PREPARED BY THE COURT

LUSHENG YAN, ANAND SHANMUGAM, YU-HSING TU, ZHI WEI, and CHAKRAPANI DABBARA, Plaintiffs, v. 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. L-1603-22 CIVIL ACTION **ORDER DENYING DEFENDANT'S MOTION TO DISMISS COUNTS I AND II**

THIS MATTER having come before the Court, the Hon. Robert Lougy, A.J.S.C., presiding, on the Motion to Dismiss Counts I and II filed by Defendant IV1 Windsor 8 Logistics Center LLC, represented by Frank J. Petrino, Esq.; and Plaintiffs Lusheng Yan, et al., represented by Robert F. Simon, Esq., having filed opposition; and Defendant IV1 Windsor 8 Logistics Center LLC having filed a

reply; and the Court having considered the parties' pleadings and arguments; and for the reasons as stated below; and for good cause shown;

IT IS on this 23rd day of December 2022 **ORDERED** that:

1. Defendant IV1 Windsor 8 Logistics Center LLC's application for an order dismissing Plaintiffs' Counts I and II of Plaintiffs' complaint is **DENIED**.

2. Defendant IV1 Windsor 8 Logistics Center LLC shall file an answer to Counts I and II of Plaintiffs' complaint no later than **JANUARY 13, 2023**.

3. The parties shall submit their Rule 4:69-4 statements of factual and legal issues and an exhibit list no later than **FEBRUARY 3, 2023**. The Court requests, but does not compel, that counsel make all reasonable efforts to assemble a joint exhibit list, without prejudice to the parties submitting supplemental, non-joint exhibits.

4. The Court schedules the Rule 4:69-4 case management conference for **FEBRUARY 14, 2023**, at 10:00 a.m. The conference shall be via TEAMS. Instructions and invitations to follow closer to the date of the event.

/s/ Robert Lougy
ROBERT LOUGY, A.J.S.C.

X **OPPOSED**
UNOPPOSED

PURSUANT TO RULE 1:6-2(f), THE COURT PROVIDES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Plaintiffs Lusheng Yan, Anand Shanmugam, Yu-Hsing Tu, Zhi Wei, and Chakrapani Dabbara filed a complaint in lieu of prerogative writs on September 15, 2022. The complaint alleged: (1) "Ordinance 2020-24 was improperly adopted and inconsistent with the [Stipulation of Settlement and Consent Order ("SCO")]," (2) the ordinance constitutes illegal "spot zoning" and (3) the Township of West Windsor Planning Board acted in an arbitrary, capricious, unreasonable manner and contrary to law when it approved Planning Board application No. PB 21-11. Compl. ¶¶ 1, 8, 10-11. Defendant IV1 Windsor 8 Logistics Center LLC, joined later by Defendants Township of West Windsor, Township of West Windsor Planning Board, filed a motion for a more definite statement regarding Count III and an extension of time to file a responsive pleading on October 5, 2022. On October 31, 2022, the Court denied the motion. On October 27, 2022, Defendant IV1 Windsor 8 Logistics Center LLC, filed a motion to dismiss Counts I and II for failure to state a claim. For the reasons as stated below, the Court denies that motion.

The Court provides the following procedural and factual histories. Plaintiffs own property and reside in West Windsor, New Jersey. Compl. ¶¶ 5-9. Defendant

Township of West Windsor is a municipal corporation of New Jersey. Id. at ¶ 10. Defendant Township of West Windsor Planning Board is an agency of the municipality. Id. at ¶ 11. Defendant IV1 Windsor 8 Logistics Center LLC f/k/a JDN Enterprises is a limited liability company in New Jersey and owns the property at 399 Princeton-Hightstown Road (County Road 571), Township of West Windsor, New Jersey. Id. at ¶ 12. Plaintiffs filed their complaint in lieu of prerogative writs on September 15, 2022.

On October 31, 2022, the Court denied Defendant IV1 Windsor 8 Logistics Center LLC's motion for a more definite statement under Rule 4:6-4 regarding Count III of Plaintiffs' complaint and extension of time to file a responsive pleading. On October 27, 2022, Defendant IV1 Windsor 8 Logistics Center LLC filed a motion to dismiss Counts I and II for failure to state a claim.

A brief description of the background facts follows. In July 2012, the Township sought a declaratory judgment stating that it met its Mount Laurel affordable housing obligations. Compl. ¶ 13. The Township agreed with Fair Share Housing Center that stated that the Township had met its affordable housing obligations. Id. at ¶ 14. A third-party subsequently appealed the agreement and several provisions of the final judgment. Furthermore, "[i]n a separate action…, 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." Id. at ¶ 16.

