SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No.: A-002119-24 T4

DIAMOND CHIP REALTY, LLC, Plaintiff/Appellant, v. TOWNSHIP OF SPARTA PLANNING BOARD, Defendant/Respondent.	Civil Action ON APPEAL FROM THE ORDER OF THE SUPERIOR COURT, LAW DIVISION, SUSSEX COUNTY DATED MARCH 5, 2025 Docket No.: SSX-L-296-24 Sat Below: Hon. Stuart A. Minkowitz, A.J.S.C.

BRIEF OF APPELLANT DIAMOND CHIP REALTY, LLC

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PRELIMINARY STATEMENT

This case is the third in a series of litigations concerning the development of a proposed warehouse. In 2021, Diamond Chip Realty, LLC ("DCR"), submitted application to the Township of Sparta Planning Board (the "Planning Boad") for preliminary site plan approval for a proposed warehouse facility. Warehouses are expressly permitted in the subject zone.

The Planning Board took jurisdiction and the application proceeded to public hearings between March 2022 and July 2022. Following the fifth (5th) hearing of the application, DCR elected to revise its proposal to address comments of the Planning Board and members of the public.

Although zoning permits warehouses, public opposition to the Application mounted. In November 2022, Neill W. Clark, the co-founder with Anand Dash, of a citizens' interest group formed to challenge DCR's application, was elected to the Township of Sparta Council. Currently, Clark is the Township's mayor, and Dash is the Township's attorney.

In December 2022, the first litigation arising from the application brought by Clark and Dash was dismissed. Subsequent litigation brought by DCR resulted in the unprecedented disqualification of eight (8) members of the Planning Board due to such members' membership in the objector group formed by Clark and Dash.

In May 2024 the application resumed before the Planning Board. Despite such hearing being the sixth (6th) on the application, DCR voluntarily extended the Planning Board's time to act on the Application to July 1, 2024.

The Planning Board quickly resumed its course of obfuscation and delay.. To that end, and despite the Planning Board having already taken jurisdiction and commenced review on the merits, it directed that the application proceed to a plenary, jurisdictional hearing to determine whether it had authority (i.e., "jurisdiction") to grant the requested site plan approval. The Planning Board also decided to strike the prior hearings from the record and restart hearing of the application. Collectively, those determinations had the effect of putting the application at "square one" *after* the passage of more than thirty (30) months from the date of filing and seven (7) public hearings.

On July 1, 2024, DCR commenced this case which, at base, seeks only to affect the Planning Board's compliance with the Municipal Land Use Law ("MLUL") in its administration of the application. Yet, the trial court's decision affirming the Planning Board's actions does precisely the opposite. The trial court held that Planning Board acted within the scope of its authority in directing a plenary, jurisdictional hearing, to determine whether (or not) it would review the application on the merits, notwithstanding that MLUL mandates that land-use boards "grant or deny" complete applications within a specified statutory,

and makes no provision within its comprehensive framework for jurisdictional hearings. The trial court also affirmed the Planning Board's decision to restart hearing of the application merely because DCR modified its plans to reduce its project's footprint, and to provide the reconstituted Planning Board, now reconstituted due to the pervasive conflicts of its regular membership, an opportunity hear the testimony and evidence anew. If permitted to stand, the trial court's ruling will set a dangerous precedent that the MLUL's policy of ensuring prompt and cost-effective adjudication of land-development applications can simply be ignored.

The MLUL provides DCR the remedy of automatic approval for the Planning Board's conduct. Under the statute, DCR's application was to be deemed approved where, as here, the Planning Board failed to timely act. Under the well-settled law, the only exceptions to this remedy arise where the board's delay was either inadvertent or unintentional. Yet, the trial court did not endeavor to analyze the Planning Board's proofs that its delay was inadvertent or unintentional – of which there were none – instead concluding that the courts could not consider automatic approval unless and until the Planning Board made a determination as to its authority (i.e., "jurisdiction") to grant the requested relief. Such ruling, like the trial court's other rulings, finds no support within the MLUL and plainly contradicts its policy.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

A. DCR's Preliminary Site Plan Application

DCR is the developer of a proposed warehouse facility to be located at 33 Demarest Road, within the Economic Development ("ED") Zone District of Sparta Township (the "Township"). Pa39.[2] A "warehouse" use is expressly permitted in the ED Zone under the Township's Comprehensive Land Development Code (the "Zoning Ordinance"). Pa319-22.

On November 15, 2021, DCR submitted its development application to the Planning Board for preliminary site plan approval, with no variances ("Application"). Pa39; Pa725.

On March 2, 2022, the Planning Board took jurisdiction and the Application proceeded to public hearing. 1T11:13-18.[3] DCR presented the testimonies of its representatives and professionals. The Application did not complete and was carried to the Planning Board's next available regularly scheduled meeting. 1T208:11-14.

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[1] The procedural history and facts of this case are interrelated and have therefore been combined to avoid repetition and for convenience of the court.

[2] "Pa" refers to plaintiff's/appellant's appendix.

[3] Transcripts of the proceedings before the Planning Board are herein referred to as follows: "1T" refers to March 2, 2022 hearing; "2T" refers to the April 6, 2022 hearing; "3T" refers to the May 4, 2022 hearing; "4T" refers to the June 1, 2022 hearing; "5T" refers to the July 6, 2022 hearing; "6T" refers to the May 1, 2024 hearing; "7T" refers to the June 5, 2024 hearing. The transcript of the trial proceeding is herein referred to as "8T".

On or about April 4, 2022, Anand Dash ("Dash"), the current Township Attorney for the Township of Sparta (the "Township"), and Neill W. Clark, the Township's current Mayor, and co-founders of Sparta Responsible Development ("SRD"), an interest organization formed to challenge the Application, raised an application to the Sparta Township Zoning Board (the "Zoning Board") purporting to seek an "interpretation" of the Zoning Ordinance (the "Interpretation Application"), but actually seeking a determination of the Zoning Board that DCR's Application was for a non-permitted use. Pa333-40.

On April 6, 2022, the Application continued before the Planning Board. Addressing the contentions raised by Dash and Clark that the Planning Board lacked jurisdiction, the Planning Board explained: "[W]arehouse is explicitly permitted so ***the [Planning Board] has jurisdiction, as a Planning Board to hear an application – there is no doubt about that*** – for a warehouse". 2T35:21-24 (emphasis added). Although the Planning Board did not memorialize its jurisdiction to review the Application in a resolution, the continuation of the hearing of the Application was a tacit acknowledgment of the Planning Board attorney's correct legal interpretation that the Planning Board has jurisdiction to review the Application.

B. Objectors Fight The Application By Any Means Necessary

In May 2022, the Interpretation Application brought by Dash and Clark proceeded and failed, with the Zoning Board determining that it lacked jurisdiction to review DCR's Application which was pending before the Planning Board. Pa393-400.

In July 2022, Dash and Clark commenced suit in the Superior Court seeking, *inter alia*, to enjoin the Planning Board from hearing DCR's Application and for a declaratory ruling that DCR's Application was for a "trucking terminal", not a warehouse, such that DCR would require a "use" variance pursuant to § 70(d) of the MLUL, which only the Zoning Board had authority to grant (the "Dash/Clark Action"). Pa403-32.

On December 2, 2022, Judge Minkowitz succinctly dismissed the Dash/Clark Action with prejudice for failure to state a claim, which was affirmed by the Appellate Division. Pa433-46.

After failing to convince the Planning Board to halt DCR's Application, falling flat on the Interpretation Application, and with the Dash/Clark Action then on its way to dismissal, on September 17, 2022, Clark announced his candidacy for the Township's Council, running with Dan Chiariello ("Chiariello") and Dean Blumetti ("Blumetti") on an anti-development platform

targeting warehouses and DCR's Application, dubbed "***ON YOUR SIDE, NO MEGA-WAREHOUSES***". Pa447-49.

Despite the fact that DCR's Application was pending before the Planning Board, the municipal board delegated exclusive statutory authority to hear and determine site plan applications – which authority is expressly independent from the governing body to which Clark sought to be elect – he was trumpeting on the campaign trail that he would utilize his standing within SRD and professional legal experience to affect the manner of the Planning Board's review. Indeed, Clark's campaign marketing materials touted that he was "co-leading legal effort to stop Sparta mega-warehouse"; that he "co-founded and [is the] former president of Sparta grassroots group to stop mega-warehouses"; and that, as a practicing attorney, he would "use[] [his] legal experience to challenge the mega-warehouse developer's experts and professionals and will continue to apply these skills as a Sparta Town Councilperson". Pa450-55. For their parts, both Chiariello and Blumetti trumpeted that, if they should be elected, they too would apply their professional experience and influence to stop warehouse development in the Township. Pa447-49.

With those promises, Clark, along with Chiariello and Blumetti were elected in November 2022 and succeeded to the Township Council in January 2023. They immediately took to making good on their anti-development, anti-

warehouse promises, installing eight (8) members of SRD on the Planning Board. Pa459-515.

C. The Superior Court Dismantles Conflicted Planning Board

On September 20, 2023, DCR commenced suit against the Planning Board (hereinafter, "DCR I"), seeking to disqualify all SRD members and to compel the Planning Board, as reconstituted, to hear and decide the Application within thirty (30) days of the entry of judgment. Pa293-534.

On March 28, 2024, Judge Minkowitz – who also presided over and dismissed the Dash/Clark Action – entered final judgment in DCR I. Pa534-548.

Finding that "the eight (8) identified appointees [to the Planning Board] are current and active members of an organization that was solely formed to challenge DCR's application, there is a clear conflict, as its virtually impossible to separate their organizational membership goals in SRD, and the impartiality necessary to render a fair determination on a site plan approval", Judge Minkowitz disqualified the eight (8) challenged members of the Planning Board. Pa534-548.

Regarding the timing and manner of the Planning Board's adjudication of DCR's Application, Judge Minkowitz explained that § 46 of the Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-1 *et seq.*, "must be read in conjunction with the part of the part of this section giving a municipality 45 days to act on a

completed application and, when so read, as granting a municipality two 45-day periods within which to act on a filed application". Pa541-42. Further, "the Planning Board would be required to render judgment within 45 days upon submission of a complete application". Pa542. Accordingly, Judge Minkowitz held that "[t]he 45-day period to hold a hearing shall begin upon entry of the accompanying Order. Pa543. The Planning Board shall thereafter render a decision in accordance with the MLUL". Id. As such, DCR understood the Court's holding in DCR I as mandating the Planning Board's final adjudication of the Application within forty-five (45) days of the March 28, 2024 entry of judgment, except as extended by DCR.

D. Reconstituted Planning Board Decimates Application

On April 29, 2024, DCR wrote to the Planning Board to address certain preliminary issues, including the time available for the Planning Board's consideration and adjudication of the Application. Pa567.

Concerning the Planning Board's time to hear and decide the Application, DCR indicated that it would consent to a period of ninety-five (95) days from the date of the March 28, 2024 Order. Pa569. Moreover, as DCR had previously advised the Planning Board, it was amendable to as many special meetings as the Planning Board deemed necessary to ensure that the Application was timely adjudicated. Pa551.

i. May 2024 Hearing

While DCR remained hopeful that, upon recommencement of the hearings, the Planning Board would afford DCR the full and fair hearing required by the MLUL, it quickly became starkly apparent that the Planning Board was going to do precisely the opposite.

Following a rambling opening statement from counsel for Dash running more than twenty-five (25) pages of transcript, 6T10:2-34:15, the Planning Board's attorney presented for vote of the Planning Board whether the Application should be deemed to start anew, with the five (5) prior hearings struck from the record. Explaining the matter to be voted on, the Planning Board attorney asserted that the Application had been "substantially amended", authorizing treatment of the Application anew. 6T46:11-47:4. With that direction (albeit erroneous as a matter of fact and law), the Planning Board voted to strike the prior record and start the Application anew without any discussion of analysis. 6T48:18-49:23.

Although DCR opposed the Planning Board's determination, which it believed to violate the MLUL and applicable caselaw, DCR proceeded to the presentation of the testimony of its architect, Richard Saunderson, RA. 6T54:6.

Such testimony did not conclude. The Application was then carried on the record to the Planning Board's meeting on June 5, 2024. 6T145:22-146:2.

ii. June 2024 Hearing

After decimating the record so as to effectively ensure that the Application would not be decided within the 95-day period to which DCR consented, operating in concert with Dash (who was since appointed as the Township's Attorney), the Planning Board set course down a continued path of obfuscation and delay. To such end, and although the Planning Board had exhaustively reviewed "predicate issues" at May 2024 hearing of the Application, including its continued jurisdiction to review the Application, which Dash again challenged, 6T:13:25-21:8, and the Planning Board reaffirmed, 6T:49:23-52:10, at urging of Dash the Planning Board endeavored to again reconsider the "predicate issue" of its jurisdiction to review the Application.

As posited in a May 22, 2024 letter submitted on behalf of Dash, despite the Planning Board having taken jurisdiction over the Application in March 2022 and thereafter having conducted five (5) hearings on the merits, and then having reaffirmed its jurisdiction and having proceeded to hearing of the merits in May 2024, it was asserted that the Planning Board must adjudicate its jurisdiction to grant the requested site plan relief before it considers the "merits" of the Application:

> The issue of whether DCR's proposal calls for a "warehouse", which is a permitted use in the ED (Economic Development) zone, or something more, or different, than a "warehouse", that constitutes either a nonconforming conditional use or a nonpermitted use, is a jurisdictional issue … [and] ***jurisdictional issues must be resolved as a predicate matter, before the land use board hears, and decides the merits of the development application***. [Emphasis added.]

Pa612.

Prior to the hearing, DCR wrote to the Planning in response to Dash's request for a "jurisdictional hearing". Pa626. DCR directed the Planning Board to TWC Realty P'ship v. Zoning Bd. of Adjustment of Edison, 315 N.J. Super. 205 (Law Div. 1998), aff'd 321 N.J. Super. 216 (App. Div. 1998), in which Judge Wolfson considered and vacated a zoning board's dismissal of an application on alleged jurisdictional grounds following a plenary, jurisdictional hearing, holding that the MLUL does not authorize boards to hear and determine questions relating to jurisdiction – except as to purely legal matters – before the merits of a complete application:

> In TWC, Judge Wolfson resolved an applicant's challenge to a determination made by subject board that it lacked jurisdiction to hear and decide the merits of the application. In that case, following the board's determination that the application was complete, the board convened a hearing as to whether it had jurisdiction. Id. at 210. After an abbreviated hearing addressing only the board's jurisdiction, the board dismissed the application finding that the relief applicant sought constituted a request for rezoning

within the exclusive jurisdiction of the governing body. Ibid.

On the applicant's appeal, Judge Wolfson reversed, ***holding that the MLUL does not authorize boards to hear and determine questions of jurisdiction before the merits of a complete application***. [Emphasis added.] As Judge Wolfson explained, a board's "original jurisdiction requires it, in the first instance, to assess the 'completeness' of a proposed development application". TWC, 315 N.J. at 212 (citing N.J.S.A. 40:55D-10.3). Once an application is deemed complete, "the [b]oard *shall grant or deny* approval of the application (emphasis in original)" within the statutory timeframe. Id. "[T]he statute does not speak in permissive terms, but rather mandates either an approval or a denial of the application". Id. (internal citations omitted).

