

**DASTI, MURPHY, McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS**

GREGORY P. McGUCKIN, ESQUIRE [004501988]
KELSEY A. McGUCKIN-ANTHONY, ESQUIRE [244842017]
620 West Lacey Road
Forked River, New Jersey 08731
Phone (609) 971-1010; Fax (609) 971-7093

Attorneys for Defendants, Township of Berkeley and Township Council of the Township of Berkeley

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

Plaintiff(s)

vs.

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

Defendant(s).

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
OCEAN COUNTY

DOCKET NO. OCN-L-002667-20

CIVIL ACTION

**TRIAL BRIEF OF DEFENDANTS, TOWNSHIP OF BERKELEY
AND TOWNSHIP COUNCIL OF THE TOWNSHIP
OF BERKELEY**

DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

KELSEY A. McGUCKIN-ANTHONY, ESQUIRE
On The Brief
GREGORY P. McGUCKIN, ESQUIRE
Of Counsel

TABLE OF CONTENTS FOR DEFENDANTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS AND PROCEDURAL HISTORY.....	3
LEGAL ARGUMENT	5
<u>POINT I</u>	5
PLAINTIFF HAS FAILED TO MEET THEIR BURDEN REQUIRED UNDER <u>N.J.S.A. 40A:7-12.1</u>	
A. Plaintiffs have failed to show that the Township acted arbitrary, capriciously or unreasonably in denying Plaintiffs’ petition for deannexation	6
B. Plaintiffs have also failed to show 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	10
I. Social well-being of a majority of the residents of South Seaside Park.	10
a. Participation in local government activities.	12
b. Participation in everyday life outside of South Seaside Park	13
c. Local news outlets	13
d. Different zip code than mainland Berkeley Township	15
e. Social diversity	16
f. Lack of Investment	17
g. Public Works	18

**DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS**

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

h. Bay beach. 20

i. Congressional Redistricting in 2020. 21

II. Plaintiffs have failed to show an economic detriment as a result of the Township’s denial of the Deannexation Petition. 23

C. Plaintiffs have failed to show that deannexation would not result in social and economic detriment to Berkeley Township 25

I. Deannexation would cause a major economic impact to Berkeley Township, its schools and its residents 26

II. Deannexation would have a significant social detriment on Berkeley Township 31

POINT II 32

PLAINTIFFS RECEIVED A FAIR AND IMPARTIAL HEARING AND THE PLANNING BOARD’S DECISION TO RECOMMEND THAT THE GOVERNING BODY DENY THE DEANNEXATION PETITION IS FULLY SUPPORTED BY THE RECORD

POINT III 37

THE CASE LAW RELIED UPON BY PLAINTIFFS IS NOT APPLICABLE TO THIS CASE

CONCLUSION 40

DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

TABLE OF AUTHORITIES

Cases	Page(s)
<u>Avalon Manor Improvement Ass'n, Inc. v. Middle Twp.</u> , 370 N.J.Super. 73, 91, 850 A.2d 566 (App.Div.)	6, 7, 9, 11, 12, 17, 29, 30, 31, 32, 39
<u>Beach Bay Way Realignment Committee, LLC v. Township of Toms River.</u>	37
<u>Beattystown v. Department of Env'tl. Prot.</u> , 313 N.J.Super. 236, 248, 712 A.2d 1170 (App.Div.1998).	7
<u>Booth v. Board of Adj. of Rockaway Twp.</u> , 50 N.J. 302, 306, 234 A.2d 681 (1967)), <u>certif. denied</u> , 182 N.J. 143, 861 A.2d 847 (2004)	7
<u>D'Anastasio Corp. v. Township of Pilesgrove</u> , 387 N.J. Super. 241, 246 (App. Div. 2006).	6, 8, 39
<u>D'Anastasio Corp. v. Township of Pilesgrove</u> , 387 N.J. Super. 254, 241 (2006).	24
<u>Dock Watch Hollow Quarry Pit, Inc. v. Warren Twp.</u> , 142 N.J. Super. 103 (App. Div. 1976), <u>affirmed</u> 74 N.J. 312 (1977)	6, 7
<u>Hirth v. City of Hoboken</u> , 337 N.J. Super. 149, 157 (App. Div. 2001).	6
<u>Hudson Circle Servicenter, Inc. v. Town of Kearny</u> , 70 N.J. 289 (1976)	6
<u>Hutton Park Gardens v. West Orange Town Council</u> , 68 N.J. 543, 564, 350 A.2d 1 (1975).	7
<u>Kramer v. Sea Girt Bd. of Adj.</u> , 45 N.J. 268, 296, 212 A.2d 153 (1965).	7
<u>Moyant v. Borough of Paramus</u> , 30 N.J. 528 (1960)	6
<u>Ne. Towers, Inc. v. Zoning Bd. of Adjustment</u> , 327 N.J. Super. 476, 483 (App. Div. 2000).	6

DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

<u>Quick Chek Food Stores v. Springfield Twp.</u> , 83 N.J. 438, 447, 416 A.2d 840 (1980).....	7
<u>Riggs v. Long Beach Twp.</u> , 109 N.J. 601, 611, 538 A.2d 808 (1988)...	7
<u>Russell v. Stafford Twp.</u> , 261 N.J.Super. 43, 61, 617 A.2d 685. (Law Div.1992)	7
<u>Ryan v. Mayor & Council of Borough of Demarest, Bergen Cty.</u> , 64 N.J. 593, 605 (1974).	10
<u>Seaview Harbor Realignment Committee, LLC v. Township Committee of Egg Harbor Township</u> , _____ N.J. _____, (2021) (slip op. at 23).	29, 30, 34, 39
<u>Ward v. Montgomery Twp.</u> , 28 N.J. 529, 539, 147 A.2d 248 (1959). ...	7
<u>West Point Island Civic Ass'n. v. Township Committee of Dover Tp.</u> , 54 N.J. 339, 349 (1969).	37
<u>Worthington v. Fauver</u> , 88 N.J. 183, 204-05, 440 A.2d 1128 (1982). ...	7

**DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS**

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

PRELIMINARY STATEMENT

This case is not a Municipal Land Use Law Case. This case is governed by N.J.S.A. 40A:7-12 and 12.1. This matter concerns the Berkeley Township Planning Board exercising its planning function and making a recommendation to the Berkeley Township Council concerning Plaintiffs' petition for deannexation. Plaintiffs, residents of South Seaside Park, are seeking to deannex from Berkeley Township, taking 10.68% of Berkeley Township's tax base with them. The loss of South Seaside Park would have a serious detrimental impact on the remaining residents of Berkeley Township, both economically and socially.

Plaintiffs spend the first fifty-two (52) pages of their one hundred and nine (109) page brief discussing the procedure, hearings and process of the deannexation hearing before the Berkeley Township Planning Board. Plaintiffs do not even begin to address the legal standard required for Plaintiffs to overturn the Berkeley Township Council's decision to deny Plaintiffs' petition for deannexation until page 52 of their brief. The reason for this is simple. Plaintiffs cannot meet the burden required of them under the Deannexation statute and have failed to show that the Berkeley Township Council acted arbitrarily, capriciously or unreasonably, that the refusal to consent to the deannexation is detrimental to the economic and social well-being of a majority of the residents of the affected land, and that the deannexation will not cause a significant injury to the well-being of the municipality.

The record is explicitly clear that should South Seaside Park and the Plaintiffs in this matter deannex from Berkeley Township, Berkeley Township would lose nearly 11% of its ratables. As was demonstrated before the Planning Board, such a loss would be detrimental to Berkeley Township. The loss of South Seaside Park would also cause a substantial social injury to Berkeley Township. Due to the serious economic and social detriment to Berkeley Township

**DASTI, MURPHY
McGUICKIN, ULAKY,
KOUTSOURIS & CONNORS**

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

that would result from the deannexation of South Seaside Park, Berkeley Township reasonably voted to deny Plaintiffs' deannexation petition.

