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STONEY 9, LLC, ROBERT A.  
CARR, and DEBORAH L. CARR,

Plaintiffs,

v.

PIERSON PLEASANTVILLE,  
LLC  
d/b/a R.E. PIERSON  
CONSTRUCTION CO. d/b/a/  
R.E. PIERSON MATERIALS;  
TOWNSHIP OF DENNIS  
CONSOLIDATED LAND  
USE BOARD,

Defendants.

APPELLATE DIVISION  
DOCKET NO. 2377-24

On Appeal From:

SUPERIOR COURT OF NEW JERSEY  
CAPE MAY COUNTY  
LAW DIVISION  
DOCKET NO. CPM-L-000030-24

Sat below:

The Honorable Michael J. Blee,  
A.J.S.C.

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APPELLANTS, STONEY 9, LLC, ROBERT A. CARR, AND DEBORAH L.  
CARR'S BRIEF IN SUPPORT OF APPEAL FROM MARCH 11, 2025 ORDER

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**TABLE OF CONTENTS**

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED ..... iv

TABLE OF AUTHORITIES ..... v

PRELIMINARY STATEMENT ..... 1

PROCEDURAL HISTORY ..... 1

STATEMENT OF FACTS ..... 2

    a. The Parties and Their Respective Commercial Properties ..... 2

    b. Applicable Dennis Township Ordinances ..... 4

    c. 2012 Master Plan ..... 8

    d. Pierson’s 2007 Application ..... 9

    e. Pierson’s 2009 Lawsuit vs. the Board and Dennis Township ..... 10

    f. Pierson’s 2011 Application ..... 11

    g. Pierson’s 2022 Application ..... 12

    h. The Board’s Decision and Resolution 2023-18 ..... 16

    i. The Trial Court’s Order & Final Judgment ..... 18

ARGUMENT ..... 18

    I. Standard of Review (Raised Below, Pa8-12) ..... 18

    II. Pierson Failed to Satisfy the Positive and Negative Criteria (Raised Below, Pa14-20) ..... 19

III.	The Board Impermissibly Usurped the Zoning Authority of Dennis Township’s Governing Body (Raised Below, PA17-18) .....	26
IV.	The Board and Trial Court Erred in Finding that Pierson’s Application was Not Barred by Res Judicata (Raised Below, Pa12-14) .....	31
V.	The Trial Court Erred in Finding that the Board’s Misplaced Reliance on an Unpublished Legal Opinion Was Not Reversible Error (Raised Below, Pa20) .....	38
VI.	The Trial Court Erred in Finding that the Board’s Grant of Waivers was Reasonable (Raised Below, Pa20-21) .....	40
	CONCLUSION .....	42

**TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING  
APPEALED**

Order Denying Plaintiffs Complaint In Lieu of Prerogative Writ..... (Pa1)

**TABLE OF AUTHORITIES**

**CASES**

Bray v. Cape May Zoning Bd., 378 N.J. Super. 160 (2005)..... 31, 40

Burbridge v. Mine Hill Township, 117 N.J. 376 (1990)..... 18

Dunbar Homes, Inc. v. Zoning Bd., 233 NJ. 546, 559 (2018)..... 19

Fallone Properties, L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552 (App. Div. 2004)..... 19

Funeral Home Mgmt., Inc. v. Basralian, 319 N.J. Super. 200 (App. Div. 1999).  
.....19, 22

Hare v. Township of Barnegat Planning Bd., 2016 WL 1228847, at \*1 (App.Div.2016)..... 37, 38, 39

Home Builders Ass’n of Northern New Jersey v. Borough of Paramus, 7 N.J. 335 (1951).....31

James R. Ientile, Inc. v. Zoning Bd. of Adj., 271 N.J. Super 326 (App. Div. 1994)..... 19

Kessler v. Bowker, 174 N.J. Super. 478 (App. Div. 1979).....18

Kohl v. Mayor and Council of Fair Lawn, 50 N.J. 268 (1967).....22

Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268 (1965).....19, 21

Medical Center at Princeton v. The Township of Princeton Zoning Board of Adjustment, 343 N.J. Super. 177 (App. Div. 2001).....26

Medici v. BPR Co., 107 N.J 1 (1987)..... 20,23, 27, 28, 29, 39

Piretti v. Mayor and Council of the Twp. of Bloomfield, 35 N.J. 382 (1961)  
..... 31, 32, 33

Price v. Himeji, LLC, 214 N.J. 263 (2013)..... 21

<u>Russell v. Tenafly Bd. of Adj.</u> , 31 N.J. 58 (1959).....	31
<u>Saadala v. E. Brunswick Zoning Bd.</u> , 412 N.J. Super. 541 (App. Div. 2010) .....	39
<u>Saddle Brooke Realty LLC v. Township of Saddle Brook Zoning Board of Adjustment</u> , 388 N.J. Super. 67 (App. Div. 2006).....	20, 23
<u>Yahnel v. Bd. of Adjust. Jamesburg</u> , 79 N.J. Super. 509 (App. Div. 1963).....	26

**STATUTES and OTHER AUTHORITIES**

<u>N.J.S.A. 40:55D-2</u> .....	20, 21
<u>N.J.S.A. 40:55D-70d</u> .....	12, 13, 17, 19, 20, 28, 39
<u>New Jersey Zoning and Land Use Administration</u> (GANN 2024), at §33-2.....	39
<u>New Jersey Land Use Administration</u> (GANN 2024), at §38-5.....	39

## **PRELIMINARY STATEMENT**

This appeal is from the trial court’s order upholding the Dennis Township Consolidated Land Use Board’s (“Board”) decision to grant multiple use variances and critical environmental site plan waivers to Pierson Pleasantville, LLC (“Pierson”) to add a redi-mix concrete plant to its pre-existing non-conforming mining operation in Dennis Township (“Township”). In the main, the trial judge’s error lies in his disregard of the Board’s confiscation of governing body authority given three prior unsuccessful attempts by Pierson to establish the same use, the failure of the Township as a result to change its ordinances or amend its Master Plan, the bar of *res judicata*, the existence of a special ordinance specifically banning the use anywhere in the Township, and the existence of similar uses a mere stone’s throw away.

In the context of zoning by *ad hoc* variance rather than by ordinance, this case is illustrative of the most egregious arrogation of legislative authority imaginable, resulting in the wholesale sacrifice of the Township’s welfare for the most profitable use of land.

We now point out why.

## **PROCEDURAL HISTORY**

On January 26, 2024, Plaintiffs Stoney 9, LLC, Robert Carr, and Deborah Carr (“Plaintiffs”) filed their Complaint in Lieu of Prerogative Writs against the

Board and Pierson under Docket CPM-L-30-24. Pa23-130. On March 3, 2024, Pierson filed an Answer. Pa131-139. On March 7, 2024, the Board filed an Answer. Pa140-148. Following submission of briefs and transcripts, the trial court conducted oral argument on February 6, 2025.<sup>1</sup>

On March 11, 2025, the trial court entered an Order and Final Judgment dismissing Plaintiffs' Complaint, finding that "the Board's grant of Pierson's application for use variance and waivers was not arbitrary, capricious, and unreasonable" and that "the Board's Resolution 2023-18 was valid and supported by adequate findings of fact and conclusions of law." Pa1. The Order was accompanied by a Memorandum of Decision. Pa2-22.

Plaintiffs filed a timely Notice of Appeal of the Trial Court's decision on April 8, 2025 and an Amended Notice of Appeal on April 17, 2025. Pa430-433.

## **STATEMENT OF FACTS**

### **a. The Parties and Their Respective Commercial Properties**

Plaintiff Stoney 9, LLC, is the owner of real property at 9 Stoney Court (Block 225.01, Lot 8.09) in the Township ("Plaintiffs' Property") and landlord for multiple businesses that operate from that property, including a coffee shop, brewery, boat storage and repair shop, and medical packaging facility. Pa783 at

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<sup>1</sup> Pursuant to R. 2:6-8, the single volume of transcript from the February 6, 2025 oral argument before the trial court is designated as 1T.

T10:10-11:25. Plaintiffs, Robert Carr and Deborah Carr, siblings, are the principals of Stoney 9, LLC. Id.

Pierson owns 384 Woodbine-Ocean View Road (the “Pierson Property”) located diagonally across the road from Plaintiff’s Property. Pa90. The Pierson Property is Block 224, Lots 68.01, 73, 74.02, 75.03, and 78.04 on the Tax Map of the Township of Dennis. Id. The Pierson Property is located in the Township’s B-Business District, C-Conservation Zone, and R-3 Residential Zones. Id.

Pierson currently operates a gravel and sand mine at the Pierson Property. Pa442 at T28:8-19. It is a large facility, roughly 165 acres in size. Pa446 at T43:23-24. The mining operation has been active for over 50 years and continues to operate in a similar fashion as it has since its inception. Pa442 at T28:8-13.

Pierson’s expert, Brian Murphy, PE, PP, acknowledged during his testimony that the Pierson Property contains priority wetlands and abuts protected areas of the Cape May National Wildlife Refuge and Great Cedar Swamp. Over the last decade, there has been a concerted effort by Cape May County, the National Audubon Society, and U.S. Fish and Wildlife to acquire land around the Pierson Property to preserve this area for conservation purposes. Id. (see also Pa382 - Open Space Map of the Township of Dennis).

**b. Applicable Dennis Township Ordinances**

A number of disregarded Township zoning ordinances inform how inconsistent and terribly erroneous the Board's decision was.

Chapter 185-4 of the Code of the Township of Dennis (the "Code") specifically prohibits commercial resource extraction facilities, including sand mining, in all districts. Pa159. It also provides that "[a]ll uses not expressly permitted in this chapter are prohibited." Id. Chapter 95 of the Code expresses a clear intent to phase out, abolish, and reclaim all remaining excavation operations in the Township. Pa.149-157. Chapter 95-5A provides "[t]here will be a maximum of six permits issued by the township at any one time for excavation," while subsection B provides that "[i]n each instance of a revocation of a permit to excavate, dig or mine, the limited number of said permits... shall be reduced by one and no new permits shall be issued...". Id.

Moreover, Chapter 95-2A states that "the provisions of this chapter shall be held to be for: (1) the promotion of the public health, morals and general welfare; (2) the elimination of dust and noise; (3) the elimination of danger from deep pits in close proximity to highways; (4) the conservation of soil; and (5) the betterment of the community." Id. In addition, Chapter 95-2B provides that "[t]he provisions and requirements of this chapter shall be held paramount to

any corresponding or similar provision of any existing law, ordinance, rule or regulation.” Id. Chapter 95-8 subsection A(2) provides that “[a]ll equipment stored on the property shall be that utilized specifically for the removal and hauling of resource extraction material(s) removed from the site only.” Id.

It bears repetition that redi-mix concrete plants are not permitted principal or accessory uses in any zoning district in Dennis Township. Pa158-213. In the subject Business District, which is where Pierson has proposed to build a redi-mix concrete plant, Chapter 185-25B of the Code provides:

A. Purpose. The purpose of the Business District is to provide locations within the township where business industrial complexes may be developed. The standards are intended to avoid visual intrusions and performance nuisances upon adjacent residences or residential zones. The visual impact of this district on the traveling public shall be minimal; signage should be tasteful and low to the ground; parked vehicles should be shielded from the road. **Uses in this district should be free from objectionable odors, fumes, dirt, vibration and noise.** [Emphasis added.]

B. Principal permitted uses. Principal permitted uses on the land and in the buildings within the B District shall be as follows:

- (1) Offices and office buildings.
- (2) Farm machinery sales, service, and rental.
- (3) Earthmoving equipment sales, service, and rental.
- (4) Contractors' yards and equipment storage.
- (5) Auto repair shops and car sales.
- (6) Boat sales, service and storage.
- (7) Warehousing/distribution center.
- (8) Product assembly and fabrication.
- (9) Lumber yard.
- (10) Government offices and public works facilities.

(11) Public utility facilities as conditional uses. See Section 185-73 for standards.

(12) Gasoline service stations, as conditional uses, subject to the standards of Section 185-73.

C. Accessory uses. Accessory uses permitted in the B District shall be as follows:

- (1) Administrative offices.
- (2) Out-of-door storage (with proper screening).
- (3) Motor vehicle and equipment storage garages.
- (4) Off-street parking.
- (5) Fences and signs.
- (6) Small wind energy systems and solar energy systems in accordance with the standards in Section 185-73D(22). [Added 5-5-09 by Ord. No. 2009-01]

D. Maximum building height. No principal or accessory buildings shall exceed 35 feet. Accessory buildings shall be limited to one story only.

Pa191-192.

Chapter 185-41 of the Code governs Performance Standards. Id. Chapter 185-41K governs Environmental Assessments and provides in subsection (c) that “[a]ll subdivision applications and/or site plan applications shall be accompanied by a complete Environmental Assessment Report including the Environmental Assessment Checklist and required documentation which shall be submitted as a prerequisite to a complete application.” Id. Subsection 5 [Environmental assessment waiver] states “...the Board may, at the request of an applicant, waive the requirement for an Environmental Assessment Report if the appropriate Board finds that sufficient evidence is submitted to support a

conclusion that the proposed development will have a negligible environmental impact. However, subpart (c) states, “any site development affecting wetlands and C-1 waters shall not be granted a waiver from these requirements.” Id.

As set forth at length below, Pierson sought and was granted waiver from the environmental assessment requirement notwithstanding the concession that there are priority wetlands on the Pierson Property. Pa463 at T110:13-111:4.

In support of its waiver request, Pierson submitted only an Environmental Assessment Checklist, which stated that “[o]n-site freshwater wetlands have been delineated and certified by NJDEP.” Pa337. Also attached was a July 18, 2014 letter from the State of New Jersey Department of Environmental Protection (“NJDEP”) containing a Freshwater Wetlands Letter of Interpretation: Line Verification (“LOI”). Pa379-381. The letter clearly states that “pursuant to the Freshwater Wetlands Protection Act Rules, you are entitled to rely upon this jurisdictional determination for a period of five years from the date of this letter...” Id. The letter also confirms that the wetlands have been identified as being priority wetlands by the U.S. Environmental Protection Agency. Id. Finally, the letter states that “if the current mining operation on site is abandoned or if a change of use occurs on the site, then the Department reserves the right to claim jurisdiction of wetlands and/or State open waters created by sand mining operations on the property. Id.

**c. 2012 Master Plan**

The Township's 2012 Master Plan (the "2012 Master Plan") sets forth the policy goals and objectives which support the Master Plan efforts as follows:

1. To provide for an appropriate variety of land uses responsive to the development potential of Dennis Township.
2. To guide development into compact Centers along the Route 9 corridor
3. To maintain and expand existing Village Centers.
4. To protect the historic, archaeological and cultural resources of the Township.
5. To protect sensitive environmental areas from inappropriate development and to provide comprehensive protection for a broad range of natural resources.
6. To provide for safe and efficient movement of traffic within and through the Township.
7. To promote resort-related development as a major local component of the resort economy of the County.
8. To promote and to enhance public access to the waterways.
9. To provide for a wide range of housing choices.
10. Provide recreational facilities that meet the needs of current and future Township residents.
11. Establish and maintain the level of community facilities and public services and infrastructure required to satisfy the needs of present and future residents.

Id. at Pa224-226.

Under Goal 1, the Master Plan explicitly seeks to “[l]imit encroachment of non-compatible uses into established residential neighborhoods, **such as sand extraction operations and heavy industrial type uses**” [emphasis added] and to “[p]rovide that mining establishments adopt long term reclamation plans to guide land use and future site development.” Id.

**d. Pierson’s 2007 Application**

In 2007, Pierson submitted an application to the Board seeking multiple use variances and other relief to construct and operate a redi-mix concrete plant, a class B recycling facility, and an asphalt plant on the Pierson Property, in addition to the existing mining operation (the “2007 Application”). Pa39-41. Although Pierson had originally sought a use variance for an asphalt plant, that part of the application was withdrawn prior to the second meeting on the application by letter from the Board attorney dated May 22, 2007. Pa44. Following multiple nights of hearings between April 27, 2007 and November 16, 2008, the Board denied the 2007 Application as memorialized in Resolution 08-20. Pa43-54.

In its Resolution denying Pierson’s 2007 Application, the Board specifically noted that “[t]he Board finds that the project in question is not, as argued by the applicant, a light industrial use. The applicant did not successfully address the negative criteria which the Board finds significantly outweighs any applicable testimony the applicant presented in support of the positive criteria.”

Pa52. The Board also “found the testimony of Ms. Barbara Wooley-Dillon as a Planner for the objectors to be particularly credible as to her analysis of the positive and negative criteria.” Id. Ms. Wooley-Dillon’s testimony is summarized in part in the Board’s Resolution as having been that “...there are no special reasons which support the granting of this application. The granting of said application would undermine the public good and the purposes of the Municipal Zoning Ordinances, and there is no public benefit which would be obtained by granting this variance.” Pa49.

