

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION**

DOCKET NO: A-001492-24

UNITED HEARTS ISLAMIC ACADEMY,

Plaintiff/Respondent,

vs.

ZONING BOARD OF THE TOWNSHIP OF WILLINGBORO,

Defendant/Appellant.

Civil Action

On Appeal from Final Order Entered on December 19, 2024
Law Division - Burlington County, Docket No. BUR-L-74-24
Sat Below: Jeanne T. Covert, A.J.S.C.

BRIEF ON BEHALF OF BEHALF OF DEFENDANT/APPELLANT

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Table of Contents

TABLE OF JUDGMENTS, ORDERS AND RULINGS APPEALED FROM..... iii

TABLE OF APPENDIX.....iv

TABLE OF AUTHORITIESv

I. STATEMENT OF FACTS1

II. PROCEDURAL HISTORY5

III. LEGAL ARGUMENT.....6

 A. Standard of Review6

 B. The Trial Court Should Have Upheld the Zoning Board’s
Denial of Plaintiff’s Application for a Use Variance
(raised below – T2 1-40)10

 C. The Trial Court Erred When It Remanded the Matter to
the Zoning Board for a Rehearing and Redetermination
(raised below – T2 1-40)18

IV. CONCLUSION.....22

TABLE OF JUDGMENTS, ORDERS AND RULINGS APPEALED FROM

December 19, 2024 Order for Final Judgment vacating
Resolution #ZB-2023-7 and remanding matter to the Zoning
Board for a rehearing and redeterminationDa 79-80

TABLE OF APPENDIX

Complaint in Lieu of Prerogative Writs, filed January 11, 2024	Da 1-11
Exhibit “A” (Variance Plan)	Da 12-13
Exhibit “B” (Resolution ZB-2023-7 adopted 12/6/23).....	Da 14-44
Defendant’s Answer to Plaintiff’s Complaint, filed February 5, 2024	Da 45-54
Plaintiff’s Motion for Remand, filed June 28, 2024	Da 55-56
Order with Statement of Reasons Denying Plaintiff’s Motion for Remand, dated August 2, 2024	Da 57-61
Order and Opinion Denying Plaintiff’s Request to Reverse and Vacate Zoning Board’s Decision and Remanding the Matter to the Zoning Board for a Rehearing and Redetermination, dated November 12, 2024	Da 62-76
Defendant’s Motion for Reconsideration, filed December 13, 2024	Da 77-78
Order for Final Judgment vacating Resolution #ZB-2023-7 and Remanding the Matter for a Rehearing and Redetermination, entered on December 19, 2024	Da 79-80
Notice of Appeal filed January 24, 2025	Da 81-84

TABLE OF AUTHORITIES

Cases

<u>Antonelli v. Plan. Bd. of Waldwick</u> , 79 N.J. Super. 433 (App. Div. 1963)	9
<u>Balsamides v. Protameen Chem., Inc.</u> , 160 N.J. 352 (1999)	6
<u>Bayshore Sewerage Co. v. Dep’t of Env’tl. Prot.</u> , 122 N.J. Super. 184 (Ch. Div. 1973), <i>aff’d o.b.</i> , 131 N.J. Super. 37 (App. Div. 1974)	11
<u>Bd. of Educ. of City of Clifton v. Zoning Bd. of Adj. of City of Clifton</u> , 409 N.J. Super. 389 (App. Div. 2009)	12
<u>Bellington v. Township of East Windsor</u> , 32 N.J. Super. 243 (App. Div. 1954), <i>aff’d</i> , 17 N.J. 558 (1955)	9
<u>Betts v. Bd. of Adj. of Linden</u> , 72 N.J. Super. 213 (App. Div. 1962)	19
<u>Carbone v. Planning Bd. of Tp. of Weehawken</u> , 175 N.J. Super. 584 (Law Div. 1980)	20
<u>Cell S. of N.J., Inc. v. Zoning Bd. of Adj. of West Windsor Twp.</u> , 172 N.J. 75 (2002)	12, 21
<u>Chirichello v. Zoning Bd. of Adjustment of Borough of Monmouth Beach</u> , 78 N.J. 544 (1979)	21
<u>D. Lobi Enterprises, Inc. v. Plan./Zoning Bd. of Borough of Sea Bright</u> , 408 N.J. Super. 345 (App. Div. 2009)	15
<u>Davis Enters. v. Karpf</u> , 105 N.J. 476 (1987)	8
<u>Demarest v. Mayor and Council of Hillsdale</u> , 158 N.J. Super. 507 (App. Div. 1978)	8
<u>Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Twp. of Franklin</u> , 448 N.J. Super. 583 (App. Div. 2017), <i>aff’d</i> , 233 N.J. 546 (2018)	6

<u>Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Twp. of Franklin,</u> 233 N.J. 546 (2018).....	10
<u>Elco v. R.C. Maxwell Co.,</u> 292 N.J. Super. 118 (App. Div. 1996)	10
<u>El Shaer v. Planning Board of the Township of Lawrence,</u> 249 N.J. Super. 323 (App. Div.), <i>certif. denied</i> , 127 N.J. 546 (1991).....	16
<u>Fallone Properties, LLC v. Bethlehem Twp. Planning Bd.,</u> 369 N.J. Super. 552 (App. Div. 2004)	9
<u>Jacoby v. Zoning Bd. of Adjustment of Borough of Englewood Cliffs,</u> 442 N.J. Super. 450 (App. Div. 2015)	6, 19
<u>Kramer v. Bd. of Adj., Sea Girt,</u> 45 N.J. 268 (1965)	8, 9
<u>Lawrence M. Krain Assoc. v. Mayor of Tp. of Maple Shade,</u> 185 N.J. Super. 336 (Law Div. 1982)	20
<u>Leon N. Weiner & Associates, Inc. v. Zoning Bd. of Adj. of Borough of Glassboro,</u> 144 N.J. Super. 509 (App. Div. 1976), <i>certif. denied</i> , 73 N.J. 55 (1977).....	10, 18
<u>Lizak v. Faria,</u> 96 N.J. 482 (1984)	22
<u>Manalapan Realty, L.P. v. Twp. Comm. of Township of Manalapan,</u> 140 N.J. 366 (1995).....	6
<u>Med. Ctr. at Princeton v. Twp. of Princeton Zoning Bd. of Adjustment,</u> 343 N.J. Super. 177 (App. Div. 2001)	7, 10
<u>Medical Realty Ass’n v. Board of Adjustment of City of Summit,</u> 228 N.J. Super. 226 (App. Div. 1988)	8
<u>Medici v. BPR Co.,</u> 107 N.J. 1 (1987).....	12, 14, 19
<u>Nextel of New York, Inc. v. Borough of Englewood Cliffs Bd. of Adjustment,</u> 361 N.J. Super. 22 (App. Div. 2003)	7

<u>Northeast Towers, Inc. v. Zoning Bd. of Borough of W. Paterson,</u> 327 N.J. Super. 476 (App. Div. 2000)	7, 8
<u>Northgate Condo. Ass’n, Inc. v. Borough of Hillsdale Plan. Bd.,</u> 214 N.J. 120 (2013).....	10
<u>Nynex Mobile Communications Co. v. Hazlet Twp. Zoning Bd. of Adj.,</u> 276 N.J. Super. 598 (App. Div. 1994)	7
<u>N.Y. SMSA v. Bd. of Adjustment of Weehawken,</u> 370 N.J. Super. 319 (App. Div. 2004)	7
<u>Pagano v. Zoning Bd. of Adjustment of Twp. of Edison,</u> 257 N.J. Super. 382 (Law Div. 1992)	20, 21
<u>Price v. Himeji, LLC,</u> 214 N.J. 263 (2013)	7, 8, 18
<u>Price Co. v. Zoning Bd. of Adjustment of Twp. of Union,</u> 279 N.J. Super. 327 (Law Div. 1993), <i>aff’d sub nom.</i> , <u>Price Co. v. Zoning Bd. of Adjustment</u> <u>of Twp. of Union,</u> 279 N.J. Super. 207 (App. Div. 1994)	16
<u>Pullen v. Township of South Plainfield,</u> 291 N.J. Super. 1 (App. Div. 1996)	9
<u>Romanowski v. Brick Twp.,</u> 185 N.J. Super. 197 (Law Div. 1982), <i>aff’d</i> , 192 N.J. Super. 79 (App. Div. 1983).....	18
<u>Rowatti v. Gonchar,</u> 101 N.J. 46 (1985).....	21
<u>Salt & Light Co. v. Willingboro Twp. Zoning Bd. of Adjustment,</u> 423 N.J. Super. 282 (App. Div. 2011), <i>certif. denied</i> , 210 N.J. 108 (2012)	11, 12, 18, 21
<u>Sica v. Bd. of Adj. of Wall Twp.,</u> 127 N.J. 152 (1992).....	11, 13, 14
<u>Smart SMR of New York, Inc. v. Borough of Fair Lawn Bd. of</u> <u>Adjustment,</u> 152 N.J. 309 (1998)	11, 12, 13, 21
<u>Smith v. Fair Haven Zoning Bd. of Adjustment,</u> 335 N.J. Super. 111 (App. Div. 2000)	20

<u>Stop & Shop Supermarket Co. v. Bd. of Adj. of Springfield</u> , 315 N.J. Super. 427 (App. Div. 1998), <i>rev'd on other grounds</i> , 162 N.J. 418 (2000).....	10
<u>Stop & Shop Supermarket Co. v. Bd. of Adj. of Springfield</u> , 162 N.J. 418 (2000).....	10, 14
<u>Ten Stary Dom P'ship v. Mauro</u> , 216 N.J. 16 (2013).....	18
<u>Toll Bros. v. Twp. of W. Windsor</u> , 173 N.J. 502 (2002).....	6
<u>Tomko v. Vissers</u> , 21 N.J. 226 (1956).....	19, 21
<u>Ward v. Scott</u> , 16 N.J. 16 (1954)	9
<u>Worthington v. Fauver</u> , 88 N.J. 183 (1982).....	10
<u>459 Cent. Ave. Corp. v. Zoning Bd. of Adj.</u> , 90 N.J. Super. 303 (App. Div.), <i>certif. denied</i> , 47 N.J. 89 (1966).....	19

Statutes

N.J.S.A. 40:55D-70.....	11
N.J.S.A. 40:55D-70(d)	11, 13, 15, 18
N.J.S.A. 40:55D-70(d)(1)	1

I. STATEMENT OF FACTS

Plaintiff, United Hearts Islamic Academy (“UHIA”) is the owner of on the property designated as Block 5.02, Lot 24 on the Township of Willingboro Tax Map (“P.I.Q.”). Da 1, ¶1. On or about August 23, 2023, UHIA submitted an application to the Township of Willingboro Zoning Board (“ZB”) for a use variance to construct a new, two-story school building adjacent to an existing childcare center, along with a multi-purpose building and an extension of the existing wrap-around parking lot. Da 2-3, ¶11. The P.I.Q. is located in the Township’s B-1 Primary Business Zoning District. Da 2, ¶5. Plaintiff’s application necessitated a use variance under the Municipal Land Use Law (“MLUL”), N.J.S.A. 40:55D-70(d)(1), because educational facilities are not a permitted use in the B-1 District. Da 2, ¶10.

A public hearing on UHIA’s application took place on November 1, 2023. See T1¹ At the conclusion of the testimony and presentation of the evidence, a motion was made to approve the application, which failed by a vote of 3 in favor to 4 against. T1 100:24 - 105:7. The Board’s decision was memorialized in Resolution #ZB-2023-7, which was adopted on December 6, 2023. Da 14-44. In reaching its decision, the Board made the following findings:

14. The Applicant’s next witness was Dan McGinnis, professional traffic engineer, from McMahon. He was sworn, qualified and recognized as an expert engineer and traffic engineer. In that regard, he testified consistent

¹ T1 is the transcript of the November 1, 2023 Zoning Board hearing. T2 is the transcript of the prerogative writ trial that took place on November 12, 2024.

with the contents of the August 10, 2023 Trip and Parking Generation letter issued by McMahon and signed by Victor C. Anosike, PE, project manager, incorporated herein by reference. He also testified consistent with the contents of the application material, and the application Rider attached as Exhibit C, and also the CME review letters, the TSE October 27, 2023 response letter and marked exhibits identified herein and incorporated by reference.

15. He made specific reference to Exhibit A-1 to discuss the parking onsite and the existing and proposed circulation onsite. He made reference to the McMahon August 10, 2023 report and provided testimony as detailed in that report with regard to parking, circulation, projected additional traffic onsite, and an additional approximate 100 trips in the morning and in the afternoon, and identified a.m. and p.m. peak hours for trips. He also discussed the traffic and parking demands that would be associated with uses that are permitted in this zone, such as retail uses, and testified that those other permitted uses would generate more traffic than the proposed school in this instance. The Applicant agreed as a condition of any approval to operations with pick up, drop off and circulation on site as detailed by Mr. Hantash, with an operations plan in place with staggered drop off and pick up times. **He confirmed that the most anticipated traffic would be coming to and from Route 130 and in an exchange with Mr. Matlack, the Board Engineer, he acknowledged that the estimated 100 additional trips would be considered by the State as being “significant”, requiring the Applicant to secure from the New Jersey Department of Transportation either a letter of no interest or an Access Permit.** The Applicant agreed to that as a condition of approval. Mr. McGinnis addressed the points raised in the CME November 1, 2023 review letter, attached as Exhibit B. He identified the 20 existing parking spaces onsite and the proposed additional 29 spaces and provided testimony with regard to his opinion that that parking was sufficient for the proposed new school use. He also provided testimony concerning the anticipated time that it would take a particular vehicle to enter the site and either pick up or drop off an individual student as being five to 10 minutes per vehicle.

