SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001054-23

NFI REAL ESTATE, LLC AND TURNPIKE CROSSINGS VI, LLC, **Plaintiffs-Appellants,** **v.** **FLORENCE TOWNSHIP ZONING BOARD OF ADJUSTMENT,** **Defendant-Respondent.**	**CIVIL ACTION** **ON APPEAL FROM ORDER DATED OCTOBER 27, 2023** **Docket No. BUR-L-001987-22** **SAT BELOW:** **HON. JEANNE T. COVERT, A.J.S.C.**

AMENDED BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS, NFI REAL ESTATE, LLC AND TURNPIKE CROSSINGS VI, LLC

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ON THE BRIEF

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PRELIMINARY STATEMENT

This is an action in lieu of prerogative writ, with Plaintiff challenging the defendant Florence Township Zoning Board's denial of a use variance. The use variance was brought under N.J.S.A. 40:55D-70(d)(1). It sought approval for accessory uses (stormwater basins, parking spaces, and a driveway), permitted in the zoning district in which the property is situated. However, the principal structure, a warehouse, is to be located in neighboring Mansfield Township. The subject property is bifurcated by the Florence Township/Mansfield Township municipal boundary line. As a result, these otherwise permitted accessory uses became the principal uses on the Florence Township side of the boundary, thus necessitating a (d)(1) use variance. The Mansfield Township Joint Land Use Board had already granted preliminary site plan approval for the warehouse and accessory improvements on its side of the municipal line when the defendant Florence Township Zoning Board began its public hearings.

The question presented is whether the Florence Township Zoning Board properly denied this variance for uses otherwise permitted as accessory to a structure, where the structure is to be built entirely within (and has already been approved by) the adjoining municipality, at a height of 48 feet, but Florence Township limits building heights to 30 feet. Stated differently, may a zoning board theoretically apply its height requirements to a building already approved

in the adjoining municipality; presume that it would have denied a height variance if the building had been proposed for its side of the boundary line; and then conclude that since it would have denied the hypothetical height variance for that building, that it is therefore justified in denying these otherwise permitted, height neutral accessory improvements to a use permitted on both sides of the municipal boundary line?

PROCEDURAL HISTORY

On October 19, 2021, NFI Real Estate, LLC and Turnpike Crossings VI, LLC (collectively "Plaintiff") submitted land development applications to both the Florence Township Zoning Board ("Defendant" or "Defendant Board"), and the Mansfield Township Joint Land Use Board ("Mansfield JLUB"). The applications sought approval for a 1,105,000 square foot warehouse, along with associated office space and accessory uses such as parking and stormwater management basins. Ja083. The Mansfield portion of the parcel contained the entirety of the structure, while the Florence portion only included uses accessory to said structure. Ja073.

On January 24, 2022, after just one night of testimony, the Mansfield JLUB granted preliminary site plan approval. Ja085-Ja095.

Plaintiff presented the application to Defendant over the course of four hearings: February 7, March 7, April 4, and May 31, 2022. Ja026-Ja028.[2] On

[2] There are five (5) volumes of transcripts, one from each of the four (4) hearings before the Defendant Zoning Board, and the Trial Court's Oral Decision. The transcripts shall be designated as follows:

1T: February 7, 2022 (Hearing Night One)
2T: March 7, 2022 (Hearing Night Two)
3T: April 4, 2022 (Hearing Night Three)
4T: May 31, 2022 (Hearing Night Four)
5T: October 27, 2023 (Trial Court's Oral Decision)

the fourth night, the Defendant voted 6-1 to deny the application. (4T 147:3-25; 148:1-6).[3]

On September 1, 2022, Defendant adopted Resolution No. Z.B. 2022-11, which memorialized the denial. Ja023-Ja046.

On October 20, 2022, Plaintiff filed a Complaint in Lieu of Prerogative Writs to appeal the Defendant's denial. Ja001-Ja009.

The Trial Court heard oral argument on October 27, 2023, and issued an oral opinion denying Plaintiff's requested relief and dismissing the Complaint. Ja222; 5T 54:4-10.

On December 7, 2023, Plaintiff filed the Notice of Appeal with the Appellate Division. Ja223-Ja225.

STATEMENT OF FACTS

Plaintiff owns a two hundred sixteen (216) acre parcel located in both Florence Township and Mansfield Township (the "Property"). Ja024. Familiarly known as the "Wainwright Property", the site is bounded by Interstate 295 to the east; Florence-Columbus Road (County Route 656) to the south; Old York Road (County Route 660) to the west; and the New Jersey Turnpike to the north. (1T 29:20-25). It does not sit on any municipal roads.

[3] "4T 147:3-25; 148:1-6" references the transcript of the May 31, 2022 hearing, at page 147, lines 3-25, and page 148, lines 1-6. This reference description will be used throughout this Brief.

The Property is bifurcated by a municipal boundary line, with the eastern one hundred eighteen (118) acres being in Mansfield, and the western ninety-eight (98) acres in Florence. Ja072; 1T 30:1-3. Only thirteen (13) of those ninety-eight (98) acres in Florence would be disturbed for development, while forty-four (44) acres in Mansfield would be developed. Ja073-Ja073; 1T 30:1-3; 4T 8:5-25; 9:1.

The Mansfield side of the Property is in that municipality's "ODL- Office, Distribution, Laboratory" Zoning District ("ODL"). Ja029. The Florence side of the Property is further bifurcated, with the portion bordering Mansfield being in the "SM-Special Manufacturing" Zoning District ("SM"), and the balance, west of the PSE&G easement, being in the "AG-Agricultural Zoning District." Ja030; Ja073; 1T 32:8-14.

Warehouses and distribution facilities are permitted uses in both Mansfield's ODL and Florence's SM Zoning Districts, as are the requested accessory uses proposed on the Florence-portion of the tract. Ja085; Ja097. However, Florence limits building height in the SM Zone to thirty feet (30'), and Mansfield limits building height in the ODL Zone to fifty feet (50'). Ja025; Ja073; Ja097; Ja181. Plaintiff's proposed development is located entirely within the SM and ODL districts; no development is proposed in Florence's Agricultural Zoning District. Ja030.

Since the Property is bisected by a municipal boundary line, Plaintiff submitted land development applications to the Defendant and the Mansfield JLUB. Ja075; Ja085. The applications sought approval for the construction of a 1,105,000 square foot, forty-eight foot (48') high, warehouse and distribution facility, accompanied by associated office space and accessory uses, such as parking and stormwater management basins. Ja073; Ja083. Both applications sought a reduction in the required number of parking spaces. Ja030; Ja086.

Since the entirety of the structure is to be located on the Mansfield-portion of the tract, the Mansfield application sought approval for the compliant forty-eight foot (48') structure, plus certain parking and loading spaces. Ja085-Ja095. The proposed development would constitute about forty-four (44) acres on the Mansfield side, with 25.37 acres comprising the structure itself. (1T 30:1-12; 4T 8:5-25, 9:1). On January 24, 2022, the Mansfield JLUB voted to approve the application. Ja085-Ja095.

The improvements sought for the Florence portion of the tract are permitted, height neutral uses accessory to the principal structure in Mansfield. Ja097; Ja146; 4T 9:10-25. The accessory uses include parking and loading spaces, a septic disposal system, two (2) stormwater management basins, and the facility's driveway. Ja024; 1T 33:17-23. The proposed driveway entrance on Florence-Columbus Road (CR 656) is approximately fifty feet (50') south of

the existing driveway for safety and practical considerations, by agreement with the Burlington County Engineer's Office. (1T 34:2-24). The development activities proposed in Florence would total about thirteen (13) acres, or about thirteen percent (13%) of the Florence-portion of the tract.[4]

Since the principal structure will be located in Mansfield, Plaintiff was obligated to seek a use variance under N.J.S.A. 40:55D-70(d)(1) to permit the accessory uses without a principal use located in Florence. Ja025; Ja097. No height variance was needed, but as mentioned above, Plaintiff also requested a bulk variance under N.J.S.A. 40:55D-70(c) to reduce the number of parking spaces required under Florence's ordinance from 1,148 to 604. Ja029-Ja030; 1T 36:12-19. The reduction of parking spaces reduced the permitted lot coverage ratio from seventy percent (70%) to twenty-six percent (26%), would result in four (4) acres less of impervious coverage, and would reduce stormwater runoff by 330,000 gallons for a twenty-five (25) year storm. (1T 35:8-13; 37:1-13).

Plaintiff was not required to seek a height variance under N.J.S.A. 40:55D-70(d)(6), and no relief requested from Florence sought deviations for height. Ja029; Ja097; Ja146; 4T 9:10-25.

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[4] The parcel totals 216 acres, and 159 acres are in the AG zone and/or constrained by wetlands or other environmental concerns. Therefore, there are 57 acres subject to development; 13 acres in Florence, and 44 acres in Mansfield. (1T 30:1-12; 4T 8:5-25; 9:1).

Plaintiff presented five (5) witnesses over the four (4) nights of hearings: Michael Landsburg, Plaintiff's Chief Development Officer; Rodman Ritchie, P.E., Project Engineer; Norman Dotti, P.E., Sound Expert; Robert Hoffman, P.E., PTOE, Traffic Engineer; and Paul Phillips, PP, AICP, Professional Planner. Ja026. Mr. Ritchie, Mr. Dotti, Mr. Hoffman, and Mr. Phillips were all accepted as expert witnesses in their respective fields. Ja026.

The Defendant's professionals testified to their review letters during the hearings. Ja026-Ja027. The application was opposed by Florence Township's Mayor and Council, who hired the following professionals to oppose the application: Matthew Madden, Esq., Special Counsel; Lee Klein, P.E., PTOE, Traffic Engineer; and Mark Remsa, PP, AICP, Professional Planner. Ja027.

During the public comment portion, nearly all of the testimony was related to truck and other traffic from the proposed development. 2T 108:21-25 through 146:1-3. The professionals hired by the Mayor and Council also focused on traffic, and what they imagined might be the intensity of the proposed use. 3T 3:14-25 through 38:1-17.

Upon the conclusion of the hearing, that Board denied the application, without explanation or discussion. 4T 146:18-23.

ARGUMENT

I. STANDARD OF REVIEW (Raised Below: 5T 48:16-19)

The Appellate Division applies the "same standard when reviewing a trial court's decision on an appeal from a decision of a board of adjustment." See, e.g. CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd./ Bd. of Adjustment, 414 N.J. Super. 563, 577 (App. Div. 2010) (citing D. Lobi Enters. v. Planning./Zoning Bd. of Borough of Sea Bright, 408 N.J. Super. 345, 360 (App. Div. 2009); N.Y. SMSA, L.P. v. Bd. of Adjustment of Twp. of Weehawken, 370 N.J. Super. 319, 33 (App. Div. 2004)).

"It is well-settled that a decision of a zoning board may be set aside only when it is 'arbitrary capricious or unreasonable.' A Court will not substitute its judgment for that of a board 'even when it is doubtful about the wisdom of the action.' Because a board of adjustment's actions are presumed valid, the party 'attacking such action has the burden of proving otherwise.' Accordingly, [a Court] will not disturb a board's decision unless [it] finds a clear abuse of discretion." Cell South of N.J., Inc. v. Zoning Bd. of Adjustment of West Windsor Twp., 172 N.J. 75, 81-82 (2002) (internal citations omitted).

That discretion, while considerable, must still be "supported by substantial credible evidence from the record as a whole." Charlie Brown of Chatham, Inc. v. Bd. of Adjustment for Chatham Twp., 202 N.J. Super. 312, 330

(App. Div. 1985). It stems from the Municipal Land Use Law ("MLUL"), which "reposes considerable power in municipal zoning boards to deny or grant variances, [but] that power must be exercised cautiously." Cell South, 172 N.J. at 88.

Such decisions, however, must be rooted in findings of fact substantiated by the record. "[I]t is essential that the board's actions be grounded in evidence in the record." Fallone Props., L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004). "Prudence dictates that zoning boards root their findings in *substantiated proofs* rather than unsupported allegations." Cell South, 172 N.J. at 88 (emphasis added).

It is the court's "duty [] to review the record before the Board in order to determine whether the Board's decision was adequately supported by the evidence." CBS Outdoor, 414 N.J. Super. at 578–79 (citing Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 58 (1999)); see also Pullen v. South Plainfield Planning Bd., 291 N.J. Super. 303, 312 (Law Div. 1995), aff'd, 291 N.J. Super. 1 (App. Div. 1996) (holding that there must be "substantial evidence" of both the positive and negative criteria before the board).

Without "persuasive evidence in the record to support the [local land use board's] decision denying [the applicant] the variance, the decision must be set aside as arbitrary, capricious and unreasonable." Cell South, 172 N.J. at 88.

Although a challenger must carry its high burden to overturn a variance denial, a reviewing Court should not act as a "rubber stamp" to the findings made by a zoning board. Review is "not simply a pro forma exercise in which [the court] rubber stamp[s] findings that are not reasonably supported by the evidence." CBS Outdoor, 414 N.J. Super. at 578–79 (quoting In re Taylor, 158 N.J. 644, 657 (1999)). "Simply stated, a reviewing court must determine whether the Board followed statutory guidelines and properly exercised its discretion." Id. (citing Med. Ctr. at Princeton v. Twp. of Princeton Zoning Bd., 343 N.J. Super. 177, 199 (App. Div. 2001)).

> The deference to local boards contemplated by Kramer is not intended to be applied rigidly or categorically, and is predicated on the existence of adequate evidence in the record supporting the board's determination either to grant or deny variance relief. Nevertheless, courts ordinarily should not disturb the discretionary decisions of local boards that are supported by substantial evidence in the record and reflect a correct application of the relevant principles of land use law.

[Lang, 160 N.J. at 58–59 (citing Kramer v. Bd. of Adjustment of Sea Girt, 45 N.J. 268 (1965))].

As will be shown, the Defendant Board's decision was neither supported by substantial evidence, nor did the Board correctly apply relevant principles of land use law.

II. DEFENDANT IGNORED BOTH THE DEFERENCE OWED TO MANSFIELD AND THE NATURE OF THE RELIEF SOUGHT FOR THE FLORENCE PORTION OF THE PROPERTY

(Raised Below: 5T 15:21-25 through 17:1-20; 43:19-25; 52:1-8)

Consistent with the general principles of zoning, when an applicant seeks approvals for a parcel split by a municipal boundary line, each land use board considers the zoning in the adjoining municipality. When Plaintiff sought approval for these accessory uses from the Defendant, Defendant ignored the required deference, and superimposed its bulk requirements over the entire tract. Even assuming that Defendant provided any deference to Mansfield's zoning, Defendant intentionally overlooked the relief sought by Plaintiff: a use variance for permitted accessory uses for a permitted principal structure to be located entirely within the adjacent municipality. As developed in detail below, Defendant's denial of Plaintiff's application was arbitrary, capricious, and unreasonable, and requires reversal by this Court.

A. DEFENDANT FAILED TO GIVE APPROPRIATE DEFERENCE TO MANSFIELD'S ZONING ORDINANCE.

When a parcel of land is situated in two municipalities, each local land use board must give "significant weight" to the other municipality's zoning ordinance. Ferraro v. Zoning Bd. of Adjustment, 119 N.J. 61, 74 (1990). Local land use boards must view the property as one parcel, even though it sits in two municipalities. See Cicon v. Planning Bd. of Borough of Franklin, 223 N.J.

Super. 199, 208 (1988). Defendant ignored this responsibility, and despite warehouses being permitted principal uses in both towns, required that Plaintiff undertake a micro-analysis of Mansfield's ODL Zone to prove consistency with Florence's SM Zone's bulk standards.