**e. Pierson’s 2009 lawsuit against the Board and Dennis Township**

After the 2007 Application was denied, Pierson filed a lawsuit against the Board and Township under Docket CPM-L-77-09 challenging the denial. Pa56. Pierson subsequently entered into a settlement agreement with the Board and the Township whereby Pierson agreed to withdraw the litigation, and, in exchange, it was agreed that the Board’s denial would not constitute *res judicata*. Pa56-57. To confirm the settlement on October 5, 2010, the Board adopted Resolution 10-17, which states, in pertinent part:

NOW THEREFORE BE IT RESOLVED that the Dennis Township Zoning Board of Adjustment adopted a Resolution amending prior Resolution 0820, so that said denial shall have no *res judicata* effect and be *without prejudice*, permitting the Applicant or its successor in title to bring an application which may be the same or similar to the [2007] application ....

WHEREAS, it is specifically recognized that Resort Campground...has successfully intervened in this case and as such their claim remains unaffected by this settlement between the Dennis Township Zoning Board of Adjustment and R.E. Pierson.  
Id.

That same date, the Township adopted the substantially identical Resolution 2010-162 confirming the terms of the settlement. Pa59-60. This resolution clearly evidences the Township's knowledge of the 2007 Application.

**f. Pierson's 2011 Application**

On May 12, 2011, Pierson submitted a substantially similar application seeking four (4) use variances for (1) multiple uses on one site, (2) a redi-mix concrete plant, (3) a concrete recycling facility, and (4) a height variance (the "2011 Application). Pa62-75. The Board held six (6) nights of public hearings on the 2011 Application between September 28, 2011 and March 28, 2012 and ultimately denied it in on March 28, 2012 in Resolution 12-06. Pa77-88.

In its memorializing resolution denying Pierson's 2011 Application, the Board specifically found that "[t]he Applicant failed to meet his burden" and "did not successfully address the negative criteria which the Board finds significantly outweighs any applicable testimony the Applicant presented in support of the positive criteria." Pa.88.

It is important to note that, at Pierson's request, the Board voted on the concrete plant and recycling facility separately. "The first vote was to approve

the construction of a concrete plant on site, which vote was no.” Pa87. “The second vote was to approve [a] Class B recycling facility for concrete and asphalt, which vote was no.” Pa88. “By consent the other two variances were considered moot and the application was denied in toto.” Id. Thus, the Board considered and voted upon the approval of the proposed redi-mix concrete plant separately from the concrete and asphalt recycling facility and still rejected it.

**g. Pierson’s 2022 Application**

On April 12, 2022, Pierson submitted still a *third*<sup>2</sup> application seeking multiple use variances and bulk variances to construct and operate a redi-mix concrete plant on the Pierson Property. On July 11, 2022, Pierson submitted an Amended Application (“2022 Application”) containing corrections and indicating that Pierson would be seeking three (3) separate use variances under N.J.S.A. 40:55D-70d as follows: D(1) variance for use or principal structure, D(5) variance for increase in permitted density, and D(6) variance for height of a principal structure greater than 10 feet or 10% of maximum permitted height. Pa90-102. The Amended Application also sought bulk variance relief under N.J.S.A. 40:55D-70c(2) to place equipment/machinery closer than 200’ to a

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<sup>2</sup> In fact, the 2022 Application was actually the *fourth* Pierson Application seeking a concrete plant at the Pierson Property since acquiring it in 2006. However, it’s first application was deemed to suffer from deficient notice and was vacated. Pa425-426.

property line, preliminary and final site plan approval, waivers from subdivision and site plan standards, and an environmental assessment waiver. Id.

The 2022 Application specifically provided that “[r]equest is made for permission to add ready-mix concrete plant as an additional use to an existing gravel pit.” Pa91. It described the variance relief being sought as being “Principal use in B zoning district, height in excess of 10%, more than one principal use and structure, contrary to the requirements of Sections 185-25B, 185-42, 185-7, 185-25D and 185-25F(1), and equipment/machinery closer than 200 feet to a property line, contrary to the requirements of Section: 185-64D(1)(a) of the Dennis Township Land Use and Development Ordinances, Dennis Township Code Chapters 98, 165 and 185.” Id. Notably, the 2022 Application did not request variance relief under N.J.S.A. 40:55D-70d(2) for expansion of a non-conforming use, nor did it seek relief from Chapter 95-8A(2) governing resource extraction which mandates that “[a]ll equipment stored on the property shall be utilized specifically for the removal and hauling of resource extraction material(s) removed from the site only.” Pa152.

Public meetings on the 2022 Application took place remotely via Zoom on the following dates:

July 28, 2022	Pa435-512.
August 25, 2022	Pa513-587.
September 22, 2022	Pa588-651.

November 17, 2022	Pa652-721.
December 22, 2022	Pa722-779.
January 26, 2023	Pa780-847.
March 23, 2023	Pa848-904.
April 27, 2023	Pa905-971.
May 25, 2023	Pa972-1049.
July 27, 2023	Pa1050-1136.
August 24, 2023	Pa1137-1171.

Pierson presented testimony from Brian J. Murphy, P.E., C.M.E. , David R. Shropshire, P.E, P.P., Tiffany A. Morrissey, P.P., AICP, Peter L. Lomax, and Bob Todd as Pierson’s representative. Plaintiffs presented testimony from professionals Barbara Woolley-Dillon, P.P., AICP, Paul Kerlinger, Ph.D., and Al Litwornia, P.E., P.P., as well as testimony from Robert and Deborah Carr, principals of Stoney 9, LLC in objection to the 2022 Application. Pa105-115.

Notably, Barbara Woolley-Dillon, PP, AICP, whose testimony was found to be “particularly credible” in connection with the 2011 Application hearing, testified on behalf of Plaintiffs in this matter on January 26, 2023. Pa791-811 at T44:7-124:19. She stated that this application was “almost like déjà vu all over again” as it was extremely similar to not only the first application but the second application.” Pa800 at T78:11-79:24. In her opinion, the 2022 Application was substantially similar to the prior applications, with the same variance relief being requested. Id. at T79:14-18. As such, it was her opinion that res judicata should bar the 2022 Application. Id. at T79:25-80:4.

Ms. Woolley-Dillon testified that the zoning in the B zone had not changed in the applicant's favor and, if anything, had gotten stricter. Id. at T79:5-9. She testified that "adding a second new use that is not permitted to the site that's already occupied by an existing nonconforming use, again, it's simply too much." Id. at T80:18-21. She went on at length and in great detail about the township's vision as set forth in its Master Plan and the emphasis placed on conservation of natural resources including the Great Cedar Swamp. Pa800-801 at T80:7-84:19. She opined at length and in great detail that the 2022 Application contradicts six of the purposes of zoning (being a, d, g, h, i, and j) and would cause substantial detriment and negative impacts, including traffic, noise, dust, vibration, and environmental impacts. Pa805-811 at T99:3-121:11. She testified that granting the 2022 Application would contradict the current Dennis Township Master Plan and their whole litany of master plans and master plan re-examination reports dating back to 1994. Pa811 at T122:7-19.

Finally, Ms. Woolley-Dillon testified, as she had previously, that no public benefit was presented from this application [Pa811 at T122:20-123:2]. "[W]ith an absolute degree of professional certainty" she concluded that the variances would substantially impair the intent and purpose of the zone plan and zoning ordinances, and that the benefit of granting the requested variances did not outweigh negative impacts of the proposed development. Id. at 124:5-16.

**h. The Board's Decision and Resolution 2023-18**

On August 24, 2023, in a stark departure from its prior decisions, the Board voted unanimously to grant all use and bulk variances and waivers sought by Pierson in connection with the 2022 Application. Pa1138-1152. On November 16, 2023, the Board adopted Resolution 2023-18 to memorialize its decision. Pa104-126. The Board's Resolution 2023-18 summarizes the testimony of Pierson's professionals at length while largely omitting the testimony of Plaintiffs' professionals, except for a passing reference that they had "testified and objected for several reasons generally to include traffic, safety, noise, and environmental issues" and that "the Board considered the testimony of the objector, Stoney 9, LLC, and its professionals in making the Board's determination." Pa115-116.

Resolution 2023-18 states that "...the Board concluded res judicata was not applicable for the reasons stated by the Applicant's professionals." Pa118. Those reasons are listed in Resolution 2023-18 and discussed below. Pa116-118. The resolution further states that "[t]he Board found as fact the testimony of the Applicant's professionals as set forth above and approves the following:

1. Preliminary and final site plan approval for the addition of a redi-mix concrete facility as an additional use associated with an existing mining operation, as required, pursuant to the Land Use Development Ordinance of the Township of Dennis as well as the

Municipal Land Use Law pursuant to N.J.S.A. 40:55D-46 and N.J.S.A. 40:55D-50.

2. Variance relief from the Land Use Development Ordinance of Township of Dennis and the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70(c) and (d) as follows:

i. (d)(1) Use variance to allow for multiple uses on the property and the addition of a redi-mix concrete facility as an additional use associated with the existing mining operation.

ii. (d)(6) height Variance from maximum permitted height of 35 feet with a proposed height of 52.85 feet to the top of the structure and 61.41 feet to the top of the vent stack.

iii. The Board finds that a variance allowing more than one principal structure on a single lot which may not allow the subdivision of the lot in a manner that each structure and resulting lot would conform to the zoning and subdivision regulations is not required.

iv. Variance to allow equipment and machinery or other structure or facility closer than the required 200 feet to any property line (Dennis Township Code 185-64D(1)(a). N.J.S.A. 40:55D-70(c) as this variance is subsumed into the d(1)).

v. Waiver from the Development Standards and/or submission requirements of a Stormwater Management calculations including any borings. (Dennis Township Code 163-4A)

vi. Waiver to provide soil borings on the Environmental checklist.

vii. Waiver from the Environmental Assessment.

Pa118-119.

**i. The Trial Court's Order & Final Judgment**

As recounted in the Procedural History above, Plaintiffs filed suit on January 26, 2024 challenging the Board's decision. Following briefing and oral argument on March 11, 2025, the trial court entered an Order and Final Judgment [Pa1] providing as follows:

1. Plaintiff's action in lieu of prerogative writ is hereby DENIED. The Court finds that the Board's Grant of Pierson's application for use variance and waivers was not arbitrary, capricious, and unreasonable.
2. The Court finds that the Board's Resolution 2023-18 was valid and supported by adequate findings of fact and conclusions of law.

The trial court's Order and Final Judgment was accompanied by a Memorandum of Decision. Pa2-22. The transcript from the oral argument is designated as 1T.

**LEGAL ARGUMENT**

**I. STANDARD OF REVIEW (Raised Below, Pa8-12)**

A decision by a land use board should be overturned if arbitrary, unreasonable, or capricious. Burbridge v. Mine Hill Township, 117 N.J. 376 (1990). A court, upon review of the decision of a land use board, is to determine as a matter of law whether the board could reasonably have concluded from the record below that the decision was correct. Kessler v. Bowker, 174 N.J. Super.

478 (App. Div. 1979). It is true that determinations of fact made by a land use board are generally given deferential treatment by a reviewing court and are entitled to a presumption of validity. Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268 (1965). However, in reviewing the Board’s decision and findings of fact, “it is essential that the board's actions be grounded in evidence in the record.” Fallone Properties, L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552 (App. Div. 2004).

Not to be forgotten, moreover, is that a court owes no deference to a land use board’s interpretation of an ordinance or decisions on matters of law, such as whether res judicata should be applied to bar an application or whether a particular use is a principal or accessory use. James R. Ientile, Inc. v. Zoning Bd. of Adj., 271 N.J. Super 326 (App. Div. 1994). This is so because zoning boards have “no particular skill superior to the courts regarding purely legal matters.” Dunbar Homes, Inc. v. Zoning Bd., 233 NJ. 546, 559 (2018). Moreover, Courts generally show less deference in reviewing grants than denials of use variances. Funeral Home Mgmt., Inc. v. Basralian, 319 N.J. Super. 200 (App. Div. 1999).

**II. PIERSON FAILED TO SATISFY THE POSITIVE AND NEGATIVE CRITERIA (Raised Below, Pa14-20)**

The standards for the granting of use variances involve various levels of analysis: (i) the “special reasons” or “positive criteria” of N.J.S.A. 40:55D-

70(d), namely, subsection d(1) allowing for a use in a district restricted against such a use; (ii) subsection (d)(2) allowing for the expansion of a nonconforming uses; (iii) subsection(d)(6) restricting the height of principal structures that exceed 10 feet or 10 per cent of the maximum height permitted; and (iv) the so-called “negative criteria of N.J.S.A. 40:55D-70 upon which Medici v. BPR Co., 107 N.J 1 (1987) imposes stringent proscriptions for new uses.

Saddle Brooke Realty LLC v. Township of Saddle Brook Zoning Board of Adjustment, 388 N.J. Super. 67 (App. Div. 2006) instructs that “special reasons”— often dubbed as the “positive criteria”— are composed of three categories of circumstances required for the granting of a (d)(1) use variance: (1) where the proposed use inherently serves the public good, such as a school, hospital or public housing facility; (2) where the property owner would suffer ‘undue hardship’ if compelled to use the property in conformity with the permitted uses in the zone”; and (3) where the use would serve the general welfare because the proposed site is particularly suitable for the proposed use”, Id. at 76, that is, where the proposed use fulfills a “purpose of zoning” as set out in N.J.S.A. 40:55D-2.

Here, the 2022 Pierson Application does not satisfy the first two categories of circumstance warranting the grant of a (d)(1) variance because (1) a concrete plant is not an inherently beneficial use like a school, hospital or

public housing facility, and (2) Pierson would suffer no undue hardship if compelled to use the property in conformity with the permitted uses in the Business District. Pierson is currently using the property as an active, albeit non-conforming gravel and sand mining operation that has been in operation for over 50 years and can continue to do so without adding an additional non-conforming use in the nature of a concrete plant. Thus, no ‘undue hardship’ is involved. Instead, Pierson must satisfy the third criterion, requiring a showing that the proposed use would serve the general welfare because the proposed site is particularly suitable for the proposed use and fulfills a purpose of zoning.

“An application for a use variance based on the assertion that a property is particularly suitable for a project requires an evaluation of whether the use, otherwise not permitted in the zone, when authorized for the particular parcel, will promote the general welfare as defined by the MLUL.” Price v. Himeji, 214 N.J. 263, 287 (2013). As our Supreme Court observed in Kramer, supra, 45 N.J. at 290-91, particular suitability in the context of a specific parcel means that strict adherence to the established zoning requirements would be less beneficial to the general welfare.

While the “general welfare” has been generally interpreted as including any of the purposes of zoning contained at N.J.S.A. 40:55D-2, “there must be a finding that the general welfare is served because the use is peculiarly fitted to

the location for which the variance is sought. This is so because nearly all lawful uses of property promote, in greater or lesser degree, the general welfare.” Kohl v. Mayor and Council of Fair Lawn, 50 N.J. 268 (1967) (no showing that the Borough or the surrounding area was dependent upon [the] existing [dairy facility] for its milk supply”, remarking that “[f]or all we know, there may be a number of milk distributors which could supply the territory”). The term general welfare is synonymous with “general societal benefits”, that is “something that is essential to the welfare of the area, Id. at 299, 281, and, as such, “that would fill a need in the general community”, thus making it important to determine both the nature of the use and the existence of any such near-by, identical use. (*see also* Funeral Home Management, Inc., *supra*, 319 N.J. at 211 (absence of any community need for funeral home)).

Thus, properly framed, the issue in this case is whether the public benefit, that is, the general welfare rather than a handful of potential commercial buyers, is served by a redi-mix concrete facility located as a second use on a site across the street from which there is an active, nonconforming batch concrete facility aside from yet another much larger redi-mix concrete plant in the same county a mere 4.3 miles away. Pa383. Adding to the horrors is the fact that the redi-mix facility would join the sand and gravel mining facility which by special ordinance provision is prohibited in every district in the Township.

For additional cases applying the foregoing principles in denying use variance relief, see Medici, supra 107 N.J. (need for “good motel accommodations” insufficient in community that prohibited them even though the site was close to highway and to commercial development and had a unique shape, emphasizing the absence of evidence of inadequate hotel capacity in community); see also Saddle Brooke Realty, LLC, supra, 388 N.J. Super. at 77-78 (use variance denied as special reason for fast food restaurant where use was prohibited in every district, there were already several fast-food restaurants nearby, and use would serve as a mere “convenience” to some customers).

In sum, to justify a special reason based upon particular suitability of the site, a second critical factor that must be established is the existence of some derived public benefit of the use for the community as a whole, measured, in part, by the existence of the same purported public benefit not being fulfilled by any other, especially nearby, similar facility. While the societal benefits need not rise to the level of being an inherently beneficial use, such as a school or hospital, the public benefits must be real, not imaginary, lest the result be that any use—no matter its nature or the number of those benefited—would suffice.

