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DONALD WHITEMAN, PATRICIA  
A. DOLOBACS, JUDITH A. ERDMAN  
and 282 other PETITION SIGNERS  
OF SOUTH SEASIDE PARK  
HOMEOWNERS & VOTERS  
ASSOCIATION,

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
OCEAN COUNTY

DOCKET NO.: OCN-L-2667-20

Plaintiffs,

VS.

CIVIL ACTION

**CERTIFICATION OF NICHOLAS R.**

**CARLSON IN SUPPORT OF PLAINTIFF'**

TOWNSHIP COUNCIL OF  
BERKELEY TOWNSHIP, TOWNSHIP  
OF BERKELEY, JOHN DOES 1-10,  
ABC CORPS. 1-10,

Defendants.

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**PLAINTIFFS’ TRIAL BRIEF**

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On the Brief

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## **PRELIMINARY STATEMENT**

Petitions for deannexation are seldom met with open arms by the host municipality. Regardless of any other factors, the unavoidable loss of ratables – and corresponding tax impact on remaining residents – is universally considered harmful from the municipality’s perspective. As such, were municipalities allowed to rule on deannexation petitions solely on the basis of tax implications to themselves, deannexation would never occur. This is not the intention of the State Legislature, which has provided a deannexation process guaranteeing to petitioners a fair and impartial hearing guided by principles of due process. As part of this process, many factors are to be weighed before a decision is made to consent to or deny deannexation: the financial and social detriment to petitioners if they are not allowed to deannex, the financial and social detriment to the host municipality if deannexation is granted, the distance and separation between the petitioners and the host municipality, and the level of social interaction and identification between petitioners and the host municipality as compared to other, closer municipalities that may have stronger social bonds with the petitioners. In short, host municipalities are forbidden from categorically denying deannexation petitions simply because deannexation must inherently cause a loss of ratables.

The cornerstone of a fair and impartial deannexation process is the independence and impartiality of the various participants. It is imperative that the local Planning Board, which is purely a neutral advisory body, is completely separate from the municipal Governing Body that makes the final decision to grant or deny deannexation. New Jersey’s deannexation statute, N.J.S.A. 40A:7-12 (the “deannexation statute”) requires the Planning Board to operate as an independent, impartial fact-finder that hears testimony, weighs evidence, and eventually provides

an unbiased report to the Governing Body on the impacts of deannexation and/or denial of deannexation. Again, the role of Planning Boards is *advisory only*; it is not to advocate on behalf of the host municipality, challenge facts or arguments of the petitioners, prepare witnesses or develop legal strategy for either party, or engage in adversarial conduct. A Planning Board's report to the Governing Body must contain objective analysis of the testimony and evidence presented to the board. The Governing Body must then review the Planning Board's report as part of its decision-making process.

In short, any failure by a Planning Board to be independent, impartial, unbiased, or objective in holding hearings on a deannexation petition or preparing a report for the Governing Body undeniably and irremediably taints the entire process and ensures that the petitioners will not receive the due process and fair hearing to which they are entitled under the deannexation statute and the State Constitution. See N.J. Const., ART 1 § 18 (“The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, *and to petition for redress of grievances.*”) (emphasis added); Jamgochian v. New Jersey State Parole Bd., 196 N.J. 222, 239 (2008) (New Jersey Supreme Court has “construed Article 1, Paragraph 1 to provide more due process protections than those afforded under the United States Constitution,” expressing confidence that “any remedy we prescribe [under the State Constitution] will be sufficient under the Federal Constitution” as well).

Here, since Petitioners first submitted their deannexation petition to the Township of Berkeley (“Berkeley Township”) on September 22, 2014, the Berkeley Township Planning Board (the “Planning Board”) has continually acted in concert with the Township itself, contrary to the deannexation statute. Evidence produced by Petitioners, as well as the plain text of the transcripts

of the Planning Board's hearings in this matter, conclusively prove that Planning Board members, as well as Planning Board attorneys and experts, coached witnesses for Berkeley Township, plotted legal strategy and rebuttal tactics for Berkeley Township, excluded, dismissed, or ignored crucial facts and case law, applied incorrect legal standards to Petitioners' claims, expressed opposition to deannexation, introduced their own facts and opinion when purportedly giving an impartial hearing to witness testimony, and improperly acted as advocates for Berkeley Township by conducting adversarial hearings rather than neutral fact-finding hearings. The Planning Board did not even attempt to hide this collusion with Berkeley Township, producing numerous written records documenting the various unlawful meetings, planning sessions, notes, and legal analysis engaged in and shared among Planning Board members, attorneys, witnesses, and Berkeley Township officials. This disdain for due process began right from the start, as the Planning Board – *on the first day of hearings* – voted to exclude testimony of the history of South Seaside Park, including crucially relevant history regarding how South Seaside Park came to be part of Berkeley Township rather than contiguous Seaside Park. Only one conclusion is possible from the vast evidence before the Court here. The Planning Board and Berkeley Township itself worked together to ensure that the deannexation process could only lead to one, predetermined result: denial of Petitioners' deannexation petition.

Worse, the Planning Board and the Township forced Petitioners to suffer through more than five (5) years of hearings and deliberations before issuing their biased, predetermined Resolutions denying deannexation. When compared to the timeline envisioned by the State Legislature (45 days for a planning board to issue a report on the impact of deannexation; 30 days for the Governing Body to issue a resolution based on the planning board's report, as per

N.J.S.A. 40A:7-12), or the timeline in similar deannexation cases (see, e.g., Bay Beach Way Realignment Comm., LLC v. Twp. Council of Toms River, No. A-5733-07 (App. Div. July 9, 2019), in which the court overturned the municipality's denial of deannexation less than two (2) years following the initial filing of the deannexation petition), Petitioners here have suffered an egregious delay of justice and have incurred significant legal fees because of this unnecessarily long process. The protracted nature of these proceedings has been entirely the fault of the Planning Board, which cancelled or postponed sixteen (16) hearings on this matter and waited nearly seven (7) months to issue a Resolution recommending denial of deannexation following a unanimous voice vote opposing deannexation, among other delays.

In light of the Planning Board's biased report, the many improprieties, delays, and significant misconduct in the Planning Board's handling of the hearings, and the substance of Petitioners' case for deannexation, it is requested that this Court find the denial of deannexation arbitrary, capricious, and unreasonable. This Court is further requested to order Berkeley Township to immediately consent to deannexation of South Seaside Park. The record is clear: South Seaside Park is too far away from mainland Berkeley Township, its residents' social and community lives are centered around other barrier island communities, its residents would save time and money in various ways by annexing to neighboring Seaside Park, and Berkeley Township would not suffer any permanent or irremediable loss of prestige, recreation, social diversity, or tax base. The Planning Board not only failed to reasonably consider these factors in its recommendations, it affirmatively worked to rig the process to produce the result it wanted: denial of deannexation.

This process was grossly inequitable and there is no remedy available other than immediately ordering Berkeley Township to consent to deannexation. Remand of this matter back to the Berkeley Township Planning Board for reconsideration is no remedy at all; it would only delay justice further. Petitioners must not be forced to waste any more time or money on additional hearings because of the Planning Board's mendacity. Instead, justice requires that Petitioners immediately be freed from Berkeley Township's biased, unfair decision denying deannexation and be allowed to move forward with their efforts to annex to Seaside Park.

### **BACKGROUND AND PROCEDURAL HISTORY**

This matter was initiated on September 22, 2014 – over seven (7) years ago – when Petitioners, residents and taxpayers residing in the South Seaside Park section of Berkeley Township, filed a Petition for Deannexation (the “deannexation petition”), pursuant to the deannexation statute, with the Township of Berkeley (“Berkeley Township”). See Exhibit A annexed to the Certification of Nicholas R. Carlson (“Carlson Cert.”). On or about October 6, 2014, Berkeley Township formally acknowledged receipt of the deannexation petition and forwarded it to the Berkeley Township Planning Board (the “Planning Board”), which is statutorily responsible for holding hearings regarding the petition and issuing a report to Berkeley Township on the impact of deannexation on the municipality. N.J.S.A. 40A:7-12.

The deannexation petition sought to have the South Seaside Park community deannexed from Berkeley Township and annexed to neighboring Seaside Park. South Seaside Park is a community located on the Barnegat Peninsula (also known as the “barrier island”) and completely separated from mainland Berkeley Township by Barnegat Bay and several other municipalities. South Seaside Park is bordered by the municipality of Seaside Park to the north,

and Island Beach State Park to the south. Petitioners submitted the deannexation petition because of longstanding concerns about the great distance between South Seaside Park and mainland Berkeley Township, related deficiencies in municipal services and improvements, travel concerns, economic detriments, and residents' proximity to and affinity for neighboring Seaside Park and other local barrier island communities rather than distant mainland Berkeley Township. Notably, the concerns motivating the 2014 deannexation petition are nearly identical to those expressed in an earlier deannexation petition filed by South Seaside Park residents in 1974. Deannexation Exhibit A-112.<sup>1</sup> In 1978, following deannexation hearings, Judge Mark Addison ("Judge Addison") ordered Berkeley Township to consent to deannexation of South Seaside Park. Ibid. However, the effort to annex South Seaside Park to neighboring Seaside Park failed when Seaside Park refused to consent to annexation, causing South Seaside Park to remain part of Berkeley Township despite the Court's deannexation Order.

The deannexation petition in this matter was created and circulated among South Seaside Park residents by the South Seaside Park Homeowners & Voters Association, a nonprofit organization of South Seaside Park residents organized to jointly pursue members' interests. The petition was signed by 285 of the 435 registered voters in South Seaside Park (approximately 66%), well above the 60% required by statute. See N.J.S.A. 40A:7-12. Notably, although the Planning Board, in its 2020 Resolution denying the deannexation petition, later expressed concern about the documentation of the value of real estate owned by Petitioners in the petition, the Planning Board and Berkeley Township accepted the petition as valid and complete in 2014

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<sup>1</sup> For purposes of clarity, exhibits introduced during Planning Board hearings in this matter will be cited in the form "Ex. A-63" while exhibits prepared specifically for this brief will be cited in the form "Carlson Cert., **Exhibit A.**"

and held no less than thirty-eight (38) hearings on the petition over the next five (5) years. Carlson Cert., **Exhibit B** at 3-5.

The deannexation statute provides that planning boards “shall, within 45 days of its receipt, report to the governing body on the impact of the annexation on the municipality” and that “[a]ction on a resolution to consent to or deny the annexation shall be taken within 30 days of the planning board’s report.” N.J.S.A. 40A:7-12. The New Jersey Legislature thus envisioned an efficient and speedy disposition of deannexation petitions. In the present matter, the parties determined that additional time would be needed to review all of the facts and agreed to devote at least two (2) hours of every Planning Board meeting to hearing testimony related to the deannexation petition. Carlson Cert., **Exhibit B** at 2. However, Petitioners still hoped to have a final decision on their deannexation petition within a reasonable time.

Unfortunately, testimony before the Planning Board lasted *nearly five (5) years*, being held between January 8, 2015 and November 25, 2019. Even then, the matter was not forwarded to the Berkeley Township Council until August 6, 2020, when the Planning Board finally adopted a Resolution recommending denial of the deannexation petition. Carlson Cert., **Exhibit B** at 1. During these hearings, the Planning Board reviewed exhibits and evidence and heard testimony from nine (9) signatories of the deannexation petition, numerous members of the general public residing in South Seaside Park who supported deannexation, and various Berkeley Township employees, officials, and experts. *Id.* at 3-4. Further, the following experts on behalf of Petitioners submitted written reports on the effects of deannexation and testified before the Planning Board in support of deannexation:

- Scott Bauman, P.P., AICP (“Mr. Bauman”);

- Kenneth Moore, CPA, RMA, CMFO, CFP (“Mr. Moore”); and
- Barbara Allen Woolley-Dillon, P.P., AICP (“Ms. Woolley-Dillon”).

Finally, the Planning Board retained the services of Stuart B. Wiser, P.P., and James Oris, P.E., P.P., both of Remington & Vernick Engineers (“R&V”), as well as Stan Slachetka, P.P., AICP, of T&M Associates (“T&M”) to participate in the hearings, cross-examine witnesses, testify on behalf of Berkeley Township, and prepare a report of findings based on the hearings for the Planning Board to use in creating the Resolution. Ibid. During the hearings, the Planning Board was represented by Gregory P. McGuckin, Planning Board Attorney, as well as Mr. McGuckin’s partner, Christopher K. Koutsouris.

Throughout the hearings, the members of the Planning Board, Mr. McGuckin, Mr. Wiser, and other Berkeley Township representatives were adversarial and argumentative in their questioning of witnesses supporting deannexation. Rather than acting as a neutral and impartial fact-finding body responsible for producing unbiased findings of the impact of deannexation, the Planning Board was transparently opposed to and dismissive of Petitioners’ case for deannexation. Notably, Mr. Wiser, Mr. Oris, Mr. McGuckin, and others routinely met with Berkeley Township witnesses and officials to coach them on strategy, develop rebuttals to the testimony and exhibits of Petitioners and Petitioners’ experts, provide written notes and generally ensure that all persons on the Berkeley Township “team” were coordinated in their efforts to resist deannexation. See, e.g., Ex. A-63, A-71, A-91, A-79, A-90, and A-69, among many others discussed in depth below. Again, the deannexation statute empowers planning boards to operate as impartial fact-finders, not as advocates on behalf of a municipality facing possible deannexation of a particular community. See also Citizens for Strathmere & Whale Beach v.



Township Committee of the Township of Upper, No. L-0432-09 at \*4-5 (Law Div. October 25, 2010) (holding that deannexation statute provides for “separate and independent functions of a planning board and a governing body” in order to create an “unbiased record.”). Petitioners’ counsel objected many times to the Planning Board’s lack of impartiality, but such objections fell on deaf ears.

On May 2, 2019, Mr. Wisner and Mr. Oris submitted to the Planning Board their Report of Findings (the “Wisner Report”) regarding the deannexation petition and the hearings before the Planning Board. Carlson Cert., **Exhibit C**. Notably, Mr. Oris and Mr. Wisner were not independent, unbiased parties, but were working on behalf of Berkeley Township *at the same time they were retained by the Planning Board*. Mr. Oris was the Berkeley Township Planner during the hearing on this matter, and Mr. Wisner works with Mr. Oris at R&V. Mr. Oris and Mr. Wisner were thus retained by the Planning Board to “coordinate the gathering of information and to assist the Board in processing such information” while they and their firm were employed by the Township itself. Carlson Cert., **Exhibit B** at 4. As noted above, Mr. Wisner also participated in the Planning Board hearings as both an expert witness in opposition to deannexation and a cross-examiner of Petitioners’ witnesses in support of deannexation. The Planning Board itself acknowledged this lack of impartiality in its Resolution, admitting that it retained the “*Township’s Planner*” to help prepare the Board’s own “independent” recommendations to the Berkeley Township Council. Carlson Cert., **Exhibit B** at 4. As such, the Planning Board unsurprisingly found that the Wisner Report “specifically prepared as a result of the Board determining to utilize the services of Mr. Wisner, accurately portrays the testimony and exhibits presented.” Ibid. The Planning Board thus based its “independent” Resolution recommending

denial of the deannexation petition on a Report prepared by biased representatives of Berkeley Township itself. In other words, one side in this adversarial dispute was allowed to contribute to the final decision in its own favor.

The Wisser Report ultimately concluded that, “while Petitioners may experience inconvenience and frustration in being part of Berkeley Township, they do not suffer the kind of ‘long term, structural and inherently irremediable detriment’ that the Legislature had in mind when it adopted the deannexation statute. Conversely, deannexation will work a ‘long term, structural and inherently irremediable detriment’ to the remaining residents of Berkeley Township.” Carlson Cert., **Exhibit C** at 399. On August 6, 2020 – approximately nine (9) months after hearings ended – the Planning Board issued its Resolution recommending denial of the deannexation petition. The Resolution contained substantially the same conclusions as the Wisser Report. Carlson Cert., **Exhibit B** at 15-16.

Specifically, the Board “agrees that the distance existing between South Seaside Park and mainland Berkeley Township by public roadway is considerable” and that the distance weighed in favor of deannexation. Carlson Cert., **Exhibit B** at 8. The Board, however, qualified this finding by noting that the Petitioners freely chose to purchase homes knowing South Seaside Park was far away from mainland Berkeley Township. Ibid. Notably, whether or not Petitioners were aware of any negative aspects of living in a particular municipality at the time they purchased their homes is not a relevant factor under the deannexation statute or deannexation case law. The Planning Board, then, admitted that refusal to consent to deannexation would harm Petitioners but arbitrarily blamed Petitioners for this harm rather than considering it objectively.

The Planning Board further noted that Petitioners had valid beliefs about their needs being neglected by Berkeley Township, poor service from the Department of Public Works, and the lack of public services and facilities in South Seaside Park. Carlson Cert., **Exhibit B** at 6-10. The Board, however, argued that “the petition has succeeded in raising these issues with the Township and this is a benefit of the process utilized herein.” *Ibid.* Essentially, the Planning Board unilaterally changed the purpose of the deannexation petition process to the benefit of Berkeley Township. Nowhere does the deannexation statute say that filing a deannexation petition is a means of effecting change by a municipality or that action taken by a municipality *after* filing of a petition should be considered when determining the impact of deannexation and/or failure to consent to deannexation. The Planning Board thus unreasonably and arbitrarily allowed Berkeley Township – in the middle of the deannexation process – to take minor cosmetic action to conceal years of neglect and detriment documented and acknowledged during the hearings.

The Planning Board further found that there was “merit to petitioners’ claims that they identify more with a neighboring municipality” but concluded that Petitioners’ dominant social interaction with neighboring barrier island communities would remain the same regardless of whether deannexation was achieved. Carlson Cert., **Exhibit B** at 8-9. In other words, the Planning Board determined that Petitioners’ community identification and social nexus with nearby barrier island communities was irrelevant as long as Berkeley Township did not hinder these social activities. This finding by the Planning Board was contrary to relevant case law and thus arbitrary, capricious, and unreasonable. *See, e.g., West Point Island Civic Ass’n. v. Township Comm. Of Dover Tp.*, 54 N.J. 339, 350 (1969) (ordering deannexation when

petitioners “naturally look to the contiguous Borough of Lavallette as the focus of community interest and activity” regardless of whether Lavallette would remain the focus of petitioners’ community interest and activity if deannexation were denied).

The Planning Board – like the Wisser Report – further found that tax savings were the primary motivations of Petitioners despite a lack of any testimony to such motivations, that municipal and emergency services provided by Berkeley Township to South Seaside Park were sufficient, that the loss of South Seaside Park would cause harm to Berkeley Township’s social diversity, economic diversity, and prestige, and that deannexation would irremediably and permanently cause “catastrophic” economic damage to Berkeley Township and its remaining taxpayers because of the loss of ratables. Carlson Cert., **Exhibit B** at 9-16. Notably, these conclusions by the Planning Board were based on the biased Wisser Report and were directly contradicted by the testimony of witnesses for Petitioners as well as Berkeley Township’s own witnesses. See, e.g., T. 3/1/18, 97:15-98:23; Ex. A-93 (showing Berkeley Township tax levy fluctuating between a .2% decrease and a 7.6% increase each year between 2010 and 2018, contradicting the finding that economic harm caused by alleged 3.1% tax increase<sup>2</sup> would be “catastrophic” and irremediable).

On September 21, 2020, the Berkeley Township Council, acting on the recommendations of the Planning Board in its August 6, 2020 Resolution, denied Petitioners’ deannexation petition. Carlson Cert., **Exhibit D**. On November 10, 2020, Petitioners filed a Complaint in Lieu

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<sup>2</sup> The Planning Board’s 2020 Resolution alleges that deannexation would cause a 3.1% rise in taxes for the average remaining Berkeley Township resident. However, as discussed in more detail below, the true tax increase to Berkeley Township residents would likely be far less. However, the 3.1% figure in the Resolution is used here to illustrate that even using the Planning Board’s self-serving numbers, the impact would be minor and remediable given the significantly greater fluctuations of Berkeley Township’s year-to-year tax rates and the Planning Board was unreasonable in its characterization of the economic harm as “catastrophic.”

of Prerogative Writs with the Superior Court seeking an Order declaring the Berkeley Township Council and Planning Board to have violated Petitioners' right to petition and right to due process, declaring the denial of the deannexation petition to have been arbitrary, capricious, and unreasonable, and ordering Berkeley Township to consent to the deannexation of South Seaside Park. A trial scheduling conference in this matter is presently scheduled for February 7, 2022, at 10:00 a.m.

### **STANDARD OF REVIEW**

It is well established that municipal actions are to be given the presumption of validity. Ward v. Montgomery Tp., 28 N.J. 529, 539 (1959); Quick Chek Food Stores v. Springfield Tp., 83 N.J. 438, 447 (1980). The law presumes that municipal governing bodies will act fairly, with proper motives and for valid reasons. Kramer v. Sea Girt Bd. Of Adj., 45 N.J. 268, 296 (1965). This presumption extends to all municipal enactments, but may be overcome by a showing of arbitrariness or unreasonableness. Dock Watch Hollow Quarry Pit v. Warren Tp., 142 N.J. Super. 103, 116 (App. Div. 1976), *aff'd*, 74 N.J. 312, 377 (1977); Hutton Park Gardens v. West Orange Town Council, 68 N.J. 543, 564 (1975); Riggs v. Long Beach Tp., 109 N.J. 601, 611 (1988).

A decision by a New Jersey township to deny a petition for deannexation is one such municipal action subject to judicial review for arbitrariness, capriciousness, or unreasonableness. "In giving or withholding consent to deannexation, governing bodies have traditionally been afforded discretion, but discretion nonetheless subject to judicial review." Avalon Manor Improvement Ass'n., Inc. v. Township Comm. Of Dover Tp., 54 N.J. 339, 347-48 (1969). A Township's exercise of discretion in denying a deannexation petition is "subject to review under the standard principles of arbitrariness or unreasonableness." Russell v. Stafford Tp., 261 N.J.