In concluding thar the board did not have authority to dismiss the application on jurisdictional grounds without hearing the merits of the application, Judge Wolfson first considered the text of the MLUL, which he found did not provide for a "jurisdictional hearing within [its] comprehensive statutory framework". TWC, 315 N.J. at 215; see also Robinson v. Board of Adjustment of Cape May, 131 N.J. Super. 236, 242 (Law Div. 1974) ("[n]o where in the statute … can it be found that a zoning board is free to determine upon application … that it did not have jurisdiction to hear this application"). Given the "Legislature's consistent refusal to provide for a 'jurisdictional hearing'", as well as "the MLUL's affirmative, mandatory language requiring local boards to 'grant or deny approval' of each application for development", Judge Wolfson found error in the board's position that it could hear issues pertaining to jurisdiction before considering the merits of the application. TWC, 315 N.J. at 215.

Pa628.

DCR also emphasized that Judge Wolfson, in TWC, also considered the prudential factors proffered by Dash, not only finding that there were "no discernable benefits associated with a jurisdictional hearing", but also concluding that such a hearing "would plainly subvert the purposes of the *MLUL*":

> While the absence of a statutory basis for a jurisdictional hearing was enough to resolve the TWC case, Judge Wolfson also considered the practical impacts of that board's position that it was authorized to hear and decide issues of jurisdiction. As Judge Wolfson explained: "A rule such as that … ***would, of necessity, result in many delays, additional litigation and probable remands, and would plainly subvert the purposes of the MLUL*** – to encourage prompt consideration and disposition of land use applications, avoid unnecessary delays and repetition of effort, and to encourage coordination of the various public and private procedures and activities shaping land development, with a view toward lessening the cost of such development and to achieve a more efficient use of land". TWC, 315 N.J. Super. at 217 (emphasis added). Further, "given the strong probability that an adverse jurisdictional finding will result in a plenary, declaratory judgment type trial in the Superior Court, bifurcation cannot be said to result in any economy of effort, nor will it likely result in any reduction in public expenditures. Instead, [it] substantially increases the risk of an additional lawsuit being waged at the public's expense". Id. at 218 (emphasis added.)

Pa628-29.

Not only had TWC held that plenary, jurisdictional hearings, are contrary to the MLUL – as there is no authorizing provision and such hearings subvert

the express purpose of expeditious adjudication of land-development applications – the Planning Board had already taken jurisdiction and conducted a total of six (6) hearings on the merits, all of which (except for the initial hearing) occurred after Dash raised the claim that the Planning Board lacked jurisdiction to grant the requested site plan approval See 1T100:2-22. In other words, the Planning Board had assumed jurisdiction and willingly proceeded to hear the Application on the merits over the course of six (6) hearings despite Dash's objection, only to reverse course at the seventh (7th) hearing, disavowing its jurisdiction on Dash's request unless and until DCR proved through a plenary, jurisdictional hearing, that the facility would be used as a warehouse, as DCR said when it filed the Application as a warehouse.

Addressing the request to the Planning Board, the Planning Board attorney advised that Planning Board that TWC is not a "binding decision" on the Planning Board, and, irrespective, it concerns a "very different jurisdictional issue". 7T53:18-22. Both assertions were and are incorrect. First, contrary to the Planning Board attorneys' statement, Judge Wolfson's decision in TWC was affirmed in a published Appellate Division decision for the reasons expressed by Judge Wolfson. See TWC Realty P'ship v. Zoning Bd. of Adjustment of Twp. of Edison, 321 N.J. Super. 216, 217 (App. Div. 1999) (holding that, "[u]pon consideration of the arguments presented, we affirm the decision reversing the

Board's jurisdictional determination, substantially for the reasons expressed by Judge Wolfson is his opinion, reported as TWC Realty v. Zoning Board of Adjustment of Township of Edison, 315 N.J. Super. 205, 717 A.2d 439 (Law Div. 1998)). Further, TWC squarely addressed the identical issue, rejecting a board's determination, in that case a zoning board, to convene a jurisdictional hearing before considering the merits of the application, which was found to be contrary to the board's statutory duty to "grant or deny approval of the application" within the statutory period, the same statutory duty imposed on the Planning Board under N.J.S.A. 40:55D-46.

The Planning Board attorney presented a motion for the Planning Board's consideration, "for the [Planning] Board, just the five members, to confirm that you want … a preliminary or plenary hearing on the jurisdictional issues to be followed with a full, additional hearing beyond the jurisdictional issues, if the [Planning] Board determines after the first part that you're finding jurisdiction. So it's a motion to have a plenary hearing". 7T70:14-22. Expectedly, given the erroneous advice of the Planning Board's attorney, the Planning Board voted in favor of the motion. 7T71:9-22. The Planning Board then adjourned the Application until July 9, 2024 for the plenary, jurisdictional hearing. 7T72:9.

E. DCR Commences Suit

On July 1, 2024, the ninety-fifth (95th) day following the court's decision in DCR I and, as such, the last day of DCR's consensual extension of the Planning Board's time to act on the Application, DCR commenced suit against the Planning Board, seeking automatic approval of the Application (first count), or alternatively, declaratory relief, inter alia, prohibiting the Planning Board from proceeding to a plenary, jurisdictional hearing (third count) and vacating the Planning Board's determination to exclude the record of hearings prior to May 2024 (fourth count).[4] Pa39-79.

On January 24, 2025, the matter proceeded to trial before Judge Minkowitz. 8T.

F. The Trial Court's Decision

On March 5, 2025, Judge Minkowitz issued his Order and Statement of Reasons, granting judgment in favor of the Planning Board and remanding the Application. Pa1-21.

Finding that his review of the Planning Board's actions at issue was deferential, Judge Minkowitz held that the Planning Board was authorized to

[4] Additionally, alternative to the first count, DCR sought additional declaratory compelling the Planning Board to hear and decide the Application within thirty (30) days (second count), disqualifying Joan Furman and Bryan Zimmermann (fifth count), and appointing a special adjudicator to supervise the Planning Board's adjudication of the Application (sixth count).

conduct hearings on its jurisdiction because it must ultimately determine whether it has authority to grant the requested site plan approval. He found that, while the MLUL does not expressly authorize land use boards to conduct plenary jurisdictional hearings, there is no provision which prohibits it. Id. Finding that decisional law has acknowledged each municipal board's inherent authority to determine the extent and scope of its own jurisdiction concerning purely legal matters, he determined that the Planning Board was permitted to hold a plenary hearing to assess its jurisdiction, notwithstanding that such jurisdiction is, in this matter, a mixed question of law and fact See Pa5-10. .

Judge Minkowitz also held that the Planning Board's decision to strike the prior record and start hearing of the Application anew was reasonable because DCR proposed substantial amendments to its Application, and given the new composition of the Planning Board resulting from the sweeping disqualifications in DCR I. Pa15-17.

Concluding that the Planning Board acted appropriately in proceeding to a plenary, jurisdictional hearing, and starting the Application anew, Judge Minkowitz determined that automatic approval was premature and could not be considered by the Court unless and until the Planning Board determined that it had authority to grant the requested site plan approval. Pa13.

DCR now appeals.[5] Pa22.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN AFFIRMING THE PLANNING BOARD'S DECISION TO CONVENE A PLENARY, JURISDICTIONAL HEARING (Pa1; 8T12)

"A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference" on appeal. Manalapan Realty. L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995). "On appeal, a trial judge's statutory interpretation is reviewed de novo". Commerce Bancorp., Inc. v. InterArch, Inc., 417 N.J. Super. 329, 334 (App. Div. 2010) (citing State v. Gandhi, 201 N.J. 161, 176 (2010), certif. denied, 205 N.J. 519 (2011)).

The purpose of judicial review of a land use board's determination "is for the court to determine whether or not the board acted within the statutory guidelines and properly exercised its discretion". Fallone Properties, LLC v. Bethlehem Tp. Planning Board, 396 N.J. Super 552, 561 (App. Div. 2004).

[5] DCR is not appealing the trial court's rulings on the second, fifth and sixth counts. Regarding the third count, concerning a request for disqualification of Planning Board members Furman and Zimmermann, the trial court ruled that there was insufficient evidence in the record to conclude that Furman and Zimmermann are conflicted. Pa17-19. As DCR pointed out in its Complaint, the Planning Board stifled DCR's attempt to examine the facts believed to give rise to the asserted conflicts of interest. Pa57.

While "courts will give substantial deference to [a board's] findings of fact", Wilson v. Brick. Tp. Zoning Bd. of Adjustment, 405 N.J. Super. 189, 196 (App. Div. 2009), and "factual determinations by [a] board are presumed to be valid", Adams v. DelMonte, 309 N.J. Super. 572, 583 (App. Div. 1998), "a board's decision regarding a question of law … is subject to de novo review by the courts since [] a board has no peculiar skill superior to the courts' regarding purely legal matters", Dunbar Homes, Inc. V. Zoning Bd. of Adjustment of Franklin, 233 N.J. 546, 559 (2018). A board's decision regarding the "scope of its own authority or jurisdiction" is such a question of law that is subject to de novo review by the courts, and is entitled to no deference. TWC Realty P'ship v. Zoning Bd. of Adjustment of Twp. of Edison, 315 N.J. Super. 205, 211 (Law. Div. 1998), aff'd, 321 N.J. Super. 216 (App. Div. 1999) (citing cases); see also 388 Route 22 Readington Realty Holding, LLC v. Township of Readington, 221 N.J. 318, 338 (2015) ("[i]n construing the meaning of a statute, an ordinance, or [] case law, [the court's] review is de novo").

The MLUL is "the enabling authority which authorizes and defines the limits of a municipality's procedural and substantive power to regulate land development within its borders". TWC, 315 N.J. Super. at 211. "Municipal authority to regulate use of land through zoning and evaluation of applications for … approval of site plans … is limited to the power delegated by the

Legislature in the MLUL". New York SMSA Ltd. P'ship v. Twp. Council of Twp. of Edison, 328 N.J. Super. 541, 546 (App. Div. 2006). Such "zoning power must be exercised in strict conformity with the delegating enactment – the MLUL". Shipyard Associates, LP v. City of Hoboken, 242 N.J. 23, 39 (2020) (internal citations and quotations omitted). "[P]ermissive interpretation or application of the statute" is prohibited. Manalapan Holding Co. v. Planning Bd. of Hamilton Twp., 92 N.J. 466, 482 (1983).

A planning board derives its powers from Article 6 of the MLUL (§§ 37-39). Within Article 6, § 46 establishes a planning board's powers in connection with preliminary site plan applications. A planning board's original jurisdiction over a preliminary site plan application derives from "submission to the administrative officer" of a "complete application for a site plan". N.J.S.A. 40:55D-46(c). An application is deemed "complete … when so certified by the municipal agency or its authorized committee or designee". N.J.S.A. 40:55D-10.3. Once an application is deemed complete, in the case of an application for preliminary site plan approval involving more than ten (10) acres, the Planning Board "***shall grant*** or ***deny*** preliminary approval within 95 days of the date of such submission" of a complete application. N.J.S.A. 40:55D-46(c) (emphasis added). As the Legislature has explained, "the term 'shall' indicates a ***mandatory*** requirement". N.J.S.A. 40:55D-3 (emphasis added). Thus, by its

own terms, once an application for preliminary site plan approval has been deemed complete, the MLUL mandates that the planning board either approve or deny the application within the applicable statutory period. N.J.S.A. 40:55D-46(c). Indeed, should a planning board fail to timely act on a complete application, it "shall be deemed to have granted preliminary approval of the site plan". Id. In other words, a planning board's "jurisdictional mandate" is to timely hear and decide complete applications. TWC, 315 N.J. Super. at 213.

As the trial court acknowledged, "no provision within the MLUL … expressly authorizes land use boards to conduct plenary jurisdictional hearings before reaching the merits of an application". Pa8-9. Notwithstanding such omission within the MLUL, the trial court resolved DCR's challenge to the Planning Board's invocation of such procedure by concluding that a planning board has the "inherent authority to determine the extent and scope of its jurisdiction", citing Randolph v. City of Brigantine Planning Bd., 405 N.J. Super. 215 (App. Div. 2009) and Chicalese v. Monroe Twp. Planning Bd., 334 N.J. Super. 413 (Law Div. 2000). Pa9. However, neither case is relevant to the matter at issue.

As a threshold matter, it appears that Randolph was cited by the trial court in error as that case did not address "jurisdictional hearings" (or even more broadly, a Planning Board's jurisdiction), and instead concerned the limited

issue of a conflict of interest arising from a planning board member's personal relationship with the planning board engineer. Randolph, 405 N.J. Super. at 220. Indeed, the scope and extent of a planning board's jurisdiction, or a planning's boards powers to review its jurisdiction, was not at issue in the case.

Further, while the trial court correctly cites Chicalese for its statement that a planning board has "inherent authority to determine the extent and scope of its jurisdiction", such language does not support plenary, jurisdictional hearings. First, as Judge Wolfson explains, a planning board's authority to make jurisdictional determinations are limited to "purely legal matters", which "do ***not*** require plenary or evidentiary hearings". Chicalese, 334 N.J. Super. at 423 (emphasis added). In that case, the issue affecting jurisdiction was whether lots joined under common ownership had merged, necessitating subdivision approval, a purely legal matter. Id. at 422. As the trial court acknowledged, the ostensible jurisdictional issue involved in DCR's Application – what is the nature of the use DCR proposes – "includes mixed questions of jurisdictional law and fact", Pa9, and thus, necessarily involves "plenary or evidentiary hearings". Indeed, the Planning Board considered the jurisdictional hearing to be plenary. 7T70:13-22.

Moreover, the central issue in Chicalese was whether an applicant could challenge a planning board's jurisdiction *after* it submitted a development

application to that board and invoked that board's jurisdiction. In Chicalese, after the planning board denied the applicants' application for subdivision and "bulk" variance relief, in seeking reversal, the applicants claimed that the planning board lacked jurisdiction. Chicalese, 334 N.J. Super. at 420. Specifically, they asserted that subdivision approval was unnecessary such that the planning board lacked primary and ancillary jurisdiction.[6] Accordingly, a threshold issue was "whether and to what extent an applicant who voluntarily invokes the jurisdiction of the planning board is collaterally estopped from later taking a position on appeal that would divest that board of its primary and ancillary jurisdiction over the development application". Id.

Resolving that issue, Judge Wolfson concluded that the applicant waived any right to collaterally challenge the planning board's acceptance of jurisdiction to review the application. Chicalese, 334 N.J. Super. at 424. "[B]y asking the planning board to assume jurisdiction over their development application, the plaintiffs, at least impliedly acknowledged the need for a subdivision". Id. Accordingly, the applicants were collaterally estopped from

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[6] The applicant claimed that the subject property, which had consisted of several tax lots at the time acquired by plaintiffs, did not require subdivision because the lots had not merged. Id. at 417. A planning board's authority to adjudicate "bulk" variance requests arises only in conjunction with its jurisdictional authority to approve subdivisions, site plans or conditional uses under § 60 of the MLUL. Chicalese, 334 N.J. Super. at 422. Thus, as the plaintiffs argued, "[a]bsent a merger [of the lots], no subdivision is required-and, absent the need for a subdivision, the planning board lacked the jurisdiction to adjudicate the requested variance". Id.

changing positions "once the planning board assume[d] jurisdiction over [the] development application". Id. at 423. To permit such a belated recantation of the planning board's jurisdiction, especially *after* the planning board unfavorably ruled on the application, would thwart the MLUL's "the MLUL's most important purposes" of "ensuring prompt consideration and disposition of land use application … avoid[ing] unnecessary delays and repetition of effort … [and] lessening the cost of [] development". Id. at 424.

While Randolph did not address a planning board's jurisdiction at all, and Chicalese addressed the limited issue of an applicant's collateral attack upon a planning board's jurisdiction following an unfavorable outcome, Judge Wolfson's earlier decision in TWC squarely addressed the issue of jurisdictional hearings, concluding upon a thorough analysis of the MLUL's text, legislative history, and purposes, that the practice was not authorized. TWC, 315 N.J. Super. at 209.