16. **Board Member Coleman inquired as to the traffic coming off of Route 130 having to make a left into the P.I.Q. and she expressed concern with that and the difficulty and the backup that would cause.** Mr. McGinnis responded to that question and confirmed his opinion that there

would be no significant queuing and that the vehicles and the traffic could proceed in this area without unnecessary delay. Mr. McMahon responded and detailed no anticipated delays but would agree as a condition of approval to study the issue and current traffic counts further and provide an additional report on the issue supporting the conclusion of no anticipated negative effect on traffic. Mr. Mancini also provided testimony as to no anticipated stacking problems or delays. **Ms. Coleman continued to express concerns about that issue.**

21. The Board Planner, Mr. Dochney then testified and recognized the Applicant's burdens of proof for the requested use variance for this recognized inherently beneficial use, as identified herein. With regard to potential imposition of reasonable conditions to reduce any detrimental effect, Mr. Dochney noted that in conjunction with the submissions, the Applicant agreed that they would in fact provide a formal template confirming adequate circulation of fire and emergency equipment, and also **the Applicant's agreement to obtain current traffic counts and use of 2023 traffic data, not 2019 data**, and the Applicant's agreement that the operations and traffic plan for pick up and drop off, at both the daycare and school, would involve a staggered and scheduled traffic management plan, with specific times assigned for each of the 275 students, and the Applicant agreeing to the comments and requests contained in the CME review letters attached, and the Applicant agreeing to address at the time of site plan student/pedestrian access to the site by walking. Mr. Matlack then provided additional testimony with regard to the necessity of addressing a potential new sidewalk at the front of the P.I.Q. to facilitate student/pedestrian access and egress to the site and also taking that into consideration means of access to the P.I.Q. from other abutting and local properties.

23. The matter was then opened to Board questions. Board Member Stephenson expressed concern with regard to the requested variance relief. Board Member Coleman requested clarity as to the balancing of an inherently beneficial use and weighing the negative criteria, which counsel for the Board addressed. The Solicitor provided clarity with regard to the Applicant's burdens of proof and the factors identified herein that the Board members should be taking into consideration in conjunction with the requested use variance for this inherently beneficial school use.

24. Board Member Stephenson asked if the Board could vote “no” on the basis that the Board does not want to change Willingboro’s ordinances. Counsel for the Board replied, “No” and clarified that to vote against, the Board would have to make a determination that the proposed school would cause a substantial detriment to the public good that cannot be addressed by imposing reasonable conditions. Board Member Stephenson stated the traffic is a detriment and she is against the project.

25. There was then a motion by Vice Chair Stinson to approve the D-1 use variance relief being requested only, with a second by Chair Finney. On roll call, Board Members Johnson, Stinson, and Finney voted yes to approve. Board Members Coleman, Nock, Stephenson and Ballard voted no, opposing the requested D-1 use variance. With a vote of three “for” and four “against”, the motion to approve the use variance was denied, and there was no necessity to then vote on the requested bulk variances identified herein.

26. In support of her no vote, Board Member Coleman detailed that she was very concerned with regard to the amount of traffic that this proposed development would cause. She is well aware of the traffic in that area currently and her opinion was that with the existing daycare and the proposed school, and the total number of students and staff, that it would simply be too many people coming and going from the site and create too much traffic. She stated that she is familiar with the location and traffic backs up now, with the daycare only. She stated she has done the balancing test and traffic will be an issue. She was not convinced that the Applicant could actually put in place a viable, staggered pick up and drop off procedure and she was not convinced that would help with the traffic flow. She also discussed how close this proposed development was to Route 130 and the proposed development causing traffic issues in both the a.m. and p.m. peak hours. Board Member Nock detailed that her no vote was based on the same concerns identified by Board Member Coleman, as did Board Member Ballard and Board Member Stephenson. Board Member Nock voted to deny due to traffic concerns and confirmed that the traffic would cause a substantial detriment to the public good and the negative outweighs the positive notwithstanding the conditions agreed to. Board Member Stephenson also voted to deny the application for the same reasons and confirmed she shares the sentiments of Board Members Coleman and Nock. Board Member Stephenson confirmed the

traffic will cause a substantial detriment to the public good and the negative outweighs the positive notwithstanding the conditions agreed to. Board Member Ballard also voted to deny the variance confirming he shared the sentiments of the other three members. He confirmed there would be a substantial detriment to the public good due to the traffic in that area. He also confirmed that the negative outweighs the positive notwithstanding the conditions the Applicant agreed to.

Da 19-23 (emphasis added).

II. PROCEDURAL HISTORY

Plaintiff filed a Complaint in Lieu of Prerogative Writs challenging the Board's decision on January 11, 2024. Da 1-11. The ZB filed its Answer on February 5, 2024. Da 45-54.

On June 28, 2024, Plaintiff filed a motion for remand. Da 55-56. The Court denied Plaintiff's motion as premature by way of Order with Statement of Reasons entered on August 2, 2024. Da 57-61.

The prerogative writ trial took place on November 12, 2024. T2 1 - 40. Judge Covert issued an Order and Opinion that same day denying Plaintiff's request to reverse and vacate the ZB's decision and remanded the matter to the Zoning Board for a rehearing and redetermination. Da 62-76.

Because the remand appeared to be inherently inconsistent with the trial court's denial of Plaintiff's request to reverse and vacate the ZB's denial of Plaintiff's use variance application, Defendant moved for reconsideration of the trial court's decision remanding the matter back to the Board for a rehearing and

redetermination. Da 77-78. Thereafter, an Order for Final Judgment vacating Resolution #ZB-2023-7 and remanding the matter for a rehearing and redetermination was entered on December 19, 2024. Da 79-80.²

Defendant filed its Notice of Appeal on January 24, 2025. Da 81-84. For the reasons that follow, it is submitted that the trial court erred by remanding the matter to the Board for a rehearing and redetermination and Defendant hereby requests that the ZB's decision denying Plaintiff's use variance application be reinstated.

III. LEGAL ARGUMENT

A. Standard of Review.

In reviewing Judge Covert's decision, this Honorable Court uses the same standard the trial court did. Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Twp. of Franklin, 448 N.J. Super. 583, 595 (App. Div. 2017), *aff'd*, 233 N.J. 546 (2018); Jacoby v. Zoning Bd. of Adjustment of Borough of Englewood Cliffs, 442 N.J. Super. 450, 462 (App. Div. 2015). That being said, the trial court's legal conclusions are not entitled to a presumption of validity; rather, they are subject to de novo review. Toll Bros. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002); Balsamides v. Protameen Chem., Inc., 160 N.J. 352, 372 (1999); see also Manalapan Realty, L.P. v. Twp. Comm. of Township of Manalapan, 140 N.J. 366, 378 (1995)

² The Final Judgment was entered further to Case Management Conference with Judge Covert held on December 17, 2024, and as a result Defendant withdrew its Motion for Reconsideration.

(“A trial court’s interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.”).

A zoning board’s decision carries a presumption of validity, Price v. Himeji, LLC, 214 N.J. 263, 284 (2013); Northeast Towers, Inc. v. Zoning Bd. of Borough of W. Paterson, 327 N.J. Super. 476, 493 (App. Div. 2000), is entitled to “substantial deference” from a reviewing court, and may be reversed only if “arbitrary, unreasonable, or capricious.” N.Y. SMSA v. Bd. of Adjustment of Weehawken, 370 N.J. Super. 319, 331 (App. Div. 2004). The presumption of validity and deference is greater where, as here, a court is called upon to review a denial as opposed to a grant of a variance. Nynex Mobile Communications Co. v. Hazlet Twp. Zoning Bd. of Adj., 276 N.J. Super. 598, 609 (App. Div. 1994). To this end, and as this Court aptly noted in Med. Ctr. at Princeton v. Twp. of Princeton Zoning Bd. of Adjustment, 343 N.J. Super. 177 (App. Div. 2001):

Courts give greater deference to variance denials than to grants of variances, since variances tend to impair sound zoning. ... Reflecting the policy of the MLUL to favor comprehensive planning by ordinance rather than variances, use variances are appropriate only in “exceptional cases.” ...

Id. at 199 (citations omitted). Moreover, where, as here, the appeal stems from the denial of a variance, there is a “heavier burden” which “requires the proponent of the denied variance to prove that the evidence before the board was ““overwhelmingly in favor of the applicant.””” Nextel of New York, Inc. v. Borough

of Englewood Cliffs Bd. of Adjustment, 361 N.J. Super. 22, 38 (App. Div. 2003) (citing Northeast Towers, Inc., 327 N.J. Super. at 494) (quoting Medical Realty Ass'n v. Board of Adjustment of City of Summit, 228 N.J. Super. 226, 233 (App. Div. 1988))).

In light of the applicable standard, “[i]t is not the role of the reviewing court to determine if the decision was wise or unwise.” Northeast Towers, Inc., 327 N.J. Super. at 493. Nor does the court review the application anew to determine if it agrees factually with the decision of the board. Demarest v. Mayor and Council of Hillsdale, 158 N.J. Super. 507, 510-11 (App. Div. 1978). As the Supreme Court explained in Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268 (1965):

Courts cannot substitute an independent judgment for that of the boards in areas of factual disputes; neither will they exercise anew the original jurisdiction of such boards or trespass on their administrative work. So long as the power exists to do the act complained of and there is substantial evidence to support it, the judicial branch of the government cannot interfere. A local zoning determination will be set aside only when it is arbitrary, capricious or unreasonable. Even when doubt is entertained as to the wisdom of the action, or as to some part of it, there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved.

Id. at 296-97 (emphasis added); see also Price, 214 N.J. at 284 (“court may not substitute its judgment for that of the board unless there has been a clear abuse of discretion”). The court’s role is limited to ascertaining “whether the board could reasonably have reached its decision.” Davis Enters. v. Karpf, 105 N.J. 476, 485 (1987). “[W]hether [a board’s] action was unreasonable, arbitrary or capricious must

be decided upon the basis of what was before the ... board and not on the basis of a trial de novo ... before the Law Division.” Antonelli v. Plan. Bd. of Waldwick, 79 N.J. Super. 433, 440-41 (App. Div. 1963).

While it is true that the Court is not bound by the ZB’s legal determinations, deference must still be afforded to the Board’s interpretation of the Township’s zoning ordinance. See Fallone Properties, LLC v. Bethlehem Tp. Planning Board, 369 N.J. Super. 552, 561 (App. Div. 2004). This is because “local officials are ‘thoroughly familiar with their communities’ characteristics and interests’ and are best suited to make judgments concerning local zoning regulations.” Id. (quoting Pullen v. Township of South Plainfield, 291 N.J. Super. 1, 6 (App. Div. 1996) (citing Ward v. Scott, 16 N.J. 16, 23 (1954); Bellington v. Township of East Windsor, 32 N.J. Super. 243, 249 (App. Div. 1954), *aff’d*, 17 N.J. 558 (1955))). It is “because of their peculiar knowledge of local conditions” that land use boards “must be allowed wide latitude in the exercise of delegated discretion.” Kramer, 45 N.J. at 296.

When reviewing a board decision, a court must consider the issues before the board in their entirety and not focus on the legal sufficiency of one factor standing alone. Kramer, 45 N.J. at 287. For example, a court cannot consider a variance in isolation, but must consider it “in the context of its effect on the development proposal, the neighborhood, and the zoning plan.” Pullen, 291 N.J. Super. at 9.

Against this backdrop, and for the reasons that follow, it is respectfully submitted that the trial court's decision must be reversed.

B. The Trial Court Should Have Upheld the Zoning Board's Denial of Plaintiff's Application for a Use Variance. (raised below – T2 1-40)

“Reflecting the policy of the MLUL to favor comprehensive planning by ordinance rather than variances, use variances are appropriate only in ‘exceptional cases.’” Med. Ctr. at Princeton, 343 N.J. Super. at 199 (citing Stop & Shop Supermarket Co. v. Bd. of Adjustment of Springfield, 315 N.J. Super. 427, 434 (App. Div. 1998), *rev'd on other grounds*, 162 N.J. 418 (2000); Elco v. R.C. Maxwell Co., 292 N.J. Super. 118, 126 (App. Div. 1996)). As the party appealing the ZB's decision, the burden of proof rests with the Plaintiff. Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Twp. of Franklin, 233 N.J. 546, 558 (2018). Plaintiff must show the Board's decision is not “fairly sustainable by the record.” Leon N. Weiner & Assocs. v. Zoning Bd. of Adjustment of Borough of Glassboro, 144 N.J. Super. 509, 520 (App. Div. 1976), *certif. denied*, 73 N.J. 55 (1977). In order to prevail, then, it was incumbent upon Plaintiff to

show that the Board engaged in “‘willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is [valid] when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.’”

Northgate Condo. Ass'n, Inc. v. Borough of Hillsdale Plan. Bd., 214 N.J. 120, 145-46 (2013) (citing Worthington v. Fauver, 88 N.J. 183, 204-05 (1982) (quoting

Bayshore Sewerage Co. v. Dep't of Env'tl. Prot., 122 N.J. Super. 184, 199 (Ch. Div. 1973), *aff'd o.b.*, 131 N.J. Super. 37 (App. Div. 1974))). With these well-settled principles in mind, and for the reasons that follow, it is submitted that Plaintiff failed to meet its burden of proof and, therefore, the trial court was obligated to uphold the ZB's decision.

The MLUL provides, in relevant part, that boards of adjustment are empowered to, “[i]n particular cases for special reasons, grant a variance to allow departure from regulations ... to permit: (1) a use or principal structure in a district restricted against such use or principal structure,” N.J.S.A. 40:55D-70(d). The “special reasons” requirement of the statute is referred to as the “positive” criteria. See Smart SMR of N.Y., Inc. v. Borough of Fair Lawn Bd. of Adj., 152 N.J. 309, 323 (1998); Salt & Light Co., Inc. v. Willingboro Tp. Bd. of Adjustment, 423 N.J. Super. 282, 287 (App. Div. 2011), *certif. denied*, 210 N.J. 108 (2012).

