FILED, Clerk of the Appellate Division, August 06, 2024, **A-002189-23**, AMENDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-002189-23

NFI REAL ESTATE, LLC AND TURNPIKE CROSSINGS V, LLC, Plaintiffs-Appellants, v. FLORENCE TOWNSHIP ZONING BOARD OF ADJUSTMENT, Defendant-Respondent.	CIVIL ACTION ON APPEAL FROM ORDER ISSUED NUNC PRO TUNC TO FEBRUARY 9, 2024 Docket No. BUR-L-000993-23 SAT BELOW: HON. JEANNE T. COVERT, A.J.S.C.

AMENDED BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS, NFI REAL ESTATE, LLC AND TURNPIKE CROSSINGS V, LLC

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ON THE BRIEF

TABLE OF CONTENTS

PAGE NO.

TABLE OF JUDGMENTS iii

TABLE OF AUTHORITIES iv

TABLE OF APPENDIX vi

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY 2

STATEMENT OF FACTS 4

ARGUMENT 6

I. STANDARD OF REVIEW 6
(Raised Below: 7T 36:8-25; 37:1-19)

II. APPLICATION OF THE INCORRECT LEGAL STANDARD AND LEVEL OF REVIEW REQUIRES THAT DEFENDANT'S DECISION BE DEEMED ARBITRARY, CAPRICIOUS, AND UNREASONABLE. 9
(Raised Below: 7T 39:4-12; 42:24-25; 43:1-11)

III. DEFENDANT'S FACTUALLY UNSUPPORTED AND LEGALLY MISGUIDED DENIAL MUST BE REVERSED WHEN SUBSTANTIAL CREDIBLE EVIDENCE IN THE RECORD SUPPORTS THE REQUESTED HEIGHT VARIANCE WHEN APPLYING THE APPROPRIATE LEGAL STANDARD. 17
(Raised Below: 7T 6:11-25; 7:1-17; 16:6-21; 39:12-25 through 42:23; 43:12-254 through 46:1; 49:10-25 through 52:1-21)

A. Proper Application Of Grasso's Standard For The Positive Criteria. 17

1. Undue Hardship. 18

2. The Height Variance Will Not Offend The Purpose Of The Restriction And The Structures Will Be Consistent With The Surrounding Neighborhood. 22

B. Proper Application Of Grasso's Standard For The Negative Criteria. ... 26

1. The Height Variance Will Not Cause A Substantial Detriment To The Public Good. 27

2. The Requested Deviation Will Not SubstantiallyImpair The Intent And Purpose Of The Zone Plan And Zone Ordinance. 31

IV. DEFENDANT'S DENIAL OF THE HEIGHT VARIANCE MUST BE DEEMED ARBITRARY, CAPRICIOUS, AND UNREASONABLE BECAUSE IT UNREASONABLY REJECTS CREDIBLE AND UNREBUTTED EXPERT TESTIMONY, AND IS NOT SUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE IN THE RECORD. 35
(Raised Below: 7T 7:18-25 through 14:1-7; 37:14-20; 46:2-25 through 52:1-21)

A. Defendant Unreasonably Rejects Credible And Unrebutted Expert Testimony. 35

1. Mr. Hoffman's Traffic Testimony. 39

2. Mr. Phillips' Planning Testimony. 44

3. Mr. Rife's Testimony On The Three-Dimensional Renderings 46

B. Defendant's Denial Of The Height Variance Is Not Supported By Substantial Credible Evidence In The Record 49

1. The Inventive And Factually Unsupported Interpretation Of The 1999 Master Plan. 49

2. Comparison Between The 2019 Height Variance Application And The Current Matter. 54

3. Factually Unsupported Assumption ConcerningHeight And Intensity. 56

CONCLUSION 58

FILED, Clerk of the Appellate Division, August 06, 2024, **A-002189-23**, **AMENDED**

TABLE OF JUDGMENTS

PAGE NO.

1. Defendant Zoning Board's Letter Enclosing its Resolution Denying Plaintiff's Application, dated April 4, 2023 (Part of Exhibit A to Plaintiff's Statement of Material Facts). Ja044-Ja045

2. Trial Court's Order Denying Plaintiff's Relief, issued on March 18, 2024, considered Nunc Pro Tunc to February 9, 2024 .... Ja174

TABLE OF AUTHORITIES

PAGE NO.

Cases

Baghdikian v. Bd. of Adjustment of Borough of Ramsey, 247 N.J. Super. 45, 50 (App. Div. 1991) 36

Bd. of Educ. of City of Clifton v. Zoning Bd. of Adjustment of City of Clifton, 409 N.J. Super. 389, 434–35 (App. Div. 2009)..................................36

Burbridge v. Mine Hill Twp., 117, N.J. 376 (1990) 12

CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd./ Bd. of Adjustment, 414 N.J. Super. 563, 577 (App. Div. 2010) 6, 8, 9

Cell South of N.J., Inc. v. Zoning Bd. of Adjustment of West Windsor Twp., 172 N.J. 75, 81-82 (2002) 7, 8, 9, 36, 49

Charlie Brown of Chatham, Inc. v. Bd. of Adjustment for Chatham Twp., 202 N.J. Super. 312, 330 (App. Div. 1985) 7

Coventry Square v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285 (1994) 9, 10, 12, 14, 15, 16, 35

D. Lobi Enters. v. Planning./Zoning Bd. of Borough of Sea Bright, 408 N.J. Super. 345, 360 (App. Div. 2009) 7

Dunkin' Donuts of N.J., Inc. v. North Brunswick Planning Bd., 193 N.J. Super. 513, 514-15 (App. Div. 1983) 53

El Shaer v. Planning Bd., 249 N.J. Super. 323, 329 (App. Div.), certif. denied, 127 N.J. 546 (1991)...36

Fallone Props., L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004) 7

Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41 (App. Div. 2004).. 9, 12, 13, 16, 17, 21, 22, 26, 31, 35, 52

Grubbs v. Slothower, 389 N.J. Super. 377 (App. Div. 2007).............................12

In re Application of Holy Name Hosp., 301 N.J. Super. 282, 295-96 (App. Div. 1997)....................8

In re Taylor, 158 N.J. 644, 657 (1999)....................8

Jacoby v. Zoning Bd. of Adjustment, 442 N.J. Super. 450, 463 (App. Div. 2015)....................13

Kramer v. Bd. of Adjustment of Sea Girt, 45 N.J. 268 (1965)....................7, 37

Lang v. Zoning Board of Adjustment, 160 N.J. 41, 58-59 (1999)....................7

Med. Ctr. at Princeton v. Twp. of Princeton Zoning Bd., 343 N.J. Super. 177, 199 (App. Div. 2001)....................8

Medici v. BPR Co., 107 N.J. 1, (1987).................... 9, 14, 15, 16, 35

New York SMSA v. Bd. of Adjustment, 370 N.J. Super. 319, 338 (App. Div. 2004).................... 36, 37, 38

Ocean Cty. Cellular Co. v. Twp. of Lakewood Bd. of Adjustment.................... 37, 38

Price v. Himeji, LLC, 214 N.J. 263, 286 (2013).................... 14, 15

Randolph Town Ctr. Assocs., L.P. v. Twp. of Randolph, 324 N.J. Super. 412 (App. Div. 1999).................... 12, 16, 35

Reinauer Realty Corp. v. Nucera, 59 N.J. Super. 189, 201 (App. Div.), certif. denied, 32 N.J. 347 (1960)....................37

TSI East Brunswick v. Zoning Board, 215 N.J. 26 (2013).................... 14, 15, 16, 35

Regulations

N.J.A.C. 16:47-1 42

Statutes

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

N.J.S.A. 40:55D-70(d)(3) 9, 15

N.J.S.A. 40:55D-70(d)(6) 15

N.J.S.A. 40:55D-70d 37

TABLE OF APPENDIX

PAGE NO.

1. Complaint in Lieu of Prerogative Writs, filed May 19, 2023 .... Ja001-Ja010

2. Defendant Zoning Board's Resolution Denying Plaintiff's Application, dated April 3, 2023 (Exhibit A to Plaintiff's Complaint) Ja011-Ja036

3. Answer, filed July 19, 2023 .... Ja037-Ja041

4. Plaintiff's Attorney Certification, filed November 30, 2023 .... Ja042-Ja043

5. Defendant Zoning Board's Letter Enclosing its Resolution Denying Plaintiff's Application, dated April 4, 2023 (Part of Exhibit A to Plaintiff's Statement of Material Facts) Ja044-Ja045

6. Original "Lounsberry Tract Site Plan"[1] (Exhibit B to Plaintiff's Statement of Material Facts) Ja046-Ja076

7. Amended Pages of "Lounsberry Tract Site Plan" (Exhibit C to Plaintiff's Statement of Material Facts) Ja077-Ja079

8. Plaintiff's Land Development Application with Cover Letter (Exhibit D to Plaintiff's Statement of Material Facts) Ja080-Ja087

9. Explanations of Plaintiff's Land Development Applications, as submitted to Mansfield JLUB and Defendant Zoning Board (Exhibit E to Plaintiff's Statement of Material Facts) Ja088-Ja090

10. Defendant Zoning Board Engineer's Review Letter,

[1] Due to a technical issue upon uploading the documents to eCourts, the blurry plans and gray boxes are original to the documents in the Trial Court docket. For the Court's convenience, a legible copy of the plans has been provided at Ja191-Ja218.

dated December 17, 2021
(Exhibit F to Plaintiff's Statement of Material Facts) Ja091-Ja099

11. 3-D Computer Generated Views of the Project
(Exhibit G to Plaintiff's Statement of Material Facts)................ Ja100-Ja103

12. "Clear Height vs. Year Built vs. Size" Graph
(Exhibit H to Plaintiff's Statement of Material Facts)................ Ja104-Ja105

13. Industrial Buildings and Height Chart
(Exhibit I to Plaintiff's Statement of Material Facts) Ja106-Ja107

14. Defendant Zoning Board Resolution No. Z.B. 2019-04
(Exhibit J to Plaintiff's Statement of Facts)............................... Ja108-Ja127

15. Florence Township 1999 Master Plan
(Exhibit K to Plaintiff's Statement of Material Facts)................ Ja128-Ja168

16. Unpublished Decision, Puleo v. Zoning Bd. of Adjustment of Belmar
(Exhibit L to Plaintiff's Statement of Material Facts) Ja169-Ja173

17. Trial Court's Order Denying Plaintiff's Relief,
issued on March 18, 2024,
considered Nunc Pro Tunc to February 9, 2024 .... Ja174

18. Notice of Appeal, filed March 22, 2024 .... Ja175-Ja177

19. Case Information Statement, filed March 22, 2024 .... Ja178-Ja181

20. Amended Notice of Appeal, filed March 26, 2024 .... Ja182-Ja185

21. Amended Case Information Statement,
filed March 26, 2024 .... Ja186-Ja189

22. Certification of Transcript Completion and Delivery,
filed April 2, 2024 .... Ja190

23. Original "Lounsberry Tract Site Plan"
(Exhibit B to Plaintiff's Statement of Material Facts)
Readable Copy Ja191-Ja218

PRELIMINARY STATEMENT

Times change. Industries change. Business models change. Land use regulations governing these industries and businesses, where same are identified as permitted uses, need to reflect those changes in order to reasonably facilitate these permitted uses. When they do not, it is for zoning boards of adjustment to evaluate the evidence showing that "disconnect", and grant variances from those regulations to facilitate the development of that permitted use. Imagine a zoning ordinance which permits hospitals, hotels, and cell towers in specific zones, but limits their heights to 20 feet, or two stories. The functionality of those facilities is rendered useless by the height limitation. To advance the purposes of the zoning ordinance, which recognizes the appropriateness of those uses in those zones, relief from the height constraint is required.

The same holds true here. Florence Township has long determined that the land sitting on the Interstate 295 Exit 52 Interchange, bordered also by two county roads, is appropriate for warehouses and distribution centers. In 1991, a 30 foot height limit was reasonable for the industry. Over the last decade and a half, however, technological innovations, the use of racking systems and other forms of automation, have required warehouses to "go up" with higher ceilings and clearances. While acknowledging that the site in this litigation is correctly zoned for warehouse use, Florence never bothered to adapt its regulations on

height to this changing industry. Thus, a height variance was needed to facilitate the development of this permitted activity. The overwhelming—and unrebutted, uncontroverted—evidence proved the unreasonableness of this regulation. The Defendant Zoning Board, however, ignored that evidence, misapplied the law, and denied the variance. Judicial relief is required.

PROCEDURAL HISTORY

On October 19, 2021, NFI Real Estate, LLC and Turnpike Crossings V, LLC (collectively "Plaintiff") submitted land development applications to both the Florence Township Zoning Board ("Defendant" or "Board"), and the Mansfield Township Joint Land Use Board ("Mansfield JLUB"). The applications sought to construct two warehouses and associated site improvements (stormwater basins, parking, landscaping, two access driveways onto County Roads, etc.) on a property bifurcated by a municipal boundary line. Ja012; 1T 21:12-25.

On January 24, 2022, the Mansfield JLUB granted preliminary major site plan approval. Ja013; 1T 7:19-23.

Plaintiff presented the application to Defendant over the course of six hearings in 2022: May 2, August 1, September 1, October 3, November 30, and

FILED, Clerk of the Appellate Division, August 06, 2024, **A-002189-23**, **AMENDED**

December 5. Ja015-Ja017.[1][2] On the sixth night, the Defendant voted 6-1 to deny the application. (6T 15:9-25; 16:1-15).

On April 3, 2023, Defendant adopted Resolution No. Z.B. 2023-05, which memorialized the denial. Ja012.

On May 19, 2023, Plaintiff filed a Complaint in Lieu of Prerogative Writs, appealing the Defendant's decision. Ja001-Ja010.

The Trial Court heard oral argument on February 9, 2024, and issued an oral opinion denying Plaintiff's requested relief and dismissing the Complaint. Ja174.

On March 22, 2024, Plaintiff filed the Notice of Appeal with the Appellate Division. Ja175-Ja177. Plaintiff filed an Amended Notice of Appeal on March 26, 2024. Ja182-Ja185.

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[1] There are seven volumes of transcripts, one from each of the six hearings before the Board, and the Trial Court's Oral Decision. The transcripts shall be designated as follows:

1T: May 2, 2022 (Hearing Night One)
2T: August 1, 2022 (Hearing Night Two)
3T: September 1, 2022 (Hearing Night Three)
4T: October 3, 2022 (Hearing Night Four)
5T: November 30, 2022 (Hearing Night Five)
6T: December 5, 2022 (Hearing Night Six)
7T: February 9, 2024 (Trial Court's Oral Decision)

[2] Eight (8) transcripts were uploaded to the docket. The transcript filed on June 11, 2024, dated February 7, 2022, was uploaded inadvertently, and does not apply to this case.

STATEMENT OF FACTS

Plaintiff owns a 133 acre parcel located in both Florence and Mansfield (the "Property"). Ja012; Ja184. The Property is bounded by Interstate Route 295 to the east; Florence-Columbus Road (County Route 656) to the south; Burlington-Columbus Road (County Route 543) to the north; and Old York Road (County Route 660) to the west. Ja050; 1T 18:5-20. The municipal boundary line runs in a north-south direction, with approximately seven acres on the easterly side in Mansfield, and the remaining portion on the westerly side in Florence. (1T 18:21-25; 19:1-4).

The Mansfield side of the Property is in that municipality's "ODL: Office, Distribution, Laboratory" Zone; the Florence side is almost completely within the "SM: Special Manufacturing" Zone, with a small portion, west of a 150-foot wide PSE&G easement, in the "AG–Agricultural" Zone. All development is confined to Mansfield's ODL and Florence's SM Zones; no development is proposed for the AG-portion of the Property. Ja013; 1T 20:15-20.

At the time of application, warehouses and distribution facilities were permitted uses in both Mansfield's ODL and Florence's SM Zones. Florence limits the height of such buildings to 30 feet; Mansfield allows a height of 50 feet. Ja013.

Plaintiff's applications sought approval for two warehouses, each 48 feet tall, totaling approximately 1.4 million square feet: 870,00 square feet for Building 1, and 523,644 square feet for Building 2. Ja012; Ja078-Ja079. 3,928 square feet of Building 1 would be located in Mansfield; the remaining square footage would be in Florence. Ja079; 1T 7:23. Plaintiff sought preliminary major site plan approval, along with bulk variance relief for the reduction of parking spaces, from the Mansfield JLUB. Ja090. On January 24, 2022, the Mansfield JLUB approved Plaintiff's application. Ja013; 1T 7:19-23.

Although Florence's SM Zone permitted warehouses and distribution centers, Plaintiff sought the following relief from the Board: (1) "(d)(6)" height variance to construct two structures at a height of 48 feet, when Florence limits building height to 30 feet in the SM Zone; (2) bulk variance to reduce the number of parking spaces from 1,496 to 589 (which was further reduced to 577 spots); (3) "(d)(1)" use variance to locate a portion of a driveway in the AG-portion of the Property (the application was later amended to move the driveway entirely into the SM Zone, and this variance request was withdrawn); and (4) preliminary site plan approval. The application was later bifurcated, and the only relief sought during these proceedings was the "(d)(6)" height variance, with the balance of the application stayed pending the outcome of the height variance. Ja025; Ja083; 1T 24:19-23; 25:24-25; 26:1-11; 4T 5:1-23.

Over six nights of hearings, Plaintiff presented seven witnesses in support of the application: Michael Landsburg, Plaintiff's Chief Development Officer; Rodman Ritchie, P.E., Project Engineer; Robert Hoffman, P.E., PTOE, Traffic Engineer; Norman Dotti, P.E., Sound Expert; Brad Rife, Witness on Visual Renderings of Proposed Project; Jake Terkanian, Industrial Real Estate Expert; and Paul Phillips, PP, AICP, Professional Planner. Ja015-Ja017. Mr. Ritchie, Mr. Hoffman, Mr. Dotti, Mr. Terkanian, and Mr. Phillips were all recognized by the Board as experts in their respective fields. (Id.)

The Defendant's professionals testified to their review letters during the hearings. Ja024. The application was opposed by Florence Township's Mayor and Council, who hired special counsel, a traffic engineer, and a professional planner to oppose the application. The planner, however, never appeared. Ja017.

The Board denied the "(d)(6)" height variance. (6T 15:9-25; 16:1-15). No explanation, discussion, or analysis was offered. See id.

ARGUMENT

I. STANDARD OF REVIEW (Raised Below: 7T 36:8-25; 37:1-19)

The Appellate Division applies the "same standard when reviewing a trial court's decision on an appeal from a decision of a board of adjustment." See, e.g. CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd./ Bd. of Adjustment, 414 N.J. Super. 563, 577 (App. Div. 2010) (citing D. Lobi Enters. v. Planning/

Zoning Bd. of Borough of Sea Bright, 408 N.J. Super. 345, 360 (App. Div. 2009).

"It is well-settled that a decision of a zoning board may be set aside only when it is arbitrary, capricious or unreasonable." Cell South of N.J., Inc. v. Zoning Bd. of Adjustment of West Windsor Twp., 172 N.J. 75, 81-82 (2002) (internal citations omitted). "The deference to local boards contemplated by Kramer is not intended to be applied rigidly or categorically, and is predicated on the existence of adequate evidence in the record supporting the board's determination either to grant or deny variance relief." Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 58–59 (1999) (citing Kramer v. Bd. of Adjustment of Sea Girt, 45 N.J. 268 (1965)).

That discretion, while considerable, must still be "supported by substantial credible evidence from the record as a whole." Charlie Brown of Chatham, Inc. v. Bd. of Adjustment for Chatham Twp., 202 N.J. Super. 312, 330 (App. Div. 1985). It stems from the Municipal Land Use Law ("MLUL"), which "reposes considerable power in municipal zoning boards to deny or grant variances, [but] that power must be exercised cautiously." Cell South, 172 N.J. at 88. "[I]t is essential that the board's actions be grounded in evidence in the record." Fallone Props., L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004). "Prudence dictates that zoning boards root

their findings in *substantiated proofs* rather than unsupported allegations." Cell South, 172 N.J. at 88 (emphasis added).

Without "persuasive evidence in the record to support the [local land use board's] decision denying [the applicant's] the variance, the decision must be set aside as arbitrary, capricious and unreasonable." Cell South, 172 N.J. at 88. "[A] determination predicated on unsupported findings is the essence of arbitrary and capricious action." In re Application of Holy Name Hosp., 301 N.J. Super. 282, 295-96 (App. Div. 1997) (citation omitted).

Although a challenger must carry its high burden to overturn a variance denial, a reviewing Court should not act as a "rubber stamp" to the findings made by a zoning board. Review is "not simply a pro forma exercise in which [the court] rubber stamp[s] findings that are not reasonably supported by the evidence." CBS Outdoor, 414 N.J. Super. at 578–79 (quoting In re Taylor, 158 N.J. 644, 657 (1999)). "Simply stated, a reviewing court must determine whether the Board followed statutory guidelines and properly exercised its discretion." Id. (citing Med. Ctr. at Princeton v. Twp. of Princeton Zoning Bd., 343 N.J. Super. 177, 199 (App. Div. 2001)).

Here, the Defendant's decision misapplied the legal standard, was not supported by substantial evidence, and was arbitrary, capricious, and unreasonable.