The parties to the previous actions entered a Stipulation of Settlement and Consent Order (SCO) that dismissed the actions "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." Id. at ¶ 17 (citing Exhibit B). In November 2020, the Township Council introduced Ordinance 2020-24, which would "amend the requirements of the ROM-3 Zone." Id. at ¶¶ 18-19. It would allow warehouse use that met certain conditions. Id. at ¶ 19. In December 2020, the Board determined that the Ordinance was "not … inconsistent with the Township's Master Plan." Id. at ¶ 20. That same month, the Council adopted the Ordinance after a public hearing. Id. at ¶ 21.

In January 2022, Defendant IV1 Windsor 8 Logistics Center applied to Defendant Planning Board for a Preliminary and Final Site Plan Approval with variance and waiver relief to build a warehouse. Id. at ¶ 22. Specifically, Defendant IV1 Windsor 8 Logistics Center requested variance relief concerning fence height and various design exceptions and submission waivers. Id. at ¶¶ 23-24. In April 2022, Defendant Planning Board approved the Application. Id. at ¶ 25.

Plaintiffs allege that Defendant Planning Board "failed to properly consider concerns and evidence raised by the public, including … expert testimony …" Id. at ¶ 26. Defendant IV1 Windsor 8 Logistics Center LLC submitted an incorrect stormwater management analysis one day before the final hearing, thus Plaintiffs contend that Defendant Planning Board and the public were prevented "from having a full and fair opportunity to review and respond" to it. Id. at ¶ 27. In July 2022, the Board adopted the Resolution of Approval of the Application. Id. at ¶ 28.

Plaintiffs' first count alleges that "Ordinance 2020-24 was improperly adopted and inconsistent with the SCO, and must therefore be set aside." Compl. 8. Plaintiffs' second count alleges that "Ordinance 2020-24 constitutes illegal spot zoning and violates the law." Compl. 10. Finally, Plaintiffs' third count alleges that "the Board's approval of the application was arbitrary, capricious, unreasonable, and contrary to law." Compl. Since Defendant IV1 Windsor 8 Logistics Center LLC moves to dismiss Counts I and II only, this analysis will focus on Counts I and II.

In Count I of the Complaint, Plaintiffs allege that Defendant failed to provide adequate and sufficient notice to the required property owners. Id. at ¶¶ 30-31. Also, Plaintiffs allege that "Ordinance 2020-24…was improperly predetermined to comply with the terms of the SCO, and was not based on a proper, independent investigation or deliberations…" Id. at ¶ 32. Further, Plaintiffs allege

that "[t]he 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." Id. at ¶ 33. Also, "Ordinance 2020-24 was inappropriately adopted inconsistent with the terms of the SCO" and "Ordinance 2020-24 was not consistent with the existing Land Use Element and Housing Element of the Township's Master Plan" as well. Id. at ¶¶ 34, 38. Plaintiffs allege that the Township did not provide satisfactory reasons to justify this inconsistency. Id. at ¶ 39. There was no evidence that the warehouse use would be suitable for the Property, and Plaintiff alleges it is not, so the Ordinance was inappropriately adopted without such evidence. Id. at ¶¶ 35-36. Furthermore, the Ordinance did not consider "the character of the Property and its particular suitability for particular uses or to encourage the most appropriate use of land." Id. at ¶ 42. Also, "[t]here was no zoning or planning justification to adopt Ordinance 2020-24 to permit warehouse development at the Property." Id. at ¶ 37. Plaintiffs allege that the Ordinance fails to "advance the health, safety and welfare of the Township's residents and property owners" and that its adoption violated N.J.S.A. 40:55D-62. Id. at ¶¶ 40-41. Thus, Plaintiffs conclude that "the adoption of Ordinance 2020-24 was arbitrary, capricious, unreasonable, contrary to law, *ultra vires*, invalid, and should be voided by this Court." Id. at ¶ 43. Finally, Plaintiffs allege that substantial and novel constitutional questions and an

important public interest involved, among other reasons, compel an extension of time in which to file a complaint. Id. at ¶ 44.

In Count II, Plaintiffs allege the following. The Property takes up the ROM-3 Zone as it only consists of one lot. Id. at ¶46. Plaintiffs allege that "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." Id. at ¶47.

Defendant IV1 Windsor 8 Logistics Center LLC asks the Court to dismiss those two counts.. First, Defendant argues that Plaintiffs filed the complaint too late. Def's Br. 1, 8. Defendant explains that "[t]he purpose underlying Rule 4:69-6 is to 'give an essential measure of repose to actions taken against public bodies.'" Id. at 9 (citing Concerned Citizens of Princeton, Inc. v. Mayor and Council of Borough of Princeton, 370 N.J. Super. 429, 446 (App. Div. 2004) (internal citation omitted)). The governing body adopted the ordinance on December 14, 2020 and published on December 18, 2020. Ibid. The forty-five day timeframe per rule Rule 4:69-6 ended on February 1, 2021. Ibid. Defendants argue that Plaintiffs' requested extension of time in which to file a complaint "is not routinely granted." Ibid. (citing R. 4:69-6(c), Tri-State Ship Repair & Drydock Co. v. City of Perth Amboy, 349 N.J. Super. 418, 423 (App. Div. 2002)).

