

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: CIVIL PART
HUDSON COUNTY
DOCKET NO.: HUD-L-4499-20
A.D. # _____

FAIR SHARE HOUSING CENTER))
))
Plaintiff,))
))
vs.))
))
CITY OF JERSEY CITY,))
MUNICIPAL COUNCIL OF THE))
CITY OF JERSEY CITY,))
))
Defendants.))
))

TRANSCRIPT
OF
MOTION

Place: Hudson County Courthouse
(Heard Via Zoom)

Date: August 12, 2021

BEFORE:

HONORABLE JOSEPH TURULA, P.J.Cv.

TRANSCRIPT ORDERED BY:

BASSAM GERGI
(Fair Share Housing Center)

APPEARANCES:

BASSAM GERGI, ESQ.,
Attorney for Plaintiffs

PHILIP ADELMAN, ESQ.,
(Assistant Corporation Counsel)
PETER BAKER, ESQ.
(Corporation Counsel)
Attorney for Defendant City of Jersey City

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RENEE STEINHAGEN, ESQ.

(Amicus)

Attorney for Intervener NJ Appleseed

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1 (Motion commenced at 2:31 p.m.)

2 THE COURT: All right, good afternoon ladies
3 and gentlemen. We are on the record. I'm Judge Joseph
4 Turula, I'm the presiding judge in the Civil Division
5 in the Hudson vicinage. And I am on this screen coming
6 from you -- coming from the Justice Garibaldi Courtroom
7 on the second floor of the Brennan Courthouse at 583
8 Newark Avenue. We're on the record. That means my
9 court clerk was just over there with a mask on, and was
10 more than six feet away is recording this through the
11 CourtSmart system. His name is Dave Arce if there's a
12 need for this matter to be recorded.

13 I understand there are many people here who
14 are not -- are more or less the gallery people who sit
15 in the courtroom if we were there. Glad you are here.
16 It's important that you are here, this does involve
17 your community or whatever reason you're here. I would
18 ask that those folks mute your microphones if you
19 haven't already done so. Because unlike a council
20 meeting, there's no public portion of this.

21 This is going to be an argument, a legal
22 argument in the matter of Fairs Share Housing Center,
23 Inc, versus City of Jersey City and the Municipal
24 Council of the City of Jersey City, which is docket
25 number HUD-L-4499-20. There are some attorneys that

1 are involved in that and I'm going to get their
2 appearances now. So for Fair Share Housing Center Inc,
3 if you could enter your appearance please.

4 MR. GERGI: Good afternoon, Judge. My name
5 is Bassam Gergi, counsel for Fair Share Housing Center.

6 THE COURT: All right. For the City of
7 Jersey City?

8 MR. ADELMAN: Good afternoon, Your Honor.
9 Philip Adelman, Jersey City Law Department on behalf of
10 the City of Jersey City and the Jersey City Council.

11 MR. BAKER: Your Honor, Peter Baker,
12 Corporation counsel on behalf of the City of Jersey
13 city.

14 THE COURT: All right, nice to see you Mr.
15 Baker. Whenever there's two attorneys from the same
16 organization, I always just give this boilerplate
17 language that even though there are two folks, great,
18 two minds are better than one, but only one can make
19 the argument.

20 So whoever draws the straws on that one
21 that's up to you gentlemen. Also there is an amicus,
22 so counsel if you can enter your appearance, please.

23 MS. STEINHAGEN: Renee Steinhagen, New Jersey
24 Appleseed amicus in support of Fair Share Housing
25 summary judgment motion.

1 THE COURT: All right. A few people have
2 come in late, so I'm going to admit those folks at this
3 time. I can see one of them is on the legislative body
4 of Jersey City. And I'm just going to say for the late
5 arrivals, please mute your microphones, because it's
6 hard to make sure that the recording is done correctly
7 and again the only people who will be speaking are the
8 attorneys and myself.

9 This is a prerogative writ action that was
10 filed by Fair Share and it comes by way of summary
11 judgment. Both -- or all attorneys have briefed the
12 issue. So before we get into the argument, I must say
13 and I say this with just so for clarity, in a
14 preliminary statement submitted by one of the parties,
15 there was some language that follows and I'll read
16 some, but Jersey City has historically been one of the
17 most ethnically, racially and socially economic
18 diversities in the country. It's prime location
19 neighboring Ellis Island and a stones throw to
20 Manhattan have made it a natural starting spot for
21 these many waves of daring dreamers who have traveled
22 to the United States in search of opportunity.

23 I'm not going to read the rest of page one of
24 the preliminary statement submitted in this brief. But
25 that language does not belong in a legal brief. It may

1 go into a letter to the editor, perhaps some kind of
2 other type of medium, but it is not legal argument. I
3 just want to go down further and it says, the influx of
4 luxury developments that cater almost exclusively to
5 high-earning professionals has squeezed the many
6 families who have lived and worked in Jersey City, et
7 cetera, et cetera, again that language is not -- should
8 not belong in any brief whether it's a preliminary
9 statement or not.

10 So that being said, let me just jump right
11 into it, I'm going to turn the question to Jersey City.
12 There was some questions during the council meeting
13 that the ordinance had not gone to the Jersey City
14 Planning Board. In these papers it is indicated that
15 in fact it has. So Mr. Adelman or Mr. Baker whoever is
16 doing the argument, was this ordinance sent to the
17 Jersey Planning Board, and then what happened next,
18 sir?

19 MR. ADELMAN: Again, thank you for the time
20 to speak, Your Honor. This ordinance was in fact
21 referred to the Jersey City Planning Board. I know
22 Your Honor has read the papers. So even before the May
23 7th, 2019 meeting on August 15th, 2018 the council
24 adopted a resolution authorizing the Planning Board to
25 do a study in order to propose an inclusionary housing

1 ordinance for affordable housing.

2 Thereafter two reports were prepared. A re-
3 examine report and a housing element report, which were
4 presented to the Jersey City Planning Board in April of
5 2019. Both of those reports were approved and
6 essentially constituted amendments to the master plan.
7 After that an ordinance was prepared by the Division of
8 planning and referred to the Jersey City Planning Board
9 on May 7th of 2019.

10 The ordinance that was prepared and given to
11 the Jersey City Planning Board, admittedly is not
12 identical to the ordinance that was ultimately passed
13 in October of 2020. However, at the same time as the
14 papers demonstrate, the two ordinances, the one that
15 was actually adopted and the one that was referred to
16 the Planning Board are virtually identical.

17 And as you saw in the certification of Ms.
18 Tanya Marione, it identifies all of the similarities
19 between the two ordinances. Thus, confirming that this
20 ordinance did in fact go before the Planning Board.
21 Now Fair Share is going to say that there are
22 differences and that the differences in the ultimate
23 ordinance that was adopted are not presented to the
24 Planning Board.

25 The distinction and the important thing to

1 remember is that the purpose of the Planning Board
2 reviewing the ordinance and considering the ordinance
3 is to confirm that it's consistent with the master
4 plan. That was done, based upon the original ordinance
5 that was submitted. The differences that have been
6 highlighted by Fair Share in their reply brief, have --
7 do not impact and have nothing to do with the master
8 plan.