N.J.S.A. 40:55D-70 also includes the following limitation:

No variance or other relief may be granted under the terms of this section, including a variance or other relief involving an inherently beneficial use, without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.

N.J.S.A. 40:55D-70(d). This is known as the negative criteria. See Sica v. Bd. of Adj. of Wall Twp., 127 N.J. 152, 156 (1992). Thus, to obtain a use variance, the

applicant must establish both the “positive” and the “negative criteria.” Cell S. of N.J., Inc. v. Zoning Bd. of Adj. of West Windsor Twp., 172 N.J. 75, 82 (2002).

“If a proposed use qualifies as an ‘inherently beneficial’ use, the burden of proof of an applicant for a use variance is ‘significantly lessened’ with respect to both the positive and negative criteria.” Salt & Light, 423 N.J. Super. at 287 (quoting Smart SMR, 152 N.J. at 323).³ “‘An inherently beneficial use’” is presumed to satisfy the positive criteria, and it does not have to satisfy an “enhanced quality of proof” for the negative criteria, as set forth in Medici v. BPR Co., 107 N.J. 1, 21-24 (1987). Salt & Light Co., 423 N.J. Super. at 287 (quoting Smart SMR, 152 N.J. at 323).

Despite the less demanding standard of proof, a zoning board is not required to grant a variance for an inherently beneficial use. Rather, the board must balance the benefits and burdens of the requested variance using the following steps as a guide:

First, the [the local land use] board should identify the public interest at stake. Some uses are more compelling than others Second, the Board should identify the detrimental effect that will ensue from the grant of the variance Third, in some situations, the local board may reduce the detrimental effect by imposing reasonable conditions on the use. If so, the weight accorded the adverse effect should be reduced by the anticipated effect of those restrictions Fourth, the Board should

³ Schools are recognized as inherently beneficial uses. See Bd. of Educ. of City of Clifton v. Zoning Bd. of Adjustment of City of Clifton, 409 N.J. Super. 389, 441 (App. Div. 2009). Therefore, it is undisputed that Plaintiff’s application qualified as an inherently beneficial use. Indeed, the ZB recognized as much when it adopted Resolution ZB-2023-7. Da 20-21, ¶18.

then weigh the positive and negative criteria and determine whether, on balance, the grant of the variance would cause a substantial detriment to the public good.

Sica, 127 N.J. at 165-66 (citations omitted). “This procedure, ‘[w]hile properly making it more difficult for municipalities to exclude inherently beneficial uses ... permits such exclusion when the negative impact of the use is significant. It also preserves the right of the municipality to impose appropriate conditions upon such uses.’” Smart SMR, 152 N.J. at 324 (quoting Sica, 127 N.J. at 166).

As the Supreme Court noted in Smart SMR, the MLUL was amended in 1997 to codify the Sica balancing test. Smart SMR, 152 N.J. at 324. To that end, N.J.S.A. 40:55D-70(d) provides, in pertinent part, as follows:

No variance or other relief may be granted under the terms of this section, ***including a variance or other relief involving an inherently beneficial use***, without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance....

Id. (emphasis added). “Thus, even when a proposed use inherently benefits the general welfare, the applicant still must prove that the variance ‘can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance.’ In effect, the 1997 amendment serves as a reminder that **even with an inherently beneficial use, an applicant must satisfy the negative criteria.**” Smart SMR, 152 N.J. at 324 (emphasis added).

To be sure, then, a zoning board can deny an application for a use variance even when the application involves an inherently beneficial use. As the Supreme Court explained in Stop & Shop Supermarket Co. v. Bd. of Adj. of Springfield, 162 N.J. 418 (2000):

In one narrow class of cases, those involving inherently beneficial uses, the proofs supporting special reasons focus less on the characteristics of the specific property and to a greater extent on whether the proposed use furthers the general welfare because the institutional character of the use fulfills a necessary or significant public purpose. See Medici v. BPR Co., 107 N.J. 1, 11-12 (1987). Nevertheless, the proponent of an inherently beneficial use variance also must address the statutory negative criteria and prove that on balance the public benefit outweighs any impairment to the zone plan and zoning ordinance or any detriment to the neighborhood. Sica v. Board of Adj. of Wall, 127 N.J. 152, 165-66 (1992). Accordingly, **if the proofs demonstrate that because of the specific property's location and characteristics the detrimental effects of an inherently beneficial use outweigh the public benefit, a municipality is authorized to deny the requested variance.** Id. at 166.

Id. at 430-31 (emphasis added).⁴

A review of the record reveals that the Board engaged in the proper analysis. After being instructed by the Solicitor as to the balancing test and the Board's role

⁴ Lest there be any doubt, the Court's review of a zoning board's denial of an inherently beneficial use is subject to the same standard as that applicable to a use that is not inherently beneficial; to wit, the denial, which is entitled to deference and a presumption of validity, can only be reversed if "arbitrary, capricious and unreasonable." Sica, 127 N.J. at 166-67.

in evaluating the proofs, the use variance was denied by a vote of 3 to 4.⁵ Da 22, ¶8

& ¶25. In reaching its decision, the Board gave the following reasons:

In support of her no vote, Board Member Coleman detailed that she was very concerned with regard to the amount of traffic that this proposed development would cause. She is well aware of the traffic in that area currently and her opinion was that with the existing daycare and the proposed school, and the total number of students and staff, that it would simply be too many people coming and going from the site and create too much traffic. She stated that she is familiar with the location and traffic backs up now, with the daycare only. She stated she has done the balancing test and traffic will be an issue. She was not convinced that the Applicant could actually put in place a viable, staggered pick up and drop off procedure and she was not convinced that would help with the traffic flow. She also discussed how close this proposed development was to Route 130 and the proposed development causing traffic issues in both the a.m. and p.m. peak hours. Board Member Nock detailed that her no vote was based on the same concerns identified by Board Member Coleman, as did Board Member Ballard and Board Member Stephenson. Board Member Nock voted to deny due to traffic concerns and confirmed that the traffic would cause a substantial detriment to the public good and the negative outweighs the positive notwithstanding the conditions agreed to. Board Member Stephenson also voted to deny the application for the same reasons and confirmed she shares the sentiments of Board Members Coleman and Nock. Board Member Stephenson confirmed the traffic will cause a substantial detriment to the public good and the negative outweighs the positive notwithstanding the conditions agreed to. Board Member Ballard also voted to deny the variance confirming he shared the sentiments of the other three members. He confirmed there would be a substantial detriment to the public good due to the traffic in that area. He also confirmed that the negative outweighs the positive notwithstanding the conditions the Applicant agreed to.

⁵ Pursuant to N.J.S.A. 40:55D-70(d), five (5) affirmative votes are required to secure a use variance. See D. Lobi Enterprises, Inc. v. Plan./Zoning Bd. of Borough of Sea Bright, 408 N.J. Super. 345, 352 (App. Div. 2009) (noting that “the affirmative vote of at least five members of a board of adjustment is necessary to grant a ‘d’ variance”).

Da 23, ¶26. To be sure, this was entirely appropriate as it has been specifically held that a zoning board may deny a use variance where, as here, the proposed use would result in an increase in off-site traffic. See Price Co. v. Zoning Bd. of Adjustment of Twp. of Union, 279 N.J. Super. 327 (Law Div. 1993), *aff'd sub nom.*, Price Co. v. Zoning Bd. of Adjustment of Twp. of Union, 279 N.J. Super. 207 (App. Div. 1994):

the Board members had a perfect right to consider existing traffic conditions and the impact the proposed use would have on traffic conditions. In doing so, they properly relied on the evidence presented to them which noted the large and significant traffic impact that the proposed facility would have on Route 22 and Springfield Road. They also had a perfect right to reject the testimony of the traffic experts, to the extent that they disagreed with them, and to use their own peculiar knowledge of traffic conditions on Route 22 which, to say the least, are somewhat infamous. The fact that the plaintiff offered to post a bond towards the cost of possible future expansion of Route 22, and made suggestions regarding ways to ease the flow of traffic, does not in any way lessen the increased traffic and congestion which would result from the proposed use. Traffic congestion was therefore a legitimate consideration of the board members in their determination of whether the requested variance would result in a substantial detriment to the public good.

Id. at 334 (footnote omitted); see also El Shaer v. Planning Bd. of Lawrence, 249 N.J. Super. 323, 329 (App. Div. 1991) (indicating that “it was entirely proper for the [b]oard to consider the accessibility to and from the development onto ... a heavily travelled state highway”).

Significantly, the trial court did not find, as Plaintiff argued, that the Board did not engage in the appropriate evaluation or analysis. Rather, the trial court found that the matter should be remanded because

Here, Plaintiff presented outdated traffic data from 2019 to the Board, which predates the COVID-19 pandemic and in any event is now almost 6 years old. T: 67:3-7. The Board members who voted against the use variance at the November 2023 meeting cite traffic as their primary concern, yet the traffic data used was so old as to be potentially irrelevant. T: 101-106. At oral argument, Plaintiff's counsel explained that they used pre-COVID traffic counts, believing them to be more reflective of traffic in late 2023 than statistics from 2022 or early 2023, as a going forward marker of traffic patterns; but, they also agreed to update same.

Additionally, Planning Board member, and Willingboro resident, Mr. Nock voiced concern about the traffic congestion at the site as there will be new developments nearby, but there was no development of the record on this point. T: 86:8-16. For instance, is this even true, and if so, how were these developments approved and how will they impact the traffic at this site? Is the Islamic School application receiving disparate treatment?

Finally, it is stated multiple times in the record that permissible retail establishments would generate even more traffic than the proposed school. But again, there is no elaboration, and yet if true, this would inform the Court's analysis as to whether or not the Board acted in an arbitrary and capricious manner. This site is in Willingboro's B-1 district, which does not explicitly allow private schools. Shopping centers, stores, business and professional offices, and restaurants are some of the included permitted uses in this zone. Twp. of Willingboro Code §370-50. Plaintiff presented trip generation data showing that a school at the site would generate less traffic than the permitted uses in this zone, such as a strip retail plaza, convenience store, bank with a drive-through, and coffee shop with a drive-through. T: 55:13-20. Despite testimony from Plaintiff's expert Mr. McGinnis, regarding site traffic, the Board's experts did not explain or refute that the permitted uses at this site would generate more traffic than the proposed school. In sum, due to the insufficient data, and a failure to further develop the record in crucial areas, the case should be remanded for a rehearing.

Da 73-74. With all due respect to Judge Covert, the matter should not have been remanded because the simple reality is that Plaintiff failed to meet its burden of proof

with respect to the negative criteria. See Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 30 (2013) (noting that burden rests with applicant to establish negative criteria); Leon N. Weiner & Assocs., 144 N.J. Super. at 51 (same). However, and as the Appellate Division made explicitly clear in Salt & Light Co., 423 N.J. Super. at 290-91, an inherently beneficial use must still satisfy the negative criteria of N.J.S.A. 40:55D-70(d).

It is submitted that what occurred here is akin to what occurred in Salt & Light Co., where the Appellate Division upheld a similar decision of the Willingboro Zoning Board to deny a variance for an inherently beneficial use. Because there was nothing arbitrary, capricious, or unreasonable about the Board's decision, the trial court was required to conclude, as the Appellate Division did in Salt & Light Co., 423 N.J. Super. at 292, that the use variance was properly denied. Therefore, the ZB's decision should be reinstated.

C. The Trial Court Erred When It Remanded the Matter to the Zoning Board for a Rehearing and Redetermination. (raised below – T2 1-40)

In reaching its decision, the trial court acknowledged that its decision must be based “on the administrative record below absent a clear abuse of discretion” and that “[t]he court must examine the record before the board to determine if its decision was adequately supported by the evidence presented.” Da 72. This, of course, is an accurate statement of the law. See Romanowski v. Brick Twp., 185 N.J. Super. 197, 203 (Law Div. 1982) (noting that trial court's function in these types of actions is

“to review the record made below without supplemental testimony”), *aff’d*, 192 N.J. Super. 79 (App. Div. 1983). To that end, it was Plaintiff’s burden at the time of the hearing before the ZB to establish the necessary proofs to secure the relief requested; to wit, the d(1) use variance. See Price, 214 N.J. at 286; Medici, 107 N.J. at 24; Jacoby, 442 N.J. Super. at 471. “Where the applicant fails to fulfill his responsibility in setting before the local agency the evidence necessary for it to exercise a seasoned discretion the failure is fatal; the board has no power to recommend a variance.” Tomko v. Vissers, 21 N.J. 226, 239 (1956). Having failed to meet its burden, the trial court should have upheld the Board’s decision, not remanded the matter back to the Board for rehearing and redetermination.

The purpose of a remand is to enlarge the record “where clarification of proofs is requisite to the intelligent determination of the issues presented.” Betts v. Bd. of Adj. of Linden, 72 N.J. Super. 213, 219 (App. Div. 1962). To this end, it has been recognized that the proceedings on remand “should be limited to a clarification of the proofs” regarding specific issues that were not fully developed during the initial proceedings. 459 Cent. Ave. Corp. v. Zoning Bd. of Adj., 90 N.J. Super. 303, 305 (App. Div.), *certif. denied*, 47 N.J. 89 (1966). Remands are not appropriate for the purpose of re-litigating issues that have been fairly and fully adjudicated. Betts, 72 N.J. Super. at 219.

