopatcong Master Plan, stating:

The provisions of proposed Ordinance 2011-15 providing for the construction of solar-photovoltaic facilities is not consistent with the Township’s Master Plan. The Master Plan does not address their development. The proposed amendments are intended to bring the Township Land Use Regulations into conformance with State policies during the construction of such facilities. Their inclusion is in recognition of their status as an inherently beneficial use that is contributing to the welfare of the State as a whole.

The proposed amendments allow solar-photovoltaic facilities in the HB and “ROM” zones and clarifying what types of manufacturing may be permitted in the “ROM” zone are in keeping with the goals and policies of the land-use element of the Township Master plan that encourages industrial development south of Route 57 (Norfolk Southern railroad right-of-way).

Although Mr. Ritter stated that the solar-photovoltaic provisions of Ordinance 2011-15 are not consistent with the Lopatcong Master Plan, he also indicates that he has reached this conclusion only because the Master Plan does not address their development at all.⁴⁰ In order to support a finding of inconsistency with the master plan, the provisions of the ordinance must, generally in fact, be inconsistent with (i.e., in direct contradiction) with some aspect of the master plan. Cf. Recchia v. Zon. Bd. of Adj. of Cedar Grove, 338 N.J. Super. 242, 250-252 (App. Div. 2001) (non-specific reference in master plan to need to review and modify split lot zoning not sufficient to support finding of inconsistency of split lot zoning ordinance amendment with master plan); Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 385-86 (1995) (master plan's zone for "mixed commercial uses" held not to support finding of inconsistency with ordinance amendment excluding sale of building supplies in that zone).

Moreover, the balance of Mr. Ritter's report demonstrates the benefits and the substantial consistency of the solar and photovoltaic uses with the Lopatcong Master Plan, in that these uses promote all of the Lopatcong Master Plan goals cited in Mr. Ritter's report, such as: (a) promoting greater flexibility in the type and size of industrial activities that might be incorporated in the "ROM" zone; (b) addressing the disparity between considerable residential growth straining municipal services and budgets and the minimal commercial development to offset such costs; (c) encouraging business development; (d) enhancing the attractiveness of the "ROM" zone to target larger business enterprises; (d) matching the intensity of development to existing facilities in the "ROM" zone south of the Norfolk Southern Railroad; (e) requiring limited public infrastructure to support development, which is of particular importance because future development in Lopatcong may be made to depend on individual subsurface disposal systems for sewage waste disposal since the limited capacity of the systems will severely restrict development opportunities in Lopatcong, thereby making less reliance on infrastructure an important consideration.

The Court finds that the inclusion of the solar and voltaic use provision should not be considered to be "inconsistent" in any event as it was a use that was mandated by State Statute to be an activity that was to be considered "inherently beneficial". The Defendants convincingly

⁴⁰ This Court is not bound by the Mr. Ritter's conclusion that the solar and photovoltaic provisions of Ordinance 2011-15 are not consistent with the Lopatcong Master Plan simply because they are not mentioned therein. Cf. Willoughby v. Twp. of Deptford, 326 N.J. Super. 158 (1999).

argue that a use that has been mandated to be inherently beneficial could hardly be also considered to be inconsistent with a local Master Plan. Once the State legislated that such uses were of a type and category to be a recognized statewide benefit that was consistent with the purposes of zoning, it could not also be said to be inconsistent with the planning goals for the municipality. Unmentioned does not equate to inconsistency.

Also, even if the solar and photovoltaic use provisions in Ordinance 2011-15 may be considered to be inconsistent with the Lopatcong Master Plan because they are not mentioned therein, Lopatcong Township Council's enactment of Ordinance 2011-15 complied with the requirements for the enactment of inconsistent ordinances set forth in N.J.S.A. 40:55D-62a.

Although N.J.S.A. 40:55D-62a seeks to ensure substantial consistency between the master plan and proposed ordinance, its scheme is not inflexible. East Mill Associates v. Tp. Council of Tp. of East Brunswick, 241 N.J. Super. 403, 406 (App. Div. 1990). Thus, "[a] zoning ordinance need not be consistent with the plan, provided the inconsistency is the result of a reasoned decision to deviate. Id. In order to enact an inconsistent ordinance, N.J.S.A. 40:55D-62a requires the vote of a majority of its full authorized membership and that it record the reasons for adopting an inconsistent ordinance. The Court finds that even though not required, the evidence supports that the Lopatcong Township Council has met these two requirements.

First, the Township Council enacted Ordinance 2011-15 by an affirmative vote of 3 of its 5 members⁴¹ which met the applicable statutory requirement.

Second, the reasons for enactment of Ordinance 2011-15, despite the purported inconsistent solar and photovoltaic use provisions, are set forth at length in the extended preamble of the Ordinance, with eight of the twelve preamble paragraphs devoted solely to the reasons for enacting the solar and photovoltaic provisions of the Ordinance.

Those provisions provide:

Solar and photovoltaic energy facilities. Solar or photovoltaic energy facilities or structures shall be permitted, subject to the following provisions:

(a) Minimum lot area shall be 20 acres.

(b) Solar or photovoltaic energy facilities and structures shall not occupy any area beyond the required principal building setbacks for the zone in which the

⁴¹ The other two members of the Lopatcong Township Council abstained on the vote.

facility is to be located and they shall not be located within 200 feet of the boundary of a residential zone or residential use.

(c) No portion of solar or photovoltaic energy facilities and structures shall occupy areas of land designated by NJDEP as floodplains, flood hazard areas, wetlands, wetland transition areas or riparian corridors. A three-hundred-foot buffer shall be maintained from NJDEP designated Category One waters.

(d) No soil shall be removed from any site upon which solar or photovoltaic energy facilities and structures are to be constructed. Within areas containing prime farmland soils and farmland soils of statewide significance, as identified by the USDA Natural Resources Conservation Service, there shall be no concrete footings constructed to support solar or photovoltaic racking systems or other structures in order to more readily enable the potential future use of these areas for active agricultural uses. Concrete pads for inverters and similar equipment and concrete footings for security fencing may be constructed within areas containing these soils. Grading within prime farmland and farmlands of statewide significance shall be limited to only that necessary to construct access roads and for construction of equipment pads.

(e) Solar or photovoltaic energy facilities and structures shall be screened from the public traveled way, preserved open space, preserved farmland and national- or state-registered historic resources or from adjoining residential uses or zones, with said screening by a combination of berms, landscaping and fencing.

(f) The maximum permitted vertical height above ground for solar energy panels shall be eight feet.

(g) All electrical wires servicing a ground-mounted solar system, other than the wires necessary to interconnect the solar panels and the grounding wires, shall be located underground.

(h) The design of solar energy systems shall, to the extent reasonably possible, use materials, colors, textures, screening and landscaping that will blend into the natural setting and existing environment.

(i) The installation of a solar energy system shall be in compliance with the National Electric Code as adopted by the NJ Department of Community Affairs.

(j) Energy systems that connect to the electric utility shall comply with the New Jersey Net Metering and Interconnection Standards for Class I Renewable Energy Systems and as required by the electric utility servicing the parcel.

(k) A maintenance plan shall be submitted for the continuing maintenance of all plantings. All ground areas occupied by the solar energy facility or structure installation that are not utilized for access driveways shall be planted and maintained with low maintenance sun- and shade-tolerant grasses for the purpose

of soil stabilization. The "OVN" seed mixture provided through the South Jersey Farmers Exchange (856-769-0062) is suitable for these purposes. It is a mixture of 40% perennial rye grass, 30% creeping fescue and 30% chewing fescue applied at a rate of five pounds per 1,000 square foot.

(l) A grading and drainage plan shall be submitted under the seal of a licensed professional engineer and shall provide the details to adequately demonstrate to the reviewing agency that no stormwater runoff or natural water shall be so diverted as to overload existing drainage systems or create flooding. Calculations shall be provided to adequately demonstrate that existing preconstruction stormwater runoff rates shall not be exceeded in the post development condition.

(m) Solar energy facilities and structures shall not result in reflective glare as viewed from second story level (20 feet above ground) on adjoining properties.

(n) Site plans and zoning permit applications for solar energy systems shall be accompanied by standard drawings of the solar panels, inverters, substations and any other required structures. The design shall be signed and sealed by a professional engineer, registered in the State of New Jersey, certifying that the design complies with all of the standards set forth in all applicable codes then in effect in the State of New Jersey and all sections referred to hereinabove.

(o) All photovoltaic facilities including all solar arrays and associated equipment shall be dismantled and removed promptly after 180 continuous days of nonuse. Applicants shall be required to submit a decommissioning plan at time of site plan application is filed for approval.

