

Prepared by the Court

**LONG ISLAND CONSOLIDATED
SCHOOL DISTRICT BOARD OF
EDUCATION,**

Plaintiff(s)

v.

**BOUROUGH OF SHIP BOTTOM,
THE COUNCIL OF THE
BOROUGH OF SHIP BOTTOM and
THE LAND USE REVIEW BOARD
OF THE BOROUGH OF SHIP
BOTTOM,**

Defendant(s)

**SUPERIOR COURT OF NEW JERSEY
OCEAN COUNTY
CHANCERY DIVISION**

DOCKET NO. OCN-L-1179-21

**FINDINGS OF FACT AND
ORDER**

THIS MATTER having been brought before the Court in this Action in Lieu of Prerogative Writs Plaintiff Long Beach Consolidated School District Board challenging the adoption of a zoning ordinance by Defendant Borough of Ship Bottom. For the reasons set forth in it's opinion the Court finds:

IT IS on this **18th** day of **December 2023**;

ORDERED, that Count 4 of the District's complaint is **DENIED WITHOUT PREJUDICE**.

ORDERED, that Counts 1, 2, and 3 of the District's complaint is **GRANTED**, and the court finds that the Ordinance 2021-05 of the Borough of Ship Bottom is contrary to the New Jersey Municipal Use Law, and is struck down as invalid due to the procedural and substantive deficiencies stated in the opinion of the court which accompanies this order. No fees or costs

are awarded to either party.

ORDERED, The Borough's Affirmative Defense of Exhaustion of Administrative Remedies is DISMISSED WITH PREJUDICE. Unless determined herein, any additional relief sought by the parties is DENIED WITH PREJUDICE.

ORDERED, that a copy of this order shall be served on all parties within seven (7) days hereof.

Mark A Troncone

Mark A. Troncone, P.J.Ch.P.

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS**

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – CIVIL PART**

LONG BEACH ISLAND CONSOLIDATED
SCHOOL DISTRICT BOARD OF
EDUCATION,

Plaintiff,

CIVIL ACTION

Docket No.: OCN-L-1179-21

v.

BOROUGH OF SHIP BOTTOM, THE
COUNCIL OF THE BOROUGH OF SHIP
BOTTOM and THE LAND USE REVIEW
BOARD OF THE BOROUGH OF SHIP
BOTTOM,

Defendants.

OPINION

Decided: December 18, 2023

Counsel: Scott A. Heiart, Esquire of Carlin, Ward, Ash & Heiart, LLC appearing on behalf
of Plaintiff Long Beach Island Consolidated School District Board of Education

Jerry J. Dasti, Esquire of Dasti, Murphy, McGuckin, Ulaky and Connors
appearing on behalf of Defendant Borough of Ship Bottom

Joseph D. Coronato, Esquire of Coronato Law appearing on behalf of Land Use
Review Board of Ship Bottom

MARK A. TRONCONE, P. J.Ch.P.

In this Action in Lieu of Prerogative Writs Plaintiff Long Beach Island Consolidated
School District Board (“District”) challenges the adoption of a zoning ordinance (“Ordinance

2021-05”) by Defendant Borough of Ship Bottom (“Borough”). In its Complaint, the District argues that the ordinance should be struck down because: 1) the actions of the Borough’s Land Use Board (“Board”) were arbitrary, capricious and unreasonable (Count 1); the actions of the Borough were unreasonable (Count 2); both the Borough and the Board failed to comply with procedural mandates of the New Jersey Land Use Law (“MLUL”), N.J.S.A. 40:55D-1 et seq. when adopting the ordinance (Count 3); the Borough’s current Master Plan is deficient and thus any attempt to adopt a zoning ordinance must fail (Count IV). The remaining counts of the District’s Complaint include Bad Faith (Count V), Conflict of Interest (Count VI) and unlawful usurpation (Count VII). The defendants deny the District’s allegations and include various affirmative defenses, the most significant of which is the failure of the District to exhaust its administrative remedies before filing this suit. The defendants also advanced a counterclaim which was dismissed by the Honorable Marlene Lynch Ford during the pendency of this matter.

