ORDER PREPARED BY THE COURT

EVELYN A. GUERRA, SARA BRESLOW, JUDITH M. BRETZGER and BARBARA DENEGAR, Plaintiffs, v. BOROUGH OF EATONTOWN and MAYOR AND BOROUGH COUNCIL OF THE BOROUGH OF EATONTOWN, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY DOCKET NO. MON-L-3767-16

THIS matter having come before the court, by Edward F. Liston, Jr., attorney for the plaintiffs, and this court having considered the papers submitted herewith and arguments of counsel, for the reasons set forth in the attached opinion,

IT IS on this 24 day of October, 2018;

ORDERED that plaintiff's complaint is hereby dismissed.

/s/ Lisa P. Thornton
LISA P. THORNTON, A.J.S.C.

NOT FOR PUBLICATION WITHOUT APPROVAL FROM THE COMMITTEE ON OPINIONS

EVELYN A. GUERRA, SARA BRESLOW, JUDITH M. BRETZGER and BARBARA DENEGAR, Plaintiffs, v. BOROUGH OF EATONTOWN and MAYOR AND BOROUGH COUNCIL OF THE BOROUGH OF EATONTOWN, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – MONMOUTH COUNTY DOCKET NO.: MON-L-3767-16 **OPINION**

Decided: October 24, 2018

Edward F. Liston, Jr., attorney for plaintiffs.

Andrew Bayer, attorney for defendants Borough of Eatontown, Mayor and Borough Council of the Borough of Eatontown (GluckWalrath LLP).

Patrick McNamara & Roshan Shah, for defendant-intervenor Eatontown Monmouth Mall, LLC (Scarinci Hollenbeck).

THORNTON, A.J.S.C.

I.

In this action in lieu of prerogative writs, plaintiffs challenge the ordinance that rezones property occupied by the Monmouth Mall from a business zone to a mixed use regional center (MURC) zone permitting "[r]esidential development in mixed-use buildings."[1] Because the ordinance is both "substantially consistent" with, and "designed to effectuate," the land use and housing plan elements of the master plan, the complaint is dismissed.[2] In addition, plaintiffs' claims

[1] Borough of Eatontown, N.J., Ordinance 10-2016 (Sept. 14, 2016).

[2] N.J.S.A. 40:55D-62.

that defendants violated the provisions of the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 to -21, are without merit.

II.

A.

Many of the relevant facts are undisputed. Plaintiffs are residents of the Borough of Eatontown ("Borough") and own property near Monmouth Mall ("Mall"), a 1960s era shopping complex owned by Eatontown Monmouth Mall LLC ("EMM"). The Mall is located in the southwest quadrant of the Borough with access from Route 35, Route 36, and Wyckoff Road.

Like many shopping malls nationwide, Monmouth Mall has struggled in recent years as competition from E-commerce draws shoppers away from brick and mortar retailers to the convenience of their homes, offices, or any location with a Wi-Fi connection. This economic reality, which is not unique to the Borough, has been a factor that caused a significant decrease in the Mall's property value and corresponding tax obligation. Because EMM is responsible for approximately 10% of the Borough's property tax revenue, the viability of the Mall is a priority for the Borough and its taxpayers. (Borough of Eatontown, Economic Impact Study, April 12, 2016.)

The Mayor and Borough Council ("Council") met with representatives of EMM, who expressed a willingness to revitalize the Mall and remain a vital economic presence in the Borough. EMM's vision for revitalization included a plan to include high density residential housing as well as other uses. (Def.s' Tr. Br. at 6.) This vision is consistent with a trend nationwide to repurpose aging malls or redevelop deteriorating communities. (Borough of Eatontown, Economic Impact Study, April 12, 2016.) More importantly, as part of their plan, EMM agreed to include a set aside for low

and moderate income housing consistent with the Borough's obligation under the Mount Laurel doctrine.[3]

On August 10, 2016, the Council introduced Ordinance 10-2016, that re-zones the Mall from a B-6 business zone to a MURC zone and permits "[r]esidential development in mixed-use buildings." At the conclusion of their discussion, the Council referred the ordinance to the Eatontown Planning Board ("Board") for consistency review pursuant to N.J.S.A. 40:55D-26.

The Board met on August 22, 2016 and asked their expert, Martin P. Truscott, PP, AICP, to comment on the ordinance, who confirmed the findings included in his report. He relied on the 2007 Master Plan and voluminous appendices and noted "there was not a whole lot of information or reference that would relate very specifically to the B-6 zone in terms of the regional business zone." (C2 at 9:15-18).