9 So while those differences may not have been
10 formally before the Planning Board, the substance and
11 the meat of this ordinance was -- was put before the
12 Planning Board. So all of the essential components of
13 the ordinance itself that was ultimately adopted were
14 referred to the Planning Board, were accepted by the
15 Planning Board. It was then sent to the City Council.
16 The City Council considered it. The City Council
17 arranged for various revisions in the format that was
18 ultimately adopted in October of 2020.

19 So it's the City's position that there's no
20 dispute that this ordinance was presented to the Jersey
21 City Planning Board as required under the Municipal
22 Land Use Law.

23 THE COURT: All right. So the next question
24 is you are familiar with your submissions and the
25 submissions of your adversaries in this case, and where

1 -- because I could not find, but maybe I'm mistaken,
2 where is there an acknowledgment that the governing
3 body reviewed the Planning Board's determinations,
4 reports on the ordinance?

5 MR. ADELMAN: Reviewed the determinations on
6 the ordinance that was reviewed in May of 2019?

7 THE COURT: Well there's an ordinance that
8 comes before the City Council.

9 MR. ADELMAN: Yes.

10 THE COURT: It's your position that in
11 accordance with the law, the ordinance was referred to
12 the Planning Board. They did something. Eventually
13 something came back to the City Council. There were
14 changes. But was there ever any acknowledgment of what
15 the Planning Board did, their determinations, their
16 reviews, lack of review or anything of that nature?

17 MR. ADELMAN: By the City Council you mean?

18 THE COURT: Yes sir.

19 MR. ADELMAN: In the -- well we know based
20 upon the May 7th transfer that it was referred to the
21 Planning Board, and we know that everything that was
22 reviewed by the Planning Board was then passed along to
23 the City Council. The -- in the whereas clauses of the
24 ordinance that was passed, predominantly I think
25 numbers, you can count them, numbers six through nine,

1 those whereas clauses are consistent with and almost
2 identical to many components of the housing element
3 update that was prepared by the Jersey City Planning
4 Board.

5 So that in and of itself demonstrates that
6 the council had to have considered these reports,
7 considered the original ordinance and made whatever
8 changes they thought were necessary.

9 THE COURT: Now when you say the ordinance, I
10 want to follow. I have the ordinance here in front of
11 me. And the whereas, of course the whereas are not
12 numbered as they are never numbered. And you're saying
13 it's what paragraph just so I can follow?

14 MR. ADELMAN: In other words if you start at
15 whereas clause number six --

16 THE COURT: Nearly 40% of Jersey City
17 household are a cost burden?

18 MR. ADELMAN: Yes. So that's six and then
19 seven, eight, and nine, those whereas clauses all of
20 that information is in the housing element update
21 report, which I think is exhibit C, let me just double
22 check to Tanya Marione's certification. And if you
23 look at pages in that report, if you look at the first
24 page of that report, page one and then pages 19, 20,
25 27, and 28, you'll see all of those statistics that

1 were obtained from that report as part of the
2 consideration by the council in passing this ordinance.

3 THE COURT: So this report is generated by
4 Ms. Tanya Marione M-A-R-I-O-N-E, March 26th, 2019. And
5 wasn't that the basis and correct me if I'm wrong, to
6 send this idea, this draft or whatever you will to the
7 Jersey City Planning Board, because this ordinance came
8 late.

9 MR. ADELMAN: Yes, the housing element update
10 and the re-examine report which are exhibits, I believe
11 B and C to her certification, were a component of the
12 study that was done at the direct of the counsel from
13 their prior resolution which is exhibit A, and
14 partially form the basis of the ordinance that was
15 presented in May of 2019.

16 As part of that ordinance, the NW Financial
17 was retained to assist and perform various calculations
18 in preparing this ordinance. So for example if you
19 look at the ordinance in section, I believe it's 187-
20 5(d), there's a tiered section of payments made in lieu
21 -- that can be made in lieu of affordable housing.
22 Those calculations were based on information from NW
23 Financial, which also gives a basis to this ordinance.

24 The whole premise here is that the plaintiff
25 has the burden -- well let me take a step back, this

1 ordinance and the City Council's actions are presumed
2 to be valid. The case law says that under Fanelli
3 versus City of Trenton 135 N.J. 582; Bryant, 309
4 N.J.Super. 596; Witt v. Borough of Maywood, 328
5 N.J.Super. 432, the City's ordinance and their actions
6 in the information in the ordinance are all presumed to
7 be valid. The plaintiff has the burden to show that
8 this ordinance is arbitrary and capricious.

9 They have not met that burden. At this
10 point, the only thing that the plaintiffs have shown,
11 or provided, or proffered is simply speculation and
12 conjecture about kickbacks and free wheeling deals that
13 are going to take place as a result of this ordinance.

14 THE COURT: All right. So let me direct you,
15 Tanya Marione, M-A-R-I-O-N-E, is the director of the
16 Jersey City Planning Division. She submitted a
17 certification in this matter. I'm sure you're familiar
18 with it.

19 MR. ADELMAN: Yes.

20 THE COURT: On page three of her
21 certification which was (indiscernible) and it
22 contained where you mentioned those reports a minute
23 ago, she says the following at paragraph 15,

24 "As stated herein, the included ordinance was
25 referred to the JCPB and is substantially similar to

1 the ordinance. After the May 7th, 2019 JCPB meeting,"
2 for the record that means Jersey City Planning Board,
3 "the INCL.ordinance was issued to the council who
4 thereafter arranged for revisions to be made to the
5 included ordinance and the final version was the
6 ordinance that was enacted by the counsel which now
7 forms the subject matter and plaintiff seeks to
8 vacate."

9 My issue with that and I don't know if you've
10 had the opportunity to follow it is when not all of
11 that sentence, but part of it, she says it was issued
12 to the council. And this is where I have an issue and
13 I'm going to have a question, and she says who
14 thereafter, meaning the council arrange for revisions
15 to be made to the included ordinance and the final
16 version was the ordinance that was enacted.

17 Is there not a Rule 1:6-6 violation, she is
18 opining to what someone else did as opposed to what she
19 did or she caused to have done? Because she's saying
20 they looked at the ordinance. They changed the
21 ordinance. And they being, I guess the entire -- no,
22 it's the entire City Council. Isn't there a problem
23 there?

24 MR. ADELMAN: I don't think that's a problem
25 because the Jersey -- the Planning Board originally

1 considers the ordinance. They submit it to the City
2 Council. The City Council then can review it and
3 decide whether to accept it, reject it or revise it.
4 And I think it's fair for her to even if she was not
5 involved in the Council's decisions for any of us to
6 conclude that revisions were made subsequent to the
7 issuance of the original ordinance and were -- were
8 arranged by these revisions, or arranged by the City
9 Council and thereby adopting the final form of the
10 ordinance that we're now discussing today.