STATEMENT OF MATERIAL FACTS

A) The Subject Property:

The District is the owner of a four acre tract (“subject property”) that contains a 54,941 square foot school building and associated improvements. The District has owned the property since 1929 and has operated a school on the property since 1951. The subject property is rectangular in shape and is surrounded by public streets on all four sides. The surrounding neighborhood consists of residential dwellings in a residential zone. The subject property however is located in the Borough’s Public District (“P”) zone.

B) The Decision of the District to Sell the Subject Property:

After two public referenda voted down a capital improvement program for the school building, the District decided for the reasons set forth in its Complaint, to close the school

and consolidate its operations with another nearby school. The District also then decided to sell the subject property in accordance with public bidding laws. It was at that time, the Borough, which opposed the closing of the school, began the process of adopting the amendment to the zoning ordinance.

C) The Borough's Master Plan:

In 1979, the Borough of Ship Bottom adopted its current Master Plan.

Subsequently, the Borough's Land Use Board prepared statutorily-mandated reexaminations of the Master Plan in 1982, 1989, 1992, 2000, 2006, 2018 and, most recently, in 2021.

In addition to the periodic reexamination reports listed above, a review of the historical documents submitted by the Borough, and entered into evidence, establishes:

- 1) In 1991, the Board updated its Master Plan to include a Housing Element as required by the Fair Housing Act which reflected the New Jersey Supreme Court's decision in Mount Laurel II in regard to the Borough's affordable housing obligation. A Resolution (Exhibit D-8) of the Board memorialized this action;
- 2) In 1992, the Board updated the Master Plan's Statement of Objectives and Land Use Element. A Resolution (Exhibit D-9) of the Board memorialized this action;
- 3) In 1993, the Borough adopted a Comprehensive Zoning Ordinance;
- 4) In 2000, the Board arguably updated the Housing Element by calculating its affordable housing obligations within the 2000 Reexamination Report.
- 5) The defendants assert that the 2018 Reexamination Report also constituted a master plan update. The District denies this assertion.

D) The Zoning Ordinance Amendment:

On March 23, 2021, the Borough's governing body ("Council") introduced Ordinance 2021-05. The Ordinance was entitled "Ordinance Amending Chapter 16.20 Of The Code Of The Borough Of Ship Bottom, Entitled "P Public District To Define The Intent And Purpose Of The P Public District and Specify Prohibited Land Uses Therein." In its preamble, the proposed ordinance stated that "enactment of new section of the municipal code defining the intent and purpose of the P Public District and setting forth prohibited uses therein is consistent with the recommendations of the 2021 Master Plan Reexamination Report." Essentially, the new ordinance specifically prohibited all land uses other than those which are currently permitted in the P zone.

Immediately prior to the introduction of the ordinance, the Board had conducted its 2021 reexamination of the Borough's 1979 Master Plan. A Reexamination Report was prepared by the Board by Stan Slachetka, P.P., the Borough's planning consultant.

The 2021 Reexamination Report devoted a significant analysis of the Long Beach Island Grade School site. At page 11 of the report it states:

The Borough has significant concerns about the closure of Long Beach Island Grade School and the potential for its subsequent conversion to uses not consistent with the property's current P (Public) zoning. The Borough's position is that the property should remain in public use to maintain existing neighborhood character and prevent further densification within the Borough. In addition, the Long Beach Island Grade School site is anticipated to be an essential component of the Borough's comprehensive recreation and open space plan. (Emphasis added) (Exhibit D-11) **2021 Master Plan Reexamination Report, Borough of Ship Bottom, Ocean County, New Jersey, page 11**

Later in his report, Mr. Slachetka compiled "Specific Changes Recommended To The Master Plan and Development Regulations." Those recommendations included the following:

At this juncture, the most critical issue facing the Borough of Ship Bottom is the need to maintain the integrity of its P (Public) Zone Districts. The need to address this issue is heightened as a result of the issues related to the Long Beach Island Grade School site (Block 48, Lot 1) that have previously been discussed in this report. To address said issues, this report recommends the strategies that are outlined in the following subsections.

