DAVE FRANEK, Plaintiff, vs. WANTAGE TOWNSHIP LAND USE BOARD, CHARLES W. MEISSNER, And TRI-STATE BULK GARDEN SUPPLY, LLC, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION: DOCKET NO.: A-00382-24T4 On Appeal From: Superior Court of New Jersey Law Division – Sussex County Docket No. SSX-L-461-23 Sat Below: The Honorable Stuart A. Minkowitz, A.J.S.C.

BRIEF OF PLAINTIFF/APPELLANT, DAVE FRANEK

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PRELIMINARY STATEMENT

Everything provided in support of general welfare, site suitability and special reasons for granting use variance relief for this property applies to any property located on Sussex County Route 565 ("CR 565") in Wantage Township.

The soil importing/exporting use at issue in this appeal has no more factual support for special reasons than would the manufacture and distribution of any other commodity at any other property in the surrounding area. Almost all lawful uses of property promote the general welfare. General social benefits of any use would meet the general welfare standards used here by Defendant, Wantage Township Land Use Board ("Board") to grant this use variance.

Here, Charles W. Meissner ("Applicant" or "Meissner") was required to prove, and the Board was required to find, that this property at this particular location was peculiarly suited for this non-permitted use. The record clearly shows that these burdens of proof were not met by the generic conclusions in the report and testimony of the Applicant's planner.

This was the third unanimous use variance granted to this Applicant in Wantage Township ("Township"). There are so many soil processing/removal operations in the Township that its governing body adopted an Ordinance in 2019 to regulate these uses "in the best interests of the Township." In this context the

Applicant also had the "formidable burden" of proving that the grant of another use variance for this soil importing/exporting operation was not inconsistent with the intent and purpose of the zoning ordinance as reflected by the governing body not making it a permitted use.

Applicant's professional planner, John McDonough, P.P. ("Applicant's planner" or "McDonough") prepared a short (6 page) report, and provided testimony in 2023 based on visits to the property on February 21 and March 4, 2021. During both visits the property was covered in snow and not operational, as noted in the report. Applicant's planner testified that he stopped at the site on his way to testify at the April 4, 2023 Board hearing; however, he never amended his March 5, 2021 report to add any firsthand observations. This planner never met or spoke with the operator of the business, Nicholas Franchino ("Franchino") of Defendant-Respondent Tri-State Bulk Garden Supply, LLC ("Tri-State"). He never reviewed any municipal records, never investigated any adjoining properties nor had any communications with those owners. Although the property is surrounded by 4 different zoning districts he analyzed only one of them. Almost all of his information came from his client, Mr. Meissner, who did not testify in support of his own application. Applicant's planner's conclusions with respect to the positive criteria contradicted the statutory language of N.J.S.A. 40:55D-2 and were unsupported by factual findings and analysis.

The memorializing resolution concludes that "The Board is persuaded by the testimony of Mr. McDonough and found that the Applicant satisfied the required positive and negative criteria." Special reasons entail demonstrating that a project carries out one or more "purposes of zoning," which was impossible for this soil removal project to do. The Board found the site particularly suited for the "proposed use" based upon its location on CR565. The Board disagreed with the Township zoning and "believed" that this soil processing use should be a permitted use.

The Board failed to make any deliberative and specific findings to satisfy the negative criteria and address the concerns of a dozen adjacent property owners. The conclusions in the Board's memorializing resolution were not the subject of actual Board deliberations. The resolution by the Board attorney, with 64 findings and 35 conditions of approval, was unanimously adopted by the Board without change.

PROCEDURAL HISTORY

The trial court's Order dated April 20, 2022 for the second time vacated Board approvals and again remanded the application of Defendants-Respondents Meissner and Tri-State for a new hearing, this time before a new Board. The "new Board" was comprised of 2 existing Board members and 4 Wantage Township residents with no apparent previous involvement in the matter that were appointed by the Mayor and Township Committee.

More than 4 months later (August 11, 2022), Defendant-Respondent Meissner re-filed this application for preliminary major site plan and use variance approval. (Pa249) During this time operations continued without the approvals that were required.

The new Board considered the remanded application at public hearings on September 20, 2022, October 18, 2022, April 4, 2023, May 9, 2023 and June 13, 2023 (Pa249). On September 12, 2023, the Board unanimously voted to adopt the third Resolution of approval ("Resolution") for this application. (6T; Pa248)

Plaintiff filed his third action in lieu of prerogative writs on October 30, 2023. (Pa1) Seven months later, on April 17, 2024, Meissner submitted an application to the Board for an extension of time limits established in its September

12, 2023 Resolution based on his failure to comply with approximately 16 of those conditions of approval. This application is pending.

On August 22, 2024, the trial court upheld the Board's decision. (Pa48) This appeal followed. (Pa267) [1]

[1] Transcripts of hearings before the Board submitted by Plaintiff-Appellant:

Hearing	**Date**	**Reference**
First Hearing	September 20, 2022	1T
Second Hearing	October 18, 2022	2T
Third Hearing	April 4, 2023	3T
Fourth Hearing	May 9, 2023	4T
Fifth Hearing	June 13, 2023	5T
Sixth Hearing (Resolution)	September 12, 2023	6T
Hearing on Defendants' request for an extension to comply with conditions of the approval	August 14, 2024	Not in the record below – no transcript obtained or submitted in this appeal

STATEMENT OF FACTS

Defendant-Respondent Meissner first obtained approval for soil processing at his vacant property located at Block 117, Lot 34 at 260 CR 565 in the Township ("Meissner property") on September 17, 2019 (Pa248) and his second approval for the same use at this location on July 20, 2021 (Id).

The Township government put its thumb on the scale and kept it there from the first Board approval in 2019 to the present. First, the three-person governing body appointed Meissner as a member of the Board shortly before his first application was filed. At the first hearing of the 2019 application Mayor Bassani ("Mayor") and longtime Board Chair, Michael Cecchini, recused themselves as Board members, joined the audience, and testified in support of the Applicant and this use variance relief.

The Mayor personally assured his fellow Board members and appointees that that the substantial wetlands on the applicant's property – 83% when Meissner purchased it in 2014 and the basis for a significant reduction of the property tax assessment – had disappeared during the intervening 5 years. The Mayor requested that the Board consider the tax ratable that this operation would generate. Chairman Cecchini told his fellow Board members that the soil importing/exporting business (Tri-State) had been a "model tenant" during its 20+

years of operation on Cecchini's nearby property and also rebutted testimony from objectors to the application.

Based upon improper actions and influence by municipal officials, the trial court invalidated unanimous approvals granted by the Board in 2019 and 2021. The 2022 Order limited participation in future applications to only 2 present Board members and required the Mayor and governing body to appoint new members to hear and decide the 2023 application.[2]

The Township permitted this operation to continue notwithstanding court invalidation of land use approvals and violation of municipal ordinances for 216 days (12/16/2020 – 07/20/2021) and again for 510 days (04/20/2022 – 09/12/2023). This proved to be a windfall for the property owner and operator by allowing them to present their case in the most recent application for use variance relief and related approvals from September 2022 to September 12, 2023 <u>while still fully operating</u>. Thus the Board was confronted with a dilemma that does not otherwise exist in use variance approvals: denial of the application by their former Board member – supported by the Mayor – would result in closing an unapproved but nonetheless existing and operating business. Instead, the Board chose to approve this ongoing operation with 35 conditions of approval that the Applicant

[2] Mayor Bassani remains in office and voted to appoint the 6-member citizen Board that unanimously approved Meissner's third application in 2023 that is the subject of this appeal

still has not complied with. This extension application remains pending before the Board.

Exactly when Defendant-Respondent Tri-State began operating at Meissner's property is not clear in this record; nor is it clear why Tri-State chose to relocate to the Meissner property. At the time of these applications, Tri-State had been operating at another location in the Township for 20+ years and had received ***permission*** from the Zoning Officer to move to the location of an existing soil operation site at "284 Aggregates" elsewhere in the Township. (Pa201)

The direct testimony of Meissner's professional planner comprises just 17 pages of the April 4, 2023 hearing transcript (3T8 to 25), 3 pages of a written report with 6 photos of the "inactive" operation, (Pa230), and 7 subsequent photos (Pa153 to Pa159). Mr. McDonough expressed his opinions/conclusions with respect to Municipal Land Use Law ("MLUL") requirements for "d" (N.J.S.A. 40:55D-70(d)(1)) variance relief for a use not permitted in the zone. His opinions were directly contradicted by Eric K. Snyder ("Snyder"), P.P., AICP, the professional planner retained by Objector, Plaintiff-Appellant Franek.

A comparison of each expert's testimony regarding site suitability, purposes of zoning, and negative criteria follows, together with the Board's findings:

A. SITE SUITABILITY [3]

1. McDonough Report (Pa230):

"The proposed use promotes the general welfare because the site is particularly suited for the area. The proposed use at this particular location is compatible with the character of the area" (Pa232)

2. McDonough direct testimony:

"Based on the photographic evidence that I've given you here, I think the proof is positive that that the site is particularly suited for this use by virtue of its condition and by virtue of its context (3T18:3-7) . . . site suitability, we look at the site condition wise being exceptionally large and well buffered to accommodate the use that's before you" (3T19:22-23)

3. McDonough cross-examination:

Q. Mr. Kelly "Did you know that your client had a plan to go to Route 284 Aggregates here in Wantage Township?" (3T56:17, 18)

A. Mr. McDonough "The answer is I don't know and the qualifier is that it's not relevant to my planning analysis . . . So I wouldn't even ask about it." (3T57:20-23)

Q. "what you're saying is the availability of permitted locations is not relevant to your analysis?"

[3] By memo dated May 3, 2023, Board counsel advised that "possible alternative locations for the proposed use are relevant," citing *Price v. Himeji, LLC*, 214 N.J. 263 (2013), disagreeing with Meissner's Planner (Pa243) – this memorandum was part of the record below and is not a brief submitted to the trial court

A. "It's New Jersey Supreme Court. That's the *Homeji* case. Availability of alternate sites is not a reason for denial of a use variance."

Q. "Availability of alternate sites is not part of the analysis that we're talking about?"

A. "Not at all." (3T57:24 to 58:11)

Q. "So he [Tri-State] could have stayed where he was and he could have gone some place else. We know that, right?"

A. "I don't know the circumstances. Maybe he got a better deal here. I don't know. It's not relevant to my analysis." (3T59:21 to 60:3)

Q. "economic benefit to an applicant has nothing to do with the criteria for a use variance. You agree with that, right?"

A. "Agree 100 percent." (3T61:5-8)

4. Objector's Planner (Snyder)(Pa209):

"You can buy topsoil from any number of different places in the area. It doesn't seem to me that there's any real need here for another one . . . topsoil is fairly ubiquitous in the county and certainly even in Wantage." (4T105:22 to 106:8)

"if the property were particularly suited to the use, we wouldn't be hearing people complaining about dust . . . we wouldn't be worrying a great deal about a significant amount of filling of wetlands and occupying transition areas." (4T112:1-6)

5. Board findings and conclusions:

"Mr. McDonough testified the location of the property is suitable for the soil processing use. He stated that County Road 565 is a collector road and the vehicles used by the operation do not have to utilize

residential streets, which lessens the impact on residential uses." (Pa255; Pa259)

B. PURPOSES OF ZONING

1. McDonough Report (Pa230):

"The project promotes the fundamental purposes of zoning in the land use law. All the above advance purposes of the land use law, especially purposes A, C, G, I and M [of N.J.S.A. 40:55D-2]. These purposes are echoed as fundamental purposes of the Wantage Master Plan." (Pa233)

2. McDonough direct testimony:

" the first purpose, Purpose A, the promotion of the general welfare with a growing medium for planting which can be used for all sorts of agricultural and landscape ornamental horticultural purposes to both beautify and improve our land environmentally. So there's certainly a nexus with this land use and the promotion of the general welfare." (3T20:10-17)

"Purpose G to provide and promote or plan a goal to provide for a variety of land uses in appropriate locations." (3T20:18-20)

"Purpose M is our planning goal to efficiently use land. This is not development of raw land." (3T21:25 to 21:1)

"Purpose I, planning a goal to promote positive aesthetics. We've got excellent buffering here. We're going to maintain that attractive frontage and also around the perimeter of the property as well. So we think there's a positive aesthetic benefit as well. That's part 2 of the test." (3T21:8-13)

3. McDonough cross-examination:

Q. Mr. Kelly "you identify I believe five purposes of the Municipal Land Use Law that justify your use variance relief?"

A. Mr. McDonough "Yes."

Q. "and I'd like to go through those and I'd like to give you a copy of the list of N.J.S.A.40:55D-2." (Pa216) which contains all of those and I'd like to give a copy to the Board so that we can be very sure exactly which ones of these that we're dealing with."

A. "Alright." (3T97:25 to 98:6)

Q. "I start right on page 2 [Pa232]. And the first one says the proposal promotes the general welfare because the site is particularly suited for the use. Which one of these are you referring to? Which one of the purposes of 40:55D-2 are you referring to when you make that statement Mr. McDonough?"

A. "Purpose A."

Q. "Purpose A. Well Purpose A doesn't say that, does it? I mean, if you look at Purpose A, it says 'to encourage municipal action to guide the appropriate use or development of all lands in the State in a manner which will promote the public health, safety, morals and general welfare.' I read that correctly, didn't I?"

A. "Yes."

Q. "Okay. Let's go to number 2. Number 2 in your report reads 'The proposal promotes the planning objective to provide a variety of land uses in appropriate locations.' Which one of these purposes are you referring to?"

A. "Purpose G."

Q. "G doesn't say that either. G says 'to provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial, and industrial uses and open space, both

public and private, in order to meet the needs of all New Jersey citizens.' I read that correctly, didn't I?"

A. "You did." (3T99:8 to 100:13) [4]

4. Objector's Planner (Snyder):

"allowing something else that's not particularly attractive is okay because there are other less attractive uses in the area – that's not a reason to grant a use variance." (4T109:9-12)

"zoning by variance is not what we're supposed to be doing. Zoning by zoning is what we're supposed to be doing at the municipal level" (4T110:10, 11), noting that "the town has had plenty of opportunity to see this operation and decide whether or not it wants it on the list [of permitted uses] and has not done so." (4T32:20-22)

"Your latest reexamination statement says that the Wantage Master Plan is generally consistent with the County plan . . . the County Plan says that residential density and smart growth techniques should be examined to meet the challenges of managing growth while retaining viable farmland and protecting environmentally sensitive land and water resources . . . you [Applicant] said that your planning documents are consistent with that generally so this is inconsistent with what you said." (4T12:24 to 113:12)

"Something led them [Tri-State] to go here. I would assume based on some economic analysis that said this is a more cost-efficient place to operate. That's fine but that's a private benefit. It's not a public benefit. That takes care of those issues that were raised as special reasons." (4T111:11-17)

[4] This continues to 3T103:3.

