

529 WATERFRONT PROPERTIES, L.P., Plaintiff/Appellant, v. MICHAEL GARGIULO, PATRICIA GARGIULO and the BOARD OF ADJUSTMENT OF THE TOWNSHIP OF HARDING, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-2009-23 On Appeal from: Superior Court Of New Jersey, Law Division, Morris County Docket No. MRS-14-23 Sat Below: Hon. Stuart A. Minkowitz, A.J.S.C.
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**BRIEF ON BEHALF OF PLAINTIFF-APPELLANT,
529 WATERFRONT PROPERTIES, L.P.**

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PRELIMINARY STATEMENT

This brief is submitted on behalf of Plaintiff-Appellant, 529 Waterfront Properties, LP (“Waterfront”), in support of its appeal of a February 9, 2024 decision of the Superior Court, Law Division. (Pa54 to Pa68). That decision affirmed a determination of the Harding Township Board of Adjustment (Pa69; Pa81) which had acquiesced in a decision of the Township’s Tree Conservation Officer, John Linson, to issue a tree removal permit to allow Michael and Patricia Gargiulo (the “Gargiulos) to remove 28 mature native trees on a right-of-way servicing Waterfront’s Properties and to replace them with a solid hedgerow of 350 arborvitaes. (Pa88 to Pa92).

This appeal raises several issues, among them the construction of the Harding Tree Removal Ordinance (Pa82 to Pa86), the scope of review to be employed by a Board of Adjustment in an appeal of a decision of an administrative officer (an issue which was appealed to the Law Division but not addressed in the Trial Court’s opinion), and the propriety of the Board’s decision refusing to entertain land use planning testimony on behalf of Plaintiff-Appellant.

The most fundamental issue, however, arises out of the Trial Court’s conclusion that the decision of the Tree Conservation Officer should be affirmed

because the Tree Conservation “ordinance simply requires that all factors be considered” as opposed to evaluated (emphasis in original). (Pa65 to Pa66). Both the Court and the Board of Adjustment declined to measure the determination of the Tree Conservation Officer against the language used in the Tree Conservation Ordinance. (Pa82 to Pa86). As a result, both decisions employed a less rigorous test than our case law requires and, because of their conclusory nature, are unreviewable. In doing so, the Zoning Board and the Trial Court departed from decades of administrative law precedent that requires that administrative decisions be informed by the language used in statutory delegations.

PROCEDURAL HISTORY

A. The Parties

Plaintiff-Appellant, 529 Waterfront Properties, LP, owns a home on property designated as tax block 5, lot 6.02, with the address of 589 Van Beuren Road, Harding Township. Waterfront also owns adjoining vacant land designated as tax block 5, lot 6.01 in Harding Township, New Jersey (collectively the “Waterfront Properties”). (Pa57 to Pa69; Pa87)¹ The managing partner of Waterfront is Michael Battista. (P69 to Pa70). Defendants-Respondents, Michael Gargiulo and Patricia Gargiulo, are the owners of property known as 595 Van Beuren Road in Harding Township, New Jersey (the “Gargiulo Property”). (Pa69).

B. The Properties

The Gargiulo Property is a flag lot; the staff of the flag begins at Van Beuren Road and is approximately 1250 feet long by 50 wide. (Pa57; Pa70; Pa87). The Waterfront Properties and others owned by Michael Battista adjoin and straddle the staff portion of the Gargiulo Property. (Pa69; Pa87). Until they were removed, the

¹“1T” refers to the transcript of the August 25, 2020 hearing before the Board of Adjustment.
“2T” refers to the transcript of the September 30, 2020 hearing before the Board of Adjustment.
“3T” refers to the transcript of the October 20, 2022 hearing before the Board of Adjustment.
“4T” refers to the transcript of the November 17, 2022 hearing before the Board of Adjustment.
“5T” refers to the transcript of the January 3, 2024 oral argument before the Trial Court.

staff of the flag lot had a number of mature native specimen trees on both sides, among them was a 50 inch diameter 80 foot tall Catalpa tree. (Pa57; 2T44:3 to 5; 1T42:16 to 19).

C. The First Tree Removal Permit

On or about December 9, 2019, the Gargiulos filed an application for a tree removal permit with the Harding Township Tree Conservation Officer (the “Application”). The Application claimed that there was a need to remove 28 trees from the flag staff in order to install underground utilities and to make unspecified driveway improvements. (Pa88 to Pa91).

On December 21, 2019, the Harding Township Tree Conservation Officer, John Linson, conditionally approved the Gargiulos’ Application. (Pa92 to Pa94) Waterfront, on or about June 8, 2020, filed an appeal of the tree removal permit with the Board of Adjustment as permitted by Ordinance § 225-111(c). (Pa98 to Pa101).

D. The First Board of Adjustment Hearing and the Appeal

The matter came on for hearing before the Board of Adjustment on August 25 and September 30, 2020. (1T; 2T). On the latter date, the Board voted, 5 to 1, to affirm the Tree Conservation Officer’s decision to grant the permit and, on October 15, 2020, it adopted a Resolution memorializing that decision. While the

Resolution was lengthy, it was almost entirely a recitation of the history of the application. The substantive findings principally appear in a single paragraph: paragraph 29. (Pa69 to Pa75)

Plaintiff filed a Complaint in Lieu of Prerogative Writs to appeal that determination on October 23, 2020. (Pa3 to Pa14; the “2020 appeal”). The parties fully briefed the issues in that 2020 appeal and the Trial Court, on July 20, 2021, remanded the matter to the Board of Adjustment due to the failure of the Tree Conservation Officer to provide a copy of the tree removal application to the Shade Tree Advisory Committee for its review which was a jurisdictional prerequisite to the issuance of a tree removal permit. (Pa95 to Pa97).

E. The Second Tree Removal Permit

The Board referred the matter back to the Tree Conservation Officer, who then sought input from the Shade Tree Advisory Committee. (Pa102 to Pa103). One member of the Advisory Committee submitted a comment on the application in which he objected to removal of the 200 year old Catalpa tree. (Pa104). On October 28, 2021, the Tree Conservation Officer confirmed his prior decision authorizing removal of the Catalpa tree and “the other 27 trees as well.” (Pa108 to Pa117). Plaintiff, who sought to maintain the rural character of the easement

abutting its properties, then filed a second appeal with the Board of Adjustment. (Pa105 to Pa107).

F. The Second Board of Adjustment Hearing and the Appeal

On the advice of its attorney, the Board determined to bifurcate the proceedings. On the first hearing date, held on October 20, 2022, Waterfront asked the Board to revisit its earlier decision because the Order of remand expressly required a “new hearing,” which Waterfront believed anticipated a plenary review. (3T35:6 to 1T48). With one member dissenting, the Board determined to confine the new hearing to consideration of the decision allowing removal of the Catalpa tree and foreclosed any additional testimony with regard to the removal of the other 27 trees. (3T72:25 to 3T75:2; Pa79 to Pa80).

On November 17, 2020, the Board held a hearing which focused entirely on the decision to remove the Catalpa tree (4T) and, on December 15, 2022, it adopted a Resolution denying Waterfront’s appeal. (Pa76 to Pa81). In that Resolution, the Board acknowledged that the scope of the hearing on the second appeal was confined to review of the actions taken by the Tree Conservation Officer in response to the remand directive. “Accordingly,” the Resolution notes, “the Board did not hear or consider any evidence or testimony as to prior proceedings or other legal issues during the public hearing . . .” (Pa79; ¶ 20; Pa76 to Pa81).

Waterfront, on January 12, 2023, filed its First Amended Complaint in Lieu of Prerogative Writs. (Pa15 to Pa27). The Harding Township Board of Adjustment filed its Answer on April 13, 2023 (Pa28 to Pa35) and the Gargiulos filed their Answer on May 17, 2023. (Pa36 to Pa49).

The matter was argued on January 3, 2024 (5T) and the Trial Court entered Judgment for the Defendants on February 9, 2024. (Pa54 to P68). Waterfront filed its Notice of Appeal on March 3, 2024. (Pa50 to Pa53).

STATEMENT OF FACTS

The resolution of this appeal turns in part on the meaning of two of the factors in the Harding Township Tree Conservation Ordinance upon which the Tree Conservation Officer and the Board of Adjustment relied to approve the tree removal permit. (Pa82 to Pa86). Therefore, this brief first discusses the relevant provisions of the Ordinance and then turns to a discussion of the proceedings before the Board of Adjustment. Evidence relevant to each argument is largely discussed in the separate brief points.

A. The Harding Township Tree Conservation Ordinance

The Harding Township Tree Conservation Ordinance is codified as § 225-111 *et seq*, of the Harding Township’s Municipal Code. That Ordinance consists of five sections: (A) Findings and purposes; (B) Applicability and exemptions; (C) Permit procedures and appeal process; (D) Standards of permit issuance; and (E) Display of permit. (Pa82 to Pa86).

The Ordinance is designed to preserve the rural character of Harding Township and to avoid the destruction of mature, large trees. Thus, the “Findings and purposes” section of the Ordinance, § 225-111(A)(1), describes its purpose as, to “**mitigate** the degradation of Harding Township’s natural resources . . . [and] to **maintain** the Township’s rural landscape . . . **by regulating the removal of**

certain mature trees.” (Pa82). Section A(2) of the Ordinance expresses the intention to protect “**the rural character and natural resources** of the Township consistent with the goals and objectives of the Master Plan.” (Pa82). (Emphasis added). The overall goal of the Ordinance was, without doubt, to maintain existing mature trees.

Section B of the Ordinance, “Applicability and exemptions,” provides for the creation of “tree conservation areas,” which are defined as an area within 50 feet “of any road, whether public or private,” in the Rural Residential zone (where all properties are located). § 225-111(B)(1)(a)(1). No large tree, those measuring 6 inches or greater in diameter at a point that is 4½ feet above the ground, may be removed without “obtaining a permit therefor in accordance with the standards and procedures in this article” of the Ordinance. § 225-111(B)(1)(a). (Pa82 to PA83).

The standards for issuance of a tree removal permit are set forth in § 225-111(D) of the Ordinance. Of particular importance, this section begins with the following statement of policy:

To the greatest extent practicable, **large trees**, tree rows and hedgerows should be **preserved**. In addition, the following factors shall be taken into consideration in determining whether to issue a permit for tree cutting or removal. (Emphasis added).

This section goes on to list 10 factors to be considered as part of a review of an application for a tree removal permit. (Pa85).

As the Trial Court noted (Pa64 to Pa67), the Tree Conservation Officer and the Board relied on 2 of the Ordinance's 10 factors to justify the tree removal permit:

- (5) Whether the cutting or removal would constitute a significant change in the screening between existing or proposed buildings on adjoining lots.
- (10) Any planned tree replacement or other landscape plan for revegetating cleared areas.

B. The Gargiulos' Application for a Tree Removal Permit

On or about December 9, 2019, the Gargiulos filed an application for a tree removal permit with the Tree Conservation Officer as required by § 225-111.

(Pa88 to Pa91) The Application claimed that there was a need to remove some 28 trees from the staff portion of their flag lot, which was a right-of-way which adjoined the Waterfront and Battista Properties, in order to install underground utilities and to make certain driveway improvements. (Pa88). The application proposed replacing the existing trees with two solid hedgerows of arborvitaes lining both sides of the right-of-way. (Pa89 to Pa91).

Pursuant to the Ordinance, a tree removal application "must" be submitted to the Township's Shade Tree Advisory Committee for its "review and advice." The

Tree Conservation Officer did not comply with that requirement and, on December 21, 2019, he endorsed his approval on the application without any explanation for the basis for his decision. (Pa92).

Although required to do so by Harding Township Ordinance § 225-111(E), the Gargiulos did not post a copy of the permit in the area of the trees to be removed. As a result, Waterfront was not aware that a permit application had been filed or granted. Once the removal activities began, Waterfront complained to the Township attorney and filed a letter appeal with the Board of Adjustment. The Board refused to hear the appeal and Waterfront then filed a complaint on an order to show cause seeking a temporary restraining order and a preliminary injunction to enjoin the tree removal work, and to allow Waterfront to proceed on its appeal to the Board of Adjustment. The Chancery Judge entered the temporary restraining order which prohibited the removal of the trees, prohibited the planting of the solid hedgerows of arborvitaes, and prohibited the Gargiulos from exercising rights under the permit. In addition, it ordered the Board of Adjustment to hear Waterfront's appeal.

C. The First Board of Adjustment Hearing

The matter came on for hearing before the Board of Adjustment on August 25, 2020 and September 30, 2020. (1T; 2T).

The trees slated for removal fell into two categories. The first category consisted of two diseased Ash trees and two Walnut trees which, all parties agreed, could be removed. The second category of trees consisted of 24 mature specimen trees including a 200-year-old Catalpa tree, among the three largest in New Jersey. The dispute focused on the second category of 24 trees.

1. The Board of Adjustment's Evidence

The Applicants, the Gargiulos, did not call a single witness. Instead, their case was – oddly – prosecuted by the Board attorney.

At the August 25 hearing, the Board called John Linson, the Tree Conservation Officer, as its only witness. (1T14). Mr. Linson's permitting approach was inconsistent with the Ordinance goals and untethered to the Ordinance language. Trees were, in his view, fungible and "if you're going to remove a tree, you replace a tree." (1T15:13 to 14). While he acknowledged that the overall purpose of the Ordinance was to protect the "rural character of the Township," (1T16:21 to 22), he described the Township's policy as "every man has his castle and we try not to be over-restrictive in the removal and replacement of trees." (1T15-10 to 13).

The Gargiulos' goal, he explained, was to create "a very formal approach to their home." (1T17:18 to 19). Thus, as a consequence of the grant of the permit,

the Township's policy - to maintain the rural character of Harding and to preserve mature trees, as stated in the Ordinance and Master Plan - yielded to the Gargiulos' aesthetic desires.

Mr. Linson essentially found three of the ten Ordinance factors relevant: screening between buildings (Factor 5), the replacement plan (Factor 10) and, with regard to the Catalpa tree, the two Ash trees and two Walnut trees, hardship and danger to the public from a falling tree (Factor 9). In his view, removal of the 24 healthy trees and their replacement with two solid symmetrical hedgerows of arborvitaes satisfied Factor 5 of the Ordinance because the replanting would enhance screening between "properties." (1T16). Because the replacement plan was extensive, he concluded, as well, that it satisfied Factor 10. There was no testimony offered by Mr. Linson, the Applicant, or any other witness about how the vaguely worded Factors 5 (screening between "buildings") and 10 (replacement plan) should be construed given the Township's desire to retain mature trees and to preserve the Township's rural character.

Mr. Linson's testimony with regard to the request to remove the Catalpa tree was a bit more detailed. Although he found it appropriate to remove the Catalpa tree, he acknowledged that for a tree to be hazardous, there must be "a defect and there needs to be a target." (1T19). Should the Catalpa tree fall, he noted, it was

“definitely going the Battistas’ way.” (1T19). The only target was a picnic table which the Battistas had removed, and a fence which Mr. Linson did not think was consequential. (1T24). Thus, while Mr. Linson was of the view that there was a “defect,” there was no “target.”

In the course of his cross-examination, Mr. Linson agreed that the reason given for the tree removal in the Gargiulo’s’ application, “installation of utilities and driveway improvements,” did not warrant the permit. (1T33 to 1T35). He acknowledged that there were no writings “explaining the basis for [his] decision to approve the tree removal permit” (1T34), and that he had not prepared any writing that analyzed the application. (1T34).

2. Waterfront’s Evidence

At the conclusion of Mr. Linson’s testimony, Waterfront proceeded with its case, calling four witnesses, Richard Schommer (a professional engineer), Lauren Battista, William Logan (a tree expert) and Matthew Weibel (an arborist). (Pa 69 to Pa75). However, the Board narrowly limited the testimony of two of the witnesses, Mr. Schommer and Mr. Logan. (Pa72, ¶ 21; Pa73, ¶23).

The Board attorney had, in a pre-hearing memo, advised the Board that its consideration “should be based on review of the papers constituting the record of the permit decision.” (Pa122). Relying on this advice, Waterfront appeared at the

hearing to address the two bases given for the permit request, which implicated engineering, not planning, issues. Waterfront first called Mr. Schommer, anticipating he would testify that the bases stated in the permit request, installation of utilities and driveway improvements, could not support the grant. However, as a result of Mr. Linson's testimony rejecting those bases for the permit, the Board ruled that Mr. Schommer's engineering testimony was not needed. As Board counsel stated: "don't waste our time if it's not relevant." (1T76:14 to 1T77:10).

The newly disclosed bases for the permit (screening and the replacement plan) however, implicated planning issues. Since Mr. Schommer also happened to have a planning license, Waterfront sought to question him on these justifications. The Board limited the questioning of Mr. Schommer because his "planning background did not encompass tree removal issues . . ." (Pa72 to Pa92; ¶ 21).

Having first been informed, at the August hearing, of the true bases (screening and replacement plan) for the grant of the tree removal permit and having been thwarted in its effort to call Mr. Schommer to address these factors, Waterfront decided to bring an experienced land use planner, Creigh Rahenkamp, PP, to testify at the September hearing. Waterfront's intended to ask the planner to address the preamble of the Ordinance, and goals of the Master Plan which are referred to in the Ordinance Findings, in order to provide context for the

construction of the language used in Factors 5 and 10, which was ambiguous.

However, in the afternoon of the hearing day, a scheduling problem arose because Mr. Rahenkamp was diagnosed with an infection and hospitalized.

Originally, Mr Rahenkamp informed Waterfront that he would be able to testify from his hospital bed. (Pa123 to Pa125). However, his condition worsened and, in the late afternoon of the day of the hearing, he informed counsel that he could not testify. (Pa125, ¶ 9). Waterfront asked that the hearing be adjourned or extended so that Mr. Rahenkamp could testify upon his discharge from the hospital, and that request was denied. (Pa73; ¶ 26).

Waterfront had intended to elicit the factual bases for Mr. Rahenkamp's opinion from an arborist, Matthew Weibel. Although it determined to bar Mr. Rahenkamp's testimony as irrelevant, the Board did allow Waterfront to call Mr. Weibel. Mr. Weibel testified that, in considering a tree replacement plan, it was important to avoid monoculture and encourage diversity. (2T30:12 to 2T31:4). A monoculture, he explained, was vulnerable to disease. (2T30:10 to 21; 2T33:4 to 18). In addition, a good replacement plan should serve indigenous wildlife species, which the arborvitaes did not. (2T30:7 to 2T33:18). These objectives and others to which he testified were consistent with the Ordinance's goal to "mitigate the degradation of Harding Township's natural resources." (Pa82; § 225-111(A)(1)).

Mr. Weibel testified as well that the replacement of large indigenous trees that serve the local habitat with two hedgerows of tightly packed shrubs consisting of a uniform non-indigenous species is common in a suburban setting but not in a rural setting and is thus incompatible with the express goals of the Harding Township Master Plan and Ordinance (2T:22:18 to 21): to protect existing trees, to maintain large trees, and to preserve the rural setting. (2T19:20 to 2T22:18; Pa82; § 225-111).

There was no disagreement with the facts in Mr Weibel's testimony, Mr. Linson stated that he agreed with nearly all of them. (2T47:6 to 9). He felt, however, that planting two rows of symmetrical arborvitaes was consistent with a rural landscape.

Mr. Weibel was not permitted to provide other testimony about the goals of arboriculture - to maintain ancient trees. The Board found that testimony and other parts of Mr. Weibel's testimony to be inapplicable to the Ordinance construction. (2T31:5 to 2T33:3). But the Board did require him to respond, over Waterfront's objection, to questions from the Gargiulos' counsel about how long the Gargiulos' landscaper had been in business (2T49:8 to 25) and whether the Gargiulos' landscaper had won any awards. (2T50:1 to 10).

Mr. Rahenkamp, Plaintiff's planner, would have tied Mr. Weibel's factual evidence to the Ordinance language. (Pa126 to Pa130; ¶¶ 11 to 17). However, as noted above, he was unable to testify.

Waterfront argued before the Board of Adjustment and the Trial Court that neither Factor 5 nor 10 (the two factors on which the Tree Conservation Officer relied), properly construed, warranted issuance of the permit. As discussed in more detail below, it was Waterfront's view with regard to Factor 5, that (1) a change in screening weighed against the grant; (2) the 350 arborvitaes did not screen "buildings" as the Ordinance expressly required; and (3) the new screening frustrated the Master Plan goal of maintaining open vistas. With regard to Factor 10, it was Waterfront's view that (1) the removal of native trees and their replacement with a non-native species was contrary to the Ordinance goal of mitigating the degradation of natural resources; (2) the planting of a suburban hedgerow was contrary to the goal of maintaining the rural landscape; and (3) the destruction of 24 of the 28 century old trees ran afoul of the goal of preserving "mature trees," as discussed in the Ordinance and Master Plan.

Although Factors 5 and 10 were vague, the Board found this evidence irrelevant and voted 5 to 1 to deny Waterfront's appeal. (Pa69 to Pa75).

D. The Board of Adjustment's First Resolution

On October 15, 2020, the Board issued its Resolution of “Denial of Appeal of Tree Removal Permit for Gargiulo Property.” (Pa69 to Pa75). While lengthy, the Resolution contained only a few substantive findings: much of the Resolution was devoted to a discussion of the procedural history of the matter and a recapitulation of the parties’ testimony. The Board’s material findings appear in just five paragraphs. Among the pertinent findings were the following (underlined paragraph designations added in this brief):

Finding 13: Township Tree Conservation Officer Linson testified that the basic attitude in Harding Township was to defer to private property rights and try not to be over-restrictive in regulating tree removal, subject to replacement planting of trees.

Finding 14: In this case, the intention of the Gargiulos was to have a nice, well screened driveway on both sides. So the net effect of the removal and replacement of these trees was not to diminish the screening between properties, but to enhance the screening between properties.

Finding 16: Mr. Linson acknowledged controversy concerning the authorized removal of a 60- inch diameter Catalpa tree. He expressed the opinion that this tree was hollow based on testing the tree with a rubber mallet and the observation of raccoon feces at the base of the tree indicating a likely raccoon nest in a cavity in the tree trunk in the tree canopy. Though he didn’t view this as an emergency situation, he opined that the tree was more susceptible than other trees to falling during a significant wind event, and if the tree fell, it would land on the Battista (529 Waterfront Properties, LP) property causing damage for which the Gargiulos presumably would be responsible.

Paragraph 29(d): The argument that the Board of Adjustment should reverse the Tree Conservation Officer's decision to issue the tree removal permit based on the contention that it was contrary to the broad objective of preserving rural character as articulated in the Master Plan and Tree Conservation Ordinance is rejected. The specific listing in Section 225-111(D) of 10 factors required to be considered does not include preservation of rural character, and the Board of Adjustment is not vested with the power or discretion to ignore the express wording of the Ordinance. Moreover, the Board of Adjustment cannot conclude that there is universal consensus as to the subjective concept of "rural character," and the Board is unwilling to issue a binding determination on that subjective basis. The Board of Adjustment possesses no legislative power, and whether the tree conservation regulations should include a more specific requirement implicates public policy considerations that are legislative matters for the governing body.

Paragraph 29(e): The Tree Conservation Officer's determination to issue the permit based on his conclusion that the Gargiulo proposal would result in improved screening and that there would be extensive tree replacement was grounded on specific provisions in the Tree Conservation Ordinance (Code Section 225-111) that cannot be ignored.

(Pa71 to Pa75).

