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DOWELL ASSOCIATES,	)	
	)	
Dowel/Respondent	)	SUPERIOR COURT OF NEW JERSEY
	)	APPELLATE DIVISION
v.	)	
	)	
HARMONY TOWNSHIP	)	<u>Civil Action</u>
LAND USE Board,	)	
	)	
Defendant/Appellant,	)	Docket No: A5650-06T3
	)	
&	)	
	)	
PHILLIPSBURG RIVERVIEW	)	
ORGANIZATION,	)	
	)	
Defendant/Intervener/	)	
Appellant	)	

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**BRIEF IN SUPPORT OF PHILLIPSBURG RIVERVIEW ORGANIZATION'S APPEAL**

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## PRELIMINARY STATEMENT

This matter involves the intersection between the constitutionally protected mandate to provide affordable housing and the statutory and common law obligation to develop land in a matter that is environmentally protective. The Supreme Court commented on this intersection in Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 331, fn. 68 (1983) ("Mount Laurel") by specifically emphasized its strong concern for protection of the environment in a statement that it "intend[ed] nothing in this opinion to result in environmentally harmful consequences."

Thus, although Harmony Township certainly has a continuing obligation to implement its certified affordable housing plan, the Harmony Township Land Use Board (the "Board") was not obligated to rubber stamp the proposed subdivision (the "Riverwalk") simply because it was part of that plan. Instead, the Board properly fulfilled its obligation to review the subdivision application in the normal manner. In the end, it decided that the presence of limestone under the Riverwalk site made the plan to dispose of all the sewage generated by the development to groundwater below the site too risky. In addition, the Board correctly decided that the stormwater management plan did not meet the required standards. The lower

court nominally determined that these decisions should have been reviewed in accordance with the normal deferential standards of administrative law, including the substantial evidence standard. However, even after the court below found that there was expert evidence in the record supporting the Board's decisions, the court substituted its judgment for that of the Board, and found that the Board's actions were arbitrary and capricious. This Court should therefore reverse the court below and reinstate the decision of the Board rejecting preliminary subdivision approval for the Riverwalk development.

The trial court essentially concluded the Planning Board should have conditioned its approval on subsequent approval by the New Jersey Department of Environmental Protection ("DEP"). This was erroneous, because the Board properly decided, based on the contradictory expert evidence before it, that the site-specific feasibility of the proposed sewage disposal system was in doubt. Moreover, the Municipal Land Use Law ("MLUL") does not permit the Board to delegate its duty to determine whether sewage disposal and drainage systems comply with applicable statutory and regulatory requirements and are feasible.

In addition, the trial court erroneously allowed its decision to be influenced by previous statements by Harmony Township that large scale development on the site was realistic and by its desire to hasten the development of additional

affordable housing. While the Philipsburg Riverview Organization ("PRO") strongly supports the goal of providing more affordable housing, the lower court took the wrong route to achieve this objective. Because Harmony Township has voluntarily submitted to the exclusive jurisdiction of the Council on Affordable Housing ("COAH"), all issues relating the enforcement of affordable housing plans must in the first instance be decided by COAH through procedures specified in the Fair Housing Act. Moreover, the Board is a separate legal entity from Harmony Township, with separate duties. Thus the non-legislative actions of the Township cannot be attributed to the Board and cannot govern decisions made by the Board. More practically, it is highly likely that any application to DEP to discharge sewage into groundwater below the site will linger because of the difficult site geology. Thus, if provision of affordable housing is the goal, this can only be achieved if Harmony Township is permitted to amend its affordable housing plan through proceedings before COAH.

In short, because the lower court found that there was expert evidence on both sides of the feasibility question for the sewage disposal system and that there was no dispute that the stormwater system did not meet the requirements of the Stormwater Management Rules, it should have upheld the Board's decision.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY<sup>1</sup>

Dowel Associates ("Dowel") owns a 185-acre property designated as Block 37, Lot 4 in Harmony Township ("Township"). Dowel had plans to construct a large-scale residential development known as "Riverwalk" on the site. Rec. at 4:17-25.<sup>2</sup> In September of 1988, Dowel initiated Mt. Laurel litigation against Harmony Township. The case was transferred to COAH, where mediation proved unsuccessful. Rec. at 5:1-4. The matter was then transferred as a contested case to the Office of Administrative Law, where a settlement agreement was reached, and subsequently accepted by the Administrative Law Judge on February 16, 1990. Rec. at 5:11-14.

Under the agreement, the Township was to re-zone the property to permit additional units, and facilitate the Riverwalk project by cooperating with Dowel on water supply and sewage disposal, and "fast tracking" Board proceedings during the development application process. In exchange, the Township would be deemed to have met its "fair share" obligation, with

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1 The procedural history in this case is inextricably linked to the facts so that these two sections have been combined to clarify their presentation.

2 "Rec." will be used throughout this brief to refer to the trial transcript from the May 2, 2007 Law Division proceedings. The format references the page number (indicated in the upper right hand corner at either the top or middle of each printed page) followed by the lines of text where the material being cited appears. For example, "Rec. 4:17-23" may be found at page 4, lines 17 to 23, from the trial transcript.

respect to affordable housing in the community. Rec. at 5:14-25, 6:1-4. COAH issued substantive certification on June 13, 1990, and the Township re-zoned the property to accommodate 315 units, 36 of which were to be devoted to low and moderate-income residents. Rec. at 6:5-9.

Dowel did not actively pursue development over the next 10 years. The delay was attributed to a sludge operation on a neighboring property, that raised questions about the site's desirability for future residents. This issue was resolved in December of 2000, when the sludge spreading ceased after the DEP sanctioned the operation for regulatory violations. Rec. at 6:10-20.