Beginning his analysis with the text of the MLUL, Judge Wolfson explained that a board's mandatory charge, upon an application being deemed complete, is to "***grant or deny*** approval" within the statutory period. TWC, 315 N.J. Super. at 212 (emphasis in original) (citing N.J.S.A. 40:55D-76(c)). In other words, the board's "jurisdictional mandate is to hear and decide a 'complete' development application". Id. at 213. Thus, the MLUL "***mandates***

either an ***approval*** or ***denial*** of the application". Id. (emphasis in original). Such mandate applies with equal weight to a planning board considering a preliminary site plan application, which too is statutorily mandated to "grant or deny approval" of a complete application within the applicable statutory period. N.J.S.A. 40:55D-46(c).

Judge Wolfson also explained that his statutory analysis was consistent with the MLUL's legislative history. As he explained, prior to the MLUL's adoption, it was found in Robinson v. Board of Adjustment of Cape May, 131 N.J. Super. 236, 242 (Law Div. 1974) that a zoning board "***must*** consider" a variance application brought before it, reasoning that "[n]o where in the statute or in the cases construing the statute can it be found that a zoning board is free to determine upon application… that it did not have jurisdiction to hear [the] application" (emphasis in original). TWC, 315 N.J. Super. at 214. Although Robinson was decided under the MLUL's predecessor statute, N.J.S.A. 40:55-39d (repealed), Judge Wolfson found its rationale persuasive:

> … Where specific legislation has been interpreted by the courts, and the legislation is subsequently re-enacted without any substantive change to the interpreted sections, there is a strong presumption that the Legislature intended to leave that interpretation intact. See Quaremba v. Allan, 67 N.J. 1, 14, 334 A.2d 321 (1975).

TWC, 315 N.J. Super. at 214-15.

Moreover, the presumption that the Legislature intended to prohibit jurisdictional hearings by virtue of the MLUL's enactment without substantive change to provisions of the predecessor statute interpreted in Robinson, is strengthened by the fact the MLUL's comprehensive framework does not provide for a jurisdictional hearing, which has remained steadfast since its enactment:

> Moreover, the Legislature's consistent refusal to provide for a "jurisdictional hearing" within this comprehensive statutory framework (or, for that matter, to adopt a procedure for requesting a zone change), has remained steadfast for over 20 years, despite numerous amendments to the MLUL. In fact, as recently as 1997, the Legislature enacted L.1997 c. 145, which amended the specific section at issue in this case, N.J.S.A. 40:55D–70, in order to incorporate additional language relating to the so-called "negative criteria" and its applicability to "inherently beneficial" uses. Where legislation is remedial in nature, and changes are made in other particulars, without changing phraseology construed in prior judicial decisions, the presumption that the Legislature intended to leave the existing judicial interpretations intact, is even stronger. See Quaremba, supra, 67 N.J. at 14, 334 A.2d 321. These principles of statutory construction, along with the MLUL's affirmative, mandatory language, requiring local boards to "grant or deny approval" of each application for development, further undermine the Board's restrictive view of its own power.

TWC, 315 N.J. Super. at 214-15.

In addition to such textual and historical reasons for concluding that "jurisdictional hearings" are not permitted, Judge Wolfson's analysis was also

informed by the legislative purposes of the MLUL. Observing that "the purposes of the MLUL [are] to encourage prompt consideration and disposition of land use applications, avoid unnecessary delays and repetition of effort, and to 'encourage coordination of the various public and private procedures and activities shaping land development,' with a view toward 'lessening the cost of such development' and to achieve a 'more efficient use of land', see TWC, 315 N.J. at 217 (citing N.J.S.A. 40:55D-2(a) & (m)), Judge Wolfson found it not only "manifestly apparent" that jurisdictional hearings "fail[] to advance any legitimate [] purpose" of the MLUL, but also "equally evident" that such hearings "undermine[] them as well". TWC, 315 N.J. at 224. As he explained,

> [m]uch of the same ground covered in the "jurisdictional" hearing would once again be the subject of expert testimony. These are hardly circumstances resulting in an economy of effort, one of the MLUL's most important goals. See Lizak v. Faria, 96 N.J. 482, 496, 476 A.2d 1189 (1984) (MLUL designed to encourage prompt consideration and disposition of land use applications for the advancement and protection of both developers and the public). Starting the process all over again under such circumstances would not serve the interests of the public, the Board, or the applicant. Cf. Pagano, supra, 257 N.J.Super. at 400, 608 A.2d 469 (substantial prejudice likely to accrue by virtue of protracted delays in the development application and litigation processes). Certainly the resulting increased costs could be significant, not only to the developer, but also to members of the public who may have appeared (possibly supported by experts) and objected

> vigorously at the "jurisdictional" hearing, believing that the matter was concluded.

Id. [7]

In construing the MLUL, and whether "jurisdictional hearings" are authorized, the trial court was required to give effect to such legislative intent. McCann v. Clerk of Jersey City, 167 N.J. 311, 321 (2001) (internal citations omitted) (discussing that the "overriding objective" in construing a statute is to "effectuate the legislative intent"). In ascertaining the legislative intent, the courts look first to the statutory language, which is the "best" and most "persuasive evidence" of legislative intent. See Branch v. Cream-O-Land Dairy, 244 N.J. 567, 587 (2021); Perez v. Zagami, LLC, 218 N.J. 202, 209 (2014). Where, as here, the statutory language "clearly reveals the meaning of the statute, the court's sole function is to enforce the statute in accordance with those terms". SASCO 1997 NI, LLC v. Zudewich, 166 N.J. 579, 586 (2001) (internal citation and quotation omitted). Individual sections of the statute must

[7] Although not discussed in TWC, perhaps the strongest indication that the Legislature gave primary regard to prompt and cost-effective adjudication of land-development applications in the enactment of the MLUL, is its consistent inclusion of the harsh remedy of automatic approval for a land-use board's failure to timely hear and decide development applications within a defined statutory period. See N.J.S.A. 40:55D-46(c) (preliminary site plan applications); N.J.S.A. 40:55D-47 (preliminary minor subdivision applications); N.J.S.A. 40:55D-48(c) (preliminary major subdivisions); N.J.S.A. 40:55D-50(b) (final site plan applications and final major subdivisions); N.J.S.A. 40:55D-61 ("bulk" variance applications); N.J.S.A. 40:55D-67 (conditional use applications).

be "harmonize[d] … and read … in the way most consistent with the overall legislative intent". Id. (internal citation and quotation omitted).

In adopting the MLUL the Legislature made clear that its purpose was to ensure prompt and cost-effective adjudication of land-development applications. See Lizak v. Faria, 96 N.J. 482, 492 (1984) (finding that a core purpose of the MLUL is to "expedite the decision of land use applications"); S. Plainfield Properties, L.P. v. Middlesex Cnty. Planning Bd., 372 N.J. Super. 410, 417 (App. Div. 2004) (construing the automatic approval provisions of the MLUL was a reflection of the legislative purpose of avoiding "governmental inaction"). Despite the Legislature having given primary regard to expeditiousness in land-development matters, the trial court simply ignored such purpose in upholding an adjudicative process which unquestionably leads to delays. See TWC, 315 N.J. at 216-17 (explaining that jurisdictional hearings "would, of necessity, result in many delays, additional litigation and probable remands, and would plainly subvert the purpose of the MLUL").

The trial court's neglect of the MLUL's purpose was likely informed by its conflation of the issue of the Planning Board's jurisdiction (and obligation) to *review* (and adjudicate) DCR's Application for preliminary site plan approval, from the Planning Board's authority (i.e., "jurisdiction") to *grant* site plan relief. As Judge Wolfson observed in TWC, a board's jurisdiction to review and

adjudicate an application is conferred and becomes statutorily mandated upon the application being deemed complete. TWC, 315 N.J. Super. at 212-13. Such "jurisdictional mandate to hear and decide complete development applications" is distinguished from a board's authority to grant relief, which is conferred upon the applicant's proofs that the statutory criteria for relief have been satisfied. See id. at 215-16 (citing Feller v. Fort Lee Board of Adjustment, 340 N.J. Super. 250 (App. Div. 1990)) (explaining that the Appellate Division's reversal of a variance in that case, which it determined "blatantly arrogated to [the board] the power to reject existing zoning" and "effected a *de facto* rezoning of the entire district", was not an affirmation of the board's authority to withhold review of the application, but merely a holding that the board should have denied it); see also id. (citing Vidal v. Lisanti Foods, Inc., 292 N.J. Super. 555 (App. Div. 1996)) (explaining that Appellate Division's reversal in that case of a use variance, which it concluded "constituted an arrogation of the power to rezone", was a reflection that MLUL narrowly circumscribes the authority to grant use variance "in particular cases and for special reasons", which the applicant failed to prove necessitating denial of relief, not a suggestion that the board should have precluded review).

This case concerns only the Planning Board's administrative obligations to review DCR's Application. After determining at the outset that it had not

only the authority but the mandate to review the Application, see 1T102-103:6;[8] 2T25L9-19;[9] 2T35:21-24,[10] which then proceeded to six (6) hearings on the merits, the Planning Board invoked a plenary, jurisdictional hearing to determine whether (or not) it would withhold further *review* of the Application. 7T70:13-23. As DCR argues, because the Planning Board is prohibited from withholding review of DCR's Application which had been determined to be

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[8] The Planning Board's professional planner explaining that:

> [M]y review of this application[,] review of the proposed use[,] and review of the layout of the building[,] ***would definitely not conclude that this is a trucking terminal*** ... This is more of a ***traditional warehouse facility*** … [F]or the purposes of here, ***this is a warehouse and distribution use.*** [Emphasis added.]

[9] The Planning Board's attorney explaining that:

> [T]he [Planning Board] has no authority to stay or stop an application. ***The Municipal Land Use Law sets up a procedure for starting a hearing and sets up a statutory time clock for the [Planning Board] to review and decide an application***. That statutory time clock can be extended by permission from the application but, ***if it was not acted upon within the statutory time, a very draconian remedy takes place which is an automatic approval*** that the applicant obtains because a [Planning] Board, in New Jersey, did not act within the time required by statute. [Emphasis added.]

[10] The Planning Board's attorney explaining that:

> [W]arehouse is explicitly permitted so ***the [Planning] Board has jurisdiction***, as a Planning Board, to hear an application – ***there's no doubt about that*** – for a warehouse. [Emphasis added.]

complete, such determination made by the Planning Board in its administration of the Application was and is unlawful.

The trial court's misapprehension regarding the nature of the requested relief, and failure to distinguish between the Planning Board's administrative obligation to review – triggered upon the determination that DCR's Application was complete, conferring "jurisdiction" – from the Planning Board's authority (i.e. "jurisdiction") to grant the requested site plan approval, informed the court's finding that DCR had not exhausted administrative remedies. Pa_ (pg. 15). While the Planning Board had not reached a final determination on the merits of the Application, it had reached a final determination to invoke a jurisdictional hearing, such that DCR had exhausted the matter before the Planning Board. Indeed, the Planning Board "acted" when it voted affirmatively to proceed to such plenary, "jurisdictional hearing". 7T70:13-71:25.

Moreover, even if the exhaustion doctrine was applicable, it is clear that several exceptions are met under the facts of this case. First, whether such action of the Planning Board in its administration of the Application is permitted is a pure question of law, a recognized exception to the doctrine of exhaustion. See Garrow v. Elizabeth Gen. Hosp. & Dispensary, 79 N.J. 549, 561 (1979) (discussing that "[t]he exhaustion doctrine is not an absolute" as "[e]xceptions exist when only a question of law need be resolved") (internal citations omitted).

Further, it was futile to expect the Planning Board would have declared its own acts unlawful, another exception to exhaustion doctrine. See AMG Associates v. Springfield Twp., 65 N.J. 101, n. 3 (1974) (explaining that, "[c]onsistent with general exhaustion doctrine, where past event or other circumstances make it clear that initial or further resort to local administrative … the owner may bypass the local agencies and commence a prerogative writ action).

The rationale of the Planning Board in deciding to convene a plenary, jurisdictional hearing, and the trial court in affirming the procedure, is impossible to reconcile with the MLUL's text, legislative history or purposes. The text mandates that the Planning Board review and adjudicate DCR's Application because it has been deemed complete. Indeed, the Planning Board "shall grant or deny preliminary approval", which must occur with the statutory period. N.J.S.A. 40:55D-46(c). No provision is made within the MLUL authorizing the Planning Board to withhold such review and adjudication until it determines that it has jurisdiction to grant the requested preliminary site plan relief. Instead, by operation of the MLUL, the Planning Board's "original jurisdiction" to review and adjudicate the Application was conferred when the Application was deemed complete. TWC, 315 N.J. Super. at 212.

Likewise, jurisdictional hearings contradict the legislative history of the MLUL. As noted by Judge Wolfson, the MLUL's adoption was preceded by a

judicial interpretation of the MLUL's predecessor statute precluding land-use boards from declining review of an application on jurisdictional grounds. TWC, 315 N.J. Super. at 215 (citing Robinson, 131 N.J. Super. at 242). Given such precedent, the enactment of the MLUL without modification to the section interpreted in that case "creates a strong presumption that the Legislature intended to leave that interpretation intact", such presumption strengthened by the fact that the Legislature has consistently refused to provide for a jurisdictional hearing within the MLUL's comprehensive statutory framework, despite numerous amendments. Id. (citing Quaremba, 67 N.J. at 14).

Furthermore, both the Planning Board and trial court ignored the stated purposes of the MLUL, ensconced within its text, to ensure expeditious adjudication of land development matters. See Lizak, 96 N.J. at 492. Cannons of statutory construction inform that the MLUL must always be evaluated with a view towards effectuating its purposes. See McCann, 167 N.J. at 321. Despite the supremacy of expediency in matters of land-development, the Planning Board invoked, and the trial court upheld, a belated jurisdictional hearing process – raised for the first time at the seventh (7th) hearing of the Application, despite the Planning Board's repeated acknowledgment of its jurisdiction, see 1T102-103:6; 2T25L9-19; 2T35:21-24 – which would necessarily delay the Application's eventual adjudication.

When appropriate consideration is given the MLUL's text, legislative history and purposes, the Court should conclude that jurisdictional hearings are unauthorized; and, therefore, reverse the trial court and vacate the Planning Board's determination to convene such hearing.

POINT II

THE TRIAL COURT ERRED IN AFFIRMING THE PLANNING BOARD'S DECISION TO STRIKE THE PRIOR RECORD AND RESTART HEARING OF THE APPLICATION (Pa1; 8T9)

The trial court affirmed the Planning Board's decision to strike five (5) prior hearings of the Application from the record and restart the Application on the grounds (i) that the reconstituted Planning Board – following the sweeping disqualification of eight (8) members in DCR I – should have the opportunity to hear the Application anew, and (ii) that DCR's most recently amended site plan constituted a "substantial amendment". Pa . Both grounds find no textual support within the MLUL and conflict with applicable caselaw.

Notwithstanding that DCR opposed restarting the Application despite the disqualifications, the trial court determined, citing Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 26 (2013), that the board, reconstituted in accordance with § 23.2 of the MLUL,[11] "should have the opportunity to hear the application anew

[11] Pursuant to this provision, "[i]f the planning board lacks a quorum because any of its regular or alternate membership is prohibited … from acting on a matter due to a member's personal or financial interests therein, regular members of the board of adjustment shall be

[and] address questions to the witness". Pa15-16. Ten Stary Dom, however, does not support the conclusion for which it was cited.

