

WELDON MATERIALS, INC., a  
corporation of the State of New Jersey

Plaintiff-Appellant,

v.

PLANNING BOARD OF THE  
BOROUGH OF WATCHUNG, 100  
UNION AVENUE HOLDINGS, LLC,  
and THE LEARNING EXPERIENCE  
HOLDING CORP.

Defendants-Respondents.

ON APPEAL FROM:  
THE SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: SOMERSET COUNTY  
DOCKET NO. SOM-L-1419-21

SAT BELOW:  
ROBERT A. BALLARD JR., J.S.C.

APPELLATE DIVISION  
DOCKET NO. A-001651-24

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**BRIEF OF PLAINTIFF/APPELLANT**

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**PRELIMINARY STATEMENT**

This appeal challenges the December 24, 2024 decision and Order by the Trial Court, which affirmed a September 21, 2021 Resolution of approval (“Resolution”) adopted by the Defendant/Respondent, Planning Board of the Borough of Watchung (“Board”). The Resolution provided preliminary site plan approval, with variances, for the construction of a two-story, 10,782 square foot day care center, with a 3,400 square foot outdoor playground, to be operated as “The Learning Experience” branded day care center accommodating up to 154 children, ranging in age from six weeks to six years (“Proposed Project”).

Plaintiff/Appellant, Weldon Materials, Inc., a Corporation of the State of New Jersey (“Weldon”) owns and operates an approximately 200 acre rock quarry in the Borough of Watchung, Somerset County, New Jersey (“Borough”), which comprises all of Block 76.01 on the Borough’s Official Tax Map (“Quarry”). Weldon has controlled the Quarry since 1892. It is surrounded by three (3) streets in the Borough: New Providence Road, Bonnie Burn Road and Valley Road. The Quarry’s main driveway, which provides access for its employees, customers, and deliveries, is located on New Providence Road, across from the proposed day care center.

Defendant/Respondent, 100 Union Avenue Holdings, LLC (“Applicant”) owns the property that is subject to the Application, located at 100 Union

Avenue, otherwise designated as Block 78.01, Lot 1, which is approximately 2.14 acres of vacant and environmentally constrained land (“Property”). The Property is located in the BB Professional Zone (“BB Zone”), where professional offices are permitted. Day care centers are not specifically permitted in the BB Zone. However, as of 1990, N.J.S.A. 40:55D-66.6 makes child care centers a permitted use in all nonresidential districts of a municipality. The Property is surrounded by heavily traveled roadways, which sometimes flood, and which offer no on-street parking. The Proposed Project is shoehorned into a corner of the Property. Although up to 154 young children are required to be personally escorted into the day care center by their parents, the Applicant only proposed 31 parking spaces for the Proposed Project.

Weldon opposed the Application throughout its multiple hearings before the Board. Weldon regularly challenged the Applicant’s experts and highlighted omissions from the Applicant’s submissions. Weldon expressed concerns regarding the flooding, riparian constraints, number of parking spaces, on-site traffic circulation, and other issues related to the safety of the proposed intense child care use. When the Board unreasonably voted to approve the Application, Weldon appealed the Board’s decision first to the trial court and now to this Appellate Division. In short, Weldon submits that a day care facility, designed

to hold up to 154 children between the ages of 6 weeks and 6 years, is too intense of a use for the Property.

### **PROCEDURAL HISTORY**

On or about June 24, 2019, the Applicant filed a development application with the Board seeking preliminary site plan approval with variance relief to construct the Proposed Project at the Property (“Application”). Pa106. The Applicant sought to construct a 10,794 square foot two-story building, with 31 parking spaces and a 3,400 square foot outdoor playground area, to use as a branded “The Learning Experience” (“TLE”) day care center<sup>1</sup> for up to 154 children, ranging in age from six weeks to six years old. Pa99. The initial Application sought two variances and one exception. Pa111.

The Board is the duly constituted planning board of the Borough of Watchung. The Board held hearings on the Application on multiple dates, as follows: December 17, 2019, October 20, 2020, November 17, 2020, December 15, 2020, January 19, 2021, February 16, 2021, March 16, 2021, April 20, 2021

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<sup>1</sup> Given the lack of participation by TLE in this Appeal, and the fact that the Applicant repeatedly represented to the Board that the proposed development of the Property would be a TLE branded day care center, any deviation in the proposed operator would require amended site plan approval by the Board as the variances and site plan relief were based on that specific operator’s testimony. See Park Ctr. at Route 35, Inc. v. Zoning Bd. of Adjustment of Tp. of Woodbridge, 365 N.J. Super. 284, 291 (App. Div. 2004) (where the record of the proceedings before the land use board demonstrated the intent to impose a specific condition on the initial approval, and the applicant was obligated to either comply with the condition or return to the land use board to show that there was a sufficient change in circumstances warranting a departure from said condition).

and May 18, 2021<sup>2</sup>. Weldon appeared through counsel at all of these hearings to object to the Application. The attorneys gave oral summations on June 15, 2021. The Board deliberated and voted to approve the Application during its July 15, 2021 hearing. On September 21, 2021, the Board adopted a Memorializing Resolution. Pa759.

On November 1, 2021, Weldon filed a Complaint in Lieu of Prerogative Writs, challenging the Board's approval of the Application and its adoption of the September 21, 2021 Resolution. Pa45. On February 2, 2022, the Board filed an Answer to the Complaint. Pa68. On February 3, 2022, the Applicant filed an Answer to the Complaint. Pa80. On February 4, 2022, TLE filed an Answer to the Complaint. Pa88. On September 18, 2024, the Honorable Robert A. Ballard, Jr., P.J.Cv. conducted a bench trial. Thereafter, on December 24, 2024, Judge Ballard issued an Order of Dismissal with an attached Statement of Reasons under R. 1:6-2(f). Pa6.

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<sup>2</sup> 1T= December 14, 2019 hearing; 2T= October 20, 2020 hearing; 3T=November 17, 2020 hearing; 4T=December 15, 2020 hearing; 5T=January 19, 2021 hearing; 6T=February 16, 2021 hearing; 7T=March 16, 2021 hearing; 8T=April 20, 2021 hearing; 9T=May 18, 2021 hearing; 10T=June 15, 2021 hearing; 11T=July 15, 2021 hearing; 12T=September 18, 2024 Trial Transcript

## STATEMENT OF FACTS

Weldon currently owns and operates a Quarry which has been in Weldon's control since 1892. 9T51-15 to 17. The Quarry comprises approximately 200 acres and all of Block 76.01 on the Borough's official Tax Map. The Quarry is bordered by three (3) streets: New Providence Road, Bonnie Burn Road and Valley Road.

The Applicant is the owner of the Property which is comprised of approximately 96,359 square feet (approximately 2.14 acres), and is located in the BB Zone. Pa106. The Property is bounded by Union Avenue, New Providence Road, wooded area and, to the east, the Green Brook. The Property is located across from the Quarry on New Providence Road, where the Quarry's main driveway is located. 1T31-3 to 9. The Property is encumbered by environmental restrictions, with wetlands that follow the top bank of the Green Brook. The site lies partially within the 100-year flood hazard area of the Green Brook. 1T31-23 to 32-2.

On or about June 24, 2019, the Applicant sought preliminary and final site plan approval with variances to construct a two-story "Learning Experience branded day care facility." Pa106. The proposed building was approximately 10,794 square foot two-story building, with a 3,400 square foot outdoor playground area. Pa99. Although the Application sought preliminary and final

site plan approval, the filed checklist requested that information regarding multiple items, including the location of all watercourses, ponds, lakes, rivers, streams, brooks, wetlands, etc., be provided as a condition of final approval. Pa117. The filed Application sought two variances: (1) front yard setback and (2) distance to lot line – parking. The filed Application also sought a waiver for a curb planting island. Pa111. The filed Application did not request a variance for the number of parking spaces.

The Board heard testimony on the Application during nine (9) public hearings: December 17, 2019, October 20, 2020, November 17, 2020, December 15, 2020, January 19, 2021, February 16, 2021, March 16, 2021, April 20, 2021 and May 18, 2021. Counsel for Weldon appeared at all of these hearings to object to the Application. The attorneys for the Applicant and Weldon delivered oral summations on June 15, 2021. The Board voted to approve the Application by a vote of 6-3 on July 20, 2021, and the Board adopted a Memorializing Resolution on September 21, 2021.

During the hearings on the Application, the Applicant presented expert testimony from five (5) witnesses: (1) Gerald Gesario, P.E., employed as the director of civil engineering for Jarmel Kizel Architects and Engineers, (2) Matthew Jarmel, AIA, offered as a professional architect and an expert in the field of childcare operations, (3) Elizabeth Dolan, P.E., a traffic expert, (4)

Leonard Cilli, P.E., an environmental expert, and (5) Creigh Rahenkamp, P.P., a professional planner. The Applicant did not present fact witness testimony from a representative of the Applicant LLC or from TLE. Weldon presented expert testimony from three (3) witnesses: (1) Alexander Lapatka, P.E., offered as a water hazard expert, (2) Hal Simoff, P.E., a licensed engineer and professional planner, offered mainly as a traffic expert, and (3) Peter Steck, P.P., a professional planner. Robert Weldon, president of Weldon Materials, Inc., also testified.

When Mr. Gesario testified at the Board's December 17, 2019 hearing, the Applicant had not received a recent Letter of Interpretation ("LOI") from the NJDEP. 1T:48-1 to 6. As designed, seven (7) of the proposed 31 parking spaces are located in the flood hazard area. The main, two-lane driveway is also proposed to be in the flood hazard area. 1T62-3 to 14. The Property contains approximately 22,500 square feet without environmental restrictions. 1T65-19 to 23.

TLE operates approximately 70 child care centers in New Jersey. Mr. Jarmel's firm "created the prototype" and updates the prototype on a regular basis. 1T69-9 to 70-4. The proposed child care center is designed to house children from 6 weeks old (newborns) to 6 years, and will be open from 6:30 am until 6:30 p.m., Mondays through Fridays. 1T73-11 to 16. Child care centers

“cater” to working parents, and allow parents to drop off or pick up their children at any time. 1T77-24 to 78-2. Parents generally arrive before 9:00 a.m., and are required to park their car, turn off its engine, and walk their child into the center. 1T78-8 to 11. TLE does not like to have parents walk across the drive aisle with a child. 1T79-12 to 13. The site plan proposed ten parking spaces in front of the building, 2 of which are handicapped, for delivery of the children. 1T79-4 to 7. There’s no assigned schedule for drop off of the children. 1T94-24 to 25.

According to Mr. Jarnel, the proposed 31 parking spaces are “very good for this type of size,” referencing the size of the proposed day care facility. 1T81-12 to 13. The process of driving in, parking, bringing in a child, and leaving only takes approximately seven (7) minutes, so that “even if you rounded up to ten minutes, one parking space can turn over six times an hour.” 1T81-21 to 22. The proposed day care center is designed for up to 154 children. 1T84-19 to 21. The Applicant agreed to construct a solid six-foot fence around the playground so that “no one can reach over and pull a child out.” 1T88-13 to 15. Although “typically” no more than 40 children would be on the playground, “based on its size, the State would allow [them] to have 108 children out there.” 1T89-10 to 14.

In response to Chairwoman Schaefer’s question, “Why this particular site location,” Mr. Jarnel testified: “This particular operator likes the – we’ll say

both the population density in the area and, candidly, **the incomes of the area.**” (emphasis added). 1T91-24 to 92-13.

Board member Pennett mentioned the Quarry’s location to Mr. Jarmel:

You’re going to be very close to a quarry. A quarry makes a lot of noise, a lot of booms, and sometimes there’s some vibration, and so forth. Are you going to inform the parents of, you know, children that there’s a quarry there and this may be happening, or is that – you know – as people come to, you know—

Mr. Jarmel replied:

Generally, I don’t know the answer to that. It hasn’t been discussed. I would – I would think anybody that drives by here knows there’s a quarry there.

1T101-16 to 102-1.

On cross-examination, Mr. Jarmel was asked to rate the proposed site, on a scale of 1 to 10, with 1 being the worst. He replied “if I asked the operator...they might say a 12 because **from an economic and income-producing standpoint** and the need for children, it’s needed.” (emphasis added). 1T138-12 to 15. The building will have a landlord. 1T140-13 to 15. Mr. Jarmel later emphasized that “the goal is for the sites to be economically viable.” 1T150-8 to 9. In response to a flooding question from Board member Desnoyers, Mr. Jarmel advised that “these centers are designed to cater to parents that work. So a parent – if they close the center, a parent can’t go to work.” 1T151-8 to 22. Mr. Jarmel also described the potential to provide after-

school day care with the Watchung school system, since the center will be licensed up to age 12. 1T151-25 to 152-10.

Board member Robinson raised a concern regarding potential dust from the quarry and “the emissions from New Providence traffic, which can be mind-boggling at time, as well as on 22” and whether the Department of Health or the Department of Children & Families have any regulations about air quality for childcare facilities and playgrounds. Mr. Jarmel replied “Not to my knowledge.” 1T156-6 to 16.

Ms. Dolan discussed the trip generation or expected driveway volumes during the busiest hours at TLE and the impact to the roadway system. For those numbers, she relied on the ITE’s Trip Generation Manual, “which is the go-to source.” 3T12-11 to 12. However, in determining the appropriate number of parking spaces at the site, she testified that members of her professional firm, Dolan & Dean, had been studying day care centers since 2003, and that the “magic number is about 30 to 35 spaces for daycare centers with enrollments of about 180 to 190 children. That I think correlates with the average rate in the ITE’s Parking Generation Manual.” 3T16-18 to 23. Ms. Dolan emphasized that based on its experience operating day care facilities, “TLE because that’s what we’re here for, is comfortable with the parking supply that is proposed.” 3T23-8 to 10.

The Board's Site Plan Subdivision Committee visited the site at 10:00 a.m. on November 15, 2020, the same day that Ms. Dolan visited the site. The Committee noticed significant heavy-duty truck traffic leaving Weldon quarry. Noting these observations, Vice Chairman Sweeney asked Ms. Dolan whether she was concerned about this mix of heavy truck traffic with the use of a school for particularly very young children. Ms. Dolan acknowledged the heavy traffic, the wide opening of the quarry driveway and the trucks entering and exiting from that driveway, but deferred answering the question by stating that it wasn't a "traffic engineering question associated with a proposed use," and that the situation was an existing condition of the site. Mr. Sweeney responded that "in addition to this being a parental decision that it's really a decision for the community, the planning board and its professionals in terms of making a statement about whether this is a good – a good use on that corner with that mix of traffic." 3T39-25 to 41-13.

Ms. Dolan admitted that the intersection of Union Avenue and New Providence Road is "at capacity" and that drivers "need courtesy gaps during peak periods to get on and off of Union Avenue." 3T66-18 to 23. Ms. Dolan further described that the intersection is "slow moving continuously and it's at capacity. So the peak hour is processing as much vehicle demand as can be processed. So the peak hour is extended. It's a longer period of peaking because

people are using the roadway to get between Point A and Point B. And that's right, you can't fit any more vehicles on New Providence Road to and from the north because the volume demand is so great." 3T67-21 to 68-4. The ingress and egress to the proposed day care center is approximately 175 feet from this intersection. 3T68-8 to 18.

Weldon's professional planner, Peter Steck, P.P., described the Property as a corner lot, adjacent to two county roads, with no on-street parking. "Unlike a more suburban location or an urbanized location where if there's overflow parking, you can park on the street, that is not the case here." 8T39-21 to 24. He testified that the Borough's parking ordinance, LDO §28-503, requires use of the industry standard to determine the required number of parking spaces for this use.

Further addressing the limited number of parking spaces and problems associated with the site, Mr. Steck explained that in other situations, the property might have green area which could be used for future parking, if needed. With this site, "there is no area to have one additional parking space" and some of the spaces might be lost due to flooding. Also, if in the future, the use of this site were to change to another use, perhaps an office building, the site would require 44 parking spaces. "[T]he real problem here is that you don't have any on-street parking, and you don't have any reserve areas that you could have additional

parking in the future.” 8T78-21 to 79-23. The proposed site plan offered 31 parking spaces, including 2 handicapped spaces, and anticipating 22 employees.

In summary, Mr. Steck stated: “Putting a day care center across the driveways from an active quarry, as well as on a site that floods is not an appropriate location for a day care center despite the fact that it’s a permitted use.” 8T66-5 to 9.

Weldon’s traffic expert, Hal Simoff, P.E., testified that he is a New Jersey licensed professional engineer and a licensed professional planner and a fellow with the Institute of Transportation Engineers. 6T53-20 to 24. Mr. Simoff explained that the Borough’s parking ordinance does not provide a parking requirement for a child day care center use and that, under the circumstances, the ordinance requires the Board to use a generally accepted industry standard.

According to Mr. Simoff, the generally accepted industry standard is provided by the ITE, as compared to what Ms. Dolan provided, “two studies taken in October of 2012 on two separate days.” 6T57-14 to 15. Ms. Dolan’s numbers were more than 8 years old, but the ITE numbers are based on a 2019 treatise. 6T57-17 to 19. Referring to exhibit OW-8, Mr. Simoff explained that the ITE provided three criteria for calculating the required number of parking spaces for 154 students, and that the information was predicated on 39 studies. 6T59-21 to 60-1. The ITE provided three numbers for the parking demand for

this site: 37 (the average), 42 (the fitted curve rate) and 52 (the 85<sup>th</sup> percentile). 6T60-23 to 61-4. Mr. Simoff would recommend between 42 and 52 parking spaces for this use, “depending upon the location and the availability of off-street parking.” 6T62-2 to 5. Mr. Simoff critiqued Ms. Dolan’s conclusion that, although the ITE parking requirement for this day care center is 37 spaces, since enrollment is never more than 80 percent, the requirement would be 30 spaces. 6T62-12 to 25.

Mr. Simoff testified that, according to TLE’s website, “they recommend that their criterion for parking – for a typical location is 40 spaces in their prototype application.” 6T63-21 to 25. TLE’s “build to suit” model is a 10,000 square foot building with 40 parking spaces. 6T64-6 to 10. Mr. Simoff reproduced this website page and provided it to the Board as part of his report, marked as Exhibit OW-7. Pa671. The proposed building is 10,782 square feet, with only 31 parking spaces. Pa106. The Applicant did not provide any professional planner testimony to support the parking space variance. Mr. Rahenkamp only provided planning testimony to support the two bulk variances, for lot frontage and the parking setback, and one exception. 4T9-17 to 24.

## **STANDARD OF REVIEW**

This appeal arises from a Prerogative Writ Complaint, filed pursuant to New Jersey Court Rule 4:69-1. Rule 4:69-1 provides aggrieved parties with a mechanism to challenge a planning board' decision in the Superior Court, Law Division. Wyzkowski v. Rizas, 132 N.J. 509, 522 (1993); Wallace v. City of Bridgeton, 121 N.J. 559, 563 (1972). An action in lieu of prerogative writs serves as “a comprehensive safeguard against official wrong.” Mullen v. Ippolito Corp., 428 N.J. Super. 85, 102 (App. Div. 2012), quoting Garrou v. Teaneck Tryon Co., 11 N.J. 294, 301 (1953).