5. Board's findings and conclusion:

"Mr. McDonough opined that the proposed use promotes several purposes of the MLUL. Good civic design and arrangement."

(Pa255).

C. NEGATIVE CRITERIA [5]

1. McDonough Report:

"1. The proposal has been well planned to address all potentially negative public impacts.

2. The proposal will comply with conventional performance standards related to nonresidential uses. The project will not produce any substantially hazardous, noxious or offensive conditions beyond the boundary of the property such as noise, smoke, odor, dust and dirt, heat, glare, vibration, fire hazards or industrial wastes.

3. The project will not impair the integrity of the zone plan." (Pa233)[6]

2. McDonough direct testimony:

"that [negative criteria] really falls back on the testimony of the witnesses that have gone before me. Again, the unwavering, uncontroverted testimony is that the site will function without any substantially adverse impacts." (3T21:17-21)

[5] The record shows that at least 11 adjacent property owners testified with respect to the negative impacts.
[6] Mr. McDonough also observed that "the operation itself is inactive." (Pa231)

"Most importantly, I know that there's concerns about dust and dust control and you've got testimony on the record as well about the watering." (3T22:4-6)

"This is a site that's zoned for activity. It's not a site zoned for a park." (3T22:12, 13)

3. McDonough cross-examination:

Q. Mr. Kelly "one of the things that you say on page one [Report Pa231] is the operation itself isn't active?"

A. Mr. McDonough "That's correct. At the time of this report the operation was inactive." (3T43:10-16)

Q. "there's snow in every one of these pictures?"

A. "Yes."

Q. "Right. The place is covered in snow. So obviously it was, as you say, inactive?"

A. "Yes." (3T44:5-10)

Q. "So in terms of your investigation, did you interview anybody?"

A. "I did not."

Q. "Did you talk to any of the neighbors?"

A. "No. That would be atypical of my planning analysis. Not something I typically do." (3T45:25 to 46:2)

Q. "What about dust impacts. Did you check that at all?"

A. "You have the testimony of an expert witness performing and makes Mr. Dykstra that talked about the watering controls to keep down the dust . . ."

Q. "There was a document marked as a Dust Plan; did you see that?"

A. "I don't recall offhand."

Q. "You didn't see the Dust Plan that was marked as A-103, correct?"

A. "I don't recall." (3T47:24 to 49:14)

Q. "I want to be clear about this. Are you saying that Soil Erosion and Sediment Control governs the Dust Plan for this facility?"

A. "I am saying that that is a regulatory body to protect the public interest against impacts from dust."

Q. "Does your client have those approvals?"

A. "I don't know." (3T49:15-25)

Q. "soil comes to the property. It comes from somewhere else. It's brought in, sand included, right?"

A. "Yes."

Q. "Do you know where it comes from?"

A. "I don't."

Q. "When it gets there do you know what he does with it?"

A. "As I said, it's blended together to a certain specification."

Q. "Like what specification?"

A. "It – it varies. I don't know. I don't know the particulars about the specification."

Q. "You just know what was going on . . . at the prior location on Route 628 and what use got transferred down to the Meissner property?"

A. "I know what's proposed there is what I stated. I don't know what components of the parent operation were carried to this site. I don't know."

Q. "So you don't know what he brought down here with him?"

A. "I don't. I don't know the particulars." (3T53:7 to 55:19)

4. Objector's Planner (Snyder):

"it's caused one person to move. You've heard that there are issues that remain to be resolved. It seems to me that's substantial and it's negative." (4T113:22-25)

"It's an industrial operation that involves the processing of materials into topsoil." (4T119:11-13)

5. Objectors' testimony:[7]

1. Plaintiff-Appellant Franek:

Q. Mr. Kelly "What about dust?"

A. Mr. Franek "Blinding. We got a patio out back. We have lunch in the car lot. Sometimes if we're cooking outside we got to bring our food inside because of the dust. There's so much dust if the wind is blowing the right way."

Q. "Why did you move out?"

A. "Couldn't be there. The noise was getting to me. The trucks, the tailgates in the morning . . . when the machine runs the whole house vibrates. It's like a big drum and it gets the whole place [to] vibrate. It will wake you up." (4T:30:6 to 31:1)

2. Zadroga:

"So I want to present you with the noise that I have every day in my house from 7:00 a.m. all weekends and Monday or Friday." (includes audio recording) (5T38:17 to 50:14)

[7] The record shows that at least 11 adjacent property owners testified with firsthand knowledge of the negative impacts.

3. Franek Jr.:

"It starts up at 7:00 in the morning. I consider it my new alarm clock. . . . I can feel the ground vibrating in my house . . . dust is flying through the air . . . it's a nuisance and it sucks to live next to it to be honest with you." (5T50:23 to 52:25)

4. Conforth:

"The dirt, the dust, the noise are just the tip of the iceberg . . . why no environmental impact statement with this application . . . I think it should have an LOI as well." (5T53:5 to 69:19)

5. Juchniewicz:

"there was only 8 or 9 videos showing the noise, the dust, the pollution in the air. If Mr. Franek was to have taken videos 9 months of the year for the last 3 or 4 years it would have been mind blowing to see what's going on at that location." (5T69:22 to 72:24)

6. Retz:

"You're bringing the stuff in. You're not testing it at all. You have no idea what comes in. You have no idea what goes out." (5T73:1 to 77:16)

7. Barklow:

"An impact that's 1200 feet from the high school." (5T77:17 to 79:11)

8. Price:

"I can hear the machine in the distance. It's very clear. It's even more clear when there aren't leaves on the trees." (5T79:16 to 83:11)

9. Seccia:

"From 6:30 in the morning when this operation is running I hear very explosive noises, tailgates banging, vibrations almost like earthquakes sometimes. And this has been going on for 3 years . . . there's a lot of dust. I have to drive right through it." (5T83:20 to 85:4)

10. Lasala:

"It's a quarry-type operation. It's very dusty. Everybody's telling you the truth. It's very simple." (5T85:9 to 86:21)

11. Nuss:

(5T94:15 to 95:19)(portions inaudible)

6. Board finding and conclusion:

"Mr. McDonough opined that the granting of the proposed use variance would not substantially impair the intent of the zoning plan or Township Master Plan. Mr. McDonough specifically cited to the Township Master Plan which has zoned this property within the HC zone for more than 40 years and has consistently permitted high density uses in the Zone for that same amount of time." (Pa256; Pa260)

The Board's Professional Engineer and Professional Planner provided no additional reports and provided minimal guidance to the special Board in these remand proceedings.

D. REQUIRED WETLANDS APPROVALS

Wetlands problems and issues continued to plague this application and remain unresolved. On August 15, 2021, Meissner applied to NJDEP for:

> "after the fact authorization of driveway and stormwater detention basin constructed within a wetlands transition area. The project requires authorization of a freshwater general permit no. 6A. In addition, an application for a letter of interpretation (LOI) – line verification is also being submitted to verify the limits of wetlands and wetlands resource value." (Pa76)

Although the Applicant's professionals continually used the shorthand reference "LOI," a Letter of Interpretation with respect to this application, much more than a routine wetlands delineation was required because Meissner had previously disturbed wetlands areas. Meissner submitted a document dated October 4, 2022 from NJDEP with its conclusion that this wetlands is certified as a "vernal pool" that will require "extensive restoration of the disturbed transition area as part of the proposal." (Pa154)

By email dated April 12, 2023, NJDEP advised that "we were back on site and found additional wetland areas and violations." (Pa217) These wetlands violations also constitute substantial negative impacts as testified to by the Objector's Planner:

> Q. Mr. Kelly "Were you able to identify any site suitability for this application?"
>
> A. Mr. Snyder "As I pointed out because of the apparent need to

> fill wetlands and to clear it. In the picture originally shown of the property before they went in seemed to have a lot of forested land up front.
>
> That's gone." (4T114:10-16)

The Board at least acknowledged these NJDEP problems during its comments at the June 13, 2023 hearing. Its engineer [Harold Pellow] said [to Applicant] "You guys gotta get the LOI." The Applicant Meissner's attorney replied, "We've been trying Harold." The Board engineer replied "I know. But they would have mitigation there that's needed also. That's the other thing." (3T131:16-20)

The Board attorney advised about LOIs:

> "It's usually better to get them beforehand but there are certain cases I've been involved with where the LOI's coming after the approval and everybody's recognizing it may change things. You usually don't do it where there's a substantial question as to whether a site is buildable, depending on the LOI it may just not be buildable. We don't know, for example, if this is a 50 foot buffer or a 300 foot buffer. You know if it's 300 feet you might just not be able to build on it." (5T141:13-23)(emphasis added)

E. BOARD DELIBERATIONS

The deliberations clearly show that the Board never seriously considered denying this application because it was an operating business, albeit without approvals. Several members expressed concerns about noise impacts:

> "I don't know how you'd really fix the noise part." (5T124:17, 18)

> "I don't know if you'll ever cut down on the noise but like the dust – I don't know if you can come up with a happy medium . . . " (5T125:6-8)

> "like the noise thing I get, I just don't know what the fix for that is, you know." (5T125:23, 24)

Ultimately the Board shifted the burden, and the blame, to the neighbors:

> "the noise that have come up from the residents in the area concerns me, but nowhere did we hear any testimony about the noise ordinance – the actual decibels were at the property line." (5T127:25 to 128-2)

> "they could have tested for sound" (5T128:24)

> "they could have done that [sound testing] privately" (5T129:6)

The Board attorney supported validation of the operating business: "the fact is we're dealing with an operating business." (5T129:18-20). Nowhere in these deliberations

is there any mention or consideration of the illegality of this operation. However, the operator did provide a track record of negative criteria.

On September 12, 2023, the Board met to consider a draft Resolution requested of its attorney. (6T)

The first question was for yet another update on approvals of the DEP applications and, again, there were none. (6T12:8-12) The Board determined to impose strict conditions and time limits for these long after the fact approvals. The Board required that DEP approvals be obtained within 90 days with a possible 90 day extension. Board counsel stated:

> "And if it's not obtained within that additional extension, the operations have to cease until the LOI is obtained unless the Board further extends it upon good cause shown." (6T12:17-21)(emphasis added)

The Board imposed time limitations on 14 conditions of the Resolution of approval, also long after the fact, which it adopted unanimously. (Pa248) However, Applicants Meissner and/or Tri-State failed to comply with these conditions. Seven months after the approval, Applicant Meissner filed extension requests with the Board. This application remains pending.

LEGAL ARGUMENT

POINT I

THIS APPLICATION FAILED TO MEET ESTABLISHED MUNICIPAL LAND USE LAW (MLUL) AND MEDICI CRITERIA FOR A USE VARIANCE PURSUANT TO N.J.S.A.40:55D-70(d)(1) (Pa56, 57, 62)

Relief by a statutory board pursuant to N.J.S.A 40:55D-70(d)(1) is required for a use that is not permitted in a municipally defined zoning district. A use variance is the most strict form of relief under New Jersey's municipal land use law. The MLUL requires an applicant to prove both positive and negative criteria to obtain a use variance. *Smart SMR of New York, Inc. v. Fair Lawn Bd. Of Adjustment*, 152 *N.J.* 309 (1998).

In *Medici v. BPR Co.*, 107 *N.J.* 1 (1987), the Supreme Court established that municipalities should make zoning decisions by ordinance rather than variance. The Court imposed an additional requirement for a d variance approval.

A. POSITIVE CRITERIA (Pa58)

"Positive criteria" for a use variance is also referred to as "special reasons." Generally, there are two categories of special reasons for the grants of a "d" variance. Cox & Koenig, *New Jersey Zoning and Land Use Administration*, Sec.

32-1 (Gann 2024). This application dealt with whether the proposed project carries out a purpose of zoning as defined in the MLUL, *N.J.S.A. 40:55D-2.*

In his report, and in his testimony, Applicant's planner identified 5 purposes of zoning set forth in MLUL, *N.J.S.A.40:55D-2*, Sections a, c, g, i and m as purposes of zoning that meet the positive criteria for granting use variance relief for this project. (Pa233)

Subsection A: Mr. McDonough opines that "the proposal promotes the general welfare because the site is particularly suited for the use" pursuant to subsection a. His opinion is based upon his conclusion that "the proposed use" is "compatible" with a list of uses at 9 other properties in "the area." (Pa232) Even if true, however, compatibility to adjacent uses does not establish the positive criteria. *Funeral Home Mgmt. Inc. v. Basralian*, 319 *N.J.Super.* 200 (App. Div. 2000). The planner does not define the "area" or its zoning nor does he explain how the uses are "compatible". His analysis does not include "findings that the general welfare is served because the use is peculiarly fitted to the particular location for which the variance is sought," as required by the Supreme Court in *Kohl v. Mayor and Council of Fair Lawn*, 50 *N.J.* 268, 279 (1967) and *Medici v. BPR*, 107 *N.J.* 1 (1987).

Accordingly, his conclusion with respect to subsection A is legally deficient.

Subsection C: Mr. McDonough similarly opines that "the project promotes the planning objective to provide for 'adequate light, air and open space'" (quoting the exact language of subsection c) but does not otherwise provide any explanation of what led him to that conclusion.

On cross-examination Mr. McDonough was asked:

Q. Mr. Kelly "And so we're clear. C simply says to provide adequate light,
air and open space and you think that this fits in your opinion that supports this operation? That's one of the things that supports the granting of the variance,
right?"
A. Mr. McDonough "Absolutely. This is a zone that supports big box commercial uses. This is not proposing any of that there. That would certainly
have more impact on light and air."
Q. "So it's got light, air and open space?"
A. "Yes this is an open air operation." (3T100:24 to 101:12)

This is factually rebutted by the neighbors' testimony, particularly at the June 13, 2023 (5T) hearing, the Plaintiff's testimony at the May 9, 2023 hearing (4T), and photographs of the soil processing operation (Pa197 – Pa200).