Super. 43, 48 (Law Div. 1992). Similarly, actions by local municipal bodies should be reversed if they are “arbitrary, capricious or unreasonable. ‘Arbitrary and capricious’ is typically understood to mean ‘willful and unreasoning action, without consideration and in disregard of circumstances.’” Avalon Manor Improvement Ass’n, Inc. v. Township of Middle, 370 N.J. Super. 73, 91 (App. Div. 2004).

The New Jersey statutory scheme governing petitions for deannexation explicitly provides standards for judicial review of a denial of a deannexation petition and sets forth the burden of proof for the petitioners to overturn a denial:

In any judicial review of the refusal of the governing body of the municipality in which the land is located or the governing body of the municipality to which annexation is sought to consent to the annexation, the petitioners have the burden of establishing that the refusal to consent to the petition was arbitrary or unreasonable, that refusal to consent to the annexation is detrimental to the economic and social well-being of a majority of the residents of the affected land, and that the annexation will not cause a significant injury to the well-being of the municipality in which the land is located.

[N.J.S.A. 40A:7-12.1.]

Here, then, there are three questions for the Court to decide. First and foremost, the Court must determine whether Petitioners have shown that Berkeley Township’s denial of their deannexation petition was arbitrary, capricious, unreasonable, or willfully lacking in due consideration and in disregard of circumstances. Second, the Court must determine whether Petitioners have shown that the denial of their petition is detrimental to the economic and social well-being of a majority of South Seaside Park residents. Finally, the Court must determine whether Petitioners have shown that deannexation will not cause significant injury to the well-

being of Berkeley Township as a whole. Plaintiffs have more than met their burden for all three of these questions.

## **ARGUMENT**

### **I. THE DECISION OF THE BERKELEY TOWNSHIP COUNCIL AND THE BERKELEY TOWNSHIP PLANNING BOARD TO DENY PETITIONERS' DEANNEXATION PETITION WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE.**

Although the decision of a municipal body to grant or deny a deannexation petition is an exercise of discretion that is to be given deference by courts, the municipal body's decision must not be arbitrary, capricious, or unreasonable. A municipality's exercise of discretion is "subject to review under the standard principles of arbitrariness or unreasonableness." Russell, 261 N.J. at 48. "Local action" will be reversed if it is "arbitrary, capricious or unreasonable." Kramer v. Board of Adj. of Sea Girt, 45 N.J. 268, 296 (1965). The New Jersey Supreme Court has held that "[a]rbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances." Worthington v. Fauver, 88 N.J. 183, 204-05 (1982).

Further, New Jersey courts have made it clear that evidence of bias, prejudice, or collusion by a municipal body when discharging its duties rises to the level of arbitrariness, capriciousness, and unreasonableness and will justify overturning the body's action. For example, in In re the Township of East Brunswick, Hidden Oaks Woods, LLC, v. Township of East Brunswick, No. A-3115-19, A-3125-19 (App. Div. July 30, 2021), the Appellate Division affirmed the trial court's reversal of a local planning board's denial of a site plan application because "[t]he Planning Board's decision was not entitled to any deference

because its action was clearly arbitrary, capricious, and unreasonable.” Id. at \*5. In reaching this decision, the court explicitly noted the prejudicial effect of numerous public comments by the Mayor of East Brunswick against the applicants, all made while the Mayor was participation in Planning Board hearings:

In rejecting the Planning Board's decision, the trial judge initially expressed that that the entire process was irreparably tainted by Cohen's statements “evidenc[ing] a clear bias against [plaintiff's] [a]pplication and appear[ing] intended to undermine the current zoning of [its] property and, for that matter, the 2016 HEFSP overall.” The judge added: Mayor Cohen's public comments about the [complex's] property, [plaintiff's] proposed project, and the sites included in the Township's 2016 HEFSP clearly demonstrated his pre-judgment of, and bias against, [plaintiff's] [a]pplication . . .” [ . . .] The time-line speaks volumes as to bias and irreparable taint against the application exhibited by the [ P l a n n i n g ] B o a r d a n d i t s m e m b e r s a n d t h e resultant arbitrariness, capriciousness and unreasonableness of the . . .denial of [plaintiff's] application.

Id. at \*3-4.

Similarly, in Lackland And Lackland v. Readington Tp., No. A-2190-05 (App. Div. February 26, 2008), the Appellate Division affirmed the trial court’s finding that a local Board of Health acted in an “arbitrary, capricious, and unreasonable” manner by accepting and adopting the biased and prejudicial advocacy of a Board member (Ms. Allen) rather than acting as an “independent and impartial decision maker.” Id. at \*14-15. The court found that Ms. Allen “induced the Board of Health, as its *de facto* leader, to derail Wilmark's septic suitability applications by imposing progressively more stringent requirements and acting personally as an advocate instead of an independent and impartial decision maker.” Id. at \*14. The court further noted that Ms. Allen “viewed herself as an opponent of the Wilmark application rather than as an impartial member of the Board of Health that was to rule fairly upon the application,” “offered



her personal assistance from the Board's records” to those “who shared her agenda,” “viewed herself as ‘on the other side of’ developers such as Mr. Hartman and Wilmark,” “was ‘fighting’ their applications rather than evaluating them impartially,” and “found alleged ‘conflicting information in the Board’s historical files and her own memory” rather than simply evaluating the testimony given to the Board. Ibid.

The court wrote that Ms. Allen “should have disqualified herself from the matter as a member of the Board” if she wished to advocate for one side over the other, and ultimately held that her “biased conduct as a member of the Board of Health, and the Board's acceptance and adoption of her advocacy, was arbitrary, capricious, and unreasonable.” Notably, the Appellate Division also affirmed the trial court’s order enjoining Ms. Allen from participating in any Board of Health or Planning Board actions regarding the property at issue in Lackland. Id. at \*15. In short, the court was so concerned with maintaining the independence and impartiality of municipal bodies that it wholly barred the participation of those who may bring biases, prejudices, or personal opinions to bear on any given decision.

In the present matter, the record clearly shows that Berkeley Township’s denial of Petitioners deannexation petition was arbitrary, capricious, and unreasonable in two ways: it was the result of willful prejudice, bias, and collusion against Petitioners, and it was a decision made without reasonably considering and understanding relevant evidence, testimony, and law.

**A. The Berkeley Township Planning Board Engaged in Numerous Acts Demonstrating Prejudice, Bias, and Collusion Against Petitioners.**

In the context of a denial of a petition for deannexation, “arbitrary, capricious, and unreasonable” action by a municipal body can take several forms. As noted above, the most grievous form of arbitrary, capricious, and unreasonable conduct occurs when a municipal body

engages in blatantly prejudicial and biased actions showing that it is attempting to “put its thumbs on the scale” in favor of denying deannexation or that it essentially made up its mind ahead of time and had no intention of giving the petitioners a fair hearing.

For example, in Strathmere, No. L-0432-09 at \*4-5, the court denied the Upper Township Planning Board’s request to have Upper Township, through special counsel, participate in Planning Board hearings on Plaintiff’s deannexation petition and cross-examine witnesses. Such action would blatantly violate the provisions of the deannexation statute and would represent an effort by the municipal government to collude against the petitioners and make denial of the deannexation petition a *fait accompli*. As the Strathmere court wrote:

[m]aintaining the separate and independent functions of a planning board and a governing body, as provided for by the current Annexation Statute, allows for a better, as well as unbiased, record than if the entities were to commingle their functions; and a complete and thorough record is essential in the event that a governing body’s decision is appealed. The planning board, *independently* applying its expertise, has the opportunity to weigh in *before* the governing body renders its decision.

Id. at \*62-63 (emphasis added).

The above examples of clearly biased and prejudicial conduct can be contrasted by the conduct of the Middle Township Committee in Avalon Manor v. Middle Tp., 370 N.J. Super.at 98, which “consider[ed] relevant and appropriate factors” in denying a petition for deannexation. Notably, the Avalon court found that, although the Middle Township mayor stated at a Township meeting that he would “never cut [the Avalon Manor section of Middle Township] off and give it to Avalon,” this outburst was the only comment showing bias or prejudice to the petitioners and was “isolated and inconsequential in the context of this comprehensive process.” Id. at 99. In short courts may forgive a single biased comment by a member of the municipal body denying a

deannexation petition as long as it is an isolated incident without any further actions reflecting or effectuating such bias.

In the present matter, however, the record shows that Berkeley Township and its Planning Board engaged in countless actions showing a lack of independence and impartiality, an adversarial stance against Petitioners, significant bias and prejudice against Petitioners, and a predetermined outcome utterly detached from any reasonable consideration of the evidence presented to them.

**1. Berkeley Township and the Planning Board Routinely Coached Witnesses, Colluded, and Encouraged Conflicts of Interest to Ensure the Predetermined Results They Wanted.**

Berkeley Township did not merely erase the lines between the purely advisory Planning Board and the municipality itself, and did not merely treat Petitioners as adversaries to defeat rather than applicants entitled to fair, open-minded consideration. The evidence shows that Berkeley Township and the Planning Board, through their representatives and agents, also actively worked to coach witnesses and collude among their various bodies and members to ensure that each person participating in the process advanced the predetermined goal of denying deannexation.

For example, evidence was presented showing that Ernest Peters, Planning Board Engineer with Remington & Vernick Engineers, reviewed transcripts of hearings in this matter with numerous witnesses and members of the Berkeley Township government. Under the project description “Berkeley/S.Seaside Park Deannexation,” Mr. Peters billed 2.5 hours to “prepare for & attend mtg w/business administrator & dept. heads re: transcript review” and 1.0 hours to “review previous transcripts w/police chief.” Ex. A-63. Notably, Remington & Vernick Engineers

is the firm of Mr. Wisner, the Planning Board's own expert. In other words, the testimony before the Planning Board by Police Chief Karin DiMichele, Business Administrator John Camera, and other Berkeley Township representatives was not purely independent but was coached by Planning Board professionals working against Petitioners.

Similarly, evidence shows that Mr. Wisner, a professional specially retained by the Planning Board, himself reviewed transcripts of hearings in this matter and provided his own commentary and analysis in the margins. Ex. A-64, A-65, A-71. Evidence further shows that Mr. Wisner's commentaries were sent to and used by Berkeley Township witnesses before the Planning Board, including Chief DiMichele, Mr. Ebenau, and Mr. Camera. Ex. A-91. Throughout these annotated transcripts, Mr. Wisner provides rebuttals to other testimony (without Petitioners' ability to cross-examine his comments) and suggests strategies for how the Planning Board should proceed in questioning witnesses and collecting facts supporting denial of deannexation. At several points, Mr. Wisner quotes a witness in his commentary and replies "BS," revealing that he was giving the Planning Board and Berkeley Township officials and witnesses egregiously biased and contentious opinions. See, e.g., Ex. A-71 at 46.<sup>3</sup> Finally, Mr. Wisner routinely uses the word "we" when offering advice on strategy, demonstrating that he viewed himself in his capacity as an expert, the Planning Board, and Berkeley Township as all being on the same side in this matter rather than as three separate entities playing three independent roles as required in the deannexation process. True and accurate copies of nine (9) representative pages from Mr.

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<sup>3</sup> Notably, copies of Mr. Wisner's annotated transcripts were sent to Petitioners' attorney Joseph Michelini by mistake, further demonstrating that Mr. Wisner, the Planning Board, and Berkeley Township were openly distributing these transcripts with the intent of collusion, and that Mr. Wisner was not merely taking notes for his own use. Further, Petitioners' counsel represents that Mr. Wisner's office immediately called asking to retrieve the annotated transcripts, demonstrating that they knew the transcripts were damaging and showed bias and collusion.

Wiser's annotated transcripts are reproduced below, although it must be noted that Mr. Wiser produced 62 pages of annotated transcripts that Petitioners are aware of.<sup>4</sup>

Under cross-examination, Mr. Wiser admitted that he prepared these annotated transcripts to "facilitate their review;" that he "coordinated with the Township witnesses;" that he made "editorial comments;" and that "[w]hat I did was to coordinate for the various township officers or officials or representatives." T. 10/3/19, 50:3-55:14. Evidence also shows that Mr. Wiser engaged in email correspondence with witnesses and Berkeley Township officials in which he discussed testimony, exhibits, and "Deannexation Questions" from the Planning Board hearings. Ex. A-69.

Again, Mr. Wiser was an expert on behalf of the Planning Board and was most certainly not a member of the municipal government. The only credible purpose for having Mr. Wiser's analysis and commentary on the hearings widely distributed to other witnesses, members of the Planning Board and Township officials was to prepare other witnesses and/or to inappropriately aid and abet Berkeley Township and the Planning Board in reaching their predetermined conclusion, especially when viewed in conjunction with Remington & Vernick's meetings with Berkeley Township officials. Either way, this evidence irredeemably taints the testimony against deannexation and the Planning Board's ultimate decision to recommend denial of the annexation petition. One must only imagine the key witness in a murder trial providing his own written commentary to the trial transcript and holding off-the-record meetings with the judge and jury to understand how brazen Mr. Wiser's conduct was and how much it violated basic tenets of fairness and due process. A guilty verdict in the aforementioned hypothetical would never hold

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<sup>4</sup> The column "SW COMMENT" contains Stuart Wiser's commentary on the testimony of Petitioners' witnesses.

up under appeal; neither should the denial of deannexation under the circumstances shown by the record here.

Members of the Planning Board and the Berkeley Township governing body also held joint meetings with each other and with witnesses to discuss this matter. Ex. A-79; A-90. Notably, one of these meetings – attended by Berkeley Township Business Administrator John Camera, Planning Board Attorney Greg McGuckin, Berkeley Township witnesses Stuart Wiser and Frederick Ebenau, and other Berkeley Township officials – was titled “Deannexation meeting” and took place at 5:00 p.m. on March 31, 2016, one hour before a Planning Board hearing on this very matter. Such joint, collaborative action between these two bodies clearly reveals improper collusion among supposedly “independent” municipal bodies and witnesses and violates the deannexation statute and the directives of reviewing courts. See, e.g., Strathmere, No. L-0432-09 at \*63, in which Assignment Judge Valerie Armstrong wrote that, “the Planning Board does not decide the ultimate issue. Rather, it conducts fact-finding, gathers information, and informs the Committee as to how the deannexation will impact the Township.” Judge Armstrong further noted that, “[m]aintaining the separate and independent functions of a planning board and a governing body, as provided for by the current Annexation Statute, allows for a better, as well as unbiased, record than if the entities were to commingle their functions.” Id. at \*62-63 (internal citations omitted). Notably, Mr. Wiser admitted being familiar with Judge Armstrong’s decision and agreed that he “and other professionals of this Planning Board” must be independent of Berkeley Township’s governing body and must avoid any “appearance of impropriety and bias.” T. 10/3/19, 41:9-42:10.

Although the impropriety of these meetings is readily apparent simply from their occurrence and the individuals present, further evidence makes clear their collusive purpose. On April 10, 2015 – ***only four (4) months into the Planning Board hearings*** – Christopher Reid, then-Administrator of Berkeley Township, sent an email to Mr. McGuckin, Mr. Wiser, Mr. Slachetka, Mr. Oris, Berkeley Township Mayor Carmen F. Amato, Jr., Mr. Ebenau, Chief DiMichele, and various Berkeley Township Council members. Ex. A-79. In this email, Mr. Reid wrote the following:

Thank you for the courtesy of your time during our most recent conversations. As you are aware the deannexation of SSSP is a critical issue to the twp. Please plan a meeting to identify the material issues, review the completed hearings, and create a strategy for the twp portion of the hearing, ***including but not limited to, material items to refute from applicant testimony, documentation required, priority of testimony/witnesses for twp.***

[Ibid.].

To put a finer point on it, Mr. Reid’s email reveals explicit collusion and concerted action in opposition to Petitioners by members and representatives of Berkeley Township, the Planning Board, and witnesses. Mr. Reid goes so far as to specifically ask these supposedly “independent” and “impartial” individuals to hold joint meetings to create strategies for refuting Petitioners’ testimony, evidence, and experts. It is difficult to imagine a more blatant and willful violation of the “separate and independent functions of a planning board and a governing body” noted by Judge Armstrong and required by the deannexation statute. Mr. Reid’s email leaves no doubt that all of the improper meetings, advice, and transcript reviews engaged in by the Township, the Planning Board, and their witnesses cannot have had any innocent purpose but were openly

intended to ensure Petitioners' defeat right from the start without giving fair consideration to Petitioners' case.

Petitioners have conclusively shown that Berkeley Township did not scrupulously maintain the separate and independent function of its Planning Board and governing body, as required by law, but rather had members of both entities – as well as their attorneys and witnesses – meet together to discuss this matter prior to issuing recommendations and decisions. Further, the evidence compels the conclusion that the participants at such meetings were coordinating their analysis of and response to the hearings in order to ensure their desired result. Witnesses at the Planning Board hearings admitted as much under cross-examination. Mr. Wisner, when confronted with Mr. Reid's email, admitted that it invited people from Berkeley Township "to assist the Township to refute the testimony of the Petitioners" and that it showed bias in his mind. T. 10/3/19, 43:23-46:11. Excerpted below are relevant portions of pages 42-49 of the transcript from the October 3, 2019, Planning Board hearing in this matter:<sup>5</sup>

Q. What is A-79?

A. It is an e-mail from Christopher Reid, who was the Administrator for the Township at the time. This is dated April 2015.

Q. And who was it sent to?

A. It was sent to Mr. McGuckin, myself, Rodney Haines, who is the – I guess was the auditor – Township's auditor at the time. Jim would be – there's a couple of Jims here. I don't know – I'm going to assume it's Jim Oris. And Stan Slachetka.

Q. Okay. And several of those people are involved in the de-annexation matter, are they not?

A. I think they all were.

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<sup>5</sup> The Court is asked to note that "Q." refers to Petitioners' counsel Joseph Michelini and "A." refers to Mr. Wisner. See T. 10/3/19, 3:2-5.



Q. And it was copied to several other people. Mayor Amato of the Township. Fred Ebenau, CFO of the Township. Karin DiMichele, Chief of Police for the Township. John Bacchione who sits here as a council member. Judy Noonan. Who is she? Is she on the council?

A. I believe she is a councilperson.

Q. Sophia Gingrich. That would be Mr. Gingrich's wife. I believe she's on the council, too.

A. I really don't know.

Q. You don't know? Jim Byrnes, Tom Gross, Angelo Guadagno, and Anthony DePaola. Anthony DePaola was the Chairman of the Planning Board.

A. He was the Board Chair at the very beginning, if I remember correctly.

Q. Right. And this was the very beginning, correct?

A. Yeah.

Q. Okay. And this e-mail said: "Greg, Stuart, Rodney, Jim, and Stan, thank you for the courtesy of your time during our most recent conversations. Right? Says that. As you are aware, the de-annexation of South Seaside Park is a critical issue to the Township. Please plan a meeting to identify the material issues, review the completed hearings, and create a strategy for the Township portion of the meeting, including but not limited to, *material items to refute from Applicant testimony*, documentation required, priority of testimony, and witnesses for the Township. Thank you."

Did I read that correctly?

A. You did.

Q. So that is a – referencing a meeting to do all those things, inviting several people from the Township and people – or copying at least several people from the Township – *to assist the Township to refute the testimony of the Petitioners*; correct?

A. *It is what that e-mail says.*

Q. Okay, that certainly does [not] seem like it's unbiased<sup>6</sup> and that the separate and independent functions of the planning board and the governing body, which the statute allows for an un – a better and unbiased record – it doesn't seem to fit that. Does it?

A. That particular e-mail does not.

Q. *In fact, that e-mail would show bias, would it not, in your mind?*

A. *Probably. Yeah.*

Q. And so you did have that meeting.

A. I attended a meeting.

Q. Okay. Was it the meeting that's referenced there?

A. If it wasn't this meeting – I'm sure it was. I – there were two meetings that were project coordination meetings that happened very early in the process that I was in. I'm going to assume this is one of them.

Q. And did you keep notes from that meeting?

A. No.

Q. And that meeting certainly was outside the record; correct?

A. Correct.

Q. And I – you never notified me of that meeting; correct?

A. I never notified you of any meetings.

Q. That's right. And then after you got that, did you care to write an e-mail or a letter or a text or anything that said, "hey, this shouldn't be. We shouldn't have people from the Township getting together with professionals from the Planning Board because their roles in the de-annexation process – I know. I've done it two times before – should be separate and unbiased." Did you write a text, a letter, any kind of written communication to that effect?

A. There would have – I did not do a written communication. No.

[ . . . ]

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<sup>6</sup> The word [not] has been added to the transcript here, as a transcription error left it out of the transcript received by Petitioners' counsel.

Q. So you assisted the Township in trying to determine who would be best advised to come and give testimony to address the issues that the Petitioners had testified to so they could be refuted; is that correct?

A. No. To address the issues.

Q. Well, the issues at that point had only been raised by the Petitioners in April of 2015.

A. Yes. Right. Whether –

Q. So it would be the issues that the Petitioners raised; correct?

A. This was to *coordinate the Township's response* and the Township's testimony related to the issues raised by the Petitioners to the – *for the Board*.

Q. Right. And you didn't tell any of us about that; correct? Did you object at the meeting and say, "gee, this shouldn't be. There's a potential for bias and a lack of independence as the case law talks about?"

A. There were four attorneys in that meeting.

Q. So you expected them to raise it?

A. I – *if there was anything improper, I'm sure one of the four attorneys would have raised the issue.*

Q. Who were the four attorneys?

A. Mr. Reid. Mr. McGuckin. George Gilmore. And one of his associates, who I think serves as the day-to-day solicitor for the Township.

Q. Is it fair to say that those attorneys were all against de-annexation? Is that fair to say? Certainly Mr. Reid was. He wrote that e-mail.

A. I'm not going to speak for them.

Q. Well, you agree Mr. Reid was; correct?

A. I agree this e-mail was.

[emphasis added].

