SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO.: A-810-24

DEERFIELD HOLDINGS, LLC AND YESHIVA CHEMDAS HATORAH,	:
	: Civil Action
Plaintiffs	:
v.	: ON APPEAL FROM THE
LAKEWOOD TOWNSHIP PLANNING BOARD AND LAKEWOOD TOWNSHIP COMMITTEE,	: FINAL ORDER ENTERED : BY THE SUPERIOR : COURT OF NEW JERSEY, : OCEAN COUNTY
Defendants.	:
	: DOCKET NO.: OCN-L- : 329-24
	: SAT BELOW: : HONORABLE FRANCIS R. : HODGSON JR., J.S.C.

BRIEF ON BEHALF OF DEFENDANT/APPELLANT LAKEWOOD TOWNSHIP PLANNING BOARD

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Dated: February 10, 2025

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PROCEDURAL HISTORY/STATEMENT OF FACTS[1]

In this appeal, defendant/appellant Lakewood Township Planning Board (hereinafter "the Board") seeks the reversal of the lower court's determination to reverse the Board's denial of jurisdiction of the application of the plaintiff/respondent, Deerfield Holdings, LLC and Yeshiva Chemdas Hatorah (hereinafter "the applicant") and a finding that the Planning Board's decision to deny jurisdiction be upheld.

On March 6, 2018, the applicant applied to the Board for preliminary and final major subdivision approval with variance and waiver relief for property known as Block 251.03, Lots 20, 20.01, 20.02, 20.03 & 31. (Da81) The application proposed the construction of a Planned Educational Campus consisting of dormitories, townhomes, a gymnasium, a yeshiva, and associated site improvements and parking. (Da81) On April 3, 2018, the Planning Board Administrator sent correspondence to the applicant deeming the Campus Application incomplete and requesting specific checklist items to be produced. (Da98) On April 19, 2018, the Planning Board Administrator authored a second correspondence to the applicant which advised that the revised plans that were produced by the applicant satisfactorily addressed the comments in

[1] The procedural history and facts of this matter are closely intertwined and are thus presented as a single narrative.

her administrative review letter of April 3, 2018, and that the application had been scheduled for a Plan Review Meeting on June 5, 2018. (Da102)

On July 12, 2018, Lakewood Township Ordinance 2018-35 was revised to add "Section J" which allowed the conversion of an approved Educational Campus into R-7.5 zoning. (Da64) The availability of this "conversion" awarded a potential developer with substantially more housing than would otherwise be allowed. The underlying zoning would otherwise be R-40. The core consequence in this case is that the Board believed that R-7.5 zoning at this location would be a profound overdevelopment in this area of town. The relevant provision is as follows:

> Section J. In all Residential Zoning Districts, any tract for which a complete application for a Planned Educational Campus has been filed with the Lakewood Planning Board, in compliance with Section 18-902 H 1 (g), **re-approval** for development of that tract shall be conditionally permitted in accordance with the provisions of the R-7.5 (Residential) Land Use District. Such **re-approval** shall be subject to all of the following conditions:
>
> > i. Submission and **approval** of a complete development application to the Lakewood Planning Board based on the provisions of the R-7.5 (Residential) Land Use District, Section 18-902G.
> >
> > ii. A complete application for a Planned Educational Campus in accordance with Section 18-902 H. 1. g. must have been

> submitted prior to the adoption of this ordinance.
>
> iii. No development of any portion of the Planned Educational Campus may have been commenced at or before the time of adoption of this ordinance. If any development of the Planned Educational Campus was commenced at or before the time of adoption of this ordinance, the re-approval provisions of this Section shall be prohibited.
>
> (Emphasis added).

Lakewood's custom and procedure calls for an informal plan review meeting with the Board's professionals and the applicant's representatives prior to the public hearing moving forward. This process, which applies to every application, is designed to make certain that applications that go before the Board are ready for public hearing.[2]

Plaintiff/respondent's application for a Planned Educational Campus did progress to the stage of a Plan Review meeting on September 4, 2018. A Plan Review Meeting memorandum inclusive of notes generated from the plan review was authored on September 4, 2018. (Da494) The applicant never provided the submission items requested at said plan review meeting, nor did

[2] The Court may take notice that Lakewood is among the fastest growing communities in the country and that the Lakewood Planning Board has as heavy a caseload as any board in the state. The preliminary informal plan review process is integral to enabling the Board to meet the statutory deadlines imposed by the Municipal Land Use Law ("MLUL") for adjudicating applications for development.

the applicant produce the updated sets of revised site plans per the Board Engineer's checklist requirements, nor did the application progress to a public hearing, nor was it ever granted approval by the Lakewood Township Planning Board.[3]

The plaintiff/respondent's failure to provide the requested items resulted in the matter not being listed for a hearing. After the plan review meeting and for almost two years afterward, the applicant made no request for a hearing, made no inquiry of status, and took no action to move the matter forward.[4]

On March 5, 2020, five-hundred and forty-nine (549) days after Board Secretary Morris advised the applicant at the Plan Review Meeting that additional items were required for the matter to move forward, Ms. Morris authored and sent correspondence advising the applicant of the Board's process, which is to purge any unresolved applications. (Da480) Since it had been determined that the plaintiff's project has been on hold per the plaintiff's own inaction since September 4, 2018, and had not yet been approved or denied by the Board, the correspondence further instructed that the application

[3] Plaintiff/respondent has failed to provide any record or evidence of the requested submission nor is there any evidence of the same before the court, which is the only means of establishing the negative or absence of a submission.

[4] The court is requested to take notice that land use hearings require that multiple sets of updated plans and all exhibits be produced and collated so that full sized plans may be distributed by the board secretary to the board members and board professionals for preparation in advance of the hearing and at the hearing itself. In this case, the applicant ignored requests for those fundamental items.

would be purged within the following two months. (Da480) The plaintiff/respondent's then attorney, Adam Pfeffer, responded via correspondence dated March 12, 2020, acknowledging receipt of the Administrator's correspondence and also acknowledging that the applicant was addressing the Board Engineer's review comments and requested submission documents which would be "provid[ed] . . . in the near future." (Da481)

The Board never received any of the afore-mentioned further submission documents and the application was removed from the active docket of the Board. In November of 2021, the applicant submitted an application for Preliminary and Final Major Subdivision to subdivide the property into 126 lots for the development of duplexes with basement apartments (504 dwelling units), one-single family dwelling, 2 HOA parking lots, 2 buffer lots, and one lot that would later be developed with a house of worship. (Da104) (Da495) The applicant claimed that this application was a new iteration of the prior Planned Educational Campus application. This application had no resemblance to the original application which called for five-hundred and twenty-eight (528) dormitories, a three-story yeshiva building, a gymnasium, and six (6) townhouse buildings. (Da81, Da104) The applicant claimed that the revised plan was authorized under Section J of the revised ordinance 2018-35 which allowed the conversion of approved plans for a Planned Educational

Campus to high density multifamily development. (Da104) The 126 duplex lots plus permitted basement apartments would result in 504 dwellings in total. As a result of the remand at the law division level,[5] the applicant now has pending before the Lakewood Planning Board a proposal calling for 506 dwellings, which they claim they are entitled to as a matter of right.

The public hearing for the new residential application began on December 6, 2022. The applicant's attorney, Adam Pfeffer, Esq., stated that the applicant was seeking preliminary and final major subdivision approval, and that the applicant was proposing 126 duplex structures on zero lot line properties, one single family dwelling, two HOA parking lots, and one future lot for a house of worship. (Da311, pg. 4-5). Mr. Pfeffer admitted that a prior application had been submitted for the same exact property, but the applicant never came before the Board for a hearing on that application. (Da311, pg. 23). Mr. Flannery presented before the Board on behalf of the applicant to provide planning testimony. An objecting attorney, Mr. Jan Meyer, Esq., objected to the application on several different grounds revolving around the interpretation of

[5] Judge Hodgson certified the adjudication on jurisdiction as a final order. See order of Judge Hodgson (Da6). This allowed the plaintiff/respondent to move forward with their conversion application. As of the date of this brief, that application is pending under case number SD#2511. In that case, the applicant claims that they have submitted a fully conforming "by-right application" for 506 units under the R-7.5 zoning. This is profoundly more than what would otherwise be permitted under the R-40 zoning, which would apply if it were not for this conversion ordinance. It is this dramatic increase in density and intensity that is motivating the Board's appeal because the Board does not believe that this type of density is appropriate for this area.

revised ordinance 2018-35. Board members expressed concern over the differences in density between a dormitory and housing which would result in much more vehicular traffic in the area. (Da352) The Board Chairman expressed concerns on the record as to what he felt was murkiness in the ordinance and questioned whether the Board could even hear the matter. (Da311, pg. 46). The Board attorney provided legal counsel and stated that the Board must listen to the arguments, and vote "yes" or "no" on the threshold question(s). (Da311, pg. 48) It was evident that, in addition to the concerns over density requirements, the Board had concerns as to what constituted a "complete" application. (Da311, pg. 49) Board members made it clear that they wanted to hear testimony from Rabbi Pruzansky as to why the application for the Planned Educational Campus did not move forward. (Da311, pg. 52) This was significant to the Board, because it was concerned over whether the Planned Educational Campus which the applicant was seeking to convert to 126 duplexes with basement apartments was ever a genuine application, or whether it was submitted solely for the purpose of an orchestrated effort to obtain R-7.5 zoning.

At the December 6, 2022 hearing, Mr. John Doyle Esq. substituted in for Adam Pfeffer, Esq. and appeared on behalf of the applicant and Mr. Jan Meyer, Esq. appeared on behalf of an objector. Mr. Jackson, board attorney, counseled

the Board to consider a threshold issue that pertains to jurisdiction: which is, what the term "re-approval" means. A Board member reasoned that the word "re-approval" seems to imply that an approval occurred. (Da383, pg. 14) Mr. Flannery again provided planning testimony regarding the history of the application. (Da383, pg. 17) The Board questioned whether the application was deemed "complete" and the meaning of the word "re-approval." Ultimately, the Board agreed that the question came down to: does the condition of re-approval require the underlying application to have been approved? (Da383, pg. 33) The issue of accreditation was raised, and whether the applicant ever achieved accreditation for an institution of higher learning. (Da383, pg. 41) Rabbi Pruzansky never presented to provide testimony on behalf of the applicant regarding accreditation and the legitimacy of the underlying original application for a Planned Educational Campus, despite the board members' request for the same.

After considering the arguments of counsel, testimony from the Board Professionals, and counsel from the Board attorney, the Board ultimately interpreted the ordinance and opined that it did not have the jurisdiction to hear the application for reasons including that there was never an approval for the Planned Educational Campus and because the applicant never in fact met

the criteria for approval as a Planned Educational Campus as it never obtained accreditation as an institute of higher learning from the State of New Jersey.

The Board formally denied the application via a Resolution of Approval memorialized on December 19, 2023. (Da160)

On February 5, 2024, the plaintiff/respondent filed a Verified Complaint In Lieu of Prerogative Writs in the Superior Court, Law Division. (Da41) Plaintiff/respondent thereafter filed an Amended Complaint, on February 5, 2024. (Da247) Kevin B. Riordan, Esq., Attorney for Defendant, Lakewood Township Committee, filed a Notice of Filing of Notice of Removal to the United States District Court for the District of New Jersey on February 23, 2024. (Da1) Ultimately, the attorneys of record executed a Consent Order wherein it was agreed that Count V of Plaintiff's Complaint containing claims under 42 U.S.C. Section 1983 were dismissed without prejudice and the case was remanded back to the New Jersey Superior Court, Ocean County Vicinage. (Da2) Counsel for Defendant, Lakewood Township Committee filed a motion to dismiss the complaint on April 12, 2024, and on July 1, 2024, the Court dismissed Plaintiffs' Amended Complaint as to Defendant, Lakewood Township Committee, and Count IV of Plaintiffs' Amended Complaint as to Defendant, Lakewood Township Planning Board. (Da4) On August 30, 2024, Plaintiff/respondent filed a motion for summary judgment seeking the Court to

deem Plaintiffs' Campus Application "complete"; a ruling that Lakewood Township Ordinance 18-900(J) requires only a complete Planned Educational Campus application for an application to be filed for a residential development consistent with the Township's R-7.5 standards; a ruling that Plaintiffs' Residential Application be deemed complete; a ruling that the Board's determination to decline jurisdiction over the Residential Application be deemed arbitrary, capricious and unreasonable, and to reverse the same; that the Residential Application filed before Defendant be deemed automatically approved; and ordering Defendant to execute a Certificate of Default recognizing plaintiff/respondents' entitlement to an automatic approval. (Da280) The Board opposed the motion via an opposition filed on September 27, 2024. The Court heard oral argument on the motion on October 8, 2024 and ultimately granted the motion for summary judgment in part, finding that Plaintiff's Campus Application was deemed complete; that the ordinance requires only a complete Planned Educational Campus application for an application to be filed for a residential development consistent with the Township's R-7.5 standards; and that the Board's determination to decline jurisdiction over Plaintiff's Residential Application was arbitrary, capricious and unreasonable, and reversed said determination. (Da6) The Court issued a written opinion regarding its decision on October 9, 2024. (Da8). Upon the

notation of a clerical error by plaintiff's counsel, the Court issued an amended opinion on October 16, 2024. (Da21) On October 23, 2024, Defendant Board made a motion for amended order, for the purpose of amending the court order to specifically state that the Court did not retain jurisdiction over the matter as the current order did not clarify this issue. The Court granted the motion via order dated October 30, 2024. (Da35) Thereafter, plaintiff's counsel filed a general correspondence objecting to the motion, arguing that it was in the interest of the Court and both parties for the Court to retain jurisdiction. The Court thereafter vacated the order, heard oral argument on the matter, and ultimately granted an amended order on November 22, 2024, in which it clarified that the Court did not retain jurisdiction of the matter. (Da39).