Mr. Truscott acknowledged that the goal of the master plan was to "support the commercial and industrial attractiveness of the Borough by facilitating the continuing viability of existing commercial development along Routes 35 and 36." (C2 at 9:18-25.) In considering whether the ordinance was consistent with the Master Plan, Mr. Truscott referenced the Land Use Plan Element and observed that in defining the category of "[r]egional business," the Board simply designated a location "south of the intersection of Routes 35 and 36…occupied by the Monmouth Mall" and opined that the Mall was the "type of regional self-contained business which is intended for these areas." (C2 at 10:11 – 11:13 (citing Bor. of Eatontown, Master Plan, at 71)). Finally, Mr. Truscott concluded that the ordinance was not inconsistent with the Master Plan because the Master Plan did

[3] See S. Burlington County NAACP v. Mt. Laurel, 67 N.J. 151, 174 (1975) in which the Court concluded that municipalities must, by their "land use regulations presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively [they] cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor."

not encourage or prohibit a mixed-use regional center. (C2 at 12:1-4.) He reasoned that because the definition of "regional business" does not exclude residential, the ordinance, which includes "the expanded uses…including residences and mixed-use businesses…is compatible with a regional business designation [because] [t]he addition of residential units may encourage more viability in the business area and also add to its own identity." (C2 at 11:14-25.)

On September 14, 2016, the Council voted to adopt Ordinance 10-2016. Before permitting public comment, the Mayor addressed the public and asked for comments from several professionals with knowledge of the ordinance. The Mayor commented that Ordinance 10-2016 was the governing body's second attempt to adopt an ordinance to revitalize the Mall. He explained that while he felt the first ordinance was good, he recommended the Council take more time to address the issues raised by the public and observed the "new ordinance" addressed "many of the residents' concerns." (Bor. of Eatontown, Bor. Council Tr. (Regular Meeting), 7:1-8:3, Sept. 14, 2016.)

The Mayor asked the Borough Planner, John Maczuga, to discuss how the changes in Ordinance 10-2016 reflected the concerns of the residents. In his comments at the meeting, Mr. Maczuga explained that Ordinance 10-2016 does not include hotels, a rooftop golf training facility, schools, or houses of worship. (Id. at 8:18-9:13.) Mr. Maczuga also stated the new ordinance better defines "recreational, amusement and entertainment facilities," reduces the overall number of residential units and percentage of affordable set-aside units, revises and reduces the maximum height requirements, and adds a regulation for additional buffers. (Id. at 9:14-12:24.)

Andrew Bayer, the Borough Attorney, commented on the affordable housing component of the ordinance. He explained that the revised ordinance reduces the set-aside to 12 ½ percent, and yields approximately 88 to 100 affordable housing units. (Id. at 18:24-19:2.) He further reasoned that the Mall site was a more desirable location to satisfy the Borough's fair share obligation because the

Mall was already developed and the Borough could receive additional credit by providing rental units. (Id. at 20:15 – 21:22.)

Edward Hermann, the Borough Engineer, also spoke during the public meeting and discussed the public's concern about additional traffic. He stated the Mayor and Council reviewed the traffic assessment provided by the developer. (Id. at 25:7-8.) He informed the public that he relied on a member of his staff, Mr. Broberg, who has worked for the Borough for over 40 years. Both the initial Mall construction and subsequent improvements were made during Mr. Broberg's tenure. (Id. at 25:23-26:8.) He noted that over the years the number of trip generations at the Mall had decreased from what the infrastructure was capable of handling. (Id. at 27:13-22.) Based on the reports and Mr. Broberg's institutional knowledge, Mr. Hermann concluded the proposed development could be "accommodated by the existing state, county and local road system." (Id. at 30:15-19.)

Lastly, the Mayor requested comments from Peter Reinhart, who was offered as an expert in the area of real estate development. Mr. Reinhart commented that the Mall's decline is indicative of a greater trend nationwide due to changes in demographics and reliance on internet shopping. (Id. at 30:10-25.) He commended the Council for taking corrective action to make "Eatontown a more competitive municipality than towns that seem to keep their head in the sand" and fail to address demographic and economic issues. (Id. at 41:10-25.)

The majority of residents offering public comment did not support Ordinance 10-2016. Opposition was primarily based on their objections to both the nature and quantity of the residential housing that would be permitted. Specifically, some residents made comments that conveyed a bias against rental housing in general or objected to the total number of units to be constructed. Many residents expressed a concern that the residential component would lead to an increase in traffic and crime, and a corresponding decrease in property values. No expert witnesses were offered to support either of these contentions.

Plaintiff Christine Caruso claimed that the proposed development would "detrimentally harm [her] property, hurt [her] quality of life and take away property rights." (Id. at 80:17-20.) Mike Flaherty proclaimed he was "against apartments." (Id. at 87:17.) Eric Cook was concerned that construction of 700 apartments would adversely affect the value of his home if renters were allowed to speed through his neighborhood. (Id. at 90:12-18.) Gina Migliaccio asserted that Eatontown didn't need more apartments and was concerned the Borough would be known as "the [s]econd Keansburg." (Id. at 94:17-24.)

