RIVERSIDE COALITION OF BUSINESS PERSONS AND LANDLORDS, RUTH MARINO, and JOHN DOE 1,	:	**SUPERIOR COURT OF NEW JERSEY BURLINGTON COUNTY LAW DIVISION**
Plaintiffs,	:	**DOCKET NO.**
v.	:	
TOWNSHIP OF RIVERSIDE,	:	
Defendant.	:	

BRIEF IN SUPPORT OF ORDER TO SHOW CAUSE AND APPLICATION FOR PRELIMINARY INJUNCTIVE RELIEF TO ENJOIN THE RIVERSIDE TOWNSHIP IMMIGRATION RELIEF ACT

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PRELIMINARY STATEMENT

This matter arises upon an Order to Show Cause and an application for preliminary injunctive relief filed by plaintiffs Riverside Coalition of Business Persons and Landlords (hereinafter "the Coalition"), Ruth Marino and John Doe 1 (hereinafter "John Doe") against the Township of Riverside (hereinafter "the Township"), to enjoin, based exclusively upon state law grounds, the Riverside Township Illegal Immigration Relief Act (hereinafter "the Riverside ordinance") (copy attached hereto as Exhibit "A"), which represents an unprecedented attempt to ban immigrants from renting, residing, using property or being employed in the Township. The ordinance, without offering any definition of the term "illegal immigrant" or how that status is to be determined, makes it unlawful for any property owner to rent, lease, or allow their property to be used by an illegal immigrant or for a for-profit entity to aid or abet any illegal immigrant, including but not limited to, the hiring or attempted hiring of illegal immigrants. This ordinance applies to conduct by businesses not only within the Township, but also to actions that aid or abet illegal immigrants *anywhere* within the United States. Violations of the ordinance result in fines of one thousand ($1,000) to two thousand ($2,000) dollars; a term of imprisonment or period of community service not exceeding ninety (90) days; denial of approval of a business permit or non-renewal of a business permit, or Township contracts or grants for a period of not less than five (5) years from the last offense.

The Riverside ordinance suffers from multiple infirmities and should be enjoined for any one of the following reasons:

a. The adoption of the Riverside ordinance is *ultra vires*, as the Township, which may only exercise those powers conferred upon it by the New Jersey Legislature, lacks the power

and authority to ban a class of housing occupants, deny an owner a substantial attribute of ownership and possession of real estate, or regulate the hiring decisions of all businesses in the Township based upon immigration status. Nor does the Township have authority or jurisdiction over business activities in other municipalities or states outside of New Jersey. Further, the ordinance is preempted by state law.

b. The ordinance is void for vagueness under Article I, paragraph I of the New Jersey Constitution. Since the Riverside ordinance, which includes penal consequences, does not define the term "illegal immigrant," or "aids and abets illegal immigrants or immigration," or "use" of property, or the scope of property subject to its leasehold restrictions, or promulgate any guidelines for its implementation, it fails to afford a person of ordinary intelligence fair warning of what conduct is prohibited, or specific enough standards for its enforcement, and is violative of fundamental principles of due process.

c. The ordinance violates the procedural due process guarantees of Article I, paragraph 1 of the New Jersey Constitution by depriving persons of protected property interests without affording them meaningful notice and procedures to challenge any adverse determination made under the ordinance.

The Riverside ordinance, born from fear and nurtured by prejudice, is blatantly unlawful and unconstitutional. As demonstrated in this brief, the plaintiffs are entitled to immediate equitable relief, enjoining the Riverside ordinance.

STATEMENT OF FACTS[1]

[1]The facts entitling plaintiffs to injunctive relief are undisputed and drawn from the Verified Complaint

filed herewith. "VC" refers to Verified Complaint, followed by the paragraph number.

The Coalition is an unincorporated association comprised of landlords and employers, all of whom either operate businesses, some of which employ persons in Riverside, or rent or lease property to tenants in the Township of Riverside. Some members of the Coalition are required to obtain business permits to operate their business and all are subject to potential fines or imprisonment for violation of the terms of the Riverside ordinance (VC ¶1).

Plaintiff Ruth Marino is a landlord who owns and leases multiple residential properties to tenants in Riverside, New Jersey (VC ¶2).

It is hard, if not impossible, for any of the landlords or businesses to determine whether their tenants, employees, or customers are "illegal immigrants" under the ordinance. There is no definition of "illegal immigrant" under the ordinance; none of the landlords or employers have received any guidance or training from the Township regarding how to determine whether an individual is an "illegal immigrant," and they have no expertise in applying immigration law or making immigration status determinations or determining the authenticity of immigration-related documents. Further, although landlords know that their tenants may be visited by guests, family members and service personnel, the landlords have no reasonable mechanism to determine whether they are providing leased premises to persons who are defined to be "illegal immigrants" under the Riverside ordinance, or whether anyone using those premises is an illegal immigrant under the ordinance (VC ¶3).

Plaintiff John Doe 1 is a Latino immigrant who has resided as a tenant with his family in a multi-family home in Riverside for several years. Plaintiff Doe is extremely concerned about having a place to live in Riverside as a result of passage of the Riverside ordinance. Immediately after its adoption, in a letter dated August 7, 2006, plaintiff Doe's landlord wrote to his tenants as follows:

> On July 27, 2006, the Riverside Township Committee passed Ordinance 2006-16 which makes it illegal to rent or lease property to an illegal alien. At this time I am requesting that all of my tenants supply me with documentation that you have legal status in this country and you are permitted by law to rent my property. Please supply me with documentation by September 1, 2006.

Plaintiff Doe is concerned that as a result of this ordinance, he and his family will be unable to remain in their current residence and unable to find rental property anywhere in Riverside. Plaintiff Doe seeks to prosecute this action under a pseudonym, because he fears retaliation from his landlord, the police, townspeople, and others, particularly in light of the virulent anti-immigration sentiments in the Riverside community which have been engendered by passage of this ordinance. (See sample of newspaper article attached to Complaint as Exhibit "D") (VC ¶4).

The Township is a municipal corporation created under New Jersey law, with its principal place of business located at 1 West Scott Street, in Burlington County, Riverside, New Jersey. It is approximately 1.54 square miles in area, with a population of approximately 8,007 people (VC ¶5).

At all relevant times, Riverside acted through its duly authorized agents, Charles F. Hilton, Sr. Mayor; and Township Council members, James Ott; George Conard; Thomas Coleman; and Marcus Carroll and its officials, employees and agents were acting under color of State law. (VC ¶6).

This Court has jurisdiction over the Township of Riverside, as it is located in Burlington County, New Jersey. Venue is proper in this County, as all of the events which give rise to this action occurred within Burlington County (VC ¶8).

THE RIVERSIDE ORDINANCE

On or about July 26, 2006, Riverside enacted Ordinance 2006-16 entitled "Riverside Township Illegal Immigration Relief Act." This Act was subsequently amended on or about August

23, 2006 (a copy of Act and amendment attached to Verified Complaint as Exhibit "A") (VC ¶9).

The intent of the Riverside ordinance is to regulate immigration in Riverside and the United States in the absence of either state or constitutional authority, and independent of the federal government and federal law (VC ¶10).

Upon information and belief, prior to adoption of the ordinance, Riverside never conducted any written studies of any criminal, physical, or employment problems confronting the Township to determine if Riverside had any actual problems caused by unlawful immigration or what measures were necessary to rectify those problems (VC ¶11).

To date, no other municipality in New Jersey has adopted an ordinance restricting use or rental of any property or employment based upon immigration status, or conditioning municipal permits, grants or contracts upon a business' actions concerning immigrants (VC ¶12).

The Riverside ordinance and its amendment consists of eight sections: Section I, Title; Section 2, Findings and Declaration of Purpose;, Section 3, Definitions; Section 4, Business Permits, Contracts or Grants; Section 5, Renting to Illegal Aliens; Section 6, Penalties and Enforcement; Section 7, Severability; Section 8, Repealer provision. Under its terms, the ordinance takes effect upon its final adoption and publication in accordance with law (VC ¶13 and Exhibit "A" hereto).

Under its "Findings" section, the Riverside ordinance, without any evidence, conclusorily states that illegal immigration contributes to a negative impact on Riverside streets and housing; negatively impacts its neighborhood; subjects classrooms to overcrowding; places fiscal hardships on its schools; leads to higher crime rates; adds demands in all aspects of public safety, jeopardizes the public safety of legal residents; and diminishes the overall quality of life in Riverside Township (VC ¶14 and Exhibit "B" attached hereto).

There is no evidence, and the Township has cited none, which indicates that illegal immigration has increased public school overcrowding, or contributed to an increase in crime rate. According to the 2005 Uniform Crime Report issued by the New Jersey State Police, the crime rate in Riverside has declined between 2004 and 2005, and there were fewer reported violent and non-violent crimes in Riverside in 2005 than there were reported in 1998 (VC ¶15).

Neither the Riverside ordinance nor any other law defines the term "illegal immigrant" nor does it specify what documents are necessary to prove who constitutes an "illegal immigrant" (VC ¶16 and Exhibit "A" hereto).

As a result, plaintiffs Marino and the Coalition and its members may inadvertently consider and classify individuals as "illegal," many of whom the federal government allows to reside or work in the United States, including some United States citizens and lawful permanent residents. Similarly, plaintiff Doe and other individual immigrants may be erroneously denied housing; employment; access to education; goods and services; and entry to hospitals, religious institutions, social service agencies, or private homes because of an erroneous determination under the ordinance (VC ¶17).

Under Section 4 of the ordinance, any for-profit entity, including such entity's parent company or subsidiaries, which aids and abets "illegal immigrants," shall be denied approval of a business permit, the renewal of a business permit, or Township contracts or grants for a period of not less than five years since its last offense. Under this section, aiding and abetting shall include but not be limited to, the hiring or attempted hiring of "illegal immigrants," and funding or aiding any establishment of a day labor center that does not verify legal work status (VC ¶18 and Exhibit "A" hereto).

The ordinance does not define what constitutes an act that "aids and abets" or "illegal immigrants," or "illegal immigration." Further, the ordinance states that any act that "aids and abets illegal immigrants within the United States, not just within the Township" of Riverside, is a violation of the ordinance (VC ¶19 and Exhibit "A" hereto).