This appellant filed an appeal in this matter on November 18, 2024. (Da487)

LEGAL ARGUMENT

1. **STANDARD OF REVIEW** (Not raised below)

A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference. Thus, an appellate court's review of a trial judge's interpretations of law and the

applications of law to facts is de novo. Klug v. Bridgewater Tp. Planning Bd., 407 N.J. Super. 1 (App. Div. 2009).

2. THE COURT ERRED IN GRANTING RELIEF BECAUSE A MOTION FOR SUMMARY JUDGMENT WAS NOT THE APPROPRIATE FORUM TO RESOLVE THE ISSUES PRESENTED (Final Order at Da6, Opinion at Da25-Da31)

The summary judgment relief granted by the court was inappropriate because the underlying matter was an action in lieu of prerogative writ and the issues lodged by plaintiff in the summary judgment motion were all issues that had to have been raised in the overall review of the record, i.e., trial *de novo*. In Willoughby v. Planning Bd. Of Tp. Of Deptford, the matter before the court involved an appeal of an order granting the defendant landowner's motion for summary judgment and dismissing the plaintiffs' complaint. In this case, the Board's approval of a site plan application constituted a quasi-judicial decision by a municipal administrative agency, which is subject to review in the Law Division through an action in lieu of prerogative writ. Willoughby v. Planning Bd. Of Tp. Of Deptford, 306 N.J. Super. 266, 273. The court established that, "Because our court rules and established practice contemplate the previously described procedures for the early disposition of prerogative writ actions which challenge quasi-judicial decisions of local agencies, summary judgment is generally inappropriate in such cases. Willoughby, 306 N.J. Super. At 274; citing Odabash v. Mayor of Dumont, 65 N.J. 115, 121 (1974).

In Willoughby, the court noted that there are some exceptions to this general rule. One, "if a defendant asserts that a prerogative writ action was filed beyond the time allowed by R. 4:69-6, this defense, which ordinarily can be ruled upon without reviewing the entire administrative record, may be raised by a motion for summary judgment." Id. At 275. Two, "where a prerogative writ action challenges governmental action which is not based on an administrative record developed in a quasi-judicial hearing or seeks performance of a ministerial duty, the usual procedures for the disposition of civil actions, including summary judgment practice, may be employed." Id.

Given the procedures governing prerogative writ actions, the court in Willoughby determined that it was appropriate for the trial court to address the portion of the defendant's motion seeking dismissal due to the untimeliness of the plaintiff's challenge to the validity of the ordinance rezoning the defendant's property. Id. However, the court also ruled that the trial court should have denied the part of the defendant's motion that sought summary judgment regarding the counts of the plaintiff's complaint challenging the grant of site plan approval. Id. The court held that the motion for summary judgment must be reversed because a review of the entire record from the Planning Board proceedings is necessary to determine whether the Planning Board's findings are properly supported by the evidence and whether

opponents of the defendant's application were given a fair opportunity to present their case and be heard. Id. at 276.

Similarly, the case here that was before the law division court involved a motion for summary judgment for a prerogative writ action challenging a quasi-judicial decision of a local agency. The exceptions referenced above do not apply in this case. The summary judgment motion should have been dismissed for several compelling reasons, as follows.

First, prerogative writ actions are distinct from typical civil actions in that they seek judicial review of administrative decisions rather than straightforward claims for damages or relief. In such cases, like the one before the court, the court's role is not to evaluate the merits of the claims through summary judgment but to ensure that the administrative decision was made within the bounds of legal authority and procedural fairness.

Second, the case of Willoughby emphasized that when dealing with quasi-judicial decisions of municipal agencies, summary judgment is not appropriate. This is because the review involves complex issues related to the adequacy of evidence and the fairness of the process, which are not well-suited for resolution via summary judgment.

Third, a thorough review of the full record from the local agency's proceedings is essential to determine whether the agency's decision is adequately supported by the evidence and whether all parties had a fair opportunity to present their case. Summary judgment, which involves a determination based on the existing record without a full trial, is inherently unsuitable for this context. The court needs to examine the entire record to ensure that the agency's findings are justified, and that procedural fairness was maintained, which cannot be fully accomplished through a summary judgment process.

The plaintiff/respondent was requesting, without the benefit of the court's review of the entire record, the extraordinary remedy of a default approval of a site plan that would allow 126 duplex units with basement apartments for a total of 506 distinct dwellings. Such a remedy would not only deprive the Board of an opportunity to scrutinize the functionality and conformity of the development, but it would also deprive the public of its right to participate. Plaintiff/respondent was in effect seeking to circumvent not only Board review, but the court's ability to review the entirety of the record in making its decision. The Rules of Court have a distinct structure governing actions in lieu of prerogative writs which require that the court review the

entirety of the record, and that did not happen in this case because the court granted the motion for summary judgment.

This appellant points out, as a related and further issue, that granting the motion for summary judgment would effectively silence key stakeholders, including public objectors such as the James Ridgeway Homeowners Association, L.L.C. that was represented by counsel at the planning board hearings. These concerned parties have a vested interest in the outcome and a legal right to voice their objections. By denying them the opportunity to present their concerns, the integrity of the public approval process is undermined, eroding the very principles of transparency and community involvement that ensure developments align with the needs and interests of the wider community. Despite their involvement in earlier proceedings, such as the September 6, 2022, planning board meeting where Jan Meyer, Esq. represented the James Ridgeway Homeowners Association, LLC, a case management order was never provided, and the objector was never formally added as a party because the matter was concluded via summary judgment motion prior to a case management conference occurring.

3. THE COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT BECAUSE PLAINTIFF/RESPONDENT DID NOT SATISFY THE REQUIRED STANDARD FOR SUMMARY JUDGMENT BECAUSE THERE WERE MATERIAL FACTS AT ISSUE

REGARDING WHETHER THE PLAINTIFF'S CAMPUS APPLICATION WAS EVER DEEMED COMPLETE (Final Order at Da6, Opinion at Da25-Da31)

A court may grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). "To decide whether a genuine issue of material fact exists, the trial court must 'draw all legitimate inferences from the facts in favor of the non-moving party.'" Friedman v. Martinez, 242 N.J. 450, 472 (2020).

The court then considers "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "The court's function is not to 'weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Rios v. Meda Parm., Inc., 247 N.J. 1, 13 (2021) (quoting Brill, 142 N.J. at 540).

When "the evidence is so one-sided that one party must prevail as a matter of law," then summary judgment is proper. Brill, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)). Because

there are genuine issues of material fact and the evidence is 'so one-sided that one party must prevail," summary judgment should be denied.

A. THERE WAS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER PLAINTIFF/RESPONDENT FILED A "COMPLETE" APPLICATION FOR A PLANNED EDUCATIONAL CAMPUS PURSUANT TO SECTION 18-900(J)

Plaintiffs' claim that they submitted a "complete" application for a Planned Educational Campus prior to the ordinance was changed is erroneous. The plaintiffs incorrectly interpreted the ordinance by assuming that Lakewood's definition of a "completed application" merely requires the submission of a Planned Educational Campus application to the Board. Under Section 18-200 of the Lakewood Unified Development code, a "completed application" is defined as follows: "Where required, all application fees, all escrow deposits shall be paid in full, and all checklist requirements shall have been complied with, unless waived by the reviewing Board, in order for an application to be deemed complete."

The application was never considered complete because the Planning Board issued a memorandum indicating that essential documents, additional information, and a revised site plan set were required from the plaintiffs after the plan review meeting took place and prior to the public hearing being scheduled. (Da494) This appellant urges the Court to take notice that

Lakewood is among the fastest growing communities in the country and that the Lakewood Planning Board has as heavy a caseload as any board in the state. The preliminary informal plan review process is integral to enabling the Board to meet the statutory deadlines imposed by the Municipal Land Use Law ("MLUL") for adjudicating applications for development. The plaintiffs did not provide the requested materials, which prevented their application from advancing to a public hearing. Therefore, since the plaintiffs did not meet the completeness requirement outlined in Section 18-200, their application was never considered a "completed" application.

According to Section 18-200, an application is considered "complete" only when all checklist requirements are met. Since the plaintiff did not provide the necessary documents and information requested in the Board Engineer's checklist requirements, they did not fulfill the criteria for a completed application.

Further, pursuant to Section 18-60(B) of the Unified Development Ordinance:

> The Planning Board Secretary shall preliminarily determine whether the Planning Board or Zoning Board of Adjustment has approval jurisdiction on the application. The Board Secretary may confer with the Zoning Officer and/or appropriate Board Attorney or Township Attorney in making this determination . . These determinations and classifications by

> the Secretary are **subject to review and final decision by the respective Boards.**
>
> (Emphasis added)

Thus, the Board itself has the responsibility to make a final decision as to any determinations that the Board Secretary/Administrator makes regarding applications. Here, the Secretary/Administrator made her "preliminary determination" that the Board had jurisdiction. The Board never had an opportunity to make a "review and final determination" during the first iteration of the project since it never advanced past the plan review stage, but it did properly make a "review and final decision" of the secretary's determination during the alleged second iteration of the application during the public hearing in 2021 wherein they declined jurisdiction over the application.

i. AUTOMATIC APPROVAL IS NOT APPROPRIATE

According to N.J.S.A. 40:55D-10.3, an application for development is considered complete for the purpose of initiating the review process once it is certified as complete by the municipal agency, its authorized committee, or a designated representative. If the application is not certified within 45 days of submission, it is automatically deemed complete after this period, unless the application is missing required information listed on an adopted checklist, and

the applicant has been notified in writing of these deficiencies within the 45-day timeframe.

N.J.S.A 40:55D-10.3 provides as follows:

> An application for development shall be complete for purposes of commencing the applicable time period for action by a municipal agency, when so certified by the municipal agency or its authorized committee or designee. In the event that the agency, committee or designee does not certify the application to be complete within 45 days of the date of its submission, the application shall be deemed complete upon the expiration of the 45-day period for purposes of commencing the applicable time period, unless:
>
> a. the application lacks information indicated on a checklist adopted by ordinance and provided to the applicant; and
>
> b. the municipal agency or its authorized committee or designee has notified the applicant, in writing, of the deficiencies in the application within 45 days of submission of the application.

Plaintiff/respondent's application was not deemed complete as a matter of law because automatic approval is clearly inappropriate in this case. In Eastampton Center, LLC v. Planning Board of the Township of Eastampton, the Planning Board defendants appealed an entry of summary judgment awarding automatic approval to the plaintiff's General Development Plan. However, in evaluating the appropriateness of automatic approval, the court reaffirmed that there "is a long-held principle of our law that automatic approval statutes are to

be 'applied with caution.'" Eastampton Center, LLC v. Planning Bd. of Tp. of Eastampton, 354 N.J. Super. 171, 193; citing King v. N.J. Racing Comm'n, 103 N.J. 412, 422 (App. Div. 1985). This principle underscores that automatic approval is not a matter of right but must be carefully scrutinized, especially in cases where the municipality's failure to act does not reflect bad faith or intentional obstruction. The courts have consistently rejected automatic approval in development actions, particularly "where the municipal board's failure to act within the statutory deadline is technical or inadvertent, and where there is no evidence of intentional delay or inattention to the application." Id. "[A]pplication of the statutory time constraints must be anchored in the reason for their existence. The evil which the automatic approval provisions were designed to remedy was municipal inaction and inattention." Id.; citing Allied Realty v. Borough of Upper Saddle River, 221 N.J. Super. 407, 418 (App. Div. 1987). Eastampton makes clear that New Jersey courts have been reluctant to uphold an automatic approval, "absent a clear showing of purposeful delay." Id.

In Eastampton, the court emphasizes several precedents illustrating that an unintentional failure by the board does not justify automatic approval. Courts have excused delays in cases where the board was operating under a reasonable misunderstanding of the law or when a decision was flawed due to an inadvertent, technical violation, such as a meeting held in violation of the Open

Public Meetings Act. Manalapan Holding Co. v. Planning Bd. of the Tp. of Hamilton, 92 N.J. 466, 482 (1983); Allied Realty, 221 N.J. Super. at 418-19; Precision Indus. Design Co. v. Beckwith, 185 N.J. Super. 9, 18 (App. Div. 1982). Similarly, inaction has been excused when it resulted from an unintentional error, like misplacing the development application, or when the applicant appeared to consent to an extension of the decision-making period. D'Anna v. Planning Bd. of Washington Tp., 256 N.J. Super. 78, 83 (App. Div. 1992); Star Enterprise v. Wilder, 268 N.J. Super. 371, 374 (App.Div.1993).

In the case at hand, the plaintiff submitted its Campus Application on March 6, 2018. On April 3, 2018, the Board Administrator issued a written notice indicating that the application was incomplete and requested additional materials, including electronic copies of the application and four additional copies of the site and architectural plans. After the plaintiff complied with this request, the Board Administrator promptly informed the plaintiffs that the revised plans adequately addressed the issues raised in the initial administrative review. At the law division level, the plaintiff contended that, at this point, their application was deemed "complete". The plaintiff alternatively argued that under N.J.S.A. 40:55D-10.3, their Campus Application should be considered complete as a matter of law. The absence of deliberate misconduct or negligence

on the part of the board makes automatic approval an excessive remedy, one that is neither justified nor in the interests of justice.

