

HEROLD LAW, P.A.

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Attorneys for Plaintiffs

LUSHENG YAN, ANAND SHANMUGAM,
YU-HSING TU, ZHI WEI, and
CHAKRAPANI DABBARA,

Plaintiffs,

vs.

TOWNSHIP OF WEST WINDSOR,
TOWNSHIP OF WEST WINDSOR
PLANNING BOARD and IV1 WINDSOR 8
LOGISTICS CENTER LLC f/k/a JDN
ENTERPRISES,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MERCER COUNTY

DOCKET NO.: MER-L-

CIVIL ACTION

**COMPLAINT IN LIEU OF
PREROGATIVE WRITS**

Plaintiffs, Lusheng Yan, Anand Shanmugam, Yu-Hsing Tu, Zhi Wei, and Chakrapani Dabbara (collectively “Plaintiffs”), by way of Complaint against Defendants, the Township of West Windsor (the “Township”), the Township of West Windsor Planning Board (the “Board”), and IV1 Windsor 8 Logistics Center LLC f/k/a JDN Enterprises (the “Applicant”) (collectively, “Defendants”), say:

NATURE OF ACTION

1. This action in lieu of prerogative writs challenges the Board’s April 27, 2022 arbitrary, capricious, unreasonable, and unlawful approval of Planning Board application No. PB 21-11 (the “Application”), requesting Preliminary and Final Site Plan approval with variance and waiver relief from the Board to develop a warehouse on the Applicant’s real property, which is

located at 399 Princeton-Hightstown Road (County Road 571), Township of West Windsor, County of Mercer, New Jersey, and designated on the Official Tax Map of the Township of West Windsor as Block 22, Lot 5, and consists of approximately 27.9 acres (the “Property”).

2. This action also challenges the Board’s July 27, 2022 adoption of a memorializing resolution approving the Application (the “Resolution”). See Resolution of Approval for Application PB 21-11, a true and accurate copy of which is attached hereto as **Exhibit “A”**.

3. Plaintiffs also challenge Township Ordinance 2020-24, amending the requirements of the Retail Office Manufacturing 3 Zoning District (the “ROM-3 Zone”), which was inappropriately promulgated in part due to the settlement of litigation surrounding the Township’s obligation to provide low and moderate income housing.

JURISDICTION

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

THE PARTIES

5. Plaintiff, Lusheng Yan, is an individual, resident and owner of property located at 15 East Kincaid Drive, West Windsor, New Jersey.

6. Plaintiff, Anand Shanmugam, is an individual, resident and owner of property located at 18 East Kincaid Drive, West Windsor, New Jersey.

7. Plaintiff, Yu-Hsing Tu, is an individual, resident and owner of property located at 19 East Kincaid Drive, West Windsor, New Jersey.

8. Plaintiff, Zhi Wei, is an individual, resident and owner of property located at 21 East Kincaid Drive, West Windsor, New Jersey.

9. Plaintiff, Chakrapani Dabbara, is an individual, resident and owner of property located at 23 East Kincaid Drive, West Windsor.

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

11. Defendant, Township of West Windsor Planning Board, is a municipal agency constituted by the Township of West Windsor pursuant to the MLUL, with offices at 271 Clarksville Road, West Windsor, New Jersey.

12. Defendant, IV1 Windsor 8 Logistics Center LLC f/k/a JDN Enterprises, is a New Jersey limited liability company and, upon information and belief, the owner of the Property located at 399 Princeton-Hightstown Road (County Road 571), Township of West Windsor, New Jersey.

THE TOWNSHIP’S AFFORDABLE HOUSING OBLIGATIONS

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

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

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

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

THE TOWNSHIP’S CONCURRENT ZONING LITIGATION

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

THE TOWNSHIP’S ZONING ORDINANCE AMENDMENTS

17. In furtherance of the Appeal of the Township’s DJ Action and the Zoning Litigation, the parties to said actions entered into a Stipulation of Settlement and Consent Order

(“SCO”), a true and accurate copy of which is attached hereto as **Exhibit “B”**, wherein, the Appeal of the Township’s DJ Action and the Zoning Litigation would be dismissed in exchange for the Township introducing and adopting proposed zoning amendments for the Property, along with a “concept plan” for the Property, permitting warehouse use thereon. See Exhibit “B”.