Defendant acknowledges that there are times where remand is appropriate, such as when there is no verbatim record, see Lawrence M. Krain Assoc. v. Mayor of Tp. of Maple Shade, 185 N.J. Super. 336, 341 (Law Div. 1982) (without verbatim recording of board of adjustment meeting, court could not decide if denial of variance was arbitrary or capricious, and remanded for new hearing on that part of the application); Carbone v. Planning Bd. of Tp. of Weehawken, 175 N.J. Super. 584, 586 (Law Div. 1980) (because the submitted meeting minutes were inadequate and no verbatim record was made, matter remanded to planning board for rehearing); or when a board makes significant legal errors, see Pagano v. Zoning Bd. of Adjustment of Twp. of Edison, 257 N.J. Super. 382, 401 (Law Div. 1992); or, as in Smith v. Fair Haven Zoning Bd. of Adjustment, 335 N.J. Super. 111 (App. Div. 2000), “for reconsideration due to the inadequacy of the factual findings set forth in the resolution granting the variances.” Id. at 115. However, that is not the case here. The trial court did not conclude that the Board made any legal errors, much less significant ones, and there are no issues with the verbatim record submitted to the trial court. Nor did the trial court take any issue with the findings set forth in Resolution #ZB-2023-7 adopted by the Board. That Plaintiff chose to rely on stale data and failed to further explore the issues identified by the trial court in its opinion does not justify a remand. Rather, it means that the ZB properly denied the use variance for failure of Plaintiff to meet its burden with respect to the negative criteria

as required. See Smart SMR, 152 N.J. at 324; Salt & Light, 423 N.J. Super. at 290-91. To be sure, and as noted above, “the applicant for a variance has the responsibility of supplying “competent and credible evidence to apprise the board of the nature and degree of the zoning burden sought to be alleviated.”” Chirichello v. Zoning Bd. of Adjustment of Borough of Monmouth Beach, 78 N.J. 544, 559-60 (1979) (citations omitted).

It was Plaintiff’s burden to establish on appeal to the trial court that the Board’s decision was arbitrary, capricious or unreasonable; i.e., that it was not based on substantial evidence in the record. See Cell S. Of New Jersey, 172 N.J. at 89; Rowatti v. Gonchar, 101 N.J. 46, 50-51 (1985). Because Plaintiff failed to meet its burden at the time of the hearing, the Board rightfully denied the application. In fact, it was compelled to do so. See Tomko, *supra*. By remanding the matter to the ZB for a rehearing and redetermination, the trial court is essentially giving Plaintiff a proverbial “second bite at the apple.” With all due respect, this is not the right result and, in fact, has the potential to limit a land use board’s ability to properly deny an application where the requisite proofs are not presented at the time of the hearing and result in unnecessary and unwarranted delay. See Pagano, 257 N.J. Super. at 400 (substantial prejudice likely to accrue by virtue of protracted delays in the development application and litigation processes). It also defeats one of the main purposes of the Municipal Land Use Law – “to expedite the decision of land use

applications.” Lizak v. Faria, 96 N.J. 482, 492 (1984) (recognizing that MLUL is designed to encourage prompt consideration and disposition of land use applications for the advancement and protection of both developers and the public).

IV. CONCLUSION

Based on the foregoing reasons and authority, it is respectfully requested that the trial court’s decision be reversed and that the Court reinstate the Zoning Board’s decision denying the use variance.

Respectfully submitted,

ZELLER & WIELICZKO, LLP
Attorneys for Defendant/Appellant

By: /s/ Eric J. Riso
ERIC J. RISO, Esquire

DATED: May 9, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-001492-24

UNITED HEARTS ISLAMIC
ACADEMY,

Plaintiff-Respondent,

v.

ZONING BOARD OF THE
TOWNSHIP OF WILLINGBORO,

Defendant-Appellant.

:
:
: **On Appeal From:**

: Final Order Entered on

: December 19, 2024

: Superior Court of New Jersey

: Law Division, Burlington County

: Docket No. BUR-L-74-24

:
:
: **Sat Below:**

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

**BRIEF ON BEHALF OF
PLAINTIFF-RESPONDENT,
UNITED HEARTS ISLAMIC ACADEMY**

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TABLE OF CONTENTS

I. PRELIMINARY STATEMENT 1

II. PROCEDURAL HISTORY AND COUNTER-STATEMENT
OF FACTS 1

III. ARGUMENT 17

 A. Standard of Review, T1/68:6-78:17; T2/4:5-9:9. 17

 B. The Trial Court Correctly Vacated the Board’s Decision and
Resolution, As Being Unsupported by the Evidence in the
Record, T2/10:9-11:14, passim. 21

 C. The Trial Court Correctly Remanded the Matter for
Rehearing and Redetermination Because the Board Failed to
Apply the Sica Analysis, T2/4:5-9:9, Da79-80, passim..... 30

 D. The Board’s Reliance on Salt & Light, Co. is Misplaced,
T2/26:11-28:2..... 33

IV. CONCLUSION..... 34

TABLE OF AUTHORITIES

Cases

<u>Baptist Home</u> , 201 N.J. Super. at 245	20
<u>Bayshore Sewage Co. v. DEP</u> , 122 N.J. Super. 184, 189 (Ch. Div. 1973), <i>aff'd</i> , 131 N.J. Super. 37 (App. Div. 1974).....	18
<u>Burbridge v. Governing Body of Mine Hill</u> , 117 N.J. 376, 385 (1990).....	18
<u>Chou v. Rutgers</u> , 283 N.J. Super. 524, 539 (App. Div. 1995), <i>certif. denied</i> , 145 N.J. 374 (1996).....	18
<u>Et Mgmt. & Inv'rs, LLC v. Zoning Bd. of Adjustment of the Twp. of Weehawken</u> , No. A-3864-22, 2024 N.J. Super. Unpub. LEXIS 2383 (App. Div. Oct. 10, 2024).....	28, 29
<u>Fallone Properties, L.L.C. v. Bethlehem Tp. Planning Bd.</u> , 369 N.J. Super. 552, 562 (App. Div. 2004).....	17
<u>Harrington Glen, Inc. v. Mun. Bd. of Adjustment</u> , 52 N.J. 22 (1968).....	23
<u>In re Taylor</u> , 158 N.J. 644, 656 (1999)	17
<u>Kramer v. Board of Adjustment</u> , 45 N.J. 268, 296-97 (1965).....	18, 23
<u>Lang v. Zoning Bd. of Adjustment</u> , 160 N.J. 41, 58, 733 A.2d 464, 474 (1999)	23, 24
<u>Medical Center at Princeton v. Township of Princeton Zoning Bd. of Adjustment</u> , 343 N.J. Super. 177, 199 (App. Div. 2001)	18
<u>Medici v. BPR Co.</u> , 107 N.J. 1 (1987).....	19
<u>New York SMSA, L.P. v. Bd. of Adjustment of Tp. of Weehawken</u> , 370 N.J. Super. 319, 338 (App. Div. 2004).....	21, 22
<u>Price v. Himeji</u> , 214 N.J. 263, 285 (2013).....	19
<u>Riya Finnegan v. South Brunswick</u> , 197 N.J. 184, 192-193 (2008).....	21

Salt & Light Co., Inc. v. Willingboro Tp. Zoning Bd. of Adjustment, 423 N.J. Super. 282 (App. Div. 2011), certif. denied, 210 N.J. 108 (2012).....33, 34

Sica v. Board of Adjustment of Tp. of Wall, 127 N.J. 152 (1992).. 8, 10, 13, 14, 19, 20, 21, 23, 29, 30, 31, 32, 33, 34

Smart SMR of New York, Inc. v. Fair Lawn Bd. of Adjustment, 152 N.J. 309, 323 (1998)..... 19

Smith v. Fair Haven Zoning Bd. of Adjustment, 335 N.J. Super. 111, 120 (App. Div. 2000)..... 17

Tomko v. Vissers, 21 N.J. 226, 239-240, (1956)..... 17

Statutes

N.J.S.A. 40:55D-62 18

N.J.S.A. 40:55D-70(d).....19, 20

Rules

R. 1:36-3 28

I. PRELIMINARY STATEMENT

This is a matter in which the trial court correctly found that a zoning board of adjustment improperly denied a use variance application for an inherently beneficial use, which was for the proposed development of a non-public school on property located in Willingboro, Burlington County. Since the zoning board failed to conduct the required analysis in rendering a decision relating to an inherently beneficial use, the trial court properly vacated the denial of the application and remanded the matter to the board for a new hearing. The lower court's decision was sound and consistent with New Jersey Supreme Court land use jurisprudence. The trial court's decision should be affirmed accordingly.

II. PROCEDURAL HISTORY AND COUNTER-STATEMENT OF FACTS¹

Respondent, United Hearts Islamic Academy ("**Respondent**" or "**United Hearts**"), owns real property located at 248 Pennypacker Drive, Willingboro, New Jersey (the "**Property**"), consisting of approximately 1.82 acres within the Township of Willingboro's B-1 Zoning District (the "**District**"). Ra1-Ra72; Ra98-Ra111.² The Property is currently improved with a one-story

¹ The Procedural History and Statement of Facts in this matter are closely intertwined and have been combined to avoid repetition.

² "Ra__" shall refer to Respondent's Appendix filed concurrently herewith.

childcare center of approximately 4,700 square feet and an associated asphalt parking lot, which includes two driveways on Pennypacker Drive and parking located in front of and beside the building. Id. While the childcare center has been a part of the community for approximately eighteen (18) years, United Hearts has been the owner and operator of the childcare center since 2021. Id.

United Heart's mission statement in operating the childcare center is to create a healthy Islamic academic environment for children to learn, grow, and build self-confidence. Id. In furtherance of its mission, United Hearts sought to construct a private school on the Property, in addition to the existing childcare center. Id. However, since an educational facility is not an expressly permitted use in the District, United Hearts was required to submit an application to the Township of Willingboro Zoning Board of Adjustment ("**Appellant**" or the "**Board**") for a use variance to add a school to the site. Ra1-Ra72; Ra124-Ra129.

On August 23, 2023, United Hearts submitted its application to the Board seeking use and bulk variance relief to permit the construction of a new two-story school building on the Property comprised of 9,520 square feet, along with additional site improvements such as a 1,750 square foot playground or open area between the proposed school and existing childcare facility (collectively, the "Application"). Ra1-Ra72. The Application was

bifurcated and, if approved, would have been subject to further site plan review. During the hearing, the Board's attorney explained that any approval granted for the use variance would still require site plan approval. See T1/5:5-8, T1/10:9-17.³

The proposed school was intended to provide services for students ranging from kindergarten through twelfth grade, with a Montessori-type curriculum model that includes mixing age groups, so that each student would be placed in accordance with their skill level rather than just their age, and a maximum of twenty students in each classroom. Ra11-Ra12.

A hearing on the Application was conducted by the Board on November 1, 2023. United Hearts provided conceptual site plans and architectural plans to explain how the proposed school would function on the Property. Ra1-Ra72. At the time of the hearing, conducted by Zoom, United Hearts presented testimony and exhibits in support of the Application, including sworn testimony from Jamil Hantash, who testified as Respondent's representative regarding the current and proposed operations on the Property; Joseph A. Mancini, EP, PP, CFM, who was qualified as an expert in the fields of

³ ("T1/___") shall refer to the Transcript of "Township of Willingboro Zoning Board" dated November 1, 2023, filed with the Court on May 8, 2025. ("T2/___") shall refer to the "Trial Court Transcript" dated November 12, 2024, filed with the Court on February 13, 2025.

professional engineering and planning; Nik Kuzowsky, who was qualified as an expert architect; and finally, Dan McGinnis, who was qualified as an expert in the field of traffic engineering. T1/12:3-12; 36:9-25; 48:21-49:18; 53:20-54:13.

Mr. Hantash testified first, advising the Board of the proposed operations of the school, and testifying that with the addition of the school, the total number of staff members would increase to a total of 35 between the daycare and the proposed school. T1/20:4 through T1/34:16. Mr. Hantash further testified that the total number of students would increase by 200, to a total of 275 students combined between the daycare and the proposed school. Id. Mr. Hantash went on to describe the school's anticipated hours of operation, indicating that drop-off and pick-up times would occur on a staggered schedule for both the daycare and the proposed school, and traffic circulation at the Property, which Mr. Hantash indicated would be managed by an on-site employee. Id. Drop-off and pick-up was proposed to be effectuated without busing. Id.

Mr. Hantash then detailed the Property's existing daycare operations and its ongoing work with the Willingboro Board of Education with "at-risk" students, with an anticipated demographic of average to below average students for the proposed school, the intention being to help those students

become average students. Id. Mr. Hantash further testified that the proposed number of forty-nine (49) parking spaces, although requiring a variance, would be more than sufficient to meet the needs of both the childcare facility and the proposed school. Id. In fact, Mr. Hantash testified that even with only 49 spaces, there would still be fourteen (14) potential visitor spaces available based on the maximum number of staff members. Id. Finally, Mr. Hantash confirmed that the proposed school would not be limited to accepting students of a specific religious orientation, whether Islamic or otherwise. Id.

Next, Mr. Mancini was qualified and testified as the Respondent's professional engineer. T1/37:2-47:13. He began by describing the existing conditions at the Property, the current operations of the daycare facility, and then fully detailed the proposed improvements for the school, discussing lot frontage and the driveways in and out of the Property. Id. Mr. Mancini also testified as to traffic circulation at the Property, including the location and width of the drive aisles, the proposed circular drop-off pattern around the school, the availability of bypass lanes, and where students and staff would congregate in the event of an emergency. Id.

Mr. Kuzowsky then testified as the Respondent's expert architect. T1/47:17-53:8. He described the proposed nature of the construction of the

school building and multipurpose building, including floor plans, building materials, and appearances. Id.

