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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-832-23
IN THE MATTER OF APPLICATION TO NEW JERSEY TURNPIKE AUTHORITY FOR LICENSE TO CROSS NUMBER P971	CIVIL ACTION ON APPEAL FROM FINAL ACTION OF THE NEW JERSEY TURNPIKE AUTHORITY APPLICATION NO. P971

BRIEF OF APPELLANTS ESTATE OF JAMES VIVIANO, NANCYLU VIVIANO MANNUCCIA, THOMAS J. VIVIANO, ROSEANNE CALDARISE AND ANITA PFEFFERKORN

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PRELIMINARY STATEMENT

This appeal seeks reversal and remand of Defendant-Respondent New Jersey Turnpike Authority's ("NJTA") wrongful decision to deny, without a hearing, Appellants' application to install minimal stormwater infrastructure within the NJTA's right of way for the Garden State Parkway (the "Parkway"), which abuts land owned by the Appellants. Appellants' family's ownership of the property predates the construction of the Parkway. In 1957, Appellants' predecessors in title sold an adjacent tract of land to the NJTA's predecessor entity, the New Jersey Highway Authority, on which the Parkway was later built. Stormwater has always and continues to naturally run off of the Appellants' property toward the Parkway and into an existing stormwater system now owned by the NJTA.

For more than two decades, the Appellants have invested large amounts of time and money to obtain the required governmental approvals to develop this property into a residential neighborhood entitled American Dream Estates (the "Project"). The Appellants previously obtained approval of the design of the stormwater management system for the Project from the NJTA, entered into a settlement agreement with the municipality to make a cash contribution to its affordable housing trust fund based upon the future construction of the development and obtained every other required land use approval to build the project, which included review and approval of the stormwater management system by outside agencies. To the point, the stormwater management plan put

forward by the Appellants has been approved by every other reviewing agency having jurisdiction over the Property and ***would reduce the amount of stormwater*** to be discharged from what naturally flows onto NJTA property now.

After submitting a formal License to Cross Application to the NJTA, based on essentially the same Grading and Drainage Plan that the NJTA previously reviewed and approved, the Appellants received a response from NJTA's Chief Engineer raising technical concerns about the stormwater management plan for the first time. None of these concerns were raised by the NJTA during the initial review process. Such a review letter from the NJTA would typically lead to a subsequent discussion between NJTA's and the applicant's engineers about how the NJTA's concerns could be addressed. Instead, the Chief Engineer's letter flat-out denied the License to Cross Application. When the Appellants subsequently requested a hearing or meeting under NJTA rules, the NJTA refused to engage in a substantive discussion and simply affirmed its denial in a three-sentence letter. This was a glaring deviation from usual practice, made even more puzzling given that NJTA had previously reviewed and given its blessing to the Appellants' plan, failed to object at any stage of the approval process before any outside agency, and waited until after all other substantive governmental approvals were obtained to raise new technical concerns at the proverbial "eleventh hour." Appellants are left unable to develop their property solely as a result of the NJTA's denial of this

application, which has effectively operated as a veto of all other land use approvals obtained for the project.

The NJTA's decision to deny Appellants' License to Cross application without a hearing should be reversed for all or any one of the following reasons: (1) the NJTA failed to engage in factfinding and its decision was not based upon sufficient, credible evidence; (2) the NJTA's decision was arbitrary, capricious and unreasonable; (3) the NJTA's blanket rejection of Appellants' request to install stormwater infrastructure in the right-of-way violates the text and policy of N.J.A.C 19:9-5.2 and constitutes illegal administrative rule-making; (4) the NJTA is equitably estopped from denying the Appellants' application after previously reviewing and approving it; and (5) the NJTA's denial of the application violates New Jersey's public policy favoring the construction of affordable housing. The case for reversal is particularly compelling since the NJTA's last minute rejection of the application came after the approval process for every other outside agency, during which the design of the stormwater management system could have been modified, had ended. To add insult to injury, the NJTA rejected the Appellants' application without a hearing and refused to engage in any substantive discussion whatsoever. Reversal of the NJTA's decision is warranted for these reasons.

STATEMENT OF FACTS

A. The Property and Current Stormwater Flow

The property, which Appellants' family has owned for generations, is an unimproved, wooded area located at Block 1305, Lot 1.05 and Block 1306, Lot 2 on the tax map of Washington Township, Bergen County, New Jersey (the "Property"). (124a.) By deed dated December 16, 1957, the Appellants' family sold vacant land adjacent to the Property to the New Jersey Highway Authority, the NJTA's predecessor entity, for the purpose of constructing a portion of the Parkway. (4a.) The Property is now bordered by single-family residential homes to the south, the Parkway to the east, Van Emburgh Avenue to the west and municipal parkland and single-family homes to the North. (124a.) At the time it was constructed, the Parkway was cut into the side of an existing hill which borders the Property.

The topography of the Property is extremely steep; it slopes east from Van Emburgh Avenue towards the Parkway at grades varying from 1 percent to over 35 percent. (124a.) To illustrate, the slope of the land leading to the Parkway is more than half as steep as the 65-degree slope of the "Raging Bull" roller coaster at the Six Flags theme park. https://www.sixflags.com/greatamerica/attractions/raging-bull (last visited May 28, 2024, 11:21 am). Much of the stormwater generated from the Property already drains downslope into an existing concrete swale located within the NJTA's right-of-way adjacent to the Parkway. (124a.) There has been

no change in the way that stormwater naturally flows off of the Property into the NJTA's stormwater system since the Parkway was constructed.

B. Land Use Approval Process

The process to build the Project has taken decades and only requires one final substantive approval before construction can commence: the License to Cross from the NJTA. The approval process began in 1999 when Viviano initiated litigation against the Township and the Planning Board of Washington Township (the "Planning Board") based upon Mount Laurel II. (8a.) That litigation was ultimately resolved through a settlement agreement between Viviano and the Township dated July 26, 2001, which resulted in the rezoning of the Property authorizing the development of American Dream Estates. (8a.) By Order dated November 15, 2001, the Superior Court of New Jersey approved that settlement agreement, which in addition to authorizing the development, also required payment of $375,000 by Viviano into the Township's Affordable Housing Trust Fund. (34a.) That settlement agreement further required the Planning Board to expedite Viviano's anticipated application for subdivision and site plan approval to facilitate actual construction of the development in a timely manner. (14a.)

In 2002, Viviano filed an application with the Township Planning Board seeking preliminary major subdivision approval and preliminary major site plan approval. (45a.) The Planning Board ultimately granted those approvals, which

included variances, by Resolution dated June 30, 2004 following several public hearings. (42a.) (the "Preliminary Approval").

C. NJTA Correspondence Regarding Stormwater Management

Numerous letters have been exchanged between the parties over the nearly two-decade-long Planning Board approval process that show NJTA was aware of, and engaged in active discussion on, the specific details of the design of the same storm drainage connection that the Appellants now seek to construct.

For example, in a letter dated June 27, 2005, the NJTA offered its consulting engineer's substantive comments on the "block wall that is to be constructed at the outfall headwall of the basin on the [Parkway]", the "scour hole detail" and the fabric to be utilized, and "the proposed flow [to] be added to the existing concrete swale along the [Parkway]." (80a.) The Appellants' engineer, Brian Murphy, PE, PP ("Murphy"), responded by letter dated October 26, 2006; addressing point-by-point each of the issued identified by the NJTA's engineer. (86a.) In other words, the NJTA engaged in an engineering discussion with Murphy concerning the proposed improvements, ***and did not indicate that construction of the proposed improvements in the right-of-way was in any way unacceptable***.

In 2006, Viviano filed an application with the Planning Board to amend the Preliminary Approval to address issues unrelated to stormwater management. By letter dated October 23, 2006, the NJTA wrote to the Planning Board indicating that it had "no objections to the proposed project provided that all of [its]

concerns" are addressed to its satisfaction; then went on to list certain comments – ***none of which involved the concerns that NJTA has now identified as the basis to deny Appellants' License to Cross Application***. (82a.) On October 26, 2006, Murphy wrote to the NJTA's consulting engineer again; responding point-by-point to each of the concerns previously raised. (86a.) On November 17, 2006, Murphy provided the NJTA with a copy of the Stormwater Management report, which NJTA had requested. (88a.) On December 1, 2006, the NJTA submitted an additional letter to the Planning Board reiterating comments from its prior letters; again, none of which involved the concerns that the NJTA now raises. (89a.) On January 31, 2007, the NJTA wrote to the Planning Board again indicating that it had "no objections to the proposed project provided that all of [its] concerns" are addressed to its satisfaction, and raising several specific questions concerning the stormwater infrastructure to be constructed in the right-of-way. (93a.) By letter dated February 22, 2007, Murphy responded to the NJTA's January 31st letter; addressing all of the comments raised therein and providing copies of the requested plans. (96a.)

Viviano continued to diligently seek the NJTA's input throughout the approval process. By letter dated May 28, 2013, Viviano's engineer reminded the NJTA that it had already reviewed the project and "had no objections to [what was] proposed, provided that all the [NJTA's] concerns in the letter were addressed. (100a). The May 28, 2013 letter restated the point-by-point response to

the NJTA's prior correspondence. The NJTA responded by letter dated June 26 2013 and requested certain revisions to the plans. (103a.) In response to that letter, Viviano revised the Grading and Drainage Plan on July 15, 2013 to accommodate the NJTA's concerns. (103a). ***The July 15, 2013 revisions to the Grading and Drainage Plan clearly depict the improvements that Appellants seek to construct in the right-of-way***. (103a.) The revision notations on the plans indicate that they were revised pursuant to the NJTA's June 26, 2013 letter. (103a.)

After receiving and reviewing the July 15, 2013 revised Grading and Drainage Plan, ***the NJTA issued a letter dated December 26, 2014 approving the revised Grading and Drainage Plan and confirming that "[a]ll prior comments have been adequately addressed to the satisfaction of the [NJTA]."*** (104a) (emphasis added). The "prior comments" referenced in the December 26, 2014 letter as being satisfied were the NJTA's comments contained in its January 31, 2007 letter, which include specific reference to the improvements Applicants desire to construct in the right-of-way. (104a).

Appellants were guided by and relied upon the NJTA's approval of the stormwater management plan and moved forward with the outside agency approval process. On March 23, 2018, Viviano filed an application with the Planning Board to amend the earlier subdivision and site plan approvals (the "2018 Application").[1]

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1 James Viviano unfortunately passed away during the pendency of the 2018 Application. His estate is a party to this case.

(105a). In response to its request for a status update on the conditions of approval contained in the Preliminary Approval, Viviano's land use counsel, Ronald Shimanowitz, Esq., provided the Planning Board with a letter dated October 11, 2018 which noted, among other things, that the NJTA had "approved" the stormwater infrastructure to be constructed in the right-of-way. (115a). By letter dated November 19, 2018, Murphy responded to the Planning Board's request for additional documentation which included, among other things, copies of the December 26, 2014 letter, which was referred to as the "NJ Turnpike Authority approval." (121a).

D. Final Approvals for the Project Were Given by Other Public Entities, on Notice to NJTA

During the pendency of the 2018 Application, the Grading and Drainage Plan underwent several revisions; none of which intensified the stormwater infrastructure to be constructed in the right-of-way. None of the letters submitted by the NJTA during the pendency of the 2018 Application containing anything other than *pro forma* comments; nor did they contain any objection to the proposed stormwater infrastructure. (373a (September 18, 2018 letter from NJTA to Shimanowitz); 204a (September 21, 2021 letter from NJTA to Shimanowitz); 211a (November 24, 2021 letter from NJTA to Shimanowitz).) This came as no surprise to the Appellants, since the NJTA had already given its approval to construct the improvements at issue through the December 26, 2014 letter. On October 29,

2021, the Appellants' caused a Stormwater Operation & Maintenance Manual to be prepared detailing how the infrastructure at issue would be maintained by the eventual homeowners' association. (182a.) The Bergen County Soil Conservation District issued a permit to the Appellants on October 29, 2021. (206a.)

By resolution dated January 19, 2022, the Planning Board approved the 2018 Application; granting amended final subdivision and site plan approval for the project (the "Final Approval"). (218a.) The Grading and Drainage Plan included in the plans upon which the Final Approval was based bear last revised date of April 30, 2020 and clearly depicted the stormwater infrastructure in the right-of-way. (158a.) ***The stormwater infrastructure depicted on the 2020 Grading and Drainage Plan is nearly identical to what is depicted on every prior version,*** including what was submitted to the NJTA in 2013. (103a.) While the site plans were later revised to comply with the Resolution of Final Approval, the Grading and Drainage Plans contained therein remain the same. (103a.)

E. The License to Cross Application

On June 6, 2023, the Appellants filed License to Cross Application P971 seeking formal permission to construct certain stormwater infrastructure within the NJTA's right-of-way, as reflected on the plans approved by the Planning Board (the "License to Cross Application" or the "Application"). (279a.) This was the final substantive approval required for the Project. Based upon the December 26, 2014 letter from the NJTA, and the lack of any objection to the approvals sought

from the Planning Board, the Appellants had every reason to believe that the License to Cross would be granted as a matter of course.

On September 22, 2023, Appellants received what was titled as an "initial review letter" from the NJTA's Chief Engineer Michael Garofalo (the "Initial Review Letter"). (1a.) That Initial Review Letter ***for the first time*** raised seven enumerated concerns and objections to the stormwater management plan:

(1) In response to the recently implemented NJDEP Inland Flood Protection rules, the Authority can no longer continue with the practice of direct connections into our stormwater collection system using legacy criteria;

(2) The applicant has not demonstrated that the peak flows in the future condition are reduced utilizing current regulatory criteria;

(3) The Authority does not have a level of comfort that maintenance of the basin will be adequately and routinely performed in perpetuity by the then Site owner in accordance with the stormwater management maintenance plan even if there is an agreement to do so recorded in the title of the Site;

(4) The Applicant has not demonstrated to the Authority's satisfaction that maintenance of the Authority's stormwater collection system will not be adversely impacted by the applicant's proposed basin or increased stormwater volumes over time;

(5) The classification of the basin as a dam has not been reviewed by the NJDEP Dam Safety Unit;

(6) The spillway of the basin directs flow onto the Parkway which is not acceptable to the Authority;

(7) The installation of drainage infrastructure and associated retaining wall on Authority Right-of-Way is not acceptable to the Authority.

(1a.) ***None of these concerns had been previously raised to the Appellants despite the fact that the NJTA was presented with the very same Grading and Drainage Plan years before, engaged in a dialogue with the Appellants' engineer and ultimately represented that its concerns had been resolved in the December 26, 2014 letter.*** At the conclusion of the Initial Review Letter, instead of inviting a written submission or a discussion to address the NJTA's concerns objections, the NJTA's Chief Engineer perfunctorily "denied" the License to Cross Application. (2a.)

On October 2, 2023, the Appellants submitted a timely letter of protest to the NJTA pursuant to N.J.A.C. 19:9-5-5 (the "Protest Letter"), which allows an applicant to request a hearing or informal meeting with the NJTA to dispute an NJTA decision. Appellants' Protest Letter responded to each point raised in the Initial Review Letter and requested a hearing on the merits of the License to Cross Application. (369a.) Two days later on October 4, 2023, Acting Director of Law Christine Ann Monica sent a three-sentence reply to the Protest Letter, stating that the Application was denied for the reasons set forth in the Initial Review Letter, that no hearing would be conducted, and that NJTA's denial of the Application was "a final agency decision" (the "Denial Letter") (3a.) No opportunity was provided to the Appellants to present information or communicate with the NJTA concerning its unexpected rejection of the Application. This appeal followed.

PROCEDURAL HISTORY

On June 6, 2023, Appellants filed the License to Cross Application. (279a.) On September 22, 2023, the NJTA issued the Initial Review Letter. (1a.) On October 2, 2023, the Appellants timely filed the Protest Letter. (369a.) Two days later on October 4, 2023, Acting Director of Law Christine Ann Monica issued the Denial Letter. (3a.) No opportunity was provided to the Appellants to present information or communicate with the NJTA concerning the License to Cross Application; nor was any hearing held.

On November 17, 2023, Appellants initiated this litigation by filing a Notice of Appeal. On December 29, 2023, the NJTA filed its Notice of Agency Record ("Agency Record"). The parties participated in the Civil Appeals Settlement Program ("CASP"), but were unable to reach an agreement.

While the Court entered an Order setting an initial briefing schedule, no briefs have been filed and oral argument has not been scheduled. On June 17, 2024, Appellants moved to supplement the record.

STANDARD OF REVIEW

An agency acts in an adjudicative, quasi-judicial capacity when "the actions and decisions of the state administrative agenc[y] adjudicat[es] the rights of particular individuals." Northwest Cov. Med. Crt. v. Fishman, 167 N.J. 123, 135 (2001) (internal citations omitted). Decisions of administrative agencies like the NJTA as to the issuance of a license or permit are quasi-judicial functions. See In re Issuance of a Permit, 120 N.J. 164, 172 (1990). The standard of review is therefore the same as that of an adjudicative decision. In re Proposed Quest Academy Charter, 216 N.J. 370, 384-385 (2013).

When acting in an adjudicative capacity as the NJTA did here, "the traditional role of administrative agencies […] is to review evidence, make findings of fact, and exercise statutorily granted discretion in reaching conclusions." Application of Holy Name Hospital, 301 N.J. Super. 282, 291-292 (App. Div. 1997). Appellate review of adjudicative actions such as this involves review of whether: (1) the factual determinations of the agency were based upon "sufficient credible evidence present in the record," Close v. Kordulak Bros., 44 N.J. 589, 599 (1965); (2) the action based on those factual findings was "arbitrary, capricious or unreasonable," Campbell v. Dept. of Civil Service, 39 N.J. 556, 562 (1963); and (3) the agency action "violated legislative policies express or implicit in the [enabling legislation]"; i.e. did the agency follow the law. Brady v. Board of Review, 152 N.J. 197, 210 (1997). Judicial review of an administrative agency's

decision also considers whether the agency's decision offends the state or federal constitution. See George Harms Construction Co. v. New Jersey Turnpike Authority, 137 N.J. 8, 27 (1994).

There is no question that the NTJA acted in an adjudicative, quasi-judicial manner in deciding the License to Cross Application, which determined whether the Appellants have the right to construct stormwater infrastructure in the NJTA's right-of-way. Northwest Cov. Med. Crt. v. Fishman, 167 N.J. at 135. In reviewing this matter, the Court is "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue[.]" Mayflower Sec. Co. v. Bureau of Sec. Div. of Consumer Affs. Dep't of Law & Pub. Safety, 64 N.J. 85, 93 (1973).

ARGUMENT

I. THE NJTA'S DENIAL OF THE LICENSE TO CROSS APPLICATION WAS NOT BASED UPON SUFFICIENT, CREDIBLE EVIDENCE (1a – 3a.)

The NJTA's denial of the License to Cross Application cannot survive appellate review because it was not based upon sufficient, credible evidence found in the agency record. An agency's factual determinations must be based on sufficient, credible evidence found in the record to be sustained on appeal. See Close, 44 N.J. at 599. Commonly referred to as the "substantial evidence rule", this element of the standard of review contains three requirements: (1) there must have been factfinding, Mercer County Deer Alliance v. DEP, 349 N.J. Super. 440, 454

(App. Div. 2002); (2) there must be sufficient, credible evidence in the record to support the decision, Andersen v. Exxon Co., 89 N.J. 483, 501 (1982); and (3) the agency determination must withstand careful and principled review. Riverside General v. N.J. Hosp. Rate Setting Com'n, 98 N.J. 458, 468 (1985).

A. The NJTA Failed to Engage in Factfinding

The NJTA's failure to engage in any factfinding warrants reversal and remand of its decision.

1. Factfinding is Required to Create an Adequate Record.

To make an adequate record, the agency must engage in fact finding. See Close, 44 N.J. at 599. "Findings of fact and conclusions of law are essential not only to inform interested parties of the basis of decision but also to permit appellate determination of whether the administrative action meets the test of being neither arbitrary, capricious, nor unreasonable and having properly comported with the legislative mandate." Mercer County Deer Alliance, 349 N.J. Super. at 454. Engaging in factfinding is ***required***, not optional:

> Fact-finding 'is a basic requirement imposed on agencies that act in a quasi-judicial capacity.' An agency must engage in fact-finding to the extent required by statute or regulation and provide notice of those facts to all interested parties and any reviewing tribunal for the salutary purpose of setting forth 'the basis on which the final decision was reached.'
>
> [Application of Holy Name Hospital, 301 N.J. Super. at 291-292 (internal citations omitted).]

Findings of fact are "not a recitation of statutory citations but a clear and concise demonstration that the litigants have been heard and their arguments considered." Bailey v. Board of Review, 339 N.J. Super. 29, 33 (App. Div. 2001). "[A] mere cataloging of evidence followed by an ultimate conclusion […] without a reasoned explanation based on specific findings of basic facts, does not satisfy the requirements of the adjudicatory process" because it does not enable a reviewing Court to perform its function. Lister v. J.B. Eurell Co., 234 N.J. Super. 64, 73 (App. Div. 1989). Agencies must also explain the reasoning behind decisions by "tell[ing] us why", In re Valley Hosp., 240 N.J. Super. 301, 306 (App. Div. 1990), and not providing "only a net opinion […] lacking the 'why and wherefore' of the decisions rendered." Matter of Medicinal Marijuana, 465 N.J. Super. 343, 375 (App. Div. 2020).

2. The NJTA's Failure to Conduct Factfinding Resulted in an Inadequate Record.

The contents of the Initial Review Letter demonstrate that the NJTA failed to comply with its duty to engage in factfinding. Simply "cataloging of evidence followed by an ultimate conclusion […] without a reasoned explanation based on specific findings of basic facts, does not satisfy the requirements of the adjudicatory process." Lister v. J.B. Eurell Co., 234 N.J. Super. at 73. This is precisely what the NJTA did in the Initial Review Letter by generally describing the Stormwater Management Plan, listing assorted concerns that were never

previously disclosed, then summarily concluding that the application is "denied" without explaining why those concerns could not be addressed through some clarification or minor tweak of the plans. (2a.) The Initial Review Letter certainly did not contain a "reasoned explanation" of the decision based upon the factors which govern the issuance of licenses to cross under N.J.A.C. 19:9-5.2, see id., or anything that can be described as a "demonstration that the litigants have been heard and their arguments considered." Bailey v. Board of Review, 339 N.J. Super. at 33.

The Appellants gave the NTJA every opportunity to engage in a dialogue which would have led to the development of additional facts and allowed the Appellants to address the NJTA's concerns. The attorney representing the contract purchaser of the Property contacted the NJTA directly on July 25 and again on August 7, 2023 regarding the status of the License to Cross Application, indicating that the Appellants were "anxious to address any comments that the NJTA may have so we can enter into the license-to-cross agreement as soon as possible." (292a.) The Appellants again followed up with the NJTA directly on September 7, 2023, but were simply told that "a letter will be sometime next week." (296a.) The NJTA ignored the Appellants' attempts to discuss any concerns that it might have had, and instead abruptly denied the License to Cross Application September 22, 2023 through the Initial Review Letter (2.)

The NJTA's refusal to engage in factfinding continued with its treatment of the Protest Letter. Any applicant for a "license to cross […] who is aggrieved in connection with the application for and/or award of such a license or permit, may protest to the Authority." N.J.A.C. 19:9-5.5(a). In accordance with that regulation, Appellants' Protest Letter "set forth in detail the facts upon which the aggrieved applicant bases its protest and shall define, as clearly as the available information permits, those issues or facts in dispute." See id. The Protest Letter responded to each of the seven concerns identified in the Initial Review Letter with specificity, and expressly requested a hearing. (369a.) The NJTA denied Appellants' request for a hearing, failed to engage in any factfinding and issued the three-sentence Denial Letter which circularly stated that the protest was "denied for all of the reasons previously set forth in the above-referenced denial letter." (3a.) For example, in response to the NJTA's concern that maintenance of the stormwater infrastructure will not be adequately performed in the future (Initial Review Letter item #3), the Protest Letter explains that an HOA will be formed that will be responsible for maintenance and that maintenance easements will also be provided to the municipality and the NJTA. (370a.) The Denial Letter fails to respond to these proposed solutions. (3a.) In response to the assertion that it had not been demonstrated that the NJTA's stormwater collection system will not be "adversely impacted" by the proposed basin (Initial Review Letter item #4), the Protest Letter indicates that the Appellants met the stormwater reductions required by the

applicable regulations and is exempt from the subsequently enacted regulations that impose more stringent requirements. (370a.) The Denial Letter ignores these issues as well. (3a.)

The Denial Letter violated N.J.A.C. 19:9-5.5(c), which imposes a standalone requirement that the NJTA "state the determination made and the reasons for the action taken" in responding to a License to Cross Application. Not only did the NJTA fail to engage in factfinding to determine whether the Appellants' contentions raised in the Protest Letter were right, it summarily ignored the Protest Letter and failed to respond entirely. (3a.) This wholesale failure to "tell us why" the License to Cross Application was denied and why the contentions set forth in the Protest Letter were not sufficient to resolve the NJTA's concerns is a hallmark of arbitrary, capricious and unreasonable conduct by an administrative agency. See In re Valley Hosp., 240 N.J. Super. at 306. As a result of its failure to engage in any type of factfinding, the NJTA failed to develop an adequate record on which to base its decision. This alone warrants reversal.

B. No Evidence in the Record Supports the NJTA's Denial of the License to Cross

No evidence in the record supports the factual determinations made by the NJTA in denying the License to Cross Application. Administrative factfinding will only be sustained where the factual conclusions themselves "could reasonably have been reached on sufficient credible evidence present in the record,

considering the proofs as a whole, with due regard […] to the agency's expertise ***where such expertise is a pertinent factor***." Close, 44 N.J. at 599 (emphasis added). "Sufficient credible evidence" is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion." In re Public Service Electric and Gas Co., 35 N.J. 358, 376 (1961). An administrative agency's factual findings must be based upon ***competent*** evidence to be sustained: "in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it." Weston v. State, 60 N.J. 36, 51 (1972).