The Lopatcong Township Council's recitation of its rationale for enacting the solar and photovoltaic provisions in the ordinance itself thereby met the second requirement in the statute for inconsistent ordinances.⁴² Cf. Hartz Mountain Industries v. Planning Board of Ridgfield Park, 2004 WL 4076238 (App. Div. 2004) (governing body's resolution set forth rationale for adopting consistent and inconsistent provisions in ordinance). Therefore, even if the Court were to find that the "solar photovoltaic" portions of the Ordinance were "inconsistent" with the Master Plan, the Lopatcong Township Council met both statutory requirements for passage of an inconsistent ordinance under N.J.S.A. 40:55D-62a.

⁴² A statement in the resolution of the rationale for adopting an inconsistent ordinance fully satisfies this statutory requirement, despite the complete absence of a repetition of such reasoning in the governing body minutes. Mahwah Realty Associates, Inc. v. Tp. of Mahwah, 420 N.J. Super. 341, 350-52 (App. Div. 2011) (reversing Judge Jonathan Harris's trial court opinion requiring the reasons be set forth in both the resolution and the minutes and referring to Judge Learned Hand's admonishment that the most likely way to misinterpret a statute is to read the words too literally).

I. **Even if the Solar and Photovoltaic Provisions of Ordinance 2011-15 are Deemed Inconsistent with the Lopatcong Master Plan, and even if the Lopatcong Township Council is Determined to Have Failed to Comply with the Requirements for Inconsistent Ordinances under N.J.S.A. 40:55D-62a. in Connection with Those Provisions, Should The Severability Provision in Ordinance 2011-15 Be Given Effect, Preserving the Separate and Distinct Balance of the Ordinance Relating to Asphalt and Concrete Manufacturing Facilities?**

Plaintiffs argue that the fact that the Defendant Township's Planner found that part of Ordinance 2011-15 is consistent with the Master Plan while another portion was inconsistent does not mean that the Court should interfere and rewrite the Ordinance by severing portions of the Ordinance that may be found to be invalid. The Court should not be required to do what the governing body was required to do and parse out the portion that is inconsistent. See Gallo v. Mayor and Tp. Council of Lawrence Tp., 328 N.J. Super. 117, 127 (App. Div. 2000).

Ordinance 2011-15 contained the following severability clause:

Severability. The various parts, sections and clauses of the Ordinance are hereby declared to be severable. If any part, sentence, paragraph, section or clause is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder off [sic] this Ordinance shall not be affected thereby. (See Exhibit P-20)

The issue of severability comes down to legislative intent. Affiliated Distillers Brands Corp. v. Sills, 60 N.J. 342 (1972) (per curiam). The incorporation in the ordinance of a severability clause evinces a legislative intent favoring severability in the event a provision thereof is found otherwise invalid by a court of competent jurisdiction and gives rise to a "strong presumption of severability." ARC of New Jersey, Inc. v. State of New Jersey, 950 F. Supp. 637, 647 (D. N.J. 1996).⁴³

Courts will enforce the severability of a zoning statute if the invalid portion is independent and the remaining portions form a complete act within themselves. Inganamort v. Borough of Fort Lee, 72 N.J. 412, 423 (1977). Where the invalid portion is functionally independent of the rest of the ordinance and the purpose of the enactment would be fully carried out without the severed portion, a court will hold a municipal ordinance severable. Id. In

⁴³ Even without a severability clause, the balance of a statute will be declared operative if the objectionable provision can be excised without substantial impairment of the general purpose of the statute. Cockerline v. Menendez, 411 N.J. Super. 596, 626 (App. Div. 2010).

contrast, where the balance of the statute is dependent on the portion sought to be invalidated, severance will not be permitted. New Jersey Retail Merchants Ass'n. v. Sidamon-Eristoff, 669 F. 3d. 374, 397 (3d Cir. 2012). For example, where a provision defining terms used throughout a statute cannot be severed from the remainder of the statute without rendering the remainder of the statute containing such defined terms meaningless or confusing, the dependency of the remaining statute on the definitional provision to be excised will defeat severability. Id.

In this case, Defendants argue, in the alternative, that Ordinance 2011-15 contains a “broad” severability clause which demonstrates the Lopatcong Township Council's intent to permit the balance of the ordinance to be effective and to operate even if certain other provisions are determined by a court of competent jurisdiction to be invalid. The incorporation of this severability clause in the Ordinance 2011-15 gives rise to a strong presumption of severability. Further, the provisions of Ordinance 2011-15 that deal with solar and photovoltaic facilities are in completely separate sections from those provisions dealing with asphalt and concrete manufacturing facilities. Thus, the sections of Ordinance 2011-15 amending sections 243-74 and 243-75 (A) (12), (B) (3) and (C) (4) are solely concerned with solar and photovoltaic facilities and can be easily excised from Ordinance 2011-15 without affecting in any way remainder of the ordinance. The Defendants also argue that the enforcement of the severability provision in Ordinance 2011-15 will also not impair the overall objective of the ordinance, which is the development of the industrial “ROM” zone south of the Norfolk Southern Railroad Right-of-Way.

Plaintiffs argue that the Defendants cannot now be permitted to sever the Ordinance “in order to save it” since there is no justification for such a measure. Plaintiffs contend that severability is a question of legislation intent so that the intent must be analyzed on whether the “objectionable feature of the statute can be excised without substantial impairment of the principal object of the statute”. NJ Chapt., Am. I.P. v. NJ State Bd. of Proof Planners, 48 N.J. 581, appeal dismissed and cert. denied (1967); Angermeir v. Borough of Sea Girt, 27 N.J. 298, 311 (1958). Plaintiffs argue that our Supreme Court in Washington National Ins. Co. v. Board of Review, 1 N.J. 545 (1949), stated:

Severability is a question of intention The rule of severance is in aid of the intention; and to be capable of separate enforcement, there must be such manifest independence of the parts as to clearly indicate a legislative intention that the constitutional insufficiency of the one part would not render the remainder inoperative. The doctrine of separability is one to be applied with caution, for in

the enforcement of valid elements of a statute containing invalid elements also, there is a danger of judicial usurpation of the legislative power. [at 556]

See also, Affiliated Distillers Brands Corp. v. Sills, 56 N.J. 251, 265 (1970). Conversely, where the provisions of an ordinance are separable, the invalidity of one or more of the separate parts does not render the entire ordinance invalid, provided the remainder contains the essentials of a complete enactment. Gilman v. Newark, 73 N.J. Super. *supra*, at 601; Kennedy v. Newark, 29 N.J. 178 (1959).

Here, Plaintiffs argue that the Ordinance cannot be separated without removing its essential components. To do so, Plaintiffs argue, that it would run counter to the intention of the Ordinance which Plaintiff describes as “to authorize the development of a single piece of property to become an asphalt plant.”

The Court’s findings concerning the Defendant Lopatcong’s compliance with the requirements for “inconsistent ordinances” under N.J.S.A. 40:55D-62(a)⁴⁴ does not necessitate a finding requiring the severability of the portions of the Ordinance that are in issue in this case. Notwithstanding the Court’s finding, in the alternative, the Court finds that severability would be appropriate had the Court’s ruling been different. The severability clause in the Ordinance demonstrates the Township’s intent that favors severability had the Court’s ruling invalidated other portions of the Ordinance. Affiliated Distillers Brand Corp., *supra.*; ARC of New Jersey, Inc., *supra.* at 647. The Defendant Township demonstrated a clear desire and intent to amend its Ordinance to designate asphalt plants as a conditional use within the “ROM” Zone. In fact, they confirmed their intent by passing it twice. The provisions relating to asphalt plants and solar and voltaic uses are easily and clearly separable. Not only are the Ordinance section numbers clearly and separately delineated, but the purposes and effects are independent and are not intertwined in any conceivable manner. These distinct uses were placed together only as a matter of convenience since the time for the proposed enactment coincided. The Court would have to completely ignore the surrounding circumstances in order not to sever either use from the other and thereby tie an anchor around the leg of a perfectly legal enactment and tossing it overboard in contravention to the clear desires of the municipal fathers.

⁴⁴ See Pages 84 to 91 *supra*.

In this case, the portions of the Ordinance that addresses asphalt plants and solar and photovoltaic facilities are clearly separate and distinct. The removal of either component does not affect the other. In fact, it creates an anomaly for the Plaintiff to even argue that they are so related that they cannot be separated when they also argue that the asphalt plant was simply “an add on” that was unrelated to the solar energy component of the law that was clearly added to address the recent legislation regarding renewable energy facilities.

As such, the Court’s finding is that the provisions are severable in any event so that the Court’s findings concerning the Defendant Township’s compliance with the requirements for inconsistent ordinances is not critical to the Court’s ultimate finding and result.

