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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-1603-22 CIVIL ACTION **ORAL ARGUMENT IS REQUESTED**

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COUNTS I AND II OF PLAINTIFFS' COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

PRELIMINARY STATEMENT

Plaintiffs LUSHENG YAN, ANAND SHANMUGAM, YU-HSING TU, ZHI WEI, and CHAKRAPANI DABBARA, (collectively, "Plaintiffs") oppose the motion of Defendant IV1 WINDSOR 8 LOGISTICS CENTER LLC ("Applicant") seeking dismissal with prejudice of Count I and Count II of Plaintiff's Complaint (the "Motion"). Oral argument is hereby requested. Count I and Count II of Plaintiff's Complaint (together, the "Counts") seek invalidation of the Township of West Windsor's ("Township" or the "Municipality") Ordinance No. 2020-24 (the "Ordinance"), which changed the requirements for the ROM-3 Zoning District to permit Applicant's proposed construction of a warehouse.

Applicant argues Count I and Count II are barred by the 45-day limitations period for actions in lieu of prerogative writs, as set forth in R. 4:69-6. However, a review of applicable law shows that the facts of this matter provide ample justification for extending the limitations period in the interests of justice, as permitted under R. 4:69-6(c). Such extensions are warranted for claims raising important and substantial issues of a constitutional nature, as well as to protect matters of public, rather than private interests.

Here, Plaintiffs have raised two substantial challenges of a constitutional nature. First, Plaintiffs were deprived of personal notice which the Township was required under the MLUL to provide. This failure resulted in the Plaintiffs being deprived of due process, and the Council being divested of jurisdiction to hold public hearings on the adoption of the Ordinance. Second, the Complaint raises questions on the limitations of the Township's ability to use spot-zoning to permit warehouse development in the Township's Research Office Manufacturing-3 Zoning District (the "ROM-3 Zone" or the "Zone"). The Complaint indeed raises important matters of public interest concerning the Township's improper adoption of zoning amendments, which

heavily outweigh any interests the Applicant or Municipality may have in repose in an ordinance that is less than two years old, and which has never been implicated prior to the site plan application being challenged in Count III of the Complaint.

For these reasons, it is clear that an extension of the limitations period in accordance with R. 4:69-6(c) is justified and should be granted by the Court to allow Plaintiffs' challenge to the Ordinance be properly heard on the merits.

PROCEDURAL HISTORY

On September 15, 2022, Plaintiffs filed a three-count complaint in lieu of prerogative writs (the "Complaint"). Counts I and II of the Complaint challenge West Windsor Township Ordinance 2020-24, which purported to amend the requirements of the ROM-3 Zone. The ROM-3 Zone consists of a single parcel (the "Property"), which Applicant seeks to develop into a warehouse. Count III of the Complaint challenged the April 27, 2022 approval by Defendant Township of West Windsor Planning Board (the "Board") of Applicant's application for Preliminary and Final Site Plan approval with variance and waiver relief for the Property (the "Site Plan Approval"), as well as the Board's July 27, 2022 Resolution memorializing the Approval. Applicant's Motion only seeks dismissal of Count I and Count II, claiming Plaintiffs' objections to the Ordinance were filed outside the 45-day limitations period and should be dismissed. Applicant does not seek dismissal of Plaintiffs' challenge to the Site Plan Approval.

STATEMENT OF FACTS

In or about July 2015, the Township filed a declaratory action in the Superior Court, Law Division, under 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 it "fair share" of the regional need for low and moderate income housing pursuant to the

Mount Laurel doctrine. The Township subsequently 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"). The Township DJ Action was appealed, however, challenging the Court's approval of the Settlement Agreement and the Township's Final Judgment of Immunity and Repose from Builder's Remedy suits. The parties to these two actions apparently entered into a Stipulation of Settlement and Consent Order ("SCO"), dismissing the Appeal of the Township's DJ Action and the Zoning Litigation in exchange for the Township introducing and adopting proposed zoning amendments permitting warehouse use in the ROM-3 Zone (which consists of a single parcel in the Township, being Applicant's Property), along with a "concept plan" for the Property.