The NJTA Chief Engineer denied the License to Cross Application for seven distinct reasons, as set forth in the Initial Review Letter. (1a.) Many of those reasons amount to legal conclusions as opposed to factual findings, and are erroneous for the reasons set forth in the succeeding sections of this brief. The factual conclusions reached by the NJTA are erroneous for the following reasons:

1. The NJTA Partially Based Its Decision Upon Speculation

In the Initial Review Letter, the NJTA concluded that it

> does not have a level of comfort that maintenance of the basin will be adequately and routinely performed in perpetuity by the then Site owner in accordance with the stormwater management maintenance plan even if there is an agreement to do so recorded in the title of the Site.[(a.)]

Plainly stated, the NJTA concluded out of thin air that a homeowners association planned ***to be formed in the future*** would not adequately maintain the stormwater infrastructure Appellants seek to construct in the NJTA's right-of-way. Putting aside that "a level of comfort" is not an ascertainable standard that can govern review of a license application, see In re N.J.A.C. 7:1B-11 Et Seq., 431 N.J. Super. 100, 128 (App. Div. 2013) ("a rule that does not contain a clear or objectively ascertainable standard may not be upheld"), that conclusion is not (and could not be) based upon any facts of record. ***It amounts to pure speculation about what a future homeowners association may or may not do.*** This statement is not evidence and is precisely the type of "net opinion" that cannot serve as the basis of an adjudicatory administrative decision. See Matter of Medicinal Marijuana, 465 N.J. Super. at 375 (agency cannot provide "only a net opinion […] lacking the 'why and wherefore'" to serve as factual support for a decision).

Moreover, NJTA reached its conclusion that a homeowner's association would not adequately and routinely perform maintenance of the stormwater basin despite that (1) the Appellants' engineer prepared an entire Stormwater Operation and Maintenance Manual for very purpose guiding the homeowner's association as to the required maintenance, and (2) protective instruments like insurance policies or maintenance bonds can be posted by a homeowners association to secure such a maintenance responsibility. (2a.) No "reasonable mind" would accept NJTA's speculative, net opinion conclusion, and therefore that conclusion cannot serve as

"sufficient, credible evidence" to support denying the License to Cross Application. See In re Public Service Electric and Gas Co., 35 N.J. at 376.

2. The NJTA's Factual Determinations Contradict the Record

The Initial Review Letter further concludes that

> The applicant has not demonstrated to the Authority's satisfaction that maintenance of the Authority's stormwater collection system will not be adversely impacted by the applicant's proposed basin or increased stormwater values over time.
>
> [(1a.)]

This vague statement is not based upon evidence in the record, ***assumes*** the occurrence of uncertain future events (i.e. "increased stormwater values over time" at unknown times and in unspecified quantities) and suggests that Appellants would be required to meet an unascertainable standard of review (that the Appellants must ensure that the NJTA has a "level of comfort" and that system would not be "adversely impacted") in order to obtain a license to cross. No reasonable mind would blindly accept these underlying assumptions as facts that could serve as a basis to reject the License to Cross Application. See In re Public Service Electric and Gas Co., 35 N.J. at 376.

Moreover, these assumptions are contradicted by the Stormwater Management Report included in the License to Cross Application. That report demonstrates that the stormwater flows from the Property will be ***reduced in overall volume*** from what they currently are. (125a.) Thus, NJTA's assumptions

that stormwater flows will increase, and that the existing stormwater system will be "adversely impacted" is not only unsupported, but ***actually contradicted in the record***. These conclusions are not based upon sufficient, credible evidence in the record and cannot support the NJTA's decision.

3. The NJTA's Factual Findings Are Inaccurate

In the Initial Review Letter, the NJTA concludes that "[t]he spillway of the basin directs flow onto the Parkway which is not acceptable to the Authority." (2a.) This statement is erroneous. The proposed spillway simply channels *existing stormwater flow* into an *existing concrete swale* within the right-of-way adjacent to the Parkway; not "onto the Parkway" where motorists travel as NJTA's statement implies. (125a.) This statement completely ignores the context of the overall project, that the location of proposed spillway is specifically described in the Stormwater Management Plan and was depicted with clarity on the Grading and Drainage Plans submitted to the NJTA in 2013 and 2023 as directing flow into an existing swale. (103a; 252a.) This swale exists for the sole purpose of collecting stormwater and is where almost all of the stormwater running off of the Property currently drains today anyway. (125a.) No reasonable mind would conclude, when viewing the actual evidence, that the proposed spillway directs water onto the actual roadway, or that it changes the current flow of stormwater running off of the Property from what it currently is. The factual conclusion reached by the NJTA

is contrary to the documents presented with the License to Cross Application and also cannot serve as a basis for the denial of the Application.

Against this backdrop, it is clear that the NJTA's outright rejection of the License to Cross Application was not based upon sufficient, credible evidence that was present in the record.

C. The Conclusions Reached by the NJTA Cannot Withstand Judicial Review

The conclusions reached by the NJTA without properly developing a factual record cannot withstand judicial review. While an administrative decision is normally entitled to deference, that is not the case where factual conclusions drawn from the evidence are "so wide off the mark as to be manifestly mistaken." Tlumac v. High Bridge Stone, 187 N.J. 56, 573 (2006). "[A]n appellate court's review of an agency decision is 'not simply a pro forma exercise in which [the court] rubber stamp[s] findings that are not reasonably supported by the evidence." In re Taylor, 158 N.J. 644, 657 (1999) (internal citations omitted). When reviewing an adjudicative decision of a State Agency like the NJTA, the Court is

> duty-bound to intervene if, upon a thorough review of the record, it harbor[s] a definitive conviction the result reached was so wide of the mark a mistake must have been made […] 'This sense of wrongness can arise in numerous ways – from manifest lack of inherently credible evidence to support the finding, obvious overlooking or undervaluation of crucial evidence, a clearly unjust result, and many others.

> [Dietrich v. Toms River Bd. of Ed., 294 N.J. Super. 252, 261 (App. Div. 1996), certif. den. 148 N.J. 459 (1997) (internal quotations omitted).]

The conclusions reached by the NJTA are not entitled to deference and cannot withstand judicial review. As stated in Section I(B) above, the factual conclusions reached by the NJTA are not based upon facts of record but conjecture and willful ignorance of the parties' interactions over the past 20 years. These conclusions are "off the mark" to say the least. See Tlumac v. High Bridge Stone, 187 N.J. at 573. The factual conclusions reached by the NJTA are plainly wrong and are not entitled to deference.

It is also clear that the NJTA ignored decades of evidence; particularly the December 26, 2014 letter where the Appellants' engineer was advised that all of the NJTA's concerns had been resolved. (104a.) The stormwater element of the plans submitted to the NJTA in 2013 which led to the issuance of the December 26, 2014 letter are identical in all relevant respects to the plans submitted with the License to Cross Application. (103a; 252a.) It is inexplicable that the NJTA would approve of the Grading and Drainage Plans in 2014, but not now. The Initial Review Letter and Denial Letter do not even acknowledge the existence of the December 26, 2014 letter or the submissions that led to its issuance. (1a – 3a.) Nor do they explain why the Appellants' were told the NJTA had no concerns over the plans in 2014, only to have the Application denied later based upon the same plans.

This evidence was clearly overlooked; as such, the conclusions reached by the are not entitled to any level of deference. See In re Taylor, 158 N.J. at 657.

As the NJTA's conclusions are not based upon sufficient, credible evidence, its decision should be reversed.

II. THE NJTA'S DENIAL OF THE LICENSE TO CROSS APPLICATION WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE (1a – 3a.)

The NJTA's wholesale rejection of the License to Cross Application was arbitrary, capricious and unreasonable and must be reversed. An agency decision will be overturned "when in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made after weighing the relative factors." Williams v. Department of Human Services, 116 N.J. 102, 108 (1989). In other words, a decision will be overturned where it is arbitrary, capricious or unreasonable. See id. "'Arbitrary and capricious' is typically understood to mean 'willful and unreasoning action, without consideration and in disregard of circumstances.'" Avalon Manor Improvement Ass'n, Inc. v. Township of Middle, 370 N.J. Super. 73, 91 (App. Div. 2004) (internal citations omitted). The term "capricious" means "contrary to the evidence or established rules of law." Black's Law Dictionary (11th ed. 2019). "The test is one of rational basis. 'Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration

and in disregard of circumstances.'" Worthington v. Fauver, 88 N.J. 183, 204-205 (1982).

A. The NJTA Ignored the Text and Purpose of N.J.A.C. 19:5-2 in Reviewing the License to Cross Application

"A license to cross is a formal agreement with the [NJTA] granting permission to enter upon or access [it's] property." N.J.A.C. 19:9-5.2(a). Licenses to cross exist for a reason: they "are utilized by ***owners of property adjacent to the [Parkway]*** that must utilize the [Parkway] ***for drainage***, egress, and access purposes." Id. (emphasis added). The License to Cross Application seeks exactly what N.J.A.C. 19:9-5.2(a) allows the Applicants to obtain: stormwater discharge for a proposed residential project on a property adjacent to the NJTA's right-of-way that is owned by the Appellants. (280a). It could not be clearer that the License to Cross exists, in part, for the exact reason that the Appellants seek it here; to drain stormwater into an NJTA right-of-way (where it currently drains anyway) when that stormwater that has nowhere else to go. See id.

Appellants' interpretation of N.J.A.C. 19:9-5.2(a), which clearly grants them a right to seek a License to Cross for drainage of stormwater from their property is correct, and the NJTA knows it. That is why, ***during the pendency of this case while the parties were participating in the CASP, the NJTA published new proposed changes to N.J.A.C. 19:9-5.2(a) removing the language that the Appellants' rely upon in this case.*** See 56 N.J.R. 321 (Mar. 4, 2024) (removing

the language "In addition, licenses to cross are utilized by owners of property adjacent to the Roadway that must utilize the Roadway for drainage, egress, and access purposes" from the regulation). The NJTA would not have removed the language that Appellants' based the License to Cross Application on and rely upon in this case if it didn't mean what the Appellants say it means – there would be no need to make the change.

Several statements contained in the Initial Review Letter confirm that the NJTA flatly ignored the text of N.J.A.C. 19:9-5.2(a) and its obvious purpose of providing neighboring property owners like Appellants with a means to drain stormwater when considering the License to Cross Application.

1. The NJTA's Ad Hoc Ban on All Direct Connections to its Stormwater System Contradicts the Text and Purpose of the Regulation

The Initial Review Letter cites the following reason as a basis to deny the License to Cross:

> In response to the recently implemented Inland Flood Protection rules, the Authority can no longer continue with the practice of direct connections into our stormwater collection system utilizing legacy criteria.
>
> [(1a.)]

This broad and conclusory pronouncement, which amounts to a legal conclusion, appears to be based upon the proposition that because another administrative agency has adopted regulations (here, NJDEP) addressing an

adjunct issue (inland flood protection), that the NJTA can no longer allow what its own regulations expressly say is allowed (drainage in the right-of-way). That proposition is nonsensical and directly contradicts the text and purpose of N.J.A.C. 19:9-5.2(a), which remains in effect, applies to the License to Cross Application, and is intended to provide a legal mechanism for owners of property adjacent to the NJTA's right-of-way like Appellants with the ability to use the right-of-way for "drainage." N.J.A.C. 19:9-5.2(a). Indeed, there is nowhere else for the stormwater runoff from the Property to go and it currently drains into the NJTA's swale; which squarely fits within the stated purpose of a license to cross. (124a.) The NJTA's decision to disregard its own regulation in reviewing the License to Cross Application is exactly the type of "willful and unreasoning action, without consideration and in disregard of circumstances" that the law prohibits. Avalon Manor Improvement Ass'n, Inc. v. Township of Middle, 370 N.J. Super. at 91.

2. The NJTA's Ad Hoc Ban on Directing Stormwater Flow into the Right-of-Way Contradicts the Text and Purpose of the Regulation

In the Initial Review Letter, the NJTA also stated: "The spillway of the basin directs flow onto the Parkway which is not acceptable to the Authority." (1a.) This broad and conclusory statement suggests that the NJTA no longer permitts neighboring property owners to direct stormwater flow toward any of its roadways. That position directly contradicts the text of N.J.A.C. 19:9-5.2(a), which specifically provides for neighboring property owners like Appellants to utilize the

Parkway right-of-way for "**drainage**, egress, and access purposes." N.J.A.C. 19:9-5.2(b). The Regulation does not condition use of the right-of-way for "drainage" based upon the direction of water flow. Id. Indeed, it would be an unlikely scenario where water flow is directed *away* from NJTA roadways since water tends to flow downhill from its source. This statement further demonstrates that the NJTA ignored N.J.A.C. 19:9-5.2(b) when it denied the License to Cross Application.

3. The NJTA's Ad Hoc Ban on Installation of Drainage Infrastructure in the Right of Way Contradicts the Text and Purpose of the Regulation

In the Initial Review Letter, the NJTA stated that "[t]he installation of drainage infrastructure and associated retaining wall on Authority [*sic*] Right-of-Way is not acceptable to the Authority." (1a.) This statement suggests that the NJTA prohibits installing any permanent improvements in NJTA rights-of-way. This position is contradicted by the text of the Regulation, which refers to "license to cross applications that contemplate entry by or work being performed by the applicant or its contractors or agents" in the right-of-way. N.J.A.C. 19:9-5.2(e). This position is further contradicted by the NJTA's Standard License to Cross Agreement, which is replete with references to construction or permanent improvements by licensees and maintenance of those improvements "within the […] right of way", insurance requirements for contractors performing said work, indemnification provisions in favor of the NJTA, and other similar provisions.

https://www.njta.com/media/7002/njta-standard-license-to-cross-agreement.pdf (last visited June 4, 2024) (Standard License to Cross Agreement). These documents demonstrate that the very purpose of a License to Cross involves construction of improvements within the right-of-way; so much so that the NJTA included language to that effect on its standard form.

That the NJTA's current position on permanent improvements in the right-of-way is just a façade is confirmed by how it treats other license to cross applications seeking similar relief. On January 7, 2022, the City of Clifton filed License to Cross Application P945 seeing to "[install a] stormwater conveyance system within the NJTA right-of-way [to] improve drainage of the area by increasing the capacity of the existing stormwater conveyance system in order to reduce impacts from flooding" (the "Clifton Application"). (347a.) Like this License to Cross Application, the Clifton Application sought to improve an existing stormwater conveyance system within the NJTA's right-of-way that would ultimately improve the overall drainage system. (347a.) If construction of permanent improvements in the right-of-way were absolutely prohibited as the NJTA now claims, it would seem odd that it sent Clifton three separate engineering review letters discussing those improvements during the design review process instead of just rejecting the Clifton Application outright as it did here. (348a – 368a.) The treatment of the Clifton Application further demonstrates that the

rejection of this License to Cross Application was a deviation from the NJTA's usual practice and was arbitrary, capricious and unreasonable.

B. The NJTA Failed to Apply the Factors Enumerated in N.J.A.C. 19:9-5.2(c) to the License to Cross Application

"The Chief Engineer may approve or reject an application for a license to cross, subject to the approval of the Executive Director." N.J.A.C. 19:9-5.2(c). "License to cross applications ***shall*** be evaluated based on the following" specific criteria contained in the text of the regulation:

> License to cross applications shall be evaluated based on the following:
>
> 1. Adherence to the Turnpike Authority's Standard Specifications;
>
> 2. The impact on the traveling public and the Roadway;
>
> 3. The duration of the request;
>
> 4. The criteria contained in N.J.S.A. 27:23–1 et seq., in particular, the provisions of N.J.S.A. 27:23–9, which must be taken into consideration concerning utilization of the Roadway for certain purposes;
>
> 5. The general concern exhibited by the applicant for the public health, safety, and welfare;
>
> 6. The financial health and stability of the applicant; and
>
> 7. The effect of the proposed crossing on the financial, economic, or engineering aspects of the activities of the Authority, the public, or neighboring property owners.
>
> [N.J.A.C. 19:9-5.2(c)(emphasis added).]

An administrative agency is required to apply its factual findings to the pertinent statute, or be subject to reversal. See Stevens v. Board of Trustees of PERS, 294 N.J. Super. 643, 652 (App. Div. 1996) ("Because the Board failed to articulate any findings of fact whatsoever and failed to apply those facts, as found, to the pertinent statute, we are compelled to reverse."); see also Williams v. Department of Human Services, 116 N.J. at 108 (agencies are required to "apply[] the legislative policies to the facts.").

Neither the Initial Review Letter nor the Denial Letter make any reference to the factors listed in N.J.A.C. 19:9-5.2(c), or contain any language amounting to an actual application of those factors to the License to Cross Application. (1a - 3a.) Application of the applicable regulation to the facts presented in the License to Cross Application was not optional: the regulation expressly requires it. N.J.A.C. 19:9-5.2(c). As the NJTA failed to comply with this basic requirement, reversal is warranted for this reason alone. See Stevens v. Board of Trustees of PERS, 294 N.J. Super. at 652.

C. The NJTA Failed to Consider or Address the Evidence Presented and Issues Raised by the Appellants

Decisions that fail to address "fundamental legal and factual issues" raised by the parties are considered arbitrary, capricious and unreasonable. Green v. State Health Benefits, 373 N.J. Super. 408, 415 (App. Div. 2004). "[I]t is incumbent on the agency to explain its decision in sufficient detail to assure [courts] that the

agency actually considered the evidence and addressed all of the issues before it." Id. at 414. Agency actions that are based "not on a preponderance of all evidence but on evidence arbitrarily selected to support a desired result" are arbitrary, capricious and unreasonable and will not be affirmed. Trantino v. NJ State Parole Bd., 166 N.J. 113, 192 (2001). "Failure to address critical issues, or to analyze the evidence in light of those issues, renders the agency's decision arbitrary and capricious and is grounds for reversal." Green, 373 N.J. Super. at 415.

In Green, the Appellate Division reversed the decision of the State Health Benefits Commission ("SHBC") denying payment on home health care to the appellant after the insurer had paid for the same care for years before abruptly denying coverage; finding that its decision to be arbitrary and capricious. Green v. State Health Benefits, 373 N.J. Super. at 410. There, the insurer paid the claim for the home health care under an exception to the plan's general prohibition on payment for custodial care for years. Id. at 411-412. Then, the appellant was informed that the State Health Benefits Plan's "new claims administrator" that home health care "would no longer be eligible for benefits" and suggested that the insured "might be better served in a nursing home." Id. at 412. The claims administrator denied an internal appeal of that decision and the SHBC denied the insured's request for a hearing and appeal. Id. at 413.

The Appellate Division reversed, finding it "troubling" that the SHBC "peremptorily" denied the application while failing to explain "the fact that for five

years, the Plan did pay for just such care, under an exception to the usual rule [and the appellant] had come to rely on it for her well-being." Id. at 416, 419. The Court held that if the claims administrator had the

> authority to permit exceptions to the 'no custodial care' rule in some circumstances, then it is incumbent upon the SHBC to explain, in this case, why an exception was permitted in the past and what factual circumstances, if any, have changes so as to make the exception no longer applicable to [appellant's] situation. The complete failure to do so render's the agency's decision arbitrary and capricious.
>
> [Id. at 417-418.]

The Court took issue with the SHBC's decision to deny the appellant's request for an administrative hearing, holding that "a hearing would permit the [appellant] an opportunity to present a further factual basis for her claims of estoppel and quasi-estoppel." Id. at 419.

i. Failure to Consider All Evidence

The Initial Review Letter and Denial Letter wholesale ignored the NJTA's December 26, 2014 letter and other documents demonstrating that the parties had agreed on the appropriateness of the Grading and Drainage Plan prior before the License to Cross Application was even filed. The record demonstrates that the Appellants ***proactively sought to understand and address any concerns the NJTA might have regarding the Grading and Drainage Plan prior to seeking final approval of the project before the Planning Board***, and that the parties had a

substantive exchange as a result. (78a – 84a; 86a – 98; 110a.) This was not some academic exercise for the Appellants: it was intended to understand and resolve the NJTA's concerns ***while the Grading and Drainage Plan could still be substantively revised*** before moving forward and obtaining final approval from the Planning Board. The Appellants revised the Grading and Drainage Plan on July 15, 2013 pursuant to the NJTA's June 26, 2013 letter requesting certain revisions. (103a.) Little guesswork is required to know what the parties were talking about: those revised plans clearly depicted the same stormwater and drainage infrastructure that the Appellants now seek to construct. (103a.)

Appellants' prudence paid off: the NJTA wrote to Appellants' engineer on December 26, 2014, acknowledging receipt of the revised plans and confirming that [a]ll prior comments have been adequately addressed to the satisfaction of the [NJTA]." (104a.) It could not have been clearer that this letter was the NJTA's *imprimatur* to the Appellants' plans; signaling that the License to Cross would be forthcoming upon the filing of a formal application. The NJTA now pretends like none of this took place; completely ignoring the existence of these documents in the Initial Review Letter and Denial Letter and failing to even include some of them in the Notice of Agency Record. (1a – 3a.) This is precisely the type of "[f]ailure to address critical issues, or to analyze the evidence in light of those issues" that "renders the agency's decision arbitrary and capricious and is grounds for reversal." Green v. State Health Benefits, 373 N.J. Super. at 415.

The NJTA is required to explain why, after okaying the Appellants' Grading and Drainage Plan in 2014, it is now doing an about-face and attempting to deny the License to Cross. See id. at 417-418 (noting the duty of a state agency to "explain […] why an exception was permitted in the past and what factual circumstances, if any, have changed so as to make that exception no longer applicable" when denying a positive right). This is particularly the case since the Appellants relied to their detriment on the representations made in the NJTA's December 26, 2014 letter and proceeded with obtaining other required land use approvals from outside agencies based upon those plans. See id. at 419. It is clear that the NJTA's decision fails to explain the basis for its sudden about-face and, as such, must be overturned.

ii. Failure to Address the Protest Letter

The NJTA similarly ignored the substantive issues raised in the Protest Letter, which is an independent reason for reversal. After being blindsided by the Initial Review Letter, Appellants sprung into action and timely filed the Protest Letter, listing in detail why each of the seven reasons for denial contained in the Initial Review Letter were wrong and requesting a hearing. (369a.) Rather than considering the arguments and evidence cited in the Protest Letter, as it was required to do, the NTJA's sent a three-sentence Denial Letter that summarily rejected the License to Cross Application and simply cited back to the Initial Review Letter in a circular fashion. (3a.) ***The complete absence in the of any***

analysis of the legal and factual issues raised Protest Letter is the hallmark of arbitrary and capricious conduct by a state agency and is grounds for reversal. Id. at 415.

The NJTA's treatment of the Appellants here is similar to the state agency's treatment of the appellant in Green, and commands a similar result. As was the case in Green, where the agency made representations to the appellant that she came to rely upon (payment for home healthcare), the NJTA affirmatively represented that all of its concerns concerning the Grading & Drainage Plan submitted to the Planning Board had been resolved. (104a.) The appellant in Green and the Appellants here both justifiably relied on the representations of the agency; here, the Appellants moved forward with the land use approval process leaving the stormwater system as-designed. In both cases, the agency later abruptly changed its position resulting in prejudice to the appellant. Here, the NJTA pulled the proverbial rug out from under the Project by unexpectedly denying the License to Cross Application in direct contradiction to its prior representations. (104a; 1a.)

In Green, this Court reversed the agency's decision, finding it "arbitrary and capricious" and "troubling" that the agency failed to address the "fundamental legal and factual issues" present in the case; namely the "complete absence of any explanation as to why the claims were paid for five years, coupled with the absence of any substantive discussion of changes in either SHBC policy or in green's

factual circumstances." Green, 373 N.J. Super. at 415, 418. The NJTA's treatment of the Appellants here is similarly arbitrary and capricious. NJTA ignored the Protest Letter and failed to explain the factual and legal basis for the conclusions reached in the Initial Review Letter, which effectively vetoed all other land use approvals obtained for the Project. (1a.) As this Court did in Green, it should reverse the agency's decision here for the same reasons.

D. The NJTA Wrongfully Applied Later-Enacted Inland Flood Protection Rules to the Application

An agency decision that fails to "properly interpret[] and appl[y] the […] relevant law" is arbitrary, capacious and unreasonable and will be overturned. Catholic Family and Community Services v. State-Operated School Dist. of City of Paterson, 412 N.J. Super. 426, 436 (App. Div. 2010); see also Shuster v. Board of Review, 396 N.J. Super. 240, 246-247 (App. Div. 2007) (overturning administrative decision that was based upon an inapplicable administrative regulation).

The NJTA's unlawful attempt to retroactively apply the Inland Flood Protection Rules to the License to Cross Application, in direct contrast to the grandfathering provisions and policy underpinnings of those rules, is arbitrary, capricious and unreasonable and requires reversal. As a general rule, our Courts favor prospective application of statutes and regulations. See Street v. Universal Maritime, 300 N.J. Super. 578, 581 (App. Div. 1997). "The purpose behind this

rule is to give people fair notice of the laws that they are expected to follow; they cannot be expected to obey laws that have not yet been enacted." Id. "In analyzing whether a statute or regulation may apply retroactively, a court must determine, first, whether the Legislature or agency intended that the statute or regulation apply retroactively[.]" State Troopers Fraternal Ass'n of New Jersey, Inc. v. State, 149 N.J. 38, 54 (1997).

The grandfathering provisions of the Inland Flood Protection Rules remove the Project from their application, which demonstrates that the contrary conclusions reached in the Initial Review Letter are erroneous. In recognition that the Inland Flood Protection Rules could not practically apply to projects that had already been designed and approved, NJDEP intentionally promulgated grandfathering provisions carving out such projects:

> 4. [t]he regulated activity is part of a project that was subject to neither the requirements of this chapter, nor N.J.A.C. 7:7, prior to July 17, 2023, and one of the following applies:
>
> i. The regulated activity is authorized under one or more of the following approvals pursuant to the Municipal Land Use Law (N.J.S.A. 40:55D–1 et seq.), prior to July 17, 2023:
>
> (1) Preliminary or final site plan approval;
>
> [N.J.A.C. 7:13-2.1(c)(4)(i).]

The Project fits squarely within these grandfathering provisions. The Project did not require a flood control permit or any other NJDEP permit under the

requirements of the prior flood protection rules applicable to the project. See N.J.A.C. 7:13-2.1(c)(4). [2] The project had already obtained the Final Approval from the Planning Board prior to the July 17, 2023 effective date of the Inland Flood Protection Rules. N.J.A.C. 7:13-2.1(c)(4)(i). (218a.) Application of the grandfathering provisions clearly removes the Project from within the Inland Flood Protection Rules.

