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PATRICIA GUTHRIE,	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
Plaintiff/Appellant,	:	
	:	DOCKET NO. A-000627-24
v.	:	
	:	CIVIL ACTION
PEMBERTON TOWNSHIP	:	
PLANNING BOARD and	:	ON APPEAL FROM THE SUPERIOR
PEMBERTON-2, LLC.	:	COURT OF NEW JERSEY, LAW
	:	DIVISION, BURLINGTON COUNTY
Defendants/Respondents.	:	
	:	SAT BELOW: HON. JEANNE T.
	:	COVERT, A.J.S.C.
	:	

PLAINTIFF/APPELLANT PATRICIA GUTHRIE'S BRIEF IN SUPPORT OF APPEAL

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PRELIMINARY STATEMENT

Plaintiff Patricia Guthrie ("Guthrie") appeals from the trial court's October 1, 2024 Order granting defendants Pemberton Township Planning Board's ("Planning Board") and Pemberton-2, LLC's ("Pemberton-2") respective motions for reconsideration and vacating the trial court's July 18, 2024 Order. The trial court's July 18, 2024 Order invalidated certain land use approvals authorizing the development of a sprawling five-building warehouse complex in the middle of an otherwise quiet residential neighborhood. Guthrie resides directly across the street from the site of the proposed project which, if constructed, will irrevocably interfere with her and her neighbors' use and enjoyment of their properties. Quality of life issues aside, several fatal legal infirmities plague the approvals which compel their invalidation, as a matter of law.

Most significantly, Pemberton-2's project proposes to locate a portion of an access drive on a different property than the property on which the warehouses would be situated. Both the Pemberton Township Zoning Ordinance ("Zoning Ordinance") and New Jersey decisional law make clear that the access drive's off-site location creates a second principal use on the already-improved adjacent property. Consequently, a use variance was required which the Planning Board lacked jurisdiction to consider or grant.

After initially ruling in Guthrie's favor, the trial court subsequently determined on reconsideration that Pemberton-2 remedied the off-site access problem by obtaining (after the fact) a proposed right-of-way expansion easement from the adjacent property owner. The trial court reasoned that such a dedication, if accepted by the municipality, would eliminate the need for a use variance and cure the jurisdictional issue because the access drive would then no longer be private property and, therefore, no longer subject to zoning regulation.

The trial court erred in granting reconsideration and vacating its July 18, 2024 Order for two reasons. First, the trial court's decision ignores the Planning Board's express directive for Pemberton-2's improvements to remain private. Not only did the trial court improperly substitute its own judgment for that of the Planning Board's in this regard, but it did so by expanding the record beyond that which the Planning Board considered. Second, and equally as problematic, the trial court's decision fails to reconcile Pemberton-2's lack of standing to include the adjacent property as part of its proposed development plan in the first instance. The submission of an easement for the adjacent property acquired months after the Planning Board's decision did not retroactively cure this jurisdictional deficiency.

For these reasons, as well as the reasons that follow, it is respectfully submitted that the Court should reverse the trial court's decision granting reconsideration and set aside and invalidate all approvals granted by the Planning Board to Pemberton-2, as a matter of law.

PROCEDURAL HISTORY[1]

Guthrie commenced this ligation by filing a Complaint in Lieu of Prerogative Writs on January 8, 2024. (Pa001-Pa009). The Planning Board filed an Answer on February 15, 2024 and Pemberton-2 filed an Answer on February 20, 2024. (Pa010-Pa017; Pa018-Pa024). The Court subsequently conducted a case management conference on March 7, 2024 at which time it established a briefing schedule which was later slightly modified. (Pa025; Pa026). A final hearing occurred on July 18, 2024. (5T). The trial court issued an Order and Opinion later that same day which presented Pemberton-2 with a choice. (Pa027; Pa028-Pa047). Specifically, Pemberton-2 could either accept the invalidation of its approvals or, alternatively, seek a limited remand to the Planning Board to proceed with a plan that eliminated the off-site access

[1] Pursuant to R. 2:6-8, transcripts referenced herein shall be designated as follows:
1T – May 4, 2023 Planning Board Hearing
2T – July 6, 2023 Planning Board Hearing
3T – July 24, 2023 Planning Board Hearing
4T – November 2, 2023 Planning Board Hearing
5T – July 18, 2024 Action in Lieu of Prerogative Writs Merits Hearing
6T – October 1, 2024 Motions for Reconsideration Hearing

drive. Id. Guthrie thereafter filed a motion for reconsideration requesting clarification of the remand procedure as well as of other issues raised in the pleadings which had not been addressed by the trial court's July 18, 2024 Order and Opinion. (Pa048-Pa049). Pemberton-2 and the Planning Board then filed cross-motions for reconsideration based upon, inter alia, a newly-acquired proposed easement from the adjacent property owner which would purport to enable a right-of-way expansion. (Pa050-Pa051; Pa052-Pa053). Following oral argument of the motions on October 1, 2024, the trial court issued an Order and Opinion granting defendants' motions for reconsideration and setting aside its prior July 18, 2024 Order. (Pa054; Pa055-Pa063). This appeal followed. (Pa064-Pa066).

STATEMENT OF FACTS

In or about December 2022, Pemberton-2 submitted an application to the Planning Board seeking preliminary and final site major plan and subdivision approval to construct a five-building warehouse complex on a 23.5 acre tract of land designated as Block 797, Lots 2.01, 2.04, 3.01 and 3.02 on the Pemberton Township Tax Map (collectively, the "Subject Property"). (Pa081-Pa102). Pemberton-2 specifically proposed to subdivide the Subject Property into five separate lots, with each new lot having a warehouse building ranging in size from 20,460 square feet to 34,245 square feet. (Pa102). The development plans also

included other site improvements such as stormwater management basins, internal roadways, drive isles, parking lots and landscaping. (Pa103-Pa126).

A portion of Pemberton-2's proposed access drive to the Subject Property crosses Block 797, Lot 1 ("Lot 1"). (Pa135). Lot 1 was previously developed with a large warehouse. Id. The proposed access to the Subject Property also requires the development of an unnamed paper street perpendicular to Birmingham Road. Id.

The Planning Board conducted a hearing on Pemberton-2's application over the course of four meetings that occurred on May 4, 2023, July 6, 2023, July 24, 2023 and November 2, 2023. (1T; 2T; 3T; 4T). During the hearing Pemberton-2 elicited testimony from several professional consultants including Michael Marinelli, PE, Benjamin J. Horten, AIA and John H. Rea, PTOE. (1T, 10:24 – 60:11; 1T, 104:13 – 112:25; 2T, 13:6 – 21:23). They generally described the proposed project and the expected operations of the warehouse complex once constructed. Id.

In response to the testimony from Pemberton-2's witnesses, the Planning Board raised concerns about truck traffic on Birmingham Road as well as with the functioning and maintenance of the proposed condominiumized stormwater management system. (1T, 41:23 – 42:6; 1T, 54:20 – 55:24; 4T, 21:7-25). The Planning Board also discussed the proposed access to the Subject Property from

Birmingham Road and voted for the portion not already within the public right of way to remain private and not to be dedicated to Pemberton Township. (4T, 107:3 – 108:13).

When the hearing was opened to the public the comments were entirely negative. (2T, 68:9 – 102:17; 4T, 46:11 – 96:17, 108:15 – 151:8). Residents expressed various concerns about truck traffic, inadequate buffering, environmental impact and noise. Id. At the final meeting on November 2, 2023, the Planning Board's chairman ended the public comment prematurely in order to finish the hearing by 10:30 p.m. (4T, 151:5-8).[2] The Planning Board then deliberated and voted 6-1 to approve Pemberton-2's application. (4T, 152:15 – 156:21).

On December 7, 2023, the Planning Board adopted Resolution Number P-20-2023 to memorialize the approvals granted to Pemberton-2. (Pa136-Pa149). Notice of the decision was subsequently published in the Burlington County Times on December 15, 2023. (Pa150).

[2] Although not an issue raised by this appeal, the deprivation of the public's opportunity to ask questions and comment on the application arguably constituted an improper denial of due process. See generally, Deegan v. Perth Amboy Redevelopment Agency, 374 N.J. Super. 80, 90 (App. Div. 2005); Witt v. Borough of Maywood, 328 N.J. Super. 432, 454 (Law Div. 1998).

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' CROSS-MOTIONS FOR RECONSIDERATION BECAUSE THE PLANNING BOARD EXPRESSLY DIRECTED THAT ALL PROPOSED IMPROVEMENTS REMAIN PRIVATELY-OWNED (Pa062-Pa063)

Pemberton-2's site plan proposes an access drive to the Subject Property which partially crosses and occupies Lot 1. Lot 1 is owned by a different entity and is already improved with a large warehouse that fronts to the opposite direction on South Pemberton Road. This proposed off-site access drive configuration necessitates a use variance for which Pemberton-2 never applied, noticed or provided proofs and for which, in any event, the Planning Board lacked jurisdiction to consider or grant. Without more, this infirmity requires the invalidation of the approvals granted to Pemberton-2 by the Planning Board, as a matter of law.