For decades, the Legislature and the courts have recognized that local officials should consider neighboring municipalities during the land use planning process. See, e.g. Cresskill v. Dumont, 15 N.J. 238, 247 (1954). The responsibility for zoning does not halt at the municipal boundary line "without regard to the effect of [the] zoning ordinances on adjoining and nearby land outside the municipality." Id. The Municipal Land Use Law ("MLUL") echoes this notion, as it was intended to "ensure that the development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities, the county and the State as a whole." N.J.S.A. 40:55D-2(d). Said another way, "[t]he insularity and parochialism of the Chinese wall theory of municipal zoning has long since been discredited." Urban Farms, Inc. v. Franklin Lakes, 179 N.J. Super. 203, 213 (App. Div.), certif. denied, 87 N.J. 428 (1981).

Zoning boards must consider adjacent municipalities when reviewing applications for development. See, e.g. Jacoby v. Zoning Bd. of Adjustment of Borough of Englewood Cliffs, 442 N.J. Super. 450, 464–65 (App. Div. 2015)

(citing Urban Farms, 179 N.J. Super. at 213). While perhaps redundant, it bears repeating: when a property is bifurcated by a municipal boundary line, the zoning board must not only consider the zoning in the adjacent municipality, but must give significant weight to it. Ferraro, 119 N.J. at 73.

In Ferraro, the plaintiff sought a use variance under N.J.S.A. 40:55D-70(d)(1) from the Holmdel Township Zoning Board for the construction of a car wash. Id. at 63. The property was divided by a municipal boundary line; 70% of the property was in Hazlet Township, and 30% in Holmdel Township. Id. The Hazlet-portion of the property was in the Business Highway Zone, and the Holmdel-portion was in a residential zone. Id. The Holmdel Township Zoning Board denied the plaintiff's use variance application. Id.

The Supreme Court held that the plaintiff must seek zoning approvals from both municipalities, and that during the process, "each [municipality] presumably would act in good faith entertaining [plaintiff's] applications for the proper use." Id. at 72–73. The Court noted that, "[w]ithout a cooperative response from both municipalities, the property may not be susceptible to development. This fact may bear on the determination of whether a special reason exists under N.J.S.A. 40:55D-70(d), militating in favor of a variance." Id. at 73 (citations omitted). While the Court acknowledged that the Holmdel Zoning Board was "mindful" of Hazlet's zoning, it decided that it had "no way

of knowing whether [Holmdel's] attention to this aspect of the variance application was sufficient." Id.

The Court held that the Holmdel Zoning Board must give "significant weight" to Hazlet's zoning ordinance when reviewing the application:

> Such considerations take on added significance in this case because ***the proposed use is permitted in the adjoining municipality of Hazlet***. The fact that Hazlet allows the use may suggest ***that the property in Holmdel is uniquely suited for the proposed use***. [Kohl v. Fair Lawn, 50 N.J. 268 (1967)]. In exercising its own zoning responsibilities, Holmdel is ***obligated to give significant weight to the zoning ordinance and plan of the adjacent municipality***, Hazlet, as well as to the character and uses of surrounding property in both Hazlet and Holmdel.
>
> [Id. at 73 (emphasis added)].

Here, Defendant was "obligated to give significant weight to the zoning ordinance and plan of the adjacent municipality," Mansfield. A simple substitution of the municipalities in Ferraro with the towns in this matter illustrates the obligation that Defendant ignored.

In Ferraro, 70% of the property was in Hazlet, and 30% in Holmdel. Id. at 63. Here, 77% of the development is in Mansfield, and 23% in Florence. 4T 8:5-25; 9:1; see also FN4. In Ferraro, Holmdel, the municipality with the much smaller piece of land, denied a (d)(1) use variance, even though the proposed use was permitted in Hazlet, the larger portion of the tract. Ferraro, 119 N.J. at 73. Here, Florence, the municipality with the much smaller section of land to

be developed, denied a (d)(1) use variance, even though the proposed use was permitted in Mansfield, the larger portion of the tract. Ja045; Ja085-Ja095; 4T 8:5-25; 9:1.

Based on these similarities alone, Defendant's failure to provide "significant weight" to Mansfield's zoning ordinance and plan becomes clear, and warrants reversal. Yet, the facts in the matter before this Court provide an even stronger argument for deference than in Ferraro.

In Ferraro, the project was not yet approved by Hazlet when the applicant was denied a use variance by Holmdel. See Ferraro v. Zoning Bd. of Adjustment of Twp. of Holmdel, 228 N.J. Super. 33, 39 (App. Div. 1988), rev'd, Ferraro v. Zoning Bd. of Adjustment, 119 N.J. 61 (1990). Here, Plaintiff had already received preliminary site plan approval from Mansfield when it was denied the use variance by Defendant. Ja085-Ja095. Additionally, in Ferraro, the proposed use as a car wash was permitted in Hazlet, but not in Holmdel. See Ferraro, 119 N.J. at 63, 73. Here, the proposed principal use as a warehouse, as well as the accessory uses proposed for the Florence side of the Property, were all permitted uses on both sides of the municipal boundary line. Ja085; Ja097; Ja146. Florence ignored all of this.

And not only are the uses permitted in both zones, the lands surrounding the Interstate 295 and Florence-Columbus Road Interchange were specifically

envisioned for this class of development. In 2017, Mansfield adopted a redevelopment plan for this area. Ja165. While this redevelopment plan did not include this particular parcel, it discussed the suitability of this area and Mansfield's ODL zone for commercial and industrial development due to the direct access to Interstate 295 via Florence-Columbus Road (County Route 656). Ja174. The Mansfield redevelopment plan also discussed the zoning compatibility with the adjacent municipality, Florence. Ja175. "The lands in Florence are zoned SM Special Manufacturing and GM General Manufacturing, which take advantage of their close proximity to Interchange 52 of I-295. The ODL zoning in the redevelopment area is compatible with the industrial zoning in Florence Township." Ja175-Ja176. Similarly, based on a March 2020 regional transportation and circulation plan, prepared by the County of Burlington - - seventeen months before this application was filed - - this specific Property was anticipated to produce 1.55 million square feet of warehouse and distribution space. Ja215; (4T 72:9-25 through 75:1-14).[5] The lands surrounding the Interstate 295 and Florence-Columbus Road Interchange, and this Property in particular, were targeted for commercial and industrial

[5] Notably, the professional planner hired by Florence Township's Mayor and Council to oppose this application, Mark Remsa, PP, AICP, authored both plans. Ja167; Ja199; 3T 24:3-4.

development. Yet, Defendant ignored this regional planning document as well as Mansfield's zoning ordinance and redevelopment plan of this area.

The Defendant's Resolution confirms that Defendant did not apply the appropriate level of deference: "Comity, and practical considerations oblige adjoining municipalities to be *respectful of* each other's development standards and regulations." Ja043 (emphasis added). This "respectful" standard is remarkably similar to the "mindful" attention the Holmdel board gave to Hazlet's zoning. The Supreme Court rejected it. Consequently, the standard is neither "respectful" nor "mindful", but an "obligat[ion] to give significant weight to the zoning ordinance and plan of the adjacent municipality[.]" Ferraro, 119 N.J. at 73.

Rather than giving "significant weight" to Mansfield's zoning ordinance and site plan approval, Defendant did the opposite: it required that Plaintiff establish that Mansfield's ODL Zone bulk standards are consistent with those in Florence's SM Zone, and then imposed one of its bulk requirements on the Mansfield portion of the Property.

> Because the applicant's expert planning testimony was founded on an unsupported assertion that the zoning of the Mansfield and Florence Township parts of the overall parcel are 'complimentary', but did not address the substantial difference in allowable building heights in the SM and ODL Zones (or any other specific zoning standards in the two zones), and therefore the intensity of the proposed use, the Board did not find that testimony credible and probative with regard to special reasons[.]

…

> None of the proofs before the Board provided a comparative analysis of the traffic impacts of a principal building on the overall parcel that conforms to the 30 ft. height limit of Florence Township's SM Zone District with the proposed 50 ft. tall building that was approved by the Mansfield Land Development Board.

[Ja043].

As these quotations make clear, Defendant did not give "significant weight" to Mansfield's zoning ordinance, but: (1) ignored it, (2) superimposed Florence's thirty foot (30') height restriction on the entire parcel, and (3) denied the application, claiming Plaintiff did not meet the novel and unlawful burden to establish that the Florence SM and Mansfield's ODL Zone bulk standards are "complimentary." This is not deference; this is a thinly veiled attempt to impose upon Plaintiff the burden of an illusory height variance under N.J.S.A. 40:55D-70(d)(6). The Resolution admits this asserting that if the structure was located in Florence, it would have required a "substantial height variance pursuant to N.J.S.A. 40:55D-70(d)(6)[.]" Ja040.

Defendant had an obligation to provide "significant weight" to Mansfield's zoning ordinance, and failed to do so. Even 70 years ago, New Jersey courts recognized the deference owed to adjacent municipalities as it relates to zoning. See Cresskill, 15 N.J. at 247. "The effective development of a region should not and cannot be made to depend upon the advantageous location of municipal boundaries[.]" Id. (quoting Duffcon Concrete Products,

Inc. v. Borough of Cresskill, 1 N.J. 509, 513 (1949)). By its failure to provide any deference, let alone "significant weight" to both Mansfield's zoning ordinance and its prior approval of the warehouse, Defendant's denial of Plaintiff's application must be set aside as arbitrary, capricious, and unreasonable.

B. EVEN ASSUMING THAT DEFENDANT APPLIED THE APPROPRIATE DEFERENCE, IT DELIBERATELY IGNORED THAT PLAINTIFF SOUGHT A USE VARIANCE FOR PERMITTED ACCESSORY USES THAT ARE ENTIRELY HEIGHT NEUTRAL.

Defendant will pretend that by declaring that it was "respectful of" Mansfield's zoning, it was actually applying "significant weight" to Mansfield's zoning ordinance when it denied Plaintiff's application. Even if this Court accepts that invention, Defendant ignored the relief sought from the Defendant: a use variance for *height-neutral permitted* uses accessory to a *permitted* principal structure located entirely within the adjacent municipality. (emphasis added).

On the Mansfield portion of the Property, the proposed improvements include the entirety of the structure, and parking and stormwater management facilities. Ja073: 1T 32:17-21. On the Florence portion of the Property, the proposed improvements include car parking spaces, loading spaces, trailer parking spaces, a septic disposal system disposal area, stormwater management

facilities, and the driveway. (1T 33:17-23). The principal use as a warehouse/distribution facility is permitted both in Mansfield's ODL and Florence's SM Zones, as are the accessory uses. Ja085; Ja097; Ja146.

Since the structure is proposed to be located entirely within Mansfield, there is no principal use on the Florence portion of the Property, and therefore the otherwise permitted accessory uses become the principal uses in Florence, which require a use variance under N.J.S.A. 40:55D-70(d)(1). See Nuckel v. Little Ferry Planning Bd., 208 N.J. 95, 103 (2011). In addition to the (d)(1) use variance for the accessory uses, Plaintiff also sought a bulk variance under N.J.S.A. 40:55D-70(c) for the reduction of parking spaces from the required 1,148 to 604. Ja030; 1T 36:14-19.

A brief review of the Resolution gives the impression that the application before Defendant was a (d)(6) height variance, rather than a (d)(1) use variance and bulk variance for a reduction of 544 parking spaces. Despite the numerous references to the building height and intensity of use, particularly traffic, all of the proposed accessory uses listed above are completely height neutral. Ja097; Ja146; Ja158-Ja159; 4T 9:5-25. With the exception of the driveway location, all of the accessory uses are calculated by the structure's square footage; height is irrelevant.

As for the location of the driveway, the record includes unrebutted testimony that it must be located in Florence due primarily to safety purposes. Plaintiff's professional engineer, Rodman Ritchie, P.E., testified that the driveway's location was established because it lines up with the driveway designed for the proposed project on the other side of Florence-Columbus Road, and it is at "the furthest end of the property to maximize the distance from the Route 295 interchange to provide for safe vehicle movements and to prevent any backup off of the [Interstate 295] off ramp". (1T 34:2-23). Since Florence-Columbus Road is a County road, Mr. Ritchie testified that the County agreed with the driveway's location, and will continue to be involved with the "geometry of the proposed driveway connection to the County Road." (Id.) Plaintiff's professional planner, Paul Phillips, PP, AICP, explained that the location of the driveway in Florence is attributable to the limited frontage in Mansfield, and that frontage is "not really suitable for access, given the lack of … a spatial separation along that frontage from the I-295 egress ramp." (2T 77:12-18).

It bears repeating that Plaintiff did not seek a (d)(6) height variance from either land use board for this project. The proposed height of the structure is permitted under Mansfield's ODL Zone, and all of the accessory uses proposed in Florence are height neutral, but subject to variance relief only because the

principal structure is located on the other side of the municipal boundary line. Plus, all of the uses proposed for the Property are permitted uses on both sides of the municipal boundary line. It just so happens that the Property is "uniquely affected by the municipal boundary line, which actually creates the D-1 condition." (2T 78:10-11).

Plaintiff sought two forms of variance relief from Defendant: a (d)(1) use variance for the accessory structures, and a bulk variance for the reduction of 544 parking spaces. Ja029-Ja030. Neither form of relief involved the height of the structure, a structure located entirely within Mansfield. Defendant's fixation on height and the alleged "negative externalities" was misguided, factually unsupported, and arbitrary, capricious, and unreasonable.

III. DEFENDANT AND THE TRIAL COURT SHOULD HAVE APPLIED THE STANDARD ARTICULATED IN THE COVENTRY SQUARE LINE OF CASES FOR "D" VARIANCES FOR PERMITTED USES, RATHER THAN THE HEIGHTENED STANDARD UNDER MEDICI FOR NON-PERMITTED USES; THEIR FAILURE TO DO SO WAS ARBITRARY, UNREASONABLE AND CAPRICIOUS

(Raised Below: 5T 21:20-25; 22:1-24; 48:24-25 through 50:1-24)

As previously explained, Plaintiff was required to seek a (d)(1) use variance for the permitted accessory uses solely because the principal structure is proposed to be situated entirely within Mansfield. See Section (II)(B). Most importantly for the argument below, the principal use as a warehouse and

distribution center is a permitted use in both Mansfield's ODL and Florence's SM Zone, as are all of the proposed accessory uses. Ja085; Ja097; Ja146.

Upon its review of Plaintiff's application, Defendant applied the (d)(1) use variance standard and the enhanced quality of proof as articulated in Medici v. BPR Co., 107 N.J. 1 (1987). Ja041, Ja043. Since the principal and accessory uses were permitted in Florence's SM Zone, it is respectfully suggested that the facts and posture of an application such as this do not require "the enhanced quality of proof required under the Medici holding for a use variance under N.J.S.A. 40:55D-70(d)(1)." Ja043.

The MLUL categorizes "use" variances into six categories under Sec. 70(d): (1) a use different than permitted in the zoning district; (2) an expansion of a nonconforming use; (3) a deviation from a conditional use standard; (4) an increase in the permitted floor area ratio; (5) an increase in permitted density; and (6) height variances which exceed the maximum permitted height by 10 feet or 10% of the maximum permitted height. The category of (d) variance determines the applicable "special reasons", or "positive criteria" required to warrant approval of the variance. Cell South, 172 N.J. at 83.