On November 30, 2020, the Township introduced Ordinance 2020-24, which permits warehouse use in the ROM-3 Zone (the Applicant's Property) on a minimum lot area of 25 acres and a "side yard setback of three hundred (300) feet" … "from the westerly boundary line of the ROM-3 District." The Council thereafter held a hearing on, and adopted, the Ordinance on December 14, 2020.

The Ordinance changed the classification of the Zone and fundamentally altered the Zone's character by introducing a new permitted warehouse use, as well as significantly modifying the bulk standards that would be applicable to said use. This fundamental alteration of the Zone's character was made clear by the fact that the Zone consists of a single parcel, Applicant's Property, and thus, the specific intended effect of these changes was to permit an entire Zoning District to be developed into a warehousing use that would not otherwise be permitted. Significantly, the changes reflected in the Ordinance were not recommended in a

periodic general reexamination of the Township's Master Plan by the Board. Given these facts, the Township was required under N.J.S.A. 40:55D-62.1 to provide at least 10 days advance written notice of the governing body's hearing on Ordinance 2020-24 to "the owners of all real property as shown on the current tax duplicates, located...within the district…within 200 feet in all diretions of the boundaries of the district…."

Despite being required to provide individual written notice of the hearing to all owners of property within 200 ft of the ROM-3 zone (the Property), including many of the Plaintiffs, the Township failed to do so. By failing to comply with N.J.S.A. 40:55D-62.1, the Township was deprived of the jurisdiction to hold the hearings, and the Ordinance is therefore null and void.

On or about January 26, 2022, 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 at the Property. The Board approved the Application on April 27, 2022 as memorialized in a Resolution dated July 27, 2022. Plaintiffs' challenge to the Board's Approval and Resolution was filed within the 45-day limitations period of R. 4:69-6.

LEGAL ARGUMENT

I. Applicant's motion for dismissal with prejudice of Count I and Count II is inappropriate and must be denied.

Applicant moves for dismissal under R. 4:6-2(e), alleging a failure to state a cause of action for which relief can be granted. R. 4:6-2 states, in pertinent part:

> Every defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except that the following defenses may at the option of the pleader be made by motion, with briefs: . . . (e) failure to state a claim upon which relief can be granted. . . . If a motion is made raising any of these defenses it shall be made before pleading if a further

> pleading is to be made. No defense or objection is waived by being joined with one or more other defenses in an answer or motion.

In hearing R. 4:6-2(e) motions, the Court's "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Bosland v. Warnock Dodge, 396 N.J. Super. 267 (Law Div. 2007) (quoting Printing Mart-Morristown v. Sharp Elects. Corp., 116 N.J. 739, 746 (1989)). The test for determining the adequacy of a pleading is whether a cause of action is even "suggested" by the facts. Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988); accord Printing Mart, 116 N.J. at 746. A reviewing 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." Di Cristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App. Div. 1957).

A court is not concerned with the ability of plaintiffs to prove the allegations contained in the complaint. Somers Constr. Co. v. Board of Educ., 198 F.Supp. 732, 734 (D.N.J. 1961). The court is obligated not only to accept the allegations of the complaint as true, but also to afford the plaintiff all reasonable factual inferences arising out of such allegations. See Independent Dairy Workers Union v. Milk Drivers Local 680, 23 N.J. 85, 89 (1956).

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. Printing Mart, 116 N.J. at 746. The New Jersey Supreme Court has cautioned that courts should approach motions for dismissal under R. 4:6-2(e) with care and every reasonable inference should be accorded the plaintiff. See id. at 771-72. In addition, should a Court determine dismissal is appropriate, such action should be taken without prejudice:

> If a complaint must be dismissed after it has been accorded the kind of meticulous and indulgent examination counselled in this opinion, then,

> barring any other impediment such as a statute of limitations, the dismissal should be without prejudice to a plaintiff's filing of an amended complaint.
>
> [Id. at 772.]