By way of explanation, the Zoning Ordinance's definition for "accessory use" includes the condition that it be located on the same lot of the principal use which it serves. See Pemberton Township Code Section 190-5.B, "Accessory Building, Structure or Use". (Pa152). The proposed partial location of the access drive on Lot 1 clearly does not satisfy this condition in respect of the principal warehouse use proposed for the Subject Property. And, while the underlying zoning permits multiple principal uses on the same property, it does so only when

they occupy same principal building. See Pemberton Township Code Section 190-24.G(1).[3] (Pa172). Plainly, Pemberton-2's proposed access drive on Lot 1 will not be located in the already-existing warehouse on that property.

The Supreme Court examined a situation analogous to the instant case in Nuckel v. Borough of Little Ferry Planning Bd., 208 N.J. 95 (2011), wherein a developer proposed the construction of a driveway on a lot with an existing nonconforming autobody shop. The driveway was intended facilitate access to a proposed hotel located on an adjacent lot. An objector argued that the driveway location triggered the need for a use variance pursuant to N.J.S.A. 40:55D-70.d(1) because it did not constitute an accessory use but rather a second principal use on the lot with autobody shop. The Supreme Court agreed, relying on the zoning ordinance's definition of accessory use which included the condition that it be located on the same lot as the principal use that it is intended to support:

> [T]he Little Ferry Code in this case carries with it a caveat in it definition of an accessory use, i.e., that it is "a use which is customarily incidental and subordinate to the principal use of a lot or a building and which is located on the same lot." Little Ferry Code § 35-103(b) (emphasis added); see 2 Rathkopf's The Law of Planning & Zoning § 33:6 (Edward H.

[3] Lot 1 is also subject to the overlay zoning standards established by the "Block 797 Lot 1 Redevelopment Plan" but those overlay zoning standards do not modify the one principal use per lot restriction established for the GCLI District.

> Ziegler, Jr. 27th ed. 2011) ("Many zoning ordinances expressly limit accessory uses 'to the same lot' as the principal use or structure."). By that language, the Little Ferry Code disposes of General's argument insofar as it precludes the characterization of a driveway on Lot 11 as accessory to the hotel on Lot 8.02.
>
> Id. at 104.

Similarly, in New Jersey Transit Corp. v. Franco, 447 N.J. Super. 361 (App. Div. 2016), the defendant in a condemnation action argued that the subject property, comprised of three parcels in three different municipalities, should be valued based on the potential construction of apartments buildings on two of the lots and a cul-de-sac on the third lot which would provide access to those apartment buildings. Relying on Nuckel, the Appellate Division determined that this configuration would require a use variance for the proposed cul-de-sac lot in light of the fact that the apartment buildings which it would serve would be located on different lots, to wit:

> Like the zoning ordinance in Nuckel, Weehawken's zoning ordinance provides: "*Use, Accessory* shall mean a use which is customarily incidental and subordinate to the principal use of a lot or a building and located on the same lot therewith." *Code* § 23-3.1. Therefore, using the Weehawken lots for a cul-de-sac to serve as the driveway for the high-rise and mid-rise apartment buildings in the adjacent lots would constitute "a new principal use." Nuckel, supra, 208 N.J. at 105. Because that principal use is not permitted in Weehawken's R-3 zone, "a (d)(1) variance [was] required." Ibid; see Cox &

> Koenig, N.J. Zoning & Land Use Admin. § 38-1, at 786-77 (2016).
>
> New Jersey Transit Corp., 447 N.J. Super. at 372-373.

Nuckel and Franco compel the conclusion that the plain language of the Zoning Ordinance's definition of "accessory use" controls in the instant case. Like the zoning ordinances in Nuckel and Franco, the Zoning Ordinance's "accessory use" definition requires an accessory use access drive to be located on the same lot as the principal use that it serves. Manifestly, Pemberton-2's site plan which partially locates the access drive on Lot 1 for the benefit of the principal warehouse use on the Subject Property does not comply with this requirement. A use variance pursuant to N.J.S.A. 40:55D-70.d(1) was therefore required which the Planning Board lacked jurisdiction to even consider, let alone grant. See N.J.S.A. 40:55D-60.

The trial court initially ruled consistent with the foregoing and in Guthrie's favor in its July 18, 2024 Order and Opinion. Pemberton-2 then sought reconsideration based upon, inter alia, a proposed right-of-way expansion easement which it subsequently obtained from the owner of Lot 1. Despite questioning the submission's timing in light of the fact that the easement had been executed more than one month prior to the initial ruling, the trial court determined that it changed the analysis. Specifically, the trial court reasoned that "if accepted by the Township, [the easement] render[s]

moot Plaintiff's contention that the entire paper street in not a public right of way, for now it can be, and is then no longer subject to zoning restrictions." (Pa063). [4]

It is respectfully submitted the trial court erred in granting reconsideration and vacating its July 18, 2024 Order based the later-acquired easement purporting to expand the public right of way. Pemberton-2 made clear during the hearing on its application that this easement was never intended to facilitate a right of way expansion. Rather, it was described by as "an access easement or rather a permanent easement to enhance **our access driveway**." (1T, 5:1-3) [Emphasis supplied]. In other words, Pemberton-2 represented to both the Planning Board and the public that the easement would be private, which is precisely what the Planning Board wanted. Mayor Tompkins specifically remarked in this regard that "I hope that's not going to be a public road, because I don't want to maintain it." (2T, 59:22-23). To effectuate this intent, the Planning Board then affirmatively voted for all property in the proposed access but outside of the existing unimproved right of

[4] In fact, the Pemberton Township Council opted at its December 18, 2024 meeting not to move forward with an ordinance that had been previously introduced to accept the proposed right-of-way dedication. This appeal is not moot, however, because no prohibition exists against the Council reconsidering such an ordinance in the future and the approvals granted by the Planning Board vest Pemberton-2 with protection against intervening zoning changes that would otherwise prohibit its warehouse project for a period of up to five (5) years. See N.J.S.A. 40:55D-52.

way to remain private. (4T, 107:3 – 108:13). It also granted Pemberton-2 the necessary variance providing relief from the Zoning Ordinance's requirement for a property to have street frontage. (Pa140-Pa141).

The trial court's recognition of the purported right of way expansion easement effectively disregards the Planning Board's will. The Planning Board clearly did not want to Pemberton-2's project to expand the right of way or result in any possible additional burden to the municipality. The trial court's decision in this regard runs contrary to the long-settled principle that judicial review should focus on the validity of a board's action as opposed to a substitution of judgment for matters within the board's discretion. See CBS Outdoor, Inc. v. Borough of Lebanon Planning Board, 414 N.J. Super. 563, 578 (App. Div. 2010). In the same vein, the trial court's review should be limited to the record made before the Planning Board and not on a de novo basis with consideration given to extraneous evidence. See Antonelli v. Planning Board of Borough of Waldwick, 79 N.J. Super. 433, 440-441 (App. Div. 1963). The trial court's review on reconsideration failed to abide these long-settled strictures. Accordingly, the trial court's decision should be reversed.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' CROSS-MOTIONS FOR RECONSIDERATION BECAUSE PEMBERTON-2 LACKED STANDING TO BRING AN APPLICATION TO DEVELOP LOT 1 (Pa046; Pa062-Pa063)

It is axiomatic that an applicant for land development approvals must have standing in order to prosecute the application. See Ric-Cic Co., Inc. v. Bassinder, 252 N.J. Super. 334 (App. Div. 1991); Trinity Baptist Church of Hackensack v. Louis Scott Holding Co., 219 N.J. Super. 490 (App. Div. 1987). Standing in this context depends on the applicant's interest in the underlying property. Id. This analysis, in turn, necessarily begins with the definitions of "applicant" and "developer" as established by Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq. ("MLUL").[5]

The MLUL defines an "applicant" as a "developer submitting an application for development." N.J.S.A. 40:55D-3. A "developer" is "the legal or beneficial owner or owners of a lot or any land proposed to be included in a proposed development, including the holder of an option or contract to purchase, or other person having an enforceable proprietary interest in such land." N.J.S.A. 40:55D-4. By operation of these definitions and as a matter of common sense, an application

[5] The Zoning Ordinance includes a definitions section but adopts the definitions from the MLUL for all words and terms which it does not specifically define. See Pemberton Township Code Section 190-5.A. (Pa152). The Zoning Ordinance does not include definitions for the terms "applicant" or "developer".

for development cannot be filed by a party that lacks any interest in the property proposed for development.

In the instant case, Pemberton-2 filed its application without having an interest of any kind (legal or equitable) in Lot 1 where it proposed to construct a portion of its access drive. Pemberton-2's counsel tacitly conceded this point when the Planning Board was exploring the possibility of alternate access routes through Lot 1 and then subsequently underscored it response to the public's repeated pleas to develop a new access through Lot 1 directing traffic away from the residential neighborhood adjacent to the Subject Property, to wit:

> As we discussed access onto County Road 530 would require a number of items that we do not have or have the ability to obtain at this time. In particular there would be requirements for amended site plan approvals both from this board as well as the county board to allow for that additional access to benefit the northern site that we're discussing tonight. Those have not been applied for. **There is a different entity that owns that with different economic interests.** So we are not able to obtain that at this time.
>
> (1T, 93:15 – 94:19) [Emphasis supplied].
>
> *****
>
> I know there's a lot of folks that want to speak. There should be no more discussion of Pemberton I. I hate to be so blunt, but we're – we're spending a lot of time on that project. **This is a completely different application, a different entity with different ownership**. There are different parties involved.