II. APPLICATION OF THE INCORRECT LEGAL STANDARD AND LEVEL OF REVIEW REQUIRES THAT DEFENDANT'S DECISION BE DEEMED ARBITRARY, CAPRICIOUS, AND UNREASONABLE. (Raised Below: 7T 39:4-12; 42:24-25; 43:1-11)

Upon only a cursory review of the Resolution, it is abundantly clear that the Board treated the (d)(6) height variance application as a (d)(1) use variance. Indeed, the seminal case for (d)(6) height variances, Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41 (App. Div. 2004), is not mentioned in the twenty-five (25) page Resolution. Even though the height variance sought approval for a permitted use in the SM Zone, the Defendant incorrectly applied the heightened standard of review articulated in Medici v. BPR Co., 107 N.J. 1, (1987).

Section 70(d) of the MLUL categorizes "use" variances into six groups. The category of (d) variance determines the applicable "special reasons", or "positive criteria" required to warrant approval of the variance. Cell South, 172 N.J. at 83.

The more relaxed standard of proof for certain categories of "(d)" variances was first articulated in Coventry Square v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285 (1994). Coventry Square established a different, less stringent standard, for conditional use variances sought under N.J.S.A. 40:55D-70(d)(3). The Court explained the distinctions between a use variance for a

prohibited use in the zone, versus a permitted use, albeit subject to certain conditions:

> Thus, our courts generally have treated a conditional use that does not comply with all the conditions of the ordinance as if it were a prohibited use, imposing on the applicant the same burden of proving special reasons as it would impose on applicants for use variances. In our view, that standard is plainly inappropriate and does not adequately reflect the significant differences between prohibited uses, on the one hand, and conditional uses that do not comply with one or more of the conditions imposed by an ordinance, on the other hand. In the case of prohibited uses, the high standard of proof required to establish special reasons for a use variance is necessary to vindicate the municipality's determination that the use ordinarily should not be allowed in the zoning district. In the case of conditional uses, the underlying municipal decision is quite different. The municipality has determined that the use is allowable in the zoning district, but has imposed conditions that must be satisfied. As evidenced by this record, a conditional use applicant's inability to comply with some of the ordinances conditions need not materially affect the appropriateness of the site for the conditional use. Accordingly, the standard of proof of special reasons to support a variance from one or more conditions imposed on a conditional use should be relevant to the nature of the deviation from the ordinance. The burden of proof required to sustain a use variance not only is too onerous for a conditional use variance; in addition, its focus is misplaced. The use variance proofs attempt to justify the board of adjustment's grant of permission for a use that the municipality has prohibited. Proof to support a conditional use variance need only justify the municipality's continued permission for a use notwithstanding a deviation from one or more conditions of the ordinance.
>
> Coventry Square, 138 N.J. at 297-98.

As a result of its distinction between a use variance for a prohibited activity, and a variance needed because a condition is not satisfied, the Court concluded:

> We hold that the proof of special reasons that must be adduced by an applicant for a "d" variance from one or more conditions imposed by ordinance in respect of a conditional use shall be proof sufficient to satisfy the board of adjustment that the site proposed for the conditional use, in the context of the applicant's proposed site plan, continues to be an appropriate site for the conditional use notwithstanding the deviations from one or more conditions imposed by the ordinance. That standard of proof will focus both the applicant's and the board's attention on the specific deviation from the conditions imposed by the ordinance, and will permit the board to find special reasons to support the variance only if it is persuaded that the noncompliance with conditions does not affect the suitability of the site for the conditional use. Thus a conditional use variance applicant must show that the site will accommodate the problems associated with the use even though the proposal does not comply with the conditions the ordinance established to address those problems.
>
> Id. at 298-99.

Here, the warehouse use was not conditional; Florence Township expressly permitted it. However, as with a conditional use situation, a deviation from the ordinance standard was needed in order to implement the permitted use. Allowing that deviation clearly did not affect the suitability of the site for the use.

The less rigorous standard of review for conditional use variances was later extended to, and appropriately modified for, the other categories of "(d)"

variances. See Randolph Town Ctr. Assocs., L.P. v. Twp. of Randolph, 324 N.J. Super. 412 (App. Div. 1999) ((d)(4) floor area ratio variances); Grubbs v. Slothower, 389 N.J. Super. 377 (App. Div. 2007) ((d)(5) deviations from density requirements); see also Burbridge v. Mine Hill Twp., 117 N.J. 376 (1990) ((d)(2) variances for minor expansion of a pre-existing non-conforming use).

Grasso v. Borough of Spring Lake Heights extends Coventry Square's less intensive standard of review to (d)(6) height variances. Grasso, 375 N.J. Super. at 49, 52–53. Under Grasso, an applicant can establish the positive criteria by demonstrating (1) undue hardship, or (2) that the structure will not offend the purpose of the height restriction and will be consistent with the surrounding neighborhood. Grasso, 375 N.J. Super. at 51-53. Contrary to Defendant's decision, Plaintiff met both tests. See Section III(A).

To establish undue hardship for a height variance, an applicant must show that "the property for which the variance is sought cannot reasonably accommodate a structure that conforms to, or only slightly exceeds, the height permitted by the ordinance." Id. at 51. "Stated differently, the applicant for a (d)(6) variance on grounds of hardship must show that the height restriction in effect prohibits utilization of the property for a conforming structure." Id. Plaintiff's proofs satisfy this standard.

Alternatively, the applicant may satisfy the positive criteria if the proposed structure would "not offend any purposes of the height restriction and 'would nonetheless be consistent with the surrounding neighborhood.'" Jacoby v. Zoning Bd. of Adjustment, 442 N.J. Super. 450, 463 (App. Div. 2015) (quoting Grasso, 375 N.J. Super. 50-53). This method focuses primarily on adequate light and air, and secondarily, on the intensity of the development. Grasso, 375 N.J. Super. at 52–53. For the surrounding neighborhood, the zoning board must also "consider the effect of the proposed height variance on the surrounding municipalities affected by the decision." Jacoby, 442 N.J. Super. at 466.[3] "[S]pecial reasons necessary to establish a height variance must be tailored to the purpose for imposing height restrictions in the zoning ordinance." Grasso, 375 N.J. Super. at 52. Plaintiff's proofs also satisfy this standard.

As with all variances, height variance are subject to the negative criteria: "the variance can be granted 'without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance,' or the so-called negative requirement[.]" Jacoby, 442 N.J. Super. at 463 (quoting Grasso, 375 N.J. Super. 48–49). For (d)(1) use variances,

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[3] When the Board heard the application, the Mansfield JLUB had already approved its portion of the building and improvements. Ja013.

applicants must establish the negative criteria by an "enhanced quality of proof." Price v. Himeji, LLC, 214 N.J. 263, 286 (2013) (citing Medici, 107 N.J. at 21).

However, in TSI East Brunswick v. Zoning Bd., 215 N.J. 26 (2013), the Court expanded Coventry Square, and eliminated Medici's enhanced quality of proof for conditional use variances. The Court analyzed Medici's "enhanced quality of proof" requirements:

> The requirement that the negative criteria be tested in accordance with the enhanced quality of proofs was derived from the recognition that granting a variance is inherently at odds with the uses permitted in the zone as established by the ordinance enacted by the municipality's governing body. As we explained, the new enhanced quality of proofs requirement was intended to ensure that the negative criteria would remain an essential safeguard to prevent the improper exercise of the variance power.

TSI, 215 N.J. at 39 (citing Medici, 107 N.J. at 22).

In explaining its earlier Coventry Square decision, the TSI Court wrote:

> We held that 'because a conditional use is not a prohibited use,… it need not meet the stringent special reason's standards [set forth in Medici] for a commercial-use variance.' [Coventry Square, 138 N.J. at 287]. Instead, a conditional use variance 'allows the applicant to engage in a conditional use despite the applicant's failure to meet one or more of the conditions. It is not the use but the noncompliance with the conditions that violates the ordinance.'

TSI, 215 N.J. at 40 (quoting Coventry Square, 138 N.J. at 287).

Similarly, in the present case, it is not the use which is prohibited, but the associated height limitation that necessitates the variance.

The TSI Court further explained:

> An application for a use variance, also referred to as a (d)(1) variance, N.J.S.A. 40:55D-70(d)(1), seeks permission from a zoning board to put property to a use that is otherwise prohibited by the zoning ordinance. Both the positive and negative criteria in such an application are tested in accordance with the standards first established in Medici. In contrast, a conditional use, by definition, is a use that the zoning ordinance permits if the applicant meets all of the conditions that are embodied in the ordinance. See N.J.S.A. 40:55D-70(d)(3). In that case, the use becomes a permitted use in the sense that no variance is required.
>
> However, if a property owner seeking to devote the property to a conditional use cannot meet one or more of the conditions imposed by the zoning ordinance, the property owner must apply for a (d)(3) conditional use variance. The inability to comply with one or more of the conditions does not convert the use into a prohibited one, and thus, the application is not tested in accordance with the standards established in Medici that govern applications for a (d)(1) use variance.
>
> Instead, the question is whether, in light of the failure to meet one of the conditions fixed by the zoning ordinance, the use 'is reconcilable with the municipality's legislative determination that the conditions should be imposed on all conditional uses in that zoning district.' [Coventry Square, 138 N.J. at 299]. In undertaking that analysis, the weighing is entirely different from that demanded for a (d)(1) use variance because the governing body has not declared that the use is prohibited but, instead, has elected to permit the use in accordance with certain express conditions. Accordingly, the focus of the analysis is on the effect of noncompliance with one of the conditions as a relates to the overall zone plan.
>
> TSI, 215 N.J. at 42-43.

The same reasoning applies here; the same outcome should attain. When height variances under N.J.S.A. 40:55D-70(d)(6) "are requested in connection with a permitted use, a lower threshold equivalent to the standard applicable to conditional use variances is appropriate." Price, 214 N.J. at 296 (2013) (citing

Randolph Town Ctr. Assocs., 324 N.J. Super. at 416-17). The proposed use as a warehouse is permitted in the SM Zone; it is not prohibited. The Defendant failed to properly apply the more-lenient standard articulated in Grasso, as evidenced by the Resolution and transcript. See Ja033 ("[It] makes it even more difficult, under the New Jersey Supreme Court's *Medici* holding, for the Board to accept the applicant's special reasons rationale."); see also 12/5/22 T. 13:22-23 (the charge given to the Board specifically stated that the Board needed to find "special reasons to grant a use variance").

Defendant's application of the enhanced standard of proof to the negative criteria also transformed the height variance application into a use variance. This expressly contradicts the Coventry Square line of cases, and in particular, the Court's decision in TSI. Unlike use variance proofs that must justify a prohibited use, height variances for a permitted use need only to justify the deviation from the height limitation. Imposing the "enhanced burden of proof" upon the negative criteria ignores this clear distinction.

Had the Board applied the standard of review articulated in Grasso & TSI, approval would have been unavoidable as the record contains substantial credible evidence to support same. Its denial of Plaintiff's height variance was arbitrary, capricious, and unreasonable for multiple reasons, which included failure to apply the correct legal standard.

III. DEFENDANT'S FACTUALLY UNSUPPORTED AND LEGALLY MISGUIDED DENIAL MUST BE REVERSED WHEN SUBSTANTIAL CREDIBLE EVIDENCE IN THE RECORD SUPPORTS THE REQUESTED HEIGHT VARIANCE WHEN APPLYING THE APPROPRIATE LEGAL STANDARD. (Raised Below: 7T 6:11-25; 7:1-17; 16:6-21; 39:12-25 through 42:23; 43:12-25 through 46:1; 49:10-25 through 52:1-21)

The Resolution concludes: "There is no credible, probative evidence before the Board that would allow it to deviate from the zoning standards set down by the governing body or which would justify this Board rethinking the determinations of the Planning Board and governing body that link the height of permitted structures with their anticipated intensity." Ja034. While inventive, the statement could not be further from the truth. Application of the Grasso standard makes clear that substantial credible evidence in the record supports granting the height variance. No evidence was offered to the contrary. Moreover, each of Plaintiff's expert witnesses were accepted as such, and the record is not only devoid of any challenges to their credibility, but of any basis upon which to do so retrospectively in the later adopted Resolution.

A. Proper Application of Grasso's Standard for the Positive Criteria.

Under Grasso, the positive criteria may be established through undue hardship, or evidence that the requested deviation will not offend the purpose of the height restriction and will be consistent with the surrounding neighborhood. Grasso, 375 N.J. Super. at 51-53. Plaintiff presented substantial credible

evidence to satisfy both approaches to the positive criteria. Defendant, on the other hand, failed to even consider the undue hardship proofs. Its Resolution is silent as to the same. Ja012-Ja036.

1. Undue Hardship.

Plaintiff proved that the 30 foot height limitation in the SM Zone, adopted in or about 1991, prohibits the permitted use of the Property as a warehouse today. A 30 foot warehouse would never be constructed, as it would be unmarketable and not financeable, given that the industry's technology and standards have advanced towards taller structures with less square footage. Testimony from Michael Landsburg, Plaintiff's Chief Development Officer, Jake Terkanian, Executive Vice-President of Coldwell Banker Richard Ellis ("CBRE"), and Paul Phillips, AICP, PP, Plaintiff's Planner, all support this conclusion. No evidence was offered to the contrary.

Mr. Landsburg testified that Plaintiff owns 19 buildings and leases or operates 79 buildings, each over 300,000 square feet: one of the 19 owned buildings has a partial height of less than 30 feet (it was acquired 20 years ago and built in 1960); and two of the 79 leased or operated buildings have building heights less than 30 feet (both were built in the 1980s). (5T 9:15-25; 10:13-25; 11:11-18). In the past 20 years, Plaintiff has not built or leased a warehouse

under 30 feet, and all new construction projects have building heights of at least 38 feet. (5T 10:1-9; 11:1-4).

Mr. Terkanain, an Executive Vice-President at CBRE, the world's largest industrial real estate broker, specializes in bulk industrial warehouses. (5T 32:21-24; 33:2-3). Mr. Terkanian's team has about 45 million square feet of bulk industrial warehouses, all greater than 200,000 square feet, in the "pipeline", in Pennsylvania, New Jersey, and Delaware. (5T 38:3-17).

Based on his experience in the field of industrial development and marketability, Mr. Terkenian provided similar testimony to Mr. Landsburg. Over the past 10 years, in the Tri-State region, warehouse building heights have ranged between 46 to 50 feet, with "clear heights"[4] between 36 to 40 feet. (5T 44:17-25; 45:1-9; 49:15-25; 50:1). Development in Burlington County has tracked the regional trend. Ja105. More specifically, in the past 10 years, no warehouses over 100,000 square feet have been constructed with a building height of 30 feet or less, or with "clear heights" of 23 or 24 feet. (5T 48:10-19). Mr. Terkanian also compiled a list of 34 "spec buildings", on the market in New Jersey, Eastern Pennsylvania, Northern Delaware, and Northern

[4] "Clear height" is the industry standard for warehousing, which is the "height under the lowest structural member at the first column line inside the building." (5T 7:4-25; 8:1-5).

Maryland. All of the buildings were built since 2015, and are between 400,000 and 800,000 square feet. Thirty-three of the 34 buildings have a "clear height" of 36 to 40 feet.[5] Ja107; 5T 50:7-25; 51:1-11. In the past 10 years, neither Mr. Landsburg, Mr. Terkanian, nor Mr. Phillips have seen the construction of a warehouse with a building height of 30 feet or less. (5T 10:1-25; 11:1-18; 44:17-25; 45:1-9; 49:15-25; 50:1; 71:21-25; 72:1-14).

Mr. Landsburg, Mr. Terkanian, and Mr. Phillips all agreed that the increase in height can be attributed to the industry's technological advancements, such as racking systems, pick mods, material handling, forklifts, and high-reach equipment. These advancements allow for taller structures on smaller footprints. (5T 11:20-25; 12:1-10; 52:13-25; 53:1-11; 71:21-25; 72:1-14). As Mr. Terkanian put it, "[t]he whole industry is centered around higher buildings. [Third-Party Logistic companies] are programmed to operate in higher buildings." (5T 47:8-16).

Therefore, Mr. Landsburg, Mr. Terkanian, and Mr. Phillips all agreed that a building of this nature, built at 30 feet is "antiquated", would be "functionally obsolete the day it was built," and "simply doesn't work for modern day

[5] The one exception was a "spec to suit", where the developer intends to construct a spec building, but later commits to a specific user, and customizes that building for that user's specific needs. That building had a "clear height" of 32 feet, and a building height of about 40 feet. (5T 50:7-25; 51:1-11).

warehousing." (5T 11:20-25; 12:1-10; 51:20-25; 52:1-2; 71:21-25; 72:1-14). Investors seek a 36 to 40 foot "clear height" for a 300,000 square foot building or larger, and lenders seek at least a 40 foot "clear height" for any building over 400,000 square feet. (5T 47:8-16; 48:1-9). As a result, any project with a 30 foot height restriction would not be financeable (even if the total square footage was broken up into three or four buildings), and would not be constructed. (5T 54:17-25 through 56:1-5). Unlike Grasso, where plaintiff argued that there was a "limited market" for the residential products permitted by ordinance, Grasso, 375 N.J. Super. at 52, the unrebutted evidence here is that there is no market for a 30 foot high warehouse. This is not a case where Plaintiff would "prefer" a different product to increase profitability; Plaintiff simply cannot finance and market a product built to the Township's height standards.

These universal—and wholly unrebutted—conclusions reached by Plaintiff's witnesses illustrate that the 30 foot building height, established in 1991, prohibits the use of the Property as a warehouse. Mr. Phillips, a professional planner, testified that if the ordinance permits warehouse distribution uses, which it did at the time of application, it should logically follow that building height should be realistic for the use. (5T 65:5-9; 72:24-25; 73:1-4). Therefore, the unrealistic height limitation poses "obvious practical difficulties and undue hardship for the Applicant[.]" (5T 72:15-25; 73:1-10).

Despite Defendant's failure to consider hardship altogether, the 30 foot height limitation clearly constitutes an undue hardship sufficient for Grasso's positive criteria. Its failure to consider the undue hardship proofs was arbitrary, unreasonable and capricious.

2. The Height Variance will not Offend the Purpose of the Restriction and the Structures will be Consistent with the Surrounding Neighborhood.

Plaintiff also presented sufficient evidence to satisfy Grasso's alternative method for establishing the positive criteria, that the requested height variance would not offend the purpose of the restriction and the proposed structure would be consistent with the surrounding neighborhood.

Beginning with the purpose of the restriction, the proposed deviation will not offend the purpose of the height restriction in the SM Zone as the proposed use was permitted in the SM Zone as far back as 1991, and pursuant to applicable 1999 Master Plan, "warehouse distribution use was envisioned for this tract." (5T 66:2-23); see also Ja150-Ja152. Upon his review of the Master Plan and applicable zoning ordinances, Mr. Phillips concluded that "the intent of the 30-foot height restriction was not to restrict warehouse use[,]" "[b]ut rather to limit the types of high-impact uses that were permitted in the township's GM, general manufacturing, zone." (5T 77:23-25 through 80:1-7).

Mr. Phillips provided comprehensive testimony on the 1999 Master Plan. He explained that the Master Plan provides that the "GM zone poses special concerns, because it can have significant off-site impacts." The listed impacts include, "noise, dust, odors, and visuals[;]" "[t]raffic impacts are not cited in any way." Mr. Phillips determined that the concerns for the GM Zone likely stemmed from the Burlington County Resource Recovery landfill facility and the Roebling Steel Mill, as both properties were specifically mentioned. The GM Zone also potentially permits high-impact uses, including heavy manufacturing, while the SM, when compared to the GM, provides for industrial uses "[a]t a lesser magnitude and intensity than uses in industrial districts." Mr. Phillips concluded that this language suggests that the SM Zone is "less likely to result in off-site impacts", when compared to the uses in the GM Zone; uses like the two expressly mentioned. (5T 78:3-25; through 80:1-7). Therefore, the proposed deviation would not contradict the intent of the restriction as it was intended to limit off-site impacts, such as "noise, dust, odors, and visuals", more common to higher intensity industrial uses permitted in the GM Zone. Mr. Phillips found no evidence "that the 30-foot height limitation in the SM zone was intended to restrict warehouse distribution use because of traffic impacts." (11/30/22 T. 79:14-23). No one rebutted, contradicted, or undermined his testimony and conclusions. This empirically and factually supported evidence

is the same language upon which this very Board relied in 2019 to reach the same conclusion as Mr. Phillips; and contradicts the Board's 2023 factually unsupported musings on the intentions underlying SM Zone/ GM Zone distinctions to any credibility. See Sections III(B), IV(A)(2), & IV(B).

The proposed height deviations are also consistent with the surrounding neighborhood. Just on the other side of Interstate 295, across the Florence/ Mansfield border, sit three newly constructed warehouse facilities: the "Vanco" building, a 700,000 square feet structure, with a 47 feet building height (5T 9:1-10); and the "Margolis" site, comprised of two buildings, at 250,000 square feet and 710,000 square feet, with "clear heights" of 36 feet, and 40 feet, respectively (the building heights would be six to 10 feet taller than the "clear heights", between 42 and 46 feet for the 250,000 square feet building, and 46 and 50 feet for the 710,000 square feet building). (6T 8:10-13; 9:2-11).

