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OLDMANS CREEK HOLDINGS, LLC, Appellant, vs. THE JOINT LAND USE BOARD OF THE TOWNSHIP OF WOOLWICH, Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No A-001402-24 On Appeal from Superior Court of New Jersey Gloucester County-Law Division Docket No. GLO-L-177-24 Sat Below: Benjamin C. Telsey, A.J.S.C.

BRIEF OF APPELLANT, OLDMANS CREEK HOLDINGS, LLC

On the Brief: Jamie A. Slimm, Esq.

Of Counsel: Clint B. Allen, Esq.

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PRELIMINARY STATEMENT

Municipalities set forth zoning districts and development requirements. When a developer meets all those requirements—presenting a variance free, design waiver free, by-right application for Preliminary Major Site Plan Approval—the reviewing Planning Board may not arbitrarily reject the request in an effort to quell authorized development. Here, the trial court's affirmance of the arbitrary, capricious, and unreasonable denial of the application filed by Oldmans Creek Holdings, LLC ("Oldmans") by the Joint Land Use Board of the Township of Woolwich ("Board") must be reversed. The trial court mistakenly upheld the Board's denial based upon speculative concerns about ingress and egress focusing on what it labeled a "stale" traffic study and suggesting the intensity of use is "unknown." These determinations ignored unrefuted facts that: (1) the expert traffic study prepared by Oldmans and accepted by the Township's traffic engineer, included an accurate representation of the traffic and would be supplemented in Oldmans future application for Final Major Site Plan Approval, as requested by the Board and (2) the intensity of use was accurately depicted in the Application, traffic study and testimony of Oldmans' professionals. Moreover, the County of Gloucester, the entity having jurisdiction over frontage road improvements, took no issue with the traffic study or the proposed roadway improvements.

Further error resulted because the trial court did not review Oldmans' challenges to the Board Resolution, which was factually inconsistent with hearing evidence. Even though all evidence evinced the Board was authorized by the Municipal Law Use Law ("MLUL") to grant Preliminary Major Site Plan Approval for Oldmans' by-right, variance and design waiver free Application, instead the adopted Resolution recited bases never raised or supported by competent evidence and relied on concerns over which the Board does not have authority.

For reasons set forth herein, following review of the record, this Court is requested to reverse the trial court and direct the matter to the Board for adoption of a Resolution approving the Application for Preliminary Major Site Plan Approval, with customary and reasonable conditions of approval.

PROCEDURAL HISTORY

On June 29, 2023, August 2, 2023, and November 16, 2023, the Board held properly noticed public hearings for the Application seeking Preliminary Site Plan Approval. (1T, 2T, 3T)[1]. At its November 16, 2023 meeting, the Board voted to

[1] The following references will be used throughout the brief:
"1T" shall refer to the transcript of the June 29, 2023 Hearing.
"2T" shall refer to the transcript of the August 2, 2023 Hearing.
"3T" shall refer to the transcript of the November 16, 2023 Hearing.
"4T" shall refer to the Transcript of Prerogative Writs Oral Argument held on September 10, 2024.

deny the Application. (3T). On December 21, 2023, the Board adopted a Resolution of Approval memorializing the denial ("Resolution"). (Pa284). On February 12, 2024, Oldmans filed an action in lieu of prerogative writs challenging the Board's decision to deny the Application. (Pa1). On April 10, 2024, the Board answered the complaint. (Pa322).

Following briefing and argument, the trial court entered a September 27, 2024 Order denying the relief requested in Counts I, II and III of Oldmans' complaint. (Pa356).

On October 17, 2024, Oldmans moved for reconsideration. Following briefing and argument, the trial court entered a November 25, 2024 Order denying the motion. (Pa358). The remaining Counts IV and V of the complaint were dismissed with prejudice on January 13, 2025. (Pa360). On January 16, 2025, Oldmans timely filed the instant appeal. (Pa361).

STATEMENT OF FACTS

Oldmans is the developer of real property located in the Township of Woolwich, Gloucester County consisting of approximately 70.17 +/- acres located at 1314 and 1366 Auburn Road, known as Block 28, Lots 3 and 4 on the Official Woolwich Township Tax Maps (the "Property").

"5T" shall refer to the Transcript of Oral Argument on Motion for Reconsideration held on November 19, 2024.

On August 21, 2023, Oldmans filed an application with the Board requesting Preliminary Major Site Plan Approval and Final Major Site Plan Approval ("Application"), to allow for the development of a single 854,450 +/- square foot warehouse and related site improvements ("Project"). (Pa27) Subsequently, Oldmans withdrew its request for Final Major Site Plan Approval limiting the Application before the Board to the requested Preliminary Major Site Plan Approval. When the Application was submitted, the Property was located in a Light Industrial Office ("LIO") Zoning District, which expressly permits warehouse development.[2]

Oldmans carefully designed a variance-free, by-right Site Plan Application, fully consistent with the LIO zoning criteria, as well as all other applicable design criteria set forth in the Township of Woolwich Zoning Code. The Application was extensively reviewed by the Board Engineer, the Board Planner, and the Board Traffic Engineer. (Pa55-Pa78). Oldmans responded to each Board professional comment by written response letters, including those related to the traffic impact study. Id. Thereafter, on September 19, 2022, the Board deemed the Application complete for review and consideration. Based on the Board's determination of

[2] Subsequent to the filing of the Application, the Township Committee of the Township of Woolwich adopted Ordinance No. 2023-08, that changed the Property zoning designation from LIO to 5A Five Acre Residential Zoning.

completeness, Oldmans proceeded with its Application for development consistent with the LIO zoning criteria.

Properly noticed public hearings were conducted on June 29, 2023, August 2, 2023, and November 16, 2023 (collectively, the "Hearings"). (1T, 2T, 3T). Oldmans presented extensive testimony from seven (7) witnesses.

Oldmans' Site Civil Engineer, Keith Ottes, provided testimony as to how the Project complies with each of the forty-three bulk and area criteria of the Woolwich Township Zoning Code generally and the LIO Zone specifically. He explained a proposed two way stop sign controlled the driveway at the southern end of the Property ("Driveway 1") and the right turn only stop sign controlled the exit at the northern end of the Property ("Driveway 2"). (1T44-1 to 66-1). During this portion of Ottes' testimony, Board member Mayor Frederick and former Board member Marino expressed the need for an acceleration lane for the north bound traffic exiting the Project via Driveway 2. (1T53-17 to 19; 1T56-22 to 25; 1T57-1 to 7). Specifically, Board member Mayor Frederick asked, "[t]here is no merge lane, so they're going to go from zero to 50 to not provide obstacles with traffic headed north?" (1T53-17 to 19). In response, Ottes confirmed that Driveway 2 (depicted on Oldmans' Hearing Exhibit A-4 and Exhibit A-10), did not include an acceleration lane as part of its design. (1T54-4 to 6). Ottes clarified that drivers using Driveway 2 must stop at the driveway stop sign then wait for on-coming north bound traffic to pass before making a right hand turn to exit the site and enter Auburn Road. (1T54-10). Importantly, Applicant's Exhibit A-4 and Exhibit A-10 depicting the site access presented to the Board do *not* depict an acceleration lane as part of the Driveway 2 design. (Pa79). Former Board member Marino further suggested: "Without an acceleration lane, that car's really at a disadvantage when they top that hill and the trailer is in front of them." (1T57-5 to 7). It was clear from testimony that Board members Frederick and Marino were insisting Oldmans revise the stop sign controlled, right turn out only Driveway 2 design to become an acceleration exit lane. (1T53-17 to 19; 1T57-5 to 7).

Oldmans' Traffic Engineer, Daniel Disario, who worked on hundreds of millions of square feet of warehouse projects throughout the country, extensively testified regarding traffic issues and explained why an acceleration lane was not included with the Driveway 2 design. (1T80-9 to 25; 1T81-1 to 25; 1T82-1 to 3). Disario testified it is not uncommon to design a stop-controlled driveway without an acceleration lane, (1T81-24 to 25), and he "does not particularly like acceleration lanes" but instead prefers a stop sign controlled design used for Driveway 2. (1T80-13 to 16). Disario testified the Driveway 2 stop sign controlled driveway design, is safer than an acceleration lane. (1T80-23 to 25; 1T81-1 to 23).

Oldmans' experts also provided testimony, including but not limited to an extensive analysis of anticipated off-site, off-tract traffic generated by the Project and Oldmans' proposed improvements to address them. This testimony was further supported by numerous exhibits introduced at the hearings. (Pa79). Oldmans' professionals collectively provided testimony that the proposed Preliminary Major Site Plan complies with the applicable Township of Woolwich Zoning Code criteria and no variances were required.

In Board discussions, Mayor Frederick stated, "First off, the courts have said that a planning board may deny a site plan application if the ingress and egress proposed by the plan creates unsafe and inefficient vehicular circulation. This is Shim versus Washington Township Planning Board..." (3T241-7 to 12). He added, "A planning board should consider offsite traffic flow and safety in reviewing proposals for vehicle ingress and egress from a site. This is from Sheston Oil Company v. Avalon 214 N.J. Super 593, 598." (3T241-13 to 17). "In addition, Section 149-5.A of the Woolwich code states that in reviewing any site plan, the board shall consider numerous elements. This says access to the site from adjacent roads shall be designed as to not interfere as little as possible the traffic flow on these roads and to permit vehicles a rapid and safe ingress and egress to the site. So again, the concern is the ingress and egress is not designed sufficiently based on the location where it resides." (3T241-18 to 25; 3T242-1 to 3).

Despite these general declarations of authority, Frederick never articulated an actual reason why the off-site traffic flow, on-site vehicular traffic circulation or stop-sign controlled, no acceleration lane design of Driveway 2 was problematic or even insufficient. Id. Even the Board's solicitor expounded on the legal authority to assist Fredericks advising, "The ingress and egress is the jurisdiction of the County, and the egress and ingress that has been provided by the applicant meets our ordinance." (3T246-14 to 17).

Fredericks persisted, urging a need for an updated traffic study before he would accept Oldmans' air modeling analysis and expert testimony, notwithstanding the Board's lack of authority on the matter because issues such as air pollution control rest under the jurisdiction of the New Jersey Department of Environmental Protection, under its ambient air quality standards. (3T242-4 to 22). Interestingly, during the June 29, 2024 hearing Fredericks asked if Oldmans would prepare an updated traffic study, and Oldmans agreed as a condition of the Board's Approval of the Preliminary Major Site Plan Application. (1T110-11 to 15; 1T111-14 to 21).

No testimony or documentary evidence was presented by the public or the Board's experts to refute Oldmans' experts' testimony and evidence. Additionally, the Board did not suggest that the Application be denied because of a stale traffic study or because Oldmans did not yet have a tenant for the building. The only request was for Oldmans to further update the traffic study as a condition of approval or with its submission of the future application for Final Major Site Plan Approval. Nonetheless, three of the six Board members present at the November 16, 2023 hearing voted "no" on the motion to approve the application. (3T251-9 to 25; 3T252-1 to 7). Because of the resultant tie vote, the motion failed and the Application was denied. (3T252-8 to 9).

The Planning Board subsequently adopted Resolution No. 2023-43 on December 21, 2023, memorializing its decision to deny the Application. (Pa545). In a revisionist after-the-fact attempt to cure the deficiencies of the decision, Resolution No. 2023-43 incorrectly recites the Board's alleged reason for denying the Application. More specifically, the stated "reason" delineated in the Resolution is based on an alleged finding that Oldmans proposed an acceleration lane for its Driveway 2 access to Auburn Road, a County road, which allegedly creates an unsafe condition.

In his review, the trial judge ignored the Board's apparent reliance on issues falling under the authority of the state or County. Additionally, the judge did not address the Board's erroneous basis for denial stated in the adopted Resolution, which completely distorted and wrongfully misstated the submitted design for Driveway 2.

LEGAL ARGUMENT

I. Standard of Review.

The New Jersey Municipal Land Use Law states that "[t]he planning board shall, if the proposed development complies with the ordinance and this act, grant preliminary site plan approval." N.J.S.A. 40:55D-46.b. It is well-established under New Jersey law that a reviewing court must overturn "arbitrary, capricious or unreasonable" municipal actions. Cell South of N.J., Inc. v. Zoning Bd. of Adjustment of West Windsor Twp., 172 N.J. 75, 81 (2002) (quoting Medici v. BPR Co., 107 N.J. 1, 15 (1987)). This standard recognizes considerations of deference to the actions of municipal boards because of their familiarity with local conditions. Simeone v. Zoning Bd. of Adjustment of Twp. of E. Hanover, 377 N.J. Super. 417, 426 (App. Div. 2005) (citing Kramer v. Bd. of Adj., Sea Girt, 45 N.J. 268, 296 (1965)). See also, N.J. Shore Builders Ass'n v. Twp. of Jackson, 199 N.J. 38, 55 (2009) (acknowledging municipal actions are "presumptively valid"). The court is not to determine if a Board "decision was wise or unwise." Ne. Towers, Inc. v. Zoning Bd. of Adjustment of Borough of W. Paterson, 327 N.J. Super. 476, 493 (App. Div. 2000) (citing Kaufmann v. Planning Bd. for Warren Twp., 110 N.J. 551, 558 (1988)).

Yet, the law recognizes the presumption of validity afforded to municipal action is by no means absolute. Spring Lake Hotel & Guest House Ass'n v.

Borough of Spring Lake, 199 N.J. Super. 201, 210 (App. Div. 1985). All Board actions must be evidentially supported and factual findings of a board must be rejected where there is insufficient evidence to support them. Pullen v. Twp. of S. Plainfield Planning Bd., 291 N.J. Super. 1, 7 (App. Div. 1996). A challenger overcomes the need to defer to Board determinations when the challenged action is revealed as arbitrary, capricious or unreasonable. Spring Lake Hotel & Guest House Ass'n, 199 N.J. Super. at 208.

Arbitrary and capricious action is "typically understood to mean 'willful and unreasoning action, without consideration and in disregard of circumstances.'" Avalon Manor Improvement Ass'n, Inc. v. Twp. of Middle, 370 N.J. Super. 73, 91 (App. Div.), certif. denied, 182 N.J. 143 (2004) (quoting Beattystown v. Department of Envtl. Prot., 313 N.J. Super. 236, 248 (App. Div. 1998)). A "determination predicated on unsupported findings is the essence of arbitrary and capricious action." Bryant v. City of Atl. City, 309 N.J. Super. 596, 610 (App. Div. 1998) (citing In re Boardwalk Regency Casino Licensing Application, 180 N.J. Super. 324, 334 (App. Div. 1981), modified on other grounds, 90 N.J. 361 (1982)).

Such is the case in the matter at bar.

II. The Trial Court Erred In Failing To Weigh The Unequivocal Factual Record Supporting the Application. (4T29-18 to 36-1; 5T19-3 to 23-8).

The trial court erroneously found that the Board's denial was not unreasonable. The judge's analysis focused on what he characterized as a "stale" traffic impact study and his speculation on the "unknown" intensity of the proposed warehouse use. The trial court's review ignored the evidence showing the Application met all of the criteria of the MLUL and did not address Oldmans challenges that the unrefuted evidence in the record showed the Resolution's findings and conclusions were inaccurate and just plain wrong.

