August 12, 2013

The Honorable Louis F. Manzo
Mayor of Harrison Township
114 Bridgeton Pike
Mullica Hill, NJ 08062-9709

The Honorable Robert Shearer
Committeeman, Harrison Township
114 Bridgeton Pike
Mullica Hill, NJ 08062-9709

The Honorable Dennis Clooney
Deputy Mayor of Harrison Township
114 Bridgeton Pike
Mullica Hill, NJ 08062-9709

The Honorable Matt Diggons
Committeeman, Harrison Township
114 Bridgeton Pike
Mullica Hill, NJ 08062-9709

The Honorable Don Heim
Committeeman, Harrison Township
114 Bridgeton Pike
Mullica Hill, NJ 08062-9709

Dear Mayor, Deputy Mayor, and Committee:

Please be advised that this law firm represents the Mullica Hills Citizens Association comprised of various property owners on and residents of Main Street in Harrison, Block 64, Lots 1 – 22. The purpose of this letter is to provide you with the legal and policy basis for analysis of the proposed designation of Block 64 properties as an “area in need of redevelopment,” i.e., as blighted. As we demonstrate below, none of the 23 properties in the “study area” comes even close – as a matter of settled constitutional law1 – to qualifying as blighted. Therefore, the Township must reject the proposed

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1 See N.J.S.A. 40A:12A-3, which defines “Redevelopment Area” as the same as “blighted area” for purposes of the Blighted Area Clause in N.J. Const. art. VIII, § 3, ¶ 1.
designation and proceed to work with the property owners to identify any necessary zoning or land use changes.

**SUMMARY:**

Since 2007 it has been settled law in New Jersey that no property may be designated as an "area in need of redevelopment" unless the property is "blighted." Such a designation means the property is subject to a "taking" through eminent domain. The term "area in need of redevelopment" is a misleading euphemism for "blighted area" authorized by the Local Redevelopment and Housing Law (LRHL). As this memorandum demonstrates, none of the properties recommended for inclusion within a "blighted area" meets the constitutional standards of blight as required by our state Supreme Court. Accordingly, the Township must reject that recommendation. By doing so, the Township spares itself and its citizens the costs of litigation which the Township is virtually certain to lose. Indeed, the lack of credible evidence of blight is so obvious that a court may well find that any municipal defense of such a clearly unconstitutional action is "frivolous," thereby subjecting the Township to the risk of paying legal fees for the prevailing parties challenging that defective designation.

In defense of this unconstitutional designation, Township officials have told the public that they have no intention of taking any property, that the designation will increase property values and allow for generous tax abatements. If the Township has no intention of "taking" any property, this is another reason why the designation must be
rejected. For, as the state Supreme Court reiterated in its Gallenthin v. Bor. of Paulsboro, 191 N.J. 344, 348 (2007) ruling, “a [blighted] classification subjects property to taking by eminent domain....” If the Township does not intend to use eminent domain, then it has in effect conceded that it is using its redevelopment powers for an improper purpose – to advance a particular redevelopment plan for non-blighted properties. Moreover, whatever may be the current intentions of current Township officials, these do not bind them or their successors; in short, they are empty promises.

Second, a blight designation does not increase property values; it drastically reduces them. We have seen this in town after town. The owners cannot sell or refinance without disclosing that it is blighted. As a result, tenants will not sign long-term leases, buyers will not buy, investors will not invest and banks will not lend. In fact, non-blighted property can become “blighted” as owners lose money on their properties over the years. The result is the property becomes “imprisoned economically” in an indefinite holding pattern, neither marketable nor developable, but not taken. See: Lyons v. City of Camden, 52 N.J. 89, 99 (1968) and its progeny.²

Point 1: The Township’s decision must be in accordance with the Supreme Court’s ruling in Gallenthin v. Bor. of Paulsboro, 191 N.J. 344 (2007), defining

² Where “the threat of condemnation has had such a substantial effect as to destroy the beneficial use that a landowner has made of his property, there has been a taking of property within the meaning of the Constitution.” Washington Market Enterprises v. Trenton, 68 N.J. 107, 122 (1975).
“blight;” as we show, there is no factual or legal basis for any of the cited properties to be designated as blighted:

The Township’s decision on whether to designate Block 64 as an “area in need of redevelopment / blighted area” is controlled by the constitutional standards mandated by the New Jersey Supreme Court in its landmark Gallenthin decision handed down in 2007. In that case, a unanimous Court struck down Paulsboro’s redevelopment / blight designation and provided guidance to lower courts and municipal government as to what constitutes blight. As we show below, the Melvin report -- which is the basis for the proposed designation -- falls far short of meeting those exacting constitutional standards.