18. On or about November 30, 2020, the Township Council introduced on First Reading Ordinance 2020-24, titled “An Ordinance to Amend and Supplement Chapter 200 of the Code of the Township of West Windsor (1999) by Modifying Provisions Pertaining to the ROM-3 Industrial District – (Research, Office, Limited Manufacturing)”, and referred same to the Board pursuant to N.J.S.A. 40:55D-26a.

19. Ordinance 2020-24 proposed to amend the requirements of the ROM-3 Zone (which is comprised of one (1) sole zoning district, and consists of one (1) single lot, the Property), to permit warehouse use within the ROM-3 Zone, subject to the Property containing a minimum lot area of 25 acres, which it does, and a “side yard setback of three hundred (300) feet” ... “from the westerly boundary line of the ROM-3 District.”

20. On or about December 9, 2020, the Board found Ordinance 2020-24 to not be inconsistent with the Township’s Master Plan.

21. On or about December 14, 2020, the Council held a public hearing regarding Ordinance 2020-24, and adopted same.

THE APPLICANT’S PROPOSAL

22. On or about January 26, 2022, presumably in furtherance of the SCO and Ordinance 2020-24, the Applicant submitted an Application to the Board seeking Preliminary and Final Site Plan Approval with variance and waiver relief to construct a 45-foot-high, single-story, 325,710 square foot warehouse facility, with 11,880 square feet of proposed office space, with parking

areas to be located on all sides of the facility, 58 loading bays along the westerly side of the facility, and 73 trailer parking spaces located to the west of said loading bays.

23. The Application sought variance relief from Section 200-227(B)(2) of the Township's Land Use Ordinances (the "Ordinances"), which limits fence height (which are required in the ROM-3 Zone to buffer nonresidential uses from neighboring residential uses) to no more than eight (8) feet, whereas the proposed fence on the westerly side of the Property is on top of a berm, which varies in height ranging from eight (8) to twenty-four (24) feet, and is proposed to be uniformly thirty-four (34) feet above existing grade.

24. The Applicant additionally sought the following design exceptions and submission waivers as part of the Application:

a. Design Exceptions:

- i. From Section 200-28D(2)(b), requiring a waiver to exceed the off-street parking requirement of 111 spaces, whereas 239 parking spaces (including 73 banked spaces) are proposed;
- ii. From Section 200-27D(1), permitting 10 loading bays, whereas 58 loading bays are proposed;
- iii. From Section 200-32A(2)(c)1, permitting one ground-mounted project/tenant identification sign per site, whereas two (2) such signs are proposed;
- iv. From Section 200-32A(2)(c)2, which permits a maximum sign area of 48 square feet, whereas each of the proposed signs has an area of 96 square feet;
- v. From Section 200-31 K(1), requiring light levels in parking lots to not exceed an average of 0.5 footcandles throughout, whereas the proposed average parking lot light level is 0.65 footcandle; and
- vi. From Section 200-31K(2), requiring light levels at intersections to not exceed 3.0 footcandles, whereas the proposed light levels at intersections range from 2.61 to 3.46 footcandles.

b. Submission Waivers:

- i. From Section 200-13C(9), which requires wetlands location to be depicted with a metes and bounds description, whereas such information was not provided on the plans;
- ii. From Section 200-14C(1)(a), which requires a copy of the approved preliminary site plan and resolution, whereas these items were not provided;
- iii. From Section 200-14C(1)(b)l, which requires construction details specified at the time of preliminary approval to be included with final plans for site development, whereas this application was for joint preliminary and final approval; and
- iv. From Section 200-14C(1)(b)5, which requires a final landscape plan conforming to the approved preliminary plan, whereas this application is for joint preliminary and final approval.

25. The Application was first heard before the Board on April 6, 2022, and again on April 27, 2022, at which time the Board approved the Application.

26. During said hearings, the Board failed to properly consider concerns and evidence raised by the public, including but not limited to the expert testimony of Sharon Paul Carpenter, President of Paul Carpenter Associates, Inc., and her accompanying Acoustical Evaluation Review report, wherein Ms. Carpenter set forth certain deficiencies in the Acoustical Evaluation of Proposed Warehouse Report, prepared by Jack A. Zybura, P.E., of Lewis S. Goodfriend & Associates, dated March 29, 2022, which was submitted by the Applicant to demonstrate compliance with State and local noise regulations.