Under the Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq. (hereinafter “MLUL”), actions of a municipal governing body, zoning board, or planning board must be overturned when its exercise of discretion is arbitrary, capricious, unreasonable, *ultra vires*, unsupported by evidence, or otherwise contrary to law. See Cell South of N.J. Inc. v. Zoning Board of Adjustment, 172 N.J. 75, 81-82 (2002); see also, Rivkin v. Dover Township Rent Leveling Board, 277 N.J. Super. 559, 569 (App. Div. 1994), aff'd, 143 N.J. 352, 378 (1996). A finding that a board acted in an arbitrary and capricious manner merely means that there is substantial evidence showing that the board made an error. See Cell South, supra, 172 N.J. at 89 (citing Rowatti v. Gonchar, 101 N.J. 46, 50-51

(1985)); see also Anastasio v. Planning Board of the Township of West Orange, 209 N.J. Super. 499, 522 (App. Div. 1986), certif. denied 107 N.J. 46 (1986).

While a Board's action may have the "presumption of validity," its decision must be "founded on adequate evidence." Price v. Himeji, LLC, 214 N.J. 263, 284 (2013) (citing Cell South, supra, 172 N.J. at 81). As such, a board's resolution must "contain sufficient findings" to permit a reviewing court to determine that the board properly analyzed the development application. N.J.S.A. 40:55D-10(g); N.Y. SMSA, L.P. v. Weehawken Bd. Of Adjustment, 370 N.J. Super. 319, 333 (App. Div. 2004).

On a de novo basis, this Appellate Division must come to its own conclusion as to a board's determination of a legal issue. Urban v. Planning Bd. Of Manasquan, 238 N.J. Super. 105 (App. Div. 1990). "Interpretation of legal issues in the particular factual context may be performed by each board, subject to de novo review by the court." Wyzykowski, supra, 254 N.J. Super. at 38.

In this matter, the Board erroneously granted preliminary site plan approval for development of child care facility with less than the required amount of parking spaces, on a site riddled with environmental constraints, surrounded by high levels of traffic congestion and across from an active Quarry driveway, without any available on-street parking and any conditions of approval which would help mitigate the intensity of the proposed day care use.

## **LEGAL ARGUMENT**

### **POINT I**

#### **THE TRIAL COURT ERRED BY AFFIRMING THE BOARD'S ERRONEOUS DECISION TO APPROVE THE APPLICATION CONTRARY TO THE BOROUGH'S ORDINANCES. (Raised Below: Pa52)**

This proposed site for a day care facility is located in a critical environmental area as defined in the LDO at Article 28-203, "Critical areas: Wetlands, 100 Flood Plan or Flood Hazard Areas." Weldon's expert used page 6A of the Applicant's site plan to identify all of the environmental constraints on the Property. Pa644 (OW-1). The Property is surrounded by two waterways: the Green Brook, which is a NJDEP regulated and studied stream and (2) the Green Brook tributary, which is an unstudied but regulated stream. Each stream requires a separate 150' riparian zone buffer. The tributary riparian zone travels through the outdoor proposed playground area, and Green Brook's 150' riparian buffer traverses much of the parking area and the ingress/egress to the site.

The Borough adopted LDO Chapter XXII, entitled "Flood Damage Prevention," pursuant to N.J.S.A. 40:48-1 et seq., with the purpose of promoting public health and safety with regard to flooding. LDO §28-401A, entitled "Floodplain Development Restrictions," provides:

- A. Floodplain Development Restrictions. No structure or use shall be moved, added to, enlarged and/or established, nor shall any

fill be placed, nor shall the elevation of any land be substantially changed, in the floodplain hazard area except in accordance with the Floodplain-Flood Hazard Ordinance of the Borough of Watchung or any other applicable statute or regulation.

Chapter XXII has a flood area which is distinct from the NJDEP flood hazard line. The DEP has not prepared a flood hazard area line for the Green Brook tributary because it is not a studied water course. The Applicant did not establish a 100-year flood hazard line as required by Chapter XXII, and the Board did not require this information, taking the position that the DEP will handle it when it reviews the Applicant's mitigation plan.

The typical NJDEP permit approving flood hazard verification is conditioned upon compliance with the Local Flood Damage Prevention Ordinance. Compliance with the Borough's Flood Damage Prevention Ordinance should be part of preliminary site plan review. LDO §28-401A prohibits activities within the flood hazard line. The Board's vote on the Application without knowing if the flood hazard line conflicts with the Applicant's proposed development warrants reversal.

These waterway issues directly relate to flooding, which is a known problem experienced by the Property. Weldon introduced photographs of flooding along New Providence Road, Exhibits OW-5 and OW-6. Pa654; Pa655. Route 22, one of the main roads going to and from the day care

center, also floods. Mr. Simoff testified as to how many days Route 22 was closed due to flooding. 6T71-24 to 72-11. Mr. Weldon presented photographs showing extensive flooding on New Providence Road, in Exhibits OW-16, OW-17 and OW-18. The photographs were taken on August 19, 2015, and the flooding on that day caused the police to shut down New Providence Road. 5T20-11 to 19.

In addition, during his testimony, Mr. Steck presented Exhibit OW-35. Pa745. This exhibit lists fourteen (14) Borough Ordinance deficiencies in the Applicant's site plans. 8T38-9 to 39-3. The Applicant did not comply with Chapter XXII by providing the flood hazard line during the site plan process, which is an important component to site plan review. LDO §28-503 requires that a parking space be reserved for loading. LDO §28-407F, which applies to properties in the BB Zone, states: "Parking spaces and loading areas shall be provided for each use in accordance with the requirements of Section 28-503." §28-503E-1 requires each principal use to "provide for off-street loading and unloading with adequate ingress and egress from streets and adequate space for maneuvering..." and a minimum of one loading space for each building. The Applicant acknowledged that it required a loading space variance but, during the July 20, 2021 vote, the Board's attorney referred to the loading space requirement as a "waiver" and not a variance. The Applicant did not present

any evidence to entitle it to a variance from the loading requirement, but the Board determined that a loading space was not required. The Board erroneously ignored the ordinance requirements for site plan review.

The Trial Court also failed to acknowledge how many required items were omitted by the Applicant during the site plan process. The Applicant and the Board were required to follow the Borough ordinances, and the Board should have denied the Application when the Board discovered the critical omissions. Similarly, the Trial Court should have reversed the Board's decision due to the Applicant's significant failure to abide by the ordinance requirements.

Mr. Lapatka presented Exhibit OW-21 to the Board. OW-21 denotes Watchung ordinances required checklist items which were not provided and a waiver was not required or items which are not on the checklist but still required. Mr. Lapatka testified that all of the missing information contained in OW-21 and Chapter XXII should be in the preliminary site plan. 6T50-15 to 51-2. For example, the Borough's Stormwater Control Ordinance, §21-9.3, required the Applicant to submit a soils report. A soils report allows someone to determine how porous the soil is, and it would detail the water table. The Applicant did not provide a soils report. The Applicant also did not perform a simple water table study. Mr. Lapatka testified that the Applicant had not provided a stormwater management plan, as required by Ordinance §28-604.

The Applicant also failed to prove that it was entitled to waivers. The LDO requires a landscaped parking island within the parking lot. The parking island assists in the free flow and safe operation of motor vehicles in the parking lot. Exhibit OW-34 shows the waivers which the Applicant needed. Pa744. For example, the ordinance required 5% landscaping, and the Applicant proposed 3.7%. N.J.S.A. 40:55D-51 describes the legal proofs necessary to obtain an exemption, commonly referred to as a “waiver.” The statute is similar to a c(1) variance, without the negative criteria. In part, the statute requires proof of “undue hardship.” The Applicant failed to provide the proofs which would entitle it to the waivers.

## POINT II

**THE TRIAL COURT ERRED BY FAILING TO RECOGNIZE THAT THE APPLICANT DID NOT PRESENT SUFFICIENT EVIDENCE TO THE BOARD TO SATISFY THE STATUTORY CRITERIA FOR ANY OF THE THREE VARIANCES GRANTED BY THE BOARD.**

**(Raised Below: Pa56)**

Planning, and not piecemeal decision making, is the cornerstone of sound governmental policy regarding municipal land use development. Kaufmann v. Planning Bd. for Warren, 110 N.J. 551, 557 (1988). This matter appeals the decision of the Board that granted preliminary site plan approval to a day care center, for up to 154 young children, ranging in age from six weeks (newborns) to six years of age, on a site where the Board granted a significant variance to

the required number of parking spaces, without evidence to support that variance. In its Resolution, the Board does not identify whether the parking space variance was granted pursuant to N.J.S.A. 40:55D-70(c)(1) or (c)(2), nor does it provide an evaluation of the statutory criteria necessary to grant either type of bulk variance. Moreover, Mr. Rahenkamp's testimony did not satisfy the negative criteria of the statute for the remaining variances. As the Board failed to fulfill its statutory duty when it approved the variances, the variances should be voided.

**A. The Board did not analyze the statutory criteria to grant the variance for the number of parking stalls. (Raised Below: Pa54)**

Even though the Board considered the Application during the course of eleven (11) hearings, it did not decide that the Application required a variance for the number of parking stalls until its final hearing, when it voted on the Application. Throughout the course of the hearings, the Applicant posited that a variance was not required, and that N.J.S.A. 40:55D-66.6 exempted the Application from parking requirements. Weldon insisted that the ITE provided the appropriate industry standard for the number of parking stalls at this site and that LDO §28-503 required use of the ITE standards. A review of the Resolution and the transcript from the July 20, 2021 hearing demonstrates that the Board did not engage in a thoughtful analysis of the statutory criteria to substantiate the grant of this variance. Moreover, a cumulative review of the evidence

presented to the Board reveals that sufficient evidence to grant this variance does not exist. As such, the Board's grant of this variance is invalid.<sup>3</sup>

At the outset of the hearings on the Application, the Applicant maintained that N.J.S.A. 40:55D-66.6 exempted this use from any parking requirements. 1T9-5 to 10.<sup>4</sup> Rather, the statute excludes the use of "floor area occupied in any building or structure as a child care center" as a means of calculating "any parking requirement otherwise applicable to that number of units or amount of floor space, as appropriate, under State or local laws or regulations adopted thereunder." N.J.S.A. 40:55D-66.6. The Borough's parking ordinance does not run afoul of the statutory prohibition. Subsection D(2) of LDO §28-503, entitled "Off-street Parking and Loading Requirements, provides:

In the case of a use not specifically mentioned in the parking schedule above, the requirements of off-street parking facilities for a use most similar, compatible or consistent with the use that is mentioned shall apply. In the event that there is no similar compatible or consistent use, off-street parking requirements shall be determined by the Board based upon accepted industry standards.

However, adhering to its position, the Applicant did not specifically pursue a variance from LDO §28-503.

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<sup>3</sup> In its decision, the trial court incorrectly states that the Plaintiff "doesn't contend the approval of the parking-space variance." Pa19. Plaintiff disputed the legitimacy of the parking space variance on Page 87 of its Trial Brief.

<sup>4</sup> The Applicant's public notice identified a variance for the number of parking stalls, and that the most similar use required 54 parking stalls. Pa641.

The MLUL allows a planning board to grant dimensional or bulk variances if the applicant can demonstrate the statutory criteria contained in N.J.S.A. 40:55D-70(c). A property owner may obtain a variance pursuant to N.J.S.A. 40:55D-70(c)(1), often referred to as a “hardship” variance, if the owner can demonstrate a special condition of the property which creates “exceptional practical difficulties” or an “exceptional and undue hardship.”

N.J.S.A. 40:55D-70(c)(1) provides:

Where: (a) by reason of exceptional narrowness, shallowness or shape of a specific piece of property, or (b) by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the structures lawfully existing thereon, the strict application of any regulation pursuant to article 8 [C.40:55D-62 et seq.] of this act would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the developer of such property, grant, upon an application or an appeal relating to such property, a variance from such strict application of such application of such regulation so as to relieve such difficulties or hardship [.]

In 1984, the Legislature amended N.J.S.A. 40:55D-70(c) and created the “flexible c” variance, N.J.S.a. 40:55D-70(c)(2). The C(2) variance allows a zoning board to grant a variance when (1) the purposes of the MLUL would be advanced and (2) the benefits of granting the variance substantially outweigh any detriment. “The grant of a c(2) variance must be rooted in the purposes of zoning and planning itself and must advance the purposes of the MLUL.” Kaufmann v. Planning Bd. of Warren, 110 N.J. 551, 562 (1998). Under a C(2) analysis, the

approval will represent a better zoning alternative for the property. Lang v. Zoning Board of Adjustment, 160 N.J. 41 (1999).

Along with demonstrating the positive criteria for a variance pursuant to either N.J.S.A. 40:55D-70(c)(1) or (c)(2), an applicant must also prove “negative criteria” of the statute. Accordingly, N.J.S.A. 40:55D-70 provides:

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. (emphasis added).

Mr. Rahenkamp provided the planning testimony to support the Application. Mr. Rahenkamp only provided planning testimony to support the two bulk variances, for lot frontage and the parking setback, and one exception. 4T9-17 to 24. He did not provide any planning testimony to support a variance for the number of parking stalls.

On the other hand, Mr. Steck insisted that the ITE provided the appropriate number of parking stalls and that the proposed number would be problematic due to on-site and off-site issues: “[T]he real problem here is that you don’t have any on-street parking, and you don’t have any reserve areas that you could have additional parking in the future.” 8T79-20 to 23. Mr. Steck also noted that some of the proposed parking spaces might be lost due to flooding, further diminishing the proposed 31 spaces. Mr. Steck’s testimony was unrefuted.

Mr. Simoff demonstrated that TLE's "build to suit" model is a 10,000 square foot building with 40 parking spaces. 6T64-6 to 10.

Ms. Dolan inconsistently relied on the ITE during her testimony. When she testified regarding trip generation or expected driveway volumes, she relied on the ITE's Trip Generation Manual, "which is the go-to source." 3T12-11 to 12. However, in determining the appropriate number of parking spaces at the site, she testified that members of her professional firm, Dolan & Dean, had been studying day care centers since 2003, and that the "magic number is about 30 to 35 spaces for daycare centers with enrollments of about 180 to 190 children. That I think correlates with the average rate in the ITE's Parking Generation Manual." 3T16-18 to 23. Ms. Dolan emphasized that based on its experience operating day care facilities, "TLE because that's what we're here for, is comfortable with the parking supply that is proposed." 3T23-8 to 10.

During cross-examination, Ms. Dolan admitted that she used ITE data to determine trip generation, but did not use the ITE parking manual for day care centers, and that the ITE suggests 42 parking spaces for 154 students. 3T54-9 to 55-1; Pa668. The Resolution acknowledges Ms. Dolan's use of ITE standards for trip generation data but not parking requirements. Pa767. The Resolution also acknowledges Ms. Dolan's testimony, that according to her firm's study of daycare sites, "the appropriate number of parking spaces for a facility of this

nature is approximately 30 to 35 spaces.” Pa 767. The Application only offered 31 parking spaces, nearly the bare minimum of Ms. Dolan’s recommended number. Based on these discrepancies, the Board’s reliance on Ms. Dolan’s testimony was unreasonable. See Pa 767.

A Board’s resolution “must contain sufficient findings, based on the proof 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.” N.Y. SMSA, Ltd. P’ship v. Bd. of Adjustment of Weehawken, 370 N.J. Super. 319, 33 (App. Div. 2004). The Resolution contains a blanket statement in its findings and conclusions at the July 20, 2021 Hearing: “a parking variance is required but should be granted” because the Applicant demonstrated “that there will be sufficient parking spaces to accommodate the use” and the testimony of the Applicant’s Traffic Consultant and the Board’s traffic consultant. Pa776. Three similarly worded paragraphs appear in the Ultimate Findings of Fact and Conclusion of Law section of the Resolution. Pa777 to Pa778. None of these paragraphs identify whether the granted variance is a C(1) or C(2) variance. This variance will allow the Applicant to provide 20 spaces less than the ITE requirement, yet the Board obviously did not analyze the request in accordance with the statute. The variance is invalid.

**B. The Applicant did not present sufficient evidence to satisfy the negative criteria for the remaining bulk variances. (Raised Below: Pa54)**

The Applicant relied on Mr. Rahenkamp to provide the necessary planning testimony to support its requested variances. Mr. Rahenkamp opined at length regarding how the Applicant satisfied the positive criteria for a c(1) and c(2) variance in both instances where a variance was required. However, Mr. Rahenkamp's testimony fell short in satisfying the negative criteria, so that these variances should have been denied.

In 1997, the Legislature amended N.J.S.A. 40:55D-70 to make clear that the negative criteria applies equally in all cases, thus offsetting the impression which had developed in the courts that inherently beneficial uses were entitled to different treatment. Cox and Koenig, New Jersey Zoning and Land Use Administration § 36-2.8. (2025).

During his testimony, Mr. Rahenkamp emphasized the statutory establishment of a child care center use in all nonresidential zones. Referring to N.J.S.A. 40:55D-66.5, Mr. Rahenkamp stated "there is a significant need for this use and that municipalities are called to do everything they can to eliminate barriers to achieving the ability to deliver this use." 4T14-23 to 15-2. Turning to the negative criteria, Mr. Rahenkamp stated that the site does not have any adjacent neighbors and, "certainly no one who is going to be harmed in some way by the location of a day care facility, children, and circulation and parking that would go with any

particular use that would be on the site.” 4T15-18 to 24. Mr. Simoff testified that this use will generate approximately 150 movements during the peak hour, significantly more than an office building, which “would be less than one-third this traffic volume using this site.” 6T70-15 to 20. Equating the intensity of this proposed use with the other uses which the Borough chose to permit at this site is not legitimate.

To support his notion that the proposed use can be appropriately located across from the Quarry, Mr. Rahenkamp relied on the location of an inclusionary housing project near the Quarry in Scotch Plains – an adjacent municipality. 4T16-3 to 14. He also referenced single-family houses on Johnston, Woods and Mareu streets in the Borough. 4T16-19 to 22.

Rebutting Mr. Rahenkamp’s testimony that the location of single family houses near the Quarry diminished any concerns regarding the proximity of the day care to the Quarry, Mr. Steck testified that “there are no single-family homes in the immediate area, and, in fact, by virtue of recent rezoning of the quarry, the single-family homes up on Bonnie Burn Road are all insulated from the impacts of the quarry” by 100-foot buffers. 8T60-24 to 61-4. “[T]he land use impacts of the quarry are essentially all on New Providence Road,” where the driveway connects to the road, where the trucks and the quarry employees access the quarry. 8T62-16 to 21.

In fact, LDO §28-420 establishes the development requirements for the Bonnie Burn Road Redevelopment District, designed to create an affordable housing inclusionary residential project of up to 230 dwelling units, with 20% of the total number of units dedicated to low and moderate income households within the zone. §28-420(K)(5) provides: Weldon Quarry Lease Notice. A form of notice shall be included in all leases informing future development residents that Weldon Quarry is across from Bonnie Burn Road and that it performs blasting on a regular basis. A draft shall be included with the site plan submission. In short, the Borough's land development ordinance requires notice of the Quarry use to new residents of this residential development.

Regarding potential contamination on the Property, Mr. Rahenkamp stated that he finds "comfort as a planner that there's a state agency looking at this," referencing the requirement that the day care center obtain a license pursuant to N.J.S.A. 30:5B-1, et seq. 4T17-3 to 8.

