

NEW JERSEY APPLESEED
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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO.

PLANEWARK, BUTTON FACTORY)	
CONDOMINIUM ASSOCIATION, INC.,)	
ALEIX MARTINEZ, MADELINE RUIZ,)	
LISA SANDERS,)	CIVIL ACTION
)	
Plaintiffs,)	
)	COMPLAINT IN LIEU OF
v.)	PREROGATIVE WRITS
)	
MUNICIPAL COUNCIL OF THE CITY)	
OF NEWARK, NEWARK CENTRAL PLANNING)	
BOARD, KENNETH LOUIS, in his)	
official Capacity as City Clerk)	
of the City of Newark,)	
)	
Defendants.)	

Plaintiffs, PLANewark, Button Factory Condominium Association, Inc., Aleix Martinez, Madeline Ruiz, and Lisa Sanders ("Plaintiffs") by way of Complaint in lieu of Prerogative Writs against the Defendants, allege as follows:

NATURE OF ACTION

This is an action in lieu of prerogative writs challenging the validity of Ordinance 17-1437 entitled "Ordinance of the Municipal Council of the City of Newark Amending the City of Newark Zoning Ordinance, Title XLI, Chapters 1 Through 5 of the Municipal Code, to Create an MX-3 Zone, which was adopted by the Municipal Council of the City of Newark on October 4, 2017, and published in the Star Ledger after adoption on October 13, 2017.

PARTIES

1. All Plaintiffs, except PLANewark and Madeline Ruiz, are owners of real property located within 200 feet in all directions of the new boundaries created by Ordinance 17-1437 who were not provided with notice by the City Clerk at least 10 days prior to the October 4, 2017 public hearing as required by N.J.S.A. 40:55D-62.1.

2. PLANewark is an unincorporated association of local residents, architects, planners, attorneys, and other professionals living in Newark who are committed to equitable and sustainable environment, land use, and transportation planning practices in all neighborhoods throughout the City. Members of PLANewark have participated in the local planning process relevant to this action and are advocates for development in accordance with the current Master Plan. A number

of PLANewark's members live within the MX-3 zone created by Ordinance 17-1437 or within 200 feet of same.

3. The Button Factory Condominium Association, Inc. is a condominium association incorporated under the New Jersey Condominium Act, P.L.1969, c.257 (C.46:8B-1 et seq.) and is comprised of 16 units governing the real property designated as Block 195.01, Lots 1-16 on the Tax Map of the City of Newark, more commonly known as 61 New Jersey Railroad ("NJRR") Avenue, Newark, New Jersey.

4. Aleix Martinez is the owner of real property designated as Block 195.01, Lot 3, Qualifier C3 on the Tax Map of the City of Newark, more commonly known as 61 NJRR Avenue, Unit #3, Newark, New Jersey. He is a trustee on the Board of the Button Factory Condominium Association, Inc.

5. Madeline Ruiz is the owner of real property designated as Block 197, Lot 28 on the Tax Map of the City of Newark, more commonly known as 74 Bruen Street, Newark, New Jersey. She is also a member of PLANewark.

6. Lisa Sanders is the owner of real property designated as Block 195.01, Lot 11, Qualifier C11 on the Tax Map of the City of Newark, more commonly known as 61 NJRR Avenue, Unit #11 Newark, New Jersey. She is the President of the Button Factory Condominium Association, Inc. and is a member of PLANewark.

7. The Municipal Council of the City of Newark ("Council") is the governing body of the City of Newark with its principal office located at 920 Broad Street, Newark, New Jersey in the County of Essex, State of New Jersey. The Council is responsible for the adoption of land use ordinances.

8. Defendant Newark Central Planning Board ("Planning Board") is a municipal agency established pursuant to the Municipal Land Use Law ("MLUL") and is vested with the responsibility to review any proposed zoning ordinance or amendment thereto pursuant to N.J.S.A. 40:55D-64 and N.J.S.A. 40:55D-26.