Finally, Mr. McGinnis testified as the Respondent's expert traffic engineer, discussing parking and traffic circulation at the Property, and eventually concluding that parking would be adequate for the proposed new school use. T1/53:10-67:23. Mr. McGinnis further opined that the proposed ingress and egress for the school would operate safely and efficiently, and that the traffic and parking demands associated with permitted uses in the B-1 Zoning District would actually generate more traffic than the proposed school. Specifically, after detailing the expected trip generation from the proposed school, Mr. McGinnis articulated that permitted uses that could be developed at the site all generated higher traffic impact:

...we also projected the potential site traffic you would expect from other uses that are permitted in the zone, including a strip retail plaza, convenience store, bank with a drive-through, coffee shop with a drive-through in sizes that are estimated to fit this site, **and they all generate more traffic than the proposed school expansion would.**

T1/55:13-20 (*emphasis added*).

Mr. McGinnis then testified that as a condition of approval, United Hearts would agree to address the comments in the Board's traffic review letter, as follows:

And just to demonstrate to the board that the signal and site driveways are going to operate well, we will, ... as a condition of approval during the site plan application phase, we will obtain current ... traffic counts at the signal and in front of the site. We'll analyze the capacity of the signal and the site driveways to accommodate the additional traffic, just to confirm that the driveways and the signal continue to operate within acceptable parameters. And we will also apply for a letter of [no] interest from the New Jersey Department of Transportation indicating that an access permit is not required.

T1/56:2-15.

Mr. McGinnis concluded his testimony by reiterating:

So once again, it's my opinion that the site will not generate any significant traffic impacts. I think the configuration will accommodate the traffic calculation well, the accesses will accommodate that traffic well, and that based on the drive-through lane proposed and its operations ... we don't expect a parking problem[.]

T1/58:7-13.

After Mr. McGinnis and United Hearts had answered all those questions and agreed to all proposed conditions concerning traffic issues, and after demonstrating through uncontroverted testimony that the traffic to be generated from the proposed school use would not create any substantial

detriments, United Hearts re-called Mr. Mancini to testify as its expert in professional planning. See T1/68:6 through T1/78:17. He articulated the burden of proof applicable to a use variance application and explained that since the proposed school is an inherently beneficial use, it was therefore presumed to satisfy the positive criteria. Mr. Mancini then elaborated that under the balancing test set forth in Sica v. Board of Adjustment of Tp. of Wall, 127 N.J. 152 (1992), the Board is to compare the benefits of approving the Application with any *substantial* detriments. Id.

Mr. Mancini explained that in the context of an inherently beneficial use, for which the positive criteria is presumptively satisfied, if the Board were to determine there were any associated negative impacts, the Board would be required to consider whether the imposition of any conditions would mitigate such impacts. Id. Mr. Mancini then identified the public interest in the proposed school and the benefit of having an additional school in the community, noting that United Heart's proposal would be a natural extension of the existing childcare center; opining that there is sufficient parking and safe and efficient vehicular circulation on site; and concluding there would be no detrimental effect that would ensue from granting the variance, whether substantial or otherwise. Id.

After Mr. Mancini concluded his testimony, the Board heard from its own professionals, who indicated that United Hearts had responded to and otherwise addressed their comments, agreed with the comments and agreed to provide additional information as a condition of any approval. Ra73-Ra87.

Regarding the engineering issues, the Board's engineer stated:

[T]he applicant addressed pretty much all the engineering comments in my review letter.... The applicant talked about the traffic impacts and addressed the comments in our review letter. There was some good discussion about the parking and the operations of the site, and I think that took care of all the engineering aspects.

T1/79:24-80:14. And regarding the planning issues, the Board's planner stated:

I'm in agreement with Mr. Mancini in terms of the criteria identified, that this is an inherently beneficial use, so it is the [indiscernible] balancing test that the board has to do which is, as Joe said, basically figure out what the benefits of this application are, figure out any negative impacts, determine if there's anything you can do to mitigate those negative impacts and then on balance, if the positives outweigh the negatives, then you can grant the use variance.

T1/80:20-81:4.

The Board's planner specifically noted that "the land use law has already identified a school as an inherently beneficial use, meaning it is a use that is universally valued and beneficial to the well-being of a community."

Ra76. Again, this premise stood out as the guiding principle to be followed by the Board in rendering its decision on the Application.

After conclusion of testimony from United Hearts, the Board opened the meeting to public comment. A member of the public testified who identified himself as a former mayor and a member of the Planning Board. This commenter, Mr. Nock, stated there was “a major development that's in the works going across the street.” T1/86:8-20. No one else from the public presented any comments. After the close of the public comment period, the Board made a motion on the Application and then deliberated.

Throughout the hearing, the Board was advised by United Hearts and its own counsel numerous times regarding the factors enumerated in the Sica case. See, e.g., T1/5:21-6:3. Before the vote, the Board’s attorney again instructed the Board on the criteria to be applied:

[T]his is an inherently beneficial use. The law in the state of New Jersey has told us that schools are an inherently beneficial use ... Meaning that they satisfy the positive criteria. They satisfy that part. You have to make a determination on the negative criteria and you heard the testimony from both Mr. Mancini and our own planner with regard to that negative criteria and how you address that.

The board first should identify the public interest at stake. You heard Mr. Mancini testify about the public interest at stake. The use of this proposed school, the

necessity of this school, how it operates, and how it can be positive for the community.

Next the board should identify any detrimental effect that will ensue from granting the variance.

Third, in those situations, the board can seek to impose conditions, reasonable conditions to address any of those negative issues. So we talked about site circulation, parking, they talked about staggering, pick up and drop off, they talked about the condition -- all those conditions in that regard, and then also giving us updated traffic counts with 2023 information, and also updated traffic counts in conjunction with any site plan application.

And then fourth and significantly, the board should weigh the positive and negatives and determine whether on balance, granting of a variance would cause -- and this is the word -- would cause a substantial detriment to the public good. That the law in the state of New Jersey; substantial detriment to the public good.

And when you do that balancing test, you heard their testimony that we think in doing that balance test, they come out on the positive side, and there's enough proofs there and they provided enough proofs there. They've addressed the conditions and callouts that were contained in the CME review letters. And with that, that is what the charge would be.

T1/92:21-94:13.

In response to request for clarification, the Board's attorney again explained the criteria to be applied in connection with the Board's consideration of the inherently beneficial use:

So the state says with those inherently beneficial uses that we like to see, in the normal course, when you come in and you want to get a use in an area where it's not permitted, you have to prove a positive and a negative criteria, that's what they call it.

The state has decided, through case law and everything else, that with this type of use, a school, it's inherently beneficial. So they do not have to prove a positive criteria ... because the inherently beneficial use, in and of itself, is considered a positive for the community.

Then you go to the negative criteria. You only have to evaluate the negative criteria. The negative criteria, the cases have told us, under the Sica standards[,] that really the four ways you would go through that. In evaluating that negative criteria ... the four items that you look at are first, is there a public interest at stake? Well, here you've heard there's a public interest at stake because it's a school, it works in conjunction with the existing schools, it's talking about average or under average students, it talked about how they're going to try to work with these students, what they're going to do and how it's going to be a plus to the community. That's number one.

Second, has the board identified any detrimental effects that would come from granting a variance. You heard testimony that they think the most detrimental effect most likely will be traffic in that area. And then if you identified those negatives, can

the board reduce that detrimental effect by possibly imposing reasonable conditions.

We've done that -- well, they've agreed to it, we haven't done it yet. They've agreed to it where they said we're agreeing that our operations plan will have this staggered system of pick up and drop off where everyone won't be coming at the same time.

In addition, we ... agreed we're going to make an application to the New Jersey Department of Transportation so that they can make a determination that they don't have any interest in this site, or if they do, we're going to need access permits.

And that they also agreed, in conjunction with any future application for site plan approval, they're going to provide us with current traffic counts. Somebody on site counting traffic going in, going out, so they can ensure that the traffic is not going to overwhelm the roads and is going to be adequate, and it's not going to be a negative impact. And they also agreed to update their data using 2023 data.

And then next the board then takes all that and then weighs the positives and negatives, and makes a determination that on balance, if the grant of the variance is not going to cause a substantial detriment to the public good. Substantial. And if it's not going to be substantial, then you should tip to the area of this is -- they met their proofs.

T1/94:21-97:7.

Despite the detailed instructions set forth above, and despite being advised numerous times about the inherently beneficial nature of the Application, the Board did not undertake consideration of the Sica factors.

The Board did not conduct the balancing test. The Board did not consider, when comparing the perceived traffic impact against the public interest at stake, whether the impact was a “substantial” detriment, or whether a condition could be imposed that would mitigate that impact. The Board attorney reviewed, in detail, the conditions that United Hearts had proposed and agreed to, and the Board did not conduct any analysis of those conditions, or any other conditions. None of the Board members discussed or even considered any conditions that could be imposed on the Application that would mitigate their expressed concern about traffic, nor did they consider the public interest at stake by way of the proposed school, or how the traffic might be controlled to facilitate development of the school for the public good. The Board simply proceeded to reject the Application based upon imprecise traffic concerns while failing to undertake the required analysis of the Sica “balancing test” factors (the “**Denial**”). The Denial was memorialized by Resolution #ZB-2023-7, which was adopted on December 6, 2023 (the “**Resolution**”). Ra88-Ra97. This appeal followed on January 11, 2024. Ra98-Ra111.

On June 28, 2024, United Hearts moved to remand this matter to the Board for consideration of the Sica analysis. Ra130-Ra133. On August 2, 2024, the trial court denied that motion. Ra134-Ra138. The trial court then

conducted a trial on United Heart's prerogative writ claims on November 12, 2024. After trial, the trial court entered an Order, along with a written opinion, remanding the matter to the Board for a new hearing. Ra139-Ra153. Per the trial court, in pertinent part:

[I]t is stated multiple times in the record that permissible retail establishments would generate even more traffic than the proposed school. But ... there is no elaboration, and yet if true, this would inform the Court's analysis as to whether or not the Board acted in an arbitrary and capricious manner. This site is in Willingboro's B-1 district, which does not explicitly allow private schools. Shopping centers, stores, business[es] and professional offices, and restaurants are some of the ... permitted uses in this zone. ... [Respondent] [presented trip generation data showing that a school at the site would generate less traffic than the permitted uses in this zone[.]⁴ ... Despite testimony from Plaintiff's expert, Mr. McGinnis, regarding site traffic, the Board's experts did not explain or refute that permitted uses at this site would generate more traffic than the proposed school. In sum, due to the insufficient data, and a failure to further develop the record in crucial areas, the case should be remanded for a rehearing. ...

[T]his court is left without sufficient resources to engage in a proper analysis of whether or not the Board acted reasonably due to shortcomings in the record[.] ... A board can reject or accept the testimony of an expert witness. (Internal citation omitted.) A rejection of an expert witness must

⁴ T1/55:13-20.

however have a reasonable basis in the record, otherwise it can be erroneous as a matter of law on appeal. (Internal citation omitted).

Here, the Board rejected all of the expert witness testimony. In fact, the experts for both Plaintiff and Board agreed that the proposed use was inherently beneficial, and that traffic would not be a substantial detriment, particularly with agreed upon proposed conditions. The Board's professional planner, Mr. Dochney, agreed with the [Respondent's] professional planner and engineer, Mr. Mancini, that the school was inherently beneficial.⁵ Mr. Dochney then stated that "the only real potential negative impact I see from this from a planning perspective is parking and traffic," but that he was in "general agreement with Mr. Mancini's testimony" regarding the use variance application.⁶ The Board's professional engineer Mr. Matlack did not disagree with [Respondent's] experts, in fact he said that the Applicant had addressed all of the concerns in his review letter.⁷ ...

The record should reflect some evidence to support the Board's denial of the use variance. And, while boards can certainly reject expert conclusions ... even the Board's experts are not supportive of the conclusions reached[.]

Ra150-Ra152.

On December 13, 2024, the Board filed a Motion for Reconsideration with the trial court. Ra154-Ra157. A case management conference was

⁵ T1/80:20-22.

⁶ T1/81:5-7, 82:7-9.

⁷ T1/79:23-25.

conducted on December 17, 2024, and on December 19, 2024, the trial court entered an amended Order for Final Judgment vacating the Resolution and again remanding the matter to the Board for a new hearing. Ra158-Ra159. On December 20, 2024, the Board withdrew its Motion for Reconsideration and thereafter filed its Notice of Appeal on January 24, 2025. Ra160-Ra171.

III. ARGUMENT

A. Standard of Review, T1/68:6-78:17; T2/4:5-9:9.

When reviewing the decision of a trial court that has reviewed municipal action, the Appellate Division is bound by the same standards as the trial court applies in reviewing the Board's decision. Fallone Properties, L.L.C. v. Bethlehem Tp. Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004). The "scope of review of an administrative decision is the same as that [for] an appeal in any non-jury case, *i.e.*, whether the findings made could reasonably have been reached on sufficient credible evidence present in the record." In re Taylor, 158 N.J. 644, 656 (1999) (*citations omitted*). While deference will be given to findings of fact, a board's actions must be grounded in evidence in the record. Fallone Properties, L.L.C., *supra*; *see also* Tomko v. Vissers, 21 N.J. 226, 239-240, (1956), and Smith v. Fair Haven Zoning Bd. of Adjustment, 335 N.J. Super. 111, 120 (App. Div. 2000). The Court will not "rubber-stamp"

findings that are not reasonably supported by the evidence. Chou v. Rutgers, 283 N.J. Super. 524, 539 (App. Div. 1995), *certif. denied*, 145 N.J. 374 (1996).