New Jersey courts have routinely held planning boards have a "circumscribed" role in considering site plan applications, with the "object of site plan review [being] to assure compliance with the standards under the municipality's site plan and land use ordinances." Shim v. Washington Twp. Planning Bd., 298 N.J. Super. 395, 411 (App. Div. 1997). See also N.J.S.A. 40:55D-46.b. Importantly, the MLUL states in no uncertain terms that "[t]he planning board *shall*, if the proposed development complies with the [municipal site plan] ordinance and this act, grant preliminary site plan approval." (Emphasis added). This circumscribed role is reflective of the legislative intent behind the MLUL to create "consistency, uniformity, and predictability in the development approval process." W.L. Goodfellows and Co. of Turnersville, Inc. v. Washington Twp. Planning Bd., 345 N.J. Super. 109, 115 (2001) (internal quotations omitted) (quoting Pizzo Mantin Group v. Twp. of Randolph, 137 N.J. 216, 229 (1994)). As such, denial of a site plan application is considered a "drastic action" where the relevant ordinance standards are satisfied. Shim, 298 N.J. Super. at 411 (citing Dunkin' Donuts of New Jersey, Inc. v. Twp. of North Brunswick, 193 N.J. Super. 513, 515 (App. Div. 1984); Lionel's Appliance Ctr., Inc. v. Citta, 156 N.J. Super. 257, 269 (Law Div. 1978)). See also Shakoor Supermarkets, Inc. v. Old Bridge Twp. Planning Board, 420 N.J. Super. 193, 200 (App. Div. 2011) ("When, as here, a planning board reviews a site plan application, it has limited discretion and typically must grant the application if the proposal complies with local ordinances and the [MLUL]"). A planning board's discretion to assure compliance with municipal site plan and land use ordinances was "never intended to include the legislative or quasi-judicial power to prohibit a permitted use." Id. (citing PRB Enter., Inc. v. South Brunswick Planning Board, 105 N.J. 1, 7 (1987)).

To ensure planning boards do not wield such legislative or quasi-judicial powers, courts reverse denials of site plan applications except in very limited circumstances, none of which are applicable here. A denial is appropriate when an application fails to conform to applicable zoning and site plan ordinances. See Pizzo Mantin Group, 346 N.J. at 228-29. Also limited exceptions upholding denial result when the application "lacks specificity" such as the "fail[ure] to provide pertinent information sufficient to assess the adequacy of a stormwater management plan," W.L. Goodfellows and Co., 345 N.J. Super. at 116 (citing Morris Cnty. Fair Housing Council v. Boonton Twp., 228 N.J. Super. 635, 642 (Law Div. 1988)), or the absence of addressing existing issues having a "pervasive impact on the public health and welfare in the community," Field v. Mayor and Council of Franklin Twp., 190 N.J. Super. 326, 333 (App. Div. 1983).

To uphold a denial in the case at bar would create chaos in the orderly handling of land use applications by allowing the Board to deny an otherwise conforming application by citing speculative concerns about traffic and intensity of use.

Here, the Resolution, lists its "reasons" for the denial incorrectly finding: (i) Oldmans proposed an acceleration lane for its Driveway 2 access to Auburn Road, a Gloucester County road, allegedly creating an unsafe condition; and (ii) the widening of the shoulders on Auburn Road as required by the Gloucester County Planning Board could encourage trucks to sit in the shoulder and create a potential for accidents. The Resolution's conclusions specifically state:

> 40. The JLUB determined that the Applicant had failed to establish that the trucks entering and existing the site (ingress/egress) can do so safely and without causing major traffic concerns along Auburn Road .... Tractor trailers are likely to exit the site without stopping at the exit, enter onto the acceleration lane, without having properly yielded to traffic along Auburn Road. This has the real and significant probability of causing accidents along Auburn Road.

> . . . .
>
> 41. [T]hat the widened shoulder to the left of Driveway #1 encourages tractor trailers to sit on the roadway, idle and wait before entering the facility. This has the significant potential for causing accidents along Auburn Road.
>
> . . . .
>
> 42. Additionally, the JLUB determines that the configuration, grading, speed limit, light of sight and heavy traffic on Auburn Road makes it unsafe for tractor trailers to exist from the site onto Auburn Road.
>
> [(Pa312-313).]

Those "reasons" rely on facts not in the record and ignore the advice of the Board solicitor that, "[t]he ingress and egress is the jurisdiction of the County, and the egress and ingress that has been provided by the applicant meets our ordinance." (3T246-14 to 17). Even the written review and hearing testimony of the Board's traffic engineer, Derek Kennedy, P.E., PTP never asserted the proposed stop-sign control Driveway 1 or Driveway 2 design would create unsafe site egress or ingress conditions. Moreover, he acknowledged the review and approval on modifications to the County road rested with Gloucester County. (Pa307). Kennedy's May 3, 2023 traffic review suggested an analysis of whether deceleration and acceleration lanes are required at the site driveways, (Pa307), which needed to be coordinated with Gloucester County for review and approval. Further, during the August 3, 2023 hearing, Kennedy agreed any issues with acceleration or deceleration lanes associated with the site entrance "ultimately, that's a county issue…." (2T143-3 to 5; 3T145-2 to 4). Accordingly, the Board finding of unsafe ingress or egress is wholly unfounded.

The Application was a by-right, variance free, design waiver free application, which conformed with all requisites of the MLUL and applicable Township of Woolwich zoning ordinance criteria. The testimony provided by Oldmans' experts was comprehensive and confirmed the nature and extent of the Application. The testimony only reinforced that the design provided safe egress. Several Board members, the Board solicitor, and its professionals confirmed that the Application was variance free and compliant. ("They're taking the position that there are no variances required. [The Board Planner] and I . . . we both believe that is correct.") (3T225-16 to 19).

In light of this evidence, the trial court should have evaluated the record and concluded the Board arbitrarily denied the Application. Instead, in his oral opinion, the judge "solely focus[ed], and [his] decision solely focuse[d] [o]n [the] ingress and egress determination" and concluded Board's decision was not arbitrary, capricious and unreasonable. (4T31-22 to 24).

The trial court identified the need "to perform a traffic study to see the volume of traffic." (4T32-15). Without identifying supporting evidence, the judge determined the traffic study Oldmans provided was insufficient, suggesting the date of the study reflected "a period of time in which one could reasonable conclude the traffic was lighter." (4T32-17 to 19). The judge referenced possible subsequent development and his view of the Board's concern for "the extent of the traffic that would be passing past driveway two, which reasonably could affect whether or not the full stop is the safest way for ingress [sic] and egress." (4T33- 9 to 10). He also recognized Oldmans did not have a proposed tenant, which the judge agreed was "not uncommon" (4T33-20); however, he assumed this affected the intensity of use, which "goes directly to the ingress and egress and what would be safe ingress and egress." (4T33-24 to 25). Based on these incorrect and erroneous assumptions, contradicted by record evidence, the trial judge affirmed the Resolution, declining to consider further challenges raised by Oldmans. (4T35-21 to 36-1). As discussed in the sections that follow, the trial court's findings and conclusions cannot withstand appellate review. Therefore, its order must be reversed.

III. The Trial Court's Flawed Finding The Traffic Study Was Stale And Inaccurate Ignored The Factual Record. (4T29-18 to 36-1; 5T19-3 to 23-8).

In denying the Application, the Board alleged that Oldmans traffic study was outdated and not representative of the actual traffic at the Property. The trial court affirmed on the same grounds. Both the Board and the trial court overlooked evidence in the record which confirmed the traffic study was updated and representative of the actual traffic at the Property. Importantly, this Application was for Preliminary Major Site Plan Approval and Oldmans stipulated it would further update the traffic study, as part of its future application for Final Major Site Plan Approval.

Consistent with the Township of Woolwich Land Use Code Section 23-33, the Application filed with the Board included a Traffic Impact Study ("TIS") dated March 2022, prepared by its traffic engineer, Dan Disario. (Pa27). Subsequently, Oldmans filed a supplemental Application, which included a July 22, 2022 TIS along with March 27, 2023 revisions, to address review comments by the Board's Traffic Engineer, Derek Kennedy. (Pa71). Oldmans also submitted May 19, 2023 correspondence, responding to each of Kennedy's comments listed in his March 8, 2023 review. (Pa71). The TIS, review letter and response were all made part of the record before the Board. (Pa79).

During the Hearings, Kennedy testified citing these submissions and confirmed Oldmans replied to his comments:

> MR. KENNEDY: So I'll start, I'll just give a little re[c]ap on the back and forth on the Traffic Impact Study and the review of correspondence that happened.
>
> The applicant completed an original TIS in March of 2022. They updated in March of 2023. We reviewed that latest TIS and we issued a letter dated May 3rd. We had 26 comments. I think I can be concise, I recall 26.

> They responded a couple of weeks later with a letter May 19. I would say some of those comments were satisfied, technical information was resubmitted.
>
> There was [sic] other comments that I would say remained outstanding, technically disagreed. They may have been more of a county issue. But I think where we stand now, there's some remaining comments that I have, and most of the issues have been addressed.
>
> [(2T138-9 to 139-2).]

In its opinion affirming the Board's denial of the Application, the trial court stated since traffic was evaluated in 2021, one could reasonably assume that traffic was lighter, presumably referencing a slowdown resulting from the COVID pandemic. (4T32-16 to 18). The court found the Board had "a reasonable concern" regarding the volume of traffic passing the Property such that the stop sign controlled Driveway 2 may not be the safest means of motor vehicle egress to Auburn Road. Id.

Both the Board and the trial court overlooked the fact the TIS was revised on March 27, 2023, in response to Kennedy's review comments regarding school traffic. The updated information included traffic count data, obtained on Thursday, October 7, 2021, from 6:00 am to 9:00 am and 2:00 pm to 6 pm. – a period after New Jersey Governor Phil Murphy issued Executive Order 175 rescinding certain COVID-19 pandemic restrictions, directed to reopening of schools. Specifically, Oldmans' traffic expert stated, "[W]e confirmed, schools were back in session under normal conditions." (1T88-2 to 5).

Additionally, it is important to recognize Oldmans' traffic expert used conservative estimates for the amount of traffic that were higher than the likely actual volume for this Project. Moreover, Kennedy, the Board's traffic engineer agreed the estimated volume of traffic in Oldmans' TIS was "likely high" and the traffic study "accurately depicted" the traffic at the Property.

> MR. KENNEDY : ...
>
> I would say the bulk that remains in our letter and everything else has been addressed, and I would say that there was a lot of discussion also at the past hearing about trip generation, and the applicant's traffic engineer kind of mentioned that the traffic proposed for this site is probably less than what the site's really going to generate, right, and that may be true, but I want to point, **I think we agree that the volumes that are in the [TIS] are accurate.** They may be high, but this is a planning exercise, so I don't think we would assume that they would be less. **I think they're high.** The standards have some factor in there that there is a little bit of unknown. We don't know who the tenant is.
>
> **So I do agree for the site and the amount of traffic that is generated, I think we have an accurate depiction of that with where the traffic study is right now.**
>
> [(2T145-24 to 146-17). (Emphasis added).]

Despite this clear and unambiguous testimony from the Board's experts supporting the accuracy of the information provided by Oldmans' professionals, the Board found the traffic study inaccurately represented possible traffic at the Property.

The trial court's analysis did not mention this unmistakable testimony. Nor did the judge cite Oldmans' willingness to further update traffic counts in as part of the future Application for Final Major Site Plan Approval. (1T111-14 to 21). Oldmans' expert, Disario stated, "I think the applicant's perfectly comfortable with a condition of approval, if the board were inclined to grant an approval, to provide a new study. And frankly, we would have done a new study as part of final anyway." (1T111-14 to 18). Also, counsel for Oldmans confirmed a new TIS would be submitted with Oldmans' Application for Final Major Site Plan Approval. "In June when we were last here we stipulated, we're only seeking preliminary site plan approval at this time. We also stipulated that should we be allowed to go forward in the future with final site plan approval, we'd be submitting a new Traffic Impact Statement." (2T141-3 to 9). Oldmans also agreed to produce an updated traffic study as a condition of approval of its Application. (1T111-14 to 21; 3T225-19 to 226-18; 4T12-13 to 15).

The judge also related the ingress and egress design of Driveway 1 and 2 as a reasonable basis for denial of preliminary approval. He did not address the Board extended its consideration of issues solely in the purview of the County.

Board review authority for the Application is limited only to examine whether the internal site driveway circulation and the driveways were safe and efficient for the proposed development. See Lionel's Appliance Center, Inc. v. Citta, 156 N.J. Super. 257, 268 (Law Div. 1978). Access lanes on the Gloucester County roadway were not within review.

Oldmans provided extensive testimony the site driveways were consistently designed to conform with Woolwich Township Code Section 149.5.A, which would permit a rapid and safe ingress and egress for the proposed site, with as little interference as possible with the traffic on Auburn Road, which remains under the sole jurisdiction of Gloucester County. (4T23). The experts testified the proposed driveway designs assured safe and efficient access to the Property.

It is uncontroverted that the MLUL states in no uncertain terms that "[t]he planning board shall, if the proposed development complies with the [municipal site plan] ordinance and this act, grant preliminary site plan approval." N.J.S.A. 40:55d-46.b.; Pizzo Mantin Group v. Twp. of Randolph, 137 N.J. 216, 229 (1994) (Emphasis added). Here instead of making an updated traffic study a condition of approval, the Board arbitrarily and capriciously denied Oldmans' application. In turn, the trial court did not consider the record and erred by upholding the denial.

Had the trial judge examined the evidence presented during public hearings, he would have discussed the Board's professional, Kennedy's validation of the traffic volume recorded in the updated traffic study and traffic volume estimates. Further, the judge should have weighed the agreement to submit a current traffic impact study at the time of its application for Final Site Plan Approval. Absent this critical review of the evidence, the trial court findings and conclusions of reasonableness fail, requiring the decision be vacated and September 27, 2024 order reversed to allow the matter to be remanded to the Board for approval with normal and customary conditions.

IV. The Trial Court Erred In Concluding Oldmans' Complaint Should Be Dismissed Based Upon the Insufficient Information on Intensity Of Use. (4T29-18 to 36-1; 5T19-3 to 23-8).

The trial court also affirmed the Board's unreasonable denial of the Application, concluding there was insufficient evidence regarding the intensity of use, since a tenant had not yet been secured for the building. This conclusion ignores the testimonial evidence detailing the nature of the proposed single warehouse building, depicted as a traditional warehouse and not a high intensity use space as inferred by the Board and trial court.

The Application, its associated attachments, and the testimony at the public hearings made clear the single building was designed as a traditional warehouse, i.e., the building was not planned to be constructed as a high intensity fulfillment center.

As is customary in the industry, in connection with the Application, Oldmans' traffic engineer analyzed traffic consistent with the Institute of Transportation Engineers ("ITE") Traffic Trip Generation Manual to estimate the number of trips a warehousing facility will generate. There are several ITE options for an expert to utilize in analyzing traffic. In the present case, ITE Land Use Code 150 ("ITE 150") was used. (3T67-18 to 19). This classification is representative of a traditional warehouse. (3T67-18 to 23). Oldmans' traffic engineer, Disario recognized there are higher and lower intensity levels of warehousing, but ITE 150 is representative of traditional warehousing, making it the appropriate standard for this Property. Id. Disario testified regarding the building characteristics making this warehouse incompatible and unsuitable for high intensity use.