This conclusion with respect to subsection C is likewise legally deficient.

Subsection G: Mr. McDonough further opines that "the proposal promotes the planning objective to provide for a variety of land uses in appropriate locations" pursuant to subsection G. (Pa232)

On cross-examination, Mr. McDonough admitted that his opinion did not meet the criteria set forth in subsection g that includes an analysis of agricultural, residential, recreational, commercial and industrial uses and environmental requirements. (3T100:2-13)

Mr. McDonough repeats his previous compatibility conclusions about alleged unattractive uses in the "area."

Accordingly these conclusions are legally and factually deficient with respect to the requirements of subsection G.

Subsection I: Mr. McDonough next opined that "the project promotes the planning objective to provide for adequate light, air and open space, for efficient land use, and for desirable visual environment" pursuant to subsection I. (Pa233)(emphasis added) Mr. McDonough asserted that this topsoil processing facility promotes a "desirable visual environment" and uses "creative development techniques" without even explaining how. He told the Board that "this applicant has done a good job of being sensitive to the land and designing as a steward of the land." (3T101:13 to 102:13)

Mr. McDonough's conclusions were again highly contested by the neighbors' testimony, the Plaintiff's testimony, and photographs and videos marked as exhibits. The Objector's Planner testified that "there is no functional barrier to

view or noise among other negative impacts to surrounding property owners" (Pa212)

Accordingly, these conclusions are factually deficient with respect to the requirements of subsection I.

Subsection M: Mr. McDonough did not address or analyze the provisions of this subsection.

This fourth or fifth and final stated zoning purpose is literally a catchall conclusion that "The project promotes the fundamental purposes of zoning in the land use law." (Pa233)

Mr. McDonough's testimony confirmed that this is a net opinion about the entire MLUL:

> Q. Mr. Kelly "Which one of these purposes are we talking about?"
>
> A. Mr. McDonough "Well, I think the project is not – does not conflict with any provisions of zoning." (3T102:14 to 103:2)(emphasis added)

B. NEGATIVE CRITERIA (Pa59, 63)

"Negative criteria" for a use variance requires an applicant to prove that this relief can be granted:

1. without substantial detriment to the public good; and
2. without substantially impairing the intent and purpose of the zone plan and zoning ordinance. *Medici v. BPR Co.*, 107 N.J. 4 (1987)

The burden is on the applicant to prove the negative criteria just as it is to prove the positive criteria. *Stary Dom. Ptp. v. Mauro*, 216 N.J. 16, 30 (2013).

The focus of the "substantial detriment" prong of the negative criteria is on the impact of the variance on nearby properties. [Cox, Sec. 36-2.2 at 524, citing *Medici*]. Here, at least 11 immediate adjoining property owners testified in opposition to this project as referenced in the Statement of Facts herein. Many questioned the Applicant's witnesses and this project at each of the 5 public hearings. They were objectors – not commentators, as the Resolution attempts to mischaracterize and ignore them. (e.g. Pa251)

There was little/minimal evidence presented by the Applicant regarding negative criteria. First, the Applicant (Meissner) chose not to testify in lieu of hearsay testimony by his professionals. Next, the hearsay testimony of the Applicant's planner was limited because, as indicated herein, the operation was "inactive" and snowbound when he conducted his wintertime site visit in February 2021 and wrote his report on March 5, 2021. Mr. McDonough's testimony was based entirely on that Report and his assumptions.

Q. Mr. Kelly "You didn't see any of these things when the property was covered with snow in February when you were there, right?"

A. Mr. McDonough "I saw all the bins. I saw the trucks. I saw the soil stockpile. I saw the conveyors. I think it's reasonably ascertainable what was going on there." (3T104:23 to 105:3)

By additional guesswork, Mr. McDonough made 3 findings to buttress his conclusions that "the statutory negative criteria are met." They are contained in one-half of a page of his Report (Pa233):

1. The proposal has been well planned to address all potentially negative public impacts. (Pa233) Mr. McDonough never explains how all of these negative impacts were addressed because he never saw them.

2. The proposal will comply with conventional performance standards related to nonresidential uses. (Pa233) In cross-examination, Mr. McDonough was asked:

Q. Mr. Kelly "in paragraph number two you say that the proposal will comply with conventional performance standards related to nonresidential use. What do you mean by conventional performance standards?"

A. Mr. McDonough "I did not see them in this particular ordinance here. I'd have to double check but what I put in the report are the typical performance standards that we would see for industrial type uses." (3T103:12-19)

Meissner's planner never did tell the Board what these standards are.

However, without seeing this business in operation the Applicant's Planner assured the Board that "the project will not produce any substantially hazardous, noxious or offensive conditions beyond the boundary of the property involved such as noise, smoke, odor, dust and dirt, heat, glare, vibrations, fire hazards or industrial waste." (Pa233)(emphasis added) Mr. McDonough never saw, tested for or observed any of the conditions set forth in these representations and testimony.

When his lack of personal knowledge became obvious, Applicant's planner said that he returned to the site in the spring of 2022. (3T42:20, 21) Yet he never amended his report or referenced any additional observations in his testimony although all of the other experts for both sides did provide updates. He never met nor even spoke with Defendant Tri-State, the operator of the soil processing operation that is the subject of the application. His employee apparently used a drone to take pictures in 2022 (Pa153-Pa159).

Planner McDonough's conclusions were highly contested by testimony and exhibits from the neighbors, Objector/Plaintiff Franek and his Planner (Snyder).

An insurmountable flaw in Mr. McDonough's Report (Pa230) and testimony is that the "proposed use" has been "well planned to address all potentially negative public impacts." (Pa233). He prepared his report in 2021 and testified before the Board in 2023. The industrial use at the Meissner property was in full

operation throughout that period, mostly when prior land use approvals had been invalidated by the trial court. The pretense that all potentially negative impacts were anticipated and adequately addressed is not credible. This includes his bare assertion that "the project will not produce any substantially hazardous, noxious or offensive conditions beyond the boundary of the property involved such as noise, smoke, odor, dust and dirt, heat, glare, vibrations, fire hazards or industrial waste." (Pa233)(emphasis added). Through testimony, photographs, video and audio recordings, Plaintiff Franek and other Objectors provided unrefuted real-world proof of the significant negative impacts that they experienced with their own senses and documented throughout. The record demonstrates the substantial negative impacts of this use at this site in this zone.

3. "The project will not impair the integrity of the zone plan." (Pa233) As usual, there is no explanation to accompany this sweeping conclusion.

Clearly the Board did not believe that the Applicant met his burden with respect to the negative criteria. Nevertheless, instead of denying the application (which the members knew would close an operating business), the Board granted a use variance with 35 separate conditions of approval. Defendants have not complied with conditions of the approval and continue to operate without extensions.

POINT II

THIS APPLICATION FAILED TO MEET ESTABLISHED MEDICI REQUIREMENTS. (Pa62)

MASTER PLAN (Pa65, 66)

> "[I]n addition to proof of special reasons, an enhanced quality of proof and clear and specific findings by the board of adjustment that the variance sought is not inconsistent with the intent and purpose of the zoning ordinance. The applicants' proofs and the boards' findings must reconcile the proposed use variance with the zoning ordinance's omission of the use from those permitted in the zoning district. For example, proof that the character of a community has changed substantially since the adoption of the master plan and zoning ordinance may demonstrate that a variance for a use omitted from the ordinance is not incompatible with the intent and purpose of the governing body when the ordinance was passed. Reconciliation on this basis becomes increasingly difficult when the governing body has been made aware of prior applications for the same use" (emphasis added)

". . . [T]he ruling in the Medici case has had a profound effect upon the evidence necessary to be presented to the board in such use variance cases . . . it will depend upon the circumstances of each case. [Cox, Sec. 36-2.2 at 526]

It is impossible for the applicant to meet its *Medici* burden in this case. This project received its first use variance in Wantage Township in 2019. At that time the Mayor, who remains in this position, was the Class I member of the Wantage Township Land Use Board. As required, the Mayor stepped down from then fellow Board member Meissner's d variance application. The Mayor then testified

in favor of the application as did the Chairman of the Board Cecchini, which led in 2020 to the trial court's invalidation of the Board's 2019 approvals. (Pa248) A similar approval and invalidation occurred in 2021/2022, which resulted in this re-application in 2022 and prerogative writ litigation in 2023. (Pa1) Each of these applications was the subject of numerous reviews by the Township's professionals, years of public hearings before its Land Use Board and public comments before the Township Committee.

Thus, the Township governing body, Land Use Board, and all of their professionals were aware of prior applications for the same variance throughout these years but declined to revise the zoning ordinance as required by *Medici*. All of these entities and individuals were also aware of Tri-State's more than 20 years of previous operation at property owned by now former Land Use Board Chair Cecchini within one-half mile of the Meissner property.

On May 9, 2019, the Township Committee adopted Ordinance #2019-04 entitled "Wantage Township Soil Importing and Exporting" to "regulate the placement of fill within the Township." Although the Township enacted comprehensive licensing and regulatory controls over all soil operations in the municipality, the Township took no action with respect to rezoning of this property.

In both *Sica v. Board of Adjustment of Tp. Of Wall*, 127 *N.J.* 152 (1992) and *Med. Ctr. v. Princeton Tp. Zoning*, 343 *N.J.Super.* 177 (App. Div. 2001), the governing bodies clearly rejected particular uses at particular locations. "When the planning board in its periodic reexamination of the master plan and zoning ordinance does not suggest changes to the ordinance and the governing body does not change the zoning in response to those variance grants, the Medici court held that the applicant for an additional variance had the formidable burden of proving that the grant of another use variance was not inconsistent with the intent and purpose of the zoning ordinance." (Cox, Sec. 36-2.3 at 525, 526, citing *Medici* at 25, 26)(emphasis added)

ENHANCED PROOFS (Pa64)

> "The zoning not having changed and the direction of commercial zoning moving toward mixed use centers in the Master Plan and re-examination reports of 2009 and 2014 is a clear indication that the Township does not intend to allow this kind of industrial use along the major highways in Wantage. Quite the opposite, sprawling commercial to say nothing of industrial uses are to be discouraged. In the time between the initial filing of this application (2019) the Township has not moved to permit this use in the HC zone. This shows that the use does not fit the Township zoning scheme as set out in the Master Plan and re-examination reports. (emphasis added)
>
> Accordingly, the site is not consistent with the Township Master Plan or with the long term outlook the plan is intended to foster." (Pa214)

At the very beginning of the Board's deliberations on June 13, 2023, its Chair expressed his personal disagreement with Medici's requirements and Snyder's testimony:

> "it came up during Mr. Snyder's testimony that the reason soil mixing operation isn't allowed in Wantage is because Wantage doesn't want it. I think that's a little shortsighted on that expert's testimony. And in my mind that's why we have the option to come in and have a variance and all that stuff – that's one thing that I don't agree with and that's been weighing on me as we sit here and go through this." (5T120:8-16) (emphasis added)

As the draft Resolution was being discussed and considered at the September 12, 2023 meeting, the Chair again expressed his personal opposition to Medici and Snyder:

> "you know that we heard previous testimony that I believe was Mr. Snyder said that if the Township wanted to allow this to happen in the zone, that would be in the zoning. I kind of question that from a number of different angles" (6T33:21 to 25)

The Chair's repeated hostility resulted in the Board's failure to even consider any enhanced proof issues and constituted an arrogation of the governing body's authority by this Board. [Cox, Sec. 36-2.3 at 528] The Board is not permitted to grant variance relief based upon its disagreement with a zoning regulation. *Saddle Brook Realty v. Bd. Of Adjust.*, 388 *N.J.Super.* 67 (App. Div. 2006); *Moriarty v. Pozner*, 21 *N.J.* 99 (1956).

The Applicant's planner, Mr. McDonough referenced *Medici* only once in his report in support of his conclusion that the decision gives the Board "statutory authority to grant use relief" (Pa232) and never mentioned it again – anywhere. Nor does the Board's Resolution mention enhanced proofs – anywhere.

POINT III

THIS APPLICATION FAILED TO MEET ESTABLISHED SITE SUITABILITY REQUIREMENTS FOR USE VARIANCE RELIEF (Pa66, 67)

In addition to proof that the use promotes the purposes of zoning per N.J.S.A. 40:55D-2, the Applicant must also prove that the site is "particularly suitable." Site suitability must be reviewed from both Applicant's perspective and from the municipality's perspective. (Cox & Koenig, sec.32-4 at 478, 479). The municipality's perspective includes consideration of available sites in zoning districts that permit the use. *Northeast v. West Paterson Zoning Bd.*, 327 *N.J.Super.* 476 (App. Div. 2000).

Site suitability is focused on:

> "1. why the location of the site within the municipality or region is particularly suited to the use despite that zoning and/or
>
> 2. what unique characteristics of the site itself make it particularly appropriate for the proposed use rather than a permitted use." (*Cox sec. 32-4 at 478).*

In *New Brunswick Cellular v. Bd. Of Adj.*, 160 *N.J.* 1 (1999), the applicant was required to prove through expert testimony that there was a need for its facility at that particular site and that adequate service could not be provided elsewhere. "The applicant initially must show the need for the facility at that site." *Id. at 6.* In

Medici v. BPR Co., 107 N.J. 1, 8 (1987) there was no evidence that there was inadequate hotel capacity in the community or that additional proposed hotel rooms would constitute a benefit to the general welfare. *Id at 28.* Thus, the proofs were inadequate to prove that the subject property was "particularly suitable" for the proposed use. *Id. at 24-25.*

"The question of whether a nuisance is involved often arises in connection with industrial uses and is significant when considering the particular suitability of the site. A nuisance generally speaking is anything that would hurt, inconvenience or do damage to others." (Cox, Sec, 32-4.2 at pg. 480, citing *Mayor & C. of Alpine Borough v. Brewster*, 7 *N.J.* 42 (1951)). "Noise regulations have been considered peripherally." (Id. at 481, citing *Quick Chek Food Stores v. Springfield Tp.*, 83 *N.J.* 438 (1980)).