(4T, 118:8-13) [Emphasis supplied].

Notwithstanding Pemberton-2's lack of interest in Lot 1, the Planning Board considered the application and granted all approvals requested. The trial court subsequently addressed this standing deficiency in its July 18, 2024 Order and Opinion which invalidated the approvals or, alternatively, offered Pemberton-2 the possibility of a remand to the Planning Board to pursue a plan that did not include Lot 1. The trial court specifically observed:

> [A]n application for development cannot be filed by a party that lacks any interest in the property proposed for development. The Applicant acknowledges that 200 South Pemberton Road Urban Renewal LLC owns Lot 1 and the Application does not contain consent of owner of 200 South Pemberton Road Urban Renewal LLC. (Citations omitted). Therefore, the Applicant cannot meet the definition of "Developer" under the MLUL, and lacked standing to pursue the Application as to Lot 1.
>
> (Pa046).

For reasons which remain unclear, however, the trial court failed to account for this situation when addressing the reconsideration motions. Put another way, regardless of the subsequently obtained easement, Pemberton-2 never had standing to bring an application involving any aspect of Lot 1 in the first instance. It is respectfully submitted that the trial court's omission in this regard compels reversal of the October 1, 2024 Order, as a matter of law.

CONCLUSION

For all of the foregoing reasons, the Court should reverse the trial court's October 1, 2024 Order and invalidate and set aside Resolution Number P-20-2023 and all approvals granted by the Planning Board to Pemberton-2, as a matter of law.

Respectfully submitted,

BARON & BRENNAN, P.A.

/s/ Jeffrey M. Brennan
JEFFREY M. BRENNAN, ESQUIRE

Dated: January 10, 2025

PATRICIA GUTHRIE

Plaintiff-Appellant,

vs.

PEMBERTON TOWNSHIP PLANNING BOARD and PEMBERTON-2, LLC

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-000627-24

CIVIL ACTION

ON APPEAL FROM:
LAW DIVISION,
BURLINGTON COUNTY
DOCKET NO.: BUR-L-42-24

SAT BELOW:
Hon. Jeanne T. Covert, A.J.S.C.

BRIEF OF DEFENDANT/RESPONDENT, TOWNSHIP OF PEMBERTON PLANNING BOARD

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PRELIMINARY STATEMENT

The decision/resolution of the Township Planning Board, which is the subject of this litigation is set forth at Pa132.

In part, as is set forth at Pa142, the Planning Board required conditions which were mandated to be complied with by the Applicant in order to finalize and preserve the approval. The first condition as set forth at Pa142 is as follows:

> 1. Applicant shall be permitted a Variance with respect to the proposed access off Birmingham Road, to permit the proposed street to remain private; whereas, a public road designation is required, pursuant to the requirements set forth for the GCLI Zone under §190-24 of the Township of Pemberton Zoning Ordinance. In light of the Board's creation and approval of such Variance, Applicant has agreed to maintain the existing public right-of-way and all improvements therein for the Township in perpetuity, as if same were private property, pursuant to a separate written agreement between the Applicant and the Township to be made as a condition of the Board's approval. However, the public right-of-way shall remain in place, as Applicant will not be seeking a vacation of same.

Because of facts and circumstances which have come forth subject to the filing of the Notice of Appeal and Cross-Appeal by the parties, it is clear that this condition will not be met. Therefore, the approval granted by the Applicant is a nullity. In order to meet that condition, the Applicant needed to obtain formal approval from the Township of Pemberton to have the Township accept a proposed easement and to allow for improvements to a Township right-of-way. That proposed Ordinance, Ordinance 46-2024, is attached as Da004. The Ordinance was considered by the

Township Council at a meeting on December 18, 2024. The Ordinance was not adopted and therefore failed.

In as much as the Township has refused to adopt an enabling ordinance accepting the easement proposed by Pemberton-2, LLC, in allowing Pemberton-2, LLC to improve a Township right-of-way, the Applicant cannot gain access to Birmingham Road, which is referenced in the first condition of the Resolution of Approval (Pa142).

In addition, Pemberton-2, LLC, has recently filed a new lawsuit naming both the Township and the Township Planning Board as Defendants. That Complaint is venued in the Superior Court of New Jersey, Law Division, Burlington County, Docket No.: BUR-L-252-25. That litigation, at least in part, contests the denial by the Township to adopt the aforementioned Ordinance upon second reading. The Complaint also requests that the aforementioned condition be removed, by judicial fiat, so that it no longer is an impediment to the Applicant moving forward with the project.

These are new and very important events which drastically affect, and we suggest alter, the status of the litigants and this litigation.

It is without question that the Township will not adopt the aforementioned Ordinance. Therefore, Pemberton-2, LLC cannot meet the condition of approval. Therefore, the Resolution of Approval is a nullity.

As a result, the Applicant must return to either the Township Planning Board or the Township Zoning Board of Adjustment for a new application seeking a new approval which will not require and allow access to Birmingham Road.

PROCEDURAL HISTORY

The Township Planning Board adopted Resolution P-20-2023 on December 7, 2023 (Pa132). Thereafter an Order was entered by the Trial Court, the Honorable Jeanne T. Covert, A.J.S.C., on July 18, 2024 (Pa027). Included with the Order was the Statement of Reasons submitted by the Court on July 18, 2024 (Pa028).

Thereafter a Motion for Reconsideration was filed by each of the attorneys. (Pa048, Pa050, and Pa052).

Thereafter, a Final Order was entered by Judge Covert on October 1, 2024 (Pa054). Judge Covert provided her opinion in support of that Order (Pa055). Therefore, as a result of the Order entered on October 1, 2024, Plaintiff's Complaint was dismissed.

The appeal followed thereafter.

STATEMENT OF FACTS

In order as to not unnecessarily burden This Honorable Court, we will rely upon the Statement of Facts set forth in the Plaintiff/Appellant's Brief in support of its appeal.

In addition, however, attached as Da001 is Ordinance 27-2023 which was adopted on second reading by the Council on June 21, 2023. That Ordinance effectively prohibits tractor trailers and other motor vehicles having a weight grading of Class 5 as established by the Federal Highway Administration to travel on Birmingham Road.

The Appellant Pemberton-2, LLC submitted a proposed Easement Agreement to the Township as a result of the Decision entered by Judge Covert (Pa054). The Appellant Pemberton-2, LLC requested that the Township adopt an Ordinance approving the easement and effectively providing access from the site to Birmingham Road (Da004). That proposed Ordinance No. 46-2024 was considered by the Township Council for second and final reading on December 18, 2024. That Ordinance was not approved and therefore is considered void and is of no force or effect.

Therefore, as a result of the refusal by the Township Council in 2024 to adopt the Ordinance, the condition imposed by the Planning Board as part of the approval process cannot be achieved. Therefore, it is clear that the approval granted by the Planning Board will never be fulfilled or completed.

LEGAL ARGUMENT

POINT I

THE PLANNING BOARD WAS JUSTIFIED AND PERMITTED TO INCLUDE AS A CONDITION OF APPROVAL OBTAINING EASEMENTS OR A RIGHT-OF-WAY AS TO ALLOW FOR THE VEHICLES TO LEAVE THE SITE AND ENTER ONTO BIRMINGHAM ROAD.

It is customary, and appropriate per N.J.S.A. 40:55D-22B "Conditional Approvals," for a Board approval to be conditioned on other approvals by other government entities:

> In the event that development proposed by an application for development requires an approval by a government agency other than the municipal agency, the municipal agency shall, in appropriate instances, condition its approval upon subsequent approval of such governmental agency.

The Board's resolution conditioned the approval on the Applicant obtaining a ROW easement to straighten the Township Road and entering a "separate written agreement between the Applicant and the Township" with regard to the maintenance of the public right-of-way (the Township Road). (Pa142).

The Resolution also required additional roadway improvements on Birmingham Road that were not yet fully designed:

> Applicant has agreed to work with the Township's professionals with respect to road improvements on Birmingham Road in connection with the required widening of same to permit safe and efficient truck access

> as well as to maximize the effectiveness of the crown in Birmingham Road to retain stormwater on the west side of Birmingham Road. (Pa143)

The requirement to obtain the easement from Lot 1 for the public right-of-way is consistent with §190-50.8 (b) of the Township Code. This provision states:

> Improvements to be constructed at the expense of the developer. In cases where the need for an off-tract improvement is reasonably related to and/or created by the proposed development, the applicant may be required, as a condition of approval and at the applicant's sole expense, to acquire and/or improve lands outside the tract and dedicate such lands to the Township of Pemberton.
>
> [Emphasis added.]

The Applicant's agreement to obtain a ROW easement in favor of Pemberton, to straighten the ROW attendant to the Township and then construct the roadway is no different than the Applicant's agreement to construct roadway improvements to widen Birmingham Road and provided stormwater retention along that roadway. This requirement is consistent with the law.