E. The Trial Court's Remand

Waterfront then filed an action in lieu of prerogative writs appealing this determination (Pa3 to Pa27) and Defendants filed answers respectively on April 13 and May 17, 2023. (Pa28 to Pa35; Pa36 to Pa49). At a pretrial conference, the Court noted that Plaintiff had argued, among other things, that the Tree Conservation Officer lacked jurisdiction to grant any permit because he failed to

submit the Gargiulos' application for input from the Shade Tree Advisory Committee as required by § 225-111(C)(3). The Court agreed and remanded the matter for referral to the Shade Tree Advisory Committee. (Pa95 to Pa97).

Following that referral and receipt of an objection to the removal of the Catalpa Tree (Pa109), the Tree Conservation Officer determined to affirm the permit with no further analysis other than with regard to the Catalpa tree. (Pa108 to Pa109).

F. The Second Board of Adjustment Hearing

Because the Board had refused to hear any planning testimony, the second hearing was devoted to a single issue: the propriety of the decision to remove the Catalpa Tree. The Board agreed with Mr. Linson and, in a resolution issued on December 16, 2022, determined by a vote of 4 to 1 to approve removal of that tree and the 27 other trees. (Pa76 to Pa81).

Waterfront then appealed to the Superior Court which affirmed the Board's decision because Mr. Linson had, in its view, "considered" the relevant factors (Pa54 to Pa68), and this appeal followed.

ARGUMENT

POINT I

**THE TRIAL COURT ERRED INsofar AS IT CONCLUDED THAT THE BOARD OF ADJUSTMENT LAWFULLY SUSTAINED THE DECISION OF THE TREE CONSERVATION OFFICER TO GRANT THE TREE REMOVAL PERMIT ON THE BASIS THAT THE TREE CONSERVATION OFFICER “CONSIDERED” THE ORDINANCE FACTORS EVEN THOUGH NEITHER THE COURT NOR THE BOARD OF ADJUSTMENT MADE ANY EFFORT TO “EVALUATE” THE FACTS ELICITED AGAINST THE ORDINANCE LANGUAGE
(Pa64 to Pa66)**

A. The Trial Court Found that the Permit Should Be Affirmed Because the Tree Conservation Officer “Considered” the Ordinance Factors

The Trial Court reasoned, with regard to Factor 5, that the Board properly relied on the Tree Conservation Officer’s testimony and that the “Ordinance simply requires that all factors be considered, which the Officer achieved, rather than a requirement that each factor must be satisfied in its entirety.” (Pa63); Emphasis in original). Waterfront did not argue that each factor had to be satisfied: it argued that each factor had to be evaluated.

With regard to Factor 10, the Court reasoned that

the manner in which the Board complies and considers the Master Plan is through compliance with the Ordinance. The Officer complied with the Ordinance when he **considered** all of the factors prior to issuing the Permit. Even if Factor 10 is ambiguous, the Court must

defer to the Board's finding that the Conditions [of the Permit], which explicitly require the replanting of 370 trees, is "an extensive replacement plan[.]" pursuant to factor 10, and thus, reasonable" (Pa64; Emphasis added in the brief).

These findings raise two issues: whether the mere "consideration" of the factors constitutes an adequate review; and whether the two factors, to the extent that they were considered, were properly construed. (See Point II below).

B. The Trial Court's Decision Employed an Unreviewable Test and is Incompatible with Decades of Administrative Jurisprudence

A mere recitation, either by the Court or an administrative agency, that a factor has been "considered" without more is not legally sufficient. It is incumbent upon the court and the Board of Adjustment to analyze the evidence offered in light of the language of an ordinance and, if ambiguous, the master plan:

The factual findings set forth in a resolution cannot consist of a mere recital of testimony or conclusory statements couched in statutory language. Rather, the resolution must contain sufficient findings, based on the proofs submitted, to satisfy a reviewing court that the board has **analyzed the applicant's variance request in accordance with the statute and in light of the municipality's master plan and zoning ordinances**. Without such findings of fact and conclusions of law, the reviewing court has no way of knowing the basis for the board's decision.

New York SMSA, L.P. v. Bd. of Adjustment of Tp. of Weehawken, 370 N.J. Super. 319, 332-333 (App. Div. 2004) (citations omitted; emphasis added).

A resolution must “explain fully,” the basis of a Board’s decision:

Local boards and their counsel should take pains to memorialize their decisions in resolutions that explain fully the basis on which the Board had acted, with ample reference to the record and the pertinent statutory standards.

House of Fire Christian Church v. Zoning Bd. Of Adjustment Of City Of Clifton, 379 N.J. Super. 526, 539 (App. Div. 2005). Findings must be “sufficiently specific . . . to enable [a] reviewing court to intelligently review an administrative decision and ascertain if the facts upon which the order is based afford a reasonable basis for such order.” *Blackwell v. Department of Correction*, 348 N.J. Super. 117, 122 (App. Div. 2002).

At trial, Waterfront did not, as the Court implies, argue that each factor “must be satisfied” (Pa63); it argued that the factual evidence must be evaluated against the Ordinance language. When an evaluation of factors is required, as is the case here, a decision maker must first determine which factors are relevant, then weigh the relevant factors, and make a “reasoned explanation of the decision.”

Cf. Hillsdale PBA Local 207 v. Borough of Hillsdale, 137 N.J. 71, 81 (1994).

Although administrative agencies are entitled to discretion in making decisions, that discretion is not unbounded and must be exercised in a manner that will facilitate judicial review. Administrative agencies must “articulate the standards and principles that govern their discretionary decisions in as much detail as possible.” When the absence of particular findings hinders or detracts from effective

appellate review, the court may remand the matter to the agency for a clearer statement of findings and later reconsideration.

In re Vey, 124 N.J. 534, 543-544 (1991) (citations omitted).

The Court and the Board failed the most fundamental test of administrative law applicable even when the scope of review is narrow:

The Department of Transportation accepts the applicability of the “arbitrary and capricious” standard. It argues that under this standard, a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute. We do not disagree with this formulation. The scope of review under the “arbitrary and capricious” standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.”

Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983).

By affirming the Board’s decision because the Tree Conservation Officer “considered” in some fashion, the relevant standards, the Court erred. The Tree Conservation Officer, the Board and most importantly, the Court, were all required to compare the evidence against the standards set forth in the Ordinance and all failed to do so.

POINT II

THE TREE CONSERVATION OFFICER AND THE BOARD OF ADJUSTMENT MISCONSTRUED THE HARDING TOWNSHIP ORDINANCE AND SHOULD HAVE CONSIDERED THE ORDINANCE PREAMBLE AND THE MASTER PLAN BECAUSE FACTORS 5 AND 10 OF THE ORDINANCE WERE AMBIGUOUS (Pa63 to Pa66)

The Court's error was exacerbated by the fact that the two relevant factors of the Ordinance were ambiguous. The first step the Board should have taken was to determine the meaning of the Ordinance. It did not, but had it done so, its interpretation would be entitled to no deference:

[A] board's decision regarding a question of law . . . is subject to *de novo* review by the courts, and is entitled to no deference since a zoning board has "no peculiar skill superior to the courts regarding purely legal matters."

Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Tp. of Franklin, 233 N.J. 546, 559 (2018). *See also Grancagnola v. Planning Board*, 221 N.J. Super. 71, 75 (App. Div. 1987) (Skillman, J.A.D.) ("where the issue is thus one of law, the court's duty and authority are not curtailed by the circumstance that the issue happens to reach it via the board of adjustment"); *Cherney v. Planning Board of Adj.*, 221 N.J. Super. 141 (App. Div. 1987) (same).

After having determined the meaning of the relevant Factors 5 and 10, the Board and, on review, the Court should have determined whether the grant of the

permit was warranted. Neither attempted to construe the Ordinance or measure the evidence against tree Ordinance standards.

A. In Three Respects, The Tree Conservation Officer and the Board Misconstrued Factor 5 (Screening) of the Ordinance

Factor 5 of the Ordinance refers to screening between “buildings” and reads as follows:

Whether the cutting or removal would constitute a **significant change** in the screening **between** existing or proposed **buildings on adjoining lots**.

(Pa85; § 225-111(D)(5)). The Board concluded that the removal of the 28 mature native trees and their replacement with a solid row of arborvitaes resulted in “improved screening” and thus, this factor weighed in favor of issuing the permit. (Pa74; ¶ 29(e)).

The Board made three interpretive errors: (1) It read the highlighted language “buildings on adjoining lots” out of the Ordinance; (2) it failed to recognize that the Gargiulo plan, because it was a “significant change” in screening, should have been rejected – not approved; and (3) it failed to consider the Master Plan goal of preserving view vistas.

First, the screening proposed by the Gargiulos only separates a driveway from a vacant lot (lot 6.01) and a driveway from a building (lot 6.02). (Pa69 to Pa70). The removal of the trees could not be a “significant change” between

“buildings on adjoining lots,” because there were no **adjoining** lots with **buildings**: the lots adjoined a roadway easement.

By omitting the language, “buildings on adjoining lots,” when they construed the Ordinance, the Tree Conservation Officer and the Board ran afoul of the Supreme Court’s admonition in *Matter of N.J. Firemen’s Ass’n Obligation to Provide Relief Applications Under Open Pub. Records Act*, 230 N.J. 258, 274 (2017):

Legislative language must not, if reasonably avoidable, be found to be, inoperative, superfluous or meaningless.

See also Foundation for Fair Contracting, Ltd. v. New Jersey State Dept. of Labor, 316 N.J. Super. 437, 444 (App. Div. 1998) (quoting *State v. Reynolds*, 124 N.J. 559, 564 (1991)) (“a construction that will render any part of a statute inoperative, superfluous, or meaningless, is to be avoided”).

Second, the Tree Conservation Officer and the Board misread Factor 5 to endorse any change which “increased” screening. Had that been the goal, the Ordinance would have been differently worded. Rather, Factor 5 seeks to avoid a “significant change” in screening, not to promote increased screening. § 225-111(D)(5).

Third, the permit here authorized the elimination of 28 large mature deciduous trees which had canopies 25 to 30 feet above grade (1T52:25 to 1T53:10) which permitted views of the nearby fields, a goal that is encouraged by the Master Plan. (2T34:11 to 19). In the place of the mature large native trees, the Gargiulos proposed to plant two solid symmetrical walls (1T73:1 to 3) of arborvitaes that obstructed those views and walled in the adjoining properties. (1T24:21 to 25). That change is, by any reading, a “significant change,” that is adverse to adjoining property owner, and inconsistent with the Master Plan goal to preserve open views. The Tree Conservation Officer and the Board chose to disregard the Ordinance language, and to presume that any increase in screening, even if not between buildings, was beneficial.

B. The Tree Conservation Officer and the Board of Adjustment Misconstrued Factor 10 (Replacement Plan) of the Ordinance

The only other factor which the Tree Conservation Officer and the Board found to support the permit to remove the 24 healthy trees was Factor 10, which reads as follows:

Any planned tree replacement or other landscape plan for revegetating cleared areas.

(Pa85).

The Tree Conservation Officer and the Board chose to infer that the only relevant criteria for assessing the “replanting” plan is the number of trees to be replanted. Thus, as the Board stated in its initial 2020 Resolution:

29(e). The Tree Conservation Officer’s determination to issue the permit based on his conclusion that the Gargiulo proposal would result in improved screening and that there would be extensive tree replacement was grounded on specific provisions in the Tree Conservation Ordinance (Code Section 225-111) that cannot be ignored.
* * * Accordingly, issuance of the tree removal permit cannot be classified as being arbitrary and capricious or otherwise improper.

(Pa74; ¶ 29).

Factor 10 of the Ordinance required a more nuanced analysis than the Board employed, insofar as the Board wrongly focused only on the “extensive tree replacement.” The replacement was exactly what the Ordinance and Master Plan discouraged. But, the Board Resolution rejected any consideration of the Ordinance Preamble and Master Plan, in spite of the fact that the latter was referred to in the Ordinance as it’s driving force. In point of fact, the Board’s decision cannot be reconciled with the Ordinance language and the Master Plan.

Thus, the Tree Conservation Ordinance provides that:

It is the intent of this article to protect the rural character and natural resources of the Township, consistent with the goals and objective of the Master Plan.

(Pa82; § 225-111(A)(2)). The Board Resolution inexplicably found the goal of the Ordinance irrelevant:

29(d) The argument that the Board of Adjustment should reverse the Tree Conservation Officer's decision to issue the tree removal permit based on the contention that it was contrary to the broad objective of preserving rural character as articulated in the Master Plan and Tree Conservation Ordinance is rejected. * * *

(Pa74). And the Board, at the 2022 hearings, remained adamant that planning testimony about how to effectuate the Master Plan and Ordinance, in the face of the ambiguous Factor 10 was irrelevant. (Pa79; ¶ 23).

The Board's construction of § 225-111(c)(10), to limit its inquiry to the number of trees, in the absence of language requiring that construction, was wrong because the wording of Factor 10 was not clear and unambiguous. That is, it does not specify what aspects of a "replacement plan" are to be considered and thus the Board and the Court should have consulted interpretative aides; i.e., the Ordinance Preamble and Master Plan.

As the Supreme Court held in *DiProspero v. Penn*, 183 N.J. 477, 492 (2005), "The Legislature's intent is the paramount goal when interpreting a statute" If an ordinance is ambiguous, as is the case here, the Tree Conservation Officer and the Board should have consulted the Ordinance preamble:

A preamble may be resorted to for assistance in arriving at the true intention of the lawmakers where doubt arises as to the construction of the statute.

Grobart v. Grobart, 5 N.J. 161, 166 (1950).

Although it has been generally held that the preamble is ‘no part of the act’ and will not control the enacting part of the statute in cases where the statute is expressed in clear, unambiguous terms, nevertheless **our courts have said on innumerable occasions that the preamble may be considered to assist in determining the intention of the law makers where any doubt arises concerning the construction to be placed upon the enacting part.**

Bass v. Allen Home Improv. Co., 8 N.J. 219, 226-27 (1951) (citation omitted; emphasis added).

The Board should have also considered the Master Plan:

It is commonplace for boards of adjustment and courts to give consideration to reports of planning agencies such as master and regional planners as background material in zoning and planning cases.

Fobe Assocs. v. Bd. of Adjustment, 74 N.J. 519, 542 (1977) over’d on other grnds.;

S. Burlington Cty. NAACP v. Mount Laurel, 92 N.J. 158, 240 n. 15 (1983). *See*

also Pagano v. Zoning Bd. of Adjustment, 257 N.J. Super. 382, 397 (L. Div. 1992):

The parties must be permitted to rely upon whatever probative information exists, whether it be legislative history, . . . or [the] Master Plan . . .

Here, Factor 10 was ambiguous and it was incumbent upon the Board and the Court to consider the explicit language of the Ordinance’s Preamble and the Township’s Master Plan when construing this Factor, but both refused to do so.

In summary, had the Trial Court and the Board of Adjustment undertaken the proper analysis, rooted in the language of Factors 5 and 10 informed by the Ordinance's Preamble and Master Plan, the permit would have been denied.

POINT III

THE BOARD OF ADJUSTMENT EMPLOYED AN ARBITRARY, CAPRICIOUS AND UNREASONABLE STANDARD IN ITS REVIEW OF THE APPEAL OF THE TREE CONSERVATION OFFICER'S DETERMINATION WHEN IT SHOULD HAVE REVIEWED THAT DETERMINATION DE NOVO AND THAT ERROR WAS COMPOUNDED WHEN THE TRIAL COURT DEFERRED TO THE BOARD'S DETERMINATION (Pa66 raised below, but not decided)

The errors discussed in Points I and II were compounded by the Board's failure to employ the proper scope of review when it reviewed the determination of the Tree Conservation Officer to issue the tree removal permit.

In its assessment of Factor 5, the Court found that "the Board's decision to defer to the [Tree Conservation] Officer's expertise when affirming the decision to issue the Permit is reasonable." (Pa66). However, the Board should have undertaken a *de novo* review of the decision of the Tree Conservation Officer.

A. The Board of Adjustment Did Not Undertake a *De Novo* Review

The Board was erroneously advised by their counsel that it should not make an independent decision:

The question isn't whether the Board wants to allow or disallow what somebody wants to do. The question is, and that's cited here is whether there's error in any order, requirement, decision, or refusal by an administrative officer. **The question for the Board, based on what you'll hear tonight, is whether Mr. Linson made a mistake. It's not whether you would do it differently, * * *** You're not making an independent decision; you're reviewing his decision, what he based it on, why he did it, and concluding whether or not that was proper under the ordinance. That's how I read the law. (Emphasis added).

(1T8:12-22). Board counsel later reiterated:

But the question is not whether it's better, it's whether Linson was unreasonable to reach the conclusion he did.

(1T116:5-7).

The Board followed this advice, stating in its Resolution, that it would not decide "whether a different decision would have been better." It concluded that it could not reverse because the issuance of the permit "cannot be classified as being arbitrary and capricious or otherwise improper." (Pa74).

B. The Board of Adjustment Should Have Reviewed the Decision of the Tree Conservation Officer *De Novo*

The scope of the Board's review of a determination of an administrative officer is addressed in *N.J.S.A.* 40:55D-74 which provides that:

The board of adjustment may reverse or affirm, wholly or in part, or may modify the action, order, requirement, decision, interpretation or determination appealed from and to that end have all of the powers of the administrative officer from whom the appeal is taken.

The breadth of options expressly given to a board of adjustment on review, in the first clause of this section, and the language which affords a board of adjustment “all of the powers” of the administrative officer, in the second clause of this section, require *de novo* review.

Our Courts have read *N.J.S.A.* 40:55D-74 and the nearly identically worded *N.J.S.A.* 40:55D-17(d) as requiring *de novo* review. The Law Division, in an opinion affirmed o.b. by this Court, construed *N.J.S.A.* 40:55D-74 to require a board to undertake a *de novo* review of the decisions of administrative officers. *Evesham Twp. Zoning Bd. of Adjustment v. Evesham Twp. Council*, 169 N.J. Super. 460, 471 (L. Div., 1979) aff’d o.b. 176 N.J. Super. 503 (App. Div. 1980) rev’d, 86 N.J. 295 (1981) (“*N.J.S.A.* 40:55D-74 . . . expressly provides for the broadest possible scope of review”). The Law Division’s Construction of *N.J.S.A.* 40:55D-74 was arguably dicta, as it was simply part of the Court’s analysis of *N.J.S.A.* 40:55D-17. However, following affirmance by this Court, *Evesham* was appealed to the Supreme Court. which reversed the lower Court’s decision, not because that Court believed that *N.J.S.A.* 40:55D-74 had been misconstrued, but because the Supreme Court **extended** the *de novo* standard of that section to a governing body’s review of a separate statute, *N.J.S.A.* 40:55D-17(d). *Evesham Twp. Zoning Bd. of Adjustment v. Evesham Twp. Council*, 86 N.J. 295. The Court

described *N.J.S.A.* 40:55D-17(b) as a “clear legislative grant” of the obligation to undertake *de novo* review comparable to that allowed by *N.J.S.A.* 40:55D-74. *Id.* at 301. *See also Kane Props., LLC v. City of Hoboken*, 214 N.J. 199, 227 (2013) (*N.J.S.A.* 40:55D-17(d) does not contemplate review under the “relatively indulgent arbitrary, unreasonable or capricious standard as would apply to proceedings in court”). The Court did not decide this issue.

In summary, appeals to a board of adjustment under *N.J.S.A.* 40:55D-74 are to be reviewed *de novo*. Insofar as the Trial Court deferred to the Board of Adjustment, it deferred to an administrative decision that employed the wrong scope of review. Because the Board employed an erroneous standard to review the Tree Conservation Officer’s determination, its decision should have been reversed.

POINT IV

**THE COURT ERRED WHEN IT AFFIRMED THE
BOARD’S DECISION TO DISALLOW THE
OBJECTOR’S PLANNING TESTIMONY HAVING
WRONGLY CONCLUDED THAT TESTIMONY
TO BE IRRELEVANT
(Pa67)**

The Trial Court determined that it was appropriate for the Board of Adjustment to bar Waterfront’s planning expert testimony concerning the purpose of the Ordinance based upon (1) the Board’s discretion to impose “reasonable limitations as to the time and number of witnesses,” and (2) its finding that the

Board appropriately confined its consideration to the “express words of the Ordinance.” (Pa67).

The Court erred for several reasons. First, the Board abused its discretion when it refused to allow planning testimony on the second day of the hearing (September 30, 2020) because Waterfront was unaware of the basis of the application prior to the first day of the hearing (August 25, 2020), and did not appear with a prepared planning professional on that date. In its pre-hearing instructional memorandum, the Board counsel had represented that the Board’s review would be “based on review of the papers constituting the record of the permit decision.” (Pa122). That record without any contrary indication, stated that the tree removal application was based on the need to install utilities and make driveway improvements. (Pa88).

Believing that the application could not be supported on this basis, Waterfront appeared with an engineer, Rusty Schommer, to address these issues but did not come with a planner to opine on Factors 5 and 10 because it had no notice that they were the basis of the permit grant. Upon learning of the new basis, Waterfront attempted to use the testimony of its – unprepared – engineer who also was a licensed land planner. That effort was, however, foreclosed by the Board due to the lack of the engineer-planner’s expertise. (Pa72). As a result, Waterfront

intended to come to the September hearing with a prepared licensed land planner, Mr. Rahenkamp. As discussed above, Mr. Rahenkamp was hospitalized before the September hearing and Waterfront's request for an adjournment was denied. (Pa73).

A. The Written Record Mislead Waterfront Insofar as it Stated that the Basis of the Application Was the Gargiulos' Desire to Install Utilities and Make Driveway Improvements

While planning testimony became relevant to the decision in this matter after the first day of the hearing, it was not relevant prior to that day. For three reasons, Waterfront believed the application was based on engineering, not planning, issues.

First, the Applicant was required by the Ordinance language to provide the correct basis of the application. Section 225-111(C)(1) of the Tree Removal Ordinance requires that an applicant for a tree removal permit "set forth . . . the reasons for the request." § 225-111(C)(1). The Gargiulos' application (Pa88) on its face implicated engineering, not planning, issues.

Second, the Ordinance says that, if the tree removal permit is approved, the Tree Conservation Officer must endorse his decision on the application and "shall set forth the basis for such decision." § 225-111(C)(5). The Tree Conservation Officer did not, when he issued the permit, indicate that it was approved on any

basis other than for the reasons requested in the application, i.e. install utilities and make driveway improvements. (Pa92 to Pa93).

Third, before the hearing, counsel to the Board of Adjustment submitted a memorandum to the Board which was served on all counsel. In that memorandum, he wrote that the Board's "decision on this appeal should be based on review of the papers constituting the record of the permit decision" (Pa122).

Accordingly, at the time the hearing began, based on the content of the application, the terms of the permit grant, and Board counsel's memorandum, Waterfront anticipated that the basis of the permit was as set forth in the application: installation of utilities and driveway improvements. As a result, Waterfront came to the August hearing with an engineer, Mr. Schommer, who was prepared to testify that utilities could be installed and the driveway improved without removing any trees and therefore there was no basis upon which to issue the permit. Mr. Linson, in fact, agreed. (Pa74).

However, at the August hearing, the Tree Conservation Officer, for the first time acknowledged that neither of the bases advanced by the Gargiulos were sufficient to warrant the permit. Instead, he explained that he justified the permit on the "policy" that "every man has his castle" and "we try not to be over-restrictive in the removal and replacement of trees." (1T15; 1T48).