POINT V

DOES ORDINANCE 2011-15 CONSTITUTE SPOT ZONING?

A. **Standard of Review**

Plaintiffs argue that Ordinance 2011-15 is also invalid as its contents and the circumstances of its passage constitute illegal spot zoning.

Under New Jersey law, “Municipalities do not possess the inherent power to zone. They possess that power, which is an exercise of the police power, only insofar as it is delegated to them by the legislature”. Riggs, Supra. at 610, citing Taxpayer Association of Weymouth Township v. Weymouth Township, 80 N.J. 6, 20 (1976).

Pursuant to Article III of the New Jersey Constitution, the State Legislature is given the authority to regulate land use within the State of New Jersey. Article IV, Section VI, paragraph 2 of the State Constitution permits the Legislature to delegate some of its powers to regulate land use to municipalities. The MLUL is the primary enabling statute that confers land use power to the municipalities. The most salient feature of the MLUL is its authorization to municipalities, through their planning boards, to adopt master plans which serve policy statements giving support to municipality’s authority to adopt zoning ordinance or amendments thereto. N.J.S.A. 40:55D-28.

In enacting zoning ordinances or modifications to existing ordinances, municipalities are required to observe the constitutional restraints on the police power they are exercising. As a general proposition, “[A]rbitrary or unreasonable zoning ordinances cannot stand.” Home

Builder's league of South Jersey. Inc. v. Township of Berlin, 81 N.J. 127, 137-138 (1979); see, also Riggs, Supra, at 611.

One constraint on a municipality's police power is that it cannot be exercised so as to create an Ordinance that constitutes so-called "spot zoning".

The New Jersey Supreme Court has defined spot zoning as "the use of the zoning power to benefit particular private interests rather than the collective interests of the community." Taxpayers Association of Weymouth Township, 80 N.J. 6, 18 (1976) cert. denied, 430 U. S. 977 (1977) where a zone change is designed to relieve a property owner from the burden of general regulation it will be stricken as unacceptable "spot zoning". Cresskill v. Dumont, 15 N.J. 238 (1954); Palisades Properties, Inc. v. Brunetti, 44 N.J. 117, 134 (1965); Kozesnik v. Montgomery Twp., 24 N.J. 154, 172-73 (1957). Gallo v. Mayor and Twp. Council of Lawrence Twp., 328 N.J. Super. 117, 127 (App. Div. 2000).

Consistent with this definition and New Jersey case law on the subject, "Spot zoning" is defined more specifically in The Latest Illustrated Book of Development Definitions (Rutgers University Center for Urban Policy Research, 2004) written by Professors Moskowitz & Lindbloom⁴⁵ as:

Rezoning of a lot or parcel of land to benefit an owner for a use that is incompatible with surrounding land uses and that does not further the comprehensive zoning plan. *Comment*: Spot zoning per se may not be illegal; it may only be descriptive of a certain set of facts and consequently neutral with respect to whether it is valid or invalid. Hagman (1975) states that **spot zoning is invalid only when all of the following factors are present: (1) a small parcel of land is singled out for special and privileged treatment; (2) the singling out is not in the public interest but only for the benefit of the landowner; and (3) the action is not in accord with a comprehensive plan.** See *Kozesnik v. Township of Montgomery*, 24 N.J. 154, 131 A.2d 1 (1957); *Borough of Cresskill v. Borough of Dumont*, 15 N.J. 238, 104 A.2d 441 (1954); and *Jones v. Zoning Board of Adjustment of Long Beach Twp.*, 32 N.J. Super. 397, 108, 498 (1954). [Emphasis added]

⁴⁵ All of the planning experts in this case agree that the Moskowitz-Lindbloom treatise is authoritative on the subject.

Id. at 378.⁴⁶ See also Kozesnik, *supra*, 24 N.J. at 173-173. See also, Borough of Cresskill, *Supra.* at 249; Palisades Properties, Inc. v. Brunetti, 44 N.J. 117, 134 (1965); Hyland v. Mayor and Tp. Comm. of Tp. of Morris, 130 N.J. Super. 470, 477-478 (App. Div. 1974), *aff'd o.b.* 66 N.J. 31 (1974); Wallington Home Owners v. Bor. of Wallington, 130 N.J. Super. 461 (App. Div. 1974), *aff'd o.b.* 66 N.J. 30 (1974).

All parties acknowledge that all three factors must be present in order to support a finding of spot zoning.

Spot zoning has alternatively been described as “re-zoning a lot or parcel of land to benefit an owner...and not for the purpose or effect of furthering the comprehensive zoning plan.” William M. Cox, New Jersey Zoning and Land Use Administration, *supra* §34-8.2, citing Moskowitz & Lindbloom, The Illustrated Book of Development Definitions. Center for Urban Policy Research. Rutgers University (1992). If the purpose of the zoning amendment solely is to serve the private interests of the owner, “there is a perversion of power” and the zoning ordinance must be stricken. Kozesnik, *supra*, 24 N.J. at 173-173. See also, Borough of Cresskill, *Supra.* at 249; Palisades Properties, Inc. v. Brunetti, 44 N.J. 117, 134 (1965); Hyland v. Mayor and Tp. Comm. of Tp. of Morris, 130 N.J. Super. 470, 477-478 (App. Div. 1974), *aff'd o.b.* 66 N.J. 31 (1974); Wallington Home Owners v. Bor. of Wallington, 130 N.J. Super. 461 (App. Div. 1974), *aff'd o.b.* 66 N.J. 30 (1974). In Rocky Hill Citizens v. Planning Bd., 406 N.J. Super. 384, 407-408 (App. Div. 2009), the court found that rather than relieving the property owner from the burden of a general regulation, the zoning complained of simply gave the general regulation specific effect. In the case of 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 v. Twp. Council of S. Brunswick, 197 N.J. 184, 198–99 (2008).

Significantly, the burden of proof that a zoning ordinance constitutes illegal spot zoning lies with party challenging the ordinance. Taxpayers Ass'n of Weymouth Twp., *supra*, 80 N.J. at 19.

⁴⁶ Inverse spot zoning has the same three elements and refers to a land use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. Manalapan Realty, L.P. v. Twp. Comm. of Tp. of Manalapan, 272 N.J. Super. 1, 13 (1994) (citing Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 132 (1978)).

Because spot zoning cases are particularly fact-sensitive, they often require an evidentiary hearing and presentation of evidence to the Court. See Jennings v. Borough of Highlands, 418 N.J. Super. 405, 425-427 (App. Div. 2011). In Jennings, the lower court denied the Plaintiff an expert planner and dismissed her claim of spot zoning, which did not allow the litigant a “fair opportunity to prove the elements of the cause of action”. Id. at 426. See also Tennis Club Assocs. v. Planning Bd. of Teaneck, 262 N.J. Super. 422, 432, (App.Div.1993) (purely legal issue as to whether an ordinance violated the MLUL is to be decided by the court); Cherney v. Matawan Borough Zoning Bd. of Adjustment, 221 N.J. Super 141, 144-45, (App.Div.1987) (interpretation of the ordinance against undisputed facts is a judicial function). In this case, the Court has conducted an evidentiary hearing on the issue.

In Riya Finnegan v. Twp. Council of Twp. of South Brunswick, 197 N.J. 184 (2008), the New Jersey Supreme Court referred to Petlin Assocs., Inc. v. Twp. of Dover, 64 N.J. 327 (1974) as its most extended discussion of the concept of spot zoning. As described by the Court in Riya Finnegan, the case of Petlin involved a municipality’s enactment of a change in zoning to preclude the proposed development of one parcel, while rejecting the advice of its professional planner about the effect of the zoning change on the overall plan. Id. at 196. The Riya Finnegan Court noted that although changing a zoning ordinance in response to a site plan application is not presumptively prohibited, the zoning change in Petlin constituted inverse spot zoning because it would have applied a zoning designation to the particular parcel that was both out of character with the surrounding area and designed for a part of town from which the affected parcel was significantly separated. Id.

The Court in Riya Finnegan declared that in any analysis of whether illegal spot zoning had occurred the emphasis is not simply on whether a particular parcel had received beneficial or detrimental treatment, but whether the ordinance constituted arbitrary governmental action. Id. at 197. In those cases when spot zoning has been found to occur, it is the antithesis of planned zoning. Tested against this criteria the Riya Court found the plaintiff had met its burden of proving the three elements needed to demonstrate the challenged ordinance constituted illegal spot zoning, stating:

It is not simply that the zoning for plaintiff’s parcel was changed, or that it will now be more difficult for the owner to develop it in accordance with the new zoning designation when its proposed site plan was completely in accord with the previously-designated zone. It is not only that the neighboring property owners were the impetus for the change, or that the new zone was originally designed for

an entirely different part of the town and for different planning purposes or that the new zone does not further a comprehensive plan. It is not merely that the planning board or the municipality's governing body acted without hearing from expert planners or consultants that makes this ordinance defective. Rather, it is the combination of those facts that marks this decision as an example of inverse spot zoning and makes the choice of the governing body both arbitrary and capricious.