Similarly, in Florence Township alone, Plaintiff owns three warehouses above 30 feet: two warehouses with building heights of 39 feet, and one with a building height of 40 feet. (5T 6:19-25 through 8:1-18). Other recently constructed warehouses in Florence Township have similar building heights, including, but not limited to: the Railroad Avenue ("Foxdale") warehouse at 48 feet; the "Ready-Pac" warehouses, also located on Railroad Avenue, at 45 feet or taller (5T 67:1-25; 68:1-25); and the Cedar Lane Amazon and B&H Foto

facilities are both in excess of 30 feet (5T 77:11-17). Moreover, two redevelopment plans, which facilitated warehouse uses, permit heights up to 75 feet in Florence Township. (5T 69:21-25; 70:1-3). Therefore, not only are immediately adjacent structures consistent with the proposed height, the more contemporary warehouses spread throughout Florence Township also have similar building heights, well above 30 feet.

Though ignored in Defendant's Resolution, the record also demonstrates that any potential impact from the height deviation will be mitigated by the character of the surrounding properties and the placement of these structures. The Property is largely bordered by Interstate 295, and a 150-foot wide PSE&G easement with overhead transmission lines. (5T 75:20-25; 76:1-13). The largest contiguous property adjoining the Property is preserved farmland. (5T 75:20-25; 76:1-13). The closest residential structure on "Cedar Lane Extension" is 700 to 800 feet from the nearest proposed warehouse, and the lone residential property bordering the property on Burlington-Columbus Road is at least 400 feet from the closest proposed warehouse building. (5T 75:25; 76:1-3; 76:14-25; 77:1).

In addition to proposed landscaping, the warehouses are setback 700 feet from County Road 656 (Florence-Columbus Road), when the SM Zone only requires 75 feet. All other setbacks from bordering roads are also substantial:

145 feet front yard setback from County Road 543 (Burlington-Columbus Road), when 75 feet is required; 125 feet side yard setback, when 50 feet is required; and 67 feet rear yard setback, when 50 is required. (5T 75:6-19; 76:1-3; 76:14-25; 77:1).

Any potential impact from the excess height will be mitigated by the character of the surrounding properties and significant setbacks from the rights-of-way. While relevant to the negative criteria, these facts also establish that the proposed height deviation will be consistent with the surrounding neighborhood.

Whether by undue hardship, or that the requested height variance will not offend the purpose of the height restriction and will be consistent with the neighborhood, Plaintiff presented substantial, credible, and unrebutted evidence to establish the positive criteria under Grasso for a (d)(6) height variance.

B. Proper Application of Grasso's Standard for the Negative Criteria.

Application of the negative criteria also illustrates that the Plaintiff presented more than sufficient evidence for approval, especially since it was unrebutted. The same evidence supports both the positive and negative criteria, so where already provided, it will be summarized appropriately below.

1. The Height Variance will not Cause a Substantial Detriment to the Public Good.

Plaintiff proved that there will no substantial detriment to the public good, whether from traffic, sound, or visual impact from the buildings.

Robert Hoffman, P.E., PTOE, Plaintiff's Traffic Engineer, testified in support of his written report, and concluded that the proposed development will result in "very minimal, if any," degradation of service at the intersections surrounding the Property: Florence-Columbus Road and Old York Road; Florence Columbus-Road and Burlington-Columbus Road; and the site access point. (2T 8:16-23).

The traffic counts incorporated the three new neighboring warehouse projects, were within the industry-standard 10% deviation, and deemed reliable and accurate by the NJDOT and County. (2T 10:2-25; 3T 9:15-21 through 12:1-14).

Mr. Hoffman's traffic study also addressed "trip assignment", or how trucks would travel to and from the facility. About 80% of the truck traffic would use the Interstate 295 interchange, and the other 20% would travel west along County Route 656 to Route 130 to access the New Jersey Turnpike–Pennsylvania Extension. (2T 7:20-25; 8:1-3). Therefore, very few trucks would utilize the two intersections about which the Board expressed concern.

In Mr. Hoffman's experience, post occupancy traffic counts are often lower than pre-development traffic projections. He has found that "relatively consistently, [the post occupancy traffic count] numbers come back lower than the ITE projections. ITE is generally considered to be conservative." (3T 33:25 through 36:1-3; 57:21-25 through 59:1-24). The post-development traffic counts for the neighboring Margolis project support this analysis. (4T 57:21-25 through 59:1-24).

Mr. Hoffman also testified that the Institute of Transportation Engineers ("ITE") Trip Generation Manual, the authoritative industry standard, does not use height as a variable for warehouse trip generation calculations. It simply does not affect traffic counts. Instead, the independent variable for trip generation is square footage of the building; height does not factor into the analysis. (2T 6:5-25; 7:1-9; 3T 26:3-21). He was asked "[s]o if these buildings were 30 feet high as opposed to somewhere between 40 and 50 feet high, would your projected traffic counts be any different?" He concluded that they would not. (3T 27:4-7). In fact, Mr. Terkanian testified that there is typically an inverse relationship between building height and employees, as taller buildings are more automated. (5T 53:12-25).

In an attempt to dispose of credible and unrebutted testimony, the Board unreasonably rejected Mr. Hoffman's evidenced-based conclusions as a "net

opinion." Ja030. For the reasons argued in Section IV(A)(1) of this brief, the rejection of Mr. Hoffman's testimony was arbitrary, capricious, and unreasonable.

Norman Dotti, P.E., Plaintiff's Sound Expert, also testified that the project will not cause a substantial detriment to the public good. Mr. Dotti's sound study revealed that the area's current ambient noise levels already exceed the permitted nighttime limit approximately 81% of the time. Mr. Dotti concluded that the project will have little to no sound impact, and the expected levels will be well under the permitted limit for the Property. (3T 51:3-25; 60:5-25; 61:1-25).

Mr. Phillips' testimony also proves the lack of substantial detriment to the public good. As explained in greater detail above, any potential visual impacts will be mitigated by the character of the surrounding properties, the significant setbacks, the proposed landscaping, and distance from residential properties. These factors include: the Property's border with Interstate 295 and a 150-foot wide PSE&G easement with overhead transmission lines; the setback 700 feet from Florence-Columbus Road; preserved farmland as the largest adjoining contiguous property; the closest residential structure on Cedar Lane Extension is 700 to 800 feet from a warehouse; and the lone residential structure bordering the Property on Burlington-Columbus Road is at least 400 feet from the closest

warehouse building. (5T 75:20-25 through 77:1). Mr. Phillips concluded that the visual impact associated with the increased height does not "rise to the level of being substantially detrimental." (5T 77:2-10).

Underlying Mr. Phillips' testimony is the recognition that the zoning ordinance's bulk requirements, including setbacks, defines how the "public good" for the proposed uses is satisfied. Again, the proposed project exceeds the required setbacks for all of the four requirements—three of which are substantial—in both the SM and GM Zones. (5T 75:6-19; 76:1-3; 76:14-25; 77:1). If a 75 foot setback is appropriate for a 75 foot warehouse, as permitted in the GM Zone, then a proposed 700 foot setback for a 48 warehouse in the SM Zone is certainly no detriment, let alone a substantial detriment, to the "public good." A contrary conclusion not only defies logic, but is also not supported by any evidence in the record.

These extensive proofs make clear that there would be no substantial detriment to the public good if Plaintiff's height variance were granted. Given the absence of any evidence in the record to the contrary, the Defendant's denial was arbitrary, capricious, and unreasonable, and requires reversal.

2. The Requested Deviation will not Substantially Impair the Intent and Purpose of the Zone Plan and Zone Ordinance.

Plaintiff's proofs also demonstrate that the increased height for the permitted use would not substantially impair the intent and purpose of the zone plan and ordinance. Again, warehouse/ distribution centers were permitted in Florence Township's SM Zone. Plaintiff did not need a use variance, and it only sought a height variance to construct a permitted use—a use explicitly envisioned for the very tract of land subject to this litigation.

Mr. Phillips provided detailed testimony on why this variance would not substantially impair the intent and purpose of the zone plan and ordinance for the SM Zone. A good portion of this testimony was also applicable to the Grasso positive criteria, or how the variance will not offend the purpose of the height restriction, and will be consistent with the surrounding neighborhood. This testimony will be summarized accordingly to avoid repetition. See Section III(A)(2).

As a professional planner, Mr. Phillips concluded that there is no evidence "that the 30-foot height limitation in the SM zone was intended to restrict warehouse distribution use because of traffic impacts." (5T 79:14-23). Rather, the Master Plan sought to address the special concerns associated with the higher-impact uses permitted in the GM Zone, which have a greater potential

for off-site impacts, including "noise, dust, odors, and visuals." Notably, "[t]raffic impacts are not cited in any way." 5T 78:3-25 through 80:1-7; see also Ja151.

The requested variance would not impair the intent and purpose of the zone plan and ordinance as the Township's governing body and land use boards have "recognized and acknowledged" over the past decade, "that building heights of 30 feet for warehouse distribution use were neither viable or appropriate." (5T 67:1-9). In support of his conclusion, Mr. Phillips cited a "series" of height variance approvals for the SM Zone, all warehouses with building heights of 45 feet or taller. (5T 67:1-25; 68:1-25). He focused specifically on a 2019 resolution, where the Board granted a (d)(6) height variance for a 300,000 square foot, 48 feet tall warehouse also in the SM Zone.

Under almost identical facts to the current height variance application, the Board acknowledged the following in the 2019 resolution of approval: (1) warehouses are a permitted use in the SM Zone; (2) the SM Zone's height limitation was not targeted to warehouses;[6] (3) there was no finding that taller warehouses have a higher intensity of use;[7] and (4) the potential negative

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[6/6] This 2019 conclusion, based on actual testimony in a hearing before this Board, underscores the fiction of its "historically hypothetical" musings on the reason for the 30 foot height limitation at p. 12, par. 3 of its Resolution. Ja122.

impacts were visual and could be mitigated. Ja120-Ja122; 5T 67:1-25; 68:1-25. This Resolution illustrates the Board's recognition that warehouses must be built above 30 feet, and the previous determination that the height restriction was not aimed at warehouses.

The Township Council has also recognized the need to increase the 30 foot height limit to effectuate a zone plan that permits warehouse uses. As early as 2008, the Township Council placed an SM Overlay Zone over lands zoned Agricultural along Route 130, and increased the permitted height limits to 50 feet to "reflect current standard[s] for uses permitted therein." (5T 69:8-20). It later adopted Redevelopment Plans for "Cedar Lane" and "Griffin Pipe," which permitted warehouses up to 75 feet tall. (5T 69:2-25; 70:1-3).

Mr. Phillips concluded that this pattern demonstrates the governing body and land use boards' have recognized "for some time now that warehouse distribution use, where it is permitted and encouraged, that buildings that are taller than 30 feet are not only the norm, but they are appropriate to actually foster development within these zones and these sites accordingly." (5T 70:8-13).

Citing Mr. Hoffman's traffic study, Mr. Phillips also agreed that "from a traffic impact and a trip generation standpoint, there was really no distinction between a 30-foot or, say, a 50-foot warehouse." (5T 73:24-25; 74:1). Mr.

Phillips repeated that the proposed project will operate as a "high-cube warehouse," and not as a fulfillment center or parcel hub that delivers directly to consumers. (5T 74:2-13). "*[I]n this instance*, building height, in my opinion, can't be viewed as a proxy for more intense -- intensive use or development." (5T 74:14-17) (emphasis added).

From a traffic prospective, Mr. Hoffman concluded that the buildings will not be any more intense than a 30 foot warehouse. The ITE, the authoritative industry standard for traffic engineering, does not include height as a variable for traffic generation calculations for warehouses; the independent variable for trip generation is square footage. See Section III(B)(1); 3T 26:3-21. The ITE data set includes warehouse buildings with heights of 50 feet, as the data consists of real traffic counts from a compilation of various building heights and sizes that fit the parameters of the specific ITE classification, and the post-development traffic counts often produce lower numbers than predicted by ITE calculations. (3T 31:19-25 through 33:1-3, 35:11-22; 4T 58:6-11).

Mr. Phillips' extensive unrebutted planning testimony, and Mr. Hoffman's unrebutted, evidence-based conclusions on traffic establish that the requested height variance would not *substantially* impair the intent and purpose of the zone plan. The record lacks substantial credible evidence to support any other conclusion.

Proper application of the Grasso and TSI standards confirms that the Plaintiff presented the evidence necessary to establish the applicable positive and negative criteria. The Board's decision to ignore same was arbitrary, capricious, and unreasonable.

IV. DEFENDANT'S DENIAL OF THE HEIGHT VARIANCE MUST BE DEEMED ARBITRARY, CAPRICIOUS, AND UNREASONABLE BECAUSE IT UNREASONABLY REJECTS CREDIBLE AND UNREBUTTED EXPERT TESTIMONY, AND IS NOT SUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE IN THE RECORD. (Raised Below: 7T 7:18-25 through 14:1-7; 37:14-20; 46:2-25 through 52:1-21)

In addition to its misapplication of the legal standard (Medici, Grasso, Coventry Square, Randolph Town Center Associates, L.P., TSI, etc.), the Resolution reaches conclusions not supported by substantial credible evidence. In an attempt to manufacture reasons for a denial, it ignores the evidence outlined above, through a conclusory rejection of unchallenged expert testimony. To further justify the denial, the Board draws conclusions unsupported by *any* evidence in the record, never mind substantial credible evidence.

A. Defendant Unreasonably Rejects Credible and Unrebutted Expert Testimony.

Underlying a municipal zoning board's quasi-judicial authority to grant or deny variances, is the authority to determine witness credibility and weigh

testimony. Baghdikian v. Bd. of Adjustment of Borough of Ramsey, 247 N.J. Super. 45, 50 (App. Div. 1991) (citations omitted). Zoning boards are not bound by the testimony of any expert, and may choose which witnesses to believe. El Shaer v. Planning Bd., 249 N.J. Super. 323, 329 (App. Div.), certif. denied, 127 N.J. 546 (1991).

"While a board may reject expert testimony, it may not do so unreasonably, based only upon bare allegations or unsubstantiated beliefs." New York SMSA v. Bd. of Adjustment, 370 N.J. Super. 319, 338 (App. Div. 2004). "Prudence dictates that zoning boards root their findings in substantiated proofs rather than unsupported allegations. By affording undue weight to the residents' unsubstantiated testimony, the Board disregarded the weight of the evidence in the record in determining to deny [the applicant] its variance." Cell South, 172 N.J. at 88. A board also cannot rely upon net opinions unsupported by any studies or data to reject expert testimony. Bd. of Educ. of City of Clifton v. Zoning Bd. of Adjustment of City of Clifton, 409 N.J. Super. 389, 434-35 (App. Div. 2009) (citing Cell South, 172 N.J. at 88).

While a board "may choose which witnesses, including expert witnesses, to believe[,]" "that choice must be reasonably made." Id. (citations omitted). "In addition, the choice must be explained, particularly where the board rejects

the testimony of facially reasonable witnesses." Id. (citing Kramer, 45 N.J. at 288).

In Ocean Cty. Cellular Co. v. Twp. of Lakewood Bd. of Adjustment, the Appellate Division reversed the zoning board's variance denial because, "based on the uncontradicted evidence submitted by [the applicant], it satisfied both the positive and negative criteria under N.J.S.A. 40:55D-70d necessary to obtain a special reasons variance." 352 N.J. Super. 514, 519 (App. Div.), cert. denied, 175 N.J. 75 (2002) (emphasis added).

The court held, in relevant part:

> One additional observation. We have reached our conclusion that [the applicant] satisfied the positive and negative criteria necessary for the grant of a special reasons variance based upon the uncontradicted testimony presented by its experts. We recognize that the Board was free to either accept or reject the testimony of those experts. "'Where reasonably made, such a choice is conclusive on appeal.'" [Kramer, 45 N.J. at 288 (quoting Reinauer Realty Corp. v. Nucera, 59 N.J. Super. 189, 201 (App.Div.), certif. denied, 32 N.J. 347 (1960))].
>
> However, in this case, we question whether the Board could have "reasonably" rejected the witnesses' testimony. *The experts presented written reports and generally relied on data and accepted methodology in reaching their conclusions.* Moreover, as noted, *no evidence was presented to challenge their reports or testimony.* In addition, the Board, neither during the hearings nor in its resolution, ever questioned or rejected the experts' testimony. For example, in its resolution the Board did not state that the experts lacked credibility. [See New York SMSA v. Bd. of Adjustment of Bernards Twp., 324 N.J. Super. 149, 162 (App. Div.), certif. denied, 162 N.J. 488 (1999) (noting that the Board had found that the applicant's real estate expert "lacks credibility")]. Indeed*, during the hearings*

> *Board members found [the applicant]'s witnesses to be highly qualified*. Consequently, there is no basis for us to conclude that the Board made a "reasonable" choice to disregard the evidence presented by the experts.
>
> Id. at 536-37 (emphasis added).

Concerning the applicant's expert testimony, the court specifically noted that "[n]o competing evidence, expert or otherwise, was presented by any interested party or the Board to counter [the applicant's expert] testimony." Ocean Cty. Cellular, 352 N.J. Super. at 526.

Similarly, in New York SMSA, the Appellate Division found that "it was not reasonable for the Board to reject [the expert]'s testimony summarily and without articulation[.]" 370 N.J. Super. at 340. In New York SMSA, the applicant's expert witness presented maps based on computer models accepted in the industry, described the technical causes for the service issues, explained the appropriateness of the proposed site to address those issues, and readily answered the board's questions. Id.

Here, the Board's Resolution summarily and unreasonably dismissed Mr. Hoffman's testimony concerning traffic generation and Mr. Phillips' planning testimony concerning the negative criteria. Notably, the Board accepted both as expert witnesses, and made no findings on the record concerning their credibility. (2T 5:24-25 through 43:1-7; 5T 32:13-25 through 60:1-9). The Resolution completely ignores Mr. Terkanian's testimony on financability,

construction, and marketability of a 30 foot warehouse. Their expert testimony was not rebutted; and their credibility was not challenged.

1. Mr. Hoffman's Traffic Testimony.

The Resolution found Mr. Hoffman's conclusion that height will not produce increased traffic, to be a "net opinion," inconsistent with testimony from Mr. Landsburg and Mr. Terkanian. Ja030. Nonsense. Mr. Hoffman's conclusions were based on factual data generated by ITE standards; and nothing Mr. Landsburg or Mr. Terkanian said undercut same.

The traffic study was conducted pursuant to the authoritative industry standard for traffic engineering, the ITE. (2T 6:5-25; 7:1-9). Using data collected from real traffic counts, the ITE generates an equation, where an independent variable is added to produce the traffic projections. (3T 28:3-24). For residential development, that independent variable is the number of dwelling units; for warehouses, the independent variable is square footage. (3T 28:12-24). There are various classifications for types of warehouses, and the traffic engineer chooses the category that best suits the proposed use. (3T 27:8-21; 29:8-25).

Mr. Hoffman chose ITE Land Use Code 154, or the "high cube short-term storage warehouses" as it "has consistent samples with the size and type of operation as proposed for this site," "consistent with the other warehousing in

the area," and "a very good fit for what's being proposed here" as the proposed buildings are "right in the sweet spot on sample sizes that were taken, as far as the sizes of the buildings where they actually conducted the studies." (2T 6:18-25; 7:1-9; 3T 29:5-25; 30:1-5). Land Use Code 154 includes 50 foot warehouses, as the data set includes counts from warehouses 24 feet or taller, and incorporates various sizes and types of buildings that fit within the specific ITE classification. (3T 30:11-17 through 33:1-3). Height is irrelevant for choice of the classification of warehouse. (3T 27:13-25; 29:5-25). Nevertheless, when asked whether the project would be a last mile facility, Mr. Hoffman answered, "[t]his is definitively not proposed to be a last mile facility. That's a different -- that would fall under a different category within ITE, and that, generally, has a higher traffic count associated with it." (2T 16:8-23).

The independent variable for trip generation is square footage of the building; "the height of the building does not factor in." (3T 26:3-21). "It's not a volumetric calculation. It's solely based on the square footage of the building." (3T 27:2-3). When asked, "[s]o if these buildings were 30 feet high as opposed to somewhere between 40 and 50 feet high, would your projected traffic counts be any different?" Mr. Hoffman concluded that they would not. (3T 27:4-7). He explained that increased volume does not "necessarily translate linearly like that[.]" (3T 31:19-25).

Post-development studies support this conclusion. In his experience, "relatively consistently, [the post occupancy traffic count] numbers come back lower than the ITE projections. ITE is generally considered to be conservative." (3T 33:25 through 36:1-3). This trend was supported by the nearby Margolis property,[8] which produced lower post-development traffic counts than projected by the ITE standards. (2T 7:2-9; 3T 35:6-22; 6T 8:10-13; 9:2-11).

The Board's Resolution criticizes the ITE, and uses the lack of height as a data point as a means to reject Mr. Hoffman's unrebutted testimony, yet no evidence supports same. Defendant's own engineer concluded that "The Transportation Impact Study was prepared [by Hoffman] in a professional manner following the generally accepted practice for traffic impact analyses." Ja098.

Pursuant to the ITE, height does not influence trip generation projections for warehouse buildings. The ITE does not differentiate between height for warehouses; therefore, neither do traffic engineers. It is the ITE, not Mr. Hoffman, who determined that height is irrelevant to the datasets it publishes; the dataset upon which developers, land use boards, courts, and the NJDOT rely.

[8] The Margolis property has a similar e-commerce warehouse use, with similar building sizes. The building heights are between 42 and 46 feet for the 250,000 square feet building, and 46 and 50 feet for the 710,000 square feet building. (6T 8:10-13; 9:2-11).