On June 1, 2000, the Township petitioned COAH for substantive certification renewal, representing that the project was still pending and that the site remained suitable for development. Rec. at 6:25-7:1-7. In light of the limited progress made since the first application, COAH requested assurances that the developer remained serious about the project. After the Township submitted documents demonstrating the Dowel site presented a realistic opportunity for development, COAH granted the second substantive certification on October 2, 2002. Rec. at 8:3-7.

On August 20, 2002, Dowel entered into a contract with Centex Homes, which applied for preliminary major subdivision

approval on March 21, 2003.<sup>3</sup> Rec. at 8:8-13. In its review of the application, the Board conducted 17 hearings, which took place between August 21, 2003 and December 16, 2004. During these hearings, the Board heard testimony from 13 of Dowel's experts, as well as 4 Township experts. Rec. at 8:23-25-9:1.

While the hearings were in progress, as previously agreed, the Township applied to the DEP for a wastewater management plan amendment to allow discharge of sewage into the ground at the site, but received a deficiency notice in return. The notice requested additional information, based on concern about the interaction between sewage disposal to groundwater and the readily-soluble karst geology underlying the site. Rec. at 9:2-13. The Township's engineer advised the Township that he was unable to reconcile the system with the site's geology, and thus could not endorse the amendment. Rec. at 9:14-23. The Township later memorialized its engineer's position in a resolution refusing to respond to the deficiency notice without first obtaining sufficient hydro-geological data. Rec. at 9:24-25, 10:1-4.

Also during the course of the hearings, Centex applied to the DEP for its New Jersey Discharge Elimination System

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<sup>3</sup> Centex was originally a plaintiff in the Law Division proceedings, but was subsequently excused from the litigation, after terminating its contractual interest. See Rec. at 4:23-25.

("NJPDES") permit. DEP sent a similar reply requesting additional information in light of "limestone pinnacles present within the area of disposal." Rec. at 10:18-25, 11:1-6.

On December 16 2004, the Board voted to deny Dowel's preliminary subdivision approval. The resolution memorializing the decision listed various non-exhaustive bases for denial. Rec. at 11:12-19. Of primary relevance for this appeal is the Board's determination that Dowel had failed to demonstrate the feasibility of its proposal for sewage disposal to groundwater, a drip irrigation system that would introduce nearly 100,000 gallons of treated effluent per day into a karst geology already prone to sinkholes and solutioning. Rec. at 11:20-13:1-2. In addition, the Board determined that the proposed stormwater management system did not meet DEP requirements. Rec. at 13:3-14:2.

Dowel filed an action in lieu of prerogative writ with the Law Division, challenging the Board's decision as arbitrary. Rec. at 14:13-22. During the months leading up to trial, the Law Division appointed two experts, Mr. Mulhall (referred to as Malhal in the transcript) and Mr. Balsavage, to evaluate the extensive testimony on record from the public hearings. During the trial on May 2, 2007, Judge Accurso acknowledged that "clearly the experts Mr. Malhal and Mr. Balsavage disagree on

the suitability of this site for the wastewater disposal system." Rec. at 26:22-24.

Nevertheless, the trial court ruled against the Board, finding that its denial was arbitrary and capricious. Rec. at 160:1-2. Specifically, the court found that the feasibility of Dowel's sewage-treatment proposal was an issue reserved for the DEP, and would be addressed in conjunction with its review of Dowel's NJPDES permit application. E.g. Rec. at 154:15-25, 155:1-14. In the order for judgment, entered on May 21, 2007, the Law Division reversed the Board's decision and ordered Dowel's application to be granted, conditioned upon subsequent NJDPES permit approval and subject to a contingency concerning stormwater. That contingency was that the court ordered the Board to hold further hearings about compliance with the Stormwater Management Rules and to determine whether Dowel was proposing a compliant stormwater system, or whether it needed a waiver of the requirements from DEP. Order for Judgment at ¶¶ 2 & 3. If the Board determines a waiver is needed, the lower court required the Board to impose the granting of the waiver as a separate condition. Order for Judgment at ¶ 3.

The matter is now properly before this Court as an as of right appeal from the Law Division's final judgment, pursuant to R. 2:2-3(a)(1). Philpsburg Riverview Organization ("PRO")

requested, and was granted, a 60-day extension, for their brief-submission deadline, which was extended to November 16, 2007.

### ARGUMENT

#### **I. The Board's Decision Was Supported By Substantial Evidence And Was Not Otherwise Arbitrary And Capricious**

New Jersey Courts have held that local municipalities, through their planning boards, should have wide discretion over the planning and development process. Here, the lower court essentially found that the Board's actions on the fundamental issues of sewage disposal and drainage were supported by substantial evidence, because there was no dispute that the requirements of the Stormwater Management Rules were not met and there was contradictory expert evidence on feasibility of the sewage disposal system. Having made such findings, the lower court should have upheld the decision of the Board. Instead, the lower court improperly substituted its own judgment in place of the Board's.

#### **A. The Standard Of Review Is Deferential**

Findings of fact in an administrative action are presumptively valid and can only be overturned by a court if determined to be arbitrary, capricious, or unreasonable given the sufficiency of the evidence before it. New Brunswick Cellular Tel. Co. v. Borough of South Plainfield Bd. of

Adjustment, 160 N.J. 1, 13 (1999) (applying the arbitrary, capricious or unreasonable standard); Fallone Prop. v. Bethlehem Plan. Bd., 369 N.J. Super. 552, 560 (App. Div. 2004) (upholding a planning board decision using the arbitrary, capricious or unreasonable standard); Morris County Fair Housing Council v. Boonton Twp., 228 N.J. Super. 635 (Law Div. 1988) (same).