Under Section 5 of the Riverside ordinance, "illegal immigrants" are prohibited from leasing or renting property and any property owner or renter/tenant/lessee in control of property who knowingly allows an "illegal immigrant" to use, rent, or lease their property violates the ordinance. The effect of this all-encompassing provision is to impair existing contractual leases between commercial and private property owners and their users, and landlords and tenants such as plaintiff Doe. Further, the Riverside ordinance does not define the term "to use their property" or the scope of property subject to its leasehold restrictions, nor does it enumerate what activities are encompassed within the scope of "use of property." Under this latter provision, even a non-profit entity such as a school, hospital, or social services agency, which knowingly allows an illegal immigrant on its premises, is in violation of this ordinance (VC ¶20 and Exhibit "A" hereto).

This ordinance provides no procedure by which plaintiff Doe and individuals may challenge erroneous deprivation of housing, employment, and other rights and benefits under the ordinance (VC ¶21).

Riverside has adopted a Business Licensing Ordinance, codified at Chapter 127 of its Municipal Code, a revenue raising measure, pursuant to which, certain designated businesses, upon payment of an initial fee of seventy-five ($75) dollars and an annual renewal fee of twenty-five ($25) dollars, are entitled to a license to operate a business within the Township (copy of ordinance, as provided by the Township, attached hereto as Exhibit "B"). To obtain this license, there is no

requirement other than completion of an application and payment of the requisite fee. Under the terms of the Riverside Immigration Ordinance, a business may be denied a license and thus prevented from operating anywhere in Riverside Township for up to five years, even though it complies with all lawful aspects of the Township's current business licensing ordinance (VC ¶22).

Any person or entity that violates the Riverside ordinance faces a fine of up to two thousand ($2,000) dollars (with a minimum fine of $1,000 for any violation of Section 5), and imprisonment, or a period of community service, not to exceed ninety (90) days. In addition, for-profit entities that violate Section 4 are subject to denial or loss of business permits, contracts or grants from the Township for a period of not less than five (5) years. The effect of this ordinance is to make it virtually impossible for anyone who is considered as an illegal immigrant to live or conduct any sort of business in Riverside (VC ¶23).

Plaintiffs Marino and the Coalition are harmed by this ordinance, as they are subjected to the prospect of imprisonment, fines, and a denial or loss of business permits, Township contracts or grants for at least five (5) years. Further, plaintiffs Marino and the Coalition and its members are harmed because they are losing revenue and business because of this ordinance, and compliance with this ordinance may cause them to violate federally-imposed obligations regarding verification of employment obligations, or impair its existing contracts (VC ¶24).

Plaintiff Doe and other individual immigrants are harmed by this ordinance because they will be denied the right to live, work, and transact business in Riverside. The effect of this ordinance is to make it virtually impossible for anyone who is considered or perceived to be an "illegal immigrant" to live or conduct any sort of business in Riverside. Plaintiff Doe and others are further harmed because the ordinance fails to provide a procedure by which they may challenge erroneous

determinations and deprivations thereunder. Further, plaintiff Doe and other individual immigrants are subject to unlawful discrimination based upon race, national origin, color, and ancestry, including foreign born appearance and foreign accent, under the ordinance (VC ¶25).

On September 25, 2006, counsel for plaintiffs Marino and the Coalition sent a letter to Mayor Hilton and members of the Township Council, detailing several of the legal problems with the Riverside ordinance, and urging the Township to rescind it (copy of letter attached hereto as Exhibit "C"). To date, the Township has refused to rescind the ordinance.[2]

LEGAL ARGUMENT

I. THE RIVERSIDE ORDINANCE IS *ULTRA VIRES* UNDER STATE LAW, AS THE TOWNSHIP LACKS THE AUTHORITY TO BAN A CLASS OF HOUSING OCCUPANTS BASED UPON IMMIGRANT STATUS, TO DENY A PROPERTY OWNER A SUBSTANTIAL ATTRIBUTE OF OWNERSHIP AND POSSESSION OF REAL ESTATE, TO LIMIT THE HIRING DECISIONS OF BUSINESSES WITHIN THE TOWNSHIP, OR TO REGULATE CONDUCT OF BUSINESSES OUTSIDE OF THE TOWNSHIP, AND IN THE OTHER 49 STATES OF THE UNITED STATES.

A. The Riverside ordinance is *ultra vires*, as the Township lacks the authority to regulate immigration, limit rental

[2]Complaints challenged the constitutionality of a municipal ordinance are maintainable either as declaratory judgment actions, *Bell v. Township of Stafford*, 110 N.J. 384, 390-91 (1988), or as actions in lieu of prerogative writs, *Hills Dev. Co. v. Township of Bernards*, 103 N.J. 1, 44, 45 (1986). "If viewed as declaratory judgment actions, plaintiffs' constitutional claims would not be subject to the time limit on actions in lieu of prerogative writs imposed by R. 4:69-6(a). Moreover, the Declaratory Judgment Act, N.J.S.A. 2A:16-50 to 62, does not contain a statute of limitations." *Ballantyne House Associates v. City of Newark*, 269 N.J. Super. 322, 331 (App. Div. 1993). *Cf. Asbury Park Press, Inc. v. Woolley*, 33 N.J. 1, 14-15 (1960). If viewed as actions in lieu of prerogative writs, plaintiffs' constitutional claims would be subject to the forty-five day limitations period of R. 4:69-6(a), but this limitation may be enlarged under R. 4:69-6(c) "where it is manifest that the interest of justice so requires." "Actions in lieu of prerogative writs challenging the constitutionality of municipal ordinances have long been afforded the benefit of such enlargements of time." *See Ballantyne House*, 269 N.J. Super. at 331; *Brunetti v. Borough of New Milford*, 68 N.J. 576, 585-88 (1975). In this case, plaintiffs are challenging the validity of the Riverside ordinance on its face pursuant to N.J.S.A. 2A:16-50 *et seq.* and thus not limited by the 45 day time requirements of *R.* 4:69-6(a). Since the ordinance was amended on August 23, 2006 and plaintiffs wrote to the Township on September 25, 2006 in hopes that Riverside would rescind its unlawful enactment, the time period should not even begin to run until shortly after September 25, 2006, when it became clear that the municipality would not alter its stance.

agreements by landlords, or restrict hiring decisions by private businesses within the Township.

New Jersey law has long held that a municipal corporation is a creation of the state, has no inherent jurisdiction to make laws or adopt regulations of government, and possesses only those powers as granted to it by the Legislature. *See, e.g., In re Public Service Electric and Gas Co.*, 35 N.J. 358, 370 (1961) ("A municipality being a creation of the state has, of course, only such powers as are delegated to it by the State."); *Auto-Rite Supply Co. v. Woodbridge Twp.*, 25 N.J. 188, 195 (1957) ("A municipal corporation is a government of enumerated powers; it has no inherent jurisdiction to make laws or adopt regulations of government and must stay within its delegated authority.") (and citations therein); *Wagner v. Newark*, 24 N.J. 467, 474 (1957) (and cases cited therein); *Bucino v. Malone*, 12 N.J. 330, 345 (1953) ("In New Jersey, local government has always been a creation of the Legislature. The people have no inherent right of local self-government beyond the control of the state.") (citation omitted); *Magnolia Development Co. v. Coles*, 10 N.J. 223, 227 (1952); *Edwards v. Mayor and Council of the Borough of Moonachie*, 3 N.J. 17, 22 (1949) ("It is a creature of the Legislature . . . A municipal corporation is a government of enumerated powers, acting by a delegated authority. It has no inherent jurisdiction to make laws or adopt regulations of government.") (citations omitted); *City of Trenton v. State of New Jersey*, 262 U.S. 182, 187 (1923) ("Municipalities have no inherent right of self-government . . . A municipality is merely a department of the State and the State may withhold, grant or withdraw powers and privileges, as it sees fit. However great or small its sphere of action, it remains the creature of the State . . . ") (citations omitted). As Chief Justice Vanderbilt reiterated:

> It is fundamental in our law that there is no inherent right of local self-government beyond the control of the State, and that

> municipalities are but creations of the State, limited in their powers and capable of exercising only those powers of government granted to them by the Legislature [*Wagner*, 24 N.J. at 474 (citations omitted)].

"In reviewing any local action, [the Court] start[s] with the basic premise that a municipal corporation may exercise only the power conferred on it by the Legislature." *Repair Master, Inc. v. Borough of Paulsboro*, 352 N.J. Super. 1, 8 (App. Div. 2002). "[E]very municipal power is the product of a statutory grant." *West Point Island Civic Association v. Township of Dover*, 54 N.J. 339, 347 (1969). "As a political subdivision of the State, a municipality owes its very existence to the State and the extent of its powers and its privileges is entirely subject to the ultimate authority of the legislative process." *Borough of Pitman v. Skokowski*, 193 N.J. Super. 215, 220 (App. Div. 1984) (and cases cited therein).

Although N.J.S.A. 40:48-1 and 40:48-2.12a-r enumerate numerous areas in which express powers are granted to municipalities, none authorize any of the subjects encompassed within the Riverside ordinance, either to control immigration, regulate the hiring decisions of private employers, "to ban a class of housing occupants, or deny an owner a substantial attribute of ownership and possession of real estate." *Repair Master*, 352 N.J. Super. at 10.[3] Nor is there any

[3]Admittedly, N.J.S.A. 40:48-2.12m allows a governing body to adopt ordinances regulating the maintenance and condition of any dwelling unit in any residential rental property "for the purpose of the safety, healthfulness, and upkeep of the structure," and thus permits a municipality "to regulate the physical use of property." N.J.S.A. 40:48-2.12a authorizes a municipality to regulate the use and structure of buildings. Neither allow Riverside to accomplish what it is trying to achieve here, which is "to regulate the attributes of ownership and the nature of the occupancy of the property." *Repair Master*, 352 N.J. Super. at 10 (citation omitted). Similarly,

other statutory provision which empowers a municipality to do what Riverside seeks to effectuate in this case, which is in the absence of any state mandated authority, to legislate on matters of its perceived view of the public interest.

N.J.S.A. 40:48-1 empowers municipalities to hire and establish salaries for municipal employees. Nothing therein or anywhere else authorizes a municipality to regulate the hiring decisions of private employers.