The trial court's citation to Ten Stary Dom was to the portion of the Supreme Court's opinion reciting the procedural history of the matter including the Law Division's initial remand order, from which the cited language arose. The complete passage is as follows:

> By order dated July 13, 2010, the Law Division affirmed the action of the Board without prejudice. The order provided that Mauro "shall have the right to file a new application with the Board seeking the same or such other relief" to permit development of the property. In his June 17, 2010 oral opinion, the judge determined that Mauro had not carried his burden to establish the negative criteria to support a variance. That is, Mauro failed to carry his burden of proof that reduced frontage would not undermine the zoning plan of the community. The judge further explained that the critical inadequacy of Mauro's proof concerned drainage …
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> The judge explained, however, that the denial was without prejudice "because the case in and of itself is relatively unusual and unique in its history." *He reasoned that a new, fully constituted Board should have the opportunity to hear the application anew, address questions to the witnesses*, and "determine for itself whether[,] in addition to meeting the safety concerns, the potential flooding in adjacent properties could be adequately addressed by applying reasonable and appropriate engineering principles and design."

called upon to serve, for that matter only, as temporary members of the planning board in order of seniority of continuous service to the board of adjustments until there are the minimum number of members necessary to constitute a quorum to act upon the matter without any personal or financial interests therein, whether direct or indirect.

> The judge also expressed a concern that the remand procedure adopted by the court, which confined the remand to the record compiled in 2007, did not permit "a fair exchange with the Board," particularly relating to the drainage issues on the site and in the neighborhood. [Emphasis added.]

Ten Stary Dom, 216 N.J. at 26.

Affirming the Appellate Division's reversal of the trial court's ruling, which found that variance relief should have been granted, the Supreme Court then "address[ed] whether [the trial court's] dismissal of the complaint in lieu of prerogative writs should have been without prejudice". Ten Stary Dom, 216 N.J. at 39. Rejecting the trial court's without prejudice dismissal, the Supreme Court discussed,

> … [T]he trial judge side-stepped the salutary rule that bars resubmission of the same proposal following a dispositive ruling by the Board.
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> … By permitting the applicant to return to the Board with the same application, the trial judge ignored the salutary purpose of the principle of res judicata, usurped the role of the Board to determine if it should hear the same application involving the same parties once again, and deprived all parties of the benefits of a final decision. In this case, it was incumbent on the judge to affirm, reverse, or modify the decision of the Board, not to prolong an already protracted proceeding.

Ten Stary Dom, 216 N.J. at 39-40.

Far from supporting the rationale below that the reconstituted Planning Board should have an opportunity to hear the Application anew, it is clear that the Supreme Court's decision in Ten Stary Dom actually rejected the practice, finding that the trial court in that case should not have dismissed the matter without prejudice in order to provide the planning board with an opportunity to hear the application anew. Ten Stary Dom, 216 N.J. at 39-40. Such practice in this case, has not only had the exact effect that the Supreme Court cautioned against, "to prolong an already protracted proceeding", id., but also affects a palpable injustice upon DCR which has already incurred substantial costs for the hearings which were struck, and further penalizes DCR for the unprecedented conflicts of interest that permeated the Planning Board resulting in the near wholesale disqualification of its membership in DCR I.

Further, the trial court's separate rationale that DCR's submission of amended plans justified hearing the Application anew contradicts settled caselaw. In Schmidhausler v. Planning Board of Law Como, 408 N.J Super. 1, 11 (App. Div. 2009) the Appellate Division declined to treat an amended application as a new application where the discovery of a private road necessitated a complete reconfiguration of the proposed subdivision because the "central focus" of project, a three-lot subdivision, remained the same. The Appellate Division distinguished the facts present in that case from Lake Shore

Estates, Inc. v. Denville Twp. Planning Board, 255 N.J. Super. 580, 592 (App. Div. 1991), aff'd 127 N.J. 394 (1992), where it was determined that the developer's "amended" application was actually an entirely different application as it included an additional twenty-eight (28) acres. Accord Courter v. Absecon Planning Bd., A-4344-11 (App. Div. June 6, 2013) (slip op. at 8) (declining to treat developer's amended application as a new application, notwithstanding redesign of the basement area, upgrades and expansions of the decks/balconies, upgrades and improvements of the façade, and a revision of the phasing plan, because "the focus of the converted development after the amended application was the construction of residences on parcel 1" such that the amended "application did not include changes substantial enough to constitute a new application") (Pa103-11); Underwood Properties, LLC v. Planning Bd. of the City of Hackensack, A-5420-18 (App. Div. July 17, 2020) (slip op. at 4) (explaining that, "[w]here the central focus of the application does not change, it is not a substantially new application", and concluding that the amended plans which converted on-street parking to on-site parking did not constitute a substantial amendment) (Pa201-06); Shaked v. Bd. of Adjustment of Twp. of N. Bergen, A-4634-15 (App. Div. May 23, 2018) (slip op. at 14) (rejecting treatment of the application as a "substantially new application" notwithstanding that the amendment including a new residential floor consisting of 20,100 sq. ft.

because "the central focus throughout the matter remained the use of a multifamily high-rise apartment building") (Pa207-13).

Here, as in Schmidhausler, Courter, Underwood Properties, and Shaked, although DCR reconfigured certain design elements (in this case to address comments made by Planning Board) it retained the "central focus" of the project – the construction of a warehouse (albeit of a smaller footprint) on the same development site. That is markedly different from Lake Shore Estates, Inc., where the applicant's "amended" subdivision plan was for twenty-eight (28) more acres than the previous iteration of the application. Indeed, as the Planning Board's professionals noted in review of the DCR's amended plans, "[t]he applicant has submitted an additional *revision to the original site plan*", which revision "proposes to construct two (2) warehouse buildings", just as the "original submission proposed two (2) warehouse buildings". Pa882. In other words, DCR's initial site plan, which was the subject of five (5) hearings prior to the litigation in DCR I, proposed two (2) warehouse buildings, and similarly, DCR's most recently amended site plan also proposes two (2) warehouse buildings, all on the same approximately 68-acre development site. Certainly, the "central focus" of the Project remains the same, and, as such, the Court erred in determining that the Project had been substantially amended justifying treatment of the Application anew.

POINT III

THE TRIAL COURT'S REFUSAL TO DEEM DCR'S APPLICATION APPROVED WAS ERRONEOUS (Pa1; 8T6)

A planning board reviewing an application for preliminary site plan approval "shall grant or deny preliminary approval within 95 days of the date of [] submission" of a complete application, N.J.S.A. 40:55D-46(c), such completeness occurring "when so certified by the municipal agency or its authorized … designee", N.J.S.A. 40:55D-10.3. Should the reviewing planning board fail to act within the statutory period, "the planning board shall be deemed to have granted preliminary approval". N.J.S.A. 40:55D-46(c). Thus, by its own terms, the MLUL establishes that a preliminary site plan application is automatically deemed approved in the event the planning board fails to timely act on the application. Such harsh remedy for inaction is "what the Legislature intended". Amerada Hess Corp. v. Burlington Cnty. Planning Bd., 195 N.J. 616, 636 (2008). It is an expression of the Legislature's "policy judgment that timely disposition [of land use applications] is of [such] great institutional value that automatic approval is the property remedy of delay. Id.

Given this bedrock principle of the MLUL, the exceptions to automatic approval where a board fails to timely act are limited. These limited exceptions are as follows:

> The first is a delay caused by ordinary mishaps or mistakes, such as omitting the place of a board meeting, thus invalidating a public notice, or misfiling an application. The second is delay caused by reasonable misapprehension regarding whether there was a complete application pending before the board, for example where the board thought the application was barred by res judicata; where the board believed that an application failed to satisfy the MLUL checklist and thus considered it incomplete; or where the board believed that consent of the property owner was necessary to perfect an application filed by a contract purchaser.

Amerada Hess Corp., 195 N.J. at 635 (internal citations omitted). In other words, "statutory timetables are to be strictly enforced; permissive interpretation is unwarranted; and only where delay is inadvertent or unintentional will a public entity be excused from automatic approval". Id. at 636.

Noting that "loose language in [earlier] opinions [] suggest[ed] that the applicant must separately demonstrate bad faith on the part of the planning board", the Amerada Hess Court emphasized that such statements "confuse the issue, run counter to the legislative command, and cast the burden on the wrong party". Amerada Hess Corp., 195 N.J. at 636-37. Simply put, boards "must [] act within the statutory timetables. When the application is deemed complete, the clock begins to run. Where a board fails to act within the statutory limits, even for what it considers 'good' reasons, the statute is violated and automatic approval comes into play. ***Only where the board establishes that its delay was***

inadvertent* or *unintentional* can its conduct be excused". Id. at 637 (emphasis added). Accord Shipyard Associates, L.P., A-4504-14 (App. Div. August 2, 2017) (slip op. at 4) (affirming automatic approval of a site plan application where the planning board denied the application for alleged lack of jurisdiction, which the court deemed akin to an unlawful extension of time) (Pa165-171).

In this case, the trial court declined to deem DCR's Application automatically approved on the basis that "the Planning Board commenced proceedings within the prescribed time period". Pa12. However, the Planning Board's "commencement" of the proceedings was and is immaterial to automatic approval, as the statute required that the Planning Board "grant or deny" the Application within the statutory period. N.J.S.A. 40:55D-46(c). While DCR and the Planning Board disagreed as to the time-period provided for the Planning Board's adjudication of the Application on remand in DCR I[12], DCR voluntarily consented to a period of ninety-five (95) days running from the March 28, 2024 Order, which is the outer-limit for a Planning Board's time to

[12] DCR understood the Court's ruling in DCR I as providing the Planning Board forty-five (45) days from the date of the Court's March 28, 2024 Order to complete adjudication of the Application. Such understanding was based on the Court's statement that "N.J.S.A. 40:55D-46, requiring that a municipality notify a developer of any defect in an application for development within 45 days of submission, must be read in conjunction with the part of this section giving the municipality 45 days to act on a completed application and, when so read, as granting a municipality two 45-day periods within which to act on a filed application". Pa_____ (DCR I, pg 7-8).

act on a preliminary site plan application under § 46(c) of the MLUL.[13] Thus, the time period for the Planning Board's action on the Application was until July 1, 2024, the ninety-fifth (95th) day of the Court's March 28, 2024 Order in DCR I. As of that date, the Planning Board had not acted on the Application.

Given that the Planning Board failed to timely act on the Application, automatic approval is avoided only upon the Planning Board's showing that the delay was unintentional and inadvertent. See Amerada Hess Corp., 195 N.J. at 644 (reaffirming "that time frames in the land use statute are to be strictly applied, that automatic approval is the remedy for purposeful delay, and that it is ***only*** when government action is ***unintentional*** and ***inadvertent*** that the time frames are subject to relaxation") (emphasis added).

Addressing neither exception, the trial court concluded that DCR's request for a declaration that its Application to have been automatically approved was premature because the Planning Board had not yet determined its jurisdiction over Application. Pa13. The trial court stated as follows:

> [T]o the extent DCR's complaint seeks automatic approval of the application, pursuant to the MLUL, consideration of such relief would have been premature. Jurisdiction is a threshold issue that must

[13] As provided therein, where an application involves 10 acres of land or less, and 10 dwelling units or less, the planning board has 45 days from the submission of a complete application to act; however, where the application involves *more* than 10 acres, or more than 10 dwelling units, the time period for the planning board's action is 95 days.

> be determined before the Court can consider the requested relief.
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> If the Planning Board determined that it lacked jurisdiction over DCR's application, then DCR would have been able to submit the application for review to the Zoning Board and/or challenge the Planning Board's jurisdictional determination in a renewed action in lieu of prerogative writs. If the Planning Board determined that it did have jurisdiction over DCR's application, then DCR's claim for automatic approval under the MLUL would have been preserved for later review by the Court.

Id.

The trial court's ruling on this issue is wrong for several reasons. First, the Court's conception that the Planning Board must have made an antecedent determination as to its jurisdiction before a court can consider automatic approval lacks a statutory basis within the MLUL. Indeed, a board's "original jurisdiction" arises upon submission of a complete application. TWC, 315 N.J. Super. at 205. Once an application is deemed complete, the automatic approval provision provides that the board, "shall grant or deny approval" within the statutory period. N.J.S.A. 40:55D-46(c). In other words, a board's jurisdiction to *review* arises upon the developer's submission of a complete application. Once certified as complete by either the board or its designee, the applicable time-period for the board to act on the application is triggered. N.J.S.A. 40:55D-10.3. No provision within the MLUL directs the board to make a jurisdictional

determination as to its authority to *grant* the relief sought by the applicant before proceeding to a review of the application. That being the case, it strains logic that the board would be required to make such determination before the automatic approval provision could be applicable. Certainly, no reading of the MLUL would suggest such reading.

Second, as explained above, except as to purely legal matters for which no plenary or evidentiary hearing is required, boards are not authorized to withhold adjudication of complete applications. TWC, 315 N.J. Super. at 217; Chicalese, 334 N.J. Super. at 423. Thus, if boards are unauthorized to withhold action on complete applications except in the limited circumstances, in applicable here, of jurisdictional resolutions on purely legal matters,[14] it makes little sense that a board can skirt the remedy of automatic approval by simply withholding a jurisdictional determination as to its authority to grant the requested relief. Such a construction of the MLUL would render the automatic approval provision utterly meaningless because a board could effectively confer upon itself an infinite extension of time to act upon complete applications by

[14] TWC gives examples of a board's resolution of jurisdiction on *purely legal matters*, as follows: "[A] planning board would lack jurisdiction to hear a development application which seeks relief pursuant to N.J.S.A. 40:55D-70d. Likewise, in accordance with N.J.S.A. 40:55D-60, a zoning board would lack jurisdiction to adjudicate an application for site plan approval (unaccompanied by a request for a "d" variance). Jurisdictional determinations such as these, which are purely legal in nature, and do not require a plenary or evidentiary hearing, are inherently proper". TWC, 315 N.J. Super. at n. 10.

simply withholding its "jurisdictional determination". Such construction violates a "cardinal rule" of statutory interpretation that "full effect [] be given, if possible, to every word of the statute [because] [w]e cannot assume that the Legislature used meaningless language". McCann, 167 N.J. at 321 (quoting Gabin v. Skyline Cabana Club, 54 N.J. 550, 55 (1969).

Finally, the trial court's fear that holding otherwise would encourage misfiling of applications is overstated, if not, totally illusory. Irrespective of the automatic approval provision, developers are encouraged to bring land-development applications before the appropriate land-use boards because a board's favorable decision is perpetually susceptible to challenge and reversal if the board did not have jurisdiction, see Najduch v. Twp. of Indep. Planning Bd., 411 N.J. Super. 268, 274 (App. Div. 2009) (holding that "an action that was utterly void … is subject to collateral attack at any time"), whereas an unfavorable decision could not be challenged on account of the board's alleged lack of jurisdiction, see Chicalese, supra, 324 N.J. Super. at 424 (holding that the applicant was collaterally estopped from challenging the planning board's jurisdiction *after* invoking the planning board's jurisdiction by bringing the application before it). Not only does a developer face a substantial risk in bringing an application before the wrong board, it also gains little benefit. Indeed, whether an application is brought before a zoning board or a planning

board, and regardless of how characterized, such board will be required to act on the application within two (2) to four (4) months.[15]

Here, the Planning Board's delay was neither inadvertent nor unintentional, but a concerted effort by the Planning Board – at the behest and request of Dash, the lead objector and current Township Attorney, more than likely with the support of Clark, the Township's then and current mayor – to delay the Application. Indeed, despite extensive proceedings on the Application which produced, inter alia, the determination of the Planning Board's planner that the Application was for a permitted warehouse facility, 1T102:21-103:6, and the acknowledgment of the Planning Board's attorney that Planning Board had jurisdiction, 2T35:21-24, the Planning Board determined that it must proceed to a jurisdictional hearing before further consideration of the merits. While the "merits" of the Application had been the subject of five (5) hearings prior to May 1, 2024 – when the Application resumed following the unprecedented disqualification of eight (8) Planning Board members in DCR I – the Planning Board decided to strike such record and restart hearing of the Application. As a result, as of July 1, 2024, the statutory deadline for the

[15] The shortest statutory time-period under the MLUL is 45 days for minor subdivisions and site plans involving less than 10 acres or 10 dwelling units, see N.J.S.A. 40:55D-46 through -48; whereas, the longest statutory time-period under the MLUL is 120 days for variance relief, see N.J.S.A. 40:55D-61.