> MR. DISARIO: In my opinion, what is being proposed by the applicant is not a fulfillment center.
>
> MR. BRENNAN: Okay. But didn't he just tell you that, or not you, but the room, that he doesn't know what he wants for build there?
>
> MR. DISARIO: Yes, because he was not of an expert opinion as to what a fulfillment center is versus a traditional warehouse versus a high cube fulfillment center.
>
> **The applicant is proposing a warehouse building that's single-sided in terms of loading, that's 40 foot tall. That is a warehouse. That is not a fulfillment center.**
>
> And I proffer that for your consideration, the public's as well as the board's respectfully, I stand before you, I'm probably – in terms of all the traffic engineers in the nation, I work on the most fulfillment center projects across the nation, and that amounts to hundreds.
>
> MR. BRENNAN: Mr. Disario, tha[nk] you for your response. I'm not sure it's responding to the question I asked, but I'm sure Mr. Allen can re-call you.
>
> But the bottom line is, it may or may not be 150, it might be 154, it might be 156, right? We just don't know at this point?

> MR. DISARIO: **No. And again in my opinion, this is not a fulfillment center. This building is not tall enough to be a fulfillment center, does not have enough car parking to be a fulfillment center, and that is why we haven't modeled it as a fulfillment center.**
>
> [(3T68-18 to 70-2) (Emphasis added).]

The testimony is clear and emphatic: the design of the proposed warehouse represents only a traditional warehouse, not a high intensity use or a fulfillment center.

The trial court did not mention, consider, or weigh this definitive evidence. Instead, he adopted the speculative specious suggestion that the inability to name a specific tenant equated to the warehouse becoming a high intensity use fulfillment center. As Disario explained, not all warehouses can be fulfillment centers – they must be designed as such. This building was neither high enough nor large enough to accommodate high intensity use. No evidence supported a possible high intensity use. This red herring was misused to deny a permitted design that fulfilled all requirements of the zone without variance.

With complete disregard for the unequivocal evidence of the building designed as a traditional warehouse, the trial court incorrectly concluded Disario should have utilized a higher intensity standard in his traffic analysis. The syllogism adopted by the trial judge -- a tenant has not yet been secured for this warehouse, therefore there could be a higher than presented intensity of use, resulting in reasonable ingress and egress—is flawed and unsustainable. Bootstrapping a valid area of Board review—ingress and egress within the development—the court accepted the manufactured uncertainty regarding the intensity of use. This conclusion ignores the facts in the record confirming the this was nothing more than a traditional warehouse. These errors require reversal.

V. The Trial Court Abused Its Discretion In Denying Review Of Expert Testimony On The Nature Of The Proposed Development. (4T29-18 to 36-1; 5T19-3 to 23-8).

In affirming the Board's denial of the Application, the trial court found that Oldman's traffic expert, Disario was "not an expert" qualified to testify regarding traffic issues and intensity of use. (4T34-8). In its opinion, the court discounted Disario's testimony regarding the development's intensity of use as it impacts traffic safety. As discussed above, Disario used the intensity of use standards published for a traditional warehouse, which is exactly what Oldman's development proposes. Reading the court's opinion, the trial judge rejected this testimony suggesting Disario was not experienced in this area, stating: "So, essentially, what he did as I understand in evaluating the intensity of the usage of this facility is—one, and that's based upon his opinion that the—appropriate that based upon something that's *outside his area of expertise.*" (4T17-21 to 25) (Emphasis added). The judge does not explain what evidence the finding was based. The judge then concluded there was no evidence regarding intensity of use, an essential element of the development. The court concluded: "And the expert, the applicant's expert took the middle road on this and said, well my experience has been, number one, *he's not an expert.* So I don't know how he can testify as to that issue . . . . So we have an unknown as the intensity of the use, and it's *based solely on the speculation of someone that's not an expert in that particular area.*" 4T34-6 to 9, 16-18 (Emphasis added).

On reconsideration, Oldman's pointed out Disario's stated qualifications in the area of traffic engineering and his qualifications as a professional traffic engineering expert, who also had much warehouse experience, making him familiar with the intensity of use of warehouse facilities justifying his rationale for utilizing ITE 150 in his traffic analysis. (1T75-16 to 76-21). Disario informed the Board he had "been practicing in the field of traffic engineering for over 30 years [and] worked on hundreds of millions of square feet of warehousing projects throughout our country, as well as in Canada, Mexico and Australia." (1T76-1 to 21). A traffic expert's responsibility includes guidance based upon review of the building's characteristics. Disario detailed why Oldmans proposed warehouse was not designed to be a high intensity Amazon fulfillment center or high cube facility. (1T102-18 to 103-18), namely because of its small size, that it was single loaded, which is contrary to the design for high intensity use, and it had limited parking. (1T103-6 to 12).

Upon reflection the trial court amended its prior opinion. Stating the warehouse was "an additional issue" and whether Disario could testify on warehousing was something that could be determined "on a case by case basis ...," the judge then stated: "As to whether or not he could opine to this and I specifically said he could not. I'm gonna retract that portion of the ruling." (5T20-18 to 19; 5T21-19 to 21). Yet, the judge continued to infer Disario was not qualified. He denied reconsideration focusing only on the original 2022 traffic impact study – and not the 2023 revised traffic impact study report - which he labeled "stale," which was sufficient to uphold the Board's denial as reasonable.

Nevertheless, the court's decision rejecting reconsideration remained unduly influenced by the original rejection of Disario's expert opinion and failed to fairly reconsider the actual evidential record:

> And as Mr. Madden correctly indicated that regardless of whether – he's entitled to opine about this or not, the Board had reasonable concerns as to the extent and intensity and the use of this warehouse. And some of that was certainly based upon the fact that the developer was unsure as to the extent and use of the warehouse.
>
> So, is it something fair for the Board consider? It's something fair for the Board to consider. Are they permitted in this situation, should they have been permitted to consider Mr. Desario's [sic] position with regards to the intensity of the use of the warehouse? And even though he wasn't clarified [sic] or determined to be an expert in that field, I would say that with his additional testimony that was placed on the record about his knowledge of the warehouse industry, it's something that

> the Board could consider, but it wasn't developed to the extent that it – the Board members would not be able to discount his opinion.
>
> Saying that, you know, you dealt with hundreds of millions of square foot warehouse spacing over the course of your 30 year career, certainly has credence. But what does that mean to the lay person? I don't know. And that's where the Board asked to place it's own individual consideration into those factors.
>
> [(5T21-24 to 22-25).]

As noted above, all testimony – by Disario and the Board's expert Kennedy— concurred that the traffic study accurately depicted the current level of traffic. Moreover, on reconsideration the judge withdrew his rejection of Disario's intensity of use in the study, conceding he had experience in this area, but equivocated on whether there was evidence supporting the intensity of use. A careful review of the record unveils the flaws in the trial court's findings leading to the incorrect conclusion. All evidence supports Oldmans' full compliance with all requisites for Preliminary Major Site Plan Approval and the Board's action was arbitrary and unreasonable. The trial court's Order holding otherwise must be reversed.

VI. The Trial Court Erred In Failing To Analyze Oldmans' Challenges To The Infirmities of the Board's Actions and Resolution Denying the Application. (4T29-18 to 36-1; 5T19-3 to 23-8).

Having found that the Board acted reasonably in its determination related to ingress and egress, the trial court further erred in failing to analyze Oldmans' challenges to the infirmities of the Board's action and the memorializing Resolution. The Resolution is inconsistent with the testimonial and evidence in the record warranting reversal of the trial court's ruling.

In the Resolution, the Board failed to make adequate correct factual findings to support the denial of the Application. Such findings are required by statute and decisional law. N.J.S.A. 40:55D-10(g)(2). New York SMSA v. Weehawkin Bd. of Adj., 370 N.J. Super. 319, 334 (App. Div. 2004).

Two of the three Board members who voted "no" on the Application set forth their reasons for their votes on the record. Those reasons included deliberations regarding an updated traffic study, feasibility of extending sanitary sewer service to the site, site ingress and egress, air pollution and alleged non-compliance with the non-binding, non-controlling warehouse siting criteria outlined in the New Jersey State Planning Commission Office of Planning Advocacy Distribution Warehousing and Goods Movements Guidelines that are not a State of New Jersey agency regulation nor part of the Township of Woolwich Zoning Code. (3T238-2 to 25; 3T239-1 to 25; 3T240-1 to 25; 3T241-1 to 25; 3T242-4 to 25; 3T243-1 to 6; 3T246-11 to 17; 3T248-3 to 19). However, the adopted Resolution No. 2023-43 memorializing the denial provides a different rationale which is in conflict with the testimony provided at the Hearings and is categorically incorrect.

The testimony of Oldmans' experts and the associated hearing Exhibits make abundantly clear that Oldmans proposes a stop sign controlled Driveway 2 design and not an acceleration lane. The Resolution correctly references the testimony of Oldmans traffic engineer that a stop sign controlled Driveway 2 design is the best design because it requires drivers to stop and wait in order to exit the driveway. (Pa300-301). The Resolution also correctly states that Disario testified that" he doesn't like acceleration lanes as they tend to make drivers feel they can pull out onto the roadway without stopping at the exit." Id. However, in justifying the denial of the Application, the Resolution in Paragraph 40 incorrectly states that Oldmans proposes an acceleration lane as part of the Driveway 2 design, which, according to the Board, creates an unsafe condition. (Pa300-301).

The Resolution fails to mention that the actual idea of including an Auburn Road acceleration lane for Driveway 2 was made by the Board's traffic engineer, Derek Kennedy, Board member Mayor Fredericks and former Board member Marino and not Oldmans. The idea was actually rejected by Oldmans' traffic expert during the Hearings. (1T53-17 to 19; 1T56-22 to 25; 1T57-1 to 7).

The Resolution cites to incorrect factual findings to support the Board's conclusion to deny Oldmans' Application for Site Plan Approval. Because the conclusion is therefore without the necessary factual foundation. The Resolution should be set aside. The trial court further compounded this error by failing to consider Oldmans' argument regarding the infirmities of the Resolution warranting reversal.

CONCLUSION

The trial court mistakenly upheld the Board's denial of Oldmans' Application for Preliminary Major Site Plan Approval based upon speculative concerns about ingress and egress focusing on what it labeled a "stale" traffic study and suggesting the intensity of use is "unknown." These determinations ignored unrefuted facts that: (1) the expert traffic study included an accurate representation of the traffic and would be supplemented in Oldmans future application for Final Major Site Plan Approval, and (2) the intensity of use was accurately depicted in the Application, traffic study and testimony of Oldmans' professionals. Further error resulted because the trial court did not review Oldmans' challenges to the Board Resolution, which was factually inconsistent with hearing evidence.

For reasons set forth herein, following review of the record, this Court is requested to reverse the trial court and direct the matter to the Board for adoption of a Resolution approving the Application for Preliminary Major Site Plan Approval, with customary and reasonable conditions of approval.

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By: Jamie Slimm

Dated: April 9, 2025

JAMIE A. SLIMM, ESQUIRE

FILED, Clerk of the Appellate Division, May 09, 2025, **A-001402-24**

OLDMANS CREEK HOLDINGS, LLC Plaintiff/Appellant vs. THE JOINT LAND USE BOARD OF THE TOWNSHIP OF WOOLWICH, Defendant/Respondent	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-001402-24 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY DOCKET NO: GLO-L-177-24 SAT BELOW: HON. BENJAMIN C. TELSEY, A.S.J.C.

BRIEF OF RESPONDENT, THE JOINT LAND USE BOARD OF THE TOWNSHIP OF WOOLRICH

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Date submitted: May 9, 2025

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PRELIMINARY STATEMENT

A planning board is permitted to deny an application for site plan approval in their discretion when the ingress and egress proposed by an applicant's plan creates an unsafe and inefficient vehicular circulation. In that regard, courts have held that a planning board should consider off-site traffic flow into and off of a site and safety as part of the analysis undertaken with respect to the proposed vehicular ingress and egress.

This is precisely what Defendant/Respondent, the Joint Land Use Board of the Township of Woolwich (the "Board"), did when it denied Plaintiff/Appellant Oldmans Creek Holdings, LLC's ("Plaintiff") application for Preliminary Major Site Plan approval (the "Application") to construct an 854,450 +/- square foot warehouse on Auburn Road in Woolwich Township, Gloucester County, New Jersey (the "Property"). As detailed in the Board's Resolution #2023-24 (the "Resolution") and the transcripts of the three (3) hearings on this matter, the Board acted within its discretion and denied Plaintiff's Application as a result of legitimate safety concerns regarding the ingress and egress to the Property that the 1,470 vehicles per day, based on Plaintiff's estimation, would utilize.

The trial court properly concluded that the Board's denial was not arbitrary, capricious or unreasonable. In so ruling, the trial court correctly found the Board had reasonable concerns with respect to deficiencies in Plaintiff's traffic study which was based on a single day of traffic counts collected in October 2021 during the Covid pandemic and did not account for new developments in the area which did not exist at the time of the stale traffic study.

The trial court also properly determined that the record supported the Board's denial based on its reasonable concerns regarding the proposed warehouse's intensity of use. Even assuming the Board was permitted to consider Plaintiff's traffic expert's opinion regarding the warehouse's use intensity based on his assumption it would be a "traditional" warehouse, despite not being qualified as an expert in warehouse design, the trial court properly noted the Board was also free to discount his opinion. In light of the various unknowns, including Plaintiff's sole member's inability to offer testimony regarding the type of warehouse or to identify the prospective tenant of the warehouse facility, the Board was not persuaded that the site would include safe ingress and egress and acted within its discretion to deny the Application.

The Board's Resolution memorializing its denial acknowledged that off-site improvements on Auburn Road, the Property's frontage road, would fall within Gloucester County's jurisdiction, but noted that the impact of off-site improvements on the ingress and egress to the Property were within the Board's purview. The Resolution further accurately detailed the bases of the Board's denial of Plaintiff's application and was factually consistent with the hearing evidence.

In sum, and contrary to Plaintiff's argument, the lack of variances required by Plaintiff's Application does not mean the Board should be compelled to rubber stamp the approval of the proposed warehouse without regard to the safety of the ingress and egress to the Property. The trial court properly determined that the Board's denial of Plaintiff's Application was not arbitrary, capricious or unreasonable. Accordingly, the trial court's ruling upholding the Board's decision should be affirmed.

STATEMENT OF FACTS

On November 16, 2023, the Board voted to deny Plaintiff's Application submitted August 12, 2022 for preliminary site plan approval to construct an 854,450 +/- square foot warehouse which would include within that square footage 20,000 square feet of office space along with 75 loading docks; 482 passenger vehicle parking spaces and 166 box trailer parking stalls. (Pa1, Complaint; Pa27, Application; 1T 9:12).

The Property which was the subject of Plaintiff's Application is located at 1314 and 1366 Auburn Road in Woolwich Township, Gloucester County, New Jersey, which property is designated on the municipal tax map of the Township of Woolwich as Block 28, Lots 3 and 4. (Pa1; Pa27, Application). The Property is approximately 70.17 acres or 3,056,605.2 square feet in size and is located along Auburn Road, a County road designated as Gloucester County Route 551.(Pa3, ¶ 12; Pa35, Application § E).

The warehouse development proposed for the Property was presented to the Board, in part, by the aerial map which was entered into evidence before the Board as Exhibit A-1. (Pa82-85). In its Application and presentation to the Board, the Plaintiff did not identify the proposed occupant(s) of the warehouse with the Plaintiff's Professional Engineer characterizing it as a "speculative building" and noting that "(t)here's no tenant yet." (1T, 44:7-9). As noted by the Professional Engineer testifying on Plaintiff's behalf, the Property is "surrounded by residential zoned areas, residential properties to plan east and plan north" along with the Charles G. Harker Elementary School to the southwest of the Property. (1T, 34:1-7).