In addition, prerogative writ matters are tried on a record made by a local agency, and the "state of the record ordinarily controls, the substantial evidence rule applies to fact finding, [and] the agency's action is presumed valid and reversible only if arbitrary capricious or unreasonable." Pressler, Rules Governing the Court of the State of New Jersey, Comment No. 5 on R. 4:69-4 at 1714 (Gann. 2006). "Substantial evidence" is a low threshold, which "does not mean a large or considerable amount of evidence, 'but rather such evidence as a reasonable mind might accept as adequate to support a conclusion.'" Cellular Tel. Co. v. Zoning Bd. of Adjustment, 197 F.3d 64, 71 (3d. Cir. 1999) (quoting Pierce v. Underwood, 487 U.S. 552, 565, (1988)).

In addition, where there is substantial evidence in the record to support more than one result, neither result would be arbitrary and capricious. Jamison v. Rockaway Tp. Bd. of Educ., 242 N.J. Super. 436, 448 (App. Div. 1990) see also In re Application of N.J. Bell Tel. Co., 291 N.J. Super. 77, 89, 676 A.2d 1133 (App. Div. 1996). ("Rather, where there is substantial

evidence on all sides of the issues addressed, no findings made or conclusions reached that are based on that evidence and are otherwise within the Board's discretionary authority will be seen to be arbitrary, capricious or unreasonable." ). Finally, assessments of expert credibility are the province of the planning board, and not of the reviewing court. See Jamison, 242 N.J. Super. at 448 ("[as a reviewing court] we do not weigh the evidence, determine the credibility of witnesses, draw inferences from the evidence or resolve conflicts therein." ).

Morris applied these principles to circumstances that are similar to those in this case. In Morris, the plaintiffs challenged a planning board's decision regarding an affordable housing development using an action in lieu of a prerogative writ. 228 N.J. Super. at 639. The planning board, after several hearings, denied the plaintiffs' site plan because the engineering expert found that the subdivision's stormwater management plan did not have an adequate proposal for necessary modifications to a downstream dam. Id. at 639-40, 644. Even though the applicant was going to subsequently seek DEP approval for repairs to the downstream dam, the Morris court did not require conditional approval subject to later DEP approval. Instead, the Morris court affirmed the denial and remanded the matter for further review of any renewed site plan applications,

because the feasibility of the repair had not been established.  
Id. at 649.

**B. The Pizzo Mantin Doctrine Is Irrelevant**

Generally, where a municipality uses a power granted to it by the Municipal Land Use Law ("MLUL") to deny preliminary subdivision approval, the rejection must be based on specific ordinance provisions. Pizzo Mantin Group v. Township of Randolph, 137 N.J. 216 (1994). However, as discussed in the next section, because the MLUL actually precludes municipal approval of subdivisions unless the applicant demonstrates the feasibility of sewage disposal and drainage systems, this requirement is not applicable to this case.

Even if the Pizzo Mantin doctrine were applicable to this case, the trial court recognized that Section 148-12.A (15) of the Harmony Township code requires "documentation of feasibility of an adequate method of sewage disposal." Rec. at 144:4-6. In addition, there was no dispute that the stormwater management system had to meet the Stormwater Management Rules, which are enforced by municipalities. Thus, the Pizzo Mantin doctrine was irrelevant to the trial court's decision.

**C. Subdivision Applications For Inclusionary Development Are Reviewed In The Same Way As Other Developments**

The Supreme Court in Southern Burlington County NAACP v. Twp. of Mount Laurel, 92 N.J. 158, 238 (1983), made clear that

municipal affordable housing obligations do not simply trump a planning board's consideration of the environmental and planning constraints of the property. The Supreme Court specifically emphasized its strong concern for protection of the environment in a statement that it "intend[ed] nothing in this opinion to result in environmentally harmful consequences." Id. at 331, fn. 68.

In addition, the Supreme Court recognized that the provision of affordable housing should take account of environmental constraints:

municipal compliance with the constitutional obligation to provide lower income housing does not require bad planning. It does not require rural municipalities to encourage large scale housing developments. There is nothing in our Constitution that says that we cannot satisfy our constitutional obligation to provide lower income housing and, at the same time, plan the future of the state intelligently.

Id. at 238. Thus, the Township of Harmony's constitutional duty to provide affordable housing did not require the Board to approve a subdivision plan that did not meet local and state standards.

The New Jersey Supreme Court has unequivocally rejected the view that the Board was limited in its site suitability review of this subdivision application. In Alexander's Department Stores of New Jersey, Inc. v. Borough of Paramus, 125 N.J. 100

(1991), the Court found that the grant by the Council on Affordable Housing ("COAH") of substantive certification to the Borough of Paramus did not preclude a property owner from challenging a municipal ordinance and developer's agreement through an Action in Lieu of Prerogative Writ. The Court specifically observed that the substantive certification process does not include a review of issues traditionally raised in the MLUL review processes. Id. at 11. Alexander's stands for the proposition that substantive certification does not dictate blindly the adoption of any municipal ordinance. Instead, municipal actions must comply with the legal requirements of the MLUL and local ordinances.