9. Defendant Kenneth Louis is the Clerk of the City of Newark. In that official capacity, he is responsible for providing notice of a hearing on an amendment to the zoning ordinance proposing a change to the classification or boundaries of a zoning district to all the owners of real property located within 200 feet in all directions of the new boundaries created by the ordinance as required by N.J.S.A. 40:55D-62.1.

COUNT I

CHALLENGE TO THE VALIDITY OF ORDINANCE 17-1437 BASED ON ITS
INCONSISTENCY WITH THE 2012 MASTER PLAN

10. Plaintiffs repeat and restate the statements contained in paragraphs 1-9 as if set forth verbatim and at length herein.

11. N.J.S.A. 40:55D-62a requires that all zoning ordinances and zoning ordinance amendments be substantially consistent with the Land Use Element of the Master Plan or are designed to effectuate such Plan elements. The "governing body may adopt a zoning ordinance or amendment or revision thereto which in whole or part is inconsistent with or not designed to effectuate the land use plan element . . . but only by affirmative vote of a majority of the full authorized membership of the governing body, with the reasons of the governing body for so acting set forth in a resolution and recorded in its minutes when adopting such a zoning ordinance."

12. N.J.S.A. 40:55D-16 of the MLUL further provides that "[a] zoning ordinance or amendment or revision thereto which in whole or in part is inconsistent with or not designed to effectuate the land use plan element of the master plan shall not take effect until a copy of the resolution required by subsection a. of section 49 of P.L. 1975, c. 291 (C. 40:55D-62) shall be filed with the county planning board."

13. The Planning Board adopted Newark's current Master Plan in September 2012. The Master Plan serves as the regulatory framework for the "City's land use, development, preservation, sustainability and neighborhood revitalization activities through the year 2025." 2012 Newark Master Plan, Page 10. The Master Plan contains several "elements" which take into account the various "systems" or "layers" of the City in order to achieve the enumerated goals for future land use and development throughout the City of Newark.

14. The Mobility Element of the 2012 Master Plan encourages transit-oriented development (TOD) and use of the Urban Transit Hub Program at all the appropriate station locations, with an emphasis on Newark Penn, Broad Street, Orange Street, and Newark Liberty International Airport stations. TOD is commonly understood as dense, walkable, mixed-use development that includes a mix of commercial, residential, office and entertainment centered around or located near a transit station and adds to vibrant, connected communities.

15. The Land Use Element of the 2012 Master Plan recommends the designation of certain blocks located within the Ironbound north of Green Street and west of McWhorter Street, and part of a block north of Hamilton Street and west of Union Street as multi-family Mid-rise Residential ("R-MM"). (2012

Master Plan, Vol II, p. 24). The R-MM designation proposed buildings with a maximum height limitation of eight stories.

16. The R-MM designation was mapped in “a few select locations in the vicinity of transit stations. Its purpose is to promote more intense residential development within walking distance of transit and other service - but in locations not suited for high-rise residential.” (2012 Master Plan, Vol II, p. 27).

17. In contrast, the High-rise Multifamily Residential (R-HM) designation is defined as “buildings over eight stories in height” but limited to a maximum height of 20 stories. (p. 28 of Vol II).

18. The R-MM designation is only mapped for a select few locations and deliberately carves out the area around Penn Station in the Ironbound as not suitable to high-rise development. Moreover, these several blocks located east of Penn Station are the only blocks with the R-MM designation throughout the entire Future Land Use Plan included in the 2012 Master Plan. This indicates that this area was carefully considered and deliberately designated as having different use and bulk standards than other Residential or Mixed-Use zones.

19. The Urban Design Element of the 2012 Master Plan describes the height and massing of both mid-rise and high-rise multifamily buildings. It recommends that mid-rise multifamily

buildings not exceed eight stories. (2012 Master Plan, Vol II, p. 65).

20. The Neighborhood Element of the 2012 Master Plan specifically recommends preserving "the physical character and vitality of the Ironbound neighborhood by establishing and enforcing strong design and planning standards." It goes further to recommend controlling "transitions between downtown and the Ironbound to prevent encroachment on the neighborhood." Moreover, it recommends retaining "the neighborhood's historic flavor" "wherever possible." (2012 Master Plan, Vol II, p. 192).