During cross-examination, Mr. Rahenkamp admitted that although N.J.S.A. 40:55D-66.6 categorizes child care centers as permitted uses in all nonresidential zones, the statute does not mandate the size of the child care center, which must pass site plan scrutiny. 3T42-21 to 43-10. As to the proposed six (6) parking spaces fronting Union Avenue, the ordinance requires a 20 foot setback, and the Applicant proposed a five (5) foot setback. 4T43-20

to 44-22. Without the parking setback variance, the site would lose at least six parking spaces, potentially reducing the size of the facility. 4T47-7 to 17. Mr. Rahenkamp added that he lacked the expertise to determine what the smallest sized daycare facility would be “that makes functional sense.” 4T49-2 to 4.

Mr. Steck effectively summarized Mr. Rahenkamp’s testimony:

The response of the applicant’s planner is we need these variances because that’s the business model of The Learning Experience. That is what we want to do...the variances are needed, in my opinion, in large part because the applicant has a certain predetermined scale...it’s all about money.

8T70-13 to 71-3.

A proposed variance must be considered “in context of its effect on the development proposal, the neighborhood, and the zoning plan.” Pullen v. Twp. of S. Plainfield Plan. Bd., 297 N.J. Super. 1, 9 (App. Div. 1996). As the Applicant did not provide sufficient evidence to satisfy the negative criteria of N.J.S.A. 40:55D-70(c), all of the variances are invalid.

### POINT III

#### **THE TRIAL COURT ERRED IN FINDING THAT THE BOARD’S LEGAL DETERMINATIONS WERE ENTITLED TO A PRESUMPTION OF VALIDITY. (Raised Below: Pa62)**

The governing body did not choose to permit a day care center use across from an active quarry. The Property is located in the BB Zone. LDO §28-407 lists the principal permitted uses in the BB Zone as (1) professional occupation

offices, such as a physician's office, dentist's office, lawyer's office, (2) photography studios, (3) offices of an insurance agent, real estate broker, travel agent and stockbroker, and (4) funeral parlor. However, N.J.S.A. 40:55D-66.6, which became effective in 1990, superseded municipal zoning by making child care centers, which require licensing from the Department of Human Services pursuant to N.J.S.A. 30:5B-1, et seq., a permitted use in all nonresidential municipal zoning districts. In response, the Borough adopted §28-401(S)(2), which provides: "Family day care homes and child care centers, as such terms are defined in the MLUL, shall be permitted in the Borough in accordance with the requirements of the MLUL." The ordinance clearly mirrors the provisions of the MLUL, and does not reflect any independent evaluation by the Borough's governing body.

Dunkin' Donuts of New Jersey, Inc. v. North Brunswick Planning Bd., 193 N.J. Super. 513 (App. Div. 1984) arose from a denial of site plan approval and two variance applications for a retail bakery shop, a retail/commercial use. The planning board's denial of these applications focused solely on the anticipated negative impact of the bakery use on traffic congestion and safety. The Dunkin Donuts decision is often relied upon for the proposition that a planning board is limited to only considering off-site traffic flow and safety in relation to the proposed ingress and egress to the development site. Id., at 515.

However, as quoted by Judge Ballard in this matter, “the authority to prohibit or limit uses generating traffic into already congested streets or streets with a high rate of accidents is an exercise of the zoning power vested in the municipal governing body.” Dunkin Donuts, at 515; Pa38. In short, the Dunkin Donuts court anticipated that local governing bodies would incorporate their knowledge of municipal roadways into their zoning of nearby properties. The court decided Dunkin Donuts in 1984, 6 years prior to the effective date of N.J.S.A. 40:55D-66.6. A glaring discrepancy exists between the permitted uses selected by the Borough’s governing body for this site and the Applicant’s proposed high intensity day care use.

Appropriate parking at this site is critical to the safety of this proposed use. The Applicant’s architectural expert, Matthew Jarmel, testified that childcare centers “cater” to working parents, who are allowed to “drop off their children and pick them up at any time,” and day care centers accommodate typical work schedules by operating from 6:30 a.m. until 6:30 p.m. 1T77-24 to 78-3. Parents are required to park their car, turn off its engine, “and walk their child into the facility.” Ms. Dolan testified that “it’s an average seven-minute parking duration for a parent to park and escort their child into or out of the building.” 3T18-9 to 11. According to Mr. Jarmel, TLE does not like the parents “to have to walk across the drive aisle with a child.” 1T79-12 to 13. The

Application provided eight parking spaces in front of the building for the parents to use for drop off and pick up of their children. 1T79-5 to 7.

Considering the math of this equation, 154 children, between the ages of 6 weeks and 6 years, will travel to the site and be delivered by their parents before their parents go to work. Assuming Mr. Jarmel's estimate that twenty-five (25%) percent of those children are siblings (1T80-18 to 21), this number calculates to be approximately 115 vehicles, with only eight preferred parking spaces, according to TLE's own policies, and taking approximately 7 minutes per vehicle. Mr. Jarmel estimated that "one parking space can turn over six times an hour." 1T81-21 to 23. Mr. Jarmel therefore concluded that the proposed 31 parking spaces were appropriate for this site. Mr. Jarmel admitted that the site "wouldn't allow for all the parents of all the children to show up here at one time. It just wouldn't – it would be a safety concern." 1T90-13 to 16. However, nothing exists to control the number of cars attempting to enter the site during morning drop off, because "there's no assigned schedule." 1T94-1 to -25. Eight parking spaces turning over six times per hour accommodates only 48 cars during that hour.

The Board's Resolution evidences its misunderstanding of the limitations created by the Dunkin Donuts in the Board's evaluation of the Application. In its Ultimate Findings of Fact and Conclusions of Law, the Board stated:

5. The Board reads the Dunkin Donuts case, 193 N.J. Super 514 (Law Division [sic] 1984) as giving the Board no authority to prohibit or limit usage generating traffic into an already congested street or streets with a high rate of access since the child care center is not only a permitted use under State law and Municipal Ordinance. The Board further concludes that the exercise of the zoning power is invested in the Municipal governing body to determine permitted uses.

Pa777. While the day care use cannot be prohibited due to off-site traffic concerns, and is a permitted use pursuant to the MLUL, as acknowledged by LDO §28-401(S)(2), the Board improperly failed to consider off-site traffic issues in assessing the Applicant's site plan application for purposes of imposing reasonable conditions of approval, such as the number of children, hours of operation, drop-off/pick-up times, since the governing body never independently took off-site traffic issues into consideration in determining whether this use should be permitted in the BB Zone.

Similarly, N.J.S.A. 40:55D-25(2) vests a planning board with the authority to engage in site plan review, pursuant to N.J.S.A. 40:55D-37. N.J.S.A. 40:55D-37(a) authorizes a municipal governing body to adopt an ordinance requiring approval of site plans by the planning board as a condition for the issuance of a permit for any development. N.J.S.A. 40:55D-41 sets forth the requirements of a site plan review ordinance, and includes "standards and requirements relating to...safe and efficient vehicular and pedestrian circulation, parking and loading." N.J.S.A. 40:55D-41(b). Evaluation of the

safety of a proposed project's vehicular and pedestrian traffic and parking is, therefore, an essential component of site plan review. Sartoga v. Borough of West Paterson, 346 N.J. Super. 569, 583 (App. Div. 2002).

Along with the deficient number of parking spaces, the Applicant's onsite circulation does not work properly. Exhibit OW-22 depicted the stacking of vehicles on both sides of Union Avenue and complete gridlock, which continues onto New Providence Road. Pa727. Exhibits OW-12, OW-23 and OW-24 show the inability of vehicles to leave the site or to maneuver around the site. Pa687. A vehicle traveling to the day care center on Route 22 west and making a right turn on Union Avenue would be stopped by queueing. 6T66-12 to 68-1. Mr. Simoff presented Exhibit OW-23, which showed that the parking lot configuration will cause cars driving in the parking lot to cross the center line. 9T72-10 to 73-23. Mr. Simoff testified that the Applicant used the wrong standard for trucks and that a 30' vehicle could not circulate through the parking lot unless the parking lot was empty. 9T83-9 to 84-12. Mr. Simoff testified regarding Exhibit OW-26, which showed a site distance problem looking north on New Providence Road at the Union Avenue intersection. The site distance is only 205' whereas the required site distance is 400'. 9T89-4 to 12.

The Application's deficient number of parking spaces, 7 of which are in the flood hazard zone, the lack of nearby on-street parking, and the off-site

traffic concerns, necessitated proactive conditions of approval from the Board, which do not exist in the Board's Resolution. The trial court erroneously affirmed the Board's Resolution, despite the Board's misinterpretation of Dunkin Donuts.

### **CONCLUSION**

For the foregoing reasons, Plaintiff respectfully requests that this Court reverse the Trial Court's December 24, 2024 Order (as amended February 19, 2025) and invalidate the Board's decision to approve the Application with variances, as memorialized in Resolution No. PB-21-R10.

Respectfully submitted,

*/s/Robert F. Simon*

Robert F. Simon

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WELDON MATERIALS, INC., a  
corporation of the State of New Jersey

Plaintiff-Appellant,

v.

PLANNING BOARD OF THE  
BOROUGH OF WATCHUNG, 100  
UNION AVENUE HOLDINGS, LLC,  
and THE LEARNING EXPERIENCE  
HOLDING CORP.

Defendants-Respondents.

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ON APPEAL FROM:

THE SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: SOMERSET COUNTY  
DOCKET NO. SOM-L-1419-21

SAT BELOW:  
ROBERT A. BALLARD JR., J.S.C.

APPELLATE DIVISION  
DOCKET NO. A-001651-24

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**BRIEF OF DEFENDANT/APPELLEE**

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Submitted to Clerk of the Appellate Division On: August 7, 2025

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Resolution No. PB-21-R10, adopted September 21, 2021, by the Defendant  
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**PRELIMINARY STATEMENT**

100 Union Avenue Holdings, LLC (“100 Union Avenue Holdings” or “Appellee”) is the owner of the vacant property located at 100 Union Avenue, Watchung, formally identified as Block 78.01, Lot 1 on the Tax Maps of the Borough of Watchung (the “Property” or the “Site”). The Property is lightly wooded and currently vacant. Appellee made an application to the Borough of Watchung Planning Board (“Planning Board” or “Board”) seeking Preliminary and Final Site Plan approval to permit the construction of a childcare center to be operated by the Learning Experience Holding Corporation (the “Learning Experience”) on the Site.

The Site lies within the BB (Professional Office) Zone (“Zone”). A childcare center is a permitted use in the Zone. *See* N.J.S.A. 40:55D-66.6. After numerous hearings, the Watchung Planning Board approved the project for the construction of a two story 10,782 square foot building, to be used exclusively by Learning Experience as a childcare center. The center would be designed to accommodate up to 154 children ranging in age from 6 weeks to 6 years of age and an estimated 22 staff members working at the facility.

The proposed building is located at the southwest corner of the Site near the intersection of Union Avenue and New Providence Road. A thirty-one (31) space parking lot was approved behind the building with access to the Site that

is provided from Union Avenue via a two-way curb cut and a one way out/right turn only curb cut. An approximately 3,800 square foot play area is adjacent to the building. The project is in substantial conformance with all the bulk requirements of the Zone including building setbacks, lot coverage, lot dimensions, building height, number of stories, and floor area.

The Planning Board determined that the Application required minimal relief of three (3) bulk variances, specifically for parking lot setback, lot frontage and the number of parking spaces required. The Planning Board, after carefully considering and weighing all the evidence presented, granted 100 Union Avenue Holding's Application by a vote of 6 to 3. The Board adopted a thorough and well-reasoned memorializing resolution that included sufficient findings of fact and conclusions.

Appellant, Weldon Materials, Inc. (the "Plaintiff" or "Appellant"), is the owner of a quarry located on the entirety of Block 76.01 of the Tax Maps of the Borough of Watchung and was the sole objector to the application before the Planning Board. Appellant herein seeks to invalidate the Trial Court's decision to affirm the Planning Board's approvals.

A review of the underlying record fully supports the Planning Board's grant of 100 Union Avenue Holding's Application. Accordingly, the Court must

uphold the Trial Court's decision affirming the Planning Board's decision granting 100 Union Avenue Holding's Application.

**PROCEDURAL HISTORY AND COUNTER-STATEMENT OF FACTS**

Appellee is the owner of the vacant property located at 100 Union Avenue, Watchung, NJ. The Property is currently undeveloped and is located at the corner of New Providence Road and Union Avenue in the Borough of Watchung. The Property is almost directly across from the Weldon Quarry, which is owned and operated by the Appellant. The Property is within a short distance from the corner of New Providence Road and Bonnie Burn Road. Both New Providence Road and Bonnie Burn Road are major thoroughfares within the Borough of Watchung.

On or about June 24, 2019, Appellee filed an application with the Borough of Watchung Planning Board, which was assigned Application No. PB 19-02, seeking Preliminary and Final Major Site Plan, with associated bulk variances and waivers to operate a Learning Experience branded childcare center (the "Application"). The underlying Application by Appellee sought Preliminary and Final Site Plan approval with related bulk "c" variances to construct a Childcare Center on a vacant lot. The Board determined that an additional bulk variance was required for the number of parking spaces because no standards existed in the Watchung Ordinances for childcare facilities. Based upon the advice of its

professional and its well documented deliberative process, the Board ultimately granted Preliminary Site Plan approval with bulk “(c)” variances for lot frontage, parking lot set-back and number of parking spaces. A Preliminary approval grants certain rights prior to final approval after specific elements of a development plan have been agreed upon by the planning board and the applicant under N.J.S.A. 40:55D-6. Final approval can only be granted after all conditions, engineering plans and other requirements have been completed or fulfilled, and the required improvements have been installed or guarantees properly posted for their completion, or approval conditioned upon the posting of such guarantees following a preliminary approval for a Site Plan. N.J.S.A. 40:55D-4. On August 22, 2019, the Application to the Planning Board was deemed complete.

In support of its application, Appellee presented the following expert witnesses over the course of ten (10) hearings:

1. Gerard Gesario, P.E., the Applicant’s Civil Engineer, a well-qualified site engineer, provided details as to the proposed site improvements and compliance with the applicable Watchung ordinances addressing site circulation, lighting, drainage and landscaping. *See* 7T, 9-30. He provided an overview of the Site and acknowledged that the Site was encumbered by environmental restrictions, but that any approval would be subject to obtaining

the appropriate permits from the New Jersey Department of Environmental Protection (“NJDEP”). Id.

2. Matthew Jarmel, A.I.A., the Applicant’s Architect, provided an overview of the proposed architectural design and layout of the facility and provided detailed operational testimony based upon his experiences in both designing and operating childcare centers. *See* 1T &3T. He also confirmed that licensing for this center would require state approval including the Department of Child Services and the NJDEP. Id. He discussed the design of the childcare center, its security, signage, and parking. Id. On cross-examination, Mr. Jarmel testified that the building can safely be evacuated without having to go through the flood area in the event of a flood. Id. at 9. He also reiterated that such an evacuation plan was necessary to secure a license from the State to operate a childcare center. Id.

3. Elizabeth Dolan, P.E., the Applicant’s Traffic Consultant, was qualified as a traffic expert and provided extremely detailed testimony as to the safety of the ingress and egress of the Site, site circulation and the adequacy of the number of proposed parking spaces, based upon studies conducted at similar childcare facilities. She further provided information concerning the off-site traffic conditions and the effect this project would have on the roadways including the number of trips that will be generated from the Site and how the

traffic would flow after the Childcare center was opened and operating. *See* 3T, 7 – 69. She presented her impact study dated July 25th, 2019. *Id.* at 10:16. She testified that the Applicant’s proposal for 31 parking spaces would be appropriate given the building size and number of enrolled students. *Id.* at 15:21-24. This testimony was based off data Ms. Dolan’s firm had been collecting on daycare sites since 2003. *Id.* at 16:10-14. The number of parking spaces is consistent with other Learning Experience facilities. *Id.* at 18:12-21. Ms. Dolan additionally reviewed reports submitted by the Planning Board Traffic Consultant. In her testimony she noted that their reports concur with her previous testimony that the Applicant had provided traffic data with appropriate adjustments and that the reports took the position that the data was consistent with the Institute of Transportation Engineers (ITE) design practices and standards. *Id.* at 19:16-21:7.

4. Leonard Cilli, the Applicant’s Environmental Expert, was qualified and accepted as an expert environmental consultant. *See* 3T, 75. He testified that childcare centers are strictly regulated by the State. Among other regulations, childcare centers are subject to environmental review by both the NJDEP and the Department of Children and Family Services before they can become licensed and operational. *Id.* at 76-78. Mr. Cilli then detailed the history of the Property from collected historical maps and photographs dating back to as early

as 1924. Id at 80-81. The land has remained vacant as it currently stands. Id. The witness testified that he did not see anything that precluded the proposed development from being constructed. Id at 81:19-23. He looked at air sampling because of the proximity of the Weldon Quarry; performed some air quality testing for asbestos and lead and found no evidence of either substance. Id. at 82:11-19. The witness also measured dust levels out of a concern for the proximate truck traffic but did not find any levels that were over the respiratory limits. Id. As such, the witness concluded that based on his assessment, it was likely that the Site would be approved by the State. Id. at 83:5-8.

5. Creigh Rahenkamp, P.P., the Applicant's Professional Planner, was qualified and accepted as a professional planner. He confirmed that not only is the use permitted under the Watchung Ordinances, but it is also recognized as an inherently beneficial use and permitted in all non-residential zones as dictated by the Municipal Land Use Law ("MLUL"). Mr. Rahenkamp further provided detailed testimony in support of the few variances and design waivers by the Applicant. *See* 4T, 7 – 18.

He testified that the Property is within the BB zone (Professional and Office District), where the use is permitted pursuant to N.J.S.A. 40:55D-66.6 of the MLUL. Id. at 9:21-24. He testified that the project is in substantial conformance with all the bulk requirements of the Zone including building

setbacks, lot coverage, lot dimensions, building height, number of stories, and floor area. Id.

He further testified that the Applicant was seeking minimal variance relief for two bulk variances and one design exception. The exception or design waiver N.J.S.A. 40:55D-51.b arises from the irregular shape of the central parking island. Id. at 11:23-12:8. The ordinance requires a width of 9 feet for landscaped separations between parking spaces that would typically occur in a row of parking. Id. This standard, when applied to an irregular-shaped area of a central island in a looped parking area, necessarily results in the need for a variance due to its overall shape and function. Id. The size of the overall landscaped island is constrained by the Site depth and the need for looping circulation, so that it provides appropriate separation and the area for landscaping but is irregular in its shape. Id. at 12:21-14:13. Mr. Rahenkamp opined that the relief is reasonable, is consistent with the intent of the requirement, is necessary due to peculiar conditions, and that literal enforcement is impractical. Id. at 18:11-14.

As to the variance required for lot frontage, Mr. Rahenkamp testified that the lot has conforming frontage along its actual front on Union. Because the lot has frontage on the right-of-way of the intersection of Union and New Providence, there is an additional “front” line segment of the lot of only 40.28 feet where 150 feet is required for a frontage. This is an artifact of an oddly

shaped right-of-way and has no real-world impact. The Appellant does not contest this variance. *Id.* At 18:10. The other variance pertains to a parking area setback requirement of ten feet from Union, where the narrowest portion of an irregular setback is five feet. While a variance is required for the distance from the curb of the parking area to the right-of-way, an overlarge right-of-way exists in this area, so there is a landscaped area from the parking curb to the actual road curb greater than ten feet in all locations. The visual intent of the setback is being met even though a variance is required. *Id.* At 18:11.