Here, Pierson failed to establish a legitimate public benefit that would result from the operation of a concrete plant at the Pierson Property and instead focused on how much more efficient it would be for its own operations. In his

July 28, 2022 testimony, Pierson’s expert, Brian Murphy, P.P., P.E. testified that there is already a ready-mix concrete plant in the county, Action Supply in Upper Township. Pa443 at T31:4-6. At the hearing, Pierson submitted its “Exhibit A-18”, a Google Maps screenshot showing that the Action Supply ready-mix concrete plant is a mere 4.3 miles from the Pierson Property. Pa383. Mr. Murphy further testified that there is also one transit mix concrete facility in the county, “Fehrle Concrete”, that is located directly across the street from the Pierson Property and makes and delivers concrete to residents in the county on a smaller scale. Id. at T31:10-17. He testified that “[t]he concrete made by the transit mix, the Fehrle, is suitable for much smaller projects, such as concrete walkways, patios, driveway aprons, **something that homeowners and residents could use.** It’s not a bright line that defines a difference between these two plans, but they each have a distinct purpose, but they do overlap in some projects.” Pa443-444 at T32:19-33:2. [emphasis added]. Mr. Murphy further testified that Pierson currently brings concrete into Cape May County from their ready-mix concrete plant located in Vineland. He noted that it is inefficient for Pierson’s trucks to run empty on the way back to Vineland. Pa449 T54:8-25. Multiple times throughout his testimony, he emphasized how much more efficient the Pierson operation would be if the 2022 Application were to be approved. (See Pa446 at T41:16-18; Id. at T44:25; Pa447 at T45:1; Id. at 48:12-

14; Pa449 at T54:20-55:9). However, under the law, as set forth above, efficiency and profitability for the applicant is not the standard.

In his August 24, 2023 findings of fact, Board Chairman Daniel Walsh acknowledged that “[t]here is currently one ready-mix concrete plant in the county, that’s Action Supply in Upper Township. There is also one transit you know, concrete facility in the county, that’s Fehrle Concrete which is directly across the street.” Pa1142 at T21:19-24. However, there was a complete lack of evidence concerning whether there is any need for additional concrete production in the Township. In making his findings of fact, Chairman Walsh merely alluded to a conclusory statement from Pierson’s planning expert that “the business will provide a needed service to the, to the community in this area” [Pa1145 at T:30:5-30:13] and stated that “we did hear testimony from a ‘concrete person’ who indicated the need for that” [Id.] which was an allusion to a brief statement made during public comment by a concrete contractor who is a customer of Pierson’s and not a resident or property owner in the Township. Pa1063 at T52:11-57:5. Such a record is insufficient to establish a public need for additional concrete production that might warrant the grant of a use variance.

Pierson failed to present evidence that there is any need in the Township for additional concrete production or that allowing Pierson to operate a concrete plant at the Pierson Property would in any way serve the general welfare.

Similarly, on Page 19 of Resolution 2023-18, in support of its finding that Pierson proved its burden of special reasons promoting the purposes of zoning, the Board asserts that it will “meet the needs of our citizens since there is a need for additional concrete facilities in Cape May County...” without providing any factual support from the record concerning how it reached that finding. Pa122.

In light of the foregoing, it is respectfully submitted that Pierson failed to satisfy the positive and negative criteria and the trial court erred in finding that the Board’s Decision was supported by adequate factual findings and legal conclusions and was not arbitrary, capricious, and unreasonable.

**III. THE BOARD IMPERMISSIBLY USURPED THE ZONING AUTHORITY OF DENNIS TOWNSHIP’S GOVERNING BODY (Raised Below, PA17-18)**

“[E]ven when a proposed use inherently benefits the general welfare, an applicant still must prove that the variance can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance.” Medical Center at Princeton v. The Township of Princeton Zoning Board of Adjustment, 343 N.J. Super. 177 (App. Div. 2001). The focus of the first criterion of the negative criteria is the effect of the variance on surrounding properties, Yahnel v. Bd. of Adjust. Jamesburg, 79 N.J. Super. 509 (App. Div. 1963). The second addresses whether the grant of relief would constitute an arrogation of governing body authority.

In other words, in order to address whether a proposed use substantially impairs the zone plan and zoning ordinance, a board must reconcile the proposed use with the master plan and ordinance as a safeguard to arrogation, that is, usurpation of governing body legislative authority. Medici, supra, 107 N.J. at 5.

To guard against the zoning board arrogation, our Supreme Court in Medici superimposed upon the “special reasons” criteria the need for an applicant seeking a new unauthorized use to show by “an enhanced quality of proof...that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance...” Id. at 21. Put another way, Medici narrows the discretion of boards of adjustment to grant use variance for uses that have been intentionally and persistently excluded from zoning ordinances by the governing body. It does so by requiring an applicant to “reconcile the proposed use variance with the ordinance’s omission of the use from those permitted in the zoning district” and sets forth examples of how this can be accomplished, such as proof that the character of a community has changed substantially since the adoption of the master plan and zoning ordinance, or that the proposed use, presently common, was uncommon when the ordinances were enacted, or that the exclusion of the use was a mistake rather than intentional. Id. at 23.

In this regard, it is not enough for a board to merely recite in a conclusory manner that the character of the community has changed since the adoption of

the master plan and subject ordinance to demonstrate that the use has been omitted. Instead, it must recite facts from the record explaining what those changes consist of and why they warrant granting a prohibited use. Crucially, as our Supreme Court reminded us in Medici:

**Reconciliation on this basis becomes increasingly difficult when the governing body has been made aware of prior applications for the same use variance but has declined to revise the zoning ordinance.**

Id. at 21-22.<sup>3</sup>

This exact issue was addressed at length during the January 26, 2023 expert testimony of Plaintiff's professional planner, Barbara Woolley-Dillion, P.P., who emphatically testified:

You as a municipality in 1994, there was a pattern of use variances that were granted in this area. And basically, what your 1994 master plan recognized is that by this granting the variances, the character of the area had changed. You could have taken the approach at that point in time 2002, 2009, 2012, at any point in time to amend your ordinance to include this as a permitted use, something that you wanted to see as a municipality. That's not been done. And your master plan is the foundation for your zoning ordinance. So by virtue of the fact that this has remained unchanged for almost 30 years if my math is correct, you've had every opportunity to add this. You've continually re-examined your planning documents, the variances granted, not granted. You as a township have not seen fit to have this use in this area as a permitted use. So I think that speaks volumes for you as a community, and I'm really struggling with the applicant reconciling the fact that for over 30 years now it's not

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<sup>3</sup> N.J.S.A. 40:55D-70.1 requires the board annually to send the planning board and governing body reports on all applications.

been a permitted use. Your ordinances have not been changed to include this as a permitted use. You've held the ground.

Pa807 at T107:13-108:17.

...each time, twice before, the Board has said no. The Board has said that it was not appropriate at that time. And as a matter of fact, all of your planning documents have gotten even stricter and have grown wiser about the environmental conditions around the site. The county has recognized it. The state has recognized it. You as a community have gone for a PA8 instead of even a PA5, and environmentally sensitive planning area going to a parks and conservation area. You actually changed the zoning to that little hat or the little triangular portion to be conservation. So for me, that speaks volumes as a planner that this is your intent with it. And I, I'm just struggling to see how the applicant reconciled it. I do not believe in my opinion as a planner that they have done so for the reasons that I have stated.

Pa808 at T109:3-24.

As our Supreme Court instructed in Medici, "...the conclusory recitation in the board's resolution of approval that 'the applicant has demonstrated that the relief requested can be granted without substantial detriment to the intent and purpose of the Zoning Ordinance' does not constitute the deliberative and specific determination we now require to satisfy the negative criteria." Medici v. BPR Co., 107 N.J., supra, at 26. The Court in Medici found that "[i]n view of the three prior motel variance applications, all of which were granted by the local board of adjustment, it is inconceivable that the governing body was unaware that motel construction, prohibited by the zoning ordinance, was proceeding in the municipality. Nevertheless, the governing body took no action

to amend the zoning ordinance in order to authorize motel construction in any zoning district. In this context, the applicant had the formidable burden of proving that the grant of another use variance for a motel at this site was not inconsistent with the intent and purpose of the zoning ordinance as reflected by the governing body's failure to authorize motels as a permitted use in the zone. No such proof was offered. No such finding was made, or could have been made, by the Board of Adjustment.”

The record in this matter likewise reflects that it is inconceivable that the Township was not aware of the prior applications filed by Pierson seeking to operate a redi-mix concrete plant on its property, in no small part because Pierson filed suit against the Township in 2009 after the denial of the 2007 Application. Nonetheless, and notwithstanding Pierson’s subsequent application in 2011, the Township governing body consistently declined to amend its zoning ordinances to permit concrete plants as a permitted use in any zoning district in the Township. And lest we forget, the current use of the Pierson Property as a mining operation, by special ordinance, is a specifically prohibited use in every zoning district and the Master Plan explicitly discourages such heavy industrial uses. Given these facts, the Board’s decision to grant Pierson’s 2022 Application impermissibly usurped the zoning authority of the Township governing body.

**IV. THE BOARD AND TRIAL COURT ERRED IN FINDING THAT  
PIERSON'S APPLICATION WAS NOT BARRED BY RES JUDICATA  
(Raised Below, Pa12-14)**

Res judicata is applicable to municipal land use boards to prevent applicants from bringing the same application for a use variance twice. Piretti v. Mayor and Council of the Twp. of Bloomfield, 35 N.J. 382, 389 (1961); Russell v. Tenafly Bd. of Adj., 31 N.J. 58, 65 (1959); see also Bray v. Cape May Zoning Bd., 378 N.J. Super. 160 (2005) (applying judicial estoppel to bar the same application from being brought a second time, seven (7) years after the initial application). When an applicant attempts to bring the same application twice, res judicata is applied to bar the subsequent application. Piretti, supra, 35 N.J. at 389. While involvement of the same parties and property is not enough to warrant application of res judicata to bar a second application, if the objector can show that “the second application is substantially similar to the first, both as to the application itself and the circumstances of the property involved,” then res judicata must be applied. Russell, 31 N.J. at 65 (citing Home Builders Ass'n of Northern New Jersey v. Borough of Paramus, 7 N.J. 335, 342 (1951)).

In Piretti, the initial variance application was filed in 1944 and a second one was filed in 1958. In applying res judicata, the Court found both applications were for greater non-conforming industrial use in an intensified residential zone and that the applications of 1944 and 1958 substantially similar.

Piretti, 35 N.J. at 389. Here, substantially the same application has been brought three times by the same applicant concerning the same property seeking the same relief; namely, to add a second non-conforming use – a redi-mix concrete plant – to a pre-existing non-conforming and specifically prohibited mining operation.

In the Board’s Resolution 2023-18, it states that “the Board concluded res judicata was not applicable for the reasons stated by the Applicant’s professionals.” Pa118. Those reasons, are listed in the Resolution at Pa116-119, as follows:

The first reason is “[t]his is a materially different application from those previously filed.” This is merely a conclusory statement.

The second reason is that “Resolution 12-06 denied an application to have more than one use on a property, specifically an existing sand mine, and a proposed redi-mix concrete facility and a Class ‘B’ recycling facility.” However, this fails to account for the fact that the concrete plant and the recycling facility were voted on independently and both were denied. Pa87-88.

The third reason is “the Applicant is only seeking a redi-mix use and no Class “B” recycling facility.” This merely restates the second reason.

The fourth reason is that “the Applicant sought a height variance for 82 feet, while this Application seeks to 52.85 to top of structure and 61.41 feet to top of vent stack – a 25% height variance reduction”. This is a red herring. The

material issue brought before the Board was not the height of the proposed concrete plant, but rather its prohibited use status in the Business zone, and in all zoning districts in the Township. In 2007, the Applicant proposed to build a concrete plant roughly 60' high. In 2011, the Applicant proposed to build a concrete plant 82' high. While the proposed 61.41' height is a reduction from 2011 Application, it is still roughly 75% over the maximum permitted height.

The fifth reason is that “[t]he size of the proposed plant is smaller.” Again, this is a red herring, as the size of the plant is not the central issue, nor was it ever the basis for the Board denying the 2007 and 2011 Applications.

The sixth reason is “[t]he location is significantly different from before as it has been moved away from sensitive environmental areas and away from residential properties and closer to the front of the facility.” However, the proposed location of the concrete plant in the 2022 Application is a mere 400' away from the location proposed in the 2011 Pierson Application. Pa1000 at T115:4-23. That is a *de minimus* change on a site of 165 acres, which is the equivalent of 7 million square feet. *Id.* Moreover, in the 2022 Application, Pierson proposed moving the concrete plant within 200' of a property line, which requires another variance. Thus, this is a situation in which the applicant is seeking even greater relief than previously sought. In such circumstances, under Piretti, supra, 35 N.J. 389, res judicata should be applied.

The seventh reason cited is that “[t]he current application proposes off-site improvements for traffic control. However, in the 2007 Application, Pierson offered to control the flow of traffic off-site and the Board found there was no basis to believe the Applicant’s promise, which it described as illusory and unenforceable. Pa52. With respect to the acceleration-deceleration lane proposed by Pierson, this was a request made by the Cape May County Planning Board after it twice denied Pierson’s application, first on May 25, 2022, and a second time on July 25, 2022. Pa455 at T179:3-19. To Plaintiffs’ knowledge, the County Planning Board has still not approved the application.

The eighth reason cited is “[t]he application includes a commitment to clean the roadway (off site) to control dust.” Again, the Board previously found that any such commitment is both illusory and unenforceable. Pa52.

The ninth reason, both conclusory and unsupported, is that “[t]he area surrounding the Applicant’s parcel has evolved and changed over time.”

The tenth reason is that “[t]he adjacent property known as Walters Marine has significantly expanded to include storing cranes, tractor trailers, and earth moving equipment.” However, this is not a valid reason because the sales, service, and rental of earthmoving equipment is a specifically permitted principal use in the Business District pursuant to Chapter 185-25(B). Pa191.

The eleventh reason cited by the Board is that “[a] local concrete company known as Fehrle is operating a small batch concrete facility across the street in the same zone.” However, Fehrle is not a concrete facility, but rather a masonry facility with land use approvals for outdoor storage of materials, which is permitted use. Pa384-405. The fact that there is already an active masonry business directly across the street from the Pierson Property that can supply concrete to meet the needs of the residents of the Township only serves to reinforce that there is no great public need or public benefit to allowing Pierson to operate a concrete plant. Furthermore, and equally as important, the Herman Fehrle & Sons operation was approved for outdoor storage of masonry materials on November 15, 2001, roughly ten (10) years prior to Pierson’s 2011 Application. Pa384-405. Copies of the Fehrle Planning Board Application materials, the Board Engineer’s review memorandum, and Board Resolution 2001-13 concerning the land use approvals granted to Fehrle in 2001 were entered into evidence as an exhibit by Pierson during the 2022 Application hearings. Pa384-405. There is absolutely no reference to concrete manufacturing in the Application, Review Memorandum, or the Board’s Resolution 2001-13. The application was brought before the Planning Board and not the Zoning Board, as no use variances were sought or granted, only approval for outdoor storage of materials. Moreover, as this approval pre-dates the 2011 Pierson

Application by a decade, there has been no lawful change in the subject zone since the 2011 Application to warrant finding that res judicata does not apply.

The twelfth reason cited is that “[t]he property across the street is a reclaimed portion of a mining operation where the Township approved an industrial park as a part of the mining operation and the industrial park is being occupied by various commercial uses such as the recently approved Klebauer application that proposed a masonry operation with outside storage of masonry items and trucks.” Again, this is not a valid reason to find that res judicata does not apply. To the contrary, the Klebauer masonry operation is a conforming use in the Business District. The fact that the property across the street was a former mining operation that was reclaimed and brought into conformance with the Code is a perfect example of what the zoning ordinance and Master Plan encourage and require. The Klebauer application, review memorandum, and Board Resolution 2022-14 were also entered into evidence by Pierson during the Board’s hearings on the 2022 Application. Pa406-424. The Klebaur application does not seek any use variance. It merely seeks permission to construct a storage/garage building for storage. Board Resolution 2022-14 specifically notes that the storage of materials is a permitted use in the B-Business District.

The thirteenth and final reason cited by the Board for declining to apply res judicata to bar the 2022 application is that “[t]he law has changed favorably

to the Applicant with the Hare decision provided to the Board. Though an unreported case it is persuasive of how this Court views batch concrete plants as accessory uses and supports such findings by Boards of Adjustments. Hare v. Township of Barnegat Planning Bd., 2016 WL 1228847, at \*1 (App.Div.2016).”

First and foremost, this unpublished non-precedential case does not represent a change in the law. It was initially introduced into evidence over objection and without a copy first being provided to Plaintiff’s counsel. More importantly, the Hare decision is easily distinguishable from the Pierson case in several respects. In Hare, the operation of the sand and gravel mine was conditionally permitted use on a renewable three-year term in the subject zone in Barnegat Township. Id. at \*2. Here, the sand and gravel mine is a specifically prohibited use and an existing non-conforming use that is explicitly not renewable by special ordinance and in the process of being phased out entirely. Moreover, the predecessor in title to the owner of the mining operation in Hare previously operated a concrete batch plant in connection with its mining operation, and it was found by the Court that Eastern Concrete had specifically and clearly reserved the right to operate the plant in conjunction with its own mining operations. Id. at \*1. Thus, the Hare decision is entirely inapplicable, does not represent a change in the law, and is not a valid reason for not applying res

judicata. In fact, as set forth below, the Board's reliance on the Hare decision, even if only partial reliance, constitutes fatal and reversible error.