A few residents expressed a particular animus against the developer. Raymond Hanson complained the "Kushners" would "use some smoke and mirrors to do a conversion from retail space to apartments…and eventually change the whole thing into high-rise apartments". (Id. 51:4-13.) Joan Williams argued, "Kushner doesn't have a very good track record" and expressed concern that if the "zoning was changed, he would have a green light to do whatever he wants." Mr. Cook was offended by the thought that the Council would "sit back and let a multimillionaire developer come into [the Borough]…and generate an ordinance for him." (Id. at 89:8-19.)

After the public comment on Ordinance 10-2016 the public hearing was closed, and the following dialogue occurred:

> MR. BAYER: Mayor, do you want to call roll call or have a statement with a vote, or –
>
> MAYOR CONNELLY: Yeah. I -- probably be better – we'll call the roll, and then they can make a statement as they vote.
>
> MR. BAYER: Yeah. You closed the public hearing, right? I believe you did.
>
> MAYOR CONNELLY: Yeah. Well, just make the motion that we close the public hearing.
>
> A MALE VOICE: So moved.
>
> MAYOR CONNELLY: It's been moved.

A MALE VOICE: Second.

MAYOR REID [sic]: Seconded. All in favor?

COUNCIL MEMBERS: Aye.

[Bor. of Eatontown, Bor. Council Tr. (Regular Meeting), 105:11-106:1, Sept. 14, 2016.]

Despite widespread opposition, the Council voted to approve Ordinance 10-2016 with five votes in favor and one vote against. The five Council members who supported the ordinance made statements that provide insight regarding the reason for their decisions. Councilwoman East stated she had confidence in her vote because she "knocked on more than 400 doors," answered residents' emails, and researched "everything [she] thought would impact Eatontown, the traffic, the school, and also any benefits of revitalizing the mall." (Id. at 106:20-107:8.) Council President Regan made it clear his decision was based on his desire to stabilize taxes and comply with the Borough's constitutional and statutory obligation to provide for low and moderate income housing. (Id. at 107:25-108-9.) Councilman Robinson relied on the opinions of professionals and his own research in deciding to support the ordinance. He was convinced the ordinance would help "strengthen the financial future of [the Borough] and…improve the prospects of additional ratables coming into the town". (Id. 114:2-11.) Councilwoman Mazella-Diedrichsen supported the ordinance hoping it would spur job growth and bring vitality back to Eatontown. (Id. at 115:12-16.)

B.

In support of their claim that defendant violated the provisions of the OPMA, plaintiffs offered the testimony of several residents who were present at the September 14, 2016 meeting. These witnesses relayed a common theme. They all objected to Ordinance 10-2016 because they were opposed to the nature and quantity of the ordinance's housing component. In addition, they were of the opinion that the meeting should have been held in a location other than Council chambers to accommodate the large crowd that was expected. They complained the governing body provided

inadequate accommodations for the overflow crowd by providing space at a firehouse next door to the municipal building. Plaintiffs also offered witnesses regarding the conditions in the firehouse.

After hearing the testimony, it is apparent that plaintiffs' testimony was affected by their bias against the ordinance. The testimony of defendants' witness, Ms. Lindsay Corcione, was more credible regarding the conditions in the firehouse and the quality of the Facebook Live broadcast of the council meeting.

Ms. Caruso testified she arrived at the meeting before 7:00 p.m. and was directed to the firehouse, where about 75 people were present. (Trial Tr. 92:12-95:3, July 10, 2012.) She remained at the firehouse for approximately 90 minutes before she went to Borough Hall to speak. (Id. at 97:18-19.) She estimated the broadcast feed was interrupted six or seven times for a total of at least 40 minutes. (Id. at 97:20-23.) She also testified the audio was "very difficult to hear." (Id. at 96:18.)

When Jeffrey Thomas King arrived at the firehouse at about 7:30 p.m., he saw about 20 people present. (Id. at 152:21-153:3.) He sat in the back third of the room. (Id. at 153:13.) While he wished the audio quality was better, he could hear what was going on and testified there was no distortion in the sound. (Id. at 155:9-16.) He confirmed there were interruptions in the feed but estimated that they lasted about two to four minutes each. (Id. at 154:24-158:7.)

Ms. Rosemary Bozenhard testified the conditions in the firehouse were "deplorable." (Id. at 167:8.) She could not hear a word when her husband spoke during the public portion of the meeting. (Id. at 274:8-9.) She claimed she had no trouble hearing when an earlier meeting was held at the Memorial School, but was reminded that in her deposition she claimed, "sometimes when the residents were speaking it was a little hard to hear." (Id. at 178:17-179:21.)