Planning Board to act, the Application was effectively at "ground zero". Because the Planning Board's conduct was intentional, and ensured that the Application would not be adjudicated within the statutory period, DCR was and is entitled to automatic approval.

CONCLUSION

For the reasons set forth herein, DCR respectfully requests that this Court reverse the judgment below: (i) on the First Count of the Verified Complaint, deeming DCR's Application automatically approved; or in the alternative, (ii) on the Third Count of the Verified Complaint, vacating the Planning Board's June 5, 2024 determination to a hold a "jurisdictional hearing"; and (iii) on the on the Fourth Count of the Verified Complaint, vacating the Planning Board's May 1, 2024 determination to strike the prior record and start hearing of the Application anew.

GIORDANO, HALLERAN & CIESLA, PC

Attorneys for Appellant,
Diamond Chip Realty, LLC

By: */s/ Adam Garcia*
ADAM GARCIA

Dated: June 19, 2025

DIAMOND CHIP REALTY, LLC, Plaintiff-Appellant, vs. TOWNSHIP OF SPARTA PLANNING BOARD, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002119-24 T4 Civil Action ON APPEAL FROM THE ORDER, DATED MARCH 5, 2025 SUPERIOR COURT OF NEW JERSEY LAW DIVISION: SUSSEX COUNTY DOCKET NO.: SSX-L-296-24 SAT BELOW: Hon. Stuart A. Minkowitz, A.J.S.C.

DEFENDANT/RESPONDENT, TOWNSHIP OF SPARTA PLANNING BOARD'S BRIEF IN OPPOSITION TO APPEAL AND IN AFFIRMANCE OF TRIAL COURT DETERMINATION

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PRELIMINARY STATEMENT

Plaintiff, Diamond Chip Realty, LLC ("DCR"), ("Applicant or Appellant") filed an application a commercial property for development ("Application") with the Township of Sparta Planning Board ("Planning Board"). DCR filed this appeal in furtherance of its unconventional attempt to obtain an "automatic approval" of its application via the courts, bypassing the full public hearing process as required by the New Jersey Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. ("MLUL"). Over the past three (3) years, DCR has filed two (2) lawsuits with the trial court, ignoring the substantive shortfalls of its application, focusing only on its self-created procedural defects.

Appellant has now filed with this Court an appeal of the second of those lawsuits, specifically challenging the trial court's balanced ruling in which the trial court: 1) confirmed the Planning Board's decision to deny DCR's request for an automatic approval of its Application, 2) upheld the Planning Board's need for a "jurisdictional" hearing to discern the nature of the Application and whether the Planning Board had jurisdiction to hear it, and 3) upheld the Planning Board's decision to start hearings on the Application "anew" after the trial court disqualified eight (8) members of the Planning Board, which disqualifications DCR had sought. All of this is taking place before the Planning Board has had a chance to complete its review of the Application and make a decision on whether the substance of the Application is properly before it, or

may arguably as a matter of law be vested before the Sparta Board of Adjustment for a use variance.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

On or about November 15, 2021, Plaintiff DCR filed an Application for preliminary site plan approval with the Planning Board to construct a warehouse on property located in the Township of Sparta. *Pa3*. Warehouse use is a permitted use in the Economic Development Zone ("EDZ") in which the Property is located. *Pa44-Pa45*. The Application was deemed complete at that time and was scheduled for a hearing before the Planning Board. *Pa45*.

A. Initial Hearings -2022

On March 2, 2022, the Planning Board held the first public hearing on the Application. *Pa3, Pa45, 1T.* [2]

On April 4, 2022, two (2) members of the public, Sparta residents, Anand Dash ("Dash") and Neill W. Clark ("Clark") filed an application with the Township of Sparta Zoning Board of Adjustment ("Zoning Board") requesting an interpretation of the zoning ordinances as permitted by the New Jersey

[1] For clarity and for convenience of the Court, the statement of facts and procedural history are interwoven herein.

[2] The transcripts of the proceedings before the Planning Board are hereby referred to as *1T (March 2, 2022), 2T (April 6, 2022), 3T (May 4, 2022), 4T (June 1 2022), 5T (July 6, 2022), 6T (May 1, 2024), 7T (June 5, 2024), consistent with the designations afforded by the Plaintiff/Appellant.*

Municipal Land Use Law ("MLUL"). *Pa333-Pa340*. They asserted that the project was not a warehouse, but rather a trucking terminal or some other non-permitted use and, therefore, was not a permitted use and needed to be heard by the Zoning Board. *Pa333-Pa340*.

On April 6, 2022, the Planning Board held a second hearing. *2T*. During that hearing objectors Dash and Clark argued that the Application should be stayed pending a decision by the Zoning Board on the interpretation of the zoning ordinance. The Planning Board's attorney opined that the use was a warehouse, and therefore, was a permitted use and that the hearings could continue. *Pa358; 2T*.

Hearings on the Application continued before the Planning Board in May, June, and July of 2022. *Pa2*.

On May 11, 2022 Dash and Clark presented an interpretation application to the Zoning Board. *Pa437*.

By resolution dated June 8, 2022, the Zoning Board held that it did not have jurisdiction to review the interpretation application filed by Dash and Clark. *Pa437*.

On July 28, 2022, Dash and Clark filed an action in lieu of prerogative writ to appeal that decision, captioned Anand Dash and Neill W. Clark v. Township of Sparta Zoning Board of Adjustment, et al., Docket No. SSX-L-303-22. *Pa404-432*.

On December 2, 2022, the trial court dismissed that matter and the Superior Court of New Jersey, Appellate Division affirmed the trial court's decision. *Pa433-Pa446.*

B. DCR Revised Plans -2023

On June 9, 2023, in response to comments from the Planning Board during the 2022 hearings, DCR submitted revised plans for the project. *Pa524.*

On July 20, 2023, the Planning Board engineer issued a comment letter determining that the Application was incomplete as the updated plans were missing certain technical requirements. *Pa254.*

On August 21, 2023, DCR submitted a letter advising the Planning Board that it intended to resubmit the plans to address the incomplete determination and requested a September 2023 hearing date. *Pa310, Pa313, Pa527.*

On August 22, 2023, the Planning Board attorney responded that because the Application had been deemed incomplete it could not be scheduled for a hearing. *Pa310, Pa528.*

On August 23, 2023, DCR submitted its final revised plans to the Planning Board Engineer. *Pa254, Pa532*.

Based on the Board Engineer's analysis of the revised plans, reports and supporting documents, the Board Engineer made his recommendation in his September 22, 2023 report that the Application be deemed complete for Board review. *Pa8; Pa254.* The Planning Board deemed the Application complete in

October 2023 and scheduled a hearing for November 1, 2023, which was within the MLUL's statutory 45-day period. *Pa12; Pa254*.

C. Appellant's Unilateral Decision to Circumvent the MLUL, file a Lawsuit and Avoid Hearing on its Merits

Instead of commencing and appearing at the scheduled November 1, 2023 hearing as per the mandates under the MLUL, on September 20, 2023, DCR filed an action in lieu of prerogative writ in the Superior Court of New Jersey, Law Division (*Pa254*) seeking to: 1) disqualify alleged conflicted members on the Planning Board, 2) compel a decision on the Application by the Planning Board within 30 days, and 3) appoint a special master to oversee the Application. ("DCR I"). *Pa293-318*. Appellant's sole action, not that of the Sparta Planning Board, suspended the November 1, 2023 Planning Board hearing.

D. The DCR I Prior Litigation is a "Red Herring," From Which Appellant has Unclean Hands

On March 28, 2024, the same trial court entered judgment in that litigation, DCR I, disqualifying the eight (8) members of the Planning Board due to a conflict of interest and remanding the Application back to the Planning Board. *Pa534-548*. DCR I requested that the trial court compel the Planning Board to make a decision on the Application within 30 days. That trial court, however, held that "the 45-day period to hold a hearing shall begin upon entry

of the accompanying Order. The Planning Board shall thereafter render a decision in accordance with the MLUL." *Pa542-Pa543*.

In further support of its DCR I decision, that same trial court held that:

> **Because DCR filed this lawsuit on September 20, 2023, [which was before the designated November 1, 2023 hearing date] the Planning Board did not have the opportunity to convene a hearing and render a decision on DCR's final completed application.** Because the Planning Board complied with the statute, DCR's prayer for relief to compel the Planning Board to render a decision on the application is denied as premature, and the 45-day period to hold a hearing shall begin upon entry of the accompanying Order. The Planning Board shall thereafter render a decision in accordance with the MLUL. (Emphasis added).

Pa543.

The "final completed application" included the revised plans that had been submitted by DCR I on August 23, 2023 and deemed complete in September/October 2023. In its DCR I holding, that same trial court relied, in part, on N.J.S.A. 40:55D-46(b), which provides:

> b. If the Planning Board requires any substantial amendment in the layout of improvements proposed by the developer that have been the subject of a hearing, an amended application for development shall be submitted and proceeded upon as in the case of the original application for development.

Pa540.

After the DCR I trial court's decision of March 28, 2024, Appellant acting now as "DCR II" wrote to the Planning Board on April 29, 2024 inquiring how the Planning Board on remand intended to address preliminary issues such as the

amount of time DCR would be allocated at the meeting. *Pa569*. DCR II indicated that it would consent to a period of ninety-five (95) days from the date of the March 28, 2024 court order in order for the Planning Board to hear the Application. *Pa569*. DCR II also stated it would consent to as many special meetings as might be necessary to complete the Application. *Pa551*.

On May 1, 2024, the reconstituted Planning Board commenced the hearing on the Application. *6T*. The plans submitted by DCR II to the Board for consideration were the substantially revised plans that had been deemed procedurally complete by the Board Engineer in September 2023. *Pa227*. Due to the prior disqualification of the eight (8) Planning Board members - which was most of the Planning Board - as a result of the DCR I lawsuit, and the subsequent appointment of new members, as well as DCR's submission of substantial changes to the Application, the Planning Board determined that the hearings needed to be restarted from the beginning "anew". *Pa6*. The DCR II Board struck the prior record and rightfully required DCR II to start anew on May 1, 2024. *6T.40:5-40:21*.

E. DCR II Substantially Changed Application and DCR II Second Lawsuit Herein Under Review is Without Merit as per MLUL

On June 5, 2024 the Planning Board held the timely next hearing on the new Application. *7T*. Sparta resident Dash appeared and argued that the

Planning Board must hold a jurisdictional determination to determine if the project was properly before the Planning Board. *7T.6:2-17:18*.

Dash's attorney stated in a supporting submission to the Planning Board dated May 22, 2024:

> The issue of whether DCR's proposal calls for a "warehouse", which is permitted in the ED (Economic Development) zone, or something more, or different, than a "warehouse", that constitutes either a nonconforming conditional use or a nonpermitted use, is a jurisdictional issue…[and] ***jurisdictional issues must be resolved as a predicate matter, before the land use board hears, and decides the merits of the development application. (Emphasis added).***

Pa 612.

The Planning Board in this DCR II application before this Appellate Court voted to hold a preliminary or plenary hearing on the jurisdictional issues, to be followed thereafter with a full hearing on the merits of the Application, if the Planning Board determined the jurisdictional issues under the MLUL. *7T.70:13-72:25*. The Planning Board then adjourned until the July 9, 2024 meeting. *7T.83:2-83:7*.

On July 1, 2024, just eight (8) days later without allowing the Planning Board to review or make a procedural or substantive finding, Appellant DCR II, filed its second action in lieu of prerogative writ in the Superior Court of New Jersey. *Pa39-Pa79*.

In this second action, DCR II challenged the Planning Board's actions at the May 1, 2024 and June 5, 2024 hearings, and sought the following relief:

> 1) Automatic approval of DCR's application (again); or (2) alternatively, compelling the Planning Board to complete hearing of the application and to render a decision within thirty (30) days of the entry of judgment; (3) prohibiting the Planning Board from holding a "jurisdictional hearing" on DCR's application; (4) vacating the Planning Board's determining to exclude prior hearings from March, April, May, June and July 2022, from the record; and (5) disqualifying Planning Board Members Joann Furman and Bryan Zimmerman; and, appointing a special master to oversee the Planning Board's review of the application.

Pa76-Pa78.

On March 5, 2025, the same trial court Judge as in DCR I issued an opinion and order in favor of the Planning Board and remanded the Application back to the Planning Board as to the DCR II application now before this Appellate Court. *Pa1-Pa21*. Three (3) of the findings in that DCR II decision by the trial court are the subject of the appeal now before this Appellate Court. *Pa22*.

F. Holdings by the DCR II Trial Court Now at Issue Were Proper, Not Appellant's Misplaced Rhetoric

The decision by the trial court in DCR II now before this Court for review held that the Sparta Planning Board was authorized to conduct hearings on its jurisdiction, because it must ultimately determine whether it has authority to grant the requested site plan approval. Finding that decisional law has acknowledged each municipal board's inherent authority to determine the extent and scope of its own jurisdiction concerning purely legal matters, the trial court rightfully determined that the Sparta Planning Board was permitted to hold a

plenary hearing to assess its jurisdiction as the matter is a mixed question of law and fact. *Pa5-Pa10*. The DCR II trial court herein further held:

> While the Court agrees that there is no provision within the MLUL that expressly authorizes land use boards to conduct plenary jurisdictional hearings before reaching the merits of an application, there is no provision within the MLUL that prohibits such hearings. *See* TWC Realty, 315 N.J. Super. at 215. ***Indeed, because planning boards are quasi-judicial bodies, each municipal board has the inherent authority to determine the extent and scope of its own jurisdiction concerning purely legal matters. See, N.J.S.A. 40:55D-20; Randolph, 405 N.J. Super. at 224; Chicalese v. Monroe Twp. Planning Bd., 334 N.J. Super. 413, 422-23 (Law Div. 200).*** Here, [Applicant's] application includes mixed questions of jurisdictional law and fact related to variance requests, which the Planning Board did not have the chance to fully review before plaintiff filed the instant action. See N.J.S.A. 40:55D-25; Ex. 7. ... the Planning Board was well within the scope of its authority and was empowered to assess facts that might affect both jurisdictional and substantive issues pursuant to N.J.S.A. 40:55D-20. (Emphasis added).

Pa8-Pa9.

The DCR II trial court again under Appellate review herein, held further that the Planning Board's decision to strike the prior record and start the hearings on the Application "anew" was reasonable because Appellant DCR II had proposed substantial amendments to its Application. Coupled with the new composition of the Planning Board resulting from the disqualification of most of the Planning Board members, the decision to start anew was appropriate. *Pa15-Pa17*.