Defendant argues that "[d]espite Plaintiffs' Complaint containing key phrases necessary to obtain an enlargement of time to challenge Ordinance 2020-24, Plaintiffs fail to carry their burden." Id. at 10. Plaintiffs only make "bald assertions" that the litigation involves constitutional issues and the public interest. Ibid. Here, Plaintiffs are challenging the Ordinance 635 days after the municipality enacted it. Ibid. As Defendant points out "[a]s Tri-State expertly explained, the longer a party waits to challenge the ordinance, the less it is entitled to an enlargement." Ibid. Defendant argues that "Plaintiffs slept on their rights to challenge." Ibid. Defendant states that "[e]ven after Plaintiffs received in March 2022, very detailed notice of the scope of IV1's development application and based on ROM-3 zoning, they still did not challenge the Ordinance." Ibid. Therefore, Defendant argues that the Court must dismiss Counts I and II because Plaintiffs' challenge is untimely. Ibid.

Second, Defendant argues that "West Windsor provided proper notice for the adoption of Ordinance 2020-24." Defendant details the steps West Windsor took. Id. at 12-13. Defendant states that "Plaintiffs argue this process was inadequate and that notice by certified mail was also required to be given to all interested landowners pursuant to N.J.S.A. 40:55D-62.1." Id. at 13. However, Defendant argues that Plaintiff's mistakenly assert that N.J.S.A. 40:55D-62.1 applies rather than N.J.S.A. 40:55D-62. Ibid. Defendant explains that N.J.S.A.

40:55D-62.1 does not apply because "Ordinance 2020-24 does not change the boundaries—this is undisputed—of the ROM-3 Zone nor does it change the classification." Ibid. Rather than altering its classification, "[t]he Ordinance merely expanded the types of industrial uses allowed in the Zone…to include warehousing," so "no individual notice was required under N.J.S.A. 40:55D-62.1." Id. at 14. Defendant states that "Ordinance 2020-24 was adopted as consistent with the most recent Amended Land Use Element of the Master Plan, as confirmed by the Board on December 9, 2020" and it "incorporated the Amended Use Element's recommendation to include warehousing in the ROM-3 Zone." Ibid. Defendant argues that "[t]his is not the type of change or process that entitled Plaintiffs to personal notice." Ibid.

Plaintiffs argue the following in opposition. Plaintiffs argue that the Court should deny Defendant's motion because Counts I and II contain constitutional matters, which Plaintiffs pled in the Complaint. Pl's Br. in Opp at 6 (citing Compl. ¶ 44). Plaintiffs explain that courts have extended the 45-day time limit in litigation involving constitutional issues. Ibid. (citing Brunetti v. Borough of New Milford, 68 N.J. 576, 587 (1975); In re Ordinance 2354-12 of Twp. of W. Orange, Essex Cty. v. Twp. of W. Orange, 223 N.J. 589, 601 (2015); Catalano v. Pemberton Twp. Bd. of Adjustment, 60 N.J. Super. 82, 96-97 (App. Div. 1960)).

Plaintiffs argue "ordinance challenges raising constitutional issues need not be brought as prerogative writ actions; rather, such claims can be brought under the declaratory judgment act, which is not subject to a statute of limitations." Id. at 7 (citing Ballantyne House Assoc. v. Newark, 269 N.J. Super. 322, 330 (App. Div. 1993); Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 14 (1960)). Thus, Plaintiffs argue that "[t]he ability of a plaintiff to raise the same or similar constitutional issues in a declaratory judgment action instead of prerogative writs weighs heavily in favor of extending the limitations period under R. 4:69-6(c)." Ibid. (citing Ballantyne House, 269 N.J. Super. at 330; Brunetti, 68 N.J. at 585-88).

Plaintiffs assert that "Courts should weigh the municipality's interest in repose against the public interest raised by the questions of law." Id. at 7 (citing Hopewell Valley Citizens' Grp., Inc. v. Berwind Prop. Grp. Dev. Co., L.P., 204 N.J. 569, 580 (2011)). Furthermore, "the fact that a claim challenges an ongoing issue should be considered in favor of extending the limitations period." Ibid. (citing In Borough of Princeton v. Bd. of Chosen Freeholders, 169 N.J. 135 (2001)).

