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JEANNE DALY, POLISH AMERICAN
STRATEGIC INITIATIVE, INC., and
POLISH AMERICAN STRATEGIC
INITIATIVE EDUCATIONAL
ORGANIZATION, INC.,

Plaintiffs,

vs.

EXCHANGE PLACE ALLIANCE
DISTRICT MANAGEMENT
CORPORATION and JERSEY CITY
PLANNING BOARD,

Defendants.

SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
LAW DIVISION

Docket No.: HUD-L-2076-22

Civil Action

BRIEF OF PLAINTIFFS JEANNE DALY, POLISH AMERICAN STRATEGIC INITIATIVE,
INC., AND POLISH AMERICAN STRATEGIC INITIATIVE EDUCATIONAL
ORGANIZATION, INC.
IN SUPPORT OF ACTION IN LIEU OF PREROGATIVE WRITS

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I. PRELIMINARY STATEMENT

The present action is a complaint in lieu of prerogative writs, challenging the May 10, 2022 decision of the Jersey City Planning Board (“Board”) to recommend a set of plans submitted by the Exchange Place Alliance District Management Corporation (“EPA”) for work on the public Exchange Place Plaza in downtown Jersey City. The Board previously decided not to recommend the plans, on April 26, 2022. Three days later, the attorney for the applicant submitted a request for reconsideration, along with new evidence, which the Board granted. The Board Planners submitted new comments the same day of the hearing. The new hearing did not permit any public comment or question on the new evidence submitted. The public was not given notice of the May 10 hearing.

The Board’s decision to reverse itself and recommend the plan, mere days after declining to recommend it, was arbitrary, capricious and unreasonable because there was insufficient evidence to support the decision. Moreover, the decision violated the Municipal Land Use Law and Open Public Meetings Act. There are also indications that it is contrary to the New Jersey public trust doctrine. In addition, some of the evidence given on behalf of the applicant was unsworn testimony and net opinions. Public comment provided significant evidence that the plan is not compliant with the Master Plan as required by the Municipal Land Use Law. For all these reasons, Plaintiffs respectfully submit that the Board’s decision should be reversed and remanded.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Exchange Place Alliance

The City of Jersey City created the Exchange Place Special Improvement District

(“SID”) by vote of the City Council in December 2016, adopting City Ordinance 16-176. Ex. Y to Ferguson Cert. Business Improvements Districts (BIDs) or Special Improvement Districts (SIDs) are established under New Jersey’s Pedestrian Mall and Special Improvement District Act. N.J.S.A. 40:56-65 et seq.

Under N.J.S.A. 40:56-79, the mayor of a municipality may appoint an advisory board of seven or more persons, “at least a majority of whom shall be owners or occupants of properties adjoining a pedestrian mall or included in a special improvement district, as the case may be, or representatives of these owners or occupants, to advise the governing body in connection with the acquisition, construction and improvement of a pedestrian mall” or SID. A city may designate a district management corporation to manage a pedestrian mall or SID. Once a district management corporation is formed, it assumes the function of the advisory board. N.J.S.A. 40:56-79.¹ The Act “shall not prevent the governing body of any municipality, at any time subsequent to the adoption of a pedestrian mall or special improvement district ordinance, by ordinance, from abandoning the operation of the pedestrian mall or special improvement district, [or] changing the extent of the pedestrian mall or special improvement district[.]” N.J.S.A. 40:56-75.

Jersey City Code 69-70 provides that the SID shall be managed by a district management corporation. Jersey City Code 69-74 provides that EPA operates as the district management corporation for the Exchange Place SID. Ex. Y to Ferguson Cert. As the district management corporation, EPA works in a private-public partnership with Jersey City. Ex. Y to Ferguson Cert. Under Jersey City Code 69-74, EPA has the power to “[u]ndertake improvements designated to

¹ In addition, a district management corporation “may exercise those of the powers listed herein as may be conferred upon it by ordinance.” N.J.S.A. 40:56-83(a). A municipality and its governing body still retain its police powers and other rights and powers “relating to the street or part thereof constituting the pedestrian mall[.]” N.J.S.A. 40:56-75.

increase the safety or attractiveness of the district to businesses which may wish to locate there or to visitors to the District including . . . landscaping[.]” The EPA is made up of seven board members: 1. President Michael DeMarco, 2. Jeremy Farrell, of LeFrak, 3. Andy Siegel, 4. City Council President Joyce Watterman, 5. Joe Panepinto, 6. Abe Naparstek, and 7. David Elkouby. The latter three members were named in January 2023, replacing Ricardo Cardoso, Steve J. Pozycki of SJP Properties, and Gus Milano.²

B. Exchange Place Plaza

Exchange Place Plaza (the “Plaza”) is part of the Exchange Place SID. Ex. Y to Ferguson Cert. The Plaza is open to the public and provides pedestrian access to public transportation at the Exchange Place PATH station. Ex. D to Ferguson Cert. It is also the site of the Katyn Memorial, a bronze statue dedicated to the Polish victims of the 1940 Katyn Massacre, in which thousands of Polish military officers and intellectuals were executed by the former Soviet Union. Ex. J to Ferguson Cert. The Memorial was gifted to the City of Jersey City in 1986. Ord. C-299, Ex. J to Ferguson Cert. In 1989, the City adopted a resolution to establish “a plaza for the placement of a monument to honor the brave members of the Polish Officer Corp. who were subject to mass execution at the hands of the Soviet Government in April of 1940.” Resolution C-4271, Ex. J to Ferguson Cert. The resolution stated that plaza “shall be known as the Katyn Monument Plaza and which shall be located on the southerly side of Exchange Place opposite the Path Station.” Id.

² Mr. Elkouby is the founder of American Equity Partners, which owns 15 Exchange Place. Ex. U to Ferguson Cert. Mr. Panepinto is the founder of Panepinto Properties, a large real estate owner in Jersey City, who recently donated \$50,000 to the Super PAC Coalition for Progress, a Super PAC tied to Jersey City Mayor Steven Fulop’s expected 2025 gubernatorial run. Ex. U, V to Ferguson Cert. In 2019, when Mr. DeMarco was CEO of real estate developer Mack-Cali, now rebranded as Veris Residential, Mack-Cali donated \$250,000 to Coalition for Progress. Ex. V to Ferguson Cert. Mr. Naparstek is a partner at G&S Investors, leading redevelopment of Metro Plaza in the Exchange Place Special Improvement District. Ex. U to Ferguson Cert.

The Memorial has garnered significant attention in Jersey City and internationally. Michael DeMarco, current President and then-President of the EPA, was quoted in the Jersey Journal in April 2018 regarding the Katyn Memorial as follows:

“I don’t think the statue’s appropriate for a major metropolitan area,” DeMarco told The Jersey Journal. “It’s a little gruesome ... I can’t imagine how many mothers go by and have to explain it to their children.” Ex. R to Ferguson Cert.

In Spring 2018, Mayor Steven Fulop announced plans to move the monument to a different location. Ex. Q to Ferguson Cert. The announcement caused significant backlash from residents and Polish politicians. EPA’s initial plans to renovate Exchange Place required the removal of the Memorial. Protests by Jersey City residents ensued. Ex. T to Ferguson Cert. On May 10, 2018, Mayor Fulop shared on Twitter a rendering that he stated showed “Exchange Place initial plans.” Ex. T to Ferguson Cert. Polish politicians, the Polish ambassador to the United States, and the artist who designed the monument publicly stated that the monument should remain in place at Exchange Place. Ex. Q to Ferguson Cert.

In December 2018, the City passed City Ordinance 18-144, “ordain[ing] that the Katyn Forest Massacre Memorial shall remain in its current location within the public right of way at the eastern terminus of Exchange Place in perpetuity.” Ex. X to Ferguson Cert. The Ordinance acknowledged that “the community has made it abundantly clear that it wishes for the Katyn Forest Massacre Memorial to remain in its current location at the eastern terminus of exchange Place Plaza and it therefore [is] in the City’s best interest that the Katyn Forest Massacre Memorial’s location be formally codified[.]” Id.

C. Planning Board Hearings

As part of the Jersey City government, EPA is required to conduct its business in accordance with the Open Public Meetings Law. Ex. Y to Ferguson Cert. According to the

Municipal Land Use Law, when a public agency wishes to spend public funds on a project and the planning board has adopted a relevant portion of the master plan, the public agency must first “refer the action involving such specific project to the planning board for review and recommendation in conjunction with such master plan[.]” N.J.S.A. 40:55D-31. This review by the planning board is commonly referred to as a “courtesy review.” A planning board may either grant or deny recommendation of a project under a courtesy review. The public agency – in this case, EPA – may not act on its project until it either receives the recommendation or until 45 days elapse without receiving the recommendation. N.J.S.A. 40:55D-31.