Concluding that the Planning Board had acted appropriately in proceeding to a plenary, jurisdictional hearing and starting the Application anew, the DCR II trial court determined that automatic approval was premature and could not be considered by the trial court unless and until the Planning Board had herein determined that it had authority to grant the requested site plan approval. *Pa13*. The DCR II trial court stated:

> [Applicant's] decision to file the instant action before the Planning Board concluded its review resulted in the Planning Board being unable to issue a resolution or any final ruling on the application. ***In other words, the instant action was filed without allowing the Planning Board's review process to reach its natural conclusion, which circumvents the Planning Board's role in reviewing the matter in the first place. See Medici v. BPR Co. 107 N.J. 1, 15 (1987). Consequently, plaintiff's' filing of the instant complaint is premature,*** as it was filed before the Planning Board completed its evaluation of DCR's application and reached a decision. (Emphasis added).

Pa10.

This DCR II trial court ordered the Planning Board to resume its review of the Application within 45 days of entry of the order (Pa20-Pa21) and the Planning Board scheduled a hearing on the Application for April 16, 2025, which was within the 45 days. Respondent Planning Board has continually acted with clean hands and in good faith.

G. Appellate Matter at Hand

On March 20, 2025, however, Appellant DCR II filed the herein appeal to the Superior Court of New Jersey, Appellate Division of three (3) of the

findings in the trial court's March 5, 2025 Order. Pa22**.** On the same date, DCR II advised the Planning Board that it would not appear for further hearings pending a decision by the Appellate Division. Appellant continued its unilateral pray for self-imposed procedural relief, without any respect for MLUL guidelines or permitting the Sparta Planning Board review of the DCR II Application on its merit.

The issues on appeal now before this Appellate Court are as to the trial court's determinations on the following issues:

- Denial of an automatic approval of DCR's application;
- Approval of the "jurisdictional hearing" on DCR's application; and,
- Approval of the Planning Board's decision to exclude the prior hearings from March, April, May, June and July 2022, from the record.

Pa31-Pa32.

POINT I

Standard of Review

The following section of the New Jersey Standards for Appellate Review by Ellen T. Wry, Former Director, Central Appellate Research and Christina Oldneburg Hall, Director, Central Appellate Research, Appellate Division, New Jersey Superior Court, August 2022 revision ("Standards for Appellate Review") outlines the standard for Appellate review herein:

> In determining whether a ruling, action or inaction by the lower court or agency constituted error, the appellate court applies a standard of review that gives the appropriate deference to the lower court's or agency's decision. That standard may allow for no deference (review of purely legal decisions), some degree of deference, or a substantial degree of deference (review of findings of fact and agency decisions). See Mandel, N.J. Appellate Practice § 34:2-1 (2022).
>
> The issues on appeal, in a typical civil or criminal case, will implicate one or more of four basic standards of review: 1) the de novo, or plenary standard of review applied to rulings of law; 2) the highly deferential standard applied to findings of facts; 3) the mixed standard applied to mixed questions of law and fact; or 4) the highly deferential standard applies to matters committed to the sound discretion of the lower court. See Mandel, N.J. Appellate Practice § 34:2-3 (2022).

Standards for Appellate Review at p. 24.

In the case at hand, the trial court's findings on the three (3) issues on appeal are largely questions of fact, but some are also a mixture of questions of law and of fact implicating both standards 2) and 3) in the excerpt above. The factual findings by the trial court are entitled to deference by this Appellate Court

and the legal findings, likewise, while not entitled to special deference, are accurate and well supported and should be upheld by this Court.

As opined by the Appellate Court in Fallone Properties, LLC v. Bethlehem Tp. Planning Boad, 369 N.J. Super. 552, 560-562, 849 A.2d. 1117 (App. Div. 2004):

> It is well established that when a reviewing court is considering an appeal from an action taken by a planning board, the standard employed is whether the grant or denial was arbitrary, capricious or unreasonable. See Burbridge v. Mine Hill Tp., 117 N.J. 376, 385, 568 A.2d 527, 532 (1990); Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 296, 212 A.2d 153, 169 (1965); Med. Ctr. v. Princeton Zoning Bd. of Adjustment, 343 N.J.Super. 177, 198, 778 A.2d 482, 495 (App.Div.2001). ***The factual determinations of the planning board are presumed to be valid and the exercise of its discretionary authority based on such determinations will not be overturned unless arbitrary, capricious or unreasonable.*** Burbridge, *supra*, 117 N.J. at 385, 568 A.2d 527, 532; Rowatti v. Gonchar, 101 N.J. 46, 51–52, 500 A.2d 381, 384–85 (1985).
> …
>
> ***Likewise, when reviewing the decision of a trial court that has reviewed municipal action, we are bound by the same standards as was the trial court.*** Fred McDowell, Inc. v. Bd. of Adjustment of Township of Wall, 334 N.J.Super. 201, 212, 757 A.2d 822, 828 (App.Div.2000), certif. denied, 167 N.J. 88, 769 A.2d 1051 (2001); Charlie Brown of Chatham, Inc. v. Bd. of Adjustment of Township of Chatham, 202 N.J.Super. 312, 321, 495 A.2d 119, 123 (App.Div.1985). Thus, while we will give substantial deference to findings of fact, it is essential that the board's actions be grounded in evidence in the record. E.g., Tomko v. Vissers, 21 N.J. 226, 239–240, 121 A.2d 502, 509–10 (1956). Cf. Smith v. Fair Haven Zoning Bd. of Adjustment, 335 N.J.Super. 111, 120, 761 A.2d 111, 116 (App.Div.2000). By the same token, although we construe the governing ordinance *de novo*, we recognize the board's knowledge of local circumstances and accord deference

> to its interpretation. Somers Assoc. v. Gloucester Township, 241 N.J.Super. 323, 342–43, 575 A.2d 20, 30–31 (App.Div.), certif. denied, 122 N.J. 355, 585 A.2d 366 (1990). (Emphasis added.)

Also see, Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254, 105 A.3d. 1082 (2015), where the New Jersey Supreme Court stated:

> In this appeal from a non-jury trial, we give deference to the trial court that heard the witnesses, sifted the competing evidence, and made reasoned conclusions. See Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, , 483-84, 323 A.2d 495 (1974). Reviewing appellate courts should "not disturb the factual findings and legal conclusions of the trial judge" unless convinced that those findings and conclusions were "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Id. at 484, 323 A.2d 495 (citation and internal quotation marks omitted); see; e.g., Seidman v. Clifton Sav. Bank, 205 N.J. 150, 169, 14A.3d 36 (2011) (stating same)

LEGAL ARGUMENTS

POINT II

The Trial Court was Correct in Denying Appellant's Demand for the Extreme Relief Measure of an Automatic Approval (*Pa10-Pa14*)

Appellant, herein DCR II's preceding attempts on appeal to argue that, based on the time used for the "improper" predicate hearings, the Planning Board exceeded the time in which to decide the Application resulting in an "automatic approval" must be denied. *Pa7-Pa8*. The lower trial court correctly held that DCR II was not entitled to an "automatic approval", finding that such a determination was premature and that the nature and timing of the hearings did

not fall within the circumstances the automatic approval was created to address. *Pa14*.

The MLUL at N.J.S.A. 40:55D-61 sets forth, in pertinent part:

> Failure of the planning board to act within the period prescribed shall constitute approval of the application and a certificate of the administrative officer as to the failure of the planning board to act shall be issued on request of the applicant, and it shall be sufficient in lieu of the written endorsement or other evidence of approval herein required, and shall be so accepted by the county recording officer for purposes of filing subdivision plats.

Such an action is the exception and is to be applied with caution. Referencing the New Jersey Supreme Court's opinion in Amerada Hess Corp. v. Burlington Cnty. Planning Board, 195 N.J. 616, 630, 951 A.2d. 970 (2008), the trial court noted that the "Legislature established the automatic approval provision of the Municipal Land Use Law ("MLUL") to ensure 'timely disposition [of land use applications]' and to provide a remedy for a planning board's delay." *Pa11* However, it is also noteworthy that "it is a long held principle of our law that automatic approval statutes are to be `applied with caution'." Eastampton Ctr. LLC v. Planning Bd. of Twp. of Eastampton, 354 N.J. Super. 171, 193, 805 A.2d. 456 (App. Div. 2002).

As stated by the Court in Fallone Properties, LLC, *supra*, 369 N.J. Super. at 568-569:

> '[A]pplication of the statutory time constraints must be anchored in the reason for their existence. The evil which the automatic approval provisions were designed to remedy was municipal

> inaction and inattention.' Allied Realty v. Borough of Upper Saddle River, 221 N.J.Super. 407, 418, 534 A.2d 1019, 1024 (App.Div.1987), certif. denied, 569 110 N.J. 304, 540 A.2d 1284 (1988).

Moreover, " courts have been reluctant to uphold an automatic approval absent a clear showing of purposeful delay." Fallone Properties, LLC, *supra*, 369 N.J. Super. at 569. In the case at bar, the *Appellant filed this action even though the Board was in the process of hearing the Application.* There was no showing of any delay here, let alone a "purposeful" one.

There was no basis on which DCR II before this Appellate Court could seek an automatic approval, except to try to circumvent the meritorious Planning Board process. In fact, DCR II's very filing of the Complaint in which it sought the automatic approval was premature under Court Rule 4:69 governing "Actions in Lieu of Prerogative Writ". Specifically, R. 4:69-5 entitled "Exhaustion of Remedies" states "[e]xcept where it is manifest that the interest of justice requires otherwise, actions under R. 4:69 shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted." Here, DCR II filed its Complaint *after* the administrative process had commenced and was underway, yet DCR II sought to by-pass that process and the law. *Pa14*.

Due to DCR II jurisdictional questions raised by the Planning Board and the objectors to the Application, an automatic approval could have resulted in a

poor record and a determination that was not within the Planning Board's jurisdictional purview. The objectors to the DCR Application(s) continued to contend that the proposed DCR II use is not a warehouse, but rather a trucking terminal or other logistics facility or use that is not a warehouse. *7T.52:19-53:23*. If correct, DCR II's use is not permitted in the ED Zone in which the Property is located. This is a significant jurisdictional issue of fact and law in the proceedings before the Planning Board, which required Planning Board analysis, testimony, Board Professionals' input and MLUL compliance. *7T.53:24-55:17*. DCR II's bullying approach and demand for procedural automatic approval served no purpose. In essence, Appellant continues to cause its own delay.

A. Automatic Approval Is Premature (*Pa13*)

The trial court correctly stated the significance of this issue and noted that it caused an automatic approval to be premature:

> Jurisdiction is a threshold issue that must be determined before the. Court can consider the requested relief. In other words, if plaintiff submitted its application to the wrong Board for review (i.e. the Planning Board instead of the Zoning Board), then the automatic grant of the application would be inappropriate, and contrary to the intent of the statutes which was to assure review of applications by agencies with the most expertise, but to also ensure prompt review. If jurisdiction for the application is with the Zoning Board, for example, then prematurely precluding the Zoning Board from such review via automatic approval simply because DCR may have filed it before the wrong body would be a ludicrous result. Indeed, it would completely circumvent the intent of the statute, and encourage the misfiling of applications.

Pa 13.

B. MLUL Controls *(Pa14)*

It is the obligation of the Applicant to meet the requirements of the Municipal Land Use Law, including the obligation explicitly stated in N.J.S.A. 40:55D-10.3, "... to prove in the application process that he is entitled to the approval of the application." DCR II fell short of its obligation to prove that it is entitled to approval of the Application. As succinctly and correctly stated by the trial court:

> [G]ranting the automatic approval of DCR's approval in this instance would be inappropriate and contrary to the intent of the MLUL, which is to assure review of applications by agencies enshrined with the power to review them. See, N.J.S.A. 40:55D-61. Here, automatically approving the application would mean that the Court would usurp the Planning Board's authority during its review process. See N.J.S.A. 40:55D-20.

This DCR II trial court correctly then held that, "automatically approving the application *while it is still in the process of review with the respective administrative agency, i.e.* the Planning Board, would constitute a premature adjudication by the Court". (Emphasis added). *Pa14.*

Thereby, Appellant's unilateral actions and self-created procedural shortfalls are without merit to cause an automatic approval.

POINT III

The Trial Court Properly Determined that the Planning Board Properly Started the Hearings on DCR II's Application "anew" (*Pa15-Pa17)*

The Planning Board here reasonably determined that it would restart the hearings anew after the recusal of Planning Board members and the passage of at least two (2) years. On review, the lower DCR II trial court held that "the Planning Board acted reasonably when it decided to hear DCR's application anew." *Pa17.* In support, the court cited the New Jersey Supreme Court on that same issue:

> The Supreme Court of New Jersey has found that ***when a new, fully constituted board is set to hear the application, it "should have the opportunity to hear the application anew*** [and] address questions to the witnesses." Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 26 (2013). (Emphasis added.)

Pa15-Pa16.

Based on its review of the facts in DCR I's motion to disqualify the eight (8) Planning Board members, the trial court had concurred with DCR I and disqualified them. (*Pa17*). New members were appointed by the Planning Board. These members did not have the benefit of attending the prior hearings two (2) years prior. Accordingly, the Planning Board correctly determined, but not limited to, that this new complement of Board members — essentially the entire Planning Board — should have the opportunity to hear the testimony in support of the Application and have the ability to ask questions. *Pa16-17.*

In further support of starting the DCR II hearings "anew" was the fact that the Appellant' s amended Application was not the same as the one that had been presented two (2) years prior. The DCR II application had substantial

amendments and changes that had not been presented or discussed at the prior hearings. This substantial amendment specific finding was referenced by the DCR II trial court in its opinion: "[t]he Planning Board points to this Court's March 8, 2024 Order, in which this Court found that DCR's new plans constituted a 'substantial amendment' pursuant to the MLUL." *Pa16-17.* The Sparta Board Engineer also found that the Application submission was substantially different from the prior one when he had deemed it procedurally complete. *Pa83.*

The standard Appellant cites for when an application should be started "anew" is whether or not the "central focus" of the application has changed. The cases cited by Appellant in support of its position against starting "anew" are easily distinguishable from those in this case. The changes to the applications in the cases cited by Appellant do not rise to the level of changing the "central focus", whereas the changes to Appellant's application did; they changed the central focus and required that the application be started "anew".

The changes to the minor subdivision in Schmidhausler v. Planning Bd., 408 N.J. Super. 1 (App. Div. 2009), cited by Appellant, that were necessitated by the discovery of a private road on the property of the proposed minor subdivision were much less than the substantial, substantive changes to DCR II's Application. Likewise, the level of changes to the subject application are more than simply converting "on-street parking to on-site parking" that "did not

constitute a substantial amendment" in the case of Underwood Properties, LLC v. Planning Bd. of the City of Hackensack, 2020 WL 4036767, A-5420-18 (App Div. July 17, 2020) (slip opinion at 4). *Da7*; *Pa 201-206.*

In the case at bar, the nature and location of the operations proposed were larger and more substantial than those in the cases cited by Appellant. The changes to the subject Application change the "central focus" of the operations and layout of the use. The facts here are more akin to those in Lake Shore Estates, Inc. v. Denville Twp. Planning Board, 255 N.J. Super. 580, 592 (App. Div. 1991), aff'd 127 N.J. 394 (1992). In that case, the court determined that a developer's application that added acreage to the project should be treated as a new application and hence was heard "anew". The changes to the application created as a result of the additional acreage changed the central focus of the application.