Plaintiffs state that "the challenge was brought less than two years after the Ordinance was approved, and within 45 days of the Board granting its first (and only) site plan approval, variance relief, and design waivers under the Ordinance." Ibid. Furthermore, Plaintiffs compare the facts here to the facts in Damurjian v.

Board of Adjustment, 299 N.J. Super. 84, 97-98 (App. Div. 1997) where "the Appellate Division held a constitutional challenge to a three-year-old zoning ordinance warranted extension of the limitations period where it was filed within 45 days of the board's decision affecting the plaintiffs' property." Id. at 7-8.

Second, Plaintiffs argue that the Court should extend the 45-day statute of limitations because the Township did not provide the required notice of the December 14, 2020 hearing on the Ordinance pursuant to the MLUL. Id. at 8. As such, Plaintiffs assert that the municipality infringed upon their due process rights. Ibid. Specifically, the Township did not provide individual notices per N.J.S.A. 40:55D-62.1. Ibid. This issue concerning due process and notice "has not been litigated in the context of N.J.S.A. 40:55D-62.1," but "it is well settled." Ibid. (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

Plaintiffs explain that "the MLUL provides a statutory requirement defining specific type of notice the Township was required to provide to Plaintiffs." Id. at 9 (citing Kelly v. Hackensack Meadowlands Dev. Comm., 172 N.J. Super. 223, 228-29 (App. Div. 1980); accord Infinity Broad. Corp. v. N.J. Meadowlands Comm'n, 377 N.J. Super. 209, 228 (App. Div. 2005)). Additionally, the Supreme Court has determined that "a failure to provide the minimum amount of notice under the MLUL justifies an extension of the limitations period under R. 4:69-6(c)," regardless of "whether the concealment was malicious or merely negligent." Id. at

9-10 (citing Hopewell Valley Citizens' Grp., Inc. v. Berwind Prop. Grp. Dev. Co., L.P., 204 N.J. 569, 580 (2011) (citing Reilly v. Brice, 109 N.J. 555, 560-61 (1988))).

Plaintiffs assert that the Appellate Division has held that "any ordinance adding new permitted uses to a zoning district (including Ordinance 2020-24) is a change to the classification of the zoning district, and therefore individual notice to all property owners within 200 ft is required under N.J.S.A. 40:55D-62.1." Id. at 10-11 (citing Robert James Pacilli Homes, L.L.C. v. Woolwich Twp., 394 N.J. Super. 319, 330 (App. Div. 2007)). Furthermore, Plaintiffs argue that the Ordinance has a substantive effect on the ROM-3 Zone, which only covers one parcel; specifically, "it allows a zone in which warehousing was prohibited to be used exclusively for warehousing." Id. at 11 (citing Mahwah Realty Assocs., Inc., 430 N.J. Super. at 253-55). The Ordinance allowed warehouses in the ROM-3 Zone and without it, a "d(1)" and "d(4)" use variance would be needed to build a warehouse there. Id. at 11, 14. As such, Plaintiffs conclude that "Ordinance 2020-24 constitutes a change in the classification of the district, and individual notice under N.J.S.A. 40:55D-62.1 was required." Id. at 11. Furthermore, Plaintiffs argue that the exception to N.J.S.A. 40:55D-62.1 does not apply here because "the Board did not recommend [the Ordinance] as part of any periodic general reexamination." Ibid. n.1. Plaintiffs point to the changes in the floor area ratio

("FAR") requirements and the minimum lot area and the minimum side yard setbacks for warehouses and distribution facilities to argue that the Ordinance changed the classification of the district. Id. at 12. Furthermore, Plaintiffs argue that "whether Ordinance 2020-24 'had the capacity to alter the fundamental character' of the ROM-3 Zoning District is a question of fact, and it is material to the question of whether individual notice was required." Thus, for purposes of Defendant's present motion, Plaintiffs assert that "the Court is obligated to accept as true that the Ordinance did alter the fundamental character of the ROM-3 Zone, and that notice under N.J.S.A. 40:55D-62.1 was required." Ibid. (citing Indep. Dairy Workers Union v. Milk Drivers Local 680, 23 N.J. 85, 89 (1956)).

Next, Plaintiffs argue that the lack of notice "voids the approval of Ordinance 2020-24." Ibid. "[A] failure to provide the required notice results in the board in question being deprived of jurisdiction." Ibid.

Third, Plaintiffs argue that the Applicant and Township are "using affordable housing as a pretext to spot-zone a parcel," which is also a constitutional issue that justifies an extension of time to bring a challenge. Id. at 13. Plaintiffs state that "it appears the Township illegally spot zoned a non-residential property to allow warehousing space in furtherance of a settlement of affordable housing litigation." Ibid. Counts I and II challenge this. Ibid.