At the outset of the Court’s opinion, the justices stated that “a classification [as blighted] subjects property to taking by eminent domain ... Because the New Jersey Constitution authorizes government redevelopment of only ‘blighted areas,’ we conclude that the Legislature did not intend N.J.S.A. 40A:12A-5(e) [of the Local Redevelopment and Housing Law] to apply in circumstances where the sole basis for redevelopment is that the property is ‘not fully productive.’ We therefore invalidate Paulsboro’s redevelopment classification....” Gallenthin, 191 N.J. at 348.

The Court continued with an expansive history of the varied definition of the concept of “blight” as follows:

"Blight" is generally defined as "[s]omething that impairs growth, withers hopes and ambitions, or impedes progress and prosperity." American Heritage Dictionary 196 (4th ed. 2000); see New Oxford American Dictionary 177 (2d ed.)
2005) (defining "blight" as "an ugly, neglected, or rundown condition of an urban area"). In 1938, an influential urban planner and author defined "blight" as "an area in which deteriorating forces have obviously reduced economic and social values to such a degree that widespread rehabilitation is necessary to forestall the development of an actual slum condition." Mabel L. Walker, Urban Blight and Slums 5 (1938). A more recent definition, as used in the context of urban redevelopment, describes "blight" as "an area, usually in a city, that is in transition from a state of relative civic health to the state of being a slum, a breeding ground for crime, disease, and unhealthful living conditions." Hudson Hayes Luce, The Meaning of Blight: A Survey of Statutory and Case Law, 35 Real Prop. Prob. & Tr. J. 389, 393 (2000). Thus, the term presumes deterioration or stagnation that negatively affects surrounding areas. [Gallenthin, 191 N.J. at 360, emphasis added.]

Clearly, not one single lot in Block 64 can be described in such a manner. There is no "slum," no "breeding ground for crime, disease and unhealthful living conditions" anywhere in Block 64.

Also, the Court further explained, these highly negative attributes of "blight" are reflected in the legislative history of predecessors to the Local Redevelopment and Housing Law (LRHL):

The Redevelopment Companies Law described "blighted areas" as "areas ... where there exist substandard conditions and [un]sanitary housing conditions owing to obsolescence, deterioration and dilapidation of buildings, or excessive land coverage, lack of planning, of public facilities, of sufficient light, air and space, and improper design and arrangement of living quarters." L. 1944, c. 169, 2. Likewise, the Urban Redevelopment Law sought to remedy "congested, dilapidated, substandard, unsanitary and dangerous housing conditions," which were a
"menace" and a "social and economic liability." L. 1946, c. 52, 2.

Accordingly, in adopting the Blighted Areas Clause, the framers [of the New Jersey Constitution] were concerned with addressing a particular phenomenon, namely, the deterioration of "certain sections" of "older cities" that were [191 N.J. 362] causing an economic domino effect devastating surrounding properties. The Blighted Areas Clause enabled municipalities to intervene, stop further economic degradation, and provide incentives for private investment.

[Gallenthin, 191 N.J. at 361-362, emphasis added.]

At the risk of repetition, the Court further examined the harmful characteristics that any property must demonstrate in order to be deemed “blighted” in conformance with the Blighted Area Clause of the state constitution, art. VIII, § 3, ¶ 1:

That said, "blight" still has a negative connotation. In Levin, supra, for example, we found that the parcels at issue were preventing the "proper development" of surrounding properties because they "had reached a stage of stagnation and unproductiveness." 57 N.J. at 512, 538, 274 A.2d 1. In Wilson, supra, we noted that much of the designated area contained "dilapidated homes and other buildings, which were obviously beyond restoration," 27 N.J. at 394, 142 A.2d 837, and we observed that community redevelopment was a means of "removing the decadent effect . . . on neighboring property values," id. at 370, 142 A.2d 837. Although the meaning of "blight" has evolved, the term retains its essential characteristic: deterioration or stagnation that negatively affects surrounding properties.