21. High-rise development is currently allowed in the area adjacent to Penn Station within the Downtown Core Redevelopment Plan and Living Downtown Redevelopment Plan. These areas lie directly west of the train station and are not considered part of the Ironbound neighborhood. The redevelopment plans were recommended for adoption in the 2012 Master Plan.

22. The City of Newark adopted the current Zoning & Land Use Ordinance in 2015, which incorporates and is consistent with the 2012 Master Plan.

23. On June 21, 2017, the Council adopted Resolution 17-1311, which referred to the Planning Board the draft Proposed Ordinance amending Zoning and Land Use Regulations for "formal review, report and recommendation" in accordance with N.J.S.A.

40:55D-26 and N.J.S.A. 40:55D-64. A copy of Resolution 17-1131, No. 7R2-G is attached hereto as Exhibit "A".

24. On June 26, 2017, staff from the City's Planning Department appeared before the Planning Board at a public hearing in support of the draft proposed Ordinance. The Planner testified that the proposed MX-3 zone was consistent with the 2012 Master Plan in that the increase in height and density for the area surrounding Newark Penn Station was synonymous with areas designated as "transit-oriented development." However, the Planner failed to acknowledge that the 2012 Master Plan specifically marked out the area around Penn Station in the Ironbound neighborhood as not suitable for high-rise development.

25. At this hearing, over 100 neighboring residents of the proposed MX-3 zone objected to the proposed Ordinance citing lack of public participation, inconsistency with the Master Plan and lack of proper notice. Testimony at this hearing lasted for several hours.

26. At the conclusion of the public hearing, the Planning Board voted to delay making any findings and suggested that the City hold a community meeting to discuss the proposed Ordinance.

27. A meeting for members of the community was scheduled for July 6, 2017 at the Portuguese Sports Club located at 55 Prospect Street in Newark. Members of the Department of Economic

and Housing Development attempted to present information regarding the proposed Ordinance but were unprepared. They did not present any studies regarding actual impacts by the proposed Ordinance on the community. There were no translators provided for the predominantly Portuguese and Spanish speaking residents present during the meeting. No information regarding the proposal was provided to the community because of the disorganization of public officials. Councilman Augusto Amador read a public statement opposing the maximum building height allowed by the proposed Ordinance, which only added to the confusion as to what was the exact maximum building height proposed by the Ordinance.

28. On July 24, 2017, the proposed Ordinance was listed on the Planning Board agenda for a second hearing. Despite the allegation that changes had been made as a result of the failed July 6, 2017 community meeting, no testimony was allowed. Moreover, the Planning Board attorney, Mr. Fredrick P. Niemann, Esq., made factual findings on the record without any additional testimony taken from anyone.

29. On information and belief, the Planning Board recommended the proposed Ordinance for approval and adoption without making a finding on the record as to its consistency and/or inconsistency with the 2012 Master Plan. Moreover, there was no additional testimony from the Planning Department to

support whatever changes were made after the first hearing on June 26, 2017.

30. Based on the provisions of the various elements of the Master Plan set forth in the above paragraphs, Ordinance 17-1437 is inconsistent with the 2012 Master Plan.

31. On September 6, 2017, PLANewark submitted a protest petition to the City Clerk pursuant to N.J.S.A. 40:55D-63 signed by 60 owners of "the area either (1) of the lots or land included in such proposed change, or (2) of the lots or land extending 200 feet in all directions therefrom inclusive of street space, whether within or without the municipality."

32. On October 3, 2017, PLANewark submitted supplemental pages containing an additional 36 signatures to attach to its protest petition submitted on September 6, 2017 opposing the proposed Ordinance creating an MX-3 zone.

33. On October 4, 2017, the City Council adopted Ordinance 17-1437 by a vote of 7 to 1. A copy of Ordinance 17-1437, No. 6PsF-C is attached hereto as Exhibit "B".

34. The Council did not acknowledge that the Ordinance was inconsistent with the Master Plan. Moreover, the Council did not state its reasons as to justify why it was making changes to the current Zoning Ordinance barely two (2) years after adoption, and did not set forth in a resolution and recorded in its

minutes its reasons for so acting as required by N.J.S.A.
40:55D-62a.