Plaintiffs assert that spot-zoning occurred due to the Ordinance because the Ordinance applies only to the Property and its passage permitted warehouse use that would have required a variance otherwise. Id. at 14. Plaintiffs acknowledge that "New Jersey courts have held an ordinance is not spot zoning if it is made to benefit the community instead of benefitting only certain individuals." Ibid. (citing Gallo v. Mayor and Twp. Council, 328 N.J. Super. 117, 128 (App. Div. 2000). Plaintiffs mention that "[t]his often comes into play when a municipality enacts an ordinance intended to satisfy its constitutional obligation to provide affordable housing." Id. at 14-15. But Plaintiffs argue that "[h]ere, the Township instead spot zoned via the Ordinance to permit Applicant to build a large warehouse in the ROM-3 Zone, a zone which entirely consists of the Applicant's Property." Id. at 15.

Moreover, "[t]he Ordinance does not in any way satisfy the Township's constitutional obligation to provide affordable housing, given it permits warehousing use to be built on a non-residential property." Ibid. Plaintiffs argue that extending the 45-day time period is appropriate because this matter "raise[s] novel and substantial constitutional questions regarding the power of a municipality to use spot-zoning, and the extent to which affordable housing can be used as a justification for municipal action." Ibid.

Fourth, Plaintiffs argue that important public issues warrant extending the 45-day time limit. Id. at 16-19. Plaintiffs assert that a public issue here is whether "the Township and Applicant's agreement to permit warehousing at the Property in exchange for an agreement to provide affordable housing elsewhere in the municipality" was legal. Id. at 16. "[T]he construction of a warehouse bears no reasonable relationship to the Township's obligation to meet its affordable housing obligations," so "[t]his arrangement appears to have allowed Applicant to side-step the requirement to obtain use variance and other relief necessary for its proposed warehouse." Ibid. As such, Plaintiffs argue that discovery is needed. Ibid.

Furthermore, Plaintiffs compare this matter to multiple cases where the courts have extended the 45-day period. Id. at 16-19 (citing Wolf v. Shrewsbury, 182 N.J. Super. 289, 296 (App. Div. 1981); Najduch v. Twp. of Indep. Planning Bd., 411 N.J. Super. 268, 274 (App. Div. 2009) (quoting Thornton v. Ridgewood, 17 N.J. 499, 510 (1955) and Jantausch v. Borough of Verona, 41 N.J. Super. 89, 94 (Law Div. 1956)); Willoughby v. Planning Bd., 306 N.J. Super. 266, 277 (App. Div. 1997); Gregory v. Borough of Avalon, 391 N.J. Super. 181, 188-191 (App. Div. 2007)). Plaintiffs state that the Ordinance's approval is void because the Township did not provide the mandatory notice. Id. at 17. As a result, it "is subject to collateral attack at any time." Ibid. (citing Najduch v. Twp. of Indep. Planning Bd., 411 N.J. Super. 268, 274 (App. Div. 2009) (quoting Thornton v.

Ridgewood, 17 N.J. 499, 510 (1955)). Plaintiffs assert that here, the public interest is "the re-zoning of a property into a large warehouse which will have a palpable impact on the local community" and concludes that "Plaintiffs' challenge to Ordinance 2020-24 involves substantial public interests that outweigh any interests in repose, and that the interests of justice warrant extension of the limitations period, and the denial of Applicant's Motion." Id. at 18-19.

Defendant IV1 Windsor 8 Logistics Center, LLC argue the following in reply. Defendant points out that "warehouse and distribution facilities were already permitted as incidental to research, testing, analytical, and product development laboratories (s. 200-213A(1), 200-211A(1)), and standalone warehouses and 'wholesale storage facilities' were already permitted as conditional uses… (s. 200-211B(4)." Def's Reply Br. 1. Defendant states that "Ordinance 2020-24 simply changed standalone warehouses from being a conditional use (which can be approved by a planning board if no variance relief is sought) to a principal permitted use with only slightly modified bulk standards." Id. at 1-2. Therefore, there was no classification change so, notice as required under N.J.S.A. 40:55D-62.1 was not needed. Id. at 2. Also, "the negotiations in the Declaratory Judgment action…cannot be challenge here." Ibid. Defendant argues that Plaintiffs' argument that the Ordinance led to spot zoning is inappropriate as "the Zone merely expanded the warehouse uses already allowed." Ibid. Also,

Defendant notes that another ordinance, which was "adopted the same night and implementing some of the recommendations of the approved Amended Land Use Element of the Master Plan, as Ordinance 2020-24 (and attached to Plaintiffs Complaint on P.122), permitting standalone warehouse development on two (2) sites in the Township." Ibid. n. 1.