[Gallenthin, 191 N.J. at 363, emphasis added.]

The Court expressly rejected the notion – so popular at that time among planners and municipal officials – that a property may be declared as “in need of redevelopment”
because of a desire to invoke the powers of the LRHL to promote redevelopment, no matter how modern, attractive or beneficial that redevelopment might appear to be in comparison with current property usage or development patterns:

We recognize that government redevelopment is a valuable tool for municipalities faced with economic deterioration in their communities. As noted, our Constitution expressly authorizes municipalities to engage in redevelopment of "blighted areas." However, Paulsboro interprets subsection 5(e) to permit redevelopment of any property that is "stagnant or not fully productive" yet potentially valuable for "contributing to and serving" the general welfare. Under that approach, any property that is operated in a less than optimal manner is arguably "blighted." If such an all-encompassing definition of "blight" were adopted, most property in the State would be eligible for redevelopment. We need not examine every shade of gray coloring a concept as elusive as "blight" to conclude that the term's meaning cannot extend as far as Paulsboro contends. At its core, "blight" includes deterioration or stagnation that has a decadent effect on surrounding property. We therefore conclude that Paulsboro's interpretation of N.J.S.A. 40A:12A-5(e), which would equate "blighted areas" to areas that are not operated in an optimal manner, cannot be reconciled with the New Jersey Constitution. [Gallenghin, 191 N.J. at 365, emphasis added.]

In short, the Court rejected the belief that a property is "blighted" because the municipality may have plans to "improve" the area; as we show below, this is the core failure of the Melvin report and why it must be rejected; repeatedly Melvin asserts that properties are "in need of redevelopment" for that reason:

Here, Paulsboro's sole reason for designating the Gallenthin property as "in need of redevelopment" was
that plaintiffs [191 N.J. 371] were not utilizing the property in a fully productive manner. According to Stevenson, the town planner, N.J.S.A. 40A:12A-5(e) was satisfied "because we have vacant, unimproved conditions, [and] because there [are] bits of land that could otherwise be more beneficial to . . . the overall welfare of this municipality." The Remington & Vernick report also concluded that the Gallenthin property was in need of redevelopment because plaintiffs were not optimizing use of the property. The Borough expressly based its designation on Stevenson's testimony and the Remington & Vernick report. Those considerations, standing alone, are insufficient to engage the sovereign's power to designate property as "in need of development" and subject to eminent domain. [Gallenthin, 191 N.J. at 370-371, emphasis added.]

Finally, the Court emphasized that a municipality must evaluate and weigh the benefits of leaving the property "as is," and not assuming away its positive attributes in the rush to promote government-led redevelopment:

The record is also silent whether the Borough considered the benefits of protected wetlands in finding that the property was in need of redevelopment. The legislative findings accompanying the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 to-30, reveal that freshwater wetlands provide a host of social goods, including protecting and preserving drinking water supplies, preventing loss of life and property, retarding soil erosion, and providing essential habitat for a major portion of New Jersey wildlife. N.J.S.A. 13:9B-2. The Legislature also found that "the public benefits arising from the natural functions of freshwater wetlands, and the public harm from freshwater wetland losses, are distinct from and may exceed the private value of wetland areas." Ibid. At the very least, the Borough should have considered those benefits. [Gallenthin, 191 N.J. at 371, emphasis added.]
The Court concluded by reaffirming the constitutional roots of the state’s redevelopment powers, which confine government redevelopment powers solely to blighted areas:

Although community redevelopment is an important municipal power, that authority is not unfettered. Our Constitution restricts government redevelopment to "blighted areas." N.J. Const. art. VIII, § 3, ¶ 1. That limitation reflects the will of the People regarding the appropriate balance between municipal redevelopment and property owners' rights. The New Jersey Constitution does not permit government redevelopment of private property solely because the property is not used in an optimal manner. [Gallenthin, 191 N.J. at 373, emphasis added.]