Id.

For instance, where an ordinance re-zoned a lot owned by a bank from residential to office/professional, this did not constitute spot zoning where it served a valid municipal purpose and was consistent with the planning objectives of the master plan. Trust Co. of N.J. v. Planning Board, 244 N.J. Super. 553, 561-567 (App. Div. 1990).

B. Did the Plaintiffs Meet Their Burden Concerning Whether Ordinance 2011-15 Was Substantially Consistent?

The Court will analyze the case on the basis of whether Plaintiff has demonstrated the three required elements required for finding of a “spot zoning”. First, it must be determined whether Ordinance 2011-15 is substantially consistent with the Lopatcong Township Master Plan.

Plaintiffs argue that the facts in this case support the proposition that the Ordinance in question does not further the municipalities’ comprehensive zoning plan.

It is well established that if “an ordinance is enacted in accordance with a comprehensive zoning plan to promote the general welfare, it is not ‘spot zoning.’” Jones v. Zoning Bd. Of Adjustment of Long Beach Twp., 32 N.J. Super. 397, 404 (App. Div. 1954); Manalapan Realty v. Township Committee, 272 N.J. Super. 1, 13-14 (App. Div. 1944). In fact, a zoning ordinance which is enacted to advance the general welfare by means of a comprehensive plan is unobjectionable even if it was proposed or advocated by a private party even if that party was the ultimate beneficiary of the enactment. Taxpayers Ass’n of Weymouth Tp. v. Weymouth Twp., 71 N.J. 249, 262 (1976); Gallo v. Lawrence Twp. Mayor & Council, 328 N.J. Super. 117, 127 (App. Div. 2000).

The Court finds that in this case the evidence supports a finding that Ordinance 2011-15 is consistent with the Lopatcong Township Master Plan. Mr. Ritter’s “consistency report” set forth in a comprehensive manner his recommendations and the Planning Board’s findings

concerning the Ordinance consistency. The Township adopted Mr. Ritter's rationale and findings. There is a clear connection and basis for the Township's findings regarding that issue. Clearly, the Board's finding cannot be said to be arbitrary, capricious or unreasonable.

The Court recognizes that the Plaintiffs' position is based upon its expert's opinion that the inclusion of asphalt manufacturing as a (permitted) conditional use was not a use that was specifically authorized or recognized in the ROM Zone. Plaintiffs' expert opined that the ROM Zone should be interpreted to promote "light industrial uses" but not the use proposed by the Defendant "189 Stryker" which he described as "heavy industrial".

Mr. Lydon testified that to be consistent with the zone plan, he had to be "95% sure" that the use was authorized or permitted. He acknowledged, however, that the "95% standard" was his own personal standard and not one that was supported by the MLUL, any zoning treatise, or, for that matter, in any case law that he could identify. In that regard, expert opinions must relate to accepted standards in the field of expertise, and not merely standards personal to the witness. Fernandez v. Baruch, et al, 52 N.J. 127, 130-31 (1968).

Mr. Lydon also failed to satisfactorily address the reference in the 1976 Lopatcong Township Master Plan that indicated that industrial uses were defined as a "class" of uses that included the production of durable goods – which he acknowledged to include both concrete and asphalt manufacture (Exhibit P-3, pg. 7). He also acknowledged that the Plan referred to consistent industrial uses such as "Steckel Concrete" (Exhibit P-3, pg. 10). Those references were not adequately explained by Mr. Lydon and detracted from the credibility of his opinion.

As a result, and for all of the reasons expressed above, the Court finds that the Plaintiffs did not meet their burden concerning the first element of the spot zoning test.

C. Did Ordinance 2011-15 "Single Out" The Defendants' Parcel for Special Treatment?

Plaintiffs claim that the second prong of the spot zoning test has also been proven in this case. In that regard, Plaintiffs claim that Ordinance 11-07 and 2011-15 do not revise the zoning regulation for the entire zone but rather they only affect a few parcels in the "ROM" Zone south of the Norfolk-Southern Railroad R.O.W. Plaintiffs argue that many of these parcels were already developed with competing land uses and are not available for the construction of an asphalt/ concrete manufacturing facility. The import of Plaintiff's contention is that only the Defendant "189 Stryker Associates" parcel is affected and benefited by the Legislation.

However, the facts and circumstances demonstrate that Ordinance 2011-15 does not single out one parcel of land for special treatment. Ordinance 2011-15 applies to all properties within Lopatcong's "ROM" zone and permits development of the uses specified in the ordinance as conditional uses throughout that zone south of the Norfolk Southern Railroad Right of Way. The evidence adduced at trial substantiates there are approximately 375 acres of land⁴⁷ (approximately 78% of all the industrially zoned land in Lopatcong), comprising 23 separate parcels of property within Lopatcong's southern "ROM" zone. Approximately 15 of these properties are available now for development and another 6 are available with further land assemblage to meet minimum lot size requirements for these uses. Moreover, the conditional uses permitted by Ordinance 2011-15 are not merely for asphalt manufacturing, but also for concrete manufacturing and resource recovery facilities, as well as the solar and photovoltaic uses. The evidence supports the proposition that Ordinance 2011-15 does not single out a single parcel of property for special or privileged treatment and is, in fact, applicable to other parcels, including perhaps the parcel owned by Plaintiff, Precast Concrete. Notably, this portion of the "ROM" Zone (formerly the I-Zone) has repeatedly been the focus of the Township's efforts to promote growth dating back to the first Master Plan in 1959. (ExhibitP-31) In fact, the record indicates that the uses and development standards within the zone were periodically adjusted in hope of attracting growth and development.

New Jersey Courts have been clear that illegal spot zoning will be found only when the challenged ordinance provides such special or privileged treatment to one parcel of property. In Manalapan Realty, L.P. v. Twp. Comm. of Tp. of Manalapan, 272 N.J. Super. 1 (1994), the Court considered an ordinance challenged as constituting illegal spot zoning that was applicable across the district in question. Even though the district was comprised of only two tracts of land, the Court held the concept of spot zoning "plainly does not apply to this case" since the ordinance did not "impose an arbitrary, unique burden on one tract of land." Id. at 13-14.

The fact that the Defendant, 189 Stryker, may acknowledge that the Ordinance may have personal benefits, it does not follow that there are also no valid basis to demonstrate that the Ordinance also furthers the goals of the Master Plan or the purposes of zoning. The Plaintiffs did not present credible evidence that the Ordinance only benefits the single property that is sought

⁴⁷ 383 acres according to Defendants' expert, Ms. McKenzie; 384 acres according to George Ritter.

to be developed by Defendant “189 Stryker”. In fact, it is arguable that Ordinance 2011-15 benefits the Plaintiffs’ property as well as it now legitimizes the Plaintiffs’ existing operation as a permitted conditional use. Given the fact that Plaintiffs’ own arguments have raised questions concerning the validity of Plaintiffs’ use as a permitted and properly approved use, the Ordinance can be said to benefit the Plaintiffs’ property as well.

In fact, the Court has actually found that the Ordinance does further the goals of the Master Plan and the purposes of zoning. The credible evidence before the Court does not support the proposition that Ordinance 2011-15 singled out the Defendant’s “189 Stryker Road” parcel for special treatment.

D. Was the Ordinance Passed as Part of A Comprehensive Plan?

Plaintiffs contend that neither Ordinance 11-07 nor 2011-15 were passed to “further the municipality’s comprehensive zoning plan”. Plaintiffs argue that a comparison of the history of the creation and implementation of the “ROM” zone with the adoption of the zoning amendments encompassed in Ordinances 11-07 and 2011-15 “makes it quite clear that these amendatory ordinances were not passed to further the comprehensive zoning plan of the Township”. Plaintiffs also believe that they have met their burden requiring the “third element” of the test because the Ordinance Amendments clearly benefit Defendant 189 Strykers by providing for allowance of an “around the clock” asphalt operation to operate on 24-hours seven (7) days a week schedule in structures eighty-five feet (85’) tall, separating the use from others and other properties in the “ROM” zone, and thereby serving private interests, rather than enhancing the public interest.

Plaintiffs argue that in order to analyze whether private or community interests are being served by zoning amendments, the Supreme Court in Riggs looked at whether the amendment was the result of changes to the physical conditions of the subject zone district or the general conditions of the Township. Riggs, supra, 109 N.J. at 614. The non-occurrence of any such change is a further indicator of spot zoning. Id. None of the evidence provided in this case, including the public records produced as a part of this litigation, demonstrate proofs to support a finding that physical changes have in fact occurred or that circumstances/conditions relating to the Township itself had changed since the last master plan.