Finally, dismissal should be used sparingly, as it would prevent the Plaintiff from obtaining discovery on its claims which may result in additional material facts being uncovered.

a. The interests of justice require the 45-day limitations period be extended under *R.* 4:69-6(c).

The sole basis of Applicant's Motion is the argument that Count I and Count II of this action are barred by the 45-day limitations period of R. 4:69-6. This is incorrect, however, because Count I and Count II both raise substantial issues of a constitutional nature. This was specifically pleaded in paragraph 44 of the Complaint:

> 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.
>
> [Complaint, at ¶ 44.]

It is well-settled law that "consideration of substantial constitutional questions warrants relaxation of the time limits of R. 4:69-6 'in the interest of justice.'" Brunetti v. Borough of New Milford, 68 N.J. 576, 587 (1975); see also In re Ordinance 2354-12 of Tp. of W. Orange, Essex Cty. v. Twp. of W. Orange, 223 N.J. 589, 601 (2015). In Catalano v. Pemberton Twp. Bd. of Adjustment, 60 N.J. Super. 82, 96-97 (App. Div. 1960), the court determined that the municipality's "failure to observe the fundamental statutory provisions referable to the enactment of the ordinance in question deprived plaintiff of his constitutional rights," and as a result, the limitations period warranted extension.

In addition, 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. Ballantyne House Assoc. v. Newark, 269 N.J. Super. 322, 330 (App. Div. 1993); see also Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 14 (1960). As a result, the 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). See Ballantyne House, 269 N.J. Super. at 330; see also Brunetti, 68 N.J. at 585-88.

In deciding whether to extend the limitations period, Courts should weigh the municipality's interest in repose against the public interest raised by the questions of law. See Hopewell Valley Citizens' Grp., Inc. v. Berwind Prop. Grp. Dev. Co., L.P., 204 N.J. 569, 580 (2011). In Borough of Princeton v. Bd. of Chosen Freeholders, 169 N.J. 135 (2001), the Supreme Court extended the limitations period for claims challenging two public contracts, filed nine years and five years, respectively, after the contracts had been awarded. The Court held the interests of justice required permitting these claims, given they concerned long-term contracts which were still ongoing. See id. As a result, the fact that a claim challenges an ongoing issue should be considered in favor of extending the limitations period.

Here, 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. The facts in this case are similar to Damurjian v. Board of Adjustment, in which 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. 299 N.J. Super. 84, 97-98 (App. Div. 1997).

II. The Township's failure to provide the notice required under the MLUL is an issue of constitutional magnitude justifying an extension of the 45-day limitations period.

A fundamental constitutional issue underlying Plaintiffs' claims is the failure of the Township to provide to Plaintiffs notice of the December 14, 2020 hearing on Ordinance 2020-24, which deprived Plaintiffs of their constitutional right to due process under the U.S. and New Jersey constitutions. Although the Township alleges it provided all required notice via publication, this is incorrect. As discussed below, N.J.S.A. 40:55D-62.1 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. This failure to provide individual notice deprived Plaintiffs of their constitutional due process rights, which warrants an extension of the 45-day limitations period so that Plaintiffs can litigate their claims.

A fundamental requirement of constitutional due process is that an affected party be provided with notice of proceedings in which its rights are to be adjudicated. Although this issue has not been litigated in the context of N.J.S.A. 40:55D-62.1, it is well-settled as shown in numerous other types of proceedings:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.
>
> [Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865, 873 (1950).]

"The minimum requirements of due process, therefore, are notice and the opportunity to be heard." Doe v. Poritz, 142 N.J. 1, 106 (1995).