Prepare Ordinance Amendments

Land development regulations for the P (Public) Zone District are provided in Chapter 16.20 of the Code of the Borough of Ship Bottom, respectively. While this chapter very clearly defines permitted principal and accessory uses, it does not specify the purpose of the zone district or define prohibited uses. It is, therefore, recommended that the Borough revise Chapter 16.20 to very clearly communicate the purpose of the zone district and specify uses prohibited therein. By doing so, the Borough’s intentions for the P (Public) Zone District would be clarified and provide a framework for the Ship Bottom Borough Land Use Board in analyzing any future requests for “d” variances. (Emphasis added) (Exhibit D-11)
 Ibid., pages 16-17

Mr. Slachetka then further recommended that the Borough prepare an updated land use element and housing element and fair share plan.

Amend Land Use Element

This report recommends that the Borough prepare an updated land use element. The new land use element should provide detailed description of the Borough’s intent and purpose for each land use district. The new land use element should also be coordinated with a new recreation and open space element for the Borough as recommended in the following subsection.

Any update to the Land Use Element would also need to conform with the new statutory requirements for land use elements that have been described in this report. These include the requirement to provide: a land use plan statement of strategy on smart growth, storm resiliency and environmental sustainability, and a climate change related hazard vulnerability assessment. Ibid.

. . .

Prepare a Third-Round Housing Element and Fair Share Plan

The Borough has not prepared a third-round housing element and fair share plan. It is therefore recommended that the Borough engage its legal counsel to develop a third-round compliance strategy and prepare a third-round housing element and fair share plan.

When developing said plan, it is recommended that the Borough consider preparing a vacant land adjustment in accordance with applicable affordable housing regulations that have been accepted by the courts. It is noted that the regulations pertaining to vacant land adjustments permit municipalities to reserve up to: three percent of their developed and developable land area for future use as active recreation; and three percent of their total area for use as conservation, parklands and open space (i.e., passive recreation). It is noted, however, that reservation of land for active and passive recreation requires that the lands to be reserved be designated in the municipality's master plan, which would be addressed in an amended recreation and open space plan. Ibid.

While the governing body ultimately adopted the recommended zoning ordinance, none of the identified Master Plan elements have been updated.

Following introduction of the zoning ordinance, the governing body then referred the ordinance to the Board as required by N.J.S.A. 40:55D-26 for a determination whether the ordinance was in substantial conformance with the Borough's Master Plan. On April 21, 2021, the Board conducted a review of the proposed ordinance. At the hearing, Mr. Slachetka testified:

MR. SLACHETKA: Mr. Chairman, Stan Slachetka from T & M Associates, and I'm the planner who worked in the matter and re-examination report and also assisted the borough in the preparation of the ordinance. And I'm just here in case there's specific questions that might arise from the board.

. . . but the one thing that I would point out when any zoning ordinance, proposed amendment to the zoning ordinances referred to the planning board by the governing body after introduction, the primary role and responsibility for the board is to review the proposed ordinance as to its consistency with the borough's master plan.

And as Mr. Coronato, pointed out at your last meeting, you adopted a master plan re-examination report which specifically recommended, uh, that this ordinance be adopted in relationship to

the P district. (Emphasis added) (Expressions of hesitation omitted)

Transcript, meeting of the Ship Bottom Borough Council, April 27, 2021, page 18 line 10 to page 19 line 8.

The Board then voted and found that the ordinance was in accord with the 2021 Reexamination Report. However, the Board did not review the ordinance's consistency with the 1979 Master Plan as amended by the subsequent updates. Further, the Board did not memorialize this action by adopting either a resolution or a written report which would have been forwarded to Council in advance of its public hearing on the ordinance.

Just six days later, on April 27, 2021, the Council, without the benefit of a resolution or a written report from the Board, conducted a public hearing on the ordinance. At the hearing, the District appeared through counsel and requested that it be allowed to present the testimony of its planning expert prior to the final vote. The Council refused to permit the expert testimony. The governing body then heard from the Board's attorney:

MR. CORONATO: Mr. Mayor. Let me just give the issues so the record is clear, this was a master plan . . . Reexamination report, that the Land Use Board meeting was open to the public. It was noticed both to the appropriate papers and also to the adjoining towns there was public comment made at that hearing.

[t]here was many, comments that were made with regards to the examination effect. Based on the comments made there was some, changes made to the [inaudible] report, that was done. Afterwards, after having the hearing, the planning board then voted and, referred, the B plan and also the other comments that were made in there.