**V. THE TRIAL COURT ERRED IN FINDING THAT THE BOARD'S MISPLACED RELIANCE ON AN UNPUBLISHED LEGAL OPINION WAS NOT REVERSIBLE ERROR. (Raised Below, Pa20)**

In both the 2007 and 2011 Applications, Pierson sought a (d)(1) use variance for a redi-mix concrete plant as being a second principal use. Once again in the 2022 Application, it sought a (d)(1) variance for a second principal use. It was not until late in the proceedings that Pierson contended the concrete plant was an accessory use, relying upon Hare. Pa427-429.

In Hare, a portable batch concrete plant was permitted without variance as accessory to the principal mining operation use because the site contained a pre-existing unabandoned batch concrete plant, being legally nonconforming, and the mining facility itself was a permitted conditional use, unlike here. Id. As such, Hare is not applicable to Pierson's application and is easily distinguishable on the facts and the entirely different zoning schemes involved.

In Resolution 2023-18, the Board specifically grants Pierson a "(d)(1) variance to allow for multiple uses on the property and the addition of a redi-mix concrete facility as an additional use associated with the existing mining operation." There is no mention of any (d)(2) variance in the 2022 Application materials or in the Board's Resolution. However, the Board in Resolution 2023-

18 nonetheless relies upon the Hare decision as constituting a “change in the law” for purposes of its res judicata analysis. Pa118. It also references Hare in support of its Medici analysis under the negative criteria, stating, “[t]he Hare case suggests that such use can be found to be an accessory use to a mining site even though the use is not identified as an accessory use.” Pa121. Finally, the Board admits that “the Board accepted the inclusion and partially relied upon Hare... to grant the Applicant’s relief; albeit the Board would have granted the same relief without reference to Hare... if it is not accepted on appeal.” Pa118. Given that the Hare decision concerns an accessory use and not a second principal use, the fact it was relied upon at all shows that the Board was not applying the correct legal standards and legal analysis, rendering its decision arbitrary, unreasonable, and capricious. The legal framework provides:

“Accessory uses which ... are accessory to a nonconforming principal use can be allowed by way of variance only pursuant to N.J.S. 40:55D-70d[2]” because they constitute an expansion.” [original emphasis] Cox & Koenig, New Jersey Land Use Administration (GANN 2024), sec.38.5 (“Cox”). “When, however, the proposal amounts to either the creation of a new use or material modification of an existing nonconforming use, the application must be considered under the standards for a d(1) variance.” Cox at sec. 33-2.3, citing Saadala v. E. Brunswick Zoning Bd., 412 N.J. Super. 541 (App. Div. 2010). Also see Cox at sec. 33-2 stating “[The] addition of an entirely new non-permitted accessory or additional primary use should require a d(1) variance.”

Moreover, when an applicant has made an unsuccessful prior land use application in which it acknowledged that the newly proposed use (here, a concrete plant) constitutes a second principal use on the site, and where the land use board agreed, both collateral and judicial estoppel bar him from taking a subsequent, different position. *See Bray, supra*, 167 (App. Div. 2005).

**VI. THE TRIAL COURT ERRED IN FINDING THAT THE BOARD'S GRANT OF WAIVERS WAS REASONABLE (Raised Below, Pa20-21)**

As set forth above, Chapter 185-41K of the performance standards governs environmental assessments and provides in subsection (2)(c) that “[a]ll subdivision applications and/or site plan applications shall be accompanied by a complete Environmental Assessment Report including the Environmental Assessment Checklist and required documentation which shall be submitted as a prerequisite to a complete application.” Pa211. Subsection (5) governing environmental assessment waiver provides that “...the Board may, at the request of an applicant, waive the requirement for an Environmental Assessment Report if the appropriate Board finds that sufficient evidence is submitted to support a conclusion that the proposed development will have a negligible environmental impact. However, subpart (c) states, “any site development affecting wetlands and C-1 waters shall not be granted a waiver from these requirements.” *Id.*

Here, there was insufficient information and evidence presented to support a conclusion by the Board that the proposed development will have a negligible

environmental impact. Firstly, it is undisputed that the Pierson Property contains priority wetlands and abuts protected areas of the Cape May National Wildlife Refuge and Great Cedar Swamp. Pa463 at T110:9-112:17. Regarding wetlands, Pierson submitted and relied upon a letter from the NJDEP dated July 18, 2014 containing a wetlands delineation that had expired in 2019. Pa379-381. The letter clearly states that “pursuant to the Freshwater Wetlands Protection Act Rules, you are entitled to rely upon this jurisdictional determination for a period of five years from the date of this letter...” Id. The letter also confirms that the wetlands have been identified as being priority wetlands by the U.S. Environmental Protection Agency. Id. Finally, the letter states that “if the current mining operation on site is abandoned or if a change of use occurs on the site, then the Department reserves the right to claim jurisdiction of wetlands and/or State open waters created by sand mining operations on the property. Id.

Viewed in this context, the Board’s decision to grant Pierson an environmental assessment waiver was arbitrary, capricious, unreasonable, and not based on sufficient evidence. Over the last decade, Cape May County, the National Audubon Society, and U.S. Fish and Wildlife have acquired land around the Pierson Property to preserve this area for conservation purposes. Pa463 at T110:9-112:17. (*see also* Pa382 - Open Space Map of the Township of Dennis). Goal 5 of the 2012 Master Plan emphasizes the need to protect sensitive

environmental areas from inappropriate development. Pa225. Chapter 185-41K of the Township's ordinances requires a complete environmental assessment report "as a prerequisite to a complete application" for all site plan application. Pa211. In light of these facts and the standards in the ordinance and master plan, the trial court erred in finding that the Board's grant of waivers was reasonable.

**CONCLUSION**

For the reasons set forth herein, Appellants respectfully request that the Court reverse both the Board and the trial court.

Respectfully submitted,

**HANKIN PALLADINO WEINTROB  
BELL & LABOV, P.C.**

August 6, 2025

By: /s/ Kevin Balistreri  
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STONE 9, LLC, ROBERT A.	)	APPELLATE DIVISION
CARR, and DEBORAH L. CARR,	)	DOCKET NO. 2377-24
	)	
Plaintiffs-Appellants,	)	
v.	)	<u>On Appeal From:</u>
	)	SUPERIOR COURT OF NEW
	)	JERSEY
PIERSON PLEASANTVILLE, LLC	)	CAPE MAY COUNTY-LAW
d/b/a R.E. PIERSON	)	DIVISION
CONSTRUCTION CO. d/b/a/	)	DOCKET NO. CPM-L-000030-24
R.E. PIERSON MATERIALS;	)	
TOWNSHIP OF DENNIS	)	
CONSOLIDATED LAND USE	)	<u>Sat Below:</u>
BOARD,	)	The Honorable Michael J. Blee,
	)	A.J.S.C.
Defendants-Respondents.	)	

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**BRIEF ON BEHALF OF DEFENDANT-RESPONDENT, PIERSON  
PLEASANTVILLE, LLC d/b/a R.E. PIERSON CONSTRUCTION CO.  
d/b/a R.E. PIERSON MATERIALS**

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**Table of Contents**

**I. PROCEDURAL HISTORY ..... 1**

**II. STATEMENT OF FACTS..... 1**

A. COMPETITOR FUNDING OBJECTOR ..... 1

B. PIERSON AND CITIZEN WITNESSES – GENERAL OVERVIEW.... 1

C. RES JUDICATA ..... 4

D. POSITIVE CRITERIA ..... 8

E. NEGATIVE CRITERIA ..... 10

F. WAIVERS. .... 13

G. BOARD FINDINGS AND RESOLUTION 2023 – 18..... 14

H. THE TRIAL COURT'S MEMORANDUM OF DECISION..... 18

**III. LAW AND ARGUMENT..... 21**

A. STANDARD OF REVIEW (Pa8-12) ..... 21

B. THE BOARD AND THE TRIAL COURT CORRECTLY DETERMINED THE POSITIVE AND NEGATIVE CRITERIA WERE DEMONSTRATED BY PIERSON (Pa0014 - 0020)..... 24

1. POSITIVE CRITERIA d1- USE – GENERAL WELFARE – PARTICULARLY SUITED (Pa0013-Pa0017)..... 24

2. POSITIVE CRITERIA – d1 – USE – MLUL PURPOSES (Pa0013-Pa0017).....	30
3. POSITIVE CRITERIA d6– HEIGHT AND EQUIPMENT WITHIN 200 FEET (Pa0019).....	33
4. NEGATIVE CRITERIA (Pa0017-Pa0019). ....	35
C. THE BOARD PROPERLY REVIEWED THE ISOLATED/ LIMITED IMPACT OF THE VARIANCES AND DID NOT USURP THE AUTHORITY OF TOWNSHIP (Pa17-18).....	40
D. RES JUDICATA WAS DETERMINED NOT TO BE APPLICABLE. (Pa12-14).....	42
E. NEITHER THE BOARD NOR THE TRIAL COURT ERRED IN REVIEWING THE HARE UNPUBLISHED OPINION. (Pa20). ....	46
F. THE WAIVERS GRANTED BY THE BOARD WERE CAREFULLY THOUGHT OUT AND PROPERLY ENTERED. (Pa20-21).....	48
<b>IV CONCLUSION .....</b>	<b>50</b>

## Table of Authorities

### Cases

<u>41 Maple Assocs. v. Common Council of City of Summit</u> , 276 N.J. Super. 613 .....	41
<u>Beirn v. Morris</u> , 14 N.J. 529, 14 N.J. 529 (1954).....	43
<u>Bell Atl.-New Jersey, Inc. v. Riverdale Zoning Bd. of Adjustment</u> , 352 N.J. Super. 407 (A.D.2002). ....	27, 28, 29, 39, 40
<u>Booth v. Bd. of Adjustment of Rockaway Twp.</u> , 50 N.J. 302 (1967).....	47
<u>Burbridge v. Mine Hill Township</u> , 117 N.J. 376 (1990).....	21, 33
<u>Centex Homes v. Township Committee of Mansfield</u> , 372 N.J. Super. 186 (Law Div. 2004) .....	22
<u>Grasso v. Borough of Spring Lake Heights</u> , 375 N.J. Super. 41 (A.D.2004). ....	34, 35
<u>Hare v. Township of Barnegat Planning Bd.</u> , 2016 WL 1228847, at *1 (App.Div.2016). ....	8, 9, 46, 47, 48
<u>Jacoby v. Zoning Bd. of Adjustment of Borough of Englewood Cliffs</u> , 442 N.J. Super. 450 (A. D. 2015). ....	35
<u>Kessler v. Bowker</u> , 174 N.J. Super. ....	33
<u>Kohl v. Mayor &amp; Council of Borough of Fair Lawn</u> , 50 N.J. 268 (1967)...	25, 26
<u>Kramer v. Board of Adjustment, Sea Girt</u> , 45 N.J. 268 (1965).....	21, 22

Mazza v. Bd. of Adjustment of City of Linden, 83 N.J. Super. 494 (App. Div. 1964).....43

Medici v. BPR Co., 107 N.J. 1 (1987).....12, 22, 23, 29, 36, 38

New Brunswick Cellular Tel. Co. v. Twp. of Edison Zoning Bd. of Adjustment, 300 N.J. Super. 456 (Law. Div. 1997).....27

Price v. Himeji, LLC, 214 N.J. 263 (2013). .....26, 27, 31

Russell v. Bd. of Adjustment of Borough of Tenafly, 31 N.J. 58 (1959) .....42, 43, 45

Saddle Brook Realty, LLC v. Twp. of Saddle Brook Zoning Bd. of Adjustment, 388 N.J. Super. 67 (App. Div. 2006),.....25

Shakoor Supermarkets, Inc. v. Old Bridge Tp. Planning Bd., 420 N.J. Super. 193 (App. Div. 2011) .....22

Sica v. Bd. of Adjustment of Twp. of Wall, 127 N.J. 152 .....36

Vidal v. Lisanti Foods, Inc., 292 N.J. Super. 555 .....41

Willoughby v. Plan. Bd. of Twp. of Deptford, 306 N.J. Super. 266.....41

Yahnel v. Bd. of Adjustment of Jamesburg, 79 N.J. Super. 509.....36

**Statutes**

N.J.S.A. 40:55 D-2 .....30

N.J.S.A. 40:55D – 70d .....24, 34, 48

N.J.S.A. 40:55D – 76b .....48

**Rules**

Rule 1:36–3 .....46

## **I. PROCEDURAL HISTORY**

Pierson accepts Plaintiffs' Procedural History.

## **II. STATEMENT OF FACTS**

### **A. COMPETITOR FUNDING OBJECTOR**

Plaintiffs, Stoney 9, LLC, Robert A. Carr and Deborah L. Carr, are having all expenses and attorney fees paid by an affiliate of Action Supply. Pa0784 at T16:16-20 and Pa0785 at T17:12-25. Action supply is a concrete manufacturing facility. Map Pa0383 and Pa0661 at T35:15-22.

The Plaintiffs' brief reflects that a competitor is paying the costs of the litigation when the Plaintiffs' brief is replete with the emotionally charged adjectives; such as, "confiscation" "egregious", and "wholesale sacrifice", Pb1; "terribly" Pb4; "stark" Pb16; "horribles" Pb22; "red herring" Pb32 and 33. Pa0012 at 0013; Pa1148 at T41:14-T42:12.

### **B. PIERSON AND CITIZEN WITNESSES – GENERAL OVERVIEW**

The Site is over 165 acres in size, significantly larger than the 1.5-acre minimum lot size required in the "B" district (approximately 100 times larger). Pa0444 at T34:2-6 and Da001, Da110, Da097, Da125 and Da133.

The fact that entrances, office space, internal roadways, scale house, shop, storage, lighting, etc. all currently exist on this site is an advantage for adding the concrete plant. Pa0444 at T34:13-25 & T35:1-9. The proposed concrete facility will be behind two existing buildings, approximately 400-450

feet away from Ocean View Woodbine Road. Pa0444 at T35:12-15. Existing and proposed internal truck traffic/flow was presented. Pa0444 at T34:13 - T36:13. The site already has frequent truck access, via two entrances. There will be no new entrances. Pa0444 at T34:22-25. There is controlled access through the gate between the office/public parking area and the operational portions of the site, for safety reasons. Pa0444 at T35:9-12.

Existing on the site already are water, sand, and gravel. The fourth component for making concrete is cement, which is brought to the site, for mixing of all of the components in the concrete plant. Pa0444 at T36:20-25.

The Board heard from David Shropshire an expert in the areas of traffic engineering, noise and sound, and visual impacts. Mr. Shropshire prepared reports that were entered into evidence; Da020 Traffic Engineering Assessment dated November 1, 2021; Da073 Sound Level Evaluation dated February 11, 2022; Da081 Visual Impact Assessment dated February 25, 2022; Da131 response to the Board Engineer; and Da154 revised Traffic Engineering Assessment dated August 21, 2007. Pa0591 at T9:16-22.

The traffic to be generated from the proposed concrete plant will have a minimal impact on the adjacent roadways. Pa0592 at T14:19-24; Pa0592 at T15:11-18 and Pa0592 at T16:7-25. In conclusion on the traffic impact, Mr. Shropshire concluded that:

And as a result, I think my perspective from a traffic

perspective would be that there won't be any substantial detriment to the public good with regard to permitting this use. Nor will there be any impairment, substantial impairment to your zoning ordinance or your master plan through the approval of this use. And again, from a traffic perspective, it's just not generating a lot of traffic. Pa0592 at T14:24 – T15:9.

The source sound levels projected to the nearest residential area at the proposed site is anticipated to conform to the state Noise Control Act requirements. Pa0593 at T17:1 - Pa0594 at T22:11.

The visual character of the proposed concrete facility will be consistent with existing visual characteristics when viewed from the roadway and will not be substantially altered by the proposed concrete facility. The existing screen of trees and woods on site will remain in the proposed condition. Pa0594 at T27:12 - T32:16.

Overall, it is anticipated that viewer response to the proposed use will be minimal. Pa0597 at T33:5-25 and T34:1-21. Due to the existing screening of trees, and the visual character of the surrounding area, no further mitigation with respect to visual impact was recommended. Pa0596 at T32:17-22.

The visual character of the area in the vicinity of the site will remain wooded with industrial uses from the perspective of viewers. Pa0597 at T33:16-25 and T34:1-2.

Mr. Bob Todd the operations manager on site, Pa0532 at T74:13-16, testified waste concrete will not be stored on-site and will be relocated to a

recycling facility. Pa0533 at T79:21-T80:3. The facility has a dust control program. “the [concrete] plant itself has a dust collection system on it...” Pa0535 at T87:23 - T88:3. The facility has an onsite water truck utilized to keep dust down and a sweeper to keep the facility clean. The system is effective in keeping dust down. Pa0535 at T88:5-8; Pa0536 at T89:18-20 & Pa0546 at T129:10-20 and Da094.