WHEREFORE, Plaintiffs demand judgment as follows:

- a. Declaring Ordinance 17-1437 inconsistent with the 2012 Master Plan;
- b. Finding that the City Council failed to justify inconsistencies as required by law and thus declaring Ordinance 17-1437 void *ab initio* with no legal effect; and
- c. Such other relief as the Court may deem just and equitable.

COUNT II

**ORDINANCE 17-1437 IS INVALID DUE TO ITS FAILURE TO COMPLY WITH
N.J.S.A. 40:55D-62A.**

35. Plaintiffs repeat and re-state the statements contained in paragraphs 1-34 as if set forth verbatim and at length herein.

36. The MLUL provides at N.J.S.A. 40:55D-62a that zoning ordinances "shall be drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate use of land."

37. Ordinance 17-1437 is not drawn with reasonable consideration to the character of the district, and there is no consideration of the suitability of the height and density allowances in the MX-3 zone.

38. Ordinance 17-1437 contravenes the stated purpose of the Land Use Element of the 2012 Master Plan, more specifically to provisions that are applicable only to the Ironbound area of Newark.

39. Ordinance 17-1437 is contrary to the purposes of the MLUL, inconsistent with sound planning principles, and is arbitrary, capricious and unreasonable.

40. Ordinance 17-1437 is contrary to fundamental principles of the MLUL and zoning and has no discernible planning reason other than to accommodate the economic interests of specific corporate and/or commercial property owners of undeveloped land within the zone.

41. Ordinance 17-1437 is effectively spot zoning effectuated on behalf of certain corporate and/or commercial property owners and is not in accordance with a comprehensive plan. Ordinance 17-1437 provides density, scale, and size of development far in excess of that permitted in the area and far in excess of sustainable growth for the zone.

42. The adoption of Ordinance 17-1437 by the Municipal Council exceeds the discretion of the governing body and the

limitations placed on municipalities in developing a local zoning plan.

WHEREFORE, Plaintiffs demand judgment as follows:

- a. Declaring Ordinance 17-1437 arbitrary, capricious, and unreasonable;
- b. Declaring Ordinance 17-1437 void *ab initio* and of no legal effect;
- c. Such other relief as the Court may deem just and equitable.

COUNT III

ORDINANCE 17-1437 IS INVALID DUE TO FAILURE TO PROVIDE PROPER NOTICE IN ACCORDANCE WITH N.J.S.A. 40:55D-62.1.

43. Plaintiffs the Button Factory Condominium Association, Inc., Aleix Martinez, and Lisa Sanders repeat and restate the statements contained in paragraphs 1-42 as if set forth verbatim and at length herein.

44. N.J.S.A. 40:55D-62.1 requires notice to property owners within 200 feet of property subject to change in a zone classification or boundary. Notices pursuant to this section of the MLUL are required to be given to all owners within 200 feet of the change.

45. N.J.S.A. 40:55D-62.1 also requires that "[n]otice to a condominium association, horizontal property regime, community

trust, or homeowners' association, because of its ownership of common elements or areas located within 200 feet of the boundaries of the district which is subject of the hearing, [] be made in the same manner as to a corporation, in addition to notice to unit owners, co-owners, or homeowners on account of such common elements or areas."

46. Notice pursuant to this section must state the street name, common name or other identifiable landmark and the lot and block number. The notice must be served on the property owner shown on the current tax duplicate, or his agent in charge of the property, or must be mailed by certified mail and regular mail to the property owner at his address shown on the current tax duplicate.

47. Ordinance 17-1437 dramatically alters the intensity of development and permitted uses in the proposed MX-3 zone. Notice to certain property owners within 200 feet was required and not provided.

48. Public notice of hearings to amend an ordinance is jurisdictional and deviations render the action a nullity.

49. The City Clerk's failure to provide notice of the zone change renders Ordinance 17-1437 a nullity.

50. The City Clerk's failure to provide notice of the adjourned hearing is void, invalid, and unsupported by applicable law, rendering Ordinance 17-1437 a nullity.