As to the variances as a group, Mr. Rahenkamp provided testimony related to the standard provided in N.J.S.A. 40:55D-70.c(1)(c) and also independently N.J.S.A. 40:55D-70.c(2). 4T, 45-47. The need to provide looping circulation to allow parents that needed to make a left from the Site to access the appropriate driveway, coupled with the odd shape of the lot and the irregular boundary of the environmentally constrained areas, created a site and design specific situation in which “the strict application of those particular standards would result in more than practical difficulties to the proper design and use of the site”. *Id.* at 12-15. As policy support for C(2) consideration, Mr. Rahenkamp referred to N.J.S.A. 40:55D-65.5.a, which includes the Legislature’s findings related to the importance of an adequate supply of childcare services, and N.J.S.A. 40:55D-66.6, which makes childcare centers a permitted use in all non-

residential districts, as extraordinary proof that the use advanced the purposes of zoning and that the childcare center is consistent with the intent of the zone plan as modified by the Legislature. *Id.* Mr. Rahenkamp further cited the intent and Purpose of the Municipal Land Use Law as enunciated in N.J.S.A. 40:55D-2. He specifically discussed Purpose “g” which requires zoning provide for a variety of uses in order to meet the needs of all New Jersey citizens and Purpose “m”, which seeks to guide efficient use of land. Mr. Rahenkamp opined that the childcare use would not have a “substantial detrimental” impact on its neighborhood that he described as across the street from a park and adjacent to inclusionary, multifamily housing. *Id.* He added that, while the Site was around the corner from an entrance to a large quarry site, there is no direct impact by the childcare center on the quarry operations or its intersections with New Providence Road. *Id.* at 17-18.

6. Robert Freud, P.E., PP the Applicant’s Civil Engineer/Flood Hazard Consultant, was accepted as an expert by the Board. 10T, 38:6-12. The Applicant requested an applicability determination from the NJDEP in relation to the unnamed tributary. On June 7th, 2021, the NJDEP issued their decision stating that the unnamed tributary has a drainage area of less than 50 acres and has a riparian zone associated with it. *Id.* at 41:2-13. Since the Site is in the flood hazard area of Greenbrook, a flood area verification will be required. *Id.* This

means that there is no specific flood plain associated with that area. Id. at 42:17-18. The flood area hazard applicability determination letter dated June 7th, 2021, was marked as Exhibit A-14 at this hearing. Id. at 43:19-21. He further testified that it is his opinion that the DEP is the arbiter of whether or not they have jurisdiction over the flood hazard area and the riparian zone on Site and the purpose of this applicability determination clarifies this issue. Id. at 43:5-12. The Board Engineer believed this letter defined the issue and satisfactorily answered the questions as to the true size of the tributary. Id. at 44:9-45:3. The calculations that determine the tributary were done by personnel in Mr. Freud's office and under his direction and submitted to the NJDEP for their verification. Id at 47:18-23.

Throughout the course of the hearings, the Appellee submitted to the Board the documents found in the appendix Pa104-Pa597. The following documents were introduced as evidence by the Appellee and became part of the record. (References herein are to the record before the Board and as referenced in the Resolution adopted by the Board. *See* Pa 198):

A-1 -12/17/19-Aerial Exhibit, drawing number E-200, prepared by Jarmel Kizel

A-2-12/17/19- Site Exhibit, drawing number E-300, prepared by Jarmel Kizel

A-3- 12/17/19 – Rendering, SA-2.3 prepared by Jarmel Kizel

A-4, Preliminary and Final Site Plan, Last Revision date September 4, 2020, Number of sheets, (17), prepared by Jarmel Kizel

A-5 Site Exhibit E-500 October 20, 2020, prepared by Jarmel Kizel

A-6 Site Exhibit E-600 October 20, 2020, prepared by Jarmel Kizel

A-7 Freshwater Wetland Delineation Map, Sheet 1 of 1, Initial Date July 6, 2020, prepared by Jarmel Kizel

A-8 Vehicle Analysis, EX-001, Issue Date 10/31/2019, prepared by Jarmel Kizel

A-9 Sight Distance Exhibit, E-100, Issue Date 11/19/19, Sheet 1 of 1, prepared by Jarmel Kizel

A-10 Fire Truck Turning Analysis, EX-002, Sheet 1 of 1, prepared by Jarmel Kizel

A-11 Proposed Floor Plan, SA\_2.1, , last revised September 4, 2020, prepared by Jarmel Kizel,

A-12 Proposed Elevation, SA-2.2, last revised September 4, 2020, prepared by Jarmel Kizel

A-13 Parking Memorandum dated September 2, 2020 by Elizabeth Dolan, P.E., Dolan and Dean

A-14 Parking Memorandum dated October 20, 2020 by Elizabeth Dolan, P.E., Dolan and Dean

A-15 Planning Exhibits, 6 pages prepared by John McDonough, LA, PP, AICP;

A-16 State of New Jersey flood hazard area applicability determination letter dated June 7, 2021.

The Objector/Appellant herein fully participated in the Hearings by cross-examining the witnesses and presenting their own witnesses in opposition to the Application. The Appellant's witnesses included:

1. Robert Weldon, a Principle of Plaintiff,
2. Alexander Lapatka, P.E., Weldon's Professional Engineer,
3. Hal Simoff, P.E. Weldon's Traffic Engineer,
4. Peter Steck, P.P., Weldon's Professional Planner.

Objector/Appellant and their witnesses attempted to obfuscate the Board's understanding of the case presented by the Applicant/Appellee and create issues where none existed. For example, Weldon's Counsel repeatedly introduced testimony and arguments which had already been deliberated by the Board, attempting to suggest that there would not be adequate parking on site. *See* 1T, 3T, 4T, 6T, 9T, and 11T. Such testimony was made almost exclusively without factual support.

To the contrary, Applicant's Traffic Expert, Ms. Dolan, provided clear and convincing testimony concerning the number of parking spaces required to satisfy the parking requirements for the staff and visitors to the Site. In concluding that the parking needs for the Proposed Use were met, she relied upon traffic and parking studies from other similar childcare facilities. The Board's own traffic consultant, Brightview Engineering, agreed that adequate parking was provided. *See* Brightview Engineering Report dated 2/22/21 p.10-11. 3T,19:16-21:7. The Brightview report of 2/22/21 was the culmination of

months of reviews and was revised on four (4) occasions prior to the final draft of 2/22/21. The Report also notes that in addition to the documents submitted by the parties, Brightview reviewed data from other childcare applications that it had reviewed in the past, summarized the data and attached a summary at the end of the memo. The Brightview team specifically stated at Page 8 of the Report that:

Based upon the provided data, we find that the proposed parking capacity of 32 spaces would be sufficient for the proposed facility with the understanding that pick-up and drop-off times are staggered and that the site is not operated at full capacity at all times. This data is consistent with parking demand data reviewed and verified by this office for other day care facility applications in New Jersey.

The Report concluded at Page 10 that:

Based upon the historic information provided for other similar Learning Experience Facilities and the filtered parking demand data from ITE, it is our opinion that the thirty-one (31) parking spaces proposed for this facility would be adequate. We must also consider that this type of daycare facility typically operates on staggered arrival and departure times for its clientele and has a mixture of half-day and full-day students.

Likewise, Objector/Appellant provided inadequate support regarding storm water and drainage issues with repeated assertions about the requirements of Chapter 22 of Watchung Ordinances. *See* 6T, 26 - 52 and 14:8-10; and 7T, 9 - 30. These arguments were soundly and repeatedly refuted by the testimony of

the Appellee's and the Board's professionals. As stated by these professionals the Applicant was not seeking relief from Chapter 22. *See* 6T, 14:8-10 and 7T, 109:15-16.

The continued references throughout the testimony concerning the prior applications for a car wash further illustrate the way the Objector had tried to confuse the Board and obfuscate the true issues. The fact that the Objector did not object to prior applications but is objecting to this use illustrates the fact that the Objector's ultimate objection is to the Use of the Property for a childcare facility. The Board's Resolution summarized Objector Robert Weldon's Testimony and objections, at the Hearing on May 18, 2021, as follows:

- a. The Applicant had previously obtained approvals (now abandoned) to build a car wash and a car spa on the site and Weldon did not object to either one on the site. He testified that Weldon is objecting because of the scale of the project and it is not a suitable use to have six week old children and older children across the street from the Quarry.
- b. With 154 children on site and 22 staff this intensifies the traffic at New Providence Road and Union Avenue right across from the Quarry.
- c. The witness conceded that Weldon's opposition is a Nimby situation (not in my backyard). As the owner of the quarry he would rather not have small children located across the street where there is heavy industrial use. At the July 20, 2021, Planning Board meeting, the Planning Board

members deliberated with respect to the Application. At this meeting the Board made the following findings and conclusions:

1. A parking variance is required but should be granted based on the fact that the Applicant has demonstrated that there will be sufficient parking spaces to accommodate the use as well as the Board accepting the

testimony of the Applicant's Traffic Consultant and the Board's Traffic Consultant. 11T, 13-15.

2. The Board concluded that based on the testimony as well as the wording of the loading space ordinance that no exemption was required. In addition, the Applicant agreed that any loading would take place during the time when the childcare center is not in operation. (Id. at 29:19-20.)

3. Any approval would be for preliminary Site Plan only. The Board acknowledged that the Applicant must return to the Board for final Site Plan approval if preliminary is granted. Id. at 5:7-14. *Also see* Id. at 30:3-6.

4. The Board considered the following variances: lot frontage, parking lot set-back and number of parking spaces as well as the design standard exceptions including the landscaping island, the lighting intensity and groundwater recharging infiltration.

5. Based on the applicable appropriate conditions and mitigations, the Board found and concluded based on substantial evidence during the public hearings, that the Applicant's requests for approvals should be granted. Id. at 45.

Following the preliminary approvals granted to Appellee, Appellant filed a Complaint in Lieu of Prerogative Writs, challenging the Board's approval on November 1, 2021. Pa45. On February 2, 2022, the Board filed an Answer to the Complaint. Pa68. On February 3, 2022, the Applicant filed an Answer to the Complaint. Pa80. On February 4, 2022, TLE filed an Answer to the Complaint. Pa88. On September 18, 2024, the Honorable Robert A. Ballard, Jr., P.J.Cv. conducted a bench trial. Thereafter, on December 24, 2024, Judge Ballard issued an Order of Dismissal with an attached Statement of Reasons under R. 1:6-2(f). Pa6.

It is respectfully submitted that most of the facts presented in the Application and relied upon by the Board in reaching its conclusions are

undisputed. For example, a childcare facility is a permitted use on the Property, the Property in question has environmental constraints, including wetlands, the proximity to the Greenbrook and a tributary to the Greenbrook, and that all of these wetlands are subject to flooding. It is abundantly clear that the few variances and design waivers being sought by the Applicant are minor in nature. *See Id.* at 11:23-12:8; 12:21-14:13; and 18:11-14. One variance is for the lot frontage on New Providence Road which is an existing condition and another being the required parking lots setback. The Board determined that a Variance was also required for the number of Parking Spaces, since no standard was set forth in the ordinance. Extensive testimony was provided in support of the bulk (c) variances and relief is clearly warranted. *See* Resolution No. PB-21-R10 (the “Resolution”) p. 19-25.

The Board’s Professionals, the Board’s Site Review Committee and Borough Staff submitted review letters and reports, as reflected again in the Resolution of Approval. These documents guided the Board in reaching its decision and these reports and statements in the record by the Board’s Professionals and Borough of Watchung Staff overwhelmingly agree with the positions taken by the Applicant and support the Board’s Action in granting the approval in this case. Overall, the hearings produced a robust record for this Court’s review. The Board's ultimate decision was not arbitrary, capricious or in any way unreasonable based on the

record below. Contrary to the assertions of Plaintiff, this Board carried out its duty to deliberate and reach well founded factual findings and conclusions, which support the decision to approve the Site Plan and grant the relief sought by the Applicant.

### **STANDARD OF REVIEW**

The standard of review for a decision of a zoning board by an appellate court varies depending on the issue being challenged. "When a land use board's action is challenged, the trial court and we in turn review the adequacy of the factual findings and legal conclusions in the board's memorializing resolution, and we have not hesitated to set aside a board's action when the resolution was inadequate." Edison Bd. of Educ. v. Zoning Bd. of Adjustment of the Twp. of Edison, 464 N.J. Super. 298, 308 (App. Div. 2020). Courts accord wide latitude to the discretion of such public bodies to make fact-findings and decisions on land use applications. Kane Props., LLC v. City of Hoboken, 214 N.J. 199, 229 (2013)

The New Jersey Supreme Court has recognized that Boards of Adjustments and Planning Boards "possess special knowledge of local conditions and must be accorded wide latitude in the exercise of their discretion." D. Lobi Enterprises, Inc. v. Planning/Zoning Bd. of Borough of Sea Bright, 408 N.J. Super 345, 360 (App. Div. 2009). Public bodies, such as the Planning Board here, because of their peculiar knowledge of local conditions,

must be allowed wide latitude in the exercise of their delegated discretion. Booth v. Board of Adjustment, 50 N.J. 302, 306 (1967). The board's decision is not to be set aside unless it is arbitrary, capricious or unreasonable. *See, e.g.*, Burbridge v. Mine Hill, 117 N.J. 376, 385 (1990); Kramer v. Bd. of Adjustment of Sea Girt, 45 N.J. 268, 296-97 (1965). In an action in lieu of prerogative writs, the role of a court is to review an administrative board's decision and determine whether the board's actions are arbitrary and capricious based on the record below. Hughes v. Monmouth Univ., 394 N.J. Super. 207 (Law Div. 2006), *aff'd* 394 N.J. Super. 193 (App. Div. 2007) *certif. den.* 192 N.J. 599 (2007). In Hughes, the Court went on to state: “Arbitrary and capricious action is described as willful and unreasonable, without consideration, and in disregard of circumstances.” Id. The term “arbitrary and capricious” means that there is no rational basis to the decision. In re Proposed Xanadu Redevelopment Project, 402 N.J. Super. 607, 642 (App. Div. 2008).

“Even if we have some doubt about the wisdom of a board's action or some part of it, we may not overturn its decision absent an abuse of discretion.” Medici v. BPR Co., 107 N.J. 1, 15 (1987). A reviewing court's analysis must focus on the validity of the Board's action; it is not to substitute its judgment for the proper exercise of the Board's discretion. Fallone Props. L.L.C. v. Bethlehem Twp. Plan. Bd., 369 N.J. Super. 552, 561 (App. Div. 2004). The court's authority

and duty is to review the record before the Board to determine whether the Board's decision was adequately supported by the evidence. Lang v. Zoning Bd. of Adjustment of Borough of N. Caldwell, 160 N.J. 41, 58 (1999). *See also* Burbridge, 117 N.J. at 385 (stating that there must be "adequate evidence" in the record supporting the board's determination); Pullen v. S. Plainfield Plan. Bd., 291 N.J. Super. 303, 312 (Law. Div. 1995) *aff'd*, 291 N.J. Super. 1 (App. Div. 1996) (holding that there must be "substantial evidence" of both the positive and negative criteria before the board).

“We accord ‘substantial deference’ to the decisions of a municipal board. A board of adjustment's determinations are presumed to be valid and will only be overturned if they are unsupported by the record and ‘so arbitrary, capricious, or unreasonable as to amount to an abuse of discretion.’” D. Lobi Enterprises, Inc., 408 N.J. Super at 360 (App. Div. 2009) *quoting*, Ocean Cnty. Cellular Tel. Co. v. Twp. of Lakewood Bd. of Adjustment, 352 N.J. Super. 514, 521-22 (App. Div. 2002). In addition, the Board, when evaluating the evidence presented during hearings, can choose to accept or reject the testimony of witnesses. Kramer, supra at 288 (citation omitted). Such a choice, when reasonably made, is “conclusive on appeal.” Id. It is presumed that the board has acted fairly, and a reviewing court may not substitute its judgment for that of the board. Charlie Brown of Chatham, Inc. v. Board of Adjustment, 202 N.J. Super. 312, 321 (App.

Div. 1985). Simply stated, a reviewing court must determine whether the Board followed statutory guidelines and properly exercised its discretion. CBS Outdoor, Inc. v. Borough of Lebanon Plan. Bd./Bd. of Adjustment, 414 N.J. Super. 563, 578-579 (App. Div. 2010).

On questions concerning the interpretation or determination of law, however, a court's review is de novo. *See* Manalapan Realty, L.P. v. Twp. Comm. of Twp. Manalapan, 140 N.J. 366, 378 (1995); Fallone Props., LLC, 369 N.J. Super. at 561; Pond Run Watershed Ass'n v. Twp. of Hamilton Zoning Bd. of Adjustment, 397 N.J. Super. 335, 350 (App. Div. 2008).

An appellate court must apply the same standard when reviewing a trial court's decision on an appeal from a decision of a board of adjustment. D. Lobi Enters., 408 N.J. Super. at 360. "Bound by the same scope of review as the Law Division, our role is to defer to the local land-use agency's broad discretion and to reverse only if we find its decision to be arbitrary, capricious, or unreasonable." Bressman v. Gash, 131 N.J. 517, 529 (1993).

A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference. *See* State v. Brown, 118 N.J. 595, 604 (1990); Dolson v. Anastasia, 55 N.J. 2, 7 (1969); Pearl Assur. Co. Ltd. v. Watts, 69 N.J. Super. 198, 205 (App. Div. 1961). Manalapan Realty, L.P., 140 N.J. at 378. "Interpretation of legal issues in the

particular factual context may be performed by each board, subject to de novo review by the court.” Wyzykowski v. Rizas, 254 N.J. Super. 28, 38 (App. Div. 1992). However, because the interpretation of a statute or ordinance presents essentially a legal issue, conclusions of a municipal board on matters of statutory interpretation are not entitled to any particular deference. New York SMSA, L.P. v. Bd. of Adjustment of Twp. Of Weehawken, 370 N.J. Super. 319, 331 (App. Div. 2004).

The standard of review was succinctly summarized in Kramer, *supra* 45 N.J. at 296-297:

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...

In evaluating a challenge to the grant or denial of a variance, the burden is on the challenging party to show that the zoning board’s decision was “arbitrary, capricious, or unreasonable.” Kramer, 45 N.J. at 296; *see also* Allen v. Hopewell Twp. Zoning Bd. of Adjustment, 227 N.J. Super. 574, 580 (App.

Div. 1988). In other words, when reviewing board determinations, a court should presume those determinations were correct. So long as the board's actions are supported by substantial evidence in the record, a reviewing court is bound to affirm that determination. Lang, 160 N.J. at 58 (1999)

### **LEGAL ANALYSIS**

The authority to regulate all land uses within the State of New Jersey is encompassed within the powers granted to the legislative branch of the government by Article III of the New Jersey Constitution of 1947. The legislature in adopting N.J.S.A. 40:55D-1, et seq., commonly referred to as the Municipal Land Use Law ("MLUL"), has delegated the power to regulate land uses to the municipalities, provided they comply with the requirements of adopting a Master Plan and a zoning Ordinance. *See* Com. Realty & Res. Corp. v. First Atl. Props. Co., 122 N.J. 546 (1991). Municipal authority in Land Use matters must be exercised in strict conformity to the provisions of the MLUL. New Jersey Builders Ass'n v. Mayor & Bernards Twp., Somerset Cnty., 108 N.J. 223 (1987). A planning board or board of adjustment, like any other state or local administrative agency, is a "creature[ ] of statute and may exercise only those powers granted by statute." Toll Bros., Inc. v. Bd. of Chosen Freeholders of Cnty. of Burlington, 194 N.J. 223 (2008).