At the time the Plaintiff's Application was filed and thereafter deemed complete by the Board, the Property was located in Woolwich Township's Light Industrial Office (LIO) Zoning District. (Pa3, Compl., ¶ 13). Subsequent to the submission of Plaintiff's Application to the Board, the zoning for the Property was changed from LIO to 5A Five Acre Residential via the Township's adoption of Ordinance No. 2023-08. (Pa3, Compl., ¶ 16). Notwithstanding the change in zoning, in accordance with N.J.S.A. 40:55D-10.5 (the "time of application rule"), the Board properly evaluated the Plaintiff's Application under the standards applicable to the LIO Zoning District. (1T; 2T; & 3T). As noted in the Board's Resolution memorializing the denial of Plaintiff's application, Plaintiff's proposed warehouse use was in conformance with the permitted principal uses of the LIO Zone. (Pa297, ¶ 3).

Plaintiff originally filed an application for preliminary and final site plan approvals for the proposed 854,450 +/- square foot warehouse but amended their application at the Board's June 29, 2023 hearing to request only preliminary site plan approval. (1T, 8:18-9:1). The Board conducted three (3) separate hearings on Plaintiff's Application on June 29, 2023; August 3, 2023; and November 16, 2023. (1T; 2T; & 3T). In advance of the public hearings on Plaintiff's Application, the Board professionals issued correspondence detailing their technical review of the application submission materials, including correspondence from the Board Traffic Engineer, Derek Kennedy. (Pa71, May 3, 2023 Correspondence issued by Annina Hogan, P.E., R.A., LEED, AP and Derek Kennedy, P.E., P.T.P).

In his report, Mr. Kennedy raised a concern regarding whether the site's proposed trip generation would outperform published ITE rates and questioned whether Plaintiff underestimated the volume of truck traffic expected based on the number of loading berths and trailer parking spaces being proposed. (Pa74,

¶ 2). Mr. Kennedy raised further concerns in light of the Plaintiff not identifying the end user of the warehouse as follows:

> The land use presented in the application does not identify a specific tenant or users for the site. If additional information is available in this regard, it should be shared with the Township. The applicant should note that different warehousing operations can generate different traffic impacts. For example, a cold storage warehouse will have different trip generation characteristics when compared to a general warehouse land use. For planning purposes, the maximum potential land use is recommended for use in the TIS.

(Pa74, ¶ 3).

The Board Traffic Engineer raised further concerns regarding the data within the Plaintiff's traffic study being outdated as follows:

> The traffic counts included in the report are from October 2021. Typically, traffic counts should be within 12 months of the application date. The revised submission should include a base year of 2023. All previous data should be recounted or properly adjusted for 2023 conditions.

(Pa74, ¶ 10). Mr. Kennedy also questioned whether deceleration and acceleration lanes are required at the proposed driveways as follows:

> The traffic report should be revised to include warranted analysis to determine if deceleration and acceleration lanes are required at the site driveways. These results should be coordinated with Gloucester County for review and approval.

(Pa76, ¶18). The Board Traffic Engineer raised a concern with respect to whether tractor trailers can remain in their travel lane when entering and exiting the Property and expressly cautioned that "(u)nder no circumstances shall a tractor trailer encroach into an opposing lane when completing a turning movement." (Pa77, ¶20). Mr. Kennedy also expressed his concern with the excessive shoulder widths proposed for Auburn Road and the resultant increased separation between the driveway's stop line and the roadway as follows:

> The proposed shoulder width along the site's frontage is excessively wide (between 19 and 25 feet), presenting an unconventional roadway cross-section. Typically shoulder widths range from 8 to 12 feet. This wide shoulder area increased the separation between the driveway's stop line locations and the travel way. The wider cross-section may also result in higher travel speeds along Auburn Road. The curb-to-curb width should be minimized.

(Pa77, ¶25). As part of the testimony presented to the Board, the Plaintiff's Traffic Engineer, Daniel Disario, P.T.E., summarized the ingress and egress to the site and proposed roadway improvements as follows:

> So the southerly driveway is a full access driveway and the northerly driveway's limited to right out only. As part of this application, the applicant is also proposing to widen along Auburn Road along the site frontage. As part of that widening, as the board heard earlier, there will be a southbound left turn lane that will serve the southerly full movement access point. In addition, there will be a shoulder essentially created along the entire site frontage with varying width, but it will be a very wide shoulder at most of the points along the site frontage.

(1T, 77:14-78:2).

The Woolwich Township ordinance details the performance standards the Planning Board is to consider in reviewing any site plan and included therein is the requirement for safe ingress and egress to the site as follows:

> § 149-5 Performance standards.
>
> In reviewing any site plan, the Board shall consider:
>
> A. Pedestrian and **vehicular traffic movement** within and adjacent to the site **with particular emphasis on** the provision and layout of parking areas, off-street loading and unloading, **movement of people, goods and vehicles from access roads**, within the site, between buildings and between buildings and vehicles. The Planning Board shall ensure that all parking spaces are usable and are safely and conveniently arranged. **Access to the site from adjacent roads shall be designed so as to interfere as little as possible with traffic flow on these roads and to permit vehicles a rapid and safe ingress and egress to the site.**

Ordinance § 149-5(A) (emphasis added).

On November 16, 2023, following the conclusion of the three (3) public hearings, upon motion made by Board member Jonathan Fein to approve the application subject to certain detailed conditions, three (3) Board members voted in favor of conditional preliminary site plan approval and three (3) Board members voted in opposition to such motion, thereby resulting in the failure of Plaintiff to obtain the affirmative votes of the majority of Board members in attendance and the denial of Plaintiff's Application. (3T, 232:18 – 252:9).

The Board thereafter memorialized its denial in its Resolution adopted by the Board on December 21, 2023. (Pa284). The Board acknowledged in the Resolution that off-site improvements on Auburn Road and elsewhere would fall within the jurisdiction of the County, but held that the impact of off-site improvements on the ingress and egress to the Property were within the purview of the Board and determined that Plaintiff failed to establish that tractor trailers can enter and exit the Property safely. (Pa313, ¶ 43).

The bases for the Board's denial of the Plaintiff's Application are set forth in detail within paragraphs forty through forty-six (40 – 46) of the Resolution which, in pertinent part, provide as follows:

> The (Board) determined that the Applicant had failed to meet its burden for the granting of the Preliminary Major Site Plan Approval. The (Board) determined that the Applicant had failed to establish that the trucks entering and exiting the site (ingress/egress) can do so safely and without causing major traffic concerns along Auburn Road. As was stated by the Applicant's own expert, the short acceleration lane to the right of driveway #2 encourages tractor trailers to exit the site without stopping or waiting for traffic along Auburn Road. This has serious potential for causing accidents with traffic on Auburn Road. Tractor Trailers are likely to exit the site without stopping at the exit, enter into the acceleration lane, without having properly yielded to traffic along Auburn Road. This is supported by the (Board's) Traffic Engineer's report of May 3, 2023 and his testimony at the time of the hearing.

(Pa312, ¶ 40). The Board further held that the widened road shoulder proposed by Plaintiff along Auburn Road presented safety concerns in light of the potential for tractor trailers to queue (park) within such a widened shoulder thereby impairing the ability of tractor trailers to safely exit the facility. (Pa312-13, ¶ 41). The Resolution further noted the Board's concern that the widening of Auburn Road proposed by the Plaintiff "will likely encourage higher vehicular speeds which will contribute to the safety concerns regarding the ingress and egress of the site," noting that this sentiment was supported by the comments made by the Board's Traffic Engineer. (Pa313, ¶ 41).

Additionally, the Board held that ". . .the configuration, grading, speed limit, light of sight and heavy traffic on Auburn Road makes it unsafe for tractor trailers to exit from the site onto Auburn Road" and that "the location of the ingress and egress as contained in driveways #1 and #2 do not allow for the safe exiting of tractor trailers onto Auburn Road." (Pa313, ¶ 42).

Further, the Board determined there were serious concerns regarding the accuracy of the traffic study presented by the Plaintiff "given that it was performed during the covid pandemic" and that there were similar concerns with the accuracy of the air pollution study presented by the Plaintiff, which was based in part upon the Plaintiff's traffic study. (Pa313-14, ¶ 44). The Board also cited the New Jersey State Planning Commission Office of Planning Advocacy Distribution Warehousing and Goods Movement Guidelines adopted by the State on September 7, 2022 and incorporated such guidelines within the findings of the Resolution. (Pa314, ¶ 45).

The bases for the Board's denial of the Plaintiff's application, *to wit*, safety concerns with the ingress/egress driveways, were echoed throughout the three (3) hearings on the Application as set forth in the summary of the hearings and testimony provided which is included below.

A. JUNE 29, 2023 BOARD HEARING

In the introduction of the Application, Plaintiff's counsel cautioned the Board regarding the limitations of the Board's jurisdiction, noting that off-site off-tract traffic is not within the Board's jurisdiction while specifically acknowledging that the proposed driveways were within the Board's jurisdiction stating ". . .this board's jurisdiction, if I will, for traffic review is confined within our site ensuring that we have safe, adequate and efficient circulation within our site, **and particularly at our driveways**. . ." (1T, 21:24-22:10)(emphasis added).

Plaintiff's Professional Engineer, Keith Ottes, P.E., testified that, as part of the proposed warehouse, the Plaintiff would be dedicating 0.93 acres of right of way to the County to increase the ultimate right of way (Auburn Road) of the Property to County standards. (1T, 34:18-21). Mr. Ottes testified that the Plaintiff proposed two (2) driveways, one which is a full access driveway and a second which would be a right-out-only exit driveway. (1T, 35:8-12). Mr. Ottes described the ingress and egress to the Property as follows:

> There's going to be a dedicated left turn in for driveway one so cars can pull into the left turn lane and other cars can go around them, but for driveway two, there was no acceleration lane planned for that.

(1T, 54:1-5).

Not long into Plaintiff's presentation, Board members raised concerns with respect to unsafe egress from the Property resulting from there being no acceleration lane proposed for the right-out exit-only driveway in the following colloquy:

> MR. FREDERICK: Continuing on with the design, specifically for driveway two, if I'm reading this correctly, they're expected to make a right turn only, right, number one?
>
> A. Correct.
>
> MR. FREDERICK: There is no merge lane, so they're going to go from zero to 50 to not provide obstacles with traffic heading north?
>
> A. There is no -- I'm going to talk about that next. There is, as part of the roadway improvements, there's going to be at driveway one -- I know you asked about driveway two. I'll get to that first. There's going to be a dedicated left turn in for driveway one so cars can pull into the left turn lane and other cars can go around them, but **for driveway two, there was no acceleration lane planned for that. It didn't -- again, Mr. Disario can talk further about that.**
>
> MR. FREDERICK: **So again, trucks are expected to continue with the flow of traffic, which would be 50.**
>
> A. **They would have to wait.**
>
> MR. FREDERICK: I'm sorry. What would happen?
>
> A. They would have to wait. They would have to wait their turn based on the traffic coming.

(1T, 53:12 – 54:14)(emphasis added).

Board member Frederick's concerns with there being no proposed acceleration or merge lane were soon echoed by additional Board members as follows:

> MR. MORRIS: Is that normal, though, that you would have no entranceway onto a road like that, like for a facility of this size? It seems abnormal to me that you would expect -- as Mr. Frederick

> had said, that you would have to -- it's a 50-mile-an-hour road, that you would kind of get on there and expect, without messing up traffic or potentially causing risk with the trucks coming on. I think there are a couple hundred bays here. I mean, this is a huge facility. Is that normal?

(1T, 55:11-21).

> MR. MORRIS: Based on that there are some concerns, especially Mr. Frederick brought out about going from zero to 50 on a small road that probably can't -- in my opinion, probably would struggle to handle the volume of the warehouse this size.

(1T, 56:15-20).

> MR. MARINO: To the mayor's point, if you look at the roadway on Auburn Road, that's the high point, and it actually goes downhill towards Swedesboro. Without an acceleration lane, that truck pulls out and they're going to pick up very slowly, and you have a car cresting that hill, not realizing a truck just pulled out in front of them, you could cause a rear -- I mean, is it likely to happen? I don't know. Without an acceleration lane, that car's really at a disadvantage when they top that hill and the trailer is in front of them.

(1T, 56:22-57:7).

In response to the concerns raised by the Board, the Plaintiff's Engineer testified he would further investigate including an acceleration lane at the second driveway. (1T, 55:14-23). Shortly thereafter, the Plaintiff's Traffic Engineer, Mr. Disario, testified that he didn't "particularly like acceleration lanes." (1T, 80:13-16). Nonetheless, Mr. Disario committed to investigating "trying to provide more length for a truck to use the right out driveway to accelerate onto Auburn Road." (1T, 81:24-82:3). Mr. Disario summarized the application from a traffic standpoint as follows:

> Originally we were contemplating two full access points along Auburn Road, but the application since has been revised to address some comments from the county whereby -- and I'll refer to Auburn as our south. So the southerly driveway is a full access driveway and the northerly driveway's limited to right out only. As part of this application, the applicant is also proposing to widen along Auburn Road along the site frontage. As part of that widening, as the board heard earlier, there will be a southbound left turn lane that will serve the southerly full movement access point. In addition, there will be a shoulder essentially created along the entire site frontage with varying width, but it will be a very wide shoulder at most of the points along the site frontage.

(1T, 77:9 – 78:2). The southbound left turn lane was described by Mr. Disario as approximately one hundred and fifty feet (150') long and testified that the left turn lane could accommodate two (2) trucks. (1T, 79:3-25). The Plaintiff's civil engineer testified at a subsequent hearing that the left turn lane southbound trucks would use to enter the Property was "roughly 200 feet long" and that at least two (2) tractor trailers could fit in the left turn lane ". . . depending on the spacing." (2T, 17:24-18:4).

Significantly and confusingly, while noting separately that no acceleration lane was proposed and that he did not particularly like acceleration lanes, during the course of the testimony provided, respectively, by Plaintiff's civil engineer, Mr. Ottes, and Plaintiff's traffic engineer, Mr. DiSario, in response to the Board's concerns regarding the lack of an acceleration lane being proposed, both of Plaintiff's professionals characterized the area east of the exit driveway as an "acceleration lane." (1T, 58:6-9 & 80:23-81:7). Specifically, Mr. Ottes testified that:

> . . . we do show outside cartway, we do have about a 24-foot area that's striped off for a portion as you go to the east, and that starts to taper back into the existing road. But, what we'll do is **we'll investigate adding more distance to the acceleration lane**.

(1T, 58:6-9)(emphasis added).

Mr. DiSario, while stating his dislike for acceleration lanes, similarly characterized the area east of the exit driveway as an acceleration lane as follows:

> In my opinion, and respectfully, it's safer to have a stop controlled driveway with no acceleration lane, particularly if the acceleration lane can't be of an adequate length, which **I believe we have some acceleration lane as part of the widening across the frontage, but we may not be able to provide additional acceleration lane length because of right-of-way issues**. If the property's not available, we can't obviously widen the road.

(1T, 80:23 – 81:7)(emphasis added).

Mr. Disario further testified that the proposed warehouse would generate 1,470 vehicle trips per day and specified that he arrived at the vehicle trip generation number using the published data for Land Use Code 150 Warehousing. (1T, 92:12-94:10). In advance of the June 29, 2023 hearing, Mr. Disario had submitted a traffic study bearing an original date of July 22, 2022 and a most recent revision date of March 27, 2023. (1T, 76:23-77:8).