In addition, he felt that the permit should be issued because he liked the replanting plan and because it increased screening. These previously undisclosed reasons would form the basis of the Board's decision.

As discussed above, Waterfront's effort to have Mr. Schommer testify on these issues was thwarted. The Board refused to allow his testimony because "his professional planning background did not encompass tree removal issues "and he was not qualified" to opine as to the propriety of the Tree Conservation Officer's decision . . ." (Pa70).

Having been misinformed and later learning that the Tree Conservation Officer's reason to grant the tree removal permit was based on a new and undisclosed ground that implicated planning, not engineering, issues, Waterfront decided to bring a planning expert, Creigh Rahenkamp, P.P., to the next meeting (September 30, 2020). Mr. Rahenkamp intended to testify that Factors 5 and 10 required rejection, not approval, of the permit. It was his opinion that:

- Mr. Linson's policy of allowing flexibility ("every man has his castle") was inconsistent with the Ordinance preamble, the Master Plan, and the factors to be considered in tree removal applications;
- Mr. Linson's construction of Factor 5 (screening) failed to recognize that the "cutting or removal" of the native deciduous trees would "constitute a significant change" to those who owned property along the drive and was thus discouraged – not encouraged - by the Ordinance;

- There was no legitimate planning objective to screen the views of fields and meadows which the Master Plan expressly sought to preserve;
- Replacing mature native trees with a row of solid arborvitaes was incompatible with the rural setting the Master Plan and Ordinance expressly sought to protect;
- The destruction of the 28 specimen trees could not be reconciled with desire to preserve large trees and native vegetation expressly set forth in the Ordinance and in the Master Plan;
- The planting of the solid wall of arborvitaes defeated the goal of the Land Use Plan to “retain open meadows and fields that are visible from public roads, such as Van Beuren Road.”

(Pa126 to Pa130).

However, Mr. Rahenkamp had to be hospitalized on the day of the hearing, and his Doctor refused to permit him to testify from his hospital bed. (Pa124 to Pa125). Within hours of learning of Mr. Rahenkamp’s illness, Waterfront’s counsel made an application for a continuance so that the planning testimony could be elicited at a later date. Despite the importance of this testimony, the Board denied the continuance finding that Mr. Rahenkamp’s testimony would “be duplicative and not relevant to the narrow issue at hand.” (Pa73). Since the Board had rejected Mr. Schommer’s testimony, Mr. Rahenkamp’s testimony could not be duplicative. And as argued in Point II, that testimony was relevant to assess the Board’s effort to construe the vaguely worded Factors 5 and 10.

Nonetheless, in its October 20, 2020 Resolution confirmed in its December 15, 2022 Resolution, the Board determined that planning testimony with regard to the Township’s desire to “preserve . . . [its] rural character as articulated in the Master Plan and Tree Conservation Ordinance” was irrelevant. (Pa73 to Pa74).

B. The Decision to Bar Expert Planning Testimony as Irrelevant Should be Reviewed *De Novo*

While decisions on admissibility are ordinarily reviewed under an abuse of discretion standard, when the issue is whether or not a court or agency applied the proper test to the admissibility of proffered evidence, the review is *de novo*.

Konop v. Rosen, 425 N.J. Super. 391, 401 (App. Div. 2012). The Board’s decision, that this evidence was irrelevant, must be reviewed under a *de novo* standard of review and the Board’s decision was wrong.

“Relevant evidence” is evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action. *N.J. R. Evid.* 401. In order to be relevant, the evidence does not by itself need to prove the fact in issue; it need only have “some tendency” to prove a material fact. *State v. Buckley*, 216 N.J. 249, 261 (2013). The test of relevance is broad and favors admissibility. *State v. Deatore*, 70 N.J. 100, 106 (1976).

Mr. Rahenkamp's testimony was not irrelevant because the language of Factors 5 and 10 was ambiguous. (See Point II above.) Waterfront should have been afforded the opportunity to elicit expert testimony with regard to the interpretation of those factors as informed by the Ordinance language, its "Findings and Purposes," and the Harding Township Master Plan.

The Board rejected this testimony and deferred to the decision of the Tree Conservation Officer (See Point III(A)) without undertaking an independent review, even though Factors 5 and 10 implicated planning issues. Mr. Lindon had no planning expertise and those issues were not part of his mandate.

C. Even Under a Deferential Standard of Review, the Board Erred

Even under a deferential standard of review, the Board erred. As discussed above, planning testimony was not implicated by the content of the Gargiulos' tree removal application or Mr. Linson's written decision, or the Board counsel's memorandum, or in any other part of the written record prior to the first day of the hearing. Therefore, there was no reason for Waterfront to bring a planning professional to the hearing on that day. That hearing adjourned at 10:58 P.M. (1T124:5) and, even had Mr. Rahenkamp appeared, he would not have been reached.

In the course of the first day of the hearing, Mr. Linson acknowledged that the engineering justifications for the permit were inadequate and injected a new rationale

– every man’s home is his castle – to support his decision; and the Board was instructed to defer to that decision and to refrain from making an independent assessment. Mr. Rahenkamp would have testified that Mr. Linson’s rationale was inconsistent with the Ordinance goals and Master Plan, but the Board declined to permit that testimony.

Planning boards and boards of adjustment act in a quasi-judicial capacity. *Kramer v. Bd. of Adjustment, Sea Girt*, 45 N.J. 268, 280 (1965). In that setting, objectors have a right to a hearing and the fact-finder “shall be bound in good conscience to consider the evidence” which the objector offers. *Id.*

As with the resolution of any contested issues, all participants at municipal hearings are entitled to a fair and honest resolution of their dispute. Just as certainly, municipal boards should be mindful of the need to manifest their impartiality not only in the decision finally rendered, but similarly in their treatment of objectors and applicants throughout the hearing. (Citation omitted).

DeMaria v. JEB Brook, LLC, 372 N.J. Super. 138, 143 (L. Div. 2003).

A municipal land use agency has an obligation to afford applicants for relief and objectors a fair opportunity to present evidence relevant to the issue before the agency. *See Witt v. Borough of Maywood*, 328 N.J. Super. 432, 453-55 (Law Div. 1998), *aff’d o.b.*, 328 N.J. Super. 343 (App. Div. 2000). In some circumstances,

the discharge of this obligation may require an agency to continue a “hearing to another date to allow all available evidence to be presented.” *Id.* at 454.

There certainly was no urgency to destroy the trees at issue and it was unlikely that, in the winter months after the hearing, the Gargiulos would plant new trees. The Board, by foreclosing the testimony of Waterfront’s professional planner, Mr. Rahenkamp, abused its discretion. *McLean v. Liberty Health Sys.*, 430 N.J. Super. 156, 168 (App. Div. 2013) (a decision to bar material expert testimony, even if duplicative, is an abuse of discretion.)

CONCLUSION

For the reasons set forth above, the Trial Court erred because it failed to require the Tree Conservation officer and the Board of Adjustment to evaluate, not simply “consider,” the Ordinance factors. The Court erred as well because it embraced the same erroneous construction of Factors 5 and 10 as did the Board. The trial Court should have reversed the Board’s decision because of its failure to undertake a *de novo* review of the decision of the Tree Conservation Officer to grant a permit. Finally, the Board improperly refused to allow Waterfront’s planning expert to testify.

Respectfully submitted,

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Arnold C. Lakind

Dated: August 5, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

529 WATERFRONT PROPERTIES, LP,

Plaintiff-Appellant,

v.

MICHAEL GARGIULO, PATRICIA
GARGIULO, THE BOARD OF
ADJUSTMENT OF THE TOWNSHIP OF
HARDING,

Defendants-Respondents.

DOCKET NO. A-2009-23

ON APPEAL FROM LAW DIVISION
MORRIS COUNTY
DOCKET NO. MRS-L-14-23PW

CIVIL ACTION

SAT BELOW: HON. STUART A.
MINKOWITZ, A.J.S.C.

**BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS MICHAEL
GARGIULO AND PATRICIA GARGIULO**

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PRELIMINARY STATEMENT

Defendants Michael and Patricia Gargiulo obtained a permit from the Harding Township Tree Conservation Officer pursuant to a township ordinance to replace existing trees along the driveway of their property with rows of alternative trees. Their neighbor, Plaintiff 529 Waterfront Properties, LP, objected and appealed the granting of the permit to the Harding Township Board of Adjustment. After extensive hearings, including additional hearing after a remand by the Superior Court to correct a procedural error, the Board of Adjustment upheld the permit. Plaintiff then filed an unsuccessful action in lieu of prerogative writs before the Superior Court. The Honorable Stuart M. Minkowitz, A.J.S.C., affirmed the Board's decision. Plaintiff now appeals the trial court's decision before this Court. At present, twenty-seven of the trees subject to the Permit have already been lawfully removed, and Plaintiff is no longer contesting the issuance of the Permit with respect to the remaining tree. Plaintiff's brief does not state what relief it seeks from this Court other than reversal of the trial court's order.

The plain language of Harding Township Ordinance § 225-111(D) (the "Ordinance" or "§ 225-111(D)") requires the Tree Conservation Officer to take "into consideration" certain factors when determining whether to grant a permit to cut or remove trees. The trial court correctly held that Harding Township Tree Conservation Officer John Linson ("Officer" or "Linson") and the Board complied

with the Ordinance when granting the Permit to the Gargiulos because they fully considered all of the factors, as required. Indeed, the Board conducted a comprehensive review of the matter – that involved testimony by multiple witnesses over at least four separate hearing days – and issued two comprehensive resolutions setting forth its determination. The Board’s decision was well-founded, based on the record before it and cannot seriously be assailed in any way.

Plaintiff’s arguments – all of which are based in some way on its improper interpretation of the Ordinance – have no merit. The Ordinance was not ambiguous. Plaintiff would have considered some of the factors in the Ordinance differently than the Officer and Board, but that does not mean they misconstrued the Ordinance. The Board did not require the proposed testimony of Plaintiff’s expert to understand the Ordinance, or whether the Permit was contrary to the Township’s Master Plan. The Board comprehensively considered the factors set forth in the Ordinance, and, as such, its level of review of the Officer’s decision was appropriate. The trial court correctly deferred to the local Board’s decision in approving the Permit.

For these reasons and the others set forth herein, the Gargiulos respectfully submit that the trial court’s judgment should be affirmed and Plaintiff’s appeal should be denied.

PROCEDURAL HISTORY

In December 2019, the Gargiulos submitted their application to the Township for a permit to remove twenty-eight trees from their Property and replace them with hedgerow consisting of 370 trees. (Pa92).¹ On December 21, 2019, the Officer granted permit 2020-01, authorizing the removal of twenty-eight trees on the flag staff of the Gargiulo Property (the “Permit”). (Pa92). On June 8, 2020, Plaintiff appealed issuance of the Permit to the Board.² (Pa98). The Board conducted public hearings on August 25, 2020 and September 30, 2020. (1T-2T). The Board denied Plaintiff’s appeal and upheld the Officer’s issuance of the Permit, memorialized in the Board’s resolution dated October 15, 2020 (the “2020 Resolution”).³ (Pa69). On October 23, 2020, Plaintiff appealed the Board’s decision to the Law Division

¹“Pa” refers to Plaintiff’s appendix. “Pb” refers to Plaintiff’s brief in support of its appeal. “GDa” refers to the Gargiulos’ appendix submitted herewith.

² On June 2, 2020, the parties filed competing orders to show cause in the Chancery Division in the now-consolidated matters bearing docket numbers MRS-C-54-20 and MRS-C-55-20 (the “Chancery Action”) (which are not the subject of this appeal). On June 17, 2020, the Honorable Martiza Berdote Byrne, P.J.Ch. entered a temporary restraint enjoining the Gargiulos from removing the trees so Plaintiff could pursue an appeal of the Permit’s issuance to the Board.

³ Following the Board’s determination of Plaintiff’s appeal, Judge Byrne entered a January 4, 2021 order in the Chancery Action, lifting the restraints on the removal of the trees (3T at 7:2-7). Accordingly, the Gargiulos removed all but one of the trees (the “Catalpa Tree”) that were the subject of the Permit. On January 7, 2021, the Honorable Stuart A. Minkowitz, A.J.S.C. entered an order in the 1st PW Action prohibiting the Gargiulos from removing the Catalpa Tree.

by way of an action in lieu of prerogative writs (the “1st PW Action”) in the matter bearing docket number MRS-L-2176-20. (Pa57-58). On June 22, 2021, Judge Minkowitz entered a consent order in the 1st PW Action, dismissing the action, and remanding the matter to the Board so that the Officer could forward the Permit application to the Shade Tree Advisory Committee. (Pa58, Pa95-97). Thereafter, on October 28, 2021, the Officer issued a decision affirming his original decision to issue the Permit. On October 29, 2021, Plaintiff again appealed the Officer’s decision to the Board. (Pa108-17). The Board conducted a second set of hearings on October 20, 2022 and November 17, 2022. (3T-4T). On December 15, 2022, the Board adopted a resolution (the “2022 Resolution”) affirming the Officer’s decision. (Pa76-81). On January 4, 2023, Plaintiff filed a second action in lieu of prerogative writs in the Law Division under docket number MRS-L-14-23 (the “2nd PW Action”) to again appeal the Board’s decision affirming issuance of the Permit. (Pa3-14). On January 3, 2024, Judge Minkowitz held a trial on the 2nd PW Action. (5T). On February 9, 2024, Judge Minkowitz entered an order and Statement of Reasons affirming the Officer and Board’s decisions. (Pa54-68). On March 7, 2024, Plaintiff filed notice of its appeal from the trial court’s order. (Pa50-53).

STATEMENT OF FACTS

I. LINSON AND THE BOARD GRANT THE GARGIULOS' TREE REMOVAL PERMIT APPLICATION.

This action follows two prior prerogative writ actions and a Chancery Division action (also on appeal before this Court) in which Plaintiff seeks to infringe on the Gargiulos' lawful use of their own property.⁴ The Gargiulos are the owners of Lot 8 in Block 5, located in Harding Township, Morris County, New Jersey (the "Property"). (Pa69). The 7.81 acre Property is a flag lot commonly known as 595 Van Beuren Road. (See id.; see also Pa87). Access to the rear portion of the Property is via an approximate 1,250-foot-long access way that is approximately fifty feet (50') in width (the "Driveway"). (Pa87). The Driveway provides access to a public road, Van Beuren Road. (Id.) Michael Battista and his family (the "Battistas") own several properties surrounding the Gargiulos' Property. In particular, the Battistas, and entities controlled by them, including Plaintiff, own Lot 8, Blocks 6.01, 6.02, 7.04, and 7.05. (Pa57; Pa87). These properties run along the "flag staff" portion of the Gargiulos' flag lot property. (Id.)

In December of 2019, the Gargiulos filed an application with the Township for a permit to remove twenty-eight trees from their Property and replace them with

⁴ Numerous facts contained in Plaintiffs' statement of fact are without citation to any support in the record and should not be considered by this Court. (See Pb11-12, 15-16; see also R. 2:6-2(a)(5)).

a hedgerow consisting of 370 trees. (Pa88-91). On or about December 21, 2019, the Officer approved the application and granted the Permit. (Pa92-94). The approval was subject to the Gargiulos replanting trees in accordance with the landscape plan submitted with the application and posting an \$8,400 escrow deposit, all which the Gargiulos complied with. (See id.).

II. PLAINTIFF’S FIRST APPEAL TO THE BOARD.

On June 8, 2020, Plaintiff appealed to the Board. (Pa98-101). The Board conducted public hearings on August 25, 2020 and September 30, 2020. (1T-2T). During the public hearing, testimony, documents, and oral arguments were presented by counsel for Plaintiff and counsel for the Gargiulos. As Plaintiff’s attorney conceded at trial, the Board “definitely heard a significant amount of testimony.” (5T at 50:24-51:1).

A. The Officer’s Testimony Before the Board.

The Board’s proceedings centered on the issue of whether the Officer’s decision to issue the Permit was contrary to the Ordinance. (1T-2T). During the hearing, the Board heard and considered extensive testimony from the Officer, a certified and licensed tree expert since 1976. (1T at 14:3-87:2). He testified that he “did not in any way expect that this would be a controversial tree removal application or permit” and that there had never been an appeal of a tree removal permit before. (Id. at 15:4-11). He also testified that the application was “standard,” the Gargiulos

“did everything by the book,” and the Gargiulos “follow[ed] all the Township requirement[s] to obtain the tree removal permit” (Id. at 20:5-12, 20:21, 58:19-22). The Officer recognized that the Ordinance attached a priority to the preservation of large trees “to the greatest extent practicable.” (1T at 47:23-48:13). He testified that he looked at every individual tree to deem whether it was to be removed or preserved. (Id. at 26:7-9). Linson further testified that the proposed tree replacement was a “positive thing for Harding Township” because the proposed 370-tree hedgerow would increase canopy coverage, replace trees that were going to die, and remove a hazardous Catalpa tree⁵ before it failed and fell into Plaintiff’s property. Linson further testified that the Township’s policy is to not be overly restrictive in the removal and replacement of trees, but that the Township requires each removed tree to be replanted. (1T at 15:12-15).

Of import, the Officer testified that he considered each and every one of the ten factors to be considered pursuant to the Ordinance. (Id. at 48:14-54:1). He confirmed on cross examination that “none of [the factors] were ignored.” (Id. at 53:21-54:1). Linson testified regarding his consideration of each specific factor and the facts underlying those considerations. (See id. at 49:2-13 (testimony regarding

⁵ The Gargiulos note that, on January 6, 2021, they cut down almost all of the trees at issue in the Permit. After the Order to Show Cause was entered by the Superior Court on January 7, 2021, however, the Gargiulos did not cut down any trees. (3T at 6:12-7:21).

§ 225-111(D)(1)); 49:17-25 (testimony regarding § 225-111(D)(2)); 50:1-51:6 (testimony regarding § 225-111(D)(3)); 51:7-9 (testimony as to § 225-111(D)(4)); 51:24-52:8 (testimony as to § 225-111(D)(6)); 52:9-53:10 (testimony as to § 225-111(D)(7)); 53:11-16 (testimony as to § 225-111(D)(8)); 53:17-20 (testimony as to § 225-111(D)(9))). With respect to § 225-111(D)(5), which required consideration of whether the tree “removal would cause a significant change in the screening between existing or proposed building for adjoining lots,” the Officer testified that: “I would say, in this case, it was going to increase the screening. There would be no diminishing of the existing screening.” (See id. at 51:12-17). With respect to § 225-111(D)(10), which required consideration of “any replanting plan,” the Officer testified that “[b]asically, the planned replacement far exceeds the removal of the 28 trees.” (Id. at 53:17-54:1) (emphasis added). He determined that the Gargiulos had gone “above and beyond with respect to their replanting and restoring [of] trees” and that “they far exceeded a normal application.” (Id. at 60:18-24). He additionally testified that the replacement of the removed trees with a hedgerow is consistent with the Ordinance’s intent to preserve the rural character of the Township. (Id. at 46:22-47:5). Moreover, the Officer testified that he approved a similar application a few years ago, wherein the property owners wanted to remove all of the trees on the flag lot, on the condition that they replace the trees. (Id. at 15:19-25). He further testified that the tree removal and replacement protected the privacy and rural character of

the Township, in accordance with the Ordinance, and made the landscaping on that flag lot “far better than it ever was before.” (Id. at 16:2-4).

B. The Board Heard Testimony From Several Witnesses Called by the Battistas.

At the hearings, the Battistas presented testimony from four witnesses: (1) Richard Schommer; (2) Lauren Battista; (3) Bill Logan; and (4) Matthew Weibel. (1T-2T). Richard Schommer was introduced as a “licensed engineer and land planner who will speak about the conditions observable at the time the application was filed” to testify regarding “the goals and policy set forth in the master plan as they impact this decision.” (1T at 72:23-73:19). Mr. Schommer testified that he was a professional planner for at least thirty-five years, who has testified over a thousand times regarding planning and engineering issues. (Id. at 74:4-24). Mr. Schommer’s testimony focused on the Harding Township Master Plan and its tree conservation elements. (Id. at 79:4-25). Ultimately, the Board determined that Mr. Schommer’s planning background did not encompass tree removal issues, he did not have experience with tree removal plans, and, thus, he was not qualified to opine as to the propriety of the Officer’s decision to issue a tree removal permit, which was the sole issue on appeal before the Board. (Id. at 76:2-77:10, 80:5-17; see also Pa72, ¶ 21).

Lauren Battista, who resides with her husband. Michael Battista, Jr., also testified on behalf of Plaintiff. Mrs. Battista’s testimony focused on her fondness of some of the trees to be removed, and was deemed not relevant to the analysis

conducted by the Board regarding whether the Permit was inconsistent with the Ordinance. (Pa72, ¶ 22). Plaintiff then called William Logan as an expert in tree issues. (Pa73, ¶ 23). Mr. Logan’s experience, however, was limited to tree issues in New York, not New Jersey. (Id.) Mr. Logan had no experience in New Jersey land use or tree removal permitting matters, nor was he a registered arborist in New Jersey. (1T at 108:23-108:11). The Board determined that limited testimony would be permitted at the continuation of the hearing. (Id. at 118:15, 124:4).

At the end of the first hearing day, Plaintiff’s counsel stated that: “I don’t have my [sic] plans to bring any additional witnesses Mr. Logan is my last witness, as I said.” (1T at 122:9-14). When asked to stipulate this, Plaintiff’s attorney was unable to do so because he had not spoken with his client. (Id. at 122:15-18). However, in response to a question from the Board chairman about what testimony remained to be presented, Plaintiff’s counsel stated: “Currently, it will be just Mr. Logan and then a summation.” (Id. at 123:9-10). Plaintiff’s counsel never indicated during the first day of the hearing that he intended to call another planning expert or had any reason to do so. Nor did he argue at any point that expert planning testimony was necessary because any section of the Ordinance was ambiguous.

At the continued hearing on September 30, 2020, Plaintiff presented testimony from a different tree expert, Matthew Weibel, without prior notice to the Gargiulos’ counsel. (2T). Mr. Weibel offered scant testimony regarding the

Ordinance itself, and during his questioning, the Board noted the mischaracterization by Plaintiff's counsel of the factors set forth in the Ordinance as requirements – rather than factors taken into consideration. (Id at 31:10-11, 31:22-25, 32:6-9). The Chairman noted, “Mr. Lakind, these are not conditions. These are things that are, quote, taking into consideration. They’re not requirements [The Board Attorney] and I were correcting you that you’re implying that these were conditions. So I just want to note that, they’re not conditions.” (Id. at 31:10-11, 31:22-25, 32:6-9). Mr. Weibel then admitted that the factors in the Ordinance were not conditions and that the purpose of the tree conservation element of the Ordinance was to provide things to be considered in connection with a tree removal permit. (Id. at 51:17-22).

Plaintiff's counsel then sought an adjournment of the second hearing date to allow Plaintiff to present testimony from planner Creigh Rahenkamp, who was unable to appear due to a medical emergency. (Id. at 6:24-10:8). Indeed, Plaintiff's counsel never identified Mr. Rahenkamp prior to the hearing as an additional witness, and instead sought to surprise the Gargiulos and the Board with a new witness a few days before the continuation of the hearing. (Id at 12:9-23). After thorough consideration, the Board determined that Mr. Schommer had already testified as a planner, and the testimony of a second planner was neither necessary nor relevant. (Id at 14:16-15:22, 56:8-59:22, 62:23-64:18). At the conclusion of the continued hearing, Plaintiff's counsel argued – for the first time – that the application

was procedurally defective due to Linson's failure to mail the application to the Shade Tree Advisory Committee for comment. (Id. at 67:7-23).