As part of this legislative scheme a Municipal Planning Board's functions are defined and set forth in N.J.S.A. 40:55D-25. Amongst these enumerated powers are the authority to hear and approve Site Plan applications. N.J.S.A. 40:55D-25 (2). A Site Plan as defined by N.J.S.A. 40:55D-7 as:

[a] development plan of one or more lots on which is shown (1) the existing and proposed conditions of the lot, including but not necessarily limited to topography, vegetation, drainage, flood plains, marshes and waterways, (2) the location of all existing and proposed buildings, drives, parking spaces, walkways, means of ingress and egress, drainage facilities, utility services, landscaping, structures and signs, lighting, screening devices, and (3) any other information that may be reasonably required in order to make an informed determination pursuant to an ordinance requiring review and approval of Site Plans by the planning board adopted pursuant to ... this act. and to grant variances and certain building permits in conjunction with subdivision, site plan and conditional use approval pursuant to N.J.S.A. 40:55D-60.

Furthermore, whenever the proposed development requires approval of a subdivision, site plan or conditional use, but not a "use" variance, pursuant to N.J.S.A. 40:55D-70(d), the planning board shall have the power to grant bulk variances pursuant to N.J.S.A. 40:55D-70(c) to the same extent and subject to the same restrictions as the Board of Adjustment. N.J.S.A. 40:55D-60. N.J.S.A. 40:55D-66.6 specifically states that, "[c]hildcare centers...shall be a permitted use in all nonresidential districts of a municipality." There is no dispute that the B-B Zone does not permit any residential uses and is considered a nonresidential

district. The proposed use is not only a permitted use under the MLUL, but also an inherently beneficial use. N.J.S.A. 40:55D-4.

Although the standard of review of the Board's decision is well settled, the decision of the Board must be supported by the record and must not be arbitrary, capricious or unreasonable. Comm. for a Rickel Alternative v. City of Linden, 111 N.J. 192, 201 (1988). In all variance cases, the applicant bears the burden of proving both the positive and negative criteria. See Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 30 (2013). An applicant has the responsibility to present the Board with evidence necessary to allow the Board to decide according to its statutory mandate, the applicant's right to the relief sought. If the applicant fails to do so, the board has no alternative but to deny the application. Toll Bros., Inc., 194 N.J. at 255. The burden of proof is on the applicant both to establish that positive criteria are present and that no negative consequence to the community or the zone plan will occur if the variance is granted. New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. of Adjustment, 305 N.J. Super. 151 (App. Div. 1997). A c(2) variance stands if, after adequate proofs are presented, the board, without arbitrariness, concludes that the harms, if any, are substantially outweighed by the benefits. Kaufmann v. Planning Board for Warren., 110 N.J. 551, 565 (1988).

On appeal or challenge, the Appellant/Plaintiff bears the “heavy burden” of overcoming this presumption of validity and demonstrating the unreasonableness of the board’s actions. Vineland Const. Co., Inc. v. Twp. of Pennsauken, 395 N.J. Super. 230, 256 (App. Div. 2007); Toll Bros., Inc., 194 N.J. at 256.

Appellant’s arguments that the Board acted inappropriately in granting the Preliminary Site Plan approval can be distilled into two major arguments: 1) The Board’s decision and Trial Court’s affirmation are legally deficient due to a misinterpretation of their legal duties; and 2) The Board’s decision and Trial Court’s affirmation were legally deficient due to a lack of evidence for the variances and waivers that were granted.

I. **The Board’s Approval Properly Interpreted their Legal Authority to Grant the Requested Variances**

Appellant continues to argue that the Board failed to appropriately apply the Watchung Ordinances for site plan approval and misinterpreted Dunkin Donuts to approve this Application. Dunkin’ Donuts of New Jersey, Inc. v. N. Brunswick Twp. Plan. Bd., 193 N.J. Super. 513 (App. Div. 1984). However, when reviewing a Board’s interpretation of its ordinances, there is generally a deferential standard given to a Board’s interpretation. Kramer, *supra*. “Ordinances should be liberally construed in favor of the municipality.” Tr. Co.

of New Jersey v. Plan. Bd. of the Borough of Freehold, 244 N.J. Super. 553, 568 (App. Div. 1990). “[A court] may give substantial deference to a municipal agency's interpretation of its ordinances where that decision is informed by knowledge of local circumstances and is combined with enforcement responsibility.” Wyzykowski, 254 N.J. Super. 28, 38 (App. Div. 1992). “As our courts have long recognized, ‘public [land use] bodies, because of their peculiar knowledge of local conditions, must be allowed wide latitude in their delegated discretion.’” Jock v. Zoning Bd. of Adjustment of Twp. of Wall, 184 N.J. 562, 597 (2005). In, Fallone Props. L.L.C., the court underscored the importance of according deference to a local board because of the local body’s familiarity with the circumstances and conditions in their community. 369 N.J. Super. at 561-62.

In reversing the trial court, the Appellate Division noted:

Indeed, local officials are thoroughly familiar with their communities’ characteristics and interests and are best suited to make judgments concerning local zoning regulations ... By the same token, although we construe the governing ordinance de novo, we recognize the board’s knowledge of local circumstances and accord deference to its interpretation. Id.

When discussing the way Appellant views the requirements of the Watchung Ordinances, Judge Ballard stated: “Plaintiff’s hyper-technical approach again leads to a construction of the ordinance that is absurd and unreasonable. Trust Company of New Jersey v. Planning Board of Freehold,

supra. at 568.” Pa42. Under Appellant’s reading of the Ordinance, every element must be accounted for in an application, even when there is no change or impact on that element. Additionally, Appellant argues that the Appellee failed to provide a Stormwater Management Plan in their Application. This is demonstrably false as the Stormwater Report provided by Jarmel Kizel Architects and Engineers includes both an evaluation of the current site conditions and what the proposed construction would change along with an evaluation of those effects. Pa0166-215. The Court is required to give the board deference in its interpretation of any ordinance requirements. Kane Props., LLC, 214 N.J. at 229 (2013). The Board’s requirements for completeness were met as evidenced by the scheduling of the matter for a hearing and the completeness letter that was sent prior to its scheduling. These two requirements in conjunction demonstrate that when reviewing the ordinance and its requirements for completeness, all critical items were submitted by the Appellee in its original application.

Appellant also argues that the Board should have denied the Application due to its delegation of determining Flood Hazard Areas. No one can dispute that the NJ DEP is the appropriate agency to determine such matters related to this Site. The record shows that each and every fact relied upon by the Appellant was refuted by the testimony of the Appellee’s witnesses and the guidance given

by the Board's Professionals. Yet, Appellant argues that this Court should overturn the Board's determination because, despite the fact it did not have the expertise to do so, the Board itself should have made the threshold determination of the applicability of Watchung's Flood Damage Prevention Ordinance. This is totally inconsistent with the conclusions that the Board reached based upon all the testimony and the recommendations of its Professionals.

Appellant argues that the Board misinterpreted the Dunkin Donuts case and failed to consider the impact the Application would have on local traffic. However, under Dunkin Donuts, off-site conditions are not an appropriate reason to deny an application. Dunkin' Donuts of New Jersey, Inc. v. North Brunswick Planning Bd., 193 N.J. Super. 513 (App. Div. 1984). These off-site conditions include but are not limited to the off-site traffic conditions, flooding and the surrounding land uses. Id. Under N.J.S.A. 40:55D-2, the Court held, the authority to prohibit or limit uses generating traffic into already congested streets or streets with a high rate of accidents is an exercise of the zoning power vested in the municipal governing body. Id. The Board properly considered the arguments of Appellant and subsequently granted the Preliminary Site Plan approval. The current off-site traffic conditions, flooding conditions and the fact that a quarry is across the street are all conditions that exist and will continue to exist despite the addition of the proposed childcare facility. "Site plan approval

for permitted uses cannot be denied by the planning board because of off-site traffic congestion.” Tennis Club Assocs. v. Plan. Bd. of Twp. of Teaneck, 262 N.J. Super. 422 (App. Div. 1993).

Additionally, Appellant argues that the Board’s resolution shows the Board interpreted Dunkin Donuts to prohibit their analysis of any off-site traffic concerns. This argument is refuted by the repeated discussions surrounding the traffic concerns and the complete language the Appellant quotes.

5. The Board reads the Dunkin Donuts case, 193 N.J. Super 514 (Law Division [sic] 1984) as giving the Board no authority to prohibit or limit usage generating traffic into an already congested street or streets with a high rate of access since the child care center is not only a permitted use under State law and Municipal Ordinance. The Board further concludes that the exercise of the zoning power is invested in the Municipal governing body to determine permitted uses. Pa777. App. Brief at 35.

The remainder of the section that Appellant quotes, makes it clear that the Board was determining solely if the proposed childcare use was a **permitted** use in the zone, not if the Board was required to accept the use for that site.

It is clear based on the resolution and discussion that the Board did not relinquish their duties to other parties when granting approvals to Appellee. Due to the above, Appellant has failed to meet its significant burden of proof and the Board’s action herein is given the presumption of validity and the decision should be upheld.

**II. The Trial Court Correctly Affirmed the Board’s Finding that  
Sufficient Justification Existed to Grant the Variances**

To obtain a variance pursuant to N.J.S.A. 40:55D-70(c)(1), an applicant is required to prove two criteria, “(1) that they will suffer exceptional or undue hardship if the variance is not granted—the so called positive criteria; and (2) that the variance will not result in a substantial detriment to the public good or the zoning plan—the so called negative criteria.” Nash v. Board of Adjustment, 96 N.J. 97 (1984). Stated another way, the “grant of the variance must not substantially impinge upon the public good and the intent and purpose of the zone plan and ordinance.” Id. The core issue presented by an application to the Board under paragraph c(1) is whether there is a showing of peculiar and exceptional practical difficulties to or exceptional and undue hardship upon, the applicant arising out of: (a) the exceptional narrowness, shallowness or shape of a specific piece of property, or (b) by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property. *See* Lang, 160 N.J. 41 (1999). N.J.S.A. 40:55-70(c)(1).

N.J.S.A. 40:55D-70(c)(2), provides an alternative ground for the grant of bulk or dimensional variances. Subsection c(2) provides that a Board may grant

a bulk variance where an application or appeal relating to a specific piece of property advances the purposes of the act by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment. Lang, 160 N.J. at 57-58. The statute contemplates that even absent proof of "hardship" pursuant to subsection c(1), a bulk or dimensional variance that advances the purposes of the MLUL can be granted if the benefits of the deviation outweigh any detriment. *Id.* The grant of approval must benefit the community in that it represents a better zoning alternative for the property. *Id.* As the Court went on to state in Lang,

Whether a dimensional variance is sought under subsection c(1) or c(2), the applicant also must satisfy the familiar negative criteria:  
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.

This flexible test for granting a bulk variance requires an analysis of the benefits and burdens of the applicant's proposal, along with specific consideration of whether the proposal would substantially impair the zone plan or negatively impact the public good. Pullen, 291 N.J. Super. at 313. What must be shown is that the application: "[1] relates to a specific piece of property; [2] that the purposes of the Municipal Land Use Law would be advanced by a

deviation from the zoning ordinance requirement; [3] that the variance can be granted without substantial detriment to the public good; [4] that the benefits of the deviation would substantially outweigh any detriment; [5] that the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance.” Cox, New Jersey Zoning and Land Use Administration (1994), at Sec. 6-3.3.

Furthermore, the Board can make decisions based upon the credibility of the testimony presented to it. Kramer, 45 NJ 268, 288. In Kramer, the court specifically stated that the Board has the choice of accepting or rejecting the testimony of witnesses. Id. The Planning Board is not required to accept the testimony of any expert, simply because they are an expert. Klug v. Bridgewater Tp. Planning Bd., 407 N.J. Super. 1 (App Div 2009). If the testimony and opinions of different experts’ conflict, it is within the Board’s discretion to decide which expert’s testimony it will accept. Hughes, 394 NJ Super 207 (Law. Div. 2006). Although the Board is not bound to accept the testimony of expert witnesses, its determination must nonetheless be made on a rational and reasonable basis. Reich v. Borough of Fort Lee Zoning Bd. of Adjustment, 414 N.J. Super. 483 (App. Div. 2010).

In this case the Board determined that the Zoning Ordinance should be interpreted so that the parking requirements contained within N.J.S.A. 40:55D-

41(b) be applied to this Application because no requirements are listed for child care uses. The MLUL dictates the parking requirements for childcare centers, preempting local ordinance requirements. *See* Acorn Montessori Sch. v. Bethlehem Twp. Plan. Bd., 380 N.J. Super. 216, 235 (Law. Div. 2005). One specific goal of this preemption is to prevent a municipality from using parking or other local ordinance requirements to avoid granting site plan applications for this use. *Id.* N.J.S.A. 40:55D-41(b) applies to “safe and efficient vehicular and pedestrian circulation, parking, loading”. As stated in Prb Enters. v. S. Brunswick Planning Bd., “N.J.S.A. 40:55D-41 contains no ‘provision...that would vest in the planning board the power to deny a site plan because of the intensity of vehicular traffic on adjoining roadways or in other parts of the municipality.’” Prb Enters. v. S. Brunswick Planning Bd., 205 N.J. Super. 225, 230 (App. Div. 1985). *quoting* Lionel’s Appliance Center, Inc. v. Citta, 156 N.J. Super 257 (Law. Div. 1978). The Court went on to find that a Site Plan application cannot be denied solely on the basis that adjacent roadways have a high volume of traffic. *Id.* Further, the Appellate Division extended N.J.S.A. 40:55D-41(b) to apply to vehicular accidents as well. Dunkin Donuts, *supra.* at 515. Likewise, the trial court determined that

[w]hile it is certainly arguable that a high frequency of vehicular accidents on the road adjacent to the proposed daycare facility presents a risk to travelers commuting to the premises, such a risk should not exclude the construction of a daycare facility. A ruling in favor of Appellant on

this issue alone without adequate proofs would deter future applicants from constructing facilities that greatly benefit the public.

In applying N.J.S.A. 40:55D-70(c)(1) to the present Application, the Board, after careful deliberation, determined that the Application required minimal relief from the variances for parking lot setback, lot frontage, and the number of parking spaces required. The Board's conclusion additionally aligns with the standard applied in Salt & Light Co., Inc. v. Willingboro Tp. Zoning Bd. of Adjustment, where the Appellate Division stated that "inherently beneficial uses" presumptively meet the positive criteria for a bulk variance. 423 N.J. Super. 282 (App. Div. 2011). A childcare center constitutes an inherently beneficial use for the public as found by the court below and as stated in N.J.S.A. 40:55D-4. A review of the record indicates that the Board was provided with adequate information in order to make an informed decision. There are sufficient facts in the record that support the Board's acceptance of the plan from a "traffic circulation" standpoint and the Trial Court specifically stated "..., the Court agrees with the position of the Board so that a reasonable interpretation of its Ordinance does not support the Plaintiff's position that additional variance relief was required." Pa006. The Board's decision on the issue, including its approval of the Site Plan, was clearly neither arbitrary, capricious, nor unreasonable.

While Appellant has argued that the Appellee failed to prove that it is entitled to the variance relief granted by the Board, the uncontroverted fact

remains that there is sufficient proof in the record for the Board to grant all the “C” bulk Variances based on both the c1 and c2 criteria. As stated earlier, the core issue presented by an application to a Board under c(1) is whether there is a showing of peculiar and exceptional practical difficulties to or exceptional and undue hardship upon, the applicant arising out of: (a) the exceptional narrowness, shallowness or shape of a specific piece of property, (b) by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property. N.J.S.A. 40:55-70(c)(1). Considering the acknowledged and proven environmental constraints on the Property, the unique characteristics of the property and other factors enumerated in the record, there can be no question that the Appellee met its burden of proof by showing that it satisfied the positive criteria. Secondly, the planning testimony unequivocally shows that these three minor variances will not result in a substantial detriment to the public good or the zoning plan.

It is even more evident that the Appellee met its burden to prove it was entitled to the relief sought under N.J.S.A. 40:55D-70(c)2. Despite the assertions of Appellant, the testimony and evidence shows overwhelmingly that the relief sought relates to a specific piece of property; the purposes of the Municipal Land Use Law would be advanced by a deviation from the zoning

ordinance requirement; that the variance can be granted without substantial detriment to the public good; that the benefits of the deviation substantially outweigh any detriment; and the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance.

Most importantly, Appellant's argument blatantly refuses to recognize that there is ample support in the record for the factual findings and conclusions reached by the Watchung Planning Board. Neither party disputes that there are environmental constraints on the Site, however, the Site Plan presented minimized the impact on the environmentally sensitive portions of the property while knowing that the plans submitted to the Watchung Planning Board might be affected by the review of State Agencies necessary for operation. As demonstrated by the preliminary approval, Appellee is willing to make modifications to the submitted Site Plan as required by these agencies or the Borough of Watchung.

Appellant argues that the expert testimony it presented was improperly considered by the Board. However, as found by the trial court, Appellant presented experts but after considerable deliberation, the Board did not find this expert testimony outweighed the testimony presented by the Appellee. The record shows that Appellant's experts were not consistent throughout their testimony and failed to make credible evidence. *See* 4T, 61- 88; 5T 27 – 34; and

6T, 23 – 52. Appellant’s traffic expert, Mr. Simoff, was not credible and made multiple unsupported statements about case law and the studies presented to the board. First, he made an assertion that the traffic impacts could be considered because a few variances were being sought in connection with the Application. 6T, 54-106. He also misconstrued information by citing two accidents in the area, which occurred at the intersection of Bonnie Burn Road and New Providence Road, as opposed to the Union Avenue, New Providence intersection closer to the proposed facility. He also failed to provide credible evidence or testimony that insufficient parking was being provided at the site. *See* 6T, 54 – 106; and 9T, 70 – 93.

As stated above, the Board has the ability to make decisions based upon the credibility of the testimony presented to it. Kramer, at 288 *supra*. As reflected in the Statement of Facts above, the Watchung Planning Board conducted ten (10) public hearings on the Application. The Board was provided with numerous reports and evidence supplied by the Applicant, the Objector, and its own professional experts. The Board heard the testimony of these experts during the course of these hearings and had more than an ample opportunity to evaluate the testimony and the opinions of the expert witnesses. As the record shows, while there were differences of opinion expressed between the witnesses

presented by both parties, the Board had the right to and determined which opinions to rely upon in reaching its decision as it was in its sole purview to do.

**CONCLUSION**

For the reasons set forth above, we respectfully request that the trial court's decision and Boards' preliminary approval be affirmed.

Respectfully Submitted,

/s/ Trevor J. Endler

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WELDON MATERIALS, INC., a  
corporation of the State of New Jersey

Plaintiff-Appellant,

v.

PLANNING BOARD OF THE  
BOROUGH OF WATCHUNG, 100  
UNION AVENUE HOLDINGS, LLC,  
and THE LEARNING EXPERIENCE  
HOLDING CORP.

Defendants-Respondents.

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-001651-24

ON APPEAL FROM:  
Law Division, Somerset County  
Docket No. SOM-L-1419-21

SAT BELOW:  
HON. ROBERT A. BALLARD, JR., J.S.C.

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**BRIEF OF DEFENDANT/RESPONDENT  
PLANNING BOARD OF THE BOROUGH  
OF WATCHUNG**

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Submitted to Clerk of the Appellate Division On: August 7, 2025

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## PRELIMINARY STATEMENT

Respondent, Planning Board of the Borough of Watchung ("Planning Board," "Board" or "Respondent"), submits this brief in opposition to the appeal filed by Appellant, Weldon Materials, Inc. ("Weldon" or "Appellant"), which seeks to invalidate the trial court's Order dismissing Weldon's Complaint in Lieu of Prerogative Writs.