Planner Tiffany Morrissey confirmed the mining operation is a pre-existing nonconforming use in the B Zone and a portion in C and R Zone. She confirmed that no improvements are proposed in the C or R Zone. Pa0653 at T2:1-9 & Pa0655 at T10:20-25.

Mr. Troiano, a local masonry contractor, testified to the need for an additional concrete plant in Dennis Township and the County; to the importance of competition in the neighborhood and that the neighborhood is “begging” for additional suppliers of concrete. The added plant will help regulate prices. Finally, he testified the closeness of the plant to where the concrete will be used is important due to the limited shelf life of the concrete. Pa1064 at T54:14-17; T54:20-25; T55:12-16; & T55:21-22.

### **C. RES JUDICATA**

The doctrine does not apply for three reasons. This is a different application from the previous one. The area surrounding the site has evolved and

changed over time. The law has changed since the last application. Pa0999 at T112:14-25; Pa1001 at T117:21-T120:1; Pa1004 at T129:15-Pa1005 at T136:10.

The first application, which was approved, proposed a redi-mix concrete plant, class B recycling facility, and an asphalt plant in addition to the existing mining operation. This was agreed to be reheard due to an unknown notice issue. Pa1000 at T113:1-20 and Pa0425.

The second application proposed a concrete plant and recycling facility which was denied. The Board agreed to allow another application. Pa1000 at T113:8-20.

The third application proposed “to have more than one use on a property, specifically an existing sand mine, and a proposed redi-mix concrete facility and a Class “B” recycling facility. Applicant also seeks a height variance where 35 feet is permitted, and 82 feet is proposed.” Question 8, from Pierson application 2012, Pa0063 and Barbra Woolley-Dillon testimony. Pa0798 at T70:19-25 & Pa1000 at T113:16 - T114:9. This application was denied by Resolution 12-06. Pa0076. In the present application on appeal the height variance is different, lower from 82 feet to 52.85 to top of structure and 61.41 feet to top of vent stack. Pa0798 at T70:6-T72:25; Da095 and Da144. Permitted height is 35 feet. Pa0446 at T41:22-T42:6.

The current location of the proposed redi mix plant is 400 feet from the

original location proposed in 2012. Pa1000 at T115:4-12 and Da202. The relocation is a substantial relocation when viewed in comparison to the area of disturbance at the site. Pa1000 at T116:15-18. The plant has shifted to behind a building in addition to the 400 feet. Pa1000 at T116:19-25.

Paragraph d2, Resolution 12-06 states that the applicant anticipates hiring 8 new employees without allocating them to a use. Pa1002 at T124:1-5. The height of the proposed plant has been reduced by 20.5', for a 25 percent reduction in height. Pa1001 at T117:3-11. The present plan presents a mobile plant. The 2012 plan proposed a permanent facility. The present application does not include the class B recycling facility. Pa1001 at T117:12-15.

The first whereas clause where the Board defines its scope of review in Resolution 12-06, the Board describes the combined application. This holds true throughout the testimony and findings of fact by the Board, Pa1002 at T122:2 - T123:19. For example, opposition witness Woolley-Dillon's testimony found at l4 and m4 and summarized "...their relevance to this application" and "...she emphasized that the application if approved..." So, she discusses, and the Board so finds that she discusses the "application" as a unit. There is no separate testimony on the use as a single use and no findings as to a singled-out use on the parcel. The Resolution sites noise and dust as concerns but does not distinguish from the concrete or recycling facility; that is because the Board did

not separate the two and considered them as one application. Pa1002 at T123:11-19. See, n2 where the berm is discussed in conjunction with both recycling and concrete; o2 where the noise impact and need to run the concrete plant at different times than the crusher to keep noise within the limits. Pa1003 at T125:1-23 and j3 where noise is discussed-all 3 uses could not run at the same time. Pa1003 at T126:3-14.

Applicant has agreed to create off site infrastructure and clean the County road off site. Da134; Da136 and Pa0455 at T80:9-T81-9.

The Applicant's expert Planner concluded "...it's my professional opinion that the board can find that there are substantial changes in the application which was submitted." Pa1001 at T117:17-20, Da134 and Da136.

The adjacent construction and marine storage has significantly expanded: Storing cranes, tractor trailers, and earth moving equipment. Fehrle has installed and is operating a small batch concrete facility across the street in the same zone after approval. Da156, Da161, Da169 and Pa0443 at T31:10-17. The property across the street is a reclaimed portion of a mining operation where the Township approved an industrial park as a part of the mining operation and the industrial park is being occupied by various commercial uses such as the recently approved Klebaur application that proposed a masonry operation with outside storage of

masonry items and trucks. Da178, Da186, Da190, Da203 and Da204. The area has changed significantly since the last application and the master plan review of 2012. Pa1001 at T118:2 - T119:25 and T120:8-20.

Finally, the law has changed favorably to applicant with the Hare decision provided to the Board, being a part of the facts used by the Pierson expert Planner to conclude among other facts that the law is evolving. Pa1004 at T129:15 – T136:17; Pa0658 at T23:19 at T24:21 and Pa0427. Hare v. Township of Barnegat Planning Bd., 2016 WL 1228847, at \*1 (App.Div.2016).

#### **D. POSITIVE CRITERIA**

The concrete plant is similar in operation to the sand mine in that it requires access by large trucks and heavy machinery. The existing office and storage facilities can be used by both. While a concrete plant is not specifically permitted in any zoning district, it is logical that it would be included with mining use since so much of the supporting infrastructure can be shared. There are special reasons associated with the redi-mix concrete use that promote the purposes of zoning. Pa0445 at T38:22-25 and T39:1-15.

The Board heard testimony as to applicability of MLUL purposes A, G, H, I, K, and M. Pa0445 at T40:5 – T42:6 and Pa0664 at T11:3 – T12:14.

The Planner provided testimony as to the particular suitability of the site. She testified the use proposed is accessory to the mining operation and directly

related to the mining operation. She confirmed that sand mining customarily has concrete plants associated with them, citing examples - Action Supply with a permanent and temporary concrete batch plant, Tri Borough Sand & Stone sand mine with concrete. Hare a 2016 case was cited. All coming together to the opinion that the law has changed. Pa0656 at T16:21-25 and T17:1-2.

The Planner testified the subject use is proposed in the B District which purpose is to provide locations where business and industrial complexes may be developed. She listed the permitted uses including warehousing etc. Though not specifically listed she opined concrete batch plant is logically a permitted use in the zone. Pa0653 at T3:11 - Pa0654 at T5:14 and Pa0191-0192.

Ms. Morrissey conducted a review of the uses in the area. She testified as to the use across the street being a brewery, cross fit and masonry shop with a small batch concrete plant in operation. She cited to contractor storage yards with large equipment, marine welding etc. She cited to the Cape May County Public Works facility located just up the street and the recent application for a new contractor storage yard literally across Route 550 from the project. She testified all have large equipment associated within and similar to equipment on the site. Pa0653 at T3:3 - Pa0654 at T5:1-6 and Da139.

Ms. Morrissey testified that the B Zone is an appropriate location for the use. This is the only zone that lends itself to this type of use in the Township. The

other commercial zones are village/neighborhood oriented where B is a broader zone allowing more industrial-type uses. Pa0653 at T3:11-Pa0654 at T5:17. The application re-purposes an existing already disturbed area. Pa0657 at T17:18-21.

The Planner testified the site can accommodate a 60 foot plant and reference to Shropshire Visual Study. Pa0657 at T17:22-25 and T18:1-10. The project is similar to cell towers and substations which are also not readily visible from the street. The concrete plant does not create a towering or massing effect from its height and has limited viewing opportunities. P0657 at T18:10-T20:4.

#### **E. NEGATIVE CRITERIA**

The proposed concrete use can easily be accommodated by this site because of the existing mining use and the extraordinary parcel size. The benefits of granting these variances will outweigh any potential negative impacts as a result of adding the concrete plant to this site. Pa0447 at T48:16-25 and Pa0448 at T49:1-11.

Mr. Murphy testified the Master Plan encourages industrial uses in the B District. Three(3) active gravel pits in the Township are within the B district. The operations on-site, existing and proposed, are consistent and compatible with other permitted uses, i.e., product assembly, fabrication, ware housing, distribution, construction yards, boat repair, utilities, landscaping businesses, etc. Pa0456 at T83:1-25. Mr. Murphy's opinion, this use at this location is

proper, reasonable and a benefit to the Community. Pa0456 at T84:1-5.

As to the suitability of the site, the use is customarily located together using the material produced on-site; reduction in truck trips; the site being located on a County truck route; cutting out the middleman; the use is similar to surrounding land uses and permitted land uses; that the site is large and the area of the plant proposal is near existing site improvements; need for no new clearing; use of an already disturbed area; away from the R and C Zones; the plant does not exasperate the noise condition; the end use of the concrete plant provides opportunity to make improved use of the site more consistent with B Zone uses; and that the business will provide a service to the community. Pa0654 at T7:11-Pa0655 at T10:10 and Pa 0656 at T16:15-Pa0657 at T17:18.

Ms. Morrissey testified as to the goals and objectives of the 2012 Master Plan. She cited goal number one to provide for an appropriate variety of land uses responsive to the development potential of Dennis Township. She testified as to the appropriate subparts that are applicable as part of goal one – to provide a mix of residential, commercial, industrial and resort development, open space and conservation districts in appropriate locations; limit the encroachment of noncompatible uses to establish residential neighborhoods; provide that mining establishments adopt long-term reclamation plans to guide land-use and future site development. Pa0224; Pa0656 at T15:10-25 and T16:1-6.

In referring to the goals and objectives of the 2012 Master Plan Ms. Morrissey concluded the site is located in the business zone where business and industrial complexes are encouraged. Finally, as part of the furtherance of the goals and objectives of the Master Plan Ms. Morrissey cited to the proposed use is being located on a disturbed area of the site. Pa0656 at T16:3-12.

In discussing Medici and its requirements Ms. Morrissey testified that concrete is permitted and accepted as already approved in this zone. She testified the use is more akin to the permitted uses. The use at issue that is the nonconforming use is the mining use which is a pre-existing nonconforming use and the new use is a permitted use in the area. Pa0656 at T16:12-25 and Pa0657 at T17:1-9; that the use is customarily associated with mining operations and supports the standard expressed in Medici. Finally, she testified the mine is in a business zone and not conservation or residential zone and therefore the site could be redeveloped and reclaimed in accordance with the permitted uses in the B Zone which as shown in the surrounding area includes uses similar to the industrial park across the street, marine repair etc. Pa0657 at T117:9-21.

In addressing the detriment to the public good Ms. Morrissey cited to the Shropshire reports which demonstrated no substantial impact in those areas. She testified impact to the public good and that the applicant's project fits into the general area and neighborhood. Pa0658 at T21:6-25 and T22:1-16.

**F. WAIVERS.**

Mr. Murphy presented an overview of the Environmental Checklist. There will be no significant adverse impacts as a result of this project. Pa0448 at T51:7-T52:25 and Pa0449 at T53:1-24.

Mr. Lomax's testimony concluded that any environmental impacts on the applicant's parcel will be negligible as a result of the proposed development. In his opinion an environmental assessment should not be required, based upon his own onsite observations and the Environmental Checklist. Pa0991 at T78-Pa0992 at T84:8 and Pa0336.

Mr. Lomax testified the proposed project will have a negligible impact to the Conservation and R10 Zones, Natural Heritage Priority Sites, and the Great Cedar Swamp. Mr. Lomax cited to the 1994 Dennis Township Master Plan which states that an environmental impact statement is recommended for any proposed use adjacent to or within the Conservation Zone. He clarified that the Master Plan does not state that the Master Plan recommends an environmental impact statement for a parcel that is adjacent to a Conservation Zone, only for a **USE** that is adjacent to the Conservation Zone. The proposed use of the concrete facility and washout station is **NOT** adjacent to the Conservation Zone. Pa0992 at T84:9-Pa0993 at T85:1-22, emphasis T85:1-3, Da148, Da150 and Da152.

Mr. Lomax testified the concrete plant is situated 1,870 feet from the

Conservation Zone, 3,020 feet from the R10 Zone. The concrete washout is 1,130 feet from the Conservation Zone. Pa0993 at T86:25 - T87:3 and Da148. Mr. Lomax concluded that there are negligible environmental impacts caused by traffic generated by the proposed concrete plant. Pa0994 at T91:19 – Pa0995 at T93:20 and Pa0995 at T96:6 - Pa0996 at T98:2, Da197, Da198, Da199, Da200 and Da201.

Species located within the Conservation Zone and in proximity to subject site are acclimated to existing traffic conditions. Species cannot make a distinction between trucks transporting sand, trucks transporting concrete, garbage trucks or semi tractor-trailer trucks. Pa0994 at T92:20-25; Pa0995 at T93:20 and T96:6 - Pa0996 at T98:2.

#### **G. BOARD FINDINGS AND RESOLUTION 2023 – 18**

At the conclusion of the extensive hearings the Board made detailed factual findings, principally enunciated by the Chair. Pa1138 - 1152.

Relative to res judicata the Chair states "The applicant has...three professionals that his application is material different from the previous application submitted. First, this is... a different application from the previous file..." "...specifically an existing sand mine, the proposed ready-mix concrete facility and a Class B recycling facility. Here the applicant is only seeking a ready-mix use and no Class B recycling facility." Pa1139 at T7:19-T8:7.

The Chair stated "...the applicant sought a height variance of 82 feet from the initial application. This application is one of 52.85 to the top of the structure and 61.41 feet to the top of the vent stack. The size of the proposed plant is also smaller. The location is significantly different than the initial application was proposed. It has been [moved] away from the sensitive environment areas to almost the front...behind two buildings. The current application proposes other offsite improvements. The application includes a commitment to clean the roadway offsite to control dust." Pa1139 at T8:7-21. "[T]he surrounding area of the applicant's parcel has evolved." Pa1139 at T8:22-24.

The findings expressed by each of the Board Members was accepted by the Board as factual. The Chair confirmed all findings placed on the record were factual determinations by the Board. Pa1141 at T14:1 – 10.

The Chair further placed findings of fact relative to the various experts which were found to be credible. The testimony relative to Pierson professional Brian Murphy was set forth by the Chair. Pa1143 at T21:12 - T23:19. The Chair summarized the testimony of Pierson professional David Shropshire. Pa1143 at T23:20-Pa1144 at PT26:25. He summarized the testimony of Pierson representative Bob Todd. Pa1144 at T27:2 - T28:16. The testimony of Pierson professional Tiffany Morrissey was reviewed by the Chair. Pa1144 at T28:17 – Pa1145 at T29 - T32:25. The Chair summarized the factual testimony of

Pierson professional Peter Lomax. Pa1146 at T33 - T35.

The Chairman found "Ms. Morrissey also testified particularly as to the suitability of the site for the use. There is customarily you know, a concrete plant is customarily located together in using the material produced on site." Pa1145 at T32:10–Pa1146 at T33:6. "Here I believe through the testimony of all of the professionals that the applicants proved its burden of special reasons through promoting this application and promotes four specific purposes of zoning." The specific purposes of zoning the Board found as having been demonstrated by the applicant are reviewed. Pa1146 at T36:11 - Pa1148 at T41:1-3. "The master plan comments and the goals provide room for use in this zone." Pa1147 at T38:5–7.

Member Penrose proposed finding "...that the environmental assessment checklist that was submitted and the testimony heard in reference to that checklist can be basis for granting an exemption from the requirement for an environmental impact statement." Pa1149 at T48:3 – 8.

Member Chambers stated "The plant is going where it belongs basically in Dennis Township. That's a you know, high volume area of trucks so forth all the time and the plant's gonna blend right in there. I you know, I mean, that's where it should be in Dennis Township and nowhere else...I think it'll be a good fit." Pa1150 at T52:4-11. Resolution CLUB 2023-18 carefully reviews the facts that were accepted by the Board and found to be credible and factual by the

Board. Pa0105-Pa0115. After finding the facts the resolution appropriately reviews the facts as found and the decision of the Board. The resolution acknowledges the objectors and the testimony of the objectors. Pa0115- Pa0116.

The standard for review of a res judicata application is set forth in the resolution along with the assertion by the objector as to the applicability of res judicata. Pa0116 - Pa0118. The resolution specifically acknowledges the Board heard the arguments of the opposition by stating "...the Board after hearing the arguments of the Opposition by Stony 9, LLC...". Pa0118. The resolution then goes through the series of findings of fact based upon the testimony and the application of those facts to the determination of the Board. Pa0118 - Pa0124. Finally, the resolution makes 7 specific conditions to the granting of the application sought by the applicant. Pa0124 - Pa0125.

The Board specifically finds "The Applicant established 'special reasons' which is broadly defined and generally includes a project which carries out a purpose of zoning...". Pa0119 at paragraph number 4. The resolution then provides four specific purposes of zoning which are found to be applicable. The Board found the purpose to provide sufficient space, to encourage the location and design of transportation routes, to promote a desirable visual environment and to encourage coordination of the various public and private procedures and activities shaping the development. Pa0120.