Similarly, Mr. Ebenau testified that he received Mr. Reid's email and attended the subsequent meeting. T. 4/1/18, 43:15-45:47:10. Mr. Ebenau admitted that the email was sent to many professionals associated with the Planning Board and that the email indicated that Berkeley Township was opposed to the deannexation in April 2015, near the beginning of Planning Board hearings. Ibid. Mr. Ebenau further admitted that participants in the meeting discussed strategy for the township portion of the Planning Board hearing specifically to refute Petitioners' testimony. T. 3/1/18, 46:6-11. Notably, Mr. Ebenau did not recall anyone at this meeting voicing concerns about violating the duty of impartiality, let alone recusing themselves. T. 3/1/18, 47:11-17. Mr. Ebenau further testified that there was at least one other meeting of Berkeley Township and Planning Board representatives and experts to discuss the deannexation hearings. Ex. A-90; T. 3/1/18, 49:7-53:4. Participants at this second meeting included Berkeley Mayor Carmen Amato, Mayor Amato's assistant and HR Director Gina Russo, Mr. McGuckin, Berkeley Administrator John Camera, Mr. Wisner, Mr. Peters, Berkeley Township Attorney Lauren Staiger, Berkeley Township CPA Rodney Haines, Mr. Oris, and Mr. Ebenau himself. Ibid. Mr. Ebenau admitted he discussed the deannexation hearings with Councilman John Bacchione at a finance committee meeting at which Planning Board Chairman Anthony DePaola may also have been present. T. 3/1/18, 54:16-55:16.

The Berkeley Township Planning Board even went so far as to allow one of its experts to amend his economic report after cross-examination revealed the report to be riddled with errors. Berkeley Township financial expert and CFO/Treasurer Fred Ebenau testified against deannexation and based his testimony on his written economic report (the "Ebenau Report," Ex. T-38). Mr. Ebenau initially made his calculations regarding the financial impact of deannexation

on Berkeley Township using a figure of 11.27 percent to represent South Seaside Park's percentage of the total assessed valuation of Berkeley Township real estate. Ex. T-38; T. 3/1/18, 9:25-14:22. During cross-examination, Petitioners' counsel walked Mr. Ebenau through calculations of all of the underlying tax numbers and determined that the South Seaside Park's true percentage of the total assessed valuation was 10.66 percent, not 11.27 percent. T. 3/1/18, 18:19-39:14. Mr. Ebenau confirmed on the record that the calculations and conclusions made by Petitioners' attorney were correct. Ibid. Mr. Ebenau further admitted that the figure of 10.66 percent was "significantly different than" 11.27 percent and that "the majority of [his] report would be significantly affected by the calculation of an inaccurate number." Ibid. Mr. Ebenau further admitted that his 11.27 percent figure was the basis for his Report regarding the financial impact of deannexation on Berkeley Township and that if this figure was incorrect, his ultimate conclusions would be incorrect as well. T. 3/1/18, 14:18-18:1. Mr. Ebenau also admitted that he failed to consider a number of important factors in preparing his Report, including whether public works employees would be retained following deannexation, the insurance costs of providing services to South Seaside Park, and the total miles of road in South Seaside Park maintained by Berkeley Township. T. 3/1/18, 80:12-84:1. Mr. Ebenau weakly explained that he made unverified "assumptions" about many of the figures and conclusions in his Report. Ibid.

The correct, impartial response to this testimony would have been for the Planning Board to discount Mr. Ebenau's incorrect data and conclusions, consider other, more reliable, testimony and evidence regarding the economic impact of deannexation, and reach a reasonable conclusion after weighing all factors. Instead, the Planning Board allowed Mr. Ebenau to prepare a revised economic report based upon the calculations of Petitioners' counsel. This revised Report still

contained incorrect statistics, “typos,” and conclusions Mr. Ebenau admitted were based on “information that is as of yet unverified.” T. 6/7/18, T. 58:21-61:18; Ex. T-44. Such action reveals a Planning Board actively trying to rehabilitate one of the main witnesses against deannexation and acting as an advocate and counsel for Berkeley Township and its witnesses rather than an independent advisory body impartially evaluating the evidence presented to it.

Notably, even after Mr. Ebenau’s Report was shown to be fatally inaccurate, the Planning Board continued to hear his testimony and conclusions regarding economic impacts of deannexation. Further, the Wiser Report and the Planning Board’s 2020 Resolution fail to mention any deficiencies or uncertainties in the evidence of potential economic harm to the Township that would be caused by deannexation. To the contrary, the Wiser Report specifically notes that its conclusions are based in part on Mr. Ebenau’s discredited expertise. Carlson Cert., **Exhibit C** at 372 (data used by Wiser Report was “augmented by Mr. Ebenau’s information”). As noted above, the Planning Board’s 2020 Resolution relied to a large extent on the Wiser Report. The clear implication of this bias against Petitioners is that the Planning Board had a predetermined conclusion about the “significant” economic harm to Berkeley Township which was unaffected by Mr. Ebenau’s testimony and Report one way or the other. The Planning Board’s only goal was to ensure that Mr. Ebenau revised and corrected his report so it could plausibly be cited as a foundation for the Board’s predetermined conclusion; the conclusion itself never changed because it was not based on the actual evidence or testimony presented. The biased conduct of the Planning Board was obvious even to members of the public observing the Planning Board hearings. During public comments, Berkeley Township resident Bobby Ring criticized the Planning Board for dismissing the testimony of one of the Petitioners while

“allow[ing] the Township’s CFO to testify as many times as necessary to correct his error-laden report.” T. 9/6/18, 34:15-35:5.

Finally, the evidence shows that Berkeley Township paid T&M and R&V tens or hundreds of thousands of dollars throughout the duration of hearings in this matter. *At the same time*, those firms were on the payroll of Seaside Park, the municipality which Petitioners seek to join following deannexation. This sets up clear conflicts of interest for T&M and R&V, which were paid handsomely by Berkeley Township – which opposes deannexation – while the firms were simultaneously providing services to Seaside Park – which would benefit from deannexation by having the option to annex South Seaside Park. Notably, Berkeley Township paid T&M significantly more money during the relevant time period than did Seaside Park. See Ex. A-75 and T-40 (showing, respectively, \$63,307.69 paid to T&M by Seaside Park from 1/1/12 to 8/18/17 and at least \$97,104.25 paid to T&M by Berkeley Township for “Deannexation”). Similarly, evidence shows that from February 2015 through February 2017, Berkeley Township paid a total of at least \$245,912.52 to R&V, a significant portion of which was for work done in this matter. Ex. T-40. Like T&M, R&V has also very publicly provided planning and engineering services to Seaside Park, although the record here is unclear as to scope or cost of such work. Carlson Cert., **Exhibit E**.

Conflicts of interest such as these lead to the inescapable conclusion that T&M and R&V – and their employees Mr. Wiser, Mr. Oris, Mr. Peters, and Mr. Slachetka – merely provided aid to their more lucrative business clients rather than providing impartial expertise, analysis, or testimony. Worse, because Petitioners’ efforts to leave Berkeley Township and join Seaside Park will fail without Seaside Park’s consent, it is reasonable to infer that T&M and R&V further

assisted Berkeley Township by giving Seaside Park “expert” advice discouraging the annexation of South Seaside Park. This taint on T&M and R&V could have been avoided had Berkeley Township simply not hired its rival municipality’s engineers and planners to work against deannexation. However, as with all aspects of this matter, Berkeley Township and its Planning Board willfully disregarded laws, rules, and best practices for ensuring impartiality.

Further, the Planning Board and/or Berkeley Township itself refused to provide Petitioners with relevant information regarding the number of police officers and patrol cars assigned to South Seaside Park. Such information would be crucial in determining the value of services South Seaside Park residents received from Berkeley Township and the potential savings Berkeley Township would accrue from reduction of police services following deannexation. Evidence was presented showing that South Seaside Park resident Patricia Dolobacs submitted an OPRA request for daily police schedules, rosters, and assignments; the number of vehicles assigned to South Seaside Park; and the number, rank, and class of officers assigned to each vehicle and assigned to crossing duty in South Seaside Park in summer 2015. Ex. A-52. This request was denied. Ibid. During Planning Board hearings, both Mr. Moore and Petitioners’ attorney requested that the Planning Board obtain these records via subpoena or otherwise, and represented that such records would be kept confidential and only shared with experts and attorneys in this matter. T.2/4/16, 15:18-25:4; T.5/5/16, 27:9-28:2. Planning Board attorney Mr. McGuckin acknowledged that “I don’t know if we have [subpoena power] for the purposes of this,” but refused to investigate the Board’s power further. Ibid. The Planning Board and Berkeley Township ultimately failed to provide such records to Petitioners or enter them into the record. Ibid. Shockingly, given the denial of the OPRA request and Mr. McGuckin’s



comments, the Planning Board's expert, Mr. Ebenau, later admitted that he was given these police records by Chief DiMichele upon request. T. 3/1/18, 74:17-75:6. Thus, the Planning Board did, in fact, have access to the requested records despite their false assertions that they had no ability to acquire them. The Planning Board simply refused to disclose them despite their relevance and importance in this matter, further demonstrating just how uneven the playing field was.

Similarly, Mr. Moore testified that his offer to meet with Board members or Board experts to discuss his testimony informally was completely ignored. T. 5/5/16, 28:3-15. The Planning Board transparently had no interest in supplementing the record with any facts that would benefit Petitioners' case, a clear violation of its duty to be a neutral fact-finder. Petitioners suffered clear harm from the Planning Board's mendacity, as they were forced to incur unnecessary costs having their expert, Mr. Moore, analyze and estimate the extent of Berkeley Police Department's service to South Seaside Park. T. 2/4/16, 6:7-19:9.

Based on the above evidence, this Court should find that the Berkeley Township and its Planning Board intentionally colluded against Petitioners and ensured a biased and prejudiced decision against the deannexation petition. Under no circumstances can such a decision be considered reasonable, and this Court is asked to find the denial of deannexation arbitrary, capricious, and unreasonable and to order Berkeley Township to consent to the deannexation of South Seaside Park immediately.

As a final note, the unlawful and inequitable conduct by Berkeley Township and the Planning Board appears in stark contrast to the actions of South Seaside Park resident James Fulcomer, who did not sign the deannexation petition despite supporting deannexation. Mr.

Fulcomer testified that he refused to sign the petition “[b]ecause I was a member of the Berkeley Township Board of Education and that would have been a conflict of interest.” T. 5/5/16, 45:9-24. Petitioners were thus demonstrably at a disadvantage from the very beginning of this matter, as they scrupulously followed the law even to their own detriment, while Berkeley Township and the Planning Board colluded at every turn to gain an advantage and defeat Petitioners. Petitioners could not possibly have received a fair hearing under such circumstances, and this Court should summarily reverse Berkeley Township’s denial of the deannexation petition.

**2. The Planning Board Violated the Deannexation Statute by Acting in Opposition to Petitioners, Thus Failing to Maintain the Planning Board’s Independence as a Purely Advisory Body and Commingling the Roles of the Planning Board, the Municipality Itself, and the Township’s Witnesses.**

As noted above, a planning board’s role in the deannexation process is to impartially review evidence and testimony and issue a fair, unbiased report on the impact of deannexation based on reasonable consideration of the facts presented to it. See N.J.S.A. 40A: 7-12. Planning boards are specifically not empowered to decide the merits of annexation petitions, nor are they allowed to act in opposition to a petitioner or on behalf of a municipality. As discussed at length in Lackland And Lackland, any efforts by a planning board to act as an adversary to a petitioner or to engage in its own fact-finding or argument on behalf of a municipality are strictly forbidden because they violate the board’s duty of impartiality. Notably, Berkeley Township’s own expert witness, Stuart Wisner, acknowledged the requirement of impartiality in a memorandum to Township Administrator Christopher Reid. Mr. Wisner advised that, “Board Members are urged

to fight the natural tendency to argue with witnesses or to explain why things happened (or did not happen) the way they did. Let the witnesses testify as they see fit.” Ex. T-36.

During the actual hearings in this matter, however, members of the Planning Board and the Planning Board’s attorney constantly intervened during witness testimony to argue against witnesses, provided their own contradictory testimony, and acted as advocates for Berkeley Township against deannexation rather than an independent, impartial body merely hearing and weighing testimony. The examples of such forbidden adversarial conduct by the Planning Board are far too voluminous to reproduce or cite here in their entirety. Below, however, is a review of some of the most egregious efforts by the Planning Board, Berkeley Township, and their representatives to unlawfully turn the hearings into an adversarial process:

- Without any documentation or foundation, Planning Board members repeatedly characterized certain parts of South Seaside Park as “historic sites” that would be lost to Berkeley Township during Petitioner’s witness Scott Bauman’s testimony regarding the impact of deannexation. The Board thus offered its own unfounded “testimony” to argue with and diminish Mr. Bauman’s testimony, rather than impartially considering the testimony and asking questions to foster understanding. T. 11/5/15, 38:23-42:9.
- Board members and Board Attorney, Mr. McGuckin, repeatedly argued with Petitioner Donald Whiteman and Petitioner’s attorney about the relevance of Mr. Whiteman’s testimony and exhibits showing the history of South Seaside Park in the context of efforts to deannex from Berkeley Township. T. 1/8/15, 42:22-62:20. A truly impartial Board would have considered Petitioners’ testimony on this topic, weighed its relevance and persuasiveness, and drawn conclusions accordingly. Instead, the Board made every effort to dismiss this evidence out of hand. Worse, the Board voted to cut short Mr. Whiteman’s testimony and exclude additional evidence of relevant history. Ibid.
- Mr. McGuckin inappropriately chastised Mr. Bauman for “calling your clients anti-social” when Mr. Bauman testified that the deannexation of affluent communities might not cause a significant detriment because the residents of such communities could be anti-social in the sense of not participating in the life the home municipality regardless of whether deannexation occurred. T. 10/1/15,

69:13-70:8. Notably, two residents of South Seaside Park – Mr. and Mrs. Fulcomer – immediately objected to Mr. McGuckin’s comment, saying, “maybe we are [anti-social], we don’t go to the mainland, except for this.” Ibid. In short, Mr. McGuckin attempted to portray Petitioners’ witness as insulting South Seaside Park residents, when in fact the residents themselves agreed with Mr. Bauman’s portrayal of the situation in South Seaside Park.

- Board member Domenick Lorelli inappropriately questioned Mr. Bauman about whether Seaside Park would agree to annex South Seaside Park should Berkeley Township consent to deannexation, which the Planning Board and its attorneys knew or should have known was irrelevant to whether deannexation should be granted. T. 9/3/15, 5:10-8:17. Even after Petitioner’s counsel explained the legal standard for deannexation to the Board, Mr. Lorelli said, “can’t be sure,” further undercutting Petitioner’s presentation by suggesting they and the Board itself were wasting their time with deannexation hearings when there was no guarantee of successful annexation to Seaside Park. Ibid. These are not the actions of an “independent, unbiased” Board.
- The Planning Board refused to admit testimony from James Fulcomer regarding State aid to schools as “expert testimony,” despite copious evidence that Mr. Fulcomer has extensive experience and knowledge of the process by which State aid is apportioned. Notably, Mr. Fulcomer’s resume shows that he was a former President of the Berkeley Township Board of Education and Chairman of the Berkeley Board of Education Committee on State Aid to Education. Ex. A-55. Mr. Fulcomer also authored and sponsored the Berkeley Board of Education’s Resolutions on State Aid to Education and served as Union County Freeholder Liason to County Educational Advisory Board. Ibid. Finally, Mr. Fulcomer was a Rahway City Council participant in negotiations with the local school board on defeated school budgets. Ibid. Mr. Fulcomer also testified that he taught New Jersey Government and History for 42 years and served as a faculty adviser for a Political Science Club for 35 years. T. 5/5/16, 47:18-50:13. Mr. Fulcomer testified that he taught issues related to State aid to schools each year in both of these positions. Ibid.

The Planning Board accepted Mr. Fulcomer’s resume and testimony regarding his vast experience working with the issue of New Jersey State aid to schools, but still voted not to admit him as an expert witness. Curiously, Mr. McGuckin defined an “expert opinion” as offering “testimony in a field that is not available to the normal layman.” T. 5/5/16, 54:13-15. Unless Mr. McGuckin is asserting that a “normal layman” would have available to them the same testimony as someone with Mr. Fulcomer’s experience – a preposterous assertion – it is

obvious that he arbitrarily disregarded his own definition by refusing to allow Mr. Fulcomer to testify as an expert on State aid to schools. Through such actions, the Board and its attorney did not fairly consider Mr. Fulcomer's testimony as an independent body, but twisted their own definition of "expert" to diminish Petitioners' witness.

- Throughout the course of the Planning Board hearings, Mr. McGuckin drastically exceeded his duties as an advisor to the Board by personally cross-examining, interrupting, and arguing with witnesses. Mr. McGuckin acted more like a prosecutor trying to prove Petitioners were unreasonable than an impartial legal expert providing guidance to the Board. Notably, Petitioners' counsel objected to this conduct on numerous occasions, but was ignored. See, e.g., T. 10/1/15, 10:9-14:21; T. 2/5/15, 35:14-36:14 (Mr. McGuckin cuts off relevant witness testimony comparing police presence in South Seaside Park in the 1970s versus the present day by saying, "why don't we stick to this century, okay? We don't care what the police presences were in 1970. That's not what's before this board." Mr. McGuckin thus badgered Petitioners' witness and prevented the Board from hearing relevant testimony about the decline of police services to South Seaside Park.).

### **3. Berkeley Township Authorities Expressed Biased Views Against Petitioners on Numerous Occasions**

Further, there are numerous examples in the record showing members of the Berkeley Township Planning Board and other representatives of Berkeley Township expressing biased, prejudiced views against Petitioners and the effort to deannex South Seaside Park from Berkeley Township. For example, exhibits submitted in this matter show that Planning Board member Richard J. Callahan had an anti-deannexation sign erected in front of his house during the years of Planning Board hearings. Specifically, the sign was displayed in front of 117 Anchor Drive, South Seaside Park, New Jersey (of which Mr. Callahan and his wife are the recorded owners) and contained the text "JOIN US – SSPHVA.COM" with a red diagonal line slashed through the text to indicate disapproval. Ex. A-59-60. Notably, Mr. Callahan's next-door neighbor, John Budish, testified that he and Mr. Callahan discovered the sign – without the red slash – placed on

the border between their two properties “a couple years” prior to 2018. T. 9/6/18, 55:17-57:19. Mr. Budish testified that he and Mr. Callahan discussed the sign, after which Mr. Budish added the red slash “being that we’re – are not in favor of de-annexation.” *Ibid.* Under questioning, Mr. Budish confirmed that he knew Mr. Callahan was not in favor of deannexation at least as far back as 2016. *Ibid.* Another South Seaside Park resident, Robert Nora, testified that the placement of the sign was such that Mr. Callahan’s house was directly behind the sign when a person faced the front of the sign head-on. T. 5/5/16, 111:16-116:16. Mr. Nora further testified that he believed it was Mr. Callahan’s sign based on this placement. *Ibid.*

The Planning Board and its attorney, Mr. McGuckin, were aghast that Petitioners would suggest that the sign was put up by Mr. Callahan. However, when Petitioners’ counsel proposed asking Mr. Callahan on the record if the sign belonged to him, Chairman Anthony DePaola replied, “[n]o, I wouldn’t do that.” T. 5/5/16, 118:20-25. To put a finer point on it, Mr. Callahan could have confirmed on the record that he did not erect this anti-deannexation sign on his property, but refused to do so. It is left to the Court to determine why.

Two photographs of the sign displayed in front of Mr. Callahan’s house are reproduced below showing, respectively, the location of the sign in front of 117 Anchor Drive and a close-up view of the sign itself:

Notably, SSPHVA.COM is Petitioners' website supporting deannexation. Thus, the Planning Board purported to hold impartial hearings on deannexation as an independent fact-finding body, while at the same time one of its members was visibly protesting against the Petitioners. This conduct caused Petitioners significantly more prejudice than the one anti-deannexation comment made by the township Mayor in Avalon, 370 N.J. Super. at 99. In that matter, the Mayor's comment was restricted to a single outburst at a single hearing. At most, only a small percentage of residents could have been present at this meeting to hear the Mayor's words. In contrast, the anti-deannexation sign was erected in front of Mr. Callahan's house in full public view for several years, allowing this Board member the opportunity to publicize his plainly prejudicial views to a significant portion of the community for a significant amount of time. It is difficult to comprehend how a resident of South Seaside Park, or this Court, could have any confidence in the purportedly "impartial" decisions of the Planning Board under such circumstances.

Testimony also revealed that Berkeley Township Councilman John Bacchione, who is part of the municipal body responsible for the final decision to deny the deannexation petition as well as a member of the Planning Board, made public comments against deannexation at a 2015 meeting of the Italian-American Club at the Silver Ridge Clubhouse in Holiday City, a senior living community in mainland Berkeley Township. Seaside Park resident Elaine Vitarello testified that Councilman Bacchione addressed everyone in attendance at the meeting and told them to "start going to the meetings, because if South Seaside Park becomes Seaside Park, your taxes are going to go up." T. 5/5/16, 102:5-103:15. Ms. Vitarello testified that she believed "he

was taking sides without hearing the whole picture from the people that live there” and “he had pre-judged the matter.” Ibid.