51. Failure to provide notice of the zone change also contravenes sound judicial precedent, specifically in cases like the one at issue that dramatically alters the character of a neighborhood. "Given the breadth and impact on development of real property within each zone, amended zoning ordinance, which changed density and bulk standards and increased the amount of open space and greenway land requirements for subdivisions within three residential zones, effected a change of classification within residential zones, and therefore, statutory personal notice to all owners of real property in the affected districts was required; the changes effected within residential zones dramatically altered the intensity of residential use within each zone and promised to affect the character of future development in the zones." Robert James Pacilli Homes, L.L.C. v. Township of Woolwich, 394 N.J. Super. 319 (App. Div. 2007).

WHEREFORE, Plaintiffs demand judgment as follows:

- a. Invalidating Ordinance 17-1437 *ab initio* for failure to provide the requisite notice to all relevant property owners pursuant to N.J.S.A. 40:55D-62.1;
- b. Such other relief as the Court may deem just and equitable.

COUNT IV

THE PLANNING BOARD FAILED TO FOLLOW DUE PROCESS BY NOT ALLOWING
THE PUBLIC TO COMMENT AT THE JULY 24, 2017 PUBLIC HEARING

52. Plaintiffs repeat and restate the statements contained in paragraphs 1-51 as if set forth verbatim and at length herein.

53. On July 24, 2017, the proposed Ordinance was listed on the Planning Board agenda for a second public hearing. The matter had been adjourned to allow for changes to be incorporated based on comments from objectors at the July 6, 2017 initial public hearing.

54. According to the attorney for the Planning Board, the Ordinance changed "in response to comments" made at the community meeting held at the Portuguese Sports Club on July 6, 2017.

55. Despite the alleged changes that were introduced for the first time at the July 24, 2017 hearing, the Planning Board improperly denied the public from commenting or giving any testimony.

56. On information and belief, the Planning Board communicated its approval to the City Council though at this time, Plaintiffs have not been able to secure any resolution, statement, or correspondence that the Planning Board sent to the City Council with respect to this matter despite submitting an

OPRA request for same on November 17, 2017. A copy of the OPRA request to the City Clerk regarding communications to Council and the Clerk's response is attached herein as "Exhibit C."

WHEREFORE, Plaintiffs demand judgment as follows:

- a. Invalidating Ordinance 17-1437 *ab initio* for failure of the Planning Board to provide the community with the opportunity to comment on the revised proposed Ordinance;
- b. Such other relief as the Court may deem just and equitable.

Respectfully submitted,

NEW JERSEY APPLESEED
Public Interest Law Center of New
Jersey

Dated: November 27, 2017

Renée Steinhagen, Esq.
Attorney for Plaintiffs

CERTIFICATION

Pursuant to Rule 4:5-1, I hereby certify that to the best of my knowledge, the within action is not the subject of any other action nor arbitration proceeding, nor is any other action or arbitration proceeding contemplated and no other party should be joined in this action.

Pursuant to Rule 4:69-4, I hereby certify that Plaintiffs' counsel has started the process of ordering the transcripts of the proceedings before the Newark Central Planning Board and Municipal Council of the City of Newark for the within matter. Plaintiffs' counsel filed an OPRA request for the audiotapes of the relevant hearings on November 13, 2017, which is the first step in the process of getting the hearings transcribed. A copy of the OPRA request and response from the City Clerk is attached herein as Exhibit "D."

Dated: November 27, 2017

Renée Steinhagen, Esq.
New Jersey Appleseed Public
Interest Law Center of New Jersey

DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:25-4, Renée Steinhagen, Esq. is hereby designated as trial counsel in this matter.

Dated: November 27, 2017

Renée Steinhagen, Esq.
New Jersey Appleseed Public
Interest Law Center of New Jersey

EXHIBIT "A"

City Council Resolution 17-1131

EXHIBIT "B"

Ordinance 17-1437

EXHIBIT "C"

OPRA Request and Response from City Clerk re Planning Board
Communications to Council

EXHIBIT "D"

OPRA Request and Response from City Clerk re Audio Recordings of
Hearings