In *Pagano v. Zoning Bd. Of Adjustment*, 257 *N.J.Super.* 382 (Law Div. 1992) the Court held that there was no proof that the location was particularly suited to the use or proof that no other suitable site existed. Here, the Applicant's Planner concluded that "the site is particularly suited for the use" based upon promotion of the general welfare (Pa232) and that the proposed use is also "compatible" with other uses in "the area." The Applicant's Planner did not

reference or address whether any other suitable sites existed for this project. He said "it's not relevant to my analysis." (3T57:21)

This application has not identified any need or particular site suitability for a soil processing operation at this location at the intersection of the HC, R-5, WED, and NC zoning districts. To the contrary, this application has demonstrated that at least 2 nearby sites in Wantage Township are particularly suited for this operation. Accordingly, the Applicant failed to meet its burden of proof.

In *Prince v. Himeji,* 214 *N.J.* 263, 295 (2013) the Court also held that the availability of alternatives is relevant to the analysis of whether a property is particularly suitable to the use. ACCORD: *Burbridge v. Twp. of Mine Hill*, 117 *N.J.* 376 (1990).

During the hearings a dispute arose with respect to the relevance of alternate sites. (3T57:9 to 60:25) The issue was briefed by the parties. Board counsel then agreed that "alternative locations for the proposed use are relevant." (Pa243) Wantage Township has so many soil removal/processing operations that its governing body saw the need to adopt a regulatory Ordinance for them in 2019. Notwithstanding, the Applicant could not or would not provide an alternative site analysis.

Tri-State's Operator, Nicholas Franchino, testified that he made a business decision to move Tri-State's operations approximately ½ mile from where it operated for more than 20 years, presumably with all required approvals.

Even more significant, Mr. Franchino applied for and received Wantage Township zoning approval to move the business to 284 Aggregates in Wantage on March 17, 2021 (Pa201) and made another business decision not to do so. Mr. Meissner never testified. His Planner never met or spoke with Mr. Franchino. Mr. Franchino never explained why he decided to seek variance relief for this site instead of operating his business where he was approved to do so.

POINT IV

THE MC DONOUGH PLANNING REPORT IS AN INADMISSABLE NET OPINION AND FAILS TO COMPLY WITH N.J.R.E. 703 (Pa68, 69)

N.J.R.E. 703 establishes the foundation for expert testimony. It mandates that expert opinions be based upon facts or data derived from:

> "1. the expert's personal observation, or
>
> 2. evidence admitted at trial, or
>
> 3. data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts" *Townsend v. Pierre, 221 N.J. 36, 54 (2018), quoting State v. Townsend, 186 N.J. 473, 494 (2006); Polzo v. County of Essex. 196 N.J. 569, 584 (2008).*

The net opinion rule is a corollary of N.J.R.E. 703 which

> "forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data. This rule requires that an expert give the why and wherefore that supports the opinion, rather than a mere conclusion." *Id at 54*

The net opinion rule mandates that experts be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable. *Id. at 55,* quoting *Landrigan v. Celotex Corp., 127 N.J. 404, 414 (1992).*

N.J.R.E. 702 requires that an expert's testimony must be "sufficiently reliable." Reliability focuses on the methodology and reasoning underlying the evidence. *State v. Olenowski*, 253 N.J. 133 (2023). Expert testimony must be sufficiently "tied to the facts of the case in order to aid the jury in resolving matters at issue." *In Re: Accutrane Litigation, 234 N.J. 340, 398 (2018).* "When the matter remains one of pure speculation or conjecture, the probabilities are at best evenly balanced," it becomes the duty of the tribunal to reject the testimony. *Townsend, supra.*, 221 N.J. 60, 61 (emphasis added)

These principles were applied to land use board expert testimony in *New Brunswick Cellular Telephone Company v. Borough of South Plainfield Board of Adjustment*, 160 N.J. 1 (1999). There, a planner provided opinion testimony that "he did not support with any studies or data." The Court held that this type of statement was a "net opinion" that could not reasonably support a Board finding. Id at 16.

The report (Pa230) and testimony of the Applicant's Planner was also the subject of dispute during the hearing process. At the conclusion of Mr. McDonough's testimony, Objector's counsel moved to strike on the basis that all of it was either hearsay and/or a net opinion. (3T30:10). It was briefed by the parties and decided at the following meeting by Board counsel that the report

(Pa246-247) and testimony was admissible subject to credibility and weight. (4T13:11).

CONCLUSION

Since 1987, the New Jersey Supreme Court has restricted the discretion of boards of adjustment to grant variance approvals for uses that are deliberately excluded by the governing body from those permitted by the zoning ordinance. *Medici v. BPR*, 107 *N.J.* 1 (1987) As this record proves, this use variance application falls far short of the proofs required for this drastic relief. Political/personal favoritism is not a permitted substitute for the *Medici* requirements.

Wantage Township's unwavering support for this project raises another obvious question: why not simply change the zoning instead of these unending attempts to shoehorn this use into the strict requirements of a "d" variance?

The testimony of Applicant's Planner could not have gotten much better if he had actually seen this use in operation and addressed the variance criteria correctly.

The pictures and videos don't lie. The neighbors didn't lie. As Wantage residents, the Board members knew very well about the negative impacts of this

operation – the noise, the dust, the trucks. They preferred to believe that they could control the substantial negative impacts by way of conditions of approval. They mistakenly believed that they could not deny this application for a business that was already in operation, albeit illegally.

In all of the testimony, exhibits, arguments and litigation, in all these years, the best summation was provided by adjoining property owner Joyce Seccia.

> "We live there. This is not something that we expected to be there. We thought it might be like Dave [Franek] has, a used car lot, even a garden center, but not something that was an industrial operation that contaminates the air, possibly the water. We don't know but were [sic] concerned about that. I agree with all the testimony of these others. I just want to ask you to vote not to do this. This is affecting our property value and our way of life." (5T84:20 to 85:4)

KELLY & WARD, LLC

Attorneys for Plaintiff-Appellant

/s/Kevin D. Kelly

Dated: March 10, 2025

DAVE FRANEK PLAINTIFF-APPELLANT, VS. WANTAGE TOWNSHIP LAND USE BOARD, CHARLES W. MEISSNER, TRI-STATE BULK GARDEN SUPPLY, LLC, DEFENDANTS-RESPONDENTS.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION: DOCKET NO.: A-000382-24-2T ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, SUSSEX COUNTY Docket No. L-000461-23

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I. PRELIMINARY STATEMENT

This matter has a tortured history which includes three (3) applications to the Wantage Land Use Board (WLUB) (all of which were unanimously approved), four (4) lawsuits, all seeking equitable relief, with one currently pending for tort damages with counterclaims and a third-party complaint.

The subject motion of this appeal is Hon. Minkowitz's August 22, 2024, Order entering judgement in favor of Defendants/Respondents and denying Plaintiffs/Appellants request for attorney's fees and costs. (Pa48). However, at no point does Appellant contend that Judge Minkowitz erred in any way. Rather, Appellant seeks another bite at the proverbial apple by submitting an appellate brief that is nearly identical to his trial brief in the underlying matter, with some editorial changes, and attempts to relitigate the exact same issues that have now been decided before both the local Wantage Land Use Board (WLUB) and upheld by the Superior Court, sitting as an appellate court.

However, the underlying decision by Judge Minkowitz was well-reasoned, thoughtful, and considered all of Appellant's arguments but ultimately found them unpersuasive, just as the WLUB did. This decision must be analyzed under an abuse of discretion standard, which is simply not met here.

II. PROCEDURAL HISTORY

This matter stems from Dave Franek's (hereinafter "Franek" or "Plaintiff/Appellant") October 30, 2023, Complaint in lieu of prerogative writs against Defendants, WLUB, Charles W. Meissner ("Meissner"), and Tri-State Bulk Garden Supply, LLC ("Tri-State"), challenging the Board's approval of preliminary site plan and a use variance relating to Meissner's property. The subject of the October 30, 2023, Complaint was a September 12, 2023, WLUB Resolution ("the September Resolution"). (Pa1). The September Resolution was the third Resolution adopted by the WLUB approving Respondent's application for a use variance. The first two Resolutions, while unanimously granted, were overturned by the Superior Court because of procedural concerns about the risk of external influences on the WLUB. (Da001 and Da012[1]). No such concern was present in the September Resolution.

Nonetheless, Franek filed a Complaint in Lieu of Prerogative Writs on October 30, 2023. (Pa1). Given the nature of a Complaint in Lieu of Prerogative Writs, no discovery occurred and trial briefs were submitted. The matter was heard in a trial held by Judge Minkowitz on August 14, 2024[2]. Thereafter, he issued a lengthy memo summarizing his findings and ultimately holding that Defendants Meissner and Tri-State made the required showing to sustain the positive criteria and there was no

[1] Da = Defendant/Respondent's Appendix

[2] The transcript of the August 14, 2024, Trial Hearing before Judge Minkowitz was filed in this matter on October 24, 2024.

substantial detriment that outweighed the positive criteria. (Pa48). He further held that the same was true for any required showing of enhanced proofs and that John McDonough, P.P.'s opinions were not net opinions as claimed by Plaintiff. Therefore, he concluded that the WLUB did not act arbitrarily, capriciously, or unreasonably. (Ibid.).

III. COUNTER-STATEMENT OF FACTS

A. THE PROPERTY AND ITS USE

Franek objected to Meissner's land use application seeking a variance related to the use of 260 Route 565, Wantage, New Jersey 07461, Block 117, Lot 34 (hereinafter "the Meissner Property"), a property located in Wantage Township's Highway Commercial Zone (hereinafter the "HC" Zone") and owned by Meissner since June 16, 2014. (Da027).

Franek owns adjoining property located next door on Route 565 (hereinafter "the Franek Property") and located in the same HC Zone. (see 4T25:7-22[3]). The HC Zone permits gas stations, baseball stadiums, "**soil removal operations**" and "**any**

[3] Transcripts of hearings before the Board that are the subject of this matter were submitted by Appellant on March 11, 2025, and are marked as follows:

Hearing	Date	Reference
First Hearing	September 20, 2022	1T
Second Hearing	October 18, 2022	2T
Third Hearing	April 4, 2023	3T
Fourth Hearing	May 9, 2023	4T
Fifth Hearing	June 13, 2023	5T
Sixth Hearing	September 12, 2023	6T

other use that is determined by the board of adjustment to be of the same general character as the above permitted uses." (Da027) (emphasis added). The Meissner Property and the Franek Property adjoin other properties which are used for industrial and commercial purposes such as auto wreckers, sites relying on heavy machinery, septic trucks, and soil removal companies. (Pa230, and 3T:11-24).

Tri-State operates a soil mixing business and was formerly located at another site in the Township of Wantage for 23 years with no history of complaints, violations of any Township ordinances, or any other issues. (5T103:14-24). In 2019, Tri-State entered into an agreement in 2019 to use the Site. (Da028)

B. PREVIOUS WLUB APPLICATIONS, HEARINGS, AND RESOLUTIONS

1. THE FIRST APPLICATION AND ACTION IN LIEU OF PREROGATIVE WRITS

In 2019, Meissner sought an interpretation from the WLUB finding that soil mixing was a permitted use as a soil removal operation. The WLUB denied it and required a variance application. (Da032). The application was granted unanimously in a September 17, 2019, Resolution (hereinafter "the 2019 Resolution").[4] (Da032). Tri-State moved onto the property and commenced operations until December 16, 2020, decision voided the 2019 Resolution and remanded the matter for a new hearing. (Da001). The basis for this decision was comments made by the Township

[4] Appellant was property noticed of the application at that time and made no objection.

Mayor, Ronald Bassani, and a recused WLUB member, Michael Cecchini that raised a concern the WLUB was improperly influenced.

2. THE SECOND APPLICATION

The WLUB required Meissner to file a new application for a D-variance and for site plan approval which he did on February 23, 2021 (hereinafter "the 2021 Application"). The 2021 Application included updated plans and reports, including a February 5, 2021 report from John McDonough. (Da038 and Pa230). During the public hearings on that application, Plaintiff objected to that application and testified that Tri-State's operations produced dust and noise and should therefore, not be permitted on the Site. (Da044). The WLUB was unpersuaded by Plaintiff's testimony and again unanimously approved Meissner's application resulting in the July 20, 2021, Resolution (hereinafter "the 2021 Resolution"). (Da044).

3. SECOND ACTION IN LIEU OF PREROGATIVE WRITS

Approximately one month later, Plaintiff filed the second Action in Lieu of Prerogative Writs asserting for the first time, that WLUB members who participated in the 2019 Application should not have participated in the 2021 Application. (Da056). The matter was decided favorably to Plaintiff on April 21, 2022, and the 2021 Application was remanded to the WLUB (hereinafter "the Remanded Application") to be reheard by a new Board who had not heard the 2019 Application which required locating additional person(s) to hear the application. (Da012).

4. THE REMANDED APPLICATION AND THE 2023 RESOLUTION HEARINGS

The Remanded Application was heard on September 20, 2022, October 18, 2022, April 4, 2023, May 9, 2023, June 13, 2023, and September 12, 2023. (1T; 2T; 3T; 4T; 5T; 6T). Documentary evidence consisted of photographs, site plans, communications, applications, reports, and various other documents. The testimonial evidence came from: Kenneth Dykstra, P.E., Applicant's professional engineer (hereinafter "Dykstra" or "Applicant's Engineer") and Kim McGuire, a Tri-State employee (hereinafter "McGuire") on September 20, 2022; David Krueger, Applicant's wetlands expert (hereinafter "Krueger" or "Applicant's wetlands expert"), on October 18, 2022; McDonough on April 4, 2023; Plaintiff and Snyder on May 9, 2023; and testimony from members of the public on June 13, 2023. (1T; 2T; 3T; 4T; 5T).

The WLUB also heard comments from their own engineer and reviewed numerous photographs submitted by Plaintiff on April 4, 2023. (3T). The WLUB carefully considered all evidence as detailed in the sixty-four (64) paragraphs of the September 12, 2023, Resolution (hereinafter "the 2023 Resolution") describing the evidence before them and their factual findings and again voted unanimously to grant the D variance sought by Meissner. (Pa248). The underlying Action in Lieu of Prerogative Writs was filed on October 30, 2023, seeking to overturn the 2023 Resolution. (Pa1).

5. 2023 HEARINGS AND SITE SUITABILITY

Throughout the course of the hearings on the Remanded Application, Meissner demonstrated that the Site is particularly suited to the proposed use. Via testimony and evidence from his planner McDonough, Meissner showed that the proposed use of the Site "line[d] up with [the] zoning ordinances and how well it integrates with the land." (3T9:7-10). The HC Zone already permits both soil excavation and mining which are similar, and a more intense use, than the soil blending and processing that Tri-State does. (3T15-16:22-26; 3T25:1-9). This is a higher use and markedly different zone than, for example, a neighborhood commercial zone. (3T16:17-22). Franek's expert, Snyder, agreed that soil mixing and processing is no more intensive than soil removal, and that soil removal is a permitted use in the HC Zone. (4T122:11-21; 132:14-17).