> At its core, due process requires adequate notice and an opportunity to be heard, whether analyzed under the Federal Constitution or under the New Jersey Constitution. Put simply, the citizen facing a loss at the hands of the State must be given a real chance to present his or her side of the case before a government decision becomes final.
>
> As a precondition of such a "real chance" to object, there must be adequate notice of what the government intends to do. Hence, **an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.**
>
> [Harrison v. Derose, 398 N.J. Super. 361, 403 (App. Div. 2008) (emphasis added, citations omitted).]

"In determining what specific form of process may be due under the Constitution, the touchstone is not abstract principle but the needs of the particular situation." Id. at 404.

The due process requirements of this particular situation are clear, given the MLUL provides a statutory requirement defining specific type of notice the Township was required to provide to Plaintiffs. See Kelly v. Hackensack Meadowlands Dev. Comm., 172 N.J. Super. 223, 228-29 (App. Div. 1980) (holding that due process requires "satisf[ying] the procedural requirements [of public notice] prerequisite to legislative action."); accord Infinity Broad. Corp. v. N.J. Meadowlands Comm'n, 377 N.J. Super. 209, 228 (App. Div. 2005).

Another factor which ties together the constitutional violation with the right to an extension of the limitations period—and which also weighs in favor of extending the limitations period independent of the due process violation—is the failure to provide all required notices amounts to concealment of the fact that a hearing on the zoning change was taking place. According to the New Jersey Supreme Court, it does not matter whether the concealment was

malicious or merely negligent; either way, 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). 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)).

a. The Township's failure to provide the required notice was a violation of *N.J.S.A.* 40:55D-62.1

The deprivation of due process rights arises from the Township's failure to provide Plaintiffs with individual notice of the December 14, 2020 hearing on Ordinance 2020-24, as required by N.J.S.A. 40:55D-62.1:

> **Notice of a hearing on an amendment to the 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 section 76 of P.L.1975, c.291 (C.40:55D-89**), 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.
>
> [N.J.S.A. 40:55D-62.1 (emphasis added).]

In its motion, Applicant cited Robert James Pacilli Homes, L.L.C. v. Woolwich Twp., 394 N.J. Super. 319, 330 (App. Div. 2007), for the proposition that for the purposes of N.J.S.A. 40:55D-62.1, in determining whether an ordinance amounts to a "change to the classification" of a zoning district, a court should focus on the substantive effect of the amendment rather than the appellation given to the zone. The Pacilli Homes court determined that an ordinance changing the bulk standards of a zoning district amounts to a change in "classification", but only if the changes are substantial enough to "have the capacity to fundamentally alter the character of a

zoning district." Id. at 331. What Applicant failed to disclose to the Court, however, is that the Pacilli Homes court determined any ordinance making changes to the permitted uses in a zoning district does have the "capacity to fundamentally alter the character of the zoning district." Id. Thus, under the case cited by Applicant, 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.

Applicant also suggests that under Pacilli Homes, the Court should look at the "substantive effect of the amendment rather than the appellation given to the zone." The ROM-3 Zone consists of a single parcel, however, and the substantive effect of Ordinance 2020-24 is it allows a zone in which warehousing was prohibited to be used exclusively for warehousing. See Mahwah Realty v. Tp. of Mahwah, 430 N.J. Super. 247, 253-55 (App. Div. 2013) (holding that an ordinance allowing health and fitness centers in industrial zoning districts had the capacity to fundamentally alter the districts' character by effecting a change in the classification of permissible uses).

Ordinance 2020-24 resulted in a change in permissible uses, by permitting warehousing in the ROM-3 Zone, where it otherwise was prohibited. Without Ordinance 2020-24, Applicant would have been required to obtain a "d(1)" use variance to construct its proposed warehouse. Therefore, 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[1].

[1] It should be noted an exception exists under N.J.S.A. 40:55D-62.1 for implementing changes "recommended in a periodic general reexamination of the master plan by the planning board." Although this Ordinance was approved by the Planning Board as consistent with the Master Plan, the Board did not recommend it as part of any periodic general reexamination. Therefore, the exception does not apply to Ordinance 2020-24.