1. April 26 Hearing

On April 26, 2022, EPA appeared before the Board in a remote Zoom hearing for a courtesy review on an application for the Exchange Place Pedestrian Plaza Improvements Project (the “Application”). Ex. O. The Application proposed landscaping improvements and other alterations to the Plaza. Ex. O. Counsel for EPA, Don Pepe, made an opening statement that claimed the application was “a better way to provide both security, to preserve, protect, and beautify the Katyn Monument, to preserve the Exchange Place as a place that can be used for public meetings and festivals indefinitely, and to enhance the aesthetics and the safety of the plaza.” Transcript of Hearing, April 26, 2022, T6:22-T7:2. Mr. Pepe claimed that EPA had “multiple design meetings” with various stakeholders including “Historic Paulus Hook Association, Powerhouse Neighborhood Association, Colgate Commercial Property Owners Association, and the Committee for the Conservation of the Katyn Monument and Historic Objects.” T8:8-15.

The witnesses for EPA on April 26 were Tom Carman, a landscape architect from Melillo & Bauer, and Gabrielle Gornelli, P.E., a civil engineer.³ Mr. Carman testified that the plan would

³ A search of the New Jersey Division of Consumer Affairs database shows that neither Mr. Carman nor Ms. Gornelli is licensed as a professional planner in New Jersey. Ferguson Cert. ¶39.

provide “good, clear pedestrian circulation to the PATH station, from the PATH station to the light rail, and around.” T12:22-T13:5. He testified about the Katyn Monument that more decorative pavers would be added, and a “large curvilinear seat wall.” T13:11-18.

Mr. Carman testified that the area would have “plenty of room for visitors, as well as bringing that space so it does feel intimate when there are – is a smaller amount of people.” T16:9-14.

The Board Attorney, Santo Alampì, asked counsel for EPA, Don Pepe, “Mr. Pepe, are we going to hear with respect to the master plan and the – what appears to me the obvious concept of pedestrian friendly in lieu of vehicular traffic?” Transcript of Hearing, April 26, 2022, T20:18-21. Mr. Pepe replied, “Counsel, I had not planned on presenting any testimony with respect to the compatibility with the master plan.” T20:22-24. He continued, “I don’t know if any of the city’s planners have any input with respect to that; we’ve been sharing these designs with them for quite some time. But – and I believe, you know, one of the Vision Zero is a big impetus for the city right now, and an important aspect of the master plan itself, which is to provide for pedestrian safety.” T20:24-T21:6. Mr. “And those are elements that we’re – you know, that we’re accomplishing, clearly.” T21:9-10. He did not cite any factual basis for this assertion. Id.

Ms. Gornelli testified that the plan would be flood-resilient because “a park, by nature, is flood-resilient design, because when you have a type of flood like we have here in a tidal flood area, where it’s typically a hurricane or something like that, where we know the flood is coming in advance, you can evacuate these type of areas, and you allow the flood waters to come to this zone.” T24:22-T25:3. She further testified that “an open space is really a flood-resistant design by nature. So while we’re not meeting the green area ratio with the design, you know, it – we believe that it is – it meets the intention, because it is a flood-resistant design, because it’s a park.” T25:6-11. She did not give further information.

Mallory Clark, A.I.C.P., P.P., Senior Planner in the City Planning Division, asked whether the design “allow[s] for community events, similar to what has been done in the past here with the 4th of July event, and other local festivals[.]” T26:5-9. Mr. Pepe replied that the new plans were “designed to accommodate a full-size stage” and “also designed to accommodate a smaller stage up front, and several, several festival tents, I think upwards of 40.” T26:12-17. Mr. Carman explained that with a “smaller stage,” the plan “would allow for people to congregate within the plaza area.” T26:23-25. Ms. Clark asked if the plan could accommodate two stages, both a large and small stage. Mr. Carman replied that another stage would have to be “set up on the Grundy Pier.” T28:5-7. Mr. Pepe then stated, “[F]rom the plan that I recall, having seen with respect to the larger stage, which is much further back, you could accommodate both. I think, if you wanted to, you could probably accommodate three stages.” T28:8-16. Mr. Pepe was not sworn in as a witness. No sworn witness gave this testimony. No evidence was presented to support this unsworn statement.

The Board Attorney, Santo Alampi, then stated, “I think that the applicant has more than explained how they came to this proposal, as opposed to just all green space and lawn. So I, personally, am satisfied, as far as how it rectifies – or reconciles with our zoning ordinances, and particularly with the master plan, and the way the Vision Zero portion of the master plan is achieved.” T29:15-T30:4. He then opened the application to public comment.

a. April 26 Public Comment

About a dozen members of the public commented, including Plaintiff Jeanne Daly and Edward Jesman, President of Plaintiff PASI. Ex. O. Margaret McGrath testified that she was “opposed of the 7 feet high obstruction around Katyn Monument and plantings[.]” T31:4-6. “Creating this so-called wall would not allow us to have meetings or celebrations and memorials.”

T31:11-14. Gosia Porwit testified that, as a retired surveyor and landscape architect, and member of the Polish-American community, the current location of the Katyn Monument is “properly exposed” and “with the background of New York City is just gorgeous and represents wonderful, beautiful Jersey City.” T34:16-25. She then testified that she was concerned about “the size of the place for the Polish community, cultural organization, to celebrate.” T25:1-3. She added that the new trees and “very high bench” is “too much of an obstacle to show the monument the proper way.” T35:6-13.

Andrzej Burghardt testified that the plan would “obscure the Katyn Monument from public sight to the greatest extent possible” and “make gatherings and ceremonies at the monument as difficult as possible, by limiting space for participants, as well as access from the front, in addition to hiding these ceremonies from public view.” T37:16-25. “The overall space around the monument is way too small to allow the typical number of ceremony participants, which was usually around 200. Where the other crowd can stand? Was there an intent to split participants into several isolated groups?” T38:1-6. He further testified that with the new plan, “there is only a very limited space, about 12 feet, left between the front of the monument and high benches, which block access to the front of the monument.” T38:12-15.

Andrzej Porwit testified that he was a retired professional engineer and had the “major concern” that the design is “a trap for human being[s] in case of panic. People may end up in this big berm, behind the berm, and nobody will be able to let them out. This huge mistake, mental mistake in this design, it has to be open, because people have to have ability to flood around the monument. There’s a lot of ceremonies, Poles like to have meetings, and God forbid some terrorist attack or whatever, we may end up with thousands of dead people. So I would really recommend removing this berm, removing this wall, and leaving the plaza open as it is.” T39:18-T40:8. Mr.

Porwit further stated, “Don’t create traps for humans.” T40:9-15. Valeriy Verkhovskiy also testified that the design “shrinks the area” and he “anticipate[s] there’ll probably be more attendees in the future than last events. Prior events, there was no space to move, and to shrink this area further, I think, creates hazards. It’s going to create a dangerous environment. I do highly think that this area needs to be open. It needs to be completely open, not cut off like it is in this design.” T41:11-19.

Marek Skulimowski testified that he was also concerned about the “excessive height of the benches.” He added that “this monument’s getting new relevance with the Russian invasion in Ukraine, so you will have more gatherings over there. ... I think that would be the place to celebrate and to teach history, history of what has happened – what has happened in the past and what is happening right now.” T42:17-T43:3.

Plaintiff Jeanne Daly also testified. She testified that the Jersey City Master Plan is “about community” and testified that the plan was “never brought to the community[.]” T46:25-T47:4. Ms. Daly testified, “Why do we have a corporate roadway going down to the 15 Exchange Place? It’s supposed to be for pedestrians. 15 Exchange Place has access via York Street. We need to preserve our public plaza for this – for us, for everyone in Jersey City, not for these private corporate interests. I do know the Hyatt House Hotel does have a franchise, the only franchise holder in that area, and their franchise is only half the size of the entrance that [Michael] DeMarco [President of the Exchange Place Alliance] has put together.” T47:6-15. Ms. Daly also testified that the project would violate New Jersey’s public trust doctrine by obstructing the visual view of the Hudson River. T47:21-T48:7. “That wide open space that you see with the skyline behind it, the New York City skyline and Hudson River, that must be preserved. It cannot be unreasonably

obstructed.” T48:1-4. Ms. Daly testified, “This is not the way Jersey City needs to address things regarding its master plan. It needs and requires community input; none was had.” T48:17-19.