The response to this testimony is telling. Not only did Mr. McGuckin refuse to ask Councilman Bacchione to recuse himself from this matter, but Councilman Bacchione laughably tried to defend his comments. Ibid. On June 2, 2016, Councilman Bacchione appeared before the Planning Board and said he had not made up his mind on the merits of the deannexation petition and that his statements at the Italian-American Club meeting were simply factual statements about the possible impact on taxes, based on the reports of experts in this matter. T. 6/2/16, 5:13-7:25. Petitioners’ counsel eviscerated this explanation on the record. Petitioners’ counsel noted that neither side’s financial expert had testified as of the date of Councilman Bacchione’s comments, suggesting that the Councilman was gathering information on his own in violation of the scheme envisioned by the Legislature when it enacted the deannexation statute. T.6/2/16, 13:18-15:20. Petitioners’ counsel further noted that the “information” given by the Councilman at the meeting was purely detrimental to Petitioners’ cause. Ibid. As Ms. Vitarello confirmed in her prior testimony, no reasonable person could have heard Councilman Bacchione talk about how Berkeley Township’s taxes would go up following deannexation and concluded that he was not trying to mobilize residents to oppose Petitioners.

Further, Berkeley Township Business Administrator John Camera admitted under cross-examination that he called Petitioners “elitist” and believed Petitioners wished to leave Berkeley Township and join Seaside Park because of “a status feeling.” T. 5/3/18, 72:4-74:21. Mr. Camera further admitted that he had had no evidence for these harmful mischaracterizations. Ibid. In short, Mr. Camera baselessly impugned Petitioners’ motives in an effort to make their fair-



minded deannexation petition seem like the petty tantrum of rich snobs. This transparently bad-faith tactic is only made worse by Mr. Camera's admission that he personally "used to live in Seaside Heights and moved up to a *more elite community* of Colts Neck now." Ibid. As if Mr. Camera's insulting testimony were not bad enough, Planning Board member Nick Mackres endorsed such views on the record, stating that, "we have, as Mr. Ebenau is saying, an elitist section moving." T. 5/3/18, 50:10-11.

The Planning Board and Berkeley Township itself are supposed to evaluate Petitioners' case for deannexation impartially. The public statements by representatives of these entities, however, show that their minds were made up against Petitioners right from the start.

**B. Berkeley Township's Planning Board Routinely Failed to Consider Relevant Evidence and Testimony and Applied Incorrect Legal Standards During Hearings and When Making Its Recommendations.**

Throughout the Planning Board's hearings, its members and counsel failed to properly appreciate and consider relevant evidence and incorrectly interpreted the law surrounding deannexation. As a result, the Planning Board's deliberations and recommendations to Berkeley Township were inherently unreasonable because they were based on a flawed understanding of the facts and the law.

At the very first Planning Board hearing in this matter, on January 8, 2015, the Board voted to exclude relevant evidence regarding the history of South Seaside Park. The Planning Board grossly misunderstood and refused to consider testimony and exhibits demonstrating that South Seaside Park was historically considered part of Seaside Park and would have formally remained part of Seaside Park but for a boundary error. Mr. Whiteman provided the Planning Board with Ex. A-3, a 1918 map labelled "Sea Side Park" which depicts present-day Seaside

Park as well as all of present-day South Seaside Park extending south all the way to 24<sup>th</sup> Avenue, which is the southernmost street of South Seaside Park before the northern border of Island Beach State Park. Mr. Whiteman testified that he found this map in a collection of historical Ocean County maps maintained by Rutgers University. T. 6/4/15, 17:20-20:8. Further, Mr. Whiteman testified that, as a long-time resident of South Seaside Park, he was aware that local oral history held that a boundary error was made when the boundaries of Seaside Park and Berkeley Township were drawn. T. 1/8/15, 27:1-28:19. Finally, Mr. Whiteman provided evidence demonstrating that Berkeley Township was previously much larger but that many smaller parts of the Township – including Seaside Park on March 3, 1898 – eventually became separate municipalities. Ex. A-1; T. 1/8/15, 25:14-25:11; see also Carlson Cert., **Exhibit F**<sup>7</sup> at 205. Seaside Park’s split from Berkeley Township thus required the drawing of a new Ocean County map with new boundary lines during the same period when oral tradition and the 1918 map indicate South Seaside Park was supposed to be part of Seaside Park.

Clearly, Mr. Whiteman’s exhibits and testimony are in harmony and reinforce each other and, at the very least, should have been considered by the Planning Board as tending to show that South Seaside Park is more naturally part of Seaside Park than Berkeley Township even if, by mistake or otherwise, it is now legally part of Berkeley Township. However, members of the Planning Board responded to this evidence by simply dismissing it as irrelevant because “I don’t know what the de-annexation has to do with 1898,” even though Mr. Whiteman and Petitioner’s counsel went to great lengths to explain the relevance. T. 1/8/15, 25:14-45:25. Worse, Planning Board attorney Mr. McGuckin interjected to poison the well regarding Mr. Whiteman’s evidence,

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<sup>7</sup> “The Story of New Jersey’s Civil Boundaries 1606-1968,” by John P. Snyder, published by the New Jersey Bureau of Geology and Topology, 1969.

stating that, “I fail to see how that is in any way relevant to this proceeding. I don’t believe it’s proper in the record.” T. 1/8/15, 47:3-6. Ultimately, the Board voted to “move on” from testimony about South Seaside Park’s history before Petitioners were able to fully present the facts regarding this relevant history. T. 1/8/15, 59:15-62:20. Again, the record shows the Planning Board and its attorney disparaging and excluding relevant evidence because it moves the needle in favor of Petitioners. The Planning Board should have considered and evaluated this evidence impartially; instead it arbitrarily, capriciously, and unreasonably dismissed it out of hand, with guidance from its counsel.

Similarly, Mr. McGuckin and several Board members demonstrated fierce and unreasonable resistance to any reference to the July 20, 1978 decision by Judge Addison ordering Berkeley Township to consent to deannexation of South Seaside Park. See, e.g., T-1/8/15, 5:12-8:18; 54:16-57-24; 10/4/18, 46:25-53:14. Mr. McGuckin explicitly attempted to prevent any reference to Judge Addison’s decision during the hearings and given his comments on the record, it is reasonable to conclude that the Planning Board did not consider the 1978 decision at all. T. 10/4/18, 47:13-54:14. The Board’s aversion to Judge Addison’s decision was unreasonable and based on a faulty interpretation of the current Annexation Statute. Although Mr. McGuckin correctly noted that the statute was amended following the 1978 decision, he and the Board failed to appreciate that the amendment merely assigned petitioners the burden of showing that deannexation would not cause significant harm to the municipality from which deannexation was sought. The amended statute certainly did not change the factors to be considered by a reviewing court, nor did it change petitioners’ burden of showing the detriments they would suffer if deannexation were denied. Similarly, Petitioners’ counsel attempted to explain that Judge

Addison's decision was relevant because the South Seaside Park of 1978 was the closest socioeconomic comparison to present-day South Seaside Park, but was immediately prevented from pursuing this line of inquiry by Mr. McGuckin. T. 10/4/18, 46:25-53:14.

Further, the Wisner Report failed to consider or even mention Judge Addison's 1978 decision ordering Berkeley Township to consent to deannexation of South Seaside Park. This failure is shocking given that Mr. Wisner purported to provide the Planning Board a synopsis of "[t]he most significant" court decisions addressing the deannexation statute "for guidance in its deliberations." Carlson Cert., **Exhibit C** at 17. Mr. Wisner reviewed eight (8) decisions addressing deannexation – including unpublished cases – yet failed to review Judge Addison's 1978 decision. *Id.* at 17-54. It is inconceivable that a good-faith effort to fairly consider all relevant case law in this matter would completely ignore a prior judicial decision specifically ordering deannexation of the same petitioning community from the same home municipality. No case law could be more relevant to the present matter, nor could any other case law have facts more analogous to those here. Notably, Mr. Wisner testified that he never even read Judge Addison's decision and that Mr. McGuckin, who, as Planning Board attorney would surely have had access to and knowledge of the earlier decision, refused to provide a copy despite Mr. Wisner's requests. T. 10/3/15, 56:20-57:19. Mr. Wisner also admitted that he believed the history of the relationship between Berkeley Township and South Seaside Park was relevant to this deannexation matter, making it all the more suspicious that Judge Addison's decision was completely ignored by the Planning Board and its experts. T. 10/3/15, 64:10-65:6. In the same vein, Mr. Ebenau also admitted that he never read Judge Addison's decision but that if he had, he would not have assumed White Sands Beach would remain with Berkeley Township following deannexation. T.

3/1/18, 77:6-78:3. It is obvious that the Planning Board could not have made a reasonably, fully-informed recommendation in this matter without the history and context its own members and attorneys refused to consider.

Worse, comparing the Wisner Report here to a prior report prepared by Mr. Wisner in a separate matter (January 29, 2016 Report for Seaview Harbor deannexation petition), it appears Mr. Wisner simply copied and pasted the same thirty-eight (38) pages of case law analysis without adding any further analysis or including any additional cases. See Carlson Cert., **Exhibit C** at 17-54; Ex. A-111. Mr. Wisner merely replaced the names of the parties in his January 29, 2016 Report with the names of the parties here without changing any of his conclusions to reflect the application of the law to the specific facts here. Under cross-examination, Mr. Wisner admitted that he did not analyze each case in relation to South Seaside Park. T. 10/3/19, 26:14-38:6. Instead, Mr. Wisner admitted that the case law synopsis in the Wisner Report “was largely lifted from the previous report [January 29, 2016 Seaview Harbor deannexation Report],” that “no changes were made,” and that the two reports were “substantially identical . . . pretty doggone close.” Ibid. Further, when Mr. Wisner was asked how much he supplemented his report to the Planning Board with information and evidence from the record of Planning Board hearings, he testified that, “[i]n the grand scheme of things, probably not a lot,” even though he agreed that the Wisner Report should be based on such information and evidence. T. 10/3/19, 42:6-43:2. The Planning Board thus did not receive an independent and impartial analysis of the existing case law and how it applied to the facts of the present matter. Instead, it received tried-and-true boilerplate anti-deannexation language designed to make deannexation seem as extreme as possible. Worse, Mr. Wisner and his firm billed the Planning Board for the time spent preparing a

purportedly “new creation” for this matter, time that was instead spent mostly copying and pasting. T. 103/19, 26:14-21.

When viewed holistically, the consistent failure to consider Judge Addison’s decision or the full record of South Seaside Park’s history here is damning. In order to fully understand and consider Petitioners’ case for deannexation it would have been not only reasonable, but necessary, for the Planning Board to review the factors considered by Judge Addison in finding that denial of deannexation would harm South Seaside Park while deannexation would not significantly harm Berkeley Township. The Planning Board could have then compared the relevant factors in 1978 with the same factors today to see whether the balance of detriments with and without deannexation was the same or substantially similar. If the circumstances were found to be identical or nearly the same today as in 1978, it would be unreasonable and contrary to precedent to reach a different conclusion than did Judge Addison, especially given that the 1978 decision involved the exact same municipalities and communities as the present matter. Further, testimony showed that Petitioners were still dealing with many of the same problems complained of during the prior deannexation effort addressed by Judge Addison. See, e.g., T. 1/8/15, 77:16-20. By utterly failing to even consider or review the substance of Judge Addison’s decision, or the testimony that the problems from the 1970’s had gone unaddressed and remained pressing, the Planning Board issued recommendations that were willfully lacking in due consideration and in disregard of circumstances. In other words, the Board’s recommendations were arbitrary, capricious, and unreasonable.

The Planning Board made other errors of fact and law throughout its hearings. The Board incorrectly demanded that Petitioners show “why you feel de-annexation is a *benefit to both*

*Berkeley Township and South Seaside Park,*” which is not the legal standard and which revealed that the Board was arbitrarily and unreasonably stacking the deck against Petitioners. T-1/8/15, 61:5-7 (emphasis added). The Board also questioned why Petitioners waited until 2014 to file a deannexation petition and insinuated that Petitioners had no right to complain about the detriments of being part of Berkeley Township or to seek deannexation. T-1/8/15, 66:15-67:9; 73:14-76:10. The Board blamed Petitioners for the detriments of being part of Berkeley Township because Petitioners chose to become and remain residents of South Seaside Park despite being aware of such detriments, even going so far as to tell Petitioners they should just buy a house down the road in Seaside Park rather than petition for deannexation. Ibid. Again, nothing in the Deannexation Statute or the case law requires petitioners to seek deannexation within a certain time or penalizes petitioners for choosing to live in a given community. The only standard regarding detriment to a petitioning community is that the petitioners must show that denial of deannexation would cause social and economic detriment to the majority of residents. Petitioners clearly met this standard, but the Planning Board’s adversarial comments show that it did not take Petitioners’ concerns seriously, erroneously believing Petitioners were to blame for their detrimental circumstances.

Further, Planning Board attorney Mr. Koutsouris recklessly distorted the legal standard for deannexation. During cross-examination of Mr. Bauman, Mr. Koutsouris asked whether it would be “more beneficial to the Township to maintain Island Beach State Park’s nine miles and the three blocks of White Sands Beach” if deannexation were granted. T. 11/5/15, 111:3-6. As Planning Board counsel, Mr. Koutsouris should have known that Petitioners do not have to show that deannexation would prove “more beneficial” to the home municipality, but only that

deannexation would not cause significant injury or loss. Either the Planning Board's legal counsel was ignorant of the legal standards for this matter, or he was knowingly asking loaded, legally-incorrect questions to get Petitioners' witness to make harmful statements on the record. Either way, Petitioners suffered obvious prejudice.

Planning Board expert witnesses also made significant factual errors in their testimony. For example, Mr. Slachetka, while cross-examining Mr. Bauman, said about South Seaside Park's White Sands Beach, "it's a valuable resource . . . not making too many barrier beaches, right?" T. 10/1/15, 75:9-21. Mr. Slachetka – intentionally or not – failed to note the fact that the barrier beach of Island Beach State Park was directly south of South Seaside Park and was part of Berkeley Township already. Again, the record shows a Planning Board expert twisting the facts to the detriment of Petitioners rather than operating as an independent fact-finder.

For all of the reasons set forth above, this Court is requested to find that the Berkeley Township Planning Board willfully and consistently violated the deannexation statute, irremediably tainting the entire process and making it impossible for Petitioners to receive due process or a fair hearing. As a result, the Planning Board's 2020 Resolution recommending denial of the deannexation petition, as well as the Berkeley Township Council's final decision to deny deannexation, were arbitrary, capricious, and unreasonable. The Court is respectfully requested to order Berkeley Township to consent immediately to deannexation of South Seaside Park.

**II. BERKELEY TOWNSHIP'S DENIAL OF THE DEANNEXATION PETITION IS DETRIMENTAL TO THE SOCIAL WELL-BEING OF A MAJORITY OF SOUTH SEASIDE PARK RESIDENTS.**



**A. Berkeley Township Failed to Consider Petitioners' Showing That the Significant Geographical Distance Between the Isolated South Seaside Park Community and Mainland Berkeley Township is Detrimental to the Social Well-Being of South Seaside Park Residents.**

In the present matter, Berkeley Township failed to consider the well-established fact that South Seaside Park residents are completely geographically isolated from distant mainland Berkeley Township, causing significant detriment to their social well-being. As a result of this geographical distance and isolation, South Seaside Park residents suffer from a lack of accessible municipal services and business, as well as intolerable travel distances and times that make it impractical to fully participate in civic life. Notably, Berkeley Township also failed to consider that such detriments to South Seaside Park residents would be entirely remedied by South Seaside Park's annexation to adjacent Seaside Park.

The New Jersey Supreme Court has identified the “geography and logistics of the situation” as factors for courts to consider in ruling on whether a denial of a deannexation petition is detrimental to the social well-being of the majority of residents of the affected land. See Ryan v. Demarest, 64 N.J. 593, 603 (1974). More specifically, the Ryan Court tasked reviewing courts with determining whether “the land in question more naturally belongs to the municipality to which deannexation is sought.” Ibid. The Ryan Court also stressed that there is no “all-inclusive” list of factors for determining social detriment and that the reviewing court “will have to bring to bear their own knowledge, experience and perceptions in determining what, in the context of deannexation, would inflict social injury upon the well-being of a community.” Id. at 605.

It is well-established that when a community within a certain municipality is non-contiguous to, and completely isolated and distant from, the rest of that municipality, it will suffer social detriment by denial of a deannexation petition. This is especially true when such a community is contiguous to another municipality whose offices, services, and businesses are significantly more accessible to the community's residents such that the community more naturally belongs to the contiguous municipality. The facts of West Point Island, 54 N.J. 339 (1969) and Bay Beach Way, No. A-5733-07 (July 9, 2019), in which the reviewing courts overturned denials of deannexation petitions, are on point and instructive in the present matter.

In West Point Island, the petitioners sought deannexation from Dover Township to Lavallette. Notably, the West Point Island community was completely isolated and distant from the main portion of Dover Township. West Point Island was located 7.5 miles from the business center of Dover Township and residents were required to travel through two other municipalities and cross a bridge over the bay separating the mainland and the barrier island in order to reach the business center. Id. at 344. The trial court had earlier noted that West Point Island was “separated . . . from Dover Township by the breadth of Barnegat Bay and apparently dependent upon Lavallette for most emergency services.” West Point Island Civic Ass’n. v. Township Comm. of Dover, 97 N.J. Super. 549, 557 (Law Div. 1967).

In contrast, West Point Island was directly adjacent to and contiguous with the Borough of Lavallette. West Point Island, 54 N.J. at 344. In reviewing Dover Township's denial of West Point Island's annexation petition, the trial court, Appellate Division, and Supreme Court each found that the denial “was not based on reasonable grounds” in large part due to the separation

and isolation of West Point Island and mainland Dover Township. Id. at 350.<sup>8</sup> The Supreme Court specifically held that “the geography is so pointedly in favor of allowing” deannexation that “on the facts of this case there is no reason to deny the overwhelming majority of voters and taxpayers on West Point Island the opportunity of joining the Borough of Lavallette.” Id. at 349-50. The Court specifically noted that without deannexation, West Point Island school-children would continue to be forced to take long bus rides to mainland Dover Township rather than walking a few blocks to school in Lavallette, illustrating the direct social harm caused by the denial of the deannexation petition. Id. at 349.

The facts and holding of the court in Bay Beach Way are similar. In that case, the petitioners sought to deannex from the Township of Toms River and – as in West Point Island – annex to the adjacent and contiguous Borough of Lavallette, the border of which was located directly south of Bay Beach Way. As in West Point Island, the only route from Bay Beach Way to the mainland portion of Toms River was through a separate municipality and then over a bridge crossing the bay separating the mainland from the barrier island. The Appellate Division noted that “residents of Bay Beach Way could not leave their street without traveling through Lavallette” and that “if the Toms River border were moved one block north, the people living on that block would not have to go through Lavallette to reach the mainland section of Toms River as the resident of Bay Beach Way must do.” Bay Beach Way, No. A-5733-07 at \*2. The Appellate Division affirmed the trial court’s decision to order Toms River to consent to Bay

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<sup>8</sup> West Point Island was decided before the Annexation Statute was amended to place upon the petitioners the burden of showing no significant injury would be suffered by the municipality from which they sought to deannex. However, the Court’s analysis of the social harm to West Point Island residents because of the geographical distance and isolation from mainland Dover Township is still good law and relevant here, as the revised Annexation Statute did not change the burden for showing that the petitioners would suffer injury if the annexation petition were denied.

Beach Way's deannexation petition, a decision based on the court's conclusion that "geographic and demographic features of Bay Beach Way were legitimate considerations" and that "plaintiffs were more closely associated and identified with Lavallette than with Toms River by geographic and demographic factors." Id. at \*4.

In contrast, the Supreme Court in Ryan, 64 N.J. at 603, found that the petitioning community of Beechwood Farms "is not isolated from the remainder of Demarest as West Point Island was isolated from Dover Township. The geography and logistics of the situation do not compel the conclusion that the land in question more naturally belongs to the municipality to which deannexation is sought." The Court further noted that the Demarest schools, police station, municipal offices, and borough center were only 2.0 to 2.9 miles away from the community petitioning for deannexation, less than half the distances as in West Point Island. Id. at 598, 600.

It is instructive here to examine and compare the geographic distances and relative isolation of Petitioners here and petitioning communities in deannexation case law. Listed below are the relevant geographic factors in this matter and in other cases where New Jersey courts reviewed denials of deannexation petitions, along with the outcome of each case:

CASE NAME	DISTANCE FROM PETITIONING COMMUNITY TO MUNICIPAL CENTER (SCHOOLS/POLICE/TOWN OFFICES/ETC.)	DID PETITIONERS HAVE TO CROSS OTHER MUNICIPALITIES OR MAJOR BODY OF WATER TO REACH MUNICIPALITY FROM WHICH THEY SOUGHT TO DEANNEX?	DID REVIEWING COURT ORDER DEANNEXATION?
Present Matter: Petition for South Seaside Park to Deannex from Berkeley Township	16.3 miles	Yes – petitioning community is not contiguous and petitioners must cross <i>between five and seven separate municipalities</i> and cross bridge over bay	<b>To be decided</b>
<u>West Point Island Civic Ass’n. v. Township Comm. Of Dover Tp., 54 N.J. 339 (1969)</u>	7.5 miles	Yes – petitioning community was not contiguous and petitioners had to cross <b>two</b> separate municipalities and cross bridge over bay	<b>Yes</b>
<u>Bay Beach Way Realignment Comm., LLC v. Twp. Council of Toms River, No. A-5733-07 (App. Div. July 9, 2019)</u>	10 miles	Yes – petitioning community was not contiguous and petitioners had to cross one other municipality and cross bridge over bay	<b>Yes</b>
<u>Ryan v. Mayor &amp; Council of the Bor. Of Demarest, 64 N.J. 593 (1974)</u>	Between 2.0 and 2.9 miles	Yes, but only “briefly” – a private country club and school, not water or other municipalities, separated petitioning community from the main portion of the municipality	<b>No</b>

CASE NAME	DISTANCE FROM PETITIONING COMMUNITY TO MUNICIPAL CENTER (SCHOOLS/POLICE/TOWN OFFICES/ETC.)	DID PETITIONERS HAVE TO CROSS OTHER MUNICIPALITIES OR MAJOR BODY OF WATER TO REACH MUNICIPALITY FROM WHICH THEY SOUGHT TO DEANNEX?	DID REVIEWING COURT ORDER DEANNEXATION?
<u>Citizens for Strathmere &amp; Whale Beach v. Township Comm. Of Upper</u> , No. L-0432-09 (App. Div. August 1, 2012)	11.9 miles	Yes - petitioning community was not contiguous, but petitioners had to cross only <i>one</i> other municipality and cross bridge over bay	<b>No</b>
<u>Russell v. Stafford Tp.</u> , 261 N.J. Super. 43 (Law Div. 1992)	Between 3 and 6.2 miles	Yes – petitioning community is contiguous but petitioners had to drive three miles through one other municipality	<b>No</b>
<u>Avalon Manor Imp. Ass’n, Inc. v. Township of Middle</u> , 370 N.J. Super. 73 (App. Div. 2004)	6.3 miles	No, only had to cross a small channel	<b>No</b>

As can be seen from the above chart, courts have been more willing to order deannexation the greater the distance between the petitioning community and the main portion of the municipality from which deannexation is sought and the more municipal and natural borders that must be crossed to travel to and fro.<sup>9</sup> Only one of the four cases in which deannexation was denied by a court had a distance of greater than 6.3 miles between the petitioning community and

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<sup>9</sup> Although it deals with judicial review of denial of a deannexation petition, D’Anastasio Corp. v. Township of Pilesgrove, 387 N.J. Super. 247 (Law Div. 2005) is not listed in this chart because the area sought to be deannexed was unpopulated, undeveloped land. As such, the question of social injury to residents because of distance from the main portion of the municipality was not present in that case.

the municipality from which deannexation was sought; the distances were 10 miles and 7.5 miles in the two cases in which deannexation was granted by the court. Similarly, the petitioning communities in cases where deannexation was denied were more likely to be contiguous to the main portion of the municipality and required less travel across up to seven (7) municipal boundaries and major bodies of water than those in cases where deannexation was granted.