In addressing the hearings in this matter, Plaintiffs continuously address the legal standards required by a planning board in hearing land use applications when a planning board is exercising its quasi-judicial function. Planning Boards also have a "planning" function. The Berkeley Township Planning Board was exercising its quasi-legislative function in the hearings on this matter, not its quasi-judicial function as Plaintiffs suggest. The Planning Board held thirty-eight (38) hearings on this matter and gathered hours and hours' worth of facts and testimony prior to making its recommendation to the governing body. Ironically, Plaintiffs spend a majority of their brief discussing the "illegalities" of the hearings, when in fact, the statute does not outline or require a specific procedure for hearing on deannexation petitions. Even though there is no statutorily required hearing, the Berkeley Township Planning Board still held 38 days of hearings on this matter, afforded the Plaintiffs the right to present any witnesses, both lay and expert, and cross-examine any and all witnesses of the Township. The Plaintiffs were given a fair hearing process and the decision of the Berkeley Township Planning Board recommending that the Township Council deny deannexation was reasonable based on the evidence in the record.

Plaintiffs focus on the hearing procedure in this matter as a way to divert from the fact that Plaintiffs cannot meet their burden required under the applicable statute. Because this case requires this court to evaluate the factors outlined in N.J.S.A. 40A:7-12.1, Defendants brief will outline those factors and show that Plaintiffs have failed to meet their burden. Defendants will then discuss the hearings in this matter. Defendants will demonstrate that the Planning Board

**DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS**

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

and the governing body acted appropriately under the applicable statutes and rightfully denied Plaintiffs' deannexation petition.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Berkeley Township, Ocean County, New Jersey is an approximately 55.8 square mile municipality located in the eastern section of Ocean County, New Jersey. The Township currently has ten miles of oceanfront, eighteen miles of bay frontage and seven miles of creeks, streams or rivers, for a total of thirty-five miles of shoreline. South Seaside Park is an approximately thirty square mile, barrier island portion of Berkeley Township. South Seaside Park is bound by the Atlantic Ocean and the Barnegat Bay, as well as the municipal boundary between Berkeley Township and the Borough of Seaside Park. This area includes the state-owned Island Beach State Park.

The developed portion of South Seaside Park consist of approximately 150 acres of land located between Seaside Park and Island Beach State Park. The community, representing approximately one percent of the total population of Berkeley Township, contains approximately 1,400 housing units consisting of single-family and multi-family (condominium) complexes, as well as several hotels, restaurants, bars and some commercial properties. The population of South Seaside Park is approximately 490.

On September 22, 2014, a private citizen organization (Plaintiffs in this matter) representing 285 of the 435 registered voters of South Seaside Park, through counsel, filed a Petition with the Berkeley Township Municipal Clerk seeking deannexation of South Seaside Park from Berkeley Township. On October 6, 2014, the petition was referred to the Berkeley

**DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS**

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

Township Planning Board for review and issuance of an Impact Report on the proposed deannexation from the municipality.

The Berkeley Township Planning Board first met to address the Petition on January 8, 2015. Subsequent meetings were held on February 5, 2015, April 2, 2015, May 7, 2015, June 4, 2015, August 6, 2015, September 3, 2015, October 1, 2015, November 5, 2015, December 3, 2015, February 4, 2016, May 6, 2016 and June 2, 2016. During each of these thirteen (13) meetings, Petitioners (Plaintiffs) presented and completed its affirmative presentation before the Berkeley Township Planning Board.

After Petitioners presented their case the Berkeley Township Planning Board, Berkeley Township called additional witnesses to supplement the record and provide additional information. The Township's witnesses appeared at twenty (20) different meetings, which occurred on September 1, 2016, October 6, 2016, November 3, 2016, December 1, 2016, January 5, 2017, February 2, 2017, April 6, 2017, May 4, 2017, June 1, 2017, July 6, 2017, August 3, 2017, September 7, 2017, November 2, 2017, December 7, 2017, February 1, 2018, March 1, 2018, April 5, 2018, May 3, 2017, June 7, 2018 and July 5, 2018.

On August 2, 2018, a procedural hearing was held. On September 6, 2018, the Berkeley Township Planning Board heard from members of the general public who wished to be heard on the deannexation petition. Rebuttal testimony from Petitioners was heard by the Berkeley Township Planning Board on October 4, 2018, December 6, 2018 and February 7, 2019.

The Berkeley Township Planning Board heard a total of thirty-eight (38) hearings on the deannexation petition. After the conclusion of the testimony and hearings on the petition, the Berkeley Township Planning Board asked its Professional Planner to compose a Report of Findings, consisting of a review and analysis of the information gathered from the testimony,

**DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS**

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

exhibits and reports submitted by all parties during the hearings on the petition. The report was issued on May 2, 2019.

After receiving and reviewing the Report of Findings, the Berkeley Township Planning Board adopted a Resolution outlining the Board's findings and ultimately recommending that the Berkeley Township Council deny the Petition for Deannexation. Thereafter, the Berkeley Township Council denied the petition for deannexation. This prerogative writ action followed.

LEGAL ARGUMENT

POINT I

PLAINTIFF HAS FAILED TO MEET THEIR BURDEN REQUIRED UNDER N.J.S.A. 40A:7-12.1.

N.J.S.A. 40A:7-12.1 governs the standard to be applied by the Court when a party challenges the denial of a petition for deannexation. The statute states:

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 deannexation is sought to consent to the annexation, the petitioners have the burden of establishing that the refusal to consent to the petition was arbitrary, capricious 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.

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

That statute requires the Plaintiffs to establish all three factors outlined in the statute. In analyzing this standard of review, the Appellate Division has found that:

The first element is simply an expression of the standard of arbitrariness and unreasonableness. The second element requires that the petitioner demonstrate deannexation will be beneficial to a majority of the residents of the land being deannexed. The third element requires that the petitioner show deannexation will not

**DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS**

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

cause a significant injury to the well-being of the deannexing municipality.

[D’Anastasio Corp. v. Township of Pilesgrove, 387 N.J. Super. 241, 246 (App. Div. 2006).]

Prior to the Legislature enacting N.J.S.A. 40A:7-12.1, the burden fell on the municipality to show the unreasonableness of the requested deannexation. Avalon Manor Improvement Ass’n. v. Twp. of Middle, 370 N.J. Super. 74, 90 (App. Div.), certif, denied, 182 N.J. 143 (2004). The D’Anastasio Court noted that “[t]he enactment of N.J.S.A. 40A:7-12.1 manifests the Legislature’s preference for preserving historical boundaries by shifting the burden of persuasion to the petitioner to establish the ‘unreasonableness’ of the municipality’s action.” D’Anastasio Corp. v. Township of Pilesgrove, 387 N.J. Super., *supra*, at 246.

A. Plaintiffs have failed to show that the Township acted arbitrarily, capriciously or unreasonably in denying Plaintiffs’ petition for deannexation.

The presumption of reasonableness and validity which attends all municipal enactments can only be overcome by clear and compelling evidence demonstrating its unreasonableness. Dock Watch Hollow Quarry Pit, Inc. v. Warren Twp., 142 N.J. Super. 103 (App. Div. 1976), affirmed 74 N.J. 312 (1977). See also Hudson Circle Servicer, Inc. v. Town of Kearny, 70 N.J. 289 (1976); Moyant v. Borough of Paramus, 30 N.J. 528 (1960). Accordingly, judicial review is intended to be a determination of the validity of the action, not the substitution of the court’s judgment for that of the party or entity making the determination. Ne. Towers, Inc. v. Zoning Bd. of Adjustment, 327 N.J. Super. 476, 483 (App. Div. 2000). In the action in lieu of prerogative writs, the court solely reviews the agency record to see if the findings are based on substantial evidence and the action is not arbitrary or capricious. N.J.S.A. 40A:12A-6b(5); Hirth v. City of Hoboken, 337 N.J. Super. 149, 157 (App. Div. 2001).

DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

Pursuant to N.J.S.A. 40A:7-12.1, the petitioner has the burden of establishing that the refusal to consent to the petition was arbitrary or unreasonable. “As a general matter, in reviewing decisions of local boards our courts recognize that such bodies have particular knowledge of local conditions and are therefore extended ‘wide latitude in the exercise of their delegated discretion.’ ” Avalon Manor Improvement Ass'n, Inc. v. Middle Twp., 370 N.J.Super. 73, 91, 850 A.2d 566 (App.Div.) (citing Booth v. Board of Adj. of Rockaway Twp., 50 N.J. 302, 306, 234 A.2d 681 (1967)), certif. denied, 182 N.J. 143, 861 A.2d 847 (2004). There is a presumption of validity accorded to municipal actions. Russell v. Stafford Twp., 261 N.J.Super. 43, 61, 617 A.2d 685 (Law Div.1992) (citing Ward v. Montgomery Twp., 28 N.J. 529, 539, 147 A.2d 248 (1959), and Quick Chek Food Stores v. Springfield Twp., 83 N.J. 438, 447, 416 A.2d 840 (1980)). “The law presumes that municipal governing bodies will act fairly, with proper motives and for valid reasons.” Ibid. (citing Kramer v. Sea Girt Bd. of Adj., 45 N.J. 268, 296, 212 A.2d 153 (1965)). This presumption “may only be overcome by a showing of arbitrariness or unreasonableness.” Ibid. (citing Dock Watch Hollow Quarry Pit v. Warren Twp., 142 N.J.Super. 103, 116, 361 A.2d 12 (App.Div.1976), aff'd, 74 N.J. 312, 377 A.2d 1201 (1977); Hutton Park Gardens v. West Orange Town Council, 68 N.J. 543, 564, 350 A.2d 1 (1975), and Riggs v. Long Beach Twp., 109 N.J. 601, 611, 538 A.2d 808 (1988)); Avalon Manor, supra, 370 N.J.Super. at 90, 850 A.2d 566. “Arbitrary and capricious” means “ ‘willful and unreasoning action, without consideration and in disregard of circumstances.’ ” Beattystown v. Department of Env'tl. Prot., 313 N.J.Super. 236, 248, 712 A.2d 1170 (App.Div.1998) (quoting Worthington v. Fauver, 88 N.J. 183, 204-05, 440 A.2d 1128 (1982)).

In this case, the Berkeley Township Council did not act arbitrarily, capriciously or unreasonably. A review of the record below, when applied to the relevant statute, makes clear

**DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS**

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

that the Berkeley Township Council's decision was proper and should be affirmed. In the resolution adopted by the Berkeley Township Planning Board, the Board relied on the Report of Findings, Petition for Deannexation prepared by the Board's Engineering Firm, Remington & Vernick. Exhibit B to Certification of Kelsey A. McGuckin-Anthony.

In D'Anastasio Corp. v. Pilesgrove, the Appellate Division affirmed the trial court's decision, affirming the municipality's denial of the Plaintiffs' petition for deannexation. D'Anastasio Corp. v. Township of Pilesgrove, 387 N.J. Super. 247 (L. Div. 2005), affirmed 387 N.J. Super. 241 (App. Div. 2006). In D'Anastasio, the municipality relied on the Township's expert report and the conclusions therein in making its decision to deny the petition. Relying on the expert report, the Planning Board recommended that the Township refuse to consent to the deannexation. The trial court found that the defendants "based their decision denying the petition in reliance upon the report prepared by and testimony of Pilesgrove's professional planner [...]. Therefore, plaintiff cannot meet the first requirements pursuant to N.J.S.A. 40A:7-12.1 that defendants in denying the petition acted arbitrarily or unreasonable." Id. at 531.

The memorializing Resolution adopted by the Berkeley Township Planning Board incorporated the report prepared by the Board's experts; Stuart B. Wiser, P.P. and James Oris, P.E., P.P. Resolution attached as Exhibit A to Certification of Kelsey A. McGuckin-Anthony.

The Resolution states:

WHEREAS, The Board finds that the May 2, 2019, report of findings with respect to the de-annexation petition which was specifically prepared as a result of the Board determining to utilize the services of Mr. Wiser, accurately portrays the testimony and exhibits presented.

[. . .]

DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS

COUNSELLORS AT LAW
620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

WHEREAS, the Board received the report of findings of Mr. Wisner, who coordinated the information and exhibits testified to before the Board in the preceding years, and submitted an impact report to the Board which analyzed the testimony, evidence and information presented;

[Ex. A to McGuckin-Anthony Cert., pgs. 4-5.]

The Wisner Report concluded that:

Based upon the totality of the testimony and Exhibits compromising the record as detailed herein, this Report of Findings finds and recommends 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.

[McGuckin-Anthony Cert., Ex. B, pg. 399.]

The Berkeley Township Planning Board relied on these findings and the recommendations of the expert report and recommended that the Berkeley Township Council deny Plaintiffs’ petition for deannexation. In relying on this report, Defendants acted reasonably. As the case law states, “arbitrary and capricious” means “willful and unreasoning action, without consideration and in disregard of circumstances.” Avalon Manor, supra, 370 N.J. Super. at 90, 850 A.2d 566. In relying on the expert’s report and fully outlining its decision in its resolution, it is clear that the Berkeley Township Planning Board gave careful consideration to this matter and considered the circumstances.

Plaintiffs have failed to show that the Defendants acted arbitrarily capriciously and unreasonably. As a result of failing to meet this burden, Plaintiffs have failed to meet the first criteria of N.J.S.A. 40A:7-12.1. The statute requires that the Plaintiffs meet all three

**DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS**

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

requirements of the statute. Plaintiffs' failure to establish that the Defendants acted arbitrarily, capriciously and unreasonably requires this Court to find in favor of Defendants and affirm the decision of the Berkeley Township Council denying the deannexation petition.

B. Plaintiffs have also failed to show 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.

As is required by N.J.S.A. 40A:7-12.1, the Plaintiffs have the burden to prove that the Township's 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. Again, not until the middle of page 80 of Plaintiffs' brief do Plaintiffs even begin to address the legal standard and attempt to establish the substantial burden Plaintiffs must show in order to be successful in this litigation.

I. Social well-being of a majority of the residents of South Seaside Park

There can be no doubt that South Seaside Park contains a number of the nicest, most expensive homes in the Township. The barrier island portion of Berkeley Township is a unique aspect of the Township which provides beach and oceanfront access; a unique characteristic that many surrounding municipalities do not have. In Ryan v. Demarest, the New Jersey Supreme Court addressed what kind of evidence is relevant to the issue of "social detriment." Ryan v. Mayor & Council of Borough of Demarest, Bergen Cty., 64 N.J. 593, 605 (1974).

Though this case was decided prior to the enactment of N.J.S.A. 40A:7-12.1, it is still helpful in determining the relevant considerations when determining whether the Township's failure to allow deannexation results in a social detriment to the petitioners.

The Ryan Court acknowledged that "economic injury" is relatively easy to recognize and quantify. Id. at 605. The Court also noted that the factors concerning social detriment outlined in the case are "in no way intended to be all-inclusive, for in the final analysis the

governing body and the trial judge will have to bear their own knowledge, experienced and perceptions in determining what, in the context of deannexation, would inflict social injury upon the well-being of a community.” Id. The Ryan Court went on to say that:

...social detriment might be found in a community’s being **deprived** of the petitioner’s participation in the religious, civic, cultural, charitable and intellectual activities of the municipality; their meaningful interaction with other members of the community and their contribution to the prestige and social standing; the part they play in general scheme of their municipality’s social diversity; and conceivably, the wholesome effect their presence has on racial integration.

[Id. at 605.]

While testimony at the hearings may have shown that residents of South Seaside Park choose to participate in activities and social gatherings outside of the Berkeley Township community, there was absolutely no testimony or evidence provided to show or even suggest that South Seaside Park residents are *deprived* of the opportunity to participate in those types of activities within Berkeley Township. Testimony revealed that members of South Seaside Park attend Township meetings, hold or have held positions on various municipal boards and otherwise participate in everyday civic life in Berkeley Township. See Ex. B to McGuckin-Anthony Cert., pg. 135.

Much of the testimony from residents of South Seaside Park showed that many residents of South Seaside Park align more with the community of Seaside Park. See McGuckin-Anthony Certification, Ex. A, pg. 8. Notably, there are a number of municipalities, including ones in Ocean County, with vibrant beach communities as well as a barrier island presence. For example, both Brick Township and Toms River Township have a portion of their Township located on the barrier island. Residents of those communities would likely “associate” more with the surrounding barrier island municipalities. In Avalon Manor v. Middle Township, the

DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

plaintiffs were part of a beach community whereas Middle Township was on the mainland. While the Court considered the fact that the plaintiffs may associate more with the beach communities, the Court found that this fact did not create a social detriment to the plaintiffs and was not a justification for deannexation. Avalon Manor v. Middle Township, 370 N.J. Super. 73, 80 (App. Div. 2004).