However, he attempted to claim that soil mixing is a use that the Township of Wantage intended to exclude from existing anywhere in the town because it was not identified in any zone within the Township. (4T122:11-22 to 123:12; 132:14-17). His conclusion flew in the face of evidence that Tri-State had already existed and operated within the Township of Wantage for decades. (Pa 209). On the contrary, this lack of identifying soil mixing in any zone speaks to the unique nature of that operation and supports Meissner's expert's contention that soil mixing is not listed, not because of an intent to exclude that particular use, but rather due to the inability

of the Township to anticipate or imagine an exhaustive list of any potential use. (Ibid).

Additionally, the surrounding properties are used for "heavily commercialized land use or heavy industrial use to both the south and to the north and west." (3T13:7-20). Meissner's experts compared the proposed use to the other uses in the area and demonstrated that it is similar. (3T18:7). The surrounding businesses include a topsoil facility with a sand plant, a topsoil and quarry operation, a towing facility, a garden masonry supply facility, a septic company, a nursery and garden supply, a heavy equipment company, Appellant's auto sales business with a welding and race car component, and an electricity company maintenance yard. (3T12-19:16-21). All of these uses create dust, noise, and even noxious odors. (3T18:7). In comparison, Meissner's property and Tri-State's operation is cleaner and more free of dust than other properties in the area as demonstrated by photographs introduced by Keith Albinson, a member of the public and the owner of the nearby towing facility. (Pa 220-229).

6. <u>SITE SUITABILITY</u>

Meissner also demonstrated that the Site was well suited to the proposed use because it was "substantially oversized" and "nearly eight times larger than what your zoning minimum would be. So, we have excellent carrying capacity to support the . . . use . . . ." (3T11:13-20; 3T14:2-6; 3T10-22). This permits the soil piles to

be set nearly two-hundred (200) yards back from the frontage road, Route 565, and further permits them to be nestled in the midst of sixty to eighty (80) foot trees. (3T14:1-22). This is ideal because it allows the soil piles to recede into the tree line in lieu of becoming a dominating presence on the site, even during winter when trees are bare. (Ibid).

He also showed that the unique topography of the property creates a natural barrier of sorts that "wraps around this particular property giving good buffering to the adjacent land uses. . . . ." (3T12:1-4). Specifically, the shape of the property was described as similar to a lollipop with a long, narrow drive that opens up into a large bowl shape with a 20-foot-high vegetative berm surrounding the perimeter of the property "provid[ing] for separation from the adjacent land uses" via both landform and vegetation. (3T11:3-12:4). The lollipop shape of this property and natural berm and barrier limiting visibility of the property would be detrimental to a large commercial or retail operation but is well suited to obscuring machinery and soil piles. (3T28:9-25). Any machinery is disguised by a heavy tree line which can be clearly seen in photographs of the Site. This stands in stark contrast to surrounding properties. (Pa153-158; Pa 220-229). Ultimately, the Site appears cleaner and less industrial than numerous properties in the area. (Pa 220-229).

7. SUITABILITY OF LOCATION WITHIN TOWNSHIP

Meissner also demonstrated that the location of the Site within the Township in Wantage was ideal. The Site is located on the south side of town and connected to a road network that permitted Tri-State customers easy access to a major artery in the area that connects to a regional highway network. (3T12:13-23). This is important insofar as it permits the truck traffic that patronizes Tri-State to avoid roads in residential neighborhoods as the residential uses near the Site, such as Franek's, are non-conforming uses under the current zoning ordinances and are located in a commercial and industrial area. (3T13:1-2).

Additionally, the heavy vegetative buffer insulates local non-conforming residences from proximity to the actual operation. (3T13:1-2). While Franek's expert, Snyder, disagreed with this premise, he did not offer specific details or support for his opinions other than the generalized fact that members of the public raised concerns about dust and noise. From that fact alone, he reached the conclusion that the Site was not suitable. (4T112:3-8). Beyond that generalized, unsupported conclusion, he opined that the Site was not suitable, and the use did not serve a public interest but again, offered no support for this conclusion. (4T114:3-16).

8. THE 2023 RESOLUTION

The WLUB considered the testimony and evidence and summarized their findings and conclusions exhaustively. They summarized their findings and decisions specifically with respect to the positive and negative criteria by stating that they were:

> persuaded by the testimony of Mr. McDonough and found that the Applicant satisfied the required positive and negative criteria. Regarding the positive criteria, the Board found the HC Zone allows a wide variety of uses. While topsoil processing is not among those uses, a soil removal operation is permitted. Topsoil processing shares some characteristics of a soil removal operation but has less impact as it does not change the topography of the Property. The Board notes that the zoning ordinance also permits any other use that is determined by the Board of Adjustment to be of the same general character as the above permitted uses.' While the Board does not find the topsoil operation to be a permitted use under this section, it does find such an operation to be appropriate in the HC Zone including at this site since it has some similar characteristics to soil removal. The Board finds that the Property is particularly suited for the proposed use. Route 565 is a County collector road. The sightlines from the driveway in either direction on Route 565 exceed 1,000 feet. The Property is surrounded by other commercial uses. A source of the same for topsoil processing is located a quarter mile away. The Property is buffered by a substantial belt of trees to the north and west and the operation is set back from Route 565 over 350 feet. Additionally, the Board found that based on the testimony that Applicant's proposed use for property for a "Topsoil Processing Operation" to be of the same general character as the permitted use under section 13-9.1(d) (Soil Removal Operations) of the Zoning Ordinance. Moreover, the Property is particularly suitable for the proposed use. The topography, drainage, size, and location make it an ideal location for the proposed use. The Board believes soil processing is not a listed permitted use because it is somewhat unusual and not anticipated when the Ordinance was prepared.
>
> [Pa 248, ¶ 62].

The Board further held that:

> [w]ith respect to the negative criteria, the . . . dust control will be addressed with a water truck and/or sprinklers. With regard to the dust alleged to be caused by the operation, the Board notes that a quarry located off of Rt. 565 is less than a mile away. Similar to the Tri-State operation, the quarry incorporates a processing operation to create topsoil products and quarry aggregates. In addition, the area contains farm fields and several businesses that have gravel driveways and parking areas that cause dust. Thus, the Applicant's use is consistent with current and approved uses in the Zone. All noise will conform to the standards for a commercial use. The Board found that operation does not present any odor issues. The Board found that operator has a good history of operations at the prior site of operation in the Township and expects the same would occur here. The Board did not find that there would be negative impacts to the immediate roadways as property is along a County highway. Further, the use is not inconsistent with what is allowed in the Highway Commercial zone and what the Township aspires to in its Master Plan. While the Zone does not expressly allow a stand-alone topsoil processing operation, the permitted soil removal operations have similar characteristics which include processes similar to that of the Applicant. In short, not including stand-alone soil processing operations in the list of permitted uses is not an indication it is inappropriate as it is similar in characteristics to a permitted use and the Ordinance allows the Board to permit uses of the same general character of those permitted listed uses. The Board found that imposing conditions to granting the use variance was appropriate to mitigate any adverse effects that might occur from the Tri State operation.
>
> [Pa 248, ¶ 63].

IV. LEGAL ARGUMENT

A. STANDARD OF REVIEW

This court is required to follow the same standard prescribed to the Law Division when reviewing a municipal action. See Fred McDowell, Inc. v. Zoning Bd. of Adj., 334 N.J. Super. 201, 212 (App. Div. 2000), certif. denied, 167 N.J. 88 (2001); see also Charlie Brown of Chatham v. Zoning Bd. of Adj., 202 N.J. Super. 312, 321 (App. Div. 1985). The Legislature has vested the municipality with the discretion to make the decision involved and as a result, municipal actions "are accorded a presumption of validity[,]" which can only be defeated "by a clear showing that the local ordinance is arbitrary or unreasonable." Booth v. Board of Adj. of Rockaway, 50 N.J. 302, 306 (1967); Harvard Enterprises, Inc., v. Board of Adj. of Madison, 56 N.J. 362, 368 (1970); Kramer v. Board of Adj. of Sea Girt, 45 N.J. 268, 296-97 (1965); Spring Lake Hotel & Guest Assoc. v. Borough of Spring Lake (Spring Lake Hotel), 199 N.J. Super. 201, 207-08 (App. Div. 1985) (internal citations omitted).

When reviewing a trial court ruling on a municipal action such as a variance, the same standard applies, namely, whether the decision was "arbitrary, capricious or unreasonable." See Fred McDowell, Inc. v. Zoning Bd. of Adj., 334 N.J. Super. 201, 212 (App. Div. 2000), certif. denied, 167 N.J. 88 (2001); see also Charlie Brown

of Chatham v. Zoning Bd. of Adj., 202 N.J. Super. 312, 321 (App. Div. 1985); Medici v. BPR Co., 107 N.J. 1, 15 (1987).

Our courts, however, have recognized that the terms "arbitrary and capricious" do not, in and of themselves, create an insurmountable bar to relief. On the contrary, the arbitrary and capricious standard simply requires a finding of error similar to the "substantial evidence" standard of review. See Cell S. of New Jersey v. Zoning Bd. of Adjustment, 172 N.J. 75, 89 (citing Rowatti v. Gonchar, 101 N.J. 46, 50-51 (1985)). This standard is not met here.

B. THE DECISION SHOULD BE UPHELD AS THE WLUB MADE APPROPRIATE AND WELL-FOUNDED DISCRETIONARY, FACTUAL DETERMINATIONS THAT WERE WELL WITHIN THEIR AUTHORITY THAT SHOULD NOT BE DISRUPTED

The Medici Court directed that boards of adjustment should not usurp the municipal governing body's legislative authority indicating that it is preferable for zoning decisions to be made via ordinance, rather than variance. Medici, supra, 107 N.J. at 5. As a result, variance applications face a higher bar than other applications and specifically require a finding that (1) positive criteria or "special reasons" exist for granting the variance; and (2) negative criteria, specifically that the variance "can be granted without substantial detriment to public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance." N.J.S.A. 40A:55D-70(d); Burbridge v. Mine Hill Twp., 117 N.J. 376, 386-87 (1990); Kohl v.

Mayor of Fair Lawn, 50 N.J. 268, 276 (1967); Sica v. Bd. Of Adjustment, 127 N.J. 152, 156 (1992). It specifically does not require showing an undue hardship because a property is not reasonably related to a conforming use, an outdated requirement disavowed by the New Jersey Supreme Court in the 1950s. Medici, supra, 107 N.J. at 9-10 (quoting Brandon v. Montclair, 124 N.J.L. 1325, 149 (Sup. Ct.), aff'd 125 N.J.L. 367 (E.&A. 1940) and comparing to later cases Monmouth Lumber Co. v. Ocean Township, 9 N.J. 64, 76 (1952) and Ward v. Scott, 11, N.J. 117 (1952)).

1. THE POSITIVE CRITERIA

The positive criteria applicable to D-variances, N.J.S.A. § 40:55D-70d has been refined to include three categories: (1) where the proposed use inherently serves the public good such as schools or hospitals; (2) where a zoning restriction creates an "undue hardship" on the property owner; and (3) where the use serves the general welfare because the "proposed site is particularly suitable for the proposed used."[5]

[5] Plaintiff attempts to impute a heightened standard to the analysis of the positive criteria in this case by implying there is a separate and distinct standard from the three categories that satisfy the positive criteria discussed at length above. The actual holding regarding the enhanced Medici proofs that Plaintiff urges states:

> if the use for which a variance is sought is not one that inherently serves the public good, the applicant must prove, and the board must specifically find that the use promotes the general welfare because the proposed site is particularly suitable for the proposed use. . . . we deem it appropriate to require an enhanced quality of proof, as well as clear and specific findings by the board of adjustment, that the grant of a use variance is not inconsistent with the intent and purpose of the master plan and zoning ordinance. Such proofs and findings

Sica, supra, 127 N.J. at 156; Medici, supra, 107 N.J. at 17 n. 9; ("[I]f the use for which a variance is sought is not one that inherently serves the public good, the applicant must prove and the board must specifically find that the use promotes the general welfare because the proposed site is particularly suitable for the proposed use."); Yahnel v. Jamesburg, 79 N.J. Super. 509, 518 (App. Div. 1963); Kramer, supra, 50 N.J. at 286.

It is this third category that is implicated in this matter. Demonstrating special reasons under that third category requires establishing that the proposed use is particularly suited to the property, and specifically: (1) why the location of the site within the municipality is particularly suited to the use despite the zoning; and/or (2) the unique characteristics of the site itself that make it particularly appropriate for the proposed use rather than a permitted use. Cox & Koenig, New Jersey Zoning and Land Use Administration (GANN, 2023), pg. 484.

Notably, and despite Franek's efforts to require Meissner to disprove the

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> must satisfactorily reconcile the grant of a use variance with the ordinance's continued omission of the proposed use from those permitted in the zone, and thereby provide a more substantive basis for the typically conclusory determination that the variance "will not substantially impair the intent and purpose of the zone plan and zoning ordinance." N.J.S.A. 40:55D-70(d).
>
> Medici, supra, 107 N.J. at 4.

It is an iteration of the standards required to prevail under the third category identified as positive criteria and not an additional standard that must be met.

suitability of other sites within the Township, the subject property need not be the *only* site available for the proposed use. Price v. Himeji, LLC, 214 N.J. 263, 290-293 (2013). Additionally, while it is true that simply providing a general societal benefit is insufficient, a particularized showing that the specific site is particularly suitable for the proposed use will suffice. Medici, supra, 107 N.J. at 18 (quoting Kohl, supra, 50 N.J. at 280).

2. THE NEGATIVE CRITERIA

A successful variance application must also demonstrate the negative criteria; that the board can grant the use variance (1) without substantial detriment to the public good and (2) without substantially impairing the intent and purpose of the municipal zone plan and zoning ordinance. N.J.S.A. 40:55D-70; see Medici, supra, 107 N.J. at 4.