Richard Jacobs attended meetings on the ordinance at both the Memorial School and the firehouse. He testified the Memorial School was crowded, with no seating, and observed residents standing along the side of the room. (Id. at 187:17-188:1.) He arrived at the September 16th meeting

before 7:00 p.m. and there were "maybe 10, 15 people already there." (Id. at 190:20-191:21.) He stayed at the firehouse for the entire meeting, and estimated that the maximum number of people present at one time was about 30 people. (Id. at 191:25-192:19.) He estimated "breaks in the video feed" occurred about three times, and lasted "maybe a minute or two" each time. (Id. at 192:24-193:14).

Ms. Corcione, the human resource manager and assistant to the Mayor and Business Administrator was responsible for coordinating the Facebook Live broadcast. (Id. at 236:1-4.) She made an initial assessment and concluded the meeting could be broadcast on Facebook. (Id. at 237:12-19.) She also monitored the broadcast during the meeting and testified that it was interrupted five times for a minute or two each time. (Id. at 243:21-245:18.) In other words, only about "[e]ight to 10 minutes" of the meeting was not broadcast on Facebook Live. (Id. at 247:5.)

III.

Plaintiffs argue Ordinance 10-2016 is invalid because the governing body violated the provisions of the OPMA at the September 14, 2016 meeting. Without providing any legal authority to support their argument, they reason that the Council was required to hold the meeting in a venue other than the Council chambers to accommodate the overflow crowd. They also contend the Council's action was arbitrary, capricious, and unreasonable because the ordinance was inconsistent with the Master Plan.[4] Finally, they argue the ordinance constitutes illegal spot-zoning because the ordinance bestowed a privilege to EMM not afforded to other property owners in the B-6 zone.

[4] N.J.S.A. 40:55D-26 permits the governing body to "disapprove or change" a recommendation of the planning board by a majority vote provided it records in its minutes "the reasons for not following such recommendation". Plaintiffs failed to object to the planning board's decision by filing an action in lieu of prerogative writs and the statute does not require the governing body to provide a statement of reasons when they have agreed to follow the recommendation of the planning board.

In reply, defendants and the intervenor, EMM, deny the Council violated the OPMA and maintain that Ordinance 10-2016 is not inconsistent with the Master Plan. They stress that the ordinance also ensures compliance with the Mount Laurel doctrine. Finally, they contend plaintiffs' spot zoning claim is without merit and note that plaintiffs refused to present any expert testimony to support their arguments on consistency or spot zoning.

IV.

The OPMA is but one example of New Jersey's strong tradition of favoring open government. Polillo v. Deane, 74 N.J. 562, 569-72 (1977). The statute codified the Legislature's desire to reinforce "the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies[.]" N.J.S.A. 10:4-7. It was also designed to limit "secrecy in public affairs" that would "undermine the faith of the public in government[.]" Id.

When interpreting a statute, "[t]he primary task for the Court is to effectuate the legislative intent in light of the language used and the objects sought to be achieved." Merin v. Maglaki, 126 N.J. 430, 435 (1992) (citing State v. Maguire, 84 N.J. 508, 514 (1980)). To determine legislative intent, courts should look to the plain language of the statute and "give words their ordinary meaning absent any direction from the Legislature to the contrary." TAC Associates v. New Jersey Dept. of Environmental Protection, 202 N.J. 533, 541 (2010) (citing Serv. Armament Co. v. Hyland, 70 N.J. 550, 556 (1976)). If the "Legislature's intent is clear on the face of the statute, [courts] must apply the law as written." Carter v. Doe, 230 N.J. 258, 274 (2017).

The powers of a mayor and council are found in New Jersey Statute Title 40A "Municipalities and Counties." In relevant part, when the municipality is a Borough the duties of the mayor of a Borough are as follows:

> c. The mayor shall preside at meetings of the council and may vote to break a tie.

> d. Every ordinance adopted by the council shall, within five days after its passage, Sundays excepted, be presented to the mayor by the borough clerk. The mayor shall, within ten days after receiving the ordinance, Sundays excepted, either approve the ordinance thereto or any item or part thereof. No ordinance or any time or part thereof shall take effect without the mayor's approval, unless the mayor fails to return the ordinance to the council, as prescribed above, or unless the council, upon consideration of the ordinance following its return, shall, by a vote of two-thirds of all the members of council, resolve to override the veto.
> e. No ordinance shall be passed, or appointment of any subordinate officer of the borough be confirmed, except by a vote of a majority of the members of the council present at the meeting, provided that at least three affirmative votes shall be required for such purpose, the mayor voting only in the case of a tie.
> …
> h. The mayor shall see to it that the laws of the State and the ordinances of the borough are faithfully executed. He shall recommend to the council such measures as he may deem necessary or expedient for the welfare of the borough. He shall maintain peace and good order and have the power to suppress all riots and tumultuous assemblies in the borough.
> [N.J.S.A. 40A:60-5.]