Plaintiffs' expert testified that deannexation would allow the residents of South Seaside Park to merge with a municipality more "in character" with South Seaside Park. Deannexation would allow the Plaintiffs to leave the diverse community of Berkeley Township and become associated with a much richer, affluent and more educated municipality. Plaintiffs are seeking to divulge themselves of the nature and character of Berkeley Township to become a part of a wealthier, more exclusive municipality. Remaining a part of Berkeley Township does not cause a social injury to Plaintiffs.

a. Participation in local government activities

Testimony provided by Plaintiffs and Plaintiffs' planning experts at the hearings before the Planning Board revealed that due to the distance from mainland Berkeley Township, residents participate less in local government than residents would if they lived closer to the mainland. Aside from testimony stating that residents of South Seaside Park would be closer to the Seaside Park municipal building than the Berkeley Township municipal building, there was no evidence presented to show that residents would actually participate more in local government should South Seaside Park annex to Seaside Park. Further, Plaintiffs did not and have not demonstrated that they have been deprived of participating in local government within Berkeley Township.

DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

b. Participation in everyday life outside of South Seaside Park

Other testimony from residents in support of deannexation suggested that residents of South Seaside Park attend community events, churches and other social gatherings on the barrier island rather than on the mainland. Ex. B to McGuckin-Anthony Certification, pg. 120-121. Testimony also showed that residents of South Seaside Park shop on the barrier island. Id. at 121.

One witness testified that she food shops in Lavallette and Toms River, goes to the doctor in Toms River and shops at Kohls and the mall on the “mainland.” See Ex. B to McGuckin-Anthony Cert., pg. 126. This statement and similar statements from others at the hearing do not demonstrate that the Township’s refusal to grant the deannexation petition impacts the social well-being of the residents of South Seaside Park or deprives them from engaging in any activities. The activities outlined in this statement and many others at the hearing show that residents not only leave South Seaside Park, but also Seaside Park, and often times the barrier island, to shop, worship and engage in other aspects of daily life. Deannexation would have no impact on residents’ participation in these various activities. In fact, many residents of Berkeley Township, including those residents in mainland Berkeley Township, likely leave the Township to shop at department stores, worship and visit doctors as Berkeley Township is not home to many of these businesses or places. The mere fact that Plaintiffs engage in social activities outside of South Seaside Park and/or Berkeley Township is not evidence of social detriment to the Plaintiffs.

c. Local news outlets

At the hearings, testimony was provided that residents of South Seaside Park feel a disconnect from Berkeley Township because they do not receive the Berkeley Citizen or the Berkeley Times. See Ex. A, pg. 127. While this may be the case, these are private publications and are certainly not the only source of local news and information available to residents.

Testimony from petitioners claimed that they did not have access to municipal information prior to the Township's website being updated. McGuckin-Anthony Cert., Ex. B, pg. 83. Whether that is the case or not, the Township's Business Administrator testified that more recent updates to the Township website allow all Berkeley Township residents, including Plaintiffs, to register for Township recreation programs online. *Id.* at pg. 90-91. Further, due to the recent Covid-19 pandemic, the Township's website now provides even more access to local government information.

Testimony from Plaintiff Whiteman suggested that residents of South Seaside Park needed to go to the municipal building for something as simple as a dog license. McGuckin-Anthony Cert., Ex. B, Pg. 85. Through the testimony of the Township's Police Chief, it was shown that the need to go to the municipal building for a dog license would not change should deannexation occur. The Police Chief testified that Seaside Park contracts with Berkeley Township for animal control. McGuckin-Anthony Cert., Ex. B., Pg 91. Due to this contract, Seaside Park residents must apply for dog licenses through Berkeley Township. Therefore, even if deannexation were to occur, residents of South Seaside Park would still have to obtain a dog license through Berkeley Township, by going to the municipal building or printing and mailing in the application from the Township's website. *Id.*

DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

The Township's Police Chief also testified that the Police Department uses the Township's website and a Facebook page to share information concerning the police department with residents. McGuckin-Anthony Cert., Ex. B, pg. 91.

d. Township Recreation Programs

Plaintiff's testimony before the Planning Board also claimed that South Seaside Park residents were unable to participate in Township-sponsored bus trips because the Township did not have a stop to pick up residents of South Seaside Park and South Seaside Park residents were required to go to the mainland in order to partake in the bus trips. McGuckin-Anthony Cert., Ex. B, pg. 83.

Township Superintendent of Parks, Beaches and Recreation, Timothy Yuricisn testified that the Township owns two recreation busses that are used for the Township's summer camp. McGuckin-Anthony Cert., Ex. B., pg. 91. He further testified the Township has over 600 children that participate in the summer camp, and the Township picks up children at various locations for the camp. Mr. Yuricisn testified that pickup is provided for children in South Seaside Park if they sign up for the camp, but no children from South Seaside Park had participated in the Township's summer camp for the two years prior to his testimony. Id. at 92. Concerning the Township-sponsored bus trips, Mr. Yuricisn testified that if the Township received a request from qualified senior citizens in South Seaside Park, the Township would provide bussing in that area for the bus trips. Id.

e. Different zip code than mainland Berkeley Township

In a further attempt to demonstrate social injury, Plaintiffs testified that residents of South Seaside Park have a different zip code than mainland Berkeley Township. See Ex. A, pg.

DASTI, MURPHY
McGUCKIN, ULAKY,
ROUTSOURIS & CONNORS

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

128. While this may be true, and could lead to delays in mail, this is not demonstrative of social injury.

f. Social diversity

When looking at social diversity within Berkeley Township, it is clear that deannexation would actually result in social injury to the residents of South Seaside Park. Both the Plaintiffs and the Township presented testimony on the issue of social diversity. Both planners relied on the 2010 census data. Plaintiffs' Planner also relied on information contained in the American Community Survey data from 2008 to 2012. The Township's Planner relied on information in the American Community Survey dated from 2011 to 2015. See Ex. A, pgs. 130-131. Certainly, the Board properly gave more credibility to the more recent data presented by the Township's expert as it was a better representation of the present state of the Township's demographics.

In reviewing the data presented by both planning experts, the Board found that:

With respect to social diversity, the Board notes that the median age of South Seaside Park is 59.9 years of age, and the median age of Berkeley Township overall is 59.8 years of age. Census data further reveals that 31% of the residents of South Seaside Park hold a Bachelor's Degree.

With respect to earnings and income, the residents of South Seaside Park have a median per capita income of \$41,158.00, as compared to \$31,025.00 for the Township as a whole, meaning the per capita income of South Seaside Park is 32.7% higher than Berkeley Township. Finally, Berkeley Township has a population of approximately 41,554 residents, of which 2,672 are non-white, equating to a 6.4% minority population townshipwide. Of the 674 residents of South Seaside Park, 12 are non-white, equating to 1.8% minority population within this section of the Township.

The Board finds that South Seaside Park is a unique portion of the Township as a whole. While there is some merit to petitioners

**DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS**

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

claims that they identify more with a neighboring municipality, it is one of the nicest areas of the Municipality, containing the best educated and highest income residents of the town. Average income and property values far exceed that of the mainland portion of the Municipality. The loss of south Seaside Park would greatly reduce the social, economic and education level diversity of the Township and would provide for residents of South Seaside Park losing their ability to be part of a more diverse community.

[McGuckin-Anthony Cert., Ex. A, pg. 8-9.]

Remaining in a more diverse, lower median income municipality does not cause Plaintiffs social injury. In Avalon v. Middle Twp., 370 N.J. Super. 73 (App. Div, 2004), the Appellate Division quoted the trial court judge, stating that "...the properties proposed for deannexation are of a significantly higher value than the general profile of residential properties of the Township, a fact that would suggest implications for the Township's 'social diversity' and 'prestige and social standing.' I think that the loss of such a disproportionately highly valued sector of the municipality of necessity would inflict a significant 'social injury' on the Township and its ability to continue to attract the kinds of residents-desirable in any community-that have successfully developed Avalon Manor."

g. Lack of Investment

During testimony before the Planning Board, Plaintiffs also attempted to show that Berkeley Township has failed to invest in South Seaside Park. There are two public recreation areas in South Seaside Park; White Sands Beach, the ocean beach, and Sergeant John A. Lyons Memorial Park. Petitioners Planner Scott Bauman testified that the Lyons Memorial Park offers a basketball court and a single picnic table, but no other amenities. McGuckin-Anthony Cert., Ex. B, pg. 98. Testimony was provided that in Seaside Park there are a number of recreational facilities including a softball field, tennis courts and a playground. Id.