While municipal boards cannot force an applicant to acquire other lands as part of an application, where the applicant agrees, it is appropriate to condition an approval on an applicant making an effort to make adjustments involving the land of others. See Kline v. Bernardsville Ass'n Inc., 267 N.J. Super. 473, 481 (App. Div. 1993). There, the court held that "The Board could compel Bernardsville [the Applicant] to seek an Agreement with the Klines [the neighbor] for relocation of the

easement, or failing that, direct it to commence an action in the courts, [even though] it may not itself compel relocation of an easement to the prejudice of the easement holder." Id. 14 481 (emphasis added). The important distinction here is that the Board does not have the authority to rule on the validity of an easement or to require that a non-party grant an easement, but it can request that an applicant work with a neighbor to establish an easement.

In this matter the Applicant stated on the record at the hearing that it consented to obtaining the ROW easement from the owner of Lot 1, Block 797. In fact, that easement, titled "Deed of Easement for Right-of-Way Access and Construction" granted to Pemberton Township and dated June 10, 2024 has been obtained by the Applicant and presented to the Township, thereby satisfying a condition of the Resolution. (See 2T)[1].

> Sitzler: Assuming, the public portion of this road, the entry is now vacated, you're still willing even if it became private to give...there might be some easement mechanism for you to take care of the maintenance of even the public portion?
>
> Shemesh: Providing the same service that we are doing for the balance of that road?...Certainly, we would be happy to explore that.

In this instance, if the Applicant cannot obtain a ROW easement in favor of the Township to straighten the Township Road, as discussed at the hearing, it either

[1] This references the second public hearing application held on July 6, 2023.

would not have been able to move forward with the project or it would have been required to make an application to the Board, on notice at a public hearing, to remove that condition from the resolution. Just as the MLUL provides that outside approvals may be conditions of Board resolutions, the MLUL contemplates that those conditions may not always be fulfilled and provides for the requirement of notice in such cases where an applicant is made to modify the condition. N.J.S.A. 40:55D-12

It is therefore appropriate and permitted that the Planning Board, as a condition of approval, mandated that the Applicant must obtain a right-of-way and approval from the Township so as to provide an access from the site to Birmingham Road. However, as what will be discussed in Point II, it is abundantly clear that the Township will not adopt an ordinance permitting the "paper street" to be improved in order to gain access to Birmingham Road. As a result, as discussed in Point II herein below, the condition in the Resolution cannot be met, and therefore the Applicant must seek alternate means to address the access issue.

POINT II

THE NEW FACT THAT THE TOWNSHIP WILL NOT ADOPT AN ORDINANCE, AS REQUESTED BY THE APPLICANT, AUTHORIZING AND PERMITTING ACCESS TO BIRMINGHAM ROAD THROUGH THE RIGHT-OF-WAY RENDERS THE RESOLUTION USELESS AND A NULITY.

As was held by Judge Covert in her written Decision:

> A motion for reconsideration should be granted when the Court based its decision upon an incorrect basis, failed to consider significant evidence, or a litigant seeks to bring new or additional information to the Court's attention which it could not have provided earlier, reconsideration is appropriate. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The standard governing Rule 4:49-2 may be relevant when a litigant's motion is based on "new or additional information [brought] to the court's attention which it could not have provided on the first application." Cummings v. Bahr, 295 N.J. Super 374, 384 (App. Div. 1996) citing D'Atria v. D'Atria, 242 N.J. Super 392, 401 (Ch. Div. 1990). (Pa057)
>
> An express easement is created by grant, and "the language of the grant is controlling." N.J.S.A. 25:1-11. The Court notes the easement documents seem to satisfy all aspects of the above and would, if accepted by the Township, render moot Plaintiff's contention that the entire paper street is not a public right-of-way, for now it can be, and is then no longer subject to zoning restrictions. (Pa063)

The new fact and evidence that the Township will not adopt an Ordinance as requested by the Applicant concerning the right-of-way and allowing access onto Birmingham Road is certainly evidential in this litigation. It demonstrates that the

Applicant will never be able to meet the condition set forth in the Board's Resolution.

Therefore, we respectfully believe that the Applicant must return to the Planning Board in order to seek removal of that condition or, in the alternative, obtain approval from either the Planning Board or the Zoning Board of Adjustment for additional relief.

CONCLUSION

For the above sited reasons we respectfully request that This Honorable Court consider the pending litigation to be moot. We respectfully request that This Honorable Court remand the matter to the Township Planning Board or Township Zoning Board of Adjustment for further consideration.

Respectfully Submitted,
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Attorneys for Defendant/Respondent,
Township of Pemberton Planning Board

By: _____
JERRY J. DASTI, ESQUIRE

Dated: April 3, 2025

By: _____
JOSEPH F. MACKOLIN, JR., ESQUIRE

PATRICIA GUTHRIE, Plaintiff/Appellant, v. PEMBERTON TOWNSHIP PLANNING BOARD and PEMBERTON-2, LLC, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-000627-24 Civil Action ON APPEAL FROM: Superior Court Of New Jersey Burlington County: Law Division Docket No. BUR-L-42-24 Sat Below: Hon. Jeanne T. Covert, A.J.S.C.

BRIEF FOR DEFENDANT/RESPONDENT PEMBERTON-2, LLC

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PRELIMINARY STATEMENT

In this appeal from the Trial Court's dismissal of Plaintiff/Appellant Patricia Guthrie's ("Guthrie's") prerogative writ action, Guthrie seeks to overturn the well-reasoned decision of Defendant/Respondent Pemberton Township Planning Board (the "Planning Board") to grant preliminary and final site plan approval to developer and co-Defendant/Respondent Pemberton-2, LLC ("Pemberton-2"). Guthrie mischaracterizes legal precedents and fundamentally misunderstands public rights-of-way. This case presents a straightforward example of the Planning Board properly exercising its authority to approve a fully conforming development application. Contrary to Guthrie's misguided claims, Pemberton-2's application required no use variance and complied with all relevant zoning ordinances.

The court below correctly upheld the Planning Board's resolution, memorializing its approval of Pemberton-2's application ("Resolution"), after it fully considered all relevant evidence, including the recorded easement that converted an access drive located on a separate lot into a public right-of-way. Though the "as of right" application that Pemberton-2 originally submitted fully conformed with all applicable ordinances, the Planning Board requested a minor reconfiguration of the access drive for public safety reasons, to which Pemberton-2 agreed. Pemberton-2 also agreed to assume maintenance responsibilities of the access drive to alleviate municipal burdens while preserving the road's public

character.

Guthrie relies on two cases—*Nuckel* and *Franco*—to suggest that the Planning Board lacked jurisdiction to even consider, let alone grant, Pemberton-2's application because a use variance was required. But Guthrie's reliance upon those cases is misguided. Those cases involved different circumstances where applicants sought to use private property for access to circumvent zoning requirements. Here, all properties involved are in the same zone, and the access is via a dedicated public right-of-way. Accordingly, there was no requirement for Pemberton-2 to secure a use variance to incorporate the public right-of-way as part of the Resolution.

Guthrie's argument that Pemebrton-2 lacks standing because it does not own the lot subject to the easement fails also. The trial court rightly rejected Guthrie's standing argument, as the overlapping ownership interests in the adjoining lot and proper public notice of the application render that argument legally moot and factually baseless.

Lastly, the Planning Board's belated attempt to undermine its own Resolution through unsupported claims about Pemberton Township (the "Township"), a nonparty that made no appearance in this action, should be rejected as speculative and procedurally improper. Furthermore, the Planning Board's claim that Ordinance 27-2023 restricts tractor-trailers on limited portions of Birmingham Road is meritless.

This Court should affirm the trial court's decision because the Planning Board's Resolution represents a proper exercise of its authority to approve a fully conforming "as of right" application. This Court should not substitute its judgment for that of the Planning Board when the record demonstrates the Planning Board's decision was neither arbitrary, capricious, nor unreasonable.

For all of these reasons, the Court should affirm the judgment below.

COUNTERSTATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY[1]

Pemberton-2 is the owner and/or contract purchaser of properties located at Block 797, Lots 2.01, 2.04, 3.01, and 3.02, consisting of approximately 23.5 acres in Pemberton, New Jersey (the "Subject Property"). (Pa95).[2] On December 5, 2022, Pemberton-2 filed an application for preliminary and final major site plan approval for the Subject Property to create five newly subdivided parcels, each developed with a one-story building for "light-industrial and office use." (Pa98).

The Subject Property is located in Pemberton's GCLI District, which permits "wholesale distribution facilities and warehouses" and "light industrial uses" on parcels not exceeding five acres. *Twp. Of Pemberton Code* §190-24(A). (Pa165).

[1] The procedural history and the facts in this case are so intertwined that the two sections are combined into one for ease of reading.
[2] References to "Pa" are to the Plaintiff's Appendix.
References to "Da" are to the Planning Board's Appendix.
References to "Developer-a___" are to Pemberton-2's Appendix.

Pemberton-2's "as of right" application was designed to be fully conforming, requiring no zoning variances in its original submission. (Pa83, 98).