Kristen Zadroga-Hart also testified, “If it’s truly a pedestrian plaza, why is there a private driveway, basically, for the hotel there? There’s access on York Street to everything that needs to be accessed. If those – if the walkway – the driveway, I’m sorry, could be removed, there’d be more space for festivals and people could still access from the York Street side vehicular, people could walk in as they please.” T53:17-24. Ms. Zadroga-Hart commented that the EPA’s meetings “were not public meetings where there was give-and-take. You basically could give a question or a comment, and there was no exchange, nothing – you didn’t get anything back. If they didn’t like your question, it was just ignored and moved on.” T54:4-10.

A number of other members of the public testified. Irena Guillon testified that “people at the gatherings and festivals will no longer face the water and the beautiful New York City skyline. The area around the monument is too small for gatherings and festivals that draw more than 200 people. There’s absolutely no reason to impose such draconian limitations.” T52:10-15. Thomas Kazalski testified that people should “have access to the west side of the statue and the river side of the statue, the east side.” T49:20-23. Alicja Jachna testified that as a mechanical engineer, she was “very concerned about safety, about open space, about the benches, high benches around the monument. It’s meant to be open. It’s meant to be viewed. Some do call it gruesome. The crime was gruesome, not the monument.” T59:21-T60:4. Edward Jesman testified that the plan was “an effort to obstruct the view” of the monument. T61:1-3.

Mr. Carman testified that EPA did not do a “person count for the area” of how many people could fit on the plaza with the plans. T63:23-24.

b. Board Comments

Mallory Clark, A.I.C.P., P.P., testified that she recommended the Alliance consider adding “a break in the planter and seat wall at the front of the statue, to allow, kind of, more open, throughway access. It’s, you know, a design change I would offer them to consider moving forward. Other than that, I would say this is consistent with the goals of the master plan, and the Open Space Element, and the larger OurJC vision. You know, they’re not changing the inherent use of the site from what it is today, which is a public plaza; this is more of just a design and aesthetic upgrade from the current conditions.” T65:10-23. She also testified that “traffic safety measures that they’ve coordinated with the office of engineering do improve pedestrian safety and are consistent with the Vision Zero goals of the city.” T65:24-T66:2.

Chairman Langston commented that he did not “see a world where I can support the current design around that statue.” T67:1-3. He “agree[d] with the safety concerns” and could not “support a design that obstructs the view of that statue.” T67:6-15. Commissioner Gangadin also stated that the statue “signifies what Jersey City’s always about.” T67:21-22. She stated that the “height of the bench, and to be so close to that statue, I think it’s such a total disrespect.” T67:25-T68:2. Commissioner Horton stated, “I think it should be more to accent and highlight the statue, not in any way impede it or, you know, block the view of New York, or block the view of the statue, or anything around that area. I think it should be open and enjoyable for everyone, and be able to serve everyone, for whatever reason they go down there.” T68:9-18.

Vice Chairman Gonzalez made a motion to not recommend the design. T68:20-25. Commissioner Torres stated that with the plan proposed, “that view of New York, the view of the water, that’s being obstructed. That is unacceptable.” T70:1-4. Commissioner Torres also stated that there should be additional community input with meetings to be “interactive.” T70:6-12. Commissioner Desai commented that “the view from that area, whole New York view, Jersey

City, that's the part everybody enjoys. And those benches, they are too big." T72:1-3. Vice Chairman Langston stated, "As far as taking the statue situation out of it, I think it's a great design. I think it hits all the points of the master plan. It's – you know, it's all about pedestrian access; the waterfront walkway is maintained. It's a great plan, but I think that statue needs to be celebrated, and this design does not do that." T74:8-16.

The Board voted not to recommend the Application. Ex. O to Ferguson Cert.

2. May 10 Rehearing

Three days later, on April 29, counsel for EPA submitted a letter to the Board requesting reconsideration. Ex. Z to Ferguson Cert. The letter added substantive factual information that was not provided at the April 26 hearing. Ex. Z to Ferguson Cert. The April 29 letter suggested that the Board's deliberations had been "not appropriate in the context of a Section 31 review" and had "made no findings as to consistency with the City of Jersey City Master Plan[.]" Ex. Z to Ferguson Cert. The April 29 letter relied on Lambert v. Borough of Beach Haven, 2020 N.J. Super. Unpub. LEXIS 954 (App. Div. May 20, 2020), which is an unpublished case, in its argument that the decision could properly be reconsidered. Ex. Z to Ferguson Cert. In the April 29 letter, EPA stated that "upon rehearing, the Applicant will introduce evidence demonstrating that . . . it met repeatedly with the Committee for the Conservation of the Katyn Monument & Historic Objects ("CCKMHO") and others . . . and ultimately received not only the approval of the committee, but its gratitude for the level of cooperation." Ex. Z to Ferguson Cert. The CCKMHO does not represent the entire Polish American community in Jersey City. The April 29 letter stated that EPA held a design meeting with the Historic Paulus Hook Association. EPA did not hold a design meeting with the Historic Paulus Hook Association. Certification of Stephanie Daniels, ¶5-7. EPA held a meeting with a number of stakeholders, including the Vice President of the Historic Paulus

Hook Association as one person in attendance, but EPA never held a meeting with the Association itself. Certification of Stephanie Daniels, ¶5-7.

The April 29 letter included an attachment of a newspaper article about the Application which EPA said showed that EPA had met with CCKMHO and CCKMHO supported its Application. Ex. Z to Ferguson Cert. The April 29 letter stated, “Had the Board been privy to this information at the prior hearing, it would have been clear to the Board that any concerns over the treatment of the Katyn Monument were fully and satisfactorily addressed[.]” The April 29 letter requested “that the matter be relisted for hearing and introduction of additional evidence[.]” Ex. Z to Ferguson Cert.

The Board reheard the application on May 10, 2022. Ex. P to Ferguson Cert. Notice was not mailed to neighbors within 200 feet of the property. New comments from the board planners were submitted to the Board the same day. Ex. A to Ferguson Cert. A document titled “Development Application Review Staff Report,” dated May 10, 2022, addressed to Planning Board Commissioners from Mallory Clark-Sokolov, PP, AICP and Tanya Marione, PP, AICP, regarding “Exchange Place Plaza Section 31 Review,” was uploaded to the Jersey City Planning website on or after May 10, 2022. Ex. A to Ferguson Cert. The new planner comments provided substantive comments from Ms. Clark-Solokov and Ms. Marione and stated that the Application was consistent with the Master Plan. Ex. A to Ferguson Cert. No prior comment documents from the board planners were submitted to the Board.

On May 10, 2022, the Board reconsidered the application at its regularly held meeting. The Board Attorney stated that the Board would not allow any new testimony or evidence, and did not allow any public comments. Ex. P to Ferguson Cert. Santo Alampi told the Board, “Mr. Pepe has asked that the board reconsider what was done at the last hearing. He is not asking to present any

additional evidence or testimony, but, rather, he is asking the board to reconsider the manner in which the vote was taken, and the basis for the vote.” Ferguson Cert. Ex. P, T3:6-11. Mr. Alampi told the Board that Mr. Pepe “cites the Ocean County Utility case, and has asked the board to reconsider its position.” Ferguson Cert. Ex. P, T6:6-7. Mr. Pepe stated, “I think that a lot of the vote that took place at the last hearing was related to design elements, specifically, related to the Katyn Monument, and didn’t really get to the heart of the issue, which was is the plan consistent with the master plan for Jersey City.” Ferguson Cert. Ex. P, T6:24-T7:4.

The Board made it clear that the relevant record was the April 26 record. Mr. Alampi stated, “I don’t think we want [Mallory Clark] to necessarily supplement her testimony[.]” Ferguson Cert. Ex. P, T8:1-2. He also stated, “I think supplementing would be inappropriate, because we’re in board deliberation at this point.” Ferguson Cert. Ex. P, T8:8-10. Chairman Langston stated, “I think we can just take her comment on the last hearing of this matter, and we can run with those.” Ferguson Cert. Ex. P, T8:13-15. Chairman Langston further stated, “We are not hearing any new testimony on this action tonight, unless the board – anybody from the board needs new testimony. I think I’d prefer to let the record speak for itself on the last – the last application.” Ferguson Cert. Ex. P, T11:11-15. Mr. Alampi said, “This is a purely legal argument, with the board reconsidering its prior decision, and how it arrived at that decision. So there’s no further testimony. The public comment stands. The testimony stands. It’s just a reconsideration of the legal standing applied in the matter.” Ferguson Cert. Ex. P, T11:18-24.