Likewise, the duties of the council in a Borough include the following:

> a. The council shall be the legislative body of the municipality.
> b. The council may, subject to general law and the provisions of this act:
> 1. pass, adopt, amend and repeal any ordinance or, where permitted, any resolution for any purpose required for the government of the municipality or for the accomplishment of any public purpose for which the municipality is authorized to act under general law;
> [N.J.S.A. 40A:60-6.]

Neither the statute nor common law requires the governing body to "use … formal words and/or a formal motion to approve an application." DeMaria v. JEB Brook, LLC., 372 N.J. Super. 138, 149 (Law Div. 2003) (citing Allied Realty v. Upper Saddle River, 221 N.J. Super. 407 (App. Div. 1987)).

The power to zone is an exercise of the police power, and has been delegated to municipalities from the Legislature. Riggs v. Long Beach, 109 N.J. 601, 610 (1988) (citing Taxpayer Ass'n of

Weymouth Township v. Weymouth Township, 80 N.J. 6, 20 (1976)). In order to be valid, a zoning ordinance must meet certain criteria.

> First, the ordinance must advance one of the purposes of the Municipal Land Use Law as set forth in N.J.S.A. 40:55D-2. Second, the ordinance must be substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements, N.J.S.A. 40:55D-62, unless the requirements of that statute are otherwise satisfied. Third, the ordinance must comport with constitutional constraints on the zoning power, including those pertaining to due process, equal protection, and the prohibition against confiscation. Fourth, the ordinance must be adopted in accordance with statutory and municipal procedural requirements.
>
> [Id. at 611-612.]

To determine if an ordinance has a valid purpose, "[t]he question is not whether the ordinance will work in every circumstance, but whether there are conceivable circumstances under which the design features will advance" a purpose of the MLUL. Zilinsky v. Zoning Bd. of Adj., 105 N.J. 363, 368 (1987). In making this determination, a judge should consider "objective factors, such as … the context in which the ordinance was adopted." Riggs, 109 N.J. at 613 (citing Developments in the Law, 82 Harv.L.Rev. 1065, 1091 (1969)).

The MLUL was enacted to encourage municipalities to exercise its zoning power to advance many interests. Among those included in the statute is the purpose to "promote…the general welfare", which includes a constitutional and statutory requirement to provide for low and moderate income housing. N.J.S.A. 40:55D-2. See Holmdel Builders Ass'n v. Holmdel, 121 N.J. 550, 567 (1990). In fact, the Fair Housing Act, N.J.S.A. 52:27D-32 to -519, requires each municipality to adopt a master plan "designed to achieve the goal of access to affordable housing." N.J.S.A. 52:27D-310. More importantly, the statute "confers on a municipality a broad range of general powers," including the ability to adopt or revise ordinances, to provide a realistic opportunity for its fair share of low and moderate income housing. Holmdel Builders Ass'n, 121 N.J. at 567.

In Holmdel Builders Ass'n, the Court recognized that "unfettered non-residential development has exacerbated the need for lower-income housing and has generated widespread efforts to link such needed residential development to non-residential development." Id. at 563. The concept of linkage includes a plan to require developers to mitigate the effects of non-residential development by constructing affordable housing. Id. at 564 (citing A. Mallach, Inclusionary Housing Programs: Policies and Practices (1985)).

The second Riggs factor requires a finding that the ordinance "be substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements." N.J.S.A. 40:55D-62. "Substantially consistent" has been defined as a concept that "permits some inconsistency, provided it does not substantially or materially undermine or distort the basic provisions and objectives of the Master Plan." Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 384 (1995). While the MLUL provides for "an enhanced role for land use planning in the establishment of local zoning ordinances" the map associated with the land use element of the master plan is "not intended to serve as a lot-specific zoning ordinance to be rubber stamped by the governing body."[5] Victor Recchia Residential Const., Inc. v. Zoning Bd. of Adjustment of Twp. Of Cedar Grove, 338 N.J. Super. 242, 251 (App. Div. 2001) (citing Riggs, 109 N.J. at 623). Such an interpretation would render the governing body powerless to enact zoning laws. Id. at 251.

Finally, an ordinance must be based on an "adequate factual basis" to comport with constitutional restraints on the zoning power and its validity will be presumed in the absence of "proofs that preclude the possibility that there could have been any set of facts known to the

[5] See also N.J.S.A. 40:55D-26 to -64 requiring the governing body to refer a zoning ordinance to the planning board for review prior to adoption and requiring the planning board to submit a report to the governing body, including "identification of any provisions in the proposed development regulation, revision or amendment which are inconsistent with the master plan."