In January 2023, the Planning Board's engineer reviewed Peberton-2's application and deemed it complete. (Developer-a001). Thereafter, the Planning Board conducted four substantive hearings on Pemberton-2's application between May and November 2023. (1T; 2T; 3T; 4T). Throughout these hearings, Pemberton-2 made numerous concessions to address concerns raised by the Board and the public. The most significant issue concerned the access drive to the development. At the request of the Planning Board's planner, Pemberton-2 agreed to straighten the access road to meet Birmingham Road at a perpendicular angle, which required a small portion (0.086 acres) of the adjacent property, Block 797, Lot 1 ("Lot 1"), to be dedicated as an easement. (2T, 27:3-29:20). Thereafter, a new public notice was issued that included Lot 1 for purposes of the access drive. (Pa32). Thus, the public was duly notified that access via Lot 1 would be discussed in connection with the application. During the November 2, 2023 hearing, the Planning Board determined via a straw poll that the access drive would remain public, with Pemberton-2 agreeing to maintain it. (4T, 106:20-108:14). Guthrie attended the hearing and had sufficient opportunity to thoroughly comment on the proposed application. (4T, 71:9-80:11). After considering public comment, the Planning Board voted to approve Pemberton-2's application, concluding the application was "as of right" and

complied with the Township's ordinances. (4T, 106:20-108:14).

The Township adopted Ordinance 27-2023 in June 2023, after Pemberton-2's application had been submitted, deemed complete, and hearings were already underway. (Da003). The Planning Board considered the impact of the new ordinance during the hearings and concluded that it did not conflict with Pemberton-2's application. (Pa136, 138, 143). By its terms, Ordinance 27-2023 restricts class 5 or heavier motor vehicles along two precisely defined road segments: (a) the portion of Brandywine Road between CR-630/North Pemberton Road and Birmingham Road, and (b) the section of Birmingham Road between CR-630/North Pemberton Road and Brandywine Road. (Da001). These restricted areas are about 1,000 feet north of the Subject Property where Pemberton-2's warehouses would be situated. The significant distance between the restricted road segments and the Subject Property renders Ordinance 27-2023 inapplicable to Pemberton-2's development. Furthermore, Pemberton-2 proactively addressed any potential concerns by agreeing to install "no left turn" signage at the Birmingham Road exit driveway, ensuring it would comply with the ordinance by preventing trucks from traveling toward the restricted road sections. (Pa136, 138, 143).

On December 7, 2023, the Planning Board adopted the Resolution, granting Preliminary and Final Major Site Plan and Subdivision Approval for the development. (Pa132). The Resolution included multiple conditions to which

Pemberton-2 had agreed during the hearings. (Pa142-144).

In good faith and reliance on the Planning Board's representations, the owner of Lot 1 granted the Township a perpetual easement for 0.086 acres on Lot 1 to facilitate the right-of-way access. This easement was executed on June 10, 2024, and subsequently recorded. (Da007-012). The Subject Property and Lot 1 share a common principal owner: Daniel Dadoun. (Da42).

On January 8, 2024, Guthrie, a local resident and objector, filed a Complaint in lieu of prerogative writs (Docket No. BUR-L-42-24) seeking to set aside the Resolution, naming Pemberton-2 and the Planning Board as defendants. (Pa001). Pemberton-2 and the Planning Board both filed Answers and defended the resolution in the Trial Court. (Pa10, 18). After a final hearing on July 18, 2024, the Court initially vacated the Resolution, finding it arbitrary and capricious, but offered a limited remand option to cure perceived defects in its adoption. (Pa027; 047). However, on motions for reconsideration filed by all parties—and based in part on the Lot 1 easement granting the Township a perpetual easement for the access drive—the Court, on October 1, 2024, vacated its prior determination, denied Guthrie's requested relief on reconsideration, granted the relief sought by Pemberton-2 and the Planning Board on their reconsideration motions, and dismissed the case with prejudice. (Pa054). This appeal followed. (Pa64).

After Guthrie filed her merits brief and appendix, the Planning Board filed a

motion to remand in this Court, which Pemberton-2 opposed. On March 13, 2025, this Court denied the motion to remand. (Developer-a005). On April 3, 2025, Planning Board filed its merits brief and appendix.

STANDARD OF REVIEW

Under *Rule* 2:10-2, the Court frequently declines to consider issues that were not raised below or not properly presented on appeal when the opportunity for presentation was available. Generally, unless an issue (even a constitutional issue) goes to the jurisdiction of the Trial Court or concerns matters of substantial public interest, the Appellate Court will ordinarily not consider it. *J.K. v. N.J. State Parole Bd.*, 247 N.J. 120, 138 n.6 (2021); *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234 (1973); *See also State v. Cabbell*, 207 N.J. 311, 327 n.10 (2011) ("Court declined to consider an argument first raised in a supplemental brief to the Court on appeal").

Rule 2:10-2 provides that "[a]ny error or omission shall be disregarded by the Appellate Court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the Appellate Court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court."

An Appellate Court's review of rulings of law and issues regarding the applicability, validity (including constitutionality) or interpretation of laws, statutes, or rules is de novo. *See In re Ridgefield Park Bd. of Educ.*, 244 N.J. 1, 17 (2020).

The Court's review of a planning board's decision is highly deferential; there

is a general presumption that "boards of adjustment and municipal governing bodies will act fairly and with proper motives and for valid reasons," and will be set aside only when it is arbitrary, capricious and unreasonable. *Price v. Himeji, LLC*, 214 N.J. 263, 284 (2013); *Kramer v. Bd. of Adjustment*, 45 N.J. 268, 296 (1965). The reviewing court may not substitute its own independent judgment for that of the agency, and review is limited to "whether the board could reasonably have reached its decision." *Davis Enters. v. Karpf*, 105 N.J. 476, 485 (1987); *Cummins v. Bd. of Adjustment*, 39 N.J. Super. 452, 460 (App. Div. 1956).

On appeal from a planning board's decision, the trial court is limited to determining whether the decision to deny or grant a given application was arbitrary, capricious or unreasonable. *Fallone Props., L.L.C. v. Bethlehem Twp. Planning Bd.*, 369 N.J. Super. 552, 560 (App. Div. 2004). "The factual determinations of the planning board are presumed to be valid and the exercise of its discretionary authority based on such determinations will not be overturned unless arbitrary, capricious or unreasonable." *Burbridge v. Twp. of Mine Hill*, 117 N.J. 376, 385 (1990). Planning board decisions are also entitled to a presumption of good faith, meaning that it acted fairly, with proper motives, and for valid reasons. *Fallone Props., L.L.C.*, 369 N.J. Super. at 560.

LEGAL ARGUMENT

I. THE PLANNING BOARD'S RESOLUTION REQUIRED NO USE VARIANCE.

The Trial Court correctly determined on reconsideration that no use variance was required for the access drive to the Subject Property. The lower court's decision upholding the Resolution should be affirmed, contrary to Guthrie's claims, because the access drive at issue is a public right-of-way, not an accessory use or a second principal use requiring variance relief, or a private use subject to zoning restrictions.

A. Because Pemberton-2 Agreed to Improve a Public Right-of-Way, No Use Variance Was Required.

Public rights-of-way are not subject to zoning restrictions that apply to private uses. As the Planning Board correctly argued below, a public access paper street owned by a municipality is not an accessory use, but a public right-of-way not subject to variance requirements. (Pa58; 5T 12:5 to 16:6).

The Resolution acknowledged this, stating, "Applicant has agreed to maintain the public right of way and all improvements within the right of way in perpetuity, as if it were private property." (Pa132). This agreement between Pemberton-2 and the Planning Board established clear maintenance responsibilities without changing the fundamental legal status of the access road. Pemberton-2's agreement to maintain the access road, at the request of the Planning Board, does not negate the fact that the road is a public right-of-way. Rather, it represents a practical allocation of maintenance duties, favoring the Township and public, that ensures proper upkeep of a public road without requiring additional public resources.

In its original decision (prior to granting reconsideration), the trial court erroneously concluded that, because the Planning Board's approval included allowing Pemberton-2 to extend the paper street through an adjoining lot (*i.e.*, Lot 1), a use variance was required, which the Planning Board lacked jurisdiction to grant. According to the lower court's original reasoning, this extension of the paper street through Lot 1 was an "accessory use" because Pemberton's Township Code defines accessory use as one "which is customarily associated with and is subordinated in area, extent and purpose and incidental to the principal . . . use . . . and which is located on the same lot therewith," such that the access drive does not satisfy the conditions in the Code. *Pemberton Code* § 190-5.B.

Before revising its decision on reconsideration, the trial court's decision was predicated on a faulty premise, which Guthrie now echoes on appeal: that the access through the subject property was a private driveway. It was not. As the Planning Board and Pemberton-2 both argued below, and as the record makes clear, the drive access through the subject property and the portion of Lot 1 to Birmingham Road is a public right-of-way and is to remain a public right-of-way. The law does not require a use variance to allow a municipality, or a developer, pursuant to a developer's agreement with the municipality, to improve a public road.

Notably, Guthrie identifies no case law to establish that a public right-of-way is an accessory use. Instead, treatises and other supporting authorities provide strong

support for the proposition that a public right-of-way *should not* be considered an accessory use. Consider first that public rights-of-way are not defined as accessory uses under Pemberton's code. See Pemberton Code § 190-5. As our cases have acknowledged, an accessory use is one that "is clearly incidental and is customarily found in connection with and located on the same zoning lot as the principal use to which it is related." *Mountain Hill, LLC v. Zoning Bd. of Adjustment of Tp. Of Middletown*, 403 N.J. Super. 210, 243 (App. Div. 2008). "The term 'accessory use' often refers to nonconforming uses that bear some relationship to the permitted use." *Id.* In addition, "[c]ertain activities, though taking place on land, do not rise to the status of a 'use.'" *N.J. Zoning & Land Use Administration – Cox & Koenig* at p. 120. Cox also makes clear that "[e]very variance, therefore, must to some limited extent at least presumptively create some detriment to the public interest as defined by the ordinance." *Id.* at 413.