Board Member Grasso questioned the veracity of traffic counts included within Mr. Disario’s traffic study in light of the fact that the study was performed during the Covid pandemic in the following exchange:

> MS. GRASSO: I have his report in front of us and it's dated, I think May 10, that you looked at intersections in particular that are adjacent to the property, but my question is, when you did the initial traffic work, what was that date?
>
> A. So when –
>
> MS. GRASSO: The numbers?
>
> A. When we collected our traffic counts –
>
> MS. GRASSO: Correct.
>
> A. -- which is the first step, that was Thursday, October 7th, 2021.
>
> MS. GRASSO: 2021.
>
> A. Yes.
>
> MS. GRASSO: So we're talking about during the pandemic when the –
>
> A. Schools, we confirmed, schools were back in session –
>
> AUDIENCE: Hybrid.
>
> A. -- under normal conditions.
>
> MR. ALLEN: Objection.
>
> MR. RUSHTON: Whoa. You gotta let him talk.
>
> MS. GRASSO: And I had a concern about that. I don't know if that's truly representative of a full day, full schedule during the school year.

(Audience applauds.)

MS. GRASSO: I feel that is not adequate.
(1T, 87:11-88:14).

During the course of Mr. Disario's testimony, Board member Frederick raised the issue of a recent guide published by the New Jersey State Planning Commission Office of Plan Advocacy noted as the "distribution warehousing and goods movement guide" dated September 7, 2022 (the "State Planning Report"). (1T, 108:3-24). The State Planning Report provides estimates for the number of vehicle trips generated by high cube warehouses which exceeded the estimate provided in Plaintiff's traffic report and testimony by more than five times, as noted in the following colloquy between Mr. Disario and Board member Frederick:

> MR. FREDERICK: And just one other item. So looking at the NJ State Planning Commission Office of Plan Advocacy, there is a distribution warehousing and goods movement guide dated under policy adopted September 7, 2022. Are you familiar with that report?
>
> A. I am.
>
> MR. FREDERICK: Okay. So in there it is talking about high-cube warehousing, which is why I started my question two hours ago on this one. The question I'm asking in there, in the report it states a typical one million square foot warehouse has an average daily traffic of 1,740 trips. Obviously, we're a little bit less than that in the 1,500 units. But **it does say that a high-cube warehouse with the same floor area has a potential trips nearly five times, as much as 8,180 vehicle trips per day. So I'm just trying to make**

> **sure I'm clear, because you're looking at high-cube warehouses and it seems quite different than what is noted in this report. So can you articulate the difference?**
>
> A. I've looked at what the state plan commission put together. I can tell you respectfully, a lot of what they put in there and the definitions they use for various warehouse types, I don't agree with and I think they're inaccurate. So I think the state commission put together a publication that was politically motivated and did not have industry experts come in, even traffic engineers come in to vet the information that they put together and put forth in that publication.

(1T, 108:3-24).

B. AUGUST 3, 2023 BOARD HEARING

Plaintiff's Professional Engineer, Keith Ottes, was recalled and he presented the Board with three (3) supplemental exhibits which were entered into evidence as Exhibit A-24, A-25 and A-26. (2T, 12:6-13:14). Exhibits A-24 and A-25 were referred to as "master truck turning plans" which Mr. Ottes testified demonstrated that ". . .at any point on the site, there is room for trucks to pass each other without having to stop, wait for each other." (2T, 12:6-19). Mr. Ottes then introduced Exhibit A-26, which he referred to as the "roadway improvements plan." (2T, 13:13-14; Pa119, Oldmans Industrial Park, Auburn Road Roadway Improvements, Roadway Improvements Plan Rendering dated July 28, 2023). Mr. Ottes summarized the contents of Exhibit A-26 and his rationale for providing the exhibit as follows:

> I move on to A-26, that is what we are referring to as the roadway improvements plan rendering, and what that shows, there's a roadway improvements plan in the application that was submitted, but it's black and white and it's very hard to see exactly what the roadway improvements consist of, and as you can see on A-26, the top of the plan shows what we refer to as driveway one, that's the full access driveway, and as you can see there, the roadway improvements generally consist of a taper to the east of that driveway, for the left turn lane in, and it depicts 12-foot lanes with a five-foot shoulder on the north side of Auburn Road, and it starts out to the west beyond the site frontage at a 1.9-foot shoulder, increases to the east right below the label, just before the label of Auburn Road in white on the right-hand side of the plan, it comes up to an 18-and-a-half foot shoulder.
>
> Continuing to the east, you'll see the match line on the right-hand side of the plan. That continues on the bottom of the plan to the east going towards driveway number two, which is the right-out-only driveway that we talked about the last time.
>
> The shoulder taper on the south side becomes 22 feet just east of that match line and then it increases to 25 feet just before driveway two, and as you travel west, you'll see, as Mr. Allen stated before, this is about a 200 foot -- it's 203.4 on the plan, 203.4 feet of additional 25-foot shoulder.
>
> The maximum shoulder width at the eastern most end of the frontage before the taper back into Auburn Road is 25.3 feet, and you can see there that there's 203 feet of additional shoulder.
>
> So that was just, I know there's a lot of questions about what's happening with the driveways and you have the driveway insets that were presented previously on another exhibit, but we did this to more clearly depict on a rendered plan what's exactly happening with the roadway improvements.

(2T, 13:13 – 15:4).

Board member Morris questioned Mr. Ottes regarding the fact that the

Plaintiff's professionals did not recommend including an acceleration lane on Auburn Road leading from the right-out-only exit driveway. (2T, 15:5-16:17). Board member Morris and Mr. Ottes engaged in the following exchange with regard to Exhibit A-26:

> MR. MORRIS: I have a question. Now that we're more clearly seeing this and you said last week you didn't recommend acceleration lanes. The question I have is is, how far up the road, half a mile, mile, does it take for a truck starting at zero to, say, hit 40, 45 miles per hour? Because I'm curious because I heard the testimony, but I'm not sure I agree with it, because you do have traffic coming up, and if these trucks are starting, like, from zero and cutting in, they could be up by, like, say, town square or something like that before they actually, like, potentially could hit speed. So my question is about how far? Half a mile? Quarter mile?
>
> **A. I don't know the answer to that question exactly. As our traffic engineer testified last time, it is a stop condition.**
>
> MR. MORRIS: Yeah, I heard that. The question may be for him, then. I thought you were covering it. What would it take? How long does it take or how far up the road before a truck gets to a reasonable speed limit?
>
> **A. I think that really depends on the truck, the engine, the weight, what it's carrying. I would say it's more than 200 feet. I would guess that it's more than 200 feet. So yes, there's going to be some time lag. They're going to have -- truck drivers are going to have to judge based on who's coming down the road if they can make it or not.**
>
> MR. MORRIS: So you guys are still recommending, I guess the general question, no acceleration?
>
> **A. That was the traffic engineer. That was Mr. Disario's recommendation at the last hearing.**

(2T, 15:5 – 16:17).

During the August 3, 2023 hearing, the Board also heard testimony from Plaintiff's professional planner, Sean Moronski, P.P., who testified he relied on the traffic impact study submitted to the Board when preparing the environmental impact statement submitted to the Board. (2T, 87:10-22). Moreover, the Board heard testimony from Plaintiff's air pollution expert, Roger Greenway, who testified that, in preparing his air quality impact analysis, he relied upon the traffic counts included in the traffic impact study prepared by Plaintiff's traffic engineer. (2T, 115:6-116:13). In an exchange with Board member Grasso, Mr. Greenway stressed that while the emissions numbers appeared low, the reason for the low projected emissions numbers were that vehicles had gotten "a lot cleaner" and that "there's really not a lot of traffic on the Traffic Impact Study." (2T, 123:15-20). Mr. Greenway's testimony represented the conclusion of Plaintiff's presentation of direct testimony at the August 3, 2023 hearing. (2T, 123:23-124:5).

Following Mr. Greenway's testimony, the Board professionals presented their respective review reports. (2T, 124:8-146:19). The hearing was then opened for public commentary which began and ended with the presentation by Jeffrey Brennan, Esquire, appearing in opposition to the application as counsel for Jessica Bauer, a Woolwich Township resident who resides near the Property.

(2T, 150:16-188:18). Upon the conclusion of Mr. Brennan's presentation of his professional planner and his client, the meeting was adjourned.

C. NOVEMBER 16, 2023 BOARD HEARING

Following brief supplemental testimony provided by Plaintiff's representatives and the comments of the Board professionals, the November 16, 2023 hearing was opened for public comment. (3T, 6:1-48:1). The public portion of the hearing began with the continuation of the presentation of Jeffrey Brennan, Esquire, appearing in opposition to the application on behalf of his client, Jessica Bauer, who presented the testimony of a professional planner and then questioned Plaintiff's representatives. (3T, 49:6-77:19).

Mr. Brennan first questioned Eric Greif who testified that he was the sole member of the applicant/Plaintiff, Oldmans Creek Holdings, LLC. (3T, 57:14-23). Mr. Greif testified that his plan was to build the warehouse and lease it to someone else; that he had not yet identified a potential tenant; that he had personally not developed a warehouse before; and that he did not know whether there were different types of warehouses. (3T, 57:25-58:23). When asked what type of warehouse was being proposed Mr. Greif was unable to answer and testified that the best person to answer that question would be another member of his "team." (3T, 59:8-12).

Mr. Greif testified further that the warehouse was being built on spec; that, until he knew who the tenant would be, he would not know what the specific operational requirements of those tenants might be; that he did not know the proposed hours of operation, the proposed number of employees, the proposed number of shifts, when trash collection might occur, or what might be stored in the warehouse. (3T, 61:17-62:19).

Mr. Brennan then questioned the Plaintiff's traffic engineer, Mr. Disario, who testified under cross examination that there were several different ITE classifications for different types of warehouses but he performed the analysis in his traffic study under classification 150, which is representative of more traditional warehousing. (3T, 67:8-23). Mr. Disario testified there were higher intensity levels of warehouses and lower intensity levels of warehouses and acknowledged that, at that point, he did not know what type of warehouse it would be, although in his opinion, the building proposed did not have the physical characteristics which would allow it to be used as a high cube fulfillment center. (3T, 68:13-70:4).

Resident Angela Blomquist testified in opposition to the application and presented the testimony of Dr. Hussain, a board certified pediatrician. (3T, 83:17-101:25). Resident Eileen Healey testified in opposition to the application and regarding the flawed nature of the data presented by Plaintiff as follows:

> As you also saw, the traffic study was less than convincing and was not scientifically based. It was done at a time when the majority of

> our school community was still working virtually and our schools were hybrid, yet the witnesses for the proposed warehouse based on a majority of their evidence and testimony on this.

(3T, 122:3-9). Upon conclusion of the public portion of the hearing, a total of twenty-nine (29) residents had appeared to voice their opposition to Plaintiff's Application. (3T, 136:8-214:4).

Following the public portion of the hearing, Board member Frederick summarized several concerns he had with the Application as presented. (3T, 234:8–246:13). Mr. Frederick's concerns included that the traffic study presented by the Plaintiff was based on October of 2021 which was during the Covid pandemic and not representative of normal conditions and, further, that the traffic counts were not conducted within twelve (12) months of the date the Application was submitted; that the assumption made in the Plaintiff's traffic report that an equal percentage of vehicles would use Center Square Road and Oldmans Creek Road to access I-95 was flawed; that the traffic study did not take into account newly approved uses in the area such as a Shop-Rite, a liquor store and pad sites; that the anticipated traffic rates as testified to by Plaintiff's experts were far less than the potential 8,180 vehicles estimated by the State Office of Planning Advocacy; and that the ingress and egress was not designed sufficiently in light of the location of the Property. (3T, 238:7-242:3).

At the conclusion of the hearing, three (3) Board members voted in favor of conditional preliminary site plan approval and three (3) Board members voted in opposition to such motion, thereby resulting in the failure of Plaintiff to obtain the affirmative votes of the majority of Board members in attendance and the denial of Plaintiff's Application. (3T, 232:18 – 252:9).

PROCEDURAL HISTORY

The Board held public hearings on Plaintiff's Application for preliminary site plan approval on June 29, 2023, August 2, 2023 and November 16, 2023. (1T, 2T, 3T). At the conclusion of the November 16, 2023 meeting, the Board voted to deny Plaintiff's Application. (3T, 232:18-252:9). On December 23, 2023, the Board passed Resolution #2023-43 memorializing the denial of Plaintiff's Application. (Pa284).

On February 12, 2024, Plaintiff filed a complaint in lieu of prerogative writ challenging the Board's denial of the Application (Pa1). On April 10, 2024, the Board filed an Answer. (Pa322). On September 27, 2024, following briefing and oral argument, Judge Telsey entered an Order denying the relief sought in Counts One, Two and Three. (Pa356).

Judge Telsey rendered a well-reasoned oral decision wherein he noted the Board had reasonable concerns regarding the traffic study that was performed during 2021 during a time of lighter traffic and did not take into account development that had occurred since the study was performed. (4T, 31:21-

32:22). The trial court further noted the Board's reasonable concern as to how the ingress and egress would be affected by the intensity of use because the Plaintiff did not know who the warehouse's tenant would be in order to determine the number of trucks entering and exiting the Property. (4T, 33:13-34:15). Judge Telsey noted that the intensity of the use was based solely on the speculation of Plaintiff's Traffic Engineer who was not an expert in the field of warehouse use. (4T, 34:16-18).

The trial court correctly concluded that the information in the record supported the Board's reasonable concerns regarding ingress and egress to the Property and that the Board did not act arbitrarily, capriciously and unreasonably when it denied Plaintiff's Application. (4T, 35:11-36:20). Accordingly, the trial court properly upheld the Board's denial of Plaintiff's application. (4T, 36:21-22).

On October 17, 2024, Plaintiff moved for reconsideration. On November 25, 2024, following briefing and oral argument, the trial court denied Plaintiff's motion for reconsideration. (Pa358). In its oral decision, the trial court reiterated its determination that the Board had raised reasonable concerns during the hearing as to whether the traffic study conducted in October 2021, which did not include recently approved developments, accurately depicted the traffic going past the Property. (5T, 19:22-20:12). The trial court held that the "stale" traffic count was a sufficient basis to conclude that the Board did not act arbitrarily, capriciously or unreasonably in raising those concerns. (5T, 20:13-17).

The trial court also clarified that, regardless of whether or not Plaintiff's Traffic Engineer, Mr. Disario, was entitled to opine regarding the intensity of the use of the warehouse, the Board had reasonable concerns as to the extent, intensity and use of the warehouse given Plaintiff's sole member did not know what the extent and use of the warehouse would be. (5T, 20:18-22:5). The trial court also noted the Board was permitted to consider, and discount, Mr. Disario's opinion. (5T, 22:6-25). The trial court, thus, maintained its original determination that the Board did not act arbitrarily, capriciously or unreasonably. (5T, 23:1-8).

On January 13, 2025, the Complaint's remaining counts, Counts Four and Five, were dismissed with prejudice. (Pa360). On January 16, 2025, Plaintiff timely filed its Notice of Appeal. (Pa361).