Plaintiff points to testimony that was presented before the Township of Lopatcong Planning Board of the following facts pertaining to the proposed development of an asphalt plant:

- a. The use will generate no less than 300 daily truck trips when the plant is in operation which will saturate the surrounding roadways with massive trucks being driven to a single site within the Township (See, Price Certification, Exhibit 22, Transcript of the Planning Board meeting held on February 29, 2012, Pp. 235: 10 – 235:22).
- b. The use will be permitted to operate on a “24-hour basis seven (7) days a week” basis for asphalt and concrete manufacturing facilities with no relief provided for the residents of the Township from the noise, odor, and traffic which will be on a continuous basis (See, Price Certification, Exhibit 20, Ordinance No. 2011-15); and
- c. The ordinance will allow for structures of eighty-five feet (85’) in height thereby constituting a negative visual impact upon neighboring properties (similar to a cell tower use or billboard). (See, Price Certification, Exhibit 20, Ordinance No. 2011-15);

As such, Plaintiffs argue that the Zoning Ordinance Amendments clearly benefit Defendants 189 Strykers by providing for an “around the clock” asphalt operation on 24-hours seven (7) days a week in structures eighty-five feet (85’), clearly separating the use from others and other properties in the “ROM” zone⁴⁸.

Plaintiffs argue, for instance, that farm silos in the “ROM” Zone are limited to the height restriction of a principle building so therefore the result of the Ordinance will be that neighboring properties will now face dramatically different height limitations depending upon the use of the silo. Notably, however, farms are permitted uses in the “ROM” Zone but according to all of the past and current Master Plans, they are not “preferred uses” in the Zone. The “ROM” Zone district to the south of Route 57 and the Norfolk Southern Railroad Line is intended to accommodate growth and not additional agricultural activity.

Plaintiffs also argue that the “road network will be overwhelmed by the number of trucks being drawn to a single site” and therefore the ordinance is not in the public interest. However, one of the reasons for locating and limiting asphalt and concrete manufacturing facilities to that portion of the “ROM” Zone is for the very reason that the Township has constructed or facilitated new and improved accessibility to that area with the long planned improvements to

⁴⁸ Plaintiffs’ argument did not address the fact that there is no prohibition in any of the Township’s industrial zones that restrict the hours of operation.

Strykers Road. In fact, those improvements were recognized and confirmed in the 2012 Master Plan Reexamination Report as being completed prior to 2008.

As declared by the New Jersey Supreme Court in Taxpayers Assn. of Weymouth Tp., supra, “[a]n ordinance enacted to advance the general welfare by means of a comprehensive plan is unobjectionable even if the ordinance was initially proposed by private parties and these parties are in fact its ultimate beneficiaries.” 80 N.J. at 18 (citations omitted). In fact, a municipality may change its zoning ordinance during the pendency of a site plan application even if the ordinance is amended in direct response to a particular application. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378-79 (1995)⁴⁹. The fact that a landowner may propose a zoning amendment in response does not in and of itself constitute spot zoning.

As Judge Harris stated in Witt v. Borough of Maywood, 328 N.J. Super. 432, 448 (L. Div. 1998): “It is no zoning sin to provide regulations that will encourage the appropriate of land in a commercial district and to attract a particular user to that end.”

The Defendants characterize this case as a policy disagreement between Plaintiffs and the Lopatcong Township Council. The Defendants argue that the Lopatcong Township Council, the duly elected legislative body for Lopatcong Township, thinks that further industrial development of the “ROM” zone south of the Norfolk Southern Railroad Right of Way is in the collective best interests of its citizens and in furtherance of the objectives the Lopatcong Planning Board has repeatedly set forth in the Lopatcong Master Plan over the last thirty years. On the other hand, Defendants indicate that Plaintiffs oppose this further industrial development.

The Court finds that the proposed Ordinance is part of a comprehensive plan. The purpose of the plan is described by the Township as one to encourage industrial development in appropriate areas of the Township. The Township has focused on the “ROM” Zone – and particularly on the portion of the zone that is located south of the Norfolk Southern Railroad R.O.W. - for such development. That focus is apparently due to the southern “ROM” Zone’s proximity and access to Route 22 and I-78 as well as other infrastructure improvements in that area that have been constructed or planned to be constructed by the Township and/or the County

⁴⁹ Ironically, in 2003 it appears that Lopatcong Township passed a Zoning Ordinance Amendment which clarified that Plaintiff Precast’s uses were specifically permitted. The passage of that Ordinance specifically benefited “Precast” and its past, present or future applications before the Planning Board by reaffirming the permitted nature of their use.

Government. The Township's goal was to devise an Ordinance that would improve the prospect of attracting development to that area in order to stabilize the ratable tax base for what is primarily a bedroom community. Mr. Ritter's credible testimony confirmed that the decision to limit the newly proposed conditional uses were based upon prudent and sound rationale and generally accepted planning principals⁵⁰.

Also, Plaintiffs' argument that the proposed Ordinance is contrary to the 1989 Master Plan because it fails to "conserve road capacity" is also not convincing based upon the record before the Court. The Township's Master Plan is replete with references to road and other infrastructure improvements that were planned and encouraged for the very purpose of attracting industrial uses. The Plaintiffs' expert's opinion that the Master Plan does not support the road and infrastructure improvements to support industrial uses is simply not credible based upon the record before the Court.

Ordinance 2011-15 is one component part of the Defendant Township's comprehensive plan to achieve its goals. The Court finds that the Plaintiffs have not met their burden regarding the third prong of the spot zoning test.

For all of the reasons expressed above, the Court finds that Ordinance 2011-15 does not constitute illegal spot zoning.

POINT VI

DOES ORDINANCE 2011-15 NOT VIOLATE THE UNIFORMITY PROVISION OF THE MLUL?

Plaintiffs contend that in this case the "ROM" Zone is not "uniform" since there are different classifications of uses within different areas of the "ROM" Zone. Plaintiffs claim that since the "ROM" Zone is not consistent throughout, it is invalid on its face for its failure to conform to the "uniformity provision" of the MLUL.

The MLUL states that "[t]he 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 . . ." N.J.S.A. 40:55D-62a. This requirement, commonly referred to as the "uniformity provision", is designed to ensure "nondiscrimination to property owners" and to continue "the constitutional

⁵⁰ Mr. Ritter confirmed that the Planning Board did not feel it appropriate to extend the conditional uses to locations in the other ROM zoning areas as their limited size, restricted accessibility and proximity to residential uses made, the siting of those uses in those areas is inappropriate.

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 Borough of Fair Haven, 177 N.J. 338, 357 (2003). In other words, equality of treatment is required. Schmidt v. Bd. of Adj. Newark, 9 N.J. 405, 418 (1952). The principle that use restrictions for a particular zoning district is basic to the local exercise of zoning power by the adoption of ordinances. Rockhill v. Chesterfield Twp., 23 N.J. 117 (1957); Moriarty v. Pozner, 21 N.J. 199 (1956); N.T. Hegeman Co. v. River Edge, 6 N.J. Super. 495 (1950).

The uniformity provision is based upon two general purposes. First, the uniformity provision was an assurance to "potentially hostile landowners that all property which was similarly situated would be treated alike". Robert M. Anderson, *American Law of Zoning*, § 5.22 at 333-34 (2d ed. 1977) (quoting Edward M. Bassett, *Zoning* at 50 (1940)). That uniformity principle essentially gave notice of nondiscrimination to property owners. Anderson, *supra*, §5.22 at 334. The other basis for the uniformity requirement was, and continues to be, the constitutional guarantees of due process and equal protection that guard against the arbitrary and unreasonable exercise of the police power. Roselle v. Wright, 21 N.J. 400, 409-10 (1956).

The New Jersey Courts have been clear that the uniformity provision does not prohibit regulations effecting different treatment for the same uses within a zone, however, so long as the regulations have a rational basis. Thus, the New Jersey Supreme Court in Rumson Estates, *supra*, stated that “[u]niformity is not absolute and rational regulations based on different conditions within a zone are permissible so long as similarly situated property is treated the same.” *Id.* at 359. The key is that any distinction must have a reasonable basis. *Id.*

Uniformity "does not prohibit classifications within a district so long as they are reasonable." Quinton v. Edison Park Dev. Corp., 59 N.J. 571, 580, (1971) (interpreting uniformity requirement to allow distinctions among uses within given zone so long as distinctions are not arbitrary and unduly discriminatory); State v. Gallop Bldg., 103 N.J. Super. 367, 371 (App.Div.1968) (upholding zoning ordinance providing special buffer zone requirements for property in business zone that border on residential zone). "Constitutional uniformity and equality requires that classification be founded in real and not feigned differences having to do with the purpose for which the classes are formed." Roselle, *supra*, 21 N.J. at 410, (citations omitted).