Unequivocally lacking express or implied powers to enact the Riverside ordinance, the Township may not now justify its actions upon its general police powers under N.J.S.A. 40:48-2 to adopt ordinances for the general health, safety, and welfare of the community, or augment its jurisdiction by relying upon the "home rule" provisions of the New Jersey Constitution. Admittedly, N.J.S.A. 40:48-2[4] empowers a municipality to enact ordinances for the preservation of the public's health, safety, and welfare, and Article IV, §7, paragraph 11 of the New Jersey Constitution[5]

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[4]N.J.S.A. 40:48-2 provides in pertinent part:

> Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or of the United States, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law.

[5]Article IV, §7, paragraph 11 of the State Constitution states in pertinent part:

> The provisions of this Constitution and of any law concerning municipal corporations formed for local government . . . shall be liberally construed in their favor. The powers of . . . such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.

provides that a municipality's powers are to be liberally construed. However "[n]either the constitutional nor the statutory provision is a blanket authorization to pursue *the governing body's particularized notion of the* public good or to legislate beyond the bestowed powers, express or implied." *Repair Master*, 352 N.J. Super. at 8 (emphasis added) (citing *Hudson Circle Service Center, Inc. v. Kearney*, 70 N.J. 289, 301.

The grant of power under N.J.S.A. 40:48-2 is limited "to matters of local concern which may be determined to be necessary and proper for the good and welfare of local inhabitants, and not to those matters involving state policy or in the realm of affairs of general public interest and applicability." *Wagner*, 24 N.J. at 478. "[T]here is an implied limitation upon broad grants of power to local municipalities." *Coast Cigarettes Sales v. Long Branch*, 121 N.J. Super. 439, 445 (Law Div. 1972). "Their scope . . . does not extend to subjects inherently in need of uniform treatment or to matters of general public interest and applicability . . ." *Township of Chester v. Panicucci*, 62 N.J. 94, 99 (1973).

Moreover, "the constitutional mandate to favor municipalities in the construction of statutory grants of power constitutes no warrant to read into these statutes a power that is not there and not intended to be given." *Wagner*, 24 N.J. at 478.

> But the constitutional mandate for the liberal construction of the powers of municipal corporations constitutes no warrant for their imposing conditions on the operations of a statute where the Legislature has not, as it has not here, authorized either expressly or by implication the imposition of such conditions. To permit a municipality to impose conditions outside the statute on the exercise of its statutory powers would inevitably result in the subversion of those powers to purposes never contemplated by the Legislature under the most liberal construction. [*Magnolia Development*, 10 N.J. at 227].

"Provisions for home rule have not given omnipotence to local governments." *Wagner*, 24

N.J. at 478. As Chief Justice Vanderbilt noted in a rather prescient observation:

> Matters that because of their nature are inherently reserved for the State alone and among which have been the master and servant and landlord and tenant relationships, matters of descent, the administration of estates, creditors' rights, domestic relations, and many other matters of general and statewide significance, are not proper subjects for local treatment under the authority of the general statutes. [Wagner, 24 N.J. at 478].

As the New Jersey Supreme Court made clear in *Wagner*, the Riverside ordinance involves concerns inherently reserved for the State and outside of the municipality's zone of legislative interest.

"Where there is a potential or actual conflict, the definition of the public interest is best left to the State, as the highest level of government." *Repair Master*, 352 N.J. Super. at 8. "Were this not so, then municipalities under these [police power] statutes could legislate on any subject not expressly forbidden to them by law . . . This goes far beyond the purpose of the home rule provisions and the related sections of our *Constitution of 1947*." *Wagner*, 24 N.J. at 479.

In this case, Riverside seeks to legislate on questions well beyond matters of local concern which are not appropriate for local enactments. First, the Township cannot realistically assert that it is legislating on a question of local concern. Immigration is undisputedly an issue of national scope. Riverside undoubtedly recognizes that, by seeking to regulate businesses not only outside of Riverside but outside of the State of New Jersey, and punishing local employers with criminal sanctions for any act that "aids and abets illegal immigrants within the United States." (Exhibit "A," §4).

Second, even if the Township could somehow justify that it is legislating on a matter of local concern, it has no power to interfere with the employment or property decisions of landlords or businesses. The Township has no authority under New Jersey law to regulate the hiring decisions of

private employers; to ban a class of housing occupants based upon their immigration status; to deny a property owner a substantial attribute of ownership and possession of real estate; to bar a landlord from leasing property based upon the renter's citizenship or immigration status, or to interfere with the contractual relationships between private parties. The Township has no more authority under state law to restrict employment decisions or real estate rentals based upon an individual's immigration status, that it has to restrict private employment and rentals based upon income, marital status, or biological relationships.[6]

Finally, as a local municipality, Riverside cannot regulate conduct beyond its borders and certainly cannot punish Township businesses for immigration decisions made by a corporate parent or subsidiary located in any of the 49 other states outside of New Jersey.

Nor may Riverside somehow justify its enactment based upon its conclusory findings in its ordinance, asserted without evidence, that illegal immigrants have somehow contributed to a negative impact on Riverside's streets and housing, neighborhoods, schools, crime rate, and allegedly diminished the overall quality of life in the Township (Exhibit "A" - "Findings" section).[7]

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[6] In *United Property Owners v. Belmar*, 343 N.J. Super. 1, 51-54 (App. Div.), *certif. denied*, 170 N.J. 390 (2001), the Appellate Division recently invalidated a municipal ordinance which required a landlord to disclose the identity of tenants in connection with summer rentals. Here, the Township is not seeking the identity of tenants but the wholesale exclusion of an entire class of tenants.

[7] Although irrelevant to the legality of Riverside's enactment, the Township admittedly adopted the ordinance without a scintilla of evidence supporting its alleged "findings" and the data that has been publicly reported belies the ordinance's findings. Thus, a newspaper article written shortly after the ordinance's enactment, reported as follows:

> In its ordinance specifying fines and/or jail time for those who hire or rent to illegal immigrants, the committee declared that, among other ills, illegal immigration 'leads to higher crime rates' and 'contributes to overcrowded classrooms and failing schools.'
>
> Neither the chief of police nor the superintendent of schools will say that's true of Riverside, however, and both the crime statistics and the school enrollment

data are inconclusive.

'The schools are not overcrowded at this point,' Superintendent of Schools Robert Goldschmidt said this week in the wake of the township committee's passage of its Illegal Immigration Relief Act ordinance. 'But we are getting close at some levels. Enrollment has been up the last year or two.'

Enrollment has grown from 1,380 students in the 2002-2003 school year to 1,444 students in 2005-2006, during which time the number of Hispanic students increased from 78 to 201.

But there is no way to determine how many, if any, of the new Hispanic students are illegal immigrants.

'We require documentation that a child lives in Riverside,' Goldschmidt said, the same as any other district in New Jersey, but not based on citizenship or immigration status, inquiries it is prohibited by law from making.

A number of factors may be contributing to the recent uptick in enrollment, Goldschmidt said, including the closure of two Catholic schools in the township in the past two years.

'School funding is a bigger issue for us than immigration,' Goldschmidt said, referring to the state's failure to adequately fund its schools.

Statistics compiled by the state police show a crime index that varies from year to year, but was lower in 2004, the last year for which they were available, than it was in 1997. [Richard Pearsall, "Riverside law not based on statistics," *Courier Post*, July 29, 2006 (copy attached as Exhibit "D")].

Over the past three decades, courts in New Jersey have repeatedly rejected efforts by local municipalities similar to Riverside's attempt in this case, to solve perceived socio-economic problems by regulating the identity of housing occupants or the attributes of ownership of property. Although municipalities are empowered to regulate the physical use of property, they have absolutely no right or authority to regulate the identity of tenants or to preclude an owner from a substantial attribute of ownership.

In *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241 (1971), the New Jersey Supreme Court considered the validity of zoning ordinance provisions prohibiting "group rentals" or seasonal shore rentals, the so-called "animal house" cases.

> It is elementary that substantive due process demands that zoning regulations, like all police power legislation, must be reasonably exercised – the regulation must not be unreasonable, arbitrary or capricious, the means selected must have a real and substantial relation to the object sought to be obtained, and the regulation or proscription must be reasonably calculated to meet the evil and not exceed the public need or substantially affect uses which do not partake of the offensive character of those which cause the problem sought to be ameliorated. [*Kirsch,* 59 N.J. at 251].

The New Jersey Supreme Court articulated the pitfalls of attempting to cure social problems through land use regulations: "[t]he practical difficulty of applying land use regulation to prevent the evil is found in the seeming inability to define the offending groups precisely enough so as not to include innocuous groups with the prohibition." *Id.* at 253. As the New Jersey Supreme Court admonished, perceived problems with criminal or antisocial behavior are to be dealt with directly by enforcement of existing criminal ordinances, not by use of ordinances to exclude a class of tenants.

> Ordinarily obnoxious personal behavior can best be dealt with officially by vigorous and persistent enforcement of general police power ordinances and criminal statutes.

* * *

> Zoning ordinances are not intended and cannot be expected to cure or prevent most antisocial conduct in dwelling situations. [*Kirsch,* 59 N.J. at 253-54].

See also, Borough of Glassboro v. Vallorosi, 117 N.J. 421, 433 (1990). The Court held that the zoning ordinance provisions were "so sweepingly excessive, and therefore legally unreasonable, that they must fall in their entirety." *Id.* at 252. In this case, Riverside has attempted to use its general police powers to "cure its perceived socio-economic problems, an impermissible arrogation of governmental power." *Repair Masters*, 352 N.J. Super. at 11.

Similarly, in *State v. Baker*, 81 N.J. 99 (1979), the New Jersey Supreme Court struck down a municipality's effort to preserve the family character of its neighborhoods by prohibiting more than four unrelated persons from sharing a single family unit. The Supreme Court recognized that although a municipality has a legitimate interest in maintaining the residential quality of its neighborhoods, it cannot achieve that goal by regulating the internal composition of residential units.

> A municipality may not, for example, zone so as to exclude from its borders the poor or other unwanted minorities . . . Nor may zoning be used as a tool to regulate the internal composition of housekeeping units . . . A municipality must draw a careful balance between preserving family life and prohibiting social diversity. [*Baker*, 81 N.J. at 106].

The Supreme Court stressed that municipal concerns should be addressed through enforcement of existing ordinances which bear a much closer relationship to the actual problem, not through efforts to use municipal police power, as has Riverside, to regulate internal living relationships.