11 So while she may not have personal knowledge
12 of what exactly happened in terms of revisions, I think
13 it's a fair presumption or fair conclusion to make
14 based on the circumstances.

15 THE COURT: No, she's not allowed --

16 MR. ADELMAN: And based on her --

17 THE COURT: -- to conclude -- she is not
18 allowed to give opinions in a 1:6-6 violation. But let
19 me move onto something else.

20 Jennings versus the Borough of Highlands, 418
21 N.J.Super. 405, 405-424 (APP. DIV. 2011), the Court
22 there, this was a mobile home issue a prerogative writ
23 matter, in which there was a change to the mobile --
24 the ordinance to allow for -- about a mobile home and
25 changing the zoning.

1 The Court said --

2 MR. ADELMAN: Judge.

3 THE COURT: Yes.

4 MR. ADELMAN: I can't hear you.

5 THE COURT: I said the case is Jennings 418
6 N.J.Super. 405 at 425 --

7 MR. ADELMAN: Judge.

8 THE COURT: -- in that matter -- could you
9 hear me now sir?

10 MR. ADELMAN: Judge, I can't hear you. I
11 can't hear you.

12 THE COURT: Well our microphones are -- let
13 me just see. My microphone is on sir and we are
14 recording. Let me just check with my court clerk, can
15 you hear me on CourtSmart, sir?

16 COURT CLERK: I do, Your Honor.

17 THE COURT: All right.

18 MS. STEINHAGEN: I can hear you here, Your
19 Honor.

20 MR. ADELMAN: I apologize, I didn't hear,
21 something must have cut out on my end, that's my fault.
22 I apologize.

23 THE COURT: Okay, so you're back.

24 MR. ADELMAN: I heard you --

25 THE COURT: Are you back with us now?

1 MR. ADELMAN: Yes, I'm back with you. I
2 heard Your Honor say Jennings.

3 THE COURT: Okay. Jennings versus Bryant
4 (sic) and in that case there was a change of zoning and
5 a prerogative writ access filed. So I'm not going to
6 go into all of the facts, but there was a change of the
7 ordinance. It was similar to this review of the
8 Planning Board had to review the ordinance because it
9 was an MLUL. The Court at 425 in a similar vain the
10 Court said, we believe the members of the governing
11 body acting pursuant to N.J.S.A. 40:55D-26A, owe an
12 applied duty under the MLUL as to at least acknowledge
13 that they reviewed the Planning Board's report. And
14 they further said the record in this case provides us
15 little toppings that any review occurred. Moreover, we
16 believe that a remand to the governing body would be
17 futile and a vain effort to backfill the missing
18 acknowledgment, and we decline to order a do over.

19 What the Court is saying there in a sense was
20 all right, the ordinance was referred to the Planning
21 Board. The Planning Board did their duty under the
22 MLUL and it came back and the record in the Appellate
23 Division, there's no record that the governing body
24 which herein would be the City Council of Jersey City,
25 but the governing body acknowledged the review of the

1 Planning Board, here it says report. But here I've
2 looked through this submissions, where is it? I don't
3 have it that says we the governing body, whether in a
4 resolution or someone said we've reviewed it, and
5 here's what we're going to do. They're not bound. I'm
6 not arguing in anyway that the counsel is bound to what
7 the Planning Board says.

8 But there's no sense in sending an ordinance
9 to the Planning Board, they do whatever they're
10 supposed to. It comes back and there's nothing in the
11 record that says that they have at least reviewed it,
12 reviewed it and declined it, reviewed it and accepted
13 it. Reviewed it, or just as the Court said here,
14 acknowledge that they reviewed the Planning Board's
15 report or I guess you could use the word work, or their
16 efforts, or their ordinance. Where is that sir?

17 MR. ADELMAN: I want to make sure that I'm
18 clear if what Your Honor is asking is that you're
19 asking for whether or not there's something in the
20 record confirming that the counsel itself reviewed
21 reports and information from the Planning Board. Is
22 that the question?

23 THE COURT: Well let me say it another way so
24 that I'm clear. It's -- I don't think there's a
25 dispute of fact, because I have to take all the facts

1 that could be in dispute in favor of the non-moving
2 party, Jersey City. So Jersey City says we have this
3 ordinance and it was referred to the Jersey City
4 Planning Board, and then it came back from the Planning
5 Board. Okay, I'll accept that as true. When it came
6 back, I'm saying where is there an acknowledgment by
7 the governing body that they have reviewed the Jersey
8 City's planning, report, ordinance, work, whatever the
9 word you want to use for that, of this ordinance before
10 they made their decision?

11 MR. ADELMAN: Well I think that's reflected
12 by the whereas clauses that I pointed out in the sense
13 that if you're asking whether they reviewed the word
14 that the Planning Board did and the reports that they
15 prepared the reports themselves in those whereas
16 clauses, that information came directly from the
17 reports, which would demonstrate --

18 THE COURT: Let me challenge you this. Ms.
19 Marione on March 26th had this report. The Planning
20 Board did their work after March of 2019, did they not?
21 Then the ordinance was passed in 2020. So wasn't this
22 report prepared before the Planning Board did the
23 review?

24 MR. ADELMAN: I -- I -- I want to make sure
25 that I understand. Was this report prepared before the

1 Planning Board did their review?

2 THE COURT: Sir, you're taking the position
3 that there was an ordinance was sent to the Planning
4 Board for their review, and when it came back the City
5 Council passed an ordinance. And in that ordinance
6 they had wherefor clauses that you said came from this
7 report by Ms. Marione on March 26th, 2019.

8 What I'm saying is that this report was done
9 -- wasn't it done prior to the referral to the Planning
10 Board?

11 MR. ADELMAN: The report is from March of
12 2019, yes. And the report -- the report was done
13 before the ordinance was sent to the Planning Board in
14 May of 2019. Correct?

15 THE COURT: So okay that's your answer. I
16 appreciate that.

17 MR. ADELMAN: I just want to make sure, yeah
18 so the report definitely was prepared before the
19 ordinance went to the Planning Board. But in the
20 transcript of the Planning Board it's clear even in Ms.
21 Marione's certification that these reports -- I'm
22 sorry, let me take a step back.

23 In -- at the April, I believe 9th meeting of
24 the Jersey City Planning Board, these reports were
25 presented to the Jersey Planning Board and accepted and

1 voting on by the Planning Board. They were prepared at
2 the direction of the City Council pursuant to the
3 ordinance that's attached as exhibit A to Ms. Marione's
4 certification. So thereafter, the reports are
5 prepared, they're submitted and discussed at the April
6 2019 Jersey City Planning Board meeting.

7 After that, the -- the division then, and the
8 Planning Board -- well prepares the ordinance, submits
9 it to the Planning Board which was reviewed in May of
10 2019. And that's the time line.

11 THE COURT: All right. I understand. I
12 understand what you're saying, sir. Mr. Gergi, same --
13 I'm not going to give you a different question than I
14 gave Mr. Adelman, but do you -- are you aware of any
15 acknowledgment once the ordinance came back from the
16 Planning Board, any acknowledgment by the governing
17 body here, the Jersey City City Council of their review
18 of the Planning Board's I'm going to say, work, report,
19 ordinance?