Further evidence of the Ordinance constituting a classification change can be found in the changes to other use and bulk standards to be applied to warehouses and distribution facilities in the ROM-3 Zoning District. The existing floor area ratio ("FAR") requirements for the ROM-3 Zone (a violation of which would require a form of use variance relief under N.J.S.A. 40:55D-70d4 were completely eliminated. While the minimum lot area for the ROM-3 Zoning District was five acres, the Ordinance provided the minimum lot area for warehouses and distribution facilities in the ROM-3 Zoning District to be increased five-fold to 25 acres. Minimum side yard setbacks of 40 feet were increased by the Ordinance almost ten-fold to 300 feet from the zone's western boundary line for warehouses and distribution facilities.

Finally, it should be noted that the issue of 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. For the purposes of this Motion to Dismiss, therefore, 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. See Independent Dairy Workers Union, 23 N.J. at 89.

b. In addition to amounting to a constitutional violation justifying an extension of the limitations period, the Township's failure to provide the required notice also voids the approval of Ordinance 2020-24.

Under the MLUL, it is very well-established that with regard to development applications, a failure to provide the required notice results in the board in question being deprived of jurisdiction. Although it is less common for municipalities to fail to provide the required notice, the result is the same for governing bodies purporting to provide notice of an ordinance hearing:

> While amendments to zoning ordinances and reclassifications of zoning districts are considered legislative in nature and enjoy a presumption of validity, nevertheless the process of enactment is statutory and courts have been strict in compelling compliance with the statutory procedures. When the notice is inadequate, the conclusion is that failure to give adequate notice of pending legislation is generally fatal to the subsequent legislative enactment. The result of a failure to comply with the procedural requirements of zoning legislation generally is that the proposed zoning or rezoning action is deemed invalid and, therefore, void or a nullity.
>
> [Rockaway Shoprite v. Linden], 424 N.J. Super. 337, 352 (App. Div. 2011) (citations and quotation marks omitted).]

As a result, the Township's violation of the MLUL's statutory notice requirements ultimately results in the invalidation of Ordinance 2020-24.

III. The Applicant's and Township's actions in using affordable housing as a pretext to spot-zone a parcel to allow warehousing space raises a second issue of constitutional magnitude warranting extension of the limitations period.

It is well-settled law that all New Jersey municipalities have a constitutional obligation to provide sufficient affordable housing for its residents. In this matter, however, it appears the Township illegally spot zoned a non-residential property to allow warehousing space in furtherance of a settlement of affordable housing litigation. Counts I and II of Plaintiffs' Complaint include a challenge to same, appropriately raising the question of whether a municipality's constitutional obligation to provide affordable housing permits it to spot-zone a non-residential parcel for exclusively non-residential use.

a. The MLUL prohibits spot-zoning.

A zoning ordinance constitutes impermissible spot zoning in violation of the MLUL when the Ordinance is inconsistent with the municipality's comprehensive zoning scheme, applicable to only a single parcel, and relieves that parcel of the burden of general regulation by granting favorable zoning requirements based on the plans for development of that parcel.

> The test is whether the zoning change in question is made with the purpose or effect of establishing or furthering a comprehensive zoning scheme calculated to achieve the statutory objectives or whether it is "designed merely to relieve the lot of the burden of the restriction of the general regulation by reason of conditions alleged to cause such regulation to bear with particular harshness upon it."
>
> If it is in the latter category, the ordinance is invalid since it is not in accordance with a comprehensive plan and in effect is a special exception or variance from the restrictive residential regulation, thereby circumventing the board of adjustment to which is committed by our Zoning Act the quasi-judicial duty of passing upon such matters, at least initially, in accordance with prescribed standards.
>
> [Riya Finnegan LLC v. Twp. Council of Tp. of S. Brunswick, 197 N.J. 184, 196 (2008) (emphasis added, citations and quotation marks omitted); accord Taxpayers Ass'n of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6, 18 (1976).]

b. The Ordinance constitutes spot-zoning.