In addressing the financial investments made to South Seaside Park by Berkeley Township, Plaintiffs' financial expert Kenneth Moore reviewed the Capital Expenditure/Bond Ordinances adopted by Berkeley Township from 2010 through 2015. He opined that "very little [money] was spent in South Seaside Park." *Id.* at 104. During cross-examination, when asked if he thought spending was "minimal" as compared to the rest of the Township, Mr. Moore replied that he was referring to "total dollars spent in the rest of the township versus South Seaside Park." *Id.* at 106. When asked if he had conducted an analysis to determine if there was a correlation between the size of the mainland section of the Township and what is spent there as opposed to the size of South Seaside Park and what was spent there, Mr. Moore stated that he had not. *Id.*

Mr. Moore simply looked at the total dollar amount of the budget for the municipality and compared it to the dollar amount that was spend in South Seaside Park. On his own admission, he did not do any calculations to determine the percentage of the allocation of money as compared to the entire Township, or to other neighborhoods or sections of the Township. Plaintiffs were unable to provide testimony on the lack of investment. Rather, Plaintiff's testimony relied solely on amenities or services that are not provided, rather than focusing on the amount of money actually invested in South Seaside Park.

h. Public Works

Plaintiffs Whiteman and Schwartz testified before the Planning Board that roads in South Seaside Park are not cleaned or repaved. In response, the Township's Public Works Director/Principal Public Works Manager Steven Seiler testified that each portion of the town has its streets cleaned every two months. *McGuckin-Anthony Cert., Ex. B, pg. 177.* Therefore,

DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

each section of town's streets are cleaned four times a year. Id. South Seaside Park's streets are cleaned as frequently as all other streets throughout Berkeley Township.

In response to road repaving, the representative from the Township Engineer's office testified that his office had reviewed the length of the municipally owned streets in Berkeley Township that have been paved since 2012, available Capital Bond Ordinances from 2012 through 2017, payment vouchers and Department of Public Works records and found that Berkeley Township has approximately 251 miles of municipally owned roads. Further, he testified that the length of the local road represented by the Deannexation Petitions is approximately 6.4 miles, or 2.5% of the roads in Berkeley Township. The length of roads not represented by the Deannexation Petition is approximately 244.6 miles, or 97.5% of the streets in Berkeley Township. Based on a review of the records, the Township Engineer's representative testified that since 2012, the rate of municipal roadways being repaved in South Seaside Park is three (3) times the rate for the balance of the Township. McGuckin-Anthony Cert., Ex. B, pg. 177-178. Berkeley Township funded the resurfacing of a larger proportion of the roads in South Seaside Park between 2012 and 2017 (approximately 27%) than it did for the remaining portions of the municipality (approximately 9%).

Plaintiffs also testified before the board concerning municipal robo-cans used for the collection of recyclables. Petitioner Robert Schwartz testified that Mainland residents of Berkeley Township had received automatic robo-cans for recycling, and the residents of South Seaside Park would not be receiving them until the following year. As of Mr. Schwartz's April 2, 2015 testimony, he still had not received a robo-can from the Township for recycling. On cross-examination, when responding to a question regarding his testimony that someone in

DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

South Seaside Park had a rob-can, Mr. Schwartz testified that he did not speak to a South Seaside Park resident who had a robo-can.

Township Director of Sanitation and Recycling, Mark Vannella, testified that the Township provides robo-cans for garbage and recycling collection. As of the date of his testimony on April 7, 2017, all properties in South Seaside Park, with the exception of the Lanes, (Midway Beach) and Miller's Camp had received both garbage and recycling robo-cans. Mr. Vannella testified that the only reason that Midway Beach and Miller's Camp did not receive the robo-cans was because of the width of the roadways and the low-hanging utility lines servicing the area that do not allow for the large trucks to make it down the roadway.

i. Bay Beach

The Planning Board heard large amounts of testimony from various petitioners concerning the Bayfront in South Seaside Park. The testimony state that the Bayfront was unmaintained with debris from illegal dumping along the waterfront and in the bay itself. Testimony stated that a person could not walk barefoot along the Bayfront. McGuckin-Anthony Cert., Ex. B, pg. 154-157.

Plaintiff Whiteman testified that due to a lack of maintenance by the Township, the Bay Beach had rocks "about the size of softballs," which were originally placed to maintain placement of a pipe. These rocks, according to Mr. Whiteman, make it difficult to walk in the bay. Id. at 154. Further, Mr. Whiteman testified that it makes it difficult for people to enjoy swimming in that section of the Township. Id.

Mr. Whiteman then compared the Bayfront in South Seaside Park to the Bayfront in Seaside Park. Mr. Whiteman testified that Seaside Park has a well-maintained, sandy beachfront bay beach with docks, swings and other amenities. Id. at 158. He further added that

DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

the bay beach in Seaside Park is guarded. Further, Mr. Whiteman compared the condition of the Bayfront in South Seaside Park to the Bayfront in Mainland Berkeley Township.

In response to the testimony concerning the Bayfront in South Seaside Park, the Township provided testimony from Mr. Yurcisin, the Township's Superintendent of Parks and Recreation. Mr. Yurcisin testified that the portion of land between the roadway and the waterline is about 10 feet wide. He concluded that there is "no room" to construct a bay beach like the one in Seaside Park.

The Township's Planner, Stanley Slachetka, reported that the area along the Bayfront in South Seaside Park is comprised of privately-owned riparian grants, which are tideland areas that are deeded to a buyer by the State of New Jersey. McGuckin-Anthony Cert., Ex. B, pg. 187. As a result, Berkeley Township has no claim or control over the area in question and cannot develop or in any way change the landscape to provide a recreation area. Regarding the small portion along the Bayfront that is Township-owned, Mr. Slachetka testified that there is no intent to maintain it as a recreation area because there is a structural issue with the adjoining roadway. *Id.* at 188. When asked about the debris in the bay referenced by Mr. Whiteman, Mr. Slachetka stated that the Township has no right to enter the waterway in those locations to clean it due to the riparian grants. *Id.*

j. Congressional Redistricting in 2020

On December 22, 2021, the Redistricting Committee adopted the "New Jersey Congressional Districts: 2022-2031" Map. See Ex. C. to McGuckin-Anthony Certification. As a result of the redistricting map, Berkeley Township now has two congressional representatives. Seaside Park only has one Congressional representative. This map is through 2031, meaning that all residents of Berkeley Township, including those residents in South Seaside Park, are

guaranteed to have two members of Congress through 2031. This gives the residents of South Seaside Park the opportunity to contact two separate, federal legislative offices for any concerns they may have. In the unfortunate event of a natural disaster such as a hurricane or flooding, there would be two members of Congress working to get federal aid to the Township. In the case of Seaside Park, there would only be one member of Congress representing the Township in those instances.

Having two members of Congress representing residents and responding to concerns is certainly an advantage not available to many citizens and residents throughout the United States and is unique to Berkeley Township. This dual representation is a social benefit to the residents of South Seaside Park.

Again, the legal standard requires that petitioners be deprived of participation in various social activities within the municipality. None of the evidence in the record shows or suggest such a deprivation. Plaintiffs continuously focused on their complaints with the Township concerning carious amenities and Township response. The statute does not require that these issues be considered when a municipality makes a determination on a deannexation petition.

Despite the fact that there is no requirement that these matters be considered, the Township's Planning Board allowed years of testimony on these issues and carefully considered this testimony when making its determination to recommend against deannexation.

In the Report of Findings, the Board's experts opined that while some of the concerns of Plaintiffs and other South Seaside Park residents were legitimate, there were various ways the Township could address the concerns absent deannexation. For instance, the report suggested entering into one or more Inter-Local Agreements with Seaside Park to address some of the issues.

**DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS**

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

Therefore, Plaintiffs have failed to demonstrate that the Township's denial of the deannexation petition would cause a social detriment to the Petitioners. As a result, Plaintiffs have failed to meet their burden and the action of the Township in denying the deannexation petition must be upheld. As Judge Serpentelli found in denying deannexation in Russel v. Stafford Township, the first case analyzing the present deannexation statute, there are mechanisms other than deannexation to address the concerns of the Petitioners. Russel v. Stafford Township, 261 N.J. Super. 43 (Law Div. 1992).

In reliance on the Report of Findings by the Board's expert, the Planning Board Resolution outlines the various concerns presented by the Petitioners, the response from Township officials and experts to those concerns, and possible resolution to those issues outside of Deannexation.