III. THE 2020 RESOLUTION DENYING THE APPEAL AND UPHOLDING THE PERMIT.

The Board voted five to one to deny the appeal and uphold the issuance of the Permit. (Id. at 93:14-15). The Board memorialized its findings in a Resolution dated October 15, 2020 (the "2020 Resolution") detailing its factual findings and statement of reasons for denying the appeal. (Pa69-75). In the Resolution, the Board relied on the Officer's testimony and expertise, which it implicitly found to be credible. (Pa71-72, Pa12). The Board rejected the contention that the issuance of the Permit was contrary to the broad objective of preserving rural character of the Township as articulated in the Master Plan and Ordinance. (See Pa74, ¶ 29(d)). The Board acknowledged the Officer's testimony that the Gargiulo proposal would increase screening and include extensive tree replacement. (Id., ¶ 29(e)). It also found that the Ordinance did not prohibit the extensive use of the same species and require use of a native species. (Id.). Based on these and other findings, the Board held that the issuance of the Permit was not "arbitrary, capricious or otherwise improper." (Id.).

IV. ENTRY OF A CONSENT ORDER TO CURE PROCEDURAL DEFICIENCY.

Thereafter the Board filed the 1st PW Action. On June 22, 2021, Judge Minkowitz entered a Consent Order dismissing the action and requiring Linson to

send the application to the Shade Tree Advisory Committee. (Pa58, Pa95-97). The Consent Order specifically preserved any arguments previously made in the matter by any party in the event of further appeal. (Pa95-97). Following the entry of the Consent Order, the Officer sent the permit application to the Shade Tree Advisory Committee. The Officer thereafter inspected the Property and issued a new decision regarding the Permit which he memorialized in an October 28, 2021 Memorandum. (Pa108-17). He noted the response of the single Shade Tree Advisory Committee member who expressed a preference to preserve the one remaining tree subject to the Permit. He further noted that his Level 3 inspection found the Catalpa tree to be “hazardous pursuant to accepted Arboriculture Standards, which was reviewed and confirmed by a New Jersey Licensed Tree Expert, and a property owner who recognizes this tree as a liability and has applied for a permit to remove the tree.” (Id.). Accordingly, the Officer confirmed his original decision to issue a permit for the removal of the hazardous Catalpa tree, in addition to the twenty-seven other trees that were already removed at the time of this inspection. (Id.).

V. PLAINTIFF’S SECOND APPEAL TO THE BOARD.

Thereafter, on October 29, 2021, the Battistas – again – appealed the Officer’s decision to the Board. (Pa105). Prior to the initial hearing, Gary Hall, Esq., the Board attorney, issued a memorandum to the Board providing background information concerning the appeal and explaining the applicable law. (Pa136-40).

Among other things, the memorandum advised the Board of the Plaintiff's right to participate in the hearing process, including cross-examination of Linson and presentation of pertinent testimony and legal argument. (Id. at 140).

The Board then held a second round of hearings on October 20, 2022 and November 17, 2022. (3T-4T). At the October 20, 2022 hearing, counsel for Plaintiff and counsel for the Gargiulos presented legal arguments to the Board regarding the appropriate scope of the proceedings. (3T at 55:7-56:22). After both sides were heard, the Board concluded that the hearing should be limited to review of the actions taken by Linson in response to the remand, and whether his decision following remand was proper in light of the remand order and the Ordinance. (Id. at 67-68). The Board further permitted Plaintiff to present testimony from an arborist, but decided it would not re-hear the extensive legal and factual issues addressed in the Board's prior hearings. (Id. at 72).

The Board held a second day of hearings on November 17, 2022, and counsel for both Plaintiff and the Gargiulos questioned the Officer. (See 4T). Plaintiff did not present testimony from an arborist. (Id. at 73). Pursuant to questioning by Plaintiff's counsel, the Officer testified that, upon a further investigation into the Catalpa tree following remand, he discovered that it was hollow and susceptible to falling. (Id. at 8-9). The Officer further testified that the examination of the tree following remand reinforced his decision to approve the tree

removal permit application as to all 28 trees, including the Catalpa tree. (Id. at 19-20). During questioning by the Gargiulos' counsel, the Officer confirmed that he considered all of the 10 factors set forth in the Ordinance. (Id. at 49-50).

A. The 2022 Resolution.

By Resolution dated December 15, 2022 (the "2022 Resolution"), the Board affirmed its decision granting the Permit. (Pa76-81). The 2022 Resolution detailed the findings of fact and statement of reasons, and ultimately denied Plaintiff's appeal, upholding Linson's decision to reaffirm the Permit authorizing the removal of the Catalpa tree and the twenty-seven other trees that were already removed. (Pa80).

VI. THE SECOND PW ACTION AND DECISION OF THE TRIAL COURT.

Thereafter, Plaintiff filed this action. A trial of the matter was held on January 3, 2024. (5T). During the trial, Plaintiff stated that it was no longer contesting the issuance of the Permit to remove the Catalpa tree, which is the only tree that has not been removed. (Id. at 11:1-22). This means that, despite extensive reference to the Catalpa tree in Plaintiff's brief before this Court, Plaintiff only contested the Permit with respect to the trees that had already been removed.

The trial court issued an order and Statement of Reasons on February 9, 2024. In the Statement of Reasons, the Court held that the "the Ordinance simply requires that all factors be considered, which the [Tree] Officer achieved, rather than a

requirement that each factor be satisfied.” (Pa65). The Court further noted that the Officer “credibly considered each factor[.]” (Pa66). The Court additionally found that the Officer provided testimony to the Board, and that the Board implicitly found such testimony to be credible, including testimony that the tree replanting was to be extensive and would result in improved screening. (Pa65-66).

VII. THE CURRENT STATUS OF THE TREES.

All of the twenty-eight trees subject to the tree removal permit other than the Catalpa tree have been removed. (5T at 11:1-22). As noted above, Plaintiff no longer contests the issuance of the Permit as to the Catalpa tree. (*Id.*). Numerous arborvitae trees have been planted in the flag staff consistent with the replanting plan. (4T at 35:11-21). In addition, over thirty deciduous trees have been planted in the flag staff that were not called for by the replanting plan. (3T at 54:10-24).

STANDARD OF REVIEW

“When reviewing a trial court’s decision regarding the validity of a local board’s determination,” appellate courts “are bound by the same standards as was the trial court.” Jacoby v. Zoning Bd. of Adj. of Borough of Englewood Cliffs, 442 N.J. Super. 450, 462 (App. Div. 2015) (quoting Fallone Props., LLC v. Bethlehem Twp. Plan. Bd., 369 N.J. Super. 552, 562 (App. Div. 2004)). It is well-settled that a decision of a zoning board may be set aside only when it is “arbitrary, capricious or unreasonable.” Cell S. of N.J. v. Zoning Bd. of Adjustment, 172 N.J. 75, 81 (2002)

(quoting Medici v. BPR Co., 107 N.J. 1, 15 (1987)). “The reviewing court must determine whether the board below followed the statutory guidelines and properly exercised its discretion within those guidelines or whether its decision amounts to an abuse of discretion.” Fay v. Medford Tp. Council, 423 N.J. Super. 81, 88 (Law Div. 2011) (citing Burbidge v. Mine Hill, 117 N.J. 376, 398 (1990)). The New Jersey Supreme Court has described this extreme deference as follows:

Such public bodies, because of their peculiar knowledge of local conditions must be allowed wide latitude in the exercise of delegated discretion. 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. . . . 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.

Kramer v. Bd. Of Adjustment, Sea Girt, 45 N.J. 268, 296-297 (1965).

Appellate courts “give deference to the actions and factual findings of local boards and may not disturb such findings unless they were arbitrary, capricious, or unreasonable.” Jacoby, 442 N.J. Super. at 462. The Board’s evidentiary determinations made under the proper evidentiary standard are also reviewed for abuse of discretion.⁶ See Konop, 425 N.J. Super. at 401; see also Kramer v. Bd. of

⁶ Plaintiff is incorrect when it asserts that this Court reviews the Board’s evidentiary determination *de novo*. Konop v. Rosen, 425 N.J. Super. 391 (App. Div. 2012), does not stand for this proposition. Rather, Konop holds that *de novo* review is required

Adjustment of Sea Girt, 45 N.J. 268, 288 (1965) (holding it is “well settled” that a zoning board “has the choice of accepting or rejecting the testimony of witnesses” and “[w]here reasonably made, such choice is conclusive on appeal”) (quoting Reinauer Realty Corp. v. Nucera, 59 N.J. Super. 189, 201 (App. Div. 1960)).

It is only when assessing questions of law, that “a court is not bound by an agency’s determination . . . and the court’s construction of an ordinance under review is *de novo*.” Fallone Properties, L.L.C. v. Bethlehem Tp. Planning Bd., 369 N.J. Super. 552, 561 (App. Div. 2004). “Nevertheless, [courts] ‘give deference to a municipality’s informal interpretation of its ordinances.’” Id. (quoting Wyzykowski v. Rizas, 254 N.J. Super. 28, 38 (App. Div. 1992)). “[B]oards are granted ‘wide latitude in the exercise of the delegated discretion’ due to their ‘peculiar knowledge of local conditions.’” Id. (quoting Burbridge v. Mine Hill Tp., 117 N.J. 376, 385 (1990)); see also Booth v. Bd. of Adjustment, 50 N.J. 302, 306 (1967). Here, Plaintiff cannot establish that any action of the Board was arbitrary, capricious and unreasonable or that the Board made any errant legal interpretation or applied an improper evidentiary standard.

only where “the trial court **fails to apply the proper test** in analyzing the admissibility of proffered evidence,” but the *de novo* standard is otherwise inapplicable to evidentiary determinations made under the appropriate legal standard. Id. at 401 (emphasis added).

LEGAL ARGUMENT

Plaintiff's appeal centers on the incorrect interpretation of the factors of § 225-111(D) ⁷ as requiring a specific outcome if certain facts are established. All of Plaintiff's arguments depend to some degree on this mistaken reading. Because the plain language of § 225-111(D) requires only that the Officer take "into consideration" certain subjects when determining whether to grant a permit, and for the other reasons set forth below, the Court should deny Plaintiff's appeal and affirm the decisions of the trial court, Board and Officer. See Hayes v. Delamotte, 231 N.J. 373, 387 (2018) ("A trial court judgment that reaches the proper conclusion must be affirmed even if it is based on the wrong reasoning.") (citing Isko v. Planning Bd., 51 N.J. 162, 175 (1968); Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001) ("[A]ppeals are taken from orders and judgments and not from . . . reasons given for the ultimate conclusion.")).

I. THE BOARD AND OFFICER PROPERLY COMPLIED WITH SECTION 225-111(D) BY CONSIDERING ALL REQUIRED FACTORS. (Pb22)

The principles governing interpretation of zoning ordinances are the same as those governing interpretation of legislation in general. See State Tp. of Pennsauken v. Schad, 160 N.J. 156, 170 (1999); Hudson Cty. v. Jersey City, 153 N.J. 254, 266

⁷ All of the Harding Township Ordinances can be found here: <https://ecode360.com/HA0992#14489838>.

(1998). “Where the plain language of a statute is clear, [courts] enforce the statute as written.” Correa v. Grossi, 458 N.J. Super. 571, 579 (App. Div. 2019). Here, the plain language of § 225-111(D) unambiguously sets forth what the Officer needed to do to issue a tree removal permit. This section reads in its entirety:

To the greatest extent practicable, large trees, tree rows and hedgerows should be preserved. In addition, ***the following factors shall be taken into consideration*** in determining whether to issue a permit for tree cutting or removal:

1. Whether the area where such trees are located will be occupied by a building or structure, a driveway or recreation area, a roadway, an equestrian (bridle) trail, a drainage right-of-way, sewer line, septic system or well, or whether it is reasonably necessary to regrade the area in relation to any of the foregoing, and further provided that such regraded areas shall be restored and landscaped with suitable ground cover, shrubbery and/or trees after construction.
2. Whether the area where such tree or trees are to be cut down or removed is consistent with the approval of any required subdivision or site plan by the Planning Board or Board of Adjustment and any conditions pertaining thereto.
3. Whether the cutting or removal would change existing drainage patterns.
4. Whether the cutting or removal would allow soil erosion or increase dust.
5. Whether the cutting or removal would constitute a significant change in the screening between existing or proposed buildings on adjoining lots.

6. Whether the cutting or removal would constitute a horticultural advantageous thinning of an existing overgrown area, taking into consideration the tree species, size and health of the trees to be removed.

7. Whether the cutting or removal would impair the growth or development of the remaining trees on the applicant's property or adjacent property.

8. Whether the area where such tree or trees are located has a depression or fill of land which is deemed injurious to such tree or trees or other trees located nearby.

9. Whether the presence of such trees is likely to cause hardship or will endanger the public or the owner of the property on which the tree or trees are located or an adjoining property owner or for some other adequate reason within the intent of this article.

10. Any planned tree replacement or other landscape plan for revegetating cleared areas.

§ 225-111(D) (emphasis added)).⁸ This plain language demonstrates the legislative intent to require that the Officer consider the ten factors listed in § 225-111(D) when determining whether to issue a permit.

The Officer and Board complied with the Ordinance because they considered each of the factors in determining whether to issue the Permit. This is evidenced by the transcripts of the Board hearings that contain the testimony of the Officer as to his consideration of each factor and the factual basis underlying them. (See id. at

⁸ The Officer must also inspect the trees sought to be removed, the drainage, and other physical conditions existing on the Property and adjoining properties. (See id. at § 225-111(C)(2).) That was done here. (4T at 14:3-15:11).

49:2-13; 49:17-25; 50:1-51:6; 51:7-9; 51:12-17; 51:24-52:8; 52:9-53:10; 53:11-16; 53:17-20; 53:17-54:1). Indeed, Plaintiff concedes that the Officer considered relevant factors. (5T at 59:9-11) (“I think the decision that the tree conservation officer made was consistent with his reading of the factor. . . .”); (Id. at 57:12-14) (“And I agree, your Honor, the testimony was in his view that an increase in screening is a positive and that warrants grant of the approval.”); (Id. at 57:21-25) (“I’m not disputing whether or not the tree conservation office determined that an increase in trees is good or that he found that that’s consistent with the ordinance, it seems that he did.”). The Board was entitled to rely on the factual and expert testimony of the Officer and others regarding each of the factors. Kramer, 45 N.J. at 288. Thus, there can be no dispute that the Officer and the Board properly applied § 225-111(D) by considering the factors when making their determinations and reasonably basing their considerations on evidence in the record. Plaintiff’s disagreement with the decision resulting from the Officer and Board’s thoughtful considerations and weighing of factors does not mean that the factors in § 225-111(D) were not considered. See Nat’l Nephrology Found. v. Dougherty, 138 N.J. Super. 470, 477-78 (App. Div. 1976) (“That [Commissioner] did not give to the . . . factor the weight, in relation to other criteria, that [Appellant] would have preferred does not mean that he failed to consider it as a factor or ignored the criteria which had been established.”).

A. Section 225-111(D) Does Not Require that Factors be Satisfied or Weighed in a Particular Way in Order for a Tree Permit to Be Issued. (Pb22-23).

The trial court correctly held that “[t]he ordinance simply requires all factors be considered, which the [Tree] Officer achieved, rather than a requirement that each factor must be satisfied” See § 225-111(D); (Pa65-66). Indeed, § 225-111(D) does not require that particular factors be satisfied to qualify for a permit, or state that factors be given particular weight, or mandate any specific decision by the Officer if specific facts are found. For example, § 225-111(D)(5) mandates only that the Officer “tak[e] into consideration . . . [w]hether the cutting or removal would constitute a significant change in the screening between existing or proposed buildings on adjoining lots,” and does not require any specific decision be made if cutting does or does not constitute a “significant change.” (Id.) Likewise, § 225-111(D)(10) only directs that “any” tree replacement plan be “taken into consideration,” and does not require a specific decision to be made based on the presence or absence of elements in the plan. This plain language demonstrates that the Township did not intend to create any specific “checklist” or balancing test that needed to be met to warrant a tree removal Permit.

It is not uncommon for statutes and ordinances to direct that factors be considered without prescribing specific standards that must be met in order to qualify for a certain outcome. See, e.g., N.J.S.A. 2A:4A-34 (listing factors that “shall be

considered” in “determining whether detention is appropriate for [a] juvenile”); N.J.S.A. 24:21-11 (listing factors that “shall be considered” to determine whether registration of an applicant to manufacturer controlled substances is in the public interest). If the Township wanted to require specific facts as a precondition to qualify for a tree removal permit under § 225-111(D), it would have used language that made that clear. For example, § 225-116(Q) of the Township’s ordinances provides that “[g]ates, pillars, and posts constructed adjacent to driveways shall satisfy the following requirements” and sets forth a list of six requirements that must be satisfied for such construction. Likewise, § 225-185(J) of the Township’s ordinances provides that the Township Engineer may grant a waiver from certain requirements [for minor development] “provided that the applicant demonstrates to the satisfaction of the Township Engineer that adjacent waterways and/or property will not be impacted by” a series of five factors. This language is consistent statutory language implemented by the Legislature when it intends certain facts be demonstrated to qualify for an outcome. See, e.g., N.J.S.A. 9:17-65 (stating “[a] gestational carrier agreement shall satisfy the following requirements”); N.J.S.A. 52:17B-202 (stating “[a] person or entity which proposes to act as a joint negotiation representative shall satisfy the following requirements”). That the Township did not use such language here demonstrates that the Township did not intend to impose

specific requirements be established for the issuance of a tree removal permit other than that the Officer consider the subject matters specified in § 225-111(D).

In addition, § 225-111(D) cannot be interpreted as requiring the Officer to find the satisfaction of particular factors as a prerequisite for removal of a tree because the “general rule is that where it is the intent [of an ordinance] to prohibit or proscribe a particular use, such intent must be stated with clarity.” Cox & Koenig, New Jersey Zoning and Land Use Administration 580 (GANN 2022). Indeed, “a zoning restriction should not be interpreted to proscribe a given use of private property unless it does so with reasonable clarity.” Bern v. Fair Lawn, 65 N.J. Super. 435, 444-45 (App. Div. 1961). “Zoning limitations on the use of private property should be clearly and expressly imposed, and should not be left to inference.” Maplewood v. Tannenhaus, 64 N.J. Super. 80, 89 (App. Div. 1960). Thus, if the Township intended to permit the removal of trees only under certain circumstances, it would have clearly said so. The Court should not rewrite the ordinance to go beyond what the Township intended. See Board of Comm’rs v. A.S. Pater Realty Co., 73 N.J. Super. 155, 162 (1962) (“This court will not act as a corrective agency for the redrafting of municipal legislation”); Jantausch v. Borough of Verona, 41 N.J. Super. 89, 104 (Law Div. 1956), aff’d, 24 N.J. 326 (1957) ([T]he legislative power must be exercised by the municipality itself; it may not ask the courts to write

a better or a different ordinance. And it should speak clearly . . . especially in view of the predicament of the citizen who seeks in good faith to utilize his property.”).

B. Plaintiff’s Attempts to Artificially Generate Legal Issues By Misinterpreting the Ordinance Fail. (Pb26-32).

Once § 225-111(D) is interpreted by its plain language, the incorrectness of Plaintiff’s various, and sometimes contradictory arguments, regarding the interpretation of the Ordinance is amply evident. (Compare, e.g., Pb26) (stating board and trial court did not “attempt[] to construe the Ordinance”) (with Pb27-32) (arguing the Board and Court misinterpreted factors 5 and 10).

1. There is No Ambiguity in § 225-111(D). (Pb26-33).

There is no ambiguity in the legislative directive of § 225-111(D) to “tak[e] into consideration” the factors set forth therein. See 5T at 58:9-13 (“The Court: Again, you cannot read factor five without reading the preamble. That preamble says these factors must be taken into consideration. How is that ambiguous? We have that all over the law. [PLAINTIFF’S ATTORNEY]: Yea, I think that’s right, . . .”). The Township’s drafting decision does not make the Ordinance ambiguous, but rather demonstrates a legislative intent to afford the Officer discretion to consider any aspects of the specified subject matter that may be relevant to a particular application. Plaintiff’s arguments that factors 5 and 10 of the Ordinance are ambiguous (Pb26, Pb31) depend entirely on the Court adopting Plaintiff’s incorrect interpretation of § 225-111(D) as having specific criteria that must be satisfied to

warrant issuance of a tree removal permit. Specifically, Plaintiff argues that the “the two relevant factors of the Ordinance were ambiguous” suggesting that some criteria hidden within these factors had to be satisfied prior to issuance of the tree removal permit. (Pb26). However, as discussed at length above, § 225-111(D) does not set forth requirements that must be satisfied or weight that must be afforded to particular factors. Rather, it requires only that these ten factors be considered, and, as the trial court held, there is nothing ambiguous about this directive.

2. Plaintiff’s Attempt To Create An Artificial Distinction Between “Consideration” and “Evaluation” of the Factors is Without Merit. (Pb22-25).

In a misguided effort to try to generate a legal issue where none exists. Plaintiff distinguishes between “considering” the factors listed in the Ordinance and “evaluating” them and complains that the Board and the trial court did not also do so. (Pb24-25). Plaintiff cites no law supporting the notion that there is a difference between “considering” an item and “evaluating” it. New Jersey law has long recognized that to “consider” or take under “consideration” requires one to think carefully about something. See Lake v. Ocean City, 62 N.J.L. 160, 162 (1898) (“The rule for statutory construction is to give to words their ordinary rather than their extraordinary meaning, unless constrained by the context. To consider means ‘to think with care’ upon a matter.”) (emphasis added); C.R. v. M.T., 257 N.J. 126, 162 (2024) (Justice Fasciale, concurring) (“To ‘consider’ means to ‘think carefully about

(something, typically before making a decision[;] . . . [to] take (something) into account when making an assessment or judgment.”) (quoting *New Oxford American Dictionary* 370 (3d ed. 2010) (emphasis added); State v. Green, 62 N.J. 547, 563 (1973). To “evaluate” means to “determine or fix the value of” or “to determine the significance, worth, or condition of usually by careful appraisal and study.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/evaluate>. (Accessed 8 Oct. 2024). Thus, there is no real difference between the use of the two terms, and to the extent there may be a difference, the plain language of the Ordinance required consideration of the factors – not an evaluation.

Moreover, the case law on which Plaintiff relies on in support of this argument is not on point because it addresses the need for a Board or Court to set forth adequate findings in support of their decisions. (See Pb23-25). In doing so, Plaintiff improperly conflates what was necessary for the Officer to comply with § 225-111(D), on the one hand, with the law regarding what is necessary for a Board or Court to include in decisions so that they can be reviewed on appeal, on the other hand. Nothing in the Ordinance says anything about a written decision by the Officer, and the cases Plaintiff cite do not address the subject. Thus, the adequacy of written findings has nothing to do with whether the Officer, Board and trial court complied with § 225-111(D). Moreover to the extent that Plaintiff contests the

adequacy of the Resolutions issued by the Board, this argument should be disregarded by the Court. Plaintiff did not raise this issue before the trial court. Nevertheless, contrary to Plaintiff's assertion, this matter is a far cry from the case where the Court or the Board made a "mere recitation . . . that a factor has been 'considered' without more[.]" (Pb23). The Board heard extensive testimony from the Officer explaining his expert consideration of each factor during the hearing. (1T at 49:2-13; 49:17-25; 50:1-51:6; 51:7-9; 51:12-17; 51:24-52:8; 52:9-53:10; 53:11-16; 53:17-20; 53:17-54:1). The Board's resolutions were lengthy and provided a basis for its decisions. For example the 2020 Resolution expressly noted some of the Officer's considerations, and made specific findings as to the Officer's expert opinion that the proposal would "improve screening" and that there would be "extensive tree replacement." (Pa74, ¶ 29(e)). In its decision, the trial court actually cited to the portion of the hearing record in which the Officer explained his considerations to the Board. (See Pa64) (citing 1T at 48:14-54:1). In addition, the trial court expressly discussed the findings made by the Board in the Resolutions as the basis for its decision. (Pa64-66). Thus, it is simply inaccurate for Plaintiff to claim that the Board or trial court made inadequate findings on these issues.