Prior to the Ordinance, warehousing use was prohibited in the ROM-3 Zone. At the request of Applicant, however, the Council adopted the Ordinance to add warehousing as a permitted use. Absent the Ordinance, the Applicant's proposed development of the Property as a warehouse would therefore require substantial variance and other relief, including, but not limited to "d(1)" and "d(4)" use variance relief under N.J.S.A. 40:55D-70 and the West Windsor Township Code. Instead, the Ordinance sought to grant to Applicant extremely permissive zoning requirements, applicable only to the Property and no other parcels, which obviated the need for Applicant to obtain the substantial variance relief, including but not limited to a d(1) use variance that would otherwise be required to develop a warehouse in the ROM-3 Zone.

It should be noted 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. See Gallo v. Mayor and Twp. Council, 328 N.J. Super. 117, 128 (App. Div. 2000). This often comes into play when a municipality enacts an ordinance intended to satisfy its constitutional obligation to

provide affordable housing. Here, 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.

Here, Plaintiffs maintain that the permitting warehousing use and revising the bulk and related requirements to accommodate Applicant's proposed development was not sufficient justification to permit the Township to spot-zone Applicant's parcel. Although the Township does have a constitutional obligation to provide affordable housing, that obligation does not extend so far as to permit the Municipality to change the zoning requirements for non-residential parcels.

The 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. The actions of the Applicant and Township in proceeding in this fashion raise 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. These constitutional issues cannot be heard if the counts challenging Ordinance 2020-24 are dismissed, therefore, extension of the limitations period of R. 4:69-6 is warranted.

IV. In addition to the constitutional issues, it would be inequitable for the Court to dismiss the counts of the complaint challenging Ordinance 2020-24.

R. 4:69-6(c) allows the Court to extend the limitations period in the interests of justice, not only in matters dealing with constitutional claims, but also "informal or ex parte determinations of legal questions by administrative officials"; and "important public rather than private interests which require adjudication or clarification." Reilly, 109 N.J. at 558.

a. This matter requires discovery and review into the important public issue of the apparently unlawful *quid pro quo* agreement between the Municipality and Applicant to permit warehousing via ordinance and master plan in exchange for providing affordable housing.

One major public issue requiring clarification and close scrutiny is the propriety and legality of 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. Simply put, the construction of a warehouse bears no reasonable relationship to the Township's obligation to meet its affordable housing obligations. This arrangement appears to have allowed Applicant to side-step the requirement to obtain use variance and other relief necessary for its proposed warehouse.

Counts I and II of Plaintiffs' Complaint raise these issues, which implicate extremely important public concerns. Discovery is necessary to ascertain how this agreement came about, why the public was not provided individual notice of any settlement of litigation that resulted in the introduction and adoption of the Ordinance, and whether there are any facts that could show that amending the Master Plan and spot-zoning a parcel to permit construction of a warehouse has a sufficient legal nexus to providing affordable housing and protecting low and moderate-income households under state and federal law.

These facts raise important public interests and concerns – substantiating the need to allow Plaintiffs' Count I and II to proceed in the interests of justice.

b. Counts I and II raise important public interests very similar to numerous prior cases in which New Jersey Courts have determined the interests of justice require extending the limitations period.

In Wolf v. Shrewsbury, 182 N.J. Super. 289, 296 (App. Div. 1981), a case very similar to this one, the Appellate Division reversed a trial court that refused to extend the 45-day limitations period concerning an ordinance that had been adopted nearly two years earlier. The

Wolf court determined that the municipality's failure to provide adequate notice under the MLUL implicated "important public rather than private interests" and held that because the ordinance was void and invalid, it was "manifest on the record…that the interest of justice required that…relief be granted pursuant to R. 4:69-6(c)." Id. The similarities between Wolf and the instant case are self-evident, and substantially similar circumstances justifying the enlargement of the limitations period in Wolf are present here.