(Indeed, the NJ State Highway Access Code requires that every traffic impact student submitted to NJDOT must include ITE traffic data. (N.J.A.C. 16:47-1 et seq., App. F). Hoffman cannot be accused of offering a "net opinion" because he failed to include a variable (height) which the reliable and authoritative source for his study has determined is not relevant, solely to appease a zoning board which, without any basis to support same, demands proof that does not exist. If the Board is going to attempt to "drill down" into ITE's dataset, and criticize its components (or lack thereof), it should at least have some empirical basis upon which to support it. As a qualified expert in traffic engineering, Hoffman used his specialized skillset and knowledge to offer an opinion, based on the ITE and the traffic study, as well as known outcomes from two warehouse buildings on the other side of Interstate 295, also on Florence-Columbus Road, to conclude that the proposed 48 foot structures would not generate more traffic than the permitted (but unmarketable) 30 foot buildings simply because of the increased height. The Board's unsupported and unsubstantiated assumptions underlying its wholesale rejection of Mr. Hoffman's credible and unrebutted expert testimony were arbitrary, capricious, and unreasonable.

Defendant's Resolution also asserts that Mr. Hoffman's conclusion was "inconsistent with the testimony of other witnesses who testified on behalf of the applicant, namely Mr. Landsburg and Mr. Terkanian." Ja030. Again, this

assertion is pure invention and belied by the evidence. Mr. Landsburg, Mr. Terkanian, and Mr. Hoffman provided consistent testimony. The Resolution never identifies any such inconsistency. For obvious reasons, it cannot.

Mr. Landsburg repeated several times that the proposed facility would be a "bulk general warehouse storage facility. It's not a parcel hub. It's not a last mile facility." (2T 17:13-23). The project will be "[t]ypical bulk distribution, warehouse and distribution building. The traffic Mr. Hoffman testified to in terms of those activities." (4T 43:22-24). Mr. Terkanian agreed, that "these buildings, really, are representative of bulk warehouse, not fulfillment, not specialized high bay, you know." (5T 47:23-25). Everyone agreed on the character of the facility, and the traffic it will produce based on the ITE classification.

Mr. Landsburg and Mr. Terkanian both testified that the industry has focused on higher buildings because of advancements in the racking process and technology, and in pursuit of increased capacity through greater density, and less utilization of land. (5T 11:20-25; 12:1-10; 47:12-16; 52:16-23). But, increased density and capacity by way of taller buildings do not equate to a de facto increase in traffic. Rather, Mr. Terkanian's testimony expressly contradicts that conclusion:

> But more often than not, the higher --the higher the building sometimes can cause a decrease in occupancy count. Lots of the

> taller buildings are more automated; therefore, less employee count density.
>
> So predominantly we've actually seen an inverse relationship with building height and number of people working in those facilities.
>
> (5T 53:14-21).

Mr. Phillips provides a similar conclusion in his testimony about the antiquated height and parking requirements:

> [Y]our ordinance has a standard, which I think is somewhat antiquated and requires a lot more parking than these type of facilities generally require, again, given the fact that a lot of the good storage and retrievable is automated, which translates into lower employee ratios than what warehousing had been 20, 30, 40 years ago.
>
> (5T 81:4-10).

A review of the record makes clear that Mr. Hoffman's conclusion that 'increased building height does not by default increase traffic' is supported by his well-reasoned expert testimony, based on the industry standard ITE, and is consistent with the testimony provided by other witnesses. The Defendant's unsupported rejection of Mr. Hoffman's credible testimony, by way of deeming his conclusions a "net opinion", unsupported by other witness testimony, was arbitrary, capricious, and unreasonable.

2. Mr. Phillips' Planning Testimony.

The Board's Resolution also summarily rejects Mr. Phillips' "no substantial detriment to the public good" testimony. It says that his conclusions

are "founded in evidence and testimony which the Board is obliged to discount[,]" and based upon "a shaky evidential foundation." Ja032. In its conclusions of law, the Board holds that the testimony by the applicant's other witnesses does not support Mr. Phillips' conclusions. Ja034. Again, the Resolution does not explain, describe, or even identify that "shaky evidential foundation." It does not detail why his testimony was "discounted" (and by how much) despite his qualification as an expert witness. It does not say why his conclusions are unsupported by the testimony of others. Of course it doesn't. It can't. Moreover, no planning expert testified to rebut, or even cast doubt upon, Mr. Phillips' conclusions. His was the only competent planning testimony presented.

Mr. Phillips reviewed the proposed building heights, Florence Township's ordinances, the Township's Master Plan, the Township's prior development approvals for warehouses, certain actions involving re-zoning and redevelopment plans for warehouse distribution uses, and the reports issued by the Board's professionals. He also visited the site on several occasions, and surveyed adjacent uses. (5T 61:10-25; 62:1-5).

In his "no substantial detriment to the public good" analysis, Mr. Phillips agreed with Mr. Hoffman that there is "really no distinction" between a 30 foot and 50 foot warehouse from a traffic impact and trip generation standpoint. (5T

73:20-25; 74:1). Mr. Phillips reiterated that the project was not a fulfillment center, parcel hub, or "Amazon-like facility" providing last mile delivery services, but a "high-cube warehouse facility that is principally used to store manufactured goods prior to their distribution largely to either retail locations or other warehouses." (5T 74:5-13). He concluded, that "in this instance, building height, in my opinion, can't be viewed as a proxy for more intense—intensive use or development." (5T 74:14-18).

As discussed earlier, Mr. Phillips also testified that any visual impacts will be mitigated by the nature of the surrounding properties and the substantial setbacks. See Sections III(A)(2) & III(B)(1). He concluded that the visual impacts associated with the increased height do not "rise to the level of being substantially detrimental." (5T 77:2-10).

The Board accepted Mr. Phillips as an expert in planning, his testimony was unrebutted, and his conclusions were supported by substantial credible evidence. Defendant's finding that his testimony was unpersuasive because it was based on unidentified, unexplained "shaky evidential foundation" was arbitrary, capricious, and unreasonable.

3. Mr. Rife's Testimony on the Three-Dimensional Renderings.

The Board also rejected the testimony from, and the renderings generated by, Brad Rife. Ja029. Employed by Thomas & Hutton Engineering Company,

a site development company with a focus on engineering, surveying, and landscape architecture and GIS, Mr. Rife presented testimony on his 3-D renderings of the proposed project. Ja101-Ja103; 5T 14:14-22. Although not asked to be qualified as an expert witness, Mr. Rife's testimony certainly established his credentials, and the basis upon which to evaluate the reliability of his testimony. He created 3-D renderings of the project through an extensive graphic design process: (1) he started with the existing survey, proposed grading plan, and "Revit model" (a 3-D architectural drawing); (2) the three items were input into "Autodesk Infraworks" to create the 3-D environment; (3) the output from "Autodesk Infraworks" was input to "Lumion", which created the rendering; and (4) he utilized the landscape plans to apply the environmental features. (5T 18:15-25 through 23:1-3).

Both "Autodesk Infraworks" and "Lumion" are industry-standard software programs, and Mr. Rife confirmed that the renderings were generated from a viewshed height of about six feet, mimicking a person standing on Florence-Columbus Road. (5T 23:1-2; 30:19-21).

The Board's Resolution rejected Mr. Rife's testimony because he had not completed post-development comparisons, a view was not generated from the southwest end of the development, and he was unable to definitively confirm the height of the crops in the fields. (Even in South Jersey, and regardless of

whether they would be soybean, corn, or tomatoes, the crops would not be 48 feet tall!). Ja029. The Resolution fails to address any credibility concerns as to Mr. Rife, and these findings notably forget to mention extremely relevant facts found in the record.

For example, these findings fail to recognize that Mr. Rife generated three renderings: (1) from Florence-Columbus Road, looking towards the two structures; (2) from the proposed driveway on Florence-Columbus Road; and (3) from Old York Road. (5T 17:3-9; 18:1-14). The Board's Resolution cites the failure to provide a view from the dwellings on the southwest end of the development, but the nearest southwest dwelling is on Cedar Lane Extension, 700 to 800 feet from the nearest proposed structure. (5T 75:20-25 through 77:1). Similarly, the warehouse are setback 700 feet from Florence-Columbus Road, the largest contiguous property is preserved farmland, and the property abuts Interstate 295 and 150-foot wide PSE&G easement (5T 75:20-25 through 77:1); see also Sections III(A)(2) & III(B)(1).

When viewed in conjunction with the entirety of the record, Mr. Rife's renderings and testimony are supported by substantial credible evidence. He testified, "[t]he goal is visual communication. It's helping people make decisions." (5T 23:25; 24:1). An honest review of Mr. Rife's testimony and renderings show that these graphics were never meant to be an exact depiction,

but only a reliable visual to supplement the 2-D blueprints. Mr. Rife himself recognized this and testified accordingly, but the Resolution substitutes his uncontroverted testimony and properly prepared demonstrative evidence with invented and speculative reasons to deny Plaintiff's application. The exercise is not only disingenuous, but arbitrary, capricious, and unreasonable when viewing the record as a whole.

B. Defendant's Denial of the Height Variance is Not Supported by Substantial Credible Evidence in the Record.

In a further attempt to justify the denial, the Resolution contains several misleading and/or factually unsupported findings of fact and conclusions. The Court owes no deference to these findings and conclusions of law, as a board's findings must be rooted in "*substantiated proofs* rather than unsupported allegations." Cell South, 172 N.J. at 88 (emphasis added).

1. The Inventive and Factually Unsupported Interpretation of the 1999 Master Plan.

The Resolution concludes that a passage from the 1999 Master Plan illustrates the Planning Board's concerns with "the intensity of uses" and the "potential negative externalities" in the SM and GM Zones, and that the ordinance is consistent with these concerns. Ja028-Ja029. These factual findings (despite the absence of any evidence to support same) conclude that "[t]he governing body sought to distinguish the scale, intensity and nature of the

permitted uses in the two zones with these differing standards in accord with the principles stated in the 1999 Master Plan." Ja029.

This "finding" is based on the entirely invented and factually unsupported premise that the proposed development is "more intense" simply because of the increased height of the buildings, and ignores the elephant in the room; the proposed use as a warehouse is permitted in the SM Zone. In a creative effort to distract the reader's attention from that fact, the Resolution ascribes motives to the 1999 Planning Board's distinction between SM Zone, which permits "distribution centers and warehouses", and GM Zone, which permit "wholesale distribution centers and warehouses." Ja151-Ja152. Nowhere, of course, does the 1999 Master Plan define "wholesale distribution center", or explain if there was an intended difference between that and a "distribution center." (Id.) Yet, the side yard, front yard, and rear-yard setbacks for warehouses in both the SM and GM Zones are the same, despite the height differences. The Master Plan does not express concerns about height limits for permitted uses; the word "height" is not even found in this section of the Master Plan. See Ja150-Ja152. The Board's interpretations of the Master Plan, unsupported by any evidence, are pure fiction.

To support this fiction, the Resolution goes a step further by pretending the word "traffic" is in the 1999 Master Plan. It dismisses Mr. Phillips' well-

reasoned, factually supported conclusion that the height restriction was not intended to restrict warehouse uses in the SM Zone, but rather to restrict externalities from the high impact uses in the GM Zone, including "noise, dust, odors and visuals." Ja032-Ja033; Ja151. The Resolution concludes that the Master Plan also sought to restrict traffic since the quoted language "is not limited in that way[,]" as it "discusses offsite impacts generally." Ja033. Its "Conclusions of Law" hold that Mr. Phillips' opinion that traffic was not a "significant matter of concern" in the 1999 Master Plan is "unsupported by the actual language of that document." Ja034. No evidence in the record supports this finding, or the rejection of Mr. Phillips' analysis and interpretation of the Master Plan's language. Instead, as Mr. Phillips testified, and as the Master Plan expressly states three paragraphs before the language quoted in the paragraph 21 of the Resolution: "The category of general manufacturing poses special concerns because it can have significant offsite impacts: noise, dust, odors and visuals." Ja151; see 5T 78:3-25 through 80:1-7 (emphasis added). Traffic does not appear in the listed concerns for the GM Zone; "[t]raffic impacts are not cited in any way." (5T 78:16).

In addition to other imaginary "findings" already discussed, the "Conclusions of Law" states, "[i]n reliance upon the 1999 Master Plan and the applicable zoning ordinance sections", the proposed structures would be a "more

intense use than the Planning Board and governing body intended at the subject property, would be substantially detrimental to the public good, and would substantially impair the zone plan and zone ordinance." Ja034. The Board then doubles down, and concludes: "The application before the Board contemplates development that is substantially more intense than anticipated by the governing body, and, therefore, allowed in the SM Zone." (Id.).

Respectfully, even if traffic was a concern referenced in the Master Plan, where the undisputed evidence shows that the building height does not impact traffic counts, the Board had no factual basis upon which to claim that the 1999 Master Plan intended a substantially less intense use than proposed, particularly when that use—a warehouse—is permitted.

Inherent in this manufactured interpretation is that increased height is a proxy for the intensity of the use. While under Grasso height can be a proxy, there was no proof, let alone "substantial credible evidence", that it is a proxy for intensity of use in this case—not in the 1999 Master Plan, not in the Township Ordinances, and not in any expert testimony. As made abundantly clear above, there is, instead, substantial reliable and unrebutted evidence to the contrary.

The Resolution hinges upon the potential off-site traffic impact of the proposed project. Although it talks in terms of "intensity" and not explicitly

off-site traffic, it is clear that the Board used that potential impact to deny the Application. While zoning boards of adjustment may consider potential off-site traffic impacts, those concerns are only one factor for the denial of even a use variance. See Dunkin' Donuts of N.J., Inc. v. North Brunswick Planning Bd., 193 N.J. Super. 513, 514-15 (App. Div. 1983). Couching traffic concerns in terms of intensity does not permit the Board to ignore that the use is permitted—a use envisioned for the Property. Even if it did, as provided ad nauseam above, the requested height variance does not de facto equate to increased traffic. From a traffic generation perspective, square footage, not height, is the independent variable. See 3T 26:3-21; 31:19-25 through 33:1-3; 4T 58:6-11; see also Sections III(B)(1) & IV(A)(1). Similarly, the Board's attempt to disguise traffic concerns in terms of intensity fails to recognize that the proposed driveway is 1.5 miles from the Florence-Columbus Road and Route 130 intersection; that said intersection is solely within State and County jurisdiction; and 80% of the traffic generated from the project will travel away from Florence and never reach that intersection. (2T 7:20-25; 8:1-3; 5T 111:18-25).

The Defendant had substantial credible evidence before it that the height of a warehouse does not impact traffic generation, and that the taller buildings would be consistent with the 1999 Master Plan. It had no evidence to the contrary. Accordingly, the Board's equally heavy reliance upon the theory that

height is a proxy for intensity of use, is wholly devoid of evidentiary support. The Board's decision was arbitrary, unreasonable and capricious, and must be reversed.

2. Comparison Between the 2019 Height Variance Application and the Current Matter.

In an attempt to dismiss Mr. Phillips' unrebutted expert testimony, the Board's Resolution discredits his conclusions by factually distinguishing the 2019 height variance approval for a 48 foot warehouse in the SM Zone for a development known as "Foxdale". Ja030-Ja031. While Plaintiff acknowledges that all variances are site specific, the purpose of admitting this 2019 resolution into evidence was not that the height variance was granted for that warehouse, but that the Board—less than three years earlier—concluded that: (1) the SM Zone height limit was not targeted to warehouses, and (2) there was no finding that taller warehouses have a higher intensity of use. See Sections III(A)(2) & III(B)(2). As Mr. Phillips' testimony reflects, this particular Foxdale height variance approval was used to show: (1) that the Board has recognized the need to build warehouses above 30 feet, and that 48 foot warehouses conform to the warehouse uses permitted in the SM Zone, and (2) this Board had already made a public pronouncement that the height limitation of 30 feet was not aimed at warehouses. The purpose of the comparison is clear: "So, again, bottom line in this instance, building height, in my opinion, can't be viewed as a proxy for more

intense -- intensive use or development. And I think that opinion is consistent with the Board's prior findings that I shared on that 2019 Foxdale application as well." (5T 74:14-19).

The 2019 Foxdale resolution also confirmed Mr. Phillips' interpretation of the 1999 Master Plan and SM Zone. The Foxdale applicant's planner provided nearly identical testimony to Mr. Phillips' testimony in the current matter. See Ja120-Ja121. In relevant part, the 2019 Foxdale resolution summarized the testimony of the applicant's planner as follows:

> She related her perception, from her review of Florence Township's Master Plan documents, *that the purpose of the prevailing 30 ft. height standard in the SM Zone District is to limit types of manufacturing, and not to constrain warehousing.* She concluded that *none of the Master Plan's stated goals and objectives would be undermined by the height of the proposed building.* …
>
> Ja120-Ja121 (emphasis added).

The 2019 Foxdale resolution then makes the following "Conclusions of Law":

> The Board finds that the proposed height variance for the principal structure to allow it to be 48.3 ft. tall when a height of 30 ft. is permitted may be granted because the underlying warehouse/office use is a permitted use, and the requested variance does not render the use less suitable for the proposed site than it would otherwise be. *There is no evidence in the record that the taller warehouse will be a substantially more intense use than a warehouse of conforming height, and it does not appear as though the target of the SM Zone District height limitation was warehousing. So, the requested height cannot be said to substantially impair the zone plan and zoning*

> *ordinance*. The primary potential impact on the public good is visual. …
>
> Ja122 (emphasis added).

Denial of the current application for the same 48 foot height, also in the SM Zone, expressly contradicts the legal findings made in the 2019 Foxdale resolution, which granted a height variance for a 48 foot warehouse in the SM Zone. While the Plaintiff recognizes that each application must be decided on its own merits, for the Board to reach a contrary *legal* conclusion on a substantially similar set of facts for a (d)(6) height variance in the SM Zone less than three years earlier, it must have evidence to do so. There was none. The Board therefore had to do this by inventing "facts"; but those "facts" enjoy zero support in the record. Thus, the conclusory dismissal of Mr. Phillips' testimony concerning the 2019 Foxdale resolution was arbitrary and capricious.

3. Factually Unsupported Assumption Concerning Height and Intensity.

The Resolution makes the assumption that height and the intensity of land use have a linear relationship—as height increases, so does the intensity of use. Ja034. To reach this conclusion, the Board focuses on testimony that described the operations <u>inside</u> the building; irrelevant to the <u>land use</u> implications of the project, such as setbacks, impervious coverage, parking, and even traffic. The assumption is unfounded. The Township's ordinances for front, side, and rear-yard setbacks are the same for 30 foot buildings in the SM Zone are they are for

75 foot buildings in the GM Zone; parking space and impervious coverage requirements are based on square footage. No land use requirements are volumetric, so height is indeed irrelevant. To accept Defendant's assumption that height and intensity of land use have a linear relationship, one must suspend reality, and ignore the Township's own identical treatment of the setbacks for the SM and GM Zones, regardless of building height.

The Board incorrectly substitutes "density of capacity" for "intensity of land use." This is simply wrong, and belies the testimony. The Plaintiff's witnesses testified that taller buildings allow for more product in a smaller footprint. (5T 11:20-25; 12:5-10; 47:8-25). Mr. Hoffman testified, based on the ITE data, that height does not influence traffic for this category of warehouse. Contrary to its findings, the Board had no evidence that the storage of more product, on a smaller footprint, generates more traffic. Simply because a structure can store more product in less square footage, does not equate to a more "intense" use inside or outside the four walls. Different products may "turn over" more, or less, frequently, than others; so simply because a structure can fit more product in a smaller footprint, does not by default equate to a more intense use of the land. Any assumption of that outcome is pure speculation, unsupported by factual predicate. The proposed warehouses are for inventory storage, which will have less throughput of products moving in and out of the

facility on a daily basis than other types of warehouses. See, e.g., (2T:1-9; 5T 43:15-20; 47:8-16; 74:2-8). The Board's assumption to the contrary is simply wrong.

A close review of the Resolution makes clear that the Board drew several inferences, from which it reached factually unsupported conclusions. It had no evidence, never mind *substantial* credible evidence, to do so. The Resolution's statement that there is "no credible, probative evidence" to support the requested height variance ignores the record. Without substantial credible evidence in the record to support the application's denial, the Board's Resolution must be deemed arbitrary, capricious, and unreasonable.

CONCLUSION

For all of the reasons set forth herein, it is respectfully suggested that the decision of the Defendant Florence Zoning Board of Adjustment and Trial Court be reversed, and that this Court grant the height variances requested by Plaintiff.

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Dated: August 6, 2024
4869-5213-8453, v. 1

NFI REAL ESTATE, LLC AND TURNPIKE CROSSINGS V, LLC, Plaintiffs-Appellants. v. FLORENCE TOWNHIP ZONING BOARD OF ADJUSTMENT Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2189-23 On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION BURLINGTON COUNTY Docket No.: BUR-L-0993-23 Sat Below: Hon. Jeanne T. Covert, A.J.S.C.