Our case closely parallels Eastampton, where the court held that automatic approval was inappropriate due to the absence of intentional delay or misconduct by the board. Similarly, in our case, the Board Administrator promptly informed the plaintiffs of the application's deficiencies and requested additional materials. The plaintiffs complied, and the Administrator confirmed that the revised plans adequately addressed the initial concerns. Like Eastampton, there is no evidence of bad faith or deliberate inaction by the Board in this case. The procedural steps were followed, and the delays were neither intentional nor unreasonable. As in Eastampton, automatic approval here would be an excessive and unjust remedy, as the Board acted within its administrative capacity to ensure a thorough and complete review of the application.

The principles set forth in Eastampton make it clear that automatic approval should not be granted when a board's failure to act is unintentional and not the result of deliberate misconduct. In our case, the Board Administrator acted promptly and in good faith by addressing the application's deficiencies and working with the plaintiffs to resolve them. There is no indication of intentional delay or negligence, and automatic approval would be an unwarranted remedy. As demonstrated in Eastampton and similar cases,

automatic approval is not appropriate where the municipality's failure to meet statutory deadlines is technical rather than willful. Accordingly, the court should reject the plaintiff's claim for automatic approval and hold that plaintiffs' application was not deemed complete as a matter of law.

ii. THE PLAINTIFF NEVER OBTAINED PROPER ACCREDITATION AND THUS THE PLAINTIFF'S APPLICATION WAS NEVER "COMPLETE"

A Planned Educational Campus is defined under Section 18-200 of the Lakewood Unified Development code as:

> An educational campus containing less than 100 acres of a not for profit institution of higher education that is a not for profit entity that is fully accredited and licensed by the Office of the Secretary of Higher Education of the State of New Jersey and one that offers both undergraduate and graduate degrees and is devoted to higher education and no other forms of education and that contains housing and accessory uses proportionate to the educational facilities intended for only for faculty and students who will attend or staff the institution's educational facilities and that is adjoining to or within 500 feet of faculty and student housing so as to create a unified campus setting. The land and all structures including dwelling units shall be owned and developed only by the institution of higher education and not by or in partnership or in other arrangement with any investor group, construction company, a not for profit entity or any other third party. The occupancy of the residential uses in the institution of higher education must be limited to: (a) students, faculty or staff of the institution of higher education, or (b) the immediate families of faculty, staff or students.

Pursuant to the definition under Section 18-200 of the Lakewood Unified Development Code, for plaintiffs' application to qualify as a Planned Educational Campus, the institution must be a not-for-profit entity that is fully accredited and licensed by the Office of the Secretary of Higher Education of the State of New Jersey. Plaintiffs, however, provided no evidence of such accreditation. Further evidencing plaintiffs' lack of accreditation is the fact that plaintiffs never provided a license by the Office of the Secretary of Higher Education of the State of New Jersey.

Moreover, the plaintiff developer refused to testify or attend planning board meetings, raising further doubts about the institution's compliance with this critical requirement. All available evidence suggests that plaintiff's proposed Planned Educational Campus had never been accredited or licensed by the Office of the Secretary of Higher Education of New Jersey, thereby failing to meet the statutory definition. Plaintiffs' application could never have been deemed complete, as their Planned Educational Campus lacks the required accreditation.

Regardless of whether or not accreditation itself is technically listed in the checklist requirements for completeness, the fact remains that the application was not *bona fide*, as the applicant did not pursue it after being provided with a list of still-needed necessary items at the plan review meeting and lacked the

necessary accreditation. Additionally, when the applicant's representative Rabbi Pruzansky was invited to provide an explanation, he failed to attend the meeting.

B. THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO THE MEANING OF THE WORD "RE-APPROVAL" IN ORDINANCE SECTION 18-900(J)

One of the contentious topics below was whether Lakewood Ordinance Section 902 (J) requires a previous "approval" or simply a previous completed application. Section J explicitly states that "re-approval" is necessary for any tract where a Planned Educational Campus is proposed within a Residential Zoning District. The plaintiff's claim that it had a completed application and therefore did not require approval is flawed based on the statutory framework. The statute specifically outlines that re-approval for development is subject to multiple conditions, including the submission and **approval** of a complete development application. The ordinance references the term "re-approval" on three separate occasions. The ordinance language does not state that if an applicant submits a complete application, then it can be converted. It includes a "re-approval" provision, which indicates that it is only when the applicant has gone through the complete Planning Board process and the applicant has proven to the Board that the application is satisfactory and meets all of the criteria that it is considered "approved." If the drafters had meant to require a completed application only, then they could have simply stated that and omitted the

separate term “approval” in sub-paragraph “i”. This language indicates that mere submission of a complete application does not equate to an approval in the first place, which is a critical distinction.

The plaintiffs' original April 2018 application for the Planned Educational Campus never gained approval, making re-approval impossible, due to the fact that no public hearing was ever held, which is a key requirement for formal approval. On March 6, 2018, Yeshiva Chemdas Hatorah submitted its application for preliminary and final major subdivision approval, but the application was deemed incomplete by the Planning Board Administrator on April 3, 2018. Although the applicant submitted revised plans, which were deemed satisfactory, and the application was scheduled for a Plan Review Meeting on June 5, 2018, the application never progressed beyond this stage. Crucially, no public hearing ever took place.

A public hearing is a necessary step for obtaining formal approval under land use law, as it allows for public participation and ensures transparency in the approval process of large-scale developments. Since the application did not reach the public hearing stage, the Lakewood Township Planning Board never granted formal approval. This is particularly important in light of the July 12, 2018, ordinance revision (Ordinance 2018-35), which states that re-approval is only possible for tracts that had previously gained approval and met specific

conditions. As the original application was never approved, re-approval under this ordinance cannot apply, as the statutory conditions for re-approval presuppose that the application had been fully approved in the first instance. Without the essential public hearing and subsequent approval, there was no initial approval to re-approve.

At the trial court level, plaintiff argued that in instances where ordinance language is vague or ambiguous, the court must consider extrinsic factors, such as the statute's purpose, legislative history, and statutory context to ascertain the intent of the legislature. Contrary to plaintiff's position below, the Board is required to evaluate each application on its own merits, considering the specific facts, circumstances, and applicable legal standards of the case at hand. Plaintiff did not cite any legal authority in its summary judgment brief below to substantiate its claim that the Board was bound to interpret the ordinance the same in the case at hand as it had in the past, nor did plaintiff explain the specific, unique facts and circumstances surrounding the prior cases it referenced and how they differed from the facts and circumstances surrounding the case at hand. Further, neither the board nor the court can define the legislative intent of an ordinance from cherry-picked statements taken from meeting minutes of past board meetings, which is what the plaintiff urged the court to do below. When a proposed ordinance becomes the law, it is the

Planning Board's role in the first instance to interpret the language of the ordinance, and the Court's role in the second instance.

IV. THE BOARD'S DECISION TO DECLINE JURISDICTION OF THE APPLICATION WAS NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE AND SHOULD BE UPHELD (Final Order at Da6)

The Board analyzed the statutory language, applied the fact specific to this case, and made its determination. When the Court looks at ordinances and tries to reconcile them, the Court must review the Board's determination under the arbitrary and capricious standard that applies in a prerogative writ review. When reviewing the decision of a trial court that has reviewed a municipal action, the Appellate Division is bound by the same standards as was the trial court. Fred McDowell, Inc. v. Bd. of Adjustment of Township of Wall, 334 N.J. Super. 201, 212 App. Div. 2000); Charlie Brown of Chatham, Inc. v. Bd. of Adjustment of Township of Chatham, 202 N.J. Super. 312, 321 (App. Div. 1985); Advance at Branchburg II, LLC v. Branchburg Twp. Bd. of Adjustment, 433 N.J. Super. 247, 252 (App. Div. 2013). The appellate court "defer[s] to a municipal board's factual findings as long as they have an adequate basis in the record." Ibid. A strong presumption of validity attaches to a municipal body's actions which cannot be overturned unless found to be arbitrary, capricious, or unreasonable. Pressler and Veniero, Current N.J. Court Rules,

Comment 5.4 on Rule 4:6-9 (Gann, 2013). New Jersey courts have consistently held that actions of municipal boards are presumed valid and will not be interfered with unless the local agency action is determined to be arbitrary, capricious, or unreasonable. Manalapan Builders Alliance, Inc. v. Township Committee, 256 N.J. Super. 295, 304 (App. Div. 1992); New Jersey Shore Builders Ass'n v. Township of Ocean, 128 N.J. Super. 135, 137 (App. Div. 1974), cert. denied, 65 N.J. 292 (1974). A court accords due deference to the local agency's broad discretion in planning and zoning matters and only reverses a local agency decision if it finds the decision to be arbitrary, capricious, or unreasonable. Kramer v. Board of Adj., Sea Girt, 45 N.J. 268, 296 (1965); Nunziato v. Planning Board, 225 N.J. Super. 124, 133 (App. Div. 1988).

In reviewing a decision of a local planning board, the Court's power is tightly circumscribed. New Brunswick Cellular Tel. Co. v. Old Bridge Planning Bd., 270 N.J. Super. 122, 134, 636 A.2d 588 (Law Div. 1993). Board decisions, when factually grounded, are cloaked with a presumption of validity, which presumption attaches to both the acts and the motives of its members. Pullen v. So. Plainfield Planning Bd., 291 N.J. Super. 303, 312, 677 A.2d 278 (Law Div. 1995), aff'd, 291 N.J. Super. 1, 6, 676 A.2d 1095 (App. Div. 1996). 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 a board's action, there can be no judicial declaration of invalidity absent a clear abuse of discretion by a board. Pullen, supra, 291 N.J. Super. at 312, 677 A.2d 278, aff'd, 291 N.J. Super. 1 at 6, 676 A.2d 1095; New Brunswick Cellular Tel. Co., supra, 270 N.J. Super. at 134, 636 A.2d 588.

Here, the Board analyzed the statutory language, applied the facts specific to this case, and made its determination, and in so doing did not act in an arbitrary or capricious manner. It is evident by reviewing the transcripts of the board hearings that the Board was extremely troubled by the application for 506 units under the R-7.5 zoning that was before it, as this number of units was well in excess of the number of units that would otherwise be allowed in the R-7.5 zone. This dramatic increase in density and intensity, coupled with concerns regarding the clarity of the ordinance itself and the question of whether the applicant was ever a genuine application, or whether it was submitted solely for the purpose of an orchestrated effort to obtain R-7.5 zoning, resulted in the Board's determination to decline jurisdiction and this decision was not arbitrary, capricious or unreasonable given the circumstances at issue in this particular case.

This point further exemplifies why plaintiffs' motion for summary judgment is inappropriate. New Jersey law allows for summary judgment only when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. R. 4:46-2(c). In this case, the statute's vagueness regarding whether prior approval is required creates a genuine dispute of material fact, making summary judgment inappropriate. According to Brill, courts must consider the evidence in the light most favorable to the non-moving party and not weigh the evidence but determine whether there is a genuine issue for trial. Brill, 142 N.J. at 540. Given the conflicting interpretations of the statute and its application, this case presents material factual disputes that should be resolved at trial rather than through summary judgment.

As a final point, this appellant urges that a view from 10,000 feet reveals the fundamental legal principles at issue, rather than getting lost in the underbrush of factual dispute. In this case, the applicant went to an informal Board review and was told it needed several more submission items in order to proceed to the Board hearing. The applicant never provided those documents. Rather, the applicant did nothing for 549 days until the Board secretary finally reached out to the applicant and reminded the applicant that it needed to provide the full set of plans to the Board and make certain revisions to move forward to the scheduling of a public hearing. This appellant submits to the Court: how can

the applicant have been deemed "complete" when the applicant failed to pursue their application, and then over two years later, return to the Board and announced that they want to take advantage of a re-approval of an approval that they never obtained? This appellant submits that the timing of the filing, as well as the lack of subsequent follow-through on the application, reveals that the plaintiff/respondent filed the planned school campus application for the sole purpose of securing consideration under the updated ordinance. The filing was a misrepresentation in an effort to circumvent limits on density in the zone. This approach is blatantly inconsistent with the notions of justice, fairness, and appropriate administration in an application.

V: DEFENDANTS WAIVED THEIR RIGHTS (This point was raised below, but not included in the Court's final order or opinion)

Under common law, the doctrine of waiver "has been defined as the voluntary, intentional relinquishment of a known right." Bruce McDonald Holding Co. v. Addington, Inc., 825 S.E.2d 779, 788 (W. Va. 2019) quoting Hoffman v. Wheeling Sav. & Loan Ass'n, 133 W. Va. 694, 712 (1950). "To effect a waiver, there must be evidence which demonstrates that a party has intentionally relinquished a known right." Id.; quoting Syl. pt. 2, in part, Ara v. Erie Ins. Co., 182 W. Va. 266 (1989). "…a waiver may be express or may be inferred from actions or conduct, but all of the attendant facts, taken together,

must amount to an intentional relinquishment of a known right. There is no requirement of prejudice or detrimental reliance by the party asserting waiver." Id. "The essential elements of the doctrine of waiver are: (1) the existence of a right, advantage, or benefit at the time of the waiver; (2) actual or constructive knowledge of the existence of the right, advantage, or benefit; and (3) intentional relinquishment of such right, advantage, or benefit." Id.