The New Jersey Practice Series on Local Government also supports this conclusion. It provides that a "determination of whether something is an accessory use involves a mixture of law and fact, taking into consideration 'societal norms, expectation and common sense." § 22:11, *Accessory Uses, 35 N.J. Prac., Local Government Law* (4th ed.) (quoting *Stochel v. Planning Bd. of Edison Tp.*, 348 N.J. Super. 636, 644-45 (Law Div. 2000) (instructing that the nature of accessory use are such that the Court should weigh common sense and the reality of modern living

which may outweigh zoning language in an ordinance). Taken together, these defining characteristics make clear that a public right-of-way is not an accessory use.

Critically, that the owner of Lot 1 voluntarily granted the right-of-way easement and thereby satisfied a condition of the Resolution does not change the municipality's ownership of the street. If, for example, the municipality had elected to employ condemnation or eminent domain to acquire the land needed to straighten the street and improve the access intersection, there would certainly be no question that the municipality had the right to do so. Nor would there be any doubt that the municipality could act in that circumstance without pursuing a zoning variance, regardless of the uses on Lot 1 or any surrounding lots, or the underlying zoning of the property. This is because a public street is neither an accessory use nor a principal use to any private property.

In this case, the Planning Board simply worked with Pemberton-2 on an agreement to improve a Township Road as contemplated by the MLUL. *See N.J.S.A.* 40:55D-35 (discussing street access to structures); *see also Highway Holding Co. v. Yara Engineering Corp.*, 22 N.J. 119, 134 (App. Div. 1956) (holding that a purchaser of a lot acquires a right of access to his lot, whether it has been retained as private or kept as public). This Court should reject Guthrie's suggestion to the contrary and affirm the trial court's reconsideration decision.

B. The *Nuckel* And *Franco* Cases Relied Upon By Guthrie Are Inapplicable.

The *Nuckel* and *Franco* cases that Guthrie relies upon are inapplicable because they involve fundamentally different factual and legal contexts. In *Nuckel v. Borough of Little Ferry Planning Board,* 208 N.J. 95 (2011), the Supreme Court addressed a hotel developer's proposal to construct a private driveway across the property of an undersized lot with a pre-existing non-conforming automobile shop. *Id*. at 98. The Court determined that because a driveway was not considered an accessory use under the Little Ferry Code, it must be a new principal use on an already undersized lot. *Id*. at 97. The driveway across the lot with the automobile repair shop would therefore require a use variance to permit expansion of a nonconforming use. *Id*. at 102. The case involved a private driveway that would intensify a non-conforming use in a residential zone, with the residential and commercial properties located in different zones, and the driveway intended exclusively for private hotel use. *Id*. at 106.

The present case, however, is markedly different from *Nuckel*. Both the Subject Property and Lot 1 are located in the same GCLI zone, not different zones with conflicting use designations. Neither property has a pre-existing non-conforming use that would be intensified. The access drive is a public right-of-way, not a private driveway for exclusive use by a single private entity. Most significantly, the Lot 1 easement was granted to the Township, not to Pemberton-2, thus transforming the property into public land.

N.J. Transit Corp. v. Franco, 447 N.J. Super. 361 (App. Div. 2016) is also readily distinguishable from the present case. In *Franco*, the Court found that using a cul-de-sac as a private driveway for apartment buildings on other lots situated in different zones constituted a new principal use, not an accessory use. *Id*. at 367. In *Franco,* the applicant attempted to dedicate the cul-de-sac to Weehawken Township as a public street to avoid zoning review. *Id*. at 375. The Court correctly held that an individual "cannot, at his pleasure, create public highways for his own benefit, upon his own land, and impose upon the public the burden of maintaining them." *Id*.

However, in this case, the access road is an improvement to an existing public right-of-way, not a new creation designed to circumvent zoning requirements. Pemberton-2 has agreed to bear the maintenance burden without imposing it on the public. Both the Subject Property and Lot 1 are in the same GCLI zone, not different zones with conflicting use restrictions. Perhaps most importantly, the Planning Board itself requested the straightening of the access road; this was not an attempt by the developer to avoid zoning requirements. Indeed, Pemberton-2's originally proposed access configuration was permissible as of right. In short, unlike *Franco* and *Nuckel*, there is no need for a use variance in this case.

This Court's recent decision in *KBS Mt. Prospect LLC v. Lakewood Twp. Planning Bd*., 2024 N.J. Super. Unpub. LEXIS 1154, at 2 (App. Div. June 12, 2024), persuasively distinguishes *Nuckel* and *Franco*, and further supports Pemberton-2's

argument. (Developer-a010). In *KBS*, the applicant sought access easements over two lots to permit entry for an adjacent lot. *Id*. at 3. Relying extensively on *Nuckel,* the objecting party insisted that the applicant should have requested a use variance for approval of the access easements since they constituted a second principal use. *Id*. at 11-13. The Appellate Division rejected this argument, concluding that KBS's reliance on *Nuckel* was misplaced because the access easements did not change the "lots' use in and of itself." *Id*. at 13. Moreover, this Court explained that, "an option for future access to the adjoining lot does not constitute a second principal use on [the servient lots]." *Id*.

If, as *KBS* confirms, the creation of a private access easement over private land does not constitute a second principal use requiring variance relief, then certainly the creation of an access easement for public use to connect to a public right-of-way cannot require variance relief either. The *KBS* decision reinforces the distinction between *Nuckel* and the present case, highlighting why no use variance is required here. Accordingly, Guthrie's claim that Pemberton-2 required a use variance under *Nuckel* and *Franco* must be rejected.

II. THE TRIAL COURT CORRECTLY DISMISSED THE COMPLAINT IN LIGHT OF THE PROPOSED EASEMENT.

On June 10, 2024, the owner of Lot 1 executed a Deed of Easement granting the Township a "perpetual easement for right of way access and construction purposes" for the 0.086-acre portion of Lot 1 needed to reconfigure the access road

as requested by the Planning Board. (Da007-012).

In light of this new fact, on reconsideration, the Trial Court correctly recognized that this easement "would, if accepted by the Township, render moot Plaintiff's contention that the entire paper street is not a public right of way, for now it can be, and is then no longer subject to zoning restrictions." (Pa63). This straightforward observation led the lower court to dismantle the foundation of Guthrie's case.

Guthrie mischaracterizes the record when asserting that "the trial court's recognition of the purported right of way expansion easement effectively disregards the Planning Board's will," and that the Planning Board "clearly did not want" Pemberton-2's project "to expand the right of way or result in any possible additional burden to the municipality." (Pb12). This argument fails for three critical reasons.

First, the Planning Board's intent regarding the proposed use for the access road is unambiguously documented in the record below and undercuts Guthrie's assertions. The Planning Board acknowledged that the portion of Lot 1 at issue was essential for providing vehicular access to Birmingham Road. The Planning Board specifically found that "Lot 1 is included in this application solely for the purpose of providing an appropriate means of ingress and egress to the proposed developments on the remaining Lots of the Property" (Pa133). This language demonstrates the Planning Board's recognition of the necessity of the portion of Lot

1 for the access road.

Second, while Guthrie correctly notes the Planning Board's reluctance to impose maintenance responsibilities on the municipality (Pb11), that concern is undermined by what the Planning Board actually did. To alleviate this concern, the Planning Board structured its approval to shift maintenance obligations for the public right-of-way to Pemberton-2, which obligations Pemberton-2 agreed to and accepted. Municipalities may condition approvals on such arrangements to serve the public interest while managing fiscal constraints. *Divan Builders v. Planning Bd. of Wayne*, 66 N.J. 582, 595 (1975); *see also Hills Troy Neighborhood Ass'n, Inc. v. Tp. of Parsippany Troy-Hills*, 392 N.J. Super. 593, 607 (Law Div. 2005) (holding that "if the use is by the municipality engaged in government business for public purposes, and it is a reasonable exercise of its authority, its exemption from zoning regulation may extend to those who join in advancing that public purpose). The Planning Board's solution in this case represents a lawful exercise of its statutory authority.

Finally, Guthrie's attack on the trial court's consideration of the Lot 1 easement misses the mark entirely: the Court didn't validate a questionable document by recognizing the easement – it simply acknowledged an existing legal reality. The easement was dedicated to the Township as part of fulfilling the Resolution's conditions for approval *as the Township requested*. It couldn't possibly

have been in the "record made before the Planning Board" (Pb12) because it came into existence afterward, as a direct response to the Planning Board's request, and as memorialized in its Resolution.

Thus, the trial court didn't override the Planning Board's judgment, but honored and effectuated the Planning Board's Resolution by recognizing the good faith steps Pemberton-2 took to meet the Planning Board's conditions. Guthrie's argument is not just unpersuasive; it ignores the basic timeline of events and the practical realities of how development approvals are implemented. By evaluating Pemberton-2's compliance with the Planning Board's conditions, the trial court properly exercised its limited role of judicial review. The trial court did not improperly substitute its will for the Planning Board's judgment, as Guthrie erroneously claims.