We know that NJDEP did not intend for the Inland Flood Protection Rules to apply retroactively to the Project and others like it because they said as much in responding to comments on the proposed regulations prior to adoption:

> [NJDEP] has determined that it is appropriate to retain the existing legacy structure at N.J.A.C. 7:13-2.1(c)4 for several reasons. Specifically, ***[NJDEP] has concluded that it is unreasonable to retroactively apply the proposed standards of this chapter to certain projects*** that satisfied requirements that were in place at the time the activity was undertaken.
>
> […]
>
> Pursuant to adopted N.J.A.C. 7:13-2.1(c)4i, such a project would have ***already been reviewed by a local government agency***, which necessarily includes a review pursuant to the UCC and its accompanying flood codes.
>
> […]
>
> In such a case, the Department will not require an approval listed at proposed N.J.A.C. 7:13-2.1(b), ***since a***

2 Appellants did obtain NJDEP permits for this project in 2019; however, a later redesign of the project obviated the need for those permits, hence why they were not required in the Final Approval.

> ***significant investment has been made by the applicant and retroactively applying the new flood elevations would result in a redesign that would likely be impracticable.***
>
> [55 N.J.R. 1385(b) (Jul. 17, 2023) (response to comments 280-285) (emphasis added)]

The NJTA's unlawful attempt to retroactively apply the Inland Flood Protection Rules to the License to Cross Application, as articulated in the Initial Review Letter, is arbitrary, capricious and unreasonable and requires reversal. The License to Cross Application was filed on June 6, 2023. (279a.) The Inland Flood Protection Rules that the NJTA attempted to apply to the were not adopted until July 17, 2023, see 55 N.J.R. 1385(b) (Jul. 17, 2023), ***after*** the License to Cross Application was already pending review by the NJTA and after Appellants had already obtained the Final Approval from the Planning Board. (218a.) Yet, the NJTA disregarded the grandfathering provisions of the Inland Flood Protection Rules entirely and improperly used them as a basis to deny the License to Cross Application, citing them three times as a basis for denial in the Initial Review Letter:

> 1. In response to the recently implemented NJDEP Inland Flood Protection rules, the Authority can no longer continue with the practice of direct connections into our stormwater collection system using legacy criteria ….
>
> 2. The applicant has not demonstrated that the peak flows in the future condition are reduced utilizing current regulatory criteria;
>
> ….

> 4. The Applicant has not demonstrated to the Authority's satisfaction that maintenance of the Authority's stormwater collection system will not be adversely impacted by the applicant's proposed basin or increased stormwater volumes over time;
>
> [(a.)]

Appellants objected and called out the obvious misapplication of these regulations in the Protest Letter. (369a.) However, the NJTA completely ignored the Protest Letter, doubled down on its position and affirmed the denial of the License to Cross Application without explanation in the Denial Letter. (3a.) This is precisely the type of failure to "properly interpret[] and appl[y] the […] relevant law" that renders the denial of the License to Cross Application arbitrary, capacious and unreasonable. Catholic Family & Community Servs., 412 N.J. Super. at 436. Denial for this is inconsistent with law and is grounds for reversal.

The written policy statements published by NJDEP in connection with the adoption of the Inland Flood Protection Rules confirm that they were never intended to apply to developments like the Project that had already been through the land use approval process prior to their adoption. The Appellants had already made a "significant investment" in the Project and were far along in the development process when the new rules were adopted, something the NJDEP focused on as reason why it would be improper to retroactively apply these rules to certain developments. 55 N.J.R. 1385(b) (Jul. 17, 2023) (response to comments 280-285). Likewise, NJDEP made clear that it was not intended for projects that

already obtained municipal approval and did not require further NJDEP review to have to redesign the entire project under the Inland Flood Protection Rules. Id. This offers further support for grandfathering the Project since the Grading and Drainage Plan had already been reviewed and approved by the Planning Board (218a) and the Bergen County Soil Conservation District (206a.) prior to the adoption of these rules. These policy statements make clear that the grandfathering provisions of the Inland Flood Protection Rules were created to exempt developments like the project for numerous common-sense policy reasons.

In sum, it is clear that the Inland Flood Protection Rules do not apply to the Project, and that the NJTA's application of those rules to the Project was precisely the type of misapplication of law by an administrative agency that requires reversal of the agency decision. See Catholic Family & Community Servs., 412 N.J. Super. at 436.

E. The NJTA Arbitrarily Applied Unarticulated and Undefined Standards to the Appellants' Application

Decisions based upon "unarticulated standards or statements of policy [are] emblematic of arbitrary action." Id. at 442-443; In re N.J.A.C. 7:1B-11, 431 N.J. Super. at 128 ("a rule that does not contain a clear or objectively ascertainable standard may not be upheld").

The NJTA's denial of the License to Cross Application was based upon unarticulated factors not contained in N.J.A.C. 19:9-5.2(c). As discussed in the

preceding sections of this brief, N.J.A.C. 19:9-5.2(c) provides an exhaustive list of factors that the NJTA must consider when reviewing a License to Cross application. Instead of limiting its review to those factors, the NJTA based its denial on unarticulated standards that Appellants had no advance notice of, or ability to comply with.

The NJTA denied the License to Cross Application based upon the possibility that the detention basin, which had already been approved by the Planning Board, might be classified as a "dam [that] has not been reviewed by the NJDEP Dam Safety Unit." (1a.) In so doing, the NJTA impliedly decided that the mere possibility that a different permit from a separate state agency might be required in order for Appellants to construct the Project was a basis to deny the License to Cross, a completely separate and distinct application.

The possible need to obtain another permit from a different agency was not a basis for NJTA denial of the License to Cross Application under N.J.A.C. 19:9-5.2(c). Even if the detention basin met the classification of a "dam" under N.J.A.C. 7:20-1.8 (***it does not***), that would not affect the NJTA's consideration of the merits of the License to Cross Application under the factors articulated in NJTA regulations. That the sudden raising of this issue is capricious is confirmed by the fact that it was never previously raised to Appellants over the past 20 years of the approval process. The NJTA's apparent desire to find reasons to deny this

properly supported application is evidence by their capricious and seemingly random effort to classify the detention basin as a "dam."

Moreover, the NJTA also attempted to establish an arbitrary, blanket policy prohibiting stormwater infrastructure in its right-of-way, disallowing connection to its stormwater collection system and prohibiting the flow of stormwater toward the Parkway, in direct contravention of the language of N.J.A.C. 19:9-5.2(a). The Initial Review Letter simply concludes that what is expressly allowed by regulation (i.e. neighboring property owners obtaining licenses to cross for drainage) will not be allowed in this case. (1a.) This action is arbitrary on its face as it purports to preemptively disallow an entire class of applications based upon an unarticulated standard without performing the required evaluation.

The NJTA also inappropriately utilized ad hoc, unascertainable standards as basis for its denial of the License to Cross Application. The Initial Review Letter states that the NJTA does not have "a level of comfort that the maintenance of the basin will be adequately and routinely performed" even if the eventual HOA governing documents include maintenance covenants, which is a widely accepted and standard industry practice. (1a.) It further states that Appellants have "not demonstrated to the Authority's satisfaction that maintenance of the Authority's stormwater collection system will not be adversely impacted by the applicant's proposed basin or increased stormwater volumes over time." (1a.) Appellants are left to guess what would provide a "level of comfort", which is a completely

subjective standard, to the NJTA on this issue. Perhaps if the Appellants had been given an opportunity to respond to that concern, the NJTA's concerns would have been satisfied by the Stormwater Operation & Maintenance Manual prepared by the Appellants, or the fact that security such as insurance policies and maintenance bonds could be posted to address such concerns. (182a.) But NJTA's perfunctory denial of the License to Cross Application and refusal of Appellants' request for a meeting or hearing prevented any consideration of such potential solutions.

Nor do Appellants have notice of what would provide the NJTA with would give "the Authority[] satisfaction" that its stormwater collection system, where almost all of the stormwater running off of the Property today drains anyway, will not be "adversely impacted." Nor are Appellants provided with a known standard of what will "adversely" impact the NJTA's stormwater system versus a different level of "impact" that might be permissible given the fact that the Project is exempt from the Inland Flood Protection Rules, as discussed in preceding sections of this brief.

In short, NJTA's application of vague new standards, outside of the requirements articulated in NJTA regulations, rendered NJTA's denial of the License to Cross Application arbitrary, capricious and unreasonable.

F. The NJTA's Denial of the License to Cross Application was Arbitrary and Unreasonable, As Evidenced by How it Treats Other Similar Applications

The NJTA's arbitrary and abrupt denial of the License to Cross Application is evident when compared to how NJTA has treated other similar applications. As noted above, the Clifton Application sought to "[install a] stormwater conveyance system within the NJTA right-of-way [to] improve drainage of the area by increasing the capacity of the existing stormwater conveyance system in order to reduce impacts from flooding". (347a.) Like the License to Cross Application, the Clifton Application sought to improve an existing stormwater conveyance system within the NJTA's right-of-way that would ultimately improve the drainage system. (347a.) But NJTA's treatment of the Clifton Application was dramatically different. When NJTA identified concerns, it did not just outright deny the application. Instead, NJTA took the typical, common-sense approach of actively engaging the City of Clifton in a dialogue to resolve concerns that it had with proposed plan. NJTA sent three separate engineering review letters to Clifton during the design process in an effort to cooperatively work out solutions to NJTA's concerns. (348a – 268a.) The disperate treatment of the Clifton Application demonstrates that the rejection of this License to Cross Application was arbitrary, capricious and unreasonable.

The NJTA's grant of permanent easements to other property owners to construct drainage infrastructure in the right-of-way likewise evidences that the

NJTA's denial of Appellants' License to Cross Application was arbitrary, capricious and unreasonable. In the Initial Review Letter the NJTA stated that it "does not have a level of comfort that maintenance of the basin," referring to a simple concrete pipe, stone riprap and a short retaining wall, "will be adequately and routinely performed by the Site owner […] even if there is an agreement to do so recorded in the title to the Site." (1a.) This language, when read together with the remainder of the Initial Review Letter, suggests that the NJTA seeks to impose a blanket prohibition against the construction of any improvement within the right-of-way.

However, that position is contradicted by easements granted by the NJTA to other entities. In 2007, NJTA granted an easement to the Hess Corporation to construct permanent improvements in the form of an underground liquid petroleum pipeline within a right-of-way on NJTA property. (297a.) That easement contains specific maintenance covenants and indemnity provisions imposing duties on a private entity. (299a.) But, in summarily denying Appellants' Application, NJTA asserted that it regards maintenance covenants and indemnity provisions are insufficient to protect NJTA's interests. The existence of the Hess easement belies NJTA's representation in that regard.

Similarly, in 2012, the NJTA granted an easement to Matrix Corporate Campus Condominium Association, Inc. for the purpose of "constructing, installing, maintaining, repairing, altering and operating utilities including, without

limitation, water, storm sewer, sanitary sewer, electric, cable, gas and telecommunications utilities and lines" on NJTA property. (308a.) Construction of minimal stormwater infrastructure is exactly what the Appellants now seek permission to do through the License to Cross Application. The existence of the Matrix easement further demonstrates the disparate, arbitrary, capricious and unreasonable nature of the NJTA's treatment of the License to Cross Application.

Further still, the NJTA has granted numerous drainage easement to public entities to do exactly what the Appellants seek to do here: construct draining improvements within the NJTA's right-of way. In 2010, the NJTA granted Ocean County a "deed of drainage easement" allowing it to construct a "drainage pipe, including but not limited to headwall structure, rip rap and appurtenances and the right to form and maintain slopes on land over a portion of" NJTA property." (328a.) That is literally what the Appellants seek to do here. Similar easements were granted to the City of Elizabeth in 1978 and the City of Linden in 2015. (334a - 346a.) This further demonstrates that NJTA's ad hoc prohibition on installation of drainage infrastructure on its property was arbitrary, capricious and unreasonable.

These easements granted by NJTA to other entities, allowing them to undertake similar activities, demonstrates that NJTA's rationale for denying Appellants' Application is arbitrary, capricious and unreasonable.

III. THE NJTA'S ATTEMPT TO ESTABLISH BLANKET POLICIES CONTRADICTING THE TEXT OF N.J.A.C. 19:9-5.2(A) CONSTITUTES ILLEGAL RULE-MAKING IN VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT (1a -3a.)

The NJTA is required to comply with the Administrative Procedures Act (the "APA"), which requires public notice and a comment period of the proposed regulation before it can be adopted by an administrative agency, whenever it engages in rule-making. See N.J.S.A. 52:14B-4. The term "administrative rule" is defined by the APA as

> an agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of any rule.
>
> [N.J.S.A. 52:14B-2(e).]

Whether an agency action is effectively a rule that must be adopted through the formal rule-making process is based on an analysis or the following factors:

> (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a

> decision on administrative regulatory policy in the nature of the interpretation of law or general policy.
>
> [Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 331-332 (1984).]

Applying these factors, the statements made in the Initial Review Letter concerning blanket prohibitions on connections to the NJTA's stormwater system and construction of permanent improvements in the right-of-way constitute illegal administrative rulemaking in violation of the APA.

A. The NJTA's Action Was Intended to Have Wide Coverage

The NJTA's pronouncements that it (1) no longer allows direct connections to its stormwater collection system; and (2) does not permit the installation of drainage infrastructure in the right-of-way; and (3) will never permit neighboring property owners to direct the flow of stormwater toward the right-of-way, are broad, sweeping statements that swallow the entire purpose of a License to Cross. These prohibitions affect the value and use of every piece of real property that abuts land owned by the NJTA in the State of New Jersey; an extremely large group.

B. The Ad Hoc Policies Were Intended to Uniformly Apply to Similarly Situated Persons

The breadth of the language used in the Initial Review Letter indicates that the action taken by the NJTA is intended to apply to all owners of property abutting NJTA land.[3]

C. The Ad Hoc Policies Apply Prospectively

The Initial Review Letter states that the NTJA can "no longer" allow direct connections to its stormwater system, and that installation of drainage infrastructure and directing of stormwater into the right-of-way are "not acceptable." (1a.) The words utilize indicate that these policies are final and are intended to apply to the License to Cross Application and to all future cases.

D. The Ad Hoc Policies Purport to Establish a Legal Standard Not Otherwise Expressly Provided or Inferable

The policy positions expressed in the Initial Review Letter – that the NJTA (1) no longer allows direct connections to its stormwater collection system; and (2) does not permit the installation of drainage infrastructure in the right-of-way; and (3) will never permit neighboring property owners to direct the flow of stormwater toward the right-of-way - find no support in the text of N.J.A.C 19:9-5.2(a). In fact, the public policy underlying N.J.A.C 19:9-5.2(a) as expressed in the text of the regulation, could not be clearer: "licenses to cross are utilized by owners of

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3 Certainly, if the NJTA intended to make an *ad hoc* rule that applied only the Appellants, that would be arbitrary, capricious and unreasonable, as discussed in the preceding sections of this brief.

property adjacent to the [Parkway] that must utilize the [right-of-way] for drainage, egress, and access purposes." Reasonable minds cannot debate that the NJTA previously made a policy decision – memorialized in its regulations – to permit neighboring property owners like Appellants to obtain a License to Cross for drainage, which contemplates construction of permanent improvements. The new legal standards that the NJTA attempted to established through the Initial Review Letter are contrary to the text of the regulation.

E. The Ad Hoc Policies Reflect Policy Not Previously Expressed and Which Constitutes a Material and Significant Change from the NTJA's Existing Policy

"If the statutory language is clear and unambiguous, and reveals the Legislature's intent, we need look no further." Farmers Mut. Fire Ins. of Salem v. New Jersey Property-Liability Inc. Guar Association, 215 N.J. 522, 527 (2013). By adopting N.J.A.C 19:9-5.2(a), the NJTA made a clear policy decision to allow Licenses to Cross for the precise reason Appellants have requested one. This regulation reflects common sense: neighboring property owners like Appellants are physically limited to utilizing the NJTA's right-of-way to drain stormwater that has no other place to go but downhill.

The policy positions taken by the NJTA in the Initial Review Letter flatly contradict the terms of N.J.A.C 19:9-5.2(a). In denying the License to Cross Application, the NJTA ignored the unambiguous policy decision that it made in adopting N.J.A.C 19:9-5.2(a) and chose to take a directly contrary position by

categorically ***disallowing*** the Appellants (any anyone else) from applying for a License to Cross to utilize the right-of-way for drainage despite the regulation expressly allowing that. This interpretation clearly violates the policy set forth in the text of the regulation and leads to an absurd result by disallowing the Appellants from doing exactly what the regulation allows. No Court would interpret N.J.A.C 19:9-5.2(a) in such a manner, and the NJTA's obviously flawed interpretation is owed no deference. See State v. Morrison, 227 N.J. 295, 308 (2016) (Courts "will not adopt an interpretation of the statutory language that leads to an absurd result or one that is distinctly at odds with the public-policy objectives of a statutory scheme.")

F. Reflects a Decision on Regulatory Policy in the Nature of the Interpretation of Law or General Policy

The positions taken by the NJTA involve interpretations of law. The Initial Review Letter states that the NJTA's interpretation of the Inland Flood Protection Rules prohibited it from complying with its own regulation. (1a.) Its decision to disallow direction of stormwater into or construction of stormwater infrastructure on the right-of-way across the board is a policy interpretation, albeit an incorrect one.

In sum, analysis of the Metromedia factors makes clear that the NJTA's attempt to move the goalposts on the License to Cross Application during its pendency amounts to illegal administrative rule-making. Metromedia, 97 N.J. at

331-332. Every factor of the analysis weighs in Appellants' favor. The APA required the NJTA to provide Appellants and the rest of the regulated community advance notice and opportunity to comment on such sweeping policy changes prior to implementation. The NJTA's failure to do so is a textbook case of an administrative agency attempting to avoid the requirements of the APA and is illegal.

The NJTA's violation of the APA is confirmed by the fact that they actually published proposed amendments to N.J.A.C. 19:9-5.2(a) ***removing the language that the Appellants' rely upon during the pendency of this case.*** See 56 N.J.R. 321 (Mar. 4, 2024) (removing "In addition, licenses to cross are utilized by owners of property adjacent to the Roadway that must utilize the Roadway for drainage, egress, and access purposes" from the regulation). This is a tacit admission by the NJTA that its attempt to change its policy during the pendency of the License to Cross Application to pull the rug out from under the Appellants violated the APA. Of course, even if the pending amendments to N.J.A.C. 19:9-5.2(a) were adopted, they would not apply to the License to Cross application, which was filed prior to their introduction.

IV. THE NJTA IS EQUITABLY ESTOPPED FROM DENYING THE APPELLANTS' LICENSE TO CROSS APPLICATION AFTER PRELIMINARILY APPROVING IT (104a.).

The doctrine of equitable estoppel prohibits the NJTA from denying the Appellants' License to Cross Application because NJTA did not object to the

stormwater management plan before the Planning Board and had previously approved the same stormwater infrastructure that Appellants now seek to construct. "Equitable estoppel 'is designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment.'" Lopez v. Patel, 407 N.J. Super. 79, 91 (App. Div. 2009) (internal citations omitted). "[A]n individual is not permitted to 'blow both hot and cold,' taking a position inconsistent with prior conduct, if this would injure another, regardless of whether that person has actually relied thereon." Heuer v. Heuer, 152 N.J. 226, 237 (1998).

The doctrine of equitable estoppel prohibits the NJTA from denying Appellants' License to Cross Application after it not only failed to object to the stormwater management elements of the project over years of Planning Board hearings, but it expressly approved the drainage improvements in the December 26, 2014 letter. As discussed in preceding sections of this brief, the NJTA approved the Appellants' plans to continue to direct stormwater from the Property into the existing swale in its right-of-way, which is memorialized in the December 26, 2014 letter. (104a.)

The Appellants revised the Grading and Drainage plans at the NJTA's request in July 2013 then submitted those plans to the NJTA for review, which led to the December 26, 2014 letter. (103a.) The same drainage improvements Appellants now seek to construct were depicted on both the 2013 plans submitted

to the NJTA then, and the more recent plans submitted to the NJTA with the License to Cross Application. (252a.) The NJTA received notice of every Planning Board application that Appellants filed and did not object. Instead, it issued letters simply acknowledging that the application called for constructing infrastructure within its right-of-way, which signaled NJTA's tacit approval. (204; 211a.) Nothing in those letters could have been interpreted as an objection to the stormwater element of the Project.

In reliance, the Appellants moved forward to obtain the Final Approval leaving the stormwater system as-designed. The NJTA's subsequent denial of the License to Cross Application represents a complete reversal of its prior position; in other words, "blowing both hot and cold." Heuer v. Heuer, 152 N.J. at 237. The NJTA cannot now, after all other substantive approvals have been obtained by Appellants, repudiate its prior course of action by denying this Application after not objecting before the Planning Board and affirmatively representing to Appellants that all of its concerns had been resolved. Appellants justifiably relied on the NJTA's conduct in proceeding with the Project as-designed and will suffer severe damage if they are not permitted to proceed with the Project. The NTJA is estopped from taking a different position at this late hour. See Lopez v. Patel, 407 N.J. Super. at 91.

V. DENIAL OF THE LICENSE TO CROSS APPLICATION VIOLATES NEW JERSEY'S PUBLIC POLICY FAVORING THE CONSTRUCTION OF AFFORDABLE HOUSING (Not Raised Below).

The NJTA's rejection of this License to Cross Application also violates New Jersey's longstanding public policy in favor of constructing affordable housing by effectively vetoing the Regional Contribution Agreement and Court Order approving it, which require the Appellants to make a $375,000 contribution to the municipality's affordable housing trust fund. An agency decision that is inconsistent with the public policy of the state will not be upheld. See In re North Haledon School Dist., 363 N.J. Super. 130, 139 (App. Div. 2003), aff'd 181 N.J. 161 (2004). "The public policy of this State has long been that persons with low and moderate incomes are entitled to affordable housing[,]" Homes of Hope, Inc. v. Eastampton Twp. Plan. Bd., 409 N.J. Super. 330, 338 (App. Div. 2009) and "to increase the supply of affordable housing." Bi-County Development of Clinton, Inc. v. Borough of High Bridge, 174 N.J. 301, 327 (2002).

The denial of the License to Cross Application all but prohibits the development of the Property as approved by the Planning Board; which, once constructed, requires the Appellants to contribute $375,000 to the Township's Affordable Housing Trust Fund pursuant to the 2001 settlement agreement with the Township that is memorialized by Court Order. (13a.) The NJTA's decision operates as a *de facto* veto of not only every other required land use approval, but of the Appellants' Court Ordered obligation to make a significant contribution to

the municipal affordable housing trust fund that will aid in the construction of affordable housing. Such a result flies in the face of the state's public policy favoring the construction of affordable housing. See Homes of Hope, Inc. v. Eastampton Twp. Plan. Bd., 409 N.J. Super. at 338; Bi-County Development of Clinton, Inc. v. Borough of High Bridge, 174 N.J. at 327. The fact that the NJTA's denial of the License to Cross Application violates this important policy requires reversal. In re North Haledon School Dist., 363 N.J. Super. at 139.

CONCLUSION

NTJA's arbitrary' capricious and unreasonable denial of the License to Cross Application should be reversed. The decades-long approval process for the Project was supposed to conclude with the formal issuance of a License to Cross by the NJTA following its substantive review of the Appellants' stormwater management plans. The shocking and abrupt rejection of the Application defies logic and ignores the substantive exchange that occurred between the parties' engineers which led to issuance of the December 26, 2014 approval letter by the NJTA and the evidence submitted to the NJTA with the application itself. For the numerous reasons set forth in this brief, the NJTA's denial of the License to Cross Application was unlawful and must be reversed.

Respectfully submitted,

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Dated: June 17, 2024
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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-832-23
IN THE MATTER OF APPLICATION TO NEW JERSEY TURNPIKE AUTHORITY FOR LICENSE TO CROSS NUMBER P971	CIVIL ACTION ON APPEAL FROM FINAL ACTION OF THE NEW JERSEY TURNPIKE AUTHORITY APPLICATION NO. P971

REPLY BRIEF OF APPELLANTS ESTATE OF JAMES VIVIANO, NANCYLU VIVIANO MANNUCCIA, THOMAS J. VIVIANO, ROSEANNE CALDARISE AND ANITA PFEFFERKORN

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I. AS AN ADMINISTRATIVE AGENCY OPERATING IN A QUASI-JUDICIAL, ADJUDICATIVE ROLE, THE NJTA ACTED IN A REGULATORY, RATHER THAN PROPRIETARY, CAPACITY RELATIVE TO THIS LICENSE TO CROSS APPLICATION.

A. A Public Entity Acts in a Regulatory Capacity Where the Proposed Activity is Subject to a Regulation.

The NJTA argues that it has unrestrained and unreviewable discretion to treat License to Cross applications however it pleases because it is acting in a proprietary, rather than regulatory, capacity. This argument is facially ridiculous and turns basic tenants of administrative law upside down. "[A]dministrative agencies, particularly where the underlying statute is silent, should 'articulate the standards and principles that govern their discretionary decisions in as much detail as possible.'" Lower Main Street Associates v. NJHMFA, 114 N.J. 226, 235 (1989). Once a regulation has been promulgated, the agency must follow it and cannot apply undisclosed criteria that contradict the regulation. See University Cottage Club of Princeton New Jersey Corp. v. NJDEP, 191 N.J. 38, 57-58 (2007). Here, the NJTA promulgated regulations creating the right to apply for a License to Cross, N.J.A.C. 19:9-5.2(a), establishing a process for submitting such applications and standards by which they are judged, N.J.A.C. 19:9-5.2(b), and (c) and a process to protest adverse decisions. N.J.A.C. 19:9-5.5. The argument that because NJTA owns the land subject to such an application, it is acting in a "proprietary" rather than "regulatory" capacity – and thus has unfettered discretion

to grant or deny – is not credible. The NJTA is required to follow the standards that it established by regulation. University Cottage Club, 191 N.J. at 57-58.

The NJTA cites cases dealing with a public entity's discretion over whether or not to convey interests in land. (See Rb19.) None of those cases apply, as the *license* sought provides "authority to go upon the land of the licensor and do an act or series of acts there, but passes no estate or interest in the land." East Jersey Iron Co. v. Wright, 32 N.J. Eq. 248, 248 (Ch. Div. 1880) (right to construct a mine on licensed premises). The cases cited deal with the government's decision to convey land under its proprietary authority; not the obligation to consider an application for a license established by regulation. Even where the government's "proprietary interest is involved and the designated officers exercise the proprietor's absolute discretion" such discretion is still "**subject … to the limitations stated in the controlling statutes[.]**" Atlantic City Elec. Co. v. Bardin, 145 N.J. Super. 438, 443 (App. Div. 1976) (emphasis added). There can be no debate that an agency is required to follow the regulations that it adopts, even when it has a proprietary interest. See University Cottage, 191 N.J. at 57-58.