> Area or facility related ordinances not only bear a much greater relation to the problem of overcrowding than do legal or biologically based classifications, they also do not impact upon the composition of the household . . . Other legitimate municipal concerns can be dealt with similarly. Traffic congestion can appropriately be remedied by reasonable evenhanded limitations upon the number of cars which

> may be maintained at a given residence.
>
> Moreover, area-related occupancy restrictions will, by decreasing density, tend by themselves to reduce traffic problems. Disruptive behavior – which, of course, is not limited to unrelated households – may properly be controlled through the use of the general police power . . . Restriction based upon legal or biological relationships such as Plainfield's, impact only remotely upon such problems and hence cannot withstand judicial scrutiny. [*Baker*, 81 N.J. at 110-111].

In concluding that limitations on the number of unrelated persons cannot pass constitutional muster under Article I, paragraph 1 of the New Jersey Constitution, the *Baker* Court stressed that the method adopted was insufficiently related to the perceived ills sought to be rectified:

> Today we hold that municipalities may not condition residence upon the number of unrelated persons present within the household. Given the availability of less restrictive alternatives, such regulations are insufficiently related to the perceived social ills which they were intended to ameliorate. [*Baker*, 81 N.J. at 115].

In *Urban v. Planning Board*, 124 N.J. 651, 662 (1991), the New Jersey Supreme Court criticized the Planning Board's denial of subdivision applications because of the potential for absentee ownership of the lots. The Court pointedly stated:

> In this case we believe that the Planning Board was moved in part by inappropriate factors, such as the possibility that subdivided lots would be held by absentee owners, thus exacerbating a problem of municipal regulation of summer rentals. We have repeatedly emphasized that the answer to such problems lies not in the zoning power but in the police power to insist on strict compliance with all other regulations. *See State v. Baker*, 81 N.J. 99 (1979) (socially disruptive behavior best regulated through use of general police power); *Kirsch Holding Co .v. Borough of Manasquan, supra,* 59 N.J. at 253-54 (same). The minutes of the Planning Board meeting showed clearly that it was motivated, at least in part, by the nature of the proposed ownership, with one Board member saying, 'one of the problems we have with absentee landlords if the fact that when we try to take some sort of action against the owner of the property, a couple [of problems] come up.' That is clearly an inappropriate factor that undercuts the presumptive correctness of the Planning Board's

decision. [*Urban*, 124 N.J. at 662-63].

See also, Borough of Glassboro v. Vallorosi, 117 N.J. 421 (municipality may not adopt zoning regulations that unreasonably distinguish between unrelated and related persons in residential occupancy) (cited by *Urban*, 124 N.J. at 662); *Cherry Hill Township v. Oxford House*, 263 N.J. Super. 25 (App. Div. 1993) (residence for recovering alcohol and drug dependent persons not a zoning violation simply because occupants unrelated); *Larson v. Mayor and Council of Borough of Spring Lake*, 99 N.J. Super. 365, 374-377 (Law Div. 1968) (ordinances prohibiting unrelated persons from living together, enacted under municipality's general police power to proscribe excessive noise, intoxication, rowdyism, and breach of public peace and order, were unreasonable and unnecessarily prohibited otherwise lawful conduct, particularly in the absence of showing any attempt by the municipality to enforce regulations reasonably designed to respond to its enumerated problems).

The Municipal Land Use Law, N.J.S.A. 40:55D-1 to 136, "'allows for municipal regulation of the uses of land only, not regulation of who may own land or what legal form that ownership or other possessory interest may take.'" *Repair Master*, 352 N.J. Super. at 12 (citation omitted). In *ML Plainsboro Ltd. Partnership v. Plainsboro*, 316 N.J. Super. 200, 205-106 (App. Div. 1998), the Appellate Division ruled that the owner of a conference center and hotel complex was not subject to municipal control as to the form of ownership, so long as the permitted use was maintained. The municipality could not insist that there be only a single user and that the property be maintained as an owner-occupied campus. The owners had a legal right to sell without municipal approval, if the zoning use was not altered.

In *Bridge Park Co. v. Borough of Highland Park*, 113 N.J. Super. 219 (App. Div. 1971), the

Appellate Division considered a municipal attempt to limit condominium development. The Appellate Division held that a zoning ordinance which restricted ownership of a twelve-unit building to a single entity was void as a regulation of ownership of buildings or types of tenancies allowed. In *Arkam Machine & Tool Co. v. Lyndhurst,* 73 N.J. Super. 528, 533 (App. Div. 1962), the Appellate Division held that the number of tenants who would be involved in the commercial use did not affect the continuing right to operate; this was an issue of ownership or tenancy, not land "use." *Id. See also AT&T Comm. v. Bedminster Adj. Bd.*, 216 N.J. Super 340, 345 (Law Div. 1986); *Tp. Of Washington v. Cent. Bergen Comm. Health,* 156 N.J. Super 388, 417 (Law Div. 1978).

The Riverside ordinance suffers from the same fatal flaws. If the Township is concerned about crime, housing density, traffic congestion, or school overcrowding, the solution is to enforce its existing criminal laws, housing codes, area-related occupancy provisions, even-handed parking restrictions, and existing school residency requirements. Although it may be politically convenient to scapegoat illegal immigrants, none of Riverside's alleged problems are unique to illegal immigrants. Riverside may not attempt to solve its perceived social difficulties by the wholesale exclusion of a class of persons, many of whom have nothing to do with the problems which Riverside seeks to ameliorate. Given the availability of less restrictive alternatives, Riverside may not adopt a blunderbuss ordinance which is insufficiently related to the alleged ills it seeks to cure.

If there is any doubt as to the limits of Riverside's authority in this area and the invalidity of its immigration ordinance, it is unequivocally resolved by the Appellant Division in its recent decision in *Repair Master*. Therein, the issue was Paulsboro's authority to place a moratorium on the issuance of licenses for residential rental properties. According to Judge King, this moratorium "was prompted by the perception that the increased number of rental units had a negative effect upon

the real estate market, drove up municipal operating costs, negatively impacted tax rates, and placed additional strain upon the school system." *Repair Master,* 352 N.J. Super. at 4. Paulsboro actually commissioned a study "to analyze the socio-economic impacts, fiscal impacts, real estate market effects, and tax base implications of the conversion of single family owner-occupied dwellings to renter-occupied units throughout the community." *Id.* Based upon the findings of the study that the proportion of renter to owner-occupied tenants in Paulsboro's housing market is beyond the threshold for balanced, healthy neighborhoods, and that the presence of rental units has an adverse socio-economic effect on the neighborhood, Paulsboro adopted an ordinance which placed a moratorium on the issuance of new licenses. *Repair Master,* 352 N.J. Super. at 4-8.

In an extremely strongly worded opinion, the Appellate Division struck down Paulsboro's moratorium on rental units, concluding that the municipality lacks the authority "to ban a class of housing occupants or deny an owner a substantial attribute of ownership and possession of real estate." *Repair Master*, 352 N.J. Super. at 10. Judge King stressed "that a municipal corporation may exercise only the power conferred on it by the Legislature" [and] N.J.S.A. 40:48-2 should be understood as the legislative implementation of this authority. *Id.* At 8. He continued that municipalities do not possess "a blanket authorization to pursue the governing body's particularized notion of the public good." *Repair Master,* 352 N.J. Super. at 8. He emphasized that Paulsboro is not attempting "to regulate the physical use of property but . . . the attributes of ownership and the nature of the occupancy of property," which as he explained, "have not fared well in our courts, presumably because of a lack of authorization by statute." *Repair Master,* 352 N.J. Super. at 10.

After canvassing New Jersey court decisions which have repeatedly invalidated attempts to regulate attributes of ownership and/or to ban a class of housing occupants, *id.* at 11-13, Judge King

admonished that "[r]estrictions on types of occupancy may also create equal protection issues, which in the past, 'have been raised most notably by municipal efforts to exclude low and moderate income people from communities . . .'" *Repair Master*, 352 N.J. Super. at 13 (and citations therein). In words which we could not improve upon, Judge King opined:

> We conclude that the Legislature did not imply the power to municipalities to deny or regulate a property owner's right to rent non-owner occupied residential housing in an effort to alter the community's dynamics and demographics, and control the ratio of owners and tenants. This is a power we simply will not infer in light of the evidence and the history of our land use and occupancy jurisprudence. If this power is conferred on municipalities, we think it should be the result of legislative deliberation and evaluation of all the complex considerations, not from a judicially-created attempt to accommodate a single, though doubtlessly sincere, municipal effort. The problem could be compounded if other municipalities were to take this route and seek an arguably more desirable occupancy mix. Specific legislative approval should be a precondition to the exercise of a power we consider a radical regulatory development. [*Repair Master*, 352 N.J. Super. at 14].

The identical sentiments compel invalidating the Riverside ordinance. Regardless of the Township's intent, the Riverside ordinance legislates on a subject which is inappropriate for municipal enactment. Riverside lacks any legal authority to regulate the hiring decisions of private businesses within the Township, to ban a class of housing occupants, control a landlord's rental rights, or to deny a property owner a substantial attribute of ownership.[8] These powers have never been ceded by the Legislature to New Jersey municipalities and cannot be inferred from the State's land use, occupancy and employment jurisprudence. Riverside may not solve its perceived social

[8] Although its scope is undefined, the Riverside ordinance requires landlords to prohibit even the use of rental units by "illegal immigrants," thereby restricting a tenant occupants' right to invite guests, friends or family to their premises. Recently, the Appellate Division, based upon violation of tenants' constitutional rights to privacy and association, invalidated a municipality's attempt to restrict summer tenants' rights to share their home with guests and visitors. *United Property Owners*, 343 N.J. Super. at 33-38. The same rationale applies to Riverside's efforts to proscribe a tenant's right to permit friends or visitors to use their property.

problems by excluding an entire class of persons it conveniently deems undesirable.

Although it may be good politics for the Township Mayor and Council, prior to the November election, to "fan the flames" of anti-immigrant sentiment by enacting the Riverside ordinance, it is bad policy and even worse law. The Township's enactment, which has caused turmoil, dissension and disruption throughout Riverside, is both mischievous and intolerable. Immigration is a complex issue and requires a carefully balanced, well-thought-out and uniform approach. New Jersey can ill afford for multiple rogue municipalities like Riverside, to enact their own strains of "immigration reform" to serve myopic political interests. Equally important, New Jersey law unequivocally does not tolerate such misadventures.