Despite the statement that the Board did not consider any new evidence, the Board received comments from the board Planner the same day, which they did consider. Mr. Alampi stated, “We had some comments from Mallory on behalf of the Planning Division, and they went through the master plan[.]” Ferguson Cert. Ex. P, T7:9-11. These comments were not posted online or made

available to the public prior to the meeting. Ex. A to Ferguson Cert. In addition, the public was not permitted to make any comments or ask any questions about the board planner's comments. The Board also considered the April 29 letter. The public was not permitted to ask questions or make comments about the April 29 letter. The Board considered the reconsideration letter and planners' comments. Ex. P to Ferguson Cert. The Board then voted to recommend the Application. Ex. P to Ferguson Cert.

Plaintiffs filed this suit on June 24, 2022.

D. Fall 2022 Plan Changes

On November 30, 2022, Plaintiffs obtained a copy of new renderings for the project from a City councilman. Certification of Jeanne Daly ¶3 ("Daly Cert."). The new renderings were posted on EPA's website on or after November 29, 2022. Ex. C to Certification of Zoe N. Ferguson, Esq. ("Ferguson Cert."); Ferguson Cert. ¶4-9. The new renderings are dated November 2, 2022. Ex. B to Ferguson Cert. They show significant changes to the renderings. Ex. B, N to Ferguson Cert. The plans presented to the Board, which included a site plan dated April 14, 2022, showed a bench in a semicircle shape around the Katyn Memorial, between the Memorial and the Plaza pedestrian area. Ex. D, N to Ferguson Cert. The new renderings show a bench on two sides of the Memorial, with the bench removed between the Memorial and the pedestrian mall. Ex. B to Ferguson Cert. In place of the bench, there is a new wall, about 5 to 6 feet high, with spaces on either side separating it from the benches. Ex. B to Ferguson Cert. The wall blocks direct pedestrian access to the Memorial and prevents people from gathering in front of the Memorial. Ex. B to Ferguson Cert. The new wall was not presented to the Board for a courtesy review. Daly Cert. ¶4-5.

On or after December 7, 2022, the EPA posted a new site plan on its website. Ex. F to Ferguson Cert.; Ferguson Cert. ¶11-16. The site plan is dated April 14, 2022, last revised June 10,

2022. Ex. F to Ferguson Cert. It shows the benches on two sides with the new wall. Ex. F to Ferguson Cert. The new site plan was not shown to the Board for a courtesy review. Daly Cert. ¶6.

On or after December 7, 2022, the EPA posted new landscaping plans on its website. Ex. I to Ferguson Cert.; Ferguson Cert. ¶18-23. The new landscaping plans are dated July 3, 2019, last revised June 10, 2022. Ex. H to Ferguson Cert. They show the benches on two sides with the new wall. Ex. H to Ferguson Cert. The landscaping plans submitted to the Board were dated April 14, 2022, and they showed the bench in a semicircle shape. Ex. G to Ferguson Cert. The new landscaping plans refer to the wall as a “Memorial Plaque.” Ex. H to Ferguson Cert. The new landscaping plans state that the wall will be 5 feet 1 inch high and will have “final plaque size, material, font, verbiage, mounting, etc. to be as directed by ownership in coordination with environmental designer.” Ex. H to Ferguson Cert. The new landscaping plans do not give a final size for the wall or final determination of the wording to be on the wall. Ex. H to Ferguson Cert. These plans are materially different from the documents submitted to the Board. Ex. G, H to Ferguson Cert. EPA did not present these documents to the Board for a courtesy review. Daly Cert. ¶7. In a statement to the Jersey Journal, EPA Executive Director Elizabeth Cain discussed the new plans but did not make any statement that they would be presented to the Board for courtesy review. Ex. M to Ferguson Cert.

E. Private Access Road

Ordinance 20-062, signed into law September 11, 2020, states that a pedestrian mall shall be created at “Exchange Place, between Hudson Street and the Hudson River Waterfront Walkway, as indicated on the street map on file in the Office of the City Clerk. This excludes Private Access Road.” Ex. J to Ferguson Cert. Ordinance 20-062 incorporates the Exchange Place Pedestrian Mall Operating Plan. Ex. J to Ferguson Cert. The Exchange Place Pedestrian Mall

Operating Plan states that the private access road is “[t]he street surface area at the southernmost edge of Exchange Place designated to be preserved and maintained as a fully functional vehicular access lane for activities related to the tenants, patrons and visitors of 1 and 15 Exchange Place.” Ex. J to Ferguson Cert. It does not include any plans, dimensions, measurements, or limitation in scope for the “southernmost edge” of Exchange Place Plaza or for the private access road. Ex. J to Ferguson Cert. The City of Jersey City owns Exchange Place Plaza. Ex. J to Ferguson Cert. However, only the tenants, patrons and visitors of 1 and 15 Exchange Place have access to the private access road. Ex. J to Ferguson Cert.

The private access road in the plans approved by the Board does not occupy only the southernmost edge of the Plaza. Ex. D to Ferguson Cert. The private access road in the plans approved by the Board extends diagonally across the Plaza and has two entrances/exits onto Hudson Street, which block pedestrian access to the Plaza. Ex. D to Ferguson Cert. The two entrances/exits are each approximately 15 feet wide on the plans shown to the Board. Ex. D to Ferguson Cert. They have the effect of blocking nearly all pedestrian access between the Plaza and Hudson Street. Ex. D to Ferguson Cert. There is road access to 1 and 15 Exchange Place from York Street. Ex. D to Ferguson Cert. The private access road proposed in the plans occupies approximately 40 percent of the pedestrian plaza. Ex. D to Ferguson Cert. The private access road restricts the public’s access to the pedestrian plaza. Ex. D to Ferguson Cert.

No recorded deed on the Hudson County Register conveys the area of the private access road from Jersey City to any private entity for use as an access road, and no recorded easement on the Hudson County Register exists for vehicular access to 15 Exchange Place via the private access road. Daly Cert. ¶9-10. No recorded lease on the Hudson County Register exists for the private access road. Daly Cert. ¶11. Ordinance 20-062 does not provide authorization for private limitation

of approximately 40% of the public pedestrian plaza. The private access road does not serve any public purpose. Ex. J to Ferguson Cert. The private access road prohibits the public from using approximately 40% of the plaza, which is public property. Ex. D, J to Ferguson Cert.

F. Planner Report

Plaintiffs retained the services of a professional planner, Carlos Rodrigues, P.P., for this action to review the record of the Board hearings. Ex. W to Ferguson Cert. Mr. Rodrigues analyzed the comments of the City Planners, the transcripts of the hearings before the Board, and the Master Plan in depth. He reviewed all materials submitted to the Board, the designs on EPA's website, and best practices in planning and design, and conducted a site visit. His conclusions were that the application should not have been approved. His report states that "certain design elements of the Alliance's proposal ... are misguided and misdirected, and inconsistent with sound planning and design principles, as well as with the intent and purpose of the Jersey City Master Plan[.]" Ex. W to Ferguson Cert. at 27. "The record of these proceedings contains no detailed review of Master Plan consistency[.]" Ex. W to Ferguson Cert. at 27.

Mr. Rodrigues's report considered the proposed changes to Exchange Place and the Katyn Monument in detail. First, his report states, the plans "call for the privatization of a large portion of the public right-of-way in order to provide an extra private access road to Hyatt House, which also has frontage on both Hudson Street and York Street, and to 15 Exchange Place. This new access road removes a substantial amount, approximately 40% of the pedestrian area of Exchange Place, and essentially creates a new East-West street in the public right-of-way, between York Street and Hudson Street." Ex. W to Ferguson Cert. at 17.

Mr. Rodrigues's report describes that the result of the changes proposed to the plaza "will be to considerably narrow the visibility of the monument" from several locations – from the North,

East, and South. Ex. W to Ferguson Cert. at 16. In addition, “Although the monument will also be accessible from the West, under the current proposal that access will be limited to two very narrow points of access on either side of the proposed wall, as discussed above, and not conducive to large crowds.” Id. at 16.

Mr. Rodrigues comments that although a pedestrian plaza could in theory accentuate a statue, this particular design does not do so. “While it is possible that landscaping changes could theoretically be intended to create a pedestrian precinct around the statue with a distinct personality, the proposed design will instead result in a “bubble” -- an area that will be more difficult to access than it currently is, much less visible than it is currently, and spatially constrained on those occasions when large numbers of people converge on the statue.” Id. at 17.