B. NJTA Regulations Establish a Right of Neighboring Property Owners like Appellants to Apply for a License to Cross.

An administrative regulation must "be construed in accordance with the plain meaning of its language, **and in a manner that makes sense when read in the context of the entire regulation**." Medford Convalescent & Nursing Ctr. v. Division of Med. Assis. & Health Servs., 218 N.J. Super. 1, 5 (App. Div. 1985)

(internal citations omitted) (emphasis added).

> A license to cross is a formal agreement with the Authority granting permission to enter upon or access the Roadway or other Authority property. This **normally** pertains to public and private utilities that must occupy the property under, on, or over the Roadway in order to provide service to the public. **In addition, licenses to cross are utilized by owners of property adjacent to the Roadway that must utilize the Roadway for drainage, egress, and access purposes.**
>
> [N.J.A.C. 19:9-5.2(a) (emphasis added).]

The words of the regulation make clear that the NJTA intended to provide a mechanism for neighboring property owners like Appellants to direct drainage of stormwater into the right-of-way by obtaining a License to Cross. See id.

In an effort to distract from such obvious intent, the NJTA offers the following tortured legal interpretation: "N.J.A.C. 19:9-5.2(a) contemplates two categories of licenses, [1] utilities and [2] abutters seeking entry to NJTA's realty. Permanent and continuous entry, however is forbidden to abutters." (Rb32). However, the regulation says nothing of the sort – it does not purport to create two distinct categories of Licenses to Cross. Rather, it simply describes examples of the most common **uses** of Licenses to Cross. Use of the word "normally" in the example of utilities occupying property through a License to Cross logically implies that there are other unmentioned scenarios and kinds of applicants who can also take advantage of such a use. Otherwise, use of the term "normally" would be unnecessary surplusage. If the NJTA intended to restrict occupancy to a specific,

narrow class of applicants, it could have easily done so.

Nor does N.J.A.C. 19:9-5.2(a) restrict the type of license that a neighboring property owner like Appellants may obtain. **The regulation contains no restrictive language.** The awkward and semantical interpretation of the word "utilize" would require the Court to conclude that "utilize" does not contemplate construction of improvements in the right-of-way. **But, the form that the NJTA itself generated to govern Licenses to Cross says that specific activity is allowed**. The Standard License to Cross Agreement discusses "the plans and specifications for the **construction of facilities** contemplated by this license." https://www.njta.com/media/7002/njta-standard-license-to-cross-agreement.pdf (last visited December 17, 2024) (Section 2) (emphasis added). Further,

> Whenever the Licensee wishes to **undertake repairs or special maintenance work upon or about said facilities within the Turnpike right-of-way**, it shall, unless prevented by the necessity for emergency action, give the Authority reasonable advance notice of its intention, and the work contemplated[.]
>
> [Id. (Section 4) (emphasis added).]

In short, NJTA's proposed interpretation of the License to Cross regulation conflicts with both (1) the regulation's plain language, and (2) NJTA's own standard forms applying that regulation. Thus, NJTA's argument does not "make[] sense when read in the context of the entire regulation" and should be rejected. See Medford Convalescent & Nursing Ctr., 218 N.J. Super. at 5.

C. The NJTA's Treatment of the License to Cross Application is Reviewed Under the Standard of an Adjudicative Action of an Administrative Agency

The NJTA asks the Court not to apply the standard of review enunciated by the Supreme Court for agency decisions. This is plainly wrong. An agency acts in an adjudicative, quasi-judicial capacity when "the actions and decisions of the state administrative agenc[y] adjudicat[es] the rights of" applicants such as Appellants. See Northwest Cov. Med. Ctr. v. Fishman, 167 N.J. 123, 135 (2001) (internal citations omitted). The issuance of a license or permit, such as a License to Cross, is a quasi-judicial function. See In re Issuance of a Permit, 120 N.J. 164, 172 (1990). The standard of review is therefore the same as that of an adjudicative decision. In re Proposed Quest Academy Charter, 216 N.J. 370, 384-385 (2013).

In asking the Court to ignore the standard of review for agency decisions, the NJTA takes the position that it has the right to consider License to Cross applications in a Star Chamber-type proceeding, where it can arbitrarily set ever-changing, subjective standards. This is a direct violation of the Supreme Court's holding in Northwest Cov. Med. Ctr. v. Fishman, 167 N.J. at 135. Thankfully, this Court is "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue[.]" Mayflower Sec. Co. v. Bureau of Sec. Div. of Consumer Affs. Dep't of Law & Pub. Safety, 64 N.J. 85, 93 (1973).

II. THE REGULATION GOVERNING PROTESTS OF NJTA DECISIONS REQUIRES AN EXPEDITIOUS SUBMISSION OUTLINING THE BASIS FOR THE PROTEST, NOT AN EXHAUSTIVE APPENDIX OF EVERY RELEVANT DOCUMENT.

The NJTA argues that every document included in Appellants' appendix was required to be submitted with the October 2, 2023 letter of protest (the "Protest Letter"), and that failure to do so waived Appellants' right to seek supplementation of the record. (See Rb71.) This argument contradicts the text and purpose of the regulation governing protests of decisions related to License to Cross applications.

Foremost, such protests must be filed on an extraordinarily expedited timeframe: protests shall "be submitted in writing to the General Counsel within **five days** after such aggrieved party knows or should have known of the facts giving rise to the grievance" – a substantially shorter time than the protest periods established by other administrative agencies. N.J.A.C. 19:9-5.5(a) (emphasis added); cf N.J.A.C. 19:36-7.2 (five "business day" protest period for N.J. Public Broadcasting Authority); N.J.A.C. 13:21-19.2 (30-day protest period for Motor Vehicle Franchise Committee); N.J.A.C. 18:26-12.9(a) (90-day protest period for Department of Treasury). The consequences for failing to file a timely protest are harsh: "failure to file a timely protest shall bar any further action." N.J.A.C. 19:9-5.5(a). The abbreviated deadline for the filing of the Protest Letter belies the claim that a long or exhaustive submission was required.

This conclusion is supported by the text of the regulation itself: "[t]he written protest shall set forth in detail the facts upon which the aggrieved applicant

bases its protest and shall define, as clearly as the available information permits, those issues or facts in dispute." N.J.A.C. 19:9-5.5(a). Put another way, a protest related to a License to Cross application must only identify the factual basis of the dispute and identify the factual or legal issues present. See id. This is akin to the information required to be included in a Request for an Adjudicatory Hearing filed with NJDEP. See N.J.S.A. 7:14A-17.2(e)(4) (adjudicatory hearing requests required to include, among other things, "[a] list of the specific contested permit condition(s) and the legal or factual question(s) at issue for each condition, including the basis of any objection."). The regulation did not, as the NJTA argues, require the Appellants to file every document that it might ultimately base a later appeal of the NJTA's decision on with the Protest Letter. The Protest Letter was legally sufficient, and the Appellants are within their rights to introduce additional documents on appeal, as the Court has already ruled.

III. THE NJTA'S PROPOSED AMENDMENT OF N.J.A.C. 19:9-5.2(A) DURING THE PENDENCY OF THIS APPEAL DEMONSTRATES THAT APPELLANTS' INTERPRETATION IS CORRECT.

In this appeal, the NJTA takes the untenable position that the Appellants never had the right to apply for a License to Cross in the first place because N.J.A.C. 19:9-5.2(a) does not allow neighboring property owners like Appellants to seek a license to construct permanent improvements in the right-of-way. N.J.A.C. 19:9-5.2(a) expressly provides Appellants with the right to do exactly what they seek to do here: "licenses to cross are utilized by **owners of property**

adjacent to the Roadway that must utilize the Roadway **for drainage**, egress, and access purposes." N.J.A.C. 19:9-5.2(a) (emphasis added). As discussed in Appellants' initial brief, this regulation is an "administrative rule" within the meaning of the APA since it "implements […] policy [and] describes the organization, procedure or practice requirements" of the NJTA by providing examples of parties who may apply for a License to Cross. See N.J.S.A. 52:14B-2(e). Evidently, the NJTA agrees, since during the pendency of this appeal, it published new proposed changes to N.J.A.C. 19:9-5.2(a) removing the bolded language in the above quote. See 56 N.J.R. 321 (Mar. 4, 2024). It is no accident that the removal of the aforementioned language, which would ostensibly curtail the rights of the owners of land abutting NJTA property, happens to mirror the NJTA's legal position in this litigation. The NJTA would not have gone through the process of publishing these proposed changes to N.J.A.C. 19:9-5.2(a), using the process required by the APA, if it thought that the language of the regulation already precluded applications by neighboring property owners to construct drainage improvements in NJTA's rights-of-way.

IV. THE NJTA'S TREATMENT OF THE LICENSE TO CROSS APPLICATION, AND CERTAIN ARGUMENTS ADVANCED ON APPEAL, DEMONSTRATE THAT THE NJTA VIOLATED THE SQUARE CORNERS DOCTRINE.

A. The Square Corners Doctrine Requires the NJTA Act Fairly and with Integrity When Dealing with the Public.

As a public entity, the NJTA has an obligation to "turn square corners" in dealing with the Appellants as members of the public. See W.V. Pangbore & Co., Inc. v. New Jersey Dept. of Transp., 116 N.J. 543, 561-62 (1989) (applying the square corners doctrine to the Department of Transportation). The Supreme Court enunciated the square corners doctrine as follows:

> We have in a variety of contexts insisted that governmental officials act solely in the public interest. In dealing with the public, government must 'turn square corners.'
>
> […]
>
> It may not conduct itself so as to achieve or preserve any kind of bargaining or litigational advantage over the property owner. Its primary obligation is to comport itself with compunction and integrity, and in doing so government may have to forego the freedom of action that private citizens may employ in dealing with one another.
>
> [F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426-427 (1985).]

"One of the hallmarks of the 'turn square corners' doctrine is that its application is not dependent upon a finding of bad faith." CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd., 414 N.J. Super. 563, 586-87 (App. Div. 2010). Like any other public entity, the NJTA was obligated to act in a forthright and honest manner and was not permitted to "exploit litigational or bargaining advantages that might otherwise be available to private citizens" in doing so, as the record demonstrates they did. See W.V. Pangbore & Co., 116 N.J. at 561.

B. Efforts to Pretend that a License to Cross Does Not Permit Construction of Permanent Improvements is Contradicted by the Language of the License to Cross Application Itself.

At best, the NJTA's argument that N.J.A.C. 19:9-5.2(a) does not actually mean what it says, when NJTA's own forms contradict that interpretation, is an attempt to gain the type of "litigational advantage" lacking in "compunction and integrity" that the square corners doctrine prohibits. See F.M.C. Stores Co., 100 N.J. at 426-27. At worst, it is a bad faith attempt to avoid compliance with the NJTA's own regulations to the detriment of a taxpayer.

C. The Feigned Lack of Institutional Memory of the NJTA's Dealings with Appellants is Indicative of Bad Faith.

Throughout its brief, the NJTA pretends that it has no institutional memory of its dealings with the Appellants over the last several decades, and even goes so far as to intimate that it no longer possesses the documents submitted by Appellants over the years. (See Rb5.) It is unclear if this is the official position of the NJTA as to the existence of the records, or just argument of counsel. In either case, for NJTA to have destroyed public documents, including e-mails and attachments submitted by Appellants, would be a violation of the Destruction of Public Records Law. N.J.S.A. 47:3-15; see also N.J.S.A. 47:1-14 ("No official responsible for maintaining public records or the custodian thereof shall destroy, obliterate or dispose of any paper, document, instrument, or index which shall have been recorded, filed, registered or indexed except as specifically permitted by law."). By law, the NJTA must either be in possession of the records relating to

this application, or have a written record of the specific records that were destroyed. N.J.S.A. 47:3-17 (written consent of Bureau of Archives and History).

D. The NJTA's Refusal to Apply the Grandfathering Provisions of the Inland Flood Protection Rules is Unlawful and Inappropriate.

In its opposition brief, the NJTA cavalierly doubles down on its unlawful attempt to apply the later-enacted Inland Flood Protection Rules ("IFP") to this Application. This is a textbook violation of the square corners doctrine. "[A]pplication of the square corners doctrine bears a close relationship to our decisional law concerning the adoption of regulations. That is, an agency may not spring upon the regulated community a new policy, never before announced, and apply it retroactively." Residuary Trust v. Director, Div. of Taxation, 28 N.J. Tax 541, 547 (App. Div. 2015). Like taxation, it is particularly important in the field of real estate that "businesses, individuals and others must be able to reliably engage in [] planning and, to do so, they must know what the rules are." Id. at 548. This was acknowledged by NJDEP in developing the IFP: "it is unreasonable to retroactively apply the proposed standards of this chapter to certain projects that satisfied requirements that were in place at the time the activity was undertaken." 55 N.J.R. 1385(b) (Jul. 17, 2023) (response to comments 280-285). The NJTA's argument that it can apply any flood protection standards that it wants, regardless of what the law says, violates both the IFP and the square corners doctrine. See Residuary Trust, 28 N.J. Tax at 547.

V. THE NJTA'S FAILURE TO CONSIDER THE FACTS AND APPLY THE REGULATION IN EFFECT AT THE TIME IT RENDERED ITS DECISION WARRANTS REVERSAL.

A. The NJTA Fails to Explain the December 26, 2014 Letter.

Perhaps the most glaring omission from the NJTA's decision is any mention of the December 26, 2014 letter. The Appellants relied on that letter and spent money and time revising the plans for submission to the NJTA, which led to the issuance of that letter. Appellants had every right to assume that its prior dealings with the NJTA would be considered when the Application was ultimately submitted. At minimum, the NJTA is duty-bound to explain the December 26, 2014 letter. See Bailey v. Board of Review, 339 N.J. Super. 29, 33 (App. Div. 2001) (requiring an explanation of an administrative decision).

B. The NJTA Failed to Apply the Factors in the Regulation, which it Now Attempts to do for the First Time on Appeal.

While the NJTA's brief purports to include an analysis of the factors contained in N.J.A.C. 19:9-5.2(c), argument of counsel in brief is not evidence. Nor does it cure the fact that the NJTA failed to actually perform that analysis when it denied the Application. Neither the Initial Review Letter nor the Denial Letter make any reference to the factors listed in N.J.A.C. 19:9-5.2(c), or contain any language amounting to an actual application of those factors to the License to Cross Application. (1a - 3a.) It is fundamentally unfair for the NJTA to argue for the first time on appeal that the Application somehow did not address these factors when it did not even analyze them in its decision.

Applying the N.J.A.C. 19:9-5.2(c) factors now makes clear that the NJTA's denial of the Application was arbitrary and capricious. While there was no mention of Adherence to the Turnpike Authority's Standard Specifications in the Initial Review Letter or Denial Letter (factor 1), the Appellants would of course adhere to such specifications at the time of construction. It is pure speculation to claim that Appellants would not do so. As to factor 2, there is no impact on the traveling public and the Roadway – all of the water running off of Appellants' property currently drains into the existing swale and the proposed improvements reduce the overall volume of water. As to the duration (factor 3), the NTJA's December 26, 2014 letter already found the Appellants' plans to install minimal stormwater infrastructure in the right-of-way to be acceptable, which bars the NJTA from now claiming that the duration of the request is an issue. As to the criteria contained in N.J.S.A. 27:23-1 (factor 4), the NJTA cannot utilize the area in question to create a revenue stream, nor use it to widen the Parkway, because it is located on the side of a hill that is nearly half as steep as a roller coaster. (See Pb4.) Appellants have taken great care in planning and designing this project with consideration for the public welfare and obtaining the required approval based upon that design (factor 5). It is not credible for the NJTA to argue that non-adherence to the IFP, which is inapplicable, somehow is evidence of disregard for public safety. As to financial stability (factor 6), a homeowners association will maintain the stormwater system. Appellants are ready, willing and able to do what

is necessary to secure funding for that maintenance. Finally, there will be little to no effect on the financial, economic, or engineering aspects of the activities of the NJTA, the public, or neighboring property owners (factor 7). The Application seeks to install a concrete pipe and stone riprap that will direct water that already flows into an existing swale to the same location in a more efficient manner. In short, none of these factors justify denial of the Application.

VI. THE NJTA IS EQUITABLY ESTOPPED FROM TAKING A POSITION CONTRARY TO ITS PRIOR COURSE OF CONDUCT.

The NJTA is estopped from taking a position contrary to its prior course of conduct, which includes representations made and its inaction. A private party's "detrimental reliance on the **action or inaction** of [an] official or entity" may serve as a basis for an estoppel claim. Trump Plaza Associates v. Director, New Jersey Div. of Taxation, 25 N.J. Tax. 555, 563 (App. Div. 2010) (emphasis added). A public entity is subject to estoppel where, "conscious of [its] true interest and aware of the private owner's misapprehension, [the public entity] stood by while the private owner acted in detrimental reliance." Newark v. Natural Res. Council in Dep't of Envtl. Prot., 82 N.J. 530, 545, cert. denied, 449 U.S. 983 (1980).

Appellants justifiably relied on the NJTA's entire course of conduct in proceeding with the Project as-designed. The NJTA's representations caused the Appellants to revise the Grading and Drainage plans in July 2013 then submit those revised plans to the NJTA for review, which led to the issuance of the December 26, 2014 letter. (103a.) That letter affirmatively represented to

Appellants that their plans to continue to direct stormwater from the Property into the existing swale in its right-of-way were acceptable to the NJTA. (104a.) If the NJTA changed its position, the law required that they communicate that change in position to the Appellants when the Project could have been redesigned. The NJTA was not free to do nothing then repudiate its entire course of conduct to date by denying the License to Cross Application. This is precisely the type of inaction that serves as a basis for an estoppel claim. See Newark, 82 N.J. at 545.

VII. THE FACT THAT THE MUNICIPALITY WILL LOSE SIGNIFICANT AFFORDABLE HOUSING TRUST FUNDS IF THIS PROJECT IS NOT CONSTRUCTED WEIGHS IN APPELLANTS' FAVOR.

The NJTA attempts to make light of the fact that the denial of the License to Cross Application will stymie this project, which in turn will deprive the municipality of the Appellants' $375,000 contribution to its affordable housing trust fund. This contribution is memorialized by Court Order and can only be used by the municipality to further the construction of affordable housing. (13a.) It cannot be seriously argued that this result would not undermine New Jersey's' longstanding policy of increasing the supply of affordable housing in this state. See Bi-County Development of Clinton, Inc. v. Borough of High Bridge, 174 N.J. 301, 327 (2002). The fact that the NJTA's denial of the License to Cross Application violates this important policy requires reversal.

By:_____
Patrick M. Flynn, Esq.
Jason N. Sena, Esq.

Dated: December 23, 2024

Superior Court of New Jersey Appellate Division

In the matter of application P971 to New Jersey Turnpike Authority for license to cross number P971.	Superior Court of New Jersey Appellate Division Docket number A-832-23-23T2 Civil Action On appeal from the New Jersey Turnpike Authority's final agency determination on application P971

Respondent New Jersey Turnpike Authority's brief.

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Contents.

References.

As the parties are not precisely defendant and plaintiffs, in the spirit of R. 2:6-2(a)(4), appellants are referred to as "applicants." The references suggested at R. 2:6-8 are consistent with those used already by applicants:

Respondent's December 29, 2024 R. 2:5-4(b) notice.	Ar[1]
Applicants' June 17, 2024 M-5568-23 motion brief.	Mb
Applicants' June 17, 2024 M-5568-23 motion appendix.	Ma
Applicants' June 17, 2024 M-5568-23 supplemental appendix.	Sa
Respondent's July 10, 2024 M-5655-23 motion appendix.	A
Respondent's July 10, 2024 M-5787-23 cross motion appendix.	Cma
Respondent's July 10, 2024 M-5568 motion answer appendix.	Oa
Applicants' August 29, 2024 merits brief.	Ab
Respondent's October 10, 2024 motion appendix.	Tma
Applicants' August 29, 2024 merits appendix, volume one.	Aa
Applicants' September 11, 2024 merits appendix, volume two.	Aa
Respondent's January 2, 2025 merits appendix	Ra

[1] Ar does not refer to consecutively numbered pages, rather it references numbered paragraphs in the R. 2:5-4(b) notice of agency record.

Authorities.

Cases

Appendix.

[2] The version of this document in NJTA's possession is not identical to the version in applicants' appendix and is thus included in NJTA's appendix.
[3] Identified as a memo *from* rather than *to* Hesslein in the R. 2:5-4(b) notice.
[4] Dated October 15, 2021 in the R. 2:5-4(b) notice.

[5] Dated October 14, 2021 in the R. 2:5-4(b) notice.

[6] The version of this document in NJTA's possession is not identical to the version in applicants' appendix and is thus also included in NJTA's appendix.

[7] The version of this document in NJTA's possession is not identical to the version in applicants' appendix and is thus also included in NJTA's appendix.

[8] The version of this document in NJTA's possession is not identical to the version in applicants' appendix and is thus also included in NJTA's appendix.

[9] The R. 2:5-4(b) notice recited David Reich name in place of John D. Ernst.

Statement of facts.

Applicants own property abutting the Garden State Parkway in Washington Township, Bergen County. Aa47, Ab1, 4, 28. In 1957, adjacent land was transferred, free of servitudes, by one of the applicants[11] and other members of his family to the New Jersey Turnpike Authority's predecessor in interest, the New Jersey Highway Authority.[12] Mb4, Aa6, Ab4.

Applicants' attempts to develop their property began as early as 1999. Mb5, Aa8. The record does not show the Highway Authority or, after July 9, 2003, NJTA was notified of hearings pertaining to applicants' request for approval to build forty-eight single family houses and twenty-five townhouses on the property, Aa42, held before the Washington planning board on July 31 and November 14, 2002; December 2, 3 and 10, 2003; February 4, March 11, April 22 and 29, 2004. Aa46.

The parties' first interaction in the record is December 15, 2004. NJTA sent Brian Murphy, applicants' engineer, an N.J.A.C. 19:8-13.2 utility

[11] James A. Viviano, who passed away May 10, 2019. Viviano's estate is a party to the appeal. The other applicants are Viviano's children. Mb1.

[12] NJTA succeeded to the Highway Authority's powers, rights, assets and duties on July 9, 2003. Holmdel v. Hwy. Auth., 190 N.J. 74, 103 n.1 (2007) (Rivera-Soto, J., concurring in part and dissenting in part) citing L. 2003, c. 79, § 50; N.J.S.A. 27:23-4. See also N.J.S.A. 27:23-42(b)(1); 36 N.J.R. 4415(a).

installation permit[13] application. Ra1. Applicants sent an application dated March 15, 2005 to NJTA. Ra3. NJTA responded via April 27 and June 27, 2005 letters, Aa78, 80, requesting, *inter alia*, the hydraulic capacity of the existing concrete swale parallel to the Parkway be checked.[14] The application was not completed; a utility installation permit was never issued. Ra2, 3.

Incident to an October 25, 2005 meeting, on October 23, 2006, NJTA wrote to the Washington Township planning board[15] stating, *inter alia*:

1. The applicant should be made aware of the fiber optic cable running along the…Parkway's right-of-way line in this area[.][16]
2. The…location…may be affected by…Parkway widening…every effort should be made to keep…improvements away from the…Parkway's right-of-way. [NJTA] cannot determine at this time the extent of future Parkway widening.
3. Encroachment onto the…Parkway's right-of-way is prohibited. Any access onto [NJTA's] property may require a…[l]icense to [c]ross.
4. [NJTA] has made efforts to obtain the plans for the above project. However, said plans have not become available as of the above date. [October 23 letter to Washington planning board, Aa829]

Noting NJTA had "received the…application[,]" ¶¶8-10 above were reiterated verbatim at ¶¶9-11 of NJTA's December 1, 2006 letter, Aa89, Sa34,

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[13] N.J.A.C. 19:8-13.2 was a Highway Authority regulation repealed January 3, 2005. See 37 N.J.R. 90(a).

[14] Applicants did not respond to this request. Aa92.

[15] Applicants were copied on this and all subsequent letters from NJTA to the planning board.

[16] The fiber optic cable is a component of the E-ZPass system. Nachtigall v. New Jersey Tpk. Auth., 302 N.J. Super. 123, 127-131 (App. Div. 1997). See also Gluck, Gabriel, An Uneasy Path For E-Z Pass, Star-Ledger (Newark), December 3, 1999, at 1, available at 1998 WLNR 6887203.

to the planning board sent in anticipation of a December 6, 2006 hearing. Ar8. Though applicants responded to NJTA's April 27 and June 27 letters, Aa86, Aa88, applicants ignored NJTA's request to check the "hydraulic capacity of the swale[.]" Aa92.

On January 31, 2007, NJTA sent a third letter, Aa93, to the planning board, reiterating verbatim at ¶¶8-10 therein ¶¶8-10 from the October 23 letter and ¶¶9-11 from December 1 letter. NJTA added five further paragraphs, including, *inter alia:*

1. Previous comments on April 27, 2005 asked that a slope stability analysis be performed for the detention basin, to be sure that it would not fail and discharge into the Parkway. The results of this analysis do not appear in the…submissions. It is unclear what type of wall is proposed for the detention basis; whether it is the concrete wall section shown on Sheet 31, or the Keystone Wall shown on Sheet 32. If it is the Keystone Wall, how will this type of wall perform adjacent to standing water during freeze and that cycles? HNTB would like to see an example of a Keystone Wall used where there is standing water adjacent to the wall. Are the walls of the detention basin depicted on Block Wall Plan Sheet 24? If so, what plan sheet are they referenced to?
2. [NJTA] inquired whether the existing concrete swale along the…Parkway had the capacity to handle the concentrated [flow] being discharged into it. There is no response to that question.
3. The sizing calculations for the 30" RCP discharging the detention basin should have been included in the submission.
4. There are no calculations for the design of the scour hole. As per the [s]oil [e]rosion and [s]ediment [c]ontrol standards, the scour hole should be [five] feet, not [three] feet wide.