Whether characterized as an attempt to control the hiring or rental decisions of local employers and landlords, or as an effort to regulate "illegal immigrants," the Riverside ordinance on its face encompasses a subject matter upon which New Jersey municipalities lack the power to legislate. Where a municipality acts utterly beyond its authority, as the Township has done here, its actions are *ultra vires* and the Riverside ordinance must be enjoined in its entirety. *Property Owners and Managers Association v. Town Council of Parsippany - Troy Hills*, 264 N.J. Super. 523, 537 (App. Div. 1993) (and citations therein).

B. The Riverside ordinance is invalid as it is preempted by state law.

Even if this Court finds that the Riverside ordinance is within the police power of the municipality to enact, which it is not, it is nonetheless invalid because it is preempted by state law. "[A]n ordinance properly enacted and within the police power of the municipality will be invalid if it intrudes upon a field preempted by the Legislature." *Plaza Joint Venture v. Atlantic City*, 174 N.J. Super. 231, 238 (App. Div. 1980). Preemption is "a judicially created principle based on the

proposition that a municipality, which is an agent of the State, cannot act contrary to the State." *Overlook Terrace Mgmt. Corp. v. Rent Control Board of West New York*, 71 N.J. 451, 461 (1976); *Summer v. Teaneck*, 53 N.J. 548, 554 (1969); "When the Legislature has preempted a field by comprehensive regulation, a municipal ordinance attempting to regulate the same field is void if the municipal ordinance adversely affects the legislative scheme." *Plaza Joint Venture*, 174 N.J. Super. at 238 (citing *Fair Lawn Educ. Ass'n. v. Fair Lawn Bd. of Educ.*, 79 N.J. 574, 586 (1979); *State v. Crawley*, 90 N.J. 241, 250 (1982) ("when the Legislative intends a statute to be the sole regulator of an area, local legislation in that area is precluded"). As New Jersey Supreme Court has explained:

> a legislative intent to preempt a field will be found either where the state scheme is so pervasive or comprehensive that it effectively precludes the coexistence of municipal regulation or where the local regulation conflicts with the state statutes or stands as an obstacle to a state policy expressed in enactments of the Legislature [*Garden State Farms, Inc. v. Bay*, 77 N.J. 439, 450 (1978)].

It is axiomatic that "a municipality may not deal with the subject if the Legislature intends its own action, whether it exhausts the field or touches only part of it, to be exclusive and therefore to bar municipal legislation." *State v. Ulesky*, 54 N.J. 26, 29 (1969). "A subject in need of statewide uniformity is one in which the 'needs with respect to those matters do not vary locally in their nature or intensity. Municipal action would not be useful, and indeed diverse local decisions could be mischievous and even intolerable.'" *Mack Paramus Co. v. Mayor and Council of the Borough of Paramus*, 103 N.J. 564, 577 (1986) (citations omitted).

New Jersey courts have long held that "when a state statute has preempted a field by supplying a complete system of law on a subject, an ordinance dealing with the same subject is void." *See e.g., Brunetti v. Borough of New Milford*, 68 N.J. 576, 601 (1975) (municipal ordinance which limits the grounds for eviction preempted by state law); *Ringlieb v. Parsippany-Tory Hills*

Tp., 59 N.J. 348 (1971) (state regulation of solid waste disposal); *Summer*, 53 N.J. 548 (ordinance designed to prevent block busting); *Mogolefsky v. Schoem*, 50 N.J. 588 (1967) (licensing of real estate brokers); *Township of Franklin v. Hollander*, 172 N.J. 147 (2002) (Right to Farm Act preempts municipality exercising its powers under the Municipal Land Use Law, N.J.S.A. 40:55D-1 to 112). That an ordinance does not conflict with a state statute is irrelevant, as "courts may still find that there has been preemption by the state even where there is no apparent conflict between the state and local enactments." *Brunetti*, 68 N.J. at 602 (and cases cited therein). *See e.g., Ulesky*, 54 N.J. 26 (municipal registration of criminals); *Chester Tp. v. Panicucci*, 116 N.J. Super. 229, 234-35 (App. Div. 1971), *aff'd.* 62 N.J. 94 (1973) (municipal regulation of firearms); *Coast Cigarette Sales*, 121 N.J. Super. at 446 (licensing of cigarette vending machines); *Dimor, Inc. v. Passaic*, 122 N.J. Super. 296 (Law Div. 1973) (state obscenity laws). "If upon an examination of the totality of the subject matter, it is concluded that the Legislature intended to solely occupy the field, it would then have preempted the same and the ordinance of necessity would be *ultra vires*, and invalid." *Dimor*, 122 N.J. Super. at 302.

Justice Schreiber, in *Overlook Terrace Management Corp.*, enumerated the pertinent questions for consideration in determining the applicability of preemption as follows:

> 1. Does the ordinance conflict with state law, either because of conflicting policies or operational effect (that is, does the ordinance forbid what the Legislature has permitted or does the ordinance permit what the Legislature has forbidden)?
>
> 2. Was the state law intended, expressly or impliedly to be exclusive in the field?
>
> 3. Does the subject matter reflect a need for uniformity?
>
> 4. Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation? . . .

> 5. Does the ordinance stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives' of the Legislature? [*Id.*, 71 N.J. at 461-462 (citation omitted)].

In this case, the Riverside ordinance is preempted because it directly interferes with the New Jersey Anti-Eviction Act, N.J.S.A. 2A:18-61.1, which is the state statute enacted to exclusively govern eviction of tenants, and the Local Public Contracts Law, N.J.S.A. 40A:11-1 to 56, the state law which establishes as a comprehensive procedure for the award of certain local public contracts.

As previously indicated, Section 5 of the Riverside ordinance precludes property owners from renting or leasing property to illegal immigrants thereby requires landlords to evict existing tenants based upon their immigration status. In addition, although the Anti-Eviction Act prescribes the explicit procedure which a landlord must follow prior to removal of a tenant, under the ordinance, a landlord is subject to fines and imprisonment as long as continuing to lease to an alleged "illegal immigrant," even if this delay occurs while the landlord is complying with the stringent requirements of the Anti-Eviction Act. The Anti-Eviction Act "was enacted to protect residential tenants from the effects of what has become a critical housing shortage." *Montgomery v. Gateway v. Herrera*, 261 N.J. Super. 235, 241 (App. Div. 1992). The purpose of the Act, set forth in the statement appended to *Assembly Bill* 1586, enacted as L. 1974 c. 49, and codified as N.J.S.A. 2A:18-61.1, reads as follows:

> At present, there are no limitations imposed by statute upon the reasons a landlord may utilize to evict a tenant. As a result, residential tenants frequently have been unfairly and arbitrarily ousted from housing quarters in which they have been comfortable and where they have not caused any problems. This is a serious matter, particularly now that there is a critical shortage of rental housing space in New Jersey. This act shall limit the eviction of tenants by landlords to reasonable grounds and provide that suitable notice shall be given to tenants when an action for eviction is

> instituted by the landlord. [*See Morristown Memorial Hospital v. Wokem Mortgage and Realty Co.*, 192 N.J. Super. 182, 186 (App. Div. 1983)].

The Act "provides substantial protections to a residential tenant." *Starns v. American Baptist Estates of Red Bank*, 352 N.J. Super. 327, 331 (App. Div. 2002). "Indeed, the effect of the Act 'is to create a perpetual tenancy, virtually a life interest, in favor of a tenant of residential premises covered by the Act as to whom there is no statutory cause for eviction under N.J.S.A. 2A:18-61.1.'" *J.M.J. Properties v. Khuzzam*, 365 N.J. Super. 325, 332 (App. Div. 2004) (citations omitted and citations therein). Courts in New Jersey have repeatedly recognized that the Anti-Eviction Act "is remedial legislation expressing a strong public policy which should be construed liberally to advance its beneficial ends." *Montgomery Gateway*, 261 N.J. Super. at 241; *Housing Authority v. Williams*, 263 N.J. Super. 561, 564 (Law Div. 1993).

The Anti-Eviction Act, N.J.S.A. 2A:18-61.1 sets forth in great detail specific grounds under which a tenant may be removed. The Act never indicates that a tenant may be removed because of citizenship or immigration status. Essentially, Riverside is imposing grounds for eviction which are not enumerated in the comprehensive state statute the Legislature adopted to govern the removal of tenants.

New Jersey courts have long recognized that as remedial legislation, the Anti-Eviction Act should be strictly construed and have rejected attempts by landlords to remove tenants for reasons not set forth in the Act.[9] Analysis by Judge Winkelstein in *Williams* in holding that conviction for

[9] *See e.g., Ivy Hill Park Section III v. Smirnova*, 362 N.J. Super. 421, 427-428 (Law Div. 2003) (noxious odor emanating from apartment after tenant fell asleep did not constitute grounds for eviction under the statute); *Williams*, 263 N.J. Super. at 565-566 (conviction for conspiracy to distribute drugs rather than underlying substantive drug offense covered by the Anti-Eviction Act was not a basis for removal); *Chapman Mobile Homes v. Huston*, 226 N.J. Super. 405 (Law Div. 1988) (landlord cannot evict based upon tenant's failure to adhere to notice to terminate tenancy, as that was not one of the designated statutory grounds for removal under the Anti-Eviction

conspiracy to distribute drugs rather than a substantive offense under N.J.S.A. 2A:18-61.1(n) was not grounds to evict a tenant under the Act is particularly instructive.

> The Act must be read in a manner which will give effect to the legislative purpose behind it, which is to protect residential tenancies . . . Had the Legislature intended to include conspiracy to commit a drug offense as a basis for eviction under subsection (n) of the Act, it clearly could have so stated . . . By implication it is therefore concluded that the Legislature did not intend to include conspiracy to distribute a controlled dangerous substance as an offense which would require a tenant's removal under the Act. [*Williams*, 263 N.J. Super. at 565-566].

Had the New Jersey Legislature intended to include alienage or citizenship status as grounds for removal, it could have done so. However, it is not for Riverside to substitute its judgment for the Legislature.