LEGAL ARGUMENT

I. Standard of Review.

This Court conducts a *de novo* review of the trial court's order affirming the Board's denial of Plaintiff's Application for site plan approval. Cohen v. Bd. of Adjustment, 396 N.J. Super. 608, 614-15 (App. Div. 2007). A court's review of the decision of a planning board is governed by the arbitrary, capricious and unreasonable standard. The standard of review used by courts in a challenge to a decision made by a planning or zoning board is very limited. Davis v. Planning Bd. Of City of Somers Point, 327 N.J. Super. 535, 542 (App. Div. 2000). A board's decision should be sustained if it "comports with the statutory criteria and is founded on adequate evidence." Id. (quoting Burbridge v. Township of Mine Hill, 117 N.J. 376, 385 (1990)). Therefore, if a court concludes that "there is [sufficient] support in the record, approval will not be deemed arbitrary or capricious." Ibid.; see also Jayber, Inc. v. Municipal Council, 238 N.J. Super. 165, 173 (App.Div.1990) (finding that a court should defer unless a decision is "so arbitrary, unreasonable or capricious as to amount to an abuse of discretion").

The trial court properly determined that the Board's denial of Plaintiff's Application was supported by the record and was not arbitrary, capricious or unreasonable. Accordingly, the trial court's ruling should be affirmed.

II. The Trial Court Properly Determined That The Record Supported The Board's Denial of Plaintiff's Application Based On The Board's Reasonable Concerns Regarding Ingress and Egress To The Property And, Therefore, The Board's Decision Was Not Arbitrary, Capricious Or Unreasonable. (4T, 29:18-36:1; 5T, 19:3-23:8).

The trial court correctly concluded that the record supports the Board's denial of Plaintiff's Application due to the Board's reasonable concerns regarding the safety of the ingress to and egress from to the Property. Therefore, the trial court's determination that the Board's decision was not arbitrary, capricious or unreasonable should be affirmed.

Courts have held that an application for preliminary site plan approval may be denied ". . .if it lacks specificity or if an applicant has failed to provide pertinent information to assess the adequacy of a stormwater management plan." W.L. Goodfellows and Co. of Turnersville, Inc. v. Washington Tp. Planning Bd., 345 N.J. Super. 109, 117-118 (App. Div. 2001)(citing Morris County Fair Housing Council v. Boonton Twp., 228 N.J. Super. 635, 642 (Law Div.1988)). As the court noted, "(b)ecause drainage and sewage may have a pervasive impact on the public health and welfare, we have recognized that the feasibility of specific proposals or solutions must be resolved before preliminary approval is given." Id. (citing Field v. Mayor and Council of Twp. of Franklin, 190 N.J. Super. 326, 332-333 (App.Div.1983)).

Here, Plaintiff's Application lacked specificity given Plaintiff could not identify the ultimate end-user of the proposed warehouse and Plaintiff's traffic counts were called into question due to both the time period within which counts were conducted and the inconsistency of the anticipated traffic as testified to by Plaintiff's expert and the guidance provided by the State Planning Commission. The Application also presented issues impacting the public health and welfare.

In Lionel's Appliance Center, Inc. v. Citta, 156 N.J. Super. 257 (1978), the court analyzed the proper scope of site plan review by municipal planning boards. There, the court analyzed the MLUL definition of "site plan" along with the MLUL provision concerning permitted contents of site plan ordinances. Id. at 267. While no provision in the MLUL permitted a planning board to deny site plan approval based on intensity of vehicular traffic on adjoining roadways, the court determined that a planning board may deny site plan approval when "the ingress and egress proposed by the plan creates and unsafe and inefficient vehicular circulation." Id. at 268-69.

The permissible scope of a planning board's review of a site plan and the Lionel's Appliance case was discussed further by the Appellate Division in Last Frontier v. Blairstown Twp. Zoning Bd. Of Adjustment, 2010 N.J. Super. Unpub. LEXIS 1106 at *12-13 (App. Div. May 24, 2010).[1] While Last Frontier dealt with a variance application, the court noted the holding in Lionel's Appliance that consideration of traffic safety at the site's ingress/egress points was a proper site plan consideration. Id. at *12. Specifically, the Appellate Division noted its holding in Dunkin Donuts of N.J. v. Twp. of N. Brunswick Plan. Bd., 193 N.J. Super. 513, 515 (App. Div. 1984), that when considering a site plan application,

[1] A copy of the unpublished opinion in Last Frontier v. Blairstown Twp. Zoning Bd. of Adjustment is submitted with the Board's Appendix at Da1.

"[a] planning board should consider off-site traffic flow and safety in reviewing proposals for vehicular ingress to and egress from a site . . . ." Id. at *23, fn. 1.

The Board's concerns with the ingress and egress to the Property were evident throughout the course of the three hearings on the Plaintiff's Application and echoed within the Resolution. It is clearly within a Planning Board's discretion to deny site plan approval when "the ingress and egress proposed by the plan creates and unsafe and inefficient vehicular circulation." Lionel's Appliance Center, 156 N.J. Super. at 268-69. This was expressly acknowledged by Plaintiff's counsel at the initial hearing on the application when he noted that the Board's jurisdiction ". . .is confined within our site ensuring that we have safe, adequate and efficient circulation within our site, *and particularly at our driveways.*" (1T, 21:24-22:10)(emphasis added). A review of the record below and the memorializing Resolution confirm that the Board and Board Professionals had valid concerns with regard to the proposed ingress and egress and Plaintiff's Application was denied on the basis of those valid concerns.

The Board Traffic Engineer, Derek Kennedy, provided his report to the Plaintiff and the Board which detailed his concerns with the Property ingress and egress and the traffic study prepared by the Plaintiff's traffic engineer. (Pa59). Therein, Mr. Kennedy noted his concern that the actual vehicle trip generation generated by the proposed use would outperform the published ITE rates upon which the Plaintiff's traffic study relied. (Pa73, ¶ 2). Mr. Kennedy also raised concerns that Plaintiff had not identified the ultimate user of the warehouse, opining that different types of warehouses generate differing volumes of traffic. (Pa74, ¶ 3).

Mr. Kennedy also questioned whether deceleration and acceleration lanes are required at the proposed driveways and requested an analysis of that potential. (Pa76, ¶ 18). Mr. Kennedy raised a concern with respect to whether tractor trailers would be able to remain in their travel lanes when entering and exiting the Property cautioning that trailers encroaching into an opposing traffic lane would not be permitted under any circumstances. (Pa77, ¶ 20). Moreover, Mr. Kennedy expressed his concerns with the excessive roadway shoulder width and resultant increased separation between the driveway exit stop line and the actual roadway and the likelihood that the increased roadway width would result in higher travel speeds along the roadway. (Pa77, ¶ 25).

Plaintiff's failure to propose an acceleration or merge lane from the exit-only driveway was raised by Board member Frederick not long into the presentation by Plaintiff's civil engineer where he noted the difficulty a tractor trailer would have exiting the Property onto a fifty-mile-per-hour roadway in the following exchange:

> MR. FREDERICK: Continuing on with the design, specifically for driveway two, if I'm reading this correctly, they're expected to make a right turn only, right, number one?
>
> A. Correct.
>
> MR. FREDERICK: There is no merge lane, so they're going to go from zero to 50 to not provide obstacles with traffic heading north?
>
> A. There is no -- I'm going to talk about that next. There is, as part of the roadway improvements, there's going to be at driveway one -- I know you asked about driveway two. I'll get to that first. There's going to be a dedicated left turn in for driveway one so cars can pull into the left turn lane and other cars can go around them, but **for driveway two, there was no acceleration lane planned for that. It didn't -- again, Mr. Disario can talk further about that.**
>
> MR. FREDERICK: **So again, trucks are expected to continue with the flow of traffic, which would be 50.**
>
> A. **They would have to wait.**
>
> MR. FREDERICK: I'm sorry. What would happen?
>
> A. They would have to wait. They would have to wait their turn based on the traffic coming.

(1T, 53:12 – 54:14)(emphasis added).

Board member Morris echoed Mr. Frederick's concerns, noting that "(i)t seems abnormal to me that you would expect -- as Mr. Frederick had said, that you would have to -- it's a 50-mile-an-hour road, that you would kind of get on there and expect, without messing up traffic or potentially causing risk with the trucks coming on. I think there are a couple hundred bays here. I mean, this is a huge facility." (1T, 55:11-21). Board member Marino noted his additional concerns with the proposed exit from the Property due to line-of-sight issues impacting the roadway, noting that ". . . if you look at the roadway on Auburn

Road, that's the high point, and it actually goes downhill towards Swedesboro. Without an acceleration lane, that truck pulls out and they're going to pick up very slowly, and you have a car cresting that hill, not realizing a truck just pulled out in front of them, you could cause a rear -- I mean, is it likely to happen? I don't know. Without an acceleration lane, that car's really at a disadvantage when they top that hill and the trailer is in front of them." (1T, 55:11-21). While the Plaintiff's civil engineer committed to further investigating the potential for an acceleration lane (1T, 55:14-23), the Plaintiff's traffic engineer testified as to his dislike of acceleration lanes (1T, 80:13-16) and, ultimately, Plaintiff did not propose an acceleration lane.

At the August 3, 2023 Board hearing, Board member Morris again raised his concerns regarding the lack of an acceleration lane and asked Plaintiff's civil engineer how long it would take a tractor trailer to get to a reasonable speed limit. (2T, 15:5-16:17). Plaintiff's civil engineer responded that it depended on the truck, the truck's engine and the weight the truck was carrying while acknowledging that ". . . yes, there's going to be some time lag. They're going to have -- truck drivers are going to have to judge based on who's coming down the road if they can make it or not." (2T, 15:5-16:17). Further, Plaintiff's civil engineer confirmed that it was Plaintiff's traffic engineer's recommendation to not propose an acceleration lane. (2T, 16:16-17).

These valid concerns regarding the unsafe nature of tractor trailer movements into and out of the Property were cited within the Resolution as the basis for the Board's denial. The Resolution specifies that Plaintiff had failed to establish that tractor trailers can enter and exit the site safely and without causing major traffic concerns along Auburn Road. (Pa312-313, ¶¶ 40 & 43). Moreover, included in the Resolution was the finding that "...the configuration, grading, speed limit, light of sight and heavy traffic on Auburn Road makes it unsafe for tractor trailers to exit from the site onto Auburn Road" and that "the location of the ingress and egress as contained in driveways #1 and #2 do not allow for the safe exiting of tractor trailers onto Auburn Road." (Pa313, ¶ 42). The Board further held that the widened road shoulder proposed by Plaintiff along Auburn Road presented safety concerns in light of the potential for tractor trailers to cue (park) within such widened shoulder thereby impairing the ability of tractor trailers to safely exit the facility. (Pa309, ¶ 41). The Resolution further noted the Board's holding that the proposed widening of the roadway would encourage higher vehicle speeds which will contribute to the safety concerns regarding the ingress and egress to the Property as noted by the Board's traffic engineer. (Pa312, ¶ 41).

The bases for the Board's denial of the Plaintiff's site plan application were valid, in furtherance of the public welfare and squarely within the Board's discretion as held in Lionel's Appliance Center, Inc. v. Citta. Each of the Board's reasons for denial were founded in the unsafe nature of the ingress and egress to and from the Property. As such, the trial court properly granted the Board's decision deference and upheld its denial. A board's decision should be sustained if it "comports with the statutory criteria and is founded on adequate evidence." Davis v. Planning Bd. Of City of Somers Point, 327 N.J. Super. 535, 542 (App. Div. 2000) (quoting Burbridge v. Township of Mine Hill, 117 N.J. 376, 385 (1990)).

Therefore, if a court concludes that "there is [sufficient] support in the record, approval will not be deemed arbitrary or capricious." Ibid.; see also Jayber, Inc. v. Municipal Council, 238 N.J. Super. 165, 173 (App.Div.1990) (finding that a court should defer unless a decision is "so arbitrary, unreasonable or capricious as to amount to an abuse of discretion"). "[P]ublic bodies, because of their peculiar knowledge of local conditions, must be allowed wide latitude in their delegated discretion." Jock v. Zoning Bd. Of Adjustment of Wall, 184 N.J. 562, 597 (2005). Therefore, "[t]he proper scope of judicial review is not to suggest a decision that may be better than the one made by the board, but to determine whether the board could reasonably have reached its decision on the record." Ibid. Thus, a reviewing court must not substitute its own judgment for that of the local board unless there is a clear abuse of discretion. Cell S. of N.J., Inc. v. Zoning Bd. Of Adjustment of W. Windsor Twp., 172 N.J. 75, 82 (2002) (citing Med. Realty Assocs. V. Bd. Of Adjustment, 228 N.J. Super. 226, 233 (App. Div. 1988)).

Considering the adequate support in the record for the Board's denial of Plaintiff's application on the basis of the unsafe nature of the proposed ingress and egress to the Property; the Board's compliance with statutory mandates; the deference granted to decisions made by municipal planning and zoning boards; and the potential pervasive impact on the public health and welfare resulting from the unsafe ingress and egress proposed by the Plaintiff, the trial court's affirmance of the Board's denial of Plaintiff's Application should be upheld.

III. The Record Supported The Board's and Trial Court's Finding The Plaintiff's Traffic Study Was Stale. (4T, 29:18-36:1; 5T, 19:3-23:8).

The trial court did not "overlook" any evidence when it determined the Board could reasonably have considered Plaintiff's traffic impact study to be stale and not an accurate representation of the actual traffic at the Property. (4T, 32:16-33:12). The Board and trial court also did not overlook that the traffic impact study was revised on March 27, 2023, however, the "updated" information therein reflected traffic count data collected on a single day, October 7, 2021. Plaintiff's assertion that the Board's rational concerns that the traffic study was flawed because it was based on data collected during the Covid-

19 pandemic should be obviated because the traffic count was conducted after Governor Murphy's Executive Order 175 is disingenuous at best.

As an initial matter, Executive Order 175 was not presented as evidence to the Board during the three (3) hearings on Plaintiff's Application nor was it presented to the Court prior to Plaintiff's motion for reconsideration. Furthermore, Plaintiff mischaracterizes Executive Order 175 as constituting a mandatory return to in-person school instruction, which it was not. (Pl. Br. p. 19). Finally, while Executive Order 175 may have impacted traffic counts pertaining to school traffic, it certainly did not operate as a green light to reopen the world so severely impacted by the Covid pandemic such that traffic volume was back to "normal" in October 2021.

The Board's Traffic Engineer, Mr. Kennedy, raised concerns regarding the data within the Plaintiff's traffic study being outdated as follows:

> The traffic counts included in the report are from October 2021. Typically, traffic counts should be within 12 months of the application date. The revised submission should include a base year of 2023. All previous data should be recounted or properly adjusted for 2023 conditions.

(Pa75, ¶10). While Mr. Kennedy stated during the second hearing that the traffic counts in the TIS were likely high, the Board had discretion to use their own peculiar knowledge of traffic conditions at the time the traffic count was conducted, *i.e.,* during the Covid pandemic, to draw their own conclusions. (2T, 145:25-146:7); See, e.g., Price Co. v. Zoning Bd. of Adj. of Union, 279 N.J.Super. 327, 334 (Law Div. 1993)(stating Board members could reject expert testimony and rely on their own knowledge of traffic conditions). Further, while Plaintiff has argued that they were agreeable to providing an updated traffic study at the time of final site plan approval, the Board cannot be expected to simply hope that a future updated traffic study would adequately address the many valid and reasonable concerns they had at the time of evaluating the Application for preliminary approval.