Thus, the sole effect of COAH's granting of substantive certification to a municipality is to create a presumption of validity in an exclusionary zoning action. Saratoga v. Borough of West Patterson, 346 N.J. Super. 569, 577 (App. Div. 2002) (citing N.J. Stat. 52:27D-317). COAH's grant of substantive certification does not constitute an administrative finding that the proposed Riverwalk site is suitable for high density residential housing. See id. Moreover, even though COAH granted substantive certification to a compliance plan for a high density development, in making this determination, it did not conduct a hearing or make findings of fact based on an evidentiary record. Id. at 578. In fact, as indicated by In re

Petition for Substantive Certification, Township of South Hampton, 338 N.J. Super. 103 (App. Div. 2002), cert. denied, 169 N.J. 610 (2001), COAH sometimes grants substantive certification to a compliance plan based on a perfunctory review of factual materials submitted by a municipality without COAH's own staff even inspecting the sites that the municipality has designated for Mount Laurel housing. Id. at 114 - 116. Thus, COAH's grant of sub-certification to Harmony Township for the Riverwalk site is not based on the kind of administrative fact-finding that was entitled to deference by the Board.

**D. The Findings Of The Board Were Supported By Substantial Evidence**

Here, the denial of Dowel's major subdivision approval by the Board was supported by substantial evidence because it was based upon expert findings that the sewage disposal methods proposed had not been shown to be feasible and the stormwater management systems did not meet the Stormwater Management Rules.

**1. Evidence Regarding The Feasibility Of The Sewage Disposal System**

The trial court correctly recognized that the court-appointed experts disagreed about the suitability of the site for the proposed discharge of the sewage to the underlying rock, stating "clearly the experts Mr. Malhal [Mulhall] and Mr. Balsavage disagree on the suitability of this site for the wastewater disposal system. . . Mr. Malhal . . . concluded . . .

based on the data collected . . . it cannot be concluded that the site is suitable for the disposal of treated wastewater." Rec. at 26:22-27:8. Clearly the lower court concluded that there was substantial evidence in the record to justify rejection of the application. However, despite this finding, the trial court erroneously concluded that it could overturn the decision of the Board:

"I don't conclude, as do the defendants in this matter, that simply because there's expert testimony on both sides and one expert determines that the -- the board was correct and that the [sewage disposal] system was not suitable, that that requires the Court to determine that - the board didn't act arbitrary or capriciously." (Rec. at 154:5-12).

It is not surprising that the judge hesitated to put this statement simply. Rephrasing, the lower court concluded that even though there was expert testimony on both sides of the feasibility issue for the sewage disposal system, the court could still conclude that the Board's decision was arbitrary. This is a straightforward disavowal of the substantial evidence standard, which requires courts to defer to the decisions of planning boards where there is conflicting expert evidence.

As the lower court correctly noted, the Board's doubts about the feasibility of the sewage disposal were based on the voluminous record that was before it. Over the course of 17

hearings, the Board listened to experts from both sides voice uncertainty over the proposal to introduce 95,000 gallons of treated effluent into an already volatile geology. Rec. at 12:12-21. This is six times the rainfall that falls on the area and 20 times the amount of water that normally infiltrates to the groundwater in the area. Id. at 12:18-13:2.

Experts noted the observation of fresh sinkholes on the site, which had appeared since the commencement of the hearings, calling them "red flags." DIa 25:2-22. The Board heard testimony regarding the mild acidity of the treated effluent being discharged, which could lead to dissolution of the rock, and the potentially de-stabilizing effect to the underlying limestone caused by an increase in impervious surfaces that prevent rainwater from recharging the water table. DIa 19:2 to 20:1. The number and significance of unresolved issues justifies the conclusion that the Board's decision was based on substantial evidence.

While some experts endorsed the on-site sewage treatment proposal, a number expressed serious concern. For example, Harmony's hydro-geological consultant Frank Getchell cautioned "you're talking about concentrating a lot of water in an area that currently does not- is not exposed to that." DIa 3:3-12. Harmony's engineer Douglas Mace testified that "there is an incident of the potential for significant sinkholes on this

property." DIa 8:10-14. Consequently, he recommended further investigation. Id.

Harmony's environmental consultant John Thonet noted that a "concentrated groundwater discharge of wastewater from hundreds of homes in an area underlain by limestone is a markedly different proposal to the original plan for regional sewers." DIa 96. Thonet also recommended further investigation. Id. On the basis of his findings, Thonet questioned the advisability of "discharging large amounts of wastewater into areas underlain by carbonate rock." Id. at 120.

Dowel's expert Soheila Rahbari acknowledged that the risk of sinkholes can never be fully eliminated, but stressed remedial measures, such as shutting down one of the disposal bed's four zones. DIa 12:18-25, 15:21-23. Mr. Getchell, however, was not convinced that this would be an adequate solution. DIa 31:1-24. Thus, the Board actually had the choice between two conclusions, based on the evidence presented, which was substantial on both sides of the feasibility issue.

**2. The Board Doubted The Credibility Of The Experts That Favored The Sewage Disposal System**

The Board's conclusion that Dowel did not establish the feasibility of the sewage disposal system is reinforced by the Board's implicit finding that it did not find Dowel's experts who favored this system entirely credible. During the

proceedings, Board Chairman Gil Greene brought attention to inconsistencies between reports submitted by Dowel's experts stating:

There is an apparent conflict of testimony from Tully and Soheila Rahbari [of Schoor DePalma] regarding soil conditions under the septic treatment area, and both are conflicting with the earlier Geosciences report.

DIA 37:7-11:13 see also DIA 35:10-36:13 (detailing inconsistencies). While engineers from Schoor DePalma minimized any chance of sink holes forming in the area designated for the sewage discharge, other experts produced by Dowel believed that sinkhole formation in that area was perfectly possible. DIA 52-57, 63-64. Furthermore, among other inconsistencies, Schoor DePalma stated that the area below the disposal field had "thick overburden soils overlying limestone bedrock." DIA 72. In contrast, the logs of the boreholes drilled by Schoor DePalma and the report by Merick-Tully (another of Dowel's experts) showed that the overlying soil was shallow. Id. The Board was, therefore, perfectly justified in giving less weight to the reassuring testimony of some of Schoor DePalma's engineers, which it had good reason to doubt. Of course, the lower court should not have second-guessed the Board's determinations on credibility.