The defendants waived their rights by failing to act on their application and neglecting to provide the required documents after being repeatedly requested. First, the defendants had a right to move forward with their Planned Educational Campus application, including the right to a public hearing and possible project approval, contingent on meeting certain conditions and providing the requested documents. Second, they were fully aware of this right, as the Board notified them on multiple occasions, including the Plan Review Meeting on September 4, 2018, where the need for additional materials was explicitly communicated. Finally, the defendants intentionally relinquished their rights through prolonged inaction. Despite receiving a follow-up letter on March 5, 2020, 549 days after the Plan Review Meeting, warning that their application would be purged if no further action was taken, the defendants still failed to submit the requested documents or take steps to move the application forward. Their continued failure to act and to provide the necessary materials despite

being informed of the consequences demonstrates an intentional relinquishment of their rights. This is not a case where an applicant received approval and then that approval expired. It is, instead, a case where an applicant started an application and then never followed through with it. The applicant's failure to perfect its application and gain approval, along with its failure to obtain accreditation disqualifies it from converting its "approved" project into another type of application.

CONCLUSION

For all of the foregoing reasons, the Order for Summary Judgment of the Trial Court should be reversed and the matter remanded back to the trial court, or in the alternative, the Order for Summary Judgment of the Trial Court should be reversed and the Planning Board's decision to decline jurisdiction in the matter should be upheld.

Respectfully submitted,

By: s/ *Jilian McLeer*
s/ *John Jackson*

Dated: February 10, 2024

DEERFIELD HOLDINGS and YESHIVA CHEMDAS HATORAH, Plaintiffs/Respondents, v. LAKEWOOD TOWNSHIP PLANNING BOARD and LAKEWOOD TOWNSHIP COMMITTEE, Defendants/Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-810-24 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, OCEAN COUNTY DOCKET NO.: OCN-L-329-24 SAT BELOW: HON. FRANCIS R. HODGSON, JR., A.J.S.C.

BRIEF ON BEHALF OF PLAINTIFFS/RESPONDENTS DEERFIELD HOLDINGS, LLC AND YESHIVA CHEMDAS HATORAH

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PRELIMINARY STATEMENT

This is an appeal from a final judgment wherein the Trial Court reversed the Defendant-Appellant Lakewood Township Planning Board's (the "Board") decision to decline jurisdiction over Plaintiffs-Respondents' application seeking preliminary and final major subdivision approval of a permitted use to create 123 lots for the development of sixty-two (62) residential duplexes, one (1) single family dwelling, two (2) parking lots, two (2) buffer lots, and one (1) lot reserved for future development as a house of worship ("Residential Application"). Da104-115. The Board declined jurisdiction based on a misapplication and misinterpretation of Lakewood Ordinance Section 18-900(J) ("Ordinance") which permits an applicant that files an application for a planned educational campus to pursue an alternate application for a residential one under the R-7.5 ordinance requirements if the applicant can demonstrate that it has satisfied five (5) essential elements of the Ordinance. In sum, the Ordinance permits the alternate residential use if: (1) the original application is for a planned educational campus; (2) the planned educational campus application was complete; (3) the complete planned educational campus application was filed prior to the adoption of Section J of Ordinance 18-900 and/or no later than July 12, 2018; (4) no construction of any portion of the planned educational campus could have begun; and (5) submission and approval

of a complete application for a residential development consistent with the R-7.5 ordinance standards.

Despite the plain language of the Ordinance and the fact that the Board had previously granted three similar applications, the Board, here, wrongfully declined jurisdiction essentially on the basis that the Board felt that the conversion was inappropriate because a potential developer would be permitted to construct substantially more housing than would otherwise be allowed. As noted in Defendants-Respondents' brief "the core consequence in this case is that the Board believes that R-7.5 zoning at this location would be a profound overdevelopment in this area of the town." Id. This type of concern, however, is not a valid reason to decline jurisdiction, as it is the governing body's role to adopt ordinances and to regulate the use of land within its borders. The Board cannot usurp those powers simply because it feels the property should have been zoned differently. See TWC Realty Ptp v. Zoning Bd. of Adj. of Twp. of Edison, 315 N.J. Super. 205, 212 (Law Div. 1998). The Board even admits that "[i]t is the dramatic increase in density and intensity that is motivating the Board's appeal because the Board does not believe that this type of density is appropriate to this area." Db 14, footnote 5. The Board is required to apply the Ordinance as written and not attempt to modify same to achieve a result it believes is a better one.

Here, the Trial Court properly analyzed the five elements set forth in the Ordinance and in a well-reasoned opinion concluded that the Plaintiffs-Respondents' application met each factor. The Court also noted that although "the language is unambiguous and extrinsic evidence is not necessary, a review of the previous actions of the Board supports its conclusion." Da 018. For the reasons set forth below, this Court should affirm the Trial Court's decision.

PROCEDURAL HISTORY & COUNTERSTATEMENT OF FACTS[1]

2018 Campus Application

On March 6, 2018, Yeshiva Chemdas Hatorah filed an application with the Lakewood Township Planning Board ("Board") to construct a planned educational campus consisting of six-4-story dormitories, a six-unit townhouse, a gymnasium, and a yeshiva with related site improvements on property identified as Block 251.03, Lots 20, 20.01, 20.02, 20.03, and 31 (the "Property").[2] Da 081-097.[3] Deerfield Holdings, LLC is the owner of the

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[1] The Procedural History and Counterstatement of Facts are interrelated and therefore combined.

[2] The 2018 site plan application that is in dispute will be referenced as the "Campus Application."

[3] Citations to the record are as follows: "Pa" refers to Plaintiffs' Appendix; "Da" refers to Defendant Board's Appendix; "Db" refers to Defendant Board's Brief; "1T" refers to the Lakewood Township Planning Board Public Meeting Transcript, dated September 6, 2022; "2T" refers to the Lakewood Township

Property.[4] Da 090. The Property consists of approximately 19.5 acres. Da 085.

On April 3, 2018, the Board Administrator, Ally Morris, PP ("Board Administrator"), sent a letter to FWH Associates, a land development firm providing professional engineering and planning services to the Plaintiffs, deeming the Campus Application incomplete for failure to submit electronic PDF copies of the application submission package. Da 099. The Board Administrator also requested (1) proof of accreditation of the yeshiva; (2) a topographic survey; and (3) four additional copies of the site plans and architectural plans. Da 099. The Board's Land Development Checklist, which under N.J.S.A. 40:55D-10.3 establishes the requirements for a land development application to be deemed complete, does not require submitting proof of accreditation. Da 086-089.

On April 4, 2018, FWH Associates provided the Board Administrator with the required electronic copies of the Campus Application. Da 302. On April 18, 2018, FWH Associates submitted the requested copies of the site plan, architectural plan, and topographic survey as required by the checklist. Da 101.

Planning Board Public Meeting Transcript, dated December 6, 2022; "3T" refers to the Motion Transcript, dated October 8, 2024.

[4] Deerfield Holdings, LLC and Yeshiva Chemdas Hatorah will collectively be referred to as "Plaintiffs."

On April 19, 2018, the Board Administrator affirmatively and without exception deemed the Campus Application complete in writing to FWH Associates and the Board Engineer/Planner, Terry Vogt, PE, PP ("Board Engineer/Planner"). Pa 001. The letter stated that "[t]he revised plans satisfactorily address[ed] the comments" of her April 3, 2018 letter initially deeming the Campus Application incomplete. Id. The letter further scheduled a Plan Review Meeting for June 5, 2018 and advised that a public hearing date would be set at the meeting. Id. As such, the Campus Application was deemed complete on April 19, 2018 as a matter of fact and law. Id.

Lakewood Ordinance Section 18-900(J)

After the Campus Application was deemed complete, Lakewood Township introduced Ordinance 2018-35, now codified in the Unified Development Ordinance as Ordinance Section 18-900(J) (the "Ordinance"). Da 062-065. The Ordinance states:

> In all Residential Zoning districts, any tract for which a complete application for a Planned Educational Campus has been filed with the Lakewood Planning Board, in compliance with § 18-902H1(g), re-approval for development of that tract shall be conditionally permitted in accordance with the provisions of the R-7.5 (Residential) Land Use District. Such re-approval shall be subject to all of the following conditions:
>
> 1. Submission and approval of a **complete development application** to the Lakewood Planning

> Board based on the provisions of the R-7.5 (Residential) Land Use District, § 18-902G.
>
> 2. **A complete application for a Planned Educational Campus in accordance with § 18-902H1g must have been submitted prior to the adoption of this ordinance.**
>
> 3. No development of any portion of the Planned Educational Campus may have been commenced at or before the time of adoption of this ordinance. If any development of the Planned Educational Campus was commenced at or before the time of adoption of this ordinance, the re- approval provisions of this section shall be prohibited.
>
> [Ordinance Section 18-900(J). Emphasis added. Da 062-065].

On July 10, 2018, prior to adoption and as required by N.J.S.A. 40:55D-26, the Board reviewed the Ordinance for consistency with the Lakewood Master Plan. Da 068-069. The meeting minutes from the public hearing state "Ms. Morris said this ordinance permits R-7.5 standards for existing campus applications." Da 068. The minutes further indicate that "complete application" was in the Ordinance to address concerns over spot zoning. Da 068. One of the Board's members explained that the Ordinance's purpose was to permit any campus application "either approved or deemed complete" to apply to the Board for approval of a residential development governed by Lakewood's R-7.5 zoning standards. Da 068-069. The Board then voted 4-4 to recommend adoption of the Ordinance. Da 068-069.

The Lakewood Township Committee ultimately adopted the Ordinance including the term "complete application." Da 062-065. After its adoption, the Board was required to apply the Ordinance to three (3) applications. Da 180-189; Da 212-224; Da 225-237. All three applications sought preliminary and final major subdivision approval after first submitting complete applications to develop planned educational campuses. Da 180-189; Da 190-198; Da 212-224. The Board approved all three applications. Da 180-189; Da 190-198; Da 212-224. The first two applicants received full approval from the Board to develop planned educational campuses prior to their request to convert the applications to residential applications. Da 180-189; Da 190-198.

Notably, Yeshiva Chemdas Hatorah was also the applicant in the third application before the Board. Da 212-224. However, that third application to develop a planned educational campus was never approved, as only a complete application was filed with the Board. Da 212-224. On July 6, 2021, the Board approved Yeshiva Chemdas Hatorah's previous residential application. Da 212-224. The meeting minutes clearly indicate that the Board interpreted the Ordinance so as to only require a <u>complete</u> planned educational campus application prior to seeking a residential approval under the R-7.5 zoning standards. Da 225-237. One Board Member, Mr. Rennert, voted to approve the initial residential application and opined on the Ordinance's interpretation. Da

225-237. The minutes state that "Mr. Rennert discussed that during the Master Plan process the Board recommended this lower density for existing campus approvals. He said when it was passed by the [Township] Committee it was written as for campuses that had an application submitted. It was not adopted in the way he had supported it." Da 225-237.

2021 Residential Application

The Ordinance permitted Plaintiffs to pursue a residential use instead of the Campus Application. Da 064-065; Da 104-115. On November 19, 2021, Plaintiffs submitted an application for preliminary and final major subdivision approval to create 123 lots for the development of sixty-two (62) duplexes, one (1) single-family dwelling, two (2) HOA parking lots, two (2) buffer lots, and one (1) lot to eventually be developed with a house of worship ("Residential Application").[5] Da 104-115.

The Board's Engineer/Planner issued a review letter of the Residential Application, dated July 14, 2022. Da 116-126. The review letter states, "[s]ince a complete application for this tract was submitted prior to July 18, 2018, as a Planned Educational Campus, the site can be designed under the R-7.5 standards

[5] The Board misleadingly describes the project as consisting of "504 dwelling units." Db 13.

per section 18-900J of the [Lakewood Unified Development Ordinance]." Da 120.

The Residential Application ultimately proceeded before the Board on September 6, 2022. A homeowners association appeared by an attorney, Jan Meyer, Esq., to object to the Residential Application. [1T 10:9-15; 1T 11:8-11]. During the hearing, the Board Engineer/Planner confirmed, in his opinion as an engineer and planner, that the Board should hear the application because it satisfied the three conditions of the Ordinance that permit a planned educational campus application to be converted into a residential application. [1T 13:18-14:6; 14:12-13]. The Board Attorney, John Jackson, Esq., originally agreed that the Board should hear the Residential Application. [1T 14:16]. In support of the applicability of the Ordinance, Plaintiffs' Engineer/Planner testified that the Campus Application followed the Municipal Land Use Law, the requirements of Lakewood's Ordinance, and was deemed complete by the Board Administrator in April 2018. [1T 25:18-24]. The Board Administrator also acknowledged that Plaintiffs submitted a complete application to develop a planned educational campus. [1T 32:22-23].

Brian Flannery, PE, PP of FWH Associates ("Plaintiffs' Engineer/Planner") provided further background on the Ordinance, stating "the Planning Board recommended that there be a provision in the ordinance with

conditions, a conditional use, that instead of building a campus . . . those would be for Lakewood residents . . .. So, the Planning Board at the time made a recommendation in the Master Plan to have a conditional use for R 7.5 with conditions." [1T 28:6-28]. He then explained that the Ordinance was required to be amended over fears of spot zoning. [1T 31:2-5].