There were no changes, Scott, that was made to any of the zoning, - - within township. The bottom line is that it was sent back to the mayor and council, and the mayor and council then have adopted the ordinance. Once they adopted the ordinance they came back before the Land Use Board.

The Land Use Board then looked at the resolution and the ordinance, found it consistent with the report. And again, voted favorably because it was consistent with what they had viewed in the theory that they had. And that's what's back before the mayor and council today. What is clear to me though, that, that there was nothing - - there was no changes. It was really just a reaffirmation

of what currently existed. So [inaudible] misunderstanding that the PP [inaudible] was changed. It was not changed at all. If anything, it was clarified. The bottom line is, is that there has been no change of the ordinance and that there is no changes that are being made here today. (Emphasis added) (Expressions of hesitation omitted)

Transcript, meeting of the Ship Bottom Borough Council, April 27, 2021, page 26 line 12 to page 27 line 23.

This statement was the only communication the governing body received from the Board after referral of the ordinance. This testimony also confirms that the only document the Board reviewed in determining whether the proposed ordinance was consistent with the Master Plan was the 2021 Reexamination Report.

Ultimately, after the public hearing, the Council unanimously voted to approve the ordinance. This litigation then ensued.

THE PLENARY HEARING

Following the submissions of written briefs by the parties, the court heard the arguments of counsel. Also, by consent of the parties, the court supplemented the record below by allowing the submission of expert reports and related testimony on the ordinance amendment. Accordingly, expert reports were submitted by the parties and testimony on those reports, with cross-examination, was heard by the court.

The District produced the testimony of Creigh Rahenkamp, P.P. while the defendant's relied on the testimony of Mr. Slachetka. Both planners prepared the reports which were submitted to the court and entered into evidence.

The Testimony of The Experts

In both his report and his testimony, Mr. Rahenkamp stated both procedural and substantive concerns with the adoption of the ordinance. Among his concerns, Mr. Rahenkamp noted:

- 1) The Board never produced any documentation which evidenced its approval of the proposed ordinance either by way of a memorializing resolution or a written report transmitted to the governing body and made available to the public in advance of the governing body's adoption of the ordinance on second reading. Instead, at the public hearing of the governing body, the only evidence of the Board's consent was the very limited and conclusory testimony of Mr. Slachetka and the Board's attorney.
- 2) The review conducted by the Board was limited to the 2021 Reexamination Report, and by reference to the 2018 Reexamination Report. The Board never reviewed the proposed ordinances as to its consistency with the 1979 Master Plan and its subsequent updates of 1991, 1992 and 2000. Moreover, the 2018 Reexamination was not a master plan update.
- 3) The Borough adopted a zoning ordinance without having a valid housing element in place.
- 4) The Board did not consider whether the current P zoning was appropriate given its admitted knowledge that the District was selling the property to a private developer. Thus, leasing the P zoning in place constituted a form of spot zoning.

Mr. Slachetka counted by asserting the proposed ordinance was valid. In particular, Mr. Slachetka noted:

- 1) The proposed ordinance is consistent with both the 2018 and 2021 Reexamination Reports. Mr. Slachetka argues that the 2018 Reexamination Plan was a hybrid – part reexamination report, part master plan update.
- 2) The proposed ordinance satisfies the criteria of Riggs v. Long Beach Township, 109 N.J. 601 (1988) in that a) it advanced at least one of the purposes of the

MLUL as codified at N.J.S.A. 40:55D-2; **b)** the ordinance is “substantially consistent” with both the land use element and the housing element of the master plan; **c)** the ordinance comports with the constitutional restraints on zoning power; and **d)** the ordinance was adopted in accordance with the statutory procedural requirements.

Following the testimony of the experts, closing arguments of counsel and the marking of exhibits into evidence, the court concluded the plenary hearing.

**The Affirmative Defense of
Exhaustion of Administrative Remedies**

Before evaluating the parties’ respective arguments as to why the ordinance should or should not be declared invalid, the court will address the Borough’s affirmative defense of exhaustion of administrative remedies. This doctrine which is set forth in Rule 4:69-5 provides:

Except where it is manifest that the interest of justice requires otherwise, actions under 4:69 (Actions in Lieu of Prerogative Writs) shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhaustive.