Here, the geographical relationship between South Seaside Park and mainland Berkeley Township is precisely the same as between the mainland municipalities and deannexing island communities in West Point Island and Bay Beach Way. If anything, the extent to which South Seaside Park is isolated and distant from mainland Berkeley Township is even greater than in those other cases in which deannexation was ordered by the court. It is indisputable that South Seaside Park is completely separated from mainland Berkeley Township by Barnegat Bay. The distance from South Seaside Park to the municipal building of Berkeley Township is as great as 16.3 miles – more than 50% greater than the largest distance in either of the successful deannexation cases and nearly three times greater than even the largest distance in the unsuccessful deannexation cases. Ex. A-4. Similarly, South Seaside Park residents must travel through up to seven (7) municipalities to get to and from the Berkeley Township Recreation Center on Route 9, significantly more than the residents in any of the prior deannexation cases on the record. See T. 1/8/15, 117:22-119:10. This is the exact isolation and separation the courts found compelling when ordering deannexation in West Point Island and Bay Beach Way, only to a significantly greater extent. In short, there have been no deannexation cases in New Jersey courts – successful or unsuccessful – with geographic separation even close to that between South Seaside Park and Berkeley Township. The reality that mainland Berkeley Township and

South Seaside Park are two completely separate regions is easily seen by looking at a map or photographs of how separated the two communities are. See Ex. A-19 (displaying map of mainland Berkeley Township, South Seaside Park, and distance to get from South Seaside Park to various centers of community life in mainland Berkeley Township); see also Ex. A-37 (photographs taken by South Seaside Park resident Donald Whiteman of distant Berkeley Township across the bay from his home, contrasted with photographs of Seaside Park within walking distance. Most dramatic of all is Ex. A-1, a cropped version of which is reproduced below to show the detail of Berkeley Township:<sup>10</sup>

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<sup>10</sup> In addition to being cropped, two arrows have been added to this exhibit for the purposes of directing the Court's attention to the location of South Seaside Park (pink arrow) and the Berkeley Township municipal offices (blue arrow). On the original exhibit, the borders of South Seaside Park have been outlined in red, while the borders of Berkeley Township have been outlined in yellow, showing the vast size and distance of Berkeley Township compared to tiny, secluded South Seaside Park.



Ex. A-1 shows the entirety of Berkeley Township (excepting the southernmost portion of Island Beach State Park) outlined in yellow. This map further identifies seven (7) different municipalities (six of which are labeled as numbers 2 through 7 written and circled in black marker, plus Toms River, which is not labeled) through which a South Seaside Park resident must travel in order to get to Berkeley Township, depending on the section of Berkeley Township to which they wish to travel.<sup>11</sup> Finally, a pink arrow has been added to show the location of South Seaside Park (also outlined in red marker) and a blue arrow has been added to show the location of the Berkeley Township municipal offices far away on the opposite side of the municipality across Barnegat Bay. Clearly these exhibits show that geography is pointedly in favor of allowing deannexation even more so than in West Point Island.

The vast distance South Seaside Park residents must travel to mainland Berkeley Township is in stark contrast to the ease of travel to adjacent Seaside Park, to which Petitioners seek annexation. South Seaside Park resident Mr. Whiteman, who created Ex. A-37, testified that, “I know that from my house to that boundary of Seaside Park, which would be two blocks towards me more, is about 400 meters . . . a quarter mile, one lap around the track. That’s all I have to go to go to the adjoining town that I would like to be a part of. [. . .] I thought by putting pictures here . . . I mean, they say a thousand words, ten thousand words. Just by looking at these pictures here, you can understand that my feeling of a town here, which is 400 meters from my house, how much easier would it be for me to be involved in the adjacent town. T. 6/4/15, 7:2-12-25.

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<sup>11</sup> These municipalities are Toms River, Beachwood, South Toms River, Seaside Heights, Seaside Park, Ocean Gate, and Pine Beach. Further, South Seaside Park residents travel along the border of Island Heights on return trips from mainland Berkeley Township.

Further, evidence presented at hearings in this matter shows that this geographic distance and isolation from Berkeley Township causes significant social harm to South Seaside Park residents. Petitioners presented exhibits and testimony regarding the long travel times and distances required for them to attend town meetings and take care of other business at official Berkeley Township offices. For example, evidence was presented showing that, on Sunday, March 30, 2014 around 4 p.m. – a relatively low traffic day and time outside of the summer tourist season – a round-trip drive from South Seaside Park to mainland Berkeley Township and back could cover as much as 32.6 miles and take as long as one hour and three minutes (1:02:50). Ex. A-4. In other words, South Seaside Park residents wishing to travel to their child’s elementary school, Township offices, meetings of the Township Council, Board of Education, Zoning Board, and Planning Board, Berkeley parks, the recycling center, the Berkeley branch of the Ocean County Library, the Berkeley Police Department, all but two small parks, or other locations crucial to participation in local civic life are forced to spend over an hour on the road and put over 30 miles on their vehicles *each time they leave their house*. A day requiring multiple trips to the mainland only causes these numbers to geometrically increase.

Testimony given to the Planning Board shows that these excessive drive times are representative of the experience of most South Seaside Park residents, are significantly worse in summer months, and cause significant harm to the well-being of South Seaside Park residents. See, e.g., T. 1/8/15, 68:1-69:18. Testimony was also given that Petitioners could walk or ride bikes less than a mile to council meetings and other municipal events in neighboring Seaside Park, which was impossible for such events in Berkeley Township. T. 1/8/15, 65:15-66:11.

Further, testimony showed that South Seaside Park students were forced to spend nearly an hour on bus rides to Berkeley Township schools, significantly more than if they were annexed to Seaside Park, where elementary school students would attend Toms River schools that are *less than half* the distance from South Seaside Park. T. 1/8/15, 70:21-73:8; T.2/5/15, 6:13-7:15.

Further, the Board viewed and discounted an exhibit showing that beach badges were available for purchase in South Seaside Park only three days during the year, from 9:00 a.m. to 1:00 p.m. Ex. A-72. Testimony confirmed that if residents were unable to purchase badges during this miniscule twelve-hour window, they were forced to travel to the Berkeley Township recreation building over 16 miles away. T. 1/8/15, 85:5-21. Similarly, South Seaside Park resident Patricia Dolobacs noted that senior programs in mainland Berkeley Township are often segregated by gender, forcing her and her husband to either make two separate round trips of over an hour or drive together and each wait for the other to finish their program. T. 5/7/15, 26:18-27:13.

Evidence also showed that Berkeley Township failed to mitigate the detriment caused to South Seaside Park residents by their vast distance from the Berkeley municipal center. Berkeley Township Council meetings were changed from 7:00 p.m. to as early as 5:30 p.m. Ex. A-5. Testimony showed that these early times for Council meetings, as well as for meetings of the Planning Board and Zoning Board and other activities necessary for full civic participation, caused severe hardship to South Seaside Park residents, who were often forced to drive more than 16 miles each way through severe, end-of-workday traffic. T. 2/5/15, 8:9-11:9.

The result of the geographic separation between Berkeley Township and South Seaside Park is that residents of South Seaside Park are cut off from being full participants in the

community life of Berkeley. Mr. Whiteman summed up this incontrovertible social harm when he testified that, “[w]e’re not part of the mainland. And that serves as one of the problems that we have, since we were not part of the mainland, to become part and to enjoy what goes on . . . it’s just, water separates us.” T. 6/4/15, 11:2-12.

**B. Berkeley Township Failed to Consider Petitioners’ Showing That South Seaside Park Residents’ Social and Community Life is Centered Around Seaside Park and Nearby Barrier Island Municipalities Rather Than Mainland Berkeley Township.**

In addition to the vast distance and geographic separation between South Seaside Park and Berkeley Township, there has long been a social and community division between the mainland Township and the barrier island communities on the Barnegat peninsula. The evidence presented clearly shows that Petitioners overwhelmingly identify with and participate in the social and community life of their close neighbors on the peninsula rather than their distant mainland counterparts.

In reviewing denials of deannexation petitions, New Jersey courts have consistently held that a given local community is best served by belonging to the municipality where its social life is centered and with which it most strongly identifies. In ordering deannexation in Bay Beach Way, the Appellate Division concluded that the Bay Beach Way petitioners “were very involved in Lavallete community activities because of their proximity to the borough” in contrast to their distance from Toms River. Bay Beach Way, No. A-5733-07 at \*2. Based upon this conclusion, the Appellate Division affirmed the trial court’s holding that “the plaintiffs were more closely associated and identified with Lavallete than with Toms River by geographic and demographic factors.” Ibid. Similarly, the Supreme Court in West Point Island ordered deannexation because

“[t]he residents of West Point Island naturally look to the contiguous Borough of Lavallette as the focus of community interest and activity. The record shows that the West Point Islanders use Lavallette recreation facilities, and the Lavallette Borough Hall for community meetings.” West Point Island, 54 N.J. at 350.

Even in cases where deannexation was denied, courts have considered and weighed which municipality was truly the center of petitioners’ identity and social lives: their current municipality, or the municipality to which annexation was sought. For example, in Ryan, 64 N.J. at 598, the Supreme Court recognized that the Beechwood Farms petitioners “perceive themselves as a community, despite the fact that they straddle the two Boroughs.” The Court, however, noted that the Beechwood Farms community was “not isolated from the remainder of Demarest as West Point Island was isolated from Dover Township” and that “while the residents may prefer to live in Alpine, they did participate in Demarest’s political, social and church activities.” Id. at 603. The Court concluded that “we cannot say that Alpine is the natural focus of social activity for the residents of Beechwood Farms in the same way that Lavallette was unquestionably the natural focus of West Point Island.” Ibid.

Other courts have engaged in similar analysis when determining whether social harm would be caused to a community by denial of deannexation. In Avalon Manor, 370 N.J. Super. at 87, the Appellate Division cited the trial court’s finding that “failure to consent to deannexation resulted in some economic and social detriments to Manor.” Relevant factors noted by the Appellate Division included the fact that “Manor had a number of similar attributes to Avalon and significant concerns which Avalon shared but in which the remainder of [Middle] Township had no interest,” testimony that “Manor was a distinct, social community” whose interaction was

“primarily with Avalon, much more so than it is with Middle Township,” and the fact that Manor was a seasonal beach community like Avalon with “specific needs and concerns different from the Township.” Id. at 78-79. See also Strathmere, No. L-0432-09 at \*24-25 (acknowledging detriment to Strathmere petitioners from denial of deannexation because “its interests and concerns were more aligned with Sea Isle City rather than Upper Township,” and because Strathmere residents “identify on a social level much more with Sea Isle City than the Upper Township mainland,” “go to Sea Isle City and to Ocean City for churches, doctors, dentists, pharmacies, grocery stores and libraries,” and “socialize more” with Sea Isle City due to “much close physical proximity”); Russell, 261 N.J. Super. at 57 (noting that “the Eagleswood residents have a greater nexus with the business and shopping areas of Stafford. Additionally, the proofs demonstrate that access to these areas at the present time, and in the foreseeable future, will have to be through Stafford. Thus, in balance, the geography, logistics and availability of businesses and municipal services seem to favor annexation of the Cedar Run Dock Road section to Stafford Township.”).

Here, evidence and testimony presented to the Planning Board clearly shows that residents of South Seaside Park identify with and center their social and community life around next-door Seaside Park and other nearby barrier island municipalities rather than mainland Berkeley Township. As one Petitioner testified:

I thought back then [in 1972], as I still do, that was illogical for us to be – that is, South Seaside Park – to be a part of Berkeley. And I feel a great affinity for the town of Seaside Park. And this has nothing to do with – you know, back in the 1970s, it had different administration. It’s got nothing to do with personalities. Nothing to do with administrations. Because those things change. But some things stayed the same. And the culture of that little community stays primarily the same. And that is why I would seek to join Seaside Park.

[T. 2/5/15, 104:5-18].

For example, South Seaside Park residents use the library in Lavallette, primarily shop in Toms River, Seaside Park and “Ortley Beach for the A&P,” eat at restaurants in their own community or in Seaside Park and Lavallette, attend church in Seaside Park and Toms River, use Seaside Park’s recycling center, go to parks in Seaside Park, and even hold community meetings in Seaside Park. T. 1/8/15, 119:20-121:21; T. 2/5/15, 12:24-14-2, T.2/5/15, 17:21-24; T. 4/2/15, 44:7-17; T. 5/7/15, 15:22-16:11, 100:18-104:19. Petitioners testified that South Seaside Park is “almost like a town in itself on the island” and that “[t]he beach is like its own community . . . that’s why we would like to become part of that same community, like community of Seaside Park.” T. 2/5/15, 17:23-18:14. Seaside Park resident Robert Schwartz testified that, “I don’t come to Mainland Berkeley. I’ve never been here. I live on the island. That’s where I live. I come to these meetings. That’s the only time I come.” T. 2/4/15, 103:22-104:1. Ms. Dolobacs testified that, “other than coming here, I swear, I would not know how to get to anything in Berkeley. We just, we have never done it. And since we’ve been here 11 years, we still haven’t done it.” T. 5/7/15, 32:13-16. Clearly, South Seaside Park residents naturally look to nearby barrier island and oceanfront municipalities as the focus of community interest and activity as in Bay Beach Way and West Point Island. Unfortunately, South Seaside Park residents are not always able to fully participate in local activities, as “Seaside Park people have first choice” for attending events and reserving public spaces. T. 5/7/15, 29:21-30:11. If South Seaside Park were to join Seaside Park, this problem would be eliminated and Petitioners would be able to participate in their local community without any barriers. Further, South Seaside Park resident Janet Shalayda

testified that her and her husband “didn’t realize really that we weren’t part of Seaside Park” for more than a decade after purchasing their home. T. 5/7/15, 99:3-24.

Testimony from experts and South Seaside Park residents confirmed that South Seaside Park identifies with, and is identified with by outsiders, Seaside Park and other nearby beach communities far more than with distant Berkeley Township. For example, Mr. Bauman testified that, “I don’t think the prestige would change from the perception of people within the town and outside the town [if deannexation were granted]. I don’t think anybody outside of Berkeley Township knows that South Seaside Park is part of Berkeley Township. Should they leave, people from Caldwell or from Cape May aren’t going to know a difference. They’ll still think you’re as prestigious as ever on that.” T. 10/1/15, 102:12-19. Mr. Bauman further testified that, from his discussions with South Seaside Park residents, he concluded that their interactions with and use of neighboring Seaside Park and its amenities represent the “types of relations and feelings that those residents would have rather than having to travel, to get in the car . . . to go to experience a municipal facility or an activity” in mainland Berkeley Township. T. 9/3/15, 28:2-15. Ms. Wooley-Dillon similarly testified that South Seaside Park was more part of the neighborhood of Seaside Park than of Berkeley Township and that these two barrier island communities crossed municipal boundaries, making them virtually indistinguishable except by arbitrary lines on a map. T. 2/7/19, 97:8-98:22. Ms. Fulcomer said one of her biggest motivations for supporting deannexation was the opportunity to “be a voter in the area where I live” as opposed to distant Berkeley Township, and concluded that deannexation was about two things: “the distance and the culture of the community of South Seaside Park in contrast to Berkeley.” T. 4/2/15, 29:9-36:6. Ms. Fulcomer noted that being able to vote in a small local community rather



than as part of a large, distant municipality would give South Seaside Park residents “a great deal of weight” in policy decisions directly affecting them. Ibid. Having a bigger voice in their own government would be a crucial social benefit for Petitioners, especially when, as testimony revealed, Berkeley Township consistently failed to respond to their concerns and needs until *after* they filed this deannexation petition.

Ms. Fulcomer also called Seaside Park a “sister community” and “a lifeline to us,” and testified that she has been involved in the effort to join Seaside Park since the 1970s because, “I thought . . . South Seaside Park being part of Berkeley then was illogical. I feel it’s illogical now. The culture of South Seaside Park matches Seaside Park far more than it does Berkeley. T. 4/2/15, 44:18-45:5. Even residents of Seaside Park consider South Seaside Park part of the same community. Seaside Park resident Robert Cardwell testified that he supported deannexation because, “there’s a lot of things that would be beneficial to South Seaside Park in joining Seaside . . . I grew up with all the kids from South Seaside . . . I’ve never not considered them part of Seaside Park. I have not considered them, you know, a separate entity.” T. 4/2/15, 62:15-64:9.

Further, evidence showed that South Seaside Park residents shared a zip code, telephone directory, and cable provider with neighboring Seaside Park but not with Berkeley Township. T.2/5/15, 11:10-12-19; T. 5/7/15, 39:7-41:1. This situation causes additional harm to South Seaside Park residents, as Berkeley Township meetings are not carried by South Seaside Park’s cable provider. Further, Ms. Dolobacs testified that letters mailed to her address and zip code in “South Seaside Park” arrived in two days, while letters with the same address and zip code sent to “Berkeley Township” took over a week to arrive. T. 5/7/15, 39:7-41:1. Clearly, the US Postal Service is as confused as anyone as to South Seaside Park being part of Berkeley Township.

In addition, Mr. Bauman testified that the South Seaside Park Homeowners Association meeting he attended was held at the Seaside Park first aid building. T. 9/3/15; 20:12-23. Notably, South Seaside Park homeowners did not hold their meetings in mainland Berkeley Township (due to distance) or in South Seaside Park itself (due to lack of meeting space). Seaside Park, then, is the natural hub of South Seaside Park residents' political and community life.

Finally, Ms. Wooley-Dillon testified that "there's an identity crisis" in which "most people assume that they were going to Seaside Park, and they went to Seaside Park instead of South Seaside Park. They commonly affiliate the two together." T. 2/7/19, 23:4-24:9. As just one example, Ms. Wooley-Dillon investigated an incident in which a contractor mistakenly tore the roof off a Seaside Park home after confusing Seaside Park with South Seaside Park, where the work was supposed to be done. Ibid. Even professional contractors, who one would think have an enhanced understanding of local geography, recognize Seaside Park and South Seaside Park to be part of the same community.

When all factors are considered, it is clear that not only do South Seaside Park residents subjectively consider themselves part of the barrier island community along with nearby municipalities, but objective measures also show that, logistically and practically, South Seaside Park is distinct and separate from Berkeley Township except by arbitrary lines on a map.

**C. Berkeley Township Failed to Consider Petitioners' Showing That South Seaside Park Residents Are Neglected by Berkeley Township and Receive Inadequate Municipal Services, Especially As Compared to Adjacent Seaside Park.**

It is critical to note that "[t]he mere providing of adequate municipal services in the past does not earn the right to withhold consent to deannexation." West Point Island, 54 N.J. at 348.

Thus, to the extent Berkeley Township based its denial of deannexation on the adequate services allegedly provided to South Seaside Park, the denial is based on a fundamental error of law and clearly arbitrary, capricious, and unreasonable. That said, the record makes it clear that Berkeley Township has not, in fact, provided adequate services to Petitioners, that South Seaside Park has often been an afterthought among the various sections of Berkeley Township, and that Petitioners will continue to suffer from substandard services if they are not allowed to annex to Seaside Park.

One of the biggest issues noted by Petitioners was the lack of timely snow plowing in South Seaside Park. Exhibits and testimony illustrated a dramatic difference between Seaside Park streets that were plowed immediately following snowstorms and adjacent South Seaside Park streets that remained covered in snow and impassable for up to five (5) days. Ex. A-11, A-13; T. 2/5/15, 19:6-21:5; T. 4/2/15, 15:24-18:11. Petitioners noted that this problem had continued without respite since the 1974 petition was first signed and that some residents were forced to hire their own private contractors to clear the roads so they could get their vehicles out and avoid being trapped in their homes. Ibid. Clearly, South Seaside Park residents not only suffer from inferior services from Berkeley Township, but the Township has failed to remedy the lack of services despite two deannexation petitions (one partially successful) over the span of forty-five (45) years. This is the very epitome of “detriment” justifying deannexation. South Seaside Park residents suffer a similar detriment from Berkeley Township’s failure to consistently pick up bulk refuse and recycling on the barrier island, despite many complaints by residents. Ex. A-11, A-17, A-18, A-20, A-36; T. 4/2/15, 20:25-21:9, 100:20-103:15; T. 5/7/15, 53:19-55:10, 74:4-77:24. South Seaside Park resident Judith Erdman noted that this failure is “a

waste of everybody's money. Not just our money on the island but everybody's money in Berkeley Township. And it is causing a lot of frustration, a lot of aggravation." T. 5/7/15, 74:4-77:24. Ms. Erdman further testified that if deannexation was approved, "Berkeley might have a little bit more money in the coffers, too, from the money they'd save from sending those trucks over" from the mainland. Ibid. Notably, Seaside Park consistently maintains prompt trash and recycling services for its citizens, likely because it does not have to service a distant community as does Berkeley Township. T. 5/7/15, 55:6-55:10.