Constitutional uniformity and equality demands zoning be by districts according to the "nature and extent" of the use of land and buildings, serve statutory policy considerations, and

that regulations have reasonable regard to the "character of the district and its peculiar suitability for particular uses." Katobimar Realty Company v. Webster, 20 N.J. 114 (1955).

Plaintiff claims that the "ROM" Zone as it is now constituted within the modification mandated by Ordinance 2011-15 is not consistently zoned throughout the zone and there is no reasonableness to the distinctions in classification. Specifically, Plaintiffs point out the height can vary between 45' and 60' permitted number of stories for some property is 4 and for other it is 3 stories and FAR also varies. Plaintiffs also argue that Ordinance 2011-15 intensifies the inconsistencies since it only permits asphalt plants in one part of the "ROM" Zone while excluding such plants from other parts of the zone. Such a classification, Plaintiff claims, violates the "uniformity provision" since it does not provide equal protection to other individuals within the same zone. As a result, Plaintiffs argue that the classification simply renders the ordinance indefensible and invalid⁵¹.

The Rumson Estates Court cited longstanding case law in New Jersey that "clearly established that uniformity 'does not prohibit classifications within a district so long as they are reasonable.'" Id. at 358 (*quoting* Quinton v. Edison Park Dev. Corp., 59 N.J. 571, 580 (1971) (interpreting uniformity requirement to allow distinctions among uses within given zone so long as distinctions are not arbitrary and unduly discriminatory)); *see also*, Schmidt v. Board of Adjustment, Newark, 9 N.J. 405, 418 (1952) (classification within a district is consistent with the uniformity principle, if it is reasonably based on the public policy to be served).

Therefore, ordinances creating distinctions within a zone will be allowed as long as they are "real and not feigned and that they advance and are reasonably related to the purposes of zoning." Rumson Estates, *supra*, 177 N.J. at 361.⁵²

For instance, in Rumson Estates, the plaintiff challenged a steep slope ordinance that applied different standards and requirements based on the topography of each particular property

⁵¹ Plaintiffs' expert, Mr. Lydon, also pointed out that the Township's ROM Zone contained certain inconsistencies even prior to the passage of Ordinances 11-07 and 2011-15. Mr. Lydon effectively conceded that if his opinion on the issue of uniformity is logically extended, that the prior ROM Ordinance is also voidable as not being in compliance with the uniformity provision. Plaintiffs' complaint did not plead for relief concerning the prior Ordinance. The Court is mindful, however, that Plaintiffs' expert's opinion, if logically extended, would provide for incongruous, anomalous, illogical and perhaps drastic results.

⁵² In Rumson Estates, the New Jersey Supreme Court also stated that this same conclusion had been reached by sister jurisdictions that have had occasion to interpret similar uniformity language, citing a string of out of state cases approving ordinances containing reasonable restrictions based on different conditions within a zone. Id. at 358.

within the district. The Court stated that “[p]laintiffs broadly misinterpret that uniformity principle to mean there can be no differences in the regulation of property within a zone.” Id. at 357. The Court pointed out, however, that such an ordinance was not invalid simply because it created varying results based upon a parcel's unique physical conditions or characteristics. Despite a disagreement over whether the steep slope ordinance would be effective towards its goal of preventing soil erosion, the New Jersey Supreme Court upheld the ordinance, concluding that this difference of opinion was not sufficient to overcome the "no discernible reason" standard that is applied to determine the ordinance's validity and rejecting the plaintiffs' "crabbed interpretation" of the uniformity provision. Id. at 358-60.

In fact, when an ordinance is reasonable in scope, it has been uniformly upheld as proper and not violative of the uniformity clause despite its unequal effect on properties within the zone. State v. Gallop Bldg., 103 N.J. Super. 367, 371 (App. Div. 1968) (citing Honigfeld v. Byrnes, 14 N.J. 600 (1954) (upholding an ordinance for a commercial zone which required a buffer zone to be placed on certain properties which border a residential zone).

Notably, Courts today inside and outside of New Jersey generally interpret such a uniformity requirement to prohibit only unreasonable discrimination between nearby lands or uses – the same standard for equal protection claims. Rathkopf's The Law of Zoning and Planning, Section 4.8 “Lack of statutorily required ‘uniformity’ ” (citing among other cases Quinton v. Edison Park Dev. Corp., 59 N.J. 571, 580 (1971) (finding that an ordinance requiring a buffer strip for certain properties based upon size and location within the zone did not violate the uniformity requirement because all similarly situated properties were treated the same.).

For example, in Montgomery County v. Woodward & Lothrop, Inc., 280 Md. 686, 376 A.2d 483 (1977), the Maryland Supreme Court held that there was no violation of the statutory uniformity requirement by an ordinance requiring that a certain portion of the floor area ratio be designated for parking in a particular central business district, but not imposing the same requirement on another central business district, where there were valid reasons advanced for this distinction.

The Defendants contend in the present case there are valid and sound reasons for the provisions in Ordinance 2011-15 that allows certain conditional uses only in the southern “ROM” zone within Lopatcong. The Defendants point to the Lopatcong Planning Board's report to the Township Council, and to the Lopatcong Master Plan, indicating that the “ROM” zone south of Norfolk Southern Railroad Right of Way has different characteristics from the rest of

the “ROM” zone. The Defendants offer that its larger overall area and its proximity and access to major highways and road systems allow for different industrial development to take place there as compared to the rest of the “ROM” zone. The southern section of the “ROM” zone also has larger lot sizes for larger scale industry that could not be accommodated in the northern and western “ROM” zones. Furthermore, the Defendants contend that consistent with specific direction in the Lopatcong Master Plan, Lopatcong has planned and constructed substantial improvements to Strykers Road, which traverses the southern “ROM” zone, in order to accommodate trucks and other commercial/industrial vehicles and provide them with easier access to the surrounding highways. The Defendants indicate these distinct characteristics made this southern section of the “ROM” zone ideal for further industrial development and for the location of asphalt and concrete manufacturing plants. Variation in the height of buildings and FAR were enacted in order to attract these types of industries to Lopatcong. The Court agrees that the credible evidence supports the Defendants’ positions. Although it can be argued that the Ordinance provisions as they are now constituted in the “ROM” Zone are not uniform, there is a rationale and reasonable explanation for the distinction. The distinctions are therefore not arbitrary, capricious nor are they discriminatory.

Plaintiffs also argue that Ordinance 2011-15 made asphalt and concrete manufacturing, resource recycling and solar and photovoltaic facilities conditional uses only in the southern “ROM” zone. The Defendants contend that the Plaintiff’s arguments are not logical since by the very definition of a conditional use, conditional uses would be prohibited because they cannot be uniformly applied throughout a zone. The Defendants characterize Plaintiffs’ “overly prohibitive interpretation” of the uniformity clause as one that, if accepted by this Court, would work a revolution in zoning jurisprudence in New Jersey, by essentially undermining all conditional use ordinances.

The MLUL specifically authorizes municipalities to allow and regulate certain uses as conditional uses. Conditional uses are considered uses that are compatible with the character of a neighborhood and the intent and purpose of the zone provided specific conditions are met. By their nature, conditional uses permit a use within a zone based upon meeting certain specified conditions or standards. Invariably, not all properties within a zone will be able to meet these conditions, creating some element of inequality among properties within a district. The MLUL does not restrict the kinds of conditions that can be incorporated into a conditional use ordinance. Conditional uses can be based on available roadway improvements, sewage service, water

supply, proximity to other land uses (with which they might conflict) as well as a site's acreage, frontage, environmental features and the like.

In fact, a conditional use ordinance is expressly permitted to include locational standards among the conditions imposed for a particular use. N.J.S.A. 40:55D-4 states a “ ‘Conditional use’ means a use permitted in a particular zoning district only upon a showing that such use **in a specified location** will comply with conditions and standards for the location or operation of such use as contained in the zoning ordinance, and upon the issuance of an authorization therefor by the planning board [emphasis added].” The conditional use mechanism allowed the Township to impose both permissive and restrictive design and development standards for asphalt and concrete plants in the “ROM” Zone. Even Plaintiff’s expert, Mr. Lydon, testified and acknowledged that “conditional uses” are generally considered to conform with the “uniformity clause” even when they permit certain uses at only specified locations within a zoning district.