[January 31, 2007 letter to Washington planning board, Aa95]

On February 1, 2007, NJTA forwarded the January 31 letter to Paul

Azzolina, the Washington planning board engineer, stating "page [three]…contains…items…not…satisfactorily addressed" by applicants. Ra12. On February 22, 2007, Aa96, applicants responded to ¶¶8-10 from the October 23 and January 31 letters and ¶¶9-11 from the December 1 letter:

> 8. A note has been placed on sheet [twelve][17] stating…every effort shall be expended…to observe extreme care while performing work in the vicinity of the fiber optic cable.
> 9. Every effort has been made to keep improvements away from the…right of way.
> 10. [A]pplicant shall obtain a…[l]icense to cross if required for the project; however *it is of our opinion that one is not required.* [February 22 letter to NJTA, Aa97 (emphasis added)]

The February 22 letter states a set of revised plans, a stormwater management plan, a Bergen County Soil Conversation District approval and a slope stability analysis were attached thereto. None these are in the record.

There is a gap in the record[18] between the February 22, 2007 letter and sheet two of the site plans, revised April 17, 2013, Aa99, on which encroachment

[17] Presumably the author intended thirteen rather than twelve as it is on that sheet the note regarding fiber optic cable was added. This error was remedied when the February 22 letter was essentially re-transmitted May 28, 2013. Aa100.

[18] "After a [thirteen year] hiatus, [the p]lanning [b]oard…renewed hearings on Sept[ember] 26 [2018]…cause for the long delay – was the addition of a sanitary sewer pump. A gravity sewer line from the original plan was dropped since the area proposed for the line is land protected by Green Acres." Noda, Stephanie, Neighbors Wants DEP Input At Residential Development Site, North Jersey Record, October 18, 2018; at 2018 WLNR 32287348.

of NJTA property is *not* indicated. Next is a May 28, 2013 letter,[19] Aa100, substantively identical to the February 22 letter. The May 28 letter repeats ¶¶8-10 above as "a point by point response addressing…the…January 31, 2007 letter" which applicants understood as "stating [NJTA] reviewed the project and had no objections to the propos[al], provided that all [NJTA's] concerns in the [January 31] letter were addressed." The letter recites that attached thereto were revised major subdivision and site plans, a stormwater management report with drainage area maps and a Soil Conservation District approval, none of which are in the record except for possibly the April 17, 2013 version of sheet two, Aa99.

Aa103 is a version of sheet thirteen of the plans purportedly revised July 15, 2013 per a June 26, 2013 NJTA letter.[20] *There is no June 26, 2013 letter in the record.* Sheet thirteen does, however, include a note regarding fiber optic cables referenced at ¶8 of the February 22, 2007 and May 28, 2013 letters per NJTA's October 23, December 1, 2006 and January 31, 2007 requests.[21]

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[19] There is handwriting *only* on the version at Aa102 which is not present at Sa53. "[January 26, 2023,] note from Rosanne – found in this file, Nancy is following up w/Brian[.] We have a date of [May 28, 2013] as submitted and [December 26, 2014] as approved. We do not have approval letter in file."

[20] Sheets five, Aa151, Ra334; thirteen, Aa103, Aa159, Ra342; sixteen, Aa162, Ra346; twenty-eight, Aa174, Ra358; thirty-four, Aa180, Ra364 and thirty five, Aa181, Ra365 recite July 15, 2013 revisions per a June 26, 2013 NJTA letter. Pre July 15, 2013 revisions are not in the record, preventing the before and after comparison necessary to determine what, if anything, was revised July 15, 2013.

[21] Between October 23, 2006 and July 15, 2013, there were no substantive

A permit from the Department of Environmental Protection was approved on July 4, 2014 and expired July 2, 2019. Sa64.

On December 26, 2014, NJTA wrote to applicants, stating "[NJTA]…has received and reviewed the revised....[p]lan[22] and…correspondence related to addressing earlier comments provided by NJTA on the initial [p]lan submission. All prior comments have been adequately addressed to the satisfaction of NJTA…all…proposed improvements are now outside of NJTA's [r]ight [o]f [w]ay the contractor does not need to obtain a [t]raffic [p]ermit from [NJTA.][23]"

Pursuant to applicants' request for planning board approval of amended plans, Aa105, 106, 112, a board meeting was to be held on September 26, 2018.[24] In response, NJTA wrote to applicants and the board attorney on September 18, 2018. After stating the "operating departments of [NJTA] have not had the opportunity to review the plans[.]" NJTA at ¶¶8-10 restated ¶¶8-10 from the

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revisions to sheet thirteen. The only revision at all was on April 17, 2013; "revise title block to FWH[.]" That the revision to sheet thirteen was addition of the note pertaining to fiber optic cables is consistent with the lack of intervening revisions between NJTA's October 23, 2006 request regarding fiber optic cables and July 15, 2013. Because the documents sent to NJTA with the May 28, 2013 letter are not in the record, the fiber optic note may have been on that set of plans with the revision only thereafter formalized on July 15, 2013.

[22] The record does not reflect the contents of *any* plans sent to NJTA prior to September 29, 2021, Ra302, *a fortiori* not the plans *first* reflecting the July 15, 2013 revisions.

[23] Consistent with ¶10 of applicants' February 22, 2007 and May 28, 2013 letters which stated applicants they would not require a license to cross.

[24] The plans sent to the board on March 28, 2018, Aa105, are not in the record.

October 23, 2006 and January 31, 2007 letters and ¶¶9-11 from the January 31, 2007 letter. Aa373. NJTA's objections were again predicated on, *inter alia*, resolution of the foregoing. Nevertheless, applicants wrote to the planning board, but not NJTA, on October 11, 2018[25] stating the project had been approved by NJTA.[26] Aa116. On November 19, 2018,[27] again without copying NJTA,[28] applicants stated the December 26, 2014 letter constituted NJTA's project approval, notwithstanding the letter stating approval *was not required* because the project *then did not encroach* on NJTA's realty. Aa120, Aa121. Prior to May 29, 2021, Azzolina, the board engineer, wrote

> [T]he…[s]tormwater [m]anagement [r]eport…indicates [it] has been revised on four separate occasions (subsequent to September 2005)…assumedly…in response to…comments offered by other entities, including…[NJTA]…We…discussed this…with [applicants'] engineer and asked…he provide…transmittal letters to the respective authorities that may identify the revisions made in response to their comments and are reflected in the current…report. We are…awaiting the submittal of the requested documentation. [Ra275, 276]

Azzolina recommended applicants be required to obtain approval from

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[25] NJTA learned of this letter when applicants moved to supplement the record.
[26] Applicants' statement to the planning board misrepresents the contents of NJTA's October 23, 2006; January 31, 2007; January 31, 2007 and the September 18, 2018 letters the last of which NJTA sent to applicants twenty-three days prior.
[27] Applicants misrepresented the parties' prior communications, saliently the September 18 letter.
[28] NJTA learned of this letter when applicants moved to supplement the record.

NJTA. Ra281. Planning board meetings were held October 24, 2018, May 29, 2019, June 2, and September 22, 2021. Aa201.[29] On September 21, NJTA wrote to applicants incident to the September 22 meeting, Aa204, 213, Ra294, again stating approval would be predicated on meeting certain conditions. Noting "[t]here…appears to be a proposed drainage feature traversing the [r]ight of [w]ay line…into [NJTA's] property[,]" comments ¶¶8-10 from the October 23, January 31, 2008, September 18, 2019 and ¶¶9-11 from the December 1, 2006 letters were restated at ¶¶3-6. At the September 22 meeting, applicants did not rely on the December 26, 2014 letter but rather the abandoned utility permit application:

> Murphy[30] spoke about a letter dated September 21, 2021, from [NJTA]. [NJTA] could not locate any record of prior approval for this development…Murphy sent the appropriate information to another attorney several months ago.[31] [Murphy] will resend the information to [NJTA] along with the former permit[32] that was issued to the applicant…Murphy suspects that the records may have been lost when [NJTA] merged with the [High]way Authority.[33] [Washington planning board September 22, 2021 minutes, Ra297]

Azzolina asked "Murphy to provide an approval letter from [NJTA]" which Murphy agreed to forward. Ra298. The application was approved, subject

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[29] Notices pertaining to the October 24 and May 29 meetings are not in the record. Ra266.
[30] Applicants' engineer.
[31] No such correspondence is in the record.
[32] There was no prior permit issued.
[33] Applicants never interacted with the Highway Authority. Ab6.

to, *inter alia,* the planning board's "[r]eceipt of [a] letter from [NJTA] agreeing with the plan and storm water issues." Ra299.

Having obtained copies[34] of Aa122,[35] 147, Ra14, 267, 269, 283 and 284, NJTA began a review on September 29, 2021. Ra302. The plans now included encroachments including a pipe headwall,[36] scour hole,[37] channel,[38] block wall[39] and timber guiderail.[40] The proposed emergency spillway[41] had the capacity to inundate the Parkway. Ra303.

On October 13, 2021, Jean-Pierre Ravetier noted the plan would have permanent and temporary impacts on NJTA's property requiring a license to cross including retaining walls to be built on NJTA's property. Aa217. Ravetier also raised concerns regarding erosion of the concrete swale and Parkway embankment and the spillway directed at the Parkway. Aa216.

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[34] NJTA did not have a copy of Aa182.
[35] The version from NJTA's file is at Ra15. All these documents post-date whatever may have been sent to NJTA incident to the December 26, 2014 letter.
[36] Depicted at Aa180.
[37] Sheet twenty-nine, hitherto absent from the record and without reciting it had been revised on July 15, 2013 pursuant to a June 26, 2013 letter from NJTA but rather reciting only that it was amended on July 15, 2013 per the Bergen County Soil Conservation District, now set out the applicants intended to build concrete structure pertaining to the scour hole occupying a twelve and a half by fifteen foot footprint on NJTA's property. Retaining walls are depicted and a headwall also referenced. Aa175.
[38] Detail at Aa175, which does not recite a June 26, 2013 letter.
[39] Detail at Aa171, which does not recite a June 26, 2013 letter.
[40] Detail at Aa180.
[41] Detail at Aa181.

During the pendency of NJTA's review, on October 27, 2021, applicants' engineer emailed the Bergen County Soil Conservation district; "[p]er our conversation yesterday, I…found the attached review letter[42] from [NJTA] as well as the attached response letters from our office. It looks like [NJTA] had some drainage comments that were addressed, and we received their final approval on December 26, 2014.[43]" Oa17.

The Ravetier letter was forwarded to applicants and the board on November 24, 2021. Aa211. NJTA's own November 24, 2021 letter to applicants and the board pointed out the encroachments: the pipe headwall, the scour hole, the rip rap channel, the block wall, the timber guiderail and "three Colorado Blue Spruces proposed behind the guiderail." The letter noted the "emergency overflow spillway…which if utilized [for] a storm exceeding the [one hundred year] threshold would flow down the embankment, potentially over the…swale and inundate the [Parkway.]" Aa212. Applicants responded to neither letter. On December 1, 2021, Azzolina forwarded the October 13 and November 24 letters to Murphy, stating "these comments are contrary to the testimony recently provided in this regard and obviously they are a major

[42] No attachments are recited in the message header.
[43] This is contrary to the statements in NJTA's September 18, 2018; Aa373 and September 22, 2018 letters; Aa204, 213, Ra294. It also contradicts the December 26, 2014 letter which is predicated on *non-encroaching* plans; the March 9, 2021 plans, Aa147, contain proposed encroachments.

component of your application." Murphy did not respond. 22Oa.

The Soil Conservation District, via a December 17, 2021 letter to applicants' engineers, stated "[i]t has come to our attention…[NJTA]…submitted additional review comments…further design changes affecting grading and drainage may require a resubmission for soil erosion and sediment control plan re-certification." Oa17.

Slightly fewer than eighteen months later, on June 6, 2023, applicants filed P971. Along with the form, Aa280, only the February 5, 2021 stormwater management report, Ra15; December 2, 2022 drainage area maps, Ra315 and March 17, 2023 plans, Aa240 were attached.

NJTA again reviewed the plans. Ra334. Applicants intended to install a timber guide rail[44] on NJTA's property Aa289, Ra348 and "[t]he stormwater management infiltration/detention basin is immediately adjacent to the Parkway with an emergency spillway and outlet pipe directed towards…NJTA['s right of way]. The basin is cut into an existing slope area elevated above the Parkway. A retaining wall is proposed within the basin to the meet surrounding grades." The basin lacked "the minimum…one foot of freeboard" and the "spillway is directed…to the…concrete swale…the flow…will be significantly higher than a [ten]-year storm." Ra348.

[44] See also Aa289.

Having concluded P971 did not take into account accommodations for future, that workers would have to enter NJTA property via an access drive to maintain the installation, Ra350, and that P971 would not benefit NJTA or others aside from applicants, NJTA's engineering department recommended P971's denial. Aa288. Counsel for K. Hovnanian Companies contacted NJTA on July 25, and August 7, 2023, stating "K. Hovnanian is the contract purchaser for the subject lots[,]" Aa293 and "we are anxious to address…comments…NJTA may have so we can enter into the license-to-cross agreement as soon as possible." Aa292.

Ravetier reviewed the P971 application; "[t]he resubmitted stormwater management report and plans…have not been revised since the…October 2021 [review].[45] [P]reviously provided comments have not been addressed and are incorporated[.]" Ravetier restated, *inter alia*, "[t]he…design includes…block retaining walls to be constructed within [NJTA's right of way. Applicants] should consider a design that does not construct permanent walls within [NJTA's right of way.]" Aa217, Ra353.

On September 22, 2023, NJTA wrote to applicants' engineer, stating:

> In the proposed condition…drainage is collected into a basin that is conveyed into [NJTA's] stormwater collection system by…an open channel ditch with an associated retaining wall on [NJTA's] [r]ight-of-[w]ay. [NJTA] has the following concerns with accepting the

[45] Aa215

proposed development.

1. In response to the recently implemented NJDEP [i]nland [f]lood [p]rotection rules, [NJTA] can no longer continue with the practice of direct connections into our stormwater collection system utilizing legacy criteria.
2. [A]pplicant has not demonstrated that the peak flows in the future condition are reduced utilizing current regulatory standards.
3. [NJTA] does not have a level of comfort that maintenance of the basin will be adequately and routinely performed in perpetuity by the then [s]ite owner in accordance with the stormwater management maintenance plan even if there is an agreement to do so recorded in the title of the [s]ite.
4. [A]pplicant has not demonstrated to [NJTA's] satisfaction that maintenance of [NJTA's] stormwater collection system will not be adversely impacted by the…proposed basin or increased stormwater volumes over time.
5. [C]lassification of the basin as a dam has not been reviewed by the NJDEP [d]am [s]afety [u]nit.
6. The spillway of the basin directs flow onto the Parkway which is not acceptable to [NJTA].
7. [I]nstallation of drainage infrastructure and associated retaining wall on [NJTA's] [r]ight-of-[w]ay is not acceptable to [NJTA].

   In light of the above, the request to connect to [NJTA's] stormwater collection system is denied.

   [September 22, 2023 letter, Aa1]

Applicants responded on October 2, 2024 via a letter, sans-attachments. Aa369. Applicants claimed to be "exempt from the…[f]lood [p]rotection rules pursuant to the grandfathering provisions" vis-à-vis ¶¶1, 2, 4. In response to ¶3, applicants stated a yet to be constituted third party would be responsible to maintain the basin. Applicants negated ¶6, stating it is only feasible that a spillway be directed towards the Parkway. Responding to ¶7, applicants stated encroachment and permanent occupancy of NJTA's property was "necessary"

except the access drive. Applicants "reserve[d] the right to supplement this submission with additional information[46]" adding "this letter of protest is being submitted to preserve [a]pplicant[s'] rights and remedies to the extent the [September 22 l]etter [is] a rejection pursuant to N.J.A.C. 19:9-5.2(d). [If] th[e September 22] letter [is] a formal rejection, [applicants request] a[n N.J.A.C. 19:9-5.5(b)] hearing within the next week[.]" Aa371.

NJTA responded October 4, 2023: "no hearing shall be conducted…your protest is denied for…the reasons…in the [September 22] letter…this is a final agency decision." Aa3. Applicants, on October 18, 2023, requested relevant material via OPRA. CMa1. NJTA produced 1417 documents including *everything* NJTA located concerning the parties interactions. CMa9-233.

Procedural history.

Applicants filed a notice of appeal on November 17, 2023 pertaining to the October 4, 2023 letter, Ra354, calling it "an appeal of the…October 4, 2023 final agency decision denying…application [P971] and denying the protest. Only the October 4 letter is in applicants' R. 2:6-2(a)(2)(A) table. Abxi. NJTA filed an R. 2:5-4(b)[47] notice of agency record. Applicants moved pursuant to R.

[46] There was no supplementation before NJTA.

[47] While applicants did move per R. 2:5-5(a) to settle the record, applicants did not challenge the inclusion of any documents in the R. 2:5-4(b) notice. Such challenge *must* be by R. 2:5-5(a) motion filed initially before the agency below.

2:5-5(a),[48] R. 2:5-5(b) and R. 2:10-5 to settle and supplement the record, albeit without first applying to NJTA, as required. Orders were entered July 17[49] and October 28, 2024[50] pertaining to the record on appeal. Ra363, Ra364. Applicants' brief and appendix were filed August 29 and September 11, 2024. This answering brief and appendix follows.

Standard of review.

Applicants, having neither contested the inclusion of any documents in the R. 2:5-4(b) with their prior R. 2:5-5(a) motion, nor ever, have waived any further challenge to the contents of the R. 2:5-4(b) notice. See High Horizons v. Dep't of Transp., 231 N.J. Super. 399, 403 (App. Div. 1989); High Horizons v. Dep't of Transp., 120 N.J. 40, 44 (1990).

[48] Applicants moved per R. 2:5-5(a) albeit improperly before the appellate court without first applying to NJTA to settle the record to include documents never sent to NJTA; Aa103 and 182 or which NJTA did not possess incident to P971; Aa82, 86, 88, 96, 100.

[49] [T]he appropriate resolution of [applicants' application to supplement is to refer the matter to the merits panel for consideration as the disputed documents may affect the relief requested by the parties and the remedy the merits panel ultimately determines is appropriate. Accordingly, the materials in the supplemental appendix shall be included in the merits appendix with the express condition that all parties' arguments regarding those documents are expressly reserved. In re P971, A-832-23, M-4468-23 (App. Div. July 17, 2024) (slip op. at 1-2).

[50] "[W]e previously considered [applicants'] revised motion to supplement and referred the issues raised in the application to the merits panel for consideration. We specifically directed the disputed materials in the supplemental appendix to be included in the merits appendix with the 'express condition all parties' arguments regarding those documents are expressly reserved.'…NJTA can address the relevance of the materials in the supplemental appendix in its merits brief…In its merits briefing, NJTA can address the relevance of the supplemental materials and all other issues necessary to respond to [applicants'] arguments." In re P971, A-832-23, M-784-24 (App. Div. October 14, 2024) (slip op. at 2-3).

Applicants requested "[t]he…supplemental appendix…be included in the appellate record [per] R. 2:5-5." Mb9. Via R. 2:10-5, applicants sought to have the court correct and supplement the record via original jurisdiction. Mb9. Applicants placed the documents into two categories. Applicants argued NJTA omitted documents from the agency record. Mb10-13. R. 2:5-5(a) applies. The second category is documents applicants claim they were unable to provide NJTA. Applicants also request judicial notice of NJTA's website. Mb23-24. R. 2:5-5(b) applies to this second category.

1. R. 2:5-5(a).

A party [questioning if] the record discloses what occurred below shall apply on motion to that agency to settle the record." R. 2:5-5(a). R. 2:5-5(a) The motion must be brought, in the first instance, before the agency below. Mandel, N.J. App. Prac. § 22:3-1 (2023). See also 19 N.J. Prac., Skills and Methods § 1:49 (Aug. 2023 update); 40 N.J. Prac., App. Prac. & Proc. § 3:57 (Robert Ramsey) (Dec. 2023 update); Jeffrey J. Brookner, *et al.*, NJ App. Prac. Handbook § 5.5 (10th ed. 2015) citing State v. Yough, 208 N.J. 385, 403 (2011). "A hearing may be held and questions of credibility decided by the *trial judge.*" NJ App. Prac. Handbook § 5.5 citing State v. Kuske, 109 N.J. Super. 575, 592-593 (App. Div. 1970) (emphasis added).

2. R. 2:5-5(b).

R. 2:5-5(b) controls supplementation with evidence outside the record. "[A] full plenary proceeding…before the Appellate Division" is not contemplated. Colon v. Tedesco, 125 N.J. Super. 446, 452 (Law. Div. 1973) "[A]pplication should ordinarily be made in the first instance to the [agency] as a motion to reopen the hearing[.]" Mayflower v. Bureau, 64 N.J. 85, 98 n.8 (1973). R. 2:5-5(b) "contemplates a remand to the agency, or, in undefined 'exceptional circumstances,' to…the Superior Court[.]" N.J. App. Prac. § 22:4-1(b). Supplementation is inappropriate when information sought to be included was known to the applicant at the time of the hearing and would be unlikely to affect the result. In re Gastman, 147 N.J. Super. 101, 114 (App. Div. 1977), See also Ocean Med. v. DHSS, 396 N.J. Super. 477, 480 (App. Div. 2007); Liberty Surplus v. Nowell Amoroso, 189 N.J. 436, 452-453 (2007); Pryor v. Dep't of Corr., 395 N.J. Super. 471, 484 (App. Div. 2007); Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 2:5-5 (2024); Mandel, § 22:4-1(c) (2023).

3. R. 2:10-5.

"[T]he Appellate Division…may exercise such original jurisdiction as may be necessary to the complete determination of [a] cause[.]" N.J. Const. art. VI, § 5, ¶ 3; see also R. 2:10-5. "This…has been interpreted narrowly. For example, an appellate court will exercise original jurisdiction to take new evidence [to] 'cure a 'technical error or omission' of some matter capable of

proof by record or other incontrovertible evidence 'in aid of affirmance,' and thereby…avoid a reversal for failure of proof of some 'obvious fact' at the trial.'" NJ App. Prac. Handbook § 5.6(c) quoting Coleman v. Newark Morning Ledger, 29 N.J. 357, 386 (1959). "[O]riginal jurisdiction is [taken] sparingly and only in clear cases that are free of doubt. It will not normally be [taken] when the contested issues [require] further fact-finding. [A]ppellate…courts [are] ill-equipped to conduct such hearings." 40 N.J. Prac., App. Prac. & Proc. § 3:57. "[O]riginal-jurisdiction…is ordinarily inappropriate when fact-finding is necessary[.]" Pressler & Verniero, cmt. on R. 2:10-5, gathering cases. [P]articularly so when the required fact-finding requires credibility determinations." Ibid. citing In re J.D.H., 336 N.J. Super. 614, 628 (App. Div. 2001). "Nor should the appellate court engage in fact-finding when administrative expertise is relevant to resolution of the issue." Pressler & Verniero, Id., citing Rudbart v. Bd., 339 N.J. Super. 118, 127 (App. Div. 2001).

4. The substantive standard of review.

> Not all…a [s]tate does…is based on its sovereign character[;] like other associations and private parties, a [s]tate is bound to have a variety of proprietary interests. A [s]tate may, for example, own land or participate in a business venture. As a proprietor, it is likely to have the same interests as other similarly situated proprietors. [Snapp v. Puerto Rico, 458 U.S. 592, 601 (1982)]

A public entity, acting as a landowner, acts pursuant to a proprietary interest and in this respect, possesses all incidents of ownership as would a

private landowner. Safari Club v. Dep't of Envtl. Prot., 373 N.J. Super. 515, 519 (App. Div. 2004); Le Compte v. State, 65 N.J. 447, 450 (1974); Atl. City Elec. v. Bardin, 145 N.J. Super. 438, 443 (App. Div. 1976). See also Hyland v. Kirkman, 157 N.J. Super. 565, 576 (Ch. Div. 1978) equating the State's proprietary interest with its property interest in realty. See also McLean v. Lanza, 27 N.J. 516, 526 (1958) distinguishing a municipality's interest in tax revenues from a proprietary interest.

NJTA is an independent corporate entity separate from the State. Tpk. Auth. v. Parsons, 3 N.J. 235, 243 (1949); Tpk. Auth. v. Parsons, 5 N.J. Super. 595, 605 (Law. Div. 1949).[51] See also E. Orange v. Palmer, 47 N.J. 307, 315 (1966) citing Tpk. Auth. v. Washington, 16 N.J. 38, 46 (1954). Herein, NJTA is the *landowner*. NJTA *owns* property appurtenant to its highway projects,[52] including the Parkway,[53] Holmdel v. Hwy. Auth., 329 N.J. Super. 410, 413 (App.

[51] Both the Supreme Court and Law Division distinguished assets owned by NJTA from those at issue in Wilson v. Water-Supply Comm'n, 84 N.J. Eq. 150, (E. & A. 1915), summarized in Hudson Cnty. v. State House Comm'n, 130 N.J.L. 90, 93 (Sup. Ct. 1943): "The decision…went upon the theory…land which the…Water Supply Commission undertook to purchase was to become state property[.]" See Parsons, 3 N.J. at 244; Parsons, 5 N.J. Super. at 603.

[52] See Tpk. Auth. v. Washington, 16 N.J. 38, 42 (1954); Tpk. Auth. v. Monroe, 2 N.J. Tax 371, 372 (1981); Tpk. Auth. v. Washington, 137 N.J. Super. 543, 545-546 (App. Div. 1975), aff'd, 73 N.J. 180 (1977); Tpk. Auth. v. Monroe, 29 N.J. Tax 55, 62 (2016).

[53] NJTA succeeded to the Highway Authority's assets in 2003. See Holmdel v. Hwy. Auth., 190 N.J. 74, 79 n.1 (2007).

Div. 2000). In 1957, applicants transferred, in fee simple, to the Highway Authority, NJTA's predecessor in interest, the realty over which the Parkway, east of applicants' property, now runs. Ab1, Aa4.

A public entity, acting within the scope of its propriety interest as an owner of realty, may issue permits permitting use of its land. "Such permits are purely *a matter of grace* [which] the State is not required to issue[.]" In re Madin, 201 N.J. Super. 105, 134 (App. Div. 1985) (emphasis added). In this respect, a public entity acts as a private landowner and has the same discretion to convey – or not – an interest for whatever consideration it might determine. Atl. City Elec. v. Bardin, 145 N.J. Super. 438, 444 (App. Div. 1976). A public entity has no obligation to convey an interest when requested "but may, if it sees fit, simply continue to retain title." Le Compte v. State, 65 N.J. 447, 451 (1974). See also In re Loveladies Harbor, 176 N.J. Super. 69, 77 (App. Div. 1980).