Board Member Rennert then asked the Board Administrator whether she completed "any reviews to see if this issue was submitted under and met the conditions of the campus." [1T 33:6-9]. The Board Administrator confirmed the language of the Ordinance, and its interpretation, by stating "the ordinance is written in a way that it was deemed complete, which means I just need to receive the technical paperwork from the application saying I have what I need to schedule this before the Board." [1T 33:10-14]. Board Member Rennert then responded and asserted his displeasure with the Ordinance's language:

> They adopt an ordinance saying that, that there's going, if there is an application submitted prior to adoption of the ordinance. So, **they changed it from having approval**, where we were trying to keep it very specific to make sure that people, like this applicant over here, who is abusing it in the town doesn't do this. . . . We were trying to keep it very specific, but the town, where they adopted the ordinance, **I don't know why, but they changed the wording to allow abuse like we have now**.
>
> [1T 35:20 to 36:7]. [Emphasis added].

Later in the hearing, the Board Attorney correctly advised the Board Chairman that "[t]he criteria is whether it's a complete application. It's not whether it's a good application, it's not whether it's an application that we passed." [1T46:12-15]. The Board Chairman seemingly concurred with the Board Attorney, however he then questioned whether the Lakewood Township Committee should advise the Board on the "technicalities of this application." [1T 46:21; 1T 47:17-21]. The Board Attorney then advised the Board to listen to the arguments of both parties prior to incorrectly advising: "the question is was an application submitted. The term application is not defined in the ordinance. You can view the application as the whole process or you can view it as the paper that's filed and it's pending before the Board as the application." [1T 48:7-12].[6] The Board Attorney advised that the Board's jurisdiction over the Residential Application was a legal issue that will likely be determined by a

[6] Both the MLUL and Lakewood Ordinance's define "application for development." The MLUL, in relevant part, defines the term as "the application form and all accompanying documents required by ordinance for approval of a subdivision plat, site plan. . .." N.J.S.A. 40:55D-3. Similarly, Lakewood Ordinance Section 18-200 defines the term as "The application form and all accompanying documents required by ordinance for approval of a subdivision, plan, site plan, planned development, conditional use, zoning variance, permit to build in a mapped area or for a structure not related to a street, or any other use or approval permitted under Article VI."

judge on appeal by either the Plaintiffs or the objecting party. [1T 48:15-17; 1T 48:3-6].

Amidst confusion by the Board over how to proceed, the Board Chairman stated "[u]nder penalty of perjury. What is going on here []. I am blinded here. It is too murky for me, for me personally, I don't know how everyone feels, to navigate through this application." [1T 53:11-15.] Applicant's counsel attempted to clarify that the Board required "additional information that's not normally required." [1T 53:19-21.] Despite testimony provided by Plaintiffs' consultants, advice presented by the Board's professionals, and the Board Administrator's confirmation that the Campus Application was deemed complete, the Board Attorney suggested that the Board did not believe Plaintiffs met the criteria required to apply for the Residential Application. [1T 53:23 to 1T 54:3]. At the end of the September hearing, the Board Chairman inappropriately suggested that if the Plaintiffs proposed a different type of residential application, then the objecting party would not have objected to the application. [1T 57:13-14]. The Board Chairman further inappropriately suggested that Plaintiffs would be able to make the same amount of money under the R-12 and R-7.5 zoning standards. [1T 57:15-18].

The Residential Application did not finish at the September 6th meeting, and it eventually resumed at the Board's December 6, 2022 meeting. This time,

the Board Chairman clarified that he believed the Campus Application was deemed complete: "I was comfortable knowing that this was part of that Master Plan approval and then they got their application in. It was deemed complete. Yes, there was a two, three-year break, but now they're back with a application." [2T 12:23 to 13:1-3]. However, the Board Attorney advised that the word "re-approval" in the Ordinance created a threshold issue for the Board to assume jurisdiction of the Residential Application. [2T 13:5-24]. Board Member Stern agreed with Plaintiffs that the Campus Application was deemed complete but argued that the term "re-approval" required the Campus Application to have been fully approved. [2T 14:12 to 15:2]. Plaintiffs' Engineer/Planner then reminded the Board that they had approved a prior residential application where a complete, but unapproved, application for a planned educational campus had first been submitted. [2T 17:12-20].

Board Member Stern opined that the legislative history of the Ordinance demonstrated that a prior planned educational campus approval was required and that the Ordinance was implemented to provide an option to reduce density. [2T 18:9-18]. While agreeing that the Ordinance will reduce density, Plaintiffs' Engineer/Planner refuted Board Member Stern's claims that the Ordinance requires a prior approval. [2T 18:19-24]. Plaintiffs' Engineer/Planner clarified that the Ordinance has explicit conditions, and a prior planned educational

campus approval is not included. [2T 19:1-22.] Later in the hearing, the Board Attorney made a legal conclusion that the Campus Application was complete because the Board never deemed it incomplete and the statutory forty-five (45) days under N.J.S.A. 40:55D-10.3 had expired. [2T 26:12 to 27:11].

Notwithstanding the testimony provided, the Board voted to decline jurisdiction over the Residential Application. [2T 52:7]. Because the Board had not yet adopted a resolution memorializing its decision, Plaintiffs filed a motion for reconsideration with the Board by way of correspondence dated February 14, 2023. Da 170-175. The Board heard the motion for reconsideration at a meeting on December 5, 2023, again voting to decline jurisdiction. Da 176-179. The Board then adopted two resolutions declining jurisdiction of the Residential Application and denying the motion for reconsideration, both memorialized on December 19, 2023. Da 160-169; Da 176-179. Notices of both decisions were published in the *Newark Star-Ledger* on December 27, 2023. Da 310.

Plaintiffs' Appeal to the Law Division

Plaintiffs timely appealed the Board's decision in the Law Division on February 5, 2024. Da 041. Plaintiffs amended the Complaint on February 5, 2024. Da 247. The Lakewood Township Committee filed a Notice of Removal to the United States District Court for the District of New Jersey on February 23, 2024. Da 001. Plaintiffs, the Board, and the Lakewood Township Committee

entered a consent order, dated March 5, 2024, agreeing to remand the litigation to the New Jersey Superior Court, Ocean County and to dismiss Count V of the Amended Complaint wherein Plaintiffs asserted relief under 42 U.S.C. § 1983. Da 002.

On July 12, 2024, the Law Division entered an order, upon a motion filed by the Lakewood Township Committee and the Board, dismissing the Complaint in its entirety as to the Lakewood Township Committee and as to Count IV of the Amended Complaint as to the Board. Da 004-005.

On August 30, 2024, Plaintiffs filed a motion for summary judgment as to Counts I, II and III, the remaining Counts of the Amended Complaint. Da 280-281. Plaintiffs sought an order (1) deeming the Campus Application complete; (2) declaring that Lakewood Ordinance Section 18-900(J) only requires an applicant to have filed a complete application to develop a planned educational campus prior to re-filing a residential application under the R-7.5 zoning standards; (3) ruling that the Residential Application was deemed complete; (4) ruling that the Board's decision to decline jurisdiction of the Residential Application was arbitrary, capricious, and unreasonable and should be reversed; (5) finding that the Board's failure to grant or deny the Residential Application within 95 days of being deemed complete entitled Plaintiffs to an automatic approval pursuant to N.J.S.A. 40:55D-48(c); and (6) ordering the Board to enter

a Certificate of Default recognizing Plaintiffs' entitlement to the automatic approval. Da 006-007; Da 280-281.

The trial court held oral argument on October 8, 2024, and, in a written opinion, granted Plaintiffs' motion, in part, finding that (1) summary judgment was appropriate to settle questions of law, (2) the Campus Application was deemed complete, (3) the Ordinance only requires an applicant to submit a complete planned educational campus application before filing a residential application, (4) the Residential Application was complete and (5) that the Board's decision to decline jurisdiction of the Residential Application was arbitrary, capricious, and unreasonable. Da 006-007; Da 008-020. At Plaintiffs' suggestion, the trial court entered a First Amended Opinion to correct a typographic error and correctly indicate that the Campus Application was submitted on March 6, 2018, which was before the adoption of the Ordinance permitting the alternate residential use on July 12, 2018. Da 021-034.

The trial court explained that "[q]uestions of law are properly resolved on summary judgment and no trial or fact-finding is needed." Da 026. "Similarly, questions of statutory interpretation are questions of law, and therefore, ones for whose resolution summary judgment is an appropriate and favored tool. Euster v. Eagle Downs Racing Ass'n, 677 F.2d 992 (3d Cir., cert. denied, 459 U.S. 1022, 103 S. Ct. 388, 74 L. Ed. 2d 519 (1982)." Da 026.

Citing to N.J.S.A. 40:55D-10.3 and Lakewood Ordinance Sections 18-200 and 18-603C, the trial court explained that the Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-1, et. seq, "requires the town adopt an application checklist and that an application is deemed complete when so certified by the designee or after 45 days of inaction by the town designee where no written notice of deficiency is provided." Da 026-027. The trial court further provided a summation of the events, as set forth in detail above, leading to the Campus Application being deemed complete on April 19, 2018. Da 027-028. In sum, the trial court agreed with Plaintiffs that the "supplemental review letter by Ms. Morris constitutes a certification that all checklist items were complied with in accordance with Ord. § 18-200." Id. The trial court also opined that the Campus Application would have been deemed complete forty-five days from receipt of the April 19, 2018 letter. Da 028.

Importantly, the trial court disagreed with the Board's argument that Plaintiffs needed to submit additional items requested at the September 2018 Plan Review Meeting to be deemed complete because "our courts have explained that one object of N.J.S.A. 40:55D-10.3 was to "preclude a municipal agency from declaring an application incomplete by requesting 'additional information not specified in the ordinance.' Eastampton Ctr. LLC v. Planning Bd. of Eastampton, 354 N.J. Super. 171, 191 (App. Div. 2002)." Da 028.

With respect to the Ordinance's interpretation, the trial court, looking at the plain language of the Ordinance, determined that the Ordinance requires five elements. Da 030. First, an applicant must file an application to develop a planned educational campus. Id. Second, the application to develop a planned educational campus must be a "complete application." Id. Third, the applicant must file a complete application for a residential development and then receive an approval for said residential application. Id. Fourth, the planned educational campus application must have been submitted prior to the Ordinance's adoption date of July 12, 2018. Id. Finally, an applicant must not have started development of the planned educational campus prior to the adoption of the Ordinance. Id.

As explained, the trial court already deemed the Campus Application complete. Da 028-030. In determining whether the Ordinance required a complete application or a full approval to pursue the residential development, the trial court wrote "a court 'should ascribe to the statutory words their ordinary meaning and significance and read them in context with related provisions so as to give sense to the legislation as a whole. (quoting DiProspero v. Penn, 183 N.J. 477, 492-93 (2005)." Da 031. The trial court emphasized the importance of the first sentence in the Ordinance that states, in relevant part, "any tract for which a complete application for a Planned Educational Campus has been filed

with the Lakewood Planning Board . . .” (Emphasis added) in determining that only a complete application must be filed. Id. In essence, the plain language established the “minimum requirement” to utilize the Ordinance. Id. The Court further clarified that the word “‘re-approval’ is simply a shorthand reference to the process later required to access a residential approval. If the drafters had meant to require a complete approval, they could have simply stated that and omitted the term ‘complete application.’” Id. In so doing, the trial court ruled that the Ordinance was not ambiguous. Id. However, the trial court determined that the Board’s previous actions and, notably, approval of Yeshiva Chemdas Hatorah’s first residential application after it had only filed a complete planned educational campus application supported Plaintiffs’ interpretation of the Ordinance. Id.

The Court did not grant Plaintiffs’ request for an automatic approval because it held that Board’s misinterpretation of the Ordinance was inadvertent, however that is not an issue on appeal. Da 032.

Thereafter, on October 23, 2024, the Board requested that the trial court amend its October 9, 2024 Order to state that the court did not retain jurisdiction of the matter. Upon belief that the request would have been entered by way of the “5-Day Rule,” the trial court granted the request. Da 035-036. Plaintiffs opposed the order because the Board’s filing did not identify that the request

was operating under the 5-Day Rule as required by Rule 4:42-1(c), so the trial court rescinded the amended order on November 1, 2024. Da 037-038. Ultimately, the trial court entered a second amended order on November 22, 2024 (1) remanding the Residential Application to the Lakewood Planning Board; (2) specifically stating it no longer retained jurisdiction; (3) ordering the Board to hear, consider and determine the Residential Application; and (4) stating that a subsequent appeal would not delay the processing or disposition of the Residential Application by the Board. Da 039-040.

The Board filed this appeal on November 18, 2024, and the Residential Application is currently pending before the Board. The Board heard the Residential Application at its February 4, 2025 meeting, and, as of the filing of this brief, has not yet approved or denied the Residential Application.

LEGAL ARGUMENT

STANDARD OF REVIEW

A court must grant a motion for summary judgment where "no genuine issue as to any material fact" exists in the pleadings and other matters of record. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 528-29 (1995); Rule 4:46-2. "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Coyne v. State, Dep't of Trans., 182 N.J. 481, 490 (2005). On appeal, the reviewing court is still required to view the evidence in the light most favorable to the non-moving party. Harz v. Bo. of Spring Lake, 234 N.J. 317, 330 (2018).

A planning board's interpretation of a municipal ordinance is not entitled to deference by the court. Bubis v. Kasin, 184 N.J. 612, 627 (2005). "In construing the meaning of a statute [or] an ordinance," the court's review is de novo. 388 Route 22 Readington Realty Holdings, LLC v. Twp. of Readington, 221 N.J. 318, 338 (2015); Dunbar Homes, Inc. v. Zoning Bd. of Adj. of Twp. of Franklin, 233 N.J. 546, 559 (2018); see also Farmers Mut. Fire Ins. Co. of Salem v. N.J. Prop.-Liability Ins. Guar. Ass'n, 215 N.J. 522, 535 (2013).

