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February 8, 2007

Supreme Court of New Jersey  
Hughes Justice Complex  
25 West Market Street  
Trenton, New Jersey 08625-0970

Re: Levin Properties, L.P. v. Hamilton Township  
Planning Board, Docket No. 59, 950

Honorable Justices:

Please accept this letter brief on behalf of Plaintiff - Respondent Levin Properties, L.P. in support of its Motion for Leave to File a Supplemental Brief. Because the Petition in this appeal invites this Court to reconsider fundamental principles of the scope of a planning board's authority under the Municipal Land Use Law ("MLUL") that were laid down in *Pizzo Mantin Group v. Township of Randolph*, 137 N.J. 216 (1994), it is respectfully suggested that the Court may be assisted by a comprehensive review of the planning board's place in the land use process that was not provided by prior briefs. In addition, it appears that the record below does not provide a suitable factual setting for the Court to address the fundamental

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questions raised by the Petition, and that certification may have been improvidently granted. The proposed Supplemental Brief submitted herewith addresses those two issues.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

On October 17, 2006 this Court granted certification to Petitioner, Hamilton Township Planning Board and Intervenor, Save Hamilton Township Open Space, to review the unreported decision of the Appellate Division dated July 12, 2006 granting preliminary site plan approval to Plaintiff - Respondent Levin Properties, L.P. for a 200,000 square foot shopping center located in a highway commercial zone. *Levin Properties v. Hamilton Township Planning Board*, 188 N.J. 493 (2006). The Appellate Division, like the trial court, had held that the application complied with the zoning ordinance in all respects.

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[Pet. App. 99a]. Review was not sought of that aspect of the decision below.

Instead, the Petition invited the Court to reconsider its holding in *P.R.B. Enterprises, Inc. v. South Brunswick Tp. Planning Board*, 105 N.J. 1 (1987) that a planning board lacks authority to reject a site plan application for a permitted use that complies with the provisions of the relevant site plan and zoning ordinances:

There is a question of general public importance with regard to the Board's action and the court's reversal of this development application. Specifically, the Board's ability to condition or deny an application based upon an application's impact upon nearby schools, churches and residential communities. [sic] The Board should be able either to deny or condition an application based upon its impact upon the surrounding neighborhood's water table (stormwater runoff and flooding concerns) and traffic generation, as well as the impact the application will have on the community by way of air, light and noise.

Our courts have only allowed planning boards do condition approvals to require improvements to on-tract entrances and exits as well as requiring contributions to off-tract improvements required by the development. See *P.R.B. Enterprises, Inc. v. South Brunswick*, 105 N.J. 1 (1987) [other citations omitted]. . . .

As our state continues to rank first as the most densely-populated state and becomes denser by the day. [sic] It is the Board's position that land use boards and municipalities should have greater power to govern large development applications and their impact upon

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local communities through generation of traffic, along with associated noise, air and water pollution, as well as runoff.

[Petition at 3-4].

Sills Cummis Epstein & Gross entered its appearance as counsel for Levin Properties in this matter on January 26, 2007. The firm immediately commenced preparation of a supplemental brief that would [Hirschhorn Cert. ¶ 2; Ex. 1]. On February 1, 2007, notice was received by telecopy from the Clerk that oral argument is tentatively scheduled for March 5 or March 6, 2007. Levin Properties' proposed Supplemental Brief is complete and is provided to the Court and adverse parties to accompany this motion for leave to file.

ARGUMENT

LEAVE TO FILE A SUPPLEMENTAL BRIEF SHOULD BE GRANTED BECAUSE OF THE IMPORTANCE OF THE ISSUES PRESENTED BY THIS APPEAL

R. 2:12-11 provides that further briefs after the grant of certification may be filed only by order of this Court granted upon motion. Supplemental briefs are required in this case because (i) the briefs hitherto filed do not fully address the provisions of the MLUL governing the authority of planning boards to review site plan applications within the general

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scheme of the MLUL, (ii) they do not fully address the governing decision of this Court, *Pizzo Mantin Group v. Township of Randolph*, 137 N.J. 216 (1994), and (iii) they do not discuss at all decisions of this Court subsequent to *Pizzo Mantin* that the Court might consider relevant to its continued viability, notably *Mt. Laurel Tp. v. Mipro Homes L.L.C.*, 188 N.J. 531 (2006) and *D.L. Real Estate Holdings, LLC v. Point Pleasant Beach Planning Bd.*, 176 N.J. 126 (2003). In addition, supplemental briefing may assist the Court on the issue of whether the record below is factually appropriate to consider the broad policy issues presented by the Petition.