REPLY BRIEF
FOR
RESPONDENT
FLORENCE TOWNSHIP ZONING BOARD OF ADJUSTMENT

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TABLE OF CONTENTS

TABLE OF JUDGMENTS i

TABLE OF AUTHORITIES ………………………………………………... ii

PRELIMINARY STATEMENT………………………………………………1

PROCEDURAL HISTORY………………………………………………..... 3

STATEMENT OF MATERIAL FACTS ……………………………….... 4

LEGAL ARGUMENT ….. 9

I. STANDARD OF REVIEW 9

II. BURDEN OF PROOF ………………………………………….... 12

III. THE BOARD AND TRIAL COURT PROPERLY WEIGHED PLAINTIFFS’ HEIGHT VARIANCE UNDER THE GRASSO STANDARDS ……………………………………………….…… 16

IV. THE BOARD PROPERLY DECLINED TO ADOPT SWEEPING POLICY CHANGES BECAUSE OF CHANGES IN THE REAL ESTATE MARKET AND WAREHOUSING INDUSTRY 22

V. THE BOARD’S FINDINGS OF FACT ARE SUPPORTED BY THE EVIDENCE IN THE RECORD ………………………………...... 26

VI. THE BOARD PROPERLY REJECTED THE TESTIMONY AND ARGUMENTS OF PLAINTIFFS’ PLANNING EXPERT 35

VII. THE BOARD’S FINDINGS REGARDING THE PURPOSE OF THE HEIGHT STANDARDS FOR THE SPECIAL MANUFACTURING ZONE DISTRICTS ARE SUPPORTED BY THE 1999 MASTER PLAN, THE ORDINANCE TEXT AND APPLICABLE LAW 44

VIII. CONCLUSION 45

TABLE OF JUDGMENTS

1. Florence Township Zoning Board of Adjustment Resolution 2023-05 Denying Plaintiff's Application, dated April 3, 2023 .... Ja012-036

2. Trial Court Order Denying Plaintiff's Relief, dated March 18, 2024, *nunc pro tunc* February 9, 2024 .... Ja222

TABLE OF AUTHORITIES

Cases **Page(s)**

Cerdel Constr. Co., Inc. v. Township Comm. of Township of E. Hanover, 86 N.J. 303, 307 (1981) 17

Chirichello v. Zoning Bd. Of Adj. Monmouth Park, 78 N.J. 544 (1979) …... 13

Coventry Square v. Westwood Zoning Board of Adjustment, 138 N.J. 285 (1994) …………………………………………………….... 19

Elco v. R.C. Maxwell Co., 292 N.J.Super. 118, 126, (App.Div.1996) ……… 11

Feiler v. Ft. Lee Bd. of Adjustment, 240 N.J. Super. 250, 256, (App.Div. 1990) 24

Funeral Home Mgmt., Inc. v. Basralian, 319 N.J. Super. 200, 208 (App.Div.1999) ……………………………………………………… 10, 11

Grasso v. Boro of Spring Lake Heights, 375 N.J. Super. 41, 52-53 (App. Div. 2004) ………………………..… 7, 14, 16, 17, 18, 19, 20, 21, 23, 40

Kenwood Assocs. v. Bd. of Adj. Englewood, 141 N.J. Super. 1 (App Div. 1976) ………………….. 13

Kramer v. Bd. of Adjust., Sea Girt, 45 N.J. 268, 288 (1965)…….. 10, 11, 15, 34

Kohl v. Mayor and Council of Fair Lawn, 50 N.J. 268 (1967) ……………... 38

Medical Realty Assoc. v. Board of Adj. of Summit, 228 N.J.Super. 226, 233 (App.Div.1988) ………………………………… 11,12

Medici v. BPR Company, 107 N.J. 1 (1987) …….………… 16, 21, 38, 39, 40

New Brunswick Tel. v. South Plainfield, 305 N.J. Super. 151 (App. Div. 1997), re-affirmed at 314 N.J. Super. 102 (App. Div. 1998) ……. 12

New York SMSA Ltd. Partnership v. Board of Adj. of Bernards Tp., 324 N.J.Super. 145 (App.Div, 1999) …………………………………….. 10, 11

Northeast Towers, Inc. v. Zoning Bd. of Adjustment of Borough of West Patterson, 327 N.J. Super. 476, 493-494 (App.Div.2000) ….. 10, 11, 12

Price v. Strategic Capital Partners, 404 N.J. Super. 295 (App. Div. 2008) …………………………… 23, 24, 25, 26

Ten Stary Dom Ptp. v. Mauro, 216 NJ 16, 30 (2013) ………………………… 12

Toll Bros., Inc. v. Burlington County Bd. of Chosen Freeholders, 194 N.J. 16, 30 (2013) ……………………………………………………… 13

Tomko v. Vissers, 21 N.J. 226, 238 (1956) …………………………………… 13

Victor Recchia Residential Constr., Inc. v. Zoning Bd., of Adjustment of Cedar Grove, 338 N.J.Super. 242, 253-54, 768 A.2d 803 (App.Div. 2001) ... 24

Weiner v. Zoning Bd. of Adjust. of Glassboro, 144 N.J. Super. 509, 516 (App. Div. 1976) ………………………………………..…………………13

Statutes

NJSA 40:55D-1 et seq. ("MLUL")..*passim*

NJSA 40:55D-20 ……………………………………………………....... 22

NJSA 40:55D-62 ……………………………………………………… 22

NJSA 40:55D-70 …………………………………………...…………… 22

NJSA 40:55D-70.1 …………………………………………………….. 39

NJSA 40:55D-70d …………………………………………… 19, 24, 25, 37, 38

NJSA 40:55D-70(d)1……………………………………………………… 21

NJSA 40:55D-70(d)6 …………………………………… 6, 16, 20, 21, 39

NJSA 40:55D-76 ……………………………………………………... 22

NJSA 40:55D-89 ……………………………………………………..… 39

Ordinances

Florence Township Ordinance §91-249 ………………………………….. 44, 45

Other Authorities

Cox & Koenig, New Jersey Zoning and Land Use Administration
(Gann 2023) pp. 261……………………………………………………… 12

Cox & Koenig, New Jersey Zoning and Land Use Administration
(Gann 2023) pp. 262 …………………………………………….………… 13

PRELIMINARY STATEMENT

This Reply Brief has been submitted on behalf of the Defendant-Respondent Florence Township Zoning Board of Adjustment (the "Board"), in response to the Amended Brief filed on behalf of the Plaintiffs-Appellants NFI Real Estate, LLC, and Turnpike Crossings V, LLC ("Plaintiffs"). Plaintiffs have appealed the decision of the Trial Court upholding the denial by the Florence Township Zoning Board of Adjustment of Plaintiffs' application for a height variance under N.J.S.A. 40:55D-70(d)(6) to permit construction of two 48 ft. tall warehouses where buildings with a maximum height of only 30 ft. are permitted. The Board found that Plaintiffs failed to meet their burden of proof with regard to both the positive and negative criteria applicable to such a variance and denied the application for the reasons stated in the Board's Resolution #2023-05. Ja012-036.

Under the applicable standard of review, Plaintiffs have the heavy burden of overcoming the presumed validity of the Board's variance denial decision and of the Trial Court's decision upholding the Board. Plaintiffs cannot meet their heavy burden because, as found by the Trial Court, the Board's decision is consistent with applicable statutory and decisional law, and with the record.

The recitation in Plaintiffs' Brief of the applicable standard of judicial review does not discuss the additional deference due to the Board's decision because it is a variance denial. Nor do Plaintiffs discuss the substantial deference due to Boards' factual determinations, including the credibility of witnesses and probative value of evidence.

At the core of Plaintiffs' argument is a fundamental misunderstanding of the proper and limited role of zoning boards weighing variance requests. N.J.S.A. 40:55D-70(d) allows zoning boards to grant variances only in "particular cases". The changed market conditions calling for taller buildings proffered by Plaintiffs as the central reason they should receive a variance affect all properties throughout the SM Zone. It is for the planning board and the governing body, not the Board, to make such sweeping policy choices. The relief requested by Plaintiffs upon the proofs they presented would be an impermissible rezoning by variance and exceed the powers of the Board.

This Court should affirm the decision of the Trial Court that the Board's height variance denial was proper because, as found by the Trial Court, the Board's denial decision is in accord with applicable law concerning variances, is well-supported by the record, is fully explained in the Board's Resolution, and should, as a valid exercise of the Board's discretion and limited powers, be accorded substantial deference by the Court.

PROCEDURAL HISTORY

On May 31, 2022, after a series of public hearings, the Board denied the application of Plaintiffs seeking a height variance pursuant to NJSA 40:55D-70(d)6 to permit construction of two 48 ft. tall warehouses on a property that was, at the time of submission of Plaintiffs' application, located in Florence Township's SM Special Manufacturing Zone District in which buildings of up to only 30 ft. tall are permitted. 6T 15:7- 6T 16:15.

The Board's height variance denial decision was memorialized in Board Resolution #2023-05 which was adopted on April 3, 2023. Ja011-Ja036.

On May 19, 2023, Plaintiffs filed a Complaint in Lieu of Prerogative Writs to appeal the Board's height variance denial decision. Ja001-Ja010.

The Trial Court heard oral argument on February 9, 2024, and issued a bench opinion denying Plaintiff's requested relief. 7T 52:14- 7T 52:21.

The Trial Court's oral decision upholding the Board's variance denial decision and denying the relief requested by Plaintiffs was confirmed by way of an Order dated March 18, 2024, Nunc Pro Tunc February 9, 2024. Ja174.

This appeal followed.

STATEMENT OF MATERIAL FACTS

Plaintiffs seek to construct two 48 ft. tall warehouse and distribution buildings, along with accessory uses and structures, such as parking and loading areas, stormwater management basins, a septic system and access driveways at a 133-acre parcel located in Florence and Mansfield Townships that is commonly referred to as the "Lounsberry Property" (the "Property"). Ja191-Ja218. All but 7 acres of the property lie in Florence Township. Building 1 is proposed to have an area of 870,000 sq. ft., and Building 2 is proposed to have an area of 523,644 sq. ft. All of Building 2 is proposed to be in Florence Township, along with the bulk of Building 1, but 3,928 sq. ft. of Building 1 would be in Mansfield Township along with some of the site improvements.

The Mansfield Township part of the property was in Mansfield Township's ODL Office, Distribution, Laboratory Zone District in which the proposed use and structures were permitted, and the Mansfield Township Joint Land Use Board approved the Mansfield Township elements of the proposed development in that board's Resolution 2022-01-02. Ja 018.

At the time of submission of its application to the Board, the subject property was in Florence Township's SM Special Manufacturing Zone District in which the proposed warehouse distribution use was permitted. Ja018. Both

Mansfield and Florence subsequently rezoned their respective parts of subject property to prohibit the proposed warehouse distribution use. Ja019. The Florence Township Planning Board adopted a new comprehensive Master Plan that recommended rezoning of the subject property on July 28, 2022, and the governing body adopted Ordinance 2022-13 to implement (*inter alia*) the Planning Board's rezoning recommendation pertaining to the subject property On October 5, 2022. Ja 026. Pursuant to the "time of application" rule set forth in N.J.S.A. 40:55D-10.5, Plaintiffs are entitled to the land use regulations that were in place at the time they submitted their application for development to the Board, notwithstanding subsequent changes.

Warehouses and distribution facilities with buildings up to 50 feet tall were permitted in Mansfield Township's ODL Zone District. Warehouses and distribution facilities with buildings up to 30 feet tall were permitted in Florence Township under the subject property's former SM Zoning. Ja019. Warehouses with heights in excess of 30 feet are permitted elsewhere in Florence Township, notably in the GM General Manufacturing Zone District. 5T 69:8- 5T 70:3.

Since the height of the proposed buildings exceeds the permitted maximum height of 30 ft. in Florence Township's SM Zone District by more

than 10 ft. or 10 percent, Plaintiffs were obliged to seek a height variance from the Board under N.J.S.A. 40:55D-70(d)6. Ja013.

In the course of the public hearings on their application, Plaintiffs offered the testimony of Michael Landsburg, Plaintiffs' Chief Development Officer; Jake Terkanian, an industrial real estate expert; Rodman Ritchie, P.E., Project Engineer; Norman Dotti, P.E., sound expert; Robert Hoffman, P.E., PTOE, traffic engineer; Brad Rife, who prepared computer generated renderings of the proposed development; and Paul Phillips, PP, AICP, professional planner. Mr. Ritchie, Mr. Terkanian, Mr. Dotti and Mr. Phillips were each accepted by the Board as experts in their respective fields. Neither Mr. Landsburg nor Mr. Rife were proffered or accepted as experts. Ja 015, Ja017.

Mr. Terkanian testified that 30 ft. tall warehouses are no longer marketable or financeable because taller buildings are needed to "…increase their capacity with less space utilization. And that includes less land." 5T 52:13-23. Mr. Terkanian also told the Board that taller buildings and the materials handling systems in them allow products to move faster. 5T 52:24-5T 53:8. Similarly, Mr. Landsburg testified that the purpose of taller buildings is to "…enable companies to store more product on a smaller footprint." 5T 11:20- 5T 11:25. Despite the testimony of Mr. Landsburg and Terkanian about

the increase in capacity and throughput of taller buildings, Plaintiffs' traffic expert, Mr. Hoffman, asserted that there would be no difference between the amount of truck traffic generated by the permitted 30 ft. tall buildings and the proposed 48 ft. tall buildings. His opinion was based upon Institute of Traffic Engineers ("ITE") traffic data that aggregates buildings 24 ft. through 50 ft. tall into a single data set. Mr. Hoffman asserted that the aggregated ITE data showed definitively that there would be no difference in truck traffic generated by the proposed taller buildings, even though the ITE data he relied upon did not distinguish traffic generation for buildings with differing heights. 4T30:6-4T 31:11.

Brad Rife presented a series of computer-generated renderings he prepared on behalf of Plaintiffs to show the visual impacts of the proposed warehouse development. Upon cross-examination, Mr. Rife made the astounding admission that he had never done a comparison of his renderings with an actual post-construction photo of a development rendered through his processes. 5T 96:17-23.

Plaintiffs' Planner, Paul Phillips testified with regard to height variance proofs under the standards set forth in Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41 (App. Div. 2004). He briefly touched upon the notion of "hardship" now central to the arguments in Plaintiffs' Brief (5T

73:5-9), but his testimony focused principally on his opinion that the proposed taller warehouses would not offend the purposes of the SM Zone District regulations. 5T 73:10- 5T 80:22. The basis for Mr. Phillips' testimony that the proposed taller than permitted buildings would not result in greater traffic, and therefore the taller buildings would not be more intense than intended by the planning board and governing body in the Master Plan and it implementing ordinances, was the testimony of Plaintiff's traffic expert, Mr. Hoffman. 5T 73:20- 5T 74:1.

Plaintiffs' concluding testimony was from their Chief Development Officer, Mr. Landsburg. He asserted in his testimony that the proposed warehouse development was actually less intense than permitted under the SM Zone District's building coverage because an additional 309,000 sq. ft. of warehouse could be constructed. 6T 9:24-10:12. Plaintiffs did not submit for review an alternative development plan that demonstrated the actual feasibility of such additional warehouse area being constructed in light of site constraints and the need for supporting facilities such as drainage basins, parking and loading areas, buffers etc. Nor did Mr. Landsburg provide a comparison of the relative volumes of the roughly 1.7 million square feet of 30 ft. tall warehouse he claimed to be feasible under the height and building coverage standards of the SM Zone District (approximately 51,000,000 cubic ft.) with the roughly

1.4 million sq. ft. of 48 ft. tall warehouse actually proposed (approximately 67,000,000 cubic ft.).

At the conclusion of the December 5, 2022 hearing, the Board denied the application, upon a vote of 6 in favor of a motion to deny, and 1 opposed. Ja036.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

Plaintiffs' discussion of the standard of review and citations to relevant cases properly presents the applicable arbitrary and capricious standard, the presumption of validity that attaches to board decisions, and the heavy burden of a party attacking a board decision to overcome that presumption of validity in light of the deference to be accorded to boards' decisions. Plaintiffs also properly discuss boards' obligation to base their decisions on substantial credible evidence in the record, and the courts' duty to determine whether challenged decisions are supported by the evidence and follow proper statutory guidelines. Plaintiffs do acknowledge that board decisions which are supported by substantial evidence in the record and reflect a correct application of the relevant principles of land use law are proper exercises of the discretion vested in boards that should not ordinarily be disturbed.

Plaintiffs failed, however, to discuss that greater deference is accorded to denial of a variance than to a grant because of the preference in our law for "land use planning by ordinance rather than by variance." Funeral Home Mgmt., Inc. v. Basralian, 319 N.J. Super. 200, 208 (App.Div.1999). Consequently, the deference to be accorded by the Court to the Board's variance denial decision in this case should be even greater than if this case were a challenge to a variance approval.

These principles, as mentioned and omitted by Plaintiffs, were brought together cogently by the Appellate Division, in Northeast Towers, Inc. v. Zoning Bd. of Adjustment of Borough of West Patterson, which summed up the standard of review for cases that involve judicial review of the denial of a variance by a local zoning board:

> Moreover, "[a]ctions of a board of adjustment are presumed to be valid and the party attacking such action has the burden of proving otherwise." New York SMSA Ltd. Partnership v. Board of Adj. of Bernards Tp., supra (324 N.J.Super. at 163-164). The Court determined in Kramer v. Board of Adj., Sea Girt, 45 N.J. 268, 296 (1965), that zoning boards because of their peculiar knowledge of local conditions must be allowed wide latitude in the exercise of delegated discretion. Courts cannot substitute an independent judgment for that of the boards in areas of factual disputes; neither will they exercise anew the original jurisdiction of such boards or trespass on their administrative work. So long as the power exists to do the act complained of and there is substantial evidence to support it, the judicial branch of the government cannot interfere. A local zoning determination will be set aside only when it is arbitrary, capricious or unreasonable. **Even when doubt is entertained as to the wisdom of the action, or as to some part of it, there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved. Where the board's**

> **decision is reasonably supported by the record, it will be sustained**. *Id.* at 285; New York SMSA Ltd. Partnership v. Board of Adj. of Bernards Tp., *supra* at 163-164). **Moreover, greater deference is accorded to denial of a variance than to a grant.** Funeral Home Mgmt., Inc. v. Basralian, 319 N.J.Super. 200, 208 (App.Div.1999). Where a zoning board has denied a variance, the proponent has the "heavy burden" of proving that the evidence before the board "was so overwhelmingly in favor of the applicant that the board's action can be said to be arbitrary, capricious or unreasonable." Medical Realty Assoc. v. Board of Adj. of Summit, 228 N.J.Super. 226, 233 (App.Div.1988). **This greater deference arises in part from the recognition that only exceptional cases warrant use variances because this state's legislative policy strongly favors "land use planning by ordinance rather than by variance."** See Funeral Home Mgmt. Inc. v. Basralian, *supra* (319 N.J.Super. at 207) (quoting Elco v. R.C. Maxwell Co., 292 N.J.Super. 118, 126, (App.Div.1996)).

Northeast Towers, Inc. v. Zoning Bd. of Adjustment of Borough of West Patterson, 327 N.J. Super. 476, 493-494 (App.Div.2000). Emphasis added.

Moreover,

> **A board has the choice of accepting or rejecting testimony of witnesses. Where reasonably made, such choice is conclusive on appeal.** Kramer v. Board of Adj., Sea Girt, *supra*, 45 N.J. at 298, 212 A.2d 153) (quoting Reinauer Realty Corp. v. Nucera, 59 N.J. Super. 189, 201, 157 A 2d. 524 (App. Div.), *certif. denied*, 32 N.J. 347, 160 A2d. 845 (1960));

Id. At 498. Emphasis added.

Thus, there are three types of determinations built into each presumptively valid variance decision by a Board: findings of fact (which includes findings concerning witness credibility and the probative value of evidence), which should be upheld by a reviewing court unless not reasonably

supported by the record; interpretations or applications of law, which are subject to *de novo* review by the courts, and discretionary decisions to grant or deny particular variances, which are entitled to substantial deference and should be upheld unless they are based upon unreasonable factual determinations, or an incorrect interpretation or application of the law.

II. BURDEN OF PROOF

Plaintiffs bore the burden of proving entitlement to a variance before the Board and the trial court, and they bear an even heavier burden before this Court of showing "… that the evidence before the board "was so overwhelmingly in favor of the applicant that the board's action can be said to be arbitrary, capricious or unreasonable."" Northeast Towers, supra at 494, quoting Medical Realty Assoc. v. Board of Adj. of Summit, 228 N.J. Super. 226, 233 (App.Div.1988).

It was the Plaintiffs' obligation to present evidence to the Board to prove their entitlement to the relief they sought. "The burden of proof of the right to the relief sought in the application rests at all times upon the applicant". Cox & Koenig, New Jersey Zoning and Land Use Administration (Gann 2023), pp. 261, citing Ten Stary Dom Ptp. v. Mauro, 216 NJ 16, 30 (2013). The burden of proof lies upon the applicant with regard to both the positive and the negative criteria. New Brunswick Tel. v. South Plainfield, 305 N.J. Super. 151, 165

(App. Div. 1997), re-affirmed at 314 N.J. Super. 102 (App. Div. 1998). If the applicant does not meet its burden of proof, the Board has no choice but to deny the application. Toll Bros., Inc. v. Burlington County Bd. of Chosen Freeholders, 194 N.J. 16, 30 (2013); Tomko v. Vissers, 21 N.J. 226, 238 (1956); Chirichello v. Zoning Bd. Of Adj. Monmouth Park, 78 N.J. 544 (1979).