3. The Officer Board and Trial Court Did Not Misconstrue Factor 5 of § 225-111(D). (Pb27-29).

In arguing that the Board made "interpretative errors" in applying Factor 5, Plaintiff ignores that this factor only required the "consideration" of "whether the

cutting or removal would constitute a significant change in the screening between existing or proposed buildings on adjoining lots.” § 225-111(D)(5). The factor does not require a finding that screening between adjoining lots would or would not be improved in order to justify a tree removal. (Pb28). Nor does it prevent tree removal if the tree removal does not “preserve open views.” (Pb29). As such, there is no basis for Plaintiff’s assertion that “Factor 5 seeks to avoid ‘a significant change’ in screening, not to promote increased screening” (Pb28), because this factor doesn’t “seek” anything – it merely requires that the issue to be considered.

Plaintiff admits that the Officer considered this factor. (5T at 59:9-11) (“I think the decision that the tree conservation officer made was consistent with his reading of the factor, . . .”); (Id. at 57:12-14) (“And I agree, your Honor, the testimony was in his view that an increase in screening is a positive and that warrants grant of the approval.”); (Id. at 57:21-25) (“I’m not disputing whether or not the tree conservation office determined that an increase in trees is good or that he found that that’s consistent with the ordinance, it seems that he did.”). Even if that were not the case, the record shows that this issue was extensively considered by Linson and the Board, taking into account the replacement plan and how that would impact the screening. Indeed, Linson testified that the replant of over 370 trees “shows that the [Gargiulos are] very concerned about maintaining screening between the properties” in accordance with the intent of the Ordinance. (See 1T at 69:5-7). Ultimately,

Linson testified that the Gargiulos' tree replacement plan is better than the existing trees in terms of natural value, increased canopy coverage, and screening between the properties. (See id. at 69:16-24). The Board further concluded that the issuance of the Permit would improve screening. (See Pa74, ¶ 29(e)). The fact that Plaintiff does not agree with or like the Board's conclusion does not provide grounds for reversal or remand, nor demonstrate a misconstruction of the Ordinance.

Furthermore, from a practical standpoint, while Plaintiff argues that the Board and Linson misapplied the Ordinance to the extent that the increased screening did not involve "buildings on adjoining lots," Plaintiff is plainly incorrect. Indeed, the hedgerow contained in the Gargiulos' plan *does* increase the screening between buildings on adjoining lots – the lots containing Mr. Battista's residence (lot 7.04) and that of his son (lot 6.02). (See Pa74, ¶ 29(e)). Thus, Plaintiff's assertion that the factor was misconstrued is misplaced.

4. The Officer, Board, and Trial Court Did Not Misconstrue Factor 10 of the Ordinance. (Pb29-32).

Plaintiff's contention that Linson and the Board misinterpreted the Ordinance with regard to Factor 10 is meritless. Factor 10 requires only that the Officer give "consideration" to "any planned tree replacement or other landscape plan for revegetating cleared areas." § 225-111(D)(10). It is clear that the Officer and Board did this and found that the replanting of 350 trees weighed in favor of issuing the Permit. (Pa74, ¶ 29(d)-(e)). In asserting that the Officer and Board applied this

factor incorrectly, what Plaintiff really means is that they did not focus their consideration on Plaintiff's personal concerns. It cannot be said that the Officer and Board "wrongly focused" on the tree replacement. The fact that Plaintiff dislikes the tree replacement plan does not mean that the Ordinance was misinterpreted.

II. PLAINTIFF'S RELIANCE ON THE MASTER PLAN IS MISPLACED. (Pb29-33).

Plaintiff is mistaken when it argues that the Board and Linson erred by failing to consider the Master Plan or Preamble to the Ordinance in light of "ambiguities" in the Ordinance. As set forth above, § 225-111(D) is not ambiguous, and, as such, there was no need for the Board to consider extrinsic evidence in connection with its review of Linson's decision to grant the Permit. See Burnett v .Cty. of Bergen, 198 N.J. 408, 443 (2009). It is well settled in New Jersey that, "[w]here the plain language of a statute is clear, [courts] enforce the statute as written." Correa v. Grossi, 458 N.J. Super. 571, 579 (App. Div. 2019). The Ordinance is detailed and clear. Screening and replanting as provided in Factors 5 and 10 are important considerations in determining whether a tree removal permit should be granted.

Even if the Ordinance did contain an ambiguity, there is no requirement that the Officer or the Board consider the Master Plan in connection with the issuance of the Permit. The Ordinance does not require any analysis of the Master Plan or any consideration of any provision of the Master Plan when determining whether a tree

can be removed. The detailed Ordinance itemizes factors related to the specific location and conditions of the proposed tree removal that are within the knowledge and expertise of the Officer. That officer cannot be tasked with evaluating the effect on the Master Plan when considering each single tree removal application. The Township council performed that function when it adopted Ordinance § 225-111(D).

The reference to the Master Plan in the Preamble of the Ordinance does not change this. (See Pb27-28). This is made clear in the Preamble itself, which states in part as follows: “The standards and procedures established herein are intended to furnish guidelines . . . in connection with the issuance of permits for certain tree cutting and removal . . . and in evaluating tree removal and landscape plans” (See Pa82 at § 225-111(A)(1)). Thus, the Preamble indicates that the Harding Township Committee properly performed its legislative function when it considered the Township’s Master Plan in enacting the Ordinance. The Master Plan is a policy document, whereas the Tree Conservation Ordinance is the legislative enactment adopted by the Township to implement the policy goals of the Master Plan. See Pop Realty Corp. v. Springfield Bd. Of Adjustment, 176 N.J. Super. 441, 447 (Law Div. 1980) (citing Municipal Law, Charles S. Rhyne, Sec. 32-59, p. 977 (1957)) (“A master plan is not a straitjacket delimiting the discretion of the legislative body, but only a guide for the city.”); Cochran v. Planning Bd. Of Summit, 87 N.J. Super. 526, 534 (Law Div. 1965) (citing Beuscher, J.H. (1956) “Land Use Controls, by Frank E.

Jorack Jr. and Van Nolan Jr.”, Indiana Law Journal: Vol. 31, Iss. 3, Article 8) (“The [master] plan is merely a declaration of policy and a disclosure of an intention which must thereafter be implemented by the adoption of various ordinances.”).⁹ Indeed, the Harding Township Master Plan Conservation Element demonstrates that it is merely a policy planning document when it states that: “The purpose of a conservation plan element is to establish policy planning goals concerning the conservation and preservation of natural resources” (See GDa1).

Moreover, if it were considered, the Master Plan does not support Plaintiff’s arguments that the Board erred by affirming the issuance of the Permit. The Master Plan’s Conservation Plan Element speaks to “Tree Protection” and specifically cautions against *excessive* tree removal, it does not forbid tree removal, generally, or speak to any specific prohibition on the removal of a particular tree. (Id. at 13).

⁹ No case cited by Plaintiff sets forth a requirement that a Preamble or Master Plan *must* be considered when determining the meaning of a township ordinance; rather they simply say that that it *may* be considered, where relevant. (Pb32); see also Fobe Assocs. v. Bd. Of Adjustment, 74 N.J. 519, 542 (1977) (making no finding that a master plan must be referenced, but permitting a board of adjustment to refer to same, among other guiding documents); Mount Laurel, 92 N.J. 158, 240 n. 15 (1983) (stating only that implementation of Mount Laurel requirements does not damage zoning objectives); Pagano v. Zoning Bd. Of Adjustment, 257 N.J. Super. 382, 397 (Law Div. 1992) (dealing with an instance in which neither the master plan nor the pertinent ordinance was reviewed in rendering a decision, not finding that a master plan must be referenced); Bass v. Allen Home Improv. Co., 8 N.J. 219, 222 (1951)(preamble *may* be considered if statute ambiguous); Grobart v. Grobart, 5 N.J. 161, 166 (1950) (preamble *may* be considered if statute ambiguous).

Plaintiff points to no language in the Master Plan that expressly prohibits tree removal or sets forth any requirements for the granting of a tree removal permit.

Thus, Plaintiff's argument regarding the Master Plan is a red herring that should be afforded no weight. In essence, Plaintiff is asking the Court to re-write the Ordinance to impose novel, additional requirements upon the Tree Conversation Officer beyond those set forth in the Ordinance. This is inappropriate and cannot be the basis for a reversal of the Board's decision. See Board of Comm'rs v. A.S. Pater Realty Co., 73 N.J. Super. 155, 162 (1962) ("This court will not act as a corrective agency for the redrafting of municipal legislation . . .").

III. THE TRIAL COURT CORRECTLY AFFIRMED THE BOARD'S DECISION TO EXCLUDE PLAINTIFF FROM PRESENTING THE TESTIMONY OF A SECOND PLANNING EXPERT. (Pb36-45).

Plaintiff argues that the Board should have allowed it to present a *second* planner to "elicit expert testimony with regard to the interpretation" of the Ordinance. (Pb43.) The trial court held that the Board reasonably exercised its discretion to limit the number of witnesses at the hearing by declining to allow Plaintiff to proffer testimony from a planning expert about the purpose of the Master Plan and Ordinance, and to instead rely on the express language of the Ordinance. (Pa67) For the reasons set forth below, the trial court was correct.

A. The Board Had Discretion to Limit Witnesses At the Hearing. (Pb42-45).

The trial court correctly determined that under § 225-17(C), the Board has discretion to limit the witnesses that appear before it. (Pa67). Specifically, § 225-17(C) sets forth the Board’s powers during hearings, and states that the “testimony of all witnesses” and “the right of cross-examination” shall be “**subject to the discretion of the presiding officer and to reasonable limitation as to the time and number of witnesses.**” § 225-17(C) (emphasis added). Moreover, N.J.S.A. 40:55D-10(d) provides that witnesses at a hearing are “subject to the discretion of the presiding officer and to reasonable limitations as to time and number of witnesses” and N.J.S.A. 40:55D-10(e) permits the board to “exclude irrelevant, immaterial or unduly repetitious evidence.” Plaintiff all but admits that this is the proper standard by arguing that the test was one of relevance. (Pb42-43).

The record demonstrates that the Board properly applied these standards. The Board allowed one planning expert to offer testimony at the August 25, 2020 hearing. (See 1T at 73:20-82:25). The Board heard Plaintiff’s counsel’s arguments as to why a second planner’s testimony was necessary at the beginning of the continuation of the hearing on September 30, 2020. (See 2T at 6:15-14:22). Rather than summarily denying the request, the Board stated, “[we] would like to hear from the arborist. And then if we feel we need to hear from Mr. Lakind’s planner, we can take it up at the end.” (Id at 14:24-15:1). At the end of the hearing, the Board

concluded that it did not need to hear testimony from *another* planner, because such testimony was not relevant to the issues before the Board and would have been duplicative of testimony already heard by the Board. (See id at 59:5-22, 52:23-64:6); (Pa73, ¶ 26). In doing so, the Board properly exercised its discretion under § 225-17(C). Mercurio v. Delvecchio, 285 N.J. Super. 328, 334-35 (App. Div. 1995) (“Just because a person is an objector does not confer an absolute right to have an applicant's matter adjourned due to claimed inability to attend one of several scheduled hearings. Generally, it is the applicant and the Board that control the scheduling of the application.”).

B. Expert Testimony on the Legal Interpretation of the Ordinance Was Inappropriate and Irrelevant. (Pb38-42).

It would have been inappropriate for the Board to allow Plaintiff to present expert testimony to the Board “with regard to the interpretation”, (Pb43), of the Ordinance and how it “should be read”, (5T at 59:7-9), for several reasons. *First*, expert testimony on the interpretation of the Ordinance would have been nothing more than an impermissible and irrelevant legal conclusion. It is well-established that the “purpose of expert testimony is to assist the trier of fact regarding the significance of evidence. An expert’s opinion on a question of law is neither appropriate nor probative.” Kamienski v. Dept. of Treasury, 451 N.J. Super. 499, 518 (App. Div. 2017) (stating the interpretation of a statute was a question of law). Thus, expert witnesses may not render opinions on matters which involve questions

of law, including the interpretation of statutes. Boddy v. Cigna Prop. & Cas. Cos., 334 N.J. Super. 649, 659 (App. Div. 2000) (holding expert witnesses may not render opinions on matters which involve questions of law); Body-Rite Repair Co. v. Dir., Div. of Taxation, 89 N.J. 540, 543 (1982) (observing that expert testimony “has little or no relevance to the interpretation of statutory language”). As such, any expert planning testimony Plaintiff presented regarding the interpretation of the Ordinance would have been nothing more than impermissible legal conclusions.

Second, Plaintiff conceded before the trial court that if the Ordinance was unambiguous no expert planning testimony was necessary, (5T at 18:8-11), that the Board is charged with the interpretation of its own ordinances, including the question of whether a provision is ambiguous, (id. at 15:1-18, 17:2-18), and that the Board determined that the Ordinance was not ambiguous, (id. at 17:9-10). As set forth above, there is nothing ambiguous about the Ordinance’s requirement for certain factors to be “considered” in connection with the granting of a permit. Thus, by Plaintiff’s own logic expert planning testimony was not necessary.

Third, Plaintiff did not argue that the Ordinance was ambiguous or that expert testimony was required to interpret the Ordinance at any point before the Board determined not to allow a second planning expert to testify. Indeed, during the September 30, 2020 hearing, Plaintiff set forth three reasons why it needed to present testimony from a second planner each of which sought to explore the policy

underlying the Master Plan. (See 2T at 56:16-57:18); (5T at 39:5-13). The alleged ambiguity of provisions of the Ordinance was not one of the stated reasons. As such, the Board did not err by refusing to allow an expert planner to offer interpretations of the Ordinance and the trial court was correct in affirming its decision.

C. Expert Planning Testimony Was Irrelevant to the Board's Determination Because It Was Not Called For By the Ordinance. (Pb38-42)

The Board's exercise of its discretion to limit planning testimony from a second expert was reasonable because any planning testimony was irrelevant to the consideration of the factors set forth in § 225-111(D)(1)-(10) by Linson and the Board. The standards for the issuance of a tree removal permit under the Ordinance are intended to be administered by the Tree Conservation Officer in his professional expertise. See § 225-111(D)(1)-(10). Plaintiff admits this when it concedes that planning issues "were not part of [Linson's] mandate." (Pb43). There is no requirement in the Ordinance that the Officer be a professional planner, that they seek or defer to the opinion of a professional planner in the discharge of their duties under the Ordinance or that they rely on any information provided by a professional planner. In addition, there is no requirement that the Officer refer the application to the Township Planner. In short, nothing in the Ordinance requires that any expert planning analysis or testimony be considered before a tree removal permit can be granted. See § 225-111(D)(1)-(10). Thus, there was no need for planning testimony

for the Officer or Board to determine whether the Permit should have been issued – no matter the standard of review undertaken by the Board.

D. Plaintiff Was Not Prejudiced by Not Being Allowed to Offer Expert Testimony on the Meaning of the Ordinance. (Pb43-45)

Plaintiff's argument that it was somehow procedurally prejudiced by not able to provide planning expert testimony because the initial permit application referenced the need to install utilities and driveway improvements has no merit. Plaintiff's argument that it was prejudiced by the language of the initial application is disingenuous and inconsistent with the record because Plaintiff was allowed to provide expert planning testimony. At the August 25, 2020 hearing, Plaintiff's counsel introduced Mr. Schommer as a "licensed engineer and land planner who will speak about the conditions observable at the time the application was filed" and regarding "*the goals and policy set forth in the master plan as they impact this decision.*" (1T at 72:23-73:19) (emphasis added). Mr. Schommer introduced himself as a professional planner for at least 35 years, who has testified over a thousand times regarding planning and engineering issues. (*Id.* at 74:4-24). Mr. Schommer then testified regarding his review of the Harding Township Master Plan, the ordinances relevant to tree removal, and his visit to the Property. (*Id.* at 70:12-17; 77:12-82:25). At no point during the first day of the hearing did Plaintiff indicate that Mr. Schommer was unprepared or that it needed to offer an additional planning witness due to a misunderstanding as to the basis of Mr. Linton's decision. At no

point during that hearing did Plaintiff request the opportunity to call another planner to offer expert testimony. Indeed, at the end of that hearing, Plaintiff stated that on the next hearing date it only anticipated offering testimony from an arborist and providing a summation. (Id. at 122:9-14; 123:9-10).

Also, Plaintiff's claim that it believed that the hearing would focus on "engineering, not planning issues", (Pb38), is not justified because it is based on a misreading of the Township ordinances and Board Memorandum. Although, "the reason for the [Gargiulos'] request" needed be set forth in their tree removal application per § 225-111(C)(1), the Officer was not required by § 225-111(D) to consider "the reason for the request" in determining whether to grant the Permit. The Officer testified that he did not consider utilities installation in his decision to grant the Permit. (1T at 25:13-23). The Board's 2020 Resolution affirming the Officer's decision noted that he did not rely on the "reason for the request" in making his decision, but rather focused on the Ordinance, as required. (Pa72, ¶ 18). Further, contrary to Plaintiff's representations to the Court, the Officer was not required to set forth on the application the basis for *granting* the permit. Section 225-111(C)(5) only requires the Officer to set forth the basis for decision on the application "in the case of partial or complete *disapproval*["]." § 225-111(C)(5) (emphasis added). Because the Permit was granted, it did not need to set forth the basis for the Officer's decision. (See Pa92-93). Thus, it was inappropriate for Plaintiff to assume that the

Permit contained a statement of the basis for the decision. Further still, language in the Board Memorandum stating that the Board should base its decision on “the papers constituting the record of the permit decision”, (Pa122), does not mean that the rationale for the Officer’s decision was clearly set forth in the record sent to the Board prior to the hearing, or that it was required to be. This was made clear just two sentences later in the Board Memorandum, which states that the Officer “has been asked to attend the hearing in order to answer questions concerning the rationale for the permit decision, as set forth in the record.” (Id.).

E. The Cases that Plaintiff Cites Do Not Support Its Position. (Pb42-45)

Plaintiff does not cite any statute, rule or case that required the Board to hear testimony from a second expert planner. Plaintiff’s citation of the Rules of Evidence and cases applying evidence rules in litigation matters, (see Pb42, Pb45), is not on point. That judicial evidentiary rules do not apply to hearings before a zoning board is codified by N.J.S.A. § 40:55D-10(e), which states: “Technical rules of evidence shall *not* be applicable to the hearing, but the agency *may exclude irrelevant, immaterial or unduly repetitious evidence.*” (emphasis added); see Bd. of Educ. of City of Clifton v. Zoning Bd. of Adjustment of City of Clifton, 409 N.J. Super. 389, 430 (App. Div. 2009) (“The rules of evidence are not binding on a zoning board.”). Moreover, the cases cited by Plaintiff do not address zoning board hearings. McLean v. Liberty Health Sys., 430 N.J. Super. 156, 168 (App. Div. 2013) (addressing

testimony of two expert witnesses on liability issue in medical malpractice lawsuit); State v. Buckley, 216 N.J. 249 (2013) (addressing the inadmissibility of expert testimony relating to seat belt usage and sign placement in a vehicular homicide case); State v. Datore, 70 N.J. 100, 106 (1976) (addressing the admissibility of testimony in a criminal trial under the predecessor of N.J.R.E. 403(b)).

Similarly, the cases Plaintiff cites for the general proposition that a board should allow objectors to offer evidence and an opportunity in no way conflict with the Board's statutory right to control the scope of a hearing and to admit or exclude proffered evidence. Indeed, as discussed above, one of the very cases cited by Plaintiff makes this principle crystal clear. See Kramer, 45 N.J. at 2 (1965). None of the other cases cited in Plaintiff's brief hold otherwise. DeMaria v. JEE Brook, LLC, 372 N.J. Super. 138, 143 (Law Div. 2003) (denying appeal of site plan approval where the record did not support that the objectors "were denied the opportunity to be heard at all"); See Witt v. Borough of Maywood, 328 N.J. Super. 432, 453-55 (Law Div. 1998), aff'd o.b., 328 N.J. Super. 343 (App. Div. 2000) (involving situation where board did not allow objectors "even a chance" to convince the Board of their position by not allowing the objectors to offer any witnesses).

Importantly, none of these cases allow expert testimony on the interpretation of a statute. Moreover, this is not a situation as in Witt where the plaintiff was precluded from offering any evidence in support of its position. Plaintiff extensively

cross-examined the Officer and elicited testimony from several of its own witnesses during the hearing. The trial court correctly upheld the Board's refusal to allow a second planning expert to testify, and this Court should affirm that decision.

IV. THE BOARD APPLIED THE PROPER STANDARD OF REVIEW WHEN CONSIDERING THE PERMIT. (Pb33-36)

Plaintiff's argument that this Court should reverse the decisions of the trial court, Board and Officer because the Board did not properly review the Officer's decision lacks merit. The Board extensively analyzed the Officer's decision to grant the Permit in consideration of the factors contained in § 225-111(D). The Board created an expansive and detailed record of support for the decision that went far beyond the record relied on by the Officer, which included testimony by a variety of witnesses and a comprehensive evidentiary record. Importantly, as discussed above, when assessing the adequacy of the Board's review, this Court should be mindful that § 225-111(D) requires only a consideration of the factors set forth therein and does not require specific criteria to be established to qualify for a tree removal permit. There can be no question that the Board considered each of the factors, and articulated a basis for its decision.

The Board held multiple public hearings involving multiple witnesses. (1T-4T). Indeed, Plaintiff admits that the Board heard "a significant amount of testimony." (5T at 50:24-51:1). That testimony included extensive testimony from the Officer who was identified as a tree expert. (See, e.g. 1T at 14:3-87:2). Much

of this testimony came by way of cross-examination by Plaintiff's attorney. The Officer exhaustively testified as to his considerations regarding each of the factors under § 225-111(D). Plaintiff also presented five other witnesses, including two others proffered as experts. Thus, the record on which the Board made its decision went far beyond that which the Officer had when granting the permit.

Moreover, it is undisputed that the Board issued "extensive resolution[s]", (5T at 54:2-7), which contained factual and legal findings. The 2020 and 2022 Resolutions demonstrate that the Board did not simply "rubber stamp" the Officer's decision, but that it independently considered the facts and legal arguments of counsel. Many of these were not raised before the Officer rendered his decision. (See, e.g., Pa74 at ¶ 29(b), (d) and (e)).

As the trial court noted, the Board implicitly found that the Officer's testimony before the Board was credible and Plaintiff does not dispute the expertise or credentials of the Officer. (Pa 65; Pa69-81). Thus, the trial court properly held there is no evidence that the Board's credibility finding was unreasonable. (*Id.*). It cannot be disputed that the Board was entitled to rely on evidence that he presented under any standard of review. Northeast Towers, Inc. v. Zoning Bd. of Adjustment of Borough of West Paterson, 327 N.J. Super. 476, 498 (App. Div. 2000) (noting a zoning board "has the choice of accepting or rejecting the testimony of witnesses. Where reasonably made, such choice is conclusive on appeal").