20 MR. GERGI: Judge, to that specific question,
21 there is obviously no acknowledgment in the record of
22 the meeting where the ordinance was adopted, because we
23 know that the City took the position in front of the
24 public, and to it's own council members that the
25 ordinance did not need to be referred. So of course,

1 there was not acknowledgment of a report, because the
2 position of the City was we don't need to refer it at
3 all, and therefore there was no acknowledgment of any
4 report as a result of referral.

5 THE COURT: Now the City is saying, I
6 understand your answer. So let me ask counsel for
7 Appleseed, Ms. Steinhagen, good afternoon, ma'am.
8 Anything you want to add to that question or not?

9 MS. STEINHAGEN: No, I would not hold myself
10 to the literal answer. I think that what is going on
11 is that in fact, if I understood the papers that were
12 presented by Jersey City, this ordinance was never
13 referred nor was the initial ordinance in 2019 a
14 referral. Rather, the City Council asked the Planning
15 Board to develop and inclusionary zoning ordinance in
16 the context of it's reexamination report.

17 So the attachment of that ordinance in 2019
18 was not the result of a referral of an ordinance from
19 the City Council. It was generated as a proposed
20 ordinance by the Planning Board. And I will not go
21 further because Mr. Gergi has more information of what
22 happened when that report and that Planning Board
23 ordinance came back to the City Council. It's our
24 understanding that another ordinance was actually
25 proposed by a City Councilman that was then referred

1 back to the Planning Board and nothing came of it.

2 That there was no ordinance -- that proposed
3 ordinance that was generated by the Planning Board as
4 an outcome of it's reexamination report, not as a
5 referral of a proposed ordinance, did not go any
6 further in the City Council meeting. There was no
7 first reading of it.

8 The referral in 26A and 64 incorporating 26A
9 requires a first reading and then a referral to the
10 Planning Board, and then a report, and then coming back
11 for a second reading and a consideration at that point.
12 And we're having here a discussion that is making up a
13 story after the fact because there was no proposed --
14 there was no referral after first reading, and there
15 was no report coming back that was considered before
16 second reading.

17 THE COURT: All right. Let me -- let me go
18 back over to Mr. Gergi. So Mr. Adelman is saying they
19 followed the procedures. You may be taking the
20 argument that in fact, as Ms. Steinhagen has said that
21 there was never really the referral of the this
22 ordinance. But this is a summary judgment motion. So
23 Mr. Adelman is saying that the facts are this, and
24 you're saying the facts are that. If there's a dispute
25 of material facts which is it, don't I have to for

1 purposes of a summary judgment motion, I know this is a
2 little beyond the people watching but either the facts
3 as Mr. Adelman says it are true, and then we go with
4 the arguments from there out or there is a dispute.
5 What exactly happened and if I can't learn exactly what
6 happened from the papers submitted, then the motion has
7 to be denied.

8 Isn't there a bit of an issue here Mr. Gergi?

9 MR. GERGI: Thank you, Your Honor. I would
10 respectfully submit that the facts are not in dispute.
11 We don't dispute that in May of 2019 there was an
12 ordinance that was proposed and discussed by the
13 Planning Board. The City doesn't dispute that
14 Ordinance 20-809 was introduced and wasn't referred
15 after introduction to the Planning Board.

16 What is in dispute here is a legal question
17 for Your Honor. Is what the Planning Board did in May
18 of 2019 sufficient to satisfy the referral requirement
19 under the Municipal Land Use Law or is it not? I'm
20 happy to make arguments as to why it's not. I think
21 it's evident why it's not. But there is a legal
22 question posed to Your Honor, not a factual one, the
23 legal question is, is the Planning Board in May of 2019
24 discussing a different ordinance with different
25 substantive terms that was not introduced and you know,

1 sufficient, 17 months later when a new ordinance with
2 new terms is introduced to satisfy the referral
3 requirement in the Municipal Land Use Law.

4 And if Your Honor would permit me one more
5 point?

6 THE COURT: Go ahead.

7 MR. GERGI: For all requirements for
8 development ordinances and zoning regulations are so
9 routine and clear as to really be without question.
10 The way this process works in every town in New Jersey
11 is a development ordinance is introduced. At the
12 meeting introducing the ordinance, typically there's a
13 resolution referring that ordinance to the Planning
14 Board. The Planning Board then considers the
15 ordinance, examines whether it is consistent with the
16 master plan, makes findings of consistency or
17 inconsistency, and then provides recommendations to the
18 governing body. The governing body at the second
19 hearing when it adopts the ordinance is supposed to
20 review that report. If there are inconsistencies and
21 it wants to adopt the ordinance anyway, it has to
22 explain why and put that in a resolution.

23 If there aren't, if there are recommendations
24 it has to acknowledge having seen them and responding
25 to them. Or if it's found consistent and there are no

1 recommendations it can proceed to adopt it. But
2 ultimately that's the process and that wasn't followed
3 here. And somehow going back in time a year and a
4 half, and saying because a different ordinance was
5 discussed at a different meeting, that somehow
6 eliminated the need a year and a half later to refer
7 the ordinance under the plain terms of the statute, I
8 would submit just doesn't pass muster as a legal
9 question, not a factual question. The facts aren't in
10 dispute. As a legal matter it doesn't pass muster.

11 THE COURT: All right, thank you sir. Mr.
12 Adelman if you would like to take a minute or two, if
13 you have anything you want to highlight for me. I have
14 read the papers. And just so I'm -- I think it's a
15 good -- a lot of times what happens in these courtrooms
16 is the lawyers understand what's happening, but it
17 seems like there is a lot of people here and it may
18 sound like Latin to them. But in oral argument it's
19 not open mic and talk as long as you want, and then you
20 sit down. It's I read the papers, I have a question
21 I'll ask and if there's anything more I need and if the
22 questions are answered I'm ready to go.

23 But I will give the attorneys brief, very
24 brief, maybe one or two minutes if there's anything you
25 want to sum up, all three of you, because my questions

1 have been answered thus far. But I do want you to all
2 have that opportunity. Mr. Adelman if you want to
3 highlight something for the next one or two minutes,
4 that we haven't already discussed, or that you need to
5 highlight it for me.

6 MR. ADELMAN: Yes, thank you, Your Honor.
7 Just real quickly, the facts as far as whether or not
8 -- there is a factual dispute. Clearly, there's a
9 factual dispute as to whether or not this ordinance was
10 referred to the Planning Board. It's not a legal
11 issue. Like the fact is that was it referred and
12 reviewed by the Planning Board, those are facts.
13 That's not a legal issue.

14 Separately, I just want to quickly address
15 some of the accusations as far as what the plaintiff
16 has made concerning these -- what this ordinance is
17 going to do or result in, these free wheeling deals or
18 acts that they presume are going to take place. The
19 ordinance does not permit for that to happen. This
20 ordinance was clearly created for affordable housing.
21 And what happens here is a developer -- in order for
22 this ordinance to kick in, the ordinance itself -- or
23 the developer has to ask for additional residential
24 space, whether it's five additional units, or 5,000
25 square feet. Once that request is made, they're

1 required to then provide affordable housing.