27. On or about April 26, 2022, one day prior to the final hearing on the Application, the Applicant first submitted an incorrect “Limited Groundwater Mounding Analysis”, purporting to evidence proper stormwater management on the Property, precluding the Board and the public from having a full and fair opportunity to review and respond to same.

28. The Resolution of Approval of the Application (the “Resolution”) was adopted on July 27, 2022, with notice of same being published on or about August 2, 2022.

COUNT I

THE ADOPTION OF ORDINANCE 2020-24 WAS IMPROPERLY ADOPTED AND INCONSISTENT WITH THE SCO, AND MUST THEREFORE BE SET ASIDE.

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

30. Prior to the adoption of Ordinance 2020-24, notices pursuant to N.J.S.A. 40:55D-62.1 were not properly sent to the affected property owners or property owners within 200 feet of the affected property.

31. Thereafter, the public notices published by the Township upon First and Second Readings were improperly and illegally vague, in that said notices merely identify the ROM-3 Zone in name only, and that there will be an ordinance to “amend and supplement” same.

32. Ordinance 2020-24, permitting warehouse use in the ROM-3 Zone, was improperly predetermined to comply with the terms of the SCO, and was not based on a proper, independent investigation or deliberations in accordance with law, including the MLUL, Ordinances and the Township Master Plan.

33. The SCO improperly considered the Township’s Affordable Housing obligations as a justification to amend the ROM-3 Zone requirements via the adoption of Ordinance 2020-24 to permit warehouse use.

34. Ordinance 2020-24 was inappropriately adopted inconsistent with the terms of the SCO, including the concept plan incorporated therein.

35. The Property is not appropriate for warehouse use.

36. Ordinance 2020-24 was improperly adopted without evidence that the Property, the sole lot in the ROM-3 Zone and adjacent to residential developments, was appropriate for warehouse use.

37. There was no zoning or planning justification to adopt Ordinance 2020-24 to permit warehouse development at the Property.

38. Ordinance 2020-24 was not consistent with the existing Land Use Element and Housing Element of the Township's Master Plan.

39. In adopting Ordinance 2020-24, the Township failed to provide adequate reasons for acting inconsistent with, and not designed to, effectuate the Land Use Element of the Township's Master Plan.

40. Ordinance 2020-24 does not advance the health, safety and welfare of the Township's residents and property owners.

41. The adoption of Ordinance 2020-24 violated N.J.S.A. 40:55D-62, which requires zoning ordinances to be consistent with or designed to effectuate a comprehensive plan for development of land within a municipality.

42. Ordinance 2020-24 failed to take into consideration the character of the Property and its particular suitability for particular uses or to encourage the most appropriate use of land.

43. As such, the adoption of Ordinance 2020-24 was arbitrary, capricious, unreasonable, contrary to law, *ultra vires*, invalid, and should be voided by this Court.

44. It is manifest that the interest of justice requires an enlargement of time within which to bring this action challenging the adoption of Ordinance 2020-24, for reasons including but not limited to substantial and novel constitutional questions raised that affect due process, and an important public interest raised which requires adjudication or clarification.

WHEREFORE, Plaintiffs demand judgment against the Defendants as follows:

- a. Finding that the Township’s actions concerning the adoption of Ordinance 2020-24 were arbitrary, capricious, unreasonable, and unlawful;
- b. Invalidating Ordinance 2020-24 as *ultra vires* and without effect;
- c. Finding that the Board’s actions concerning the approval of the Application were arbitrary, capricious, unreasonable, and unlawful;
- d. Finding that the approval of the Application and the Resolution as *ultra vires* and without effect;
- e. Enjoining and restraining Defendants from taking any further action with regard to the development of the Property in furtherance of the Board’s approval of the Application;
- f. For attorneys’ fees, costs of suit and interest; and
- g. For any and all such other relief as this Court deems equitable and just.