In furtherance of its affirmative defense, the Borough argues that the present action is not ripe for adjudication because the District has not exhausted its administrative remedies, i.e., the District or its successor should be required to apply for a use variance for whatever use it proposes for the subject property before challenging the ordinance.

The court finds this doctrine should be waived for several reasons. First, the challenger here is a public school district and the public interest requires this matter be resolved as expeditiously as possible so that the District can move forward with its plans and reduce the cost to the taxpayers. N.J. Civil Serv. Ass’n. v State, 88 N.J. 605 (1982) (citing Garrow v. Elizabeth Gen. Hosp. & Dispensary, 79 N.J. 549, 561 (1979)). Second, the adoption of the revised zoning

ordinance by the Borough would make any application for a use variance to be a futile exercise. Given the action of the governing body to reinforce its intentions on permitted uses within the P zoning district, the Board, and indeed any applicant, would be hard-pressed to obtain approval for any use variance application. Deal Gardens, Inc.v. Board of Trustee of Village of Loch Arbor, 48 N.J. 492 (1967); AMG Assocs. v. Twp. of Springfield, 65 N.J. 101 (1974). Third, the challenge to the ordinance is, at least in part, based upon the failure of the defendants to conform with the procedural requirements of the MLUL and whether the Borough has lost its power to zone because of the infirmities of its Master Plan. Thus, the issue is a question of law which may be decided before any final administrative decision is reached. New Jersey Shore Builder's Ass'n v. Township of Jackson, 199 N.J. 449 (2009) and see generally, Gripenburg v. Township of Ocean, 220 N.J. 239 (2015).

For these reasons, the court finds that relief from the doctrine of exhaustion of administrative remedies should be afforded to the District and accordingly, the Borough's affirmative defense is DISMISSED.

LEGAL ANALYSIS

It is unquestioned that a municipality may, for sound and valid zoning reasons, amend its zoning ordinance at any time, even in anticipation of a proposed specific development provided that governing body acts in accordance with New Jersey's Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-1 et. seq. Manalapan Realty v Tp. Committee, 140 N.J. 366, 379 (1995). The statutory requirements relating to the adoption of a municipality's zoning ordinance, or an amendment thereto, is found at Sections 64 and 26 of the MLUL. The issues at bar are 1) whether the Board properly conducted a correct procedural review of the proposed ordinance to satisfy the statutory requirements of the MLUL; 2) whether the Borough had a sound and proper

zoning basis for exacting the ordinance; and 3) whether the zoning amendment could have been properly and substantially reviewed by the Board and referral by the governing body due to alleged deficiencies and currency of the Borough's Master Plan.

New Jersey land use law mandates that a zoning ordinance may only be adopted after the municipality has adopted a Master Plan. N.J.S.A. 40:55-D-62(a). Moreover, as indicated above, before final action is taken by the governing body it must refer the proposed ordinance or any subsequent amendment thereto to the planning board, N.J.S.A. 40:55D-64, for a determination that the proposed ordinance is consistent with the municipal Master Plan. N.J.S.A. 40:55D-26 then provides:

Prior to the adoption of a development regulation, revision or amendment thereto, the planning board shall make and transmit to the governing body, within 35 days after referral, a report including identification of any provisions in the proposed development regulation, revision or amendment which are inconsistent with the master plan and recommendation. The governing body . . . shall review the report of the planning board and may disapprove or change any recommendation by a vote of a majority of its full authorized membership and shall record in its minutes the reasons for not following such recommendation. . . . N.J.S.A. 40:55-D-26(a).

All of the above assumes the Master Plan was properly adopted and remains reasonably updated. Due to the centrality of a master plan to sound land use planning and zoning regulation, the MLUL requires every municipality to periodically (at least once every ten years) reexamine the plan and by resolution adopt a report on its reexamination. N.J.S.A. 40:55D-89. That section provides the report must state:

- a. The major problems and objectives relating to land development in the municipality at the time of the adoption of the last reexamination report.
- b. The extent to which such problems and objectives have been reduced or have increased subsequent to such date.