Mr. Rodrigues explains that the design scheme “reflects a complete misunderstanding of the fundamentals of design for a public space of that nature.” Id. at 17. “The message that is conveyed by the proposed design is that the statue and the area around it are not really an integral part of the plaza, and therefore need to be cordoned off.” An appropriate plan for this open space should “maintain the flow and synergies between all the various elements that constitute Exchange Place,” rather than segmenting the Plaza with a “series of gratuitous design interventions that serve no functional need. All areas of the plaza should interact with each other. There is no legitimate planning or design reason to isolate the statue and the area around it in such a dramatic fashion. The Jersey City Master Plan does not implicate these measures as being necessary or appropriate for this kind of feature.” Id. at 17.

Considering the messaging of the design of the plaza, “the Alliance’s design proposal for the area surrounding the Katyn statue calls to mind the ghettoizing strategy used by various regimes over the years, including the Axis powers during World War II, to isolate and contain

people they had grievances against. The Alliance proposal would isolate the Katyn Memorial in its own small pod, with access for only a limited number of members of the public at a time, and physically cut it off from its surroundings – the much larger portion of Exchange Place Plaza.” Id. at 17. In contrast to EPA’s plan, the report offers examples of other memorials: the Holocaust Memorial in Philadelphia, PA, where “the public has complete, unimpeded access to the statue from every direction,” and the statue of General Tadeusz Kosciusko in Philadelphia, where the public also has complete access and the base of the statue doubles as a sitting wall. Ex. W to Ferguson Cert. at 20-21.

Mr. Rodrigues explains that the functionality of the pedestrian plaza is significantly limited by the plans. “Accommodating pedestrians is the whole purpose of a pedestrian mall. The proposed appurtenances reduce the flexibility and the ability of the plaza to respond to changing events that attract large crowds. ... Segmenting the plaza with gratuitous appurtenances introduces an unwanted rigidity and needlessly restricts how pedestrian may occupy the public space.” Ex. W to Ferguson Cert. at 18-19.

Commenting on the City Planners’ memo of May 10, Mr. Rodrigues explains that the memo is insufficient to demonstrate compliance with the master plan. “The planning memorandum from the City’s planners, dated May 10, states that the project is consistent with the Master Plan because it designates a pedestrian area separate from motor vehicle areas. ... In any city, reclaiming an area that is over-run by cars and converting much of it into a pedestrian plaza is a positive step. But that is not the point of a Section 31 review. The point is whether the Alliance’s specific design plan accomplishes those goals.” Id. at 22.

As Mr. Rodrigues’s report explains, the planners’ memo is inaccurate in its statements that the plan furthers certain Master Plan goals. For example, although the memo says the plan will

“maintain pedestrian and bicycle access and views to the Hudson River Waterfront Walkway, the river itself, and the Owen Grundy Pier,” the plan actually restricts that access. Ex. W to Ferguson Cert. at 22. The planners’ memo also states that the design “maintains a flexible arrangement” to allow events at the site, but “the proposed treatment of the Katyn memorial introduces an element of spatial rigidity – not flexibility – that does not currently exist. If the Alliance’s design is implemented, Exchange Place will be less flexible than it currently is, and certainly less flexible than it could be.” Id. at 22-23. In addition, contrary to the goal to “enhance every square inch: Design parks to be welcoming and accessible spaces” in the Master Plan, “there is nothing ‘welcoming and accessible’ about the proposed treatment of the Katyn Memorial.” Id. at 22. Mr. Rodrigues’s report explains how the Open Space element of the Master Plan “is in fact full of examples” of why the plan “is extremely ill-advised.” Id. at 23.

Mr. Rodrigues also explains the applicability of the public trust doctrine to the site and the right of the public to visual access to the Hudson River. The NJDEP maintains a NJ Public Access Locations Search Tool, which identifies all locations in New Jersey where there is public access to tidal waterways. Ex. W to Ferguson Cert. One of the locations listed is the Hudson River Waterfront Walkway adjacent to Exchange Place Plaza. It is listed as visual public access for a river shoreline. It is noted as not being handicap accessible. The Public Access ID is JC03515. Ex. W to Ferguson Cert. The Hudson River access qualifies as a tidal waterway subject to the Public Trust Doctrine, since it is maintained on NJDEP’s list of public access locations to the state’s tidal waterways. “The public’s ability to get to the Hudson River walkway, from the West, will be impeded by the addition of the various appurtenances (walls, benches) and shrubbery planned by the Alliance for the area around the Katyn Memorial.” Ex. W to Ferguson Cert. “If the Alliance’s plans are executed, both access to the walkway and the Hudson River views will be needlessly

impeded. The public will have to go around the seating walls to both reach the Hudson River walkway and to have views of the Hudson River.” Ex. W to Ferguson Cert. “As such, it would appear that the Alliance’s plans violate the Public Trust Doctrine.” Id. at 26.

III. LEGAL ARGUMENT

Municipal land use board decisions are reviewed under an arbitrary and capricious standard. Kohl v. Fair Lawn, 50 N.J. 268, 275 (1967). A board’s decision is arbitrary, capricious or unreasonable if the board fails to meet a minimum standard of making its decision “honestly and upon due consideration.” Witt v. Borough of Maywood, 328 N.J. Super. 432, 442 (Law Div. 1998) (citing Worthington v. Fauver, 88 N.J. 183, 204-05; Bayshore Sewerage Co. v. Dept. of Env’tl. Protection, 122 N.J. Super. 184, 199 (Ch. Div. 1973)). While courts generally show deference to the decisions of municipal land use boards, this deference “is not intended to be applied rigidly or categorically, and is predicated on the existence of adequate evidence in the record supporting the board’s determination either to grant or deny variance relief.” Lang v. Zoning Bd. of Adj., 160 N.J. 41, 58 (1999). Although the determination in question is not for a variance per se, it is still considered under the same standard as a decision made by a planning board pursuant to the Municipal Land Use Law, regarding the implementation of zoning ordinances and land use standards.

A. Defendants’ approval of the Application was arbitrary, capricious and unreasonable because the Board considered substantive information that was not in the record before the Board when making their decision, and therefore the Board’s Section 31 review was invalid.

In considering an application, a municipal land use board must make its decision solely on the evidence in the record before the board. It is “essential that the [planning] board’s actions be grounded in evidence in the record.” Fallone Props., LLC v. Bethlehem Twp. Plan. Bd., 369 N.J.

Super. 552, 562 (App. Div. 2004). “A determination predicated on unsupported findings is the essence of arbitrary and capricious action.” DeFalco Instant Towing, Inc. v. Borough of New Providence, 380 N.J. Super. 152, 158 (2005), quoting Bryant v. City of Atlantic City, 309 N.J. Super. 596, 610 (App. Div. 1998).

The Board’s decision was arbitrary, capricious and unreasonable because they considered substantive evidence outside the record. The Board stated that it was limiting its decision to the information on the record at the April 26 hearing and did not accept public comment for this stated reason. The record was explicitly limited to the April 26 hearing. However, the Board considered information that was outside the record in its decision on May 10: the May 10 board planners’ comments, the April 29 letter, and the attached article were all outside the record. The Board had to consider the April 29 letter and its attachment because this is the letter in which EPA requested reconsideration, and since they granted reconsideration, they clearly considered the letter. It is “essential that the [planning] board’s actions be grounded in evidence in the record.” Fallone Props., LLC v. Bethlehem Twp. Plan. Bd., 369 N.J. Super. 552, 562 (App. Div. 2004). Evidence that forms the basis of a board’s actions must be in the record. The board’s decision cannot be grounded in evidence outside the record. “A determination predicated on unsupported findings is the essence of arbitrary and capricious action.” DeFalco Instant Towing, Inc. v. Borough of New Providence, 380 N.J. Super. 152, 158 (2005). Here, it is clear that the Board made its decision based on evidence outside the record. For this reason, the decision was arbitrary and capricious and must be reversed.

B. Defendants’ approval of the Application was arbitrary, capricious and unreasonable because the Board did not give the public the opportunity to view or comment on substantive information presented to the board in the Section 31 review on May 10, contrary to N.J.S.A. 40:55D-10(d).