Even more concerning is testimony from South Seaside Park residents regarding the lack of acceptable emergency response services, communications, or refuse services they receive from Berkeley Township. For example, South Seaside Park resident George Giovenco testified that Berkeley Township police failed to respond in a timely manner to his call regarding a hit and run accident that damaged his cars. T.6/2/16, 24:6-32:5. As a result, Mr. Giovenco was forced to find and apprehend the perpetrators on his own. Ibid. Again, several Seaside Park officers were the first to respond, while only one Berkeley Township police officer showed up later. Ibid. Similarly, South Seaside Park resident Don Whiteman testified that he has seen no beach patrols by Berkeley Township police in South Seaside Park since the 1980s. T. 6/2/16, 65:18-67:10. As a result, Mr. Whiteman and other residents suffer significant nuisances on the beach, such as unlawful drinking, partying, and bonfires. Ibid. Ms. Fulcomer summed up the problem when she testified, "we are really dependent, our lives are quite dependent on the goodness of Seaside Park, mostly because and all because they're the closest people to take care of an emergency." T. 4/2/15, 27:6-19.

Notably, Seaside Park resident and former Seaside Park police officer Robert Cardwell testified in support of deannexation and noted that South Seaside Park would gain the benefit of more police coverage from Seaside Park than from Berkeley Township. T. 4/2/15, 59:12-63:16. Mr. Cardwell further noted that it would take “less than a minute” for Seaside Park police to respond to South Seaside Park emergency calls and concluded that, “from a police standpoint” he was supporting deannexation because “I feel that Berkeley down there, you know, what the lady said, better services down there.” Ibid. Clearly, South Seaside Park residents would be significantly better off receiving emergency services and police protection directly from Seaside Park, which is much closer, more responsive to these needs, and part of the same barrier island community.

South Seaside Park resident Judith Erdman also gave testimony and provided exhibits showing that Berkeley Township failed to sufficiently protect beach dunes with snow fencing and modified cut throughs following Superstorm Sandy. T. 5/7/15, 59:3-62:13. Ms. Erdman noted that Midway Beach, a private condominium community in South Seaside Park, provided significantly greater protection for its dunes, showing that Berkeley Township’s failure was a matter of simply neglect, not impossibility. Ibid.

Further, Berkeley Township does not provide Petitioners with any nearby indoor recreational facility, whereas neighboring Seaside Park opens up its school gyms for residents upon request. T. 1/8/15, 93:13-95-8. This indoor facility is in addition to outdoor facilities in Seaside Park that are better maintained and offer more activities than any in South Seaside Park and which South Seaside Park residents use far more often than those in mainland Berkeley Township. Ibid.; T. 1/8/15, 97:3-102:13; T.4/2/15, 11:21-15:18; Ex. A-10. Mr. Bauman testified

that the only other recreation facility in South Seaside Park aside from White Sands Beach, the Sergeant John A. Lyons Memorial Park, “has no bathrooms, no bleachers, no shade, no trees, no lights, no parking.” T. 8/6/15, 29:5-15. As a result of the meager recreational resources in South Seaside Park, residents Cathy Fulcomer and Patricia Dolobacs testified that residents are forced to purchase badges in two municipalities in order to fully utilize all nearby recreational options on the barrier island. T.4/2/15, 14:14-15-18; T. 5/7/15, 17:20-18:7. This burden would be eliminated if South Seaside Park became part of Seaside Park. Ms. Dolobacs noted that she would personally save \$385 per year following deannexation because she would only have to purchase Seaside Park badges for her family. Ibid.

Petitioners also provided overwhelming evidence that Berkeley Township failed to maintain bayside beachfront areas in South Seaside Park, even though bayside beachfront areas in mainland Berkeley Township and neighboring Seaside Park were both well maintained and open for a variety of recreational activities. T. 2/5/15, 85:5-86:6. Petitioners noted asphalt, cement, rusty pipes, and chunks of wood along the bayside beach, making it impossible to walk barefoot or enjoy swimming or sunbathing, as well as the total absence of lifeguards or restrooms. Ex. A-6, A-7, and A-39; T. 2/5/15, 50:16-52:16; 106:11-114:8; T.6/4/15, 13:17-15:24. Mr. Whiteman specifically noted that “you can walk without shoes on” on Seaside Park bayside beaches but “my beach, I have to have sneakers on.” T.6/4/15, 15:6-24. Berkeley Township simply does not prioritize investing in South Seaside Park’s bayside beachfront in the same way it invests in the mainland bayside beaches, or that Seaside Park invests in its own nearby bayside beaches. This neglect occurs despite repeated efforts by South Seaside Park residents to get Berkeley Township to address their concerns. Mr. Whiteman testified that “[f]or years, I have

gone to the council, I asked them to clean up the bay. [. . .] I realized I went to the council meeting and it went on deaf ears.” T. 6/4/15, 15:6-24. In addition to the lack of usable bayside beaches, South Seaside Park has no bayside park, while mainland Berkeley Township has several bayside parks with amenities such as roller hockey, a pavilion, a playground, ample parking and trash receptacles, boardwalks, and picnic tables, none of which exist in South Seaside Park. T. 4/2/15, 6:15-10:21; Ex. A-8, A-9.

Again, South Seaside Park residents suffered detriment that could have been remedied by annexation by Seaside Park once it became clear that Berkeley was not interested in developing the bayside beaches. It is important to emphasize that this detriment to all South Seaside Park residents is a conscious decision by Berkeley Township. Although maps show some riparian grants to the bay waters adjoining the South Seaside Park bayside beachfront, nothing has prevented Berkeley Township from seeking a public easement, condemnation, or other attempts to develop and utilize the bayside beachfront under the Public Trust Doctrine, whereby the ownership, dominion and sovereignty over land flowed by tidal waters, which extend to the mean high water mark, is vested in the State in trust for the people.” Matthews v. Bay Head Imp. Ass’n, 95 N.J. 306, 312 (1984). Indeed, Berkeley Township’s own Planner, Mr. Slachetka, stated that the water and land under the water in Barnegat Bay directly west of South Seaside Park is located within Berkeley Township. T. 11/2/17, 87:4-89:20. Mr. Slachetka admitted that Seaside Park maintained excellent bayside beaches despite having geography nearly identical to that of the South Seaside Park bayside. Ibid. As such, Mr. Slachetka said he would encourage Berkeley Township to establish an improved public bayside beach in South Seaside Park. Ibid. The fact

that the Township has failed to do so reveals its neglect of South Seaside Park, especially compared to neighboring municipalities.

Even the one maintained beach in South Seaside Park, White Sands Beach, is still grossly deficient when compared to neighboring Seaside Park. Seaside Park beaches are 1.5 miles long, have numerous water fountains, showers, and are cleaned with a beach cleaner daily. In contrast, White Sands Beach has one (1) water fountain for the entire beach, no showers, and is cleaned only once or twice per week, causing garbage to pile up during summer months. T. 2/5/15, 53:24-56:5. Further, Mr. Bauman testified that White Sands Beach “has no parking, no changing facilities, no snack shack or organized activities.” T. 11/5/15, 76:9-12. Along the same lines, South Seaside Park residents testified that while Seaside Park’s beaches and boardwalk were fully refurbished and open for the tourist season the summer after Superstorm Sandy, Berkeley Township utterly failed to do the same for White Sands Beach. Ex. A-28, A-29, A-30, A-31; T.6/4/15, 34:5-36:2; T. 5/7/15, 64:6-69:19. This was an egregious failure by Berkeley Township and caused South Seaside Park significant injury, as the condition of beaches and boardwalks is a critical part of the social well-being and economic life of oceanfront communities like South Seaside Park. Ibid.; T. 5/7/15, 67:7-68:25. Worse, even though it was obvious that the White Sands boardwalk would not be in working condition for summer 2013, Berkeley Township continued working on the boardwalk during the July 4<sup>th</sup> holiday weekend, causing significant interruption to enjoyment of the beach. Ibid. By such negligence, Berkeley Township either did not care or did not appreciate the unique needs of its oceanfront community the way Seaside Park did.



Further, despite South Seaside Park having a significant senior citizen population, there are no senior facilities in the community, forcing older residents to travel to the mainland if they wish to join in senior services and activities. T. 2/5/15, 50:5-15. Mr. Bauman testified that, even though residents of South Seaside Park have an average age of 61.9 years, Berkeley Township's programs and events are all held on the mainland, requiring South Seaside Park seniors to "jump in the car and go over the bridge," which, as noted above, is a significant burden given the lack of any public transportation service for South Seaside Park. T. 11/5/15, 60:14-16; T. 8/6/15, 30:13-32:12. Notably, the record shows that, even though Berkeley Township indicated that a bus stop would be added to South Seaside Park if requested by residents, this has not been accomplished. T. 2/7/19, 9:10-11:7; 5/7/15, 28:1-29:2. Ms. Fulcomer testified that, "I feel kind of neglected" because of the lack of senior activities in South Seaside Park. T. 4/2/15, 43:19-44:6. This is a significant burden and social injury to older residents who often face greater difficulties in travelling far distances. Ms. Wooley-Dillon testified that this unresponsiveness to the needs and requests of South Seaside Park residents is particularly harmful given that South Seaside Park is "predominantly a senior population" requiring assistance for needed recreation. Ibid. Ms. Wooley-Dillon also noted that South Seaside Park residents receive little to no benefit from beaches maintained by Berkeley Township, given that neighboring Seaside Park's beaches are better maintained and offer significantly more recreation options than those maintained by Berkeley Township. Ibid.

Further, in his Planner's Report, Mr. Bauman noted that "South Seaside Park is not part of Berkeley Township's fair share plan for affordable housing; no housing units in South Seaside Park were part of Berkeley Township's 610-unit prior round affordable housing obligation. No

South Seaside Park housing units were rehabilitated by Berkeley Township.” Ex.A-41 at 22. Mr. Bauman concluded that, “[i]f deannexation is not approved, Berkeley Township’s fair share plan will not achieve any new affordable units or any rehabilitated units” in South Seaside Park, which constitutes “a significant injury to the social and economic well-being of South Seaside Park residents.” Ibid.

This neglect of South Seaside Park by Berkeley Township is also demonstrated by a lack of appropriate zoning. Mr. Bauman testified that South Seaside Park is zoned for much larger and more intense development than similar barrier island communities such as adjacent Seaside Park. T. 9/3/15, 37:41:15. Mr. Bauman noted that such “inconsistencies” are usually results of certain outlying neighborhoods not being “cared for as much” by the centralized municipal government and that outlying areas like South Seaside Park are “out of sight, out of mind . . . it’s not an area that a municipality is concerned about or has plans for.” Ibid. As a result of such zoning inconsistencies, property values may decrease, parking spaces are at a premium, and “quality of life would go down.” Ibid. Mr. Bauman concluded that annexation to Seaside Park could solve this problem given Seaside Park’s more consistent and appropriate barrier island zoning. Ibid. Berkeley Township also demonstrated its neglect of South Seaside Park by failing to maintain roads on the barrier island, in some cases neglecting the roads for “50 years or more.” T. 4/2/15, 94:8-24. Worse, when Berkeley Township finally performed some road maintenance following years of complaints by South Seaside Park residents, it did so in the middle of summer, causing disastrous traffic problems and generally destroying residents’ enjoyment of a beach community’s most important season. T. 6/4/15, 39:5-40:1; T. 4/2/15, 42:18-43:18.

The overall neglect of South Seaside Park by Berkeley Township was summed up by Ms. Shalayda: “We really began to discover the disadvantages, quickly, of being a very remote, unconnected and basically an unrepresented part of a township, Berkeley. Like most residents of South Seaside Park, we feel like we’re treated as second class citizens.” T. 5/7/15, 99:16-21.

**III. PETITIONERS HAVE SHOWN THAT BERKELEY TOWNSHIP’S DENIAL OF THE DEANNEXATION PETITION IS DETRIMENTAL TO THE ECONOMIC WELL-BEING OF A MAJORITY OF SOUTH SEASIDE PARK RESIDENTS.**

**A. Berkeley Township Failed to Consider Petitioners’ Showing of Economic Detriments Due to Travel Costs.**

The social detriments to South Seaside Park residents from the excessive distance they must drive to mainland Berkeley Township has already been discussed. However, the geographic distance between these two areas also causes significant economic detriment to South Seaside Park residents that the Planning Board did not reasonably consider. Mr. Bauman testified that,

the economic benefit to South Seaside Park residents [from deannexation is] that walkability reduces auto trips, thus making more sustainable communities. Shopping, socializing and civic activities would be made walkable should South Seaside Park de-annex from Berkeley Township and become part of Seaside Park, less time in cars and the healthier the residents will be. And better health is a significant benefit that can be translated to economic benefits as well.

T. 11/5/15, 98:13-22.

Mr. Bauman further testified that, “the cost of travel of South Seaside Park residents from their homes to the mainland should not be underestimated. It involves operating cost of the vehicle, as well as the opportunity costs lost by South Seaside Park residents when they engage in time-consuming activities of traveling back and forth to the mainland.” T. 11/5/15, 98:25-99:6.

Further, Mr. Wiser testified that, based on Federal and State reimbursement rates for driving mileage, South Seaside Park residents could incur as much as \$8.72 each way (\$17.44 round trip) in wear and tear on the vehicles from having to drive to and from mainland Berkeley Township. T. 11/3/15, 93:21-96:12. Mr. Wiser also testified that South Seaside Park residents were forced to incur approximately \$2.07 in gasoline costs to drive each way to and from mainland Berkeley Township (\$4.14 round trip), in addition to Garden State Parkway tolls. T. 11/3/15, 92:22-93:20.

Clearly, then, the significant distance between South Seaside Park and mainland Berkeley Township creates immense social *and* economic detriments to South Seaside Park residents and by itself justifies deannexation.

**B. Berkeley Township Failed to Consider Petitioners' Showing of Economic Detriments Due to a Higher Tax Burden in Berkeley Township than in Seaside Park**

**1. Courts may consider tax implications for petitioners, as long as "tax shopping" is not the only consideration.**

As an initial matter, New Jersey courts have routinely considered tax implications for petitioners in deannexation cases. For example, in Avalon Manor, 370 N.J. Super. at 88-89, the Appellate Division noted that the trial court "acknowledged that Manor residents' having to forego the tax savings resulting from deannexation qualified as a detriment to those residents" and concluded that "[w]e agree with this analysis." See also Bay Beach Way, No. A-5733-07 at \*3 (ordering township to consent to deannexation when "Plaintiffs testified . . . that the tax consequences were not the sole reason for seeking deannexation."); D'Anastasio Corp. v. Township of Pilesgrove, 387 N.J. Super. 247, 254 (Law Div. 2005) ("For example, a resident

may sign a petition for deannexation because the deannexation may result in less property tax. This is clearly an economic benefit to the residents.”).

Here, Mr. Moore testified that none of the Petitioners ever asked him to calculate the tax savings for South Seaside Park residents and that he never told Petitioners about the tax impacts of deannexation. T. 10/4/18, 79:11-80:23. Further, Mr. Wiser testified that he believed Mr. Moore’s testimony that Petitioners were not informed of the positive tax implications for them should they successfully deannex from Berkeley Township. T. 10/3/15, 101:8-16. Thus, experts representing both sides in this matter agree that “tax shopping” was not Petitioners sole – or even primary – consideration in seeking deannexation. However, even if some Petitioners did allegedly sign the deannexation petition in the hope of reducing their taxes, this Court should follow precedent and consider these tax implications as simply one of many factors in its analysis.

## **2. Petitioners Demonstrated that They Would Realize Significant Tax Savings Following Deannexation.**

Mr. Moore testified that he conducted an analysis of the tax impact for the residents of South Seaside Park if they were to become part of Seaside Park following deannexation from Berkeley Township. T. 10/4/18, 78:12-79:5. Following his analysis, Mr. Moore concluded that the taxes of South Seaside Park residents would decrease by “approximately 40 percent,” a figure that was not challenged or rebutted during the Board hearings. Ibid.

Further, evidence was presented showing that South Seaside Park’s debt service burden would be significantly reduced if it were annexed to Seaside Park. Mr. Moore prepared a supplemental report entitled “Impact of Debt Restructuring,” which showed that the average

South Seaside Park home currently pays \$143 per year towards debt service. Ex. A-53; T. 2/4/16, 33:12-44:20. If South Seaside Park successfully deannexed from Berkeley Township and joined Seaside Park, this debt service burden for the average home would be reduced to \$46 – a 68% reduction. Ibid. Mr. Moore explained that following successful annexation to Seaside Park, South Seaside Park’s share of Berkeley Township’s debt would become part of Seaside Park’s debt and would be shared by all Seaside Park homeowners, reducing the burden on South Seaside Park. Ibid. At the same time, Seaside Park residents’ increased debt service burden would be counterbalanced by the increased ratables Seaside Park would gain from South Seaside Park: “if we take the entire levy of Seaside Park and add the debt service to it and divide it by the assessments, the rate goes down for everybody.” Ibid. Notably, after being confronted with evidence of his inaccurate calculations of the economic impact of deannexation, Mr. Ebenau eventually agreed that there would be a substantial savings of debt service to Berkeley Township totaling \$5 million over ten years following deannexation. T. 6/7/18, 56:10-57:24. Thus, the Planning Board should reasonably have concluded that denial of deannexation would economically harm residents of South Seaside Park *and* Seaside Park.

**IV. PETITIONERS HAVE SHOWN THAT THE DEANNEXATION OF SOUTH SEASIDE PARK FROM BERKELEY TOWNSHIP WOULD NOT CAUSE SIGNIFICANT SOCIAL INJURY TO THE WELL-BEING OF BERKELEY TOWNSHIP AS A WHOLE.**

**A. Berkeley Township Failed to Consider Petitioner’s Showing That Deannexation Would Not Significantly Affect the Social Diversity, Prestige or Social Standing of Berkeley Township.**

One of the main arguments against deannexation of South Seaside Park is that doing so would deprive Berkeley Township of its most prestigious and socioeconomically desirable

neighborhoods, causing severe social harm to the remaining residents. The record, however, shows that South Seaside Park is not socioeconomically or demographically unique and that deannexation would affect such a small portion of Berkeley Township's total area, population, and housing stock as to have negligible social impact.

At a basic level, deannexation of South Seaside Park will only affect a minute portion of the physical land in Berkeley Township. In his Planner's Report, Mr. Bauman calculated that South Seaside Park comprises only .24 square miles – one half of one percent of Berkeley Township's total area – and has only 1.5 miles of bayside and ocean shoreline – approximately 5.4 percent of Berkeley Township's total 28 miles of shoreline. Ex. A-41 at 14. Thus, Berkeley Township would retain the vast majority of its land and valuable, “prestigious” shorelines even if deannexation were granted.

Mr. Bauman further compared demographic housing and economic data between South Seaside Park and mainland Berkeley Township and concluded that “there would be no loss of diversity should de-annexation be granted.” T. 11/5/15, 54:4-13. The record makes it clear that the residents and neighborhoods of South Seaside Park are not significantly different from similar neighborhoods in mainland Berkeley Township. Mr. Bauman noted that the average age of a Berkeley Township resident (61.1 years) was nearly identical to that of a South Seaside Park resident (61.9 years). T. 11/5/15, 60:14-16. Mr. Bauman wrote and testified that “[t]he loss of South Seaside Park would not be significant as far as the people and their careers are concerned. They won't be losing professions or scientists. These are all very similar [homogenous] career folks on both sides of the bay.” T.11/5/15, 67:8-16. This testimony is supported by documents submitted to the Planning Board. For example, the Bauman Report notes that “the most prevalent

race is white for both Berkeley Township and South Seaside Park” and “the deannexation of 490 persons – 0.1% of the township’s population of identical ethnicity and age group will not cause significant injury to the economic and social well-being of Berkeley Township residents. Ex. A-41 at 14.

Similarly, Petitioners presented a comparison of United States Census statistics for several categories between South Seaside Park and two other similar waterfront communities in Berkeley Township designated as Mainland Bayside North and Mainland Bayside South.<sup>12</sup> Ex. A-43, a true and accurate copy of which is reproduced below:

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<sup>12</sup> As noted on Exhibit A-43, “Mainland Bayside North” consists of the River Bank and Good Luck Point sections of Berkeley Township, while “Mainland Bayside South” consists of the Berkeley Shores and Glen Cove sections of the Township.



The comparison of South Seaside Park with such similar beachfront neighborhoods is crucial. General comparisons between South Seaside Park and Berkeley Township as a whole, although they reveal significant homogeneity throughout the Township, also fail to consider the fact that the Township, like all municipalities, is made of up different neighborhoods with different characteristics. Thus, the loss of a particularly affluent neighborhood would look severe when measured against the mean affluence of a municipality, but would actually cause little or no social harm or loss of diversity if the municipality had other similarly affluent neighborhoods. Only by comparing “apples to apples” can a true measure of social harm be obtained. If South Seaside Park is a truly unique and prestigious community, then it could reasonably be argued that deannexation would cause some social harm to Berkeley Township. However, if South Seaside Park is merely one of several similar (and much larger) communities within the Township, then any social harm from deannexation would necessarily be *de minimis*, as Berkeley would still retain plenty of affluent, well-educated, beachfront neighborhoods.