In addition to special reasons the resolution specifically finds that the applicant established the negative criteria addressing both substantial detriment to the public good and substantial impairment of the intent of the zone plan. Pa0120 - Pa0121. The resolution finds an enhanced quality of proof by clear and specific findings culminating in a finding that the applicant has demonstrated the site is particularly suited for the use sought. Pa0121 paragraph 6 - Pa0123 paragraph 10.

#### **H. THE TRIAL COURT'S MEMORANDUM OF DECISION**

The Trial Court in a well reasoned, thorough and complete Memorandum of Decision upheld the Board's granting of the variances dismissing all of the Plaintiffs' arguments now raised on appeal. The Court reviewed the appropriate standard of review including the requirement that the applicant demonstrate that the proposed site is particularly suited for the proposed use and on the positive factors demonstrates that there are special reasons for the granting of the variances. The Court further reviewed the res judicata issues and the negative criteria. Pa0002. After reviewing the record in reviewing the Board determination on the application and the issue regarding res judicata the Court opined:

This court finds that there were significant changes from the prior applications. Specifically: (1) the elimination of the asphalt plant, (2) the elimination of the Class B recycling facility, (3) the re-location of the concrete plant to a site much further away from the Conservation zone, (4) the reduction in the size of the concrete plant itself, and (5) the significant height reduction in the concrete plant. The changes in the

surrounding properties and the intensification of those uses, all support the reasonableness of the Board's decision that this Application was not barred by *res judicata*. Pa0013 – Pa0014.

In addressing the positive criteria the Court appropriately noted that "This analysis is an inherently fact specific and site sensitive analysis." Citation omitted. Pa0014 – Pa0015.

The Court approvingly cites the four special reasons set forth in the Board's resolution and determines that "These findings are well supported by the testimony of the Applicant's experts, David R. Shropshire, PE, PP, Brian Murphy, and Tiffany Morrissey, PP, AICP, whose testimony was accepted as credible and truthful by the Board." Pa0015. The Court then reviews and summarizes significant aspects of the testimony.

The Court concludes relative to special reasons "Accordingly, this court finds that the Board's specific findings as to the four (4) purposes of zoning that Pierson's Application promotes, clearly constitutes the 'special reasons' necessary to satisfy the positive criteria for a use variance. Moreover, the Board's findings are adequately supported in the record, found in the testimony of Pierson's experts, whose testimony the Board found to be credible and truthful." Pa0017.

The Court then turned and reviewed the negative criteria. Relative to the public good prong of the negative criteria the Court opined.

...the Board properly found that Pierson satisfied the negative criteria. The Board noted that there will be limited, if any, visual impact on the neighborhood, as testified by Pierson's experts, and deemed as fact by the Board. The Board also found, as testified by Pierson's experts, that there will be limited noise, traffic, and environmental impacts on the neighborhood. Additionally, the Board found that there would be no negative safety impacts to the area, as testified by Pierson's experts and deemed as fact by the Board. This Court finds that the Board provided significant details for their findings on the first prong of the negative criteria by showing the variance's effect on the surrounding properties. Citations to the Board Resolution omitted. Pa0018.

Relative to the use variances the Court reviewed the impact of the variances on the master plan and zoning ordinance. The Court properly recited being that the municipality's omission of a concrete plan as a permitted use in the B Business District must be reconciled with the granting of the variance. To that end the Court cited the expert testimony of Pierson Planner where and after such review the Court found:

...that the Board accurately found that the second prong of the negative criteria was met based upon the following: (1) the purpose of the B-Business District is to provide locations within the Township or businesses and industrial complexes may be developed; (2) the proposed use is more akin to the permitted uses in the zone as testified by Ms. Morrissey and accepted as fact by the Board; (3) a similar use is located and permitted in this zone and is just across the road from the property; and (4) these factual findings reconcile the proposed use with the zoning ordinance despite not specifically listing the use as a permitted one. Consequently, the Board sufficiently found that granting the variances would not be inconsistent with the intent and purpose of the Master Plan and zoning ordinance. Pa0019.

Finally, the Court found that the use and height variances, the subsumed c(2) variance, and the waivers were all properly granted, supported by ample evidence in the record. Pa0020.

### III. LAW AND ARGUMENT

#### A. STANDARD OF REVIEW (Pa8-12)

The Board acted on the record before it and their own appreciation of the local environment. The Board's decision is not to be lightly disturbed and should not be disturbed here. Substantial evidence in the record supports the Board's decision that the variances and waivers requested align with the character of the neighborhood and are supported by the record.

The standard of review to be undertaken by the Court is whether the Board followed the statutory guidelines and properly exercised its discretion. Burbridge v. Mine Hill Township, 117 N.J. 376, 385 (1990). As recognized by the Supreme Court of New Jersey, "the record made before the [Zoning] Board is the record upon which the correctness of the Board's action must be determined, and the receipt of testimony before the Superior Court is no substitute for this requirement." Kramer v. Board of Adjustment, Sea Girt, 45 N.J. 268, 289 (1965). In other words, "[T]he record below is controlling and the municipal agency's decision should be sustained if supported by substantial credible evidence in the record." Centex Homes v. Township Committee of

Mansfield, 372 N.J. Super. 186, 196 (Law Div. 2004).

In fact, absent a showing of a clear abuse of discretion, this Court "must not substitute its own judgment for that of the board, even if it questions the *wisdom* of the action." Shakoor Supermarkets, Inc. v. Old Bridge Tp. Planning Bd., 420 N.J. Super. 193, 200 (App. Div. 2011).

Moreover, upon reviewing the actions of the board with respect to any factual dispute (if any), courts should not substitute their judgment for that of the board - even if the board's judgment appears unwise - unless a clear abuse of discretion exists or there is insufficient evidence to support such actions.

Kramer, 45 N.J. at 296.

While Pierson is loath to recount the testimony of this Application in the prior pages of this brief, it was not done to waste the Court's time but rather to demonstrate the time, effort, and care the Board engaged in as the trier of fact before coming to its determination. That care was memorialized in the Board's exhaustive 23 page Resolution containing detailed findings of facts and conclusions of law to explain the basis of the relief that was granted. These findings and conclusions were based upon an extensive factual record developed over the course of 11 hearing dates. In contrast to these proceedings, the "seminal" Medici decision involved a factual record developed at a single hearing by four (4) witnesses presented by

the applicant with no opposition testimony, and the Supreme Court characterized the record as containing "perfunctory proof and conclusory findings". Medici v. BPR Co., 107 N.J. 1, 6 and 22 (1987).

Simply stated, Plaintiffs are asking the Court to ignore the detailed Resolution, and substitute its judgment for that of the Board in disregard of long established principles governing the scope of judicial review.

While there is case law, cited by Plaintiffs, that suggest that Courts review determinations granting variances with a keener eye, that line of cases does not stand for the proposition that the reviewing Court ignore a board's decision and substitute its own - as urged by Plaintiffs. Rather, reviewing Courts need to study the record to ensure that the findings and determinations are not simply based on the whims of a board. The Plaintiffs' arguments are devoid of any merit as the Resolution is based upon substantial testimony in support of the requested relief, and this Court, standing as a court of appeals, is required to give substantial deference to the Board's determinations. The Plaintiffs urging of this Court to accept the testimony of its planner, where the Board did not, undermines the Board factual determinations. Pb28-29.

The only issue is whether on the record before it the Zoning Board could

have reasonably reached their decision. Here, the Zoning Board accepted the testimony of the experts for Applicant Pierson as well as their own individual experience and knowledge of the character of the neighborhood as the basis for the ultimate conclusion they reached. The Zoning Board weighed the evidence in the case and came to a particular conclusion contrary to the Plaintiffs' position, but they clearly weighed the evidence. Pa1143 at T21:2 - Pa1151 at T53:15.

**B. THE BOARD AND THE TRIAL COURT CORRECTLY DETERMINED THE POSITIVE AND NEGATIVE CRITERIA WERE DEMONSTRATED BY PIERSON (Pa0014 - 0020).**

**1. POSITIVE CRITERIA d1- USE – GENERAL WELFARE – PARTICULARLY SUITED (Pa0013-Pa0017).**

Relative to the use variance the Board made specific findings as to the "particularly suitable" for the use and found that the use, redi mix concrete facility located at a mining extraction site, is a more suitable location for the use than any other location in Dennis Township Commercial District or any other district. The expert Planner's testimony of Tiffany Morrissey and Brian Murphy supports that conclusion. The Trial Court correctly upheld the Board's findings and determination.

It is the long-standing policy of the State of New Jersey that a board of adjustment has authority to grant a variance and permit the nonconforming use of zoned property pursuant to N.J.S.A. 40:55D – 70d, which confers on the board

the power, "in particular cases and for special reasons," to:

Grant a variance to allow departure from regulations pursuant to Article 8 of this Act to permit: (1) a use or principal structure in a district restricted against such use or principal structure,... A variance under this subsection shall be granted only by the affirmative vote of at least 5 members, in the case of a municipal board...

The statutory section sets forth certain negative criteria as follows:

No variance or other relief can be granted under the terms of this section unless such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance.

The statute makes clear that before a board of adjustment may grant a variance, it must make two critical findings. First, that "special reasons" exist for the variance, and second that the variance "can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance." See, Kohl v. Mayor & Council of Borough of Fair Lawn, 50 N.J. 268, 276 (1967).

Special reasons can be found in three categories of circumstances, first where the proposed use inherently serves the public good, second, where the property owner would suffer "undue hardship" if compelled to use the property in conformity with the permitted uses in the zone, and third, where the use would serve the general welfare because "the proposed site is particularly suitable for the proposed use." Saddle Brook Realty, LLC v. Twp. of Saddle Brook Zoning Bd. of Adjustment, 388 N.J. Super. 67 (App. Div. 2006), cites omitted.

"There must be a finding that the general welfare is served because the use is peculiarly fitted to the particular location for which the variance is sought." Kohl, 50 N.J. at 279. This analysis is an inherently fact specific and site sensitive analysis. It does not require proof that there is no other potential location for the use nor does it demand evidence that the project "must" be built in a particular location. "Rather, it is an inquiry into whether the property is particularly suited for the proposed purpose, in the sense that it is especially well-suited for the use, in spite of the fact that the use is not permitted in the zone. Most often, whether the proposal meets the test will depend on the adequacy of the record compiled before the zoning board and the sufficiency of the board's explanation of the reasons on which its decision to grant or deny the application for a use variance is based." Price v. Himeji, LLC, 214 N.J. 263, 292-293 (2013).

The position of the applicant is, and the Board found, that this site is particularly well-suited for the redi mix concrete facility because of its large size, location, highway access, and the various industrial uses generally in the area, including manufacturing of concrete products and storing of concrete products. Further, the site has a history of use for the extraction of raw materials that are specifically necessary and used in the manufacture of concrete. The general welfare is served by providing a location for concrete manufacture. The Board Resolution 2023–18 is specific and detailed in its findings.

The Board is authorized to make factual findings based on the evidence in the record. "So long as there is substantial evidence in the record, the court may not interfere with or overturn the factual findings of a municipal board." New Brunswick Cellular Tel. Co. v. Twp. of Edison Zoning Bd. of Adjustment, 300 N.J. Super. 456, 465 (Law. Div. 1997), Price Supra, 214 N.J. at 301-302.

In a case similar to the applicant's application, an applicant was allowed to build a parking lot for employee parking next to the applicant's office, despite the fact that parking lots are prohibited in the zone because the site is particularly suited for a parking lot due to the fact that adequate space is not conveniently available elsewhere and the lot where the parking lot is placed had previously been a gas station, an existing nonconforming use. See Bell Atl.-New Jersey, Inc. v. Riverdale Zoning Bd. of Adjustment, 352 N.J. Super. 407 (A.D.2002).

In that case Bell Atlantic operated an installation and maintenance work center and garage as a pre-existing nonconforming use in a professional office zone. It was surrounded by a gas station, an armory, an electric service substation, and a rail line. Bell Atlantic sought a use variance to place employee parking on the property of the nonconforming gas station. The trial court applying the enhanced standard reversed the board's denial of the use variance and remanded the matter for approval of the use variance under appropriate conditions. The Appellate Court affirmed the trial court's decision. Bell Atlantic

– New Jersey, 352 N.J. Super at 408 – 409.

The Appellate Court specifically declined to view Bell Atlantic as an inherently beneficial use "since we agree with Judge Stanton that Verizon has met the more rigorous burden of establishing adequate special reasons for its proposed use." The Appellate Court opined "although we do not doubt that telecommunications explosion has resulted in an increase in profits to Verizon, we regard as erroneous the board's sole focus on this result as a ground for denying the requested variance the increase in employees at the Riverdale facility resulted from public need as well as a profit motive." Bell Atlantic – New Jersey, 352 N.J. Super at 411 – 412.

The Plaintiffs' main focus has been the profit-making motive of the applicant referencing it in the brief as postulating what is good for Pierson and not the community. However, this argument belies the facts in the case and the substantial record before the Court which demonstrates the general welfare and the need for a local facility that can accommodate the needs of the local area.

"[T]he space for the additional 40 cars existed on adjoining property that already was being used for nonconforming commercial purposes, and was not conveniently available elsewhere. The proposed site had previously been improved by a gravel surfacing, perimeter fencing, and border planting. The use of portions of the site for parking was not inconsistent with the permitted

nonconforming use of the site as a gas station, since such stations commonly store cars awaiting repair." Bell Atlantic, 352 N.J. Super at 412. Similarly, the use of the redi mix facility is not inconsistent with the permitted nonconforming use of extraction of sand.

The commitment by the Applicant to recycle all waste material generated by the facility further supports the general welfare. Pa0553 at T78:10-T79:25.

The public witnesses, those not paid by the local competitor, supported the need for the facility and the benefit to the general welfare of the community. Pa1064 at T54:14-T55:22.

The Plaintiffs take a narrow view of particular suitability and of the public benefit afforded by the proposed application. The court is not limited to such a narrow view and should look at the totality of the application in conjunction with the findings of the Board. The general welfare, through the engineer, planner, noise, dust and environmental experts is addressed and accepted by the Board and found by the Trial Court to be appropriate.

As noted in Medici, "any benefit to the general welfare [must] derive not from the use itself but from the development of a site in the community that is particularly appropriate for that very enterprise." Medici, 107 N.J. at 18. There is ample evidence in the record that supports a finding that the coupling of a redi mix concrete plant with an existing sand mine extraction facility is a particularly

appropriate site for the intended use.

The Board cites the direct access to a county truck route as the site being particularly suited in its location.

The plant will be placed in an already disturbed area and will not impact conservation areas or residential areas as noted by the expert testimony this also is a use that promotes the general welfare. There is ample evidence that the proposed additional use is similar to existing and surrounding uses. It fits the character of the neighborhood and will not substantially impact the neighborhood at the same time providing a needed service to the Township.

In summary, special reasons can be shown through demonstrating that no adequate space is available elsewhere in the Township, which it is submitted applicant has shown, and also where the area to be utilized previously housed a use that was and is compatible, which this particular site is. Finally, the general welfare is addressed by the citizen witness, engineer, and Planner for Pierson.

**2. POSITIVE CRITERIA – d1 – USE – MLUL PURPOSES  
(Pa0013-Pa0017).**

The Board found that four specific purposes of zoning as contained in the Municipal Land Use Law (MLUL) were found as having been met by the applicant's application. The Board found that N.J.S.A. 40:55 D-2 purposes G, H, I, and M are met by the applicant. See Resolution 2023–18 number 9, A, B, C, and D, page 19 and 20. Pa0122 and Pa0123.

"To promote sufficient space in appropriate locations for a variety of ... commercial and industrial uses and open space", the Board specifically found "there is a need for additional concrete facilities in Cape May County and the ability of this site to cater to that need." Pa0122, 9a. To satisfy criteria G, the applicant does not need to show there is no other potential location for the type of plant. See, Price, 214 N.J. at 293 ("demonstrating that a property is particularly suitable for a use does not require proof that there is no other potential location for the use nor does it demand evidence that the project 'must' be built in a particular location").

In the present case, the Board made the specific finding that there was a specific need for the type of activity sought to be allowed. The applicant proposes to reuse existing and disturbed areas without creating any additional impervious surface area and operating the plant according to the highest environmental standards, providing both industrial use and continuing to maintain open space on the very large 165 acre site. This revitalization of a portion of the site that is being used simply as storage would provide the precise kind of space in an appropriate location, in this case for commercial and industrial uses and preserve open space as contemplated in subpart G of the MLUL.

The Board made specific findings as to subpart H of the criteria in the

MLUL. H provides for the promotion of the free flow of traffic while discouraging congestion and blight. There is the testimony of the Pierson Engineer as well as the traffic consultant with traffic studies, which the Board accepted as credible. There are no countervailing traffic studies in contravention of the traffic study. The Board found that the site is located on a major truck route in the County, the applicant's experts addressed the limited impact on the access road and the access road is being enhanced to make the site even more safe. The Resolution also makes reference to the double use of trucks which will be loaded both ways coming in and off the site minimizing traffic flow onto the county highway by heavy trucks and through the Township.