POINT I

THE TRIAL COURT APPROPRIATELY CONSIDERED PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT TO RESOLVE A QUESTION OF LAW.

Issues of law are "appropriately reviewed on summary judgment." Shields v. Ramslee Motors, 240 N.J. 479, 487-88 (2020) (citing Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 555 (2015)). As explained below, certain questions of law, such as the existence of a duty of care, see Adron, Inc. v. Home Ins. Co., 292 N.J. Super. 463, 473 (App. Div. 1996) and contractual interpretation, see Carvalho v. Toll Bros and Developers, 143 N.J. 565, 675 (1996), are appropriate for summary judgment. Da 026. The trial court further concluded that statutory interpretation is a question of law where summary judgment may be sought. Euster v. Eagle Downs Racing Ass'n, 677 F.2d 992, 997 (3d Cir.), cert. denied, 459 U.S. 1022 (1982). Da 026.

Below, Plaintiffs sought declaratory judgments on legal issues affecting its right to develop the Property, including: (1) whether the Ordinance required Plaintiffs to first obtain full Board approval for the Campus Application and (2) whether Plaintiffs Campus Application was deemed complete under N.J.S.A.

40:55D-10.3.[7] The trial court correctly found that "the resolution [of this matter] calls for an interpretation of law and that there are no genuine issues of material fact that prevent the court from deciding the issues." Da 026. In short, by interpreting the Ordinance the trial court resolved a jurisdictional determination, where the Board is entitled to no deference.

The Board erroneously relies on Willoughby v. Planning Bd. of Twp. of Deptford, 306 N.J. Super. 266 (App. Div. 1997), a case where a planning board actually accepted jurisdiction of the application and heard the application at more than one hearing, unlike the case at bar. In Willoughby, the plaintiff filed an action in lieu of prerogative writs appealing the decision of a planning board granting the defendant site plan approval with variances. 306 N.J. Super. at 272. The planning board held multiple hearings on the application and ultimately adopted a resolution memorializing the approval of the application. Id.

The defendant, who was also the applicant, moved for summary judgment to dismiss the complaint and included supporting documentation including a "Statement of Material Facts," a certification and other exhibits. Id. The

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[7] Plaintiffs also sought a declaratory judgment that it was entitled to an automatic approval of the Residential Application, which the trial court denied in the summary judgment motion. Contrary to the Board's assertion, whether Plaintiffs are entitled to an automatic approval is not at issue in this appeal, and thus the Board's brief at pages 28-33 are not relevant.

defendant did not submit a transcript of the proceedings below or all of the documentation submitted to the planning board. Id. The trial court granted the defendant's motion, and the plaintiff appealed. Id. at 273. On appeal, the court held that summary judgment was inappropriate in that instance because the trial court did not conduct a complete review of the record to determine whether "the Planning Board's findings are adequately supported by the record and whether it afforded opponents of Wolfson's application a fair opportunity to present evidence and be heard." Id. at 276.

Plaintiffs' case is inherently different from Willoughby. Here, Plaintiffs appealed the Board's decision to decline jurisdiction of the Residential Application, inevitably requiring the trial court to determine multiple issues of law. On the other hand, the Willoughby plaintiff challenged an application where the planning board assumed jurisdiction, held multiple hearings on the merits of the application, and made factual findings. Plaintiffs quite differently sought ordinance and statutory interpretation ordering the Board to hear the Residential Application; the Willoughby applicant received that and more from its planning board, thus requiring a review of the record leading to the factual findings made by the Board. To be heard by the Board Plaintiffs were required to have these questions of law settled. When the Board mistakenly interpreted

the Ordinance, it was not awarded any deference in the trial court. Bubis, 184 N.J. at 627.

In a similar vein, the Board points out that prerogative writs actions are unique from "typical civil actions" because the role of a court in a prerogative writs action is to "ensure that the administrative decision was made within the bounds of legal authority and procedural fairness."[8] Db 22. Again, a planning board's interpretation of a municipal ordinance is awarded no deference. Bubis v. Kasin, 184 N.J. at 627. The evidence required to make a determination in the present case lies primarily in the language of the Ordinance, the hearings surrounding the adoption of the Ordinance, and evidence of Plaintiffs' submission of the Campus Application. The trial court was able to fairly make a legal determination based on the evidence provided, which clearly demonstrates that no issue of material fact exists.

Thus, Plaintiffs appropriately filed the motion for summary judgment.

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[8] The Board also laments that the summary judgment motion was inappropriate because it "would effectively silence key stakeholders, including public objectors such as the James Ridgeway Homeowners Association, L.L.C." Db 23. It should be noted these objectors failed to intervene in the matter below, and so this point is moot.

POINT II

THE TRIAL COURT CORRECTLY FOUND THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER THE ORDINANCE ONLY REQUIRES AN APPLICANT TO FILE A COMPLETE PLANNED EDUCATIONAL CAMPUS APPLICATION.

To reiterate, a municipal land use board is awarded no deference in its interpretation of an ordinance, Bubis, 184 N.J. at 627, and the court applies a de novo review. 388 Route 22 Readington Realty Holdings, LLC, 221 N.J. at 338. "The established rules of statutory construction govern the interpretation of a municipal ordinance." State, Twp. of Pennsauken v. Schad, 160 N.J. 156, 170 (1999). The court reviews the "plain language of the statute" while using "common sense to effectuate the legislative purpose." Dunbar Homes, Inc. v. Zoning Bd. of Adj. of Twp. of Franklin, 448 N.J. Super. 583 (App. Div. 2017), aff'd, Dunbar, supra, 233 N.J. 546. Where an ordinance's language is clear and unambiguous, the court must apply the plain meaning taken from the language of the ordinance. Schad, 160 N.J. at 170. Alternatively, where the ordinance's language is ambiguous and may be "susceptible to different interpretations, the court considers extrinsic factors" including the purpose, legislative history, and context behind the adoption of the ordinance. Id. As the trial court correctly explained in its written opinion, "words and phrases shall[,] . . . unless inconsistent with the manifest intent of the [governing body] or unless another

or different meaning is expressly indicated, be given their generally accepted meaning." N.J.S.A. 1:1-1. An ordinance "must be read in [its] entirety; each part or section should be construed in connection with every other part or section to provide a harmonious whole." Burnett v. County of Bergen, 198 N.J. 408, 421 (2009) (internal quotations and citations omitted).

A. The Ordinance's plain language permits an applicant to file a complete application to develop a planned educational campus prior to filing a residential application under the R-7.5 zoning standards.

The Ordinance, as adopted on July 12, 2018, states:

> In all Residential Zoning districts, any tract for which a complete application for a Planned Educational Campus has been filed with the Lakewood Planning Board, in compliance with § 18-902H1(g), re-approval for development of that tract shall be conditionally permitted in accordance with the provisions of the R-7.5 (Residential) Land Use District. Such re-approval shall be subject to all of the following conditions:
>
> 1. Submission and approval of a complete development application to the Lakewood Planning Board based on the provisions of the R-7.5 (Residential) Land Use District, § 18-902G.
>
> 2. A complete application for a Planned Educational Campus in accordance with § 18-902H1g must have been submitted prior to the adoption of this ordinance.
>
> 3. No development of any portion of the Planned Educational Campus may have been commenced at or before the time of adoption of this ordinance. If any development of the Planned Educational Campus was commenced at or before the time of adoption of this

> ordinance, the re- approval provisions of this section shall be prohibited.

The trial court correctly explained that the Ordinance establishes five elements for proper utilization by an applicant. Da 030. First, an applicant must file an application to develop a planned educational campus. Id. Second, a planned educational campus application must be a "complete application." Id. Third, the applicant must file a complete application for a residential development and then receive an approval for said residential application. Id. Fourth, a planned educational campus application must have been submitted prior to the Ordinance's adoption on July 12, 2018. Id. Finally, an applicant must not have started development of the planned educational campus prior to the adoption of the Ordinance. Id.

Additionally, other sections of Lakewood's Unified Development Ordinance make the Ordinance's requirements certain. Section 18-200 defines "a completed application" as "[w]here required, all application fees, all escrow deposits shall be paid in full, and all checklist requirements shall have been complied with, unless waived by the reviewing board, in order for an application to be deemed complete. Similarly, the MLUL defines "application for development" as "the application form and all accompanying documents required by ordinance for approval of a subdivision plat [or] site plan . . . ." N.J.S.A. 40:55D-3.

The Ordinance begins with the following phrase: "any tract for which a complete application for a Planned Educational Campus has been filed . . .." The Ordinance again echoes this notion, stating "2. A complete application for a Planned Educational Campus in accordance with § 18-902H1g must have been submitted prior to the adoption of this ordinance." Put together, Lakewood's definition of "completed application" and the MLUL's definition of "application for development" establishes that the Ordinance requires a complete application and not a full approval.

Moreover, the Ordinance makes clear in no uncertain terms that there is a concrete difference between a "complete application" and an "application for development." The Ordinance's first condition clause requires "**submission** and **approval** of a **complete development application** to the Lakewood Planning Board based on the provisions of the R-7.5 (Residential) Land Use District, § 18-902G." (Emphasis added). It cannot be said that the plain language of the Ordinance requires a planned educational campus approval when the Ordinance unambiguously differentiates the two concepts. Inexplicably and misleadingly, the Board grasps at straws by arguing that this distinction proves an applicant first must have received a planned educational campus approval. Db 35-36. What the Board fails to realize is that this approval requirement is speaking to the residential phase of the application process, **not** the planned educational

campus phase. The Board is correct in stating "This language indicates that mere submission of a complete application does not equate to an approval in the first place." Db 36. This assertion only strengthens the merits of Applicant's point that a planned educational campus application required only a complete application to be submitted.

The Board also argues that "If the drafters had meant to require a completed application only, then they could have simply stated that." In fact, and as referenced above, the second subparagraph of the Ordinance states: "2. A complete application for a Planned Educational Campus in accordance with § 18-902H1g must have been submitted prior to the adoption of this ordinance." Filing a complete application to develop a planned educational campus is simply a condition precedent to receiving a residential approval under the R-7.5 zoning standards.

In turn, the trial court correctly found that the plain language of the Ordinance requires an applicant to file a complete application for a planned educational campus prior to submitting the subsequent residential application.

B. While the trial court found the Ordinance's language to be clear and unambiguous, should this Court find the language vague the extrinsic evidence establishes that the Ordinance only requires an applicant to submit a complete application for a planned educational campus.

The trial court did not make findings as to the legislative history, public hearings and other evidence evincing the intent and purpose of the Ordinance because it correctly interpreted the plain language. However, there can be no doubt as to the intent of the Ordinance as seen by several comments made by the Board during the Planning Board's recommendation hearing and subsequent applications where the Board was required to apply the Ordinance.

First, at the July 10, 2018 hearing for the Board's recommendation of the Ordinance, the meeting minutes show that the Board Administrator explained the "ordinance permits R-7.5 standards for existing campus applications." The meeting minutes further make clear that some of the Board members feared the Ordinance would create impermissible spot zoning. In response, Plaintiffs' Engineer/Planner, who was also present at the recommendation hearing, advised the Board that the Township did not have concerns with spot zoning because the language was amended to state "complete application." In addition, at the July 10, 2018 recommendation hearing Board Member Flancbaum provided background on the Ordinance, stating "The residents in those areas were adamantly against having any sort of educational campus because they were

talking about 700 apartments . . . Therefore, there was a recommendation by this Board that if the application is either approved or complete, they have the option of building the campus or they could put it in R-7.5."

The Board also interpreted the Ordinance on three development applications prior to the Applicant's Residential Application. Significantly, Yeshiva Chemdas Hatorah was an applicant in one of the three applications. In March 2018, Yeshiva Chemdas Hatorah filed another application with the Board to develop a planned educational campus ("SP 2290"). Like the application in question here, the Board deemed SP 2290 complete but it **never** approved the application. Yeshiva Chemdas Hatorah then, as permitted by the Ordinance, sought subdivision approval from the Board ("SD 2477"). SD 2477 proceeded to a public hearing on July 6, 2021, where the Board further discussed the history and intent of the Ordinance. For instance, according to the meeting minutes Board Member Rennert stated "that during the Master Plan process the Board recommended this lower density zoning for existing campus approvals. He said when it was passed by the Committee it was written as for campuses that had an application submitted [not approved, i.e.]. It was not adopted in the way he had

supported it." (Emphasis added). The Board approved SD 2477 even though SP 2290 was only deemed complete and did not receive a full approval.[9]

While the Board is correct that each application stands on its own, the Board cannot re-interpret the Ordinance to satisfy its own agenda. The history set forth by the Board cannot be ignored should this Court find the Ordinance vague or ambiguous. Just over one year prior to the first hearing on the Residential Application, the Board had a drastically different, legally correct, interpretation of the Ordinance. "Of course, the independence of a board does not allow it to rewrite the ordinance by ignoring its provisions any more than a court can rewrite a statute. The board is bound by the ordinance, even though it may believe that certain provisions are impractical or undesirable." Cox & Koenig, New Jersey Zoning & Land Use Administration, comment 1-4, pg. 5 (2025 ed.) (citing Kaufman v. Planning Bd. for Warren Twp., 110 N.J. 551, 564 (1968); Terner v. Spyco, Inc., 226 N.J. Super. 532, 542 (App. Div. 1988)).

Applicant therefore respectfully requests that the Court affirm the trial court's decision granting summary judgment.