The more relaxed standard of proof for certain categories of "(d)" variances was first articulated in Coventry Square v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285 (1994). The Court in Coventry Square established a

different, less stringent standard, for conditional use variances sought under N.J.S.A. 40:55D-70(d)(3). The Court explained the distinctions between a use variance that sought permission for a use prohibited in the zone in which the property is located, versus a use permitted in the zone, albeit subject to certain conditions. The Court wrote, in relevant part:

> Thus, our courts generally have treated a conditional use that does not comply with all the conditions of the ordinance as if it were a prohibited use, imposing on the applicant the same burden of proving special reasons as it would impose on applicants for use variances. In our view, that standard is plainly inappropriate and does not adequately reflect the significant differences between prohibited uses, on the one hand, and conditional uses that do not comply with one or more of the conditions imposed by an ordinance, on the other hand. *In the case of prohibited uses, the high standard of proof required to establish special reasons for a use variance is necessary to vindicate the municipality's determination that the use ordinarily should not be allowed in the zoning district.* In the case of conditional uses, the underlying municipal decision is quite different. The municipality has determined that the use is allowable in the zoning district, but has imposed conditions that must be satisfied. As evidenced by this record, a conditional use applicant's inability to comply with some of the ordinances conditions need not materially affect the appropriateness of the site for the conditional use. *Accordingly, the standard of proof of special reasons to support a variance from one or more conditions imposed on a conditional use should be relevant to the nature of the deviation from the ordinance.* The burden of proof required to sustain a use variance not only is too onerous for a conditional use variance; in addition, its focus is misplaced. The use variance proofs attempt to justify the board of adjustment's grant of permission for a use that the municipality has prohibited. Proof to support a conditional use variance need only justify the municipality's continued permission for a use notwithstanding a deviation from one or more conditions of the ordinance.

[Coventry Square, 138 N.J. at 297-98 (emphasis added)].

As a result of its distinction between a variance for a non-permitted use, and a variance needed because a condition is not satisfied, the Court concluded:

> We hold that the proof of special reasons that must be adduced by an applicant for a "d" variance from one or more conditions imposed by ordinance in respect of a conditional use shall be proof sufficient to satisfy the board of adjustment that the site proposed for the conditional use, in the context of the applicant's proposed site plan, continues to be an appropriate site for the conditional use notwithstanding the deviations from one or more conditions imposed by the ordinance. That standard of proof will focus both the applicant's and the board's attention on the specific deviation from the conditions imposed by the ordinance, and will permit the board to find special reasons to support the variance only if it is persuaded that the noncompliance with conditions does not affect the suitability of the site for the conditional use. *Thus a conditional use variance applicant must show that the site will accommodate the problems associated with the use even though the proposal does not comply with the conditions the ordinance established to address those problems*.
>
> [Id. at 298-99 (emphasis added)].

Between 1999 and 2007, New Jersey courts extended the more relaxed 1994 Coventry Square standard to "d" variances for floor area ratio ("FAR"), density, and height variances under N.J.S.A. 40:55D-70(d)(4), (5) and (6), respectively. In 1999, the Appellate Division held:

> Because a (d)4 FAR variance also deals with uses that are permitted in the zone and thus is different from variances for excluded uses, we hold pursuant to Coventry Square that an applicant for a FAR (d)(4) variance need not show that the site is particularly suited for more intensive development. To impose such a stringent burden would mean that a FAR variance applicant would have perhaps as

> difficult a burden to meet as an applicant for a prohibited use variance. *To require such a burden would be inconsistent with the principle that (d) variances for permitted uses need not meet the 'stringent special reasons standards for a commercial-use variance.'* [Coventry Square, 138 N.J. at 287].
>
> Like a conditional use variance applicant, *FAR variance applicants must show that the site will accommodate the problems associated with a proposed use with larger floor area than permitted by the ordinance*.

[Randolph Town Ctr. Assocs., L.P. v. Twp. of Randolph, 342 N.J. Super. 412, 416–17 (App. Div. 1999) (emphasis added)].

In 2004, the Appellate Division extended the Coventry Square standard to (d)(6) height variances in Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41 (App. Div. 2004), because, again, the use is not a prohibited use, but a permitted one. An applicant can establish special reasons by demonstrating undue hardship, or that the structure will not offend the purpose of the height restriction and will be consistent with the surrounding neighborhood. Id. at 51-53.

In 2007, the Appellate Division also extended the Coventry Square standard to (d)(5) density variances.

> We now hold that Coventry Square relaxed standard of review should be applied to variance applications seeking deviations from the density requirements in a particular zone. N.J.S.A. 40:55D-70d(5). *Density variances for permitted uses in the zone should not trigger the application of Medici's more stringent standard for the same reasons expressed in Coventry Square. A density variance seeks a departure from certain regulations applicable to a use the municipality has chosen to permit, not prohibit, in the zone.*

> Such requests need not demonstrate that the property is 'particularly suitable to more intensive development' in order to prove 'special reasons' under the MLUL. [Randolph Town Ctr., 324 N.J. Super. at 416]. Rather, in considering such applications, *zoning boards of adjustment should focus their attention on whether the applicant's proofs demonstrate 'that the site will accommodate the problems associated with a proposed use with [a greater density] than permitted by the ordinance.'* [Id. at 417].

[Grubbs v. Slothower, 389 N.J. Super. 377, 388–89 (App. Div. 2007) (emphasis added)].

As outlined above, the less rigorous standard of review has been extended to, and appropriately modified for, all other categories of "(d)" variances. See Coventry Square v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285 (1994) ((d)(3) conditional use variances); Randolph Town Ctr. Assocs., L.P. v. Twp. of Randolph, 324 N.J. Super. 412 (App. Div. 1999) ((d)(4) floor area ratio variances); Grubbs v. Slothower, 389 N.J. Super. 377 (App. Div. 2007) ((d)(5) deviations from density requirements); Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41 (App. Div. 2004) ((d)(6) height variances); see also Burbridge v. Mine Hill Twp., 117 N.J. 376 (1990) ((d)(2) variances for minor expansion of a pre-existing non-conforming use).

In 2013, the Supreme Court further expanded the Coventry Square standard, and eliminated the enhanced quality of proof required under Medici for the negative criteria. TSI East Brunswick v. Zoning Bd., 215 N.J. 26 (2013). In explaining its earlier Coventry Square decision, the TSI Court wrote:

> An application for a use variance, also referred to as a (d)(1) variance, N.J.S.A. 40:55D-70(d)(1), seeks permission from a zoning board to put property to a use that is otherwise prohibited by the zoning ordinance. Both the positive and negative criteria in such an application are tested in accordance with the standards first established in Medici. In contrast, a conditional use, by definition, is a use that the zoning ordinance permits if the applicant meets all of the conditions that are embodied in the ordinance. See N.J.S.A. 40:55D-70(d)(3). In that case, the use becomes a permitted use in the sense that no variance is required.
>
> However, if a property owner seeking to devote the property to a conditional use cannot meet one or more of the conditions imposed by the zoning ordinance, the property owner must apply for a (d)(3) conditional use variance. The inability to comply with one or more of the conditions does not convert the use into a prohibited one, and thus, the application is not tested in accordance with the standards established in Medici that govern applications for a (d)(1) use variance.
>
> Instead, the question is whether, in light of the failure to meet one of the conditions fixed by the zoning ordinance, the use 'is reconcilable with the municipality's legislative determination that the conditions should be imposed on all conditional uses in that zoning district.' [Coventry Square, 138 N.J. at 299]. In undertaking that analysis, the weighing is entirely different from that demanded for a (d)(1) use variance because the governing body has not declared that the use is prohibited but, instead, has elected to permit the use in accordance with certain express conditions. Accordingly, the focus of the analysis is on the effect of noncompliance with one of the conditions as a relates to the overall zone plan.
>
> [TSI, 215 N.J. at 42–43].

This line of case law has one common theme: a more relaxed standard for special reasons (tailored to the specific type of "(d)" variance), and to the negative criteria, when the underlying use is permitted, not prohibited, in the zone. Like the "(d)" variances in the Coventry Square line of cases, the

requested uses in this matter are permitted in the zone. Again, the underlying use as a warehouse is permitted in both Mansfield and Florence. Ja085; Ja097; Ja146. The accessory uses, which only become principal in Florence because of the municipal boundary line, are also permitted uses in both Mansfield's ODL and Florence's SM Zones. Ja085; Ja097; Ja146. Since the underlying use is permitted, a more relaxed standard of review, without the enhanced burden of proof, is appropriate, as the requested use variance only seeks relief for that which is already permitted on both sides of the municipal boundary.

Plaintiff had to seek a (d)(1) use variance because there was simply no other variance for the Plaintiff to seek, even though the principal use and all accessory uses are permitted on both sides of the municipal boundary line. Indeed, if the proposed structure were to be located in Florence, which it is not, the application would have been subject to a lower standard of review as a (d)(6) height variance. Yet, all that is proposed for the Florence side of the Property are permitted, height neutral, accessory uses that result in less parking, less stormwater runoff, and less lot coverage than permitted under Florence's ordinance. These uses are all calculated on square footage, not volume. Height is irrelevant, even under the ordinances themselves. Plaintiff should not have to bear an unreasonable burden due to a mere boundary line technicality. This

Court should apply the less stringent standard of review as developed in the Coventry Square line of cases.

IV. PLAINTIFF PRESENTED SUFFICIENT PROOFS FOR A USE VARIANCE APPROVAL UNDER THE MEDICI STANDARD AS SUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE IN THE RECORD.

(Raised Below: 5T 15:3-20; 22:20-25 through 24:1-13; 53:23-25; 54:1-10)

Should the Court rejects the application of the Coventry Square & TSI East Brunswick standards, the proofs presented by Plaintiff also meet the heightened Medici standard as relied upon by the Defendant.

To merit approval of a use variance, an applicant must satisfy both the "positive" and "negative" criteria of N.J.S.A. 40:55D-70(d)(1). "In particular cases for special reasons" a Board may grant a use variance. These "special reasons", or positive criteria, include advancement of one or more of the purposes of zoning as defined in N.J.S.A. 40:55D-2, and evidence that the site is particularly suited for that specific purpose. Medici v. BPR Co., 107 N.J. 1 (1987). If the applicant meets the "positive criteria" test, it must also establish the "negative criteria," and show that the variance "can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." Id. at 21–22.

Paul Phillips, PP, AICP, provided the planning testimony in support of the application before the Defendant Board. He explained that the application involved "sort of unique circumstances" as a result of the tract being split by the municipal boundary line, and that "the sole reason the Applicant requires a D-1 variance is that the proposed building in this instance is located entirely within the limits of Mansfield Township." (2T 74:12-20). Ultimately, the requested relief was a "technical variance" since the "underlying zoning in both Florence and Mansfield permits warehouse distribution use." (2T 75:3-7; 78:9-15).

For the positive criteria, Mr. Phillips testified that the Property must be viewed in its entirety. More than half of the Property is located in Mansfield, and a significant portion of the Florence portion of the Property is located in the "AG- Agricultural Zone," or constrained by flood hazard or wetland areas. (2T 76:1-9). As a result of the site's characteristics, most of the development, including the structure itself, will be located in Mansfield, and the some of the accessory uses will be in the limited portion of Florence's SM Zone, which is largely unconstrained. (2T 76:16-22). Given the physical and environmental constraints on the Property, Mr. Phillips testified that the Florence portion of the tract is particularly suited to accommodate the proposed accessory uses, and allows the structure itself to be located closer to the Interstate 295 interchange, further away from the agricultural and residential zones. (2T 76:23-25; 77:1-

11). In regards to the driveway location, he testified that it best fits the site layout as the frontage in Mansfield is both limited and not suitable for access, due to the short distance from the Interchange. (2T 77:12-18).

For the positive criteria's special reasons, Mr. Phillips testified that the use variance would advance several purposes of zoning, as articulated in the MLUL: (A) guiding development in a manner that promotes the general welfare; (D) promoting development that does not conflict with the adjoining municipality; (G) providing sufficient space and appropriate locations for a variety of uses; and (M) encouraging coordination between public entities to ensure efficient use of land. [N.J.S.A. 40:55D-2(a), (d) (g) & (m); 2T 78:16-25; 79:1-9].

For the negative criteria, Mr. Phillips testified that there would be no detrimental impacts with the "placement or location of [the] accessory uses on the Florence portion of the tract[,]" in relation to the site plan and zoning parameters, nor to the adjacent properties and streets. (2T 79:10-21). He also testified that there would be no substantial impairment of the zoning ordinance and master plan, considering the "like kind zoning" in both municipalities, especially when the Mansfield portion of the tract required no zone specific or bulk variance relief. (2T 79:22-25; 80:1-8). Importantly, Mr. Phillips testified that the "key" to the analysis is that "warehouse distribution use is contemplated,

indeed contemplated on the SM zoned portion of the property in Florence, I think consistent with those principles, I think under the circumstances, the D-1 variance can be granted without compromising intent and purpose of the zoned plan." (2T 80:10-15).

In regards to the bulk variance for the reduction of parking spaces, Mr. Phillips testified that the ordinance requires 1,148 spaces, when 604 are proposed. (2T 81:1-3). The 604 spaces would be "more than sufficient[,]" as the proposed state-of-the-art facility would be automated and have fewer employees. (2T 81:8-20). The reduction of spaces, which equates to about four (4) less acres of impervious coverage, will also reduce the stormwater runoff by 330,000 gallons for a 25-year storm. (1T 37:1-13; 2T 82:18-23). In addition, the reduction of spaces also reduces the permitted lot coverage ratio from seventy percent (70%) to twenty-six percent (26%). (1T 35:8-13).

Plaintiff's other witnesses also provided testimony in support of the positive and negative criteria. Norman Dotti, P.E., Plaintiff's sound expert, testified that the structure was about 1,400 feet from the nearest residential area to the northeast (and across the Turnpike); the existing ambient noise levels already exceed the permitted nighttime limits; and the Project will have little to no sound impact and the expected levels will be well under the permitted limit for the Property. (2T 8:12-17; 13:1-19).

Robert Hoffman, P.E., PTOE, provided testimony on the potential traffic impacts from the development. He testified that the industry standard for trip generation, the Institute of Transportation Engineers ("ITE") Trip Generation Manual, uses the square footage of the building as the independent variable; the height of a particular building is irrelevant to the analysis of traffic impacts. (2T 30:10-25; 31:1-6; 4T 33:19-25 through 36:1-12). In regards to "trip assignment", about eighty percent (80%) of the truck traffic would use the Interstate 295 interchange, and the other twenty percent (20%) would travel west along Florence-Columbus Road (County Route 656) to Route 130 to access the New Jersey Turnpike – Pennsylvania Extension. Mr. Hoffman also concluded that the impacts on Florence-Columbus Road and Route 130 Intersection, 1.53 miles from the proposed driveway, would be *de minimis*. (2T 35:2-13, 36:9-19, 37:17-21; 4T 10:13-19).

Rodman Richie, P.E., the project engineer, also reiterated that the parking ordinance and stormwater runoff calculations are based on square footage of the building, and height of the structure is irrelevant. (4T 9:6-25).

And again, in its 2020 traffic and circulation plan, the County projected that this tract would generate 1,550,000 square feet of warehouse and distribution space. Ja215; (4T 72:9-25 through 75:1-14).

Despite Defendant's claim that "[t]here is no credible, probative evidence before the Board" to grant the requested relief, Plaintiff presented more than sufficient proofs to warrant approval of the (d)(1) use variance for the proposed accessory uses on the Florence side of the municipal boundary line, as well as for the bulk variance for the reduction of parking spaces. Defendant's decision must be deemed arbitrary, capricious, and unreasonable, and warrants reversal by this Court.