A. Hearing Anew (*Pa15-Pa17*)

The determination to start anew was reasonable as it would be more helpful to hear the testimony of all witnesses, including but not limited to expert, documentation and factual witnesses, from all sides, on DCR II's substantially amended plans, and to be able to cross-examine witnesses on all of the issues. The Respondent Board further reached this conclusion in part, because it would allow the current members of the Board, several of whom were not present at the prior proceedings, to observe the entirety of the hearing and to cross-examine all

of the anticipated witness(es). *6T.46:11-49:25*. This is particularly appropriate here where the plans were determined to be substantially different from those discussed at the original DCR I hearings, including a specific revision to convert one of the buildings to a non-rail-dependent building, which is not authorized to use the different bulk standards applicable to a rail-dependent building. *6T.46:11-49:25, 6T.59:2-60:16*.

The Sparta Planning Board Engineer and the Board Planner both confirmed that there are very significant differences between the original DCR I application and the pending DCR II Application and plans. *6T.59:2-60:16*. For example, the buildings are now proposed to have one building that is not rail dependent and a second building that is proposed to be rail dependent. *6T.59:2-60:16*. This changes the bulk standards for the entire lot, because the site plan application is one lot with two different building types. Moreover, the revised DCR II Application plans necessitated "c" variances, and site plan exceptions or waivers were required for the Application that were not considered at the original hearings. *See e.g., Pa863, Pa867, Pa872, Pa888.*

The impervious coverage is higher than the 42.3% impervious coverage proposed by the DCR II as a result of the deferred parking spaces that will be required for any parking space count relief. *Pa860, Pa863*. The DCR II Application also required a "c" variance because of impervious coverage of over 40% at the Ordinance maximum of 40%. *Pa888.* After considering all of these

differences, and having reviewed both the old DCR I record and the new DCR II plans, the Planning Board determined that given the Appellant's different plans, and the time that had elapsed, the Board reasonably concluded that it would be meritorious to the Board members and the public to start anew as per the MLUL mandates. *Da81, Da87, 6T.46:11-49:25, 6T.59:2-60:16.*

Moreover, it is apparent that the Appellant's initial litigation in the DCR I case, and the resultant change in the Board members, is something which the Appellant cannot object to as it is a logical consequence of the determination that Board members had been disqualified through Appellant's efforts. The now newly formed Board should have discretion to fully review the DCR II application to avoid confusion and mishaps. *6T.46:11-49:25; Pa17.* It is apparent that planning boards have the authority to determine that a revised application should be restarted as affirmed herein by the trial court. See. Ten Stary Dom Pt. v. Mauro, *Id*., and Lake Shore Estates v. Denville Tp., 255 N.J. Super. 580, 592 (App. Div. 1991), affd o.b. Lake Shore Estates v. Denville Tp.. 127 N.J. 394 (1992).

POINT IV

The Trial Court was Correct in Permitting a "Plenary" Hearing (*Pa9-Pa10)*.

Appellant, DCR II contends that the Respondent, Planning Board incorrectly required a "plenary hearing" on the issue of jurisdiction as to

Appellant's DCR II's revised site plan application. The trial court, however, correctly confirmed that it was proper for the Planning Board to hold such a hearing in order to determine raised predicate issues that could determine whether the Planning Board was the correct venue, before reaching the merits of the DCR II revised Application. *Pa9-Pa10*.

As properly opined by the trial court:

> Planning boards function as quasi-judicial bodies and obtain their jurisdiction by the Municipal Land Use Law ("MLUL"). See, N.J.S.A, 40:55D-20; Randolph v. City of Brigantine Planning Bd., 405 N.J. Super. 215, 225 (App. Div. 2009) (noting planning board members act in a "quasi-judicial capacity").

Pa6.

N.J.S.A. 40:55D-25 sets forth the powers allocated to the Planning Board:

> a. The Planning Board **shall** follow the provisions of this act and shall accordingly exercise its power in regard to:
>
> (1) The master plan pursuant to article 3
> (2) Subdivision control and **site plan review** pursuant to article 6
> (3) The official map pursuant to article 5
> (4) The zoning ordinance including conditional uses pursuant to article 8
> (5) The capital improvement program pursuant to article 4
> **(6) Variances and certain building permits in conjunction with subdivision, site plan and conditional use approval pursuant to article 7.6. (Emphasis added.)**
>
> b. The Planning Board **may:**

> (1) Participate in the preparation and review of programs or plans required by State or federal law or regulation
> (2) Assemble data on a continuing basis as part of a continuous planning process; and
> (3) Perform such other advisory duties as are assigned to it by ordinance or resolution of the governing body for the aid and assistance of the governing body or other agencies or officers.
>
> (Emphasis added.)

The DCR II revised site plan threshold question here was whether the Planning Board even had subject matter jurisdiction to hear the application. "Subject matter jurisdiction involves 'a threshold determination as to whether [a board] is legally authorized to decide the question presented." Robertelli v. N.J. Off. of Att'y Ethics, 224 N.J. 470, 481 (2016) (quoting Gilbert v. Gladden 87 N.J. 275, 280-81 (1981)).

Based on the authority set out in the MLUL and the cases cited above, it was appropriate and necessary for any Planning Board to consider the issue of its jurisdiction in the context of a preliminary or plenary hearing. The Planning Board must ultimately determine whether it has the authority to hear any Application and consider the relief raised by an applicant.

A. Use and Nature of Operations and Activities (*Pa8-Pa9*)

The nature of the operations and activities proposed by DCR II were in question. As noted above in Point II, objectors to the Appellant application had raised the issue of whether the proposed use is a warehouse, a trucking terminal

or some other type of commercial use. Threshold testimony relative to the revised DCR II operations was necessary for the Planning Board to determine MLUL jurisdiction. *Pa8*.

Another procedural question that was raised was whether the revised DCR II application complied with other Sparta land use ordinance(s) requirements or required exceptions, such as "c" variance(s). *Pa888*.

The trial court noted in the herein DCR II appellate matter that while there is no provision in the MLUL that expressly authorizes land use boards to conduct plenary jurisdictional hearings:

> **[t]here is no provision within the MLUL that prohibits such hearings**. See, TWC Realty, 315 N.J. Super. at 215.2 Indeed, *because planning* boards are quasi-judicial bodies, each municipal board has the inherent authority to determine the extent and scope of its own jurisdiction concerning purely legal matters. See N.J.S.A. 40:55D-20; Randolph, 405 N.J. Super. at 225; Chicalese v. Monroe Twp, Planning Bd., 334 N.J. Super. 413, 422-23 (Law. Div. 2000). **Here, DCR's application includes mixed questions of jurisdictional law and fact related to variance requests,** which the Planning Board did not have the chance to fully review before plaintiff filed the instant action. See N.J.S.A. 40:55D-25. (Emphasis added.)

Pa8-Pa9.

The Respondent Sparta Planning Board reasonably determined to hold a jurisdictional hearing.

From a timing standpoint, holding the DCR II jurisdictional hearing on the predicate issue(s) would not make a significant difference because the testimony

by the Applicant detailing its proposed use would be necessary anyway. Moreover, if it were ultimately determined at the outset that the DCR II use as proposed does not fall within the Planning Board's scope, time would be saved because the Planning Board would not have to address the remaining land use issues until the end of an anticipated lengthy hearing process.

On review in this herein DCR II appeal the trial court correctly found that the plenary hearing was proper, analyzing the case of TWC Realty P'ship v. Zoning Bd. of Adjustment of Twp. of Edison, 315 N.J. Super. 205 (Law Div. 1998), aff'd 321 N.J. Super. 216 (App. Div. 1999). *Pa9.* The TWC case involved a zoning board that claimed it did not have jurisdiction to review an application because the use constituted an unlawful rezoning under Dover Township v. Dover Tp. Board of Adjustment, 158 N.J. Super. 401 (App. Div. 1978) and its line of cases. Whether a use variance application effectively constitutes unauthorized zoning because it usurps the authority of the governing body is an issue beyond the normal expertise of a planning board to decide, but is an issue the zoning board must hear, and the TWC court so found. The zoning board could not simply disavow hearing an issue under its purview.

Here, in a manner completely distinguishable from TWC, the Respondent Planning Board determined that it would hear the Applicant with public comment raised by objectors as to the jurisdictional mixed question of fact and

law of whether the proposed application is for a warehouse, a trucking terminal or some other use not permitted in the ED Zone.

Unlike TWC Realty, the Sparta Planning Board here in DCR II did not determine that no board had jurisdiction to determine the case. Instead, as a threshold procedural matter, the Respondent, Planning Board determined that if, after the preliminary jurisdictional hearing, it concluded that the use is a trucking terminal or other use not permitted in the ED Zone, it would transfer the application with the entire record to the Zoning Board of Adjustment for a "d" variance with related site plan review, as stated in the record of the Board hearing. *7T.53;24-58:9*

Determination of the plenary hearing MLUL jurisdictional question in this matter is more in line with the decision in Tannenbaum v. Township of Wall Board of Adjustment, 407 N.J. Super. 446, 462 (Law Div. 2006), aff'd o.b. 407 N.J. Super. 371 (App. Div. 2009), where the Tannenbaum court determined that a zoning board not only had the jurisdiction but the duty to decide whether the use was a permitted one. In Tannenbaum the court stated:

> Here, the Planning Board's express lack of jurisdiction is a reasonable interpretation of the statute and ordinance; there is no proof of bad faith or intentional delay on the part of the Planning Board. Unlike TWC Realty, the Board of Adjustment was ready, willing and able to hear Plaintiffs application. Plaintiff simply disagreed with the Board's decision as to which zoning requirements controlled, and they declined to go forward.

Tannenbaum, *Id*. at 462.

Appellant here, as similar to the plaintiff in Tannenbaum, disagrees with the Respondent, Sparta Planning Board and the DCR II Superior Court findings as to the need for a jurisdictional determination and then DCR II declined to go forward.

Further, in this DCR II matter the Sparta Planning Board was ready, willing and able to proceed with the DCR II's case if the facts elicited indicated it was the proper jurisdictional board to hear it. The Respondent Planning Board did not delay the DCR II Application. It was in the proper process of hearing it when Appellant unilaterally declined and made its sole decision to prematurely file the DCR II suit herein.

In additional support of the propriety of the Respondent, Planning Board holding hearings to discern the nature of the Application and its jurisdiction, the negative consequences associated with a planning board hearing a case in which it lacks jurisdiction is readily apparent from the procedural history and the opinion of the Appellate Division in Red Oaks Homeowner's Ass'n, LLC v. Planning Bd. of the Twp. of Lakewood, 2024 WL 1987735, A-2146-22 (App. Div. May 6, 2024). In Red Oaks, the New Jersey Appellate Division upheld the trial court's reversal of the Planning Board's site plan approval after multiple hearings because the Appellate Division determined that the application required a "d" (use) variance that could only be heard by the Zoning Board of Adjustment. *Da 1*.

Thereby, Appellant DCR II continues its unilateral decision to appeal to advocate procedural issues in complete disregard to predicate substantive jurisdictional issues that are necessary and proper under the MLUL. The trial court correctly upheld the procedural decision of the Planning Board to proceed with a preliminary hearing on the threshold jurisdictional questions as to the undisputed DCR II substantially revised site plan.

Conclusion

In sum, the trial court properly determined that Appellant, DCR II's land use application did not comply with the New Jersey statutory mandates under the MLUL and the supportive New Jersey case law at hand.

The trial court determination of the Honorable Stuart A. Minkowitz, A.J.S.C. should be affirmed.

Respectfully submitted,
BRACH EICHLER, LLC

/s/ Kenneth A. Porro

Kenneth A. Porro. Esq.

Dated: August 1, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No.: A-002119-24 T4

DIAMOND CHIP REALTY, LLC, Plaintiff/Appellant, v. TOWNSHIP OF SPARTA PLANNING BOARD, Defendant/Respondent.	Civil Action ON APPEAL FROM THE ORDER OF THE SUPERIOR COURT, LAW DIVISION, SUSSEX COUNTY DATED MARCH 5, 2025 Docket No.: SSX-L-296-24 Sat Below: Hon. Stuart A. Minkowitz, A.J.S.C.

REPLY BRIEF OF APPELLANT DIAMOND CHIP REALTY, LLC

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I. THE DETERMINATIONS AT ISSUE ARE SUBJECT TO DE NOVO REVIEW NOT ENTITLED TO DEFERENCE.

The Planning Board's "Point I" mistakenly argues that the challenged determinations are subject to deferential review. As DCR noted in its initial brief, a municipal agency's determinations concerning the "scope of its own authority and jurisdiction" are legal in nature, not entitled to deference, and subject to de novo review by the courts. TWC Realty P'ship v. Zoning Bd. of Adjustment of Twp. of Edison, 315 N.J. Super. 205, 211 (Law Div. 1998), aff'd, 321 N.J. Super. 216 (App. Div. 1999) (citing cases).

As would be expected, the Planning Board asserts that the determinations at issue are "largely questions of fact". Resp. Br. at 13. However, the record reveals that both the Planning Board and trial court considered such determinations to be committed to the Planning Board's discretion under the MLUL, a question of law. See 6T:47:11-47:4 (discretion to start anew); 7T55:8-16 (discretion to conduct plenary, jurisdictional hearings). Moreover, the trial court deemed those decisions to concern questions of law. See Pa16-17 (holding that MLUL and decisional law conferred the Planning Board with discretion to start anew); Pa8-9 (holding that a planning board has inherent authority to determine the extent and scope of its own jurisdiction).

II. THE APPLICATION WAS DEEMED AUTOMATICALLY APPROVED BECAUSE THE PLANNING BOARD FAILED TO TIMELY ACT ON THE APPLICATION AND NO EXCEPTIONS TO AUTOMATIC APPROVAL HAVE BEEN SATISFIED.

The Planning Board's "Point II" argues that automatic approval was premature because the Planning Board was still reviewing the Application. Such argument ignores the simplistic formulation of the automatic approval provision set forth in the MLUL and is contrary to well-established precedent.

The MLUL and decisional authorities makes clear that it is the final action on a land-development application – either a grant or denial – that is germane to automatic approval. As set forth in § 46(c) of the MLUL, a planning board reviewing an application for preliminary site plan approval "shall grant or deny preliminary approval within 95 days of the date of submission" of a complete application. N.J.S.A. 40:55D-46(c). When a planning board fails to act within such statutory period, "the planning board shall be deemed to have granted preliminary approval". N.J.S.A. 40:55D-46(c). Thus, by its own terms, the automatic approval provision focuses exclusively on final action within the statutory period, not commencement of hearings on an application. Cf. Neu v. Planning Bd. of Tp. of Union, 352 N.J. Super. 544, 552-53 (App. Div. 2002) (discussing that the relevant inquiry in the context of the MLUL's automatic approval provisions is whether the board took action on an application, noting that "pending simply means not yet decided").

Finding to be misplaced the lower court's reluctance to grant automatic approval in the absence of purposeful delay, the Supreme Court clarified the standard in Amerada Hess Corp. v. Burlington Cnty. Planning Bd., holding that a board's failure to act on a complete application within the statutory period results in an automatic approval unless "the board establishes that its delay was inadvertent or unintentional". 195 N.J. 616, 637 (2008). Such harsh remedy is "what the Legislature intended". Id. at 636. It reflects the Legislature's "value judgment that expeditious land use decisions are of such benefit to the public and applicants alike that the strong remedy of automatic approval is necessary and appropriate". Id. at 637.

In this case, there can be no question that the Planning Board failed to act on the Application within the 95-day statutory period, which commenced as of the trial court's March 28, 2024, remand in DCR I and expired on July 1, 2024. Because the Planning Board failed to adjudicate the Application by such date, it was to be deemed approved unless the Planning Board established the delay was inadvertent or unintentional. Amerada Hess Corp., 195 N.J. at 637. Accord Shipyard Associates, L.P. v. Hoboken Planning Board, A-405-14 (App. Div. August 2, 2017) (slip op. at 4) (Pa165-171).