Pursuant to N.J.S.A. 40:55D-10(a), “[t]he municipal agency shall hold a hearing on each application for development . . . or any review undertaken by a planning board pursuant to section 22 of P.L. 1975, c. 291 (C. 40:55D-31).” Pursuant to N.J.S.A. 40:55D-31, “[w]henver the planning board shall have adopted any portion of the master plan, the governing body . . . before taking action necessitating the expenditure of any public funds . . . shall refer the action involving such specific project to the planning board for review and recommendation in conjunction with such master plan[.]” Under N.J.S.A. 40:55D-10(b), any documents “for which approval is sought at a hearing shall be on file and available for public inspection at least 10 days before the date of the hearing, during normal business hours in the office of the administrative officer.” According to N.J.S.A. 40:55D-10(d), “all interested parties” have a right to comment and cross-examine witnesses at a hearing.

In Shakoor Supermarkets, Inc. v. Old Bridge Twp. Planning Bd., 420 N.J. Super. 193 (App. Div. 2011), the Appellate Division held that a board did not deny a member of the public the right to cross-examine witnesses when a plan was submitted to the planning board and the public was denied the opportunity for comment. In that case, the applicant submitted plans revised to include changes discussed at the public portion of the previous meeting. The meeting in question was for “just Board comment and a vote.” The Court stated:

Shakoor did in fact have the opportunity to cross-examine all witnesses regarding the application. No new witnesses were presented after the public portion of the hearing was closed. Shakoor conceded at oral argument that it cannot identify any aspect of the final plan to which it would have objected and as to which it was denied the opportunity to present its objection at a public hearing. As a result, the Board's decision to end cross-examination cannot be considered unreasonable and any error in closing the public portion of the hearing and failing to vote on the matter in a public session was harmless.

Shakoor Supermarkets at 205.

This case stands in stark contrast to Shakoor Supermarkets. First, there was new evidence presented to the Board that was never contemplated in the previous hearing. The April 26 hearing

resulted in the decision not to recommend the plan. There was no contemplation of a further hearing. Rather, Mr. Pepe's letter unilaterally introduced substantive evidence that the Board considered, and the Board then denied the public the ability to review or comment on the letter or the evidence given in the letter, including an article appended to it. In addition, the new comments from the Board Planners were submitted without any ability for the public to see them, or comment or question them. For these reasons, the Board's decision was arbitrary, capricious and unreasonable and violated the Municipal Land Use Law, and this Court should reverse and remand the decision of the Board.

C. EPA violated N.J.S.A. 40:55D-31 by using Section 31 review to undertake the project of the Exchange Place Plaza renovation, using public funds, with plans that were not presented to the Board for courtesy review and which were materially different from the plans presented to the Board.

For “each application for development” or “any review undertaken by a planning board pursuant to” Section 31, “the municipal agency shall hold a hearing[.]” N.J.S.A. 40:55D-10(a). “Whenever the planning board shall have adopted any portion of the master plan, the governing body ... before taking action necessitating the expenditure of any public funds, incidental to the location, character or extent of such project, shall refer the action involving such specific project to the planning board for review and recommendation in conjunction with such master plan[.]” N.J.S.A. 40:55D-31 (emphasis added).

In Board of Educ. of City of Clifton v. Zoning Bd. of Adj. of City of Clifton, 409 N.J. Super. 389, 435 (App. Div. 2009), the court considered whether the School Board made a formal submission to the local planning board as required by Section 31. The Court held that the School Board had not made a formal submission as required by Section 31 because the plans they submitted to the Planning Board were significantly different from the plans approved by the State Department of Education a year later. The plans differed in details about alterations to parking,

ingress, and egress. “The failure to submit plans with these alterations ... defeats the purpose of N.J.S.A. 40:55D-31.” Id. at 549.

The Planning Board's examination of the site plan is not binding on the Department of Education. However, the provision was implemented to provide local entities, with knowledge of sites, an opportunity to inform the Department of specific site plan concerns. Therefore, since the School Board failed to make a formal submission to the Clifton Planning Board, this Court is satisfied that the School Board did not comply with their statutory obligation under N.J.S.A. 40:55D-31. Id. at 549-550.

Under N.J.S.A. 40:55D-31, the Planning Board must consider the “specific project.” The project proposed in November 2022 is different from the specific project presented to the Board in April 2022. Significant elements of EPA’s plans were changed after the plan was approved: the new wall in the Fall 2022 plans blocks direct pedestrian access to the Memorial, segments open space, and prevents people from gathering in front of the Memorial. Ex. B to Ferguson Cert.

This change is significant because it is relevant to the application’s compliance with the Master Plan, similar to the City of Clifton case. The addition of a five-foot wall between the Katyn Memorial and the plaza is relevant to several elements cited in the Board Planners’ memo about the Master Plan: “make parks welcoming,” “understand community needs,” “highlight unique features,” “enhance every square inch,” “design parks to be welcoming and accessible spaces.” The wall is counter to Section 6 of the Open Space element, which states that any future investments in City open spaces should “ensure the spaces do not create unnecessary barriers to access.” Ex. W to Ferguson Cert. The wall significantly alters the pedestrian experience of the Plaza. “This wall – which serves no functional purpose whatsoever – completely eliminates the view of the base of the statue. Entrance to the oval from the West is limited to two, 6-foot wide entrances, which are very confining for a statue such as this memorial. The combination of the landscaped areas, the backs of the benches and the masonry wall conceals the view of the base of

the statue from multiple vantage points and makes it more difficult for the public to access the statute.” Ex. W to Ferguson Cert. at 16.

EPA used Section 31 review to undertake the project of the Exchange Place Plaza renovation, using public funds, and then obtained that approval and acted in reliance on that approval to move forward with plans that were not presented to the Board were materially different from the plans presented to the Board. As a result, this Board approval is invalid to support the current plans. EPA cannot rely on the Board’s approval to construct the plans presented in Fall 2022, and EPA must return to the Board.

D. Defendants’ approval of the Application was arbitrary, capricious and unreasonable because the EPA did not present sufficient evidence of compliance with the master plan in the April 26 record, which is the applicable record for the May 10 decision, for the board to support recommendation of the application under the Jersey City Master Plan, and the applicant presented unsworn attorney testimony.

A land use board’s decision requires that “the power exists to do the act complained of and there is substantial evidence to support it[.]” Kramer v. Board of Adjustment, 45 N.J. 268, 296 (1965). Without substantial evidence, a decision is arbitrary and capricious. Id. “It is apparent that the MLUL gives the master plan a central role in a municipality’s decisions regarding the use and development of the land within its jurisdiction.” Willoughby v. Wolfson Grp., 332 N.J. Super. 223, 229 (App. Div. 2000). The Municipal Land Use Law “requires that witnesses offering testimony before the Board be sworn.” DeMaria v. JEB Brook, LLC, 372 N.J. Super. 138, 141 (Law Div. 2003). “The testimony of all witnesses relating to an application for development shall be taken under oath or affirmation by the presiding officer[.]” N.J.S.A. 40:55D-10(d).

The applicant failed to provide sufficient testimony or evidence for the April 26 meeting to support the Board’s decision, which makes the Board’s approval arbitrary and capricious. No expert planning testimony was given by the applicant. The witnesses for EPA on April 26 were

Tom Carman, a landscape architect from Melillo & Bauer, and Gabrielle Gornelli, P.E., a civil engineer. There was no professional planner to give planning evidence. Mr. Carman did not give any testimony about the master plan or any priorities of Jersey City that would be met by the plan. Since he is not a planner, he did not give any planning opinion or expertise. Ms. Gornelli, who is also not a planner, did not give any opinion about the master plan or any relationship to any goals of Jersey City. Since she is not a planner, she was not qualified to speak as a planning expert.

The most telling element of the transcript of both the April 26 and May 10 hearing is the exchange between the Board Attorney and applicant's counsel about the master plan. The Board Attorney, Santo Alampi, asked counsel for EPA, Don Pepe, when they would hear testimony about the master plan. Mr. Pepe replied, "Counsel, I had not planned on presenting any testimony with respect to the compatibility with the master plan." T20:22-24.

Considering the fact that the Section 31 review is centered around compatibility with the Master Plan, it runs contrary to the entire foundation of Section 31 review that an applicant would bring a proposal to the Planning Board without any intention of showing compliance with the Master Plan. That an applicant would expect to receive a recommendation of compatibility with the Master Plan, with the stated intention to present no testimony to support that claim, flies in the face of the Municipal Land Use Law. Mr. Pepe's subsequent request for reconsideration expressed a newfound concern for the importance of the Master Plan, which was not previously shown at the April 26 hearing, and was not substantiated on the record.