The foregoing makes clear that the Board conducted as comprehensive a review as could be imagined. The taking of new evidence is a hallmark of a de novo standard of review and is not something that is done when reviewing merely for an abuse of discretion. See, e.g., Kimba Med. Supply v. Allstate Ins. Co., 431 N.J. Super. 463, 486 (Ap. Div. 2013) (observing that a trial judge’s de novo review of an arbitrator’s award in cases involving contested automobile personal injury protection benefits includes the hearing of evidence in a summary proceeding); Weston v. State, 60 N.J. 36, 45 (1972) (noting that de novo review in the context of a hearing “contemplates introduction of relevant and material testimony and the application of an independent judgment to the testimony by the reviewing” tribunal); Appeal of Darcy, 114 N.J. Super. 454, 459 (App. Div. 1971) (noting that during a de novo review on appeal to the Civil Service Commission “all relevant testimony may be introduced”). Similarly, the assessment of credibility of a witness is also generally limited to de novo review and not to abuse of discretion reviews. See State v. Kashi, 180 N.J. 45, 48 (2004) (“The court conducting a de novo review must give due, but ‘not necessarily controlling, regard to the opportunity of the [municipal court] to judge the credibility of the witnesses.’”). The fact that the Board relied on the testimony of the Officer does not mean that its review was limited. The Officer was a fact and expert witness before the Board, and the Board was entitled to rely on the conclusions of such a witness as part of a de novo review. See Weston, 60 N.J. at

45. Thus, it is clear that the Board conducted a thorough and comprehensive review. Even if the Board attorney gave inaccurate advice, the attorney's actions would be harmless error and not be ground to reverse the Board's decision.

Second, the guidance of the Board's attorney was consistent with the broad review typically associated with *de novo* review, contrary to the arguments raised in Plaintiff's brief. The Board attorney instructed the Board as follows:

The question isn't whether the Board wants to allow or disallow what somebody wants to do. The question is, and that's cited here, is whether there's error in any order, requirement, decision, or refusal by an administrative officer. The question for the Board, based on what you'll hear tonight, is whether Linson made a mistake. It's not whether you would do it differently, it's whether he was - - what he did was consistent under the ordinance. Whether someone else, trees greater and should be given more leeway, whatever; that's not the issue. You're not making an independent decision; you're reviewing his decision, what he based it on, why he did it, and concluding whether or not that was proper under the ordinance. That's how I read the law.

(See 1T at 8:7-22). Crucially, the Board attorney directed the Board to “conclude[e] whether or not [the Officer's decision] was proper under the ordinance” and was “consistent under the ordinance.” Likewise, the Board was reminded of its statutory obligation under N.J.S.A. § 40:55D-70(a) to evaluate whether there was “any error in any order, requirement, decision, or refusal by an administrative officer.” Plaintiff attempts to cherry-pick the phrase “[y]ou're not making an independent decision” to equate to a deferential standard of review, but the language of this instruction taken

as a whole clearly suggests an expansive review that includes a thorough analysis of whether the Officer properly applied the applicable provisions of the Township Ordinance or otherwise committed an error of legal interpretation.

This is corroborated by the language of the 2020 Resolution. For example, the Board described its review as follows: “The issue for the Board is to decide whether [the Officer’s] decision **was contrary to the ordinance**, not whether the Ordinance should be modified or whether a different decision would have been better.” (Pa74, ¶ 29(a) (emphasis added)). The Board observed it was “not vested with the power or discretion to ignore the express wording of the Ordinance.” (*Id.*, ¶ 29(d)). Finally, the Board observed that the Officer’s decision “was grounded on specific provisions in the Tree Conservation Ordinance” and, as a result, was not “arbitrary and capricious or **otherwise improper**.” (*Id.*, ¶ 29(e) (emphasis added)). Taken together, the 2020 Resolution clearly establishes that, however the Board may have described its review, its analysis was thorough, thoughtful, independent and cannot fairly be characterized as applying a deferential standard of review.

Finally, Plaintiff cites to no statute or case that required the Board to apply a *de novo* standard of review to the decision of a Township officer like Linson. Nothing in the plain language of N.J.S.A. 40:55D-74 mentions a *de novo* review requirement. Moreover, Plaintiff cites no case law to establishes that the scope of review for the Board is *de novo*. The only cases Plaintiff cites to in support of its

argument are inapposite, and involved the scope of review to be applied by a governing body when reviewing a *zoning board's* determination. They do not discuss the proper scope of review for a Board of Adjustment reviewing the decision of an administrative officer such as Linson. In the matter of Kane Props., LLC v. City of Hoboken, 214 N.J. 199, 225 (2013), the court found that the defendant city and city council's review of a zoning board's grant of a use variance is not the arbitrary, capricious, and unreasonable standard that a Court would apply in a prerogative writ action. Kane did *not* assess the scope of review for a Board of Adjustment – or similar entity – reviewing the decision of an administrative officer. Id. Moreover, Kane involved an assessment of ethical impropriety by the city council's attorney and the appropriate remedy thereto, *i.e.*, circumstances that have no nexus to the issues before the Court in this case. Similarly, in Evesham Twp. Zoning Bd. Of Adjustment v. Evesham Twp. Counsel, 86 N.J. 295, 301 (1981), the court found that the Township Council, when reviewing a decision of the Board of Adjustment with respect to a variance, has the right to apply its own expertise and knowledge of the community. Evesham, like Kane, did not involve review of a decision by an administrative officer. Nor do these cases even mention N.J.S.A. 40:55D-74, which relates to appeals to zoning boards of adjustment. Thus, neither case relied upon by Plaintiff stands for the proposition that a zoning board of adjustment is to undertake a *de novo* review of an administrative officer's decision.

The fact that Plaintiff has to engage in such a tortured interpretation of these cases shows that there is no law to support Plaintiff's position. Thus, there is no basis for Plaintiff to assert that the Board applied the improper standard of review.

CONCLUSION

For the foregoing reasons, the Gargiulos respectfully request that the Court deny Plaintiff's Appeal and affirm the Trial Court's judgment.

Respectfully submitted,
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By: /s/ Nicholas Racioppi, Jr.
Nicholas Racioppi, Jr.

Date: October 9, 2024

**529 WATERFRONT
PROPERTIES, LP,**

Plaintiff-Appellant

vs.

**MICHAEL GARGIULO and
PATRICIA GARGIULO and THE
BOARD OF ADJUSTMENT OF
THE TOWNSHIP OF HARDING,**

Defendants-Respondents.

**SUPERIOR COURT OF NEW
JERSEY APPELLATE DIVISION
DOCKET NO. A-002009-23**

**ON APPEAL FROM FEBRUARY 9,
2024 FINAL ORDER BY THE
SUPERIOR COURT OF NEW
JERSEY, LAW DIVISION:
MORRIS COUNTY
DOCKET NO. MRS-L-14-23**

CIVIL ACTION

**SAT BELOW:
HON. STUART A. MINKOWITZ,
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**BRIEF FOR DEFENDANT-RESPONDENT
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PRELIMINARY STATEMENT

This litigation by 529 Waterfront Properties, LP (“Plaintiff”) represents the latest chapter in a protracted dispute between Plaintiff’s principals Michael and Tracey Battista and their neighbors Defendants Michael and Patricia Gargiulo (“Gargiulos”), that has included private party litigation not involving the Board of Adjustment.

Plaintiff previously challenged a decision by the Board of Adjustment memorialized in a resolution adopted on October 15, 2020 that upheld issuance by the Township Tree Conservation Officer of a permit authorizing removal of trees along the flag staff portion of the Gargiulos’ property. Judicial review of that decision was not completed due to entry of a Remand Order requiring strict compliance by the Tree Conservation Officer with the procedural requirement in the Ordinance for copies of any tree removal permit to be mailed to members of the Township Shade Tree Advisory Committee (“STAC”) within 15 days after an application is filed in order to provide the opportunity to comment prior to issuance of a decision.

Consistent with the Remand Order, the Board directed the Tree Conservation Officer to mail copies of the application to STAC members prior to rendering a new decision. Only a single STAC member responded to the mailing by sending a short letter expressing his personal opinion that a

mature Catalpa tree should not be removed. (Pa104). The Tree Conservation Officer then conducted a further investigation of the condition of the Catalpa tree and issued a memorandum describing that investigation and repeating his prior determination to approve removal of the Catalpa tree. The Tree Conservation Officer also re-affirmed the prior issuance of a tree removal permit for 27 other trees based on the absence of any comments as to those trees by any STAC member and receipt of no other additional information. (Pa108).

Plaintiff filed an administrative appeal of the Tree Conservation Officer's new decision, which triggered new Board jurisdiction. (Pa105). Plaintiff did not challenge any actions taken by the Tree Conservation Officer in response to the Remand Order, except to dispute propriety of allowing removal of the Catalpa tree. Plaintiff did not present any evidence at the public hearing conducted by the Board challenging Tree Conservation Officer's further evaluation of the Catalpa tree. The Board upheld the Tree Conservation Officer's decision, and Plaintiff appealed that decision to the trial court.

As permitted by the Remand Order, Plaintiff's brief addresses several substantive issues that were raised in 2020, but were not adjudicated by the trial court in the prior litigation. All claims are devoid of merit. Plaintiff was

given a full opportunity during the initial public hearing process to demonstrate that the permit was issued in error, and failed to do so. Plaintiff was unable to demonstrate to Judge Minkowitz any actionable error by the Board in upholding the Tree Conservation Officer's decisions.

Plaintiff's legal contentions continue to evidence a clear goal of rewriting the Harding Township Tree Conservation Ordinance to suit the personal preference of its principal, Michael Battista. Plaintiff's arguments disregard the clear legislative determination embodied in the Ordinance to allow owners of private property to remove trees on their property subject to oversight authority by Tree Conservation Officer John Linson, who testified that he had served in that capacity in Harding Township for 15 or 16 years. (1T 21:7 to 9). This delegation of authority by the governing body was subject only to a requirement that the Tree Conservation Officer give consideration to 10 factors enumerated in Section 225-111(D). The trial court correctly concluded that the record establishes compliance with that requirement, and there is no basis in law or fact to conclude that Harding Township's governing body intended to vest the Board of Adjustment or any other person or entity with discretionary authority to render an independent decision in the event of an appeal.

COUNTER-STATEMENT OF FACTS & PROCEDURAL HISTORY

Plaintiff seeks to reverse the trial court ruling that upheld the Board of Adjustment decision that affirmed issuance of a tree removal permit by the Township Tree Conservation Officer, as memorialized in a written Resolution adopted on December 15, 2022. Plaintiff also seeks judicial rulings on legal issues raised in a prior appeal in 2020 that were not adjudicated at that time, but were expressly permitted to be addressed in the event of a new appeal. Review of the facts demonstrate that the trial court correctly held that Plaintiff's claims were appropriately considered and rejected by the Board of Adjustment.

A. The Gargiulo Flag Lot and Abutting Property Owned by Plaintiff 529 Waterfront Properties, LP

The facts concerning the property at issue are undisputed. The Gargiulos are the owners of a flag lot designated as Lot 8 in Block 5 on the Township Tax Map that is commonly known as 595 Van Beuren Road. The flag staff portion of the lot contains a driveway that provides the sole access from the residence on the Gargiulo Property to Van Beuren Road, a public road. (Pa69 to Pa70; Pa77).

The driveway in the flag staff of the Gargiulo property also currently provides vehicular access to the residence on Lot 6.02, which is owned by Plaintiff. Lot 6.02 was created by a subdivision approved by the Township Planning Board, as memorialized in a resolution adopted on July 28, 2003. This subdivision also created Lot 6.03, an unimproved private road lot

providing access to Van Beuren Road. Lots 6.02 and 6.03 were required to be held in common ownership in order to ensure access rights. The subdivision approval did not require improvement of the private road lot, and a portion of the driveway in the Gargiulo flag staff continues to be used for access to Van Beuren Road from Lot 6.02. (Pa70; Pa77). These access rights were the subject of separate litigation between the private parties in the Chancery Division. (Pa14; Pa27).

B. Appeal to Board of Adjustment of 2019 Tree Removal Permit

An Application for Tree Removal dated December 9, 2019 was submitted for the Gargiulo property by Jim Mazzucco of Bosenberg Landscape Architecture. (Pa88). The application was conditionally approved by Township Tree Conservation Officer John Linson by letter dated December 23, 2019. (Pa93). This approval authorized removal of 28 trees on the flag staff of the Gargiulo property subject to planting approximately 370 replacement trees and posting a \$8,400 escrow deposit. (Pa93).

In reliance on the tree removal permit, the Gargiulos started removing the trees, which lead to the institution of reciprocal ligation between the private parties in the Chancery Division. (Pa14). Plaintiff also filed an appeal of the permit issuance with the Board of Adjustment (Pa98) that included a statement of

the grounds for the requested relief as expressly required by N.J.S.A. 40:55D-72. (Pa101).

Prior to the initial hearing, the Board Attorney issued a memorandum to the Board dated August 14, 2020 that provided background information concerning the appeal process and applicable law. (Pa118). The memorandum attached a complete copy of Township Code Section 225-111, which contains the tree removal regulations, and provided a summary of these provisions. (Pa82 to Pa86).

Before issuing a permit for tree removal, the Tree Conservation Officer is directed to consider the following factors set forth in Section 225-111(D):

- (1) Whether the area where such tree or trees are located will be occupied by a building or structure, a driveway or recreation area, a roadway, an equestrian (bridle) trail, a drainage right-of-way, sewer line, septic system or well, or whether it is reasonably necessary to regrade the area in relation to any of the foregoing, and further provided that such regraded areas shall be restored and landscaped with suitable ground cover, shrubbery and/or trees after construction.
- (2) Whether the area where such tree or trees are to be cut down or removed is consistent with the approval of any required subdivision or site plan by the Planning Board or Board of Adjustment and any conditions pertaining thereto.
- (3) Whether the cutting or removal would change existing drainage patterns.
- (4) Whether the cutting or removal would allow soil erosion or increase dust.

- (5) Whether the cutting or removal would constitute a significant change in the screening between existing or proposed buildings on adjoining lots.
- (6) Whether the cutting or removal would constitute a horticulturally advantageous thinning of an existing overgrown area, taking into consideration the tree species, size and health of the trees to be removed.
- (7) Whether the cutting or removal would impair the growth and development of the remaining trees on the applicant's property or adjacent property.
- (8) Whether the area where such tree or trees are located has a depression or fill of land which is deemed injurious to such tree or trees or other trees located nearby.
- (9) Whether the presence of such tree or trees is likely to cause hardship or will endanger the public or the owner of the property on which the tree or trees are located or an adjoining property owner or for some other adequate reason within the intent of this article.
- (10) Any planned tree replacement or other landscape plan for revegetating cleared areas.

The Board of Adjustment conducted a public hearing on Plaintiff's appeal at public meetings on August 25, 2020 (1T) and September 30, 2020 (2T). At the outset, the Board Attorney provided a brief overview of the appeal process, which had been discussed in a memorandum distributed to the Board prior to the start of the public hearing. (Pa118). The Board Attorney summarized his opinion as follows:

The question isn't whether the Board wants to allow or disallow what somebody wants to do. The question is, and that's cited here [in the memorandum], is whether there's an error in

any order, requirement, decision, or refusal by an administrative officer. The question for the Board, based on what you'll hear tonight, is whether Mr. Linson made a mistake. It's not whether you would do it differently, it's whether he was – what he did was consistent with the ordinance. . . . You're not making an independent decision; you're reviewing his decision, what he based it on, why he did it, and concluding whether or not that was proper under the ordinance. (1T8:7 to 21)

Township Tree Conservation Officer John Linson testified at the hearing and was questioned by members of the Board, the Board Attorney, Plaintiff's counsel and counsel for the Gargiulos. Mr. Linson testified that he had been a certified and licensed tree expert since 1976 (1T15:8 to 10) and had served as the Harding Township Tree Conservation Officer for 15 or 16 years. (1T21:7 to 9). He summarized his rationale for issuing the challenged tree removal permit as follows:

In this case, the intention of the Gargiulos was to have a nice, well-screened driveway on both sides. So the net effect of the removal and replacement of these trees was not to diminish the screening between properties, but to enhance the screening between properties. I did not even take into account the idea that neighbors might have some kind of emotional attachment to the trees on this old farm road. (1T16:5 to 13)

Mr. Linson testified that he and Brian Bosenberg, the Gargiulos' landscape architect, met on the property and inspected every tree proposed for removal. He stated that they did not consider saving ash trees due to the pervasive ash borer problem and did not view the walnut trees as worthy of preservation, though one near the end of the driveway would be preserved.

(1T16:14 to 19:3). Mr. Linson noted that he gave particular attention to a large (60-inch diameter) Catalpa tree that was leaning over the adjacent property and based on testing with a rubber mallet concluded that it was hollow. (1T19:4 to 23).

Mr. Linson testified that the Township's policy was to not be overly restrictive with respect to the removal of trees, subject to the requirement for planting replacement trees. (1T15:12 to 15). Not only did the Gargiulos' tree removal application include a plan to replace the 28 trees to be removed, but Mr. Linson testified that "there were 370-some-odd trees to be replaced." (1T15:15 to 17). Mr. Linson noted that the Ordinance "allows a lot of flexibility with homeowners." (1T27:13 to 14).

Mr. Linson further summarized the rationale for approval of the Gargiulos' tree removal permit application as follows:

[I]n light of the extensive landscaping, these 370-some-odd evergreens that were to line the driveway on both sides, it looked like a win-win for everybody. There was going to be better screening, healthy screening, problem-free plant material. (1T19:25 to 20:5)

* * *

To me, it was a standard application that really was a positive thing for Harding Township. We were not losing canopy coverage, but we were gaining canopy coverage. We were replacing ash trees that were going to die anyway. We were going to be removing a hazardous catalpa tree before it failed and fell into a neighboring property. (1T20:21 to 22:2)

Mr. Linson opined that replacement of the removed trees with a hedgerow was consistent with the Ordinance's intent to preserve the rural character of the Township. (1T46:22 to 47:5). In that regard, Mr. Linson testified that the Gargiulos' plan to replant over 370 trees "shows that the applicant is very concerned about maintaining screening between the properties." (1T69:5 to 7). Mr. Linson also testified that the Gargiulos' tree replacement plan would provide "an increase in canopy coverage and an increase in screening as opposed to a depletion of screening between properties." (1T69:21 to 24).

With respect to the reason for the application, Mr. Linson testified that the tree removal and replanting of a hedgerow was intended to "beautify the entrance" to the property, as reflected by landscaping plans prepared by a professional landscape architect that proposed planting a hedgerow with over 370 trees. (1T62:13 to 63:6). He acknowledged that the application listed "installation of utilities and driveway improvements" as the reason for the requested tree removal. (1T33:2 to 6). However, Mr. Linson stated that neither subject was relied upon as a reason for issuing the permit. (1T25:13 to 23; 1T38:11 to 20). He testified that he principally relied upon the improved screening that would result from the extensive replacement plantings. (1T16:5 to 10).

Plaintiff presented four witnesses in connection with the appeal before the Board. Richard Schommer, a professional engineer and planner, provided testimony describing the flag lot and surrounding properties. (1T78:5 to 79:3). He testified that at the request of Plaintiff's counsel he reviewed the Master Plan and its tree conservation element. (1T79:4 to 25). Concern was expressed that Mr. Schommer was not qualified as an expert concerning tree removal issues, and in response Plaintiff's counsel indicated that he would rely on testimony by his "tree expert" as to the propriety of Mr. Linson's decision to issue a tree removal permit. (1T80:1 to 81:17).

The next witness called by Plaintiff was Lauren Battista, who resides with her husband, Michael Battista, Jr., in the residence on Lot 6.02. This property is owned by Plaintiff, and Mr. Battista's father is the owner of Plaintiff 529 Waterfront Properties. Mrs. Battista was not qualified as an expert, and her lay testimony focused on her personal fondness for some of the trees on the flag staff of the Gargiulo property that would be removed, particularly the catalpa tree that provides pollen for bees that she keeps on the property on which she resides. (1T88:24 to 96:10). Her testimony was deemed to not be relevant to the question of whether issuance of the tree removal permit was inconsistent with the Ordinance. (Pa72).

Plaintiff then called William Logan, who was offered as an expert in tree issues. However, he had no experience in New Jersey land use or tree removal permitting matters and was not registered as an arborist in New Jersey. (1T108:23 to 118:11). After considerable procedural discussion, the Board decided that limited testimony by Mr. Logan would be permitted at the continuation of the hearing at a subsequent meeting that would be necessary due to the late hour at that point in the proceedings. (1T118:15 to 124:4; Pa73).

At the continued hearing on September 30, 2020, instead of presenting Mr. Logan, Plaintiff presented testimony from a different tree expert, Matthew Weibel, who is a licensed arborist in New Jersey. Mr. Weibel criticized the Gargiulos' tree replacement plan and speculated that the branches of the planned hedgerow might "encroach" on Plaintiff's property by 15 feet when full grown. (2T23:5 to 15). In response, Mr. Linson noted that the first 25 feet of Plaintiff's property adjoining the Gargiulo flag staff is classified as a tree conservation area and, therefore, 15-foot growth onto the property would actually be a benefit, not an "encroachment." (2T47:16 to 24). Mr. Weibel acknowledged that the existing deciduous trees also encroach on Plaintiff's property and that the root expanse of the deciduous

trees is actually more extensive than that of the arborvitaes proposed to be planted. (2T42:15 to 22).

Mr. Weibel went on to opine as to the propriety of tree removal and replacement, noting the importance of avoiding monoculture and using diverse types of trees, though he failed to link this testimony to any factor required to be considered in the Township tree conservation regulations in the Ordinance. (2T30:7 to 32:11). He also testified that removal of deciduous trees and replacement planting of arborvitaes would not serve the indigenous wildlife population, though once again he failed to link this opinion testimony to any Ordinance provisions. (2T32:18 to 33:18). In subsequent questioning by counsel for the Gargiulos, Mr. Weibel acknowledged that there is no ordinance requirement empowering the Tree Conservation Officer to determine whether to issue a tree removal permit based on the genus of specific trees. (2T54:14 to 21).

Mr. Weibel testified that the Gargiulos' proposal would constitute a significant change in screening by adding ground level screening that currently does not exist. In response to a question, he agreed that the proposal would provide more screening "if that's what you want." (2T33:22 to 34:25).

In sum, Mr. Weibel's testimony did not identify any ordinance provision purportedly ignored or violated by Mr. Linson's decision to issue

the contested tree removal permit. Instead, Mr. Weibel's testimony focused on his personal opinion as to desirable tree removal criteria and thus was not relevant to the issue before the Board of Adjustment that was required to be grounded on the criteria in the Township Ordinance.

Counsel for Plaintiff requested an adjournment of the second hearing to allow testimony at a subsequent date by planner Creigh Rahenkamp, who was unable to attend due to a medical problem that arose on the day of the hearing. Plaintiff's counsel presented his request at the beginning of the second hearing, and at that time it was discussed at length by the Board, including consideration of oral objections presented by counsel for the Gargiulos. (2T5:10 to 14:4). The Board decided to hear testimony from Plaintiff's arborist Matthew Weibel before deciding whether to grant the adjournment request. The Board discussed the adjournment request further after Mr. Weibel's testimony and concluded that planning testimony was not necessary or relevant to the issue before the Board concerning whether issuance of the tree removal permit was improper under the Ordinance. (2T56:8 to 59:22; 62:23 to 64:18; Pa73).