**3. The Court Found That The Stormwater Management Plan Did Not Meet The Required Standards**

The lower court confirmed that the stormwater management plan did not meet the required standards:

The Court having further determined that the Court appointed stormwater management expert has confirmed deficiencies in the Dowel's stormwater management plan's compliance with the Stormwater Management Rules, N.J.A.C 7:8-1 et. Seq., a second basis for the Land Use Board's denial of Dowel's major site

Order for Judgment dated May 21, 2007 at 2. In the oral decision, although the lower court indicated that the deficiencies were "minor" and "technical" which could probably be corrected, the court also allowed for the possibility that Dowel might have to seek a waiver of the requirements from DEP. Rec. at 161:4-163:18. Notably, the lower court failed to find that the Board's finding of non-compliance with the requirements was arbitrary and capricious.

Absent a finding of an abuse of discretion or an arbitrary and capricious finding, a reviewing court may not substitute his or her judgment regarding appropriate procedure where a planning board correctly determines that an application fails to comply with an applicable statutory or regulatory standard. However, this is precisely what the lower court did. Moreover, the lower court could only form the judgment that the discrepancies were minor with the benefit of hindsight. As the court recognized,

at the time the storm water management rules were new and all of the experts "were struggling." Rec. at 161:6-10.

It is axiomatic that the Board's decision should have been reviewed based upon the record before the Board. Here, unlike the lower court, the Board did not have the benefit of an expert who was experienced in applying the stormwater management rules. The post hoc judgment of the court appointed expert on the degree of compliance with the stormwater management rules used a preponderance standard and benefited from "hindsight" because his analysis was based upon "DEP . . . promulgated guidance" about the rules. Id. at 161:16-20. The conclusions of the court appointed expert therefore should not have been carried forward into the lower court's decision.

Nonetheless, the lower court adopted the post hoc interpretation by the expert appointed by the court that the admitted violations of the rules were "minor." Id. at 162:10-163:18. This was an error. Instead, the lower court should have reanalyzed the issue of stormwater compliance by applying the deferential substantial evidence standard to the record. Had the lower court done the appropriate reanalysis, it would have affirmed the Board's denial of the subdivision approval because the stormwater management rules were not met and at the time the Board was not able, based on the record, to determine

how easy it would have been for Dowel to comply with the stormwater management rules.

**II. The Trial Court Erroneously Determined That The Board Should Have Delegated Its Duty To Determine Feasibility To DEP**

The MLUL authorizes municipal agencies to issue development approvals conditioned upon a separate subsequent approval only "in appropriate instances." N.J.S.A. 40:55D-22(b). It is well established that where the feasibility of sewage disposal and drainage systems are at issue, conditional approval is not appropriate until a planning board has first resolved the question of feasibility. Field v. Twp. of Franklin, 190 N.J. Super. 326, 332-333 (App. Div. 1983). The trial court based its conclusion that conditional approval was appropriate on two errors: (1) that the DEP had primary jurisdiction on the subject of sewage disposal, and (2) that the initial feasibility requirement had been met, because the method of sewage treatment proposed was a "recognized technology."

**A. The Board And DEP Have Concurrent Jurisdiction Over Sewage Disposal Systems**

The trial court emphasized that the DEP had primary jurisdiction to decide whether the proposed sewage treatment proposal was sufficient to allow a discharge permit to be granted. E.g. Rec. at 154:15-18 ("All the parties agree, and I think it's clear, that DEP has primary jurisdiction regarding

waste water management systems and their impact on geological conditions."). The lower court therefore implied that the Board's scope of review on the issue should be very limited. See id. at 151:17-18 ("it's important to -- to have some sense about what the limits of a board is [sic] when concerning feasibility."). This reasoning misconstrues both the Board's legal duty to address the feasibility of sewage treatment proposals, and the independent, complementary regulatory purposes which govern the Board and the DEP.

In Field, the court used drainage, water supply, and sewage disposal as three examples of elements of a subdivision plan that would be considered essential. The court explained that these elements "may have such a pervasive impact on the public health and welfare in the community that they must be resolved at least as to feasibility of specific proposals or solutions before preliminary approval is granted." Field, 190 N.J. Super. at 332-33; W.L. Goodfellows and Co. of Turnersville v. Washington Township Planning Board, 345 N.J. Super. 109, 116-117 (App. Div. 2001); D'Anna v. Planning Board of Township of Washington, 256 N.J. Super. 78, 84 (App. Div. 1992); Lake Shore Estates, Inc. v. Denville Township Planning Board, 255 N.J. Super. 580, 592 (App. Div. 1991); Morris County Fair Housing Council v. Boonton Township, 228 N.J. Super. 635, 642 (Law Div. 1988). Where a subdivision plan offered only alternative

concepts, but no details on sewage disposal options, the Field court upheld a finding by a planning board that insufficient information had been presented on the sewage disposal issue to permit the planning board to make a determination as to feasibility of a "fundamental element of the plan, notwithstanding governmental approval." Field, 190 N.J. Super. at 333.

Similarly, the court in D'Anna, relying on Field, declined to automatically approve a major subdivision application pursuant to the automatic approval provision in MLUL, N.J.S.A. 40:55D-48(c), when the Township Engineer and the Department of Health did not approve the plan for numerous reasons including lack of proper percolation tests. D'Anna, 256 N.J. Super. at 83-84. Recognizing that the subsequent "final subdivision approval is virtually automatic," the D'Anna court followed Field holding "that matters vital to the public health and welfare, such as drainage, sewer disposal and waste supply must be resolved before preliminary approval is granted." Id. at 84.