The Board found criteria M, to promote more efficient use of land, was met by the applicant. The basis of this finding is that much of the raw material to operate the plant is being extracted from the site, uses already disturbed area of land, uses existing access points of the county truck route, and is distant from residential and conservation areas.

Finally, the Board found that purpose I, to promote a desirable visual environment was found. The Board based this determination on the facts before it specifically finding that the design reuses existing disturbed area, uses resources already on-site, uses existing trees, structures and distance from the street to hide the plant, uses the expansion of an acceleration/deceleration lane

to improve access to the site and movement of trucks around the area, which does not currently exist.

A zoning board may consider aesthetics with respect to a use variance. See, Burbridge, supra at 392. There is ample evidence in the record to support that the applicant will beautify the site through the creation of the acceleration/deceleration lanes, passing lane, off-site maintenance of the street by sweeping it periodically, creatively using existing infrastructure such as trees and structures to hide the concrete plant and by moving the concrete plant away from the residential properties in which it was originally proposed.

It is long standing in New Jersey that the beautifying of an area in the context of an application could be deemed a special reason justifying a variance to expand the nonconforming use. Kessler v. Bowker, 174 N.J. Super. 478, 486 (App. Div. 1979), cert. denied, 85 NJ 99 (1980).

**3. POSITIVE CRITERIA d6– HEIGHT AND EQUIPMENT WITHIN 200 FEET (Pa0019).**

The applicant has met the burden imposed under the Municipal Land Use Law for the granting of the height variance and granting of the allowance of equipment within 200 feet of the property line variance, if same is not subsumed by the grant of the use variance. Much of the argument submitted in the foregoing section specifically also applies to the height variance and the equipment variance. The particular zone allows for additional height under

certain circumstances. For example, wind turbines are permitted to exceed the height restraints. Dennis Township Code, 185-73D(22)(e)[1][c], height in commercial zone not to exceed 150 feet. Da205. There exists a multitude of structures in the zone exceeding the height requirement in proximity to the subject parcel. The height is shielded from sightlines off-site by existing trees, berms, and structures.

The analysis starts with N.J.S.A. 40:55D – 70d, which confers on the board the power, "in particular cases and for special reasons," to:

Grant a variance to allow departure from regulations pursuant to Article 8 of this Act to permit: (6) a height of a principal structure which exceeds by 10 feet or 10% the maximum height permitted in the district for a principal structure. ...a variance under this section shall be granted only by the affirmative vote of at least 5 members, in the case of a municipal board ...

"[T]he special reasons necessary to establish a height variance must be tailored to the purpose for imposing height restrictions in the zoning ordinance.” Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41, 52 (A.D.2004).

In the present case the maximum permitted height is 35 feet. Applicant proposes a height of 52.85 feet to the top of the concrete redi mix structure and 61.41 feet to the top of the vent stack.

Generally speaking a height variance requires a showing that the increased height of the structure does not offend the purpose of the height restriction. The court in Grasso, Id, characterized as being primarily focused on density and light

and air concerns. Grasso, supra at 52-53. In that case the parties were dealing with height controls in the residential zones.

The subject property is located in a commercial district. The record is replete with testimony that the added height will not adversely affect density or light and air in and around the area particularly given the huge size of the applicant's property. Further, the facility will be hidden from the road and other viewpoints by trees, other structures, and natural topography. Pa0446 at T43:1-Pa0448-T49:11.

The testimony in the record not only addressed the immediate concern but also addressed the entire general area in which the stack would be located. The testimony pointed out various other structures that exceed the height as an example, wind turbines, electrical towers, cranes and other tall pieces of equipment on site and on other sites. See, Jacoby v. Zoning Bd. of Adjustment of Borough of Englewood Cliffs, 442 N.J. Super. 450, 459-461 (A. D. 2015).

The applicant has met the burden of proof of demonstrating that the granting of equipment within 200' of the property line variance was an appropriate action by the Board. The area where the equipment is sought to be placed is further away from residential areas adjacent to the applicant's parcel and is adjacent to an Atlantic City Electric electrical field for high tension wires.

#### **4. NEGATIVE CRITERIA (Pa0017-Pa0019).**

There is no substantial impairment of the Dennis Township Zoning Ordinance and Zoning Plan or Master Plan and there is no substantial detriment to the public good in the granting of the variances sought by the applicant.

The key word in both criteria is “substantially”. As stated in Yahnel v.

Jamesburg, the word substantially:

...comes from the statute itself. Obviously, any permission for a nonresidential use in a residential zone may have some tendency to impair residential character, utility or value. But the statutory rationale of the function of the board of adjustment is that its determinations that there are special reasons for a grant of variance and no substantial detriment to the public good or impairment of the zone plan, etc. in such grant represent a discretionary weighing function by the board wherein the zoning benefits from the variance are balanced against the zoning harms. If on adequate proofs the board without arbitrariness concludes that the harms, if any, are not substantial, and impliedly determines that the benefits preponderate, the variance stands.

Yahnel v. Bd. of Adjustment of Jamesburg, 79 N.J. Super. 509, 519, (App. Div. 1963); see also Medici, supra, N.J. at 22 FN12 and Sica v. Bd. of Adjustment of Twp. of Wall, 127 N.J. 152, 163-4, 165 (1992).

In addressing the negative criteria/Medici Standard reconciling the proposed use with the zoning ordinance omission of the specific use, concrete batch plant, from the stated permitted uses in the zone one must keep in mind the specific non-permitted use is the mining operation. The concrete batch plant is not a stated non-permitted use.

The analysis starts with the B Business Zone where the purpose of the Zone is specifically stated, "...the business district is to provide locations within the Township where business industrial complexes may be developed." In interpreting this language as to what is permitted in the zone the Board has recognized and approved the small batch plant at the Fehrle site without requiring variance for that use. Further, there is an existing mining operation also directly across the street in the business district where an industrial park was approved and is being developed with a myriad of uses contained in the industrial/mining site. Pa0191 – Purpose B-Business District. Da156, Da161, Da169, Da178, Da186, Da190, Da203 and Da204. So, the type of uses similar to or the same as the concrete batch plant proposed have been permitted on nearby sites in the business zone.

The Master Plan in effect at the time of the hearing, is the exam of 2012. That exam does talk about the business area. The business area includes existing commercial, and business uses outside of the proposed centers. Ms. Morrissey testified that the subject property is located in the primary business district which permitted uses include office, local services, retail, automobile, repair shops, warehousing, product assembly and fabrication, and other similar uses. The Master Plan acknowledges that the business zone itself only accounts for approximately 1.1% of the total land area within the Township. So as opined by

the Planner there is not a lot of land area available for business type uses. Pa0656 at T13:20 - T16:12.

In reconciling the Master Plan with the proposed use it is respectfully submitted that the goals cited by the Planner in the 2012 Master Plan are applicable.

goal number one – to provide for appropriate variety of land uses responsive to the development potential of Dennis Township.

- provide for a mix of residential, commercial, industrial and resort development, open space and conservation districts in appropriate locations.
- limit the encroachment of noncompatible uses and to establish residential neighborhoods, such as sand extraction operations and heavy industrial type uses.
- provide that mining establishments adopt long-term reclamation plans to guide land use and future site development. Pa0224.

As Ms. Morrissey testified "this property is a mining operation in your business zone which is encouraging business industrial complexes for development. It is not encroaching into any residential neighborhood, and it is providing an opportunity for the use that we're proposing to be more consistent with the permitted uses in the business district advancing those purposes in your master plan. Additionally, when we look at this operation and under the Medici Standard... concrete operations are permitted and expected because they have already been approved and are located within the business zone." Pa0656 at T16:3-21.

Ms. Morrissey went on to testify "the standard is that this is really more akin to those uses that are permitted. ...[it] is the mining operation which is nonconforming use, but that what we are proposing is more consistent with those permitted uses ...". Pa0657 at T17:2-18.

In terms of the impact on the zoning ordinance itself, the development is located in an area that is already disturbed on the property and is not impacting additional properties or the greater neighborhood.

Further, the 2012 Master Plan under historic development patterns recognizes the lack of developable land in the Township. "Nonresidential (commercial and industrial) uses increased in land coverage by more than 30% in 16 years but still make up a minuscule portion (less than 1%) of the Township." Pa0244.

In combining the above with Ms. Morrissey's testimony that the logical place for this development is the business district, combined with the stated goals of the Master Plan and the recognition of a minuscule area for the type of development it is plain to see even without specifically citing to this use the Master Plan contemplates the use in the business district.

The Bell Atlantic case supports the planner's opinion. The court opined: We find that the negative criteria have been met as well. We note in this regard that none of Verizon's immediate neighbors use their property in a manner that conforms to the zoning plan. Therefore, the character of the neighborhood,

established through Riverdale's zoning ordinances, is not detrimentally impacted by Verizon's proposed use, as it might be if the non-conforming facility were to be built anew in a professional office zone or if expansion of parking onto a professional office site were to occur. The public good simply is not affected by this use. Further, as previously noted, the much-needed occupancy of portions of the proposed site by the private vehicles of Verizon employees, thoroughly screened from view, differs little from occupancy by private gas station customers. As a consequence, the proposed change in use of a portion of the already non-conforming gas station property not only has negligible impact on its surroundings, it has little effect on municipal zoning. The mere fact that two non-conforming uses of the gas station property will exist if the variance is granted is insufficient to warrant denial of Verizon's request. *See, e.g.*, each recognizing the existence of two non-conforming uses on property at issue. The Court noted that the courts have in the past recognized the existence of two nonconforming uses on a property. Bell Atlantic, 352 N.J. Super at 413. Cites omitted.

It is respectfully submitted that any issues raised by the Plaintiffs as to subsidiary issues involving the property can be and were handled by the board in the utilization of its powers to impose conditions on the granting of the variance and therefore any negative effects of the expansion are substantially lessened. *Id.* at 415.

**C. THE BOARD PROPERLY REVIEWED THE ISOLATED-LIMITED IMPACT OF THE VARIANCES AND DID NOT USURP THE AUTHORITY OF TOWNSHIP (Pa17-18).**

Plaintiffs attempt to make an argument that the decision of the Board improperly usurped the role of the Governing Body and in effect amended the Land Use Ordinance by variance. This is simply not the case. This is an isolated

case of single significance in a particular zone of which there are many zones in the Township. The granting of a reasonable variance seeking a reasonable change to the conditions of an ordinance to allow for the added use similar to permitted uses to an existing use is not an arrogation of the authority of the Council to properly zone.

An example of rezoned variance can be found in the case of Vidal v. Lisanti Foods, Inc., 292 N.J. Super. 555 (App. Div. 1996). In that case variance was granted permitting retail sales outlets in nearly the entirety of two zones and was determined to be improper rezoning. Another example is Willoughby v. Plan. Bd. of Twp. of Deptford, 306 N.J. Super. 266, 279 (App. Div. 1997) where the Appellate Division suggested in the strongest terms possible that because of the statutory provision protecting site plan approval from ordinance change, approval of site plan while an ordinance change making the use impermissible was pending amounted to usurpation of governing body authority. None of these circumstances exist in the present case.

The present case is more aligned with 41 Maple Assocs. v. Common Council of City of Summit, 276 N.J. Super. 613 (App. Div. 1994). In that case a variance was granted to expand buildings in the downtown area and to relieve parking requirements. Those variances did not amount to a rezoning and were permitted to move forward. In the present case, there is no such overreaching or

over controlling action by the Board. The request of the applicant and decision of the Board is narrowly tailored to a specific property in the zone.

To counter these reasonable assertions, Plaintiffs argue that the Board lost its authority to review and grant a use variance since the Governing Body did not take action. Such a degrading of the Board's statutory authority is not supported by case law or the MLUL and should be rejected, particularly where the ordinance is broad enough to allow inclusion of the proposed use.

**D. RES JUDICATA WAS DETERMINED NOT TO BE APPLICABLE. (Pa12-14).**

The doctrine does not apply for three broad categories of reason. First, this is a different application from those previously filed. Second, the area surrounding the applicant's parcel has evolved and changed over time. Third, the law has changed since originally placed before the Board.

The laudable goal of res judicata is to prevent the same claims involving the same parties from repeatedly being filed and brought before the Court and the doctrine has been found to apply to zoning applications as well as court cases. Russell v. Bd. of Adjustment of Borough of Tenafly, 31 N.J. 58 (1959).

Even where an application is "closely similar" to a prior application, if the applicant demonstrates changed circumstances, "it is within the discretion of the Board whether to reject the application on the ground of res judicata, and the exercise of that discretion may not be overturned on appeal in the absence of a

showing of unreasonableness.” Mazza v. Bd. of Adjustment of City of Linden, 83 N.J. Super. 494, 496 (App. Div. 1964).

The obligation of the Board of Adjustment on a second application for a variance concerning the same property is “whether there has occurred a sufficient change in the application itself or in the conditions surrounding the property to warrant entertainment of the application.” Russell, 31 N.J. at 66.

The requirement regarding res judicata is to be liberally construed in favor of the Applicant in order to provide with the purposes of the Board of Adjustment and to provide the necessary flexibility to the zoning ordinance. See Russell, 31 N.J. at 66 and 67.

The finding of the zoning board of adjustment is dispositive and may be overturned the same as for any other decision made by a board only if it is shown to be unreasonable, arbitrary, or capricious. See Beirn v. Morris, 14 N.J. 529, 537–538 (1954).

Applying the law noted above to the instant case, it is respectfully submitted that there is no basis to overturn the Board's decision that res judicata does not apply. In looking at the previous applications it is abundantly clear that the relief sought is different in the present application than the prior applications. One need look no further than the resolutions. In the original application 07–06, Applicant sought an asphalt plant, Class “B” recycling and a central mix

concrete plant which was approved by the Board but vacated due to an error in notice provided to the public. Pa0425. The second application Resolution 08–20 requested a concrete plant, 65 feet in height and a Class “B” recycling facility. Pa0042.

Resolution 12–06 wherein the Resolution makes clear that the Applicant is seeking a concrete plant, 82 feet in height, and a Class “B” recycling plant. Pa0076. On the application relative to the 12-06 Resolution, question 8, on the application, Applicant is requesting, "request is made for permission to have more than one use on a property, specifically an existing sand mine, and a proposed redi mix concrete facility and a Class "B" recycling facility, applicant also seeks a height variance where 35 feet is permitted and 82 feet is proposed." Pa0063.

The first whereas clause where the Board defines its scope of review in Resolution 12-06, the Board describes the combined application and does not state the Board will consider one facility separate from the other. Pa1002 at T122:2 – T123:4. This holds true throughout the testimony and findings of fact by the Board. Pa1002 at T123:5-9. For example, Ms. Woolley-Dillon’s testimony at the prior hearing is summarized found at l4 and m4 and summarized “...their relevance to this application” and “...she emphasized that the application if approved...” So, she discusses, and the Board so finds that she

discusses the “application” as a unit. Pa0085. There is no separate testimony on the use as a single use and no findings as to a singled-out use on the parcel. The Resolution sites noise and dust as concerns but does not distinguish from the concrete or recycling facility; that is because the Board did not separate the two and considered them as one application. A fair reading of the Resolution one comes to the conclusion this was one single application considered by the Board and no separate relief was sought, evidenced, or considered by the Board. Pa0076 and Pa1002 at T123:11-19. Other examples of combined findings of fact are noted in the Statement of Facts.

A common sense reading of the requested relief by the Applicant makes abundantly clear that the application presently before the Board and the Court is different than the requested relief in the prior applications.

The proposed use at a minimum is a reduced use and not the same intensity of use requested in prior applications. The Board understood this and found it to be in their findings of fact. Pa0116-Pa0117.

The height is reduced by 25%. In Russell the Court found that a board did not abuse its discretion in considering a second application on its merits where the application provided for an increase of 5 feet in the proposed setback, which amounted to a 20% benefit in the increase and the total area to be occupied by the dwelling had been decreased from 18% to 12%. Russell, 31 N.J. at 67.

The location of the concrete plant has changed.

The current application proposes off-site improvements to the County road for acceleration and deceleration lanes as well as a passing lane versus no County road improvements on the previous application. Pa0455 at T79:3-25 and T80:1-25. It also includes a commitment to clean the roadway to control dust which again was not part of the earlier application. Pa0458 at T91:20-T92:5.

The Plaintiffs point to the fact that the Board in the earlier application called for two separate votes. However, this is not dispositive of the issue. As noted above the application was clear in what was being requested by the Applicant. There is a plethora of evidence before the Board that the surrounding neighborhood and community along Route 550 in Dennis Township has dramatically changed.

In summary, it is respectfully submitted that the Board's Resolution in the present case clearly identifies facts and renders determinations that justify the determination of the Board that res judicata is not applicable.

**E. NEITHER THE BOARD NOR THE TRIAL COURT ERRED IN REVIEWING THE HARE UNPUBLISHED OPINION. (Pa20).**

The analysis begins with Rule 1:36–3 which states "no unpublished opinion shall constitute precedent or be binding upon any court."