V. DEFENDANT'S DENIAL IS STILL ARBITRARY, CAPRICIOUS, AND UNREASONABLE UNDER THE MEDICI STANDARD BECAUSE THE FINDINGS AND CONCLUSIONS ARE NOT SUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE IN THE RECORD

(Raised Below: 5T 6:21-25; 7:1-8; 23:1-5; 31:14-25; 32:1-16; 37:19-25; 38:1-22; 51:16-25; 53:4-10)

As the record makes clear, Plaintiff presented the requisite proofs for the requested (d)(1) use variance. In an attempt to formulate a legitimate denial of Plaintiff's application, the Defendant's Resolution makes factual findings and conclusions that are not only unsupported, but actually belied by the substantial credible evidence in the record.

A. THE FINDINGS REGARDING THE 1999 MASTER PLAN AND THE INTENT OF THE SPECIAL MANUFACTURING ZONE ARE NOT SUPPORTED BY THE DOCUMENT ITSELF.

In an attempt to justify the arbitrary focus on the height of the structure already approved to be located on the other side of the municipal boundary line, the Defendant's Resolution erroneously construes the intent of Florence's 1999 Master Plan as it relates to the "SM-Special Manufacturing" and "GM-General Manufacturing" Zones. In doing so, the Defendant ignores the language in the document itself.

Defendant's Resolution quotes the applicable section of the 1999 Master Plan. Ja037-Ja016. In the Resolution's Findings of Fact, the Defendant finds, in relevant part: "Significantly, the 1999 Master Plan highlights the Planning Board's concern with the intensity of uses in the SM Special Manufacturing Zone properties in the area where the subject property is located, and the *potential negative externalities of uses* in that area." Ja039 (emphasis added). It then goes on to explain the differences in the permitted uses in the SM and GM Zones, how they are "consistent with the concerns about intensity and negative externalities expressed in the 1999 Master Plan[,]" and concludes that, "[t]he governing body sought to distinguish the scale, intensity and nature of the permitted uses in the two zones with these differing standards in accord with the principles stated in the Master Plan." Ja039.

Yet, even imaging for a moment that this is an accurate depiction of the passage, the Board concludes the following:

> Absent such proofs, the Board is obliged to rely upon the purposes stated in the 1999 Florence Township Master Plan for including the subject property in the SM Special Manufacturing Zone District, and the refined distinctions made between the SM Zone District uses and standards and those of the adjoining GM Zone District in the implementing Florence Township zoning ordinances. In reliance upon the 1999 Master Plan and the applicable zoning ordinance sections, the Board finds that the proposed building on the overall parcel that is 67% taller than allowed, and accessory uses associated with that building, would be a more intense use than the Planning Board and governing body intended at the subject property, would be substantially detrimental to the public good, and would substantially impair the zone plan and zoning ordinance.
>
> [Ja043].

There are several issues with these findings and conclusions. First, putting aside the fact that the record is devoid of <u>any</u> discussion among the Board Members of the intent of the 1999 Master Plan, the language selected in the Resolution does not provide the full story of 1999 Master Plan. Notably absent from the quoted language in the Resolution, is the following: "The category of <u>general manufacturing</u> poses special concerns because it can have significant offsite impacts: noise, dust, odors and visual." Ja123 (emphasis supplied). The passage quoted in the Resolution then discusses the SM Zone as an intermediate area of development as it is "less likely to result in offsite impacts" than the GM Zone. Ja123. While the Defendant relies upon traffic as an offsite impact sought

to be addressed by the Master Plan, the word "traffic" does not appear in the actual excerpt. Rather, the "potential negative externalities" sought to be avoided were "noise, dust, odors and visual." None of these are at issue in this application; none of them are identified as a reason for the denial.

Second, despite the Board's imaginings to the contrary, the Master Plan is silent on height. Ja123. Without the Master Plan even making mention of the permitted heights in the SM and GM Zones, the Defendant assumes that the height differential in the SM and GM Zones, was an intended method to limit intensity. Without any langue in the Master Plan to support it, the Defendant correlates height to intensity of use: "[t]here is no credible, probative evidence before the Board that would allow it to deviate from the zoning standards set down by the governing body or which would justify the Board rethinking *the determinations of the Planning Board and governing body that link the height of permitted structures with their anticipated intensity*." Ja044 (emphasis added).

There is simply no language in the Master Plan to support Defendant's unfounded invention that the differences in permitted building heights in the SM and GM Zones was to limit or reduce the "negative externalities" in the SM Zone. Nor was any evidence adduced during the hearing to support this fiction; and again, the Board never even mentioned it.

The 1999 Master Plan is silent on any correlation between building height and intensity of use, and again, height is not mentioned in the Master Plan whatsoever. Despite the lack of any reference to height, Defendant concluded that the increased height of the structure to be located in Mansfield, and the accessory uses to be located in Florence, will be more intense than intended. Ja044. This conclusion is unsupported by the plain language in the 1999 Master Plan. It is also contradicted by the evidence.

B. THE RECORD SUPPORTS THE CONCLUSION THAT THE DRIVEWAY MUST BE LOCATED ON THE FLORENCE PORTION OF THE PROPERTY.

As the Resolution and the transcript make abundantly clear, the primary issue of concern was traffic. Since the principal use and accessory uses were permitted on both sides of the municipal boundary line, the Defendant honed in on height, the only measurable difference between Florence's SM and Mansfield's ODL Zones, in order to concoct a story in which traffic might be an appropriate consideration.

Again, Defendant's focus on the height difference between Florence's SM Zone, and Florence's GM and Mansfield's ODL Zones, is a red herring at its core. After all, the proposed accessory uses in Florence - - parking, stormwater management facilities, septic, and the driveway location - - are permitted and height neutral. Ja085; Ja097; Ja146.

The Resolution draws special attention to the driveway's location on the Florence side of the tract, and determines that the "practical effect" of the approval would be imposition of a "substantially more intense use upon lands in Florence[.]" Ja044. Even if the Court accepts Defendant's unfounded assumption that the increased height leads to higher intensity which leads to increased traffic, this assumption can only rationally be extended to the driveway. The other accessory uses, parking, stormwater management facilities, and septic, are calculated by square footage. Ja097; Ja146; Ja158-Ja159; 4T 9:6-25.

The record includes clear and concise reasons for the driveway's location in Florence. As already discussed above, Plaintiff's professionals provided the following reasons for the driveway location: (1) it lines up with the driveway design for the proposed project on the other side of Florence-Columbus Road; (2) it is at "the furthest end of the property to maximize the distance from the Route 295 interchange to provide for safe vehicle movements and to prevent any backup off of the [Interstate 295] off ramp"; (3) the limited frontage in Mansfield, that is "not really suitable for access, given the lack of … a spatial separation along that frontage from the I-295 egress ramp"; and (4) collaboration and agreement with the County of Burlington as Florence-Columbus Road is County Route 656. (1T 34:4-23; 2T 77:12-18).

Furthermore, Defendant's conclusion also directly contradicts the unrebutted traffic testimony provided by Plaintiff's traffic engineer, Robert Hoffman, P.E., PTOE. Mr. Hoffman testified that eighty percent (80%) of the site's traffic will exit east, a distance of 1,600 feet, to access Interstate 295. (2T 35:2-13, 36:9-19, 37:17-21). The other twenty percent (20%) would travel west along Florence-Columbus Road (County Route 656) to Route 130 to access the New Jersey Turnpike – Pennsylvania Extension. (2T 35:2-13, 36:9-19, 37:17-21). Importantly, Interstate 295, Route 130, the New Jersey Turnpike, and Florence-Columbus Road, are all within the jurisdiction of the State or County; none are municipally controlled roads. (2T 35:2-13, 36:9-19, 37:17-21). In addition, Mr. Hoffman concluded that the impacts on Florence-Columbus Road and Route 130 Intersection, located 1.53 miles from this proposed driveway, would be *de minimis*. (2T 35:2-13, 36:9-19, 37:17-21; 4T 10:13-19).

While much is made by Defendant about traffic and the potential impacts from the location of the driveway, the record makes clear that the location is required for safety and functionality. Regardless of the driveway's location, eighty percent (80%) of the site's traffic will be traveling *away* from Florence, on State and County roads. Since the Resolution's findings and conclusions are not supported by the record, the decision is arbitrary, capricious, and unreasonable.

VI. DEFENDANT'S REJECTION OF PAUL PHILLIPS' PLANNING TESTIMONY WAS UNREASONABLE

(Raised Below in Plaintiff's Brief, Not Addressed by the Trial Court)

Even though there were no challenges to Mr. Phillips' qualification as an expert in professional planning, to his substantive testimony, nor to his credibility in general, the Defendant's Resolution retrospectively rejected his testimony for lack of credibility. Ja040-Ja041; Ja043. This wholesale denial of Mr. Phillips' testimony based on lack of credibility was unreasonable.

"While a board may reject expert testimony, it may not do so unreasonably, based only upon bare allegations or unsubstantiated beliefs." New York SMSA v. Bd. of Adjustment, 370 N.J. Super. 319, 338 (App. Div. 2004). A board also cannot rely upon net opinions unsupported by any studies or data to reject expert testimony. Bd. of Educ. of City of Clifton v. Zoning Bd. of Adjustment of City of Clifton, 409 N.J. Super. 389, 434–35 (App. Div. 2009) (citing Cell South, 172 N.J. at 88). While a board "may choose which witnesses, including expert witnesses, to believe[,]" "that choice must be reasonably made." Id. (citations omitted). "In addition, the choice must be explained, particularly where the board rejects the testimony of facially reasonable witnesses." Id. (citing Kramer, 45 N.J. at 288). The choice to accept or reject witness testimony must be reasonably made to be conclusive on appeal. Kramer, 45 N.J. at 288.

Defendant's rejection of Mr. Phillips' professional planning testimony was unreasonable. The Resolution rejected his testimony on the "unsupported assertion that the zoning of the Mansfield and Florence Township parts of the overall parcel are 'complimentary'", because he did not address the differences in permitted building height between Florence's SM and Mansfield's ODL Zones. Ja040-Ja041; Ja043. Defendant's Resolution removes all context from Mr. Phillips' statement. His testimony was this: "[A]s I noted, *due to the complementary zoning, in terms of use*, the Applicant has, basically, looked at this property in its entirety and designed the project and submitted a site plan that makes logical sense, given the physical and locational qualities of the overall tract." (2T 75:19-24) (emphasis added). It is clear that the "complimentary zoning" reference explicitly refers to the permitted uses, and that warehouses and the accessory uses are permitted in both Florence's SM and Mansfield's ODL Zones.

Comparison of the each zone's bulk requirements, on the other hand, was unnecessary, as no bulk variances, outside of the reduction of parking, were requested from Florence or Mansfield. (Mansfield had also granted the requested reduction. Ja086, 092). More importantly, the differences in permitted building height was irrelevant as the proposed accessory uses in Florence are all height neutral, and the structure itself is to be located in, and

was already approved by, Mansfield. The Defendant Board's own planner advised the Board that these were "permitted accessory uses in the SM zoning district." Ja146. No variances were sought from either municipality's ordinances, except that parking space reductions were sought in both. Ja030; Ja085-Ja086. Otherwise, the project complied with the zoning regulations in both towns, and were conforming applications. Ja029-Ja030; Ja085; Ja146. These obvious facts did not require Mr. Phillips to compare Florence's standards with Mansfield's standards. Plus, the bulk standards from both zoning districts were in fact provided to Defendant on the site plans. Ja071-Ja073. Its claims, therefore, that without bulk standard testimony from Mr. Phillips, the Board only knew about the use compatibility, is simply false.

In reality, the Defendant imposed an entirely new and novel standard on Plaintiff, requiring that Plaintiff prove that all of Florence's SM and Mansfield's ODL zoning regulations are "complimentary", in particular, the bulk standards for height. Ja040-Ja041; Ja043-Ja044. This is not the correct legal analysis. Rather, Defendant was "obligated" to give "significant weight" to Mansfield's zoning under Ferraro. Under Ferraro, the fact that the proposed use was permitted in Mansfield suggests that the Florence portion of the Property is "uniquely suited for the proposed use." Ferraro, 119 N.J. at 73.

Even if Defendant gave "significant weight" to Mansfield's zoning ordinance, and assuming that Medici and not TSI applies, the standard for negative criteria is "substantial detriment to the public good", and "substantially impair the intent and purpose of the zone plan and zoning ordinance." Medici, 107 N.J. at 21–22. Putting aside the evidence in the record, how can the height neutral accessory uses be "substantially detrimental" or "substantially impair the intent and purpose" of the zone when the principal use and accessory uses are all permitted in Florence's SM and Mansfield's ODL zones? After all, this was not a hypothetical (d)(6) height variance for a structure located entirely in another municipality.

As provided in Section (V), Mr. Phillips' professional planning testimony concisely and completely addresses the positive and negative criteria. And, his testimony succeeds under both the lesser standards urged in Pont III, supra, and under Medici. The Defendant had to invent a reason to reject his testimony to conclude that "[t]here is no credible, probative evidence before the Board that would allow it to deviate from the zoning standards set down by the governing body or which would justify the Board rethinking the determinations of the Planning Board and governing body that link the height of permitted structures with their anticipated intensity." Ja044. The only way to reconcile Mr. Phillips' testimony with this conclusion was to remove Mr. Phillips' testimony entirely.

This is exactly what the Defendant did, without any evidence in the record to support it. Therefore, the Defendant unreasonably rejected Mr. Phillips' testimony, and the denial must be deemed arbitrary, capricious, and unreasonable.

CONCLUSION

For all of the reasons set forth herein, it is respectfully suggested that the decision of the Defendant Florence Zoning Board of Adjustment and Trial Court be reversed, and that this Court grant both the use variance to allow the permitted accessory use to become a permitted principal use, and the parking reduction variance.

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BY: s/John C. Gillespie
JOHN C. GILLESPIE

Dated: May 13, 2024

4866-0477-7403, v. 1

NFI REAL ESTATE, LLC AND TURNPIKE CROSSINGS VI, LLC, Plaintiffs-Appellants. v. FLORENCE TOWNHIP ZONING BOARD OF ADJUSTMENT Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-1054-23 On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION BURLINGTON COUNTY Docket No.: BUR-L-0987-22 Sat Below: Hon. Jeanne T. Covert, A.J.S.C.

REPLY BRIEF
FOR
RESPONDENT
FLORENCE TOWNSHIP ZONING BOARD OF ADJUSTMENT

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PRELIMINARY STATEMENT

This Reply Brief has been submitted on behalf of the Defendant-Respondent Florence Township Zoning Board of Adjustment (the "Board"), in response to the Amended Brief filed on behalf of the Plaintiffs-Appellants NFI Real Estate, LLC, and Turnpike Crossings VI, LLC ("Plaintiffs"). Plaintiffs have appealed the decision of the Trial Court upholding the denial by the Florence Township Zoning Board of Adjustment of Plaintiffs' application for a use variance to permit construction in Florence Township of uses accessory to a 48 ft. tall warehouse to be constructed by Plaintiffs on adjoining lands in Mansfield Township. The Board found that Plaintiffs failed to meet their burden of proof with regard to both the positive and negative criteria applicable to such a variance and denied the application for the reasons stated in the Board's Resolution #2022-11. Ja024.

Under the applicable standard of review, Plaintiffs have the heavy burden of overcoming the presumed validity of the Board's variance denial decision, and the Trial Court's decision upholding the Board. Plaintiffs cannot meet their heavy burden because, as found by the Trial Court, the Board's decision is consistent with applicable statutory and decisional law, and with the record. Before the Board, Plaintiffs, as applicants, had the burden of proof of all elements of the use variance which they sought. In its decision denying

Plaintiffs' application, the Board found, for reasons made clear in its Resolution and founded in the record before it, that Plaintiffs failed to present competent, credible evidence to the Board that proved Plaintiffs' entitlement to the relief they requested.