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[9] Board Member Rennert voted to approve SD 2477 at the July 6, 2021 hearing. He was also a member of the Board at the September 6, 2022 and December 6, 2022 hearings where the Board voted to decline jurisdiction of the Residential Application.

POINT III

THE TRIAL COURT CORRECTLY FOUND THAT PLAINTIFFS FILED A COMPLETE CAMPUS APPLICATION.

A. The Board is conflating a "complete application" and an "automatic approval."

A brief review of the differences in a "complete application" and an "automatic approval" is required because the Board is conflating the requirements for an application to be deemed complete versus an application receiving an automatic approval. The MLUL establishes explicit timelines for a land use board to (1) deem an application for development complete and (2) vote on the application at a public hearing. N.J.S.A. 40:55D-10.3; see, e.g., N.J.S.A 40:55D-48(c).

The application process can, generally speaking, be broken down into two phases. First, the applicant submits the application for development, as defined supra, with any required supporting documentation, plans, and fees as may be required by a checklist adopted by ordinance. N.J.S.A. 40:55D-10.3; N.J.S.A. 40:55D-3. N.J.S.A. 40:55D-10.3 states, in relevant part:

> An application for development shall be complete for purposes of commencing the applicable time period for action by a municipal agency, when so certified by the municipal agency or its authorized committee or designee. In the event that the agency, committee or designee does not certify the application to be complete within 45 days of the date of its submission, the application shall be deemed complete upon the

> expiration of the 45-day period for purposes of commencing the applicable time period, unless: a. the application lacks information indicated on a checklist adopted by ordinance and provided to the applicant; and b. the municipal agency or its authorized committee or designee has notified the applicant, in writing, of the deficiencies in the application within 45 days of submission of the application.

The application must be deemed complete in order to proceed to a public hearing. There are two ways for an application to be deemed complete. First, a designated official or committee may affirmatively confirm that the application is complete in writing. Second, as provided by statute, the application is complete where the municipal designee fails to inform the applicant, in writing, within forty-five (45) of any deficiencies in the application as prescribed by the application checklist.

Once deemed complete, the application then proceeds to a public hearing. If the application is deemed complete because of the passage of the forty-five (45) days, this is **not** an automatic approval as the Board has asserted. The time in which the Board has to act begins to toll once the application is deemed complete. Db 28-33. The time in which a land use board must vote to approve or deny an application is determined based on the type of application filed. For instance, Plaintiffs sought major subdivision approval of more than 10 lots. Therefore, N.J.S.A. 40:55D-48(c) controls, which states that a land use board must vote to approve or deny the application within ninety-five (95) days of the

submission of a complete application. If a board does not vote within ninety-five (95) days and the applicant does not consent to an extension, the applicant is entitled to an automatic approval. See, e.g., Amerada Hess Corp. v. Burlington County Planning Bd., 195 N.J. 616, 628 (2008).

To reiterate, automatic approval is not at issue in this appeal. The trial court denied Plaintiffs' motion for summary judgment with respect to this issue, and Plaintiffs have not cross-appealed. There is extensive case law on automatic approvals, some of which the Board cited in its brief. Db 29. The Board would like this Court to believe that an application cannot be deemed complete upon passage of the forty-five days unless there is "deliberate misconduct or negligence on the part of the board." Db 31-32 (citing Eastampton Ctr., LLC v. Planning Bd. of Twp. of Eastampton, 354 N.J. Super. 171 (App. Div. 2002)). However, that case law is wholly irrelevant and inapplicable to the whether an application is deemed complete. The MLUL does not require deliberate misconduct or negligence for an application to be deemed complete, nor has the Board cited any appropriate case law to support its position.

1. The Lakewood Township Planning Board Administrator deemed the Campus Application Complete on April 19, 2018.

Lakewood's Unified Development Ordinance almost parallels the MLUL regarding the Board's obligation to deem an application complete or incomplete. Section 18-603A specifically designates the Board Secretary/professional staff

as the responsible party to deem an application complete or incomplete within forty-five (45) days of receiving the application. Ally Morris was the Board Administrator responsible for deeming an application complete when Plaintiffs filed the Campus Application. As explained at great length above, the Board Administrator initially deemed the Campus Application incomplete in writing on April 3, 2018. FWH Associates provided required electronic copies of the application on April 4, 2018 and the requested paper copies of the site plan, architectural plan and topographic survey on April 18, 2018. The very next day, the Board Administrator wrote a letter to FWH Associates stating that Applicant "satisfactorily" address the comments of her April 3, 2018 incompleteness letter. In short, the Board Administrator informed Plaintiffs of the deficiencies of the Campus Application, Plaintiffs submitted those missing items, and the Board Administrator concluded the submissions were satisfactory. Therefore, there is no genuine issue of material fact as to whether the Campus Application was explicitly deemed complete on April 19, 2018.

2. Nonetheless, the Campus Application would have been deemed complete as a matter of law.

Assuming, *arguendo*, that this Court does not find the Campus Application was deemed complete on April 19, 2018, Plaintiffs are entitled to a determination that the Campus Application was complete as a matter of law no later than June 4, 2018. Between April 18 and June 4, the Board Administrator

did not issue any other correspondence, in writing, identifying deficient or missing checklist items. In turn, the Applicant is also entitled to rely on a completeness determination as a matter of law.

3. The Board falsely states that the Campus Application could not have been deemed complete because the Applicant did not provide proof of accreditation.

The Board's argument that Plaintiffs were required to provide proof of accreditation, is, simply put, a red herring. The Board Administrator explicitly deemed the Campus Application complete on April 19, 2018. However, even if the Campus Application had not been deemed complete, the Board's request for additional information is irrelevant. N.J.S.A. 40:55D-10.3 permits a land use board to request "additional information not specified in the ordinance . . . as are reasonably necessary to make an informed decision as to whether the requirements **necessary for approval** of the application for development have been met. **The application shall not be deemed incomplete** for lack of any such additional information . . .." [Emphasis added]. The MLUL clearly contemplates that a land use board can request additional information not required by the checklist. However, importantly a municipal board may not weaponize this statute to keep an application incomplete in perpetuity. The trial court succinctly stated that "[o]ur courts have explained that one object of N.J.S.A. 40:55D-10.3 was 'to preclude a municipal agency from declaring an

application incomplete by requesting additional information not specified in the ordinance." Da 028 (citing Eastampton Ctr., LLC, 354 N.J. Super. at 191 (internal citations omitted)).

The Board also explains that Ordinance Section 18-200, entitled "Definition of Terms," defines a planned educational campus, in part, as being "fully accredited and licensed." Db 33. The Board fails to acknowledge that this section of Lakewood's Unified Development Ordinance is distinct and separate from the ordinance codifying the checklist, Ordinance Section 18-1112, which does not require an applicant to provide proof of accreditation for an application to be deemed complete. Therefore, any request from the Board for the Applicant to produce proof of accreditation could not, as a matter of law, have prevented the Campus Application from being deemed complete.[10] "Accordingly, the Campus Application was either complete upon [Board Administrator's] April 19th letter, or it should be deemed complete forty-five days from that letter that indicated the application had no deficiencies." Da 028.

[10] The Board similarly notes that Plaintiffs never submitted items requested at a plan review meeting held on September 4, 2018. For the same reasons set forth above, any additional, non-checklist items requested at this meeting could not have prevented the Campus Application from being deemed complete.

Therefore, Plaintiffs respectfully request that this Court affirm the trial court's Order deeming the Campus Application complete.

POINT IV

THE BOARD'S JUSTIFICATION FOR DECLINING JURISDICTION IS WITHOUT MERIT BECAUSE IT USURPED THE ZONING POWER OF THE LAKEWOOD TOWNSHIP COMMITTEE.

N.J.S.A. 40:55D-62(a) states, in relevant part, "The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon." A planning board is not permitted to amend an ordinance based upon their own preference for certain municipal development regulations. See Kaufman, 110 N.J. at 564; Terner, 226 N.J. Super. at 542 (App. Div. 1988)). "A municipal governing body is empowered with the "responsibility . . . to create the zoning scheme in the first instance through the adoption of comprehensive land use regulations. See, e.g., N.J.S.A. 40:55D-62 (power to zone)." TWC Realty Ptp. v. Zoning Bd. of Adj. of Twp. of Edison, 315 N.J. Super. 205, 212 (Law Div. 1998). "'It is the governing body's ultimate responsibility to establish, by the adoption of its zoning ordinances and amendments thereto, the essential land use character of the municipality." Id. (quoting Dover Twp. v. Bd. of Adj. of Dover Twp., 158 N.J. Super. 401, 411 (App. Div. 1978)).

As set forth above, the trial court correctly held that the Ordinance only requires an applicant to file a complete planned educational campus application

prior to converting the application to a residential application. The court also correctly held that Plaintiffs' Campus Application was complete. However, the Board is attempting to manufacture a reason to decline jurisdiction of the Residential Application. For instance, in reference to the Residential Application, the Board writes:

> This dramatic increase in density and intensity, coupled with concerns regarding the clarity of the ordinance itself and the question of whether the applicant [sic] was ever a genuine application, or whether it was submitted solely for the purpose of an orchestrated effort to obtain R-7.5 zoning, resulted in the Board's determination to decline jurisdiction.
>
> Db 40.

The Board similarly questioned the "legitimacy" of the Campus Application and inquired as to why Rabbi Pruzansky never testified with respect to the Campus Application. Db 16.

However, these assertions do not carry any merit as to the interpretation of the Ordinance and whether the Campus Application was deemed complete. In doing so, the Board is overstepping its statutory authority in an attempt to re-write the Ordinance and the Municipal Land Use Law. Questioning the accreditation status, raising concerns about density, asserting that the Campus Application was illegitimate and pointing to Rabbi Pruzansky's lack of testimony is merely an attempt to circumvent the MLUL and justify their

interpretation of the Ordinance. It is very clear that a governing body is tasked with drafting and adopting ordinances, and the Board may not take it upon itself to effectively re-zone the Property.

In sum, the Lakewood Township Committee adopted the Ordinance in a manner consistent with the trial court's interpretation, and Plaintiffs took all necessary steps to properly convert the Campus Application into the Residential Application. The Board cannot refuse to enforce the Ordinance simply because it believes that such a conversion is inappropriate. Therefore, Plaintiffs respectfully request that this Court affirm the trial court's decision to grant summary judgment.

POINT V

PLAINTIFFS' DECISION TO PURSUE THE RESIDENTIAL APPLICATION IN LIEU OF THE CAMPUS APPLICATION DOES NOT CONSTITUTE A WAIVER OF RIGHTS.

First and foremost, the Board has cited non-binding West Virginia case law in support of its meritless waiver argument. Nonetheless, "[w]aiver is the voluntary and intentional relinquishment of a known right." Knorr v. Smeal, 178 N.J. 169, 177 (2003) (citing W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152 (1958)). The waiving party must have a full knowledge of its legal rights and an intent to surrender the rights. Id. "The party waiving a known right must do so clearly, unequivocally, and decisively." Id. (citing Country Chevrolet, Inc. v. Twp. of N. Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983).

Here, Plaintiffs by no means waived their rights to develop the Property in the manner it so chose. The Board argues that Plaintiffs voluntarily waived its right to move forward with the Campus Application because they advised the Campus Application would be withdrawn on March 5, 2020 if no further action was taken. Db 43. Plaintiffs' decision to not pursue a full approval of the Campus Application is immaterial. As explained in great length above, the Ordinance only requires an applicant to file a complete application to develop a planned educational campus prior to seeking full approval for a residential

development under the R-7.5 zoning standards. Plaintiffs were aware of their rights to either pursue the Campus Application, or, alternatively, convert the Campus Application into the Residential Application. The Applicant chose the latter when it filed the Residential Application in November 2021. Notably, the Ordinance is silent as to when the Residential Application must be filed after the Campus Application was deemed complete. The only relevant timing requirement imposed by the Ordinance is that the planned educational campus Application needed to be deemed complete before July 12, 2018, the date of adoption of the Ordinance.

Applicant's decision to pursue the Residential Application in no way relinquished its rights to develop the Property, and Plaintiffs respectfully request that this Court affirm the trial court's decision granting summary judgment.

CONCLUSION

The trial court correctly granted Plaintiffs' motion for summary judgment finding that (1) Plaintiffs submitted a complete Campus Application and (2) the Ordinance only requires an applicant to submit a complete planned educational campus application prior to pursuing the alternate residential application. An applicant has the right and opportunity to present its application before the appropriate board when it has followed the necessary procedural requirements established by the MLUL. In this instance, the application was appropriately before the Lakewood Planning Board, however at every step of the way the Board took measures in blatant disregard of the MLUL and New Jersey case law. The MLUL has been amended to provide safeguards protecting an applicant against boards that do not consider applications in a timely manner, including by enacting explicit requirements for an application to be deemed complete.

The Board, through its actions and statements at the board level and contained within the arguments in their brief, assert that it has the right to establish their own procedures regardless of the law. Lakewood seeks to justify these illegal actions, in part, because of Lakewood's growth. However, increasing development and the Board's displeasure with the Ordinance as adopted by the governing body are not acceptable reasons for disregarding the fundamental principles of the MLUL. While a planning board is entitled to

review an ordinance prior to adoption, it is not permitted to re-write an ordinance to prevent an application for development and satisfy its own agenda. Here, the plain language of the Ordinance leaves no issue of material fact as to how it must be interpreted, and the legislative history shown in several public hearings further demonstrates why the Lakewood Township Committee drafted the Ordinance to only require a complete planned educational campus application before an applicant can pursue an alternative residential application.