[governing] body or which could reasonably be assumed to have been known which would rationally support a conclusion that the enactment is in the public interest." Hutton Park Gardens v. Town Council of West Orange, 68 N.J. 543, 565 (1975). In support of a challenge, an objector "may rely on extrinsic evidence,"[6] including expert testimony, although expert analysis is not required if "grounded in facts and… analyzed in light of … the Master Plan." Riya Finnegan LLC v. Township Council of Twp. of South Brunswick, 197 N.J. 184, 193 (2008). However, it is important to note, the court's role in reviewing an ordinance is "tightly circumscribed" and the ordinance must be upheld "if any set of facts can reasonably be conceived to support it." Zilinsky, 105 N.J. at 368-69 (citing David v. Vesta Co., 45 N.J. 301, 315 (1965).

"'Spot zoning' is the use of the zoning power to benefit particular private interests rather than the collective interests of the community. It is zoning which disregards the requirement of N.J.S.A. 40:55-32 that regulation be accomplished in accordance with a comprehensive plan to promote the general welfare." Taxpayers Ass'n of Weymouth Twp., 80 N.J. 6, 18 (1976) (citing Palisades Properties, Inc. v. Brunetti, 44 N.J. 117, 134 (1965)). A plaintiff bears the burden of proving that an ordinance constitutes illegal 'spot zoning'.[7] The test is whether the zoning change in question is made with the:

> purpose or effect of establishing or furthering a comprehensive zoning scheme calculated to achieve the statutory objectives or whether it is "designed merely to relieve the lot of the burden of the restriction of the general regulation by reason of conditions alleged to cause such regulation to bear with particular harshness upon it."
>
> [Riya Finnegan LLC v. Twp. Council of Twp. of S. Brunswick, 197 N.J. 184, 195 (2008) (citing Cresskill v. Dumont, 15 N.J. 238, 249 (1954); Conlon v. Bd. of Pub. Works, 11 N.J. 363, 366 (1953)).]

[6] Riggs, 109 N.J. 611 (citing Bellington v. Township of East Windsor, 32 N.J. Super. 243, 248 (App. Div. 1961).

[7] Taxpayers Ass'n of Weymouth Twp, 71 N.J. at 262 (citing Ward v. Montgomery, 28 N.J. 529, 539 (1959)).

Because these issues are fact sensitive and involve a "challenge to the reasonableness of an ordinance," an evidentiary hearing is required and parties should be afforded an opportunity to present expert testimony relevant to a determination of its validity. Jennings v. Borough of Highlands, 418 N.J. Super. 405, 426 (App. Div. 2011) (citing Sartoga v. Borough of W. Paterson, 346 N.J. Super. 569, 579 (App. Div. 2002)).

V.

A.

As an initial matter, plaintiffs argue defendants had an obligation to notify the public "of the shortage of available seating" at Borough Hall. (Pl.'s Tr. Br. 55.) They also assert the OPMA was violated because defendants made provisions for the overflow crowd in a "sweltering firehouse—with sirens, revving engines and fumes [and] ran the risk of the entire hearing being disrupted by a fire call." (Pl.'s Tr. Br. 55.) Finally, they allege the governing body's decision to "entrust video-feed equipment to police officers clearly untrained in operating (and repairing) the same, was practically designed to preclude public access". Unfortunately, absent from plaintiffs' argument regarding the OPMA is any statutory reference or other legal authority to support their contentions. (Pl.'s Tr. Br. 56.)

There is no doubt that speech in public forums is afforded "[h]eightened protection." Bessler v. Board of Educ. Of West Windsor-Plainsboro Regional School Dist., 201 N.J. 544, 570 (2010). However, that speech is "subject to reasonable limitations" that must be "narrowly tailored to serve a significant government interest, and…leave open ample alternative channels for communication of the information". Id. (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

While plaintiffs correctly note the OPMA requires access to public meetings, nothing in the statute requires a public body to guarantee every citizen be seated at the meeting or be given a right to speak. In fact, a plain reading of the statute indicates the governing body is only required to "set aside

a portion of every meeting" for public participation, the length of which may be determined at their discretion. N.J.S.A. 10:4-12. This reasoning is consistent with the Court's recent holding in Kean Fed'n. Of Teachers v. Morell, which concluded "[t]he OPMA does not contain a requirement about the robustness of the discussion that must take place on a topic," provided that the public is able to witness the proceedings and is equipped with "a base of information on which they can express views" to any and all decision making bodies. 233 N.J. 566, 588 (2018).

While our courts have not encountered the specific issues presented in this case regarding the breadth of Sunshine Laws, other jurisdictions have concluded that public meetings laws, such as OPMA, do not require a public body to "accommodate all of the members of the public wishing to attend" a meeting. Wyse v. Rupp, 1995 Ohio App. LEXIS 4008 *13 (1995). More importantly, when public bodies go above and beyond their statutory requirements, failure to provide optimal conditions will not result in a statutory violation. Sovich v. Shaughnessy, 705 A.2d 942, 946 (1998).