The Board, with authority under N.J.S.A. 40:55D-23, et seq., is tasked with reviewing and approving land development applications, site plans, and redevelopment plans, along with enforcing zoning regulations. Defendant/Respondent, 100 Union Avenue Holdings, LLC ("100 Union" or "Applicant") applied to the Planning Board for preliminary site plan, variance and design exception/waiver approval to construct and operate a childcare center on vacant property owned by 100 Union in a non-residential zone. The Planning Board granted the variances following twelve days of public hearings.

The proposed childcare center is a permitted use and 100 Union sought variances for lot frontage along New Providence Road and the parking setback requirements on Union Avenue, as well as design exceptions for lighting and other requirements, pursuant to N.J.S.A. 40:55D-70(c) and N.J.S.A. 40:55D-51(b).

At the Board's July 20, 2021 hearing, they voted to approve the application for a preliminary site plan, including variances and design exceptions. The Board adopted a Resolution on September 21, 2021, memorializing the Board's decision, which set forth the recitation of the hearings and additional factual findings and conclusions of law which are fully supported by the record.

The Board found the testimony and reports of its Engineer and Planner more persuasive than the reports and testimony of Weldon's Engineer. Pa000759. The Planning Board also found (1) a variance was required for lot frontage, parking lot set-back and number of parking spaces and (2) design exceptions were required for landscaping islands, lighting intensity and ground water recharging and filtration.

Weldon filed its Complaint on November 1, 2021, seeking a decision that the granting of the preliminary site plan approval, variances, and waivers was arbitrary, capricious and unreasonable, and that the approval should be reversed. More specifically, Weldon argued that the Planning Board did not consider that the property was located in a critical environmental area, the site plan approval was not justified, and that the granting of any of the requested variances was unfounded. On December 24, 2024, an Order of Dismissal and written opinion was issued by the Honorable Robert A. Ballard, Jr., J.S.C.,

finding that the Board's decision was not arbitrary, capricious or unreasonable, that the daycare facility was an inherently beneficial use, and that the Board properly deliberated regarding the variances and dismissing the Complaint. Pa000006. Judge Ballard issued a lengthy opinion laying out the full history of the application and the subsequent hearings before upholding the decision of the Board. The decision correctly laid out the legal justification for upholding the Board's decision stating first that their decision is presumptively valid unless shown to be arbitrary, capricious, or unreasonable. The Judge also stated that allowing the deferral of stormwater questions to NJDEP was well within the Board's discretion, acting properly and consistent with prior case law. The Court addressed Weldon's arguments surrounding any potential concerns about traffic or parking and stated that "a ruling in favor of Plaintiff on this issue alone without adequate proofs would deter future applicants from constructing facilities that greatly benefit the public." Weldon's assertion that the area's high traffic character should singularly cause a denial of this application was incorrect and should hold no persuasive value.

Weldon did fail to meet its burden. In filing its appeal, Weldon continues to bring forth arguments that were properly rejected by the trial court, persisting in its failure to show the Board's decision was arbitrary, capricious or unreasonable.

## **PROCEDURAL HISTORY**

Respondent, the Planning Board of the Borough of Watchung, adopts and incorporates, as though set forth at length herein, the Joint Procedural History recounted in the brief submitted to the Court on behalf of Co-Respondent 100 Union Avenue Holdings, LLC.

## **STATEMENT OF FACTS**

Respondent, the Planning Board of the Borough of Watchung, adopts and incorporates, as though set forth at length herein, the Counter-Statement of Facts recounted in the brief submitted to the Court on behalf of Co-Respondent 100 Union Avenue Holdings, LLC.

## **LEGAL ARGUMENT**

### **POINT I**

#### **THE TRIAL COURT PROPERLY EXERCISED DEFERENCE AND RESTRAINT IN ITS REVIEW OF THE PLANNING BOARD'S ACTIONS.**

In reviewing any decision of a municipal land use board, the trial court must practice deference. Pullen v. South Plainfield Planning Bd., 291 N.J. Super. 303, 312 (Law Div. 1995), aff'd 291 N.J. Super. 1, 6 (App. Div. 1996); New Brunswick Cellular Tel. Co., v. Old Bridge Planning Bd., 270 N.J. Super. 122, 134 (Law Div. 1993). The court's review should begin with the recognition that the board's decision is presumptively valid, and is reversible

only if arbitrary, capricious and unreasonable. Kramer v. Bd. Of Adjust., Sea Girt, 45 N.J. 268, 296 (1965); Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment, 172 N.J. 75, 81 (2002). The party challenging the municipal board's determination has the burden of proving the land use decision is arbitrary, capricious and unreasonable. See Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Twp. of Franklin, 233 N.J. 546, 558 (2018).

Underlying the presumption is a recognition that such boards possess special knowledge of local conditions and must be accorded wide latitude in the exercise of their discretion. Ward v. Scott, 16 N.J. 16, 23 (1954); See also Jock v. Zoning Bd. of Adjust., 184 N.J. Super. 562, 597 (2005). A reviewing court may not substitute its judgment "for the proper exercise of the Board's discretion," CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd./Bd. of Adjustment, 414 N.J. Super. 563, 578 (App. Div. 2010).

If the findings of fact made by the board are supported by the record and its legal conclusions are valid, then the reviewing court must affirm the approval even if the court itself might have ruled differently, Kramer, supra, 45 N.J. at 296; New Brunswick Cellular, supra, 270 N.J. Super. at 134, or questioned the wisdom of the Board's actions, Shakoor Supermarkets v. Old Bridge Tp. Planning Bd., 420 N.J. Super. 193 (App. Div. 2011), cert. den., 208 N.J. 598 (2011). "The record below is controlling and the municipal agency's

decision should be sustained if supported by substantial credible evidence in the record." Centex Homes v. Township Committee of Mansfield, 372 N.J. Super. 186, 196 (Law Div. 2004); see also Citizens Protect The Maurice River & Its Tributaries, Inc. v. City of Millville Planning Bd., 395 N.J. Super. 434, 451 (App. Div. 2007).

In the Court's December 24, 2024 Order of Dismissal, after weighing the standard of review in light of what was presented in the Board's review, the Court found the Board's Resolution to be thorough and complete (cite order). Further, the Court went on to say that during the Board's two-year period of deliberations, in which the Defendant Applicant gave the Board a "detailed overview of the proposed daycare center," complete with expert testimonies containing comprehensive explanations of Defendant's compliance with the township's local ordinances (Id.) The Court concluded that,

As such, the Board utilizing its discretion, made a sound decision to grant the Resolution in accordance with Defendant's proofs. The Board did not abuse its discretion, and this Court is persuaded that ample evidence exists within the records to support this finding. Therefore the Board's decision was not arbitrary, capricious, or unreasonable, and the Board's Resolution is entitled to a presumption of validity.

Moreover, on appeal, the appellate court is bound by exactly the same standards utilized by the trial court when conducting a review of the actions of the municipal board. CBS Outdoor v. Lebanon Plan. Bd., 414 N.J. Super 563,

567 (App. Div. 2010); N.Y. SMSA, L.P. v. Bd. of Adjustment of Twp. of Weehawken, 370 N.J. Super. 319, 331 (App.Div.2004).

Therefore, the decision of the Planning Board is, by law, entitled to a presumption of validity and the Respondent and the trial court properly concluded that the Appellant failed to overcome that presumption in this case.

## POINT II

### **THE TRIAL COURT CORRECTLY DECIDED THAT THE BOARD'S LEGAL DETERMINATIONS WERE ENTITLED TO A PRESUMPTION OF VALIDITY**

The Appellant continues to assert that the Planning Board failed to demonstrate that the site plan complied with Chapter 22 (Flood Damage Protection) and Chapter 28-401A (Land Development Floodplain Development Restrictions) of the Borough's Land Development Ordinance ("LDO").

Appellant also argues that the Planning Board improperly waived adherence to the LDO and relinquished authority to the NJDEP. Weldon's interpretation of the Planning Board's action is not only erroneous, but further, the Board's Resolution requires not only NJDEP's determination that the site plan complies with its regulations, but that the Township Engineer must be satisfied that the Applicant has complied with Chapter 22 as per Condition 31.

Pa000759.

The record reflects that the Applicant provided expert testimony contradicting Weldon's position, providing justification for the Board's decision. The Applicant's expert asserted that adherence to NJDEP regulations was warranted in this case, as the state's standards delineating flood hazard zones were far more restrictive than the Borough ordinance. See N.J.S.A. 58:16A-50 et seq.

Gerard Gesario, P.E., the Applicant's civil engineer, offered testimony on December 17, 2019, acknowledging that the site is encumbered by environmental constraints (wetlands, flood hazard area, etc.), but that, based on his preliminary discussions with NJDEP, the site plan approval necessarily would be subject to obtaining the appropriate permits from NJDEP, utilizing strict NJDEP standards for more restrictive than those required by the Borough under Chapters 22 and 28:

“So the Chapter 22 cites that the flood hazard area is the 100-year flood elevation from the FEMA map. In this particular case, this is lower than the DEP criteria for the design flood elevation. So, in my opinion, because the DEP is more restrictive and creates a greater area of flood hazard, by meeting the DEP requirements, we effectively would meet the requirements of the borough's Chapter 22 ordinance.

So I—you know, I think it's important to say we're not looking for waivers from Chapter XXII. We just believe that by adhering to the DEP ordinance, based on what I just said, we—it's a stricter ordinance and, by doing that, we would comply with Chapter 22.”

1T13-9 to 23.

The witness was extensively questioned on his expert opinion by the Board's engineer and Weldon's attorney, as well as the Board members. It was concluded by both the Board's Planner, Mark Healey, and Engineer, Ricardo Matias, that the expert opinion offered by Mr. Gesario was correct and in line with any concerns that Appellant had brought forth with respect to the Board's adherence to the LDO. 5T107-25 to 108-24.

Based upon the foregoing, it is clear that the Board's reliance on the NJDEP regulations, in addition to deferring to the NJDEP's enforcement of the stricter standards set forth in the regulations, was entirely justified, and based its decision on its evaluation of all reports and witnesses' presentations. The Board's Resolution, dated September 21, 2021, reinforces the position that the Board simply did not abandon its authority to enforce the Borough's LDO, that as per condition 31, "the applicant shall submit satisfactory proof to the Borough Engineer that it has complied with Chapter 22." Pa000759.

In addition to the focus on the flood hazard issue, the Appellant goes on to address the parking and loading space requirement. LDO Section 28-503 addresses off-street parking and loading requirements. Specifically, Subsection D(2) of 28-503 refers to the parking requirements for non-residential uses,

In the case of a use not specifically mentioned in the parking schedule above, the requirements of off-street parking facilities for a use most similar, compatible or consistent with the use that is mentioned, shall

apply. In the event that there is no similar, compatible or consistent use, off-street parking requirements shall be determined by the Board based upon accepted industry standards.

In making their decision, the Board relied on the expert testimony of its planner, Mark Healey, and Applicant's traffic expert, Elizabeth Dolan, to support their conclusion that a variance was necessary for the number of parking spaces. Ms. Dolan's firm has been studying daycares since 2003, and points out that, "in our studies we have found that the -- the magic number is about 30 to 35 spaces for daycare centers with enrollments of about 180 to 190 children. 3T16-18 to 21. Ms. Dolan went on to say that the number of proposed parking spaces (31) is consistent with The Learning Experience's ("TLE") standards for similar childcare facilities 3T17-18. The Board's traffic consultant (Brightview Engineering) concurred that the Applicant provided traffic data with appropriate adjustments and was consistent with ITE standards. As such, in its July 20, 2021 hearing, the Board concluded that a parking variance was required and would be granted.

The Board finds and concludes that a variance for the number of parking spaces is required however based on the evidence presented the Applicant's proposal for 31 parking spaces are sufficiently adequate to satisfy the needs of the project.

Pa000759

As to the loading space, LDO Section 28-503E-1 states that each principal use should, "provide for off-street loading and unloading with

adequate ingress and egress from streets and adequate space for maneuvering...” with a minimum of one loading space for each building. In discussing this part of the LDO, the Board deliberated as to whether or not a variance or an exception would be required, once again relying on expert testimony, as it is in their purview to do so. The Board’s engineer recommended that the Board should find, which it did in its Findings of Fact and Conclusions of Law, No. 16, that

the Applicant, need not comply with the Ordinance requirements regarding providing a specific loading space since the Applicant has provided with loading and unloading with adequate ingress and egress from streets and has adequate space for maneuvering.

Id.

The Board further resolved that Applicant would be subject to the condition (No. 42) that all deliveries are to be made off hours. Id. The Applicant agreed that any loading would not take place during the time that the Childcare center was in operation. 9T19-2 to 25.

Appellant has continued to argue that 100 Union failed to meet its burden of proving that it is entitled to the variance relief that was granted by the Board. To obtain a variance pursuant to N.J.S.A. 40:55D-70(c), an applicant is required to prove certain criteria to the Planning Board: that [the applicant] will suffer exceptional or undue hardship if the variance is not granted (for a N.J.S.A. 40:55D-70(c)(1) variance) or where the purposes of the

Act would be advanced by a deviation from the zoning ordinance requirements (for a N.J.S.A. 40:55D-70(c)(2) variance) -- the so-called “positive criteria;” and/or that the variance will not result in a substantial detriment to the public good or the zoning plan -- the so-called negative criteria required by N.J.S.A. 40:55D-70(c)(2). Kaufman v. Planning Board of Warren, 110 N.J. 551 (1978), Nash v. Board of Adjustment, 96 N.J. 97 (1984). The court in Commons v. Zoning Board of Adjustment, 81 N.J. 597, 604 (1980), stated it this way; "... the grant of the variance must not substantially impinge upon the public good and the intent and purpose of the zone plan and ordinance." Id. The Court has determined that the applicant carries the burden of establishing the negative criteria by a fair preponderance of the evidence. Chirichello v. Monmouth Beach Zoning Bd. of Adjustment, 78 N.J. 544 (1978). See also Ten Sary Dom Partnership v. Mauro, 216 N.J. 16, 30 (2013).

As the Supreme Court stated in Kaufman v. Planning Board of Warren, 110 N.J. 551 (1978):

“By definition, then, no c(2) variance should be granted when merely the purposes of the owner will be advanced. The grant of approval must actually benefit the community in that it represents a better zoning alternative for the property. The focus of a c(2) case, then, will be not on the characteristics of the land that, in light of current zoning requirements, create a "hardship" on the owner warranting a relaxation of standards, but on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community.” 110 N.J. 551, at 563.

In the present matter, the issue presented to the Board by the Applicant

under N.J.S.A. 40:55D-70(c)(1) is whether there is a showing of peculiar and exceptional practical difficulties, or exceptional and undue hardship, which may be sustained by the Applicant arising out of: (a) the exceptional narrowness, shallowness or shape of a specific piece of property, or (b) by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property. See Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 52-23 (1999).

The statute also provides an alternative ground for the grant of bulk or dimensional variances. Subsection (c)(2) states that a variance may be granted by a Planning Board where, in an application or appeal relating to a specific piece of property, the purposes of this act would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment. Lang v. Zoning Bd. of Adjustment, supra. The statute considers that even absent proof of "hardship" pursuant to subsection (c)(1), a bulk or dimensional variance that advances the purposes of the MLUL can be granted if the benefits of the deviation outweigh any detriment. Id. The grant of approval must benefit the community in that it represents a better zoning alternative for the property. Id.

All of the criteria set forth in N.J.S.A. 40:55D-70(c)(1) are easily met

here. The applicant sought Preliminary and Final Site Plan, approval, with related bulk “c” variances to construct a two (2) story Childcare Center on what is currently a vacant, oddly shaped and undeveloped lot. Per N.J.S.A. 40:55D-66.6, the operation of a commercial daycare facilities in a non-residential district, with the specific intent to expand access to childcare centers, is of vital importance,” Id. This particular use has therefore been regarded to be inherently beneficial. Id.

Furthermore, substantial testimony, upon which the Planning Board relied, was provided in support of the bulk (c) variances and design waivers. The Board planner, Mark Healey, confirmed that the proposed use is permitted in the zone, both by statute and ordinance, and that the only relief being sought by the Applicant by way of variances addressed the existing condition of the unusually shaped lot on New Providence Road, and the parking setback. Likewise, the Planning Board’s traffic consultant, Mr. John Jahr, P.P.P., T.S.O.S., and traffic engineer Mr. Joseph A. Fishinger, Jr., P.E., P.T.P., T.S.O.S. confirmed the adequacy of the lot location of the parking spots as well as the site circulation and the safety of ingress and egress to and from the site.

The Planning Board was therefore entirely justified in granting the variances, as well as the design exceptions. The requirements of both N.J.S.A.

40:55D-70(c)(1) and (c)(2) have been met. The variances addressed hardship the Applicant would have otherwise suffered due to (a) the exceptional narrowness, shallowness or shape of a specific piece of property, or (b) by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property (the “c(1) requirement”). Moreover, the intrinsic value to the community of a daycare center, as codified in N.J.S.A. 40:55-66.6 meets the requirements of N.J.S.A. 40:55D-70(c)(2). The Board has properly concluded that the overall benefit of a daycare center to the community outweighed any potential detriment to the Borough’s zoning plan. The Planning Board’s decision was therefore entirely appropriate, as the trial court agreed.

### **POINT III**

#### **THE BOARD JOINS CO-RESPONDENT IN POINTS I AND II OF ITS BRIEF**

The Board joins in and adopts and incorporates the Co-Respondent 100 Union’s Points I and II of its brief submitted to the Court, in their entirety.

**CONCLUSION**

For the above reasons, Respondent respectfully requests that the trial court's Order and the Planning Board's preliminary approval be affirmed.

Respectfully submitted,

*/s/ Francis P. Linnus*

Francis P. Linnus

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WELDON MATERIALS, INC., a  
corporation of the State of New Jersey

Plaintiff-Appellant,

v.

PLANNING BOARD OF THE  
BOROUGH OF WATCHUNG, 100  
UNION AVENUE HOLDINGS, LLC,  
and THE LEARNING EXPERIENCE  
HOLDING CORP.

Defendants-Respondents.

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ON APPEAL FROM:  
THE SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: SOMERSET COUNTY  
DOCKET NO. SOM-L-1419-21

SAT BELOW:  
ROBERT A. BALLARD JR., J.S.C.

APPELLATE DIVISION  
DOCKET NO. A-001651-24

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**REPLY BRIEF OF PLAINTIFF/APPELLANT**

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Submitted to Clerk of the Appellate Division On: September 2, 2025

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**LEGAL ARGUMENT**

**POINT I**

**THE REMAINING RESPONDENTS NOW LACK STANDING  
IN THIS MATTER (Not Raised Below).**

Whether a party has standing to pursue a legal remedy is a question of law. Manalapan Realty, L.P. v. Twp. Comm. of the Twp. of Manalapan, 140 N.J. 366 (1995). Standing refers to a litigant’s ability to maintain an action before the court. In re Adoption of Baby T., 160 N.J. 332 (1999). On August 18, 2025, this Court entered an Order suppressing the brief or other papers filed on behalf of Defendant/Respondent, The Learning Experience Holding, Corp. (“TLE”). TLE’s exclusion from this appeal strips the Applicant and the Board from having standing to oppose this appeal, as neither the Applicant nor the Board may, on their own, pursue TLE’s rights to operate a TLE-branded day care center on the Property. See Spinnaker Condo. Corp. v. Zoning Bd. of the City of Sea Isle City, 357 N.J. Super. 105 (App. Div. 2003), cert. den’d, 176 N.J. 280 (2003). Their filed opposition briefs should be disregarded, with judgment rendered on behalf of Plaintiff/Appellant, Weldon Materials, Inc., a Corporation of the State of New Jersey (“Weldon”).