COUNT II

**ORDINANCE 2020-24 CONSTITUTES ILLEGAL
SPOT ZONING & VIOLATES THE LAW**

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

46. The ROM-3 Zone is comprised of only one (1) lot, which happens to be the Property.

47. Ordinance 2020-24 improperly and illegally singled out the Property for rezoning under the guise of a settlement agreement related to the Township’s affordable housing obligations and the SCO, and therefore constitutes impermissible “spot zoning” and must be set aside.

WHEREFORE, Plaintiffs demand judgment against the Defendants as follows:

- a. Finding that the Township's actions concerning the adoption of Ordinance 2020-24 were arbitrary, capricious, unreasonable, and unlawful;
- b. Invalidating Ordinance 2020-24 as *ultra vires* and without effect;
- c. Finding that the Board's actions concerning the approval of the Application were arbitrary, capricious, unreasonable, and unlawful;
- d. Finding that the approval of the Application and the Resolution as *ultra vires* and without effect;
- e. Enjoining and restraining Defendants from taking any further action with regard to the development of the Property in furtherance of the Board's approval of the Application;
- f. For attorneys' fees, costs of suit and interest; and
- g. For any and all such other relief as this Court deems equitable and just.

COUNT III

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

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

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

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

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

52. The Application contemplated the warehouse loading bays facing the residential properties along the Property's western property line, in violation of the SCO.

53. The Application improperly violated the terms and conditions of the SCO, including failing to provide a project design consistent with the concept plan incorporated within said SCO.

54. The Applicant did not have clear legal title to certain real property included in the Application.

55. The Board improperly failed to consider any report or recommendations that were to be made by the West Windsor Environmental Commission per the Ordinances.

56. The Board improperly failed to qualify certain experts presented by the opposing public as experts.

57. The Applicant failed to adequately and sufficiently address the negative impacts of the proposed development on the homeowners and residents of the subject neighborhood, including but not limited to the excessive noise generated by the Applicant's proposal and the lack of an adequate stormwater management system.

58. The Applicant's groundwater mounding analysis, dated April 26, 2022, was not submitted to the Board ten (10) days prior to the hearing in which it was considered, as required by law.

59. The Board failed to make sufficient findings of fact or conclusions of law as to why it considered the Applicant's acoustical analysis more credible than the acoustic evidence presented by the opposing public.

60. The Board failed to make sufficient findings of fact to demonstrate or establish that approval of the Application was justified, given the relief required by the Application including variance and exception relief and the submission waivers improperly granted by the Board, and the extent of said relief required from the Ordinances.

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

62. The Board failed to properly consider and analyze whether the Application satisfied the positive and negative criteria for variance relief under the MLUL.

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

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

65. The Board improperly relied on contradictory testimony and evidence including that concerning onsite truck traffic, on the one hand accepting the Applicant's assertion of a low projected truck traffic volume purely for the purpose of meeting the noise level regulation, and on the other hand projecting a much a higher traffic volume for the purpose of justifying the waiver relevant to the loading bay limit exceedance.

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

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

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

WHEREFORE, Plaintiff demands judgment against Defendants as follows:

- a. Finding that the Township's actions concerning the adoption of Ordinance 2020-24 were arbitrary, capricious, unreasonable, and unlawful;
- b. Invalidating Ordinance 2020-24 as *ultra vires* and without effect;
- c. Finding that the Board's actions concerning the approval of the Application were arbitrary, capricious, unreasonable, and unlawful;
- d. Finding that the approval of the Application and the Resolution as *ultra vires* and without effect;
- e. Enjoining and restraining Defendants from taking any further action with regard to the development of the Property in furtherance of the Board's approval of the Application;
- f. For attorneys' fees, costs of suit and interest; and
- g. For any and all such other relief as this Court deems equitable and just.

HEROLD LAW, P.A.
Attorneys for Plaintiffs

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

Dated: September 15, 2022

DESIGNATION OF TRIAL COUNSEL

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

HEROLD LAW, P.A.
Attorneys for Plaintiffs

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

Dated: September 15, 2022

CERTIFICATION PURSUANT TO RULE 4:5-1

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

HEROLD LAW, P.A.
Attorneys for Plaintiffs

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

Dated: September 15, 2022

CERTIFICATION PURSUANT TO RULE 4:69-4

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

HEROLD LAW, P.A.
Attorneys for Plaintiffs

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

Dated: September 15, 2022