A board cannot determine whether the negative criteria are met without reference to the positive criteria as it requires a weighing of the benefits and detriments, the positive and negative effects, of a given variance proposal. See Yahnel, supra, 79 N.J. Super. at 519, cited approvingly in Medici, supra, 107 N.J. at 22-23, n. 12; Cox & Koenig, at 526. Every variance constitutes, by definition, a departure from and impairment of the zoning scheme. The negative criteria requirement for variance relief asks whether such departure is "substantial." Cox & Koenig, New Jersey Zoning and Land Use Administration (GANN, 2023), 525-526

(emphasis added). Substantiality cannot be determined in a vacuum. Ultimately, the greater the quantum of proof produced by the applicant regarding its satisfaction of the positive criteria – in this case, the special reasons justifying the use variance – the greater the detriments must be to rise to the level of "substantial." (Ibid.).

The focus of the "substantial detriment" prong of the negative criteria is the impact of the variance on nearby properties. Medici, supra, 107 N.J. at 22-23, n. 12. In Medici, the Court explained:

> The board of adjustment must evaluate the impact of the proposed use variance upon the adjacent properties and determine whether or not it will cause such damage to the character of the neighborhood as to constitute "substantial detriment to the public good." . . . [I]f on adequate proofs the board without arbitrariness concludes that the harms, if any, are not substantial, and impliedly determines that the benefits preponderate, the variance stands.

Medici, supra, 107 N.J. at 22-23, n. 12. The second prong of the negative criteria focuses on the extent to which the variance can be granted without substantially impairing the intent and purpose of the zone plan and zoning ordinance.

C. THE WLUB'S FINDINGS AND CONCLUSIONS BALANCING THE POSITIVE AND NEGATIVE CRITERIA WERE WELL SUPPORTED AND REASONED, AND AMOUNT TO FACTUAL DETERMINATIONS THAT CANNOT BE OVERTURNED

While Appellant's hyper focus on McDonough's testimony suggests that the WLUB **SOLELY** relied on McDonough's opinions, the reality is that the WLUB heard extensive testimony and evidence over the course of six hearings spanning ten

months in 2022 and 2023, including site plans, a dust control plan, photographs (including aerial photographs and photographs submitted by members of the public), videos, maps, communications with the NJ DEP, testimony from factual witnesses including Appellant himself, and multiple experts. The WLUB also heard from eleven (11) members of the public: Mariusz Zadroga, Dave Franek Jr. (Appellant's son), Emil Conforth, Kevin Juchniewicz, Joseph Retz, Chris Barklow, John Price, Joyce Seccia, William LaSala, Keith Albinson, and John Nuss. (5T38-50:18-14 Mariusz Zadroga; 5T50-52:23-25 Dave Franek Jr.; 5T53-69:5-21 Emil Conforth; 5T70-72:5-24 Kevin Juchniewicz; 5T73-77:6-16 Joseph Retz; 5T77-79:24-11 Chris Barklow; 5T79-83:16-11 John Price; 5T83-85:20-4 Joyce Seccia; 5T85-86:13-21 William LaSala; 5T87-93: 12-25 Keith Albinson; 5T77-79:24-11 John Nuss).

They heard testimony from experts, such as McDonough, that the use is similar to permitted uses, is appropriate for the zone, and furthers the Township's Master Plan by permitting a use that preserves open space. To the extent complaints arose about dust and noise, the WLUB rightfully noted that testimony on that topic was contradicted by witnesses (some of whom testified that the dust was no worse than spring pollen) and that there was no evidence that any dust or noise exceeded permitted levels, or that of nearby permitted uses, especially in light of the nature of a HC Zone. (5T92:13-25).

They also credited McDonough's testimony explaining why the Site was

particularly suitable for this use given the oversized nature of the property, the extensive land and vegetative buffer, the zoning and similar permitted uses, and the location of the property within the Township and the road network. (Stat. of Facts, supra, III(B-6)). They simply found McDonough more credible than Snyder, given Snyder's lack of particularized findings, failure to visit the Site, and lack of knowledge on certain topics. (Stat. of Facts, supra, III(B-7)).[6] "The Board is persuaded by the testimony of Mr. McDonough and found that the Applicant satisfied the require positive and negative criteria." (Pa 248, 2023 Resolution ¶ 62).

The WLUB ultimately found, based on extensive evidence and their own evaluation of the credibility of the witnesses and the evidence, that the positive criteria was satisfied while the negative criteria was not substantial. This is therefore a decision that should not be overturned as it is the type of determination best made by those "thoroughly familiar with their community's characteristics and interests . . . [who] are the proper representatives of its people who are undoubtedly the best equipped to pass initially on such applications for variance.'" Medici, supra, 107 N.J. at 14-15 (internal citations omitted).

Appellant's arguments to the contrary are unpersuasive. For example, he argues that the WLUB was concerned about noise because one member stated, "I

[6] Snyder also agreed that the lack of identifying the use in the zoning ordinance did not completely preclude the use within the Township as Franek argues since it is simply not feasible for the township to provide an exhaustive list of all included or excluded uses which is the reason variance applications exist.

don't know how you'd really fix the noise part. . . ?" (5T124:17-19). However, he ignores that the same member, familiar with farming communities such as Wantage, went on to state, "obviously we all grew up in farming area and I grew up with tractors. I understand there's some noises. I've been out there trying to sleep as a kid and the farmer's farmer at 10:00 at night." (5T125:2-7).

That same member indicated a concern about dust which the WLUB's engineer addressed via requiring a dust control plan and explaining how violations of such a plan would be addressed which satisfied the member's concern. (5T126:3 to 127:15). Additionally, the WLUB considered the paved driveway to the Site which has resulted in a visible decrease in the dusty nature of the property compared to other surrounding properties. (Pa 248, ¶ 16; Pa220-229).

Ultimately, they conclude that the conditions incorporated into the Resolution addressed any potential detriments and rendered them insubstantial. Specifically, the Applicant was required to submit a dust control plan that required spraying any soil piles and roads with water to prevent dust, and limiting the days and times of operation to weekdays from 6:30 am and 6:00 pm and from 8:00 am to 2:00 pm on Saturdays. (Pa 248, Resolution Conditions ¶ 19, 32). At the time the 2023 Resolution was considered, the WLUB further limited the soil mixing machine on the Site to 8:00 am to 5:00 pm solely on weekdays. (Ibid.; 6T24:10 to 26:3).

Another member of the WLUB indicated that he was concerned about noise but concluded that there was no evidence the noise exceeded the levels established by the township noise ordinance. "[T]he noise that have come up . . . concerns me, but nowhere in here did we hear any testimony about the noise ordinance and what the noise - - the actual decibels were at the property line, if it was still within the town ordinance, if it was acceptable or if it wasn't." (5T127-128:16-3).

Additionally, Appellant alleges that the WLUB explicitly stated their disagreement with the applicable standards, and suggests that they disregarded it which is simply not true. The WLUB's disagreement referenced in the June 13, 2023, transcript was not a disagreement with the legal standard, but rather a disagreement with Snyder whose testimony they found shortsighted. (5T120:8-16). It is simply disingenuous to suggest that the WLUB blatantly refused to follow the law.

The WLUB did consider applying more stringent conditions to address potential noise levels but decided against it because the area is generally noisy with other commercial and industrial businesses and machinery, as well as a busy county highway in operation. (6T19:23 to 20:22). In their discussion, the WLUB recognized that video evidence purporting to demonstrate the sound level of the soil mixing operation was admitted but was difficult to hear over music in the background and birds chirping. "I think the one video that we had also had Hotel California blasting

in the . . . background." (6T22:1214). The same WLUB member also noted "[t]o be fair the birds chirping was pretty clear also." (6T22:17-18).

Thus, their decision to grant the application was based upon the particularized suitability of both the site and the use, and upon a finding that any detrimental impact did not rise to the level of substantial. Their decision cannot be overturned now despite Appellant's disagreement with the outcome, especially where Appellant fails to identify any aspect as arbitrary, capricious or unreasonable.

D. THE LAND USE BOARD'S DETERMINATION THAT DEFENDANT TRISTATE'S SOIL PROCESSING OPERATION IN THE HIGHWAY COMMERCIAL ZONE IS CONSISTENT WITH THE INTENT AND PURPOSE OF THE WANTAGE ZONE PLAN AND ZONING ORDINANCE CONSTITUTES VALID AGENCY ACTION THAT IS NOT ARBITRARY AND CAPRICIOUS

In Point One and Two of Appellant's brief he claims that Respondents failed to document the enhanced proofs required by Medici for the grant of a d(1) use variance because despite several years, applications, and lawsuits, the zoning ordinance has not been changed to include soil mixing as a permitted use in the HC Zone. Thus, it must be the case that Wantage legislators don't want soil processing operations in the HC zone and, moreover, that Defendant WLUB's approval of the use variance is an impermissible usurpation of the Wantage legislative function. (4T122:11-22 to 123:12; 132:14-17).

Appellant's argument turns a blind eye to the fact that the express terms of the Zoning Ordinance already contemplate and have contemplated soil processing operations in the HC zone since at least 2011. (Da001). The zoning ordinance for the HC Zone specifically include "[s]oil removal operations" and "[a]ny other use that is determined by the board of adjustment to be of the same general character as the above permitted uses." (Da001). The use permitted by the WLUB in the September Resolution is of the same general character. Even Snyder, Appellant's planner, agreed that the use is no more invasive than the permitted use of soil removal operations. (Stat. of Facts, *supra*, IV(A) and (B)). McDonough, who the WLUB found more credible, testified that soil mixing is of the same general character as soil removal and is less invasive. (Stat. of Facts, *supra*, IV(A)).

For its part, Defendant WLUB and in particular Member Dudzinski stated on the record during the Board's deliberations:

> MR. DUDZINSKI: Well, I think -- I think 62 and 63, you know we heard previous testimony that I believe was Mr. Snyder said that if -- if the Township wanted to allow this to happen in the zone, that with would in the zoning. And I -- I kind of question that from a couple different angles, because, number one, I never heard soil mixing until this application you know. So, like if you think back to when the zoning laws were written, I don't know that anybody then would have known include it you know. So, the fact that he said it wasn't in there, cause we don't want it, I don't think that was accurate you know. I think that's why this application is here, and that that's why we're going through what we're going through is to see if the -- if the site is suited for what's taking place. So, I don't agree with Mr. Snyder's interpretation or his conclusion. And that's -- that kind of falls into that -- that area there. So, you know there's a lot of businesses on that stretch. If I -- if I were

> just driving through there not living in the area, I would assume that that is like a business district. You know there's just a lot of stuff going on. Obviously, we have the – the towing that got approved a little while ago. The car lots, you know the -- the shed place. There's just -- there's a lot of business down there. So, that to me seems like a business area. And if you look at what is approved, you know soil mining is a -- is an approved operation within that zone, which I think would be a lot louder, noisier, intrusive. I think there -- I think there'd be a lot more issues with something like that operating, which is already included. So, you know we don't know what we don't know. And I -- I don't think anybody would have known to include soil mixing. But I think it does fall along the lines of other approved uses in that -- in that area.
>
> [(6T33:20 to 6T35:7)].

Furthermore, the Resolution of Approval at paragraph 62 provides:

> The Board found the granting of the requested use variance to be appropriate pursuant to N.J.S.A 40:55D-70d(l).The Board is persuaded by the testimony of Mr. McDonough and found that the Applicant satisfied the required positive and negative criteria. Regarding the positive criteria, the Board found the HC Zone allows a wide variety of uses. While topsoil processing is not among those uses, a soil removal operation is permitted. Topsoil processing shares some characteristics of a soil removal operation but has less impact as it does not change the topography of the Property. The Board notes that the zoning ordinance also permits "any other use that is determined by the Board of Adjustment to be of the same general character as the above permitted uses." While the Board does not find the topsoil operation to be a permitted use under this section, it does find such an operation to be appropriate in the HC Zone including at this site since it has some similar characteristics to soil removal. The Board finds that the Property is particularly suited for the proposed use. . . .

[(Pa 248, Resolution of Approval at paragraph 62).]

The WLUB, and the Superior Court, specifically considered this argument and was not persuaded by it. Accordingly, Defendant WLUB's approval of Defendant Meissner's development application should be upheld.

E. THE APPLICANT WAS NOT REQUIRED TO DEMONSTRATE THE LACK OF ALTERNATIVE SITES

Appellant also continues to argue that the WLUB should have considered the suitability of alternative sites. In doing so, he is attempting to create a requirement that does not otherwise exist. While it is true that the availability of alternative sites may be relevant under Prince v. Himeji, 214 N.J. 263, 295 (2013), the true holding of that case is that it is not a requirement to do so, and is not preclusive.

> Although the availability of alternative locations is relevant to the analysis, demonstrating that a property is particularly suitable for a use does not require proof that there is no other potential location for the use, nor does it demand evidence that the project "must" be built in a particular location. Rather, it is an inquiry into whether the property is particularly suited for the proposed purpose, in the sense that it is especially well-suited for the use, in spite of the fact that the use is not permitted in the zone. Most often, whether a proposal meets that test will depend on the adequacy of the record compiled before the zoning board and the sufficiency of the board's explanation of the reasons on which its decision to grant or deny the application for a use variance is based.
>
> Price v. Himeji, LLC, 214 N.J. 263, 292-293 (2013).

Other cases have held similar.

> Zoning boards do not have carte blanche to reject an application based on conjecture that a possible alternative site is both suitable and available. Requiring providers to disprove the suitability of every possible alternate site

> is a daunting task because of the uncertainty surrounding the availability and ultimate suitability of such sites. Moreover, an alternate site may require the provider to file a variance application, the approval of which is far from certain.

[Mesquite Tower Consulting, LLC v. Zoning Bd. of Adjustment of Dover, 2011 N.J. Super. Unpub. LEXIS 2376, *38-39 (citing N.Y. SMSA Ltd v. Twp. of Mendham Zoning Bd. Of Adjustment, 366 N.J. Super. 141, 163-64 (App. Div.), aff'd o.b., 181 N.J. 387 (2004) (citations omitted); accord Ocean County Cellular Telephone Co. v. Township of Lakewood Bd. of Adjustment, supra, 352 N.J. Super. at 529-30)].

Simply put, this requirement does not exist and there was no need for Applicant to disprove other sites or for the WLUB to consider other sites.