It is also not the case that the Board inappropriately considered issues within the purview of the County when denying the Application. (Pl. Br. p. 21). Rather, the Board "acknowledge[d] that off-site improvements on Auburn Road and elsewhere would fall within the jurisdiction of Gloucester County Planning Board, the impact those issues have on the ingress and egress to the site are within the review and approval powers" of the Board. (Pa313, ¶ 43). Woolwich Ordinance § 149-5 specifies that in reviewing any site plan, the Board "shall consider…vehicular traffic movement within and adjacent to the site…" and that "[a]ccess to the site from adjacent roads shall be designed so as to…permit vehicles a rapid and safe ingress and egress to the site." Although Plaintiff's experts testified the proposed driveway design was safe, the Board's Traffic Engineer, Mr. Kennedy expressed concerns regarding the ingress and egress.

(1T, 7:14-8:2). Thus, the trial court did not err in upholding the Board's denial based on its concerns related to ingress and egress to the Property which was clearly within the Board's purview when considering the Application.

IV. The Trial Court Properly Determined That The Board Was Entitled To Consider The Lack Of Information On The Warehouse's Intensity of Use When Denying Plaintiff's Application. (4T, 29:18-36:1; 5T, 19:3-23:8).

In considering whether the Board could have reasonably reached its decision based on the record before it, the trial court correctly found that the Board was entitled to consider the irrefutable lack of information regarding the warehouse's intensity of use when denying Plaintiff's Application. Courts have held that a site plan application may be denied ". . .if it lacks specificity or if an applicant has failed to provide pertinent information to assess the adequacy of a stormwater management plan." W.L. Goodfellows and Co. of Turnersville, Inc. v. Washington Tp. Planning Bd., 345 N.J. Super. 109, 117-118 (App. Div. 2001) (citing Morris County Fair Housing Council v. Boonton Twp., 228 N.J. Super. 635, 642 (Law Div.1988)). As the Appellate Division noted, "(b)ecause drainage and sewage may have a pervasive impact on the public health and welfare, we have recognized that the feasibility of specific proposals or solutions must be resolved before preliminary approval is given." Id. (citing Field v.

Mayor and Council of Twp. of Franklin, 190 N.J. Super. 326, 332-333 (App.Div.1983)).

Plaintiff's presentation to the Board was marked by numerous uncertainties detailed herein, including those engendered by Plaintiff's sole member's inability to offer testimony regarding the type of warehouse or its tenants and the lack of an offer by Plaintiff of a condition preventing the Property from being used as a fulfillment center. Nevertheless, Mr. Disario opted to use "middle of the road" estimates for the amount of traffic the Property would generate and outdated data to support their assertions regarding the volume of traffic passing the Property.

In light of these various unknowns, the Board was not persuaded that the site would include safe ingress and egress in order to operate safely and, thus, reasonably used their discretion to deny the Application. While Plaintiff has argued that they were agreeable to providing an updated traffic study at the time of final site plan approval, the Board cannot be expected to kick the can down the road in the hopes that a future updated traffic study would adequately address the valid and reasonable concerns they had at the time of evaluating the application for preliminary approval.

Further, neither the trial court nor the Board ever equated Plaintiff's inability to name a specific tenant with the warehouse "becoming a high intensity fulfillment center." (Pl. Br., p. 25). In fact, the trial court explicitly stated that it found no fault with Plaintiff "not knowing the intensity of the use because they don't know who the tenant is," which the trial court considered "something that's not uncommon." (4T, 33:13-20). However, the trial court found it was still reasonable for the Board to ask how intense the use will be regarding the number of trucks coming and going from the site since "that goes directly to the issue of the ingress and egress." (4T, 33:21-34:1).

Plaintiff's traffic expert, Mr. Disario, testified that he utilized the ITE 150 classification for his traffic study, which is representative of traditional warehousing, but he acknowledged that there are higher and lower intensity levels of traditional warehousing. (3T, 67:8-68:1). The trial court never dictated what intensity standard Mr. Disario should have used; rather, the court merely noted that, given the tenant was unknown, it was reasonable for the Board to suggest that one should err "choosing the higher volume" of traffic rather than the "middle of the road" approach to estimating the volume taken by Mr. Disario. (4T, 34:21-35:18). Considering Plaintiff's sole member had no idea what type of warehouse would be built, the Board had valid concerns with whether the traffic study, which was based on the hypothetical use about which Mr. Disario opined, was accurate in its representation of the traffic which would be generated by the proposed use. Plaintiff could have offered a condition of approval providing that the Property would not be used as a fulfillment center but failed or refused to do so. Simply put, the Board had no assurances that the warehouse would not be more intensely utilized than the traditional warehouse Mr. Disario opined it would be.

The trial court acted properly and within its discretion when it determined the record reflected that, notwithstanding Mr. Disario's assumption regarding the warehouse's intensity of use, the Board still had reasonable concerns as to the actual extent and intensity of the warehouse's use. (5T, 21:11-23-4).

V. The Trial Court Acted Within Its Discretion When It Properly Determined That Plaintiff's Traffic Expert Was Not An Expert in The Field of Warehouse Design And The Board Was Entitled To Discount His Opinion Regarding The Warehouse's Potential Intensity of Use. (4T, 29:18-36:1; 5T, 19:3-23:8).

Contrary to Plaintiff's mischaracterization, the trial court never concluded that Plaintiff's Traffic Expert, Mr. Disario, was not an expert qualified to testify regarding traffic issues. (Pl. Br., p 26). Rather, the trial court correctly noted that Mr. Disario was not an expert in the "particular area" of warehouse design and, thus, was not qualified to opine on precisely what type of warehouse the Plaintiff was proposing. (4T, 33:13-18). This is no surprise given that at no point was Mr. Disario offered or accepted as an expert in the field of warehouse design. Rather, prior to Mr. DiSario reviewing his qualifications during the June 23, 2023 hearing, Plaintiff's counsel requested that Mr. DiSario be accepted as an expert in the field of traffic engineering, not warehouse design. (1T, 75:5-8). Mr. DiSario made the identical request after reviewing his qualifications for the Board. (1T, 76:17-19).

On reconsideration, the trial court clarified the portion of its ruling regarding whether Mr. Disario could have opined as to the intensity of the warehouse's use and deferred to the reasonableness of the Board's concerns as to the extent and intensity of the warehouse's use, which was unknown to Plaintiff at the time. (5T, 20:18-22:5). The trial court did not "discount" or reject Mr. Disario's opinion. (Pl. Br. p. 26). Rather, Judge Telsey properly concluded that even if the Board was permitted to consider Mr. Disario's opinion regarding the intensity of use of the warehouse despite him not being qualified as an expert in that field, the Board was also free to discount his opinion. (5T, 21:24-22:18). As discussed below, Mr. Disario's testimony did little to assuage the Board's valid concerns regarding the intensity of the warehouse's use and its resulting impact on the safety of the ingress and egress to the Property.

Mr. Disario offered testimony which went well beyond his field of traffic expertise and strayed into fields such as Amazon fulfillment centers, building design, and the type of tenant the proposed building would attract as follows:

> I think somebody had mentioned fulfillment centers. I can tell you, I do a lot of work with Amazon. This site is not set up for an Amazon fulfillment center. It's under-parked in terms of car parking. Doesn't have enough loading docks. Doesn't have enough trailer spaces.

> A fulfillment center, and we'll specifically talk about Amazon, Amazon fulfillment centers are not single-story high-cube buildings. Amazon fulfillment centers, particularly the ones that fulfill small items, are multi-story. They have ground floor operations with four and five mezzanines. They're over 100 feet tall.
>
> That's not what this building is. That's not what this applicant is proposing. The types of tenants that would seek out this type of building, particularly a single-loaded building, which means only that it has loading docs on one side, severely limits the amount of product that can be processed through this building.
> So you are going to see tenants in line with the ones I just cited to you. You can get a third-party logistics company in here. You could get an HVAC company that wants to put air conditioners and heaters and store them and then fulfill them.

(1T, 102:18-103:18). Thus, notwithstanding the fact Mr. DiSario was never qualified nor accepted as an expert in the field of warehouse design, he based his traffic study and testimony in part on his assumption that the proposed warehouse would be a "traditional" warehouse and not a fulfillment center or other more intense type of warehouse based on how the proposed warehouse was designed. (3T, 67:8-23–70:2).

Mr. DiSario offered this opinion on the type of warehouse the proposed structure would be notwithstanding the fact that the Property owner and Plaintiff's sole member, Eric Greif, had no idea what type of warehouse was being proposed. (3T, 57:11-23). Specifically, Mr. Greif testified that the proposed warehouse was a "spec building;" that he had never developed a warehouse before; that he had not identified a potential tenant for the building;

that he did not know whether the building would have one tenant or multiple tenants; that he did not know whether there were different types of warehouses; and that he did not know what type of warehouse this would be. (3T, 58:3-61:12). Notably, Mr. Greif further testified that, until he knew who the tenant would be, he would not know what the specific operational requirements of such tenant might be, such as the hours of operation, number of employees, number of shifts, trash collection schedule, whether hazardous materials would be stored in the warehouse. (3T, 61:17-62:19).

Further, as elicited during the cross-examination of Mr. DiSario by Jeffrey Brennan, Esquire during the third hearing on Plaintiff's application, the traffic generation estimate used by Mr. DiSario constituted, as correctly characterized by the trial court, "taking the middle road." (4T, 34:6-15). Mr. DiSario used traffic generation estimates based on the Property being used as a traditional warehouse while ITE classifications exist for both higher intensity and lower intensity warehouse uses. (3T, 68:13-70:4). Considering the uncertainties the Board faced as to the type of warehouse being proposed, the unknown identity of potential warehouse tenants and their attendant operational requirements, it was incumbent upon the Plaintiff to demonstrate to the Board that the site can operate safely notwithstanding these uncertainties. However, rather than alleviating the Board's valid concerns with the accuracy of the traffic generation estimates by using the highest intensity type of warehouse when making his estimates, Mr. Disario used "middle of the road" estimates.

Based on the foregoing, the trial court properly determined that the record supported the Board's valid concerns regarding the proposed warehouse's intensity of use and, therefore, its denial was not arbitrary, capricious or unreasonable.

VI. The Board's Resolution Is Sufficiently Supported By The Factual Record and Is Not Deficient. (4T, 29:18-36:1; 5T, 19:3-23:8).

Lastly, there is simply no merit to Plaintiff's assertion that the Board's Resolution should be set aside because it purportedly contains an incorrect factual statement at Paragraph 40; *i.e.,* that Plaintiff's Traffic Engineer proposed an acceleration lane as part of the Driveway 2 design which the Board found created an unsafe condition when the Board's Traffic Engineer actually made that suggestion. (Pl. Br., p. 31; Pa312, ¶ 40).

When read in isolation, Paragraph 40 could arguably appear to indicate that Mr. Disario had proposed an acceleration lane at Driveway 2. However, when the thirty-one (31) page Resolution is reviewed in its entirety, it is evident the Board was merely reciting Mr. Disario's response to the suggestion of an acceleration lane made during the hearing by the Board's Traffic Engineer and Board members Fredericks and Marino. (Pa312). Further, as Plaintiff notes, the Resolution elsewhere correctly references Mr. Disario's testimony that he believed a stop sign controlled design at Driveway 2 was the best option and that he did not like acceleration lanes. (Pa300-301).

Moreover, any confusion as to whether or not the Plaintiff proposed an acceleration lane was exacerbated by Plaintiff's witnesses. Specifically, two of Plaintiff's professionals characterized the area east of the exit driveway as an "acceleration lane." (1T, 58:6-9 & 80:23-81:7). Mr. Ottes testified that ". . . what we'll do is **we'll investigate adding more distance to the acceleration lane**." (1T, 58:6-9)(emphasis added).

Mr. DiSario, while stating his dislike for acceleration lanes, testified as follows:

> In my opinion, and respectfully, it's safer to have a stop controlled driveway with no acceleration lane, particularly if the acceleration lane can't be of an adequate length, which **I believe we have some acceleration lane as part of the widening across the frontage, but we may not be able to provide additional acceleration lane length because of right-of-way issues**. If the property's not available, we can't obviously widen the road.

(1T, 80:23 – 81:7)(emphasis added).

Nonetheless, the Resolution is otherwise compliant with statutory mandates and contains the required findings of fact and legal conclusions. Further, any perceived deficiency with the Resolution could be cured by a review and incorporation of the extensive record in this matter. <u>See, e.g.</u>, <u>Fieramosca v. Twp. of Barnegat</u>, 335 N.J. Super. 526, 534 (Law. Div. 2000)(a resolution is evidential, not determinative, of what was considered at the hearing, rather, "[t]he record is the best evidence of what the board considered and decided.")(citing Sherman v. Harvey Cedars Bd. of Adj., 242 N.J. Super. 421, 430 (App.Div. 1990)(citing Allied Realty v. Upper Saddle River, 221 N.J. Super. 407,415-16 (App.Div.1987), certif. denied, 110 N.J. 304 (1988)).

There is ample evidential support in the record supporting the Board's denial of Plaintiff's Application and reversal of the Board's decision is not warranted.

CONCLUSION

Based on the foregoing, considering the Board's rational concerns regarding the accuracy of the existing and future traffic estimates; the impact such estimates have on the Board's consideration of the proposal's safety; the adequate support in the record for the Board's denial of Plaintiff's Application due to the unsafe nature of the proposed ingress and egress to the Property; the Board's compliance with statutory mandates; the deference granted to decisions made by planning and zoning boards; and the potential pervasive impact on the public health and welfare resulting from the unsafe ingress and egress proposed by Plaintiff, the trial court's ruling upholding the Board's denial of Plaintiff's Application should be affirmed.

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OLDMANS CREEK HOLDINGS, LLC, Appellant, vs. THE JOINT LAND USE BOARD OF THE TOWNSHIP OF WOOLWICH, Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No A-001402-24 On Appeal from Superior Court of New Jersey Gloucester County-Law Division Docket No. GLO-L-177-24 Sat Below: Benjamin C. Telsey, A.J.S.C.

REPLY BRIEF OF APPELLANT, OLDMANS CREEK HOLDINGS, LLC

On the Brief: Jamie A. Slimm, Esq.

Of Counsel: Clint B. Allen, Esq.

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PRELIMINARY STATEMENT

The Joint Land Use Board of the Township of Woolwich ("Board") mischaracterizes the matter before the Board and the resulting errors by the trial court. Oldmans Creek Holdings, LLC's ("Oldmans") Application sought **preliminary** site plan approval. In a misdirection, the Board invokes its discretionary authority suggesting Oldmans requested final approval. The record clearly reveals Oldmans agreed to Board conditions including an approved updated traffic study and that the warehouse would not be a high-volume facility. Instead of adhering true to the facts, the Board's opposition goes to great lengths to cite twenty-two pages of selected statements from the hearings, which are incomplete and untethered to the context. The referenced "factual statements" omit subsequent testimony and evidence contrary to the Board's claims and which reveals the errors overlooked by the trial judge.

In this matter, the trial court upheld the Board's unsupported denial of the preliminary application for two interrelated reasons: the first, based on speculative concerns about ingress and egress that focused on what was characterized as a "stale" traffic study; the second, a manufactured intensity of use despite the expert's testimony showing this was not a "high" intensity warehouse. A careful review of the evidence, shows all traffic professionals – the Board's and Oldmans'-

- agreed the study presented reflected the possible traffic for the site and the intensity of use was a traditional single building warehouse.