Since Gallenthin was issued the lower courts of New Jersey have been striking down municipal blight designations for their failure to employ the Court’s standards of what constitutes blight. Very recently, for example, the Appellate Division applied the Constitution’s restriction in Hoagland v. City of Long Branch, 428 N.J. Super. 321 (App. Div. 2012): “The trial court had decided these cases prior to the Supreme Court’s decision in Gallenthin, which reaffirmed that the New Jersey Constitution requires a finding of actual blight before private property may be taken for purposes of redevelopment.” Id. at 324, emphasis added.

Point 2: The Melvin group study is not competent as expert evidence:

The proposed blight designation is based upon the “investigation report” prepared by Melvin Design as “substantial evidence” in hearings by the Land Use Board. As an
initial matter, the board did not qualify Melvin as an expert on the subject of whether property is blighted. Qualification as an expert is necessary before it may offer an opinion as evidence on whether these properties are blighted and subject to condemnation. Melvin’s expertise cannot simply be assumed. Since even a cursory review of the study shows that the Melvin group ignored the standards for determining if properties are blighted in accord with the Gallenthin opinion, it follows that this report is not “substantial evidence” that any of these properties are blighted. These are basic requirements of constitutional law, Gallenthin, 191 N.J. at 360, as any legitimate expert in the relevant field must know, some six years after Gallenthin was handed down.

The Melvin report also failed to evaluate the value of the wetlands in Block 64, as required (Gallenthin, 191 N.J. at 371), as well as the value of the historic properties included in the study area. The Melvin report identifies Lots 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, and 19 as within the Historic District.

Since Melvin does not acknowledge or apply these standards, it is clear that the

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3 Rule governing expert testimony imposes three basic requirements: testimony must concern subject matter beyond the ken of the average juror; field testified to must be at state of the art such that expert’s testimony could be sufficiently reliable; and witness must have sufficient expertise to offer the intended testimony. Rules of Evid., N.J.S.A. 2A:84A, Landrigan v. Celotex Corp., 127 N.J. 404 (1992). Wilson v. City of Long Branch, 27 N.J. 360, 389-90 (1958) outlined what constitutes substantial evidence for purposes of the LRHL: an elaborate report of a planning consultant who made a study of the area with respect to blight, including, inter alia, maps showing land use in the entire city, topography of the area, underdeveloped and underutilized land, the extent of blighting factors and tax delinquencies in the proposed area.
Melvin group lacked the relevant expertise.

**Point 3: Melvin assumed that property is blighted because it could theoretically be improved, clearly the wrong standard of what constitutes blight:**

The Melvin group would declare property as blighted because it assumes that the property will be more fully redeveloped “to its highest and best use” if it is declared blighted, subjected to eminent domain, and transfer to a “redeveloper” chosen by municipal officials. This is a blatantly unconstitutional standard of what constitutes blighted as the Supreme Court opinion in *Gallenthin* expressly declared. Put simply, the “suboptimal use” of any property can never be a valid basis for a blight designation. *Gallenthin*, 191 N.J. at 370-371. As the Justices observed, such a loose standard could entrap literally any property in New Jersey in a blight designation and eminent domain anytime municipal officials imagined a better future for the property. *Gallenthin*, 191 N.J. at 365. This is a prescription for arbitrariness which the Court emphatically rejected. *Ibid*.

**Point 4: A property-by-property review of the Melvin report reveals why there is no legitimate finding of blight anywhere on Block 64:**

**A. Lot 5:** The Melvin report claims that lot 5 is blighted “because the state of the principal structure is in disrepair, and because of its proximity to the intersections of N. Main St / Route 45 and Route 322 it would be difficult to provide access to the site by necessary curb cuts, due to the volume of traffic at that intersection, and because of queuing at the intersection.” Melvin at 10. None of this is evidence of blight. There is no
actual evidence — no facts — proffered showing that “the principal structure is in
disrepair.” Nor is there any indication that this “disrepair” is serious enough to cause any
harm to the safety or health of current users of that structure, nor, more importantly, is
there any evidence that the structure is causing harm to surrounding properties, as
required by Gallenthin, 191 N.J. at 360. Finally, it is obvious that Melvin applied the
exact same standard as the Borough of Paulsboro — — namely, that the municipality can
imagine a better use of the property if it is taken through eminent domain — — which was
also emphatically struck down by this High Court.