F. MCDONOUGH'S TESTIMONY EXPLAINED THE WHY AND WHEREFORE OF HIS CONCLUSIONS AND WAS THEREFORE, NOT AN INADMISSIBLE NET OPINION

Appellant further argues that the WLUB acted improperly in hearing Mr. McDonough's testimony as his opinions amounted to an inadmissible net opinion. This is a motion that Plaintiff previously made before the WLUB. (3T130-135:10-4). At the conclusion of McDonough's testimony before the WLUB hearing on April 4, 2024, Appellant moved to strike McDonough's expert testimony arguing that it was based entirely on hearsay, and therefore lacked the requisite foundation. This argument was rejected appropriately because (1) it is factually wrong as McDonough's testimony was not based entirely on hearsay; (2) to the extent that he relied upon hearsay, the New Jersey Rules of Evidence (N.J.R.E.) expressly permits him to rely on otherwise inadmissible hearsay evidence; and (3) any lacking or

questionable factual support for McDonough's testimony is a credibility factor to be weighed by the WLUB and not an admissibility consideration.

N.J.R.E. 703 is the applicable rule, provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the proceeding. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

N.J.R.E. 703 was modified in 1982 to specifically allow experts to rely on otherwise inadmissible hearsay in forming their opinions. See Dietzman v. Peterson, 196 N.J. Super. 96 (Law Div. 1984) (a non-treating physician may testify concerning the history of past and present complaints of pain made to him by an injured plaintiff to corroborate a diagnosis reached largely on the basis of objective, diagnostic tests, even if the complaints were otherwise inadmissible hearsay); Gerstenberg v. Reynolds, 259 N.J. Super. 431, 435-436 (Law Div. 1991) (allowing psychiatrist to testify in a wrongful death action with respect to the psychiatric history of the decedent, including the latter's prior suicide attempts, because the psychiatrist had relied on that history in reaching the opinions rendered).

N.J.R.E. 703 simply requires expert opinions to be "grounded in 'facts or data derived either from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert, which is not necessarily admissible in evidence, but which is the type of data normally relied upon by experts.'"

Townsend v. Pierre, 221 N.J. 36, 53 (2015) (quoting Polzo v. Cty. of Essex, 196 N.J. 569, 583 (2008)).

If an expert's conclusion is not supported by factual evidence or other data, it is considered a "net opinion." In short, experts must "give the why and wherefore" to support their opinions, "rather than . . . mere conclusion[s]." Id. at 54 (quoting Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013)). Expert testimony that is "based merely on unfounded speculation and unqualified possibilities" should be barred. Vuocolo v. Diamond Shamrock Chems. Co., 240 N.J. Super. 289, 300 (App. Div. 1990).

However, the New Jersey Supreme Court has also stated:

> An expert's conclusions should not be excluded merely because it fails to account for some particular condition or fact which the adversary considers relevant. . . The expert's failure to give weight to a factor thought important by an adverse party does not reduce his testimony to an inadmissible net opinion if he otherwise offers sufficient reasons which logically support his opinion.
>
> [Townsend, 221 N.J. at 54 (internal citations and quotations omitted); see also Alloco v. Ocean Beach & Bay Club, 456 N.J. Super. 124, 142-143 (App.Div. 2018) (professional planner's report was not net opinion because it contained sufficient factual basis and he was not merely expressing a personal standard but instead referenced New Jersey case law and FEMA requirements)].

Therefore, an opinion is not rendered a net opinion simply because it may be subject to attack on cross-examination for not including other considerations. Rosenberg v Tavorath, 352 N.J. Super. at 402 (citing Rubanick v. Witco Chem.

Corp., 242 N.J. Super. 36, 55, (App. Div. 1990)); see also Glowacki v. Underwood Mem'l Hosp., 270 N.J. Super. 1, 16-17, (App. Div. 1994) (declining to strike an expert's testimony as a net opinion as "[a]ny shortcoming in his method of analysis was explored and it was for the jury to determine the weight his opinion should receive").

Mr. McDonough's testimony did not amount to unfounded speculation or mere conclusions. He described extensive background efforts that he relied upon in forming his opinions including his own personal observations of the subject property on five (5) separate occasions: (1) February 2021; (2) March 2021, (3) May 2021, (4) September 2022; and (5) April 2023. He testified that he walked the site and made personal observations of the equipment and materials involved in the operations (e.g., the soil stockpiles, the conveyor used to mix the soil, the trucks, the bins containing stone, mulch, etc.) that are the subject of the application. He further testified that based on his own observations he was able to ascertain the nature of the operations. (3T105:1-3).

He also testified as to background research that he did in order to form his opinions including reviewing the Township's current Master Plan, the Township's preceding Master Plans going back to the early 1980's, the applicable Township ordinances related to the HC zone and NC zone, and additional research on the type of businesses permitted in those zones. (3T105:9-25). He also testified that he

personally observed the area surrounding the subject property and the businesses referenced in his report, as well as additional businesses that began operations after his report was authored. (3T25-26:20-1).

He also testified that he reviewed relevant property databases, including MOD-4, and other publicly available data, and relevant legal standards pertinent to his analysis. (3T61- 62:22-2). This testimony in and of itself satisfies the criteria required by N.J.R.E. 703 and Townsend's first prong.

During cross examination Appellant's counsel asked McDonough, inter alia, if he had interviewed any neighbors or if he had conducted any noise tests. McDonough testified he had not interviewed neighbors and did not conduct any noise tests to determine the decibel level of the operation because that would exceed the scope of his role and expertise. (3T45-47:25-23). Regardless, he testified that any operation on the site was still subject to the Wantage Township noise ordinance and must comply or be subject to an enforcement action as part of the municipalities general police power, a separate matter from the question before the WLUB. (3T47:7-13).

To the extent that any of this testimony erodes the foundation of McDonough's opinions, it does not impact its admissibility but rather its credibility, which Plaintiff's counsel unpersuasively argued to the WLUB.

The Alloco case, though not on point factually, is instructive for the analysis

here because the crux of the net opinion discussion revolved around whether the professional planner's opinion was factually supported. Plaintiff in Alloco argued that the planner's report was a net opinion because the planner "failed to examine minutes of Board meetings, interview Board members, visit the site, or review the discovery in the litigation." Id., at 143. The Court rejected this argument and concluded that the report contained a sufficient factual basis for the professional planner's conclusions and recommendations. Id.

Here, McDonough's efforts were far more extensive than the expert planner in the Alloco case. He did not rely solely on his own personal observations. He also conducted research on the township, the site and surrounding sites, reviewed the minutes of the September 20, 2023, WLUB hearing, and spoke to Matthew Flynn, a licensed professional planner from his office, who attended the two prior WLUB hearings on September 20, 2022, and October 18, 2022, where the testimony of Applicant's prior witnesses was heard by the WLUB. Thus, in addition to relying on his own personal observations under the first prong of Townsend, which is sufficient in and of itself to satisfy N.J.R.E. 703, Mr. McDonough also relied on the evidence presented to the WLUB in the two prior hearings, the second prong of Townsend.

Yet, Franek relies on these extensive efforts to simultaneously claim Mr. McDonough's testimony is inadmissible because he relied on hearsay from Mr. Flynn and Meissner but is also inadmissible because he should have spoken to more

neighbors thus relying on more hearsay. Plaintiff's own arguments contradict each other.

Under the third prong of Townsend, and within the plain text of N.J.R.E. 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the proceeding. . ." and is the type of data normally relied upon by experts), McDonough is permitted to rely on hearsay to form his opinions. Experts routinely rely on their colleagues, and staff to gather facts and data to support their opinions, which is exactly what occurred here.

In sum, Mr. McDonough relied on exactly the type of facts and data that all professional planners routinely rely on in testifying before the WLUB, which is explicitly permitted under N.J.R.E. 703. To the extent Plaintiff demonstrates any deficiencies in Mr. McDonough's opinions, those deficiencies only go to the weight and credibility of his opinions which the land use board must evaluate and consider. That is precisely what occurred in this hearing.

A municipal board is empowered to make such credibility determinations, which should be accorded deference unless they are unsupported by the record or are arbitrary, capricious, or unreasonable. The probative weight to be accorded "an expert's opinion depends not only upon the expert's analysis, but also upon the facts offered in support of the opinion." E. Orange City v. Livingston Tp., 15 N.J. Tax 36,

47 (Tax 1995) (citing Dworman v. Tinton Falls, 1 N.J. Tax 445 (Tax 1980), aff'd o.b., 180 N.J. 366 (App. Div. 1981)).

Quite simply, the WLUB found McDonough's testimony more credible than Snyder's, a permissible finding that was within their discretion. Snyder never made on site observations limiting his observations to those made from the roadway and relying on Plaintiff to make observations from Plaintiff's house. He was unaware of the testimony from both Meissner's Engineer and Wetlands Expert and was not qualified or able to address either. He also gave no specifics in opposition to the application other than general statements that the use cannot be allowed because it is not a permitted use within the zone (a rationale that would preclude any variance), is not an attractive business, and it must not be a suitable business solely because neighbors were opposed to it. Those generalities do not address the specifics that the WLUB considered, and were not persuasive.

IV. CONCLUSION

It is clear that the WLUB took this application seriously and thoughtfully and made appropriate findings and decisions based on an extensive record that were well within their purview and which cannot be disturbed lightly. For the foregoing reasons, we respectfully request that judgment be entered in favor of Respondents.

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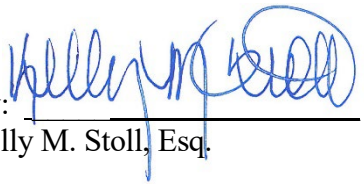
By: 
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DAVE FRANEK Plaintiff-Appellant, vs. WANTAGE TOWNSHIP LAND USE BOARD; CHARLES W. MEISSNER; and TRI-STATE BULK GARDEN SUPPLY, LLC, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-000382-24 Civil Action On Appeal From: Superior Court of New Jersey Law Division – Sussex County Docket NO. SSX-L-461-23 Sat Below: Honorable Stuart A. Minkowitz, A.J.S.C.

BRIEF OF DEFENDANT/RESPONDENT WANTAGE TOWNSHIP LAND USE BOARD

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STATEMENT OF THE FACTS

This appeal relates to property owned by Defendant/Respondent Charles Meissner (Meissner) located on County Road 565 in Wantage Township, Sussex County, New Jersey. It is designated as Block 117, Lot 34 on the Township Tax Map. ("The Property" or "The Site). The Property is rectangular in shape and contains 7.4 acres. The Property is in the Highway Commercial ("HC") Zone which permits, per Sections 13–9 of the Zoning Code, a wide range of commercial uses, including retail sales, motor vehicle sales, offices, taverns, restaurants (including drive-in restaurants), department stores, gas stations, baseball stadiums and soil removal operations. Property to the North and South of the site are also in the HC Zone. (Pa 251)

Property to the rear of the site is in the Wantage Economic Development Zone ("WED") which, per Section 13-9B.2, allows a broad range of uses including hotels, supermarkets, offices, warehouses and manufacturing. Across the street from the site, the zoning is Neighborhood Commercial ("NC") which permits, per Section 13-8.1, a range of commercial and office uses. Adjacent to the NC Zone is a Residential Zone. (Pa 251)

Uses in the vicinity are a mixture of various commercial activities. There is a quarry/sand/stone operation, an excavator/septic installer, a junk

yard, a car storage yard, a multi-tenanted industrial site, and across the street, a garden center. There are also a few residential uses. (Pa 252)

Adjacent to the site on the north is Block 117, Lots 35.02 and 35.03 which are owned by Plaintiff/Appellant, David Franek ("Franek"). On those lots, Franek operates a used car dealership (a permitted use) and also lives in a residence (a non-permitted use). (Pa 252)

On the Property, the tenant, Respondent Tri-State Bulk Garden Supply LLC ("Tri-State"), operates a soil mixing operation. Soil mixing is a process whereby mulch, sand, clay and other constituents are stock piled and fed into a mixer, so that there is a consistent final material that can be sold as topsoil. Tri-State also stores various landscape materials on site. Sales are generally done in bulk to contractors, but retail sales also occur. Retail sales are permitted in the Zone. (Pa 252)

Tri-State has operated in Wantage Township for approximately 25 years before moving to the site and beginning operation in 2019. The application by Meissner in this matter was to permit the same to occur at the Property. While, under the Wantage Zoning Code, soil removal operations are permitted in the HC Zone, a topsoil processing operation is not specifically listed as a permitted use. The 2022 application and approval in September

2023, which is at issue in this case, granted a use variance together with a site plan approval.

PROCEDURAL HISTORY

There were two prior use variance and site plan approvals granted to Meissner for the Tri-State operation at the Property. Both of the approvals were appealed by Franek to the Superior Court, with each appeal resulting in a remand to the Board. The first was remanded due to improper testimony by recused Board members. The second was remanded due to participation at the second application by Board members who heard the improper testimony in the first hearing. The 2022 application and approval, which is challenged by this case, was heard by a special Board consisting of two regular Board members who had not sat on the prior hearings and four specially appointed Board members just for the Meissner application. Hearings were held over six meetings beginning on September 20, 2022 and ending on September 12, 2023.

During the 2022-2023 hearings, Meissner, Tri-State and Franek were represented by Counsel. Each had ample opportunity to present evidence and arguments which opportunity was fully exercised with fact witnesses, expert witnesses, plans, photos and other evidence being presented to the Board. Residents had the opportunity to question witnesses and present testimony and exhibits.

After hearing all of the testimony, reviewing the documentary evidence and discussing the application, on September 12, 2023, the Board voted to approve the application subject to conditions. On September 26, 2023, the Board considered and adopted a written resolution. (Pa 248) The resolution thoroughly considers the facts, the testimony, the Wantage Zoning Ordinance and the applicable standards under the Municipal Land Use Law ("MLUL"). It consisted of 19 pages containing 64 paragraphs setting forth the Board's conclusions as to the facts and its analysis of the law and imposes 35 paragraphs of conditions on the approval.

LEGAL ARGUMENT

POINT I

STANDARD OF REVIEW
(Pa 54, 55, 56)

In reviewing a challenge to the action of a municipal land use board, such action is presumed, at the outset, to be correct. Sica v. Board of Adjustment, Wall Twp., 127 N.J. 152 (1992). As noted in Menlo Park Plaza v. Woodbridge Planning Board, 316 N.J. Super. 451, 459 (App. Div. 1998), certif. denied, 160 N.J. 88 (1999), "the Legislature has recognized that local people familiar with the community's characteristics and interest are best equipped to assess the merits…" of municipal land use questions. Because of their "peculiar knowledge of local conditions", local boards "must be allowed wide latitude in the exercise of their delegated discretion." Medici v. BPR Co., 107 N.J. 1, 23 (1987); Burbridge v. Mine Hill Twp., 117 N.J. 376 (1990).