After considerable discussion at the close of the public hearing on September 30, 2020, the Board voted 5 to 1 to deny the appeal of issuance of the tree removal permit and thus affirmed the Tree Conservation Officer's

administrative decision. (2T93:14-15). The Board's decision was memorialized on October 15, 2020 by adoption of a Resolution that was a seven page document detailing findings of fact and a statement of reasons for denying the appeal. ("2020 Resolution") (Pa69).

As set forth in the 2020 Resolution, the Board concluded that the fact that the permit application form submitted by the Gargiulos' consultant listed installation of utilities and driveway improvements as the reason for the tree removal request was harmless error and had no impact on validity of the permit. (2020 Resolution, para. 29b; Pa74). In support of that finding, the Board relied on Mr. Linson's uncontested testimony that he did not consider or base his decision on the erroneous statement of purpose in the permit application and that his decision was based on inspection of the property and consideration of the Gargiulos' tree replacement plan submitted with the permit application. (Id.)

The Board determined that the failure to mail a copy of the permit application to the Shade Tree Advisory Committee ("STAC") did not impair propriety of the tree removal permit. (2020 Resolution, para. 29(c); Pa74). The Board noted that this argument was not mentioned in Plaintiff's required statement of reasons submitted with the appeal papers when the appeal was filed, was not the subject of questioning during the hearing proceedings, and

was not raised until closing argument by Plaintiff's counsel, which prevented meaningful consideration of this contention by the Board. Regardless, the Board noted that STAC's input would have been advisory only under Section 225-111 of the Ordinance. (2020 Resolution, para. 29(c); Pa74; Pa84). The Board also noted Mr. Linson's undisputed testimony that STAC had not held a meeting in 2020, that the practice had been to not refer every application to the full Committee, and that the Gargiulos' application was perceived as a standard, non-controversial application. (2020 Resolution, para. 29(c); Pa74).

The Board rejected the argument that the Tree Conservation Officer's decision to issue the permit should be reversed based on the assertion that it was contrary to the broad objective of preserving rural character of the Township as articulated in the Master Plan and Tree Conservation Ordinance. (2020 Resolution, para. 29(d); Pa74). The Board noted that the specific factors required to be considered by Ordinance Section 225-111(D) did not include "preservation of rural character," and the Board also noted that there is no universal consensus of the meaning of "rural character." (Id.).

The Board concluded that Mr. Linson's decision to issue the permit was grounded on his determination that the Gargiulos' proposal would result in improved screening and that there would be extensive tree replacement, which

are specific considerations listed in Section 225-111(D) that could not be ignored. (2020 Resolution, para. 29(e); Pa74). Moreover, the Ordinance does not prohibit the proposed extensive use of the same species in the tree replacement plan, nor does it require use of native species. (Id.). Accordingly, the Board concluded that issuance of the permit was not arbitrary, capricious, or otherwise improper. (Id.).

Finally, with respect to the Catalpa tree, the Board concluded that it should defer to the Tree Conservation Officer's professional assessment of the condition of the tree as potentially creating a safety concern, particularly in light of the fact that the tree is close to the property line and leans towards Plaintiff's property, creating potential liability for the owners of the Gargiulo property should the tree fall. (2020 Resolution, para. 29(f); Pa74).

C. The First Tree Permit Appeal to the Law Division

Plaintiff challenged the Board's decision by filing a complaint in lieu of prerogative writs in the Law Division on October 23, 2020. (Pa7). The attorneys for the parties submitted trial briefs that addressed at length legal issues based on the record that had been developed in proceedings before the Board of Adjustment. However, those legal issues were never adjudicated, because the Court was concerned about the fact that the Tree Conservation Officer had not strictly adhered to the procedural requirement in Section 225-111(C)(3) to mail a copy of the

application to STAC. The Court authorized limited discovery proceedings on this subject, followed by legal argument. The Court was not persuaded by the Tree Conservation Officer's substantial compliance argument and the Board's harmless error argument.

Under these circumstances, counsel agreed to a remand to allow for mailing the application to STAC. The court entered a Remand Order on July 20, 2021 that provided for the Board to "direct the Tree Conservation Officer to mail a copy of the tree removal permit application to" STAC and "thereafter make a new decision on the tree removal permit application in accordance with all provisions of Harding Township Code Section 225-111." (Pa95) (emphasis supplied).

Contrary to Plaintiff's assertion, the requirement in the Order for a new decision was directed at the Tree Conservation Officer, not the Board. Board of Adjustment jurisdiction would arise again only in the event of a new administrative appeal by Plaintiff in response to subsequent action by the Tree Conservation Officer. Significantly, the Court did not retain jurisdiction, though the Order provided that Plaintiff's previously asserted substantive legal arguments were preserved "in the event of a further appeal." (Remand Order, para. 4; Pa96).

D. The Tree Conservation Officer's New Tree Removal Permit Decision and Plaintiff's Appeal to the Board of Adjustment

Per the direction of the Board, the Tree Conservation Officer sent copies of the prior tree removal permit application to STAC members. (Pa102; Pa108). Plaintiff mischaracterizes the Ordinance by implying that STAC action was required (Pb10), but the wording of Section 225-111(C)(3) is unambiguous. The mailing requirement merely provides STAC members with the opportunity to comment, and only a single STAC member did so by sending a brief letter expressing his personal opinion that the mature Catalpa should not be removed. (Pa104¹). In response to that comment, the Tree Conservation Officer conducted a further investigation of the condition of the Catalpa tree and issued a memorandum, dated October 28, 2021, that summarized his further investigation and repeated his prior determination to approve issuance of a tree removal permit authorizing removal of the Catalpa tree. (Pa108). The memorandum also stated that the Tree Conservation Officer re-affirmed prior authorization for removal of 27 other trees. (Id.).

Plaintiff chose to file an administrative appeal of that new decision, which triggered new Board jurisdiction. (Pa105). The initial public hearing on the new appeal was conducted on October 20, 2022. (3T). The Board

¹ This letter was obviously misdated as being issued on September 20, 2022, rather than September 20, 2021.

discussed the appropriate scope of the administrative appeal proceedings and concluded that the hearing should be limited to consideration of actions taken in response to the Remand Order. This procedure was consistent with the fact that the Remand Order provided that in the event of new litigation the parties could seek judicial rulings on claims that previously were raised, but not adjudicated. Adjudication of these claims would necessarily be grounded on and be confined to judicial review of the record of the prior proceedings in 2020.

Proceedings at the second public hearing session on November 17, 2022 were conducted subject to the foregoing limitation, and the Board declined to hear new argument and discussion of issues that had been raised or that could have been raised during the prior proceedings in 2020. (4T5:1 to 7:3). The Tree Conservation Officer testified concerning his further evaluation of the Catalpa tree, which was more extensive than the prior investigation. (4T14:1 to 16:22). This had served as the basis for his conclusion that the Gargiulos should be permitted to remove the Catalpa tree, as summarized in his memorandum. (4T20:6 to 17).

In response to questioning, Mr. Linson testified that after the mailing to STAC he did not receive any additional information as to the 27 other trees

covered by the tree removal permit. He stated that “the original tree permit was justified.” (4T19 to 20).

Plaintiff’s attorney was then given the opportunity to question the Tree Conservation Officer. Before doing so, attorney Lakind stated that he wanted to once again address the contention raised unsuccessfully in the public hearing in 2020 that the tree removal permit was not consistent with the Ordinance. The propriety of rejection of that assertion by the Board was raised in the prior litigation, but was not adjudicated at that time. In response, he was reminded that there was no reason for the Board to hear duplicative argument on this issue, since it could be adjudicated by the court if Plaintiff elected to pursue further litigation based on provisions in the Remand Order expressly stating that such issues had not been waived. (4T22:11 to 23:12).

Plaintiff’s counsel then asserted a new legal contention that had not been raised in the prior Board proceedings and litigation that the proposed tree replacement plan to plant rows of arborvitaes along the sides of the flag staff of the Gargiulos’ property would constitute a fence exceeding a height of 7 feet, thus requiring zoning variance relief. After discussion of Plaintiff’s failure to raise this legal issue previously, the Board determined that there was no basis for hearing testimony or argument on this untimely new issue.

(4T23:13 to 32:3). This legal issue was not raised in Plaintiff's appellate brief in the within action and thus has been abandoned.

Attorney Lakind then proceeded with questioning of the Tree Conservation Officer. This questioning focused on an attempt to obtain a specific quantification of the likelihood that the Catalpa tree would fall due to its impaired condition and the potential timing for doing so and comparison to the arborvitaes planted along the sides of the flag staff of the Gargiulos' property. (4T32:12 to 46:15). The questioning seemed to be premised on the erroneous theory that an imminent safety hazard needed to be demonstrated in order to justify authorizing removal of the Catalpa tree.

Mr. Linson declined to predict a specific time frame or likelihood of tree failure, stating instead that:

You know, at some point in time, with the lean of the tree, the defect in the trunk, the tree's going to fall into the Battista property. We don't know when. We don't know whether it's going to be wind or it's going to be ice or excessive rain or, you know, don't - - it's just it's logical that at some point in time the tree is going to fall. (4T44:3 to 9)

The Tree Conservation Officer then expressed the opinion that:

. . .if the owner of the tree wants to remove it, there's no reason why the town would deny him the privilege of taking down a defective tree. (4T44:21 to 45:1)

The procedural determination made by the Board at the initial hearing on October 20, 2022 did not preclude Plaintiff from presenting testimony by

a tree professional concerning Mr. Linson's further evaluation of the condition of the catalpa tree. (3T71:14 to 73:21). However, Plaintiff's counsel did not present a tree expert at the hearing on November 17, 2022. As a result, Mr. Linson's new evaluation of the condition of the Catalpa tree was not disputed by any expert testimony.

The only witness that was called was Plaintiff's principal, Michael Battista, who provided brief lay testimony to authenticate a photograph that he had taken of arborvitae planted along the Gargiulos' flag staff at an estimated distance of about 3 feet from the property line. (4T47:19 to 49:14).

At the conclusion of proceedings at the public hearing session on November 17, 2022, the Board of Adjustment engaged in considerable dialog and then adopted an oral resolution upholding the decision by the Tree Conservation Officer to repeat and reaffirm issuance of the prior tree removal permit. That oral decision was memorialized by adoption of a written resolution on December 15, 2022 (Pa76) that summarized the Board's reasons for upholding the Tree Conservation Officer in Paragraph 24 as follows:

a. The Board of Adjustment's jurisdiction under N.J.S.A. 40:55D-70(a) is limited to review of the challenged administrative action based on consideration of Harding Township's tree conservation regulations as set forth in Township Code Section 225-111, entitled Tree Conservation. These provisions vest the Tree Conservation Officer with responsibility for review and issuance, if appropriate, of tree removal permits. The issue for the Board is to decide whether his decision was contrary to the Ordinance, not whether the Ordinance

should be modified or whether a different decision would have been better.

b. It was undisputed that copies of the prior tree removal permit application were sent to all STAC members in strict compliance with the Township Tree Ordinance, consistent with the remand order. That action produced only a single response from one STAC member who expressed his personal, non-professional opinion that the Catalpa tree was in excellent condition and that removal of this tree should not be permitted.

c. The Ordinance provides STAC members with the opportunity to comment on tree removal permit applications. The Ordinance does not require STAC to provide comments and does not mandate a hearing before STAC or any other STAC action. Any input from STAC is advisory only, rather than being mandatory.

d. The record is clear that the Tree Conservation Officer considered the lay comments of STAC member Platt concerning the Catalpa tree and in response conducted a further evaluation of the condition of the Catalpa tree as reported in his memorandum to the Board and explained in testimony at the hearing.

e. There was no testimony or evidence in the record to support a finding that the Tree Conservation Officer's investigation was inappropriate or that his conclusions were erroneous.

f. The argument that the Board of Adjustment should reverse the Tree Conservation Officer's decision reaffirming issuance of the tree removal permit based on the contention that it was contrary to the broad objective of preserving rural character as articulated in the Master Plan and Tree Conservation Ordinance was previously rejected based on the reasons articulated in the Board's prior resolution adopted in 2020, which is incorporated herein by reference. This legal contention is also beyond the scope of the current appeal. Other legal contentions raised by attorney Lakind are similarly rejected.

g. The Board of Adjustment engaged in specific deliberations as to the authorization for removal of the Catalpa tree and ultimately concluded that the Board should defer to the Tree Conservation

Officer's professional assessment of the condition of the tree as potentially creating a safety concern, particularly in light of the fact that the tree is close to the property line and leans toward the neighboring property owned by appellants, creating potential liability for the owners of the Gargiulo property. Therefore, the Board concluded that the Gargiulos should not be precluded from removing the Catalpa tree on their property. (Pa79-80)

Plaintiff filed a Complaint in the Superior Court challenging that decision on January 4, 2023 that was docketed as a new action (Pa3). The initially filed complaint was superseded by the filing of a First Amended Complaint on January 12, 2023. (Pa15). Answers were filed by the Board of Adjustment on April 13, 2023 (Pa28) and by the Gargiulos on May 17, 2023. (Pa36). The trial court subsequently conducted oral on January 3, 2024 and thereafter entered an Order and Statement of Reasons on February 9, 2024 that rejected all of Plaintiff's legal contentions and fully affirmed the Board of Adjustment. (Pa54).

Plaintiff then filed the within appeal with the Appellate Division on March 14, 2024, and both Defendants subsequently filed responsive papers.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY UPHELD THE BOARD'S DECISION AFFIRMING ISSUANCE OF A TREE REMOVAL PERMIT BY THE TREE CONSERVATION OFFICER WHO APPROPRIATELY CONSIDERED THE FACTORS LISTED IN ORDINANCE SECTION 225-111(D)

Plaintiff argues that the Board did not perform an appropriate review of Mr. Linson's decision to issue a tree removal permit to the Gargiulos. Plaintiff fails to cite a single decision involving an appeal to a zoning board of adjustment of an administrative decision and instead principally relies on case law involving judicial review of zoning variance decisions. In doing so, Plaintiff fails to recognize the distinction between these materially different functions of municipal zoning boards of adjustment.

In the present context, the Board was not vested with the authority and responsibility to serve as the primary decision-maker as is the case when required to decide a variance request, but instead was reviewing the administrative decision made by the Township Tree Conservation Officer. The burden was on Plaintiff to develop a record establishing that the administrative decision was in error, and Plaintiff failed to meet that burden. Case law cited by Plaintiff concerning analysis by a land use board of an applicant's variance request (Pb23 to Pb26) is not applicable in this materially different context.

Plaintiff ignores the trial court's quotation of the Appellate Division holding many years ago in Kotlarich v. Mayor and Council of the Borough of Ramsey, 51 N.J.Super. 520, 540 (App. Div. 1958) that:

[T]he scope of judicial review of acts of an administrative agency in a quasi-judicial capacity is narrowly limited to an examination and determination of whether it acted arbitrarily, capriciously, or otherwise illegally and to a correction of any abuse of discretion legislatively delegated to it. (Pa060)

Plaintiff attempts to avoid this limited standard of review by reference to the legal principle that issues of interpretation are subject to a de novo review standard, while ignoring the fact that the wording of the Ordinance is not ambiguous. Section 225-111(D) lists 10 factors required to be "taken into consideration" in connection with issuance of a tree removal permit. Judge Minkowitz recognized that the record is clear that the Tree Conservation Officer did not ignore any of the listed considerations. (Pa64, *citing* 1T48:14 to 54:1). Indeed, Plaintiff's counsel ignores the fact that the Tree Conservation Officer addressed each of the 10 factors in response to specific questioning by Plaintiff's counsel at the public hearing. (1T48:14 to 54:1).

At the public hearing, Plaintiff's counsel did not seek clarification of the Tree Conservation Officer's responses as to the 10 factors, but now asserts that the fact that a "factor has been 'considered' without more is not legally sufficient." Pb23. We are left to wonder what additional analysis or explanation was lacking.

As stated by Judge Minkowitz:

The Ordinance simply requires that all factors be considered, which the Officer achieved, rather than a requirement that each factor must be satisfied in its entirety. See Ordinance (emphasis added). Because the Officer credibly considered each factor, including factor 5, the Board's decision to defer to the Officer's expertise when affirming the decision to issue the Permit is reasonable. See Factor 5; Somers Associates, Inc., 241 N.J.Super. at 34[3].² (Pa65-66)

Here, the central issue concerns whether Tree Conservation Officer Linson properly applied the Ordinance by issuing a permit that in his judgment was consistent with at least 2 of the 10 factors required to be considered under Ordinance Section 225-111(D). Plaintiff did not provide any meaningful evidence to overcome the required deference to both this discretionary determination by the Tree Conservation Officer and the Board's determination to uphold that decision.

Indeed, it was within the sound discretion of the Board to provide whatever weight it chose to Mr. Linson's testimony. The Board attorney instructed the Board as follows:

The question isn't whether the Board wants to allow or disallow what somebody wants to do. The question is, and that's cited here, is whether there's error in any order, requirement, decision, or refusal by an administrative officer. The question for the Board, based on what you'll hear tonight, is whether Mr. Linson made a mistake. It's not whether you would do it differently, it's whether he was -- what he did was consistent under the ordinance. * * * You're not making an independent decision; you're reviewing his decision, what he based it

² The page citation reflects an obvious typographic omission. The full citation for the referenced decision is Somers Associates, Inc.v. Gloucester Tp., 241 N.J.Super. 323, 343 (App. Div. 1990).

on, why he did it, and concluding whether or not that was proper under the ordinance. That's how I read the law. (1T 8:7 to 22)

The Board's obligation under N.J.S.A. 40:55D-70(a) was to review Mr. Linson's decision and decide whether there was "error" in that decision or whether issuance of the permit was consistent under the Ordinance. Consideration of the Tree Ordinance shows that the Township Committee intended to vest the Tree Conservation Officer with discretionary authority as to issuance of tree removal permits. Mr. Linson testified that the Township's policy was to not be overly restrictive with respect to the removal of trees, subject to replacement plantings (1T15:12 to 15), and there was no indication that his discretionary judgment had ever been questioned during the more than 15 years that he had served as the Harding Township Tree Conservation Officer.

Plaintiff bears the burden to prove that the decision of the Board was arbitrary, capricious, and unreasonable, which is an extremely heavy burden. Kane Properties, LLC v. City of Hoboken, 214 N.J. 199, 225 (2013). Moreover, judicial review of administrative decisions must be based solely on the administrative record, and the factual findings are presumed to be valid.

As explained by the New Jersey Supreme Court, land use board decisions are entitled to significant deference:

Such public bodies, because of their peculiar knowledge of local conditions must be allowed wide latitude in the exercise of delegated discretion. 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 government cannot interfere. A local [board] 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. (Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 296-97 (1965)).

Plaintiff cannot meet this highly deferential standard of review and prevail on the merits of its prerogative writ claim. The record unequivocally shows that the Board appropriately determined that issuance of the permit was consistent with the applicable ordinance and concluded that there was no evidence that Mr. Linson's decision was in error or contrary to the Ordinance. Accordingly, Plaintiff's arguments should be rejected, and the trial court decision affirming the Board of Adjustment decision upholding issuance of a tree removal permit by the Tree Conservation Officer should be affirmed in all respects.

POINT II

THE TREE CONSERVATION OFFICER AND BOARD OF ADJUSTMENT DID NOT MISCONSTRUE THE ORDINANCE

The contention by Plaintiff that the Tree Conservation Officer and the Board of Adjustment misconstrued the Ordinance is contrary to the record and common sense. Mr. Linson reasonably grounded his decision to issue a permit on at least 2 of 10 factors listed in Section 225-111(D) that are required to be considered prior to issuance of a tree removal permit. Upon doing so, he concluded that the tree removal and replacement plan proposed by the Gargiulos would result in improved screening and increased tree canopy.

Plaintiff's reliance on vague, subjective language concerning preservation of "large trees" ignores the fact that tree size is not included in the list in Section 225-111(D) of specific factors required to be considered prior to issuance of a tree removal permit. Plaintiff also complains that the tree replacement plan approved by the Tree Conservation Officer will involve rows of arborvitae, but Plaintiff fails to point to any restrictions in the Tree Ordinance as to tree species type, species mix or other characteristics that the approved tree replacement plan allegedly contravened.

Plaintiff asserts that Mr. Linson's reliance on the screening factor in Section 225-111(D)(5), was misplaced based on Plaintiff's narrow literal reading of the reference in item (5) to "screening between existing or proposed buildings on

adjoining lots.” (Pb27 to Pb28). Plaintiff also asserts that removal of deciduous trees will decrease screening by reducing the extent of upper tree canopy, thus resulting in a “significant change” in screening. (Pb28). These arguments fly in the face of the commonsense understanding of the concept of screening, which is to provide buffering to reduce visibility between properties. The assertion that reduced screening would be contrary to the Ordinance is grounded on an inappropriate literal reading of the Ordinance language that flies on the face of the commonsense reading of the intent of the Ordinance.

The Complete Illustrated Book of Development Definitions, Fourth Edition, 2015 (Moskowitz, Lindbloom, Listokin, Preiss & Merriam), at p. 461, provides a definition of the term “screening” as follows:

A method of shielding or buffering one abutting or nearby structure or use from another by fencing, walls, berms, or densely planted vegetation.

This definition is reflected in screening requirements in various provisions of the Harding Township Land Development Ordinance. See e.g., Section 225-5 (21) (“buffer strip” definition); Section 225-5(172) (“site plan” definition); Section 225-86 (outdoor storage regulations). The commonsense concept of screening has similarly long been recognized in published court opinions. See e.g., Petition of

Monmouth Consol. Water Co., 47 N.J. 251, 261 (1966); Hawrylo v. Board of Adjustment, Harding Tp., 249 N.J.Super. 568, 575, 584 (App. Div. 1991).³

Similarly, there is no basis for Plaintiff's assertion that factor 10 of the Ordinance "required a more nuanced analysis than the Board employed." (Pb30). Section 225-111(D)(10) required the Tree Conservation Officer to take into consideration:

- (10) Any planned tree replacement or other landscape plan for revegetating cleared areas.

The Ordinance only requires consideration of any replacement plan; it does not require evaluation of the any replacement plan, as urged by Plaintiff. (Pb31 to Pb32). It is undisputed that the Tree Conservation Officer considered Factor 10 and was aware of the fact that the tree replacement plan involved 370 trees to replace the 28 trees authorized to be removed. Therefore, there is no basis for Plaintiff's argument.

Simply stated, this Court should reject Plaintiff's efforts to re-write the Ordinance to accommodate the personal preferences of its principals as to the desired appearance of the flag staff portion of their neighbors' property. The Board of Adjustment had no authority to change the Ordinance or ignore its

³ The Hawrylo case involved an unsuccessful challenge by the Gargiulos' predecessors in title to a setback variance granted to allow construction of a barn on property owned by Plaintiff's predecessors in title with a reduced setback from the flag staff of the flag lot now owned by the Gargiulos. The Appellate Division noted that the Board required screening "so that in a period of a few years ... this thing [the barn] is screened out from the objector's right-of-way drive." Id. at 575.

obvious purpose, and doing so would have directly encroached on the legislative authority of the Harding Township Committee.