Ordinance 2011-15 makes asphalt and concrete manufacturing, resource recycling and solar and photovoltaic facilities conditional uses in the southern “ROM” zone. The Court does not find Ordinance 2011-15 an unusual, extraordinary or improper application of a conditional use ordinance. Ordinance 2011-15 is not found by the Court to be violative of the “uniformity clause” under the facts and circumstances of this case.

The Court finds that there is no violation of the uniformity clause by the adoption of conditional use standards even if the conditional use is not able to be developed on all sites within the zone. In fact, locational standards are recognized in the Statute’s definition of a conditional use. It certainly is reasonable and appropriate to limit the location of a conditional use based upon available roadway improvements, sewerage service, water supply, proximity to other land uses with which it may compliment or conflict, or environmental features and the like. Given the recent public investment in the improvement of roadway infrastructure and the proximity to major highways makes the conditional uses appropriate in the South ROM Zone. Also, the limiting factor of the inability to obtain sewerage connection makes the choices of industrial uses somewhat limited. By allowing a conditional use that meets that criteria, the Township has facilitated its goals of attracting appropriate and achievable ratable growth to that location. The uniformity provision of the MLUL is not violated by such an application.

POINT VII

ARE THERE CONFLICTS OF INTEREST IN THIS CASE?

Plaintiffs claim that this matter is “riddled” with conflicts of interest that affect the validity of the municipal actions. Plaintiffs argue that the Defendants have crossed the line and created a conflict that “cannot be overcome”. They indicate that throughout the zoning process and in this litigation there has been a “seamless alliance” between the Township and “189 Stryker Associates” that demonstrates, or at least corroborates, the conflict between the parties.

The Court addressed the issue of the alleged conflicts of interest for Defendants’ expert, Elizabeth McKenzie, and the alleged conflicts of Mayor Douglas Steinhardt as part of a R. 4:37(2)(b) motion at the end of Plaintiffs’ case. This opinion is designed to supplement the Court’s ruling in that regard.

The determination as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case.” Van Itallie v. Franklin Lakes, 28 N.J. 258, 268 (1958) (citing Aldom v. Borough of Roseland, 42 N.J. Super. 495, 503 (App. Div. 1956)). As stated, “The question will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty.” Van Itallie, *supra*, 28 N.J. at 268. In fact, actual proof of dishonesty need not be shown. Aldom, *supra*, 42 N.J. Super. at 503. An actual conflict of interest is not the decisive factor, nor is “whether the public servant succumbs to the temptation,” but rather whether there is a potential for conflict. Griggs v. Borough of Princeton, 33 N.J. 207, 219 (1960) (citing Aldom, *supra*, 42 N.J. Super. at 502).

One of the “conflicts” that is raised by the Plaintiff is that 189 Strykers Road Associates’ planning expert, Elizabeth McKenzie, is conflicted because she previously served as the Lopatcong Township planner and authored the 1982 periodic re-examination within the town.⁵³

Specifically, Plaintiffs cite to the case of Klug vs. Bridgewater Township Planning Board, 407 N.J. Super. 1 (App. Div. 2009), in support of a conclusion that Ms. McKenzie has a conflict of interest. The Klug case involved a professional who submitted an environmental

⁵³ Plaintiffs are actually factually inaccurate in their description of planning work performed by Ms. McKenzie on behalf of the Township, but this inaccuracy is irrelevant for purposes of the analysis of whether there is a conflict. Ms. McKenzie acted as the Lopatcong Township Planner from 1982 to 1989.

impact statement for a particular applicant, and then was appointed town planner, and prepared a memorandum in her role as town planner regarding the same applicant's revised application before the zoning board. The Court finds that a professional cannot sit on both sides of a specific transaction before a board. The facts in this case are distinguishable from Klug, however. The fact that Ms. McKenzie participated in the 1982 re-examination and, at some time in the past, did planning work for Lopatcong Township, is irrelevant to her involvement in this case.

The case of Cortesini vs. Hamilton Township Planning Board, 417 N.J. Super. 210 (App. Div. 2010) is instructive on the issue. As in the present case, the planner in Cortesini was formerly employed as town planner. Years later, and completely divorced from any of the professionals' prior work on behalf of the town, the same professional represented an applicant before the town. The court held that the contention there was a conflict "clearly is without merit and only requires limited discussion." Id. at 189. The Court held that any alleged conflict of interest by a present or former local government officer or employee is now governed solely by the Local Government Ethics Law. The Court further found that the only subsection that imposes any restrictions upon a former local government officer or employee is N.J.S.A. 40A:9-22.5(b), which provides in pertinent part:

No independent local authority shall, for a period of one year next subsequent to the determination of office of a member of that authority:...[2] allow a former member of that authority to represent, appeal or negotiate on behalf of any other party before that authority.

In this Court's view, Ms. McKenzie's participation in the 1982 Master Plan Reexamination or her role, years ago, as the Township's Planner, would not present a conflict even if she was actually representing an applicant before the board. In fact, Ms. McKenzie is not even representing any applicant before the board or any other Lopatcong subdivision of government. Rather, she is an expert in an action on behalf of one of the parties.

First, Ms. McKenzie's former role is remote and effectively unrelated to the issues before the Court. Even in the Plaintiffs' brief, Plaintiff characterizes the 1982 reexamination as the "Planning Board's focusing on goals for residential, parks, recreation, commercial development and public facilities rather than industrial uses." The Plaintiffs do not provide any facts or arguments that connect Ms. McKenzie to any real or potential conflict. In fact, if the Court were to find that Ms. McKenzie's role in the Township's reexamination report of 32 years ago would preclude her from rendering opinions in this matter, it could send shock waves throughout the

expert witness community as any past connection with a government entity, even if not proximately related to a present issue or opinion, would be in jeopardy. The chilling effect on a governmental entity's ability to retain consultants would be palpable if such were the case.

Also, the Court finds that the determination of whether a conflict of interest exists in a case such as this has been superseded by the Local Government Ethics Law. N.J.S.A. 40A:9-22.5(b).

The Court finds that Ms. McKenzie is not in conflict⁵⁴.

Plaintiffs also allege that a conflict of interest occurred with other various public officials in Lopatcong. Plaintiffs' argument is based upon a "chart" that was apparently a handout that was distributed by an objector at one of the hearings before the board. The chart was never identified or marked into evidence by the board; there was never any testimony concerning the chart. The objector who prepared the chart did not testify and clearly its contents are hearsay. The chart was referred to in pretrial briefs but was not offered into evidence in this case. NJRE 901; NJRE 802. As such, the chart has not been considered by the Court.

Also, Plaintiffs, while acknowledging that Lopatcong's mayor recused himself from voting with respect to the application, continue to allege that "the public still recognized he was influencing the other town officials. In fact, the mayor was receiving text messages during these proceedings despite the fact he had a conflict." (Plaintiffs' Trial Brief at page 52).⁵⁵ Defendants' trial brief points out that a review of the transcript cited by plaintiffs reveals, however, that an unidentified member of the audience had objected to the fact that the mayor was not present and sarcastically commented that the mayor should not be receiving information about the hearings by text. In fact, there is no evidence of a conflict of interest that is before the Court that in any way taints the proceedings that are under review.

Plaintiffs ask the Court to evaluate whether there is a conflict of interest based upon the totality of the circumstances. By so doing, Plaintiffs indicate that the actions of the Defendant

⁵⁴ In fact, during Plaintiffs' case there was no affirmative proof of any conflict of Ms. McKenzie. Plaintiffs argued simply that Plaintiffs should be permitted to cross examine Ms. McKenzie with regards to her prior relationship with the Township in order to attempt to impeach her credibility. The Court permitted cross examination on those subjects.

⁵⁵ This allegation was gleaned from Plaintiffs' pretrial brief but there was no testimony to support the allegation. In point of fact, the Mayor and one other council member abstained from any vote on either ordinance. The Mayor recused himself altogether with respect to the planning board application and appointed a designee to sit in his place.

Township during the adoption of the Ordinance and during this litigation should be determined to be a conflict of interest. Wyzykowski v. Rizas, 132 N.J. 509 (1993) (quoting Griggs, supra. at 219).

There is simply no evidence to support the Plaintiffs' claims other than surmise, shadow and speculation. While surmise and speculation may constitute ample support for conspiracy theorists, neither or both are evidence to support Plaintiffs' claims here. Mayor Steinhardt recused himself from all actions and proceedings involving the matter in issue. He acted appropriately. Short of resignation (which he is clearly not required to do in these circumstances), he could do no more.