2 At that juncture if the developer believes
3 that it is not feasible to provide affordable housing,
4 they then can make a request to say, we'll provide
5 affordable housing off sight, or make a payment in lieu
6 of affording housing, or provide a benefit to the City
7 like a school, or road, something of that nature.

8 So it's not the City that can go to the
9 developer and say look, if you want to develop you must
10 pay us something, or do something for us. The
11 ordinance requires affordable housing to be created if
12 the developer asks for additional space. Then the
13 ordinance permits for alternatives if it's not
14 feasible. Perhaps maybe there are environmental
15 issues, other issues that don't allow for affordable
16 housing to take place.

17 The cases that plaintiffs rely on have to do
18 with matters where areas are designated as areas in
19 need of redevelopment, where you can say, yes okay City
20 you designate this area as a needed redevelopment, and
21 you know, we'll give you X. Whereas, here that's not
22 what is taking place. It's the City that is requiring
23 the affordable housing and perhaps allowing for
24 alternatives to take place if it's not feasible based
25 on a request made by the developer and after an

1 assessment made by the -- by the supervising entity.

2 So this is all notion of this scheme or that
3 we adopted this ordinance for the pure purpose of
4 taking kickbacks or for legal conduct is completely a
5 farce. The purpose -- both sides want affordable
6 housing. So this whole lawsuit, they would rather have
7 this City have no affordable housing as opposed to what
8 we're trying to do which is good.

9 You know, based on that alone all of this
10 speculation and conjecture that they offered which has
11 no basis, is not a basis to vacate this ordinance. And
12 as a result and for all of the reasons stated in my
13 papers, the ordinance should be affirmed. If there are
14 any other questions from Your Honor, I am happy to
15 entertain them. And of course, I pass the microphone
16 to plaintiffs counsel.

17 THE COURT: Mr. Gergi, one or two minutes if
18 there's anything you would want to highlight, if you
19 don't that's fine as well. Go ahead sir.

20 MR. GERGI: Thank you, Judge. Can I ask one
21 clarifying question Judge before I begin? Is this is
22 the closing argument for the entire argument or just on
23 the procedure issue?

24 THE COURT: It's the entire argument.

25 MR. GERGI: Okay. Thank you, Judge. Then I

1 will just briefly on the procedural, I think the facts
2 they're not in dispute. The City did not refer the
3 ordinance to the Planning Board. The City's own
4 council stated at the meeting it wasn't referred
5 because they didn't believe it needed to be referred.
6 There is written documentation post-dating the adoption
7 where the Director of Housing and Community Development
8 confirms that the ordinance wasn't referred.

9 And under the Municipal Land Use Law you have
10 to strictly comply with the procedural requirements,
11 otherwise as the Court said in Jennings, the Supreme
12 Court said in Hasbrouck Heights the ordinance is --
13 that's a fatal defect that renders the ordinance void.
14 This ordinance is void for not having all of the
15 procedural requirements set forth by the New Jersey
16 Legislature.

17 Substantively, Your Honor.

18 UNIDENTIFIED FEMALE: See how he rules, Guy.

19 THE COURT: All right. I'm going to ask once
20 again that anyone who is not an attorney mute your
21 microphones, because someone just came through. I
22 would ask you to do that right now. Please continue,
23 sir.

24 MR. GERGI: Thank you, Judge. Substantively
25 counsel for the City states that you know, our

1 arguments are substantive arguments and based on -- I
2 believe his words were speculation and conjecture. Our
3 arguments Your Honor are based in law. I heard Your
4 Honor's earlier comments at the beginning of today, but
5 if you look at our brief, everyone of our arguments
6 about why this is unauthorized and why it violate
7 public policy as well as substantial precedent in this
8 State, is well-supported and well-established in the
9 case law that dates back decades. It's not just simply
10 one case or the other.

11 In opposition, the City has not cited any
12 statute, no statute passed by the New Jersey
13 Legislature that allows them to trade away affordable
14 housing for an unlimited number of community benefits
15 with no standard to determine when or why or how much.
16 I delegates authority in violation of the Municipal
17 Land Use Law to a small group of local officials, and
18 consultation with a council person for the ward where
19 the development is proposed, you know supposedly trade
20 away the affordable housing for these community
21 benefits.

22 And Your Honor, I think there's case law from
23 this vicinage and from the Appellate Courts that makes
24 it clear that this kind of open negotiation and
25 unbridle authority granted to a municipality to engage

1 in horse trading, poses a fundamental threat to the
2 Land Use Process. It poses a fundamental threat to the
3 integrity of the process.

4 You know, I'm not going to cite the statutes,
5 the limitations set forth in the Municipal Land Use Law
6 that clearly says that it has to be reasonable and
7 necessary and related to the development. It can't
8 just be whatever the City wants at any time. It can
9 accept an exchange for a reduction in affordable
10 housing. You know in Pool Brothers which is the 2008
11 opinion from the New Jersey Supreme Court, the Court
12 was clear even when the developer is enthusiastically
13 offering to provide a community benefit or some sort of
14 off track improvement, it's impermissible. It's not
15 authorized by statute, because it poses the very real
16 threat that one developers who cannot offer the same
17 won't be able to do the benefit, and it leads to an
18 auction process of bidding for land use approvals.

19 The City's counsel argued that the City isn't
20 going to demand. The developers have to come to the
21 City and propose a community benefit. But what is the
22 difference, if a developer comes and proposes a
23 community benefit unacceptable and the City says no,
24 what are they going to do, turn around and offer
25 another, and another, and another until they secure the

1 land use approval they seek without providing the
2 affordable housing.

3 Judge D'Elia from this very vicinage talked
4 about the Municipal Land Use Law and the local housing
5 and redevelopment don't permit for these kinds of give
6 backs untethered to any sort of rationally based link
7 to a development. He says, you know, it permits abuse
8 that should not be permissible. So Your Honor, I think
9 procedurally it's clear that this ordinance should be
10 void. I think substantively the City hasn't offered
11 any statute no case law to rebut our arguments and the
12 case law we cite that shows this isn't permissible,
13 especially when it comes at the expense of affordable
14 housing. We respectfully ask for Your Honor to enter
15 an order finding that the ordinance isn't valid on
16 both procedural and substantive grounds.

17 THE COURT: Thank you. Ms. Steinhagen,
18 anything you would like to add, ma'am?

19 MS. STEINHAGEN: Well there's a lot I would
20 like to add, but I realize that it would be
21 inappropriate. I just want to say that we've been
22 talking about things as procedural -- wait a second I
23 did see -- procedural and substantive. And as I
24 pointed out in my brief, this procedural requirement in
25 the MLUL that has to be strictly complied with is

1 really has substantive import, as I discussed by going
2 to some initiative and referendum earlier cases that
3 were decided that decided that a development ordinance,
4 a zoning ordinance is not just any ordinance that would
5 be allowed to be subject to initiative and referendum,
6 because of the central role of the Planning Board and
7 the expertise.