The comparison of Census statistics shows that South Seaside Park, Mainland Bayside North, and Mainland Bayside South are nearly identical in terms of race/ethnicity, average household size, and distribution of types of employment. See Ex. A-43. In fact, Mainland Bayside North actually has a significantly higher median household income than South Seaside Park. Ibid. Further, although South Seaside Park has a moderately older population than the other beachfront communities it is certainly not unique in this respect, as mainland Berkeley Township contains the large Holiday City senior living development, which is significantly larger than South Seaside Park’s population. T. 2/5/15, 50:5-15. The only reasonable conclusion from this data is that deannexation of tiny South Seaside Park will have little or no effect on Berkeley

Township's demographics, diversity, or prestige, as plenty of communities with nearly identical populations will remain.

Further, Mr. Bauman testified that other mainland waterfront neighborhoods of Berkeley Township had higher median incomes than South Seaside Park, with home prices similar to those in South Seaside Park. T. 11/5/15, 61:10-64:24. In fact, Ms. Woolley-Dillon testified that homes on Pelican Island actually have a *higher* value than those in South Seaside Park, and that home values in the Glen Cove neighborhood, although not as high as Pelican Island or South Seaside Park, are still vastly higher than the Berkeley Township average. T. 12/6/18, 33:9-41:23. Notably, the price of homes in South Seaside Park is not due to those homes being larger or more impressive than other Berkeley homes, but rather to the simple fact that they are located near the ocean. T. 12/6/18, 44:6-21. Photographic evidence was presented by Petitioners showing the modest existing housing stock in South Seaside Park and comparing it to significantly larger and more luxurious houses in other sections of Berkeley Township. Ex. A-44, A-45, and A-46. Mr. Bauman testified that "the houses on South Seaside Park aren't mansions. For the most part they're trailer type or mobile type of housing. The average year of structure built was in 1970. [ . . . ] mainland bay side north, the average year structure built was 1989." T. 11/5/15, 67:19-24; Ex. A-43. Mr. Bauman further affirmed that the photographic evidence of South Seaside Park homes "accurately depict the area as it exists today" and that the houses were "one-story, narrow housing, close to the street, close together." T. 11/5/15, 70:1-72:25. Moreover, the types of households in South Seaside Park are nearly identical to those in Berkeley as a whole. Mr. Bauman testified that the household composition in Berkeley Township "reflects a retirement setting, 40 percent one-person households and 60 percent of two-or-more-person households,"

which is “exactly the same” as the composition of South Seaside Park households. T. 8/6/15, 23:2-11.

This testimony is in harmony with the statistics and visual documentation showing the modest character of South Seaside Park homes. Notably, Mr. Koutsouris stated on the record that the Planning Board accepted the photographic evidence as an accurate depiction of South Seaside Park, yet failed to note that deannexation would have little to no negative impact on Berkeley Township’s overall prestige and quality of housing stock. T. 11/5/15, 70:13-21. Clearly, Berkeley Township would not lose a uniquely prestigious or valuable neighborhood if deannexation occurred, but merely a tiny one similar to other, larger neighborhoods on the mainland. This is, at most, *de minimis* harm to the Township.

Mr. Bauman also testified that the population and number of housing units in South Seaside Park are so small relative to Berkeley Township as a whole that deannexation would have minimal impact even if South Seaside were far wealthier and more prestigious than the rest of the Township, as Berkeley Township wrongly asserts. T. 11/5/15, 65:20-66:14 (South Seaside Park only has 1,268 housing units out of roughly 24,000 in Berkeley Township in total, and a population of 490 out of a population of 41,255 in Berkeley Township in total). Essentially, few people, either residents of Berkeley Township or visitors, would even notice that South Seaside Park had left. Further supporting this conclusion is the fact that, as noted above, many people do not even realize that South Seaside Park is currently part of Berkeley Township and often confuse South Seaside Park with neighboring Seaside Park. See, e.g., T. 10/1/15, 102:12-19. Mr. Bauman contrasted the significant loss of prestige were Princeton Township to lose the area containing Princeton University with the negligible loss of South Seaside Park: “in this case,

we're talking about housing, a very small part of business area and a beach, which you have ten miles of beach in addition to, so I don't see where the prestige loss comes into play." T. 10/1/15, 103:2-11.

Further, evidence from multiple experts confirmed that South Seaside Park does not have any special or unique zoning such that deannexation would deprive Berkeley Township of certain types of homes, businesses, or land uses. In his Planner's Report, Mr. Bauman notes that under current zoning, the ratio of residentially-zoned to commercially-zoned land "remains unchanged in a post-deannexation Berkeley Township." Ex. A-41 at 23. Mr. Bauman further writes that, "[t]he permitted use and lot requirements in the zone districts of South Seaside Park are no different than those throughout Berkeley Township; deannexation will not cause significant economic or social injury to Berkeley Township's diversity of permitted uses." Ibid. Similarly, Mr. Bauman's testified that the only property in South Seaside Park included in the State Historic Preservation Office opinion – the Midway Campus Historic District – has "no significant architectural features. No tours are given in that area. No income would be lost in that sense." T. 8/6/15, 38:11-40:14.<sup>13</sup> Similarly, Ms. Wooley-Dillon testified that any unique housing or unique zoning is "now becoming less diverse in South Seaside Park." T. 2/7/19, 11:19-12:10. As a result, "it's not going to leave anything that's exceptional, unique, or unusual" in South Seaside Park, thus negating any purported loss of a neighborhood of uniquely prestigious character through deannexation.

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<sup>13</sup> Notably, this property has not been included in the State Register of Historic Places and is unlikely to be in the future, as the Midway Beach Condominium Association has recently permitted construction of two-story dwellings, destroying the historic character of the property.

Finally, as noted above, Mr. Bauman noted that “South Seaside Park is not part of Berkeley Township’s fair share plan for affordable housing.” Ex. A-41 at 22. Thus, Mr. Bauman concluded, “[d]eannexation of South Seaside Park will not cause significant injury to Berkeley Township’s fair share plan for affordable housing.” Ibid.

**B. Berkeley Township Failed to Consider Petitioner’s Showing That Deannexation Would Not Significantly Affect Berkeley Township Residents’ Access to Desirable Recreational or Social Activities**

In his Planner’s Report, Mr. Bauman concludes that “deannexation will not significantly impact any cultural sites or environmental resources.” Ex. A-41 at 12. Similarly, Mr. Bauman testified that the restaurants and other commercial establishments in South Seaside Park are “limited in diversity and quantity. There’s no loss to Berkeley Township should South Seaside Park be deannexed,” especially given that mainland Berkeley Township commercial establishments “run the gamut, restaurants, hotels, commercial nodes, retail shopping, strip malls, mixed use commercial and residential.” T. 8/6/15, 43:10-44:11. Similarly, the record shows that South Seaside Park has only one public park with meager accommodations, Sergeant John A. Lyons Memorial Park, while mainland Berkeley Township has 14 parks, most of which offer far more amenities than in South Seaside Park. Ex. A-19; T. 8/6/15, 29:5-15; T. 5/7/15, 7:21-13:9. As such, Berkeley Township residents will not suffer any appreciable loss of quality recreational areas.

The record also makes it clear that while deannexation would cause Berkeley Township to lose 400 meters of ocean beachfront, it would retain approximately eight and a half miles of ocean beachfront in Island Beach State Park, in addition to several well-maintained bayside

beaches on the mainland. T. 1/8/15, 103:19-104:10. Although Island Beach State Park is operated by the State, it is part of Berkeley Township and is touted on the Township website and in promotional materials, offers significantly more amenities, and costs Berkeley Township residents less money than South Seaside Park's White Sands Beach ocean beachfront. T. 11/5/15, 88:3-92:23. Further, unlike the bay beaches in South Seaside Park, the bay beaches in mainland Berkeley Township are well maintained and usable for recreational purposes. T. 9/3/15, 78:6-13. Mr. Koutsouris, counsel for the Planning Board, admitted that the Board did not dispute the vast amenities offered at Island Beach State Park that would remain in Berkeley Township. T. 11/5/15, 91:12-15. Similarly, Mr. Bauman testified that the existing White Sands Beach in South Seaside Park "has no parking, no changing facilities, no snack shack or organized activities." T. 11/5/15, 76:9-12.

Further, the record shows that Island Beach State Park is similar in price to White Sands Beach – and less expensive for Berkeley Township residents, in some cases – and is more accessible by car, with more parking than White Sands Beach. T. 9/3/15, 94:15-95:2. As such, it is unreasonable to conclude that deannexation will affect Berkeley residents' access to the most desirable recreational locations and activities. As Mr. Bauman testified, the loss of White Sands Beach "would not be significant to Berkeley Township." T. 11/5/15, 92:22-23.

Notably, in his 1978 decision ordering Berkeley Township to consent to deannexation of South Seaside Park, Judge Addison specifically found that deannexation would not negatively affect Berkeley Township because of the wealth of superior beaches within the Township and in nearby municipalities:

There are ocean beaches on adjacent municipalities on the barrier peninsula which are available to all on a pay-as-you-go basis, as is the so-called “white sand beach” in South Seaside Park. Several of them are closer to the defendant’s mainland than is its own beach. The loss to the municipality of a future bay bathing beach in South Seaside Park for use by the mainland residents does not in any way have a deleterious social impact on the Township. Even a cursory examination of the map attached to this opinion reveals several miles of municipal bay frontage as part of the mainland, on which there is already established a County Park with bathing beach and the potential for additional bathing facilities.

Ex. A-112 at 8.

Further, Mr. Bauman noted that South Seaside Park has no properties listed on the State or National Registers of Historic Places, no important cultural sites or environmental resources, no houses of worship, and no schools or libraries. Ex. A-41 at 12. The Bauman Report also notes that Berkeley Township and South Seaside Park are both in the Barnegat Bay Watershed Management Area and both have NJDEP-approved shellfish harvest areas. Ibid. Thus, deannexation will not cause a loss to Berkeley Township of any of the aforementioned benefits or resources. Mr. Bauman also testified that the businesses and other land uses in South Seaside Park are not unique and can be found elsewhere in Berkeley Township as well. “Beach stands, restaurants, you have them on the mainland, you have them on the shoreline. I don’t see the uniqueness of – you go buy a soda, you’re going to go to a 7-Eleven. There’s going to be one on the barrier island. There’s one on the mainland.” T. 10/1/15, 83:10-15. Thus, deannexation will not cause any social injury to Berkeley Township residents from the loss of unique businesses or land uses in South Seaside Park.

**C. Berkeley Township Failed to Consider the Clear Evidence that Deannexation Would Not Harm South Seaside Park Residents.**

As a final consideration in this discussion of the social harm – or lack thereof – to Berkeley Township resulting from deannexation of South Seaside Park, it must be noted that the Planning Board attempted to show that deannexation would cause social harm to South Seaside Park residents in addition to the remaining residents of mainland Berkeley Township. During Mr. Moore’s testimony, Mr. McGuckin suggested that South Seaside Park residents’ debt burden might increase following deannexation and noted that, “our obligation is also to determine if this is in the best interest of the residents of South Seaside Park to do this.” T. 12/3/15, 51:2-22.

Fundamentally, this represents yet another error and/or willful mischaracterization of the law by the Planning Board and its attorneys. As noted above, the only factors to be considered by the Planning Board and the municipal governing body (and now, this court in its review) are whether deannexation would cause social and economic harm to Berkeley Township, and whether failure to consent to deannexation would cause social and economic harm to South Seaside Park residents. See Avalon Manor, 370 N.J. Super. at 90. Whether or not deannexation would cause any harm to South Seaside Park residents is not part of this legal analysis. Simply put, the requirement of a petition signed by at least 60% of South Seaside Park’s registered voters functions to ensure that any proposed deannexation would, by necessity, be beneficial to the majority of such petitioners. In *D’Anastasio*, 387 N.J. Super. at 254, the court noted that “the statute does not require the petitioner to show a benefit to the majority, but rather that the refusal to consent is detrimental to the economic and social well-being of the majority . . . a resident would only sign [a deannexation petition] if receiving a benefit . . .” Here, as noted above, the deannexation petition was signed by approximately 66% of registered voters. It is the height of arrogance and nanny-state overreach for the Planning Board to assert that it can tell South



Seaside Park residents that deannexation would be bad for them even though they overwhelmingly support it. Wisely, the Legislature and courts do not require Petitioners to prove they will not be harmed by deannexation, accepting that Petitioners can and have made decisions regarding their own interests.

Even though the Planning Board's paternalistic attempts to demonstrate the negative effects of deannexation on South Seaside Park can be dismissed out of hand as legally irrelevant, one concrete example is illustrative of the Board's utter lack of evidence. Mr. Slachetka testified about the Geographic Information Systems ("GIS") program run by Notre Dame, which would provide real-time information regarding coastal weather patterns and help communities impacted by severe weather events plan responses, including buildings to be used in weather disasters. T. 9/7/17, 59:12-74:2. Berkeley Township was one of two pilot communities selected for the initial stages of the program, which Mr. Slachetka and the Planning Board implied would cause significant harm to South Seaside Park once it deannexed from Berkeley Township and could no longer benefit from the pilot program. Ibid. However, Ms. Woolley-Dillon testified that she investigated the GIS program – including speaking with Keith Henderson from the New Jersey Department of Community Affairs, which funded the pilot program – and discovered that the GIS program would soon be made public online. T. 12/6/18, 60:14-63-8. As such, Ms. Woolley-Dillon testified, deannexation is “not going to impact either Berkeley Township, the mainland, or South Seaside Park, one way or the other,” since all of New Jersey would soon have public access to all GIS data. Ibid.

Further, the overwhelming testimony in support of deannexation – by members of the public who did not sign the deannexation petition in addition to Petitioners – demonstrates that

deannexation would clearly benefit South Seaside Park. Specifically, on September 6, 2018, the Planning Board hearings were opened up to public comment. During this session, a total of fifteen (15) members of the public testified before the Planning Board. None of these individuals was a signer of the deannexation petition. Despite not being parties to the matter before the Planning Board, thirteen (13) of the individuals who spoke at this session supported deannexation, giving testimony reinforcing and adding to the evidence already produced by Petitioners. See T. 9/6/18.

Thus, even though any evidence purportedly showing harm to South Seaside Park as a result of deannexation should not even be considered by the Planning Board, the record before the Board demonstrably shows no harm whatsoever. To the contrary, the consensus of Petitioners and other South Seaside Park residents who did not sign the petition is that they would reap significant benefits from leaving Berkeley Township and joining Seaside Park. The Planning Board is in no position to contradict them.

**V. PETITIONERS HAVE SHOWN THAT THE DEANNEXATION OF SOUTH SEASIDE PARK FROM BERKELEY TOWNSHIP WOULD NOT CAUSE SIGNIFICANT ECONOMIC INJURY TO THE WELL-BEING OF BERKELEY TOWNSHIP AS A WHOLE.**

**A. The Berkeley Township Planning Board Failed to Consider Petitioners' Showing That Any Negative Economic Effects Resulting from Deannexation Would be De Minimis and Easily Ameliorated.**

As noted above, Petitioners merely have the burden of showing that deannexation would not cause *significant* economic injury to Berkeley Township. A certain amount of economic impact is inevitable and acceptable; Courts and the Legislature recognize that deannexation with no economic impact whatsoever would be an impossible standard to meet. See, e.g., West Point

Island, 54 N.J. at 348-49 (Court ordered township to consent to deannexation in part because the township’s loss of ratables “would be offset by an equivalent reduction in cost of municipal services” provided to the deannexing neighborhood); . Here, the record is clear that any economic harm to Berkeley Township would be *de minimis* and would be easily absorbed and remedied by the Township, causing little to no long-term adverse effects to residents’ wallets.

In its 2020 Resolution, the Berkeley Township Planning Board unreasonably determined that deannexation of South Seaside Park would “have a significant, long-term detrimental effect upon the remaining residents of Berkeley Township.” Carlson Cert., **Exhibit B** at 14. Notably, the Planning Board based this conclusion on “Petitioners’ own experts’ information.” Ibid. The Resolution stated that remaining Berkeley Township property owners would face “annual tax increases of \$19.00 for a home assessed at \$100,000.00, \$35.00 for the average home assessed at \$183,600.00, and \$94.00 for a home assessed at \$500,000.00.” Id. at 15. Put another way, the Board found that deannexation would cause most Berkeley Township residents significantly less than \$50.00 in increased taxes each year – or less than a dollar per week.

Even granting the Planning Board and the Township discretion in their conclusions, it is difficult to take seriously the contention that less than a dollar per week in taxes, with no additional debt service burden, is a “significant economic injury” to the majority of residents, especially when weighed against the factors described earlier. Notably, this increased tax burden is relatively insubstantial when compared to similar economic injuries in other deannexation cases. See, e.g., Citizens for Strathmere & Whale Beach v. Township Committee of the Township of Upper, No. A-1528-10 at \*2 (App. Div. August 1, 2012) (deannexation denied when it would “result in an estimated tax increase to the balance of the residents of the Township of \$700.00 to

the owner of a home assessed at \$350,000.00”, or a \$200.00 increase for a \$100,000.00 property); Avalon Manor, 370 N.J. Super. at 84 (deannexation denied when the “overall increase would be 7.5 cents” for property taxes, resulting in a \$75.00 annual increase on a property assessed at \$100,000.00); West Point Island, 97 N.J. Super. at 558 (deannexation ordered by the Court when “the difference in the tax rate without West Point Island ratables would be four points according to the township auditor,” or \$40.00 for a property assessed at \$100,000.00). As can be seen, the \$19.00 annual increase in taxes for a \$100,000.00 acknowledged by the Berkeley Township Planning Board is exceedingly insignificant when compared to increases in other similar cases, even cases in which deannexation was ordered by the court.

Further, the already *de minimis* tax increases cited by the Planning Board do not take into account additional savings to Berkeley Township following deannexation. Petitioners introduced Mr. Moore’s supplemental report regarding the tax impacts from deannexation. Ex. A-50. In his supplemental report, Mr. Moore calculated that Berkeley Township spent \$841,036.32 for each police car it had in service, factoring in the cost of the cars, mileage, salaries of the officers and sergeants associated with each car, and other expenses. Ibid. As such, eliminating two police cars servicing South Seaside Park following deannexation would save Berkeley Township approximately \$1.68 million, eliminating the need for any tax increases to make up for lost revenue. Ibid. Mr. Moore testified that these projected savings were based on his analysis of shift hours and total number of days per year worked by the police, which showed that five officers, plus a sergeant, are required to patrol South Seaside Park 24 hours per day, 7 days per week, 365 days per year in one patrol car. T.2/4/16, 6:4-16-1. Mr. Moore further testified that South Seaside residents advised him that two patrol cars currently patrol South Seaside Park, although as noted

above, Berkeley Township refused to provide records to confirm the number of cars and officers assigned to South Seaside Park. T.2/4/16, 15:18-19:8. South Seaside Park resident Don Whiteman also testified on the record that he diligently observed police patrol patterns in South Seaside Park and concluded that at least two and possibly three cars routinely patrolled the community. T. 6/2/16, 45:5-54:11; Ex. A-62. As such, the record reflects – and the Planning Board should reasonably have considered – that deannexation would eliminate Berkeley Township’s burden of policing South Seaside Park, which would likely result in savings for the Township and/or enhanced police presence on the mainland.

Notably, even if Berkeley Township decided not to reduce cars and officers in response to deannexation, or was forced to retain one of the South Seaside Park cars to patrol Pelican Island, as suggested by Planning Board experts, the Township would still benefit from deannexation.<sup>14</sup> First, the number of police cars, officers, and man-hours required to patrol Pelican Island would likely be less than the number required to patrol both Pelican Island *and* South Seaside Park, resulting in at least some savings. Second, even if there were no reductions at all in police expenditures following deannexation, the remaining parts of Berkeley Township would have the same number of police officers and vehicles covering a smaller and more centralized area, thus providing enhanced services without any cost increase. This directly contradicts the Planning Board’s assertion in the 2020 Resolution that deannexation would cause a “potential loss or cut-back of jobs and services.” Carlson Cert., **Exhibit B** at 15. Berkeley Township would benefit

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<sup>14</sup> Of course, because the Planning Board refused to provide Petitioners with information regarding police patrols, any claim that Pelican Island patrols would necessarily have to be done by the same cars and officers who currently patrol South Seaside Park cannot be investigated or rebutted and should thus be dismissed out of hand. In other words, Berkeley Township has not demonstrated that the cars and officers patrolling South Seaside Park cannot be eliminated due to the needs of Pelican Island.

from deannexation either way: a reduced police budget to help offset small tax increases, or enhanced police coverage at no cost.

As further evidence of the benign economic effects of deannexation, Mr. Moore testified that Berkeley Township residents' debt service burden "wouldn't change because it's based on the same assesment, right? In other words, if I'm pulling out 10 percent [due to deannexation], and the ratables go down 10 percent, their dollars shouldn't change." T. 2/4/16, 45:6-14.

Notably, the Berkeley Township Planning Board relied heavily on the Wiser Report in preparing its 2020 Resolution. The Planning Board retained Mr. Wiser to "analyze the testimony, evidence and information presented" and "offer a recommendation to assist the Board in its functions." Carlson Cert., **Exhibit B** at 2. Further, the Planning Board found that the Wiser Report "accurately portrays the testimony and exhibits presented." *Id.* at 4. The Wiser Report itself confirms that Mr. Wiser "utilizes Mr. Moore's base data, augmented by Mr. Ebenau's information where applicable." Carlson Cert., **Exhibit C** at 372. Despite acknowledging and using Mr. Moore's numbers and projections in the Wiser Report, Mr. Wiser and the Planning Board arbitrarily ignored them in making their final recommendations. In their conclusions regarding the impact of deannexation on Berkeley Township, neither the Wiser Report nor the Resolution addresses the fact that eliminating two police cars would counterbalance any projected tax increase, nor do they consider other cost savings demonstrated by Mr. Moore. It appears that Mr. Wiser and the Planning Board simply ignored these savings favor of a higher (but still exceedingly low) projected tax increase because it was inconvenient to their desired outcome rather than because there was good reason to think Mr. Moore's numbers were wrong. In doing so, the Planning Board acted arbitrarily, capriciously, and unreasonably. The Planning

Board also failed to consider Mr. Moore's testimony that senior citizens in Berkeley Township were eligible to register for a freeze on their real property taxes, which would completely negate any potential tax increases resulting from deannexation. T. 10/4/18, 29:9-31:11.