Defendant argues that N.J.S.A. 40:55D-62.1 does not apply because the classification of the ROM-3 Zone did not change. Id. at 4-5. Before the Ordinance was passed, "[w]arehouses incidental to research, testing, analytical, and product development were already a permitted principal use, and standalone warehouses were a permitted conditional use." Id. at 5. Defendant explains that "a change in classification only occurs when a Zone transitions to an entirely new use." Ibid. (citing Pacilli, 394 N.J. Super. at 330). Defendant cites Mahwah Realty Associates, Inc., which defines "classification as used in the statute 'is typically synonymous with the broad general uses permitted in a designated area . . . and extends to sub-categories within those general categories … distinguished by the intensity of the permitted use.'" Id. at 6 (citing 430 N.J. Super. at 253-54). Plaintiffs argue that "Ordinance 2020-24 did not change the Zone's industrial use," rather it "merely expanded the scope to include standalone warehousing, a use already allowed in the ROM-1, ROM-2, ROM-3, ROM-4, and RP-5 Zones when incidental to a permitted use and a conditional use in the ROM-2 and ROM-3

Zones." Id. at 7-8 (citing Township Code § 200-211). Defendant argues that "[a]s Mahwah explained, for the super Notice under N.J.S.A. 40:55D-62.1 to apply, the permitted use must be a marked departure from the current uses allowed." Id. at 7. Even so, Plaintiffs received notice of the proposed development in March 2022 and waited about six months before filing their Complaint. Id. at 8.

Furthermore, Defendant argues that "Plaintiffs' request for discovery based on their spurious allegations of improper dealings by the Township in its passing of Ordinance 2020-24 should be denied" because the Ordinance "is valid in substance and on its face, and … discovery is not reasonably calculated to lead to admissible or relevant evidence." Ibid.

Next, Defendant argues that the Ordinance did not lead to spot zoning because warehouse use was considered a permitted principal use and conditional use. Id. at 9. There were negotiations "related to affordable housing," which Plaintiffs argue led to "'illegal' spot zoning of standalone warehouses in the ROM-3 Zone." Ibid. Defendant argues that "Plaintiffs' concerns regarding these negotiations are not properly before this court in this lawsuit," so "any challenge to those negotiations cannot be brought here." Ibid. Furthermore, Defendant explains that "[t]he negotiations resulted in a court approved Housing Element and Fair Share Plan that did not include the specific site in question." Ibid. Finally, Defendants assert that Ordinance 2020-25 was passed at the same time as

Ordinance 2020-24, which "created a zone within the Township to permit standalone warehousing." Id. at 9-10. Therefore, Ordinance 2020-24 could not have led to spot-zoning when two sites were concurrently zoned for standalone warehousing. Id. at 10.

In determining whether a plaintiff has failed to state a claim upon which relief can be granted under Rule 4:6-2(e), the Court limits its examination to evaluating the legal sufficiency of the facts alleged on the face of the complaint. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (citing Rieder v. Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987)). The Court "searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Ibid. (citing DiCristoforo v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). At this preliminary stage of the litigation, the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint; therefore, plaintiffs are entitled to every reasonable inference of fact. Ibid. (citing Indep. Dairy Workers Union, 23 N.J. at 89). In short, "the test for determining the adequacy of a pleading [is] whether a cause of action is 'suggested' by the facts." Ibid. (citing Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). "In evaluating motions to dismiss, courts consider 'allegations in the complaint, exhibits attached

to the complaint, matters of public record, and documents that form the basis of a claim.'" Teamsters Loc. 97 v. State, 434 N.J. Super. 393, 412 (App. Div. 2014) (quoting Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005)). "The examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach." Ibid.

If the complaint states no basis for relief, dismissal of the complaint is appropriate: "[d]iscovery is intended to lead to facts supporting or opposing a legal theory; it is not designed to lead to formulation of a legal theory." Camden Cty. Energy Recovery Assocs., L.P. v. DEP, 320 N.J. Super. 59, 64 (App. Div. 1999). Thus, "if the complaint states no claim that supports relief, and discovery will not give rise to such a claim, the action should be dismissed." Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 107-08 (2019) (citing Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div. 2011); Camden Cty. Energy Recovery, 320 N.J. Super. at 64-65)). The Court may dismiss some of the counts without dismissing the entirety of the case. See Jenkins v. Region Nine Housing, 306 N.J. Super. 258 (App. Div. 1997). However, dismissals "should be granted in only the rarest of instances." Printing Mart-Morristown, 116 N.J. at 772.

Ordinarily, a dismissal for failure to state a claim is without prejudice, and the court has the discretion to permit a plaintiff to amend the complaint to allege additional facts to state a cause of action. Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 116 (App. Div. 2010). Courts should not dismiss complaints if the facts suggest that a plaintiff may be able to better articulate a potential cause of action by an amendment of the complaint. Printing Mart-Morristown, 116 N.J. at 746.