II. Plaintiffs have failed to show an economic detriment as a result of the Township's denial of the Deannexation Petition

N.J.S.A. 40A:7-12.1 requires that the petitioners seeking deannexation show that the municipality's failure to consent to the deannexation will result in an economic detriment to the petitioners. Plaintiffs then turn to the geographic location of South Seaside Park as compared to Mainland Berkeley Township. Plaintiffs spend over ten (10) pages discussing the distance of South Seaside Park to Mainland Berkeley Township. Plaintiffs' focus on the geographic location of South Seaside Park is puzzling considering the Planning Board Resolution recommending the Township deny Plaintiffs' deannexation petition admits that South Seaside Park is a significant distance from Mainland Berkeley Township. Specifically, the Resolution from the Berkeley Township Planning Board, in its first sentence discussing the distance from mainland Berkeley Township to South Seaside Park

DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

states: “The Board agrees that the distance existing between South Seaside Park and mainland Berkeley Township by public roadway is considerable,” See Ex. A to McGuckin-Anthony Cert., Pg. 5. The Resolution goes on to state that “[t]he Board agrees that this fact weighs in favor of the notes, however, that [the] distance has never changed from the time the petitioner’s first purchased their properties in South Seaside Park to the present.” *Id.* Conveniently, Plaintiffs completely fail to discuss the fact that the many other portions of Berkeley Township require a considerable drive to reach other portions of the municipality. For instance, the western portion of the municipality to the Bayfront in South Seaside Park would also require an extended automobile ride of a similar time and distance. *Id.* at 6.

The Planning Board’s Expert Report of Findings in this matter also conceded that “South Seaside Park being a part of Berkeley Township does work an economic injury to the residents of the community. And deannexation may address many of the issues cited by Petitioners. However, there are mechanisms other than deannexation that could address many of these concerns as well.” McGuckin-Anthony Cert., Ex. B, pg. 391.

Petitioners’ financial expert testified that the Plaintiffs would experience a first-year post-annexation reduction in property taxes of 40%. The fact that Plaintiffs currently pay higher taxes in Berkeley Township does not constitute an economic hardship. In *D’Anastasio*, the Court stated:

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. However, the refusal to consent may not be detrimental to the economic and social well-being of the residents. The residents may still be able to pay the higher property taxes, thus not evidencing detriment to the economic well-being of the residents.

[*D’Anastasio Corp. v. Township of Pilesgrove*, 387 N.J. Super. 254, 241 (2006).]

**DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS**

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

The Defendants have recognized that there is some economic detriment to Plaintiffs if deannexation is denied. However, the Report of Findings relied upon by the Planning Board in making its recommendation also recognized that deannexation could actually cause an increase in badge fees for the residents of South Seaside Park should they become a part of Seaside Park. While Defendants believe that Plaintiffs have failed to show an economic detriment resulting from the denial of deannexation, the statute requires that the Plaintiffs show economic **and** social detriment to meet their burden under the second factor of N.J.S.A. 40A:7-12.1. As has been demonstrated above, Plaintiffs have not shown a social detriment and have shown, if any, a very minor economic detriment to the Plaintiffs should the Township's decision be affirmed and deannexation be denied. Therefore, Plaintiffs have failed to meet their burden under the second prong of the statute and have not demonstrated that the Plaintiffs will suffer social and economic detriment absent deannexation. As a result, the Township's decision denying deannexation must be affirmed.

C. Plaintiffs have failed to show that deannexation would not result in social and economic detriment to Berkeley Township.

N.J.S.A. 40A:7-12.1 requires that Plaintiffs show that deannexation would have no social or economic detriment on Berkeley Township. Not only does Plaintiff fail to establish this, but Plaintiff barely even discusses this requirement under the statute. There can be absolutely no doubt that the loss of South Seaside Park will have a catastrophic impact on Berkeley Township, both socially and economically.

DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

Plaintiffs attempt to severely minimize the economic impact deannexation would have on Berkeley Township. The impacts deannexation would have on the Township cannot be ignored and must be addressed in full detail.

- I. Deannexation would cause a major economic impact to Berkeley Township, its schools and its residents.

In support of deannexation, petitioners engaged Kenneth Moore, CPA, RMA of Ford-Scoot & Associates, LLC to undertake a Financial Impact analysis of the proposed deannexation. The findings were submitted to the Board in an undated report entitled South Seaside Park Financial Impact in Compliance with the Matter of Deannexation from Berkeley Township. McGuckin-Anthony Cert., Ex. B, pg. 337. During Mr. Moore's initial testimony, the Board and its Professionals questioned a number of the assumptions used by Mr. Moore in supporting his findings. As a result, Mr. Moore revised his report. Id.

In his revised report, Mr. Moore found that the Total Net Assessed Value of property in South Seaside Park in 2014 was \$543,926,800.00. **This equates to 10.68% of the Township's Total Net Assessed Value.** Mr. Moore further found that should deannexation occur, the Total Net Valuation for Berkeley Township would be reduced to \$4,550,048,622 from \$5,094,011,422.00. Mr. Moore found that, assuming there was no change in the Township's or the Berkeley School District's services or increases in non-tax revenue, the Township and the School District would be required to increase taxes to recoup the lost revenue. Id. at 338.

In addressing the impact to the local school district, Mr. Moore opined that deannexation would result in approximately \$0.07 School Tax increase per \$1000 of assessed value for the properties in the mainland section of Berkeley Township. Based on the average value of

\$138,600, the average residential property on the mainland would see a first year post-deannexation School Tax increase of \$121.18. Id. at 357.

Mr. Ebenau testified that in New Jersey, the maximum amount a municipality may bond for improvements, or “Bonding Capacity,” is (with certain statutory exemptions) 3.5% of the ratable municipal base. For school districts, the maximum Bonding Capacity cannot exceed an amount equal to two-third (2/3) of the amount of obligations (exclusive of utility and assessment obligations) for the payment of which an appropriation was made in the budget of the district for the current fiscal year, plus two-third (2/3) of the amount raised in the tax levy of the current fiscal year by the district for the payments of bonds or notes. McGuckin-Anthony Cert., Ex. B, pg. 369-370.

Mr. Moore did not specifically address the Township’s Bonding Capacity in his report. This fact is troubling considering a municipality’s Bonding Capacity is an important aspect of municipal government and is a major consideration when a municipality is establishing its budget. Mr. Moore’s report did state, however, that the Township’s 2014 equalized valuation was \$5,094,011,422, 3.5% of which is \$178,290,399.

In the Report of Findings, the Board’s expert determined that while South Seaside Park may represent a small land area, it still represents 10.68% of the property tax revenue stream for the Township (\$3,318,173) and its School District (\$3,018,994). McGuckin-Anthony Cert., Ex. B, pg. 381. The Board’s expert further opined that the loss from deannexation is not simply a one-time shortfall. The impacts of deannexation would be felt annually, in perpetuity. A 3.1% increase on the remaining residents within Berkeley Township would result in increased property tax payments ranging from \$19 for a home assessed at \$100,000, \$35 for the average Berkeley Township home assessed at \$183,600 to \$94 for a home assessed at \$500,000. Again,

this increase, combined with the school tax increase of \$121.18 will have a serious impact on the residents of Berkeley Township and will be subject to a compounding affect as the impact of deannexation will be felt in perpetuity. McGuckin-Anthony Cert., Ex. B, pg. 397.

On Plaintiffs' expert own admission, the loss in revenue would require the Township and the School District to increase taxes and/or cut services and programs. Mr. Moore opined that given the information he was able to review, there would be a property tax benefit to the residents of both Seaside Park and South Seaside Park should deannexation of South Seaside Park from Berkeley Township, and annexation to Seaside Park occur. In response to a series of questions posed by the Board Attorney, Mr. Moore stated that there would be a "substantial savings" to the residents of South Seaside Park if deannexation were to occur. McGuckin-Anthony Cert., Ex. B, pg. 355. Mr. Moore projected an approximately 40% tax reduction for South Seaside Park residents should deannexation occur. McGuckin-Anthony Cert., Ex. B, pg. 397.