A local zoning determination must be set aside if it is arbitrary, capricious, or unreasonable. Kramer v. Board of Adjustment, 45 N.J. 268, 296-97 (1965). The concept of “arbitrary and capricious” action emerges from the due process clause of the fifth and fourteenth amendments of the United States Constitution and operates to guarantee that acts of government will be grounded on established legal principles. Bayshore Sewage Co. v. DEP, 122 N.J. Super. 184, 189 (Ch. Div. 1973), *aff’d*, 131 N.J. Super. 37 (App. Div. 1974). Arbitrary and capricious means “willful and unreasoning action, without consideration and in disregard of circumstances.” Id.

In reviewing a decision regarding a variance, the court must determine “whether the board followed the statutory guidelines and properly exercised its discretion.” Medical Center at Princeton v. Township of Princeton Zoning Bd. of Adjustment, 343 N.J. Super. 177, 199 (App. Div. 2001), *citing* Burbridge v. Governing Body of Mine Hill, 117 N.J. 376, 385 (1990). Under the Municipal Land Use Law, the Zoning Board is vested with the power “[i]n particular cases for special reasons, [to] grant a variance to allow departure from regulations pursuant to article 8 [C.40:55D-62 et seq.] of this act to permit: (1) a use or principal structure in a district restricted against such use or principal

structure....” N.J.S.A. 40:55D-70(d). The standard to be applied by the Zoning Board in reviewing a use variance application is set forth in Medici v. BPR Co., 107 N.J. 1 (1987), and its progeny.

Specifically, in the case of a (d) variance:

[T]he MLUL “requires an applicant to prove both positive and negative criteria to obtain a use variance.” Smart SMR of New York, Inc. v. Fair Lawn Bd. of Adjustment, 152 N.J. 309, 323 (1998); accord Sica v. Bd. of Adjustment, 127 N.J.152, 156 (1992). The requirement that a use variance be based on proof of the positive criteria arises from the language of the MLUL, which limits the grant of a use variance to those cases in which there is a showing of “special reasons.” N.J.S.A. 40:55D-70(d).

Price v. Himeji, 214 N.J. 263, 285 (2013). Where a use is considered inherently beneficial, like here, the positive criteria are presumptively satisfied, as such use serves the general welfare and satisfies the “special reasons” test. Sica v. Bd. of Adjustment, 127 N.J. 152, 150 (1992).

Once the positive criteria are satisfied, the applicant must also satisfy the negative criteria. Under the MLUL, “[n]o variance or other relief may be granted [under section 70(d)]..., including a variance or other relief involving an inherently beneficial use, without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning

ordinance.” N.J.S.A. 40:55D-70(d). In order to determine whether a given impairment or detriment is “substantial,” the Board must balance the public benefits of a variance with the impairment and detriments, and consider whether imposition of reasonable conditions would ameliorate any adverse impact in reviewing the negative criteria. Sica, supra, 127 N.J. at 167. Without any balancing, a local board's finding that an applicant has not satisfied the negative criteria would always defeat an inherently beneficial use, no matter how compelling the need for that use. Sica, 127 N.J. at 164, citing Baptist Home, 201 N.J. Super. at 245.

Under Sica, the Court set out a detailed procedure for evaluating inherently beneficial uses:

We suggest the following procedure as a general guide to municipal boards when balancing the positive and negative criteria. First, the board should identify the public interest at stake.... Second, the Board should identify the detrimental effect that will ensue from the grant of the variance.... Third, in some situations, the local board may reduce the detrimental effect by imposing reasonable conditions on the use.... Fourth, the Board should then weigh the positive and negative criteria and determine whether, on balance, the grant of the variance would cause a substantial detriment to the public good.

Sica v. Bd. of Adjustment, 127 N.J. 152, 165-66 (1992).

Finally, in considering an application, a board “may reject expert testimony, but it may not do so unreasonably, based only upon bare allegations

or unsubstantiated beliefs.” New York SMSA, L.P. v. Bd. of Adjustment of Tp. of Weehawken, 370 N.J. Super. 319, 338 (App. Div. 2004).

Moreover, “[w]here an applicant has supported all aspects of the application with the testimony of experts... denial of the application by the Board based solely on... lay testimony cannot overcome the positive testimony of experts.” Id. Nor can local government agency decisions be based upon mere sentiments. *See* Riya Finnegan v. South Brunswick, 197 N.J. 184, 192-193 (2008). The Riya Finnegan decision makes it clear that the lack of substantive support for local government action results in a finding of arbitrary and capricious action.

B. The Trial Court Correctly Vacated the Board’s Decision and Resolution, As Being Unsupported by the Evidence in the Record, T2/10:9-11:14, passim.

The trial court correctly ascertained that the Board failed to conduct the required balancing test for such applications and failed to undertake the required analysis under Sica in denying the United Hearts Application, despite frequent reminders from the Board’s counsel that the proposed school is an inherently beneficial use. The trial court also properly reversed the denial because the Board ignored the un rebutted testimony of the experts presented by United Hearts as well as the testimony of its own professionals, relying instead on the Board’s own feelings that traffic would be a problem associated

with the proposed school. When a board decision is based on assertions that are not supported in the record, that decision is not entitled to the deference typically afforded to board decisions.

The trial court recognized this, and therefore properly vacated the Board's decision to deny the United Hearts application, along with the resolution memorializing that decision. The trial court's decision to vacate and remand the application to the Board should be affirmed.

Contrary to the argument set forth in the Board's appellate brief, the Board is not free to ignore the testimony of all the experts, and the Board is not at liberty to deny an application based only on unsubstantiated concerns regarding traffic. Indeed, even the Board's claim that it engaged in such analysis, Ab⁸ at p. 14, lacks any support anywhere in the record below. Instead, that claim is premised entirely on a statement in the Resolution, not on any reference to the transcripts of the hearing before the Board. While a resolution is a memorialization of a Board's decision, resolutions cannot contain hollow recitals designed to buttress otherwise unsupported decisions which have no basis in the record. See New York SMSA, L.P. v. Bd. of Adjustment of Tp. of Weehawken, 370 N.J. Super. 319, 333 (App. Div. 2004)

⁸ "Ab" shall refer to the Appellant's Brief.

(“the resolution must contain sufficient findings, **based on the proofs submitted**, to satisfy a reviewing court that the board has analyzed the applicant’s variance request in accordance with the statute and in light of the municipality’s master plan and zoning ordinances.”) (*Emphasis added*). See also Harrington Glen, Inc. v. Mun. Bd. of Adjustment, 52 N.J. 22 (1968).

Here, the statements in the Resolution upon which the Board heavily relies on appeal lack any nexus to the proofs contemporaneously adduced before the Board. The Resolution instead is the product of a yeoman’s effort on the part of the Board Solicitor, crafting the Board’s purported Sica analysis from whole cloth, after-the-fact, to provide a colorable justification for a decision that had none at the time it was made by the Board.

In addition, Respondent’s brief places undue reliance upon the Board’s “peculiar knowledge of local conditions” which cannot salvage the Board’s decision to deny the Application in light of the unrebutted competent and credible evidence and expert testimony of record. Our courts have indicated that “deference to local boards contemplated by Kramer is not intended to be applied rigidly or categorically, **and is predicated on the existence of adequate evidence in the record supporting the board's determination** either to grant or deny variance relief.”) Lang v. Zoning Bd. of Adjustment,

160 N.J. 41, 58, 733 A.2d 464, 474 (1999)(*emphasis added*), citing Kramer v. Board of Adjustment of Sea Girt, 45 N.J. 268, 296-97 (1965).

Respondent cannot wield “local knowledge” as a talisman here to ward off scrutiny of its unsupported decision, and likewise a Resolution full of hollow recitations to statutory standards cannot salvage a decision that was not rendered based on actual evidence in the record. The result is nothing more than a façade and rationalization for the Board’s Denial, which was based only on sentiments alleging concerns about traffic and not on any expert testimony or other evidence in the record.

Illustrative of this point, there was **no** testimony from any traffic expert indicating that traffic conditions were poor and would get worse if the Application was approved. The Board’s own engineer indicated only initially that traffic *could* have a *potential* negative impact (T1/79:24-80:14), as to which he then confirmed he was satisfied:

[T]he applicant addressed pretty much all the engineer comments in my review letter. ... The applicant talked about the traffic impacts and addressed the comments in our review letter. There was some good discussion about the parking and the operations of the site, and I think that took care of all the engineering aspects.

T1/81:5-7 (*emphasis added*). Satisfaction of the engineer’s concerns was based on the testimony and discussion offered by United Hearts about the daily

operations of the facility which were specifically designed to alleviate potential traffic issues, including an “extensive drive-through facility” and “active traffic management,” which includes “a traffic controller that goes out, puts the cones directing the traffic to come in from one entrance – from one side of the entrance where there are three lanes, parents will go in ... After that, the car is directed to exit from the other entrance that’s already existing.” T1/21:13-23; 57:12-16. United Hearts confirmed these measures would continue “in a robust way” if the Application was granted. Id.

The comprehensive testimony of United Hearts and its professionals was not only uncontroverted but outright supported by the Board’s professionals. For example, United Hearts’ professionals testified as to the concern presented by Ms. Coleman, who felt that the proposed development was close to Route 130 and would cause traffic issues. However, United Hearts provided testimony to address this concern:

The entrance driveway for our site is more than 300 feet from the exit lane, the right turn lane from Route 130. So that’s a fair amount of room for stacking there if we needed stacking, but ... we can get folks in and out pretty quickly. And there is also sufficient width on that southbound lane of Pennypacker that will allow people to get around folks making a left turn.

T1/62:4-12.

These assessments and conclusions were entirely supported by the Board's own professionals, as noted in the following exchange between Mr. Matlack and Mr. McGinnis:

MR. MATLACK: So the majority of the traffic is coming to and from 130, and I think I heard somebody say that the driveway coming out of the site is going to be a right turn only going towards 130, so that's definite that it's all going in that direction. So the rest of Pennypacker Drive, you don't anticipate will be affected by this?

MR. MCGINNIS: Not significantly, no. Without restricting ingress ... you might expect some traffic to come to the site by Pennypacker, but I wouldn't expect it to be a significant volume that would be noticeable.

T1/66:15-67:2. After confirming that United Hearts would agree to present 2023 traffic volume data as a condition of approval, Mr. Matlack advised the Board that he was satisfied. T1/79:24-80:14.

From a planning perspective, Mr. Mancini proffered an extensive description of the exact type of balancing test the Board was required to undertake in making its decision. *See* T1/70:1-78:17.

Of particular note, Mr. Mancini testified:

[T]he B-1 primary business district permits a variety of commercial and light manufacturing uses ... With respect to the traffic impacts, the board should weigh any impacts the proposed school would have against those other permitted uses. So we're not weighing

that against a no-build scenario, we're really weighing the traffic impact against a build scenario [of] a permitted use. And I think you heard the testimony that those other permitted uses, such as shopping centers and restaurants, would have a similar or possibly greater impact on traffic and circulation as compared to the use as proposed.

T1/72:1-17 (*emphasis added*). Mr. Mancini also noted that it is not mere “detriment” which warrants a denial of an inherently beneficial use, but “substantial detriment” – “the key word here is substantial” – before concluding that “we don’t find that the impacts associated with this proposed use are substantially more in comparison to other permitted uses.” T/73:22-74:2 (*emphasis added*). It is noteworthy that the traffic envisioned from the application was incontrovertibly less of an impact than a permitted use. The Board’s Planner agreed with Mr. Mancini, stating that “in terms of the actual use variance, which is before you tonight, **I’m in general agreement with Mr. Mancini’s testimony.**” T1/82:7-9 (*emphasis added*).

The Board now erroneously claims the right to reject the testimony of the Respondent’s experts out of hand, which itself is inaccurate when such testimony is uncontroverted and there is no finding that those experts were not truthful or credible. The inaccuracy of the Board’s position is exacerbated by the fact that its own professionals agreed with the testimony and conclusions of Respondent’s professionals.

To wit, the planners for both United Hearts and the Board agreed that the required balancing test weighed in favor of granting the use variance for the proposed school. The Board's engineer indicated that his questions about traffic impacts had been satisfactorily addressed. Under these circumstances, it is inconceivable for the Board to contend that its decision is based upon knowledge of local conditions when there is no evidence of record that would merit deference to that unsubstantiated position, and that mantra certainly should not be given credence when it is used as a mere smokescreen to obscure a lack of evidence supporting the Board's Denial.

This matter is akin to a recent decision of the Appellate Division: Et Mgmt. & Inv'rs, LLC v. Zoning Bd. of Adjustment of the Twp. of Weehawken, No. A-3864-22, 2024 N.J. Super. Unpub. LEXIS 2383 (App. Div. Oct. 10, 2024),⁹ a case which involved two use variances for both density and height, along with several bulk variances, where the Appellate Division upheld the trial court's decision to overturn the Weehawken Zoning Board's denial of the application because the "Board failed to make sufficient findings **supported**

⁹ In accordance with R. 1:36-3, a copy of this decision is provided herewith at Ra172. Counsel is unaware of any adverse unpublished opinion.

by competent evidence in the record to support its denial of plaintiff's application." Id. at *23 (*emphasis added*). The Court found:

[T]he Board simply declared that it disagreed with plaintiff's experts without any competent factual basis for doing so. The Board relied on Hartmann who is not a traffic engineer, did not undertake any sort of parking or traffic study, and did not have any factual basis for her opinions on parking or traffic. ...

[T]he Board's amended resolution was based on the personal disagreement of the Board members with plaintiff's evidence and experts, not on competent facts in the record. Because the amended resolution sets forth only bald conclusions rather than sufficient findings supported by facts in the record, we conclude the court determined correctly the Board's decision denying plaintiff's application was arbitrary, capricious, and unreasonable.

Id. at *23-*26 (*emphasis added*).