Mr. Pepe then gave several unsworn statements that cannot support the Board's decision. He stated, "Vision Zero is a big impetus for the city right now, and an important aspect of the master plan itself, which is to provide for pedestrian safety." T20:24-T21:6. "And those are elements that we're – you know, that we're accomplishing, clearly." T21:9-10. He later testified

that the plan could accommodate two stages. “[F]rom the plan that I recall, having seen with respect to the larger stage, which is much further back, you could accommodate both. I think, if you wanted to, you could probably accommodate three stages.” T28:8-16. Mr. Pepe was not sworn in as a witness. No sworn witness gave this testimony. No evidence was presented to support these unsworn statements. This testimony cannot support the Planning Board’s decision, under N.J.S.A. 40:55D-10, which requires that all testimony be made by witnesses under oath.

Contrary to the applicant’s lack of evidence, numerous members of the public provided substantial evidence, via testimony on April 26, illustrating the fact that the application is inconsistent with the Jersey City Master Plan. Although the majority of the commenters did not name the Master Plan specifically, the substance of their comments show that the plans are contrary to many elements of the Master Plan.

For example, the Jersey City Master Plan Open Space Element, for Waterfront Parks, states under “Waterfront Parks Design Guidelines” that the parks should “highlight unique features.” The board Planners’ memo states, “The design maintains pedestrian and bicycle access and views to the Hudson River Waterfront Walkway, the river itself, and the Owen Grundy Pier.” Ex. A to Ferguson Cert. However, several commenters noted that the view would be obstructed. Gosia Porwit testified that the current location of the Katyn Monument “with the background of New York City is just gorgeous and represents wonderful, beautiful Jersey City.” T34:16-25. Ms. Daly testified, “That wide open space that you see with the skyline behind it, the New York City skyline and Hudson River, that must be preserved. It cannot be unreasonably obstructed.” T48:1-4. Thomas Kazalski testified that people should “have access to the west side of the statue and the river side of the statue, the east side.” T49:20-23. Irena Guillon testified that “people at the gatherings and festivals will no longer face the water and the beautiful New York City skyline.”

T52:10-15. ⁴These comments give significant support showing that the design is not consistent with the master plan.

The Open Space Element's Waterfront Parks Design Guidelines also state that parks should "understand community needs." The board planners' memo states, "The plaza redesign has given large consideration to the space's historic use as a host site for several benchmark community events and festivals, such as the City's 4th of July celebration. The design maintains a flexible arrangement to enable Office of Cultural Affairs and community organizations / associations to utilize the site for temporary events in a flexible manner." The overwhelming majority of testimony given about historic and cultural significance of the site was not for events such as the "City's 4th of July celebration," but the historic and cultural significance of commemorations surrounding the Katyn Monument. The vast number of comments from the public explaining their deep concerns with this plan illustrates the sharp incongruence of this plan with the master plan's instruction to "understand community needs."

Commenters also noted that they were not engaged interactively in the process of the planning. See T46:16-T47:4. Jeanne Daly commented that the Master Plan is "about community. There has been no input whatsoever." Ms. Zadroga-Hart commented that at the EPA's meetings, "They were not public meetings where there was give-and-take." T54:4-10. Open Space design principle 15.2 is "Send mailers to all neighbors within walking distance of the project boundary to ensure residents and business owners are aware of the plan and have opportunity to engage." As Mr. Rodrigues states, "the community groups that have historically hosted their events in that space should have been the proxy for the residents, and they were reportedly not consulted." Ex. W to Ferguson Cert at 24. This is another element of the master plan that is contraindicated by the

⁴ Commissioner Horton also commented that the plan would "block the view of New York." Commissioner Torres commented that the "view of the water" is "being obstructed." T70:1-4.

plan – community engagement – which was made clear to the Board on the record of the April 26 hearing.

In addition, regarding the views of the Hudson River, the public trust doctrine is implicated in this application. The public trust doctrine “dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible.” Borough of Neptune City v. Borough of Avon-By-The-Sea, 61 N.J. 296, 309 (1972). “This does not mean the public has an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied so long as there is reasonable access to the sea.” Matthews v. Bay Head Improv. Association, 95 N.J. 306, 324 (1984). The NJDEP maintains a NJ Public Access Locations Search Tool, which identifies all locations in New Jersey where there is public access to tidal waterways. Ex. W to Ferguson Cert. One of the locations listed is the Hudson River Waterfront Walkway adjacent to Exchange Place Plaza. It is listed as visual public access for a river shoreline. It is noted as not being handicap accessible. The Public Access ID is JC03515. Ex. W to Ferguson Cert.

The Hudson River access qualifies as a tidal waterway subject to the Public Trust Doctrine, since it is maintained on NJDEP’s list of public access locations to the state’s tidal waterways. “The public’s ability to get to the Hudson River walkway, from the West, will be impeded by the addition of the various appurtenances (walls, benches) and shrubbery planned by the Alliance for the area around the Katyn Memorial.” Ex. W to Ferguson Cert. “If the Alliance’s plans are executed, both access to the walkway and the Hudson River views will be needlessly impeded. The public will have to go around the seating walls to both reach the Hudson River walkway and to have views of the Hudson River.” Ex. W to Ferguson Cert. Obstruction of the visual public access point to the Hudson River without any need for such obstruction is counter to the public

trust doctrine.

Commenters noted that the private access road was unnecessary and counter to the pedestrian mall function. Kristen Zadroga-Hart testified, “If it’s truly a pedestrian plaza, why is there a private driveway, basically, for the hotel there? There’s access on York Street to everything that needs to be accessed.” T53:17-24. Ms. Daly testified, “Why do we have a corporate roadway going down to the 15 Exchange Place? It’s supposed to be for pedestrians. 15 Exchange Place has access via York Street. We need to preserve our public plaza[.]” T47:6-15.

In addition, members of the public commented about their concerns for safety. Valeriy Verkhovskiy also testified that he “anticipate[s] there’ll probably be more attendees in the future than last events. Prior events, there was no space to move, and to shrink this area further, I think, creates hazards. It’s going to create a dangerous environment.” T41:11-19. Andrzej Porwit testified to his “major concern” that the design is “a trap for human being[s] in case of panic. People may end up in this big berm, behind the berm, and nobody will be able to let them out. ... it has to be open, because people have to have ability to flood around the monument. ... I would really recommend removing this berm, removing this wall, and leaving the plaza open as it is.” T39:18-T40:8. Andrzej Burghardt testified that “the overall space around the monument is way too small to allow the typical number of ceremony participants.” T38:1-6. He further testified that with the new plan, “there is only a very limited space, about 12 feet, left between the front of the monument and high benches, which block access to the front of the monument.” T38:12-15. The JC Vision Zero Action Plan iterates the priority to “design safer streets” and “promote a culture of safety” for pedestrians. The board planners’ memo states that the plan advances these goals. However, the plan creates significant pedestrian safety issues, as explained on the record before the Board.

The applicant did not present any testimony to refute this testimony. Without evidence to refute this testimony, there is no substantial evidence to support the decision. These comments give significant support showing that the design is not consistent with the master plan. The lack of appropriate evidence given to the Board regarding Master Plan compliance makes the Section 31 review insupportable, and the board's decision should be reversed.

3. The testimony of the Board Planner did not provide sufficient evidence to show compliance with the Master Plan in the April 26 record, which is the applicable record for the May 10 decision, because she provided only a net opinion.

“An expert's conclusion is considered to be a "net opinion," and thereby inadmissible, when it is a bare conclusion unsupported by factual evidence.” Creanga v. Jardal, 185 N.J. 345, 359-360 (2005). Although the rules of evidence do not strictly apply to land use boards, the Supreme Court has overturned a municipal board decision that relied on a net opinion. New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. of Adj., 160 N.J. 1, 16 (1999) (holding that board erred in relying on an expert statement that was “tantamount to a net opinion that could not reasonably support the Board's finding[.]”). A land use board “cannot rely upon unsubstantiated allegations, nor can it rely upon net opinions that are unsupported by any studies or data.” Board of Educ. of City of Clifton v. Zoning Bd. of Adj. of City of Clifton, 409 N.J. Super. 389, 435 (App. Div. 2009).

The testimony given by the Board Planner constitutes a net opinion that does not support the Board's decision. Mallory Clark, A.I.C.P., P.P., testified, “I would say this is consistent with the goals of the master plan, and the Open Space Element, and the larger OurJC vision. You know, they're not changing the inherent use of the site from what it is today, which is a public plaza; this is more of just a design and aesthetic upgrade from the current conditions.” T65:10-23. She also testified that “traffic safety measures that they've coordinated with the office of engineering do improve pedestrian safety and are consistent with the Vision Zero goals of the city.” T65:24-T66:2.