The Application at issue in this matter was originally submitted by Defendant/Respondent, 100 Union Avenue Holdings, LLC (“Applicant”), the owner of the subject property. Pa106-Pa107. However, the evidence presented

to the Defendant/Respondent, Planning Board of the Borough of Watchung (“Board”) in support of the challenged Application was solely based on the proposed development of a specific TLE branded day care center. Pa764. Further, operation of a day care center requires the specific operator to qualify for and obtain licensing from the State of New Jersey. The relationship between the Applicant and TLE was not publicly defined during the Board hearings, with no contract or written agreement between the Applicant and TLE becoming part of the record below. Nevertheless, the Applicant cannot move forward with its approval without the express involvement of TLE because the day care center must be a TLE-branded facility. In addition, the Applicant has not demonstrated that it has the legal right to operate a TLE-branded day care center independently. The Board obviously lacks interest, and is incapable of developing the approved project itself. Because the approval was unique to TLE, TLE’s disappearance from this litigation is fatal to the standing of the remaining opponents of this appeal.

In Spinnaker, 357 N.J. Super. 105 (App. Div. 2003), cert. den’d, 176 N.J. 280 (2003), the court denied standing to a property owner who sought to appeal the denial of a variance submitted to the board of adjustment by its lessee, Sprint Spectrum L.P., a wireless telecommunications provider. Sprint’s application sought to install an antennae and related equipment on the subject property to

address a coverage gap in its services. After the board denied Sprint's application, Sprint found another location. In finding that the property owner lacked standing to appeal the denial, the court explained that the variance did not "adhere to the land in the traditional zoning sense" because it was unique to the applicant. Id., at 114. Significantly, the property owner was not a licensed telecommunications service provider and was unable to install the proposed facility on its own. Due to the type of application, the board was required to consider factors unique to the applicant, particularly whether the variance was needed to fill a coverage gap. Id., at 111-113. Accordingly, the court found that the property owner lacked standing to pursue the appeal of the board's denial on its own.

Similarly, in Figa v. Raritan Twp. Planning Bd., 2011 N.J. Super. Unpub. LEXIS 1100 (App. Div. 2011), the court reviewed the dismissal of a complaint in lieu of prerogative writs which challenged the planning board's denial of a subdivision application. The plaintiffs had entered into a contract with an adjacent property owner, Hi-Gear, by which Hi-Gear would purchase a portion of plaintiffs' property, and then submit a subdivision application seeking to create three lots on the combined property and to develop twenty-four single family homes. The board denied the subdivision application. The plaintiffs

filed an appeal of the board's decision, but Hi-Gear chose not to join in the appeal.

As part of its analysis of the case presented, the Figa court addressed the legal concept of standing. "Standing refers to a plaintiff's ability to initiate and maintain an action before the court." Id., at 8, citing Stubaus v. Whitman, 339 N.J. Super. 38, 47 (App. Div. 2001), cert den'd, 171 N.J. 442 (2002). A court will not entertain a matter where the plaintiff lacks sufficient standing. Id. In response to the plaintiffs' attempt to distinguish Spinnaker, the Figa court stated: "...the principle enunciated in Spinnaker is that a party who did not control the application lacked standing to challenge its denial when the party who did control did not wish to pursue the matter further." Figa, at 13. The court recognized that the plaintiffs only owned a portion of the property needed for the development and provided no evidence that they could pursue the development without the cooperation and participation of Hi-Gear, and therefore lacked standing. Figa, at 14-15.

Much like the plaintiffs in Spinnaker and Figa, the Applicant lacks the ability to develop a TLE branded day care center without the participation of TLE. While the Applicant submitted the Application to the Board, and is the owner of the subject property, the evidence in the record below conclusively establishes that the proposed day care center would be TLE-branded. As such,

the approval is unique to the anticipated operator of the proposed day care center. Therefore, the property owner does not have standing to pursue this appeal, as TLE, the entity that would operate the approved TLE-branded day care center, is the only party that would have legal standing to oppose this challenge to the Board's approval of the Application.

## POINT II

### **THE BOARD'S APPROVAL IS LIMITED TO DEVELOPMENT OF A LEARNING EXPERIENCE BRANDED CHILD CARE CENTER, SO THAT ANY CHANGE IN THE OPERATOR REQUIRES AMENDED SITE PLAN APPROVAL FROM THE BOARD (Not Raised Below).**

Even if the Court determines that the Applicant continues to have standing in this matter, TLE's failure to participate in this appeal raises genuine questions as to its intent to operate a day care center on the subject property. Neither the Applicant's Brief nor the Board's Brief provides any explanation for TLE's absence from these proceedings, despite Weldon raising the concern in its initial Brief. Pb3<sup>1</sup>, footnote 1. Beginning with statements made by the Applicant's attorney, the record before the Board focused on a TLE-branded day care center. The Board clearly anticipated that the day care center would be a TLE-branded day care center when it approved the Application, so that any change in the

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<sup>1</sup> Pb = Plaintiff's brief; Ab = Applicant's brief; Boardb = Board's brief

operator of the facility must require an amended site plan approval from the Board.

In Park Center at Route 25, Inc. v. Zoning Bd. of Adjustment of Tp. of Woodbridge, 365 N.J. Super. 284 (App. Div. 2004), the plaintiff appealed the zoning board of adjustment's denial of the plaintiff's application for an amended site plan. At the outset, the court affirmed Judge Serpentelli's decision in Fieramosca v. Tp. of Barnegat, 335 N.J. Super. 526 (Law Div. 2002), wherein Judge Serpentelli determined that a land use board may enforce a condition of its land use application approval even if that condition is not specifically contained in its memorializing resolution. In addition, the Park Center court found that the record of the case before it demonstrated the board's intent to impose a condition of approval on the plaintiff's application. 365 N.J. Super. at 287.

The plaintiff, Park Center at Route 35, LLC, had applied to the zoning board of adjustment for a minor subdivision with various other approvals to construct a strip shopping center. The application sought to construct a new shopping center building, along with associated parking for the proposed new building and an existing medical building. The application incorporated an intent to demolish another building, which Park Center represented posed a serious safety hazard, but which also housed a long-standing business in the

community known as the Park Sweet Shop. In recognition of the Park Sweet Shop's business, Park Center proposed a two-phased project, allowing for the demolition of the sweet shop building at undetermined date, at which time Park Center would replace the building with six additional parking spaces. Id. The board approved Park Center's application, without imposing a condition on the timing of Phase II or describing Phase II as a condition of approval. When the sweet shop's lease expired, Park Center leased the building to a pizza restaurant rather than moving forward with Phase II. In response to a violation notice issued by the Township's zoning officer, Park Center applied to the board for an amended minor site plan approval. The board denied the application, finding that construction of Phase II was a condition of approval and that Park Center did not demonstrate a significant change in circumstances to justify relief from the condition.

The court found that the record before the board compelled the conclusion that the approval of the initial application was conditioned upon the construction of Phase II, even though that condition was not specifically stated in the memorializing resolution: "Phase II was a material aspect of the entire application and an integral component of the Board's overall approval of the application." Id., at 290. "Park Center was obligated to either perform Phase II or return to the Board to show there was a sufficient change in circumstances

warranting a departure from the Board's earlier requirement that Phase II be completed." Id., at 291. The court further noted that based on the record developed during Park Center's amended site plan application, Park Center's motivation for requesting relief from the condition was solely based on economics and not a change in the safety concerns existing on the site. The court found the board's insistence on the construction of Phase II was not arbitrary, capricious or unreasonable. Id., at 292.

Similar to the Fieramosca and Park Center decisions, although not specifically stated in the Resolution, the Board intended that TLE operate the day care center as a condition of its approval. Accordingly, any change in the operator of the facility requires an amended site plan approval from the Board.

### POINT III

#### **THE BOARD HAD AN OBLIGATION TO ENFORCE THE BOROUGH'S ORDINANCES OR REQUIRE THE APPLICANT TO JUSTIFY RELIEF FROM THE ORDINANCE PROVISIONS (Raised Below: Pa50-Pa52).**

N.J.S.A. 40:55D-37 authorizes a municipal governing body to adopt an ordinance requiring site plan review by its planning board prior to the issuance of any development permit. N.J.S.A. 40:55D-38 specifies eighteen (18) items which must be included in a municipal site plan ordinance, and includes regulation of land subject to flooding. N.J.S.A. 40:55D-38(6). The enabling statute requires land use boards to incorporate review of potential flooding

issues into their site plan review, and the statute does not exempt property that falls within the jurisdiction of the NJDEP. The parties do not dispute that Chapter 22 contains the Borough's Floodplain Management Regulations, and LDO §28-602 requires that an applicant for land development approval comply with Chapter 22. Contrary to the Applicant's statements, both N.J.S.A. 40:55D-38 and the LDO expect that the Board will review any floodplain or flooding issues associated with a property as part of preliminary site plan review, rather than defer review to the NJDEP. see Ab28-Ab29. If the Board's professionals are not equipped to appropriately educate the Board, then the Board may retain other professionals.

The provisions of the Borough's General Development Standards, located in LDO §28-600, are mandatory requirements. LDO §28-602 provides: "In filing an application for development, the applicant **shall** comply with the following development standards..." (emphasis added). LDO §28-604 states: "In filing an application for a preliminary major subdivision or preliminary major site plan approval, the applicant shall comply with the following stormwater management requirements..." In addition, LDO §28-605, §28-606, §28-607, §28-608 and §28-609 all include the word "shall" in their introductory provision. In Weldon's Exhibit OW-21, Weldon's engineer, Al Lapatka, properly identified omissions from the Application which were required by these

sections of the Borough's ordinance. see Pa725-Pa726. Contrary to the Applicant's statements, the Board's completeness letter and the scheduling of a hearing on the Application did not indicate that the Application was properly deemed complete. (emphasis added) see Ab28. Instead, Weldon submits that deeming the Application complete, without the information itemized on Exhibit OW-21 or, in the alternative, requests for variances or waivers for the missing items, was a significant and arbitrary, capricious and unreasonable error.

#### **POINT IV**

#### **GRANTING THE PARKING VARIANCE WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE AND SHOULD BE INVALIDATED (Raised Below: Pa54) .**

Appropriate parking for this proposed day care, which is intended to provide care for up to 154 children under the age of 7, and requires parents to park and walk their infants, toddlers and young children into and out of the facility, is essential to maintaining safety. 1T78-8 to 11. As part of its approval, the Board chose to grant a variance for the number of on-site parking spaces. Pa780. The Applicant bears the burden of proving both the positive and negative criteria in all variances cases. See Ten Stary Dom Ptp. v. Mauro, 216 N.J. 16, 30 (2013); Nash v. Board of Adjustment of Morris Tp., 96 N.J. 97 (1984); Cohen v. Borough of Rumson, 396 N.J. Super. 608, 615 (App. Div. 2007); Kogene Bldg. v. Dev. v. Edison Tp., 249 N.J. Super. 445, 449 (App. Div. 1991). In its

initial Brief, Weldon maintained that the Applicant did not demonstrate that the parking space variance could “be granted without substantial detriment to the public good and will not impair the intent and the purpose of the zone plan and zoning ordinance”, and that even inherently beneficial uses must satisfy the negative criteria. Pb24-25, quoting N.J.S.A. 40:55D-70(c). Neither of the Defendants’ Briefs cite to any portions of the record below where the Applicant provided proof to carry its burden and refute Weldon’s argument. Accordingly, granting this variance was arbitrary, capricious, and unreasonable, and should be invalidated.

The Borough’s ordinance does not contain a specific on-site parking requirement for day care centers. Applicant’s Brief erroneously claims that the Board applied the parking requirements contained in N.J.S.A. 40:55D-41(b) because the Municipal Land Use Law dictates the parking requirements for childcare centers. Ab33-34. Rather, as stated in Plaintiff’s Brief and the Board’s Brief, the Board applied the provisions of Subsection D(2) of LDO §28-502 this Application. Pb23; Boardb9-10. This subsection of the Borough’s ordinance provides:

In the case of a use not specifically mentioned in the parking schedule above, the requirements of off-street parking facilities for a use most similar, compatible or consistent with the use that is mentioned, shall apply. In the event that there is no similar, compatible or consistent use, off-street parking requirements shall be determined by the Board based upon accepted industry standards.

Determining the appropriate number of parking spaces for this day care center required a multiple pronged analysis. First, the Board needed to determine what the “accepted industry standard” established as the required number of parking spaces. Second, the Board needed to consider the number of parking spaces offered by the Application: 32. Then, if a discrepancy existed (which it did), the Board needed to perform the statutory analysis as to whether this bulk variance could be granted pursuant to N.J.S.A. 40:55D-70(c)(1) or (c)(2), recognizing that a c(1) or c(2) variance required proof of the positive and negative statutory criteria. Regardless of the type of bulk variance, at all times the Applicant bore the burden of proof.

The Board’s site plan subdivision committee expressed concerns regarding the sufficiency of parking. Pa765. Despite the committee’s input, the Board still determined that 32 parking spaces was sufficient. In fact, accepting this number even fails to coincide with the testimony provided by the Applicant’s experts. According to the Resolution, Matthew Jarmel, the Applicant’s Architect, testified that “Based on his experience and TLE’s experience a child care center of this size operates very well with 30 to 35 parking spaces.” Pa766. Similarly, Elizabeth Dolan, the Applicant’s Traffic Consultant, testified that her “firm has been studying daycare sites since 2003 and based on those studies the appropriate number of parking spaces for a

facility of this nature is approximately 30 to 35 spaces.” Pa767. During cross-examination, Ms. Dolan admitted that the ITE suggests 42 parking spaces for 154 students. 3T54-9 to 55-1. The Board therefore not only chose to disregard the ITE standards, but also chose a number which was on the lower end of the ranges which the Applicant’s experts deemed appropriate. Based on Ms. Dolan’s testimony, the Board approved a variance that provides approximately 20% fewer parking spaces than what the ITE requires.

Turning to the proofs presented to justify the parking space variance, the Resolution summarizes the testimony of the Applicant’s planner, Creigh Rahenkamp, which makes clear that he testified with regard to the frontage variance and the parking area setback variance. He did not provide any testimony regarding the parking space variance. Pa768-Pa769. The Resolution recites various testimony to substantiate the positive criteria but not the negative criteria. In its findings and conclusions from the July 20, 2021 Hearing, the Resolution states:

- a. A parking variance is required but should be granted based on the fact that the Applicant has demonstrated that there will be sufficient parking spaces to accommodate the use as well as the Boar accepting the testimony of the Applicant’s Traffic Consultant and the Board’s traffic consultant.

Pa776.

In its section, entitled “Ultimate Findings of Fact and Conclusions of Law,” the Resolution states in Paragraph 4 that, based on the testimony of the Applicant’s Traffic Consultant, the Applicant’s proposed 31 parking spaces “is sufficient for its operational needs” and granted the variance. Pa777. Similarly, in Paragraph 15, the Resolution states that “based on the evidence presented the Applicant’s proposal for 31 parking spaces are sufficiently adequate to satisfy the needs of the project.” Pa778. Then, in Paragraph 19(a), the Resolution states that the parking space variance can be granted “based on the testimony of the Applicant’s Traffic Consultant as well as on reliance upon the testimony and reports issued by the Applicant’s Traffic Consultant and other professionals...” Pa779. None of this testimony is planning testimony designed to reconcile the variance with the zone plan or zoning ordinance, as required by the negative criteria of the statute. Therefore, the Board’s grant of this parking space variance was arbitrary, capricious and unreasonable and should be reversed.

**CONCLUSION**

For the foregoing reasons, Weldon respectfully requests that this Appellate Division reverse the Trial Court's December 24, 2024 Order (as amended February 19, 2025), and invalidate the Board's decision to approve the Application with variances, as memorialized in Resolution No. PB-21-R10.

Respectfully submitted,

/s/ Robert F. Simon  
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Dated: September 2, 2025

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WELDON MATERIALS, INC., a  
corporation of the State of New Jersey

Plaintiff-Appellant,

v.

PLANNING BOARD OF THE  
BOROUGH OF WATCHUNG, 100  
UNION AVENUE HOLDINGS, LLC,  
and THE LEARNING EXPERIENCE  
J.S.C. HOLDING CORP.

Defendants-Respondents.

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-001651-24

ON APPEAL FROM:  
Law Division, Somerset County  
Docket No. SOM-L-1419-21

SAT BELOW:  
HON. ROBERT A. BALLARD, JR.,

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**SURREPLY BRIEF OF DEFENDANT/APPELLEE  
PLANNING BOARD OF THE BOROUGH  
OF WATCHUNG WITH LEAVE FROM THE COURT**

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Submitted to Clerk of the Appellate Division On: November 13, 2025

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## LEGAL ANALYSIS

### **I. THE BOARD’S RESOLUTION APPROVING THE PRELIMINARY SITE PLAN APPLICATION IS CONSISTENT WITH THE RECORD, ARTICULATES THE BOARD’S DECISION IN ACCORDANCE WITH N.J.S.A. 40:55D-10g(2), AND NO AMENDED SITE PLAN APPROVAL IS REQUIRED.**

Appellant Weldon Materials, Inc. (“Appellant”) puts forth the contention that any change in the operator of a facility must require amended site plan approval from the Planning Board. On the contrary, this is not the case. Any potential change with relation to the operator of the licensed daycare center could be minor, unsubstantial, and insignificant, as the *preliminary* site plan approval was granted to Co-Appellee 100 Union Avenue Holdings, LLC, as the applicant.

Appellant relies on the reasoning in Park Center at Route 35, Inc. v. Zoning Bd. of Adjustment of Tp. of Woodbridge, 365 N.J. Super. 284 (App. Div. 2004), to support its claim that even if a condition is not specifically stated in a memorializing resolution, a Board’s intention can somehow be implied as a condition of approval. In that case, at issue was an application by Park Center to construct a new shopping center building, along with parking for the proposed new building and an existing medical building. According to the application, an additional structure (the Park Sweet Shoppe) was to be demolished at some point in the future to allow for additional parking spaces.

Id. at 287. A two phase project was proposed by Park Center to accomplish this. As a result, the Board adopted a resolution granting minor subdivision and site plan approval, along with variances for the project, while neither imposing any requirements as to when Phase II would occur nor describing it as a condition for the granting of the necessary approvals for Phase 1. Id. at 288. Later in 2001, the Sweet Shoppe owner did not renew his lease, and Park Center obtained a new tenant to lease the building for a pizza restaurant. Park Center was subsequently cited by the zoning office for failing to comply with the site plan requirements, and as such, applied for an amended minor site plan approval. The application was denied by the board, as it viewed Phase II as a condition of approval and also that Park Center did not demonstrate a significant change in circumstances that would allow for alleviation from the prior condition. Id.