Indeed, the New Jersey Supreme Court, in *Brunetti*, held that with the enactment of the Anti-Eviction Act, the Legislature evidenced its intent to preempt this area of the law, and any municipal ordinance which sets forth any other grounds for eviction, even in the absence of any conflict with the state law is invalid. In *Brunetti*, the Supreme Court concluded that because the state Anti-Eviction Act provided "a complete system of law," it inferred a legislative intent to exclude parallel enactments.

> With the enactment of N.J.S.A. 2A:18-61.1 in 1974, which sets forth specific enumerated grounds of eviction, there can be no longer any doubt that the Legislature intended to preempt this area of the law. Consequently, we hold that provisions in municipal ordinances which set forth grounds for eviction or dispossession are invalid has having been preempted by state enactments. [*Id.*, 68 N.J. at 603].

See e.g., Crawley, 90 N.J. at 250 (Code of Criminal Justice preempted local loitering ordinance, as

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Act).

Code manifested "clear design for uniform statewide treatment" and "complete systems of law"); *Wein v. Town of Irvington*, 126 N.J. Super 410, 414 (App. Div.), *certif. denied*, 65 N.J. 287 (1974) (municipal pornography ordinance voided on preemption grounds because corresponding state statute manifested "a clear design for uniform state treatment").

Therefore, the Riverside ordinance which requires property owners to remove tenants based upon their citizenship or immigration status is clearly preempted by the Anti-Eviction Act. That the Township seeks to accomplish this objective indirectly by requiring landlords to remove them rather than Township officials effectuating their eviction is of no moment. Since lawfully, a tenant in New Jersey may be removed only through eviction, the Riverside ordinance is nothing but a device to require evictions by landlords upon grounds not set forth in the Anti-Eviction Act. Moreover, the ordinance punishes a landlord even if a tenant remains while the landlord is complying with the mandatory requirements of the Anti-Eviction Act. Clearly, Section 5 of the ordinance is undisputedly preempted, as the Anti-Eviction Act is meant to exclude any other enactments or ordinances.

For similar reasons, Section 4 of the Riverside ordinance, which denies public contracts for a period of not less than five years, to any entity which aids and abets "illegal immigrants," including but not limited to, the knowing hiring or attempted hiring of illegal immigrants, even if the lowest qualified bidder on the contract, is preempted by the Local Public Contracts Law, N.J.S.A. 40A:11-1 to 56 (hereinafter referred to as "LPCL").

"New Jersey has a long tradition of requiring open and free competitive bidding for public contracts." *Borough of Princeton v. Mercer County*, 333 N.J. Super. 310, 328 (App. Div. 2000) (citing *Terminal Construction Cor. v. Atlantic County Sewerage Authority*, 67 N.J. 403 (1975); *Twp.*

of Hillside v. Sternin, 25 N.J. 317 (1957)). According to the New Jersey Supreme Court the "practice of public bidding is universally recognized and deeply embedded in the public policy of this State." *N.E.R.I. Corp. v. New Jersey Highway Authority*, 147 N.J. 223, 236 (1996).

To that end, the Legislature has enacted the LPCL, which is a "comprehensive statutory framework governing public contracts," *Clean Earth v. Hudson County*, 379 N.J. Super. 261, 267 (App. Div. 2005), under which N.J.S.A. 40A:11-6.1 requires contracts to be awarded to the "lowest responsible bidder." To ensure that bidding is fair and free from fraud, New Jersey courts have curtailed "the discretion of local authorities by demanding strict compliance with public bidding guidelines." *L. Pucillo & Sons, Inc. v. Mayor & Council of the Borough of New Milford*, 73 N.J. 346, 356 (1977) (citations omitted). *See also*, *Autotote, Ltd. v. New Jersey Sports & Exposition Authority*, 85 N.J. 363, 370 (1981) (noting that courts have construed LPCL strictly, "so as not to dilute [public policy] or permit a public body to avoid pertinent legislative enactments."); *Kurman v. City of Newark*, 124 N.J. Super. 89, 94 (App. Div.) ("Statutes calling for public bidding . . . should be construed with sole reference to the public good and rigidly adhered to by the court."), *certif. denied*, 63 N.J. 563 (1973). "Public bidding statutes exist for the primary benefit of the taxpayer and not the bidder . . . and must be construed with 'sole reference' to the public good and rigidly adhered to by courts . . ." *N.E.R.I. Corp.*, 147 N.J. at 236 (and cases cited therein); *Borough of Princeton*, 333 N.J. Super at 328 (and cases cited therein).

In this case, LCPL sets forth a comprehensive procedure for the award of public contracts. With an obvious overriding need for uniformity, the LCPL was designed to be comprehensive and to prevent local governmental units from substituting their own peculiarities or requirement not recognized by the Legislature.

The LCPL does not authorize local municipalities to deny a contract to the lowest bidder simply because the contracting party allegedly knowingly hired an "illegal immigrant" or in some undefined fashion has aided or abetted illegal immigration. Nor should a local contracting entity be penalized because a parent or subsidiary in another town or another state allegedly violated the Riverside ordinance. The Local Public Contracts Law would become a nullity if each municipality in New Jersey is able to impose peculiar requirements not set forth anywhere in the statute which are completely unrelated to the Legislature's underlying objectives. Therefore, those aspects of the Riverside ordinance which seek to rescind any existing public contracts, or deny up to five years, any future public contracts to any employer who violates the terms of the ordinance, are unequivocally preempted by the Local Public Contracts Law. N.J.S.A. 40A:11-1 *et seq.*

The Riverside ordinance interferes directly with the New Jersey Anti-Eviction Act and the LCPL, areas where the Legislature intended that state enactments solely occupy the field. Therefore, for this reason alone, those portions of the Riverside ordinance are *ultra vires* and must be enjoined.

II. THE RIVERSIDE ORDINANCE VIOLATES THE DUE PROCESS PROVISIONS OF ARTICLE I, PARAGRAPH I OF THE NEW JERSEY CONSTITUTION, AS IT IS IMPERMISSIBLY VAGUE.

Even if this Court concludes that the Riverside ordinance is not *ultra vires* or preempted by state law, plaintiffs are still entitled to a preliminary injunction, because the ordinance as drafted is impermissibly vague, in violation of Article I, paragraph 1 of the New Jersey Constitution.[10]

The New Jersey Supreme Court has long recognized that vague laws are unenforceable under the New Jersey Constitution. *See, e.g., State v. Cameron*, 100 N.J. 586, 591 (1985); *Pazden v. New*

[10] Article I, paragraph 1 of the New Jersey Constitution provides that "all persons are by nature free and independent and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."

Jersey State Parole Board, 374 N.J. Super. 356, 368 (App. Div. 2005). "Vagueness 'is essentially a procedural due process concept grounded in notions of fair play.'" *State v. Lee*, 96 N.J. 156, 165 (1984) (citing *State v. Lashinsky*, 81 N.J. 1, 17 (1979)). "A statute that is vague creates a denial of due process because of a failure to provide notice and warning to an individual that his or her conduct could subject that individual to criminal or quasi-criminal prosecution." *State v. Hoffman*, 149 N.J. 564, 581 (1997) (and citations there). "[T]he constitutional ban on vague laws is intended to invalidate regulatory enactments that fail to provide adequate notice of their scope and sufficient guidance for their application." *Cameron*, 100 N.J. at 591. As the New Jersey Supreme Court explained:

> [c]lear and comprehensible legislation is a fundamental prerequisite of due process of law, especially where criminal responsibility is involved. Vague laws are unconstitutional even if they fail to touch constitutionally protected conduct, because unclear or incomprehensible legislation places both citizens and law enforcement officials in an untenable position. Vague laws deprive citizens of adequate notice of proscribed conduct, and fail to provide officials with guidelines sufficient to prevent arbitrary and erratic enforcement. [*State v. Afanador*, 134 N.J. 162, 170 (1993) (quoting *Town Tobacconist v. Kimmelman*, 94 N.J. 85, 118 (1983)].[11]

Moreover, because municipal court proceedings to prosecute violations of ordinances similar to the Riverside ordinance at issue here, are essentially criminal in nature, such penal ordinances

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[11] The United States Supreme Court expounded upon the evils of vague laws as follows:

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [*Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (footnotes omitted)].

must be strictly construed. *Township of Pennsauken v. Schad*, 160 N.J. 156, 171 (1999); *State v. Golin*, 363 N.J. Super. 474, 482 (App. Div. 2003); *Maplewood v. Tannenhaus*, 64 N.J. Super. 80, 89 (App. Div. 1960), *certif. denied*, 34 N.J. 325 (1961). "A penal ordinance offends due process if it does not provide legally fixed standards and adequate guidelines for police and others who enforce the laws." *Golin*, 363 N.J. Super. at 482; *Betancourt v. Town of West New York*, 338 N.J. Super 415, 422 (App. Div. 2001) (*citing Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972)); *Town Tobacconist*, 94 N.J. at 118. "Vague language and inadequate standards permit the subjective and therefore impermissible enforcement of penal ordinances by the police." *Betancourt*, 338 N.J. Super. at 422 (*citing Grayned*, 408 U.S. at 108-109 (1972)). "'A violation of an ordinance should not depend upon which enforcement officer, or for the matter which judge,' happens to be considering the actor's conduct." *Guidi v. City of Atlantic City*, 286 N.J. Super. 243, 245-246 (App. Div. 1996) (citation omitted).

To withstand a void for vagueness challenge, the municipal ordinance must be written in terms sufficiently clear and precise to "enable a person of 'common intelligence in light of ordinary experience' to understand whether contemplated conduct is lawful." *Cameron*, 100 N.J. at 591 (citation omitted); *Lashinsky*, 81 N.J. at 18. The ordinance must define the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A law is void if it is so vague that persons "must necessarily guess at its meaning and differ as to its applications." *Town Tobacconist*, 94 N.J. at 118. "A[n] ordinance must meet the test of certainty and definiteness . . . If the ordinance fails this test, it must be 'invalidated as impermissibly vague and indefinite.'" *Damurjian v. Board of Adjustment*, 299 N.J. Super 84, 95

(App. Div. 1997) (and citations omitted). As the New Jersey Supreme Court admonished:

> [A] legislative act, whether a statute or ordinance, must not be so vague that a person of ordinary intelligence is unable to discern what it requires, prohibits, or punishes . . . No one should be criminally responsible for conduct that could not reasonably be understood to be proscribed [*Brown v. City of Newark*, 113 N.J. 565, 572-573 (1989) (and citations therein)].