Ms. Clark did not give any reference to any part of the plan that is consistent with the Master Plan. She gave a net opinion that it is consistent with the goals of the Master Plan, the Open Space element, and larger OurJC vision. She did not substantiate it with any explanation of what parts of the plan are consistent, which parts of the Master Plan it is consistent with, or how she reached her opinion. This is an unsubstantiated net opinion that cannot form the basis for a decision. For this reason, there is insufficient evidence to support the Board's decision, and it should be reversed.

4. Even if the Board Planner's comments from May 10 were included in the record for the May 10 decision, they are insufficient to show compliance with the Master Plan.

Even if the Board Planners' comments were included in the record, which they were not, the comments would be insufficient to show that this plan is in compliance with the Master Plan. "The planning memorandum from the City's planners, dated May 10, states that the project is consistent with the Master Plan because it designates a pedestrian area separate from motor vehicle areas. ... In any city, reclaiming an area that is over-run by cars and converting much of it into a pedestrian plaza is a positive step. But that is not the point of a Section 31 review. The point is whether the Alliance's specific design plan accomplishes those goals." Ex. W to Ferguson Cert at 22. Although the planners' memo says the plan will "maintain pedestrian and bicycle access and views to the Hudson River Waterfront Walkway, the river itself, and the Owen Grundy Pier," the plan actually restricts that access. Id. at 22.

The planners' memo also states that the design "maintains a flexible arrangement" to allow events at the site, but "the proposed treatment of the Katyn memorial introduces an element of spatial rigidity – not flexibility – that does not currently exist. If the Alliance's design is implemented, Exchange Place will be less flexible than it currently is, and certainly less flexible

than it could be.” Ex. W to Ferguson Cert. at 22-23; See Ex. A to Ferguson Cert. In addition, contrary to the goal to “enhance every square inch: Design parks to be welcoming and accessible spaces” in the Master Plan, “there is nothing ‘welcoming and accessible’ about the proposed treatment of the Katyn Memorial.” Ex. W to Ferguson Cert. at 22. Mr. Rodrigues’s report explains how the Open Space element of the Master Plan “is in fact full of examples” of why the plan “is extremely ill-advised.” Id. at 23.

The planners’ memo does not give sufficient basis for approval of the plan based on consistency with the Master Plan. For this reason, the board’s decision to recommend the plan as being consistent with the Master Plan is arbitrary and capricious since it is unsubstantiated, and it should be reversed.

E. Defendants’ approval of the Application was arbitrary, capricious and unreasonable because the Board approved the private access road.

1. The Board approved the private access road with no benefit to the public, only serving private interests, in what is supposed to be a public pedestrian plaza, in contradiction to Jersey City’s own ordinances and Master Plan.

Ordinance 20-062, signed into law September 11, 2020, states that a pedestrian mall shall be created at “Exchange Place, between Hudson Street and the Hudson River Waterfront Walkway, as indicated on the street map on file in the Office of the City Clerk. This excludes Private Access Road.” Ex. J to Ferguson Cert. The Ordinance includes the findings: “(2) That an Exchange Place Pedestrian Mall will enhance the movement, safety, convenience and enjoyment of pedestrians;” “(4) That a reasonably convenient alternative route to other parts of the City and state exists for private vehicles;” “(5) That continued unlimited use of the street or part thereof by private vehicles may constitute a hazard to the health and safety of pedestrians;” “(6) That abutting properties can reasonably and adequately be provided with emergency vehicular services and receive and deliver merchandise from other streets and alleys[;]” and “(7) That it is in the best

interest of the City and the public and of benefit to adjacent properties to use such street primarily for pedestrian purposes, and that pedestrian use is determined to be the highest and best use of such street or part thereof.” The Ordinance excludes a “private access road” but does not define it. The access road is only further elaborated upon in the Operating Plan attached to the ordinance when it was adopted. Ex. J to Ferguson Cert. It states that the private access road is “[t]he street surface area at the southernmost edge of Exchange Place designated to be preserved and maintained as a fully functional vehicular access lane for activities related to the tenants, patrons and visitors of 1 and 15 Exchange Place.” Ex. J to Ferguson Cert.

The private access road in the plans approved by the Board serves only private interests in a space that is supposed to be dedicated to public pedestrian access. Only the tenants, patrons and visitors of 1 and 15 Exchange Place have access to the private access road. Ex. J to Ferguson Cert. The private road extends diagonally across the Plaza and has two entrances/exits onto Hudson Street, each approximately 15 feet wide, which block nearly all pedestrian access between the Plaza and Hudson Street. Ex. D to Ferguson Cert. Moreover, as stated in the Ordinance, there is road access to 1 and 15 Exchange Place from York Street. Ex. D to Ferguson Cert. The private access road proposed in the plans occupies approximately 40 percent of the pedestrian plaza and restricts the public’s access to the pedestrian plaza, when the plaza is supposed to be a designated pedestrian mall under the Ordinance. Ex. D to Ferguson Cert. It does not serve any public purpose and prohibits the public from using approximately 40% of the plaza, which is public property. Ex. D, J to Ferguson Cert. As a result, the Board’s approval of this road is arbitrary and capricious and should be reversed.

- 2. The Board approved the private access road even though the access road had no previous authorization by the governing body, and the Board lacks the authority to approve the access road without proper authorization from the governing body of Jersey City.**

Ordinance 20-062 authorized a private access road at the southernmost edge of the plaza. The ordinance does not provide authorization for private limitation of approximately 40% of the public pedestrian plaza, which is the extent that the proposed road has. This private road does not occupy only the southernmost edge of the Plaza. Ex. D to Ferguson Cert. No recorded deed on the Hudson County Register conveys the area of the private access road from Jersey City to any private entity for use as an access road. Daly Cert. ¶9. No recorded easement on the Hudson County Register exists for vehicular access to 15 Exchange Place via the private access road. Daly Cert. ¶10. No recorded lease on the Hudson County Register exists for the private access road. Daly Cert. ¶11. The only franchise agreement that exists is for the Hyatt to have a limited drop-off space in front of its building. The franchise agreement recorded for that access does not show anything resembling the private access road in EPA's plans.

It is clear from the relevant documentation that Jersey City never anticipated, and never authorized, an access road taking up such a large portion of a pedestrian area. The addition of the private access road does not create more pedestrian space; it actively removes pedestrian space from Exchange Place. It removes a significant portion of access to the Plaza, since it blocks off most of the pedestrian access to the Plaza, and it also reduces access to the Hudson River Walkway, the Pier, and the Katyn Memorial. This runs counter to the establishment of the pedestrian mall in Ordinance 20-062. Critically, there is no documentation supporting this handicapping of the governing body's clear intention to create a pedestrian mall. Without authorization, the EPA has no authority to build this road, and the Board has no authority to approve it. As a result, the Board's decision was arbitrary, capricious and unreasonable and must be reversed.

F. The Board's approval violated the Open Public Meetings Act because EPA and the Board did not provide adequate notice of the May 10 meeting to the public or to neighboring property owners.

Pursuant to the Open Public Meetings Act (“OPMA”), “no public body shall hold a meeting unless adequate notice thereof has been provided to the public.” N.J.S.A. 10:4-9(a). Pursuant to the OPMA, “all meetings of public bodies shall be open to the public at all times.” N.J.S.A. 10:4-12(a). “Any action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court, which proceeding may be brought by any person within 45 days after the action sought to be voided has been made public[.]” N.J.S.A. 10:4-15(a). Under the OPMA, any person, “including any member of the public, may institute a proceeding in lieu of prerogative writ in the Superior Court to challenge any action taken by a public body on the grounds that such action is void for the reasons stated in subsection a. of this section, and if the court shall find that the action was taken at a meeting which does not conform to the provisions of this act, the court shall declare such action void[.]” N.J.S.A. 10:4-15(b).

Here, EPA and the Board violated OPMA because they did not provide adequate notice of the May 10 hearing. Adequate notice was not given by publication. In addition, EPA did not provide adequate notice to property owners within 200’ of Exchange Place regarding the May 10 hearing. Without this notice, the public was not made aware of the meeting and given the opportunity to attend. The May 10 meeting did not comply with OPMA, and as a result, the action taken at the May 10 meeting is void under N.J.S.A. 10:4-15(b). The Open Public Meetings Act states that if the Court finds the May 10 meeting did not conform to the provisions of the act, the Court “shall” declare that action void. For these reasons, this Court should declare the action of the Board void.

IV. CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that this Court reverse and remand the determination of the Jersey City Planning Board as arbitrary, capricious and unreasonable, in violation of the Municipal Land Use Law, and in violation of the Open Public Meetings Act.

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