Neither the Board, nor any other participant in the hearing other than the applicant bears any proof burden. Hearings before planning and zoning boards are not inherently adversarial proceedings. "Very often it happens that only the applicant submits any evidence to the board but it should be noted that the absence of evidence in support of denial of a requested variance does not itself mean that the board's denial of a variance is arbitrary. The burden rests with the applicant to demonstrate that the *affirmative* evidence in the record dictates the conclusion that a denial would be arbitrary." Cox, supra, at pp.262, citing Kenwood Assocs. v. Bd. of Adj. Englewood, 141 N.J. Super. 1 (App Div. 1976). "It was not the burden of the board to find affirmatively that the [master] plan would be substantially impaired…it was the burden of the applicant to prove the converse." Weiner v. Zoning Bd. of Adjust. of Glassboro, 144 N.J. Super. 509, 516 (App. Div. 1976). Consequently, Plaintiffs' claim that they are entitled to the height variance they sought in this

case rests entirely upon the probative value, credibility, and thoroughness of the affirmative testimony of Plaintiffs' witnesses on both the positive and negative criteria applicable to such variances.

The Board's essential finding in its Resolution is that the Plaintiffs failed to meet their burden of proof and the Board was therefore obliged to deny the application. Ja033. The Board did not rely upon evidence or testimony presented by objectors to make its decision. Instead, the Board weighed the affirmative evidence presented by Plaintiffs under the standards applicable to height variances under Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41 (App. Div. 2004), as detailed below under heading III., and found that evidence to be unpersuasive.

The reason that Plaintiffs failed as a matter of law to satisfy the special reasons positive criteria for height variances through an assertion of hardship are detailed below under heading III.

The reason that Plaintiffs' core argument or changed market conditions also fails to satisfy the special reasons for a height variance on grounds other than hardship is detailed under heading IV.

Key testimony of the Plaintiffs' Traffic Engineer in support of both the positive and negative height variance criteria was found by the Board to be inadequate for reasons fully explained in the Board's denial Resolution and

discussed below under heading V. Ja0029-034. Similarly, and also discussed below under heading V., the Board found that the computer-generated rendering exhibits prepared and presented on behalf of Plaintiffs by Mr. Rife were not probative because he admitted to the Board that he had never compared his renderings to actual post development conditions. Ja029. 5T 96:17-23. The Board contrasted Mr. Rife's computer-generated renderings, which the Board found to be unreliable, with the pre-development modeling done by Plaintiffs' Sound Expert, Mr. Dotti, which is regularly compared to post development sound studies to confirm actual compliance with sound regulations and confirm the reliability of the modeling. Ja029.

The Board's detailed analysis of the reasons stated in the Board's Resolution for rejection of the arguments and testimony of Plaintiffs' planner are detailed below undern heading VI.

Each of these findings by the Board was reasonable and founded in the record, and collectively they resulted in the Board's conclusion that Plaintiffs did not prove their case. "…it is well settled that the Board has the choice of rejecting or accepting the testimony of witnesses. Where reasonably made, such choice is conclusive on appeal." Kramer v. Bd. of Adjust., Sea Girt, 45 N.J. 268, 288 (1965). The Board's finding that the Plaintiffs failed to meet their burden of proof must again be upheld, as it was by the Trial Court.

III. THE BOARD AND TRIAL COURT PROPERLY WEIGHED PLAINTIFFS' HEIGHT VARIANCE UNDER THE GRASSO STANDARDS

Plaintiffs correctly assert in their Brief that judicial interpretations of the statutory "special reasons" applicable to all use variances have evolved, and that Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41 (App. Div. 2004), now sets forth the proper standards for review of the positive and negative variance criteria for height variances under NJSA40:55D-70(d)(6). Pb12. However, Plaintiffs are incorrect when they assert that the Board erred because it applied the standards for uses not permitted in the zone under NJSA 40:55D-70(d)(1) as set forth in Medici v. BPR Co., 107 N.J. 1 (1987) to the height variance Plaintiffs sought under NJSA 40:55D-70(d)(6). Pb9. The Board did not apply the more stringent standards of Medici. Had the Board done so, it would have required proofs of the peculiar suitability of the site for the proposed use as the "special reasons", and, in addition to the usual positive and negative criteria, the Board would have required "an enhanced quality of proof" to explain the omission of the proposed use from the list of permitted uses in the applicable ordinance.

Instead, the Board analyzed the proposed height variance under the criteria set forth in Grasso, which establishes two paths for establishing special reasons: hardship, or, alternatively, an inquiry into the effect of the proposed

deviation on the purposes of the height restriction. With regard to establishing hardship special reasons, the Grasso Court said the following:

> In keeping with the Legislative intent, **applicants for (d)(6) variances based on hardship must show that the property for which the variance is sought cannot reasonably accommodate a structure that conforms to, or only slightly exceeds, the height permitted by the ordinance.** Stated differently, the applicant for a (d)(6) variance on grounds of hardship must show that the height restriction in effect prohibits utilization of the property for a conforming structure.
>
> It is relatively clear that plaintiffs failed to demonstrate hardship as a special reason. The record shows that the property could accommodate a single-story ranch or bi-level home, or perhaps even a Cape Cod style two-story dwelling. Alternatively, if permitted by the Borough's ordinances relating to soil removal, plaintiffs could remove a portion of the knoll in order to construct a two-story colonial style house that was less than thirty feet high.
>
> Plaintiffs' argument that there is a limited market for ranch-style or Cape Cod homes is beside the point. **A developer's inability to make the most profitable use of the property is not sufficient to show hardship in a (d) variance case.** Cerdel Constr. Co., Inc. v. Township Comm. of Township of E. Hanover, 86 N.J. 303, 307, 430 A.2d 925, 927-28(1981).

Grasso v. Boro of Spring Lake Heights, 375 N.J. Super. 41, 51-52 (App. Div. 2004). (Emphasis added).

Plaintiffs' claim of hardship (which was only briefly touched upon in the hearings before the Board, 5T 73:5-9) is inherently flawed and fails because, as explained in Grasso, their "…inability to make the most profitable use of their site is not sufficient to show hardship." Id. The focus of the testimony of Mr. Landsburg and Mr. Terkanian, discussed more fully below, was on how

warehouses of the permitted 30 ft. height are no longer marketable. 5T 11:20-5T 12:10; 5T 52:24- 5T 53:8.b Their testimony was about Plaintiffs' business needs, not about limitations imposed on development by the property itself, as required for a hardship under Grasso. Just as in Grasso, where the court found that: "Plaintiffs' argument that there is a limited market for ranch-style or Cape Cod homes is beside the point [,]" Plaintiffs' argument that there is a limited market for height-conforming warehouses is beside the point when assessing hardship. Grasso, supra. Plaintiffs have not shown through their proofs: "that the property for which the variance is sought cannot reasonably accommodate a structure that conforms to, or only slightly exceeds, the height permitted by the ordinance." Grasso, *supra* at 51. Therefore, hardship cannot be the basis for a finding of special reasons to support the requested height variance.

Plaintiffs presented more fully, and the Board reviewed in its Resolution, evidence and testimony on the second path outlined by Grasso to show special reasons for height variances. This second path involves exploration of the purposes for imposition of the height limitation. In taking the step to make the variance criteria for height variances consistent with the standards applicable to the other lesser variances under N.J.S.A.40:55D-70(d), the Grasso court explained about these criteria as applied to height variances:

> **We believe that the special reasons necessary to establish a height variance must be tailored to the purpose for imposing height restrictions in the zoning ordinance.** See Coventry Square, supra, 138 N.J. at 298, 650 A.2d at 346 (standards for conditional use variances must be "appropriate for the purposes and characteristics of conditional uses"); Randolph Town Ctr., supra, 324 N.J.Super. at 416-17, 735 A.2d at 1168 (the criteria for evaluating a FAR variance application must be relevant to the purposes of FAR restrictions). See also N. Bergen Action Group v. N. Bergen Township Planning Bd., 122 N.J. 567, 578, 585 A.2d 939, 944 (1991) ("[I]t is fundamental that resolutions granting variances undertake to reconcile the deviation authorized by the Board with the municipality's objectives in establishing the restriction.").
> Municipal restrictions on building height date back to the late 1800s, and were imposed in response to advancing technology and construction techniques that enabled the construction of tall buildings. Norman Williams and John M. Taylor, American Land Planning Law, § 69:1 (rev. ed. 2003). **Very early on, courts recognized the relationship between height restrictions and the public welfare because the height of a building could impact traffic congestion, fire hazards, public health, adequate light and air, and population density.** E.g., Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30, 31 (1925), overruled on other grounds, Vill. of Hudson v. Albrecht, Inc., 9 Ohio St.3d 69, 458 N.E.2d 852, 855-56, appeal dismissed, 467 U.S. 1237, 104 S.Ct. 3503, 82 L.Ed.2d 814 (1984). **Height restrictions like restrictions on density, bulk or building size, can also be a technique for limiting the intensity of the property's use.** N. Bergen Action Group, supra, 122 N.J. at 567, 585 A.2d at 939; see N.J.S.A. 40:55D-65(b) (zoning ordinance may regulate bulk, height, building size, lot coverage, lot size, floor area ratios and "other ratios and regulatory techniques governing the intensity of land use and the provision of adequate light and air").
>
> Grasso, *supra* at 52-53 (Emphasis added).

In accord with Grasso, the Board's Resolution explores Plaintiffs' proofs concerning the intent of the height limitation in the SM Zone:

> This application presents directly the substantial height variance pursuant to NJSA 40:55D-70(d)6 from the standards for the SM Zone

> District set forth in Ordinance §91-252, that was presented only obliquely by NFI's companion application concerning development of the Wainwright parcel. **The Board's consideration of the purposes of the building height restriction in the SM Zone in this resolution** is therefore quite similar to the Board's consideration of the issue in the resolution memorializing the Board's decision in the earlier companion application concerning the Wainwright parcel.
>
> Ja025, paragraph 18. (Emphasis added).

The Board's Resolution weighs evidence about the intensity of the taller buildings proposed by Plaintiffs, the potential visual impact of the increased height, and the potential effect of the buildings' height on the intensity of the use, especially the amount of traffic generated. These concerns are entirely consistent with the recognition stated in the above-quoted language from Grasso that "Height restrictions like restrictions on density, bulk or building size, can also be a technique for limiting the intensity of the property's use[,]", and "Very early on, courts recognized the relationship between height restrictions and the public welfare because the height of a building could impact traffic congestion, fire hazards, public health, adequate light and air, and population density." Grasso, *supra* at 53-53. With regard to the testimony of Plaintiffs' Planner, Paul Philips, the Board found: "Mr. Philips testimony concerning the negative criteria correctly seeks to focus the Board on the effects of the proposed height variance on light, air, noise and the intensity of development." Ja032, paragraph 30. In the Resolution's

Conclusions of Law, the Board says: "The Florence Township Planning Board and governing body have pointedly chosen uses and standards with an anticipated level of intensity and have explained why they have done so. The application before the Board contemplates development that is substantially more intense than anticipated by the governing body, and, therefore, allowed in the SM Zone District." Ja034 These are the considerations which Grasso tells us to weigh when considering a height variance under NJSA40:55D-70(d)(6).

Plaintiffs' argument that the Board applied the more stringent criteria of Medici applicable to use variances under NJSA40:55D-70(d)(1), as though this were a variance for a use not permitted in the zone, is simply incorrect. The Board's Resolution never demands proofs concerning the particular suitability of the site for the proposed use, nor does the Resolution ever ask the Plaintiffs to address an enhanced quality of proof; both are at the core of the Medici proofs. The Resolution addresses the criteria that Grasso requires, not those of Medici.

The Board applied the correct legal standard.

IV. THE BOARD PROPERLY DECLINED TO ADOPT SWEEPING POLICY CHANGES BECAUSE OF CHANGES IN THE REAL ESTATE MARKET AND WAREHOUSING INDUSTRY

Plaintiffs' Brief begins with the assertion in its Preliminary Statement that: "Times change. Industries change. Business models change. Land use **regulations** governing these industries and businesses need to change….". Pb01. Emphasis added. Plaintiffs have it exactly right: **regulations** need to change to address changing conditions. The Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., is a comprehensive statutory scheme that precisely and thoroughly allocates the powers necessary to carry out its purposes. The Board, as a zoning board of adjustment has only those powers granted to it under N.J.S.A. 40:55D-70 and N.J.S.A. 40:55D-76, which do not include the authority to make policy or adopt regulations. The Board's powers in this case are limited to assessing Plaintiffs' proofs against the criteria for height variances, not reworking existing regulations to adapt them to evolving conditions. N.J.S.A 40:55D-70, N.J.S.A. 40:55D-76. That authority lies solely with the Township governing body, subject to the guidance of the Township planning board under its own authorities concerning the master plan and ordinance master plan consistency review. N.J.S.A. 40:55D-62; N.J.S.A. 40:55D-25, N.J.S.A. 40:55D-26; N.J.S.A. 40:55D-20.

The problem for Plaintiffs argument that changes to markets and business conditions can be the basis for a finding of special reasons for a height variance on the basis of a hardship is that, in accord with the statutory limitations on zoning board powers, the relevant cases say otherwise. In Grasso, as discussed above, we learned that: "applicants for (d)(6) variances based on hardship must show that the property for which the variance is sought cannot reasonably accommodate a structure that conforms to, or only slightly exceeds, the height permitted by the ordinance." Grasso, supra 52. The Grasso court added: "A developer's inability to make the most profitable use of the property is not sufficient to show hardship in a (d) variance case." **Id.** Plaintiffs have not argued that some physical constraint of the subject property prevents it from accommodating structures with conforming heights infeasible, rather they argue that changes to business needs and market conditions prevent them from profitably developing buildings with conforming heights. This rationale was expressly rejected in Grasso.

The decision of the court in Price v. Strategic Capital Partners, 404 N.J. Super. 295 (App. Div. 2008), further informs us that market conditions which are common problems affecting all properties in a zone are also not a basis for a finding of special reasons under the second theory outlined in Grasso that focuses upon the purposes of the regulations. Price v. Strategic Capital

Partners, 404 N.J. Super. 295, 308 (App. Div. 2008). The Price decision is about a density variance not a height variance, but as discussed in Plaintiffs' Brief, the standards for the various lesser (d) variances have all converged around similar proofs. Pb 9-12.

The Price court adopted the analysis of the plaintiff in that case who sought to set aside a density variance granted by the Union City zoning board:

> The overall premise of Price's appeal is that the Board's action in this case did not just address a "particular case," but rather a common problem in the SSOD zone. Consequently, he argues, the Board was essentially engaged in rezoning by variance, which the Board is not authorized to do. See Victor Recchia Residential Constr., Inc. v. Zoning Bd., of Adjustment of Cedar Grove, 338 N.J.Super. 242, 253-54, 768 A.2d 803 (App.Div. 2001) ("In short, the Zoning Board may not rezone by variance.").
> Price contends that the density problem underlying this case, i.e., that it is not economical to build a low-density high rise in the SSOD zone, is not unique to the tract owned by Strategic Capital, but is a common problem facing property owners and developers of property in the SSOD zone. As such, he contends, it cannot be remedied by the issuance of variances. See Feiler v. Ft. Lee Bd. of Adjustment, 240 N.J.Super. 250, 256, 573 A.2d 175 (App.Div. 1990) ("`[I]f the difficulty is common to other lands in the neighborhood so that the application of the ordinance is general rather than particular,' a variance may not be granted." (quoting Lumund v. Bd. of Adjustment of Rutherford, 4 N.J. 577, 583, 73 A.2d 545 (1950) (alteration in original))), certif. denied, 127 N.J. 325, 604 A.2d 600 (1991).
>
> Id. at 303.

The standards to be applied by zoning boards of adjustment when deciding variances under N.J.S.A. 40:55D-70(d) are defined by the text of that

statute. "The board of adjustment shall have the power to: …(d) **In particular cases** and for special reasons, grant a variance to allow departure from regulations…". N.J.S.A. 40:55D-70(d). Emphasis added. The statutory requirement that zoning boards confine their decision-making only to "particular cases" informed the Price court's decision and its instruction to the Union City board on remand: "The Board must first consider whether it is really dealing with (1) "a particular case" that can be resolved through the granting of a variance; or (2) a more general problem with the density requirement in the SSOD zone that must be addressed through a change in the ordinance itself." Id.

The changes to the real estate market and warehousing industry that Plaintiffs' offer as justification for their claim of special reasons for a height variance affect equally all properties in Florence Township's SM Zone District, not just Plaintiffs'. The market does not affect only this "particular case"; it is a "more general problem… that must be addressed through a change in the ordinance itself." Id. Indeed, the testimony of Plaintiffs' Planner highlighted to the Board how the Florence Township governing body did address these market changes by adopting ordinances that allow taller buildings in other zone districts. 5T 69:3- 5T 70:13.

The conclusion of the Board's denial Resolution in this case reflects proper concern for the considerations about exceeding zoning board powers expressed in Price:

> The Florence Township Planning Board and governing body have pointedly chosen uses and standards with an anticipated level of intensity and have explained why they have done so. The application before the Board contemplates development that is substantially more intense than anticipated by the governing body, and, therefore, allowed in the SM Zone District. There is no credible, probative evidence before the Board that would allow it to deviate from the zoning standards set down by the governing body or which would justify this Board rethinking the determinations of the Planning Board and governing body that link the height of permitted structures with their anticipated intensity. In the absence of such evidence, it would be improper for the Board to arrogate to itself an authority to second-guess the policy determinations of the governing body. Ja 034.

As matter of binding statutory and decisional law, the changes in the warehousing business that Plaintiffs' testimony presented to the Board are not a proper basis for a finding of the special reasons necessary to sustain a height variance in this case, and the Board properly declined to make the sweeping and *ultra vires* policy decision necessary for it to accept this rationale.

V. THE BOARD'S FINDINGS OF FACT ARE SUPPORTED BY THE EVIDENCE IN THE RECORD

Plaintiffs' central argument is that the warehouse distribution use allowed in the SM Zone District has been made infeasible at the permitted height of 30ft. by market developments, and that the proposed 50 ft. tall

buildings, which are 67 percent taller than allowed by ordinance, must be permitted by variance because otherwise the purpose of the SM Zone would be frustrated. This argument begs the question: why does the market demand taller buildings? The answer to this question is in the testimony of Plaintiffs' Chief Development Officer, Michael Landsburg, and the commercial leasing industry testimony from Plaintiffs' expert, Jake Terkanian of Caldwell Banker Richard Ellis.

Mr. Landsburg testified in response to a question from counsel about the purposes of taller buildings:

> A: So some of the reasons that they've –
> these buildings have been built to these higher
> building heights is mainly for advancements in the
> racking and material handling, the technology, the
> processes. **All of those things have enabled companies to store more products in a smaller footprint.**
>
> And so, you know, the design of a
> 30-foot-high building is just antiquated and doesn't
> -- hasn't kept up with what current use cases and
> current operations are in these buildings.
> A side benefit is you need less land to
> do it. So, you know, if you think about all that
> product, instead of going out, you're going up, and so
> it consumes less land, less impervious coverage. And
> that's been part of how these buildings have advanced
> over time.

5T 11:20- 5T 12:10 (Emphasis added).

Mr. Terkanian echoed Mr. Landsburg's statement that taller buildings enable companies "…to store more product on a smaller footprint.[,]" when Mr. Terkanian testified in response to a question from counsel:

> Q: Why are they going higher? Why do you
> need -- one of the questions was, why do you need to
> go higher, from a previous hearing?
> A: Yeah. I guess a couple of different
> factors. One is land's precious and it's become more
> difficult to source, more expensive to build. The
> entitlements have become more difficult to achieve.
> **And users and developers are looking at ways to
> densify their storage, increase capacity with less
> space utilization.** And that includes less land. And
> it's driving the buildings higher.

5T 52:13-23 (Emphasis added)

Mr. Terkanian later added in response to counsel's query about the implementation of automated material handling systems:

> Q And is there -- what about material
> handling systems, the picking systems, racking
> systems? How do they factor into this?
> A Sure. Yeah. The whole industry has been
> evolving over time, and the evolution is speed and
> height predominantly. **Speeds to move the product
> faster, height to increase density of capacity.**
> So the entire industry has been stretched
> vertically, and we continue to see that trend over
> time.

5T 52:24- 5T 53:8 (Emphasis added)

From the foregoing testimony, there can be no doubt that taller buildings will allow the storage of more goods and allow those goods to be handled

faster. This testimony amply supports the Board's finding: ".... that the proposed buildings that would be 67% taller than allowed would be a more intense use than the Planning Board and governing body intended at the subject property[.]" Ja034.