- c. The extent to which there have been significant changes in the assumptions, policies, and objectives forming the basis for the master plan or development regulations as last revised, with particular regard to the density and distribution of population and land uses, housing conditions, circulation, conservation of natural resources, energy conservation, collection, disposition, and recycling of designated recyclable materials, and changes in State, county and municipal policies and objectives.
- d. The specific changes recommended for the master plan or development regulations, if any, including underlying objectives, policies and standards, or whether a new plan or regulations should be prepared.
- e. The recommendations of the planning board concerning the incorporation of redevelopment plans adopted pursuant to the Local Redevelopment and Housing Law, N.J.S. 40A:12A-1 et seq., into the land use plan element of the municipal master plan, and recommended changes, if any, in the local development regulations necessary to effectuate the redevelopment plans of the municipality.

While a reexamination report is vital to ensuring that a master plan remains a valid and useful document, it is not, in itself, an update or revision to the Master Plan. If, for instance, the reexamination report recommends changes to the current Master Plan then the process to implement those changes must comply with the same statutorily mandated procedures employed when first adopting a master plan. Furthermore, the failure of the Board to follow up on its own recommendations as to updating the Master Plan calls into question whether the Plan itself is still valid.

As noted in a recognized treatise on New Jersey Land Use Law: “Today there is no question but that the master plan is the cornerstone supporting the zoning of a municipality and its importance cannot be overestimated. William M. Cox and Stuart R. Koenig, “New Jersey Zoning and Land Use Administration,” Section 8-2. With this in mind, the court analyzes the case at bar.

It is therefore a maxim of land use law that planning precedes zoning. See, Jarner, “The New Jersey Municipal Land Use Law, A Comprehensive Informational Symposium, New Jersey Department of Community Affairs, 1976. Moreover, the MLUL requires every zoning ordinance must be “substantially consistent” with the land use plan element and the housing plan element of the municipal master plan. N.J.S.A. 40:55D-62(a); Recchia Res. Const. v. Cedar Grove Zoning Bd. Of Adj., 338 N.J. Super. 242, 251-252 (App. Div. 2015). Conversely, an ordinance that is not consistent with the Master Plan is not entitled to such deference. The MLUL provided that the governing may only adopt an ordinance which is not consistent with the Master Plan only by an affirmative vote of a majority of its fully authorized membership and only then if it adopts an accompanying resolution setting forth its reason for deviating from the land use and/or housing plan elements. This procedure must be strictly followed. Willoughby v. Wolfson Group, Inc., 332 N.J. Super. 223, 229 (App. Div.), certif. den. 165 N.J. 603 (2000). The above more than suggests that in the context of a Master Plan, form and protocol matter. Corners may not be cut and adherence to the statutory framework is essential.

In reviewing the total circumstances relating to the ordinance in question, it is clear that it must be struck down for several reasons.

First, the Borough and the Board failed in their basic obligation to follow the clear mandate of the MLUL in reviewing whether the ordinance was in substantial conformance with the municipality’s master plan. Procedurally, neither the Board nor the governing body reviewed the ordinance in the context of the master plan. Rather, the Board clearly only reviewed the 2021 Reexamination Report. That is undeniable based upon a review of the transcript as detailed above. A reexamination report is not a master plan and Section 26 directs the Board to determine whether an ordinance is consistent, or not, with the master plan. The 2021

Reexamination Report is what it represents to be, i.e., a reexamination of the Master Plan and not an update to the Master Plan or any element thereof. It was noticed as a reexamination report; the Resolution of the Board clearly states it is a reexamination report; and there is no language in the report that suggests otherwise. Accordingly, the court rejects Mr. Slachetka theory that the 2021 Reexamination Report was a hybrid - part reexamination plan, part master plan update. Such a creature does not exist in New Jersey land use law. Moreover, the Board failed to reduce its findings on the ordinance review in either a resolution or a written report. The oral transmission of the findings by the Board attorney at the council meeting does not suffice. A board professional or indeed an individual member cannot speak for a land use board. A board can only speak as a body and then only by resolution or some other document, e.g., a written report, it formally adopts.