A central legal question is presented by this case. Should the Board have considered the applicable development standards, and the character of the use and principal building proposed to be constructed on the Mansfield Township part of the overall parcel when deciding a use variance to allow upon the Florence Township part of the overall parcel uses and structures accessory to the development proposed in Mansfield? Restated more narrowly, does it matter for purposes of weighing proofs for this use variance under NJSA 40:55D-70(d)(1) by the Florence Zoning Board that the warehouse proposed to be constructed in Mansfield will be very substantially taller than would be allowed under Florence Township's ordinances when the sole access for the warehouse is via a driveway that joins the public road system in Florence Township?

If this Court finds as a matter of law that the nature of the use and the height of the building proposed in Mansfield are simply immaterial to the Board's use variance decision and improper subjects for consideration by the Board, then the Court should find for Plaintiffs on this legal issue. But, the

Board does not see how, under relevant statutes and cases, the Board or the Courts can simply ignore the nature of the proposed principal use of the overall parcel when weighing a request for use variance relief for uses accessory to that principal use. Contrary to the assertion in Plaintiffs' Brief, there is no competent credible evidence in the record to support Plaintiffs' claim that the driveway is "height neutral". The failure of the Plaintiffs' Planner to discuss the impact of the differing development standards in the two Townships on the positive and negative use variance criteria left the Board without the competent, credible evidence necessary to find for Plaintiffs.

This Court should affirm the decision of the Trial Court that consideration by the Board of nature of the proposed principal use of the overall parcel and the height of the principal building to be constructed on the Mansfield part of the overall parcel was proper. The Court should affirm the Board's use variance denial because, as found by the Trial Court, the Board's denial decision is in accord with applicable law, is well- supported by the record, is fully explained in the Board's Resolution, and should, as a valid exercise of the Board's discretion, be accorded substantial deference by the Court.

PROCEDURAL HISTORY

On May 31, 2022, after a series of public hearings, the Board denied the application of NFI seeking a use variance pursuant to NJSA 40:55D-70(d)1 to permit construction in Florence Township of uses accessory to a warehouse to be constructed by NFI on adjoining lands in Mansfield Township. T4 146:18 through T4 148:5.

The Board's use variance denial decision was memorialized in Board Resolution #2022-11 which was adopted on September 1, 2022. Ja023-Ja046.

On October 20, 2022, NFI filed a Complaint in Lieu of Prerogative Writs to appeal the Board's use variance denial decision. Ja001-Ja009.

The Trial Court heard oral argument on October 27, 2023, and issued a bench opinion denying Plaintiff's requested relief. 5T 47:24 through 5T 54:10.

The Trial Court's oral decision upholding the Board's variance denial decision and denying the relief requested by Plaintiffs was confirmed by way of an Order dated October 27, 2023. Ja222.

This appeal followed.

STATEMENT OF MATERIAL FACTS

Plaintiffs seek to construct a 1,105,000 square foot, 48 ft. tall warehouse and distribution facility, along with accessory uses and structures, such as parking and loading areas, stormwater management basins, a septic system and

the sole access driveway for the proposed warehouse distribution facility at a 216-acre parcel located in Florence and Mansfield Townships that is commonly referred to as the "Wainwright Property" (the "Property"). Ja024. Interstate 295, a limited access highway, bounds the Property to the east; Florence-Columbus Road (County Route 656) lies to the south; Old York Road (County Route 660) is to the west; and the New Jersey Turnpike is to the north. 1T 29:20-25.

The easternmost 118 acres of the Property lie in Mansfield Township in its ODL-Office, Distribution, Laboratory Zone District ("ODL"). The western 98 acres of the Property are in Florence Township. Ja072; 1T 30:1-3. The area of the Florence Township part of the Property which lies west of a high-tension powerline easement is in Florence Township's AG-Agricultural Zoning District ("AG"). The Florence Township part of the Property east of the powerline easement (and bordering Mansfield Township) is in Florence's SM-Special Manufacturing" Zoning District ("SM"). Ja030; Ja073; 1T 32:8-14. No development is proposed on the part of the Property west of the power line which lies in Florence's AG Zone. Ja030

Warehouses and distribution facilities with buildings up to 50 feet tall are permitted in Mansfield Township's ODL Zone District. Ja024. Warehouses and distribution facilities with buildings up to 30 feet tall are

permitted in Florence Township's SM Zone District. Ja025, Ja097. Warehouses with heights in excess of 30 feet are permitted elsewhere in Florence Township, notably in the GM General Manufacturing Zone District. Ja039.

The proposed 48 ft. tall warehouse distribution facility building would be located on the Mansfield-portion of the Property along with some parking and loading spaces. Ja085-Ja095. The proposed building itself would cover over 25 acres of the 44 acres to be developed in Mansfield. Ja085-Ja095. The Mansfield Township Joint Land Use Board approved the Mansfield Township part of the Project on January 24, 2022. Ja085-Ja095.

The development proposed for the Florence portion of the tract includes parking and loading spaces, a septic disposal system, two (2) stormwater management basins, and the facility's sole driveway, which joins the public road system at Florence-Columbus Road in Florence Township. Ja024; 1T 33:17-23. Since the principal structure will be located in Mansfield, Plaintiffs were obliged to seek a use variance from the Board under N.J.S.A. 40:55D-70(d)(1) to permit the accessory uses in Florence without a principal structure located in Florence. Ja025; Ja097.

In the course of the public hearings on their application, Plaintiffs offered the testimony of Michael Landsburg, Plaintiffs' Chief Development

Officer; Rodman Ritchie, P.E., Project Engineer; Norman Dotti, P.E., Sound Expert; Robert Hoffman, P.E., PTOE, Traffic Engineer; and Paul Phillips, PP, AICP, Professional Planner. Ja026.

None of Plaintiffs' witnesses provided competent credible evidence to support Plaintiffs' claim that the height of the proposed warehouse is immaterial to the intensity of the proposed warehouse distribution use. Ja042, 4T 33:25; 4T 34:1-13.

Plaintiffs' Planner, Paul Pillips. testified with regard to use variance proofs under the standards set forth in Medici v. BPR Company, 107 N.J. 1 (1987). He dismissed the necessary use variance as "...really sort of a technical variance...because the zoning in both Florence and Mansfield permits the warehouse distribution use." 2T 75:3-6. Mr. Phillips' testimony never explored the actual similarities or differences between the warehouse distribution uses allowed in the two Townships, and never discussed the substantial difference in the building heights permitted in Florence versus what was approved in Mansfield. He merely relied repeatedly upon his assertion of the purported similarity of the permitted uses and other zoning parameters without actually exploring them with the Board. 2T 79:22-25.

Florence Township's Mayor and Council hired special counsel, a planning expert and a traffic expert to appear before the Board in opposition to the proposed development.

Upon the conclusion of the hearing, the Board denied the application, upon a vote of 6 in favor of a motion to deny, and 1 opposed. 4T 146:18-23.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

Plaintiffs' discussion of the standard of review and citations to relevant cases properly presents the applicable arbitrary and capricious standard, the presumption of validity that attaches to board decisions, and the heavy burden of a party attacking a board decision to overcome that presumption of validity in light of the deference to be accorded to boards' decisions. Plaintiffs also properly discuss boards' obligation to base their decisions on substantial credible evidence in the record, and the courts' duty to determine whether challenged decisions are supported by the evidence and follow proper statutory guidelines. Plaintiffs do acknowledge that board decisions which are supported by substantial evidence in the record and reflect a correct application of the relevant principles of land use law are proper exercises of the discretion vested in boards that should not ordinarily be disturbed.

Plaintiffs' citations in support of their recitation of these well-understood principles are accurate and do not need to be repeated.

Plaintiffs failed, however, to discuss that greater deference is accorded to denial of a variance than to a grant. Funeral Home Mgmt., Inc. v. Basralian, 319 N.J. Super. 200, 208 (App.Div.1999). Consequently, the deference to be accorded by the Court to the Board's variance denial decision in this case should be even greater than if this case were a challenge to a variance approval.

II. BURDEN OF PROOF

It was the Plaintiffs' obligation to present evidence to the Board to prove their entitlement to the relief they sought. "The burden of proof of the right to the relief sought in the application rests at all times upon the applicant". Cox & Koenig, New Jersey Zoning and Land Use Administration (Gann 2023), pp. 261, citing Ten Stary Dom Ptp. v. Mauro, 216 NJ 16, 30 (2013). The burden of proof lies upon the applicant with regard to both the positive and the negative criteria. New Brunswick Tel. v. South Plainfield, 305 N.J. Super. 151, 165 (App. Div. 1997), re-affirmed at 314 N.J. Super. 102 (App. Div. 1998). If the applicant does not meet its burden of proof, the Board has no choice but to deny the application. Toll Bros., Inc. v. Burlington County Bd. of Chosen Freeholders, 194 N.J. 16, 30 (2013); Tomko v. Vissers, 21 N.J. 226, 238

(1956); Chirichello v. Zoning Bd. Of Adj. Monmouth Park, 78 N.J. 544 (1979).

Neither the Board, nor any other participant in the hearing other than the applicant bears any proof burden. Hearings before planning and zoning boards are not inherently adversarial proceedings. "Very often it happens that only the applicant submits any evidence to the board but it should be noted that the absence of evidence in support of denial of a requested variance does not itself mean that the board's denial of a variance is arbitrary. The burden rests with the applicant to demonstrate that the *affirmative* evidence in the record dictates the conclusion that a denial would be arbitrary." *Cox*, supra, at pp.262, citing Kenwood Assocs. v. Bd. of Adj. Englewood, 141 N.J. Super. 1 (App Div. 1976). "It was not the burden of the board to find affirmatively that the [master] plan would be substantially impaired…it was the burden of the applicant to prove the converse." Weiner v. Zoning Bd. of Adjust. of Glassboro, 144 N.J. Super. 509, 516 (App. Div. 1976). Consequently, Plaintiffs' claim that they are entitled to the use variance they sought in this case rests entirely upon the probative value, credibility, and thoroughness of the affirmative testimony of Plaintiffs' witnesses on both the positive and negative criteria applicable to use variances.

The Board's essential finding in its Resolution is that the Plaintiffs failed to meet their burden of proof and the Board was therefore obliged to deny the application. Ja043. Key testimony of the Plaintiffs' Planner and Traffic Engineer were found by the Board to be inadequate. Ja041, Ja042, Ja043. "…it is well settled that the Board has the choice of rejecting or accepting the testimony of witnesses. Where reasonably made, such choice is conclusive on appeal." Kramer v. Bd. of Adjust., Sea Girt, 45 N.J. 268, 288 (1965).

Thus, if this Court finds as a matter of law, as the Trial Court did, that the nature of the use and the height of the building proposed in Mansfield are material to the Board's use variance decision and proper subjects for consideration, then the Board's rejection of the testimony of Plaintiffs' witnesses, which, as will be shown below did not adequately address those issues, must be conclusive on appeal. The Board's finding that the Plaintiffs failed to meet their burden of proof must then again be upheld, as it was by the Trial Court.

III. THE BOARD PROPERLY CONSIDERED THE DIFFERING ZONING STANDARDS OF FLORENCE AND MANSFIELD TOWNSHIPS AND THE HEIGHT OF THE BUILDING PROPOSED IN MANSFIELD IN ACCORD WITH APPLICABLE LAW

The Board was obliged to consider the character of the use of the principal building, including its height, under applicable decisions concerning

accessory uses generally, driveways as a specific subset of accessory uses, and lots split by municipal boundaries.

Accessory Uses and Driveways

An accessory use is one which is customarily incidental and subordinate to the main use. The accessory use must also bear a "reasonable relationship" with the primary use. Wyzykowski v. Rizas, 132 N.J. 509, 519-521 (1993), citing Charlie Brown of Chatham, Inc. v. Board of Adjustment, 202 N.J. Super. 312 (App. Div. 1985). Access driveways have been held to be accessory structures and to take on the character of the principal use they serve. Angel v. Franklin Tp. Bd. of Adj., 109 N.J. Super 194, 197-199 (App. Div. 1970). The Angel court adopted the holding in Wolf v. Zoning Bd. of Adjustment of Park Ridge, 79 N.J. Super. 546 (App. Div. 1963). The Wolf court's perspective that the character of driveways follow the use to which they are accessory was also later quoted favorably by the New Jersey Supreme Court in Nuckel, ("[L]and used as a means of access to . . . a business[] is in a use accessorial to the business and thus is itself in legal contemplation [of] being used for the business purpose in question."). Wolf , supra, at 550-551, quoted by Nuckel v. Borough of Little Ferry, 208 N.J. 95, 102, 104 (N.J. 2011). See also: N.J. Transit Corp. v. Franco, 447 N.J. Super. 361 (App. Div. 2016), certif. denied, 230 N.J. 504 (2017), holding that where the zoning did not allow residential

use on the lot upon which a driveway was to be built, use of that lot for a driveway for an apartment building on an adjacent lot would constitute either a new non- permitted principal use or, if considered as an accessory use, a variance under NJSA 40:55D- 70(d)1; as well as the similar holding in Menlo Park Plaza v. Woodbridge, 316 N.J. Super. 451, 461 (App. Div. 1998), certif. den. 160 N.J. 88 (1999) where the Appellate Division upheld denial of access over a lot in an adjoining town which would have altered the character of the neighborhood into which access would be created and which served only the interests of the developer.

Since the accessory uses and structures in Florence, most especially the driveway, will be used for "the business purpose in question" and thereby take on the character of that use, it is imperative that the Board fully understand and weigh the nature of that business purpose in order to measure the particular suitability of the lands in Florence for the structures and uses accessory to that use and to assess the effect of the use on the zone plan and the public good. The driveway cases holdings indicate that it was entirely proper (in fact statutorily required) for the Board to look for more from the Plaintiffs' witnesses and proofs than the dismissive and conclusory statement of Plaintiffs' Planner that the uses in the two Townships are "complimentary" and of "like kind". 2T 75:3-6

Split-Municipality Cases

The split-municipality cases do not change the foregoing conclusion. There are two published New Jersey cases that are most relevant to thinking about what to do when parcels of land are in two towns, Ferraro v. Zoning Bd. of Adjustment, 119 N.J. 61 (1990), and Ciocon v. Planning Bd. of the Borough of Franklin Lakes, 223 N.J.Super.199 (1988). Both have been cited by Plaintiffs, but their conclusion about the guidance given by these cases is incorrect.

In Ferraro the landowner's application to the board of adjustment of Holmdel for a use variance for an automated car wash had been denied. About thirty percent of the land was in Holmdel where it was zoned for residential use only. The seventy percent of the property lying in Hazlet was part of a business highway zone where the use was permitted. The New Jersey Supreme Court's decision in Ferraro was principally about the issue raised on appeal of whether Holmdel had ceded its zoning authority over the subject property to Hazlet under a 1962 agreement that allocated tax assessments between the municipalities. Much of the discussion in the decision is about the history of zoning in New Jersey, the "meticulous" way in which zoning authority had been delegated to municipalities by the Legislature, and how the "... zoning power is an extremely important and sensitive element of municipal power,

one that the Legislature has recognized as being singularly within the expertise of local boards of adjustment." Ferraro, *supra* at 71. Further, the Ferraro court cites NJSA 40:55D-20 in support of the court's decision that the 1962 agreement did not divest Holmdel's zoning board of its authority:

> Consistent with the selective attention given to municipal zoning power, NJSA 40:55D-20 expressly vests the zoning board of adjustment with the exclusive authority to act in making zoning decisions about property within their boundaries: "Any power expressly authorized by this act to be exercised by….[a] board of adjustment shall not be exercised by any other body except as provided in this act." N.J.S.A. 40:55D-20. The exclusive authority vested in a local board of adjustment encompasses the power to grant variances. That authority is itself a special and distinctive aspect of local zoning powers.
> Ferraro, supra, at 70.