III. THE TRIAL COURT CORRECTLY REJECTED GUTHRIE'S STANDING ARGUMENT.

Guthrie argues that Pemebrton-2 never had standing to include any aspect of Lot 1 in its application. (Pb14-15). It lodged the same protest below, in substantially the same form. Notably, after hearing the arguments advanced by Pemberton-2 and the Planning Board on reconsideration, the trial court swiftly rejected this argument. Under Guthrie's theory, Pemberton-2's application was void *ab initio* because it lacked a legal or equitable interest in Lot 1, where it proposed to construct a portion of its access drive. (Pb14). The trial court offered three reasons why this argument

was unsound.

First, the trial court chastised Guthrie for her failure to cite any authority to support its assertion that Pembrton-2 is required to demonstrate legal or equitable interest in the public right-of-way that it plans to develop for its access drive. Aside from her reliance on blackletter cases on basic standing principles, Guthrie offers no additional case law for her argument in this Court.

Second, the trial court correctly recognized that development of the paper street had been part of Pemberton-2's as of right application from inception; only the exact route for the access drive was modified to incorporate a tiny corner of Lot 1 *at the Planning Board's request*. Insofar as the application was ultimately amended to reference Lot 1, and the public was duly on notice of that change, there is no viable reason for Guthrie to challenge the Pemberton-2's standing to proceed before the Planning Board. Moreover, the Lot 1 owner, duly on notice of the application, did not object to the Planning Board's actions, and, in fact, consented as evidenced by the fact that the Lot 1 owner granted the perpetual easement to the Township after the Resolution was adopted.

Finally, the trial court rightly concluded that extending Guthrie's reasoning to its logical conclusion would lead to absurd results. *See Strasenburgh v. Straubmuller*, 146 N.J. 527, 541 (1996) ("It is a venerable principle that a law will not be interpreted to produce absurd results."). Under Guthrie's theory, no developer

could advance a plan including a paper street or public right-of-way, and no board would have the ability to condition its approval on modifications to adjoining lands, paper streets, or public rights-of-way. This interpretation would neuter a municipality's ability to condition approvals under the Municipal Land Use Law. *See, e.g., N.J.S.A.* 40:55D-22.b (governing conditional approvals). Indeed, Section 190-50.8(b) of the Pemberton Township Code specifically contemplates conditioning municipal approvals on a developer completing certain off-tract improvements reasonably related to and/or created by a proposed development at the developer's expense. This is precisely what the Planning Board did when it adopted the Resolution, and exactly what Pemberton-2 facilitated by pursuing (and obtaining) the easement from Lot 1, and agreeing to maintain the paper street and access drive in perpetuity. *See, e.g., Kline v. Bernardsville Ass'n Inc.*, 267 N.J. Super. 473, 481 (App. Div. 1993) (planning board may condition approval on an applicant granting right of way to another property owner or seek agreement with another owner for relocation of an easement, but cannot itself order such a change to the detriment of the servient owner's rights). Put simply, though the Planning Board lacks the authority to require a non-party to grant an easement, it can certainly request that an applicant work with a neighbor to establish an easement, which is precisely what occurred here.

Pemberton-2's application included Lot 1 for the purposes of providing an

appropriate means of ingress and egress *at the request of the Planning Board*. The Planning Board had every right to condition its approval on Pemberton-2 facilitating the easement discussed above. The public was duly notified that access via a sliver of Lot 1 would be discussed in connection with the application. Thus, the trial court correctly rejected Guthrie's standing theory, and this Court should do so as well.

IV. PEMBERTON-2 SATISFIED THE CONDITION OF APPROVAL BY GRANTING AN EASEMENT TO THE TOWNSHIP.

As a condition to approve the Resolution, the Planning Board required Pemberton-2 to agree "to maintain the existing public right-of-way and all improvements therein for the Township in perpetuity, as if same were private property." (Pa142). The Planning Board correctly argued below in support of its motion for reconsideration, that a fundamental principal of land use law in New Jersey is that "a public access paper street owned by a municipality is not an accessory use, but a public right of way, and that the portion of Lot 1 which was needed to straighten out the public street for ingress and egress was required by the approving resolution to be dedicated to the municipality, not…[Pemberton-2], and that no variance was required to accept the dedication of a right of way easement for public roadway improvements." (Pa58-59).

More to the point, the Planning Board acknowledged on reconsideration below that Pemberton-2 satisfied the Resolution's condition concerning the easement and the access drive:

> In this matter the Applicant stated on the record at the hearing that it consented to obtaining the ROW easement from the owner of Lot 1, Block 797. ***In fact that easement, titled "Deed of Easement for Right-Of-Way Access and Construction" granted to Pemberton Township and dated June 10, 2024 has been obtained by the Applicant and presented to the Township, thereby satisfying a condition of the Resolution.***

(Developer-a008). Despite this clear language, in a strange turn of events, the Planning Board, having granted approval, adopted a resolution memorializing that approval, and having successfully defended its resolution against Guthrie's challenge in the trial court, now insists that Pemberton-2 must return to the Planning Board or the Zoning Board of Adjustment since Pemberton-2 cannot meet the condition relating to the access street. (Db10). The about-face in the Planning Board's brief substantially mirrors and recycles the same arguments raised in its motion to remand, which this Court already considered and rejected.

The Planning Board repeatedly claims that Pemberton-2 can no longer satisfy the Resolution's condition regarding the access road to the Subject Property. (Db3, 4, 8). But this position is not supported by evidence in the record, just speculation. Tellingly, the Planning Board does not cite to a single page in the record for support. It cites no minutes of any Township meeting, no resolution of denial, nor any transcript that purports to support the audacious claims in its brief. Nor does the Planning Board offer a certification from the Township or anyone purporting to act on the Township's behalf to support these claims. Instead, the Planning Board offers

nothing more than its attorney's own conjecture, which cannot constitute evidence as a matter of law, would be inadmissible under any circumstance, and cannot possibly support a reversal of the Trial Court's decision. By way of example, the Planning Board asserts that "it is abundantly clear that the Township will not adopt an ordinance permitting the "paper street" to be improved in order to gain access to Birmingham Road," which dedicates a 0.086-acre access road to the Township. (Db5). There is exactly zero record support for this and many of the Planning Board's other assertions.

By contrast, the record confirms that Pemberton-2 has fully complied with its obligations under the Resolution by facilitating execution of the Lot 1 perpetual easement providing right-of-way access, precisely as the Planning Board requested. Therefore, the Planning Board has failed to provide any concrete or admissible evidence substantiating its assertion that Pemberton-2 cannot comply with the Resolution's conditions—a critical deficiency that renders any request for remand to either the Planning Board or Zoning Board of Adjustment unwarranted. Accordingly, this Court should, for a second time, reject the Planning Board's remand request.

V. THE PLANNING BOARD'S USE OF ORDINANCE 27-2023 TO ATTACK ITS OWN RESOLUTION IS FUTILE.

After unsuccessfully advancing the same argument in its earlier remand motion, the Planning Board tried to sneak Ordinance 27-2023 into its statement of

facts. After alleging that Ordinance 27-2023 "effectively prohibits tractor trailers and other motor vehicles having a weight grading of Class 5 as established by the Federal Highway Administration to travel on Birmingham Road" (Db1-2), the Planning Board conspicuously omitted any discussion of the Ordinance in its legal argument. That omission speaks volumes. The Planning Board never raised its veiled arguments about the propriety of the Township Council's decision to adopt certain traffic ordinances below. *See Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234 (1973) ("appellate courts will decline to consider questions or issues not properly presented to the trial court").

More importantly, though, the Planning Board's position rests on an egregious misreading of the ordinance language. Ordinance 27-2023 does not conflict with Pemberton-2's development plan or the Planning Board's Resolution. Ordinance 27-2023 prohibits vehicles with a gross vehicle weight rating of Class 5 or higher "from operating on Brandywine Road from the intersection of CR-630/North Pemberton Road to the intersection of Birmingham Road," and "from operating on Birmingham Road from the intersection of CR-630/North Pemberton Road to the intersection of Brandywine Road." (Da001). These prohibitions apply only to specific, limited portions of these roadways—namely, the sections that connect with *North* Pemberton Road.

As clearly illustrated on the map in Pemberton-2's appendix, Pemberton-2's

development is situated proximate to *South* Pemberton Road, about 1,000 feet away from the road segments regulated by Ordinance 27-2023. (Developer-a006). Furthermore, Pemberton-2 proactively addressed potential traffic concerns by agreeing to post "no left turn" signage at the exit driveway to Birmingham Road. This requirement, memorialized in the Resolution, ensures that trucks exiting the development cannot travel toward the restricted portions of Birmingham Road. (Pa136, 138, 143). Put simply, the Planning Board completely misreads Ordinance 27-2023's legal and factual significance. There is no conflict between the Ordinance and Pemberton-2's development. This Court should disregard the Planning Board's improper attempt to manufacture one.

CONCLUSION

For the foregoing reasons, the Court should affirm the Trial Court's reconsideration decision, and uphold the validity of the Planning Board's Resolution.