Even if an offender receives specific notice of a violation prior to enforcement is irrelevant. "Although knowledge that the municipality considers certain behavior to be a nuisance allows ordinary people to understand that their conduct is prohibited by the ordinance, it does not prevent arbitrary or discriminatory enforcement of the ordinance in the first place . . ." *Golin*, 363 N.J. Super at 484-485; *Betancourt*, 338 N.J. Super at 423. As the United States Supreme Court admonished many years ago in *Lanzetta v. N.J.*, 306 U.S. 451, 453 (1939):

> If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression.

It is not for this Court or defendant's counsel to rewrite such vague provisions.

> * * * the legislative power must be exercised by the municipality itself; it may not ask the court to write a better or a different ordinance. And it should speak clearly * * * especially in view of the predicament of the citizen who seeks in good faith to utilize his property [*Jantausch v. Borough of Verona*, 41 N.J. Super. 89, 104 (Law Div. 1956); *aff'd.*, 24 N.J. 326 (1957)].

See also, Schack v. Trimble, 48 N.J. Super. 45, 53 (App. Div. 1957), *aff'd.*, 28 N.J. 40, 54 (1958).

The fact that Riverside might assure the public that its enactments will be implemented in a reasonable manner is of no moment. "This presumes that [the government] will act in good faith and adhere to standards absent from the statute's face. But this is the very presumption that the doctrine forbidding unbridled discretion disallows." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 (1988). "[T]he ordinance so commanding must be in clear terms, either by precise definition or common understanding . . . The municipality cannot simply leave the entire process in the hands of its agents, no matter how well intentioned." *Damurjian*, 299 N.J. Super at 97. Any criteria which the Township contends are implicit in its ordinances should be explicit by textual incorporation, binding judicial or administrative precedent, or well established practice. *Poulos v. New Hampshire,* 345 U.S. 385 (1953). "A defendant should not be obligated to guess whether his conduct is criminal. Nor should the statute provide so little guidance . . . that law enforcement is so uncertain as to become arbitrary." *Lee*, 96 N.J. at 166. "This Court [should] not write nonbinding limits into a silent [municipal enactment]." *City of Lakewood*, 486 U.S. at 700. An ordinance may be challenged as being either facially vague or vague 'as applied.' *State v. Maldonado*, 137 N.J. 536, 563 (1994); *Cameron*, 100 N.J. at 593. "[A] law that is challenged for facial vagueness is one that is assertedly impermissibly vague in all its applications." *Cameron*, 100 N.J. at 594.

The Riverside ordinance is unequivocally facially vague, as it utterly lacks a modicum of definiteness. The ordinance provides absolutely no definition of the critical term "illegal immigrant," or what conduct constitutes "aiding and abetting" an illegal immigrant. As such, neither the plaintiffs nor those charged with enforcing the ordinance, will be able to comply with its terms or apply it in a consistent manner. *See e.g.*, *Lionshead Woods v. Kaplan Bros.*, 250 N.J. Super 545,

548-549 (Law Div. 1991) ("[T]he ordinance is impermissibly vague because it lacks clear standards to guide either an applicant for development or the local officials who must administer it.").

Further, the ordinance lacks any standards for implementation. Neither the plaintiffs nor any person of reasonable intelligence can determine from its provisions, what conduct is encompassed within it and/or what conduct is permitted or proscribed.

Nor does the ordinance offer any guidance as to its scope. It bars a property owner from knowingly allowing an "illegal alien to use, rent or lease their property." What constitutes use? Does it apply to attending a birthday celebration, sharing a meal, or joining a card game? Indeed, even a nonprofit entity such as a school, hospital, social service agency, or the government itself, which knowingly allows an illegal immigrant on its premises, could be in violation of the ordinance's "use of" property provision. Nor does it explain the scope of leasehold interests encompassed by this section. Does it apply to the leasing of automobiles, commercial equipment, or just apartments? It is absolutely impossible to determine its scope from the ordinance's provisions.

The ordinance claims that aiding and abetting includes, but is not "limited to, the hiring or attempting hiring of illegal immigrants . . ." What else is or might be encompassed by aiding and abetting is inexplicable from the face of the ordinance. Finally, the ordinance applies to acts "within the United States, not just within the Township limits." Thus, companies throughout the 49 other United States, who have never heard of Riverside, New Jersey, are now subject to an ordinance, whose reach is utterly baffling.

As drafted, the breadth of the Riverside ordinance is virtually unlimited. On pain of fines, imprisonment, and the loss of the ability to operate a business within the Township for five years, plaintiffs should not be required to guess as to what conduct is covered. Entities over whom the

Township has no jurisdiction, should not have to try to decipher its potentially boundless application. In circumstances similar to these, where either an ordinance lacks sufficient definiteness of critical terms, or the standards that are offered are so vague and ambiguous that the ordinance cannot be adequately enforced, New Jersey courts have consistently invalidated such ordinances on vagueness grounds. *See, e.g., Weiner v. Borough of Stratford*, 15 N.J. 295, 299 (1954) (ordinance requiring all businesses to obtain license invalid, "unless the provisions of a licensing and regulatory ordinance . . . provide adequate standards to govern the deliberations of officials . . . the provisions must be struck down as utterly void."); *New Jersey Builders Association v. Mayor and Township Council of East Brunswick*, 60 N.J. 222, 233 (1972) ("These matters, as well as other instances of obscurity and lack of clarity in the ordinance . . . should not be left in doubt or for judicial interpretation; the lawgivers' meaning should be made clear and exact . . . We do not think it fair to builders that they be required to submit to regulations so vague and imprecise."); *Cameron*, 100 N.J. 586 (finding that a municipal zoning ordinance that excludes "churches and similar places of worship" from a residential use district cannot be applied to prohibit a minister from temporarily using his home to hold a one hour religious service each week for his congregation, as the ordinance is unconstitutionally vague); *Golin*, 363 N.J. Super at 485 (a municipality's ordinance prohibiting the maintenance of a public nuisance is unconstitutionally vague); *Guidi*, 286 N.J. Super. at 244 (same).

The Riverside ordinance is indefinite and fails to provide adequate notice of its scope or sufficient guidance for compliance or application. On its face, it violates plaintiffs' fundamental due process rights under Article I, paragraph 1 of the New Jersey Constitution. On that ground alone, it should be invalidated and plaintiffs granted preliminary injunctive relief

III. THE RIVERSIDE ORDINANCE VIOLATES THE DUE PROCESS PROVISIONS OF ARTICLE I, PARAGRAPH 1 OF THE NEW JERSEY CONSTITUTION, BECAUSE IT DEPRIVES PERSONS OF PROTECTED PROPERTY INTERESTS WITHOUT AFFORDING MEANINGFUL NOTICE AND PROCEDURE TO CHALLENGE ANY ADVERSE DETERMINATION.

In addition, the Riverside ordinance fails to afford any meaningful notice or procedures to contest an adverse determination rendered under the ordinance. Although correction of these procedural defects will not rectify the ordinance's existing flaws which require its invalidation, they nonetheless highlight the critical danger of adopting an ordinance which may result in depriving persons of shelter and means of livelihood, without any notice explaining the basis of the decision or any ability to challenge adverse determinations thereunder.

As previously indicated, Article I, paragraph 1 of the New Jersey Constitution mandates that no person be deprived of life, liberty or property without due process of law.[12] *See e.g., Rivera v. Board of Review,* 127 N.J. 578, 583 (1992) ("The Constitution demands that a person may not be deprived of property or liberty absent due process of law.").

In analyzing procedural due process, New Jersey courts have predicated their analysis upon decisions from the United States Supreme Court. *See e.g., New Jersey Parole Bd. v. Byrne,* 93 N.J. 192, 209 (1983) ("Our State view of what process is due is

[12]In addition, New Jersey has long recognized that its doctrine of fundamental fairness may be applicable even in the absence of due process protection. "New Jersey's doctrine of fundamental fairness 'serves to protect against unjust and arbitrary government action and specifically against government procedures that tend to operate arbitrarily.'" *Doe v. Poritz*, 142 N.J. 1, 108 (1995) (citation omitted). Although applied in a variety of contexts, the New Jersey Supreme Court has stressed that there is one common denominator in all of these cases: "a determination that someone was being subjected to potentially unfair treatment and there was no explicit statutory or constitutional protection to be invoked." *Doe*, 142 N.J. at 109.

similar [to the federal court's view under the Fourteenth Amendment]."); *Klebanow v. Glaser*, 80 N.J. 367, 377 (1979) (after conducting federal due process analysis, holding: "We see no reason to reach a different conclusion in interpreting the comparable provision of the New Jersey Constitution (1947), Art. I, par. 1."). The New Jersey Supreme Court has stressed that due process is a "dynamic concept," *Callen v. Sherman's Inc.*, 92 N.J. 114, 136 (1983) and its "sense of fairness cannot be imprisoned in a crystal." *Id.* at 134. If anything, New Jersey courts have recognized a more expansive view of due process requirements than their federal counterparts.

> Our analysis [of procedural due process under the New Jersey Constitution] differs from that under the Federal Constitution only to the extent that we find a protectable interest in reputation without requiring any other tangible loss. In interpreting the State Constitution, we 'look to both the federal courts and other state courts for assistance . . . [but] [t]he ultimate responsibility for interpreting the New Jersey Constitution . . . is ours.' [*Doe v. Poritz*, 142 N.J. 1, 104 (1995)].

See also, Byrne, 93 N.J. at 208 ("We observe that we have generally been more willing to find state-created interests that invoke the protection of procedural due process than have our federal counterparts."); *Callen*, 92 N.J. 114 (statute pertaining to distraint violation of due process, as it lacked procedures for taking property and deprived persons of goods without notice and hearing); *In re B.L.*, 346 N.J. Super. 285 (App. Div. 2002) (establishing additional due process procedural requirements when patient conditionally released from a psychiatric hospital is recommitted); *In re M.G.*, 331 N.J. Super. 365 (App. Div. 2000) (requiring notice and procedures for certain sexual offenders prior to temporary commitment to the Sexually Violent Predator facility).