The Ferraro decision should properly be seen as protective, not dismissive, of the authority of each town over the uses of land within its own borders and highlighting that neither the Mansfield governing body nor its Joint Land Use Board have the power to determine zoning standards or to grant variances in Florence Township. The statute itself dictates that only the Board has the power to grant variances in Florence "…which shall not be exercised by any other body except as provided in this act.". NJSA 40:55D-20. The practical effect of Plaintiffs' erroneous reading of Ferraro would be to vest the zoning authority of Florence Township's governing body and the and

variance authority of the Board in Mansfield's governing body in direct contravention of the statute and the decision in Ferraro.

Having determined Holmdel had not ceded its zoning authority over the subject property, and uncertain of the extent to which Holmdel's Zoning Board had considered Hazlet's zoning of the subject property when it denied the car wash developer's use variance application, the Ferraro court then remanded the case back to the Board and with the direction that:

> "The fact that Hazlet allows the use may suggest that the property in Holmdel is uniquely suited for the proposed use. See Kohl v. Mayor and Council of Fair Lawn, 50 N.J. 268 (1967). In exercising its own zoning responsibilities, Holmdel is obligated to give significant weight to the zoning ordinance and plan of the adjacent municipality, Hazlet, as well as to the character and uses of surrounding property in both Hazlet and Holmdel."
>
> Ferraro, *supra*, at 73.

The Ferraro court recognized the statutory obligation of Holmdel's board to exercise "...its own responsibilities...", phrased "...the fact that Hazlet allows the use may suggest..." in the permissive "may", not the mandatory "shall", and told Holmdel's board to give "...significant weight to the zoning ordinance and plan of the adjacent municipality...as well as to the character and uses of surrounding property in both Hazlet and Holmdel." Id. The Ferraro court did not require the Holmdel board to simply accept the other town's regulations for proposed new uses as binding or to ignore the character

of existing uses in either town. This language also makes clear, since it must give "significant weight" to it, that a board should actually have knowledge of the adjoining town's zoning ordinance and plan, and of the character of the uses in the adjoining town.

Plaintiffs are simply incorrect when they assert that the Ferraro court rejected review of Hazlet's zoning by the Holmdel board and any effort of the Holmdel board to reconcile Hazlet's zoning with Holmdel's. There is nothing in the Ferraro decision that would divest the Florence Zoning Board of its statutory obligation under the positive and negative criteria of NJSA 40:55D-70 to understand and weigh the character of the use proposed on the Mansfield part of the overall parcel.

There is no reliance in Ferraro on the comparative land area in the two towns that would support Plaintiffs' assertion that the relative area of the lands to be developed should cause Mansfield's zoning to inherently predominate over Florence's zoning. Pb15. Relative land area in each town was not the basis for the court's decision in Ferraro, and should not be the basis for a decision in this case.

Similarly, Plaintiffs assert that there is some significance in Mansfield's board having already approved the development of the warehouse in Mansfield when the use variance application at issue in this case was heard and denied by

the Board. Pb16. Plaintiffs provide no authority for their proposition that the decision of the first town's board to approve an application concerning a split lot in any way determines the outcome of a later application to another town's board. If this were the law, then every owner of a split lot would merely race to the most favorable jurisdiction for pre-emptive approval. Ferraro certainly does not support this idea.

Perhaps more useful as a general principle than relative land area or the timing of approvals, could be the question of which town's standard should prevail when differing policies must be reconciled: the more intense and impactful use as urged by Plaintiffs or the less impactful use as found by the Board and Trial Court.

Plaintiffs' Brief cites, but does not discuss, the second case of significant relevance to this issue: Ciocon v. Planning Bd. of the Borough of Franklin Lakes, 223 N.J.Super.199 (1988) for the idea that "local land use boards must view the property as one parcel, even though it sits in two municipalities." Pb12. The Ciocon case involved whether setbacks for development of a pool and tennis court in Franklin Lakes should be measured from the nearer municipal boundary between Franklin Lakes and Wayne that transects the subject parcel, or from the farther boundary of the parcel which was in Wayne. Significantly for the court, Wayne had granted a use variance to allow

recreational uses like those that were proposed in Franklin Lakes. Ciocon at 202, 204. The 2023 edition of the *Cox* treatise notes this fact: "Thus, absent the variance from the adjoining municipality in Ciocon, it is doubtful that the court would have granted the relief sought." Cox, supra pp. 465. The Ciocon court held that "under the facts and circumstances presented" the rear setback should be measured from the farther parcel boundary, not the transecting municipal boundary, and that no setback variance was therefore required for the development in Franklin Lakes. Ciocon at 208. The guidance provided by the Ciocon decision is that the land use controls of both towns are significant factors to be considered when analyzing parcels in two towns.

In sum, with regard to the legal question of whether it was appropriate under NJSA 40:55D-20 and NJSA 40:55D-70, and the cases applicable to accessory uses, driveways and split lots, for the Board to understand and compare more fully the standards applicable to the development in Mansfield, to seek to weigh the character of the development proposed on the Mansfield part of the overall parcel, and therefore to assess the impact of the height of the proposed building on Florence Township: clearly it was proper for the Board to do so. Indeed, the statutes and cases required it to do so.

IV. THE TRAFFIC IMPACTS OF THE DRIVEWAY HAVE NOT BEEN PROVEN TO BE HEIGHT NEUTRAL

Plaintiffs assert in their Brief that all of the accessory uses proposed in Florence are "height neutral" and that all of the uses proposed on both sides of the municipal boundary are "permitted". Pb20, Pb23. The Board disagrees with these assertions because they require acceptance of Plaintiffs' unproven assertion that there is no difference in the traffic generation on the site driveway and roads in Florence (and therefore intensity of use) between the proposed 48 ft. tall warehouse and the 30 ft. tall warehouse that is permitted by Florence's ordinances.

As found by the Board and the Trial Court, the testimony of Plaintiffs' traffic expert, Robert Hoffman, despite its portrayal in Plaintiff's Brief, does not provide an evidential foundation for an expert opinion that building height is immaterial to traffic generation. Ja19; 5T 52:16-22. Specifically, Mr. Hoffman was asked on direct examination by counsel, "Does the height of a warehouse building come into play when determining your traffic projections? In other words, does it matter if its's 30 feet versus 35 feet? Thirty-five feet versus 40 feet? Do you factor that in when you do the traffic count?" 4T 33: 19-24. Mr. Hoffman answered, "As far as projections, the traffic count projection from ITE, no. The height of the building does not come into account

when you look at warehouse uses. **It's not an independent variable.** So you'll choose an independent variable, which is typically the square footage of the building. The height doesn't play into that. They don't specify that a building—in the description they will give you a certain height. Like, it might say, you know, **a 24 foot or higher ceiling height, which is I think the definition for most of the ITE warehouse categories that are in there** says it, but it's not—it's not a factor in determining trip generation." 4T 33:25; 4T 34:1-13 (Emphasis added). Mr. Hoffman's testimony is that building height is not an independent variable that he can extract from the ITE data. That data, he tells us, probably includes buildings with "a 24 foot or higher ceiling height". 4T 34:9-10.

Mr. Hoffman is unable to tell us what the effect will be of a warehouse building that is 48 feet tall instead of 30 feet tall because the aggregated data incorporated into the equation developed by Institute of Traffic Engineers includes buildings with ceiling heights of 24 feet and greater, and building height is not an independent variable in the ITE equation that he can change or examine in order to create a comparative analysis. The ITE data relied upon does not separate or distinguish between buildings that are 30 feet tall or 48 feet tall, so Mr. Hoffman cannot do so either. The testimony he offered on that subject that Plaintiffs wish to construe as evidence that there is no difference

in the amount of traffic generated by buildings of different heights is, therefore, unsupported by the cited data. The Board and the Trial Court were justified by the record in finding that Plaintiffs' assertion that all of the accessory structures and uses proposed in Florence are height neutral is not supported by Plaintiffs' evidence. Ja042; 5T 52:16-22.

V. THE BOARD AND TRIAL COURT PROPERLY WEIGHED PLAINTIFFS' (d)1 USE VARIANCE UNDER THE MEDICI STANDARDS, BUT EVEN IF THE COVENTRY SQUARE STANDARDS ARE MADE APPLICABLE, PLAINTIFFS HAVE NOT PROVEN THAT THEY ARE ENTITLED TO APPROVAL

Plaintiffs argued before the Trial Court, and continue to assert here, that their use variance application under NJSA 40:55D-70(d)1 should not have been decided under the standards made applicable to (d)1 use variances through the New Jersey Supreme Court's decision in Medici v. BPR Company, 107 N.J. 1 (1987). Rather, Plaintiffs argue, their variance application should have been considered under the less stringent standards made applicable to conditional use variances under NJSA 40:55D-70(d)3 in Coventry Square v. Westwood Zoning Board of Adjustment, 138 N.J. 285 (1994), and subsequently also judicially extended to density, floor area ratio and height variances under other subsections of NJSA 40:55D-70(d). Pb23, Pb28. Plaintiffs do not cite any precedent for their novel idea that the Coventry

standard should be further extended to apply to (d)1 use variances like the one they sought.

Plaintiffs argue that the common theme of the case law concerning the loosening of standards for conditional use, density, floor area ratio and height variances is that they pertain to uses that are permitted, not prohibited in the zone. Pb29. Acceptance of the Plaintiffs' novel theory, that the standards stated in these cases should be extended to their case, would require not only the making of new law, but also for the Court to ignore Florence Township's ordinances which do, in fact, prohibit Plaintiffs' accessory uses without a principal use on the same lot.

The loosened standards for the lesser 70(d) variances under Coventry and its progeny call for proofs "…relevant to the nature of the deviation from the ordinance." Pb 25 quoting Coventry, supra at 297-98. In addition to never arguing before the Board that Coventry-like standards should apply to their variance application, Plaintiffs never presented any proofs about the purposes of Florence Township's prohibition of accessory uses without a principal use on the same lot, how Plaintiffs' proposed development does not offend those purposes, or how Plaintiffs' site "….will accommodate the problems associated with the use even though the proposal does not comply with the ordinance established to address those problems." Pb26 citing Coventry, supra

at 298-299. Plaintiffs' expert planner testified to the Medici criteria, not the Coventry criteria and never even mentioned the purposes of Florence Township's prohibition of accessory uses without a principal use on the same lot. Thus, even if this Court were to announce a new legal standard, the record does not support a conclusion that Plaintiffs have proven their entitlement to approval under the new standard.

This is the result also, if the deviation from Florence Township's ordinance is framed as the greater height of the building proposed in Mansfield than would be allowed in Florence, since Plaintiffs' argument is based upon their unproven assertion that all of the accessory uses proposed in Florence are "height neutral" and therefore would therefore be inherently permitted if only they were on the same lot as the proposed principal warehouse building. Pb30. The testimony of Plaintiffs' traffic expert doesn't support this conclusion and their Planner never sought to explain the purpose, effect or importance to the proposed development of the differing height standards in the two towns. Plaintiffs cannot satisfy Coventry-esq standards with this framing of the issues either.

The Trial Court determined, for the purposes of its decision upholding the Board's (d)1 use variance denial in this case, that even under the less stringent standards in accord with the principles of Coventry that are

applicable to (d)6 height variances, as articulated in Grasso v. Boro of Spring Lake Heights, 375 N.J. Super. 41, 52-53 (App. Div. 2004), the Board's concerns about the height of the proposed building, and therefore the intensity of the proposed warehouse use and its impact on traffic in Florence as a result of the driveway in Florence, were appropriate. 5T 50:22-24. The Trial Court also agreed with the Board's conclusion that the greater height of the proposed building would result in a more intense use than Florence Township's ordinances anticipated. 5T 51:3- 5T 51:15. There is no reason in fact or law for this Court to disturb these findings, which show that even under this formulation of a standard less stringent than Medici, the Plaintiffs are not entitled to approval.

VI. THE BOARD'S FINDING THAT THE TESTIMONY OF PLAINTIFFS' PLANNER WAS NOT PROBATIVE OR CREDIBLE IN LIGHT OF HIS FAILURE TO RECONCILE THE DIFFERING CHARACTER OF THE WAREHOUSE USES ALLOWED IN FLORENCE AND MANSFIELD TOWNSHIPS IS SUPPORTED BY THE RECORD

Plaintiffs' planning expert, Paul Phillips, testified to the variance proofs under the Medici standards and opined that the Florence Township lands are particularly suited for the proposed uses accessory to the proposed warehouse on the Mansfield Township lands. 2T 75:15. Mr. Phillips arrived at his conclusion that the Florence Township lands are particularly suited for the

basins, parking areas, loading areas, septic system and sole driveway accessory to the warehouse in Mansfield Township because there is little space on Florence Township lands that is not constrained by wetlands and flood hazard areas: "And also the remaining land in the SM zone is limited, and much of it is also constrained by either flood hazard or wetland areas. 2T 76:7-9. "So as a result of those physical and environmental characteristics, the bulk of the site improvements and the entire building has been located in Mansfield proper where there is actually more industrially zoned land, and where there are far fewer development constraints." 2T 76:16. In the context of assessing the particular suitability of the Florence part of the overall parcel for the proposed accessory uses, Mr. Phillips dismissed the necessary use variance as "...really sort of a technical variance...**because the zoning in both Florence and Mansfield permits the warehouse distribution use.**" 2T 75:3-6. (Emphasis added).

Mr. Phillip's testimony concerning the "substantial detriment to the public good" prong of the negative criteria asserted that: "...I actually see no substantive impacts to the public, and especially in relation to surrounding properties or zones, if this variance were to be granted by the Board." 2T 79:10-14. Mr. Phillips added: "In fact, in my opinion, I really do not see detrimental impacts associated with placement or location of these accessory

uses on the Florence portion of the tract, as they've been proposed. And I say that not just in relation to the site plan and the zoning parameters, **but also relative to the adjacent properties and streets.**" 2T 79:15-21. (Emphasis added).

With regard to the second prong of the statutory negative criteria, Mr. Phillips opined that, "I see no substantial impairment of the zoned—planner's [sic] zoning ordinance. Again, I say that **largely in recognition of the like kind zoning in each of the respective municipalities**." 2T 79:22-25. (Emphasis added).

Mr. Phillips testimony on the special reasons positive criteria. and on the two distinct aspects of the negative criteria, never explored the actual similarities or differences between the "warehouse distribution" uses allowed in the two Townships, and never discussed the substantial difference in building heights permitted in Florence and approved in Mansfield. He merely relied repeatedly upon his assertion of the purported similarity of the permitted uses and other zoning parameters without actually exploring them with the Board. The Board, in its Resolution, found this omission from Mr. Phillip's testimony (especially, but not exclusively with regard to one obvious difference that was apparent to the Board on the face of the application,

namely building height) significant enough that it refused to accept Mr. Phillip's testimony as credible and probative. Specifically, the Board found:

> 25. Mr. Philips' testimony did not address the substantial difference between the permitted maximum building height in Florence Township's SM Zone of 30ft. and the actual building height of 50ft. that was approved by the Mansfield Township Planning Board for the proposed principal building to be located on the Mansfield Township part of the overall parcel. Mr. Philips did not provide any testimony that compared specifically and qualitatively the permitted uses and associated development standards in the Florence SM Zone with those of the adjoining Mansfield ODL Zone. From Mr. Philips testimony, the Board knows only that warehouse and distribution uses in 50 ft.-tall buildings are allowed in the Mansfield ODL Zone, but nothing at all about any qualifications or limitations on those uses which may be found in Mansfield's ordinances, or how genuinely consonant the warehouse distribution uses permitted in Florence Township's SM Zone are with the Mansfield ODL uses. The Redevelopment Plan that was attached to Mansfield Township Ordinance 2017-11, and which was later accepted into evidence by this Board is not helpful because it contains no substantive zoning standards and merely adopts by reference the zoning standards of Mansfield Township's ODL Zone District.
>
> Because Mr. Philip's testimony was founded on an unsupported assertion that the zoning of the Mansfield and Florence parts of the overall parcel are "complimentary", and because his testimony does not address the substantial difference in allowable building heights in the SM and ODL Zones, the Board does not find Mr. Philip's testimony credible with regard to the special reasons, absence of substantial impairment of the zone plan and the enhanced quality of proof required under the *Medici* holding for a use variance pursuant to NJSA 40:55D-70(d)1.
>
> Ja040-041.