Decisional law pertaining to the State's decision to convey realty, or not, and to set consideration for such conveyances begins from the premise an owner's proprietary rights are absolute and unreviewable. Rather, the only question is if the relevant officers are statutorily limited in their "exercise [of] the proprietor's absolute discretion[.]" Taylor v. Sullivan, 119 N.J. Super. 426, 430-431 (App. Div. 1972)

"[T]itle to land under navigable waters is in the state." Gough v. Bell, 22

N.J.L. 441, 451 (Sup. Ct. 1850), aff'd, 23 N.J.L. 624 (E. & A. 1852). Alienation of the State's tidelands realty is governed by N.J.S.A. 12:3-7.[54] Further requirements pertaining to tidelands located within meadowlands obtain.[55] Extensive decisional law pertains to issuance of tidelands permits. "Issuance of such permits…is an executive function." In re Madin, 201 N.J. Super. 105, 134 (App. Div. 1985). "the State has broad power in determining the consideration

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[54] "[I]t shall be lawful for the Tidelands Resource Council, together with the Commissioner of Environmental Protection and Attorney General of the State, upon application to them, to designate what lands under water for which a grant is desired lie within the exterior lines, and to fix such price, reasonable compensation, or annual rentals for so much of said lands as lie below high-water mark, as are to be included in the grant or lease for which such application shall be made, and to certify the boundaries, and the price, compensation or annual rentals to be paid…and upon the payment of such price or compensation or annual rentals…it shall be lawful for such applicant to apply to the council for a conveyance…and upon the delivery of such conveyance, the grantee may reclaim, improve, and appropriate to his and their own use, the lands contained and described in the said certificate…and such lands shall thereupon vest in said applicant[.]" N.J.S.A. 12:3-7.

[55] One "must…appl[y] to the Natural Resource Council. N.J.S.A. 13:1B-13.7; N.J.S.A. 13:1B-13.1(d); N.J.S.A. 13:1D-3(b). The Council…forward[s]…the application to various state agencies. N.J.S.A. 13:1B-13.8. [S]ubject to the recommendations of the…agencies, the Council must determine if the conveyance will be in the public interest. N.J.S.A. 13:1B-13.9. If…in the public interest, the Council 'shall' approve the application. N.J.S.A. 13:1B-13.9. '[T]he council shall…determine the fair market value of the property…shall fix the proper consideration to be charged[.]' N.J.S.A. 13:1B-13.9. However, no grants shall be allowed 'except when approved and signed by the Governor and…Commissioner' of Environmental Protection. N.J.S.A. 13:1B-13; N.J.S.A. 13:1B-2. Upon payment of the consideration, the Council 'and the appropriate State officers' shall convey…the premises[.] N.J.S.A. 13:1B-13.9. See generally, N.J.S.A. 13:1B-13.14; N.J.S.A. 12:3-7; N.J.S.A. 13:1B-13.7(c)." B. P. Oil v. State, 153 N.J. Super. 389, 392-393 (Law. Div. 1977).

for a grant of riparian lands." "It has been suggested that [s]tate action, taken pursuant to this statutory authorization, is beyond judicial review." Le Compte at 452 n.3.

"[T]he State's power to vacate or abridge public rights in tidal lands is absolute and unlimited, and our statutes dealing with state conveyances of such lands contain few, if any, limitations thereon." Neptune v. Avon, 61 N.J. 296, 307 (1972). [T]he State…possesses all incidents of ownership to riparian lands and has complete discretion to convey an interest therein and determine a consideration therefor." Atl. City Elec. at 444. "As the holder of such title[56] the State possesses all attributes of ownership, including the right…to grant or alien the lands so held." Le Compte at 450.

> The Appellate Division opinion in [Bailey v. Driscoll, 34 N.J. Super. 228 (App. Div. 1955), aff'd in part, rev'd in part, 19 N.J. 363 (1955)], without disapproval in that of the Supreme Court, establishes that action or inaction by the designated agencies and officers of the State in respect of grants of its riparian interests is not reviewable in terms of alleged abuse of discretion but solely on the basis of whether their action is within or without the bounds of the pertinent statutory limitations. Bailey, 34 N.J. Super. at 253. "Of course, the Council is entrusted with complete discretion as to whether it will convey anything and, if so, at what price[.]" Ibid.

[56] "[B]y the common law, the ownership of all lands under tidewater below high water mark within the territorial limits of the State belonged to the Crown of England, did not pass to the proprietors of New Jersey under the grant from the Duke of York, and became vested by the Revolution in the sovereignty of the State under the guardianship of the Legislature." Bailey v. Driscoll, 34 N.J. Super. 228, 247 (App. Div. 1955), aff'd in part, rev'd in part, 19 N.J. 363 (1955) See also Arnold v. Mundy, 6 N.J.L. 1, 71 (1821).

> Since, moreover, the statute provides that no such grant shall be effective "except when approved and signed by the Governor and the Commissioner[,]" N.J.S.A. 13:1B-13; and see N.J.S.A. 13:1A-29, it is clear that the "complete discretion" of the Council is subject additionally to the equally comprehensive discretionary approval of the Chief Executive and the Commissioner. These statutory requirements evidence that in the administration of this subject matter the State's proprietary interest is involved and the designated officers exercise the proprietor's absolute discretion, subject only to the limitations stated in the controlling statutes, to convey or not, and on such terms as the Council and they may choose. Bailey, N.J. Super. at 252-253.
> [Taylor v. Sullivan, 119 N.J. Super. 426, 430-431 (App. Div. 1972)]

The statutes pertaining to conveyance of tidelands within the meadowlands, containing a "shall" approve requirements, see B. P. Oil v. State, 153 N.J. Super. 389, 392-393 (Law. Div. 1977), are subject to not only the Governor's unfettered discretion, but the Attorney General's discretion to even present an application to the Governor. Id. at 393. The "arbitrary and capricious" standard was rejected in prior cases. Id. at 394 citing Le Compte at 561 and Taylor at 432.

NJTA's propriety powers are broader than the Tideland Council's. Compare N.J.S.A. 13:1B-13.8 to .10 which are insufficient to render issuance of tideland permits more than "purely a matter of grace[.]" In re Madin at 134 with the following: NJTA is "a body corporate" N.J.S.A. 27:23-5, able "sue and be sued" N.J.S.A. 27:23-5(d), may "dispose of real…property[.]" N.J.S.A. 27:23-5(i) and "enter into…contracts" N.J.S.A. 27:23-5(l). Not only may NJTA "do

all acts and things necessary or convenient to carry out the powers expressly or impliedly granted" to it, N.J.S.A. 27:23-5(o), it may "designate…points of ingress to and egress from each highway…as may be necessary or desirable in the judgment of the authority to insure the proper operation and maintenance of such project, and to prohibit entrance…from…points not so designated[,]" N.J.S.A. 27:23-5(k).

Herein, NJTA could have acted in a regulatory capacity. Had applicants requested a license to cross for drainage rather than occupancy, NJTA, in its regulatory capacity, would have sought to prevent applicants doing something within the boundaries of their own parcel; the construction of the spillway directed towards the property, Aa216 and the stormwater basin immediately adjacent to and elevated above the Parkway. Ra348. NJTA has not yet so acted in any manner pertaining to applicants' parcel. Rather, by denying permanent occupancy of its realty,[57] NJTA acted only as a private landowner,[58] who, as a matter of right, can decide to permit an easement or to settle a nuisance claim *ex ante*. NJTA's decision, taken as a private landowner, is only reviewable to

[57] Without compensation being offered by applicants, either.
[58] Compare with In re Madin, 201 N.J. Super. at 134 wherein neither the State nor Pinelands Commission owned the relevant property and thus their actions were not propriety.

determine if it is outside of the relevant statutory grants of power.[59]

Argument.

1. P971 was denied based on undisputed facts on a basis previously communicated to applicants.

Assuming, *arguendo*, any of the decisional law applicants invoke is applicable to NJTA acting as private landowner, as herein, the arguments themselves are predicated on a red herring; that the relevant fact is disputed. Applicants propose occupancy of NJTA's realty. Ab10.[60] There is no debate on this point; it is what applicants state P971 requests.

While applicants claim some of the engineering outcomes of P971 would not be *negative* within N.J.A.C. 19:9-5.2(c), it is undisputed applicants do not and cannot satisfy N.J.A.C. 19:9-5.2(c)'s *positive* requirements. For instance, P971 does not create a positive impact for motorists or the Parkway within the meaning of N.J.A.C. 19:9-5.2(c)(1) nor does it advance *any* of NJTA's statutory goals[61] per N.J.A.C. 19:9-5.2(c)(4). As a license to cross can be based on non-

[59] It is not; NJTA's action, on its own behalf as proprietor and not delegated, is provided for by N.J.S.A. 27:23-5(d).

[60] "[Applicants] filed [l]icense to [c]ross [a]pplication P971 seeking formal permission to construct certain stormwater infrastructure within the NJTA's right-of-way, as reflected on the plans approved by the [p]lanning [b]oard[.]"

[61] Even if P971 *were* neutral, aside from arrogating to applicants occupancy of NJTA's realty, in terms of its physical impact on the Parkway, P971, in demanding public risk for private profit, it is undisputed that it *cannot* satisfy the positive impact requirements in N.J.A.C. 19:9-5.2(c).

compliance with any of the N.J.A.C. 19:9-5.2(c) requirements, see N.J.A.C. 19:9-5.2(d), P971 was properly denied on undisputed facts.

Applicants argue there is an inadequate record. However, NJTA, on October 23, 2006; December 1, 2006 and January 31, 2007 informed applicants "*[e]ncroachment* onto the…right-of-way is *prohibited*. Any *access* onto [NJTA's] property may require a…[l]icense to [c]ross" and even that might not be enough and it would be prudent, in case of future Parkway widening, that improvements be located far from the right of way.

Responding to the proscription of encroachment, in their February 22, 2007 and May 28, 2013 letters, at ¶10 applicants stated there would be no license to cross required, thus asserting, *ipso facto*, their plans as then consituted did not require occupancy of NJTA property. Applicants also recognized that future Parkway widening could affect their use of their own property, advising at ¶10 they would situate improvements as far away from the property line as possible. Pursuant to this lack of encroachment, NJTA indicated as of December 26, 2014, "all proposed improvements are outside of NJTA's [r]ight [o]f [w]ay[.]"

On September 18, 2018, after plans had been amended, NJTA again reiterated encroachment was prohibited and improvements should be located away from the right of way. Responding to the amended plans, on September 21, 2021 NJTA wrote the plans called for proscribed encroachment, ¶2 and

reiterated the prohibition at ¶6 and widening advice at ¶5. Via the October 13, 2021 and November 24, 2021 letters, NJTA noted the plans required six separate permanent encroachments and retransmitted the September 21, 2021 letter reciting the existence of and the prohibition on encroachments. After P971 had been filed, NJTA, taking the same position it had since October 23, 2006, wrote "installation of drainage infrastructure and associated retaining wall on [NJTA's] [r]ight-of-[w]ay is not acceptable[.]" Aa1, ¶7. Consequently, P971 was denied as it was incompatible with the prohibition on occupancy.

Applicants argue "NJTA…ignored the substantive issues raised in [October 2, 2023 N.J.A.C. 19:9-5.5(a) l]etter, which is an independent reason for reversal. However, per N.J.A.C. 19:9-5.5(a), applicants were to raise "those issues or facts in dispute." Rather than disputing *anything*, applicants *confirmed* certain occupancy of NJTA's realty is necessary to the plans and cannot be altered.[62] Any doubt as to the central fact that P971 is entirely predicated on permanent occupancy of the Parkway right of way was resolved by via the N.J.A.C. 19:9-5.5(a) letter.[63]

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[62] "[I]t is necessary to install the rip rap as shown on the plan. Due to the grade change across this area, the southerly wall is necessary to contain the water within the rip rap area." Aa371, ¶7.

[63] Because applicants confirmed the absence of disputed facts, a discretionary N.J.A.C. 19:9-5.5(b) hearing would have been, at best, redundant and was properly denied.

Applicants argue other conclusions in the September 22, 2023 letter are unsupported or mistaken. However, applicants do not dispute P971 calls for permanent occupancy nor do applicants claim they could or would have altered P971 to avoid occupancy, rather their application and this appeal is predicated on occupancy "to construct drainage infrastructure in the right-of-way." Ab49. "Construction of minimal stormwater infrastructure is…what…[applicants] now seek permission to do[.]" Ab51. It is undisputed applicants' plans require permanent encroachment of NJTA's realty. Applicants' position, at point one, is after being told seven times during the fifteen years, one month and one day between October 23, 2006 and November 24, 2021 an application for a license to cross requiring occupancy would be denied on that ground, after applicants so acknowledging on February 22, 2007 and March 28, 2013, NJTA must further explain and make findings of fact after, in fact, denying an application which applicants will not revise to eliminate occupancy of NJTA's realty. The occupancy issue is black and white and undisputed. On that point, further factfinding or explanation would be inutile.

Finally, the notice of appeal pertains to the October 4, 2023 letter denying applicants' N.J.A.C. 19:9-5.5(a) request. Because the applicants N.J.A.C. 19:9-5.5(a) letter only restated that the plans contemplated and required permanent encroachment, NJTA's denial of an N.J.A.C. 19:9-5.5(b) hearing was entirely

warranted because the N.J.A.C. 19:9-5.5(a) letter, rather than raising new facts, confirmed the facts upon which the denial of P971 was based.

2. NJTA's decision was neither arbitrary, capricious nor unreasonable.

NJTA, as a private landowner, operates with the widest discretion. As to the Mazza v. Bd., 143 N.J. 22, 25 (1995) factors; first, NJTA did not violate the law. It considered and denied the application. Denial of an N.J.A.C. 19:9-5.5(b) hearing was neither arbitrary nor capricious as it is undisputed the plan calls for permanent encroachment and applicants, though they could have, adduced no further evidence in support of their request for a protest hearing.[64]

Second, the application called for encroachment, creates an inundation risk, requires NJTA to give up its own drainage capacity, has a perpetual duration during which maintenance would be required, does not benefit bondholders, is not designed to comply with current stormwater management and flood regulations and requires maintenance to be performed by a yet inextant entity. All of this is in the service of externalizing private costs and risk onto NJTA to maximize private profit.

Third, without considering technical details, the project can be described

[64] Though required to present the material in support of their request for a hearing, applicants withheld much of what constituted their supplemental appendix, improperly supplementing the record which what could have been adduced below.

as an application for an encroachment on the right of way and a waiver of nuisance/trespass claims which fails to create revenue but rather requires perpetual maintenance. Thus, on description alone the project cannot satisfy N.J.S.A. 27:23-1 factors three, four, six and seven. The nature of the project precludes satisfaction of the third N.J.S.A. 27:23-1 factor, duration. Failure to satisfy any one of those requirements justified a denial of the application. N.J.A.C. 19:9-5.2(d). NJTA's decision can even be upheld under an analysis similar to a motion to dismiss on the pleadings. In this case, facially, the project described in one sentence failed four of the N.J.S.A. 27:23-1 factors. Analysis of the facts in the material submitted in support of the application implicates factors two and five.

As NJTA has been granted propriety capacity,[65] its actions taken as a proprietor are "matter[s] of grace[.]" Le Compte at 451. The arbitrary and capricious standard is irrelevant to NJTA's refusal to transfer a property right to applicants. Applicants argue permanent occupancy by abutters is comprehended by N.J.A.C. 19:9-5.2(a). Ab31. It is not.

> [NJTA] shall also have power to make reasonable regulations for the installation, construction, maintenance, repair, renewal, relocation and removal of tracks, pipes, mains, conduits, cables, wires, towers, poles and other equipment and appliances (herein called "public utility facilities") of any public utility as defined in

[65] See N.J.S.A. 27:23-5(i), permitting NJTA to acquire and alienate realty,

> [N.J.S.A. 27:7-1],[66] in, on, along, over or under any highway project. Whenever the authority shall determine that it is necessary that any such public utility facilities…shall be relocated in…or…removed from such highway project, the public utility…shall relocate or remove the same…however…the cost and expenses of such relocation or removal, including the cost of installing such facilities in a new location, or new locations, and the cost of any lands, or any rights or interests in lands, and any other rights, acquired to accomplish such relocation or removal, shall be…paid by the authority[.] In case of any such relocation or removal of facilities, as aforesaid, the public utility…may maintain and operate such facilities, with the necessary appurtenance, in the new location…for as long a period, and upon the same terms and conditions, as it had the right to maintain and operate such facilities in their former location[.]
> [N.J.S.A. 27:23-6]

Consistent with NJTA enforcing its property rights like any other landowner, *any* occupancy of the roadway is by default forbidden. "No unauthorized person shall install or attempt to install, construct, or place upon any portion of the [r]oadway, any item, sign, structure, or equipment for any purpose whatsoever." N.J.A.C. 19:9-1.13(e).

However, per N.J.S.A. 27:23-6, NJTA provides a mechanism the license to cross which "normally pertains to public and private utilities that must *occupy*

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[66] "'Public utility' means…every individual, copartnership, association, corporation or joint stock company…owning, operating, managing or controlling within…New Jersey a steam railroad, street railway, traction railway, canal, express, subway, pipe line, gas, electric, light, heat, power, water, oil, sewer, telephone, telegraph system, plant or equipment for public use under privileges granted by the State or by any political subdivision thereof." N.J.S.A. 27:7-1.

the property under, on, or over the [r]oadway in order to provide service to the public."[67] N.J.A.C. 19:9-5.2(a) (emphasis added). A second category, pertaining to *entries* short of occupancy, "are utilized by owners of property adjacent to the [r]oadway that must utilize the [r]oadway for drainage, egress, and access purposes." Ibid. N.J.A.C. 19:9-5.2(a) contemplates two categories of licensees, utilities[68] and abutters,[69] seeking entry[70] to NJTA's realty. Permanent and continuous entry, however, is forbidden to abutters.

As to both utilities and abutters, the license to cross allows consideration of claims on a basis which, in comparison with civil litigation, is expedited and less formal to resolve competing applications, see N.J.A.C. 19:9-5.2(d) and to provide for the imposition of fines and indemnification for noncompliance, see N.J.A.C. 19:9-5.2(f).[71]

However, N.J.A.C. 19:9-5.2(a) otherwise differs in its application to utilities and abutters; a license to cross encompasses distinct and different

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[67] Referring to occupying rather than merely entering.
[68] N.J.A.C. 19:9-5.2(a) envisions a mechanism whereby utilities could negotiate an agreement with NJTA which effectively would constitute a release of NJTA's, or any property owner's right to mesne profits.
[69] As to abutters, N.J.A.C. 19:9-5.2(a) contemplates resolving a trespass action.
[70] Entering land "include[s], not only coming upon land, but also remaining thereon and…include[s] the presence…of a third person or thing…the actor has caused to be or to remain thereon." Restatement (First) of Torts, cmt. §158 (1934). See also Restatement (Second) of Torts, cmt. b on §158 (1965).
[71] NJTA would act in its regulatory capacity were it to impose fines. As it has not, it has hitherto only acted as a proprietor.

permits as applied to either class. N.J.A.C. 19:9-5.2(a) separately comprehends permanent physical encroachments by utilities and regulation of common law disputes between abutting landowners without overlap.

As to abutters, *utilize*, rather than *occupy* is the operative vowel. Neither drainage, egress, nor access requires transient entry or access rather than occupancy. *Occupancy* is only used referring to utilities. *Verba cum effectu sunt accipienda*,[72] the surplusage canon, applies to regulations: "[w]hen interpreting a statute or regulation, we endeavor to give meaning to all words and to avoid an interpretation that reduces specific language to mere surplusage." DKM v. Montgomery, 182 N.J. 296, 307 (2005). The surplusage canon, which *must* be applied, dictates *occupy* has a meaning distinct from abutters' "utilize[ing] the [r]oadway for drainage, egress, and access[.]"

Differentiating *occupancy* mandates utilities' and abutters' respective applications on to what could be either considered different choses in action enforceable by an owner of realty or damages available in actions for trespass. Utilities' licenses address common law disseisin; abutters' licenses allow

[72] "If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." U.S. v. Collins, 859 F.3d 1207, 1220-1221 (10th Cir. 2017) quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174 (2012).

common law trespass. There is no other construction of N.J.A.C. 19:9-5.2(a) which preserves the independent definition of *occupancy* required by the surplusage canon's mandate that every word be given meaning.

Occupancy is a term of art relating to trespasses which rise to a disoccupancy or disseisin. One subject to disoccupancy is entitled to mesne profits. "[D]ependent upon possession by defendant, the claim for [m]esne profits[73] derives historically from a trespass action." Marder v. Realty Const, 84 N.J. Super. 313, 321 (App. Div. 1964), aff'd, 43 N.J. 508 (1964) citing Am. Can v. Dornoil, 126 N.J.L. 345, 347 (E. & A. 1941): "the right of mesne profits springs from actual possession by defendant."

Realty Construction parked cars on, cut the grass of, shoveled snow onto, put trash cans in front of and "trimmed down a large tree" on Marder's premises. Marder at 317. Marder sued for "incidental damages, including mesne profits, and the full value of the use and occupation of the premises for the time…during which [Realty] was in possession[.]" N.J.S.A. 2A:35-2, Marder at 316.

There was "no doubt that the acts complained of, when taken separately, constitute[d] mere trespass[.] Marder at 321. Marder was entitled to "nominal

[73] "[T]he fair and reasonable rental value of the land." Coleman v. Sweeney, 11 N.J. Super. 352, 355 (Ch. Div. 1951). "[T]he rental value, or, as it is sometimes put, the value of the use and occupation of the land." Mastbaum v. Mastbaum, 126 N.J. Eq. 366, 368 (Ch. 1939).

damages" and "damages for the diminution in the value of his property caused by these trespasses." Marder at 323. As "there [was] no such diminution" Marder sued "under a theory of ejectment, which would allow the recovery of damages for [m]esne profits based upon the benefit derived by the dissei[s]or…measured by the fair…value of the land…irrespective of actual loss to the true owner." Ibid citing Morvay v. Gressman, 29 N.J. Super. 508, 512 (App. Div. 1954). Trespasses effectuating dispossession; "depriving the owner of the right to go on [the] property and to do with it as he please[s]," Marder at 322 constitute disseisin. Id. at 321 citing 1 Harper & James, Law of Torts, §1.7 (1956). "The question [wa]s [if] these acts of trespass were so continuous and of such a nature as to constitute possession of the property and a dissei[s]in[,]" Marder at 321, entitling Marder to mesne profits.

Possession is a binary; if Realty *possessed* the realty, it would be the exclusion of Marder, dispossessing him. "'Possession' in this sense may aptly be described as occupancy of land with the intent to control it or, in cases where the land is vacant, the right as against all persons to immediate occupancy thereof." Marder at 321-322 citing Restatement (First) of Torts § 157 (1934) "acts done upon the land as manifest a claim of exclusive control thereof and indicate to the public that he who has done them has appropriated the land."

Licenses are granted to "utilities that must occupy the property under, on,

or over the [r]oadway." This *occupancy* can be subterranean or in NJTA's airspace. Sewers, electrical lines, gas lines and telephone cables are all examples of *permanent* utility infrastructure contemplated by N.J.A.C. 19:9-5.2(a). Only in that context does N.J.A.C. 19:9-5.2(a) refer to *occupancy*, a term of art comprehending permanent infrastructural encroachments. Such installations *must* work a partial dispossession of NJTA as "two [objects] cannot occupy the same space at the same time[.]" Moore v. E. Cleveland, 431 U.S. 494, 521 (1977) (Burger, C.J., dissenting). Such trespasses, because they are continuous and exclusive, *occupy* NJTA's realty. Vis-à-vis actual encroachment, NJTA is put out of control and partially ejected from its own realty. Likewise, were applicants to place concrete infrastructure in the narrow strip, Ra267, between the Parkway and the steep slope to the west, Ab4, NJTA would be unable to do as it likes, that is, enjoy the possession of its own realty where it is otherwise occupied by applicants' infrastructure. NJTA's capacity to improve its own drainage infrastructure or widen the Parkway, to place a sign, to run fiber optic lines, will be prevented by applicants' proposed *occupancy*. In that sense, applicants propose to occupy NJTA's realty. Inside the perimeter of the footprint of applicants' proposed installation, applicants would control the property;

occupying it to NJTA's exclusion. Such occupancy is reserved to utilities,[74] which applicants, self-described abutters, are not. Ab1, 4, 28.

The second example is "licenses to cross…utilized by owners of property adjacent to the [r]oadway that must *utilize* the [r]oadway for *drainage*, *egress*, and *access* purposes." Drainage, egress, and access are also terms of art pertaining to potential common law rights of entry held by adjoining landowners. Such rights are transient and do not comprehend occupancy, i.e. permanent encroachment. There is no reference in N.J.A.C. 19:9-5.2(a) to abutters' permanent physical encroachments. An abutter may obtain a license for stormwater discharge directed to the roadway in the absence of, for instance, entrance onto NJTA's property in the sense of placement of physical drainage infrastructure. Only licenses akin to easements by necessity for access/egress or resolutions of reasonable uses disputes over drainage are available to abutters. Licenses for permanent physical encroachments on NJTA's property are reserved to utilities.

Pertaining to drainage, Bowlsby v. Speer, 31 N.J.L. 351 (Sup. Ct. 1865)

[74] As to utilities, N.J.A.C. 19:9-5.2(a) governs what would be, as against private landowners, utilities' condemnation actions. N.J.A.C. 19:9-5.2(a) is the vehicle by which NJTA can waive its own blanket regulatory prohibition, N.J.A.C. 19:9-1.13(e), on encroaching utility infrastructure. See also N.J.S.A. 27:23-6, the statutory basis for N.J.A.C. 19:9-5.2(a) vis-à-vis utilities. Further, NJTA can always move, reroute or remove encroaching utilities at its own expense. N.J.S.A. 27:23-6. No similar statute applies to abutters.

established the common enemy rule.[75] Id. at 354. "[N]either the diversion nor the altered transmission, repulsion or retention of surface water gives rise to an actionable injury…he who…alters land is not subjected to liability because of the consequences of his acts upon the flow of surface water…Under this rule it matters not that the flow of water upon plaintiffs' property is much increased or accelerated or its force aggravated." Yonadi v. Homestead, 35 N.J. Super. 514, 517-518 (App. Div. 1955). The common enemy rule was replaced by the reasonable use rule, rendering actionable the alteration of natural drainage. "[E]ach possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, but incurs liability when his harmful interference with the flow of surface waters is unreasonable." Armstrong v. Francis, 20 N.J. 320, 327 (1956). See also Manasquan v. Dep't of Transp., 69 N.J. 92, 96-97 (1976).