For the foregoing reasons, Plaintiffs respectfully request that this Court affirm the trial court's Order granting Plaintiffs summary judgment.

Respectfully submitted,

Wilentz, Goldman & Spitzer, P.A.
Attorneys for Plaintiffs-Respondents

Dated: March 13, 2025

By: _____
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Attorneys for Plaintiffs-Respondents

Dated: March 13, 2025

By: /s/ John Paul Doyle
JOHN PAUL DOYLE

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO.: A-810-24

DEERFIELD HOLDINGS, LLC AND YESHIVA CHEMDAS HATORAH,	:
	: Civil Action
Plaintiff-Respondent	:
v.	: ON APPEAL FROM THE
LAKEWOOD TOWNSHIP PLANNING BOARD AND LAKEWOOD TOWNSHIP COMMITTEE,	: FINAL ORDER ENTERED : BY THE SUPERIOR : COURT OF NEW JERSEY, : OCEAN COUNTY
Defendants.	:
	: DOCKET NO.: OCN-L- : 329-24
	:
	: SAT BELOW: : HONORABLE FRANCIS R. : HODGSON JR., J.S.C.
	:
	:

REPLY BRIEF ON BEHALF OF DEFENDANT/APPELLANT LAKEWOOD TOWNSHIP PLANNING BOARD

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On the Brief

Dated: March 26, 2025

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Preliminary Statement

Appellant will rely on its arguments as contained within its affirmative brief. Appellant will address respondent's arguments in its affirmative brief to the extent same warrant a specific response not already set forth previously.

Reply to Statement of Facts/Procedural History

Appellant's affirmative brief contains an accurate recitation of the procedural history and statement of facts with references made to the appendix record.

The respondent's counterstatement of facts contains several inaccurate statements. On page 5 of the respondent's brief, respondent asserts that the Board Administrator "affirmatively and without exception" deemed the Campus Application complete in writing and cites to Pa 001. Appellant does not agree that that writing deemed the application complete "affirmatively and without exception" for the reasons cited in our original appellate brief and reiterated below. On page 11 of the respondent's brief, respondent mischaracterizes the Board Attorney's legal counsel as "incorrect" at 1T 48:7-12. This is not a statement of fact but rather the opinion of the respondent.

Legal Argument

1. The Trial Court Erred in Granting the Motion for Summary Judgment Because Genuine Issues of Material Fact Existed

Respondent attempts to discredit appellant's reliance on Willoughby v. Planning Bd. Of Twp. Of Deptford, 306 N.J. Super. 266 (App. Div. 1997) by pointing out that in Willoughby, the planning board had accepted jurisdiction of the case, whereas in the case at hand, it did not. This is besides the point. In both cases, the Board held more than one hearing regarding the application and issued a written resolution summarizing the Board's ultimate determination as to the application. In Willoughby, that determination happened to be an approval of a site plan, and in the case at hand, that determination was a denial of jurisdiction. The underlying principles that justify summary judgment in the former scenario apply with equal force in the latter. Whether a planning board grants site plan approval or declines jurisdiction, its decision involves analyzing the facts of the proposed project to determine whether it falls within the scope of the board's authority. Here, the planning board's determination to decline jurisdiction hinged on fact-intensive inquiries regarding the nature, scope, and classification of the proposed project, as well as whether the project was deemed "complete" based on the specific procedural history involved in this specific case. Like the situation in Willoughby, judicial review of the

board's jurisdictional determination in this particular case required a more thorough evidentiary record to assess whether the board properly exercised its discretion, and the matter should not have been summarily decided by the court.

Further, the fact that key stakeholders failed to intervene prior to the summary judgment motion being decided in the matter below does not preclude the possibility that they would have sought to intervene afterwards. Since the summary judgment motion was granted and the case disposed of without a full trial on the matter with legal briefing, the conclusion that other key stakeholders made a definitive decision not to intervene is pure speculation on the part of respondent. Thus, contrary to respondent's contention in footnote #8 of its legal brief, this point is not moot and is an important and valid point that should be considered by the Court.

2. The Trial Court Incorrectly Found that No Genuine Issue of Material Fact Exists as to Whether the Ordinance Only Requires an Applicant to File a Complete Planned Educational Campus Application

Respondent argues that the ordinance's plain language permits an applicant to file a complete application to develop a planned educational campus prior to filing a residential application under the R-7.5 zoning standards. Respondent reproduces various sections of the ordinance and then

cobbles them together to conclude that Lakewood's definition of "completed application" and the Municipal land use law's definition of "application for development" establishes that the Ordinance requires a complete application and not a "full approval."

Respondent points out that Section 18-200 defines a "completed application" as "where required, all application fees, all escrow deposits shall be paid in full, and all checklist requirements shall have been complied with, unless waived by the reviewing board, in order for an application to be deemed complete." The Municipal Land Use Law defines "application for development" as "the application form and all accompanying documents required by ordinance for approval of a subdivision plat or site plan . . ." N.J.S.A. 40:55D-3. This language bolsters the *appellant's* argument, because the Planning Board issued a memorandum on September 4, 2018 indicating that essential documents, additional information, and a revised site plan were required from the plaintiffs after the plan review meeting took place and prior to the public hearing being scheduled. Respondent asserts that the application should have been "deemed complete" upon the expiration of the 45- day period as referenced in N.J.S.A. 40:55D-10.3, and cites Ally Morris' letter dated April 19, 2018 as proof that the application was "deemed complete". However, the provision cited in NJS 40:55D-10.3 does not strip the board of its authority to

require additional information essential to evaluating the merits of the application. In other words, the statutory 45-day period is designed to prevent unnecessary delays in the application process, but it does not foreclose the Board's ability to later determine that critical documents or information were missing or insufficient. To hold that an application becomes irreversibly "complete" simply due to the passage of time, despite missing or deficient documentation, would interfere with the Board's ability to proceed with a substantive review in cases where a board reasonably determines that an application remains incomplete if it lacks the necessary documentation to proceed with said review. It is not certain whether the ordinance language of "complete application" meant procedurally complete or "complete" for purposes of a substantive review of the matter by the Board. As such, this appellant reiterates that there exists a question of material fact as to whether this particular application should have been considered "complete."

This appellant reiterates that separate and apart from the question of application "completeness" is the legal issue surrounding the language of "re-approval" in the ordinance. The word "re-approval" is found in the ordinance three separate times. Critically, the ordinance language does not state that if an applicant submits a "complete" application, then the application can be converted. It includes a "re-approval" provision, which indicates that it is only

when the applicant has gone through the complete Planning Board process and the applicant has proven to the Board that the application is satisfactory and meets all of the criteria that it is considered "approved." That never happened in this instance, because the Board requested further information and documentation prior to the application being deemed "complete" for purposes of the scheduling of a public hearing. It makes sense that the ordinance references "re-approval", because one cannot ascertain whether the application would pass public scrutiny or even have been approved to proceed to a public hearing for that matter, had the application been more complete. Interestingly, the respondent never addresses in its appellate brief why the word "re-approval" appears three separate times in the ordinance.

For the same reasons as cited above, respondent's argument at Point III, section 3 fails. The Board's request for additional information, including proof of accreditation, is not irrelevant. The Board felt that information concerning the status of accreditation was necessary for approval of the application and the Board was well within its rights to request further documentation as a means of carrying out its responsibility of making certain that the application was fully and properly reviewed.

The Board herein reiterates its argument that a Planned Educational Campus is defined under Section 18-200 of the Lakewood Unified Development Code as follows:

> An educational campus containing less than 100 acres of a not for profit institution of higher education that is a not for profit entity that is fully accredited and licensed by the Office of the Secretary of Higher Education of the State of New Jersey and one that offers both undergraduate and graduate degrees and is devoted to higher education and no other forms of education and that contains housing and accessory uses proportionate to the educational facilities intended for only for faculty and students who will attend or staff the institution's educational facilities and that is adjoining to or within 500 feet of faculty and student housing so as to create a unified campus setting. The land and all structures including dwelling units shall be owned and developed only by the institution of higher education and not by or in partnership or in other arrangement with any investor group, construction company, a not for profit entity or any other third party. The occupancy of the residential uses in the institution of higher education must be limited to: (a) students, faculty or staff of the institution of higher education, or (b) the immediate families of faculty, staff or students.

Pursuant to the definition as reproduced above, for respondent's application to qualify as a "Planned Educational Campus", the institution must be a not-for-profit entity that is fully accredited and licensed by the Office of the Secretary of the Higher Education of the State of New Jersey. Respondent provided no evidence of such accreditation, and the developer refused to testify or attend planning board meetings, raising further doubts about the institution's compliance with this critical requirement. This appellant

respectfully urges the Court to consider that the philosophy behind the ordinance in question is to allow institutes of higher education- not private developers- to turn their application(s) into housing. This appears to be the case of a private developer trying to take advantage of this "conversion" to permit substantially more housing in this zone than would otherwise be allowed. [1]

3. Extrinsic Evidence of the Planning Board's History in Interpreting this Particular Ordinance Should Not Be Considered by the Court

Respondent submits that, should the Court find the language of the ordinance vague, the extrinsic evidence of the Planning Board's history in interpreting this particular ordinance should establish that the ordinance only requires an applicant to submit a complete application for a planned educational campus. In making this argument, the respondent is attempting to divert the court's attention away from the plain language of the ordinance. The respondent provides its version of a short history of various Board members' prior musings regarding the ordinance at prior board meetings in 2018 and also recounts the Board's approval of prior applications (SP#2290, SD#2477). This

[1] This is a difficult situation, as this is an on-going issue because currently pending in front of the Lakewood Township Planning Board is this very application and the Board is having trouble with it because the application is for such a greater density than the zone can handle. On top of this, at a recent planning board hearing in mid-March 2025, one of the objectors- who, again, might have intervened in the matter had the matter not been concluded via summary judgment below- reminded the Board of the accreditation issue.

appellant is not going to go back and relitigate the merits of those cases or delve into an analysis of the Board's thoughts, findings, and the nuances of those applications, because the fact of the matter is, the Board's current position is that it feels it made errors in the past and it does not wish to repeat the same error in the case at hand. Put another way, the history of various prior board findings and/or interpretations concerning this ordinance does not matter because the interpretation of the ordinance is a question of law solely for the court. As respondent states itself in respondent's legal brief, the planning board's interpretation of a municipal ordinance is awarded no deference when it comes to the Court's determination as to a question of law.

4. The Board's Justification for Declining Jurisdiction Was Not Arbitrary, Unreasonable, Or Capricious

Respondent argues that the Board's justification for declining jurisdiction is without merit because it attempted to "manufacture" a reason to decline jurisdiction and took into consideration concerns regarding the clarity of the ordinance and the legitimacy of the campus application. This is not a "circumvention" of the Municipal Land Use Law, but rather a diligent Board taking seriously its obligation to engage in a thorough and fact-based review of the application before it. Boards are not merely tasked with applying technical criteria; boards are also charged with protecting the integrity of the land use

process. In assessing the legitimacy of the application, the Board was not overstepping its authority but rather fulfilling its duty to consider all relevant factors, which included whether the application was presented in good faith and whether the applicant was seeking approval consistent with the intent and purpose of the ordinance. To ignore concerns about the legitimacy of an application would amount to a dereliction of the board's duty to safeguard the public interest and uphold the intent of local land use regulations. With that being said, this appellant reiterates its request that this Court view this matter from a "10,000 feet" standpoint. In this case, the applicant went to an informal Board review and was told it needed several more submission items in order to proceed to the Board hearing. The applicant never provided those documents. Rather, the applicant did nothing for 549 days until the Board secretary finally reached out to the applicant and reminded the applicant that it needed to provide the full set of plans to the Board and make certain revisions to move forward to the scheduling of a public hearing. This appellant submits to the Court: how could the application have been deemed "complete" when the applicant failed to pursue their application, never provided the checklist documents necessary to be formally scheduled for a public hearing, and then over two years later return to the Board and announced that they want to take advantage of a re-approval of an approval that was never obtained? The timing

of the filing, as well as the lack of subsequent follow-though on the application, reveals that the respondent filed the planned school campus application for the sole purpose of securing consideration under the updated ordinance. This approach is blatantly inconsistent with the notions of justice, fairness, and appropriate administration in an application, and the Board was well within its rights to weigh the totality of the circumstances in evaluating this application and ultimately deciding to decline jurisdiction, which represents a necessary and appropriate exercise of its role to ensure that the application was consistent with the law and the interests of the community at large.

As to respondent's response to the appellant's waiver of rights argument, the courts have recognized that applicants cannot sit idly by and expect to benefit from statutory protections when they have not met their corresponding obligations to advance the application in good faith. Further, the respondent's conduct in doing just that – sitting idly by – deprived the planning board of the ability to engage in a meaningful review and to consider the merits of the application, which should nullify the protections that would otherwise attach to a "complete" application. Thus, for the reasons expressed at length in the initial appellate brief and reiterated in this reply brief, not only did the trial court err in concluding that the respondent had submitted a "complete"

application, but it should have found that the respondent's behavior demonstrated an intentional relinquishment of their rights. The applicant's failure to perfect its application and gain approval disqualifies it from converting it's "approved" project into another type of application.

CONCLUSION

For all of the foregoing reasons, the Order for Summary Judgment of the Trial Court should be reversed and the matter remanded back to the trial court, or in the alternative, the Order for Summary Judgment of the Trial Court should be reversed and the Planning Board's decision to decline jurisdiction in the matter should be upheld.

Respectfully submitted,

By: s/ Jilian McLeer
s/ John Jackson

Dated: March 26, 2025