New Jersey courts have stressed that "[d]ue process is a flexible concept." *In re*

M.G., 331 N.J. Super. at 375; *In re B.L.,* 346 N.J. Super. at 302. As the New Jersey Supreme Court explained: "Both this Court and the Supreme Court of the United States have recognized that due process is a flexible concept." *Callen*, 92 N.J. at 127 (and cases cited therein). "Determining what is required to satisfy due process under a 'given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by the governmental action.'" *In re M.G.,* 331 N.J. Super. at 375 (citation omitted). The Supreme Court has established a two step test for examining claims alleging such unlawful deprivations.

> [T]he first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon the deprivation were constitutionally sufficient. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (citations omitted)].

Accord, Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000).

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). *See also*, *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest."). The "right to be heard before being condemned to suffer grievous loss

of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurther, J., concurring). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews,* 424 U.S. at 333 (quoting, *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

The Riverside ordinance deprives Township residents and employees such as plaintiff Doe of crucial liberty and property interests without any meaningful notice or procedure to challenge any adverse findings. Pursuant to the ordinance, once a person is determined to be an "illegal immigrant," a landlord is authorized to remove a tenant under an existing lease, and an employer may discharge an employee regardless of length of continuing tenancy or employment. The ordinance utterly fails to provide persons deprived of those critical interests of any ability to participate in that determination process or to challenge that finding. Indeed, the ordinance does not even require minimal explanation regarding the basis for any determination that a person is an "illegal immigrant."[13] By imposing such severe deprivations without affording any notice or procedure to challenge these conclusions, Riverside violates the fundamental due process protections guaranteed

[13]New Jersey courts have long recognized that due process requires meaningful notice of any adverse determination. *See e.g., Donaldson v. Board of Education*, 65 N.J. 236, 245-246 (1974) (holding nontenured teachers entitled to statement from local board of education as to reasons for nonretention); *J.A. v. Board of Education for the District of South Orange and Maplewood*, 318 N.J. Super. 512, 523-525 (App. Div. 1999) (local board of education excluding a student must disclose reason for the exclusion from school); *State v. Cengiz*, 241 N.J. Super. 482, 496-97 (App. Div. 1992) ("defendant here is entitled to statement of reasons for the prosecutor's decision not to join his application for probationary drug rehabilitative treatment and judicial review of prosecutor's adverse decision."); *R.R. v. Board of Educ.*, 109 N.J. 337, 349 (Ch. Div. 1970) (requiring that students facing expulsion from a state college or university be afforded due process protection, including a statement of charges and grounds that would justify expulsion if proven). Under Riverside's ordinance, an individual immigrant receives absolutely no notice regarding the basis of any adverse determination and no procedure to challenge such a determination.

by Article 1, paragraph 1 of the New Jersey Constitutions.

A. The Riverside ordinance deprives persons of protected liberty and property interests.

The courts have long held that certain property interests attach to a person's ability to hold a job. "[T]he right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich,* 239 U.S. 33, 41 (1915); *see also Cowan v. Corley,* 814 F.2d 223, 227 (5th Cir.1987). "The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within both the 'liberty' and 'property' concepts of the Fifth and Fourteenth Amendments." *Greene v. McElroy,* 360 U.S. 474, 492 (1959); *see also, Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("Without doubt, ['liberty' in the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contact, to engage in any of the common occupations of life . . .").

Similarly, an individual's right to enjoy his home free from governmental interference has consistently been recognized by the courts to be a fundamentally important private right, one which "merits special constitutional protection." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53-54 (1993) (describing the right to maintain control over one's home as "a private interest of historic and continuing importance"). This right is afforded to owners and tenants alike. See *Greene v. Lindsey*, 456 U.S. 444, 450-51 (1982) (recognizing that tenants enjoy a constitutionally protected property interest in their continued residency). *See also, Southern Burlington County N.A.A.C.P. v. Township of*

Mount Laurel, 67 N.J. 151, 178-179 (1975) ("There cannot be the slightest doubt that shelter, along with food, are the most basic human needs . . . It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare . . .") (citations omitted).

B. The Riverside ordinance deprives persons of protected interests without providing prior notice or meaningful opportunity to challenge any adverse determination.

It has long been recognized that at a minimum, procedures depriving a person of protected interests must provide "the opportunity to be heard 'at a meaningful time.'" *Mathews*, 424 U.S. at 333 (citation omitted). In analyzing the deprivation of due process, the New Jersey courts have stressed that the following factors determine what procedural due process protections are constitutionally required:

> 1) the private interest affected by the governmental action; 2) the risk of an erroneous deprivation of these interests through the procedures used, as well as the probable value, of added procedural requirements; and 3) the government's interest and the extent to which it will be impeded by the use of additional safeguards. [*In re B.L.,* 346 N.J. Super. at 303 (citing *Mathews*, 424 U.S. at 334-335)].

See, Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 17 (1978) ("Our decision in *Mathews* . . . provides a framework of analysis for determining the specific dictates' of due process."); *In re M.G.,* 331 N.J. Super. at 375 (quoting the three *Mathews* factors).

With respect to the first *Matthews* factor, the protected property interests implicated by the Riverside ordinance are substantial and should be afforded great weight. "[T]he interest in one's home merits special constitutional protection." *See, United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 902 (2d Cir. 1992). This interest

applies to both owners and tenants. *Greene*, 456 U.S. at 450-51. *See e.g., Price v. Rochester Housing Authority,* 2006 U.S. Dist. LEXIS 71092 at * 19 (W.D.N.Y. 2006) ("The private interests at stake – the continued receipt of rental housing assistance – is assuredly a weighty one."). The deprivation of real property need not be total or complete to trigger procedural protections. "[E]ven . . . temporary or partial impairments to property rights . . . 'are subject to the strictures of due process.'" *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) (citations omitted). Similarly, the courts have long acknowledged that plaintiffs threatened by the loss of employment face substantial hardships. "[T]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985) (and citations therein). In combination, he loss of the ability to earn a living and a place to reside unquestionably demands the highest level of procedural due process protection, as it seriously threatens a person's ability to avoid homelessness and destitution.

As for the second *Mathews* factor, the risk of erroneous deprivation is extraordinarily high under the Riverside ordinance. Neither the Riverside ordinance nor any other law defines the term "illegal immigrant" nor does the ordinance enumerate how "illegal immigration" status is to be determined. Landlords and businesses will be required to implement the Riverside ordinance but have no expertise or experience in applying immigration law, making immigration status conclusions, or determining the authenticity of immigration-related documentation. They have not been trained as federal immigration officials; the Riverside ordinance provides them absolutely no guidance as to how such determinations should be made, and they cannot possibly implement the Riverside ordinance's provisions. Without question, the risk of erroneous deprivation is unacceptably high.

Further, the value of additional or substitute procedural safeguards is substantial. Providing notice and an opportunity to challenge a determination has always been recognized as a critically essential procedural safeguard. The Supreme Court has repeatedly held that, absent "extraordinary circumstances," any deprivation of a person's occupancy rights must be preceded by notice and an opportunity to be heard. *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972); *see also, Sniadach v. Family Finance Corp. of Bay View,* 395 U.S. 337, 342 (1969)*; James Daniel*, 510 U.S. at 53-54 ("Good's right to maintain control over his home . . . is a private interest of historic and continuing importance."). The New Jersey courts have been extremely scrupulous to ensure that adequate notice and procedures are provided to prevent erroneous determinations. *See e.g., Rivera*, 127 N.J. 578 (notice procedures and practices applied by New Jersey Department of Labor to

migrant farm workers inadequate to protect due process rights; procedure must ensure that recipient of unemployment benefits knows that an initial determination of ineligibility has been made and has sufficient time to appeal before that determination becomes final); *Callen,* 92 N.J. at 138 ("By depriving the tenant of its goods without notice and hearing, the landlord violated the tenant's right to due process."). Indeed, the deprivations effectuated upon tenants under the Riverside ordinance is functionally equivalent to the New Jersey Supreme Court's conclusion that landlords violated a tenant's rights by depriving the tenant or his or her goods without notice and hearing. *Id.*

Affording an affected tenant or employee notice and a meaningful opportunity to challenge an adverse determination before an impartial decision maker is critical to ensure the accuracy and reliability of the decision making process. Tenants and employees who risk the immediate and irreparable loss of shelter and means of livelihood as a result of an erroneous determination and who possess the most critical information relevant to such a determination, should be provided a meaningful opportunity to participate in this process before suffering the serious consequences from it. The Riverside ordinance provides none.

Finally, the burden imposed on the locality is not so substantial as to justify a denial of minimal due process protections to those persons directly impacted. Since these individuals have been living and working in Riverside without incident, some for many years, the Township suffers no harm by affording the impacted persons notice and an opportunity to challenge any adverse finding before an impartial adjudicator before discharge from work or removal from residence. On the other hand, harm from an erroneous determination may be long lasting and even life threatening.

The supreme importance of the rights at stake, the arbitrariness that will otherwise pervade the process, and the lack of substantial burden upon the Township, underscore the serious procedural defects of the existing Riverside ordinance. When reviewed in their totality, the three *Mathews* factors recognized by the New Jersey courts, clearly indicate that the Riverside ordinance, by failing to provide meaningful notice and a procedure to challenge any adverse determinations thereunder, violates basic due process principles under the New Jersey Constitution and the doctrine of fundamental fairness under New Jersey law. For this reason alone, the ordinance should be enjoined.[14]

CONCLUSION

[14] In addition, the ordinance as drafted, also violates the substantive due process provisions of paragraph 1 of the New Jersey Constitution, by denying property owners a substantial attribute of ownership and possession of real estate and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.* However, plaintiffs are not seeking injunction relief upon any of those grounds at present.

"Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore, Send these, the homeless, tempest - tossed, to me: I lift my lamp beside the golden door."[15] This is meant to be more than just an inscription on the Statute of Liberty. It is a beacon to the nations of the world and the bedrock foundation upon which this nation was built and enriched. Predicated upon irrational fear, prejudice and xenophobia, the Riverside ordinance is designed to rip that foundation asunder and to exclude those whom Lady Liberty previously welcomed with open arms. For all of the foregoing reasons, plaintiffs respectfully request that this Court find the Riverside ordinance unlawful and invalid, and grant plaintiffs' application for injunctive relief, enjoining the ordinance in its entirety.

Respectfully submitted,

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