The reasonable use rule, by subjecting landowners' alterations to the flow of surface waters to tort liability, rendered the water so diverted an actionable *entry* subject to injunction, Id. at 93-94 and the award of damages, Paolicelli v. Wojciechowski, 132 N.J. Super. 274 (App. Div. 1975).

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[75] [S]urface water [i]s [a] common enemy, which every proprietor may fight and get rid of as best he may." Durkes v. Union, 38 N.J.L. 21, 22 (Sup. Ct. 1875) citing R. v Comm'rs of Sewers, (1828) 108 E.R. 1075, 1076 (K.B.) (opinion of Lord Tenterden, C.J.).

Drainage, as used in N.J.A.C. 19:9-5.2(a), references NJTA's rights predicated on the reasonable use rule. N.J.A.C. 19:9-5.2(a) contemplates abutters requesting a license to cross before artificially diverting water on to NJTA's realty. Such entry would not dispossess NJTA because it would neither continuously nor exclusively occupy NJTA's realty. *Drainage* is used in the regulation as a term of art referring to altering the flow of water from one parcel to another artificially without entry on the other parcel except by the water itself.

Assuming, arguendo, the diversion of water causes an entry, no other entry nor, *a fortiori* occupancy is contemplated by the regulations. Drainage, as used in the regulation *cannot*, without running afoul of the surplusage canon, pertain to encroachments, i.e., occupancy. P971 is not cognizable as a request to permit drainage as comprehended by N.J.A.C. 19:9-5.2(a).

"Egress and access," relates to easements by necessity, see Old Falls v. Johnson, 88 N.J. Super. 441, 451 (App. Div. 1965) quoting Denman v. Mentz, 63 N.J. Eq. 613, 618 (Ch. 1902) and for "reasonable access to…public roadways." See Lima v. Ramsey, 269 N.J. Super. 469, 477 (App. Div. 1994), gathering cases. Notwithstanding easements by necessity and reasonable access being cognizable at common law, NJTA is statutorily exempt from these claims, as it has the exclusive right to "[t]o designate the locations, and establish, limit and control such points of ingress to and egress from each highway…and to

prohibit entrance…from any point or points not so designated[.]" N.J.S.A. 27:23-5(k). While entry or access easements can be permanent at common law, because NJTA cannot be compelled to give neither permanent entry nor access easements, a license to cross for egress or access, in this context, would be temporary in duration. Driving or walking across NJTA property *cannot* create occupancy as by its very nature, the action is transitory and discontinuous.

Occupancy implicates a proprietor's right to possess and enjoy, every inch of its realty. Occupancy relates *solely* to control of NJTA's realty within its boundaries. Drainage refers to actions within an abutter's parcel to alter flow of water from that parcel to NJTA's. *Entry* on to land by anything other than water is foreign to *drainage* as term of art.

The encroaching pipe and headwall are the keystones to the entire license to cross application. All other encroachments derive from the pipe and headwall. Without the pipe and headwall, there would be no reason for the scour hole, the rip rap channel, the block wall, the timber guiderail and access drive nor to plant the "three [trees] behind the guiderail." Construction of the encroaching pipe and headwall is a condition precedent to the necessity of the remaining encroachment. Lack of encroachment and the determination thereof is the predicate to NJTA's further consideration of the application. The application was denied because applicants refused to alter the plans to avoid encroachment.

As applicants are not utilities, P971 was properly denied for this reason.

NJTA's realty is not a commons that abutters can "fence in" for their own purposes. However, applicants propose just that; condemnation of NJTA's property for their own pecuniary benefit. A requirement that NJTA give up realty to abutters is not only beyond the contemplation of the pertinent regulation, but is also completely inconsistent with logic undergirding NJTA's status as an independent agency with a special mandate, to which laws of general application relating to highways do not apply, see N.J.S.A. 27:23-21 which boils down to, above all else, furthering the development and maintenance of the Parkway and Turnpike as limited access highways.

3. The Administrative Procedures Act does not apply to proprietary actions.

Applicants argue NJTA "attempted to establish blanket policies contradicting the text of N.J.A.C. 19:9-5.2(a) constitute[ing] illegal rule-making in violation of the administrative procedures act[.]" Ab52. This argument first assumes its own conclusion that N.J.A.C. 19:9-5.2(a) contemplates occupancy by abutters. It does not. Second, this argument is contrary to decisional law.

In Safari Club v. Dep't of Envtl. Prot., 373 N.J. Super. 515 (App. Div. 2004) the Commissioner of Environment Protection's closing all state lands under the DEP's jurisdiction to bear hunting was upheld. Id. at 520-21. Safari Club argued the Commissioner "lacks the statutory authority to close [state]

lands under his control to bear hunting." Id. at 517. Safari Club further argued the Commissioner's action was arbitrary and capricious. Ibid. The court rejected these arguments and affirmed the Commissioner. Id. at 520-21.

The State has "the *proprietary* authority of any private or public landowner to determine whether to allow hunting on its land. The Legislature has delegated this proprietary authority over [s]tate parks, forests and recreation areas to the Commissioner [of Environmental Protection]…Therefore…the Commissioner has ultimate authority…to open those lands to hunting." Safari Club at 519 (emphasis added). "[U]ltimate authority 'to direct and coordinate the uses' of State parks, forests and recreation areas, N.J.S.A. 13:1B-5(a), including the determination [if] to allow hunting, rest[s] with the Commissioner…the Legislature has delegated[76] plenary authority to the Commissioner to determine what 'uses' will be allowed in state parks, forests and recreation areas. N.J.S.A. 13:1B-5(a). In the exercise of this authority, the

[76] Unlike Le Compte and its progeny, the Commissioner's discretion in Safari Club was not entirely unfettered. However, the difference between NJTA and the Commissioner's discretion is that the Commissioner's authority was delegated, specifically by statute. Neither the DEP nor the Commissioner were proprietors; rather they were exercising delegated authority. This is not the case herein where NJTA *is* the proprietor rather than an agency with delegated propriety authority of state lands. There is no delegation at play here, NJTA is the proprietor. NJTA's statutory proprietary authority is unlimited, similar to the not only the governor's authority noted in B. P. Oil, 153 N.J. Super. at 393, but also the Attorney General's absolute discretion to even present an application to the governor. Ibid.

Commissioner may close particular parks, forests and recreation areas to all hunting...allow the hunting of some game species on those State lands but prohibit other hunting." Safari Club at 520.

Safari Club makes clear the Commissioner closing state lands to bear hunting was a proprietary decision rather than regulatory action. Safari Club neither states nor suggests the Commissioner must engage in administrative rulemaking in making such a proprietary determination. Safari Club, by classifying as proprietary in nature a decision to close state lands to bear hunting exempted the DEP from conducting formal rulemaking procedures under the Administrative Procedures Act as a precondition of the State exercising its propriety rights like any other property owner. Safari Club stands for the proposition that the APA does not apply to a public entity's proprietary actions.

Were the court to adopt applicants' contrary argument, NJTA would need to pursue formal rulemaking, including public notice and comment, prior to closing roads for repairs, renovations, maintenance, or public safety reasons or conveying or alienating any interests in real property. NJTA's refusal to alienate a permanent property is inherently proprietary in the most basic sense. Accordingly, the requirements of the APA and the Metromedia v. Div. of Tax., 97 N.J. 313, 331-232 (1984) analysis used for generally determining when formal rules are required for an agency's regulatory actions, have no bearing

herein due to the *lack* of *any* regulatory action.

The September 22, 2024 letter does not create administrative rules that must be enacted through the elaborate procedures for agencies to adopt regulations spelled out in the APA. See N.J.S.A. 52:14B-2 (defining an "administrative rule"). Rather, decisional law establishes a decision to alienate realty is a proprietary, rather than a regulatory, action.

4. Equitable estoppel does not require approval of P971.

The equitable estoppel issue, not raised below, should not be now entertained on appeal. Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 2:6-2 (2024) (collecting cases).

Applicants claim "NJTA did not object to the stormwater management plan before the [p]lanning [b]oard and…previously approved the…stormwater infrastructure [applicants] now seek to construct." Ab57. This is not an action in lieu of a prerogative writ challenging the actions of the planning board. Applicants are not litigating to affirm a planning board resolution and NJTA has not taken the converse position.

Applicants argue, that NJTA, having not filed formal objections before the planning board, and presumably, having not filed actions in lieu of a prerogative writ, is now bound by the planning board's approval, Aa218, to the extent that NJTA's own basic property right to control the occupancy of its

realty is subject to the planning board. Not only is this simply not within the contemplation of municipal land use, this position arrogates to the planning board a *private* takings power absent from N.J.S.A. 40:55D-25's power. Applicants' suggestion that a state agencies, unless they file actions in lieu of prerogative writs challenging municipal land use decisions, are required to grant all approvals[77] upon which such decisions are conditioned should be rejected.

Further, the Turnpike Authority Act provides for "the superiority of [NJTA] over" municipalities through which its roads travel. Newark v. Tpk. Auth., 7 N.J. 377, 387 (1951). From this superiority flows that pursuant to the doctrine of prior use,[78] the Parkway *cannot*, be condemned by a municipality, nor can NJTA, as relating to the Parkway, be bound by the resolution as Washington and its planning board are without jurisdiction.

Even if the resolution could somehow bind NJTA, it does not. Rather than stating "notice was given to potential objections and NJTA did not register a formal objection," it requires "applicant [to] obtain all required agency approvals and/or [d]epartment [h]ad plan review comments from" NJTA. Aa230, 231. Approval is also subject to not a license to cross but "[r]eceipt of

[77] Regulatory *or* proprietary.

[78] "[T]he rule denies exercise of the power of condemnation where the proposed use will destroy an existing public use or prevent a proposed public use unless the authority to do so has been expressly given by the Legislature or must necessarily be implied." Weehawken v. Erie R. Co., 20 N.J. 572, 579 (1956).

[a] letter from [NJTA] agreeing with the plan and storm water issues." Ra299.

The argument that NJTA is bound to convey its "agree[ment]with the plan and storm water issues" pursuant to the planning board's September 22, 2021 requirement applicants obtain a letter reflecting the foregoing because NJTA did not file formal objections *prior* to September 22, 2021 inverts causality.

As set out in detail at §1 above, applicants' position is factually mistaken. Applicants were informed seven times during the fifteen years, one month and one day between October 23, 2006 and November 24, 2021 that application for a license to cross requiring occupancy would be denied on that ground. Applicants acknowledged this on February 22, 2007 and March 28, 2013.

Further, per the December 26, 2014 letter, applicants previously provided a set of plans without encroachments to NJTA. Applicants claim to have "revised the plans at…NJTA's request in July 2013[79] then submitted [them] for" NJTA's review. Applicants went through great time and expense to supplement the record on motion, yet *any* proof the plans were submitted after July 2013 for NJTA's review is entirely absent from the record.

Applicants claim notations on the March 9, 2021 plans show the plans were revised July 15, 2013 pursuant to a June 26, 2013 letter and this constitutes

[79] Presumably referring to the June 26, 2013 letter, absent from the record.

proof NJTA approved the plans.[80] A comparison of the plans pre and post July 15, 2013 would show what, if anything was altered. Instead, applicants have only provided post July 15, 2013 plans, making it *impossible* to determine what, if anything, was changed in the July 15, 2013 revision.

Presumably, plans immediately pre and postdating the July 15, 2013 revisions are available to applicants; they have not stated otherwise. Incident to the supplementation motion, Murphy, applicants' engineer, Mb11, certified he "caused copies of the October 26, 2006, February 22, 2007, October 26, 2007 and November 17, 2006 letters…to be sent…My office only maintains the unsigned copies[.]" Oa41. Given the opportunity, no explanation for the absence of proof the July 15, 2013 revisions were sent to NJTA was adduced nor was a transmittal letter reconstructed. No explanation was given for applicants decision not to supplement the record with the plans as constituted prior to July 15, 2013 and the July 15, 2013 version, which would have the relevant changes.

The March 9, 2021 revisions, which have been adduced, are *entirely* inconsistent with applicants' February 22, 2007 and May 28, 2013 letters which

[80] Applicants do not explain what this "approval" would have consisted of. There was no application to be approved. If applicants maintain NJTA "approved" occupancy of its realty, such "approval" was never recorded as an easement. Further, applicants do not explain how Michael Grant, a senior project engineer could have possibly alienated NJTA's property interest or approved *anything*. See N.J.A.C. 19:9-5.1, N.J.A.C. 19:9-5.1(c), N.J.A.C. 19:9-5.9.

state not license to cross would be required, *ipso facto* because the plans did not require encroachment and the December 26 letter itself, which states the plans, *at that time*, did not require encroachment on NJTA property. Applicants were told repeatedly no encroachment would be permitted. Applicants wrote in 2007 and 2013 that their plans did not contemplate encroachments. In 2018, applicants provided plans calling for encroachment and were again informed this was proscribed via the September 18, 2018 letter. Aa373. Nevertheless, on October 11 and November 19, 2018 applicants informed the planning board NJTA had "approved" the plans,[81] forwarding the December 26, 2014 letter.

NJTA wrote again on September 18, 2021, Aa213, informing applicants encroachments would not be tolerated. It stands to reason if, as recited at Aa120, applicants had sent the December 26, 2014 letter to the planning board and had the planning board regarded that letter as constituting approval, "[r]eceipt of letter from [NJTA] agreeing with the plan and storm water issues[,]" Ra299, would not have been a condition of plan approval nor would have, on September 22, 2021, applicants represented to the planning board they had written to NJTA "several months ago"[82] and would transmit "the former permit that was issued to the applicant."[83] NJTA sent three letters to applicants on November 24, 2021

[81] Without having first filed an application, again inverting causality.
[82] Not present in the record.
[83] Neither the "former permit" nor its transmittal to NJTA are in the record.

disapproving of the plans due to encroachment, A211, 213, 215. Applicants, however, did not correct the September 21, 2021 testimony, even when questioned by the planning board's engineer. Oa22.

Were the court to do anything other than affirm NJTA's decision, it should remand this matter to permit further factfinding pertaining to the representations applicants made regarding NJTA's position to other entities. If equitable estoppel were to apply, it would be to hold NJTA to its consistent position that encroachments on the right of way are forbidden.

5. The Mount Laurel doctrine does not require P971's approval.

As above, this issue was not raised below and should not be considered. See Pressler & Verniero, cmt. 3 on R. 2:6-2 (collecting cases).

Applicants rely on two cases applying the Mt. Laurel doctrine, Homes of Hope v. Eastampton, 409 N.J. Super. 330 (App. Div. 2009) and Bi-Cnty. v. High Bridge, 174 N.J. 301 (2002) for the proposition the denial of P971 must be reversed as against public policy. Ab61.

The relevant "statutory scheme[84] does not require a municipality to provide sewage services to anyone other than its residents and, as a general rule, a municipality that provides services for the benefit of its residents is under no obligation to extend its services to those beyond its borders." Bi-Cnty. v. High

[84] See N.J.S.A. 40A:26A-1 to -22.

Bridge, 174 N.J. at 316. ["D]istribution of water by a municipality to its inhabitants…is a private or proprietary function…subject to the rules applicable to private corporations." Reid v. Parsippany-Troy Hills, 10 N.J. 229, 233 (1952). See also Fay v. Trenton, 126 N.J.L. 52, 54 (E. & A. 1941).

"Bi-County d[id] not argue that a municipality which operates a sewer system has a statutory or common law duty to allow a property owner in another municipality to connect into that system…Bi-County d[id] not claim apart from the Mt. Laurel doctrine,[85] there is any other basis upon which it could compel High Bridge to grant access to its sewer system." Bi-Cnty. v. High Bridge, 341 N.J. Super. 229, 235-236 (App. Div. 2001).

But, just like applicants, Ab60, "Bi-County and Clinton [Township] agreed…Bi-County would make…payment to the affordable housing fund rather than constructing lower income housing." Bi-Cnty., 341 N.J. Super. at 232. "Bi-County chose to contribute…$2,000 for each market rate unit it constructed in lieu of actual construction of low…income housing units." Bi-Cnty., 174 N.J. at 309. *Just like applicants*, Bi-County's payment in lieu was not equivalent to actual construction of housing. "Bi-County is not building low…income housing." Bi-Cnty., 174 N.J. at 327.

The predicate to invoking the Mt. Laurel doctrine was Bi-Country

[85] As per Samaritan v. Englishtown, 294 N.J. Super. 437 (Law. Div. 1996).

actually building low income housing. Both the Appellate Division[86] and Supreme Court concluded the doctrine did not apply. "'[C]ompelling High Bridge to allow Bi-County to connect into High Bridge's sewer system would not facilitate the construction of lower income housing. It would only lower the costs and thereby increase the…profits from a development[.]'" of market price realty. Bi-Cnty., 174 N.J. at 327 quoting Bi-Cnty., 341 N.J. Super. at 237.

The Court held "payment of a development fee in lieu of constructing affordable housing does not justify disturbing the general rule that a municipality is not obligated to provide access to its sewer system to residents of a neighboring municipality." Bi-Cnty., 174 N.J. at 303 (2002). Bi-Cnty. stands for the proposition that applicants' payment to Washington Township does not permit applicants to avail themselves of any special considerations pertaining to the construction of low income housing.

Homes of Hope v. Eastampton, 409 N.J. Super. 330 (App. Div. 2009) addressed the interrelation of the Fair Housing Act, N.J.S.A. 52:27D-301 to -329 and the Municipal Land Use Law, N.J.S.A. 40:55D-1 to -163.

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[86] [T]hough Bi-County's payment of a development fee to Clinton presumably will assist in the construction of lower income housing somewhere, this does not mean that Bi-County's development should be considered a residential development for lower income households[.]" Bi-Cnty., 341 N.J. Super. at 237-238. "Bi-County's obligation to pay $210,000 to Clinton's affordable housing fund does not transform its proposed development into an 'inclusionary development.'" Id. at 241.

Homes of Hope sought an N.J.S.A. 40:55D-70d(2) variance to build affordable housing units. N.J.S.A. 40:55D-70d(2) requires proof of positive criteria pursuant to which the applicant must establish "special reasons" for the variance. Homes of Hope at 335 citing Sica v. Wall, 127 N.J. 152, 156 (1992). "An inherently beneficial use presumptively satisfies the positive criteria[.]" Homes of Hope at 335 citing Burbridge v. Mine Hill, 117 N.J. 376, 386 (1990). Affordable housing is an inherently beneficial use. Homes of Hope at 336 citing Sica at 165. See also Burbridge at 392 citing De Simone v. Englewood, 56 N.J. 428, 442 (1970).

Easthampton had "a surplus of twenty-one units toward its fair share obligation for affordable housing[.]" Homes of Hope at 334. Easthampton contended after meeting its "fair share of affordable housing pursuant to the FHA and its concomitant regulations, affordable housing in [Easthampton was] no longer entitled to inherently beneficial use status." Id. at 336.

Easthampton's argument was rejected. The court explained the Fair Housing Act's statutory scheme "focuses on a municipality's fair share of affordable housing as it relates to the constitutionality of existing ordinances and the general zoning plan" Id. at 339. In contrast, "[a] municipal land use board serves a different function in considering an application for a use variance. The board's obligation is to accommodate individual situations that may require

relief from the strict confines of a zoning ordinance applicable in a specific zoning district." Id. at 339. In other words, there are separate statutory schemes, and never the twain shall meet; the Fair Housing Act and the Municipal Land Use Law address different issues and are separately applied. As applied herein, Homes of Hope stand for the proposition the FHA and the Turnpike Act should be separately cabined, each staying within in its own lane, so to speak.

Public policy relating to affordable housing is expressed statutorily via the Fair Housing Act, N.J.S.A. 52:27D-301 to -329. Besides the legislative findings at N.J.S.A. 52:27D-302,

> The Legislature declares…the statutory scheme…in this act is in the public interest in that it comprehends a low and moderate income housing planning and financing mechanism in accordance with regional considerations and sound planning concepts which satisfies the constitutional obligation enunciated by the Supreme Court[.] [N.J.S.A. 52:27D-303]

Per "NAACP v. Mt. Laurel, 67 N.J. 151 (1975) and NAACP v. Mt. Laurel, 92 N.J. 158 (1983)…every municipality in a growth area has a constitutional obligation to provide through its land use regulations a realistic opportunity for a fair share of its region's present and prospective needs for housing for low- and moderate-income families." N.J.S.A. 52:27D-302(a). "[T]he 'Fair Housing Act,'…is intended to implement the Mt. Laurel doctrine[.]" N.J.S.A. 52:27D-302(p). See also N.J.S.A. 52:27D-302(r). The Mt. Laurel doctrine and the Fair Housing Act apply to municipalities. The Legislature could have widened the

scope of the Fair Housing Act to apply to independent state agencies. It did not.

Rather, even after the 1975 and 1983 Mt. Laurel cases and the 1985 Fair Housing Act, see L. 1985, c. 222, the Legislature, when amending Turnpike Authority Act, see L. 1991, c. 183; L. 2003, c. 79 did not include the construction of low income housing with NJTA's competency. Rather, by statute, NJTA exists to "facilitate vehicular traffic and remove the present handicaps and hazards on the congested highways in the [s]tate, and to provide for the acquisition and construction of modern express highways embodying every known safety device including center divisions, ample shoulder widths, long sight distances, multiple lanes in each direction and grade separations at all intersections with other highways and railroads[.]" N.J.S.A. 27:23-1. See also N.J.S.A. 27:23-3(A); N.J.S.A. 27:23-4; N.J.S.A. 27:23-23a; N.J.S.A. 27:23-41.

In fact, NJTA *may not* construct low income housing. NJTA "shall not engage in the acquisition, construction or operation of any facility or activity not directly or indirectly related to the use of a transportation project except as may be specially authorized by law." N.J.S.A. 27:23-5.9.

Generalia specialibus non derogant,[87] the general/specific canon[88]

[87] See Ex parte Kan-gi-shun-ca, 109 U.S. 556, 570 (1883).
[88] See Milne v. Robinson, 513 Mich. 1, 21 (2024) (Viviano, J., concurring in the result only) quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 185 (2012).

requires "where two statutes on the same subject matter…conflict, the statute which deals specifically with the subject shall prevail over the more general statute." Springfield v. Union Cnty., 163 N.J. Super. 332, 342 (Law. Div. 1978).

Here, there is an entire statutory scheme related to low income housing and another relating to essentially running the Parkway and Turnpike. The Legislature chose to express public policy statutorily; that public policy and the underlying constitutional right are applicable to *municipalities.* Simultaneously, there is a specific scheme relating to two particular north/south toll freeways.

Even if the Fair Housing Act could apply to NJTA, and even if the Fair Housing Act dictated the public policy goals of independent state agencies rather than municipalities, it still would be, pursuant to the general/specific canon, superseded by the more specific public policy embodied in the Turnpike Authority Act. This all presupposes the project advances public policy favoring the construction of low income housing which, per Bi-Cnty., it does not.

6. P971 was properly denied under N.J.A.C. 19:9-5.2(c).

NJTA "*may* approve or reject an application for a license to cross[.]" N.J.A.C. 19:9-5.2(c) (emphasis added). There are seven factors upon which "applications *shall* be evaluated[.]" Ibid. (emphasis added). "An application…*can* be rejected based on a violation of, or non-compliance with, *any* of the requirements of [N.J.A.C. 19:9-5.2]." N.J.A.C. 19:9-5.2(d) (emphasis

added). P971 does not meet any of the N.J.A.C. 19:9-5.2(c) standards.

I. Adherence to NJTA's standard specifications.

NJTA promulgates standard specifications[89] to be incorporated into "[a]ll contracts of [NJTA] entered into for the performance of any work, or any purchases or hiring of personal property, services, supplies, equipment or goods[.]" N.J.A.C. 19:9-2.1(a). See also Dugan v. Tpk. Auth., 398 N.J. Super. 229, 234 (App. Div. 2008). The operative standard specifications are the 2016 7th Edition. N.J.A.C. 19:9-1.1. The State Soil Conservation Committee promulgates its own standards.[90] N.J.S.A. 4:24-42, N.J.A.C. 2:90-1.3 as does the Department of Transportation also with regard to its own standard specifications. N.J.A.C. 16:41-4.1(a)(6). Rather than relying on NJTA's standard specifications pertaining to, for instance, headwalls, NJTA Standard Specifications §§ 504.01, 504.02, 905.05, applicants addressed Department of Transportation standards rescinded in 2003,[91] by calling for the headwall's

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[89] N.J. Tpk. Auth., Standard Specifications (7th ed. 2016); njta.com/media/2168/njta 2016_standard_specifications.pdf.
[90] State Soil Conservation Comm., Standards for Soil Erosion and Sediment Control in New Jersey (7th ed. rev. July 2017); nj.gov/agriculture/divisions/anr/pdf/2017 Standards Complete with Soil Restoration.pdf.
[91] See Dep't of Transp., Baseline Document Change Announcement BDC02S-08 (February 7, 2008); nj.gov/transportation/eng/documents/BDC/pdf/bdc02s08.pdf eliminating Class C Concrete from Dep't of Transp., Standard Specifications for Road and

"concrete to be N.J.D.O.T. class 'C.'" Applicants indicated neither application nor *a fortiori* review of NJTA's standard specifications. Nor did applications apply for a waiver of the standard specifications. N.J.A.C. 19:9-5.19(b). As applicants made a showing of neither of "[a]dherence to" nor even recognition of [NJTA'] [s]tandard [s]pecifications, P971 was properly denied pursuant to N.J.A.C. 19:9-5.2(c)(1).