While the Section 26 may suggest that if the Board does not, within 35 days report back to governing body its findings on an ordinance, the governing may move forward and adopt the ordinance, in this case that statutory time period had not expired.¹ The better action for the governing body would have been to table action on the ordinance until a proper resolution or written report was prepared by the Board and transmitted to the governing body. There was clearly no need to rush the process. The failure of the governing body to await for documentation suggests that it acted in an arbitrary and capricious manner. Moreover, when the oral report indicated that the Board did not review the ordinance to the master plan but rather to a reexamination report, the governing body should have remanded the matter to the Board and directed the Board to do so.

¹ In the circumstance where a board does not report its finding, the statutory scheme and case law suggests that the governing body should detail the reasons for adopting the ordinance.

Second, although its planner argued both in his report and at trial that the zoning ordinance comported with criteria set forth in Riggs, supra, it is clear it did not on several points. In addition to the procedural deficiencies outlined here, the even more fatal problem with the ordinance is what is directly out in the open. The main purpose for the adoption of the ordinance was to make it more difficult for the District or any subsequent owner to obtain a use variance. That motivation simply does not provide the sound planning basis for the adoption of the ordinance which the law demands. Indeed the action taken was in reaction to Board's knownplan to divest itself of the subject property. In Riggs, the Supreme Court struck an ordinance when the primary purpose was to depress the value of property that the town was looking to purchase. Here the Court noted:

The present case focuses on the first criterion, which requires that the ordinance must have a valid purpose. One of the purposes of the Municipal Land Use Law is “[t]o encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare.” N.J.S.A. 40:55D-2a. In addition, the Act specifically states that one of its purposes is to provide for open space. N.J.S.A.40:55D-2. An ordinance enacted solely to reduce the municipality’s cost of acquisition of the land affected by the ordinance, however, does not fulfill a valid zoning purpose. Other states also recognize that it is an abuse of the zoning power to enact an ordinance for the sole purpose of depressing the value of property that the municipality seeks to acquire through condemnation.

In determining whether the ordinance was adopted for an unlawful purpose, we distinguish between the purpose of the ordinance and the motives of those who enacted it. Courts generally will not inquire into legislative motive to impugn facially valid ordinance but will consider evidence about the legislative purpose “when the reasonableness of the enactment is not apparent on its face.” Although the distinction between motive and purpose can be fuzzy, “motive” ordinarily addresses the subjective considerations that move a legislator, and “purpose” speaks to the goals to be achieved. The determination of “purpose” depends on objective factors, such as the terms of the ordinance and its operation and

effect, as well as the context in which the ordinance was adopted. 109 N.J. at 612. (Citations and footnote omitted).

As stated, the purpose of the ordinance enactment was to make it more difficult, if not impossible for the District to obtain a use variance. That is not a valid zoning purpose pursuant to N.J.S.A. 40:55D-2. See, Manalapan Realty, supra. Rather, the action was in reaction to Board's stated plans for the property. Reaction is the very antithesis of planning. Based on the foregoing, the ordinance failed to meet the Riggs criteria.

This then leads to the final issue, i.e., whether the Borough's Master Plan is even a valid document. The Master Plan is nearly a half century old and its statement of goals, its land use element and its housing element, the three essential components of any plan, have not been updated in nearly a quarter century. While the court has serious concerns as to whether the Borough's Master Plan is still viable, will not reach that question here since it is not needed to resolve the litigation at this point. Moreover, since neither the Board nor the Borough properly evaluated whether the ordinance was in substantial conformance with the Master Plan, the court will leave the question as to whether the Master Plan remains viable where there is a more fulsome record below on that issue. The court is also mindful that such a ruling would completely divest from the Borough its ability to adopt any zoning ordinances. Since the court need not reach that issue to determine this case, it will not do so at this juncture. Therefore, this cause of action (Count 4) is DENIED WITHOUT PREJUDICE.

Accordingly, the court GRANTS Counts 1, 2 and 3 of the District's Complaint and finds that the Ordinance 2021-05 of the Borough of Ship Bottom is contrary to the New Jersey Municipal Land Use Law and is struck down as invalid due to the procedural and substantive deficiencies determined above. No fees or costs are awarded to either party. The Borough's

Affirmative Defense of Exhaustion of Administrative Remedies is DISMISSED WITH PREJUDICE. Unless determined herein, any additional relief sought by the parties is DENIED WITH PREJUDICE.

The court will prepare an Order consistent with this opinion.