To be clear, acceptance of Mr. Philip's testimony would be akin to accepting an assertion that since "Residential" uses are permitted in two zone districts, their zoning is necessarily identical without reference to standards like density, lot size, setbacks, building height, whether only single or multi-family buildings are allowed, and other significant parameters commonly found in zoning ordinances. The Board's concern to actually unpack the respective ordinances is especially legitimate in the context of "warehouse distribution" uses, which other testimony presented by the Plaintiffs highlighted as being highly variable in character. Testimony of Michael Landsburg, 1T 19:10-25; 1T 22:9-1T 23:18.

VII. THE BOARD'S FINDINGS REGARDING THE GOVERNING BODY'S INTENT WHEN IT ADOPTED DIFFERENT HEIGHT STANDARDS FOR THE GENERAL MANUFACTURING AND SPECIAL MANUFACTURING ZONE DISTRICTS ARE SUPPORTED BY THE 1999 MASTER PLAN, THE ORDINANCE TEXT AND APPLICABLE LAW

The Board found that "None of the professional experts or lay witnesses who testified before the Board provided a comparative analysis of the traffic impacts of the proposed 50 ft. tall building with the 30 ft. tall building that would be allowed under Florence Township's standards applicable to the SM Zone District." Ja042, Ja043.

In the absence of credible, probative testimony from anyone about comparative traffic generation, the effect of building height on the intensity of the proposed use, and the use variance criteria more generally, the Board properly relied upon the very clear discussion of the purposes of the SM zoning of the subject property in the Township Master Plan. This language of the Township Master Plan was highlighted to the Board in the summation of the applicant's counsel. 4T 116:7-118:22. The Board's Resolution focused upon and explained the way in which the intent of the Master Plan is expressed in the specific and differing standards of the SM and GM Zone Districts, where the SM allows buildings with maximum heights of only 30 ft. and the GM heights of up to 75 feet. Ja037-Ja039. The stated purpose of the SM Zone District is "...to provide areas for industrial uses which are of **lesser magnitude and intensity** than permitted in industrial districts." Florence Township Ordinance §91-249, Ja097 (Emphasis added).

The attack in Plaintiffs' Brief on the Board's reliance upon the Master Plan and the Board's connection of the specific discussion in the Master Plan of the purposes behind the SM zoning of the subject property with the SM Zone ordinance standards is misplaced and ignores the statutorily required interplay between master plans and zoning ordinances, the referral powers of planning boards under NJSA 40:55D-26, and the plain language of the

ordinance which references both "magnitude" and 'intensity". Ja097. It is a foundational principle of the MLUL that planning is a necessary prerequisite for zoning, and zoning regulations should be substantially consistent with and designed to effectuate the master plan. NJSA 40:55D-26, 40:55D-62(a), 40:55D-64, Riggs v. Long Beach Tp., 109 N.J. 601, 619-622. Manalapan Realty v. Township Committee, 140 N.J. 366, 381 (1995). Drawing the connection between the Master Plan and its implementing regulations, and gauging the effect of specific development proposals on the zone plan is a fundamental part of the work of zoning boards under NJSA 40:55D-70 and the statutory proofs for all variances. "No variance or other relief may be granted under the terms of this section, including a variance or other relief involving an inherently beneficial use without a showing that such variance or relief can be granted without substantial detriment to the public good and **will not substantially impair the intent and purpose of zone plan and zoning ordinance**." NJSA 40:55D-70, final paragraph -emphasis added. Where there is explicit language in the Master Plan like that which was quoted by the Board, the statutory framework of the MLUL, and relevant case law, make such Master Plan language the legislative history behind adoption of the zoning regulations adopted to implement the Master Plan. NJSA 40:55D-62(a),

NJSA 40:55D-89(d), NJSA 40:55D-28(b)1, NJSA 40:28(b)2(d), NJSA 40:55D-26; Medici v. BPR Co., supra, at 20, Manalapan Realty, supra at 381.

Plaintiffs' claim is incorrect that traffic was expressly excluded from the concerns of the Planning Board for the SM Zone when that body drafted the 1999 Master Plan and by the governing body when it adopted implementing ordinances. Pb38. The Master Plan language about the GM Zone cited by Plaintiffs discusses some examples of specific offsite impacts for uses in GM Zone of noise, dust, odors and visual. Plaintiffs overreach by claiming that these are the exclusive concerns about uses in the SM Zone. In fact, the language of the Master Plan does not state that these are the only concerns for either Zone, merely that they are of special concern for uses in the GM Zone. Ja123. The Master Plan's discussion about the SM Zone speaks more generally of "offsite impacts" and "intensity of development" without any reference to specific offsite impacts that could be perceived as limiting their scope in the way pressed by Plaintiffs. Ja123, Ja037-Ja038. Significantly, the implementing ordinance section for the SM Zone District, Ordinance §91-249, expressly refers to seeking "lesser magnitude" in the SM Zone District. Ja097. Height, clearly is an expression of "magnitude".

The Board's understanding of the Master Plan and Zoning Ordinances as considering building height to be a significant factor in weighing the relative

intensity of uses is further supported by relevant caselaw which likens height limitations to density and floor area ratios, all of which can be intended to control the intensity of development. The Appellate Division tied these ideas together in Grasso v. Boro of Spring Lake Heights, 375 N.J. Super. 41, 52-53 (App. Div. 2004).

> We believe that the special reasons necessary to establish a height variance must be tailored to the purpose for imposing height restrictions in the zoning ordinance. See Coventry Square, supra, 138 N.J. at 298, 650 A.2d at 346 (standards for conditional use variances must be "appropriate for the purposes and characteristics of conditional uses"); Randolph Town Ctr., supra, 324 N.J.Super. at 416-17, 735 A.2d at 1168 (the criteria for evaluating a FAR variance application must be relevant to the purposes of FAR restrictions). See also N. Bergen Action Group v. N. Bergen Township Planning Bd., 122 N.J. 567, 578, 585 A.2d 939, 944 (1991). ("[I]t is fundamental that resolutions granting variances undertake to reconcile the deviation authorized by the Board with the municipality's objectives in establishing the restriction.").
>
> Municipal restrictions on building height date back to the late 1800s, and were imposed in response to advancing technology and construction techniques that enabled the construction of tall buildings. Norman Williams and John M. Taylor, American Land Planning Law, §69:1 (rev. ed. 2003). **Very early on, courts recognized the relationship between height restrictions and the public welfare because the height of a building could impact traffic congestion, fire hazards, public health, adequate light and air, and population density.** E.g., Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30, 31 (1925), overruled on other grounds, Vill. of Hudson v. Albrecht, Inc., 9 Ohio St.3d 69, 458 N.E.2d 852, 855-56, appeal dismissed, 467 U.S. 1237, 104 S.Ct. 3503, 82 L.Ed.2d 814 (1984).

> **Height restrictions like restrictions on density, bulk or building size, can also be a technique for limiting the intensity of the property's use.** N. Bergen Action Group, supra, 122 N.J. at 567, 585 A.2d at 939; see N.J.S.A. 40:55D-65(b) (zoning ordinance may regulate bulk, height, building size, lot coverage, lot size, floor area ratios and "other ratios and regulatory techniques governing the intensity of land use and the provision of adequate light and air").
>
> Grasso, *supra*, at 52-53 (Emphasis added).

The Board's conclusions about the intent of the height limitation in the SM Zone are supported specifically by the quoted Master Plan language, the express language of the relevant ordinance, and, more generally, by caselaw that discusses why such height limitations are incorporated into zoning standards. The Board correctly considered, under the Florence Township Master Plan and ordinance, and applicable caselaw, that the height of the building to be constructed on the Mansfield part of the overall parcel would affect the intensity of the use of that building and the uses accessory to that building proposed in Florence, and the Board correctly required that substantial, credible evidence about those effects be a part of the use variance proofs under the positive and negative criteria.

Plaintiffs did not provide those necessary proofs, and the Board was amply justified in finding that Plaintiffs failed to show their entitlement to the requested variance relief.

VIII. PLAINTIFFS' DISCUSSIONS OF NECESSITY OF THE DRIVEWAY LOCATION AND THE STATUS OF FLORENCE-COLUMBUS ROAD AS A COUNTY ROAD ARE IRRELEVANT TO THE ISSUES BEFORE THE COURT

Plaintiffs Brief includes a review of the testimony concerning the design choices that lead to the proposed site plan and the location of the proposed driveway in Florence. Pb40- Pb42. That testimony does show that these designs are likely good ways for the Plaintiffs to place their desired development on the Wainwright Property. The Board's Resolution did not question these site design choices or the driveway location proposed by Plaintiffs in the Board's review of the variance proofs concerning the proposed development. It is therefore unclear why any of this discussion in Plaintiffs' Brief is relevant to the issues now before the Court. The Board's variance denial decision was not a quibble about the physical layout of the site.

Plaintiffs attempt at the conclusion of this argument to deflect concerns about the amount of traffic that the driveway for the proposed 48 ft. tall warehouse would place onto the public roadway in Florence Township by arguing that 80% of the traffic would travel away from Florence misses the mark. Presumably, 80% of the traffic from a shorter building that conformed to the intensity of development anticipated by Florence would also go east away from Florence, and of course 20% of the likely lesser amount traffic

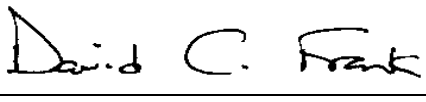
generated by a conforming building would also go west into Florence. Even if credible and probative, evidence about the likely directions of travel for traffic to and from a warehouse does not address how much traffic there will be, or how much more there may be from a taller building than from a shorter one.

Similarly, Plaintiffs' characterization of the road upon which the sole driveway serving the proposed development will debouch, Florence-Columbus Road, as a "County" road is an attempt to focus the Court on an irrelevancy. Although the road's alignment, improvement and maintenance are governed by Burlington County, Florence has the authority and responsibility, not the County, to "…. adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land[.]" New Jersey Constitution Article 4, Section 6, Paragraph 2. Under our 1947 Constitution, the Legislature may delegate the zoning power only to "municipalities, not counties" which is precisely what the MLUL does. Id., NJSA 40:55D-62. Under the County Planning Act, NJSA 40:27-1 *et seq*., in accord with our Constitution, counties have a role in infrastructure planning, but not zoning, and the principal role of county infrastructure is to accommodate the development authorized by local municipalities through their local zoning. The status of Florence-Columbus

Road as a "County" road is immaterial to the proofs for Plaintiffs' zoning variance application and irrelevant to this case.

CONCLUSION

For these reasons, Defendant-Respondent Florence Township Zoning Board of Adjustment respectfully requests that the Court affirm the decision of the Trial Court finding proper legally the Board's consideration of nature of the proposed principal use of the overall parcel and the height of the principal building to be constructed on the Mansfield part of the overall parcel. The Board further respectfully requests that the Court affirm the Board's use variance denial because, as found by the Trial Court, the Board's denial decision in accord with applicable law is well- supported by the record, is fully explained in the Board's Resolution, and should, as a valid exercise of the Board's discretion, be accorded substantial deference by the Court.

By: 

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Attorney for Respondent:
Florence Township
Zoning Board of Adjustment

Dated: July 15, 2024

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-001054-23

NFI REAL ESTATE, LLC AND TURNPIKE CROSSINGS VI, LLC, **Plaintiffs-Appellants,** **v.** **FLORENCE TOWNSHIP ZONING BOARD OF ADJUSTMENT,** **Defendant-Respondent.**	**CIVIL ACTION** **ON APPEAL FROM ORDER DATED OCTOBER 27, 2023** **Docket No. BUR-L-001987-22** **SAT BELOW:** **HON. JEANNE T. COVERT, A.J.S.C.**

REPLY BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS, NFI REAL ESTATE, LLC AND TURNPIKE CROSSINGS VI, LLC

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ON THE BRIEF

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LEGAL ARGUMENT

Defendant's opposition brief would lead one to think the matter before this Court is an appeal of a use variance for a non-permitted use, or a height variance. It is neither. Plaintiff sought a technical use variance for permitted uses accessory to a permitted principal use, all of which are a direct result of the municipal boundary line that dissects the Property. Defendant's denial of Plaintiff's application requires reversal by this Court.

I. DEFENDANT'S DENIAL EXCEEDED THE APPROPRIATE LEVEL OF DEFERENCE OWED TO LOCAL LAND USE BOARDS.

While Plaintiff agrees that a certain level of deference is owed to Defendant's decision, the record shows that Defendant's actions far exceed any acceptable application of the law.

Zoning boards are given deference due to their "peculiar knowledge of *local conditions*[.]" See, e.g., Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965)(emphasis added). This deference is an acknowledgment that "that local citizens familiar with a *community's characteristics and interests* are best equipped to assess the merits of variance applications." CBS Outdoor, Inc. v. Borough of Lenanon Planning Bd./ Bd. of Adjustment, 414 N.J. Super. 563, 577-78 (App. Div. 2010)(citation omitted)(emphasis added). This deference is directed to local conditions; issues and concerns peculiar to the locality. Here, Defendant's denial, including its rejection of expert testimony, relies entirely

upon the unfounded general assumption that building height is, by default, a proxy for intensity of use, especially for traffic generation. This unsupported belief has nothing to do with local conditions or the community's characteristics, but rather a preconceived notion that Plaintiff actually disproved. This general assumption—the lynchpin of Defendant's decision—is therefore not entitled to any deference.

Plaintiff also agrees that it had the burden to establish the positive and negative criteria, but Defendant transmogrifies this burden into one of requiring Plaintiff to disprove its unfounded beliefs regarding height and intensity. This is a fundamentally different burden than the law requires. No case law supports it; nothing in the record corroborates it. Instead, given the substantial credible evidence in the record proving Plaintiff's right to the requested relief, Defendant was required to grant the variance.

II. DEFENDANT WAS REQUIRED TO PROVIDE "SIGNIFICANT WEIGHT" TO MANSFIELD'S ZONING, AND FAILED TO DO SO.

Defendant goes to great lengths to minimize the application of Ferraro v. Zoning Bd. of Adjustment, 119 N.J. 61 (1990), to this matter. It grossly overstates its argument that to give the "significant weight" to Mansfield's zoning plan, as required by Ferraro, would effectively abdicate its own zoning authority to Mansfield's governing body, Db14-Db19, something it will not do.

At its core, Ferraro was an appeal of a use variance denied by the Holmdel Zoning Board. On appeal, the trial court ruled that the Holmdel Zoning Board lacked jurisdiction to decide the variance based on a joint resolution that "ceded" zoning authority to Hazlet Township. Id. at 63. The Appellate Division's review determined that municipalities cannot cede zoning jurisdiction, and ultimately "remand[ed] the cause to [Holmdel's] *board of adjustment* for further proceedings *consistent with this opinion*." Id. at 73 (emphasis added). The Court directed that "[i]n exercising its own zoning responsibilities, Holmdel is *obligated to give significant weight* to the zoning ordinance and plan of the adjacent municipality[.]" Id. (emphasis added). Referring to Holmdel's consideration of the "zoning status of the property under the Hazlet ordinance", the Court had "no way of knowing whether its attention to this aspect of the variance application was sufficient." Id. Had the Holmdel Zoning Board provided the deference articulated in the decision during its original hearing, the Court would have had no need to remand the matter.