In the present case, defendants have provided more than enough evidence to support their contention that the three (3) minute time limit was narrowly designed to further a government interest. With a large crowd expected, the OPMA permits the governing body to limit the time each resident has to comment. This restriction was presumably imposed to provide a voice for as many people as possible. There was no attempt to limit the substance of any comments, and no evidence the governing body sought to preclude the opinions of residents who disagreed with the ordinance. As a matter of fact, they went above and beyond to ensure residents were able to see and hear government at work. Not only did they provide seating for an overflow crowd, they made accommodations for residents to watch and comment on the proceedings in their homes, cars, or offices. The fact that the firehouse was warm and the Facebook Live feed was not perfect, should in no way detract from the governing body's efforts to include as many residents in the process as possible. Their efforts are not only noble and to be applauded, they were reasonable. When the meeting was held at the Memorial School, the seating was

insufficient and many residents could not hear. Nothing in the language or legislative history of OPMA indicates that the governing body was required to provide a seat and an opportunity to speak for all that wished to attend the meeting. As the Court in Kean concluded, the Legislature, not the courts should provide for requirements on the location of meetings or additional rights afforded to citizens if they are so inclined. Kean, 233 N.J. at 588.

B.

There should be little doubt that Ordinance 10-2016 advances the "general welfare" because it seeks to ensure the commercial viability of the Borough. In comments before the ordinance was adopted, the governing body's expert, Mr. Reinhart, noted that the ordinance was designed to make Eatontown more competitive by bringing vitality to the Mall. He observed the residential component was important to developers like EMM who were willing to invest in malls across the country. In addition, other residents that offered comments at the public meeting confirmed that many new retail developments, both in New Jersey and elsewhere, contain residential housing.

In Holmdel Builders Ass'n, the Court concluded affordable housing is a goal that is not "merely implicit in the notion of the general welfare…but expressly recognized as a governmental end and codified under the FHA, which is to be construed *in pari materia* with the MLUL". Holmdel Builders Ass'n, 121 N.J. at 567. The comments made by public officials and experts at both the planning board and council meetings underscore the importance of adopting the ordinance to meet the Borough's constitutional and statutory obligations to "provide a realistic opportunity for a fair share of the region's present and prospective low and moderate income housing need". (Bor. of Eatontown, Master Plan, at 124.) Specifically, at the Mayor's request, Mr. Bayer spoke about the affordable housing component of Ordinance 10-2016 and explained the plan was desirable because it satisfied a portion of the Borough's obligation by placing housing in "an existing developed property". (Bor. of Eatontown, Bor. Council Tr. (Regular Meeting), 20:15-24, Sept. 14, 2016.) He also opined that he hoped the Borough could help

resolve pending litigation involving "the Old Orchard site." (Id.) Finally, he stressed the higher density residential plan for rental units contemplated by the ordinance would yield "bonus credit" towards the Borough's fair share obligation. These comments constitute objective evidence that defendant satisfied the first prong of the Riggs test. They further support the idea that good planning links commercial development to the provision of affordable housing. Holmdel Builders Ass'n, 121 N.J. at 565. Plaintiffs have failed to offer any factual or expert evidence to support their argument that the ordinance does not support the general welfare.

C.

The overwhelming evidence in the record supports the conclusion that Ordinance 10-2016 is both "substantially consistent" with, and designed to "effectuate," the land use and housing plan elements of the master plan. Mr. Truscott's report reveals that a goal of the 2007 Master Plan is to "support the commercial and industrial attractiveness of the Borough by facilitating continuing viability of existing commercial development along Routes 35 and 36." He concluded that because the Master Plan does not "encourage nor prohibit a mixed use regional center[,]" Ordinance 10-2016 is not only consistent with a goal of the Master Plan, but it was specifically designed to effectuate that goal. The court notes that while Mr. Truscott's analysis may have been imprecise, his ultimate conclusion was based on adequate evidence in the record. See Riggs, 109 N.J. at 611 (requiring a comparison between the ordinance and the housing plan and land use elements, and not the general goals of the Master Plan).

As Mr. Truscott's report and testimony before the planning board revealed, the Master Plan and associated attachments consist of a voluminous array of documents. Interestingly, there are few references to the Mall that would provide clear guidance on the issues before the court. The "Background Information" to the Master Plan notes that until 1986, the "southwest quadrant" of the Borough "contained Monmouth Mall at the intersection of Routes 35 and 36."