Contrary to the assertion in Plaintiffs' Brief, the testimony of Plaintiffs' traffic expert, Robert Hoffman, does not provide an evidential foundation for an expert opinion that building height is immaterial to traffic generation. The Board does not dispute that Mr. Hoffman is a traffic expert. Nor does the Board dispute that Institute of Traffic Engineers data represents an industry standard with regard to data collection and projections. But even an expert must base his or her testimony on data which supports his or her expert opinion, and the data used by Mr. Hoffman does not support testimony about differences (of the lack thereof) between traffic generated by 30 ft. tall warehouses and 50 ft. tall warehouses. Mr. Hoffman was cross examined by the Board Solicitor at the Board's September hearing:

> MR. FRANK: So is it possible to have a
> 30-foot tall building that classifies itself as a high
> cube under 154?
> MR. HOFFMAN: Yes.
> MR. FRANK: It is?
> MR. HOFFMAN: Yes. Yes. Because the
> definition by ITE, again, it's a building height of 24
> feet or greater.
> MR. FRANK: Okay. And that could be up

to 75 feet or 100 feet? Doesn't matter. Once you're
24 feet, you're in a different universe.
MR. HOFFMAN: Right.
MR. FRANK: Interesting. Okay.
MR. HOFFMAN: And, you know, it will --
because, again, you know, the theory is that that
sample set will encompass various types of buildings
within that -- you know, within those parameters.
So you can have a building that's maybe
-- the count was down. The building was 30 feet and
there was one done at 50 feet. Again, it's a
compilation of, you know, samples, actual samples,
where they conduct these traffic counts.
MR. FRANK: **So we're not saying that
there's no distinction to be made between buildings in
those heights. We're just saying that the way the
data is calculated, it doesn't distinguish?**
MR. HOFFMAN: **From a traffic generation
perspective, correct.**
MR. FRANK: **Right. The way the data is
sliced, it doesn't distinguish?**
MR. HOFFMAN: **Correct.**

4T 30:6 through 4T 31:11 (Emphasis added)

Mr. Hoffman is unable to tell us what the effect will be of warehouse buildings that are 50 feet tall instead of 30 feet tall because the aggregated data developed by the Institute of Traffic Engineers includes buildings with ceiling heights of 24 feet and greater, and building height is not an independent variable in the ITE equation generated from the ITE data. The ITE data relied upon does not separate or distinguish between buildings that are 30 feet tall or 50 feet tall, so, based upon it, Mr. Hoffman cannot do so either. Mr. Hoffman did not provide any other data to support a conclusion that there will be no

more traffic from a taller building than a shorter one. The Board found concerning Mr. Hoffman's testimony that:

> This data set does not compare traffic generation from buildings of different heights within the 24 ft. to 50 ft. range, it aggregates them. Therefore, this data cannot be used to support Mr. Hoffman's assertion that there will be no difference in traffic between a building with the permitted height of 30 ft. and one of the requested 50 ft. height. In addition to Mr. Hoffman's assertion being a "net opinion" unsupported by the data he cites, his assertion is inconsistent with the testimony of other witnesses who testified on behalf of the applicant, namely Mr. Landsburg and Mr. Terkanian.

Ja030, paragraph 25.

The Board's finding concerning Mr. Hoffman's testimony is supported by the record, which includes not only his testimony, but also that of Mr. Landsburg and Mr. Terkanian who testified that the whole purpose of taller buildings is to store more material and to move it faster. This is the essence of greater intensity of use.

Similarly, the Board's findings with regard to the three-dimensional visual simulations and supporting testimony provided by Brad Rife are supported by the record. The Board found:

> The Board does not consider these exhibits to be probative because, in response to questioning from Board, **Mr. Rife stated that he had never done post-development comparisons of the renderings prepared through the software tools he uses with actual photos of the developed sites.** Moreover, no simulation was provided of the view from vicinity of the dwellings to the southwest of the proposed development and nearest the proposed

> warehouse structures, so one of the most significant potential visual impacts of the greater heights of the proposed buildings was not addressed by these exhibits. Finally, Mr. Rife was unable to specify with any certainty the height of the crops growing in the field between the point of viewing and the proposed development in the several exhibits. The height of the crops shown in the intervening farm fields in the several simulation exhibits is a critical feature affecting the perception of height of the proposed buildings, and one that is necessary to assess the views shown. The Board acknowledges Mr. Rife's sincerity and his confidence in the tools he uses, but in light of the foregoing cannot give any weight to his exhibits.

Ja029, paragraph 23 (Emphasis added).

The Board's findings are supported by the record. Upon cross-examination, Mr. Rife made the astounding admission that he had never done a post-construction comparison of his renderings with an actual photo of the development:

> Q And do you have any examples of instances where you prepared a rendering like this and the developments subsequently were built, and you, thereafter, procure a photo of that site as a comparison to your rendering?
> A I don't. I wish I did. But, unfortunately, I did not.

5T 96:17-23

Taken alone, Mr. Rife's admission on cross-examination that he had never ground-truthed his renderings by comparing them to post-construction photos is a sufficient basis in the record to justify the Board's decision that it could not give weight to his exhibits. The Board's rejection of the probative

value of Mr. Rife's renderings is also supported by his direct testimony, which included numerous other caveats about the certainty that his renderings would in fact be reflected in the actual construction. He repeatedly told the Board that his renderings showed what the project "…potentially could look like…" and never stated that his renderings were what the project would actually look like. 5T 16:12, 5T 23:7, 5T 24:6, 5T26:11. He told the Board: "We can't make any guarantee", 5T25:18; "So the best I would say is that it would similar", 5T 23:25; "what hopefully it should look like in the end". 5T 26:11. Emphasis added. Mr. Rife also told the Board that the purpose of his rendering is "visual communication. 5T 15:16.

Plaintiffs' Brief makes much of the supposed "industry standard" character of the software tools used by Mr. Rife, but tools that may be helpful for some aspects of communication in industry are not inherently reliable as evidence. Pb 47. It was entirely reasonable of the Board to seek the basic indicia of reliability to be derived from post-development comparison of the renderings with reality, and for the Board to find not probative renderings without such support and subject to so many caveats about their reliability from their author.

The Board also contrasted Mr. Rife's computer-generated renderings, which the Board found not to be probative, with the pre-development onsite

sound studies and computer modeling done by Plaintiffs' sound expert, Mr. Dotti, which is regularly compared to post development sound studies to confirm actual compliance with sound regulations and to confirm the reliability of the modeling. Ja029.

In sum, the Board's factual findings concerning the testimony and evidence presented by each of the key expert and fact witnesses whose testimony was relevant to gauging the intensity and visual impact of the proposed 50 ft. tall warehouses are amply supported by the record. The Board's findings with regard to the credibility of these witnesses, the weight to be given to their testimony and evidence, and the conclusions to be drawn from their testimony and evidence (including most significantly that the proposed taller warehouses would be more intense uses than warehouses of conforming heights) are reasonable. "A board has the choice of accepting or rejecting testimony of witnesses. Where reasonably made, such choice is conclusive on appeal." Kramer v. Board of Adj., Sea Girt, 45 N.J. 268, 28, (1965) (quoting Reinauer Realty Corp. v. Nucera, 59 N.J. Super. 189, 201 (App. Div.), *certif. denied*, 32 N.J. 347, 160 A2d. 845 (1960)). The Board's reasonable findings of fact should not be set aside by the Court.

VI. THE BOARD PROPERLY REJECTED THE TESTIMONY AND ARGUMENTS OF PLAINTIFFS' PLANNING EXPERT

The preceding discussion of the applicable law and the evidence in the record shows that the Board applied the correct legal tests to reasonable findings of fact that are based in the record. The Board's rejection of the arguments and testimony of the Plaintiffs' expert Planner, Paul Philips, was also reasonable, and should be sustained by this Court.

Mr. Philips testimony and argument in support of his clients' height variance request can be reduced to five key points: i. the Township governing body has recognized in previously adopted re-zonings and redevelopment plans that warehouses that are only 30 ft. tall are no longer viable; ii. the Board itself recognized that warehouses that only 30 ft. tall are not viable in a 2019 decision; iii. traffic was immaterial to an assessment of the intensity of a use for the drafters of the 1999 Master Plan and its implementing ordinances; iv. approval of the requested height variance would advance purpose (g) of the Municipal Land Use Law which calls for sufficient space in appropriate location for a variety of uses; and v. that there will be not be any substantial impairment of the zone plan or substantial detriment to the public good as a result of the effect of the proposed development on light, air, noise or the intensity of development.

The Board did not accept Mr. Philip's first argument with regard to the governing body's other re-zonings and adopted redevelopment plans that allow for buildings of heights similar to the 50 ft. proposed by Plaintiffs. Nor did the Board accept Mr. Philip's related assertion in his fourth argument that allowing a variance for such a height at the subject property would advance purpose (g.) of the MLUL. The Board found: "So, it is clear that the governing body has provided opportunities for the development of buildings like those which are the subject of this application, just not in the Zone District and location for which this applicant now seeks approval." Ja032, paragraph 29. Mr. Philip's first and fourth arguments fall flat because there are other places in Florence Township were taller buildings like those proposed by his clients may be built, so a variety of uses are already provided sufficient space in accord with purpose (g) of the MLUL, and because the governing body has shown through those re-zonings and redevelopment plans precisely where the governing body thinks those taller buildings should be, which is not in the SM Zone.

Mr. Philip's second argument: that the Board's own 2019 decision in the Foxdale application approving a height variance for a warehouse in the SM Zone of similar height to the warehouses proposed by Plaintiffs should govern the instant application, ignores the very significant factual differences between

the Foxdale application and the Plaintiffs' proposed development. These are detailed in the Board's Resolution:

> The Railroad Avenue site was a former sand and gravel mine excavated in the course of construction of the New Jersey Turnpike, and as a result, its prevailing grade was in excess of ten feet below the surrounding lands. The application now before the Board concerns development that will be at or above the grade prevailing on adjoining properties in an area noted by the Planning Board in the 1999 Master Plan to have relatively flat topography that would make any development highly visible. The relative visual impact of a height variance on a site that starts out ten feet lower than its surroundings is necessarily less than the impact of a similar variance on a site level with its surroundings. The 2019 approval resolution of the Board also found that part of the site was bordered by existing trees that were taller than the proposed building. The Railroad Avenue site enjoyed an existing and then-still valid approval dating back to the early 2000's that allowed construction of an industrial building that was taller, and which could house a more intensive processing use, than the warehouse proposed in 2019. The parcel which is the subject of the current application does not have any prior approvals and is mostly undisturbed farmland.

Ja 030-031, paragraph 27.

In addition to ignoring the dramatically different factual situations of the Foxdale property from the Plaintiffs' site, Mr. Phillips' argument that the Board's Foxdale decision is precedential is also incorrect as a matter of law, since no zoning board decision is precedential. As a matter of statutory law, each variance pursuant to NJSA 40:55D-70(d) must relate to a "particular case". NJSA 40:55D-70(d). Thus, the Legislature has told us that all variances are to stand on their own circumstances. Our Supreme Court has

also long held that variance decisions are not precedential: "Because of the nature of the subject, no precise formula is feasible, and each case must therefore turn on its own circumstances." Kohl v. Mayor and Council of Fairlawn, 50 N.J. 268, 276 (1967), quoting Andrews v. Ocean Township Board of Adjustment, 30 N.J. 245, 251 (1959). The precedential value of the Board's Foxdale decision is further diminished by the more recent decision of our Supreme Court under the Municipal Land Use Law in Medici, which further explains the reasons that variance decisions are not precedential under the MLUL more generally than just the "particular case" language of N.J.S.A. 40:55D-70(d). The effect of this decision on Mr. Phillips' argument is discussed in the Board's Resolution:

> Moreover, in one of the most significant New Jersey cases concerning variances pursuant to NJSA 40:55D-70(d), *Medici v. BPR Co.* 107 NJ. 1 (1987), the New Jersey Supreme Court held that successive applications for the same type of variances should become more difficult, not easier. This is because each year the Zoning Board is obliged under NJSA 40:55D-70.1 to forward a report to the planning board and governing body summarizing variances granted by the Board and recommending amendments to the zoning ordinance. Under *Medici*, the guidance this Zoning Board is obliged to take from the fact that the Florence Township governing body has not amended the SM Zone height standard to conform to evolving market standards in the years following the Board's 2019 height variance grant is that the governing body does not desire to change the SM Zone height standard. *Id*. At 20. Therefore, contrary to the assertion in Mr. Philip's testimony that the similarity of the current variance request with the 2019 variance that was granted by the Board calls for approval of the current application, the opposite is true.

Ja031-032, paragraph 28.

The Supreme Court's holding in Medici makes clear that its understanding of the statutory scheme of the MLUL and the interplay of the Zoning Board's Annual Report with policy-making by the governing body is intended to be generally applicable to all types of variances, including the instant variance under NJSA40:55D-70(d)(6), not just the use variance pursuant to NJSA 40:55D-70(d)(1) which was at issue in Medici:

> The legislative enactments requiring periodic re-evaluation of municipal master plans and zoning ordinances, N.J.S.A. 40:55D-89, -89.1, and annual reports and recommendations from the boards of adjustment, N.J.S.A. 40:55D-70.1, reflect a legislative policy intended to insure that a municipality's master plan and zoning ordinance reflect contemporary needs and conditions, and that the governing body is kept informed of provisions of the zoning ordinance that generate variance requests. Thus, the mandatory re-examination by the planning board of the master plan and zoning ordinance, at least every six years, is intended to inform the governing body of the need for revisions in the plan and ordinance based on significant changes in the community since the last such re-examination. **Similarly, the annual reports by boards of adjustment summarizing variance requests throughout the year and recommending amendments to the zoning ordinance are designed to avoid successive appeals for the same types of variance by encouraging the governing body to amend the ordinance so that such appeals will be unnecessary. When an informed governing body does not change the ordinance, a board of adjustment may reasonably infer that its inaction was deliberate.**

Medici, *supra* at 20-21 (Emphasis added).

The Board quite properly was not persuaded by Mr. Philips second argument that it should give precedential value to the Board's Foxdale decision in Plaintiffs' height variance application because of the significant factual differences between the Foxdale application and the Plaintiffs' project. Moreover, in light of the above-quoted language from Medici, the Board correctly perceived the inaction of the governing body with regard to changing the SM Zone District height limitation following the Board's Foxdale approval to be a policy choice by the governing body, and a deliberate statement of disfavor for the aspect of the Foxdale decision relied upon by Mr. Phillips.

Mr. Philip's third and fifth arguments are closely linked because they are both concerned with negative externalities that are at the heart of the second prong of the Grasso special reasons proofs, as well as the negative criteria. In his third argument, Mr. Philips asserted that there would be little detriment to the public good or impairment of the zone plan as a result of the proposed development, which he asserted would have only minimal impacts on light, air, noise and the intensity of the development. But as noted by the Board in its Resolution, the opinion of Mr. Philips with regard to the intensity of the proposed development is founded on traffic data that does not compare or distinguish traffic generation from taller and shorter buildings, and that the

Board did not find probative. Ja032, paragraph 30. In his testimony, Mr. Philips stated his reliance upon the ITE traffic data and testimony of Plaintiffs' traffic expert that was debunked earlier in this Brief:

> I think when I talked about Grosso [sic]I mentioned the -- that the standard would be to go back and look at the intent of the height restriction, and it would principally relate to sort of light, air, and open space.
> And, secondarily, intensity of development. I want to deal with the intensity issue first. A**nd I want to just piggyback on the testimony of the Applicant's traffic engineer who testified that, from a traffic impact and a trip generation standpoint, there was really no distinction between a 30-foot or, say, a 50-foot warehouse.**

5T 96:17-23 Emphasis added.

Since, it was founded on the shaky underpinnings of traffic testimony that was not supported by the underlying data (and which is also inconsistent with the testimony of Plaintiffs' other witnesses about the greater amount of product to be stored and moved through taller buildings), the Board quite properly did not accept this argument of Mr. Philips.

Mr. Landsburg's concluding testimony on the final night of hearings, in which he asserted that the proposed warehouse development was actually less intense than permitted under the SM Zone District's building coverage standards because an additional 309,000 sq. ft. of warehouse could be

constructed, does not bolster Mr. Phillips' conclusion that the proposed development would not be more intense than envisioned for the SM Zone. 6T 9:24-10:12. Plaintiffs did not submit for review an alternative development plan that demonstrated the actual feasibility of such additional warehouse area being constructed in light of site constraints and the need for supporting facilities such as drainage basins, parking and loading areas, buffers etc. Nor did Mr. Landsburg provide a comparison of the relative volumes of the roughly 1.7 million square feet of 30 ft. tall warehouse he claimed to be feasible under the height and building coverage standards of the SM Zone District (approximately 51,000,000 cubic ft.) with the roughly 1.4 million sq. ft. of 48 ft. tall warehouse actually proposed (approximately 67,000,000 cubic ft.).

Mr. Philips fifth argument was that the 1999 Master Plan's concerns about the intensity of the uses allowed in the SM Zone did not include concerns about traffic. To arrive at this conclusion Mr. Philips misapplies the specific concerns voiced in the 1999 Master Plan about some of the offsite impacts of noise, dust, odors and visual for uses in GM Zone to claim that these are the exclusive concerns about uses in the SM Zone as well. In fact, the language of the Master Plan does not state that these are the only concerns

for either Zone, merely that they are of special concern for uses in the GM Zone.

> The Future Land Use Plan designates a number of areas for SM Special Manufacturing and GM General Manufacturing. In most cases they are designated on the Future Land Use Plan only in areas where there is an established and use pattern of such uses. This is because both of these categories pose special concerns for neighboring land uses, especially residential areas. **The category of general manufacturing poses special concerns because it can have significant offsite impacts: noise, dust, odors and visual.** Two of these areas merit particular consideration in this plan.

Ja 151. Emphasis added.

In its Resolution, the Board quotes in full the remaining discussion at page VIII-5 of the 1999 Master Plan, but the most relevant excerpt from that quoted language is the following:

> It is a goal of this plan to minimize impacts on these residences by designating the future land use for the adjacent area (north of I-295) as SM Special Manufacturing. SM is the most appropriate future land use for the area north of I-295 **because it is less likely to result in offsite impacts than permitted by a GM designation. In addition, it is intermediate in the permitted intensity of development** between the Recovery Facility in the GM area and the existing homes to the east, north and west.

Ja027; Ja151 fourth full paragraph. (Emphasis added)

From the foregoing, it is evident that the offsite impacts of “noise, dust, odors and visual” perceived as being attributes of GM uses are not the same thing as the “permitted intensity of development.” Mr. Philip’s erroneous

conflation of these concerns and resulting dismissal of traffic as an intensity concern in the SM Zone for the drafters of the 1999 Master Plan and implementing ordinances is therefore not supported by the language of the Master Plan. The Board was justified in dismissing this argument concerning the height variance criteria.

In sum, the Board was amply justified in not finding persuasive any of the arguments of Plaintiffs' Planner in support of their height variance application.

VII. THE BOARD'S FINDINGS REGARDING THE PURPOSE OF THE HEIGHT STANDARDS FOR THE SPECIAL MANUFACTURING ZONE DISTRICTS ARE SUPPORTED BY THE 1999 MASTER PLAN, THE ORDINANCE TEXT AND APPLICABLE LAW

The Board properly relied upon the discussion of the purposes of the SM zoning of the subject property in the Township Master Plan. The Board's Resolution focused upon and explained how the intent of the Master Plan is expressed in the specific and differing standards of the SM and GM Zone Districts, where the SM allows buildings with maximum heights of only 30 ft. and the GM heights of up to 75 feet. Ja026-029. The stated purpose of the SM Zone District is "...to provide areas for industrial uses which are of **lesser magnitude and intensity** than permitted in industrial districts." Florence

Township Ordinance §91-249. Emphasis added. Height, clearly is an expression of "magnitude" as well as "intensity".

The Board's conclusions about the intent of the height limitation in the SM Zone are supported specifically by the quoted Master Plan language, the express language of the relevant ordinance, and, more generally, by caselaw that discusses why such height limitations are incorporated into zoning standards. The Board correctly considered, under the Florence Township Master Plan and ordinances, and applicable caselaw, that the height of the buildings to be constructed would affect the intensity of the use of those buildings, and in the absence of competent credible evidence in the record provided by Plaintiffs to support the requested height variance, the Board properly deferred to the policy choices of the Township's planning board and governing body as set forth in the 1999 Master Plan and implementing ordinances.

CONCLUSION

Plaintiffs offered fact and expert testimony as well as exhibits in support of their assertion that they should receive a very substantial height variance because warehouses of a conforming height would be infeasible in the current market. The Board's Resolution details why it did or did not find certain evidence and testimony offered in support of Plaintiffs' argument probative

and credible, and these findings are supported by the record. The Board's Resolution also details why, based upon appropriate legal standards, the Board did not find persuasive Plaintiffs' arguments in support of their requested height variance. This determination of the Board is entitled to substantial deference.

For these reasons, Defendant-Respondent Florence Township Zoning Board of Adjustment respectfully requests that the Court affirm the decision of the Trial Court upholding the Board's denial of Plaintiffs' height variance because, as found by the Trial Court, the Board's denial decision is in accord with applicable law, is well- supported by the record, is fully explained in the Board's Resolution, and should not, as a valid exercise of the Board's discretion and limited authorities, be disturbed by the Court.

By: ______________________

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Attorney for Respondent:
Florence Township
Zoning Board of Adjustment

Dated: September 25, 2024

FILED, Clerk of the Appellate Division, October 21, 2024, **A-002189-23**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-002189-23

NFI REAL ESTATE, LLC AND TURNPIKE CROSSINGS V, LLC, Plaintiffs-Appellants, v. FLORENCE TOWNSHIP ZONING BOARD OF ADJUSTMENT, Defendant-Respondent.	CIVIL ACTION ON APPEAL FROM ORDER ISSUED NUNC PRO TUNC TO FEBRUARY 9, 2024 Docket No. BUR-L-000993-23 SAT BELOW: HON. JEANNE T. COVERT, A.J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS, NFI REAL ESTATE, LLC AND TURNPIKE CROSSINGS V, LLC

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October 21, 2024

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ON THE BRIEF

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES ii

TABLE OF APPENDIX iv

PRELIMINARY STATEMENT 1

ARGUMENT 1

I. PLAINTIFF BEARS THE BURDEN, BUT THE STANDARD OF REVIEW DOES NOT ALLOW FOR THE DEFENDANT BOARD'S UNBRIDLED DISCRETION AND LIMITLESS DEFERENCE. 1

II. DEFENDANT'S REJECTION OF EXPERT TESTIMONY WAS UNREASONABLE. 7

III. DEFENDANT OVERSTATES THE COURT'S HOLDING IN GRASSO V. BOROUGH OF SPRING LAKE HEIGHTS. 11

IV. DEFENDANT'S RELIANCE ON DE FACTO ZONING CASE LAW IS MISPLACED. 13

CONCLUSION 15

TABLE OF AUTHORITIES

PAGE NO.