Other decisions have also recognized that planning boards have discretion to deny a subdivision plan application "if it lacks sufficient specificity or if an applicant has failed to provide [sufficient] pertinent information" about essential parts of the plan. W.L. Goodfellows and Co. of Turnersville, 345 N.J. Super. at 116; see also Lake Shore Estates, Inc., 255

N.J. Super. at 592 (holding application for subdivision plan preliminary approval was not complete because so many significant questions were left unanswered). The W.L. Goodfellows court relied on Field and held that "[b]ecause drainage and sewage may have a pervasive impact on the public health and welfare, . . . the feasibility of specific proposals or solutions must be resolved before preliminary approval is given." Id. at 116-17. The W.L. Goodfellows court then decided that because the feasibility of the proposed drainage plan had been established, conditional preliminary approval was appropriate. In contrast, the court in Morris County Fair Housing Council declined to grant preliminary site plan approval conditioned upon the applicant later securing the necessary DEP approval of certain portions of its plan, because there was insufficient information available about the feasibility of the repairs. Morris County Fair Housing Council, 228 N.J. Super. at 635-6. The Morris court recognized that the MLUL, N.J.S.A. 40:55D-22(b) permits conditional approval "in appropriate instances," but held that the board did not abuse its discretion by determining that this was not such an appropriate instance. N.J.S.A. 40:55D-22(b); Id. at 645-46.

Complementing the case law, the MLUL also requires municipalities to include provisions ensuring adequate drainage and sewerage facilities in their subdivision ordinances.

N.J.S.A. 40:55D-38 b(3). Harmony's ordinance met the statutory requirement through provisions requiring subdivision applicants to demonstrate the "feasibility of an adequate method of sewage disposal." Harmony Code §§ 148-12.A(15) & 148-12.B.(1)(a). The Board was therefore required by statute, case law, and the Township's ordinance to determine whether the applicant had established the feasibility of the proposed sewage treatment proposal.

The regulations and case law confirm that planning boards have concurrent jurisdiction with DEP over sewage disposal. As the administrative agency designated by statute, the DEP implements the Water Pollution Control Act (N.J.S.A. 58:10A-1 et seq.) through regulations requiring New Jersey Pollution Discharge Elimination System ("NJPDES") permits for sources purporting to discharge pollutants. N.J.S.A.10A-6. The regulations generally require applicants for discharge to groundwater permits to submit a variety of information concerning soil quality and geological conditions underlying the proposed site. N.J.A.C. § 7:14A-7.9 d(3)(iii). Because the DEP "can and does analyze underlying soils to determine the safety of the disposal field" (Rec. at 149:23-25), the trial court reasoned that the DEP was "in a much better position" to rule on the propriety of Dowel's proposal. Id. at 156:6-7. This statement by the Court demonstrates the error of its reasoning.

As Morris demonstrated, just because DEP will subsequently review an issue does mean a planning board may abdicate its duty to determine that the submitted plan is feasible.

Although the DEP was, without question, in a better position to review the proposed facility's effect on the underlying water quality, the Board remained obligated to assess initial feasibility, in order to protect the health and welfare of the residents of Harmony Township. The trial court recognized as much, stating "the issue is -- is jurisdiction but it's -- it's not preemption which would make the case a lot easier." Rec. at 76:9-11.

In fact, the two reviews are complementary and jurisdiction is concurrent because the two reviewing entities act pursuant to different regulatory purposes. Under the MLUL, a municipality is required to guide land use to protect the health and safety of its residents and the integrity of its natural resources. N.J.S.A. 40:55D-2. Similarly, the rationale for requiring planning boards to resolve feasibility is that "essential elements," such as sewage and drainage, "may have such a pervasive impact on the *public health and welfare in the community* that they must be resolved at least as to feasibility of specific proposals or solutions before preliminary approval is granted." Field, 190 N.J. Super. at 332-333 (emphasis added). In contrast, "the purpose of the Water Pollution

Control Act is to limit pollution.” Shupak v. Manasquan River Regional Sewerage Authority, 194 N.J. Super. 199, 204 (App. Div. 1984) (citing N.J.S.A. 58:10A-2).

In Shupak, the Appellate Division explicitly rejected the argument that Environmental Protection Agency and DEP approvals, under the Sewerage Authorities Law (N.J.S.A. 40:14A-1 et seq.) and Water Pollution Control Act, obviated the need for site plan approval and construction permits, as required by local ordinance and the State Uniform Construction Code (N.J.S.A. 52:27D-119 et seq.). 194 N.J. Super. at 205. Instead, the court focused on the different purposes of the various authorities, and emphasized that the requirements imposed by each were not in conflict with each other, stating “we are quite unable to see any inconsistency between the purposes of controlling pollution and those related to building permits and site plan approval.” Id. at 204).

Similarly, there was no inherent tension between the Board’s legal duty to protect Harmony’s residents and natural resources by assessing feasibility, and the DEP’s jurisdiction over the resultant effect on the State’s water quality. As with the authorities considered in Shupak, an applicant can simultaneously comply with both. Ordering conditional approval, therefore, defied precedent and usurped the Board’s jurisdiction unnecessarily.