Despite that simplistic statutory formulation, as clarified by Amerada Hess, the Planning Board has not argued that its delay should be excused as inadvertent or unintentional, but instead asserts that DCR's request for automatic approval was

and is premature because the Planning Board's review was ongoing. Tellingly, the Planning Board cites no statutory or decisional authority supporting its view, and in fact, the argument has already been rejected by the courts. See South Plainfield Properties, L.P. v. Middlesex County Planning Board, 372 N.J. Super. 410 (App. Div. 2004) (discussing that a board's extenuating review beyond the statutory period is "precisely the conduct that the automatic approval provision was designed to prevent").

DCR briefly addresses the cases cited by the Planning Board – Easthampton Ctr. LLC v. Planning Bd. of Twp. of Easthampton, 354 N.J. Super. 171 (App. Div. 2002) and Fallone Properties, LLC v. Bethlehem Tp. Planning Board, 369 N.J. Super. 552 (App. Div. 2004) – neither of which are of any help to the Planning Board here.

In Easthampton Ctr., the Appellate Division addressed the trial court's grant of automatic approval where the inaction stemmed from the planning board's belief that the application was incomplete. 354 N.J. Super. 171, 195 (App. Div. 2002). In particular, the applicant sought approval for a general development plan for which the MLUL set forth a checklist of required submittals. At the time of the application, the planning board had not yet adopted a checklist for required submittals on a general development application. Id. at 179. Notwithstanding, when the application was submitted, the planning board deemed the application incomplete as it was not submitted with the items included in the MLUL's checklist.

Id. at 181. On appeal from the trial court's grant of automatic approval, the Appellate Division found that the planning board had correctly deemed the application incomplete such that automatic approval was inapplicable. Id. at 191-92. However, in dictum, the panel observed that even if the board had erred in finding the application incomplete, its belief was reasonable as it was based on the advice of its professional planner. Id. at 195-96. As such, its failure to act within the statutory deadline would have been inadvertent and unintentional. Id.

Similarly, in Fallone Properties, the Appellate Division affirmed the trial judge's denial of automatic approval where the delay was based on the planning board's mistaken belief that the MLUL required contract-purchasers application to include the consent of the property owner, leading the planning board to conclude that the application was incomplete. Although the trial judge and panel found that the planning board's legal determination was wrong, its misapprehension was reasonable, such that automatic approval was unwarranted. 369 N.J. Super. 552, 570-72 (App. Div. 2004).

Unlike Easthampton and Fallone Properties, a finding of inadvertent or unintentional delay would be unwarranted here. In this case, the Planning Board justifies the certain delay beyond the statutory period on the ostensible presence of a "significant jurisdictional issue" regarding whether the proposed "use is not a warehouse, but rather a trucking terminal or other logistics facility or use that is not a warehouse". See Resp. Br. at 18. Yet, despite this current contention, the

Planning Board's own professionals resolutely and repeatedly rejected any "jurisdictional issue". Indeed, the board's professional planner opined that DCR's proposed facility was "definitely not … a trucking terminal", but a permitted "warehouse and distribution use". 1T102:1-103:6. Similarly, its attorney found "no doubt" that the Planning Board "has jurisdiction". 2T35:21-24.

As should be clear from this background, the Planning Board's delay was certainly not inadvertent or unintentional, based on technicalities and reasonable misapprehension, but a calculated effort to obfuscate and delay adjudication of the Application through a phantom claim of a "jurisdictional issue" that simply does not exist. Because the Planning Board failed to timely act on DCR's Application, and its inaction cannot be excused as inadvertent or unintentional, automatic approval is the appropriate remedy.

III. THERE WAS NO BASIS TO STRIKE THE PRIOR RECORD AND RESTART HEARING OF THE APPLICATION BECAUSE THE CENTRAL FOCUS REMAINS THE SAME AND THE UNPRECEDENTED DISQUALIFACTIONS OF THE PLANNING BOARD'S MEMBERSHIP IS INSUFFICIENT AND INEQUITABLE.

The Planning Board's "Point III" argues that the determination to strike the prior record and restart hearing of the Application was reasonable because of the change in composition of the board following the wholesale disqualifications of the board's membership in DCR I, and the submission of amended plans. As DCR

established in its initial brief, neither basis is supported by the MLUL or decisional law interpreting it.

The Planning Board's first justification for restarting hearing of the Application makes clear that it is simply veiled justification for the Planning Board's retaliation against DCR for decimating the board's composition in DCR I. To that end, the Planning Board argues restarting the hearings was a "logical consequence" of DCR's efforts in DCR I which resulted in constitution of "essentially an entirely new board" that "did not have the benefit of attending the prior hearings". See Resp. Br. at 20-24. A necessary assumption of such argument, however, is that the disqualified members had actually participated in the initial hearings on the Application. Yet, the Planning Board overlooks that all of the members disqualified in DCR I had been appointed *after* the initial hearings occurred. See, e.g., 3T (reflecting that the Planning Board's eleven members as of May 4, 2023, the third hearing of the Application, were Andrew Reina, Christine Quinn, Dr. George Parker, Joshua Hertzberg, Michael Sylvester, Peter Skei, Daniel Healy, John Kollar, Theodore Gall, Joe Toscano, and Jerry Murphy), Pa535 (March 28, 2024 Order in DCR I, disqualifying eight new members of the Planning Board, Angela Kasse, Christine Dunbar, Dean Blumetti, Jeanette Burke, Ron Day, Celeste Luciano, Justin Kanellis, and William Enright). In other words, irrespective of the disqualifications that resulted from DCR I, the Planning Board that would have heard DCR's resumed Application would have been entirely new and lacked the

"benefit of attending the prior hearings" – the asserted basis for restarting hearing of the Application.

Given that the composition of the Planning Board hearing DCR's Application after the initial set of hearing would have been "entirely new" irrespective of the disqualifications in DCR I, the Planning Board's asserted justification for striking the record and starting anew – which it suggests is a product of DCR's own doing – simply crumbles upon itself. Indeed, if the Planning Board had actually been concerned that its members who would preside over DCR's Application had not been on the board and participated in the initial hearings, then it would not have effectuated the wholesale reorganization of the Planning Board's membership in 2023 – in which all but one board member to have sat on DCR's initial hearings was removed. See Pa460-507. Because it would have been wholly unjust to permit the Planning Board to restart hearing of the Application due to the wholesale reappointments of its membership, it is unjust to permit it to do so when such appointed members are disqualified due to conflicts of interest.

While DCR would argue that the injustice befalling it from the commencement of the Application anew following DCR I is alone a basis for reversal, the Court should also observe that the MLUL has established a procedure to address the ostensible concern raised by the Planning Board. Under § 10.2 of the MLUL, by which the absent member simply certifies to having reviewed the

transcript or audio of the meeting from he/she was absent. See N.J.S.A. 40:55D-10.2. This procedure applies to new members who were not on the board at the time of the hearings. See Mercurio v. DelVecchio, 285 N.J. Super. 328, 331-334 (App. Div. 1995).

Given that the Planning Board's first justification for starting the Application anew finds no support in the MLUL, and actually contradicts it, the Planning Board points to the trial court's citation to Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 26 (2013), which it claims to reflect a decision of the Supreme Court "on [the] same issue". However, as DCR pointed out in its initial brief, the portion of the opinion cited by the trial court was simply the Supreme Court's recitation of the ruling of the trial judge in that case, which ruling was reversed by the Appellate Division, as affirmed by the Supreme Court. Id. at 39-40. As the cited language arose from the reversed trial court ruling, it certainly does not reflect an accurate statement of the law.

The separate rationale of the trial court and Planning Board that DCR's submission of amended plans justified hearing the Application anew is equally unavailing.

As an initial matter, the Court should observe that neither the Planning Board below, nor the trial court, articulated a factual basis for the determination that DCR's amended application constituted a "substantial amendment" justifying treatment anew. Indeed, when the matter arose during the May 1, 2024, hearing,

the Planning Board's attorney concluded that that DCR's amended plans were "substantial amendments", without any analysis having a tendency to show the scope of changes from the prior plans to the current, amended plans. See generally, 6T:46:11-48:17. Given that the Planning Board did not open the matter for discussion, and did not adopt a resolution memorializing its determination and the reasons thereof, it is impossible to assess the Planning Board's rationale for determining that DCR's amended plans included "substantial amendments". In turn, and similarly, the trial court's ruling simply concluded, without any analysis whatsoever, that "DCR [] submitted an amended application with substantial proposed amendments". Pa17. Indeed, the trial court did not identify a single aspect of the original plans which were modified in the amended plans. Such failure to set forth the basis of the decision warrants vacation. Smith v. Fair Haven Zoning Bd. of Adjustment, 335 N.J. Super. 111, 120 (App. Div. 2000).

Perhaps recognizing that this shortcoming below justifies vacation, the Planning Board attempts in its brief to identify perceived differences in DCR's current plans from its prior plans, which it now argues rise to the level of a "substantial amendment". Review of the Planning Board's assertions and the record, however, show that they have essentially been made up. For example, the Planning Board asserts that the "Sparta Planning Board Engineer and the Board Planner both confirmed that there are very significant differences between the original DCR I application and the pending DCR II Application and plans". Resp.

Br. at 23. Despite this assertion, the testimony cited – 6T59:2-60:16 – was that of Richard Saunderson, DCR's architect, and made *after* the Planning Board had voted to strike the prior record and start hearing of the Application anew. See 6T48:2-49:19.

In addition, the Planning Board's brief asserts that there were "changes [to] the bulk standards for the entire lot, because the site plan application is one lot with two different building types" and that "the revised DCR II Application plans necessitated 'c' variances, and site plan exceptions or waivers [which] were required for the Application that were not considered at the original hearings". See Resp. Br. at 23. However, review of the Planning Board's general citations to pages 863, 876, 872 and 888 of DCR's appendix, shows excerpts from engineering and planning review letters which merely identify a purported parking deficiency in the current plans, and do not address the original plans at all.

The Planning Board's brief also asserts that "[t]he DCR II Application also required a 'c' variance because of impervious coverage of over 40% at the Ordinance maximum of 40%", citing Pa888 for that claim. However, review of the cited report of the Planning Board's professional planner refers singularly to relief needed for any alleged parking deficiency and does not refer to a variance for impervious coverage.

In short, cursory review of the record cited by the Planning Board fails to establish an iota of evidence that DCR's plans have been "substantially amended"

justifying treatment of the Application anew. DCR has simply modified its plans to satisfy the requests of the Planning Board, and in so doing, has maintained the Application's "central focus" of a warehouse – albeit of a smaller footprint – consisting of two (2) buildings on the same approximately 68-acre development site. 6T59:7-64:12. Because the "central focus" of DCR's proposed development is unchanged, this Court should reverse the judgment below and vacate the Planning Board's decision to strike the prior record and start hearing of the Application anew.

IV. THERE WAS NO BASIS FOR A PLENARY, JURISDICTONAL HEARING BECAUSE THE PLANNING BOARD IS STATUTORILY OBLIGATED TO HEAR AND DECIDE DCR'S APPLICATION ON THE MERITS.

The Planning Board's "Point IV" argues that it was "appropriate and necessary" to direct a plenary hearing concerning only the Planning Board's jurisdiction because "the Planning Board must ultimately determine whether it has the authority to hear any Application and consider the relief raised by the Applicant". The Planning Board is wrong.

Contrary to the Planning Board's argument, its authority to *hear* an application for preliminary site plan approval, as here, arises solely upon the "submission to the administrative officer" of a "complete application for a site plan". N.J.S.A. 40:55D-46(c). An application's completeness is determined "when so certified by the municipal agency or its authorized committee or designee" or

by operation of the law "[i]n the event that the agency, committee or designee does not certify the application to be complete within 45 days of the date of submission". N.J.S.A. 40:55D-10.3. Once an application is deemed complete, a planning board "*shall* grant or deny preliminary approval" within 45 days (if the application involves 10 or less acres or dwelling units) or 95 days (if, as here, the application involves more than 10 acres or dwelling units). N.J.S.A. 40:55D-46(c). Because "'shall' indicates a mandatory requirement", N.J.S.A. 40:55D-3, by its own terms, the MLUL mandates that a planning board must *hear* and decide (i.e., grant or deny), within the applicable statutory period, all complete applications seeking preliminary site plan approval. N.J.S.A. 40:55D-46(c). As such, and despite the Planning Board's assertion otherwise, there was and is no "threshold question" as to "whether the Planning Board had subject matter jurisdiction to hear the application". Simply put, the Planning Board not only has "subject matter jurisdiction" to *hear* DCR's Application, it was and is statutorily obligated to do so.

Both the Planning Board and the trial court conflate the distinct concepts of a board's jurisdiction to hear applications brought before it, from such board's authority (i.e. "jurisdiction") to *grant* the relief requested. A Planning Board's jurisdiction to review and adjudicate a site plan application is conferred and becomes statutorily mandated upon an application being deemed complete. TWC Realty, 315 N.J. Super. at 212-13. Such "jurisdictional mandate to hear and decide complete development applications" is distinguished from a board's authority to

grant relief, which is conferred upon the applicant's proofs that the statutory criteria for relief have been satisfied. Id. at 215-16 (citing cases).

TWC Realty directly addressed the propriety of plenary, jurisdictional hearings, finding upon a comprehensive review of the MLUL's text, legislative history, and purposes, that such hearings are not authorized. 315 N.J. Super. at 209. The Planning Board and trial court attempt to distinguish TWC Realty on the basis that it concerned the utilization of a plenary, jurisdictional hearing by a zoning board, rather than a planning board. This is a distinction without significance because a zoning board and planning board have identical jurisdictional mandates to hear and decide complete applications. Compare 40:55D-46(c) ("upon the submission of an application for a site plan … the planning board *shall grant or deny* approval), with N.J.S.A. 40:55D-76(c) ("the board of adjustment *shall grant or deny* approval … after submission by the developer of a complete application") (emphasis added.) Just as it was determined in TWC Realty that the MLUL's jurisdictional mandate upon zoning boards to "grant or deny" complete applications prohibit zoning boards from holding plenary, jurisdictional hearings, so too does the identical jurisdictional mandate upon planning boards prohibit planning boards from holding such plenary, jurisdictional hearings. Cf. State v. Drake, 444 N.J. Super. 265, 271-72 (App. Div. 2016) (courts "so not support interpretations that render statutory language as surplusage").

As DCR acknowledged before the Planning Board, the trial court, and in its initial brief, the limited exception to a land-use board's jurisdictional mandate arises from a board's resolution of *purely legal matters.* This was the situation in Tannenbaum v. Township of Wall Bd. of Adjustment, 407 N.J. Super. 446 (Law Div. 2006). In that case, a planning board determined as a matter of law that it lacked the authority to grant the requested subdivision approval which required a density variance, in addition to subdivision approval, because the plot to be subdivided was created under zoning established for an affordable housing settlement limiting the number of lots, all of which had already be created. Id. at 458. Because the planning board's determination that it lacked authority to grant the requested subdivision was based on its "interpretation of the statute and ordinance", a purely legal determination not requiring a plenary hearing, it was proper. See TWC Realty, 315 N.J. Super. at 217 n. 10. The circumstances present here – an ostensible "jurisdictional issue" arising solely on account of objectors' claims (albeit, repeatedly rejected by the Planning Boards' professionals) and admittedly concerning "mixed questions of fact and law" necessitating plenary review – are entirely different. Just as the "jurisdictional issue" in TWC Realty could not be resolved through a plenary, jurisdictional hearing, neither can the "jurisdictional issue" now claimed by the Planning Board. Instead, the Planning Board must hear and decide DCR's Application on the merits.

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Dated: August 28, 2025