Even though the Board did not impose any requirement as to when Phase II would occur and did not describe Phase II as a condition for the granting of the approvals necessary for Phase I, the Court made it a point to note that the resolution did observe that, “[t]he retail structure is proposed to be demolished and converted to six (6) parking spaces at a later date.” Id. at 290. Co-Appellee 100 Union is the property owner and set forth its proofs for the application before the Planning Board. TLE did not meaningfully participate in any of the

previous litigation nor the original application, no one from TLE appeared before the Appellee Planning Board, and any approvals that were granted by the Appellee Planning Board specifically attach to the property.

Where proposed changes and/or revisions to a preliminarily approved plan are more than minimal or de minimis but are not substantial or significant, they do not require amended preliminary or a new preliminary approval. Our courts have held that local land use boards have authority to grant final site plan approval to a plan that includes insubstantial or insignificant changes from the preliminarily approved plan. Davis v. Somers Point Planning Board, 327 N.J. Super. 535, 541 (App. Div. 2000); Macedonian Church v. Randolph Planning Board, 269 N.J. Super. 562, 565-567 (App. Div. 1994). As such, plan changes and/or revisions to preliminarily approved plans which do not constitute minimal or de minimis changes but do not constitute substantial and significant changes, do not require amended preliminary approval, nor do they require a new preliminary approval. Schmidhausler v. Lake Como Planning Board, 408 N.J. Super. 1, 10-11 (App. Div. 2009). Where proposed changes and/or revisions to a preliminarily approved plan are substantial or significant, they require amended preliminary or a new preliminary approval. As provided in N.J.S.A. 40:55D-46b and 48b, if a proposed change or revision to the plan represents a “substantial amendment in

the layout of improvements proposed by the developer that have been subject of a hearing, an amended [preliminary approval] application shall be submitted and proceeded upon, as in the case of the original application for development.” As held in Lake Shore Estates v. Denville Tp., 255 N.J. Super. 589, 592 (App. Div. 1991), aff’d o.b. 127 N.J. 394 (1992), where a subsequent application contains substantial changes from a prior application, the subsequent application must be considered to be a new application. In the present matter, no substantial changes currently exist for either a new or amended site plan approval to be required.

In Davis v. Planning Bd. of City of Somers Point, 327 N.J. Super. 535 (App. Div. 2000), beginning in 1990, McDonald's sought to build a fast-food restaurant in Somers Point, facing opposition from plaintiffs. After receiving preliminary site plan approval in 1991, the project was delayed and extended under the Permit Extension Act. In 1997, McDonald's applied for final site plan approval with minor changes, including reducing the building size, seating, parking spaces, and modifying driveway access per DOT requirements. Plaintiffs argued the changes were substantial and required new preliminary approval, but the Planning Board deemed them minor and granted final approval. The court upheld the Board's decision, ruling the changes were not significant and supported by evidence. 327 N.J. Super. at 537.

In 1991, the Somers Point Planning Board granted preliminary site plan approval and several variances, after a public hearing over several sessions, to the McDonald's Corporation to build a fast food-restaurant, at the intersection of New Road (Route 9) and Chapman Boulevard, consisting of an 89-seat restaurant in a 4,200 sq. ft. building with 55 parking spaces and no drive-through window. Nineteen (19) months later, the Permit Extension Act automatically extended the preliminary site plan approval until December 31, 1996, due to a statewide economic emergency. McDonald's later received a one-year extension until December 31, 1997. In August 1997, McDonald's applied for final site plan approval with minor changes, including reducing the building size to 3,200 sq. ft., reducing seating to 84, parking spaces to 37, and modifying driveway access as required by the Department of Transportation (DOT). N.J. Super. at 538.

Plaintiffs argued that the changes were substantial, requiring a new preliminary site plan approval, and claimed improper notice to property owners. The Board rejected these arguments, deeming the changes minor, and granted final site plan approval. Plaintiffs filed a complaint challenging the Board's actions, but the court dismissed it, ruling that the changes were not significant or substantial. The court also found no conditions in the extension resolution that prohibited minor modifications.

The court examined the specific changes made by McDonald's to the original site plan as part of its reasoning. These modifications included reducing the size of the restaurant from 4,200 square feet to 3,200 square feet, decreasing the number of seats from 89 to 84, and adjusting the number of parking spaces from 55 to 37. Additionally, access points were altered to comply with Department of Transportation requirements. The court found that these changes, while they resulted in a smaller project, did not constitute a significant redesign or a new plan but were rather consistent with the overall goals of the original approval, thereby supporting the Board's determination.

The court emphasized the legal standards governing the approval process for site plans, particularly the distinction between preliminary and final approvals. The court referenced past case law indicating that not all modifications require a new preliminary approval, and the determination of whether a change is substantial or significant must occur on a case-by-case basis. *Id.* at 542. In applying these legal principles, the court found that the changes made by McDonald's were more administrative than substantive, addressing practical needs rather than altering the fundamental nature of the project. The reduction in size and adjustments to the access points were seen as necessary adaptations to evolving industry standards and regulatory requirements rather than an attempt to create a new plan. The court

underscored that the intent and overall character of the project remained intact, which supported the Board's conclusion that the changes did not warrant a new preliminary approval. Id.

Ultimately, the court affirmed the Planning Board's decision, concluding that it maintained jurisdiction to approve the final site plan as the changes were not significant or substantial. The court also clarified that the conditions imposed during the extension of preliminary approval did not preclude minor modifications, further legitimizing the Board's actions. The dismissal of the plaintiffs' complaint was upheld, reinforcing the Board's discretion in interpreting the nature of changes to site plans in the context of ongoing development and compliance with regulatory obligations.

N.J.S.A. 40: 55D-6 provides that a preliminary approval means the conferral of certain rights... prior to final approval after specific elements of a development plan have been agreed upon by the planning board and the applicant. “Final approval means the official action of the planning board taken on a preliminarily approved ... site plan, after all conditions, engineering plans and other requirements have been completed or fulfilled and the required improvements have been installed or guarantees properly posted for their completion, or approval conditioned upon the posting of such guarantees.”

N.J.S.A. 40:55D-4.

After hearing extensive testimony and prior to the conclusion of the July 21, 201 hearing, the Planning Board requested a rundown from the Board Attorney of what they would be voting on, prior to the vote.

All right. So, basically, then here is 1 what the board will be considering tonight: You will be considering preliminary site plan approval only. Not final. Assuming preliminary is granted, the applicant has to come back before you for final site plan. You will be considering the following variances: For lot frontage, for parking lot setback and the number of parking spaces. You're going to consider -- I have taken a list of what I think are design standard exceptions, and that would be the landscaping island, the lighting intensity, groundwater recharge and infiltration, and those are the only exceptions that I see, the only design standards that I see. As the board may further recall, you asked me to provide you with a compilation of a list of proposed conditions. I did that and you have them, and basically they include what would be our standard conditions and then tailored towards the testimony, as well as a review of the transcripts. So you're being asked tonight to make a decision on whether, A, you should grant preliminary site plan approval with the variances, with the exceptions, and adding any conditions that you would like to make with respect to any motion for approval. CHAIRPERSON SCHAEFER: Thank you, Frank.

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In the case at bar, the Planning Board took action to approve the application for *Preliminary Site Plan, Variance and Design Exception* approvals, with conditions, in accordance with N.J.S.A. 40:55D-10(g)(2). The Board adopted a Resolution on September 21, 2021, memorializing the Board's decision, which set forth the recitation of the hearings and additional factual findings and conclusions of law which are fully supported by the record. "The board

decision in every case should be set forth in a carefully prepared resolution making appropriate findings of fact and conclusions of law, not only because the board may desire to refer back to the facts in that case, but also, in the event of an appeal, a well drawn resolution is of great aid to the reviewing body, and can also be considered as a ‘first brief’ filed by the board...in any potential lawsuit” Cox and Koenig, New Jersey Zoning and Land Use, Gann Law Books 2025, at 301, See also Pagano v. Zoning Board of Adjustment, 257 N.J. Super. 382 (Law Division 1992).

Reviewing the Resolution and the record upon which it is based confirms that the Planning Board meticulously followed statutory requirements. The fact remains that the application was for the approval of a licensed daycare center, as a *preliminary* site plan approval. In the Board’s Resolution, Condition 4 states,

The development of this property shall be implemented in accordance with the plans submitted and as approved. In the event that the applicant shall make or propose any changes to the project or structures on the property from those shown on the revised and approved plans and exhibits approved for this application, whether such changes are voluntarily undertaken or required by any other regulatory agency, applicant shall resubmit any such changes to this Board for review and determination.

Ma61.

Further, Condition 24 reiterates, “this approval is for preliminary site plan only.” Ma63. Co-Appellate 100 Union has the opportunity to reappear in the case that there are any changes to the approved project. Regardless of whether TLE is the particular licensed daycare center to take occupancy of the site, the Board would not be precluded from having any licensed daycare center operate as approved.

**II. THE BOARD JOINS CO-APPELLEE IN ITS SURREPLY BRIEF  
LEGAL ANALYSIS I**

The Board joins in and adopts and incorporates Co-Appellee 100 Union’s Legal Analysis of its Surreply Brief submitted to the Court, in its entirety.

**CONCLUSION**

For the reasons set forth above and in Co-Appellee’s Surreply, Appellee Planning Board respectfully requests that the trial court’s decision and Board’s preliminary approval be affirmed.

Respectfully submitted,

*/s/ Kristen L. Seibold*

Kristen L. Seibold

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WELDON MATERIALS, INC., a  
corporation of the State of New Jersey

Plaintiff-Appellant,

v.

PLANNING BOARD OF THE  
BOROUGH OF WATCHUNG, 100  
UNION AVENUE HOLDINGS, LLC,  
and THE LEARNING EXPERIENCE  
HOLDING CORP.

Defendants-Respondents.

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ON APPEAL FROM:

THE SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: SOMERSET COUNTY  
DOCKET NO. SOM-L-1419-21

SAT BELOW:  
ROBERT A. BALLARD JR., J.S.C.

APPELLATE DIVISION  
DOCKET NO. A-001651-24

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**SURREPLY BRIEF OF DEFENDANT/APPELLEE WITH LEAVE FROM THE  
COURT**

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Submitted to Clerk of the Appellate Division On: November 13, 2025

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## LEGAL ANALYSIS

### I. APPELLEE RETAINS STANDING IN THE SUBJECT ACTION WITHOUT THE NEED FOR TLE'S INVOLVEMENT IN THE PRESENT APPEAL

Appellant argues that due to The Learning Experience's ("TLE") failure to participate in the present appeal, neither remaining appellee, 100 Union Avenue Holdings, LLC ("100 Union") nor the Planning Board of the Borough of Watchung ("Planning Board"), has standing to continue with the matter. However, this argument does not align with the case law as found by this Court in previous cases with similar fact patterns.

The MLUL explains standing as follows: "[a]ny interested party may appeal to the governing body any final decision of a board of adjustment approving an application for development." N.J.S.A. 40:55D-17(a). Under N.J.S.A. 40:55D-4, an "[i]nterested party" includes anyone with a "right to use, acquire, or enjoy property" "affected" by a land use application. Cherokee LCP Land, LLC v. City of Linden Planning Bd., 234 N.J. 403, 417 (2018).

"New Jersey's courts have long taken a liberal approach to standing in zoning cases and . . . [thus] have broadly construed the MLUL's definition of 'interested party.'" DePetro v. Twp. of Wayne Planning Bd., 367 N.J. Super. 161, 172 (App. Div. 2004). Nevertheless, standing requires that, in addition to establishing its "right

to use, acquire, or enjoy property," a party must establish that their right "is or may be affected." N.J.S.A. 40:55D-4.

“The fact that plaintiff was not the applicant does not necessarily deprive it of standing.” Campus Associates L.L.C. v. Zoning Bd. of Adjustment of Tp. of Hillsborough, 413 N.J. Super. 527, 534-535 (App. Div. 2010). Standing has been found for parties ranging from objectors to landowners in adjacent communities. William M. Cox, New Jersey Zoning and Land Use Administration, § 33-1.1 at 716 (2010).

A variance is both a quasi-legislative and quasi-Judicial determination that the use or structure proposed, and subsequently granted, is not offensive to the zoning master plan or municipal ordinance under the statutory criteria specified by *N.J.S.A.* 40:55-39. In short, the use or structure granted becomes a conforming use. 2 Rathkopf, The Law of Planning and Zoning (3d ed. 1972), 46-1. While a variance can be lost due to abandonment, *see* North Plainfield v. Perone, 54 N.J. Super. 1, 12-13 (App. Div. 1959) *certif. den.* 29 N.J. 507 (1959), it is typically a vested right that runs with the characteristics of the property. Indus. Lessors v. Garfield, 119 N.J. Super. 181, 183 (App. Div. 1972). The reasoning for this "widely-accepted principle" of zoning law is "the property-specific focus of the proofs that ordinarily must be elicited to support commercial use variances...." Stop & Shop Supermarket Co. v. Bd. of Adjustment of Springfield, 162 N.J. 418, 431-32 (2000).

However, a landowner has no standing to appeal the denial of a variance where the variance requested is unique to the applicant and "would not adhere to the land in the traditional zoning sense." Spinnaker Condominium Corp. v. Zoning Bd. of City of Sea Isle City, 357 N.J. Super. 105, 114 (App. Div. 2003). Here the owner/Appellee 100 Union, seeks to uphold the grant of bulk variances for the property to be used as a child-care center.

“As the owner of the land, [Appellee] is directly affected by the variance application because '[v]ariations run with the land.’” Spinnaker, 357 N.J. Super. 105, 109 (App. Div. 2003). *See also Cox, supra*, § 13-2.1 at 350 (stating that "[a] variance once granted runs with the land").

“The question is not whether the successor use is ‘essentially duplicative’ of the use for which the variance was granted, ... but rather whether, considering all relevant factors, the successor use is sufficiently similar to the variant use to afford it the benefit of the variance.” Stop & Shop, 162 N.J. 418, 438 (2000). The two leading cases for this proposition are Spinnaker and Campus Assocs. L.L.C. v. Zoning Board of Adjustment of Hillsborough, 413 N.J. Super. 527 (App. Div. 2010).

In Spinnaker, Sprint Spectrum L.P. (“Sprint”) leased space on the roof of the building owned by plaintiff Spinnaker Condominium Corporation (“Spinnaker”). Spinnaker, 357 N.J. Super. 105, 109 (App. Div. 2003). Sprint was looking to install antennae on Spinnaker’s roof to address a coverage gap in its wireless

telecommunications services. *Ibid.* Sprint's application for a conditional use variance to install the antennae was denied by the Zoning Board of Adjustment of Sea Isle City. *Id.* at 108. Sprint did not appeal the denial but Spinnaker, as landowner, brought an appeal. *Ibid.* The Appellate Court concluded that Spinnaker had no standing to appeal because the variance sought was unique to the applicant and "would not adhere to the land in the traditional zoning sense." *Id.* at 114. The Court further stated that because Spinnaker was not a licensed telecommunications service provider under the Federal Communications Act, 47 U.S.C.A. § 332 it could not install the facility on its own. Spinnaker, 357 N.J. Super. at 111 (App. Div. 2003).

The Court found that this specific type of application requires a board to consider factors unique to the applicant rather than specific to the property. *Id.* at 112-13. As a result, the "conditional-use variance to permit construction of the nine specific antennae proposed by Sprint would not adhere to the land in the traditional zoning sense." *Id.* at 114. For those reasons, the Court held that a variance granted to a telecommunications provider does not run with the land but rather is personal to the applicant. *Ibid.* Due to this finding, Spinnaker had no standing as the landowner to challenge the denial of the use variance. *Ibid.*

By contrast, in Campus Associates, the contract purchaser applied for use and bulk variances to construct affordable housing units. Campus Assocs., 413 N.J. Super. 527 (App. Div. 2010). After the zoning board denied the application, the

contract purchaser decided not to appeal and terminated the contract. Id. at 531. The landowner then filed an appeal of the zoning board's decision which was dismissed by the trial court due to the owner's lack of standing. Id. at 532.

The Appellate Division disagreed with the trial court and held that Campus Associates had standing to appeal the denial of the contract purchaser's application, "provided the application depended on property specific proofs and not factors unique to the applicant." Id. at 530. The court reasoned that this case was factually distinct from the situation in Spinnaker because in that case factors unique to the applicant caused the variance not to run with the land. Id. at 534-38. The application in Campus Associates on the contrary required an ordinary use variance which would run with the land and benefit Campus Associates as the landowners. *Ibid.*

The Defendant Zoning Board argued that because affordable housing required a federal tax credit which Campus Associates did not have, the application required applicant specific proofs. Id. at 538. The Court held that "[w]hether the plaintiff or another developer receive[s] the federal tax credit is not a relevant factor in the Board's land use decision. What is relevant is whether the project, ... , would satisfy the positive criteria as an inherently beneficial use." *Ibid.*

These cases appear to provide contrasting holdings as to a property owner's standing in an appeal of a land use board's determination but in fact state the same principle. The principle enunciated in Spinnaker is that a landowner does not have

standing if the application required specific findings as to the applicant who did not wish to pursue the matter further. Spinnaker, 357 N.J. Super. 105 (App. Div. 2003). That same idea is repeated and enforced in Campus Associates which clearly held that the property owner had standing to challenge the denial although the original applicant did not wish to pursue and appeal. Campus Assocs., 413 N.J. Super. 527 (App. Div. 2010). That principle is fully applicable here.

Appellee 100 Union as the property owner was the sole applicant before the Planning Board. The underlying application was for Preliminary and Final Site Plan approval with bulk “c” variances. The use as a childcare center is a permitted use under Watchung’s ordinance and therefore no use variance was required. As such the specific proofs required were based solely on property specific proofs rather than those related to any potential operator/applicant. The Learning Experience has not meaningfully participated in any of the previous litigation nor the original application.

No representative of TLE appeared during the application and the proofs put on for the application’s approval were specifically linked to the property. All application materials were supplied directly by Appellee 100 Union and their experts without the input of TLE. In addition to their lack of participation in the original application, they were similarly absent from meaningful participation at the trial level. TLE filed an Answer to the Complaint filed by Appellant, but the Answer

contained no material information or responses to the allegations. After filing their Answer, TLE did not participate in the trial court proceedings either in person or via eCourts filings. No representative from TLE appeared at either the Case Management Conference or the oral argument held before the Honorable Judge Kevin Shanahan. As explained in Campus Association the ability of the Appellee to receive accreditation to run a child-care center is not a relevant factor in the Board's land use decision. Id. at 538. Therefore, Appellee clearly still has standing to pursue the site plan and use variance granted by the Zoning Board of Watchung.

Additionally, it should be noted that a finding that Appellee no longer has standing in this case due to TLE's non-participation would implicate the doctrine of *res judicata*. Campus Assocs., 413 N.J. Super. 527, 534-535 (App. Div. 2010). *See Also, Cox*, § 28-3.2 (discussing the application of the doctrine of *res judicata* in land use applications). A new application by Appellee for bulk variances on this property for an identical use but different operator would need to feature a substantial change to not be automatically denied by *res judicata*. For example, a different operator with identical operating hours and age range for children would not be substantially different from the application before this Court. Because the State controls many regulatory elements in the operation of a childcare center, there would be little ability to substantially change the application with a new operator.

Appellant's definition of standing does not follow the case law in this State nor common logic. As such, Appellee respectfully requests that the Court deny Appellant's standing argument and uphold the variance as granted by the Board and the trial court below.

**CONCLUSION**

For the reasons set forth above, we respectfully request that the trial court's decision and Boards' preliminary approval be affirmed.

Respectfully Submitted,

/s/ Trevor J. Endler

Trevor J. Endler