Finally, contrary to Respondent's arguments in the court below, the Pizzo Mantin doctrine does not control here, because the MLUL does not grant the Board the power to give a conditional approval if the applicant has not demonstrated the feasibility of fundamental aspects of the development. There was therefore no need for the Township to pass an ordinance requiring feasibility to be established.<sup>4</sup>

**B. The Trial Court's Decision To Limit The Board's Role In Assessing Feasibility To Whether The Proposed System Was A "Recognized Technology," Was Erroneous**

While the concept of feasibility has not been expressly defined, the few cases that deal directly with the issue suggest that it is a question of degree. In Field, the Appellate Division ruled that the feasibility threshold had not been met where the plaintiff's subdivision approval application listed three options for sewage disposal, but offered limited evidence that any option could be applied to the designated site. 190 N.J. Super. at 333. In W.L. Goodfellows v. Washington Twp. Planning Board, by contrast, the Appellate Division ruled that feasibility had been established, where the township's engineer verified that the proposed drainage system would work, but the planning board denied the plaintiff's site plan approval based

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<sup>4</sup> In spite of absence of this requirement, as discussed above, Harmony Township actually has an ordinance requiring the feasibility of sewage disposal systems to be established.

solely on the failure to obtain a timely drainage easement from the adjoining property owner. 345 N.J. Super. 109, 117 (App. Div. 2001).

While both Field and Goodfellows essentially involve "sufficiency of the evidence" arguments, language in both decisions contemplates the situation in which an applicant provides extensive data *and* the planning board finds the proposal to be infeasible. Goodfellows states: "we conclude that sufficient information was presented by plaintiff concerning the specificity of its drainage plan, including its feasibility and adequacy..." 345 N.J. Super. at 117. Even more significantly, the court in Goodfellows noted that "[m]ost telling was the Board's Engineer's testimony that he reviewed the drainage plan and the area involved, made his calculations, and was confident that it could support the additional facility and would work." Id. This language shows that an applicant must not only submit sufficient data regarding the proposed technology, but must also convince the planning board that the technology will work on the particular site.

Despite these authorities, the trial court narrowly construed the Board's role in reviewing feasibility as limited to whether the proposed system was a "recognized technology":

"And if you think about feasibility , not as permitability, whether the applicant will be successful in getting its -- its NJPDES permit that's an issue that's only going to be

determined by D.E.P[.] But *is it a recognized technology? Yes. Was there -- there testimony in the record that this -- that this is a recognized technology?*" Rec. at 151:9-15. (emphasis added).

As a matter of policy, the shift from a "question of degree" standard to a "recognized technology" standard does not make sense. Planning boards regulate land use, not treatment technologies. They are required to decide if plans for sewage disposal are feasible when they are applied to a particular site. Here, the issue was not whether the level of treatment was appropriate, but whether the volume of the sewage discharge could cause further sink holes to form, rendering the sewage disposal system inoperative. Using a "recognized technology" standard for feasibility would prevent precisely the type of site-specific review that planning boards are supposed to carry out.

Such a standard would also eviscerate the much-followed Field doctrine that planning boards must verify the feasibility of "essential elements" of developers' applications, Field, 190 N.J. Super. at 332, and encourage applicants to postpone serious consideration of site-specific sewage disposal issues. Such a result would be directly contrary to the policy of encouraging cooperative dialogue between developers and planning boards, for the benefit of the greater good. See STC Corp. v. Planning Bd., 194 N.J. Super. 333, 335 (App. Div. 1984).

Finally, here the lower court erroneously concluded the Board's denial was invalid, because of the extensive data presented. see Rec. at 135:10-15 ("the issue here is . . . was it arbitrary and capricious for the Board not to have, *in the face of all this information*, not to have conditioned the approval on the applicant obtaining an NJPDES permit.") (emphasis added). Framing the issue in this manner further reveals the error made by the lower court. After weighing all the information, the Board decided that it was not convinced that the sewage disposal system was feasible. In making such a decision, the Board properly evaluated both the quantity and the quality of the information on both sides of the question. Although, like the lower court, the Board is not expert in sewage disposal systems, here it relied on its own experts and reached a reasoned decision. Even if the lower court would have reached a different conclusion, it should not have substituted its judgment for that of the Board. Furthermore, the lower court ignored controlling precedent when it decided that, because there was extensive evidence in the record on both sides of the site-specific feasibility issue, the Board had to delegate to DEP its non-delegable duty to determine whether the proposed sewage disposal system was feasible on this particular site.

### **III. The Trial Court Mistakenly Attributed Actions Of The Township To The Board**

In the decision below, the trial court erroneously allowed Harmony Township's past statements concerning the suitability of the site for large-scale development and the Township's desire to fast-track affordable housing to influence the Court's verdict. Rec. 158:1-25, 159:1-24. Harmony Township and the Board are completely separate legal entities, with differing duties and statutory obligations. N.J. Stat. Ann. § 40:55D-20 (expressly limiting all other bodies from exercising a planning board's statutorily authorized powers). It is unlawful for a planning board to interfere with the actions of a township, just as it is unlawful for a township to interfere with the actions of a planning board. Toll Bros., Inc. v. Bd. Of Chosen Freeholders of the County of Burlington, 388 N.J.Super. 103, 126 (App. Div. 2006)(finding that a board would exceed its power were it to impede a governing body's rightfully-exercised authority). The courts have repeatedly refused to blur the lines between that which is the duty of the Board and that which falls under municipal jurisdiction. Id., Twp. of Dover v. Bd. of Adj. of the Twp. of Dover, 158 N.J.Super. 401, 411-13 (App. Div. 1978)(holding that a township lacks standing to contest a board's actions except on the ground that the board exceeded its authority.) See also Twp. of Stafford v. Stafford Twp. Zoning

Bd. of Adjustment, 154 N.J. 62, 77-78(1998). Thus, past statements and actions by Harmony Township cannot be attributed to the Board. Furthermore, these statements could not legally be incorporated into the Board's decision-making process on Dowel's application. Instead, the Board alone - without the influence of the Township - had the authority to decide on Dowel's application for preliminary subdivision approval. Accordingly, the lower court should not have intimated that the Board should have taken account of the actions of Harmony Township regarding the provision of affordable housing.