II. Impact on the traveling public and the roadway.

N.J.A.C. 19:9-5.2(c)(4), addressed below, implicates, above all, consideration of N.J.S.A. 27:23-9. N.J.S.A. 27:23-9 also informs consideration, per N.J.A.C. 19:9-5.2(c)(2), of a license to cross's "impact on the traveling public and the roadway." NJTA may collect "fees, licenses, rents, concession charges and other charges" to use its property to construct "telephone, telegraph, electric light or power lines, gas stations, garages, or for any other purpose[.]" N.J.S.A. 27:23-9(a). Aside from addressing NJTA's pecuniary interests, N.J.S.A. 27:23-9(a)'s examples provide benefits to "the traveling public and the roadway." For instance, "gas stations" and "garages" pertain to the needs of motorists. "[S]tores, hotels…restaurants" and "entertainment facilities" address the needs of long distance travelers passing through New Jersey along the east

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Bridge Construction (2001 ed.);
nj.gov/transportation/eng/notices/superseded/pdf/BDC00S05ATTs.pdf.

coast. In 1948, when N.J.S.A. 27:23-9 was enacted, see L. 1948, c. 454, § 9, "telephone" and "telegraph…lines" were of vital importance to motorists wishing to communicate while en route. Further, "telephone, telegraph, electric light or power lines" are necessary and "offices" are incidental to construction of the aforementioned motorist benefiting facilities as gas stations and garages would scarcely be able to function without electricity. Neither a benefit within the contemplation of N.J.S.A. 27:23-9 or more broadly would be provided by granting application P971. Rather, the effect on the motorists and the Parkway would be negative. In both his October 13, 2021 and August 30, 2023 letters, Jean-Pierre Ravetier wrote the outlet pipe "may result in local flows exceeding the bank of…the concrete swale and eroding the [p]arkway's embankment." On August 30 letter, Ravetier noted "[s]tability of the spillway and the embankment downstream needs to be provided to ensure no adverse impacts to the [p]arkway will occur." Terasaki, in his June 28, 2023 review, noted "flow from the basin emergency spillway will be significantly higher than a [ten] year storm." NJTA, in its November 24, 2021 letter, set out that "[t]here is an emergency overflow spillway on the detention basin, which if utilized [for] a storm exceeding the [one hundred year] threshold would flow down the embankment, potentially over the…swale and inundate the mainline southbound." The risks created by standing water on a roadway is not trivial. See, e.g., McGowan v. Eatontown,

151 N.J. Super. 440, 443-444 (App. Div. 1977); Meta v. Cherry Hill, 152 N.J. Super. 228, 231 (App. Div. 1977); Brown v. Brown, 86 N.J. 565, 570 (1981).

P971 would represent an increased risk to motorists and the Parkway. However, even without so finding, P971 does not implicant any *benefit* to the Parkway or motorists, *a fortiori* not within the contemplation of N.J.A.C. 19:9-5.2(c)(2). Due to the lack of a *positive* "[i]mpact on the traveling public and the roadway; P971 was properly denied pursuant to N.J.A.C. 19:9-5.2(c)(2).

III. The duration of the request.

P971 requested permission to permanently encroach on the Parkway right of way by occupying, and thus constricting, the width of property available for NJTA's purposes such as widening the Parkway, adding a rest area and so forth. Reference to N.J. Tpk. Auth., License to Cross Terms And Conditions, §5 (rev. Aug. 24, 2022) is instructive. A license must "bear all costs and expenses for the relocation, alteration, modification and reconstruction of said facilities made necessary by the enlargement, alteration, modification or extension of the…Turnpike." Id. at §5. Insurance is required for "the duration of the [p]roject and for a period of two years following termination of this [l]icense to [c]ross or the completion of the [p]roject. Id. at §7. §8 an indemnification cause which "shall survive the expiration of this license." The licensee must establish an escrow account to reimburse NJTA for costs set out at §5, to be returned "[a]t

the conclusions of the work[.][94]" Id. at §14(A). The foregoing are all consistent with a temporary rather than permanent license to cross. The standard terms and conditions reflect that a permanent license to cross runs afoul of N.J.A.C. 19:9-5.2(c)(3). As discussed above, N.J.A.C. 19:9-5.2(a) contemplates licenses to cross granted to abutters for transient entries. Directing water onto or driving across NJTA's property creates momentary entries. By contract, drainage infrastructure is a continuous occupancy. P971's duration is, in both senses, maximal. It would, permanently and continuously, not serve "the needs of [NJTA] and the public[,]" N.J.A.C. 19:9-5.2(d) and was properly denied pursuant to N.J.A.C. 19:9-5.2(c)(3).

IV. Criteria…in N.J.S.A. 27:23-1 *et seq.*, in particular…N.J.S.A. 27:23-9, which must be taken into consideration concerning utilization of the roadway[.]

N.J.A.C. 19:9-5.2(c)(4) pertains to consideration of NJTA's governing statutes, N.J.S.A. 27:23-1 to -60 and N.J.S.A. 27:23-9.

> NJTA is hereby authorized by resolution to fix, revise, charge and collect tolls, fees, licenses, rents, concession charges and other charges for the use of each project and the different parts or sections thereof, and to contract with any person, partnership, association or corporation desiring the use of any part thereof, including the right-of-way adjoining the paved portion, for placing thereon telephone,

[94] §5 pertains to costs pertaining to the subject of the license to cross including "reconstruction, maintenance, repair and operation" which in the abstract, extend into the future without limitation. However, because §5 contemplates the escrow account being closed "at the conclusion of the work[,]" the licensee's otherwise open ended obligations are temporally limited and thus, temporary.

> telegraph, electric light or power lines, gas stations, garages, stores, hotels, and restaurants, offices, entertainment facilities, or for any other purpose, and to fix the terms, conditions, rents and rates of charges[95] for such use…Such tolls shall be so fixed and adjusted as to carry out and perform the terms and provisions of any contract with or for the benefit of bondholders."
> [N.J.S.A. 27:23-9]

As set out in N.J.A.C. 19:9-5.2(c)(2) above, per N.J.S.A. 27:23-9, NJTA is to pursue revenue streams which also benefit the travelling public. Leasing property to build gas stations creates a synergistic benefit to NJTA and motorists. Further, NJTA is to "facilitate vehicular traffic and remove the present handicaps and hazards on the congested highways in the [s]tate, and to provide for the acquisition and construction of modern express highways embodying every known safety device including…ample shoulder widths [and] multiple lanes in each direction[.]" N.J.S.A. 27:23-1. P971 would not create a revenue stream for NJTA. It would not benefit motorists. Putting concrete structures, including one pertaining to the scour hole occupying a twelve and a half by fifteen foot footprint on the Parkway right of way would not promote

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[95] Senate Bill No. 2352 (SCS) abolishes the New Jersey Highway Authority and transfers the projects and functions of the Highway Authority…to [NJTA]…The bill…authorizes [NJTA] to borrow money and issue negotiable bonds for any of its corporate purposes and to secure the bonds through the pledging of tolls *and other revenues* and proceeds of such bonds, or other available sources and to enter into credit agreements[.] Assem. Appropriations Comm. Statement to S.B. 2352 (May 5, 2003); Assem. Transp. Comm. Statement to S.B. 2352 (April 28, 2003); S. Transp. Comm. Statement to S.B. 2352 (March 17, 2003) (emphasis added).

"ample shoulder widths" described at N.J.S.A. 27:23-1. Not only would P971 provide no revenue stream, it would create a maintenance liability and would prevent NJTA otherwise using the realty to create revenue. For example, NJTA would be unable to charge rent to a roadside hotdog stand if that portion of its property were already occupied by drainage infrastructure. N.J.S.A. 27:23-9 requires NJTA to use its property in furtherance of revenue streams which synergistically benefit motorists. Instead, applicants demand a public agency turn over a property rights applicants claim are necessary to their completion of a subdivision project in order that applicants, rather than NJTA, should profit. P971 advances neither NJTA's general mission at N.J.S.A. 27:23-1 nor the specific goals at N.J.S.A. 27:23-9 but rather hinders both and thus does not satisfy N.J.A.C. 19:9-5.2(c)(4).

V. General concern exhibited by the applicant for…public health, safety, and welfare.

Applicants claim NJTA attempted to "retroactively apply the [i]nland [f]lood [p]rotection [r]ules to the [l]icense to [c]ross [a]pplication[.]" Ab40. Applicants claim NJTA has attempted to apply regulations effective July 17, 2023, see 55 N.J.R. 1385(b) (July 17, 2023). Ab43. In the September 22, 2023 letter, NJTA noted its health, safety and welfare concerns:

1. In response to the recently implemented NJDEP [i]nland [f]lood [p]rotection rules, [NJTA] can no longer continue with the practice of direct connections into our stormwater collection system utilizing

legacy criteria.

2. [A]pplicant has not demonstrated that the peak flows in the future condition are reduced utilizing current regulatory standards.

Rather than addressing NJTA's concerns, applicants in response advanced a legal argument, relying on the grandfathering provision at N.J.A.C. 7:13-2.1(c)(4)(i) in both the October 2, 2023 letter and in this appeal. Ab42. This argument is orthogonal to NJTA's concerns and irrelevant to NJTA's proprietary authority. In this instance, NJTA could rely on its regulatory powers. It could have denied a license to cross pertaining to drainage based on its concern over the spill directed towards and basin elevated over and adject to the Parkway; in doing so it would have acted in pursuant to its regulatory powers via direct interference in applicants' use of *their* realty. Rather, NJTA is simply controlling occupancy of *its* realty and thus acting as a proprietor.

A private landowner could ask applicants to stand on one foot, sing a song or pay in pennies. Pursuant to its statutory authorization, see N.J.S.A. 27:23-5(i) NJTA can do the same. NJTA can "fix such price or compensation as it shall see fit[.]" Le Compte v. State, 65 N.J. 447, 451 (1974); Atl. City Elec. v. Bardin, 145 N.J. Super. 438, 446 (App. Div. 1976). NJTA when acting as a private landowner, as herein, is entitled to ask, as a condition to granting an easement, for the grantee to comply with *any* criteria at all. NJTA is not "applying" regulations. NJTA, as a private landowner, is setting the terms of consideration

applicable to the property interest applicants are attempting to acquire.[96]

The Department of Environmental Protection amended its stormwater management regulations, effective July 17, 2023. See 55 N.J.R. 1385(b) (July 17, 2023). The prior rules were "informed by data that is decades old[97] and "neither representative of existing conditions nor indicative of future conditions[,]" 54 N.J.R. 2169(a) (December 5, 2022) and contained "methodologies for managing stormwater and determining the extent of flood hazard areas utilize[ing] outdated and inherently backward-looking precipitation data and d[id] not account for either current conditions or the expected impacts of climate change on precipitation events." Id. at 2170. The current rules "ensure the use of current precipitation data and reliable climate science to aid New Jersey communities in better preparing to confront climate change induced increases in the intensity of precipitation events and the resulting effects of additional stormwater runoff on stormwater management systems and flood elevations in fluvial areas. The rules incorporate climate-informed precipitation data to better align with current precipitation conditions." 55 N.J.R. 1385(b), 1386 (July 17, 2023). Herein, NJTA requested applicants comply with, *inter*

[96] "Acquire" insofar as attempting use N.J.A.C. 19:9-5.2 to condemn NJTA property and to do so with paying compensation.

[97] "[I]nitially published in the 1970s and 1980s and…generally still based on precipitation data and hydrologic calculations determined at that time." 54 N.J.R. at 2170.

alia, N.J.A.C. 7:8-5.7, effective July 17, 2023, governing calculation of stormwater runoff and groundwater recharge, in its current form. Such a request is a permissible fixing of consideration a proprietor could request in response to what is substantively a request for an occupancy easement.

The emergency spillway could cause a catastrophic inundation of the Parkway. The outlet pipe into NJTA's concrete swale would effectuate a direct connection from the subdivision into the Parkway's stormwater connection system. This connection would generally diminish NJTA's own capacity, which must, in light of climate change and increased stormwater, be husbanded in the interest of NJTA's raison d'être; "facilit[ating] vehicular traffic…remov[ing] the present handicaps and hazards on the congested highways in the State, and…provid[ing] for the acquisition and construction of modern express highways[.]" N.J.S.A. 27:23-1. The regulations with which NJTA requests compliance as consideration to grant what is, in effect, an easement, are predicated on physical reality. One cannot wave a copy of the N.J.A.C. 7:13-2.1(c)(4)(i) grandfathering provision à la Canute[98] and expect floodwaters to recede. After all, "the hazard of flooding does not depend upon an artificial description but rather upon the quantity of water at a specific depth." Queen City

[98] "Even the fabled King Canute with all of his power could not control water by fiat." Queen City v. Cincinnati, 666 F. Supp. 1035, 1039 n.3 (S.D. Ohio 1987). See also Dewey v. Stevens, 83 N.J. Eq. 656, 661 (1914).

v. Cincinnati, 666 F. Supp. 1035, 1039 (S.D. Ohio 1987). N.J.A.C. 7:13-2.1(c)(4)(i) makes no difference to an oncoming flood with the potential to sever one of the major north-south routes not only in New Jersey, but also the most populated area of the county, the Boston/Washington corridor. At heart, this issue is not if N.J.A.C. 7:13-2.1(c)(4)(i) applies or notwithstanding, as a proprietor, NJTA can nevertheless condition its approval on compliance with latest environmental regulations. Rather, the test pertains the "[g]eneral concern exhibited by [applicants] for the public health, safety, and welfare." The gold standard of "general concern" entails demonstration of more than minimal concern for the public's health, safety and welfare. Herein, general concern would be demonstrated by, rather than resistance to NJTA's request, voluntary compliance with the newly promulgated stormwater management regulations at N.J.A.C. 7:8-1.1 to -6 and flood regulations at N.J.A.C. 7:13-1.1 -24.11 on which any of private landowner could condition granting an easement. Applicants mere invocation of N.J.A.C. 7:13-2.1(c)(4)(i) counts against them vis-à-vis N.J.A.C. 19:9-5.2(c)(5); P971 must be denied on that basis.

VI. [F]inancial health and stability of the applicant.

Applicants propose to build, on NJTA's property, infrastructure requiring

maintenance.[99] Ab10, 22, 47, 48. N.J.A.C. 19:9-5.2(c)(6) pertains to the *applicants'* financial health. The form license to cross similarly contemplates the licensee, not a third party "agrees to bear all costs and expenses attributable to the construction, reconstruction, maintenance, repair and operation of said facilities[.]" N.J. Tpk. Auth., License to Cross Terms and Conditions, §5 (rev. Aug. 24, 2022).[100] Such costs to be borne by the licensee for the duration of the license. "Licensee further agrees to bear all costs and expenses for the relocation, alteration, modification and reconstruction of said facilities made necessary by the enlargement, alteration, modification or extension of the New Jersey Turnpike." Ibid. A two million dollar insurance police is required "for the duration of the [p]roject and for a period of two years following termination of th[e] [l]icense to [c]ross or completion of the project" which "may be modified by [NJTA]…without…approval of the [l]icensee." Id. at §7. The form license contains an environment indemnification clause which "shall survive the expiration of th[e] license." Id. at §8. §14(A) requires "[l]icensee shall establish an escrow account with" NJTA. A future homeowners association is not the applicant. Whatever arguments applicants make regarding *that* entity's financial

[99] NJTA learned of a nineteen page maintenance manual when applicants moved to supplement the record. Aa182, Sa104.

[100] Applicants requested judicial notice of N.J. Tpk. Auth., License to Cross Terms and Conditions, §5 (rev. Aug. 24, 2022), Mb23-24 and rely thereon at Ab31, 32.

health are orthogonal to the regulation, which pertains to *applicants'* financial health. However, applicants, via their October 2, 2023 letter took the position they[101] would have *no* future responsibility pertaining to maintenance. Rather, applicants would pass all obligations on an entity to be created in the future. Applicants continue to take this position. Ab19, 47. Compare with §6 of the January 19, 2022 planning board resolution, wherein applicants were obliged to establish and maintain and escrow account for repairs.[102] Applicants omitted the January 19, 2022 resolution from application P971 though the escrow condition therein was relevant to N.J.A.C. 19:9-5.2(c)(6), perhaps to avoid opening the door to NJTA similarly demanding sums to be placed in escrow for maintenance. Applicants took, and continue to maintain a position contrary to what the form license to cross envisions and what they agreed to vis-à-vis Washington

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[101] Nor "K. Hovnanian [Companies]…the contract purchaser for the subject lots[.]" Aa293 who has styled itself as party to P971; "*we* are anxious to address…comments…so *we* can enter into the license-to-cross agreement as soon as possible." Aa292 (emphasis added).

[102] "[Applicants] and/or any successor in title shall establish an escrow account for repairs/replacement to the pump station and for main system in the [sum] of [s]ixty-[e]ight thousand…[d]ollars…maintained…as a minimum requirement and shall be replenished…when utilized. This obligation shall be applicable to the developer and/or any successors(s) in title. The pump station and force main shall be…maintained in perpetuity by the [HOA] and the escrow account…shall remain in perpetuity…maintenance of the pump station will be the responsibility of the HOA…The cost of maintaining the pump station shall be borne solely by the HOA…Replacement of the pump station…will be…responsibility of the HOA…The cost of maintaining the force main shall be borne solely by the HOA in perpetuity." Aa227 - 229 §6.

Township. In application P971, in their October 2, 2023 letter and even now, applicants deign to subject themselves to financial risk, contrary to N.J.A.C. 19:9-5.2(c)(6). Applicants refusal to proffer any information regarding their financial health and stability require denial of P971 per N.J.A.C. 19:9-5.2(c)(6).

VII. [E]ffect of the…crossing on the financial, economic, or engineering aspects of the activities of NJTA, the public, or neighboring property owners.

The proposed crossing benefits neither NJTA nor the public at large. Further, applicants have refused to comply with the general requirement that they, rather than a third party, shoulder some of the financial risk, as set out pursuant to N.J.A.C. 19:9-5.2(c)(6) above. P971 proposes textbook public risk for private profit; applicants would benefit while leaving NJTA and the public holding the bag. P971 was properly denied pursuant to N.J.A.C. 19:9-5.2(c)(7).

7. The court should not consider the supplemental material.

Applicants provided material they possessed neither with their application, *when permitted* nor when they protested, *when required* and now seek to include this withheld material, contrary to In re Gastman, 147 N.J. Super. at 114. Applicants chose to attach the supplemental documents to neither their application nor their N.J.A.C. 19:9-5.5(a) letter, though per N.J.A.C. 19:9-5.2(b), applying to an initial license to cross requires "supporting documentation," and N.J.A.C. 19:9-5.2(c) sets out criteria pursuant to which

applicants would offer "supporting documentation." Also, N.J.A.C. 19:9-5.5(a) requires a written protest of a denial to a license to cross "set forth in detail the facts upon which…applicant bases its protest and…define…as the available information permits, those issues or facts in dispute…within five days after [applicant] knows or should have known of the facts[.]"

Applicants claim had NJTA permitted an N.J.A.C. 19:9-5.5(b) hearing "or…an exchange of information [applicants] could and would have brought forward" the supplemental documents. Mb16. "No opportunity was provided to [applicants] to present information or communicate with…NJTA concerning its unexpected rejection of" P971. Ab12. However, applicants do no explain why they did not attach relevant material, including from the supplemental appendix, to their original application. N.J.A.C. 19:9-5.2(b) contemplates the submission of supporting documentation beyond the mandatory engineering plans with a license to cross application. Reference to N.J.A.C. 19:9-5.2(c) informs applicants what types of material would be relevant to an application. For instance, N.J.A.C. 19:9-5.2(c)(1) informs applicants it is important to show "[a]dherence to [NJTA's] [s]tandard [s]pecifications. N.J.A.C. 19:9-5.2(c)(6) informs applicants information on "[t]he financial health and stability of the applicant" is relevant, however nothing relating thereto was provided and the January 19, 2022 planning board resolution, Aa218, which imposes *direct*

financial obligations on applicants was omitted. "[I]mpact on the traveling public and the [r]oadway;" "general concern exhibited by the applicant for the public[.]" and "[t]he effect…on the…public, or neighboring property owners" are set out at N.J.A.C. 19:9-5.2(c)(2), (5) and (7). Project maintenance is responsive to these yet applicants attached neither the maintenance manual,[104] Aa182, nor Aa218, the planning board resolution, which relates to maintenance. Applicants claim the December 26, 2024 letter constituted plan approval yet have only referenced it on appeal; it was neither produced nor even referenced below though it had been sent to the planning board and other agencies in 2018 and 2021. Applicants also do not explain why relevant information was adduced on appeal rather than pursuant to N.J.A.C. 19:9-5.5(c). R. 2:5-5(b) "is not a device to include evidence…a party could have presented below." 37 N.J. Prac., Admin. Law & Prac. § 7.13 (Steven L. Lefelt, *et al.*) (July 2023 update). See also Liberty Surplus, 189 N.J. at 452-453; Ocean Med., 396 N.J. Super. at 480. Applicants possessed the supplemental documents when they requested the N.J.A.C. 19:9-5.5(b) hearing on October 2, 2023 or they would have been able

[104] The *existence* of a maintenance manual, notwithstanding the contents but solely the *existence* of which is highly germane to the application, for instance in determining if applicants take maintenance seriously *at all*, was not disclosed until the motion to supplement was filed.

to present them by October 13, 2023.[105] Any material they did not possess, though applicants do state "the supplemental documents "were generally known to [applicants] at the time of the [a]pplication[,]" Mb15 could have been presented to NJTA when acquired, per the *applicable discovery rule*[106] referenced by applicants.[107] The supplemental documents were in applicants' possession or could have been prior to the application rendering [s]upplementation…inappropriate[.]" NJ App. Prac. Handbook § 5.6(a) citing In re Gastman, 147 N.J. Super. at 114. These documents should not be considered by the merits panel. The record cannot be supplemented with evidence unlikely to affect the outcome via R. 2:5-5(b). Gastman at 114; Liberty Surplus at 453. The material pertaining tother easements and licenses to cross falls into this category. Applicants claim NJTA has treated other license to cross applicants in a manner which demonstrates "rejection of [P971] was arbitrary, capricious and unreasonable." Ab47. As a threshold matter, applicants are attempting to prove an exception to a general rule via supplemental evidence. Cherry-picked examples from NJTA's entire corpus, going as far back as 1978

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[105] "Applicant[s] [request] a hearing as provided [by] N.J.A.C. 19:9-5.5(b) within the next week[.]" Aa369.

[106] "The protest shall be submitted…within five days after such aggrieved party *knows or should have known* of the facts giving rise to the grievance." N.J.A.C. 19:9-5.5(a) (emphasis added).

[107] Applicants "reserve[d] the right to supplement with submission[.]" Aa369.

tend to show that if, over the past forty-five years, there were only six instances upon which would applicants rely those instances should be treated as exceptions to NJTA's practices. Regardless, a closer examination of the six examples shows the examples support NJTA's rather than applicants' position.

The Hess easement, Aa298 shows at one time, NJTA had granted a license to cross to a utility. Aa301. The actual license to cross, if it were permanent, and so forth, are not before the court. What is before the court is an easement allowing a utility, a liquid petroleum pipeline, to run in the vicinity of a Turnpike ramp in Newark. Aa303. The Hess easement supports NJTA's position.

The Matrix easement, Aa307, shows consideration on both sides; thus a benefit to NJTA and motorists, something lacking in P971. It shows that NJTA acquired property owned by Matrix[108] subject to easements. Matrix imposed an easement condition on property it transferred to NJTA. Matrix had no obligation to engage in this transaction but, as part of the consideration, it required the realty be transferred subject to easements. The Matrix easement *is not a license to cross* nor does it recite the existence of one. It shows a voluntary real estate transaction benefiting both parties; the opposite of applicants' attempt to twist N.J.A.C. 19:9-5.2 into a private right of eminent domain.

The Ocean County drainage easement, Aa328 shows that pursuant to

[108] To widen the Turnpike. Aa319, 320.

widening the Parkway, Birch Street in Beachwood, which runs under the Parkway was relocated. Per N.J.S.A. 27:23-6, NJTA was responsible for reconstructing Birch Street in the same condition. The easement allows Ocean County to take responsibility construction and drainage pertaining to the relocated Birch Street. Again, this is not a license to cross.

The Linden deed,[109] Aa334, is a transfer of preexisting easements NJTA had, on a parcel which was also transferred to Linden. Aa334 is simply a deed conveying easements separately from "Parcels to be Quit-Claimed to the City of Linden," Aa334, ¶2, pursuant to NJTA transferring title of a Wood Avenue, which travels over the Turnpike and had been relocated and then turned over to Linden per N.J.S.A. 27:23-5.6.

The Elizabeth deed, Aa339, shows NJTA *sold* an easement to Elizabeth pursuant to an Army Corps of Engineers project, Aa342. This is not a license to cross but the sale of a property interest by NJTA; something which applicants argue they are entitled to free of charge.

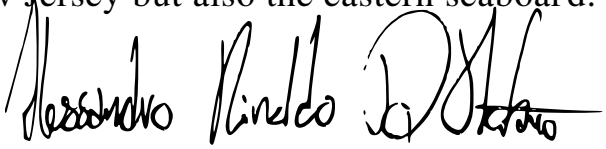
The Clifton application, P945, pertains to modifications of an existing structure and is by a municipality, an entity qualifying as a utility per N.J.S.A. 27:23-6 and N.J.A.C. 19:9-5.2(a). Further, the Clifton application *has not been granted*. Saliently, even cherry picking material, applicants failed to adduce *one*

[109] Also not a license to cross.

license to cross they felt would help their position.

Conclusion.

The supplemental material should not be considered. Even with considering the supplemental material, the court should affirm NJTA's denial of P971, an application which seeks, contrary to decisional law, statute and regulation, to require NJTA transfer a property right to them for free. Fundamentally, applicants seek to arrogate to themselves not only a private power of eminent domain, but seek to condemn property without compensation. *A fortiori*, the court should not *reverse* the denial of P971 because, *inter alia*, though applicants claim some of the outcomes of P971 would not be *negative* within the meaning of N.J.A.C. 19:9-5.2(c), it is undisputed applicants do not and cannot satisfy N.J.A.C. 19:9-5.2(c)'s positive requirements. Should the court find otherwise, remand rather than reversal would be warranted. Should the court, for instance, disagree with NJTA's interpretation of *occupancy*, immediate construction, without further review, of a retention basin adjacent to and elevated over the Parkway with a spillway pointed at the Parkway would be rather unfortunate and premature considering the dangers posed to motorists and potential impact on travel not only in New Jersey but also the eastern seaboard.



Alessandro Rinaldo Di Stefano
Thursday, January 2, 2025