The Court first addresses whether the challenge is timely. Rule 4:69-6 provides the following:

> a.) General Limitation. No action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed, except as provided by paragraph (b) of this rule.
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> b.) Particular Actions. No action in lieu of prerogative writs shall be commenced
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> > 3.) to review a determination of a planning board or board of adjustment, or a resolution by the governing body or board of public works of a municipality approving or disapproving a recommendation made by the planning board or board of adjustment, after 45 days from the publication of a notice once in the official newspaper of the municipality or a newspaper of general circulation in the municipality, provided, however, that if the determination or resolution results in a denial or modification of an application, after 45 days from the publication of the notice or

> the mailing of the notice to the applicant, whichever is later. …
>
> c.) Enlargement. The court may enlarge the period of time provided in paragraph (a) or (b) of this rule where it is manifest that the interest of justice so requires.
>
> [Ibid.]

The Supreme Court of New Jersey has determined that an extended time to file a complaint is permitted in cases where there are "(1) important and novel constitutional questions; (2) informal or *ex parte* determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification." Rocky Hill Citizens for Responsible Growth v. Planning Bd. of Borough of Rocky Hill, 406 N.J. Super. 384, 398 (App. Div. 2009) (quoting Horsnall v. Washington Twp. Fire Div., 405 N.J. Super. 304, 312-13 (App. Div. 2009) (quoting Brunetti v. Borough of New Milford, 68 N.J. 576, 586 (1975))). As the Appellate Division in Gregory v. Borough of Avalon reminded, this list is non-exhaustive and "[e]ven if a case involves purely private interests, a court may conclude that the 'interest of justice' warrants an enlargement of the forty-five day period." 391 N.J. Super. 181, 189 (App. Div. 2007) (citing Cohen v. Thoft, 368 N.J. Super. 338, 345-47 (App. Div. 2004)). The court may also consider "whether there will be a continuing violation of public rights." Borough of Princeton, 169 N.J. at 152 (quoting Reilly v. Brice, 109 N.J. 555, 559 (1988)). "[A] court must weigh the public and private interests that favor

an enlargement against 'the important policy of repose expressed in the forty-five day rule.'" Gregory, 391 N.J. Super. at 189 (citing Borough of Princeton., 169 N.J. at 152-53 (quoting Reilly, 109 N.J. 555, 559 (1988)); see also Tri-State Ship Repair & Dry Dock Co. v. City of Perth Amboy, 349 N.J. Super. 418, 423-24 (App. Div. 2002). The 45 day "statute of limitations is designed to encourage parties not to rest on their rights." Rocky Hill Citizens for Responsible Growth, 406 N.J. Super. at 398 (quoting Horsnall, 405 N.J. Super. at 313). Nevertheless, courts have extended the timeframe previously. Ibid. (citing Concerned Citizens v. Mayor and Council of Princeton Borough, 370 N.J. Super. 429, 447 (App. Div. 2004); Willoughby v. Planning Board of Twp. of Deptford, 306 N.J. Super. 266, 277 (App. Div. 1997); Horsnall, 405 N.J. Super. at 314).

Here, Plaintiffs argue that the complaint alleges important due process constitutional issues and matters of public interest sufficient to warrant the Court extending the deadline to file under Rule 4:69-6(c). Pl's Br. in Opp 6, 8, 12-13, 16, 19. The complaint alleges that Defendants failed to adequately notice all relevant property owners under N.J.S.A. 40:55D-62.1 applies, which "requires municipalities to provide individual mailed notice to all owners of real property located within 200 ft of a zoning district at least 10 days in advance of a hearing proposing a change to the classification of a zoning district." Id. at 8. Defendant argues that the statute does not even apply, because the ordinance, in its view, did

not change the classification. The provision "directs that all property owners within a zoning district shall receive personal notice if the municipal body seeks to change the classification or boundaries of a zoning district." Pacilli, 394 N.J. Super. at 329; see Grabowsky v. Twp. of Montclair, 221 N.J. 536, 558-59 (2015). The statute provides:

> Notice of a hearing on an amendment to the zoning ordinance proposing a change to the classification or boundaries of a zoning district . . . shall be given at least 10 days prior to the hearing by the municipal clerk 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.
>
> *Notice shall be given to a property owner 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.
>
> [N.J.S.A. 40:55D-62.1 (emphasis added).]

Whether notice was adequate depends on whether the Ordinance "propos[ed] a change to the classification . . . of a zoning district." Ibid. As the Appellate Division has observed, "'[u]nlike many terms found in the MLUL, "classification" is not defined.'" Mahwah Realty Assocs., Inc., 430 N.J. Super. at 253 (quoting

Pacilli, 394 N.J. Super. at 329). "Until the Legislature adopts some different meaning, we will continue to apply, as we apply here, Pacilli's general understanding of the term[.]" Id. at 254 (footnote omitted).