Plaintiff does not disagree that Ferraro is "protective" of a municipality's authority to zone, and that the Defendant should not surrender its zoning responsibilities to Mansfield. This case did not require it to do so. Moreover, Ferraro demands that Defendant's exercise of zoning authority cannot be done in a vacuum, and that it was "obligated to give significant weight" to Mansfield's

zoning while deciding Plaintiff's application. Similarly, as articulated in Ciocon v. Planning Bd. of Borough of Franklin, 223 N.J. Super. 199 (1988), Plaintiff's Property must be viewed as one parcel, despite being bifurcated by a municipal boundary line, and that the zoning in both municipalities must be considered. Here, the zoning in both towns permitted warehouses and their associated accessory uses. Except for the height of the building, the other bulk standards were the same in both towns. Ja72-Ja73. Defendant ignored these facts. Defendant also ignored the facts that (a) 77% of the development, including the warehouse itself, was in Mansfield, and (b) that Mansfield had already approved same. Ja085-Ja095; 4T 8:5-25; 9:1. Defendant completely ignored its obligation to give "significant weight" to Mansfield's zoning.

III. DEFENDANT UNREASONABLY REJECTED EXPERT TESTIMONY AND MADE CONCLUSIONS UNSUPPORTED BY THE RECORD.

To support its variance denial, Defendant relies up the unproven assumption (not borne of any peculiarly local knowledge) that height is a proxy for intensity of use. This assumption was also used to reject the uncontroverted testimony of Plaintiff's traffic expert, Robert Hoffman, P.E., PTOE. Db20-Db22; and the undisputed testimony of Plaintiff's professional planner, Paul Phillips, PP, AICP, because he failed to provide a "comparative analysis" of the

"differing character" of the warehouses permitted in each municipality. Db25-Db29.

"While a board may reject expert testimony, it may not do so unreasonably, based only upon bare allegations or unsubstantiated beliefs." New York SMSA v. Bd. of Adjustment, 370 N.J. Super. 319, 338 (App. Div. 2004)(emphasis added). While a board "may choose which witnesses, including expert witnesses, to believe[,]" "that choice must be reasonably made." Id. (citations omitted). "In addition, the choice must be explained, particularly where the board rejects the testimony of facially reasonable witnesses." Bd. of Educ. of City of Clifton v. Zoning Bd. of Adjustment of City of Clifton, 409 N.J. Super. 389, 434-35 (App. Div. 2009)(citing Kramer, 45 N.J. at 288).

The rejection of both experts was arbitrary, unreasonable and capricious.

A. REJECTION OF ROBERT HOFFMAN, P.E., PTOE.

Defendant claims that the traffic testimony presented by Mr. Hoffman did not establish that the traffic generation for the proposed structure, located entirely in Mansfield, is equivalent to the traffic generated by a building that conforms to Florence's height restriction. Db20. No such proof was ever required on these facts. Nevertheless, the industry standard for trip generation, the Institute of Transportation Engineers ("ITE") Trip Generation Manual, does not include height as a variable for calculations. (2T 30:10-25; 31:1-6; 4T 33:19-

25 to 36:1-12). In layman's terms, this means that as far as the ITE is concerned, the height of a warehouse does not impact the volume of traffic is generates.

To rationalize its assumption, Defendant recites Mr. Hoffman's testimony on height not being a variable in the ITE data. Db21-Db22. Defendant reads this testimony in isolation to come to the illogical conclusion that since the ITE does not include height as a data point, Hoffman cannot "change or examine" the data to create a "comparative analysis." Db21. This is exactly the point conveyed by Mr. Hoffman: height is so immaterial to ITE traffic generation calculations that the authoritative industry standard does not include it as a variable. As Mr. Hoffman, an accepted expert in traffic engineering, concluded, the lack of a data point illustrates that height is irrelevant, and therefore traffic generation calculations would not change for a taller building. Defendant wants a different analysis of the impact of height on traffic, but there is no evidence to support same. Defendant therefore rejected the industry standard data, and doubled down on its "unsubstantiated beliefs" regarding height and intensity.

B. REJECTION OF PAUL PHILLIPS, PP, AICP.

Defendant claims that it rejected Mr. Phillips' planning testimony because he did not provide a "comparative analysis" of the warehouse uses permitted in Mansfield's ODL and Florence's SM Zones. Db27-Db28. Said another way, the Defendant rejected all of his testimony because he did not compare the

differences in the warehouses and types of warehouses permitted in the two zones. Id.

This conclusion ignores the elephant in the room—warehouses and the accessory uses sought are the same, and are permitted in both zones. And, unlike the ITE, neither town distinguished between different types of warehouses. Moreover, this specific Property, and the land surrounding the Interstate 295 and Florence-Columbus Road Interchange, was targeted for this very type of development. Just a few years earlier, it was projected by both the County of Burlington and Florence Township to produce 1.55 million square feet of warehouse and distribution space. Ja215; 4T 72:9-25 to 75:1-14. If Defendant wanted a comparative analysis regarding the two zones, it already had it, as the zoning requirements for Mansfield's ODL and Florence's SM Zones were shown on the site plans. Ja73.

Defendant unreasonably expected Plaintiff to "unpack the respective ordinances" (Db29), but there was nothing to unpack. Defendant was obligated to give "significant weight" to Mansfield's zoning requirements, which, except for the height of the building in Mansfield, were the same. Again, through its dependence on the preconceived and factually unsupported theory that height is a proxy for intensity of use, Defendant unreasonably rejected Mr. Phillips' planning testimony.

IV. THE DRIVEWAY IS HEIGHT NEUTRAL AND THE LOCATION MUST BE IN FLORENCE.

Mr. Hoffman's traffic testimony further established that the driveway is height neutral. In an attempt to justify its denial of this variance application for permitted uses accessory to a permitted principal use located in the adjoining municipality, Defendant relies on the traffic generated by the site's access driveway. Db13. The only reason Defendant can make this convoluted argument is because the driveway *is* located in Florence; if the driveway was in Mansfield, Defendant's entire argument falls apart as there is no question that the remaining accessory uses are calculated by square footage. Ja097; Ja146; Ja158-Ja159; 4T 9:5-25. The driveway's location in Florence means everything, as it is the "Jenga" block upon which Defendant's entire argument is built.

A glance at the project's site plan illustrates the proximity of Mansfield's border to the Interstate 295 interchange. See Ja72-Ja73. Simply put, the driveway has to be in Florence for reasons of safety and functionality. (1T 34:2-23; 2T 77:12-18). Defendant bases its argument on the following line of logic: the driveway is in Florence, cars will leave that driveway and travel through roads also in Florence, traffic is a function of intensity of use, increased height increases intensity of use, the building in Mansfield is taller than permitted in Florence, and therefore it will be a more intense use with more traffic that will travel roads in Florence. This entire theory is a farce, not only unsupported by

reality, or any evidence in the record, but actually contradicted by them. Whether the driveway is placed in Mansfield or Florence, the traffic impact will remain unchanged.

The driveway location is simply a product of the proximity to the interchange and the artificial municipal boundary line, which bifurcates the Property. The site must be viewed as one parcel, and the only reason Defendant can conjure its argument is because of the placement of the boundary line. This is the epitome of arbitrary and capricious.

Even if the Court accepts the fickle string of logic that causes Defendant to consider the driveway's impact, substantial credible evidence in the record established that the vast majority of traffic will be moving towards Interstate 295, and *away* from Florence. In fact, 80% of the site's traffic will exit east, a distance of 1,600 feet, into Mansfield to access Interstate 295, and the other 20% will travel west along Florence-Columbus Road (County Route 656) to Route 130 to access the New Jersey Turnpike–Pennsylvania Extension. (2T 35:2-13, 36:9-19, 37:17-21). All of this traffic will be on, and/or moving towards Interstate 295, Route 130, the New Jersey Turnpike, and Florence-Columbus Road; all roads within the jurisdiction of the State or County, and not the municipality. Id.

The reality is, the same traffic will be on the same roads traveling in the same directions, regardless of which side of the municipal boundary the driveway is placed. Defendant's argument arbitrarily and capriciously contradicts the principles outlined in Ferraro and Ciocon.

Defendant also urges that the term "principal use" has greater meaning than its own zoning ordinance provides. Db13. Section 91-3 of the Florence Township Code defines "principal use" to mean "the main purpose for which any lot or building is used." Here, the main purpose for the lot, under the "permitted uses" provision of the ordinance, is for a warehouse. Since Florence Township does not define "accessory use", resort to the definition adopted in Nuckel is appropriate:

> As a general rule, a driveway is considered an accessory use. Mountain Hill, LLC v. Zoning Bd. of Adjustment of Middletown, 403 N.J. Super. 210, 243 (App. Div. 2008) ('Driveways are so ineluctably incidental to any main structure and so customary for all structures that they are permitted accessory structures and uses in every zone'); Wolf v. Zoning Bd. of Adjustment of Park Ridge, 79 N.J. Super. 546, 550-51 (App. Div. 1963) ('[L]and used as a means of access to…a business [] is in a use accessorial to the business and thus is itself in legal contemplation [of] being used for the business purpose in question.'). Further, there is commentary to the effect that a use may be characterized as accessory to a use on another lot. Nuckel v. Little Ferry Planning Bd., 208 N.J. 95, 104 (2011).

Defendant, however, seeks to rewrite not only this case law, but the definition of "principal use" in its own ordinance. It argues that an undefined

"character" of the use determines whether the driveway is actually accessory to the warehouse.

> Since the accessory uses and structures in Florence, most especially the driveway, will be used for 'the business purpose in question' and thereby take on the character of that use, it is imperative that the Board fully understand and weigh the nature of that business purpose in order to measure the particular suitability of the lands in Florence for the structures and uses accessory to that use and to assess the effect of the use on the zone plan and the public good. Db13.

In other words, Defendant wants the court to ignore that driveways, stormwater basins, and parking spaces are accessory uses to the principal (and permitted) warehouse use, but to instead consider other things, undefined, which go to the "character" of that warehouse. The Defendant also wants the Court to ignore the advice of its own planner that these are permitted accessory uses in this SM zone. Ja146. The Defendant further wants the Court to ignore the fact that, just a few years earlier, the County of Burlington, in conjunction with the Township of Florence, recognized that this tract was zoned to generate 1.55 million square feet of warehouse and distribution space. Ja215; 4T 72:9-25 to 75:1-14. And, given the close proximity of this tract of land to the Interstate 295 interchange "on and off ramps", the only driveway that could access this singularly owned parcel of land (notwithstanding its bifurcation by a municipal boundary line) is on the Florence side of the property. (2T 77:12-18; 1T 34:2-24).

The driveway use is indeed accessory to the warehouse use and there is no other "character" which needs to be imagined or invented in order to reach that conclusion. However, under Nuckel, since there is no building on this part of the tract for the driveway to access, it becomes a principal use. Thus the requested variance.

V. DEFENDANT READS THE WORD "TRAFFIC" INTO THE MASTER PLAN, AND THE RELATED CONCLUSIONS ARE UNSUPPORTED BY THE DOCUMENTS ITSELF.

Defendant argues that traffic was a consideration in the 1999 Master Plan, and the height differentials between Florence's SM and GM Zones was intended to reduce intensity, and therefore traffic in the SM Zone. Db29-Db34. Unfortunately for Defendant, the word "traffic" does not appear in the relevant portion of the Master Plan. Ja122-Ja124. Defendant also assumes that the differential between the heights permitted in Florence's SM and GM Zones was a method to limit intensity of use. But the Master Plan is also silent on height. Id. Defendant's attempt to draw the conclusion that "[h]eight, clearly is an expression of 'magnitude'" (Db32), is unsupported by the document itself and by any evidence in the record.

Defendant then discusses and quotes Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41 (App. Div. 2004), and argues that the differential in height between the SM and GM Zones was a method to limit intensity for the

SM Zone. Db32-Db34. Plaintiff does not disagree with Grasso's proposition that "[h]eight restrictions…***can*** also be a technique for limiting the intensity of the property's use[,]" but there is no evidence that it was intended to limit intensity and therefore traffic, in Florence's SM Zone. Id. at 52-53 (emphasis added). While height *can* be a method for limiting intensity, there is no evidence that it *is* intended to limited intensity in this case, especially when the explicit language in the Master Plan does not support the Defendant's interpretation, and where the proposed building is not even in Florence Township. And again, this is not a height variance case.

VI. THE STANDARD ARTICULATED IN COVENTRY SQUARE FOR PERMITTED USES SHOULD APPLY TO THIS MATTER.

Plaintiff agrees that extension of the standard articulated in Coventry Square v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285 (1994) and the subsequent line of cases would be a new standard for (d)(1) use variances sought for permitted accessory uses that become principal as a result of a municipal boundary line location. Such extension would, nevertheless, be appropriate and consistent with Coventry's subsequent line of cases.

It is important to note that at no point does Plaintiff argue that Grasso's standard for (d)(6) height variances should apply to this case. Instead, the reasoning of the Coventry Square progeny, should apply. And, if the Court does not extend the Coventry Square standard to these types of variances, substantial

evidence in the record nevertheless still supports approval under Medici v. BPR Co., 107 N.J. 1 (1987).

Defendant urges that

> Coventry and its progeny call for proofs '…relevant to the nature of the deviation from the ordinance.' Pb 25 quoting Coventry, supra at 297-98. … Plaintiffs never presented any proofs about the purposes of Florence Township's prohibition of accessory uses without a principal use on the same lot, how Plaintiffs' proposed development does not offend those purposes, or how Plaintiffs' site '…. will accommodate the problems associated with the use even though the proposal does not comply with the ordinance established to address those problems." Pb26 citing Coventry supra at 288-299. Plaintiffs' expert planner… never even mentioned the purposes of Florence Township's prohibition of accessory uses without a principal use on the same lot. Db23-24.

There are no such purposes. There is no such thing. The argument is pure fiction. Nothing in Florence Township's zoning ordinances even reference a prohibition against accessory uses without a principal use on the same lot. This outcome is a judicial construct arising from the Court's decision in Nuckel, 208 N.J. at 102-05. Nuckel dealt with the question of whether a driveway proposed to be built on one lot to provide access to a business use on a separate lot was an accessory use or a principal use. Little Ferry's zoning code defined an accessory use as "a use which is customarily incidental and subordinate to the principal use of a lot or a building which is located on the same lot." Florence Township does not define "accessory use." It therefore accepts the general law, as articulated in Nuckel that "as a rule…a driveway is considered an accessory

use." Id. at 104; Ja146. Because there was no principal use or principal structure on the lot upon which the driveway was to be constructed to which it could be deemed "accessory", the Court determined that since it was the only use to be put on that lot, it became the principal use. Such is the case here, where the building is proposed on the Mansfield side of the property, and the driveway, along with the otherwise permitted accessary stormwater basins and parking spaces, become the principal uses on the Florence lot.

Nothing in Florence Township's ordinances, however, speak to this. There are, therefore, no "purposes of Florence Township's prohibition of accessory uses without a principal use" to be discussed. No expert needed to testify to same. No proofs were required for same. Case law created the need for the variance. Defendant's argument lacks merit.

CONCLUSION

For the reasons set forth herein, as well as those pressed in Plaintiff's original submission, the Defendant's decision to deny these variances requires reversal, and that the Court grant same.

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