Cases

Bd. of Educ. of City of Clifton v. Zoning Bd. of Adjustment of City of Clifton, 409 N.J. Super. 389, 434–35 (App. Div. 2009) 7

Cell South of N.J., Inc. v. Zoning Bd. of Adjustment of West Windsor Twp., 172 N.J. 75, 81-82 (2002).. 2, 7

Charlie Brown of Chatham, Inc. v. Bd. of Adjustment for Chatham Twp., 202 N.J. Super. 312, 330 (App. Div. 1985) 2

Commercial Realty & Res., Corp. v. First Atl. Props. Co., 122 N.J. 546, 561 (1991).. 12

Dover v. Bd. of Adjustment of Dover, 158 N.J. Super. 401, 412-23 (App. Div. 1978) 14

ET Mgmt. & Inv’rs, LLC v. Zoning Bd. of Adjustment of the Twp. of Weehawken, Dkt No. A-3864-22 (App. Div. Oct. 10, 2024) 11

Feiler v. Ft. Lee Bd. of Adjustment, 240 N.J. Super. 250, 255 (App. Div. 1990) 14

Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41 (App. Div. 2004) 9, 11, 12, 13

Grubbs v. Slothower, 389 N.J. Super. 377, 388 (App. Div. 2007).................. 12

In re Holy Name Hosp., 301 N.J. Super. 282, 295-96 (App. Div. 1997) 2

Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965) 2, 3, 7, 11

Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 58–59 (1999) 2

N. Bergen Action Grp. v. N. Bergen Twp. Planning Bd., 235 N.J. Super. 597, 602 (App. Div. 1989) 12

N.Y. SMSA, L.P. v. Bd. of Adjustment of Twp. of Weehawken, 370 N.J. Super. 319, 333 (App. Div. 2004) 6, 7

Northeast Towers, Inc. v. Zoning Bd. of Adjustment of Borough of W. Patterson, 327 N.J. Super. 476 (App. Div. 2000) 3

Ocean Cty. Cellular Co. v. Twp. of Lakewood Bd. of Adjustment, 352 N.J. Super. 514, 536-37 (App. Div.), certif. denied, 175 N.J. 75 (2002) 8

Price v. Strategic Capital Partners, 404 N.J. Super. 295 (App. Div. 2008) 13, 14

Statutes

N.J.S.A. 40:55D-70d(4),(5) 13

TABLE OF APPENDIX

PAGE NO.

1. Unpublished Decision, ET Mgmt. & Inv'rs, LLC v. Zoning Bd. of Adjustment of the Twp. of Weehawken, Docket No. A-3864-22 (App. Div. Oct. 10, 2024) Pra01-Pra25

2. Certification of John C. Gillespie, Esquire, Pursuant to R. 1:36-3 .... Pra26-Pra27

PRELIMINARY STATEMENT

Defendant Zoning Board's decision hinges entirely on its outright (and unsupported) rejection of credible expert testimony, and its insistence that the proposed 48' height of these warehouses will generate greater traffic than would the allowed 30', thereby "intensifying" the use. Nothing in the record supports this conclusion.

Defendant's Resolution, and its brief, stretch the law, distort and ignore evidence, and reject unrebutted credible expert testimony; and its brief introduces new reasoning for its decision. Defendant abused its discretion; its decision is entitled to no deference. Substantial credible evidence in the record and the applicable law support Plaintiff's height variance. Defendant never weighed that evidence; it simply rejected it. The Court should reverse the decisions below, and direct that Plaintiff's requested variance be granted.

ARGUMENT

I. PLAINTIFF BEARS THE BURDEN, BUT THE STANDARD OF REVIEW DOES NOT ALLOW FOR THE DEFENDANT BOARD'S UNBRIDLED DISCRETION AND LIMITLESS DEFERENCE.

Plaintiff and Defendant generally agree on legal principles underlying burden of proof, discretion afforded land use boards, standard of review, and deference owed to decisions. They disagree on how the limitations on those legal standards, and the law, apply to this case.

Plaintiff had the burden of proof; the Defendant enjoys decision-making discretion; and its decision is generally entitled to deference. That burden of proof, discretion, and deference are not, however, without boundaries.

Deference "is predicated on the existence of adequate evidence in the record supporting the board's determination either to grant or deny variance relief." Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 58-59 (1999) (citing Kramer v. Bd. of Adjustment of Sea Girt, 45 N.J. 268 (1965)). That discretion, while considerable, must still be "supported by substantial credible evidence from the record as a whole." Charlie Brown of Chatham, Inc. v. Bd. of Adjustment for Chatham Twp., 202 N.J. Super. 312, 330 (App. Div. 1985). Zoning boards must "root their findings in *substantiated proofs* rather than unsupported allegations." Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment of W. Windsor Twp., 172 N.J. 75, 88 (2002). "[A] determination predicated on unsupported findings is the essence of arbitrary and capricious action." In re Holy Name Hosp., 301 N.J. Super. 282, 295-96 (App. Div. 1997) (citation omitted).

Said another way, if a decision is not grounded in substantial credible evidence in the record, then the board has exceeded its discretion, and deference is no longer owed. Such is the case here.

Defendant urges that greater is deference owed to a denial of a variance, relying heavily upon Northeast Towers, Inc. v. Zoning Bd. of Adjustment of Borough of W. Patterson, 327 N.J. Super. 476 (App. Div. 2000). Db10-Db12. But the deference given to zoning boards is due to their "peculiar knowledge of *local conditions*[.]" See, e.g., Kramer, 45 N.J. at 296 (emphasis added). Deference is specifically directed to local conditions; the Defendant's insistence that building height is, by default, a proxy for intensity of use, based on general assumptions about traffic, has nothing to do with local conditions or the community's characteristics. It is based, instead, upon a preconceived notion about traffic generation that Plaintiff actually disproved.

Defendant distorted, ignored, and/or unreasonably rejected unrebutted, credible expert and lay testimony to manufacture its desired outcome. For brevity, only three examples are provided below.

First, Defendant distorts the testimony of both industrial real estate expert Jake Terkanian, and Michael Landsburg, Plaintiff's Chief Development Officer, to support its conclusion that more storage capacity through greater building height equates to an increase in intensity of land use. Db28-Db29. Mr. Terkanian provided detailed testimony, supported by his experience in industrial real estate, and explained two graphs admitted into the record. Ja105; Ja107. He explained that taller buildings on smaller footprints, like the structures proposed,

are necessitated by the industry's technological advancements (racking systems, "pick mods", high-reach equipment, etc.). (5T 47:8-16; 52:13-25; 53:1-11). As he put it, "[t]he whole industry is centered around higher buildings. [Third-Party Logistic companies] are programmed to operate in higher buildings." (5T 47:8-16). Mr. Landsburg provided similar testimony. (5T 11:20-25; 12:1-10). Neither ever suggested that such operational activity within a building increased land use activity outside that building.

Defendant cites Mr. Terkanian's testimony that the industry has evolved with "[s]peeds to move the product faster, height to increase density of capacity." Db28. But the storage of more products within a higher structure, and their more efficient movement inside that building, does not by default mean that land use impacts have a negative upwards linear relationship, as Defendant wants to believe. No evidence supports that invention. Mr. Landsburg, Mr. Terkanian, and Paul Phillips, PP, AICP, Plaintiff's planning expert, all made it abundantly clear that the impact of product storage and movement was entirely within the building. There was absolutely no testimony linking the greater height of the proposed building to increased traffic or other negative land use impacts.

Defendant also ignores the expert testimony from Mr. Terkanian and Mr. Phillips that increased building height permits more automation, and therefore leads to fewer employees: "So predominantly we've actually seen an inverse

relationship with building height and number of people working in those facilities[,]" and "again, given the fact that a lot of the good storage and retrievable is automated, which translates into lower employee ratios than what warehousing had been 20, 30, 40 years ago." (5T 53:14-24; 81:4-10).

Second, Defendant ignored expert testimony on all of the bulk requirements, with the exception of height of course, likely because Mr. Phillips' testimony provided more than enough support to satisfy the positive and negative criteria. The Property is largely bordered by Interstate 295, and a 150-foot wide PSE&G easement with overhead transmission lines. It adjoins preserved farmland. The closest residential structure is 700 to 800 feet from the nearest proposed warehouse, and the lone residential property bordering the property on Burlington-Columbus Road (County Route 543) is at least 400 feet from the closest proposed warehouse. The warehouses are setback 700 feet from Florence-Columbus Road (County Route 656), even though this SM Zone only requires 75 feet. All other setbacks from bordering roads are also substantial: 145 feet front yard setback from Burlington-Columbus Road, when 75 feet is required; 125 feet side yard setback, when 50 feet is required; and 67 feet rear yard setback, when 50 is required. (5T 74:20-25 through 77:10).

As presented by Mr. Phillips, any potential negative impact from the enhanced height is mitigated by the character of the surrounding properties and

significant setbacks. There was more to this application, and the proofs surrounding the positive and negative criteria, than just traffic considerations. Yet, rather than address this unrebutted expert testimony, Defendant simply pretends it does not exist.

Third, Defendant unreasonably rejected unrebutted, credible expert testimony. This includes the wholesale rejection of Robert Hoffman, P.E., PTOE, Plaintiff's Traffic Engineer, and the planning testimony from Mr. Phillips. As argued in Plaintiff's primary brief (Pb35-Pb46), to effectuate its desired outcome; the Board could not allow evidence to get in its way. Defendant has even introduced entirely new explanations for its denial, absent any support in the record, let alone the Resolution. Db8, Db22-Db26, Db42.

Case law informs us that the board's resolution is the operative document that provides the required findings of fact and conclusions of law, which again, must be supported by the record. N.Y. SMSA, L.P. v. Bd. of Adjustment of Twp. of Weehawken, 370 N.J. Super. 319, 333 (App. Div. 2004). Here, Defendant's reply brief provides at least three new and novel reasons for the denial of Plaintiff's application not found in this Resolution: (1) Plaintiff's failure to provide an "alternative development plan", (2) Plaintiff's failure to provide a comparison of cubic space in conforming versus the proposed structures, and (3) the variance would have been *de facto* rezoning. See Db8, Db22-Db26,

Db42. The Resolution is devoid of any mention of these reasons for denial; nothing in the record discusses them, never mind supports them. This effort to retrospectively amend the Resolution, and by extension, the hearing record, is without merit and warrants no consideration.

Plaintiff had the burden of proof, and clearly met it, with substantial credible evidence to support its request. Defendant distorts, ignores, and unreasonably rejects those credible proofs, including expert testimony, to achieve its desired result. Recognizing these fatal weaknesses, it retrospectively supplies new reasons for its denial in this appellate submission. These efforts are not only unsupported by the record, but contradicted by it.

II. DEFENDANT'S REJECTION OF EXPERT TESTIMONY WAS UNREASONABLE.

"While a board may reject expert testimony, it may not do so unreasonably, based only upon bare allegations or unsubstantiated beliefs." N.Y. SMSA, 370 N.J. Super. at 338. Though a board "may choose which witnesses, including expert witnesses, to believe[,]" "that choice must be reasonably made." Bd. of Educ. of City of Clifton v. Zoning Bd. of Adjustment of City of Clifton, 409 N.J. Super. 389, 434-35 (App. Div. 2009) (citing Cell South, 172 N.J. at 88) (citations omitted). "[T]he choice must be explained, particularly where the board rejects the testimony of facially reasonable witnesses." Id. (citing Kramer, 45 N.J. at 288). Where no evidence is presented to challenge the

reports or testimony of experts, and the board qualifies the witnesses as experts during the hearings, "there is no basis for [the Court] to conclude that the Board made a 'reasonable' choice to disregard the evidence presented by the experts." See Ocean Cty. Cellular Co. v. Twp. of Lakewood Bd. of Adjustment, 352 N.J. Super. 514, 536-37 (App. Div.), certif. denied, 175 N.J. 75 (2002).

Defendant rejects Mr. Hoffman's conclusion that height is not a proxy for more intense traffic, as a net opinion. Db30-Db31. His testimony is anything but that. As described in greater detail in Section IV(A)(1) of Plaintiff's initial brief, the traffic study was conducted pursuant to the authoritative industry standard for traffic engineering, the Institute of Transportation Engineers ("ITE") Trip Generation Manual. (2T 6:18-25; 7:1-9). Defendant's own engineer agreed that it "was prepared in a professional manner following the generally accepted practice for traffic impact analysis." Ja098. The independent variable for ITE trip generation is square footage of the building; "the height of the building does not factor in." (3T 26:3-25). "It's not a volumetric calculation. It's solely based on the square footage of the building." (3T 27:2-3). Post-development studies, including those for two nearby properties, are normally lower than the ITE projections, as the "ITE is generally considered to be conservative." (3T 35:6-22). As a qualified expert in traffic engineering, Hoffman used his specialized skillset and knowledge to offer an opinion, based on the ITE and the traffic

study, as well as known outcomes from two neighboring warehouse buildings on the same County Route 656, to conclude that the proposed 48 foot structures would not generate more traffic than permitted 30 foot buildings simply because of the increased height. Neither the Board's engineer, nor the traffic engineer hired by the Mayor and Council to oppose this application, offered contrary testimony, nor did they dispute Mr. Hoffman's methodology and conclusions. Defendant's mere dislike of the accepted industry standard does not render Hoffman's testimony a net opinion. To the contrary, it was well founded, but unreasonably rejected.

Similarly, Defendant rejects Mr. Phillips' planning testimony regarding the negative criteria. Db35-Db44. Again, as described in greater detail in Sections III and IV of Plaintiff's initial brief, Mr. Phillips provided comprehensive planning testimony on the positive and negative criteria under Grasso, including the proposed building heights, the Township's ordinances, the Township's Master Plan, the Township's prior development approvals for warehouses, certain actions involving re-zoning and redevelopment plans for warehouse distribution uses in Florence, the reports issued by the Board's professionals, and multiple site visits. (5T 61:10-25 through 82:1-12). Like the rejection of Mr. Hoffman's testimony, the reasons for rejecting Mr. Phillips' testimony are distortions. For example, Defendant misconstrues Mr. Phillips'

testimony about the 2019 "Foxdale Resolution." Db36-Db40. Plaintiff did not offer that previous approval for "precedential value", but rather as evidence that: (1) the Board itself, along with the Township governing body, has recognized and acknowledged that building heights of 30 feet for warehouse/distribution use are neither viable, appropriate, nor realistic; and (2) the Defendant, just three years earlier, interpreted the Master Plan in the same way as Mr. Phillips, and concluded that the SM zone's 30 foot height limitation was not targeted to warehousing, and thus, the requested height cannot be said to "substantial[ly] impair[] the zone plan and zoning ordinance." (Ja122; 5T 80:20-21). Defendant turned 180 degrees in this matter to conclude the opposite, without any help from the Board Planner (who sat through five of the hearings and all of Mr. Phillips' presentation, but neither volunteered nor was asked for her thoughts on this issue), and without any other evidence in the record to allow it to reach this contrary legal conclusion. Indeed, other than Mr. Phillips' testimony, and the Foxdale Resolution itself, the record is silent on the issue.

In a recent opinion that substantially affirmed the trial court's reversal of a denied density variance, the Appellate Division held that a resolution based on the "personal disagreement of the Board members with plaintiff's evidence and experts[,]" with "only bald conclusions rather than sufficient findings supported by facts in the record," was arbitrary, capricious, and unreasonable. ET Mgmt.

& Inv'rs, LLC v. Zoning Bd. of Adjustment of the Twp. of Weehawken, Dkt No. A-3864-22 (App. Div. Oct. 10, 2024) (Pra24). As noted by the trial court, "Simply saying, I do [not] care what your expert says, I disagree is, by definition, arbitrary and capricious and unreasonable." Id. at 14 (Pra14).

The acceptance or rejection of expert testimony is conclusive on appeal, when *reasonably* made. Kramer, 45 N.J. at 288 (emphasis added). The prerequisite to deference is reasonableness, and Defendant cannot show how its rejection of both these experts was reasonable, or at the very least, that it was not unreasonable. Like the ET Management decision, the Court should reverse.

III. DEFENDANT OVERSTATES THE COURT'S HOLDING IN GRASSO V. BOROUGH OF SPRING LAKE HEIGHTS.

Defendant's brief overstates two aspects of this Court's decision in Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41 (App. Div. 2004) in claiming: (1) Plaintiff's profitability margin was not an adequate reason to grant this (d)(6) hardship variance; and (2) height is always a method of limiting intensity of use. Db17-Db21; Db23.

First, Plaintiff's evidence on feasibility is very different from the facts in Grasso on profitability. In Grasso, it was the style of the home that was less marketable—the developer could still build a house, just with a different, less profitable style. Id. at 52. Here, the issue is not *profitability* but *feasibility*; no warehouse can or will be built at the permitted 30 foot height. Unlike Grasso

where the height reduced profitability, the height restriction here completely bars the permitted use from being financed, marketed, and therefore, constructed.

Second, Defendant continues to conflate intensity of use and height, and overstates the language in Grasso regarding the intent of the relevant height limitation. Defendant relies primarily upon the following language: "Height restrictions like restrictions on density, bulk or building size, can also be a technique for limiting the intensity of the property's use." Id. at 53 (citations omitted). Plaintiff does not disagree that height *can* be a way to limit intensity of use, but there is no credible evidence in this record that it *does*.

Indeed, while height can be a way to limit intensity, residential density (e.g., number of units per acre) and commercial floor area ratio are the traditional controls for intensity. "Density restrictions, in the residential context, and [floor area ratio] restrictions, in the commercial setting, both serve to limit the intensity of the use of the land to be developed." Grubbs v. Slothower, 389 N.J. Super. 377, 388 (App. Div. 2007) (citing Commercial Realty & Res., Corp. v. First Atl. Props. Co., 122 N.J. 546, 561 (1991)); see also N. Bergen Action Grp. v. N. Bergen Twp. Planning Bd., 235 N.J. Super. 597, 602 (App. Div. 1989) ("[D]ensity restrictions, primarily applicable to residential structures, perform the same functions as floor area ratios, primarily applicable to nonresidential

structures. N.J.S.A. 40:55D-70d(4),(5)."), rev'd on other grounds, 122 N.J. 567 (1991).

Defendant distorts this language to support its preconceived belief that taller buildings, by default, create a more intense use. No evidence in the record supports this proposition. Instead, substantial credible evidence satisfies the positive and negative criteria under Grasso.

IV. DEFENDANT'S RELIANCE ON DE FACTO ZONING CASE LAW IS MISPLACED.

For the first time, Defendant argues that Plaintiff's evidence on the unrealistic permitted height represents a common problem affecting all properties in the zone, and is therefore, not a basis for a (d)(6) hardship variance. Db22-Db26. Defendant relies upon Price v. Strategic Capital Partners, 404 N.J. Super. 295 (App. Div. 2008), to argue that Plaintiff's request exceeds the Board's authority, as it would *de facto* rezone the SM Zone. This assertion is misplaced for several reasons.

First, this argument was not raised during the six nights of hearings, in the 25 page Resolution, nor before the Trial Court. Indeed, the Resolution completely omitted Mr. Terkanian's expert testimony on feasibility. Second, the language from Price relied upon by Defendant, is found in that court's recitation of the plaintiff's argument. Third, had the Defendant analyzed this application as a *de facto* rezoning case, which it did not, the proper standard is "whether the

impact of the requested variance will be to substantially alter the character of the district as that character has been prescribed by the zoning ordinances." Feiler v. Ft. Lee Bd. of Adjustment, 240 N.J. Super. 250, 255 (App. Div. 1990) (quoting Dover v. Bd. of Adjustment of Dover, 158 N.J. Super. 401, 412-23 (App. Div. 1978)). There was no such discussion at the hearing. Fourth, if the Court indulges this new argument, the fact patterns in *de facto* rezoning cases are much different than in this matter. See, e.g., Price, 404 N.J. Super. at 298, 303 (zoning board granted a density variance for an 18 story, 91-unit residential building, where the permitted density was 30 units, and the Township's ordinance, albeit unlawfully, prohibited density variances); Feiler, 240 N.J. Super at 251, 253 (zoning board granted use and bulk variances, where the residential portion of the project included the entire zone, the zone allowed one and two-unit dwellings, and the board approved two residential towers with 670 total units, that exceeded the 35 foot height restriction by 316 and 221 feet). Price is not applicable to this matter.

CONCLUSION

For all of the reasons set forth herein, and in Plaintiff's initial brief, it is respectfully suggested that the decision of the Defendant Florence Zoning Board of Adjustment and Trial Court be reversed, and that this Court direct that the height variances requested by Plaintiff be granted.

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4855-1958-8075, v. 1