8 I think that we can't just play a game of
9 when the Board considered something, there was some
10 report at some point. This has to be strictly complied
11 with, and as both the Court in the Supreme Court in
12 Hasbrouck Hospital and the Appellate Division in
13 Jennings makes clear, any failure to adhere to so-
14 called procedural requirement is fatally defective
15 because of it's substantive input. And it's -- it's
16 sort of not respectful of the central role of the
17 Planning Board, planning principles, et cetera.

18 Substantively, I just want to set clear from
19 the amicus point of view, the way we use the word
20 corruption is an abuse of entrusted power for private
21 gain. And it doesn't have to include transfers in
22 money, which is what I think the City is responding to.
23 It can be enforcement, it can be enhancement of
24 political power, reputation, or electoral support.

25 What we're claiming is this ordinance does in

1 fact codify a process that already is being used by
2 Jersey City in the development process that does
3 undermine public confidence and does in effect, it is
4 what we're calling corrupt, it's an abuse of process.
5 The (indiscernible) back in negotiations with
6 developers to trade away affordable housing on a case-
7 by-case basis is what is going on here, nothing more
8 and nothing less.

9 The purpose of inclusionary zoning is to
10 provide affordable housing for the most vulnerable in
11 our State. It's not to provide leverage for individual
12 councilmen and City officials to exact community
13 benefits that don't necessarily benefit low- and
14 moderate-income people, but rather fuel a process of
15 gentrification, potentially resulting in displacement
16 of the residents that are currently living there, and
17 increasing the housing costs for residents that remain
18 in the community.

19 The key vulnerability of the IZO that's
20 before you is both the waiver and the community benefit
21 provision. It is the lack of affordable adequate
22 standards to guide the exercise of discretion. I'm
23 going to say as Justice Brennan articulated back in
24 1954 in Weiner versus Stanford 15 N.J. 295, 291, unless
25 the provisions of any regulatory ordinance that vest

1 discretion in officials to grant or to deny an
2 application, "provides adequate standards to govern the
3 deliberations of those having discretionary power"
4 those provisions must be struck as entirely void.

5 Now he goes onto quote Macmillian on the same
6 principle indicating that this is a very well-
7 established principle of administrative law. Here the
8 waiver has no standard in criteria and the community
9 benefits for which the approving authority in
10 consultation with the councilman from the ward in which
11 the project is to be built, can trade away affordable
12 housing is not an exclusive list, and it doesn't
13 require it to be built on site and it's not proximate
14 to the site or the redevelopment area. And as we show
15 in our brief, this ordinance gives unfettered
16 discretion and it's roots -- such ordinances are
17 routinely struck down by the U.S. Supreme Court and our
18 Federal District Court most recently in Rosedale on the
19 grounds of vagueness, violating due process, and they
20 should be taken this too -- these provisions must be
21 found invalid.

22 Also what we added from an empirical point of
23 view the researches have found that when municipal
24 governments are given the right to challenge -- the
25 chance to engage in this type of free willing standard

1 list negotiations, it enables such as the waiver
2 provision, it definitely generates a political
3 patronage system, and it tends to develop. And here,
4 the ordinance gives city officials definitely the
5 unconstitutionability to remove affordable housing
6 requirements for connected developers in sweetheart
7 deals or to arbitrarily impose them on others.

8 And so finally, the unfettered discretion
9 embedded in the IZO is bound to create misunderstanding
10 and conflict. As we show in our brief, professors from
11 UCLA have noted when governments trade zoning for cash
12 or amenities, the zoning is no longer reliable
13 predictor of future planning. And converting zoning to
14 a tool of fiscal policy, as Jersey City has done
15 already and will continue to do under this ordinance,
16 have by -- they've done this by exacting public schools
17 and other amenities traditionally provided by
18 government, dilutes governments general traditional
19 role as the guarantee of land use policy. It's just
20 land use policy itself becomes less predictable, and
21 everybody becomes dissatisfied with it.

22 No one on this call and people who are
23 watching say that community benefits are not good
24 things. But affordable housing is a social good as
25 well. And it's a social good that the Supreme Court of

1 New Jersey has allowed municipalities to exact from
2 developers when they're asking for certain variances
3 and certain enhancements. There is no authority to
4 exact other types of community benefits. And this
5 statute itself must be struck down on substantive
6 grounds as well.

7 THE COURT: All right, thank you. So what I
8 will -- the attorneys again know how this proceeds.
9 But what I'm going to just -- there are many people and
10 we should be transparent and open. So this matter was
11 filed challenging the Jersey City ordinance by Fair
12 Share Housing. It's come to this point because there
13 is a motion by Fair Share and the amicus Appleseed, a
14 motion for summary judgment basically to say the case
15 is over, there is really not dispute of material facts,
16 and the ordinance should be struck down. Jersey City
17 sees it otherwise.

18 Before we got to today's date, there were
19 numerous written exchanges of legal arguments submitted
20 by all of the parties in the case, the City of Jersey
21 City, Fair Share Housing, and Appleseed. We also
22 conducted a conference recently because hadn't been
23 done earlier to make sure that everyone was on the same
24 -- you know, on the same track and that we were doing
25 things in accordance with rules and that we were

1 following those procedures.

2 Today's legal argument is not someone reading
3 their entire submissions, because I have a stack of
4 papers there, that is probably with exhibits hundreds
5 of pages that we the Court has studied. The oral
6 argument is one that if I have any particular
7 questions, and allow the attorneys to answer those
8 questions, whether they're good questions or not. It
9 depends on who is asking them, I suppose. Then they'll
10 say a little further what their arguments are. Again,
11 it's not like open mic say at a city council meeting.
12 Having been a city councilman over 25 or 30 years ago,
13 I -- you know, it's a different -- it's a different
14 dynamic.

15 At this juncture, I have two choices I can
16 do, I can reserve the decision and I'll give you the
17 decision later. But I am not going to do that. I'm
18 prepared to make the decision today on this question
19 before me. Not everyone will be happy with it, because
20 it's either going to be one way or another, and then
21 under our system, any party can file leave to or file
22 an appeal with what's called our Appellate Division of
23 the Superior Court.

24 That's just how the system works, and if
25 they're not satisfied at that point it can go to the

1 New Jersey Supreme Court. I don't know what will
2 happen from here. I have a feeling, I think my
3 decision is a good one, but I'm a little biased. I
4 think I studied this pretty well and I have some issues
5 here. Not everyone will agree, and that's fair.

6 This comes about there's a motion here for
7 summary judgment, I'll explain more of that in a
8 moment, and a motion to strike the answer and impose
9 sanctions upon Jersey City filed by Fair Share. This
10 matter is called an action in lieu of prerogative writs
11 and on December 7th, 2020 plaintiff, Fair Share, filed
12 suit against defendant Jersey City and the Municipal
13 Council of Jersey City, collectively I may refer to
14 them as defendants or Jersey City, challenging the
15 validity of the ordinance number 20-089, hereinafter
16 I'm going to call it the ordinance. The ordinance is
17 titled the Ordinance Creating Chapter 187 Inclusionary
18 Zoning of the municipal code requiring the inclusion of
19 affordable housing units and all development projects
20 with residential which have received use variances or
21 increased density in (indiscernible).