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May 12, 2025

Honorable Judges of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
25 West Market Street
Trenton, New Jersey 08625

Re: Patricia Guthrie v. Pemberton Tp. Pl. Bd.
Docket No. A-000627-24
Civil Action: On Appeal from a Final Judgment of the Superior Court of New Jersey, Law Division, Burlington County
Sat Below: Hon. Jeanne T. Covert, A.J.S.C.

To the Honorable Judges of the Appellate Division:

This firm represents plaintiff/appellant Patricia Guthrie ("Guthrie") in the above-referenced matter. Pursuant to R. 2:6-2(b), please accept this letter brief in lieu of a more formal brief in reply to the opposition brief submitted by defendant/respondent Pemberton-2, LLC (Pemberton-2) as well as the brief submitted by defendant/respondent Pemberton Township Planning Board ("Planning Board").

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PROCEDURAL HISTORY

Guthrie incorporates the Procedural History set forth in her previously filed Brief in Support of Appeal as if the same were fully set forth at length herein.

STATEMENT OF FACTS

Guthrie incorporates the Statement of Facts set forth in her previously filed Brief in Support of Appeal as if the same were fully set forth at length herein. By way of supplement thereto, Gutherie adopts the Statement of Facts set forth in the Planning Board's Brief.

LEGAL ARGUMENT

I. STANDARD OF REVIEW (Pa034-Pa035)

Appellate review of a trial court's decision in an action in lieu of prerogative writs involves application of the same standard of review applied by the trial court to the challenged municipal decision. CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd./Bd. of Adjustment, 414 N.J. Super. 563, 577 (App. Div. 2010) (citing D. Lobi Enters. v. Planning/Zoning Bd. of Borough of Sea Bright, 408 N.J. Super. 345, 360 (App. Div. 2009); N.Y. SMSA, L.P. v. Bd. of Adjustment of Twp. of Weehawken, 370 N.J. Super. 319, 331 (App. Div. 2004)). Factual determinations are presumed valid and will not be overturned unless demonstrated to be arbitrary, capricious and unreasonable. Price v. Himeji, LLC, 214 N.J. 263, 284 (2013) (citing Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965)). Although somewhat harsh-sounding, land use commentators have observed that this standard is "simply a finding of error" and analogous to the substantial evidence standard. Cox & Koenig, New Jersey Zoning and Land Use Administration, § 42.2-1 at p.

619 (Gann 2025) (citing Anastasio v. Planning Bd. of Tp. of West Orange, 209 N.J. Super. 499, 522 (App.Div.), certif. den., 107 N.J. 46 (1986); Cell South of New Jersey, Inc. v. Zoning Bd. of Adj. of West Windsor Tp., 172 N.J. 75, 89 (2002) (citing Rowatti v. Gonchar, 101 N.J. 46, 50-51 (1985). In this regard, courts have deemed it "essential that the board's actions be grounded in evidence in the record." Fallone Properties, LLC v. Bethlehem Tp. Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004).

Determinations of law, however, are afforded entirely different treatment. See Dunbar Homes, Inc. v. Zoning Bd. of Adj. of Tp. of Franklin, 233 N.J. 546, 559 (2018). Such matters, including those involving the interpretation of ordinances and statutes, are reviewed de novo. Bubis v. Kassin, 184 N.J. 612, 627 (2005); Toll Bros., Inc. v. Tp. of West Windsor, 173 N.J. 502, 549 (2002) (citing Balsamides v. Protameen Chem., Inc., 160 N.J. 352, 372 (1999). With a de novo review, neither the municipal land use board's nor trial court's legal determinations are entitled to deference. Piscitelli v. City of Garfield Zoning Bd. of Adj., 237 N.J. 333, 350 (2019) (citing Dunbar, supra, 233 N.J. at 559; Reich v. Borough of Fort Lee Zoning Bd. of Adjustment, 414 N.J. Super. 483, 499 (App. Div. 2010); Chicalese v. Monroe Tp. Planning Bd., 334 N.J. Super. 413, 419 (Law Div. 2000)).

The instant case involves two discrete legal issues to which the de novo standard of review applies. The first such issue concerns the significance of

Pemberton-2's obtainment of an easement from an unrelated party for a proposed right-of-way dedication that was unwanted by the Planning Board and that was later rejected by Pemberton Township's governing body. The second pertains to Pemberton-2's lack of legal or equitable interest in certain property which it included in its application for development to the Planning Board. It is respectfully submitted that the trial court erred in its analysis of both legal issues, thus warranting the reversal of the trial court's decision, as a matter of law.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' CROSS-MOTIONS FOR RECONSIDERATION BECAUSE THE PLANNING BOARD EXPRESSLY DIRECTED THAT ALL PROPOSED IMPROVEMENTS REMAIN PRIVATELY-OWNED (Pa062-Pa063)

Pemberton-2 confuses and conflates Guthrie's argument regarding the proposed access driveway depicted on its plans across Lot 1 with the paper street immediately adjacent to the Subject Property. (DP2b9-12). Contrary to what Pemberton-2 would have the court believe, Gutherie has never suggested that the improvement of the latter requires a use variance. That of course does not hold for an off-site access drive situated on private property, which unquestionably necessitates relief pursuant to N.J.S.A. 40:55D-70.d(1) as confirmed by settled New Jersey decisional law. See Nuckel v. Borough of Little Ferry Planning Bd., 208 N.J. 95 (2011); New Jersey Transit Corp. v. Franco, 447 N.J. Super. 361 (App. Div. 2016).

The unpublished decision cited and relied upon by Pemberton-2 in its brief does not compel a different result. (DP2b14-15) (Developer-a010 – Developer-a014). In KBS Mt. Prospect, LLC v. Lakewood Tp. Pl. Bd., 2024 N.J. Super. Unpub. LEXIS 1154 (App. Div. June 12, 2024), the access easement in question inured to the benefit of an undeveloped lot. The Appellate Division reasoned that a use variance was not necessary because the undeveloped lot "may never be approved, thus there is no additional use." Id. at *13.

The situation in KBS clearly does not exist in the instant case. Pemberton-2 proposes to construct a warehouse complex on the Subject Property which would adjoin the massive warehouse already existing on Lot 1 where the access drive is also proposed to be located. Put another way, unlike KBS, the properties already have or will have improvements. The access drive therefore constitutes a second principal use on Lot 1.

Moreover, Pemberton-2's attempt to characterize the access drive on Lot 1 as a public improvement compels rejection. No part of Lot 1 has ever been part of the public domain. And, the Planning Board made clear that it did not want a public improvement. (Pa137); (2T, 59:22-23; 4T, 107:3 – 108:13). Pemberton-2 nevertheless attempted to dedicate the access drive despite the Planning Board's express direction, but Pemberton Township's governing

body wholly rejected that effort. (Da004-Da013). Accordingly, the trial court's decision should be reversed.

III. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' CROSS-MOTIONS FOR RECONSIDERATION BECAUSE PEMBERTON-2 LACKED STANDING TO BRING AN APPLICATION TO DEVELOP LOT 1 (Pa046; Pa062-Pa063)

Pemberton-2 filed its application for development with the Planning Board without having either a legal or equitable in Lot 1 where it proposed to construct a portion of its access drive. Although Pemberton-2 contends that no authority exists which requires it to possess any interest in that property, the Municipal Land Use Law's definitions of the terms "applicant" and "developer," read in pari materia, undermine such an argument. See N.J.S.A. 40:55D-3, -4. Significantly, renown New Jersey land use commentator Professor William M. Cox once opined on the subject and concluded that even certain types of lesser interests would not suffice to establish the requisite standing needed to prosecute an application for development:

> The terms "applicant" and "developer" are defined in N.J.S. 40:55D-3 and 40:55D-4. An applicant is a developer submitting an application for development, while a developer is the legal or beneficial owner of any land to be included in a proposed development and this includes the holder of an option or contract to purchase or other person having an enforceable proprietary interest in such land. While the applicant for variances or site plan or subdivision approvals is usually either the fee owner or contract purchaser, it was held in Ric-Cic Co. v. Bassinder, 252 N.J. Super. 334 (App. Div. 1991) that a

> commercial tenant holding a 99 year lease has standing to apply for variances and site plan approval. See also Aronowitz v. Planning Bd., 257 N.J. Super. 347, 360-368 (Law Div. 1992). On the other hand, it seems clear that the holder of a mere license which is not an interest in land would not have standing to file an application since a license, while it may confer authority to go upon the land of another and do an act or series of acts there, does not give rise to an estate in land. See Township of Sandyston v. Angerman, 134 N.J. Super. 448, 451 (App. Div. 1975) distinguishing between a lease and a license. Cox & Koenig, New Jersey Zoning and Land Use Administration, § 18-2 at p. 249 (Gann 2025).

Professor Cox's commentary reinforces the basic principle that prosecuting an application for development necessitates that the developer has some type of interest in the property. In the instant case, Pemberton-2 had no interest in Lot 1 of any variety. Accordingly, the trial court's decision should be reversed, as a matter of law.

CONCLUSION

For all the foregoing reasons, as well as the reasons set forth in Guthrie's initial brief in support of appeal, it is respectfully submitted that the Court should reverse the trial court's decision granting reconsideration and set aside and invalidate all approvals granted by the Planning Board to Pemberton-2, as a matter of law.

Respectfully submitted,

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/s/ Jeffrey M. Brennan
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