#### **IV. Affordable Housing Issues Should Have Been Referred To COAH**

Although the trial court clearly had jurisdiction in the action in lieu of prerogative writs to determine whether the Board's denial of Dowel's application was arbitrary and capricious, it lacked jurisdiction to determine whether Harmony Township had properly implemented its affordable housing plan. Indeed, Harmony Township was not even a defendant in the case. Moreover, exclusive jurisdiction to enforce affordable housing plans lies with COAH. Harmony Township voluntarily made such a plan precisely to avoid litigation about affordable housing issues in court. Thus, if this Court believes that this case raises issues with regard to the provision of affordable housing in Harmony Township, it should transfer those issues to COAH for further fact-finding and action.

More specifically, in response to the Mount Laurel decisions, the Legislature passed the New Jersey Fair Housing Act ("FHA") in order to create an administrative process to meet the constitutional obligation. The FHA was upheld by the Supreme Court in Hills Dev. Co. v. Township of Bernards, 103 N.J. 1, 49 (FHA "had two primary purposes: first to bring an administrative agency into the field of low income housing to satisfy the Mount Laurel obligation; second, to get the courts out of that field." ). The Supreme Court specifically rejected a claim that the FHA unconstitutionally interfered with the judiciary's exclusive control over actions in lieu of prerogative writs. Id. at 44. The Court went on to conclude that under the FHA, "courts will, pursuant to section 16b, transfer to the Council any Mt. Laurel actions except where the Act clearly calls for retention." Id. at 63.

Furthermore, as discussed in Fair Share Housing Center, Inc. v. Township of Cherry Hill, 173 N.J. 393, 395 (2003)(quoting N.J.S.A. 52:27D-303), "[b]y enacting the FHA, the Legislature declared "the State's preference for the resolution of existing and future disputes involving exclusionary zoning" through the "mediation and review process ... and not litigation." The Appellate Division has also discussed the need for courts to treat municipalities differently based upon the receipt of substantive certification: "[i]t is consistent with

this legislative preference to treat municipalities differently, depending upon whether they voluntarily submitted their Mount Laurel compliance plans for review by COAH or were involuntarily subjected to court supervision through a successful builder's remedy lawsuit." Deland v. Township of Berkeley, 361 N.J. Super. 1, 15 (App. Div. 2003), cert. den. 178 N.J. 32 and 179 N.J. 185 (2003). More recently this Court reiterated that a party such as Dowel must exhaust all administrative remedies before COAH before bringing litigation before a trial court. Sod Farm Assoc. v. Township of Springfield, 336 N.J. Super. 116, 129 (App. Div. 2004).

Therefore, because Harmony Township has received substantive certification, Dowel is required to exhaust its administrative remedies before COAH by bringing any claims for enforcement of the affordable housing plan before that agency. As far as PRO is aware, Dowel has neither sought COAH review nor named COAH as a party to this action as required by the FHA. Thus, any issues with Harmony Township's compliance with its affordable housing obligations raised by this case should have been referred to COAH.

As well as being legally required, this approach is also preferable from a practical perspective. Allowing Harmony Township to continue to rely on the Riverwalk development to provide affordable housing could result in even more delay than

occurred in Clinton Township because of Windy Acres.<sup>5</sup> Based on the DEP's initial reactions to the permit application and the wastewater management plan, it is highly likely that any application to DEP to discharge sewage into groundwater below the site will linger because of the difficult site geology. Thus, if provision of affordable housing is the goal, this can only be achieved if Harmony Township is permitted to amend its affordable housing plan through proceedings before COAH.

Instead of taking this path, the lower court attempted to finesse the situation by requiring the Board to approve the application, even though there was substantial evidence to support the Board's findings that the stormwater system did not meet the regulatory requirements and the applicant had not demonstrated that the sewage disposal system was feasible. To avoid upending years of settled precedent and causing further delay in the provision of affordable housing, this Court should maintain the clear separation between actions on lieu of prerogative writ and actions to enforce affordable housing obligations. To do otherwise would divest municipalities of the

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5 Windy Acres was an inclusionary affordable housing development which was eventually deemed infeasible by COAH after approximately seventeen years of delay primarily because of somewhat similar sewage disposal issues. Counsel for PRO represented a party in the later stages of the various legal proceedings concerning Windy Acres. Based on that experience, it is likely that COAH would be receptive to a petition to amend Harmony Township's affordable housing plan by eliminating the Riverwalk development on the ground that it is infeasible.

incentive to submit to COAH jurisdiction, confuse planning boards as to the standard of review when they are reviewing inclusionary developments, and allow developers to litigate affordable housing matters without naming as defendants COAH or the municipality which has allegedly failed to provide sufficient affordable housing.

**CONCLUSION**

For the foregoing reasons, PRO respectfully requests this Court to reverse the decision of the lower court and find that the Board's denial of subdivision approval was properly based on findings that the feasibility of the proposed sewage disposal system had not been demonstrated and that the stormwater management system did not meet the required standards. In addition, PRO requests that the remaining issues regarding implementation of Harmony Township's affordable housing plan be remanded to COAH.

Respectfully submitted,

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Richard Webster, Esq.

PLEASE TAKE NOTICE that Intervenor-Appellant, the Phillipsburg Riverview Organization, by their counsel, Richard

Webster, Esq., hereby requests oral argument pursuant to R.  
2:11-1.

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Richard Webster, Esq.

Dated: November 16, 2007