22 On October 7th, 2020 the ordinance was
23 introduced by the Jersey City Municipal Council at it's
24 regularly scheduled meeting on October 21st, 2020. The
25 Council adopted the ordinance by a seven-two vote. The

1 challenge of course followed. On April 16th, 2021 the
2 New Jersey Appleseed public interest loss filed a
3 motion to intervene and appear as amicus curiae in this
4 matter. The motion was granted on April 16th, 2021.

5 Again, the motion for summary judgment, a
6 motion to strike was filed and the Court has -- had a
7 briefing schedule. We've had briefs submitted. We've
8 had conferences and essentially again the plaintiff
9 challenges the ordinance and wanted to be struck down
10 that they failed to comply with the Municipal Land Use
11 Law which I'll refer to as MLUL, statutory and mandate
12 process. Bear with me one second. I think somebody
13 has joined us without their mute on. I don't know why
14 that happened.

15 They violate the MLUL's mandated process, and
16 the ordinance unlawfully enables the Jersey City
17 municipal officials to negotiate for and accept the
18 legal extractions in lieu of affordable housing, in
19 violation of the MLUL and case law. And three, the
20 ordinance violates the New Jersey Civil Rights Act.

21 I will sum up now and very shortly of what
22 the arguments are, that we've heard some of them today.
23 And there's more voluminous arguments been made. But
24 plaintiff has said that the ordinance violates the
25 statutory requirements of the MLUL. Mainly, that the

1 referral to the Planning Board was necessary and that
2 it did not occur. They assert that the ordinance
3 creates an unlawful scheme that encourages quid pro
4 exchanges between developers and Jersey City officials.
5 The ordinance was ultra virus because Jersey City was
6 not authorized to adopt the mandatory set aside
7 ordinance that enables the City to trade away
8 affordable houses for so-called community benefits.
9 Such a policy would encourage officials to negotiate a
10 case-by-case basis.

11 Bear with me one moment, please. All right.
12 They also -- the plaintiff emphasizes the ordinance
13 violates public policy and precedent that this Court
14 must follow. They've also filed a motion to strike and
15 oppose sanctions against defendant City with regards to
16 their answer.

17 There was some submissions, and in reply to
18 those submissions the plaintiff further argues that the
19 failure to discuss or acknowledge a report from the
20 Planning Board on the proposed ordinance consistency
21 with the master plan is alone fatal, because case law
22 explains a governing body acting pursuant to the
23 N.J.S.A. 40:55D-26(a) owe an implied duty under the
24 MLUL to at least acknowledge that they reviewed the
25 Planning Board's report. That's citing the case of

1 Jennings 418 N.J.Super. 405, 425 (APP. DIV. 2011).

2 That's their argument.

3 Appleaseed Public Interest Law Center submits
4 some similar arguments. They also say the Planning
5 Board -- the ordinance should be set aside because the
6 Planning Board -- as to the Planning Board it's fatal
7 that the statute clearly mandates and obligation by the
8 Planning Board. They argue that the ordinance allows
9 City officials to engage in backroom negotiations, a
10 trading off affordable housing for other type of items.

11 The City of Jersey City doesn't agree at all
12 with any of those arguments, as I imagine. They said
13 the defendant -- summary judgment should be denied as
14 the ordinances are virtually identical. Meaning that
15 one was sent, one was adopted, and they were virtually
16 identical. When I say sent, sent to the Planning
17 Board, as the Jersey City Planning Board prepared and
18 presented an ordinance entitled Ordinance Amending and
19 Supplementing Chapter 345.

20 All right. So they also said at the meeting
21 on May 7th, 2019 the Planning Board passed a motion to
22 adopt the identical ordinance so that, in fact, did
23 comply with the MLUL and then adopted the ordinance.
24 They've said they complied completely with the MLUL.

25 They also argue that the motion to strike is

1 not necessary because their answer was based on good
2 faith belief of the responses answer to the complaint.
3 That's an argument for the people listening that has
4 not really been argued that much here today but has
5 been argued in the papers, which is acceptable.

6 Motions for summary judgment are a type of a
7 motion governed by Rule 4:46-1 of our New Jersey Court
8 Rules, which I'll incorporate by reference. And in
9 those type of motions, the movant here, the plaintiff,
10 must demonstrate that there are no disputes as to the
11 material facts -- the material facts, okay, and not
12 just a fact but a material fact, and that the movant is
13 entitled to a judgment as a matter of law. That's from
14 the case of Brill 142 N.J. 525.

15 A determination of whether there exists a
16 general issue of material fact requires a consideration
17 of whether the materials presented when viewed in the
18 light most favorable to the non-moving party are
19 sufficient to permit a rational fact finder to resolve
20 the alleged dispute issued in favor of the non-moving
21 party. That's at 540.

22 An issue of fact is drawn only if considering
23 the burden of persuasion at trial the evidence
24 submitted by the parties on the motion with all
25 legitimate inferences therefrom favor the non-moving

1 party, which requires submissions of the issue to the
2 trier of fact. See Rule 4:46-2(c) and Bhagat 217 N.J.
3 22, 38 (2014).

4 The Court looked at his matter and I have two
5 really areas that I want to address. The Court has to
6 find that for a summary judgment, that if a material
7 fact has to be found for purposes of the non-moving's
8 favor or in a sense that I have to deny the motion.
9 The City of Jersey City says the ordinance was sent,
10 and the plaintiff says it was not sent essentially but
11 it doesn't really matter because of their arguments
12 which I'm not going to repeat. But the Court will find
13 for purposes of this motion that I will accept the
14 facts of Jersey City that the motion was sent to the
15 Jersey City Planning Board.

16 But therein lies a problem. In the
17 certification of Ms. Marione, she writes that at
18 paragraph 15 that -- and I'm going to say it in mid-
19 sentence, who thereafter, meaning the City Council
20 arranged for revisions to be made to the included
21 ordinance in the final version of the ordinance that
22 was enacted by the Council, which now forms the subject
23 matter and the plaintiff seeks to vacate. That's a
24 Rule 1:6-6 violation. So Ms. Marione's saying what the
25 Council did not really specifically doesn't give me the

1 information that I need.

2 Under the case of Jennings, again I did say
3 this earlier, but I am going to say it again, the
4 process is that an ordinance is then referred to the
5 Planning Board and then they report back. And whether
6 the Council -- what they do with that is of no moment to
7 this Judge or any other Judge. But which is
8 significant is what would be the useful -- why would
9 the statute refer to the Jersey City Planning Board if
10 there would be no acknowledgment that they've done some
11 work? If governing bodies could refer things to
12 Planning Boards and then not really care whatever they
13 did with it would really nullify the law. There would
14 be no point in having it referred if it didn't come
15 back.