B. Lots 2, 4, 6, 7, 9, 12, 13, 14, 16, 17, 18 and 21:

Melvin claims that these 12 lots are blighted because “if left to develop on their
own, [these lots] do not meet the intent or standards of the applicable zoning districts, the
Main Street Business District and the Village Business District. Each lot... is affected by
either regulatory or physical constraints which make development of the lots consistent
with the intent of the Mullica Hill section of the community infeasible. These lots exhibit
conditions of obsolete layout and design consistent with the “D” criteria designation.”
Melvin at 10. In other words, Melvin theorizes without any factual basis that these 12
properties cannot be properly developed unless the government steps in to seize the
properties through eminent domain. This is not the constitutional test of blight. Likewise,
Melvin does not cite to any specific zoning ordinance or code allegedly “violated” by any
existing property. Furthermore, Melvin fails in his analysis to take into consideration that
Lots 6, 7, 9, 12, 13, 14, 16, 17 and 18 are within the Historic District. Moreover, consistency with current zoning or a master plan has never been held to be a valid basis for a blight designation of any property. Most importantly, Melvin has not identified a single example of any property that is harmful or unsafe to the inhabitants or users of the property; nor is there any hint that any property exhibits “deterioration or stagnation that has a negative effect on surrounding property.” As with the Paulsboro interpretation of blight, this claim “would equate ‘blighted areas’ to areas that are not operated in an optimal manner, [which] cannot be reconciled with the New Jersey Constitution.”

Gallentin, 191 N.J. at 365.

Egregious examples of the Melvin’s failure to apply constitutionally required standards of blight are found throughout report:

**Lot 2**: This property is deemed to be blighted because it “does not have access or frontage on Main Street.” This has nothing to do with causing harm to the owners or to anyone else, the bedrock principle of a valid finding of blight. Gallentin, 191 N.J. at 363. Melvin goes on to say that “Lot 2 is additionally constrained by the presence of the Raccoon Creek which bisects the lot ... The area of the stream is heavily wooded.” The presence of any natural feature such as a stream which hinders full build-out is never a factor in determining a property is blighted. Surely, Melvin knows this.

Next, Melvin says that “additionally the township’s riparian buffer ordinance applies to the stream corridor, which requires an extension of ‘75 feet from each defined
edge of an identified watercourse or surface water body at bankfull flow or level.’ This limits the types of uses permitted within this portion of the lot to open space and agricultural uses and does not permit roadways which could connect potential site development on Lot 2 except for under certain circumstances and requiring municipal review and approval.” In other words, Melvin declares the property blighted because the Township has an ecologically inspired stream buffer ordinance that limits development and would require “municipal review and approval,” presumably through a variance proceeding. Thus Melvin reasons that some property is blighted because it is not consistent with local laws, but this property is blighted because of current municipal law. Not even close.

**Lots 3.01 and 3.02:** To quote the Melvin report is to see why it utterly fails the Gallenthin constitutional test. “These lots are not conducive to development due to the lack of necessary area for parking, loading, and buffers for any development other than residential.” (italics added) In short Melvin believes it is blighted because it is more conducive to residential use, a ludicrous position. Melvin goes on to say, as with Lot 2, lot 3.02 “is partially intersected by the Raccoon Creek … which may present an additional constraint to any future development of the site, given necessary buffer requirements.” Melvin at 11. Another obvious example of an unconstitutional standard, i.e., the property is not causing harm to anyone but there are some natural and legal constraints “to any future development of the site.” If that were the test of what is blighted, it is doubtful that
any property in New Jersey would fail to qualify. Gallenthin, 191 N.J. at 365.

Lot 4: It has certain characteristics “which do not make this lot conducive to
development … the developable portion of the lot becomes severely limited.” Melvin at

Lots 6, 7, 12, 13, 16, 17, and 18: Melvin says these 7 lots are blighted because
they do not meet certain site plan standards, which “constrains development opportunity
on these sites … [For example] rear parking lots are difficult to attain given the location
of existing structures and the narrowness of the lots … As a result the lots will remain
underutilized…” Melvin at 11-12. Again, these observations have nothing to do with
blight; the Supreme Court expressly rejected the notion that “underutilization” or desire to
maximize redevelopment equates with blight. Gallenthin, 191 N.J. at 365. Furthermore,
Melvin ignored in the analysis that all of these lots are within the Historic District.
Melvin at 5.