In present matter, the trial court correctly recognized that the same rationale applied in the Et Mgmt. decision is applicable here, and properly vacated the Board's Denial and Resolution accordingly.

Indeed, the Supreme Court's decision in Sica was expressly intended to "mak[e] it more difficult for municipalities to exclude inherently beneficial uses," and "permits such exclusion [only] when the negative impact of the use is **significant**." Sica v. Bd. of Adjustment, 127 N.J. 152, 166 (1992) (*emphasis added*). The negative impacts contemplated in the present matter were

admittedly insignificant, or could have otherwise been addressed by the imposition of conditions. The Board's alleged concerns about traffic are unsupported by any actual evidence. The Denial, therefore, does not merit the deference the Board seeks, and the trial court properly vacated the Board's Denial of the Application and the Resolution memorializing same.

C. The Trial Court Correctly Remanded the Matter for Rehearing and Redetermination Because the Board Failed to Apply the Sica Analysis, T2/4:5-9:9, Da79-80, passim.

The elements of the Sica analysis are well known. Where a proposed use is "inherently beneficial," special reasons are said to exist and the positive criteria are presumptively met. Applicants for such uses are deemed to have met the test of promoting the general welfare without proof that the proposed site is particularly suitable for the proposed use. Sica, 127 N.J. at 165. Then, evaluating the negative criteria and conducting the balancing test, the Board first must identify the public interest at stake. Next, the Board must identify the detrimental effect, if any, that might ensue from the grant of the variance. A minimal effect will not outweigh the positive criteria. If the effect is perceived to be substantial, the board may impose reasonable conditions to reduce the detrimental effect. The last step is for the Board to determine whether, on balance, the grant of the variance would cause a substantial detriment to the public good. Sica, 127 N.J. at 166.

Despite repeated instruction from counsel for both the Board and United Hearts, the Board simply did not engage in the balancing test. See, e.g., T1/94:21-97:7. The Board clearly identified the issue of traffic as a perceived detriment, but did not analyze whether that detriment was substantial, nor did the Board weigh that concern against the positive benefit to be gained by having the proposed school developed to service the community. The Board also failed to consider whether there could be any conditions imposed on the approval of the Application that could mitigate the perceived impact from traffic, such as the conditions the Applicant had already proposed and agreed upon. Instead, based solely on their feelings and not on any professional testimony, the Board members opined that traffic was a detriment, failed to further consider whether that detriment was truly “substantial,” and failed to consider any means of alleviating those traffic concerns that could have been implemented in connection with an approval.

The Board Solicitor even put the question directly to the Board members: “Can the board reduce that detrimental effect by possibly imposing reasonable conditions?” T1/95:3-4. The Board’s Solicitor elaborated, again, that the Board had to apply the critical element of the Sica analysis to the testimony they had heard, instructing as follows:

If you made a determination that the granting of this variance would cause a substantial detriment to the

public good, **and that that can't be addressed, in your eyes, in a satisfactory manner by imposing these conditions**, then there's no way to get around that, then you can use that to support a vote against it.

But again, that's a substantial detriment to the public good **with imposing conditions** [that] would not alleviate that in any way.

T1/98:11-20 (*emphasis added*).

In response, the Board members said they were simply not in agreement with the proposal, period. As one Board member stated, immediately after hearing the instructions above: "I'm not in agreement with this. I'm going to tell you straight up. Okay?" T1/99:3-5. The vote then followed, with no analysis or consideration of whether the conditions proposed, or any conditions, would alleviate the Board's concerns about traffic.

The Board Solicitor then even polled the Board members as they voted in effort to elicit the analysis required under Sica. Yet, each Board member merely acknowledged that they had made up their minds even though there had been no deliberation as to the traffic issue, and no analysis of whether the proposed conditions, or any other conditions, would mitigate the perceived traffic impacts. *See* T1/101-105. Upon conclusion of the vote, counsel for United Hearts noted the Board's action was devoid of the Sica analysis, stating that "I would have... been looking for more of a reason why those concerns

couldn't be alleviated by the conditions we agreed to, but the vote is the vote and we'll take it from here as to where to go next." T1/105:11-15.

A through review of the record as detailed above demonstrates that the Board failed to follow the standard set forth in Sica that governs applications for inherently beneficial uses. On these grounds, the trial court was correct to vacate the denial and remand the matter back to the Board for rehearing and application of the proper standards.

D. The Board's Reliance on Salt & Light, Co. is Misplaced, T2/26:11-28:2.

The Board contends that its decision here is comparable to rejection of another inherently beneficial use as detailed in the matter of Salt & Light Co., Inc. v. Willingboro Tp. Zoning Bd. of Adjustment, 423 N.J. Super. 282 (App. Div. 2011), certif. denied, 210 N.J. 108 (2012). *See* Ab at p. 18. However, that case is readily distinguishable from the present matter. Salt & Light Co. involved the denial of an application for a use variance to permit the construction of a duplex to provide transitional housing for two homeless families in a neighborhood zoned exclusively for single-family residences, as compared with construction of a school on a property that already has an existing daycare center. As each use variance application is unique as to the circumstances and property at issue, the Board's denial of the Salt & Light application is in no way determinative of the case at bar.

Furthermore, the court's opinion in Salt & Light illustrates that the Board actually engaged in the required Sica balancing test in that matter, through which the Board determined on the record and based on the evidence presented that the benefits to be gained by approving the application did not outweigh the detriments associated with the development proposal. In the present matter, there was no such analysis and no such findings made on the record that were based on the evidence presented. Contrary to the Board's argument, the Salt & Light decision does not empower the Board to deny an inherently beneficial use whenever it wants. Rather, the opinion in Salt & Light only serves to illustrate and amplify the Board's failure to conduct the required balancing test in the present matter.

IV. CONCLUSION

For the reasons set forth above, the trial court's decision to vacate the Board's Denial and Resolution and remand the matter back to the Board for rehearing and redetermination should be affirmed.

Respectfully submitted,

HYLAND LEVIN SHAPIRO LLP

Dated: July 23, 2025

By:


Robert S. Baranowski

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION**

DOCKET NO: A-001492-24

UNITED HEARTS ISLAMIC ACADEMY,

Plaintiff/Respondent,

vs.

ZONING BOARD OF THE TOWNSHIP OF WILLINGBORO,

Defendant/Appellant.

Civil Action

On Appeal from Final Order Entered on December 19, 2024
Law Division - Burlington County, Docket No. BUR-L-74-24
Sat Below: Jeanne T. Covert, A.J.S.C.

REPLY BRIEF ON BEHALF OF BEHALF OF DEFENDANT/APPELLANT

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Table of Contents

I. LEGAL ARGUMENT..... 1

 A. The Trial Court Improperly Vacated the Board’s Decision..... 1

 B. The Trial Court Did Not Take Issue with the Propriety of the
 Zoning Board’s Resolution As It Fully Complied with the
 Municipal Land Use Law and Case Law Interpreting Same 4

 C. The Board’s Reliance Upon Salt & Light Co. v. Willingboro Twp.
 Zoning Bd. of Adjustment Is Not Misplaced 7

II. CONCLUSION..... 13

TABLE OF AUTHORITIES

Cases

<u>Bd. of Educ. of City of Clifton v. Zoning Bd. of Adj. of City of Clifton,</u> 409 N.J. Super. 389 (App. Div. 2009)	3
<u>Chirichello v. Zoning Bd. of Adjustment of Borough of Monmouth Beach,</u> 78 N.J. 544, 559-60 (1979)	1
<u>Dunbar Homes, Inc. v. Zoning Bd. of Adj. of Twp. of Franklin,</u> 233 N.J. 546 (2018)	2
<u>ET Mgmt. & Invs., LLC v. Zoning Bd. of Adjustment of Twp. of Weehawken,</u> No. A-3864-22, 2024 WL 4455324 (N.J. Super. Ct. App. Div. Oct. 10, 2024).....	7
<u>Harrington Glen, Inc. v. Mun. Bd. of Adjustment of Borough of Leonia,</u> 52 N.J. 22, 28 (1968).....	5
<u>Heritage at Towne Lake, LLC v. Plan. Bd. of Borough of Sayreville,</u> 422 N.J. Super. 75, 79 (Law Div. 2010).....	1
<u>Kenwood Assocs. v. Bd. of Adjustment of City of Englewood,</u> 141 N.J. Super. 1 (App. Div. 1976)	1
<u>Lincoln Heights Ass’n v. Twp. of Cranford Planning Bd.,</u> 314 N.J. Super. 366 (Law Div. 1998), <i>aff’d</i> , 321 N.J. Super. 355 (App. Div.), <i>certif. denied</i> , 162 N.J. 131 (1999).....	5
<u>Medical Realty Ass’n v. Board of Adjustment of City of Summit,</u> 228 N.J. Super. 226 (App. Div. 1988)	1
<u>N.Y. SMSA v. Bd. of Adjustment of Weehawken,</u> 370 N.J. Super. 319 (App. Div. 2004)	4, 5
<u>Price v. Himeji, LLC,</u> 214 N.J. 263 (2013)	1, 2
<u>Price Co. v. Zoning Board of Adjustment of Union,</u> 279 N.J. Super. 327 (Law Div. 1993), <i>aff’d o.b.</i> , 279 N.J. Super. 207 (App. Div. 1994).....	12

<u>Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus,</u> 47 N.J. 211 (1966).....	3
<u>Salt & Light Co. v. Willingboro Twp. Zoning Bd. of Adjustment,</u> 423 N.J. Super. 282 (App. Div. 2011), <i>certif. denied</i> , 210 N.J. 108 (2012)	6, 7, 8, 12
<u>Sciarrotta v. Glob. Spectrum</u> , 194 N.J. 345 (2008)	7
<u>Scully-Bozarth Post #1817 of the VFW v. Planning Bd. of City of Burlington,</u> 362 N.J. Super. 296, 314 (App. Div. 2003)	2
<u>Sica v. Bd. of Adj. of Wall Twp.</u> , 127 N.J. 152 (1992).....	1, 2, 3, 8

Rules

R. 1:36-3.....	7
----------------	---

Statutes

N.J.S.A. 40:55D-1	4
N.J.S.A. 40:55D-10(g)	5

I. LEGAL ARGUMENT

A. The Trial Court Improperly Vacated the Board's Decision.

Ignoring the fact that the burden rested with Plaintiff to secure the use variance, Price v. Himeji, LLC, 214 N.J. 263, 286 (2013), and the “heavy burden” Plaintiff had to overcome to secure a reversal from the trial court of the Board’s denial of its application for a use variance, Medical Realty Ass’n v. Board of Adjustment of City of Summit, 228 N.J. Super. 226, 233 (App. Div. 1988), Plaintiff contends that the “[t]he trial court correctly ascertained that the Board failed to conduct the required balancing test for such applications and failed to undertake the required analysis under” Sica v. Bd. of Adj. of Twp. of Wall, 127 N.J. 152 (1992). Pb 21. Plaintiff is mistaken.

First, the trial court made no such finding. Rather, Judge Covert simply determined that the matter should be remanded because the court was “left without sufficient resources to engage in a proper analysis of whether or not the Board acted reasonably due to shortcomings in the record on both sides.” Da 74. Respectfully, this constitutes reversible error as the burden was on Plaintiff, not the Board, to create a sufficient record to secure the use variance. See Chirichello v. Zoning Bd. of Adjustment of Borough of Monmouth Beach, 78 N.J. 544, 559-60 (1979); Heritage at Towne Lake, LLC v. Plan. Bd. of Borough of Sayreville, 422 N.J. Super. 75, 79 (Law Div. 2010). Moreover, and as this Court said long ago in Kenwood

Assocs. v. Bd. of Adjustment of City of Englewood, 141 N.J. Super. 1 (App. Div. 1976):

In this connection it should be noted that the absence of evidence in support of the denial does not in itself mean that the board's determination is arbitrary. Since the burden rests with the applicant to establish the criteria for the grant of the variance, it must demonstrate that the affirmative evidence in the record dictates the conclusion that the denial was arbitrary.

Id. at 5.

Second, and what Plaintiff fails to acknowledge, is that it is well-settled that “[t]he role of a court in reviewing the decision of a local board’s land use decision is very narrowly circumscribed,” Scully-Bozarth Post #1817 of the VFW v. Planning Bd. of City of Burlington, 362 N.J. Super. 296, 314 (App. Div. 2003), and that review of a decision to deny a variance because the applicant has failed to satisfy the negative criteria “begins with the recognition that the board’s decision is presumptively valid, and is reversible only if arbitrary, capricious, and unreasonable.” Sica, 127 N.J. at 166-67. This presumption is rooted in the recognition that land use boards “possess special knowledge of local conditions and must be accorded wide latitude in the exercise of their discretion.” Sica, 127 N.J. at 167; accord, Price, 214 N.J. at 284; Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 296 (1965). The party who challenges the grant or denial of a variance must demonstrate the decision was arbitrary, capricious or unreasonable. Price, 214 N.J. at 284; Dunbar Homes, Inc. v. Zoning Bd. of Adj. of Twp. of Franklin, 233 N.J. 546,

558 (2018). As noted above, the burden is even greater in a challenge to the denial of a variance because courts “give even greater deference to a planning board’s decision to deny a variance in preservation of a zoning plan than a decision to grant a variance.” Bd. of Educ. of City of Clifton v. Zoning Bd. of Adjustment of City of Clifton, 409 N.J. Super. 389, 433 (App. Div. 2009).