N.J.S.A. 40:55D-46b, governing site plan approval, and N.J.S.A. 40:55D-48b, governing subdivision approval, provide, "The planning board shall, if the proposed development complies with the ordinance and this act, grant preliminary [site plan or subdivision] approval." (emphasis added). In *Pizzo Mantin*, this Court discussed at length the relation of the planning board's power's under the MLUL in relation to those of the governing body. It held that the planning board's duty to approve applications that complied with "this act" did not confer on the board the power to reject an application that complied with the

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ordinance if it believed that the application was otherwise inconsistent with the provisions of the MLUL. Instead, held *Pizzo Mantin*, it was the role of the elected governing body to implement the statutory purposes of the MLUL by the enactment of ordinances governing zoning, subdivisions or site plans, and off site improvements; it was the role of the planning board to enforce and implement the enacted will of the governing body. See 137 N.J. at 226-29.

Since *Pizzo Mantin*, it has been well understood by the lower courts that a planning board lacks the authority to deny a site plan application that complies with the relevant ordinances because the board believes that it's off-site impact is inconsistent with criteria beyond the provisions of the ordinance. See, e.g., *Meridian Quality Care, Inc. v. Bd. of Adjustment of Tp. of Wall*, 355 N.J. Super. 355 (App. Div. 2002); *Sartoga v. Borough of West Paterson*, 346 N.J. Super. 569 (App. Div.), certif. denied 172 N.J. 357 (2002); *Shim v. Washington Tp. Planning Bd.*, 298 N.J. Super. 395 (App. Div. 1997).

The briefs below accepted the continuing validity of *Pizzo Mantin* and *P.R.B., Inc.* Levin relied upon them as settled law; the Planning Board sought to distinguish them. Although the

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Petition does not cite *Pizzo Mantin*, the question it presents will require this Court to revisit the continuing scope and validity of that decision and of *P.R.B.*. Accordingly, it is respectfully suggested that this Court may benefit from a comprehensive review of the role of the planning board under the MLUL, similar to that conducted by Justice Handler in *Pizzo Mantin*.

The Court may also benefit from the discussion of three of its decisions subsequent to *Pizzo Mantin* which were not discussed in either the Petition or Levin's response, or in any of the briefs below, but which are relevant to the policy issues raised by the Petition. *Manalapan Realty, L.P. v. Tp. Committee*, 140 N.J. 366 (1995), decided the year after *Pizzo Mantin*, examined the scope of the governing body's powers to make flexible, targeted responses to changing conditions and community needs through amendment of the zoning ordinance in accord with amendments to the master plan. *D.L. Real Estate Holdings, LLC v. Point Pleasant Beach Planning Bd.*, 176 N.J. 126 (2003), involved the power of a governing body to limit the duration of site plan approvals in order to keep land use regulation in harmony with contemporary conditions. *Mt. Laurel*

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*Tp. v. Mipro Homes, L.L.C.*, 188 N.J. 531 (2006), a case not applying the MLUL, addressed the governing body's authority to condemn for open space in order to prevent unwanted development after site plan approval has been granted. If Holmes's "felt necessities of the times"<sup>1</sup> reflect increasing concerns with development, we suggest that the Court will benefit from discussion of how these cases relate to *Pizzo Mantin*.

Moreover, it should be noted that, as discussed in Point II of the proposed Supplemental Brief, the Planning Board's decision that Levin's application was inconsistent with the general welfare of the community was not supported by expert testimony from the Board's own staff; rather, it rested upon the vocal opposition to the project expressed by local public officials and lay members of the community. Before it decides whether and to what extent it wishes to revisit the principles of *Pizzo Mantin* and *P.R.B., Inc.*, this Court may be assisted by an examination of whether the record below presents the appropriate facts for a decision of such magnitude.

Finally, no prejudice should result from the consideration of the proposed Supplemental Brief and the responses of

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<sup>1</sup> O. Holmes, *The Common Law* 1



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Petitioner and Intervenor - Petitioner. To be sure, argument has tentatively been scheduled for March 5 or March 6. The magnitude of the issues involved, however, makes expedition less important than a thorough canvass of the governing principles and all the potentially relevant authorities. Since no development will take place until this Court decides, Petitioner and Intervenor - Petitioner will suffer no harm from any delay occasioned by the submission of supplemental briefs in accord with a schedule fixed by the Court.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court issue an order pursuant to R. 2:12-11 granting leave to file the accompanying proposed Supplemental Brief of Levin Properties, L.P. and fixing a such schedule for response and reply briefs as the Court deems proper.

Respectfully submitted,

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JMH/

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