POINT III

THE TRIAL COURT CORRECTLY UPHELD THE DENIAL OF PLAINTIFF'S ADJOURNMENT REQUEST

The Board of Adjustment did not summarily deny the request by Plaintiff's counsel for a continuation of the hearing so that Creigh Rahenkamp, a professional planner, could testify. The transcript reflects that the Board heard initial arguments by Plaintiff's counsel as to why Mr. Rahenkamp's testimony was believed to be necessary to the appeal at the beginning of the continuation of the hearing on September 30, 2020. (2T6:24 to 14:1). Rather than summarily denying the request, the Board stated that "[we] would like to hear from the arborist. And then if we feel we need to hear from Mr. Lakind's planner, we can take it up at the end." (2T14:24 to 15:1). After hearing testimony by Mr. Weibel, Plaintiff's tree expert, the Board concluded that it did not need to hear testimony from a planner, because such testimony was not relevant. (2T59:5 to 22; 62:23 to 64:6.)

Plaintiff's counsel acknowledged that he presented testimony by professional planner Richard Schommer at the initial hearing on August 25, 2020, but he stated that he had not prepared Mr. Schommer to address planning issues that allegedly arose in response to Mr. Linson's testimony. (2T8:16 to 9:16). That assertion is inconsistent with the following

interchange at initial hearing between Plaintiff's attorney and planner Schommer:

Q. Now, at my request did you undertake a review of the Master Plan to assess what the policies of Harding Township are with regard to trees?

A. I did look at that. (1T79:4 to 8)

Moreover, at the close of the August 25 hearing, Plaintiff's counsel did not indicate any intention to call a different planner at the continued hearing. Instead, he stated:

MR. LAKIND: I don't have my plans to bring any additional witnesses, number one. * * * But I think as a practical matter, it's not going to come to play. Mr. Logan is my last witness, as I said. (1T122:9 to 14)

The Board's decision to deny the request for an adjournment to allow Plaintiff to present testimony from Mr. Rahenkamp was memorialized in the Resolution as follows:

This request was discussed by the Board, which concluded that additional planning testimony by a second planner [was] not relevant to the narrow issue at hand of determining whether issuance of the tree removal permit was improper under the Township Tree Conservation Ordinance. It was noted that Mr. Schommer had been presented by attorney Lakind at the initial hearing. (2020 Resolution, para. 26)

The Board was specifically authorized by N.J.S.A. 40:55D-10(e) to "exclude irrelevant , immaterial or unduly repetitious evidence." Moreover, the Board was authorized to limit the number of witnesses presented by

Plaintiff. Consistent with N.J.S.A. 40:55D-10(d), Harding Township Ordinance Section 225-17(C) provides that:

The testimony of all witnesses shall be taken under oath or affirmation by the presiding officer or person designated by him, and the right of cross-examination shall be permitted to all interested parties through their attorneys, if represented, or directly, if not represented, **subject to the discretion of the presiding officer and to reasonable limitation as to the time and number of witnesses.** (emphasis supplied)

The proposed planning testimony was not relevant to the issue at hand concerning whether Harding Township Tree Conservation Officer John Linson properly issued a tree removal permit consistent with the considerations listed in the Ordinance. Indeed, this was recognized by Plaintiff's counsel when he abandoned additional testimony by planner Richard Schommer at the first meeting and indicated that he would rely on testimony by his "tree expert." (1T81:14 to 17).

In summary, the fact that the hearing was not carried to a third meeting to allow Mr. Rahenkamp to testify is not a basis upon which to set aside the tree removal permit. Judge Minkowitz recognized that there is no legal principle that would justify judicial override of the Board's discretionary determination that the circumstances did not entitle Plaintiff to an adjournment to present additional planning testimony directed at the assertion that issuance of the permit was contrary to the Tree Conservation Ordinance. That judicial decision should be affirmed by this Court.

CONCLUSION

For the foregoing reasons, defendant Harding Township Board of Adjustment respectfully submits that this Court should reject all of the Plaintiff's claims and affirm the decisions by the trial court and Board of Adjustment upholding the tree removal permit issued to the Gargiulos by the Harding Township Tree Conservation Officer and the Tree Conservation Officer's re-affirmance of the permit.

Respectfully submitted,

McCARTER & ENGLISH LLP
ATTORNEYS FOR DEFENDANT
HARDING TOWNSHIP
BOARD OF ADJUSTMENT

By: /s/ Gary T. Hall
Gary T. Hall

Date: October 9, 2024

529 WATERFRONT PROPERTIES, L.P., Plaintiff/Appellant, v. MICHAEL GARGIULO, PATRICIA GARGIULO and the BOARD OF ADJUSTMENT OF THE TOWNSHIP OF HARDING, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-2009-23 On Appeal from: Superior Court Of New Jersey, Law Division, Morris County Docket No. MRS-14-23 Sat Below: Hon. Stuart A. Minkowitz, A.J.S.C.
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**REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT,
529 WATERFRONT PROPERTIES, L.P.,**

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PRELIMINARY STATEMENT

This brief is submitted in reply to the response briefs filed by Michael and Patricia Gargiulo (the “Gargiulos”) and the Harding Township Board of Adjustment (the “Board”) in this matter.

The Gargiulos, the Board, and Appellant, 529 Waterfront Properties, LP (“Waterfront”), agree that an ordinance is to be construed in accordance with its plain language. However, if an ordinance is ambiguous, it is appropriate to consider extrinsic aids to construction. Appellant maintains that factor 10 of § 225-111(D) is ambiguous. Respondents maintain that it is not because § 225-111(D) only requires the Tree Conservation Officer to “consider” the factor and he did so; the meaning of any factor is therefore irrelevant. Appellant maintains that “consideration” is not enough; each relevant factor must be evaluated against the language in the Ordinance.

Second, Respondents confine their focus on two of the ten factors listed in Ordinance § 225-111(D), but ignore the following language which precedes the listing of factors:

Standards for permit issuance. **To the greatest extent practicable, large trees, . . . should be preserved.** In addition, the following factors shall be taken into consideration in determining whether to issue a permit for tree cutting or removal:

*

*

*

(Emphasis added). Based on that language, the goal of retaining large trees should have been the paramount consideration in the permit analysis outweighing the

listed factors which, because of the use of the phrase “in addition,” were secondary to the expressly stated goal.

Appellant maintains that the language in factor 10 is ambiguous; and that factor 5 was misconstrued and does not support the permit grant. Since the language in factor 10 was capable of more than one reasonable construction, the Board of Adjustment and the Court should have consulted extrinsic interpretative aids, the Master Plan and the Ordinance preamble, in order to interpret the ambiguous language. To the extent that this should have been done, testimony from a land use planner would have been relevant. The Respondents claim that such testimony is irrelevant because all factors are clear and, in any event, the Ordinance only requires that they be “considered.” (Gb32 to Gb34; BAb3, BAb33).

Since the resolution of these issues turns on principles of administrative law, they are legal in nature and should be reviewed *de novo*.

Michael and Patricia Gargiulo note that 27 of the 28 trees at issue have been destroyed and question what relief Appellant seeks. While the trees are lost, Appellant seeks implementation of a replacement plan that is consistent with the Ordinance language and objectives. And while it would be expensive to do so, Respondents chose to remove the trees after they succeeded in vacating a preliminary injunction preventing them from doing so. (Pa118).

REPLY TO RESPONDENTS' STATEMENT OF FACTS

The Gargiulos make a number of factual assertions in their Statement of Facts that are incompatible with the record. At Gb7,¹ the Gargiulos note, without record citation, that Mr. Linson testified that the proposed tree replacement plan was positive because it “replaced trees that were going to die.” Mr. Linson actually said that “[w]e were replacing **ash** trees that were going to die.” (1T20:24 to 25). Only four of the 28 trees were ash trees. (1T22:20 to 1T23:2; 1T43:23 to 25; 1T86:20 to 22).

The Respondents argue that Mr. Linson’s decision was correct because of his view that the replacement plan was “consistent with the Ordinance’s intent to preserve the rural character of the Township.” (Gb8). This is not an opinion within the purview of an arborist, it is a planning issue that should have been considered by the Board. Setting that aside, not only did the Board decline to consider this justification but it prohibited testimony by Appellant on this issue. Nor can Mr. Linson’s view be reconciled with the express Ordinance language which seeks to preserve large trees to the “greatest extent practicable,”

¹ “1T” refers to the Board of Adjustment hearing transcript of August 25, 2020.

“2T” refers to the Board of Adjustment hearing transcript of September 30, 2020.

“3T” refers to the Board of Adjustment hearing transcript of October 20, 2022.

“4T” refers to the Board of adjustment hearing transcript of November 17, 2022.

“Gb” refers to the response brief of Michael and Patricia Gargiulo.

“BAb” refers to the response brief of the Board of Adjustment.

§ 225-111(D), which presumably fosters the maintenance of the rural environment.

With regard to Waterfront's proposed witnesses, the Board questioned whether its New York based tree expert, William Logan,² was qualified to opine as to the indicia of "rural character." (1T113:11 to 14). In addition, the Board refused to allow Rusty Schommer, a local planner, to testify on this issue and precluded Waterfront from bringing a planner, Creigh Rahenkamp, to address this issue because it was, in the Board's view, irrelevant. (Pa74, ¶ 29(d)). Yet, the Gargiulos argue that the decision of Mr. Linson, an arborist, on the land use impacts of the replacement plan should be affirmed because it "preserves the rural character of the Township". (Gb8; Gb12).

At the first day of hearing, Appellant's counsel did state that he thought Mr. Logan (with whom the Board expressed displeasure because of his lack of experience in New Jersey) would be the last witness. However, counsel indicated he wished to discuss the matter with his client before deciding if additional witnesses were needed. (1T122:15 to 22). That was the Board's understanding as well inasmuch as the Chairperson noted, at the conclusion of the August hearing,

² William Logan has authored four books on the impact of trees, taught at the New York Botanical Garden for two decades, has been a consultant for the New York City Department of Parks and Recreation, as well as to churches and museums, lectured at a number of arboretums, among them the Arnold arboretum at Harvard, and rendered opinions on the land use impact of plantings on the character of properties and the landscape. (1T106:24 to 1T108:22; 113:21 to 1T114-10).

that there were no stipulations by the applicant's or the objectors' counsel as to whether additional witnesses would be called. (1T123:22 to 25). In addition, all parties anticipated that Mr. Logan would be providing testimony at the next meeting. (1T118:15 to 1T124:4). Given the Board's – erroneous – view that Mr. Logan lacked the expertise to testify, Appellant decided to bring a land use planner, Creigh Rahenkamp, to that meeting in lieu of Mr. Logan. Therefore, all parties knew that there would be further testimony.

Finally, Appellant's counsel did not, as the Gargiulos argue (Gb11), mischaracterize the Ordinance factors as "requirements." At the hearing, counsel merely said that "item 10 of the ordinance required Mr. Linson to assess the appropriateness of the tree replacement plan" (2T31:15 to 18), not that satisfaction of any particular factor was a requirement. The Ordinance uses the peremptory "shall be taken into consideration" in the paragraph describing what is to be considered. (Pa85; § 225-111(D)). The Gargiulos' criticism of counsel's statement is erroneous and their assessment of the Ordinance is inaccurate.

ARGUMENT

POINT I

IT IS INSUFFICIENT FOR AN ADMINISTRATIVE OFFICER TO MERELY “CONSIDER” FACTORS LISTED IN A STATUTE OR ORDINANCE WITHOUT EVALUATING THOSE FACTORS AGAINST THE ORDINANCE LANGUAGE

A. An Administrative Officer Must Do More Than Merely “Consider” Factors and the Board Failed to Do So

The Respondents argue that “the plain language of the Ordinance only required ‘consideration’ of the factors – not an evaluation.” (Gb28; see also BAb3 and BAb33). It is a fundamental principle of administrative law that an administrative officer, called upon to assess factors listed in a statute or ordinance, must do more than claim to have considered them. He or she must evaluate the evidence against the listed factors.

In *State v. Bender*, 80 N.J. 84, 93 (1979), the Supreme Court ruled that a determination under a statute which lists factors to be considered will not be upheld if it

(a) was not premised upon a consideration of all relevant factors, (b) was based upon a consideration of irrelevant or inappropriate factors, or (c) amounted to a clear error in judgment. *Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

See also Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (involving review of a permit issued by the Federal Department of Transportation which permitted a proposed highway to encroach on parkland) and the cases cited therein.

In addition, a Court undertaking a judicial review must act “as a guardian of the statute to insure that its mandate is fulfilled and that all environmental factors are considered.” *Crema v. New Jersey Dep’t of Environmental Protection*, 193 N.J. Super. 505, 510 (App. Div.) *certif. den.* 96 N.J. 307 (1984). If merely considering factors inoculated an administrative determination from judicial review, then a Court could not fulfill this mandate.

Neither the Board nor the Court construed the two relevant factors: factors 5 and 10. As the Board argued:

The Ordinance only requires consideration of any replacement plan; it does not require evaluation of any replacement plan, as urged by Plaintiff. (Emphasis in original).

(BAb33).

The delegation of authority by the governing body was subject only to a requirement that the Tree Conservation Officer give consideration to 10 factors enumerated in Section 225-111(D).

(BAb3). The lower Court agreed: “[t]he Ordinance simply requires that all factors be considered, which the Officer achieved, rather than a requirement that each factor must be satisfied . . .” (Pa65; emphasis in original; see also Pa66). No effort was made to evaluate the application against the text of the Ordinance.

The cases cited by the Gargiulos in Point I(B)(2) are not to the contrary. *Lake v. Ocean City*, 62 N.J.L. 160, 162 (1898) involved review of a legislative determination. In *C.R. v. M.T.*, 257 N.J. 126, 132 (2024), the statute at issue required a court to “consider” certain factors. In doing so, the lower courts and the

Supreme Court there focused on the meaning of the language in each of the factors and undertook an assessment of whether they were properly construed. *See e.g. id* at 137 and 145 to 149. The Courts did not, as the Gargiulos argue here, merely find that the lower court “considered” the relevant factors. In *State v Green*, 62 N.J. 547 (1973), the Supreme Court evaluated the evidence against the statutory factors.

Therefore, the Tree Conservation Officer, the Board of Adjustment, and the Court were required to evaluate the evidence against the language used in the Ordinance factors. In order to undertake this evaluation, they should have focused first on the language of the Ordinance. The paramount goal of the Ordinance, as expressly stated in the “standards for permit issue,” § 225-111(D), was to preserve large trees to the “greatest extent practicable.” Merely claiming to have “considered” two factors is insufficient.

B. Sections 225-111(D)(5) Did Not Support Issuance of the Permit

Without any basis in the language of the Ordinance, the Tree Conservation Officer concluded that increased screening is always preferred, irrespective of its impact on the properties screened. While factor 5 anticipates a consideration of whether there would be a “change in the screening,” it does not say that all increases in screening weigh in favor of issuing a permit.

By its terms, this factor limits consideration to a change in screening “between . . . buildings . . . on adjoining lots.” Here, the increased screening was not between buildings on adjoining lots, it was between a building and a right-of-way. The Ordinance presumably used the phrase “between . . . buildings . . . on adjoining lots” intentionally. Screening homes with trees in side and rear yards may be beneficial. Screening the front yard of Waterfront’s home by the installation of trees in the right-of-way on which it fronted is tantamount to a property owner placing a barrier of trees in the front yard of a neighbor. By doing so, the Gargiulos walled in Waterfront’s property and impaired the view of vistas encouraged by the Master Plan. The change in screening was detrimental.

The Board argues that Appellant’s consideration of factor 5 is too literal. Yet, the Board and the Gargiulos argue that the “shall be considered” language of § 225-111(D) must be afforded a literal construction and prevail over other language in the Ordinance which seeks the preservation of large trees to the “greatest extent practicable.” § 225-111(D)(10).

POINT II

INASMUCH AS THE LANGUAGE IN FACTOR 10 IS AMBIGUOUS, ITS INTERPRETATION SHOULD HAVE BEEN INFORMED BY MR. WEIBEL’S TESTIMONY, THE LANGUAGE IN THE MASTER PLAN, AND THE ORDINANCE PREAMBLE

In Point II of their brief, the Gargiulos argue that there is no need to consider

the Master Plan (and presumably the Ordinance preamble and the first sentence of § 225-111(D)) because factors 5 and 10 are not ambiguous. (Gb32). Statutory language that is susceptible to more than one reasonable interpretation is ambiguous, *Cashin v. Bello*, 223 N.J. 328, 335 (2015), and, if a statute is ambiguous, a court may consider extrinsic aids to its construction. *DiProspero v. Penn*, 183 N.J. 477, 492 (2005).

Factor 10 reads in its entirety as follows: “Any planned tree replacement or other landscape plan for revegetating cleared areas.” This language does not specify what attributes of the replacement plan are to be considered. It does not say whether the species of the trees replaced is relevant, whether the species of the replacement trees are relevant, it does not say whether the age of the replaced trees matters, or whether their size is to be considered. It is devoid of standards.

Given these omissions, the language in factor 10 is ambiguous because that language is capable of many reasonable interpretations. Waterfront sought to provide a basis to construe this factor by calling its arborist, Mr. Weibel, who testified about the benefits and drawbacks of elements of a replacement plan. Mr. Linson agreed with Mr. Weibel’s analysis, but Mr. Weibel’s testimony was disregarded because it was characterized as a “criticism of the ordinance.” (Pa73). The Board also determined that planning testimony, rooted in the Master Plan and Ordinance preamble, was not relevant to inform the interpretation of factor 10.

While, as the Gargiulos argue, the Tree Conservation Officer “cannot be tasked with evaluating the effect of the Master Plan” (Gb33), the Board of Adjustment and the lower Court should, as part of their *de novo* review, have done so.

The Gargiulos, in conclusory terms, argue that the Master Plan, had it been considered, would support the decision of the Tree Conservation Officer. They do not address, however, the Board’s finding that the Master Plan and Ordinance preamble were irrelevant. Nor do the Gargiulos address those provisions of the Master Plan that are incompatible with their position. By way of example, the Conservation Plan element seeks to “maintain woodlands and specimen trees;” it seeks to preserve native vegetation compatible with local animal habitats; and it seeks to avoid suburban growth patterns. The Historic Preservation element seeks to maintain ancient trees and assure their visibility from public roads. The Land Use Plan element seeks to “retain open vistas and fields . . .” (Pa128 to Pa129).

The Ordinance preamble seeks to “mitigate the degradation of Harding Township’s natural resources, to maintain the Township’s rural landscape . . .”, to “protect the rural character and natural resources of the Township . . .”, to preserve “large specimen trees or other historic vegetation.” § 225-111(A)(1) and (2). “To the greatest extent practicable,” the Ordinance reads, “large trees . . ., should be preserved.” § 225-111(C)(6). All of these goals have been ignored because the

Respondents believe that they are irrelevant since the Tree Conservation Officer “considered” two factors.

The interpretation of the factors at issue, which the Ordinance characterizes as “additional” factors, should have been informed by other language in § 225-111(D), and the goals of the Township set forth in the Ordinance preamble and Master Plan. (Pa82 to Pa85).

POINT III

THE BOARD ERRED WHEN IT REFUSED TO CONSIDER PLANNING TESTIMONY

The Board did have the authority to limit witnesses. However, because it did so on relevance grounds, its decision must be reviewed *de novo*. *Konop v. Rosen*, 425 N.J. Super. 391, 401 (App. Div. 2012). The Board employed an improper test because it based its decision on the erroneous conclusion that planning testimony about the Master Plan was irrelevant. (Pa74). Even if that decision were reviewed under an abuse of discretion standard, the preclusion of relevant evidence is such an abuse. *Griffin v. City of E. Orange*, 225, N.J. 400, 423 (2016).

Creigh Rahenkamp was not a “second planner.” (Gb35, Gb36). The Board refused to hear the planning testimony of Rusty Schommer because “his professional background did not encompass tree removal issues . . .” (Pa72). The planning testimony was not, as the Gargiulos argue at Point III(B), legal in nature.

Planners routinely evaluate land use applications against master plans. *See e.g. Price v. Himeji, LLC*, 214 N.J. 262, 271 (2013); *Kane Properties, LLC v. City of Hoboken*, 214 N.J. 199, 207-8 (2013); *Trust Co. of New Jersey v. Planning Bd. of Borough of Freehold*, 244 N.J. 553, 565 n. 6 (1990).

The Board argues, at BAb28, that Waterfront should have submitted evidence to overcome the “required deference to the discretionary decision of the Tree Conservation Officer” Waterfront did elicit evidence, principally through its arborist, Mr. Weibel, and insofar as it sought to introduce planning evidence, the Board determined that planning testimony was “not relevant to the issue at hand.” (BAb37).

While Appellant’s counsel did not, as the Gargiulos argue (Gb38), use the word “ambiguous” when arguing for the relevance of the Master Plan, he described factor 10 as “vague” (3T13:24; 3T37:9 to 21), and explained planning testimony was needed to describe the policies and goals of the Master Plan (1T73:1 to 8).

POINT IV

EVEN IF THE BOARD HEARD EXTENSIVE TESTIMONY, THAT DOES NOT EXCUSE ITS FAILURE TO EMPLOY THE CORRECT SCOPE OF REVIEW

The Board did not undertake a *de novo* review because it was told by its counsel that “You are not making an independent decision.” The Board attorney instructed the Board, “you’re reviewing his decision” “It’s not whether you

would do it differently . . .” (1T8:7-22; 1T8:12-22; Pa74). The Board Resolution explicitly states that the Board reviewed the permit decision under an “arbitrary and capricious standard” (Pa74, ¶ 29(e)); this error was compounded when the Court deferred to the Board’s assessment.

The Gargiulos do not address Appellant’s argument on the scope of review that should have been employed by the Board in reviewing the Tree Conservation Officer’s decision. Unlike the Gargiulos, the Board argues that it need not undertake a *de novo* review of that decision. The Board’s brief conflates the scope of a court’s review of a board of adjustment’s decision with the scope of a board of adjustment’s review of an administrative officer’s decision. In the first context, findings on issues of law are reviewed *de novo*, *Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Tp. of Franklin*, 233 N.J. 546, 559 (2018), and findings on issues of fact are reviewed under the arbitrary and capricious standard. *Kotlarich v. Mayor and Council of the Borough of Ramsey*, 51 N.J. Super. 520, 540 (App. Div. 1958), on which the Board relies, involved a Court’s review of a factual not a legal determination. (BAb27).

However, when a board of adjustment reviews a decision of an administrative officer under *N.J.S.A.* 40:55D-74, that review is *de novo*. *Evesham Twp. Zoning Bd. of Adjustment v. Evesham Twp. Council*, 169 N.J. Super. 460, 471 (L. Div., 1979) *aff’d o.b.* 176 N.J. Super. 503 (App. Div. 1980) *rev’d, on other*

gr'nds. 86 N.J. 295 (1981) (“*N.J.S.A.* 40:55D-74 . . . expressly provides for the broadest possible scope of review”); *see also Kane Props., LLC v. City of Hoboken*, 214 N.J. at 227. The Board fails to cite or discuss *N.J.S.A.* 40:55D-74 or *Evesham, supra*, and while it cites *Kane* (BAb29), it does so for an unrelated proposition. Contrary to the Board’s argument (BAb26), the Board was vested with the authority to exercise “all of the powers of the administrative officer” and to make its own decision. *N.J.S.A.* 40:55D-74. By failing to do so and by applying the arbitrary and capricious standard, the Board erred; by deferring to the Board without addressing this issue of law which was raised before it, the Court compounded that error. Appellant has yet to have this issue addressed.

CONCLUSION

For the foregoing reasons, the decision of the trial court should be reversed and the matter should be remanded to the Board of Adjustment.

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