In Pacilli, the Appellate Division ruled that "in its most general sense, classification refers to the use permitted in a zoning district, such as residential, commercial or industrial, as well as sub-categories within the broader uses, such as single-family residential and high-density residential, highway commercial and neighborhood commercial, and highway retail and neighborhood retail." 394 N.J. Super. at 330-31. Classification also refers to "uses that may be permitted under certain conditions within a generally designated category. A change in any of these broad categories and sub-categories has the capacity to fundamentally alter the character of a zoning district." Id. at 331.

The Appellate Division also ruled in Pacilli that "classification" also "include[s] changes to the density, bulk and height standards and conditions applicable to designated uses," because "changes in bulk and density requirements within a zone can effect a substantive change in future development within a zone without any alteration to the label applied to the zone." Id. at 331-32. Thus, determining "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; See

also Mahwah Realty Assocs., Inc., 430 N.J. Super. at 254 (reiterating that a change in classification is one that "has the capacity to fundamentally alter the character of a zoning district."). As Pacilli explains, in determining "what constitutes a substantial change and what notice may or may not be required," "the test is not the number of changes but the substance of the changes." Id. at 333.

For instance, an amendment that made "sweeping" changes to the bulk and density requirements in two residential zoning districts "dramatically altered the intensity of the residential use within each zone and promised to affect the character of the future development in both zones." 394 N.J. Super. at 332. The Appellate Division observed "the scope of the changes . . . is illustrated simply by focusing on the maximum gross density per acre," which changed from one unit per two acres under the existing zoning laws and the ordinance's "Option 1" to one unit per ten acres under the ordinance's "Option 2." Ibid. The court ruled that change itself "effects a fundamental alteration of the character of this zoning district." Id. at 332. Therefore, "the Township Committee was required to follow the notice requirements of N.J.S.A. 40:55D-62.1," and as it did not, the ordinance was "invalid." Id. at 333.

Likewise, in Mahwah Realty Associates, one of the zoning ordinances at issue fundamentally altered the character of certain industrial districts because it added "health and wellness center" and "fitness and health club" to the list of

permitted uses in two industrial zones, and because the definitions "given by the ordinance to both 'health and wellness center' and to 'fitness and health club' reveal that these proposed uses are clearly discordant from the uses permitted in the affected industrial zoning districts." 430 N.J. Super. at 254. The two industrial zones each allowed numerous uses, but the ordinance at issue would "introduce commercial recreation, medical services, retail sales, and educational facilities into zoning districts designed for manufacturing, trucking and the like." Id. at 255.

Here, given the generous and hospitable approach with which the Court reviews Plaintiffs' complaint, it is not the Court's role to consider the merits of Plaintiffs' arguments, that is, to decide if the challenged ordinance amounted to a change in classification. Plaintiffs allege that it does; Defendant disputes that, and Rule 4:6-2(e) motions are not the vehicle for this Court to decide whether the changes here rise to the Pacilli / Mahwah Realty Associates threshold. The complaint alleges enough, generously read, to suggest a due process cause of action. Whether Plaintiffs can meet their burden of proof is, of course, a question for a different day. Printing Mart-Morristown, 116 N.J. at 746.

More fundamentally, however, the Court denies Defendant's application to dismiss Counts I and II of the complaint because Plaintiffs could repackage their challenge to the ordinance tomorrow as a declaratory judgment action. As Judge Skillman explained, a plaintiff may challenge the constitutionality of a municipal

ordinance either as a declaratory judgment action or as an action in lieu of prerogative writ. Ballantyne House Assocs., 269 N.J. Super. at 330 (citing Bell v. Twp. of Stafford, 110 N.J. 384 (1988) (declaratory judgment action) and Hills Dev Co. v. Twp. of Bernards, 103 N.J. 1 (1986) (action in lieu of prerogative writ)). Declaratory judgment actions do not have a statute of limitations and are not ordinarily subject to the defense of laches. Ibid. Because those defenses to an action in lieu of prerogative writ do not exist in the parallel cause of action, "actions in lieu of prerogative writs challenging the constitutionality of municipal ordinances have long been afforded the benefit of such enlargements of time." Ibid. (citing Brunetti, 68 N.J. at 585-88).

Accordingly, for the reasons as stated above, the Court denies Defendant's application to dismiss Counts I and II of Plaintiffs' complaint. Rule 4:69-4 allows the Court to extend the forty-five-day period in the interests of justice, and the Court finds that the available parallel track of a declaratory judgment action to challenge the constitutionality of a municipal ordinance, along with the generous and hospitable reading of the complaint that Rule 4:6-2(e) requires, compels the denial of Defendant's motion to dismiss.

The balance of the decretory paragraphs of this Order is self-explanatory.