As explained to the trial court, even though Oldmans' preliminary site plan Application met all criteria of the Municipal Land Use Law ("MLUL") and applicable zoning and site plan ordinances, the Board issued a denial because it was a warehouse. The post-denial zoning change for the property eliminating warehouses as a permitted use, reveals the Board's denial of the fully compliant permissible Application to be not only arbitrary, but also a capricious and unreasonable imposition of governmental authority. Nevertheless, the trial judge's failure to fully review the evidence, upheld that denial. The erroneous determination must be reversed and the matter remanded to the Board for adoption of a Resolution approving the Application for Preliminary Major Site Plan Approval, with customary and reasonable conditions or approval.

LEGAL ARGUMENT

I. THE TRIAL COURT IGNORED EVIDENCE RELATED TO INGRESS AND EGRESS RESULTING IN REVERSIBLE ERROR. (4T29-18 TO 36-1; 5T19-3 TO 23-8).

The Board argues the trial court correctly concluded the denial of Oldmans' Application was not arbitrary, capricious or unreasonable because the Board expressed "reasonable concerns" about the safety of ingress and egress from the Property. The Board supports this contention by broadly suggesting the

Application lacked specificity, relying on W.L. Goodfellows and Co. of Turnersville, Inc. v. Washington Twp. Planning Bd., 345 N.J. Super. 109, 117 (2001) (stating an application for preliminary site plan approval can be denied if it "lacks sufficient specificity or if an applicant has failed to provide pertinent information to access the adequacy of a stormwater management plan"). (Db29).

It is agreed that a lack of specificity may be a basis for denial of a preliminary application; however, as applied here, this unsupported opinion ignores not only the record but also expert testimony of the Board's own professionals as well as the County's comprehensive review and approval. Moreover, consideration of the facts and holding in W.L. Goodfellows fully highlights the trial court's error in upholding the Board's denial of Oldmans' application.

In W.L. Goodfellows, the Washington Township Planning Board denied an application for preliminary site plan approval based upon the alleged failure of W.L. Goodfellows to demonstrate it secured a drainage easement for the property, although it initiated the process of procuring the easement. On appeal, this court reversed the summary judgment dismissal of W.L. Goodfellows complaint, holding the preliminary site plan should have been approved, conditioned on the acquisition of a drainage easement. Id. at 118 (emphasis added). Similar to the circumstances faced by Oldmans' in this matter, the Application should have been approved with conditions to clarify any broad concerns of whether traffic flow had increased since the Application's traffic study was competed. Also, conditional approval could have limited use to a traditional warehouse as clearly represented by Oldmans, obviating concerns of a high intensity fulfillment center tenant.

Oldmans does not dispute that a Board can deny a site plan application "only if the ingress and egress proposed by the plan creates an unsafe or inefficient vehicular circulation." Lionel's Appliance Ctr., Inc. v. Citta, 156 N.J. Super. 257, 268-269 (Law Div. 1978) (emphasis added)[1]. Oldmans provided documentary and expert witness testimony of each of these issues—the application did not omit or

[1] The Board cites Last Frontier v. Blairstown Twp. Zoning Bd. of Adjustment, 2010 N.J. Super. Unpub. LEXIS 1106 (App. Div. May 24, 2010) to support its advanced position that Board members' concerns regarding ingress and egress is a proper site plan consideration. (Db30-31). Notwithstanding that this is an unpublished opinion, which is not precedential, see R. 1:36-3, the facts of the cited reference are distinguishable, and context is essential to the holding. In denying the requested use variance, this Court held the Blairstown Board did not act arbitrarily when considering the knowledge of Board members who personally visited the property and observed identified safety concerns related to ingress and egress, documented in the evidentiary record. This evidence was properly weighed by the Board and later the trial court when rejecting contrary expert testimony. That said, here, Board members simply suggested a disagreement with the unrefuted testimony of both Oldmans' experts as well as the Board's own traffic professional, who stated ingress and egress was safe. Thus, no case precedent supports the proposition that a lay member Board's, unsupported, speculative possibilities defeats expert opinion evident unequivocally set forth in the record. In fact, to do so is the epitome of arbitrary and capricious action.

neglect to specifically address these two issues. In fact, Oldmans hand selected a traffic engineer who has millions of square feet of warehouse design application experience across the United States to ensure the quality of its ingress and egress analysis and warehouse operations. (1T76-1 to 5). Nevertheless, the trial judge erred by ignoring the holding in W. L. Goodfellows: instead of defining conditions the Board felt required enhancement the judge upheld the arbitrary dismissal based on the erroneous finding there was a lack of specificity. In fact, the record shows Oldmans presented a design, which provided safe ingress and egress, (3T241-18 to 25; 3T242-1 to 3); agreed to a condition requiring an updated traffic study, (1T110-11 to 15; 1T111-14 to 21); and stipulated to the intensity of use.[2] (3T68-18 to 70-2).

It cannot be overlooked that the Board cites limited extractions of statements from its traffic engineer, Derek Kennedy. The summary is misleading because it ignores the entirety of the evidence presented to the Board on the issue.

For example, citing only Kennedy's May 3, 2023 written report (Pa71), the Board neglects to mention that Oldmans May 19, 2023 responsive correspondence, addressing each of Kennedy's comments. (Pa71). The Traffic Impact Study

[2] The Board implies Oldmans refused a condition of approval specifying the proposed warehouse building would not be a fulfillment center. This condition was never proposed by the Board and therefore not refused by Oldmans. Oldmans' evidence supported the project was a traditional –not high intensity use—warehouse, making such a condition of approval welcome.

("TIS"), review letter and supplemental response were all made part of the record before the Board. (Pa79). Moreover, Kennedy testified referring to these submissions and confirmed Oldmans fully replied to his observations. (2T138-9 to 139-2). Kennedy acknowledged the proposed ingress and egress plan met the requirements of the local ordinance—an important fact overlooked by the Board and the trial court. (3T246-14 to 17).

The credible sufficient evidence, overlooked and not discussed by the trial court, regarding safe ingress and egress included: (1) Kennedy's written review and expert hearing testimony on behalf of the Board, which never opined the proposed stop-sign control Driveway 1 or Driveway 2 design would create unsafe site egress or ingress conditions (Pa71); (2) the very detailed and deliberate testimony of Oldmans' expert traffic engineer explaining the efficacy and safety of the presented design (1T80-9 to 25; 1T81-1 to 25; 1T82-1 to 3); (3) review of the driveway and roadway design by the County, which has jurisdiction over the road (Pa307) and who has jurisdiction over any roadway and associated ingress/egress improvements; and (4) the absence of any expert or other evidence supporting the design was unsafe. Accordingly, the trial court's acceptance of the findings the design "lacked specificity" and was an unsafe ingress or egress design is wholly unfounded, requiring reversal.

II. THE TRIAL COURT ERRED IN FINDING THE TRAFFIC STUDY WAS STALE (4T29-18 TO 36-1; 5T19-3 TO 23-8).

The Board argues the record supports the trial judge's finding that Oldmans' traffic study was "stale." Such opposition ignores record evidence which confirmed the traffic study not only was updated to address the Board's professional's review comments, but also that it was representative of the actual traffic at site, having been conducted outside the COVID timeframe and with schools back in attendance. In doing so, the Board conveniently glazes over the salient fact this Application requested preliminary site plan approval. Irrespective of the back and forth with the Board's professional to update the traffic study, Oldmans stipulated it would again update the traffic study as part of its submission requesting final site plan approval. Oldmans expressly clarified it accepted a condition of approval requiring an updated traffic study. "In June when we were last here we stipulated, we're only seeking preliminary site plan approval at this time. We also stipulated that should we be allowed to go forward in the future with final site plan approval, we'd be submitting a new Traffic Impact Statement." (2T141-3 to 9). Oldmans also agreed to produce an updated traffic study as a condition of approval of its Application. (1T111-14 to 21; 3T225-19 to 226-18; 4T12-13 to 15). ("I think the applicant's perfectly comfortable with a condition of approval, if the board were inclined to grant an approval, to provide a new study. And frankly, we would have done a new study as part of final anyway." (1T111-

14 to 18)). Unfortunately, the trial court's cursory review did not mention these facts, resulting in the erroneous dismissal of the challenge to the Board's arbitrary, capricious and unreasonable denial.

Kennedy, on behalf of the Board, explained the traffic estimates provided by Oldmans were accurate, despite the date of the study, testifying, "I think we agree that the volumes that are in the [TIS] are accurate." (2T146-7 to 8) (emphasis added). Additionally, Kennedy opined the estimated volume of traffic in Oldmans' TIS was "likely high" and the traffic study "accurately depicted" the traffic at the Property. (2T146-8 to 17). This clear and unambiguous testimony from the Board's expert, upholding the accuracy of the information provided by Oldmans' professionals, was not mentioned by the Board or the trial judge. Even now, the Board's brief incompletely discussed the record evidence quipping instead, it "cannot be expected to simply hope that a future updated traffic study would adequately address" the traffic questions it had at the time of the Application for preliminary approval. (Db39). All expert professionals agreed the questions were properly addressed. Moreover, a conditional approval of this preliminary application would not grant Oldmans permission to begin construction. Rather, as Oldmans agreed (1T111-14 to 18; 2T141-3 to 9), a future application for final site plan approval was necessary and would again allow the Board to weigh speculative traffic concerns before final approval would be granted. Indeed, the Township of

Woolwich's own application checklist for the submission of an application for final site plan approval requires an applicant to submit an updated traffic study in connection with an application for final approval.

III. THE TRIAL COURT ERRED IN FAILING TO CONSIDER EVIDENCE REGARDING THE INTENSITY OF USE (4T29-18 TO 36-1; 5T19-3 TO 23-8).

Next, the Board argues Oldmans' presentation was "marked with numerous uncertainties" and "irrefutable lack of information" regarding the proposed intensity of use. (Db40-41). This assertion is unfounded and wrong. In fact, even the trial court dispelled this account.

The Application, its associated attachments, and the testimony at the public hearings made clear the application was a single building designed as a traditional warehouse and nothing supported the building was planned as a high intensity fulfillment center.

In a specious attempt to characterize the facts, the Board proclaims Oldmans "could have offered a condition of approval providing that the Property would not be used as a fulfillment center <u>but failed or refused to do so."</u> (Db42-43) (emphasis added). This is categorically false.

First, at no point did Oldmans refuse a condition of approval providing that the Property would not be used as a fulfillment center or high-intensity use. The testimony repeatedly stated the proposed building was not designed for high intensity use, as it was neither large enough, nor high enough to function as such and did not have sufficient parking to accommodate that use. Importantly, at no point did the Board or any of its professionals propose such a condition of approval, which would have readily been acceptable to Oldmans, just as it accepted any condition of approval to provide an updated traffic study.

Second, Oldmans did not offer such a condition of approval simply because the clear and convincing evidence presented only indicia the development was a single warehouse building with single-side loading, as found in a traditional warehouse. (3T68-18 to 70-2). Nothing suggested this Application was for a high-intensity use. This artificial "concern" was raised solely to defeat the building, which was a fully compliant properly zoned warehouse use.

Finally, although Oldmans member, Mr. Greif, could testify as to the specifics of the proposed building, he appropriately referred to other members of his team, who have the expertise to respond to inquiries related to specifics of this proposed warehouse building. As the owner, Mr. Greif is entitled to rely upon the information provided by those who work with and for him on this Project. To wit, Disario's detailed testimony regarding the characteristics of this traditional warehouse building making it incompatible and unsuitable for high intensity use. (3T68-18 to 70-2). Notwithstanding the issue of whether Disario could be considered an expert in this area, his testimony as an experienced knowledgeable professional, as well as his personal knowledge of the Project cannot be discounted and was recognized and accepted by the trial judge. (1T75-11 to 76-22). To reject this evidence on speculation, and not based on evidence, is the epitome of an arbitrary governmental exercise of authority.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING REVIEW OF EXPERT TESTIMONY ON THE NATURE OF THE PROPOSED DEVELOPMENT. (4T29-18 TO 36-1; 5T19-3 TO 23-8).

It is undisputed that Oldmans' Traffic Engineer was qualified as an expert in traffic. (1T75-11 to 76-22). It is also undisputed that it is the traffic engineer's responsibility to conduct a traffic analysis for the Project. It is customary in the industry, to analyze traffic consistent with the Institute of Transportation Engineers ("ITE") Traffic Trip Generation Manual to estimate the number of trips a warehousing facility will generate. It is also undisputed that there are several ITE options for an expert to utilize in analyzing traffic based upon the nature of the warehouse being proposed.

In the present case, ITE Land Use Code 150 ("ITE 150") was used. (3T67-18 to 19). This classification is representative of a traditional warehouse. (3T67-18 to 23). Oldmans' traffic engineer, Disario recognized there are higher and lower intensity levels of warehousing, but since ITE 150 is representative of traditional warehousing, it is the appropriate standard for this Property. Id.

With complete disregard for Disario's extensive expertise in the area of traffic analysis, planning and engineering for warehouse development projects, the trial court incorrectly concluded Disario should have utilized a higher intensity standard in his traffic analysis. (4T34-6 to15). This flawed conclusion was based on the manufactured confusion related to intensity of use. However, Disario was aware that the proposed warehouse was designed as a traditional warehouse and, based upon his expertise as a traffic expert, selected the ITE standard corresponding to that use. Query who is qualified to select the appropriate ITE classification for a traffic analysis if the traffic engineer is not?

By concluding Disario should have used a higher intensity use in his analysis for this project, the trial court substituted its judgment for that of the expert. Moreover, the court's conclusion ignores the facts in the record confirming the proposed building was nothing more than a traditional warehouse making ITE150 the appropriate standard. These errors require reversal.

V. THE TRIAL COURT ERRED IN FAILING TO ANALYZE OLDMANS' CHALLENGES TO THE INFIRMITIES OF THE BOARD'S ACTIONS AND RESOLUTION DENYING THE APPLICATION. (4T29-18 TO 36-1; 5T19-3 TO 23-8).

The Resolution cites to incorrect factual findings to support the Board's conclusion to deny Oldmans' Application for Preliminary Site Plan Approval. The Resolution specifically claims that "[t]he JLUB determined that the Applicant had failed to establish that the trucks entering and existing the site (ingress/egress) can do so safely and without causing major traffic concerns along Auburn Road…Tractor trailers are likely to exit the site without stopping at the exit, **enter onto the acceleration lane**, without having properly yielded to traffic along Auburn Road. This has the real and significant probability of causing accidents along Auburn Road." (Pa312) (emphasis added). In its brief, the Board admits there are errors in the Resolution, but contends that when read in its entirety, it is "evident" that the Board was reciting the testimony of Oldmans' traffic expert. (Db47). This argument ignores the plain fact that paragraph 40 of the Resolution sets forth the Board's findings and is not a recitation of the testimony of Oldmans' expert. (Pa312).

The Application was denied based on unsupported, arbitrary allegations manufactured by the Board regarding an acceleration lane allegedly proposed by Oldmans for its Driveway 2 egress to Auburn Road, a Gloucester County Road (Gloucester County Route 551), supposedly creating an unsafe condition, and then utilized by the Board as a basis to deny the Application. To be absolutely clear, no such acceleration lane was ever proposed by Oldmans. Rather, the notion of an acceleration lane for Driveway #2 – in lieu of the stop controlled driveway intersection proposed by Oldmans - is the imaginative product of the Board which it used to manufacture a wrongful basis to deny the Application.

The trial court compounded the error by failing to consider this argument. This error warrants reversal.

CONCLUSION

For the reasons set forth herein and in Oldmans' initial Brief, Oldmans respectfully requests that this Court reverse the trial court and remand the Application back to the Board for adoption of a Resolution approving the Application for Preliminary Major Site Plan Approval, with customary and reasonable conditions or approval.

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