This standard is predicated on the recognition that local officials who are thoroughly familiar with a community's unique characteristics are in the best position to rule on variance applications. Kramer v. Board of Adjustment, Sea Girt, 45 N.J. 268, 296 (1965). As expressed by the New Jersey Supreme Court, "courts ordinarily should not disturb the discretionary decisions of local boards that are supported by substantial evidence in the

record and reflect a correct application of the relevant principles of land use law." Lang v. Zoning Bd. of Adjustment of Borough of North Caldwell, 160 N.J. 41, 58–59 (1999).

Thus, the decision of the Board in the present instance enjoys "a presumption of validity". Price v. Himeji, LLC, 214 N.J. 263, 284 (2013). "In evaluating a challenge to the grant or denial of a variance, the burden is on the challenging party to show that the zoning board's decision was 'arbitrary, capricious, or unreasonable.'" Id. The Appellant cannot satisfy that standard because of disagreement with an approval or because the approval is debatable. There must be an actual showing that it is arbitrary or unreasonable. Harvard Enterprises, Inc v. Board of Adjustment of Tp. of Madison, 56 N.J. 362, 368 (1970).

In an action in lieu of prerogative writs, the court's decision is predicated upon the record made before the agency whose action has been appealed. Willoughby v. Planning Bd. of Tp. of Deptford, 306 N.J. Super. 266 (App. Div. 1997). An appellate court reviewing that record may not substitute its independent judgment for that of the local board. Judicial review is a determination of the validity of an agency's action, not the substitution of the Court's judgment for that of the agency. Northeast v. Zoning Board of Adjustment, 327 N.J. Super. 476, 493 (App. Div. 2000). "So long as there is

substantial evidence to support it, the Court may not interfere with or overturn the decision of a municipal board. Even when doubt is entertained as to the wisdom of the Board's action, there can be no judicial declaration of invalidity absent a clear abuse of discretion by the Board." New Brunswick Cellular Tel. Co. v. Old Bridge Pl. Bd., 270 N.J. Super. 122, 134 (Law Div. 1993); Cell South of N.J., Inc. v. Zoning Bd. of Adjustment, W. Windsor Twp., 172 N.J. 75 (2002).

POINT II

THE BOARD'S APPROVAL OF THE USE VARIANCE WAS NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE (Pa 56, 57, 62, 63)

Positive and Negative Criteria for a Use Variance

The Municipal Land Use Law (MLUL) "requires an applicant to prove both positive and negative criteria to obtain a use variance." Smart SMR of New York, Inc. v. Fair Lawn Bd. of Adjustment, 152 N.J. 309 (1998). "The requirement that a use variance be based on proof of the positive criteria arises from the language of the MLUL, which limits the grant of a use variance to those cases in which there is a showing of 'special reasons.' N.J.S.A. 40:55D-70(d)." Price v. Himeji, LLC, supra, at 285. Proof of the negative criteria requires the applicant to demonstrate that the variance "can be granted without substantial detriment to the public good" and that it "will not substantially impair the intent and purpose of the zone plan and zoning ordinance." N.J.S.A. 40:55D-70(d).

Positive Criteria

The MLUL does not define "special reasons", but New Jersey courts have identified three categories of circumstances in which "special reasons", or the "positive criteria" may be found: (1) where the proposed use inherently

serves the public good; (2) where the property owner would suffer "undue hardship" if compelled to use the property in conformity with the permitted uses in the zone; and (3) where the use would serve the general welfare because the proposed site is particularly suitable for the proposed use. Saddle Brook Realty, LLC v. Twp. of Saddle Brook Zoning Bd. of Adjustment, 388 N.J. Super. 67, 76 (App. Div. 2006).

Where, as here, the proposed use is not inherently beneficial, the applicant must prove that the use promotes the general welfare because the proposed site is particularly suited for it or that undue hardship exists. Medici v. BPR Co., 107 N.J. 1, 4 (1987).

As explained by the New Jersey Supreme Court in Price v. Himeji, LLC, supra, at 287, "[a]n application for a use variance based on the assertion that a property is particularly suitable for a project requires an evaluation of whether the use, otherwise not permitted in the zone, when authorized for the particular parcel, will promote the general welfare as defined by the MLUL. In our efforts to give content to that standard, this Court has used several articulations to explain its meaning and intent." Such an analysis is "inherently site-specific." Id., at 288.

Negative Criteria

In addition to showing special reasons, the applicant must prove the "negative criteria" by demonstrating that the variance "can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance". N.J.S.A. 40:55D-70. The first prong of the negative criteria requires the Board to focus on the effect of a variance on surrounding properties. If the Board finds that the harm is not substantial, it may grant the variance. Medici, supra, at 22. Both the applicant's proofs and the Board's findings "must reconcile the proposed use variance with the zoning ordinance's omission of the use from those permitted in the zoning district." Id. The memorializing resolution adopted by the Board must be sufficient to "satisfy a reviewing court that the board has analyzed the master plan and zoning ordinance, and determined that the governing body's prohibition of the proposed use is not incompatible with a grant of the variance." Id., at 23.

In addition, the applicant must also prove that the variance sought is not inconsistent with the intent and purpose of the Master Plan. Id., at 4. In granting the variance, the Board must reconcile the proposed use variance with the fact that the zoning ordinance omitted the use from those permitted in the district. Id., at 21-23.

In setting forth this analysis of the Board's responsibility vis-à-vis the negative criteria, the Medici Court took care to emphasize that the standards it announced were not intended to "limit the vitality and flexibility of use variances to afford appropriate relief from the general provisions of a zoning ordinance." Id., at 23.

Turning to the use variance approval for the soil mixing facility in this case, the Resolution demonstrates that the Board considered all the facts and testimony and reached the conclusion that the proposal satisfied the positive criteria as the site was particularly suited for such an operation. The Resolution specifically addresses the use variance and its analysis relating thereto in paragraphs 61 through 63. (Pa 259-261) The Board's analysis and conclusions as set forth therein are based on all of the testimony and evidence from six hearings as reviewed in the first 60 paragraphs. (Pa 248-259) Based on all of the evidence and the Board's own knowledge of Wantage Township and its Zoning Code, the Board found the site to be particularly suitable for several reasons:

1) The site is on a County Road that is a collector road which means local residential streets are not used.
2) The entrance has sufficient sight distance on a County Road.

3) The property is oversized at 7 acres, thereby allowing separation from other properties.
4) The property is essentially flat, providing space for the operation.
5) The property is buffered by a belt of trees on the north and west.
6) The operation is over 350 feet from Route 565.
7) Uses surrounding the property are generally of a commercial nature.
8) The uses allowed in the HC Zone and the neighboring WED and NC Zones are commercial.

The Court should also take note that Wantage Township Zoning Code (Section 13-9.1(f)) has a provision that designates as a permitted use in the HC Zone "any other use that is determined by the Board of Adjustment to be of the same general character as the above permitted uses." This provision recognizes that a Zoning Code may not be able to predict the enormous variation in business enterprises/land uses that can arise and permits the Board to allow uses if, after considering evidence, it concludes the proposed use is akin to a permitted use. Among the permitted uses in the HC District is soil removal operations. Removing soil involves large machinery, removing

soil/rocks from the ground, trucking, stockpiling and processing the soil/rocks and transporting the product off site. The Tri-State soil processing operation has many similar characteristics, except it has less impact because it does not alter the actual ground because no soil excavation or removal occurs. Theoretically, the Board could have found the soil mixing use a permitted use since the ordinances list under "permitted uses" those determined by the Board to have similar characteristics as other permitted uses, thereby relieving the applicant of proving the positive and negative criteria. It did not, but the permissibility of soil removal operation in the Zone is relevant as to why the Site is particularly suited for the Tri-State operation and provides clear and rational authority for granting the requested use variance. (Paragraph 62, Pa 260)

With regard to the negative criteria, the Board made specific findings in paragraph 63 of the Resolution. (Pa 260) It did not find any substantial impairment of the Zoning Plan or Ordinance. Among the reasons for that conclusion, again, was that the soil processing operation has characteristics similar to the permitted soil removal operations. The Board further found no substantial detriment to the public good as any noise would be regulated by Ordinance, other nearby operations produce possible dust and the traffic from the operation would traverse a County Highway and not local

streets. In addressing the negative criteria, the Board specifically addressed its impact on the Master Plan and Zoning Ordinance, finding that the "use is not inconsistent" with the other uses allowed in the HC Zone and the goals of the Master Plan. Further, the Board found that imposing conditions would mitigate possible adverse charachteriscs. It then imposed 35 conditions as found in the Resolution. (Pa 261-265)

In sum, the Board had ample evidence on which to base its determination that Meissner had satisfied both the positive and negative criteria. Granting the variance was neither arbitrary, capricious or unreasonable.

POINT III

ENHANCED PROOF PER MEDICI
(Pa 64, 65)

The Appellant argues that the application failed to establish the enhanced proofs required by Medici. That enhanced proof is the reconciliation of the use variance with the Zoning Ordinance's omission of the use from the list of permitted uses. Appellant further argues that, since the Township has not amended its Zoning Code to address soil processing operations since the applicant's initial application in 2019 but did amend it to allow soil removal operations is evidence that the Township believes the soil mixing is incompatible with the zone scheme.

The Appellant asserts the Board's Resolution does not even mention "enhanced proof." But the use of that phrase is immaterial. The Medici requirement is that the Board consider why the use, if it can satisfy the positive criteria in the Zone, is not listed as a permitted use. The Board specifically addressed that issue in the Resolution stating that it believed soil processing is "somewhat unusual and not anticipated when the Ordinance was prepared." (Paragraph 62, Pa 260)

As to the soil removal/import ordinance adopted in 2019, it is irrelevant to this matter. The applicant's use does not involve changing the

grade of a lot by excavating or filling, which is the activity addressed by that ordinance. The Board specifically noted the inapplicability of that ordinance to the Tri-State operation in Paragraphs 59-60 of the Resolution. (Pa 259)

As to the fact that, despite the prior application, the Ordinance has not been changed, the failure of the Township to make a change does not necessarily mean the Township specifically does not want a soil processing operation. The failure to amend the Ordinance to specifically address soil mixing when the application has been the subject of three Court challenges is equally likely, if not more likely, the result of hesitancy to incite more Court action. The failure to amend could also mean that the Township prefers that such uses seek a variance, so that there is greater authority to impose conditions on any approval. Or, perhaps, the Governing Body feels that the authority of the Board to permit uses of "the same general character" as permitted uses per Section 13-9.1(f) is sufficient to encompass such operations on a case-by-case basis.

POINT IV

SITE SUITABILITY DOES NOT REQUIRE THE SITE TO BE THE ONLY SUITABLE SITE IN THE MUNICIPALITY (Pa 66, 67)

Appellant argues that the site suitability standards were not proved. Actually, as set forth in Point II, the Board's Resolution addresses the same. Apparently, Plaintiff believes that the reasons are inadequate and would have the Court require that the Board find that there is no other site in the Township where the Tri-State operation could be located. That is not the correct legal standard.

The correct standard was explained in *Price v. Himeji*, 214 N.J. 263, 295 (2013):

> Although the availability of alternative locations is relevant to the analysis, demonstrating that a property is particularly suitable for a use does not require proof that there is no other potential location for the use, nor does it demand evidence that the project "must" be built in a particular location. Rather, it is an inquiry into whether the property is particularly suited for the proposed purpose, in the sense that it is especially well-suited for the use, in spite of the fact that the use is not permitted in the zone. Most often, whether a proposal meets that test will depend on the adequacy of the record compiled before the zoning board and the sufficiency of the board's explanation of the reasons on which its decision to grant or deny the application for a use variance is based. *(Emphasis added.)*

In this case, the Board had ample evidence that this site was particularly suited for the soil mixing use proposed. There need not be proof that it is the only site in the Township that could be used.

POINT V

ADMISSABILITY OF THE MCDONOUGH REPORT (Pa 68, 69, 70)

The last point of the Appellant's Brief seeks to exclude the Planning Report of John McDonough. The basis is that Mr. McDonough did not observe the operation of Tri-State before the report was written. Thus, it is argued, the report is an inadmissible net opinion.

First, it must be noted that N.J.R.E. 703 permits expert testimony to be based on facts or data personally "perceived by" the expert or "made known to the expert at or before the proceedings". If the facts or data are of a type reasonably relied upon by experts in the particular field, the facts or data need to be admissible in evidence. Thus, personal observation is not mandatory for the report to be admissible.

Applicant's argument is framed as if the Planning Report was the only planning evidence before the Board. Most importantly, it ignores the testimony of Mr. McDonough. He stated that he had visited the site on five occasions, at least three of which were during the operating season. He was either present at the hearings on the application or spoke with another planner in his office regarding hearings he did not attend. He performed the research one would expect by a Professional Planner, reviewing the zoning ordinance,

the Master Plan, the surrounding properties and the site. These are all steps taken by professional planners every day as a basis to render opinions. Clearly, the report when supplemented by Mr. McDonough's testimony is neither speculation nor conjecture and is sufficiently reliable to be admitted as part of his expert testimony.

Further, the argument ignores that the Board had evidence relevant to the planning issues before it beyond Mr. McDonough's testimony and his report. The application documents, the Exhibits, the testimony of all witnesses, the testimony of Eric Snyder, PP as the expert for the Appellant, comments from the public, and the Board's knowledge of the site, and the Zoning Ordinance all formed the basis for the Board's conclusion.

Plaintiff would seem to have the Court require that a Planner have lengthy observations of the operation, conversations with neighbors, and conduct tests beyond his expertise, such as noise tests. This is not required for admissibility of a report as part of the overall planning evidence submitted to the Board. Such factors may go to weight or credibility of the report, but not admissibility.

CONCLUSION

The record clearly demonstrates that the Board carefully and fully considered all of the testimony and evidence presented. Thereafter, it adopted a lengthy resolution setting forth its findings and conclusions. Those findings and conclusions, while apparently not acceptable to the Plaintiff, have not been shown to be arbitrary, capricious or unreasonable, and the Court should uphold the same.

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By: _____
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Dated: April 23, 2025