The "Planning Board Deliberations" section highlights the Board's discussions on their examination of "remaining vacant lands" and "specific requests for changes in the land use plan element." It should be obvious the Mall was not located on vacant land at the time of the reexamination. Furthermore, it appears that no request to change the zoning was made at the time the Master Plan was adopted. A review of this section also reveals that land "across the street from Monmouth Mall" was discussed and the Board concluded that "Wyckoff Road was a proper dividing line between the commercial uses to the East and the residential areas to the West."

The Land Use Plan Element discusses "Business and Industrial Land Use" and provides little clarity on the meaning of "regional business" except to mention that the location of the zone is "exclusively to the South of Route 36 and to both sides of Route 35 extending in a westerly direction to front on Wyckoff Road." In addition, this section mentions that the Mall is the "type of regional self-contained business which is intended for these areas." Nothing in the Land Use Element suggests that a "self-contained business" should not include rental housing. On the contrary, an argument could be made that a self-contained business would provide housing suitable for employees and patrons of the Mall. This type of land use scheme could further the MLUL goal of providing "municipalities the flexibility to offer alternatives to traditional development … in order to concentrate development in areas where growth can best be accommodated and maximized while preserving agricultural lands, open space, and historic sites." N.J.S.A. 40:55D-2(p). In his comments at the council meeting, Mr. Bayer asserted that the Old Orchard site, the location of a golf course, was a less desirable location because the Mall was already developed.

A review of the Master Plan and the 2008 Amendment to the Housing Plan Element and Fair Share Plan reveals the Board acknowledged the Borough's obligation for affordable housing. (Bor. of Eatontown, Master Plan, at 124.) The Board also notes that the Borough may provide for its obligation "by means of any technique or combination of techniques which provide a realistic opportunity for the

provision of fair share." (Bor. of Eatontown, Master Plan, at 127.) The Housing Plan element further recognizes that in seeking to effectuate the goal of providing affordable housing, the Borough should consider the "lands of developers who have expressed a commitment to provide low and moderate income housing." (Bor. of Eatontown, Master Plan, at 127.) Finally, the 2008 Amendment to the Housing Plan Element highlights an economic development policy of fostering commercial development "along the Route 35 corridor and the Route 36 corridor." (C1 at 14.)

Nothing in the above referenced sections of the Master Plan supports a conclusion that residential development at the Mall property should be proscribed. At best, reference to the residential development west of Wyckoff could be considered "some inconsistency." However, plaintiffs failed to offer any evidence that this alleged inconsistency "substantially or materially undermine[s] or distort[s] the basic provisions and objectives of the Master plan," which supports both the viability of the Mall and construction of affordable housing in the Borough. The court also notes that plaintiffs failed to offer any expert evidence that the ordinance is inconsistent with the land use or housing plan elements. In the absence of same, or any compelling evidence to support their argument, the court must uphold the ordinance. See Zilinsky, 105 N.J. at 369.

D.

Plaintiffs have failed to prove that adoption of the ordinance constitutes spot zoning. They had an opportunity to offer expert testimony before the Board, Council and this court, and failed to do so. In addition, nothing in the record below, or the testimony or arguments offered before this court, supports plaintiffs' contention that the ordinance benefits only a private interest. On the contrary, the overwhelming evidence supports a finding that the ordinance was adopted to further a collective interest of the community, that being the provision of affordable housing. More importantly, the ordinance was adopted as part of a comprehensive plan to revitalize the commercial business zone.

E.

Plaintiffs' arguments regarding notice and the alleged "failure of the motion before the vote" are completely without merit and require little discussion. In the first instance, defendants assert that the "Borough did, in fact, send notice letters to all property owners located within 200 feet advising them of the introduction of the ordinance." Plaintiffs fail to provide any facts or evidence to dispute this fact. In addition, defendants note that they complied with N.J.S.A. 40:49-2 despite referring to the ordinance as "established" rather than "newly-established" in one part of the legal notice. They contend that the legal notice made it clear that the MURC was a new ordinance and note that the "actual text of Ordinance 10-2016 refers to the "newly-established" MURC zone." They reason that any reference to "established" in the notice was typographical and "de minimis" and this court agrees. In light of the opposition of the residents, there is no evidence that a single person misunderstood that what was proposed was a new ordinance. The issue was before the Council on at least two occasions and was the subject of many public hearings and discussions.

Finally, plaintiffs failed to cite facts or law to support their argument that the Mayor "dictated a vote by the Council." As defendants observed, two members of the Council moved and seconded the decision to consider Ordinance 10-2016 "out of order." In addition, two members of the Council moved and seconded the decision to "close the public hearing." More importantly, each member of the Council publically voted on Ordinance 10-2016. Neither the statute nor any authority cited by the parties indicates that the Mayor or Council was required to utter magic words to legitimize the formal action they obviously took.

VI.

For the reasons stated above, the complaint is dismissed.