In Najduch v. Twp. of Indep. Planning Bd., 411 N.J. Super. 268, 274 (App. Div. 2009), the court held, "even if the time *Rule* 4:69-6 allows for direct review of a municipal agency's action has expired, an action that was utterly void is subject to collateral attack at any time." (quoting Thornton v. Ridgewood, 17 N.J. 499, 510 (1955)).

> where there is no semblance of compliance with or authorization in the [governing] ordinance, the deficiency is deemed jurisdictional and reliance will not bar even a collateral attack after the expiration of time limitation applicable to direct review.
>
> [Id. (quoting Jantausch v. Borough of Verona, 41 N.J. Super. 89, 94 (Law Div. 1956), *aff'd*, 24 N.J. 326 (1957)).]

This is applicable to the case at bar because, given the Township's failure to provide the statutorily required notice divested it of the jurisdiction to hold hearings on Ordinance 2020-24, and thus the approval of such ordinance was utterly void. It should also be noted that Nadjuch permitted an extension of the limitations period to an invalid site plan approval issued eighteen years earlier, whereas the instant matter only concerns an ordinance that was purportedly adopted less than two years prior to the filing of this Complaint.

Willoughby v. Planning Bd., 306 N.J. Super. 266, 277 (App. Div. 1997) also concerned a simultaneous challenge to a zoning ordinance and an application for site plan approval. The Appellate Division held that a challenge to an ordinance re-zoning the permitted uses of a

property warranted extension of the limitations period because it implicated public, rather than private interests, given the development allowed by the re-zoning could have a significant impact on the community. Id. In addition, in weighing the public interests against the developer's interest in repose, the Court found it significant that the challenge to the ordinance was brought at the same time as a timely challenge to the first application for site plan approval under the new ordinance's requirements. Id. at 277-79. Similarly, the court in Gregory v. Borough of Avalon, 391 N.J. Super. 181, 188-191 (App. Div. 2007) permitted an extension of time in the interest of justice for a challenge to a nine-month old zoning board decision when it was brought in connection with a timely challenge to a related planning board decision. The court determined the subject matter was one of public importance. The court held: "a close relationship between the actions of different agencies of municipal government is a circumstance that weighs in favor of an enlargement of time for challenging the action of the agency that acted first." Id. at 190. The court also found it significant the full nature of the prior zoning board decision did not become apparent until the later decision, and that the applicant was not prejudiced by the delay in challenging the zoning board decision because "he knew all along" he would require planning board approval as well. Id. at 191.

The instant case is similar to Willoughby and Gregory, in that they all involve a substantial public interest—here the re-zoning of a property into a large warehouse which will have a palpable impact on the local community—concerning governmental action which could not have been challenged upon initial adoption, but which was challenged not long after, in connection with a closely- related application for planning board approval, here being a challenge to the Ordinance filed with a timely challenge to site plan approval under the Ordinance. Given these facts, as well as the similarities to Wolf and Nadjuch, it is clear the

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.

CONCLUSION

Plaintiff has established entitlement to an extension of the 45-day limitations period in the interests of justice, as permitted by R. 4:69-6(c).

Plaintiffs were deprived of their fundamental rights to due process in connection with the adoption of the Ordinance, given the Municipality did not provide the notices required under the MLUL, and resulting in municipal action that was undertaken without jurisdiction, and which therefore is void *ab initio*.

In addition, Plaintiffs' challenge raises novel and substantial issues concerning the limits of a municipality's power to use spot zoning to satisfy its constitutional obligation to provide affordable housing.

Last, the Plaintiffs' challenge to Ordinance 2020-24 seeks to advance important public interests, rather than private interests, which easily outweigh the Applicant's and Municipality's interests in repose for an Ordinance that is less than two years old, and which has not been used for any development applications prior to the timely filed one being challenged in this action.

For all of the above reasons, Applicant's Motion to Dismiss should be denied.

Respectfully submitted,

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