In Sica, 127 N.J. at 162, the Court acknowledged Justice Hall’s observation in his concurring opinion in Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus, 47 N.J. 211 (1966): “Just because an institution is thought to be a good thing for the community is no reason to exempt it completely from restrictions designed to alleviate any baneful physical impact it may nonetheless exert in the interest of another aspect of the public good equally worthy of protection.” Id. at 221. And as the Supreme Court said in Burbridge v. Governing Body of Mine Hill, 117 N.J. 376 (1990), “variances to allow new nonconforming uses should be granted only sparingly and with great caution since they tend to impair sound zoning.” Id. at 385 (quoting Kohl v. Mayor of Fair Lawn, 50 N.J. 268, 275 (1967)). The trial court failed to adhere to these well-settled principles when it remanded the matter instead of upholding the Board’s denial of the use variance application for failure of Plaintiff to establish the negative criteria.

B. The Trial Court Did Not Take Issue with the Propriety of the Zoning Board's Resolution As It Fully Complied with the Municipal Land Use Law and Case Law Interpreting Same.

Plaintiff takes issue with the Zoning Board's Resolution. Pb 22-23. However, the trial court did not invalidate the Board's decision because of any perceived imperfections or irregularities in the Resolution. Rather, the trial court remanded the matter to the Board due to what it believed was the need for additional evidence in order to make a proper determination with respect to Plaintiff's appeal of the Board's decision. Da 72-76. Thus, Plaintiff's argument with respect to this issue is a red herring. Assuming the Court nevertheless considers this argument, Plaintiff is mistaken.

A land use board's decision regarding the relief requested by an applicant must be embodied in the form of a written resolution, which includes findings of fact and conclusions of law. N.Y. SMSA v. Bd. of Adjustment of Tp. of Weehawken, 370 N.J. Super. 319, 332 (App. Div. 2004). To that end, the Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-1, *et seq.*, provides as follows:

The municipal agency shall include findings of fact and conclusions based thereon in each decision on any application for development and shall reduce the decision to writing. The municipal agency shall provide the findings and conclusions through:

(1) A resolution adopted at a meeting held within the time period provided in the act for action by the municipal agency on the application for development; or

(2) A memorializing resolution adopted at a meeting held not later than 45 days after the date of the meeting at which the municipal agency voted to grant or deny approval

N.J.S.A. 40:55D-10(g). In order to satisfy this requirement, “[t]he factual findings set forth in a resolution cannot consist of a mere recital of testimony or conclusory statements couched in statutory language. ... Rather, the resolution must contain sufficient findings, based on the proofs submitted, to satisfy a reviewing court that the board has analyzed the applicant's variance request in accordance with the statute and in light of the municipality’s master plan and zoning ordinance.” N.Y. SMSA, 370 N.J. Super. at 332-33 (citations omitted). As aptly noted in Lincoln Heights Ass’n v. Twp. of Cranford Planning Bd., 314 N.J. Super. 366 (Law Div. 1998), *aff’d*, 321 N.J. Super. 355 (App. Div.), *certif. denied*, 162 N.J. 131 (1999):

Resolutions of municipal boards should reflect the deliberative and specific findings of fact necessary to sustain the board’s conclusions that statutory requirements for relief were or were not met. ... The point of such a requirement is to allow a reviewing court to determine fairly whether the board acted properly and within the limits of its authority in granting, or refusing to grant a variance. ...

Id. at 386 (citations omitted).

As in Lincoln Heights, a review of Resolution #ZB-2023-07, which is ten (10) pages long and contains twenty-six (26) enumerated paragraphs detailing the Board’s findings of fact and conclusions of law, reveals that it more than adequately recounts the testimony and evidence relating to the use variance at issue. Da 14-24. Plaintiff’s reliance upon New York SMSA, L.P., *supra.*, and Harrington Glen, Inc.

v. Mun. Bd. of Adjustment of Borough of Leonia, 52 N.J. 22, 28 (1968), is misplaced. Pb 22-23. The Board's Resolution does not consist of a mere recital of testimony or conclusory statements couched in statutory language. Rather, it contains a summary of the testimony presented at the hearing, makes specific findings of fact regarding same, and contains conclusions of law with respect to the application and the reasons why the Board denied the application. Da 14-44. That Plaintiff is unhappy with the result does not change this, and it certainly does not constitute grounds for reversal. As noted already, and despite Plaintiff's protestation to the contrary, the Board was well within its right to deny Plaintiff's application for a use variance, even though it involved an inherently beneficial use, for failure to satisfy the negative criteria at the time of the hearing as Plaintiff was required to do. See Salt & Light Co. v. Willingboro Twp. Zoning Bd. of Adjustment, 423 N.J. Super. 282, 284 (App. Div. 2011) (holding that "even though the proposed duplex for the homeless would be an inherently beneficial use that satisfies the positive criterion for a use variance, the board of adjustment did not abuse its discretion in determining that the public benefit to be derived from this proposed duplex was outweighed by the detrimental effect upon the integrity of the zoning plan that would result from construction of a two-family residence in an area zoned exclusively for single-family residences"), *certif. denied*, 210 N.J. 108 (2012).

To support its argument that the trial court properly vacated the Resolution, Plaintiff relies upon ET Mgmt. & Invs., LLC v. Zoning Bd. of Adjustment of Twp. of Weehawken, No. A-3864-22, 2024 WL 4455324 (N.J. Super. Ct. App. Div. Oct. 10, 2024). Pb 28-29. Pursuant to R. 1:36-3, this unpublished opinion is neither binding nor precedential. Therefore, it is submitted that the Court should not give it any weight nor consider any argument advanced by Plaintiff in reliance thereon. See Sciarrotta v. Glob. Spectrum, 194 N.J. 345, 353 n. 5 (2008). Plaintiff's reliance on ET Mgmt. is also misplaced because it is factually distinguishable from the matter *sub judice*.

The panel in ET Mgmt. upheld the trial court's decision because it was "satisfied [that] the court correctly determined the Board failed to make sufficient findings supported by competent evidence in the record to support its denial of plaintiff's application." Id. at *8. Significantly, the trial court in this matter made no such determination. Moreover, the Zoning Board here did not make the same mistakes as the board did in ET Mgmt.; rather, as noted above, the Board made detailed findings to support its denial of Plaintiff's application for a use variance.

C. The Board's Reliance Upon Salt & Light Co. v. Willingboro Twp. Zoning Bd. of Adjustment Is Not Misplaced.

Not surprisingly given the result, Plaintiff argues that this Court's decision in Salt & Light Co. is distinguishable and, therefore, Defendant's reliance thereon is misplaced. Pb 33-34. Plaintiff is mistaken. This case is on all fours with Salt &

Light Co., wherein this Court upheld the local board's decision to deny a variance for an inherently beneficial use and, in so doing, recognized that while the Legislature codified the Sica balancing test by means of an amendment to the MLUL, *L. 1997, c. 145, § 1*, it also established explicitly that an inherently beneficial use must still satisfy the negative criteria of the variance statute. Salt & Light Co., 423 N.J. Super. at 290-91. It is clear from a review of the record that the Board properly denied the application due to Plaintiff's failure to satisfy the negative criteria.

For example, in response to Board Member Ballard's question regarding transportation to and from the school, Plaintiff's representative, Jamil Hantash, testified that "most of the students will be walking to the school." T1 30:1-16.¹ In response, the following colloquy took place between the Board's Planner, Christopher Dochney, PP, AICP, and Mr. Hantash:

Mr. Dochney: I had a question between the testimony of the traffic engineer and the applicant himself earlier, they had mentioned there's a hope and desire and anticipation that a certain amount of students would be walking to school? I'm curious how you anticipate that would occur? I'm just looking at Google Maps right now, I don't see a sidewalk on any road within half a mile of the school, including Pennypacker Drive where there's no pedestrian infrastructure there.

Do you anticipate having to take any action to make that a feasible method of transportation or is it just a hope and a prayer?

...

¹ T1 is the transcript of the November 1, 2023 Zoning Board hearing. T2 is the transcript of the prerogative writ trial that took place on November 12, 2024.

Mr. Hantash: So currently, south of the school, is there a cross guard that allows students to cross, I can't remember the name of the street, that is south of the school. So students already use that cross guard to cross from the housing all the way into the school, south of the street.

And where the school is, there is a sidewalk and there is a grass walk where this empty green space is that is not built by anybody yet. And beside that there's a shopping center where there is a car wash. And beside the car wash there's another shopping center where there's a convenience store and all that, and at all these places, I see there's sufficient -- sufficient space for people to walk all the way. I see them walk all the time, you know, into the shopping center and the car wash and back and forth. So it's really less than 20 feet to go into the school.

I have not looked into that [indiscernible] into that pavement, but I'm sure if this is something that we face, then we have to come up with a solution for the team.

T1 63:20 - 64:7.

The Board also had concerns about traffic resulting from the new school as evidenced by the following exchange between Board Member Coleman and Plaintiff's traffic engineer, Dan McGinnis:

MS. COLEMAN: Yes, I have a question. For the traffic coming off of 130, they would have to make a left into the driveway, is that correct? Into the building to get into the traffic that's going around the building? Coming off of Route 130, you would have to make a left to get into the school, is that correct?

MR. McGINNIS: Yes, yes, ma'am. That is correct.

MS. COLEMAN: So that location is pretty close to 130. What was your assessment just for that particular part of the traffic pattern?

MR. McGINNIS: Well, the incoming traffic into the site in the morning is the most standing period for traffic coming into the site.

Again, 56 vehicles, roughly a vehicle a minute. So given the traffic volumes along Pennypacker Drive, we wouldn't expect any significant queuing that might build up back to the signal. We would expect gaps in traffic approaching 130 that these vehicles can turn in without significant delay or any queuing spillback. However, again, as a condition of approval, we would agree to study this in detail.

...

MR. BARANOWSKI: Ms. Coleman, does that answer your question?

MS. COLEMAN: It did, it answers my question. I'm not quite sure that that would not be an issue, but you did answer my question, thank you.

T1 61:4 - 62:17.

The Zoning Board Engineer, Bennett Matlack, PE, CME, CFM followed up on this issue and testified:

MR. MATLACK: Yeah, Mr. Chairman, I have a couple questions. Ms. Coleman was spot on. She had some of the same questions that I had with regards to some of the queuing and, you know, how the driveway access points would act. And that's part of my review letter dated November 1st, the capacity analysis and delays understanding how the two driveway points would act, what the level of service would be there, as well as at the signalized intersection.

I guess one of the questions is -- and I know that the applicant has agreed to address these comments. I guess one of the things that we're trying to figure out is how does Pennypacker Drive traffic operate right now? Is what this application is going to propose, is that going to be a significant increase to the volume on Pennypacker?

Obviously we, you know, we still want to see how these intersection points are going to function, but just in general, you know, can you give the board an understanding of what that increase in traffic generated by the site is going to do to Pennypacker?

T1 65:10 - 66-6. In response, Mr. McGinnis simply testified that “ ... absent any restrictions on movements at the site driveways, regardless, the majority of the traffic would travel to and from the site by Route 130. But you know, this is something we can certainly examine further in our study.” T1 66:9-14. Notably, when Mr. Matlack questioned him further about the traffic data he relied upon, Mr. McGinnis admitted that it was from 2019, which was pre-COVID. T1 67:3-21. In light of this testimony, the Board’s Planner, Mr. Dochney properly noted that there was a real potential negative impact posed by the application due to parking and traffic issues. T1 81:7-7.

The Board’s concerns regarding these issues were captured in Resolution ZB-2023-7:

In support of her no vote, Board Member Coleman detailed that she was very concerned with regard to the amount of traffic that this proposed development would cause. She is well aware of the traffic in that area currently and her opinion was that with the existing daycare and the proposed school, and the total number of students and staff, that it would simply be too many people coming and going from the site and create too much traffic. She stated that she is familiar with the location and traffic backs up now, with the daycare only. She stated she has done the balancing test and traffic will be an issue. She was not convinced that the Applicant could actually put in place a viable, staggered pick up and drop off procedure and she was not convinced that would help with the traffic flow. She also discussed how close this proposed development was to Route 130 and the proposed development causing traffic issues in both the a.m. and p.m. peak hours. Board Member Nock detailed that her no vote was based on the same concerns identified by Board Member Coleman, as did Board Member Ballard and Board Member Stephenson. Board Member Nock voted to deny due to traffic concerns and confirmed that the traffic would cause a substantial

detriment to the public good and the negative outweighs the positive notwithstanding the conditions agreed to. Board Member Stephenson also voted to deny the application for the same reasons and confirmed she shares the sentiments of Board Members Coleman and Nock. Board Member Stephenson confirmed the traffic will cause a substantial detriment to the public good and the negative outweighs the positive notwithstanding the conditions agreed to. Board Member Ballard also voted to deny the variance confirming he shared the sentiments of the other three members. He confirmed there would be a substantial detriment to the public good due to the traffic in that area. He also confirmed that the negative outweighs the positive notwithstanding the conditions the Applicant agreed to.

Da 23, ¶26. This, of course, was entirely appropriate. See Price Co. v. Zoning Board of Adjustment of Union, 279 N.J. Super. 327, 334 (Law Div. 1993) (stating that board members could reject expert testimony and rely on their own knowledge of traffic conditions), *aff'd o.b.*, 279 N.J. Super. 207 (App. Div. 1994).

In short, Plaintiff incorrectly argues that the Board did not engage in the appropriate evaluation. However, Plaintiff's real argument is that it disagrees with the Board's decision. Because the trial court did not find anything arbitrary, capricious, or unreasonable about the Board's decision, and because the Board properly concluded that Plaintiff failed to establish the negative criteria as required by Salt & Light, Co., this Court should reverse the trial court, affirm the Board's decision, and dismiss Plaintiff's complaint with prejudice.

IV. CONCLUSION

Based on the foregoing reasons and authority, it is respectfully requested that the trial court's decision be reversed and that the Court reinstate the Zoning Board's decision denying the use variance.

Respectfully submitted,

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By: /s/ Eric J. Riso
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DATED: August 18, 2025