Lot 8: Melvin alleges to some vague “safety concerns for ingress and egress” to
the lot, but without providing any evidence of actual harm to residents, users, or other
properties. Then as if in an afterthought Melvin adds that “as seen in the accompanying
photograph there is also evidence of a dilapidated accessory building within the rear yard
of the property…” Melvin at 12. A single photograph of what appears to be a backyard
shed is not evidence of any harm to the owners of the site or to surrounding properties, as
mandated by the Supreme Court. Gallenthin, 191 N.J. at 363. This property is also in the
Historic District. Melvin at 5.

**Lot 9:** After reciting a familiar list of constraints on future development, Melvin basically concedes that the site is not blighted because he asserts that the lot in its current configuration “does not lend itself to any development types which maximize the use of the lot.” Melvin at 12. Another per se violation of the *Gallenthin* opinion, 191 N.J. at 365. It would seem that no one in the Melvin group has read the *Gallenthin* opinion. This Lot 9 is partly within the Historic District. Melvin at 5.

**Lot 14:** Again, Melvin focuses on the assumed “fact” that the “most economically valuable or buildable portion of the lot” is impractical thereby “adding to the potential cost of necessary access drive to reach the developable portion of the site....” Melvin at 12. Once again, we see the same violation of constitutional standards as enunciated so clearly in *Gallenthin*. This property is also within the Historic District. Melvin at 5.

**Lot 15:** Again Melvin cites to future development limitations of the site “which would make it difficult to provide adequate parking and loading....” Melvin at 13. Not blighted. No evidence of blight. This property is also within the Historic District. Melvin at 5.

**Lot 19:** This is the Chabad Jewish Center and Synagogue. As before and throughout Melvin claims it is blighted because “the property had severe limitations for full utilization of the existing structure....” Melvin at 13. Another per se violation of constitutional requirements. *Gallenthin*, 191 N.J. at 365. This property is also within the
Historic District. Melvin at 5.

**Lot 21:** Melvin says the lot “is not conducive to the types of walkable mixed-use development envisioned under the VB Village Business District Zone.” Melvin at 13. Again, not a shred of evidence of blight.

**Lot 22:** After conceding that “it appears to be technically possible” to redevelop the property for non-residential uses Melvin says that the “actual site layout [would lead to] a compromise solution at best, which would not be optimal and would not meet the highest and best use of the site.” Melvin at 13. Another per se violation of the Supreme Court’s dispositive decision in *Gallenthin*, 191 N.J. at 365.

**Point 5:** the smart growth consistency criterion in subsection h is obviously unconstitutional and no blight expert would ever dare to use it as the basis for a blight designation:

Finally, Melvin asserts that all 23 lots on Block 64 are blighted for this reason: They do not comport with “smart growth consistency” criteria as permitted by subsection h of section 5 of the LRHL. N.J.S.A. 40A:12A-5(h). “Redevelopment of these parcels supports smart growth principles ... Additionally, all lots within the study area, because of their proximity to the Village of Mullica Hill, do not achieve the highest and best use for the area. Development of this site should align itself with the goals of the State Plan by supporting a walkable community and environmental protection and preservation.”

Melvin at 16. Whatever one thinks of the aspirational smart growth criteria, they do not
show blight. Subsection H was added to the LRHL by the state legislature in 2003. That is, it preceded the 2007 Gallenthin decision which expressly rejects the notion that property can be blighted because it should be put to an allegedly higher or better use. 191 N.J. at 365. Melvin would know this if he and the others in the Melvin Design Group had even passing familiarity with the Gallenthin opinion and its progeny in the lower courts since 2007.

CONCLUSION:

For the reasons explained above, the Township must reject the Land Use Board’s recommendation, based on the blatantly faulty Melvin report, that any property in Block 64 is blighted as a matter of constitutional law. If the Township nevertheless votes to designate the Block 64 properties as blighted, the Township faces the prospect of costly litigation which it is virtually guaranteed to lose. Rather than wasting everyone’s resources in a losing effort, the Township should focus on whatever zoning changes may be needed to assure the enhanced prosperity of its property owners.

Respectfully submitted,

POTTER AND DICKSON

[Signature]

By R. William Potter

RWP/erd
cc: Brian J. Duffield, Esq.
    Joan Sorbello Adams, Esq.