Further, as noted above, Berkeley Township financial expert Fred Ebenau failed to rebut Mr. Moore's conclusions with accurate data, admitting on the record that his calculations were wrong even after having been allowed to file a revised Financial Impact Report. Worse, when asked to give testimony regarding what levels of economic impact would qualify as "significant" versus "insignificant," Mr. Ebenau replied, "I don't have an opinion on that." T. 3/1/18, 17:24-18:5. As such, Mr. Ebenau's testimony and Report clearly were not credible and should not have been considered by the Planning Board at all in determining the economic impact of deannexation on Berkeley Township. Amazingly, Mr. Wisner himself admitted that Mr. Ebenau's reports had errors in them and that Mr. Ebenau's testimony was "suspect" and "questionable," yet later used Mr. Ebenau's numbers in preparing the Wisner Report, which formed the foundation for the Planning Board's 2020 Resolution opposing deannexation. T. 10/3/19, 124:8-23; Carlson Cert., **Exhibit C** at 372. This reliance by Mr. Wisner and the Planning Board on any of Mr. Ebenau's data or conclusions is patently unreasonable and taints the decision to deny deannexation.

The Planning Board also ignored additional savings that would nullify any economic harm caused by deannexation. Mr. Bauman gave his expert opinion that deannexation of South Seaside Park would provide economic relief to Berkeley Township because the Township would no longer have to provide road resurfacing services, waste and recyclable collections, snow removal, police service, animal control, or park maintenance to South Seaside Park. Ex. A-41 at

12. When challenged by Mr. Wiser in cross-examination, Mr. Bauman affirmed that eliminating such services to South Seaside Park would provide significant savings to Berkeley Township and noted that, “I’ve been a mayor of the township. I know how much these things cost.” T.10/1/15, 18:21-19:7. Former Seaside Park Fire Chief Robert Cardwell testified that deannexation would completely relieve Berkeley Township of the cost of fire services in South Seaside Park, which Berkeley Township currently pays as part of a contract with Seaside Park. T. 4/2/15, 64:10-66:20. Mr. Cardwell stressed that there would be no interruption in fire services in this scenario. Ibid. Again, the record shows that the minor economic impact of deannexation on Berkeley Township would easily and quickly be mitigated or eliminated entirely.

Similarly, Mr. Fulcomer submitted a March 11, 2016, letter from State Senator Christopher J. Connors and State Assemblyman Brian E. Rumpf confirming that, “Berkeley Township would receive additional state aid in the event that the Toms River zip code section of Berkeley Township seceded from the township.” Ex. A-56. Mr. Fulcomer explained that he requested information regarding the potential “secession” of the Toms River zip code section of Berkeley Township (the Holiday City area) specifically because the Legislature had already done a study analyzing the effects of this proposed “secession.” T. 5/5/16, 59:23-62:11. Thus, the conclusion of this letter was not merely speculative, but was the result of formal investigation by the State. Based on this letter and his own review of the current State formula for aid, Mr. Fulcomer concluded that the deannexation of South Seaside Park would result in a similar



increase in State aid to Berkeley Township. T. 5/5/16, 62:17-67:21.<sup>15</sup> Using the same information, Mr. Fulcomer also rebutted Planning Board member Nick Mackres' suggestion that Berkeley Township might lose State aid as a result of deannexation. Mr. Fulcomer testified that "a member of your board suggested that if you lost ratables from South Seaside Park, that that might mean that Berkeley Township is going to lose state aid. Well, that's utterly impossible under the previous state aid formula and the current state aid formula." T. 68:9-70:8. The Planning Board failed to rebut Mr. Fulcomer's testimony – and the conclusion of the March 11, 2016 letter from legislative representatives – that the State aid formula provides for increased aid for townships that lose ratables.

The long-term budgetary and demographic trends of Berkeley Township further demonstrate the lack of any significant economic harm to the Township from deannexation, as well as the ease with which Berkeley Township will absorb whatever minor effects do occur. A review of Berkeley Township's yearly budgets and tax levy from 2010 to 2018 revealed that the budget had increased by 19.81% and the tax levy by 27.9% over this nine-year period, an average increase of approximately 2% and 3% per year, respectively. Ex. A-93. Compared to these "natural" yearly increases, the exceedingly small one-time increase in taxes following deannexation is negligible.

Further, Mr. Bauman testified that Berkeley Township's population grew by 10.5 percent between 1990 and 2010, and that "the North Jersey Transportation Authority anticipates a 0.9

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<sup>15</sup> As described in detail above, Mr. Fulcomer has extensive experience working with matters involving State aid to schools, which was acknowledged by the Planning Board even though the Board arbitrarily declined to admit Mr. Fulcomer as an expert witness. As such, significant weight must be given to Mr. Fulcomer's analysis of the State aid formula and conclusion that deannexation here would have the same result as "secession" of the Toms River section of Berkeley Township.

percent annual population growth to 2040 for Berkeley Township.” T. 8/6/15, 60:22-61:11. To put this growth in perspective, Mr. Bauman noted that between 2010 and 2013, Berkeley Township grew by 574 persons – 84 more than the entire population of South Seaside Park. Ibid. Clearly, whatever economic harm would be caused to Berkeley Township by the loss of 490 taxpayers and their associated residential properties would be recouped many times over by the Township’s projected growth and development.

The significant pace of growth during the past few decades is only expected to increase in coming years. In preparing his Report, Mr. Bauman reviewed Berkeley Township’s 2008 build-out analysis as well as a 2012 analysis of the Transfer of Development Rights (“TDR”) obtained by Berkeley Township, which shifts land development away from environmentally sensitive areas and redirects development towards receiving areas zoned and prepared for growth. T. 8/6/15, 65:2-10; Ex. A-42 at 7-9. Mr. Bauman testified that the build-out analysis (without considering the 2012 TDR) showed the potential for 2,800 residential units to be developed in Berkeley Township, representing approximately 5,656 additional residents – more than 10 times the population of South Seaside Park that would be lost to deannexation. T. 8/6/15, 65:2-10. Mr. Bauman further testified that the transfer of development to receiving areas in the eastern part of mainland Berkeley Township under the TDR would, before 2030, add another 1,543 housing units on top of those estimated in the 2008 build-out analysis, in addition to 260,000 square feet of light industrial and 150,000 square feet of commercial development. T. 8/6/15, 65:11-66:15. Mr. Bauman concluded that “the TDR program makes Berkeley Township well-equipped and favorably suited for accepting and maintaining positive population growth, not only for an aging population but for talented and well-educated workforce-aged people as well. Ibid. This

combination of tremendous population growth and commercial/industrial development planned for Berkeley Township means the loss of a tiny, commercially and industrially insignificant portion of the Township to deannexation cannot possibly be considered a “significant injury.”

Ultimately, *the Planning Board’s own expert*, Mr. Ebenau, concluded that when all factors were taken into account, Berkeley Township would *completely recover* from the loss of South Seaside Park ratables in “*probably less than five years.*” T. 3/1/18, 97:15-98:23 (emphasis added). Mr. Ebenau based this conclusion on his expertise from working on cash flow issues for several distressed municipalities in New Jersey. *Ibid.* Notably, Mr. Ebenau’s conclusions were based off of his own data, which showed significantly greater economic impact from deannexation than Mr. Moore’s data that was used as the basis for the Wisner Report. T. 10/4/18, 27:1-28:24. Mr. Moore noted that deannexation would have negligible impact on Berkeley Township under either his or Mr. Ebenau’s data: under Mr. Moore’s data, there would be no impact at all on Berkeley Township taxpayers (“based on my numbers, they don’t exist”), and under Mr. Ebenau’s data, any impact would be eliminated in less than five years. *Ibid.* Thus, even if the Planning Board arbitrarily and unreasonably preferred Mr. Ebenau’s data to Mr. Moore’s data, it had no justification for concluding that there would be any long-term significant harm to Berkeley Township.

Further, Mr. Moore testified that his conclusions regarding economic impact to Berkeley Township taxpayers did not even take into account Mr. Ebenau’s projected \$50 million increase in ratables over the next five years. *Ibid.* If the Planning Board gave fair and impartial consideration to the testimony and evidence from both Mr. Ebenau and Mr. Moore, it would have been impossible for it to conclude that deannexation would cause “significant economic injury”

to Berkeley Township. That the Planning Board did find such injury indicates that the Board's findings were arbitrary, capricious, and unreasonable.

**B. Berkeley Township Failed to Consider Petitioner's Showing That South Seaside Park Has Little to No Unimproved, Buildable Land and is Not a Site of Significant Future Economic Growth.**

Testimony from Petitioners and experts alike made it clear to the Planning Board that South Seaside Park has little to no potential for development and that deannexation would not deprive Berkeley Township of any significant future economic growth. For example, Mr. Bauman concluded that there was no potential for new residential or commercial growth in South Seaside Park. Ex. A-41 at 17. Mr. Bauman specifically cited Berkeley Township's own 2008 build-out analysis, which "revealed that there are no developable acres or new dwelling units yielded in South Seaside Park." *Ibid.* Further, under questioning from Mr. Wiser, Mr. Bauman noted that Berkeley Township had not offered any evidence of imminent teardowns and redevelopment of property in South Seaside Park such as would create additional future value that would be lost if the community were deannexed. T. 11/5/15, 25:20-32:10.

Notably, when Mr. Bauman and Petitioners' counsel objected to Mr. Wiser's continued reference to unproven redevelopment in South Seaside Park, Mr. Wiser began improperly testifying to such redevelopment in other, much larger municipalities and then suddenly ended his statement, saying "I'm not going to follow this up." *Ibid.* Again, not only did Petitioners provide un rebutted evidence that Berkeley Township would not lose future economic growth in South Seaside Park, but Berkeley Township and the Planning Board were revealed to be adversarial, collusive, and willing to violate the rules of deannexation hearings in an attempt to

reach their predetermined result. The expert analysis by Mr. Bauman was corroborated by Petitioners' testimony. See, e.g., T. 2/5/15, 14:9-22 ("Best of my knowledge, the growth of South Seaside Park is done, okay. South Seaside Park has just about every lot built on."). Further, Ms. Wooley-Dillon conclusively refuted Mr. Slachetka's misleading claim that 271 permits were recently issued for new housing units in South Seaside Park. Ms. Wooley-Dillon testified that she reviewed the actual building permits issued between January 1, 2008 and August 23, 2017 and only found four permits for new construction. T. 2/7/19, 26:20-28-4. The 271 number cited by Mr. Slachetka was based on projections from the American Community survey, not true numbers of permits issued. Ibid. Further, Ms. Wooley-Dillon testified that most of the alleged "new building permits" issued for South Seaside Park in recent years were simply demolitions and rebuilds of houses damaged or destroyed in Superstorm Sandy, not new development. T. 12/6/18, 29:13-31:3. Ms. Wooley-Dillon concluded that South Seaside Park was essentially built out and that "any conclusions [Mr. Slachetka] drew from the additional building units would be inaccurate as well in terms of impact." Ibid.

In contrast, the record shows that mainland Berkeley Township does, in fact, have expected growth in coming years. Mr. Bauman testified that he reviewed Berkeley Township's 2020 vision plan, the result of a "public visioning process to identify long range goals for the Township's physical, recreational, business and community development" in 2002 and 2003. T. 8/6/15, 57:23-60:9. Mr. Bauman concluded from his review that "[t]he plan focused on future development of a town center and three commercial nodes on the eastern mainland. The plan does not have a plan for South Seaside Park. And it fails to include how South Seaside Park would be linked to the mainland town center in those commercial nodes." Ibid. The bottom line,

Mr. Bauman testified, is that there is significant projected growth in Berkeley Township in the area between the Garden State Parkway and the bay, but none at all in South Seaside Park. Ibid. Further supporting Mr. Bauman's conclusion is the TDR obtained by Berkeley Township to focus future development towards this eastern section of mainland Berkeley Township. Ex. A-42 at 7-9. These additional residential housing units, plus significant light industrial and commercial properties, will easily compensate Berkeley Township for the insignificant loss of 490 residents and .24 square miles of barrier island land with no potential or plans for economic growth. Ibid.

The inescapable conclusion of this lack of potential future growth is that Berkeley Township will not suffer any significant loss from the deannexation of South Seaside Park land, aside from the already-existing ratables which were addressed above. Mr. Bauman noted that “[i]f it's a no-growth area, then if they should leave, there will not be a negative impact on the rest of the municipality because there's no growth. If there were 50 acres left to be developed, we would try to figure out how much of that loss will be. But since your own studies have said that there's no potential future growth, I think it's safe to say that the impact would be a lot less than if there were a 50-acre parcel ready for development.” T. 11/5/15, 34:8-17.

**VI. THE COURT SHOULD ORDER BERKELEY TOWNSHIP TO CONSENT TO THE DEANNEXATION OF SOUTH SEASIDE PARK.**

The facts and procedural history of this matter compel the conclusion that Berkeley Township must be ordered to consent to the deannexation of South Seaside Park. It is a “well-worn but nevertheless truthful aphorism that justice delayed is justice denied.” Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1228 (3d Cir. 1995). Petitioners have already waited more than seven (7) years for justice in this matter since the Berkeley Township Planning Board

first received their deannexation petition on October 6, 2014. See Carlson Cert., **Exhibit A**. Should this Court agree with Petitioners and find that Berkeley Township’s denial of their deannexation petition was arbitrary, capricious, and unreasonable, it would be manifestly unjust and contrary to precedent to remand the matter back for Berkeley Township to reconsider the petition in a more reasonable and less biased way. Instead, this Court should spare petitioners further delay and expense and immediately order Berkeley Township to consent to deannexation on the basis of the facts and law set forth herein.

“[I]t is well established in administrative law that excessive delay may, in some circumstances, excuse exhaustion requirements.” Bhatnagar, 52 F.3d. at 1228. The New Jersey Supreme Court granted courts discretion to bypass administrative procedures when excessive delays would pervert the interests of justice:

The requirement for the exhaustion of the administrative remedy is neither jurisdictional nor absolute in its terms. The cited rule, which reflects prior decisional law, vests discretion in the trial court to determine whether the interests of justice require that the administrative process be by-passed. There is no rigid formula for the exercise of that discretion. The public interest in a speedy determination may be considered.

Durgin v. Brown, 37 N.J. 189, 202-03 (1962) (internal citations omitted).

Further, in the two cases cited above in which the court ruled against municipalities’ denial of deannexation petitions – West Point Island and Bay Beach Way – the court ordered the municipalities to immediately consent to deannexation rather than remanding the matter back to the municipalities for a more reasonable, and less arbitrary, reconsideration. Notably, the Bay Beach Way court issued an order to immediately consent to deannexation even though less than

two (2) years had passed since the Bay Beach Way petitioners first filed their deannexation petition. Bay Beach Way, No. A-5733-07 at \*2.

Here, the facts and procedural history are even more in favor of an immediate order for Berkeley Township to consent to deannexation. As noted above, Petitioners have been waiting more than seven (7) years since filing their deannexation petition – more than three times longer than the Bay Beach Way petitioners. In the grand scope of New Jersey’s deannexation process, Petitioners have already suffered irremediable harm. The Annexation Statute provides that a municipal planning board “shall, *within 45 days* of its receipt [of the deannexation petition], report to the governing body on the impact of the annexation upon the municipality. Action on a resolution to consent to or deny the annexation shall be taken *within 30 days* of receipt of the planning board's report.” N.J.S.A. 40A:7-12 (emphasis added). Thus, the plain words of the statute show the legislature’s intent that communities petitioning for deannexation are entitled to a speedy resolution of their petitions. Although the case law addressing this issue shows that the statutory 75 days of consideration of a deannexation petition is impracticable, courts certainly have not supported expanding the process to seven (7) years or more.

Further, the record reveals significant delays by the Planning Board that have no explanation at all. For example, a significant number of Planning Board hearings in this matter were cancelled and/or delayed through no fault of Petitioners. See chart below<sup>16</sup>:

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<sup>16</sup> This chart was prepared from Petitioners’ notes taken throughout the course of the hearings in this matter.



<b>HEARING DATE</b>	<b>REASON FOR CANCELLATION</b>
12/4/14	Hearing in another matter (this was the first scheduled hearing in this matter)
3/5/15	Snow
7/2/15	“Agenda too long”
1/7/16	“Agenda too long”
3/3/16	“Previous commitment”
4/7/16	“Agenda too long”
7/7/16	“Re-organization”
8/4/16	“Berkeley Township Witness vacations/ schedule conflict”
3/2/17	“Needed to address other matters”
10/4/17	“No quorum”
1/17/19	“Scheduling conflicts/agenda too long”
3/7/19	“Agenda too long”
4/4/19	Mr. Wisner not prepared
5/2/19	No reason given
6/6/19	“Agenda too long”

Similarly, at the February 7, 2019, hearing, Mr. Wisner admitted on the record that he was not prepared to give testimony, despite the fact that Planning Board hearings were planned and publicized well in advance and Petitioners’ counsel had prepared extensively for the hearing. T. 2/7/19, 99:19-101:24. As a result of all these delays, Petitioners have wasted time and incurred legal fees for at least fifteen (15) hearings that never happened, in addition to prolonging their wait for justice. The Planning Board has only continued to delay this process following the filing

of Petitioners' Complaint in Lieu of Prerogative Writs. For nearly a month and a half in June and July 2021, the Planning Board failed to allow Petitioners' attorneys to confidentially review the exhibits in this matter, which are in the possession of the Planning Board. This failure defied the Court's order to provide Petitioners' attorneys with confidential access to the exhibits and forced the Court to hold a conference to affirm Petitioners' right to privately review the exhibits. As a result, Petitioners' were forced to request an adjournment of the deadline to file this Brief, pointlessly adding another month to this interminable matter.

Finally, the Planning Board bizarrely waited *nearly seven months* between taking a voice vote to recommend denial of the Deannexation Petition on December 19, 2019, and finally issuing its Resolution on August 6, 2020. Carlson Cert., **Exhibit B**; T. 1/9/20. As noted above, the Annexation Statute requires Planning Boards to issue a report to the governing body on the impact of deannexation within 45 days of receipt of a petition. N.J.S.A. 40A:7-12. The Planning Board here took *nearly three times as long* merely to reduce a voice vote to writing. To the extent Berkeley Township and its Planning Board may justify this delay by referring to the COVID-19 pandemic, their appeal fails because the pandemic did not begin until several months after the December 19, 2019, voice vote. Such delays can only be explained by ongoing bad-faith delay tactics.

Beyond the excessive amount of time already expended in this matter, the financial considerations further reveal the severe detriment and miscarriage of justice that would be suffered by Petitioners should the Court remand the matter back to the Planning Board. As of early 2018 – barely three (3) years after hearings began in this matter – Berkeley Township had already spent at the very least \$305,008.19 on this matter as of early 2018, according to

Township documents introduced as evidence at the April 5, 2018 Planning Board hearing. Ex. T-40. In the more than three (3) years since that hearing, Berkeley Township has undoubtedly spent significantly more in opposing deannexation. Mr. Wisner testified in 2019 that his firm alone had billed \$350,792.66 on this deannexation matter through August 2019, with additional billing likely on top of that sum. T. 10/3/19, 19:20-20:22; Ex. A-110. Although no comprehensive tally of the total amount spent by Berkeley Township is available, it is certain the number is well into the six figures and may approach or exceed seven figures by this time. This torrent of spending shows no signs of slowing down, as Mr. Wisner further testified that there were “no constraints that were expressed to me” regarding the amount his firm could bill the Planning Board for services in continuing the fight against deannexation. T. 10/3/19, 21:22-22:4. In short, the record makes it clear that Berkeley Township is willing and able to waste as much time and resources as necessary to delay justice and prevent Petitioners from achieving their goal under a fair and reasonable consideration of the facts and law.

In contrast, Petitioners are not a large municipality with unlimited funds but are rather a relatively small group of ordinary citizens without great wealth or disposable income to spend on interminable legal proceedings. Petitioners’ counsel represents that, to date, Petitioners have incurred more than \$170,000.00 in legal fees, expert fees, and other expenditures in this matter. This represents a tremendous, and irremediable, detriment to Petitioners in the form of lost personal wealth. Given the pattern established thus far, it is nearly certain that Petitioners will be faced with the same burden of delays and increasing bills they have faced for the past six (6) years should this matter be remanded back to the Planning Board. Worse, such expenditures of time and money would be exceedingly wasteful, as further hearings would essentially just repeat

the same testimony and evidence already presented, only with a Planning Board now chastened by the Court and ordered to reconsider the matter in a more reasonable and impartial way. In other words, by overseeing a biased and unlawful process thus far, the Planning Board would merely force Petitioners to pay double to remedy the Board's own misconduct. Such an outcome would be the height of injustice.

It is obvious that Berkeley Township and its Planning Board have already prolonged this process beyond the wildest expectations of the legislature or of courts addressing deannexation in prior cases. As such, Berkeley Township should not be given the opportunity to delay justice any further through administrative reconsideration of Petitioners' case for deannexation.

If this Court finds that the denial of consent for the deannexation of South Seaside Park from Berkeley Township was arbitrary, capricious, and unreasonable given all the facts in the record, it is respectfully requested that, in the interest of justice, the Court follow precedent and order Berkeley Township to consent to deannexation within thirty (30) days. Given the gross misconduct in this matter, the Court is further requested to issue a declaration that the Berkeley Township Planning Board violated the deannexation statute, N.J.S.A. 40A:7-12.

DATE: October 8, 2021

Respectfully submitted,

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