16 And in Jennings at 424 the Court said, we
17 believe the members of the governing body acting
18 pursuant to N.J.S.A. 40:55D-26(a) owe an implied duty
19 under the MLUL to at least acknowledge that they
20 reviewed the Planning Board's report. In the
21 materials, assuming Jersey City is correct that it was
22 sent to the Planning Board, there's never been an
23 acknowledgment of what -- by the municipal governing
24 body of what the Jersey City Planning Board did.

25 In the case of Jennings they said remanding

1 it which for the layman here would be to send it back
2 to get acknowledgments or an affidavit later from
3 Councilman whoever saying oh I did mean to say that I
4 did this. In that Court they said that would be futile
5 and a vain effort to backfill the missing
6 acknowledgment. And they would not do a do over. And
7 therefore, they concluded that it is a material
8 violation of the Statute 40:50.5(d)-26(a) which is
9 similar here that's why it was referred to the Planning
10 Board. So the Court is going to decide that this
11 ordinance is invalid, the ordinance from the Jersey
12 City government for that fatal flaw.

13 Further, and separately apart from my
14 decision, in the ordinance there is a definition
15 section 187.2, the definition of approving authority
16 says, means the director of housing economic
17 development and commerce (HEDC) or his or her designee,
18 the director of affordable housing, the director
19 community development. In the case of an application
20 for a project in a redevelopment zone or redevelopment
21 area, the director of the Jersey City redevelopment
22 agency or his or her designee shall be a member of the
23 approving authority.

24 So that's the definition of approving
25 authority. If you look further in the ordinance,

1 187.6(a), it reads the approving authority who I've
2 just listed a moment ago is permitted to approve a
3 reduction in the mandatory onsite affordable housing
4 requirement related to the value of community benefits
5 proposed by the developer. A reduction in the required
6 affordable housing for community benefits will only be
7 considered for projects in a redevelopment area, and
8 must meet the following criteria which talks about an
9 application fee and things that aren't germane to our
10 argument.

11 The Court looks on such a question to the
12 case of Nunziato, N-U-N-Z-I-A-T-O versus Edgewater
13 Planning Board, 255 N.J.Super. 124 for some guidance
14 with regards to this language. So let me say that the
15 Court finds that the legislature specifically provided
16 that the MLUL, that the governing body must require
17 contributions for off track expenses or other items
18 related to caused by a subdivision or site plan to be
19 approved. These contributions are limited to specific
20 categories.

21 Case law makes it clear that they must be at
22 a minimum some type of relationship between the
23 development to be approved and the activity funded by
24 the contributions. That's N.J. Builders Association
25 108 N.J. 223, 227 (1987). As a general public policy

1 the Appellate Division has emphasized that any such
2 contributions or give backs must be based on the goals
3 of sound land use regulation not free wheeling bidding
4 that indicates the approvals are up for sale. That's
5 Nunziato 225 N.J.Super. 124, 134 (APP. DIV.).

6 The Court is concerned that the way the
7 ordinance is drafted poses significant risk for abuse,
8 favoritism, or bad faith on the part of the
9 municipality and I looked again. I cite to Nunziato
10 and I will quote that case where they said we conclude
11 the kind of free wheeling bidding under review is
12 grossly (indiscernible) to the goals of sound land use
13 regulation. The intolerable spectacle of Planning
14 Board haggling with the applicant over money strongly
15 suggests that the variances aren't for sale. This
16 cannot be a proceeding in which this should not be --
17 should not occur and the proceedings are hereby
18 irredeemably tainted and must be set aside. That's
19 Nunziato who is talking about a Planning Board.

20 Here, the ordinance is talking about the
21 approving authority, which essentially for this Court
22 is the same dynamic, so I think Nunziato and this Court
23 says that Nunziato is really applicable to what we have
24 here and we're relying upon Nunziato. And for those
25 reasons this free wheeling bidding that the Court in

1 Nunziato was concerned with, this Court is concerned
2 because the dynamic is such that someone seeking an
3 approval can essentially -- and I don't want to use the
4 word corruption with money in a bag, but say we'll give
5 you a pool and maybe you can reduce our affordable
6 housing. And if it meets the muster of the approving
7 authority, we're done.

8 So it's two free wheeling. It's something
9 that is not under the case law of Nunziato something
10 that this Court believes is lawful. And the ordinance
11 is struck down for that reason separate and apart from
12 the other reason. Now it's not in any way to imply
13 that the current holders of those positions that are
14 the approving authority are anyway not honorable
15 people, concerned for the continuing development of all
16 of the people of Jersey City. I'm not saying that at
17 all. Nor am I saying that there is corruption. I'm
18 not saying that either.

19 But the formula for the housing to be reduced
20 is -- violates the Appellate Division in Nunziato, it's
21 too free wheeling, and is subject to abuse. For those
22 reasons the ordinance, most respectfully to the City of
23 Jersey City and their apt corporation counsel and
24 deputy corporation counsels, I am striking the
25 ordinance in it's entirety.

1 Further the application by Fair Share to
2 impose sanctions and strike the answer of Jersey City
3 is denied. I don't see there's any need for sanctions.
4 And really that question is moot at this point. All
5 right. That is my decision. All the attorneys well-
6 argued their positions. And I respect the good work.
7 The people of Jersey City should be happy for their
8 corporation counsel, staff and the good job they did,
9 as well as Fair Share who they represent on the
10 Appleseed, who they are representing, they did fine
11 work.

12 I wish everyone the best. And to all the
13 people on board, I'm glad you're participating in this
14 discussion if you will. At this juncture, I have
15 concluded my decision. I thank you all. I always say
16 if there's anything that we have to tie down I ask the
17 attorneys for anything else. Mr. Gergi, anything sir?

18 MR. GERGI: No Judge, I think you covered it,
19 thank you, Your Honor.

20 THE COURT: Okay. Mr. Adelman?

21 MR. ADELMAN: No, Your Honor, thank you very
22 much.

23 THE COURT: Thank you sir. Ms. Steinhagen?

24 MS. STEINHAGEN: Thank you very much, Your
25 Honor. Thank you for letting me argue.

1 THE COURT: Thank you very much as well. And
2 you're welcome. All right, ladies and gentlemen, what
3 you can do is you can now hang up. We're going to go
4 off the court record and we're going to terminate this
5 call. Thank you.

6 (Motion concluded at 3:39 p.m.)

7 * * * * *

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12 CERTIFICATION

13 I, Sharon Conover, the assigned transcriber, do
14 hereby certify the foregoing transcript of proceedings
15 on CourtSmart, Index No. from 2:31:17 to 3:40:01, is
16 prepared to the best of my ability and in full
17 compliance with the current Transcript Format for
18 Judicial Proceedings and is a true and accurate non-
19 compressed transcript of the proceedings, as recorded.
20
21

22 /s/ Sharon Conover

23 Sharon Conover

24 AD/T 625

25 AOC Number

26 Phoenix Transcription LLC

27 Agency Name

28 08/14/21

Date