No evidence was provided to the effect that Mayor Steinhardt exercised any direct or other influence upon any other public officials in Lopatcong Township. While the Court is mindful of conflict of interest rules that are imposed and enforced in order to discourage improper activity and ensure the public trust, that does not give license to an attack by pure speculation upon a public official where there is not a scintilla of evidence to suggest any wrongdoing or improper influence. In other words, even for the purpose of the Court's consideration of this matter on the basis of a R. 4:37(2)(b) motion at the close of Plaintiffs' case, in order for there to be inferences that would be created by the "totality of the circumstances" there must be facts to support the inferences. In this case, the paucity of facts is "covered up" by Plaintiffs' urging for the Court to ignore the lack of specificity by instead viewing the totality of the circumstances.

When a conflict is present, the Court should so find and take appropriate action. Similarly, when no conflict exists, the Court must recognize that fact and not allow a public official to be the subject of non-evidential rumor and speculation that unfortunately fuels many public debates. In those cases, the public official's political vulnerability is leveraged to achieve a result.

Our public officials are subject to strict statutes, rules and case law that regulates their conduct. When the officials do act in a manner that they are supposed to, the Court should not allow surmise, shadow and speculation raised under the flag of "totality of the circumstances" to undermine their position and their decisions, especially when the decision to abstain from any participation in the matter⁵⁶.

⁵⁶ Reference in Plaintiffs' trial brief also referenced the participation of H. Matthew Curry, then a Township Councilman. H. Matthew Curry is now Matthew Curry, J.S.C. who currently sits in Flemington, New Jersey (footnote continued)

As such, the Court does not find any conflict of interest by municipal officers that in any way affect the municipality's actions in this matter.

POINT VIII

DEFENDANTS' BAD FAITH CLAIMS

Plaintiffs charge that the Defendants', with a "passing reference" to the Defendant's Motion respecting the issue of the Plaintiffs being required to reveal the identity of its funding sources and the unavailability of that information to the Defendants under the Noerr v. Pennington Doctrine. Plaintiffs object to the ongoing suggestion that they have "somehow acted in bad faith" by not revealing the identity of Plaintiffs' funding sources. That ruling by a previous court is now the "law of the case" in this matter. In re Estate of Stockdale, 196 N.J. 275, 311-12 (2008); Monaco v. Hartz Mountain Group, 178 N.J. 401, 413 (2004); R. 1:36-3.

The Court acknowledges that Precast Manufacturing and GPF Leasing, LLC are neighbors of the proposed asphalt plant. They, along with the Marinellis and the James are interested parties with rights under the law.

The Court has not found or considered any bad faith on the Plaintiffs' behalf as no evidence to support such a finding is found anywhere in the record. The issue is simply not one that was considered by the Court in its findings and opinions.

POINT IX

DUTY TO TURN SQUARE CORNERS

A municipality owes a duty to Plaintiffs and the public to "turn square corners" as articulated by the Supreme Court in F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418 (1985). Plaintiffs argue that the Ordinance Amendment with regard to the "ROM" Zone and conditional use requirements listed therein and the actions taken related to the adoption of same are unreasonable and unlawful. By virtue of Defendants' adoption of Ordinance No. 11-07 and Ordinance No. 2011-15, Plaintiffs claim that they were left "with no option but to seek legal

(footnote continued from previous page)

(Hunterdon County) in the Family Division. No evidence was presented at the trial concerning Matthew Curry other than the passing fact that, as a private attorney, he represented the landowner or Stryker Road who sold the property to "189 Stryker". Both parties acknowledge that Mr. Curry recused himself from all considerations involving Ordinances in issue. Neither party argued that Mr. Curry had a conflict of interest, or in any way acted improperly.

remedy in the Court”. Plaintiffs ascribe their plight to the Defendants’ violation of the duty to “turn square corners.” Plaintiffs charge that the Defendants have acted improperly and unlawfully to tailor the development of certain property in the Township for certain types of uses in direct violation of and without consideration of the rights and interests of Plaintiffs and the public. Plaintiffs also argue that the actions of Defendants violate fundamental concepts of fairness. As a result of the aforementioned defects and conduct by the Defendants, Plaintiffs claim to have been and continue to be injured and deprived of their rights as landowners in the Township of Lopatcong. As such, Plaintiffs claim that since interests are affected and prejudiced by Defendants’ conduct, they are entitled to relief from this Court.

A general standard has been articulated by the New Jersey Supreme Court:

We have in a variety of contexts insisted that governmental officials act solely in the public interest. In dealing with the public, government must “turn square corners.” This applies, for example, in government contracts. Also, in the condemnation field, government has an overriding obligation to deal forthrightly and fairly with property owners. It may not conduct itself so as to achieve or preserve any kind of bargaining or litigational advantage over the property owner. Its primary obligation is to comport itself with compunction and integrity, and in doing so government may have to forego the freedom of action that private citizens may employ in dealing with one another. F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426-27 (1985) (internal citations omitted).

Under the Square Corners Doctrine, a government must act forthrightly and fairly. The corollary to this is that a government may not act in such a way as to work an improper disadvantage or harm to the public. The government’s stated duty of fairness, integrity and forthrightness is already mirrored in the obligations imposed by the United States constitutional law.

The Court’s finding and analysis of the various objections raised by the Plaintiffs in this case do not support a determination that the Defendant Township and Planning Board acted in an inappropriate manner. The governmental defendants have offered valid, plausible and reasonable explanations for their actions which support their claim that the actions were in the public interest (as they saw it). Due deference must be given to their actions. It is not for the Court to substitute its judgment or opinion when adjudging their actions. Nor is the Court to assume that the Plaintiffs’ opinions and versions are correct. Plaintiffs like “189 Strykers Road Associates” have a bias in favor of their position that is understandable and predictable. The fact that the governmental

Defendants have not taken actions to conform with their wishes does not mean that the “square corners” have not been turned.

One of the themes of the Plaintiffs’ challenge in this case was that the Defendant, 189 Stryker, and the Defendant Township had formed an unholy alliance to facilitate the proposed development. The Court finds that the evidence did not support such a finding. The Township acted consistently and appropriately in a manner that it determined to be in its best interests. Defendant, 189 Stryker, acted appropriately within the bounds of the law to promote its commercial business interest to develop the property.

Mr. Fischer, the principal of Defendant Precast, also was solicited by the Plaintiffs themselves for testimony concerning his motives and purposes. The Court found Mr. Fischer’s testimony regarding his concerns to be heartfelt and real. His personal concerns do not provide a basis to overturn the Township’s actions however.

The Plaintiffs’ charges concerning the Defendants’ motivations and bad acts as well as Mr. Fischer’s offerings concerning his motives for opposing the zone change and Defendants’ project “opened the door” to testimonial offerings from Plaintiff, Enzo Marinelli. NJRE 611(1); State v. James, 144 N.J. 538, 544 (1966). Although listed as a party, neither Mr. nor Mrs. Marinelli attended any of the Court hearings⁵⁷. On the last day of trial, the Defendants subpoenaed Mr. Marinelli to solicit testimony concerning his motivations for the suit. Mr. Marinelli testified by “speaker phone” on the record in order to accommodate his personal schedule and issues.

Mr. Marinelli did provide credible testimony that he was personally opposed to the project because he believed, as a 57 year resident of the community, that it was not in the best interest of the community. He also admitted, however, that neither he, his wife, nor the James’ had funded the Court challenge as that was being paid for by an undisclosed source that was unknown to him⁵⁸. He was not aware of whether the challenge was funded by a competitor asphalt manufacturer.

Even though Mr. Marinelli’s testimony appeared truthful, the vagueness of his testimony was troubling. The Court is left to wonder who would anonymously fund such an expensive action and what the motivations may be. For the purposes of this opinion, the Court does not believe that

⁵⁷ Mrs. Marinelli was suffering from various health issues. If Mr. and Mrs. James attended the trial, the Court was not made aware of their presence.

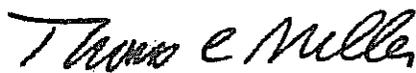
⁵⁸ The litigation costs included attorney’s fees and expert costs.

any finding or inference can be made concerning the source of challenge and the motivation. Notwithstanding that position, the troubling testimony certainly gives the Court concern that the Plaintiffs can argue lack of “good faith” or the failure of the Township to “turn square corners” when their own hands may be unclean. Leeds v. Chase Manhattan, NA, 331 N.J. Super. 416, 420 (App. Div. 2000).

The Court finds that there is insufficient credible evidence to make a finding that the actions taken by the governmental Defendants in this case were not forthright, fair or appropriate so as to disrupt or overturn their actions.

CONCLUSION

For all of the reasons expressed in this opinion, the court finds in favor of the Defendants and dismisses the complaints filed by the intervening Plaintiffs as those complaints pertain to the challenges of the validity of Lopatcong Township Ordinance 2011-15. The bifurcated portions of the case will subsequently be separately addressed by the Court.



THOMAS C. MILLER, P.J.Cv.

Dated: April 21, 2014