In evaluation the expert reports from both the Township and the Petitioners, the Board's Planner found that deannexation will have a significant injury to the wellbeing of the residents of Berkeley Township. Petitioner's financial expert projected a first year post-deannexation tax increase for the remaining residents of Berkeley Township as 3.1%. Such percentage equates to increased property taxes ranging from \$19 for a home assessed at \$100,000 to \$35 for the average Berkeley Township home assessed at \$183,600 to \$94 for a home assessed at \$500,000. McGuckin-Anthony Cert., Ex. B, pg. 397. According the Board's expert's Report of Findings, these increases will be subject to a compounding affect as the impact of deannexation extends in perpetuity.

DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

Petitioners' financial expert projected a first year post-deannexation tax reduction for the residents of South Seaside Park of approximately 40%. *Id.* Petitioners have maintained, and Plaintiffs continue to maintain that they are not "tax shopping." The fact that Plaintiffs will experience a 40% reduction in tax savings as a result of deannexation is not something to be ignored.

In Avalon Manor v. Middle Twp., 370 N.J. Super. 73 (App. Div. 2004), the Township's expert found that the portion of real estate proposed for deannexation amounted to 2.5%-2.6% of the Township's overall tax base. *Id.* at 80. In addressing the economic impact, the tax increase would have on the municipality, the Appellate Division quoted the trial judge's decision, stating:

With respect to the statutory standard of avoiding a "significant injury" to the Township, I believe that the record cannot compel a conclusion other than that reached by the Township insofar as the tax impact on the remaining residents of the Township is concerned. Phrased another way, I do not believe that it is the court's proper function to assess the relative "significance" of an annual tax increase of \$67.97 or \$75.52. I believe that the court's role in this instance is to assess whether the Township's decision was founded in facts established in the record ... and whether that decision was "arbitrary or unreasonable"—it was not. It was not unreasonable for the Township to have considered such financial impacts as "significant," especially in view of the tax savings that would accrue to the residents of Avalon Manor from deannexation.

[Avalon Manor v. Middle Twp., 370 N.J. Super. 73, 88-89 (App. Div. 2004).]

In the recent decision of Seaview Harbor Realignment Committee v. Township Committee of Egg Harbor Township, the Appellate Division affirmed the decision of the trial court, in which the trial court found that the Township acted appropriately in denying the Plaintiffs' petition for deannexation and affirming the decision of the governing body. The

case, which was just decided and approved for publication on December 29, 2021, involved Egg Harbor Township facing a loss of 2.4% of its tax ratables. Seaview Harbor Realignment Committee, LLC v. Township Committee of Egg Harbor Township, _____ N.J. _____, _____ (2021) (slip op. at 23). The trial judge and the Appellate Division found this lost tax revenue to be “significant” even though it compromised only 1.3% of Egg Harbor’s budget. Id. at 26.

In the case of Berkeley Township, should South Seaside Park deannex from the Township, the Township is facing a loss of 10.68% of its tax base. The precedent is clear. In Seaview Harbor, the Court agreed with the trial court’s finding that a 2.4% loss of ratables was significant and constituted a financial detriment to the Township. In Avalon Manor, the Appellate Division agreed with the trial court’s findings that the loss of 2.5%-2.6% of the municipality’s ratables was significant. There can be no question, then, that Berkeley Township’s loss of 10.68% of its tax base is extremely significant and will cause a severe economic detriment to the Township and its residents.

Like in Avalon Manor and Seaview Harbor, the Berkeley Township Planning Board heard copious amounts of testimony and relied on an impact report prepared by the Board’s professionals. The Berkeley Township Planning Board’s Expert’s Report of Findings concluded that “based on the totality of the testimony and Exhibits compromising the record as detailed herein, this Report of Findings finds and recommends 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 has in mind when it adopted the Deannexation statute. Conversely, deannexation will work a ‘long

DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

term, structural and inherently irremediable detriment' to the remaining residents of Berkeley Township. McGuckin-Anthony Cert., Ex. B, pg. 399.

Just as the case law before this case held, the Planning Board acted reasonably in relying on the recommendations of its expert and the conclusions of the expert in the Report of Findings. The testimony and exhibits revealed that the Township would face a series economic detriment should deannexation occur. The Planning Board and the Township properly denied deannexation as a result of this financial detriment.

In their attempt to brush over the significant financial impact deannexation will have on Berkeley Township, Plaintiffs fail to address the 2% cap on municipal tax increase, which was statutorily implemented in 2010. Both Plaintiffs' expert and the Township's expert determined that deannexation would cause the Township to lose 10.68% of the Township's tax base. As Plaintiffs' expert opined, in order for the Township to make up the loss of South Seaside Park, the township would have to raise taxes. Certainly, the 2% cap on the increase in municipal taxes would not make up the difference in the loss of 10.68% of the Township's taxes. Therefore, even if the Township raised taxes by the maximum permitted by State law, various municipal services and programs would need to be cut in the first year alone to make up for the loss in revenue.

II. Deannexation would have a significant social detriment on Berkeley Township

The record in this matter is full of testimony and information concerning the uniqueness of South Seaside Park. South Seaside Park affords the residents of Berkeley Township with an ocean beach; a unique asset that many surrounding municipalities do not have.

In Avalon Manor, the Court specifically addressed the monetary and social value such a community is to its host municipality. The Court found:

...[T]he properties proposed for deannexation are of a significantly higher value than the general profile of residential properties of the Township, a fact that would suggest implications for the Township's 'social diversity' and 'prestige and social standing.' I think that the loss of such a disproportionately highly valued sector of the municipality would inflict a significant 'social injury' on the Township and its ability to attract the kinds of residents-desirable in any community-that have successfully developed Avalon Manor. [Avalon v. Middle Twp., 370 N.J. Super. 73 (App. Div, 2004).]

Applying this reasoning to South Seaside Park, the loss of South Seaside Park would be detrimental to the social standing of Berkeley Township and would negatively impact the social diversity of the municipality.

Further, the record reflects that deannexation would reduce the overall education level of the Township, remove a significantly higher income portion of the township, thereby reducing the overall income of Township residents, remove high median value of real estate and reduce the Township's overall civilian labor force. As a result, the Township's social and economic diversity will be reduced. Ex. B to McGuckin-Anthony Cert., pg. 390. Should deannexation occur, the Township would lose the active participation of South Seaside Park residents in the everyday civic life of the municipality.

POINT II

PLAINTIFFS RECEIVED A FAIR AND IMPARTIAL HEARING AND THE PLANNING BOARD'S DECISION TO RECOMMEND THAT THE GOVERNING BODY DENY THE DEANNEXATION PETITION IS FULLY SUPPORTED BY THE RECORD.

A municipal planning board serves various functions. The functions of a planning board "may be considered ministerial or administrative in nature, rather than quasi-judicial, as is true in the case of a zoning board." § 12.11. The planning board, 36 N.J. Prac., Land Use Law § 12.11 (3d ed.). While hearings in front of a planning board require the same procedural due

DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS

COUNSELLORS AT LAW
620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

process considerations as those before a zoning board, “it should be kept in mind that the planning board functions, to a certain extent, as a political policy-making body, directing and controlling the general development of the municipality as a whole. This policy-making role is clearly evidenced in the make-up of the board’s membership.” Id. This legislative function is the authority the Berkeley Township Planning Board exercised throughout the hearings on Plaintiffs’ petition for deannexation. Had Plaintiffs had it their way, the hearing would have been held in front of a board of uninterested, uninformed members and testimony would have been provided only by Plaintiffs and Plaintiffs witnesses. The Planning Board had the duty to review the petition for deannexation and “report to the governing body on the impact of the [de]annexation upon the municipality.” That is precisely what the Planning Board did.

The Planning Board heard testimony on Plaintiffs’ deannexation petition over thirty-eight (38) hearings, spanning four years. The Planning Board heard from over 45 witnesses, petitioners and members of the public. The Planning Board received and reviewed various professional reports, listened to cross-examination of witnesses and reviewed an Impact Report prepared by the Board’s professional planner. The enormous record in this matter clearly demonstrates that Plaintiffs received a fair hearing.

Plaintiffs’ brief contains over fifty (50) pages challenging the process the Planning Board took in hearing Plaintiffs’ petition, while failing to cite any applicable statute or precedent to demonstrate that the process afforded to Plaintiffs was unfair or violative of due process. Despite the fact that Plaintiffs were given each and every opportunity to provide testimony from residents and experts, as well as cross-examine any witnesses presented by the Township, Plaintiffs’ still claim the process was unfair.

DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

The fact that N.J.S.A. 40A:7-12 does not contain a procedural requirement cannot be overlooked. The statute simply requires the Planning Board to report on the impact that the deannexation would have on the municipality. It does not require the Planning Board to hold any type of hearing, hear any testimony or review expert reports. The Berkeley Township Planning Board went above and beyond to ensure that any and all information on this matter was heard and carefully considered by the Board. The time in which the Board dedicated to this matter demonstrates the seriousness the Board gave this application considering such careful and lengthy testimony is not a statutory requirement.

In its recent decision in Seaview Harbor Realignment Committee v. Township Committee of Egg Harbor Township, the Appellate Division agreed with the trial judge's finding that the plaintiffs' bias claim was unfounded "because plaintiffs received a full and fair opportunity to present their case to Egg Harbor and Egg Harbor's decision to deny consent was fully supported by the record and entitled to deference." Seaview Harbor Realignment Committee, LLC v. Township Committee of Egg Harbor Township, _____ N.J. _____, _____ (2021) (slip op. at 43).

A planning board is created by the governing body of the municipality and may consist of either seven (7) or nine (9) members. N.J.S.A. 40:55D-23(a). In Berkeley Township, the municipality has a nine (9) member planning board. The membership of a planning board consists of specific members outlined by statute.

Pursuant to N.J.S.A. 40:55D-23, the Planning board membership consists of the following classes of members:

Class I- the mayor or the mayor's designee in the absence of the mayor[...];

**DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS**

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

Class II one of the officials of the municipality other than a member of the governing body [. . .];

Class III- a member of the governing body appointed by it;

Class IV-other citizens of the municipality, to be appointed by the mayor [. . .]

[N.J.S.A. 40:55D-23.]

A planning board is made up of members involved in the municipality's governing body and municipal offices. The deannexation statutes expressly require that all deannexation petitions be reviewed by the planning board. It is clear that the legislature intended that deannexation petitions be heard by the board with the most municipal "involvement" in order to ensure that those members making a recommendation to the governing body fully understand and appreciate the impacts of deannexation.

N.J.S.A. 40:55D-25 outlines the powers of a planning board. The statute states that a planning board may "(1) participate in the preparation and review of programs or plans required by State or federal law or regulation; (2) assemble data on a continuing basis as part of a continuous planning process; and (3) perform such other advisory duties as are assigned to it by ordinance or resolution of the governing body for the aid and assistance of the governing body or other agencies and officers." N.J.S.A. 40:55D-25(b).

The deannexation statute specifically states that petitions for deannexation shall be reviewed by the planning board. N.J.S.A. 40A:7-12. The legislature, in adopting N.J.S.A. 40A:7-12 recognized the fact that a planning board is made up of members close to and involved in the governing body, and most members are appointed by the mayor of the municipality. It was intended that the members of the planning board would have some knowledge and understanding of the impacts deannexation would have on a municipality. Had the legislature

**DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS**

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

intended deannexation petitions to be reviewed by a board with a more disconnected body, the Legislature would have had deannexation petitions reviewed by a zoning board, which is, by its member make-up, more removed than a planning board. For Plaintiffs to suggest that members of the planning board were too “involved” in the governing body of the municipality, therefore, a fair hearing was not held, is completely contradictory to the express language of the statute and accompanying case law.

**DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS**

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

POINT III

**THE CASE LAW RELIED UPON BY PLAINTIFFS IS NOT APPLICABLE
TO THIS CASE.**

In support of Plaintiffs' claim that the Berkeley Township Council and the Berkeley Township Planning Board acted arbitrarily, capriciously and unreasonably, Plaintiffs point to the cases of West Point Island Civic Association v. Township Committee of Dover Township and Beach Bay Way Realignment Committee, LLC v. Township of Toms River. Both of these cases are inapplicable to this case and do not support Plaintiffs' arguments. These are the only two cases cited by Plaintiffs in which the Court determined deannexation was appropriate.

In West Point Island Civic Association v. Dover Township, the Court evaluated the case under the prior deannexation statute, and the burden was on the Township, rather than the Plaintiff. Further, in reaching its decision to uphold the trial court's decision in finding in favor of the petitioners, the New Jersey Supreme Court found:

While it is true that the deannexation of West Point Island would reduce the ratables in Dover Township by 1.37%, the trial court found, and we agree, that this loss would be offset by an equivalent reduction in cost of municipal services to the Township. In his deposition testimony, the mayor said that the loss and gain calculation 'is probably about equal.' Nor was there any showing that by reducing the area of Dover Township by the small amount represented by West Point Island, any economic benefit or efficient allocation of services which accrued to the Township because of its larger size would thereby be lost.

[West Point Island Civic Ass'n. v. Township Committee of
Dover Tp., 54 N.J. 339, 349 (1969).]

The Court went on to find that "[s]ince Dover Township is not being economically or socially injured by the deannexation...on the facts of this case there is no reason to deny the

**DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS**

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

overwhelming majority of voters and taxpayers on West Point Island the opportunity of joining the Borough of Lavalette.” Id. at 350.

The Court ruled in favor of Petitioners because the Township did not show that there would be a social or economic detriment should deannexation occur. In West Point Island, Township’s own mayor testified that the savings weighed against the loss of ratables would be “about equal.” The testimony in this case shows the opposite. The lengthy testimony from Township officials and experts shows that the Township will face a serious economic and social detriment should that Plaintiffs be permitted to deannex. The facts of West Point Island differ greatly from this case and West Point Island does not apply.

Similarly in Bay Beach Way Realignment Committee v. Township Council of the Township of Toms River, the Appellate Division cited to the trial court decision, in affirming the trial court’s decision overturning the Township’s denial of Plaintiffs’ deannexation petition. The trial court’s decision entered by the Honorable Vincent J. Grasso, A.J.S.C. on July 22, 3008, found that (McGuckin-Anthony Cert., Ex. D). The facts of Bay Beach Way are certainly distinguishable from the facts of the case before this Court. In Bay Beach Way, the petitioner plaintiffs represented .0003% of Toms River’s land area. Further, in Bay Beach Way, the Township’s own Planner testified that the amount of tax revenue generated from the deannexing community was relatively small in percentage when compared to the overall tax revenue of the Township. Id. at 10. In Bay Beach Way, there is no evidence that the deannexing portion of the municipality had any recreational, commercial or other social amenities available to or utilized by other Toms River residents. The Court compared the deannexing portion of the Township to other barrier island portions of Toms River, such as the Ortleigh Beach section “which offers a beach, recreational facilities and commercial attractions.” Id. at 38. In South

DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731

Seaside Park, Berkeley Township has ocean beaches which are not available anywhere else in the municipality. If deannexation were to occur, the Township would lose all of its ocean front. Further, South Seaside Park is home to the John Lyons Memorial Park as well as various restaurants and commercial establishments; all of which were not present in Bay Beach Way.

Lastly, the economic loss to Toms River in Bay Beach Way was 3/8ths of 1 percent of the Township's ratable base. In this case, Berkeley Township faces the loss of 10.68% of its tax base. There can be no question that the loss to Berkeley Township is far greater and more impactful than the economic loss experienced by Toms River as a result of the deannexation in Bay Beach Way.

The facts of this case are much more similar to the cases of Seaview Harbor Realignment Committee v. Township Committee of Egg Harbor Township, Avalon Manor v. Middle Twp. and D'Anastasio Corp. v. Township of Pilesgrove as explained in detail above. The established case law in the State of New Jersey supports the Township's and Planning Board's decision to deny Plaintiffs' deannexation petition. The Defendants acted reasonably and properly determined that deannexation would cause a social and economic detriment to Berkeley Township.

**DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS**

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731


CONCLUSION

Plaintiffs have failed to meet their burden as required under N.J.S.A. 40A:7-12.1. For all the reasons set forth herein, Defendants, Township of Berkeley and Township Council of the Township of Berkeley, respectfully requests this Honorable Court deny the Plaintiff's requested relief and affirm the decision of the Berkeley Township Council in denying Plaintiffs' petition for deannexation.

Respectfully submitted,

**DASTI, MURPHY, McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS**

Attorneys for Defendants, Township of Berkeley and
Township Council of the Township of Berkeley



KELSEY A. McGUCKIN-ANTHONY, ESQ.

Dated: January 28, 2022

**DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS**

COUNSELLORS AT LAW

620 WEST LACEY ROAD
FORKED RIVER, N.J. 08731