The unpublished opinion was cited to by the Pierson Planner in testimony before the Board and was not cited to the Court. There is no

prohibition to planners and other people who regularly work within land use or other areas reviewing unpublished opinions and using them in context unrelated to being cited to the Court. Further, in the way the opinion was utilized by the Planner was only one part of the Planner's argument that the law in general had changed in the area of uses such as concrete plants as accessory to mining operations.

It is interesting in that the case Hare cited to Booth v. Bd. of Adjustment of Rockaway Twp., 50 N.J. 302, 305 (1967) which affirmed the municipal board's decision that a blacktop plant was accessory to a mining and quarry operation. The Hare case was a logical extension of the concept and used by the Planner to support her opinion.

The Trial Court correctly understood what was occurring and handled the Hare argument by the Plaintiffs correctly. The Trial Court specifically and clearly acknowledged that the Hare case "...does not bind this court, we acknowledge the Hare opinions support of the New Jersey Zoning and Land Use Administration's concept:

If, on a tract of land there is a sand and gravel removal operation, the operation of an aggregate separation plant on the same site would clearly be accessory to the primary use of soil removal. On the other hand, if such a plant is located by itself on a tract of land where no such soil removal operation exists, but where sand and gravel was brought to the site for separation, then in that circumstance the plant is clearly a principal use on the property." Cites omitted. Pa0020.

Both the Board and the Trial Court were explicit in setting forth that the Hare decision was not a part of the basis of the findings by the Board and the Court. The Court opined "The Hare decision is not binding nor forms any part of the basis of this court's findings, however, the Board's Resolution states that 'the Board would have granted the same relief without reference to Hare.' As such, no further analysis is afforded to this issue, and the Board did not act arbitrary, capricious, or unreasonable in granting Pierson's application." Pa0020.

**F. THE WAIVERS GRANTED BY THE BOARD WERE CAREFULLY THOUGHT OUT AND PROPERLY ENTERED. (Pa20-21).**

Boards of adjustment deal with site plans by virtue of their ancillary powers granted by N.J.S.A. 40:55D – 76b and then only in connection with an application under N.J.S.A. 40:55D – 70d for a (d) variance.

Dennis Township Code provides for waivers by the appropriate board hearing the appropriate case under the appropriate jurisdiction. Dennis Township Code 165-54A(4). Da221.

Under site plan review, preliminary approval, the ordinance in Dennis Township provides the permissive authority of the Board to require an environmental impact study. "The Board may require an environmental impact study in connection with any site plan application whose environmental impact may, in the Board's reasonable judgment, affect any purposes for which this article or the zoning chapter was enacted (see § 185-41K)." See, Dennis

Township Code 165 – 54 B.(2)(i). Da221.

This language is permissive and does not require an environmental impact study. The ordinance specifically leaves it to the board reviewing the site plan to determine what it needs and whether it needs an environmental impact study. This section specifically references 185-41K, the section relied upon by Plaintiffs’ in arguing there is no authority to waive the assessment. (Pb40).

Under zoning regulations, supplemental regulations, performance standards, one finds similar discretion afforded to the Board reviewing an application to grant a waiver for an environmental assessment. In addressing an environmental assessment the ordinance specifically provides "notwithstanding the foregoing, the appropriate board may, at the request of an applicant, waive the requirement for an environmental assessment report if the appropriate board finds that sufficient evidence is submitted to support a conclusion that the proposed development will have a negligible environmental impact." See, Dennis Township Code 185 – 41K.(5)(a). Pa0212.

The Plaintiffs’ reliance on subsection (c) of 185-41K is misplaced. First, the limitation is not applicable to the site plan review ordinance as that section specifically allows waiver and actually references 185-41K in allowing the waiver. Second and more importantly, section 185-41K (c) allows a waiver of an environmental assessment for any “site development” except site

development that is “affecting wetlands and C-1 waters”. Pa0212.

The credible, accepted testimony of Pierson environmental expert, Peter Lomax, was clear that the proposed site development does not affect any wetlands or C-1 waters. Pa0991 at T77:1 – T79:8.

In the present case, Pierson's Planner, engineer, and environmental expert addressed the criteria for the granting of waivers. The Board had sufficient credible testimony in the record, and the Trial Court found as to the hardship upon the Applicant in complying with the waivers requested.

Going one step further, the Board had before it the Environmental Assessment Checklist. The Environmental Checklist and the specific content contained within the Environmental Checklist was reviewed by both the engineer for Pierson and the environmental expert. The checklist is clear the site will not have an impact on a conservation area or a protected wetlands area.

#### IV CONCLUSION

It is respectfully submitted the Plaintiffs’ appeal should be dismissed.

Respectfully Submitted,  
**PAUL J. BALDINI, P. A.**

Date: August 27, 2025

By: */s/Paul J. Baldini*  
Paul J. Baldini, Esquire  
Counsel for Respondent R.E. Pierson

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STONE 9, LLC,	:	SUPERIOR COURT OF NEW JERSEY
ROBERT A. CARR, and	:	APPELLATE DIVISION
DEBORAH L. CARR,	:	CIVIL APPEAL
	:	DOCKET NO.: 2377-24
Plaintiffs,	:	
	:	
v.	:	ON APPEAL FROM:
	:	
PIERSON PLEASANTVILLE, LLC	:	SUPERIOR COURT OF NEW JERSEY
d/b/a R.E. PIERSON	:	LAW DIVISION
CONSTRUCTION CO. d/b/a	:	CAPE MAY COUNTY
R.E. PIERSON MATERIALS;	:	DOCKET NO.: CPM-L-000030-24
TOWNSHIP OF DENNIS	:	
CONSOLIDATED LAND USE	:	SAT BELOW:
BOARD,	:	HON. MICHAEL J. BLEE, A.J.S.C.
Defendants.	:	
	:	

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**BRIEF OF RESPONDENT  
TOWNSHIP OF DENNIS  
CONSOLIDATED LAND USE BOARD**

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Dated: September 15, 2025



**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....iii

PRELIMINARY STATEMENT .....1

PROCEDURAL HISTORY .....1

STATEMENT OF FACTS .....2

    A. THE APPLICATION ..... 2

        1. The Property .....3

        2. The Surrounding Properties/Area .....6

        3. Traffic .....7

        4. Noise .....7

        5. Visual Impact Assessment ..... 8

        6. Environmental Impact Assessment ..... 9

        7. Public Comment ..... 12

        8. Positive criteria required for use variances ..... 13

        9. Negative criteria required for use variances ..... 17

        10. The previous applications – *res judicata* ..... 18

    B. THE ORDINANCES .....20

        1. Chapter 185 ..... 20

        2. Chapter 95 ..... 21

    C. THE MASTER PLAN .....21

    D. THE DECISION AND RESOLUTION ..... 24

    E. THE TRIAL COURT’S DECISION ..... 34

LEGAL ARGUMENT ..... 34

    I. STANDARD OF REVIEW (Pa8; Pa12).....34

    II. THE TRIAL COURT PROPERLY AFFIRMED THE BOARD’S  
        DECISION THAT THE APPLICATION WAS NOT PRECLUDED  
        BY *RES JUDICATA* (Pa12-14) ..... 36

III.	THE TRIAL COURT PROPERLY AFFIRMED THE BOARD’S FINDINGS THAT THE APPLICANT SATISFIED THE POSITIVE AND NEGATIVE CRITERIA NECESSARY FOR A USE VARIANCE (Pa14-20).....	39
A.	POSITIVE CRITERIA .....	40
	Height Variance .....	44
B.	NEGATIVE CRITERIA .....	44
	1. Public Good .....	44
	2. Intent and Purpose of the Master Plan and Zoning Ordinance .....	45
IV.	THE TRIAL COURT PROPERLY UPHELD THE BOARD’S GRANT OF SEVERAL WAIVERS AS REASONABLE AND AMPLY SUPPORTED BY THE RECORD (Pa21) .....	48
	CONCLUSION .....	50

**TABLE OF AUTHORITIES**

**CASES:**

Allen v. Hopewell Tp. Zoning Bd. of Adjustment,  
222 N.J. Super. 574 (App.Div. 1988)..... 35

Bressman v. Gash, 131 N.J. 517 (1993) .....36,37

Burbridge v. Governing Body of Tp. of Mine Hill,  
117 N.J. 376 (1990) .....39,43

Davis Enterprises v. Karpf, 105 N.J. 476 (1987) .....35,40

Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41  
(App.Div. 2004).....44

Hare v. Township of Barnegat Planning Bd., 2016 WL 1228847  
(App.Div. 2016).....38,39,46,47

In re Boardwalk Regency Corp., 180 N.J. Super. 324 (App.Div. 1981),  
*aff'd and modified*, 90 N.J. 361 (1982) .....34

Kaufmann v. Planning Bd. for Warren Tp., 110 N.J. 551 (1998) ..... 34

Kohl v. Mayor of Fair Lawn, 50 N.J. 268 (1967) .....40

Kramer v. Board of Adjustment, Sea Girt, 45 N.J. 268 (1965) ..... 34,35,40,43

Medici v. BPR Co., 107 N.J. 1 (1987) ..... 40,41,43,45,46,47

Russell v. Board of Adjustment of Tenafly, 31 N.J. 58 (1959) .....36,37

Smart SMR v. Borough of Fair Lawn Board of Adjustment,  
152 N.J. 309 (1998) ..... 40,41

Ten Stary Dom Partnership v. Mauro, 216 N.J. 16 (2013).....36

Ward v. Scott, 16 N.J. 16 (1954) .....35,43

**STATUTES:**

<u>N.J.S.A.</u> 40:55D-1 .....	34,39
<u>N.J.S.A.</u> 40:55D-2 .....	40,41
<u>N.J.S.A.</u> 40:55D-70 .....	39,44

## **PRELIMINARY STATEMENT**

Plaintiffs appeal the trial court's Order upholding Dennis Township's Consolidated Land Use Board's decision to grant Pierson Pleasantville, LLC a use variance, height variance, and waiver from submitting an environmental assessment to add a mobile concrete plant to the sand and gravel mining operation that has been ongoing at the property for more than 70 years.

The application herein consumed eleven hearings over the course of a year. Eight experts testified; four testified for Pierson, three for Plaintiffs, and the Board Engineer discussed his report. The Resolution setting out the detailed findings and conclusions of the Board is more than twenty pages.

Based on the comprehensive testimony proffered by Pierson's experts, the Board found the Applicant satisfied both the positive and negative criteria required for the variances. The decisions of the Board were reasonable, based on ample support in the record. The trial court upheld the decisions, finding nothing arbitrary, capricious, or unreasonable.

## **PROCEDURAL HISTORY**

On April 12, 2022, Pierson Pleasantville, LLC ("Pierson") filed an application with the Dennis Township Consolidated Land Use Board ("the Board") for use and bulk variances to add a redi-mix concrete plant as an additional use to a legally existing, ongoing sand and gravel mining operation. (Pa29) The application also

sought several waivers regarding stormwater management, soil borings and an environmental assessment. In July 2022, Pierson filed an amended application. (Pa90) The application was considered over the course of eleven hearings, conducted via Zoom, between July 28, 2022 and August 24, 2023. The Board voted unanimously on August 24, 2023, by a vote of six to zero, granting Pierson the use and height variances, and the several waivers. (Pa104-126) Resolution 2023-18 was adopted on November 16, 2023, memorializing that decision. (Pa129)

Plaintiffs, who were objectors at the hearings, filed a Complaint in Lieu of Prerogative Writ on January 26, 2024. (Pa23) Defendant Pierson filed an Answer on March 3, 2024 (Pa131), and Defendant Board filed its Answer on March 7, 2024. (Pa140) The parties submitted briefs and transcripts of the hearings. The trial court heard oral argument on February 6, 2025. (1T) The trial court denied the Plaintiffs' Complaint on March 11, 2025, and issued a Memorandum of Decision on the same date. (Pa1; Pa2) Plaintiffs timely filed this appeal. (Pa430)

## **STATEMENT OF FACTS**

### **A. THE APPLICATION**

Pierson filed its application with the Board for three (d) variances pursuant to N.J.S.A. 40:55D-70(d); a (c)2 variance; and several waivers. (Pa90) Specifically, Pierson sought a d(1) variance to add a mobile, redi-mix concrete plant to its 165 acre parcel in Dennis Township's "B-Business Zone" district that contains an

existing sand and gravel mining operation; a d(5) density variance to allow the additional structure of the mobile plant; a d(6) height variance; and a c(2) variance to allow the placement of machinery-equipment within 200 feet of a property line. (Id.) The variances were required because concrete plants are not a permitted use in the zone, and the permitted height in the district is 35 feet. (Pa191; Pa192) The d(5) variance was not required.

### **1. The Property**

The subject property is a sizeable 165-acre parcel of land. (Pa446-T43:23) The minimum lot size in this Business District is 1.5 acres. (Pa106) The majority of the property is located within the B-Business District. There is a very small area located in the R-3 Residential District, and a small corner of the property in the far northwest corner of the parcel is within the Conservation Zone. (Pa460-T98:9; Pa529-T61:2)

#### **The existing mining operation and the proposed concrete plant**

The sand and gravel mining operation has been ongoing for more than 70 years. (Pa461-T104:22) In conjunction with the mining operation, there is an office building, a storage and service building, a scale house and a sand wash. (Pa445-T38:18) Trucks and machinery circulate on roadways within the parcel. (Pa443-T29:1) Trucks are driven onto the property and off the property to other locations. (Id.)

The property fronts on Woodbine-Ocean View Road, also known as County Route 550. (Pa90) Woodbine-Ocean View Road is a county truck route, and is thus designed to handle truck traffic. (Pa612-T96:3) The property has two existing entrances which would continue to be used for the mining operation and the redi-mix concrete plant. (Pa444-T34:22) The concrete plant will be situated behind two existing buildings, set back about 400 to 450 feet from Woodbine-Ocean View Road. (Id.-T34:10) There is a line of mature trees about 60 feet tall between the road and the location of the concrete plant. (Pa446-T44:2)

Pierson's engineer, Brian Murphy, who is also a licensed planner, testified about the existing mining operation's buildings and equipment and roadways. (Pa442-T28:9) Mr. Murphy testified that the proposed location for the concrete plant is land already disturbed, i.e., trees and vegetation had been removed in the past. (Pa449-T53:22) He further testified that, in his professional experience and opinion, the proposed concrete plant would be characterized as a "light industrial" use and activity. (Pa453-T70:17) He contrasted this to what he would characterize as "heavy industrial" uses, such as the Navy Yard, a refinery, or a steel mill. (Id.-T70-71) He also explained that the vehicles that use the Pierson facility are regular vehicles that can travel on public roadways. Heavy industrial uses, unlike this operation, utilize specialized heavy equipment and vehicles and sometimes have their own railroad system within a facility. (Id.)

Mr. Murphy described the concrete-making process and explained that concrete must be poured shortly after it is mixed, generally within less than two hours. (Pa443-T29-30) That time frame is shortened in hotter weather, and heavy summer traffic can put stress on delivery times. (Id.-T30:19) There is only one other redi-mix concrete plant in the county, Action Supply, so this plant would be a benefit to county residents. (Id.-T30-31) He noted that the Fehrle transit mix concrete plant across the street from the Pierson property provides concrete on a much smaller scale than the proposed plant, and explained the benefits and advantages to the redi-mix concrete for larger jobs. (Id.-T31:10-32)

Ernest Troiano, Jr. testified in the public comment portion of the July 27, 2023 hearing. (Pa1063-T52-56) Mr. Troiano testified that he and his family owned and operated a large concrete plant in nearby Rio Grande for many years. He explained the importance of competition; and he disclosed that he had recently considered opening a concrete plant to provide an additional source for it in the area, until he heard Pierson was doing so. Mr. Troiano testified that this proposed concrete plant would help bring the product to southern Cape May County in a shorter time frame – an additional benefit to having this application approved. (Pa1064-T54-56)

Robert Todd, the manager of the concrete division of Pierson, testified about the proposal. (Pa532-T72-106) He explained that the sand needed for making concrete will be provided by the mining operation already on the property; that some

percentage of the aggregate needed will also be provided by the mining operation, and some additional aggregate would be brought in. (Pa533-T77:25) Three to six additional employees would be hired, depending on the need and market demand, who would park in the existing parking area. (Id.-T80:7) He anticipates 3 to 6 concrete trucks being based at the property. (Pa534-T81:23)

The operation was described as follows: dump trucks, which would already be coming to the site to pick up sand, will bring any additional aggregate needed for producing concrete. All the necessary infrastructure, with the exception of the actual mobile concrete plant, is already on-site. (Pa534-T82-90) Mr. Todd testified that the life expectancy of concrete is about 90 minutes from the time water is introduced into the mix at the plant to when it is poured, and that in hotter weather, that time frame or limit is reduced to 60 minutes. (Pa537-T94:18) He testified that the busiest months of the year in this area are April, May, September, October and November; and the slowest months are July, August and December. (Pa548-T138:11)

## **2. The Surrounding Properties-Area**

The Pierson property is located in the B-Business District of Dennis Township, across the street from an industrial park and a transit-mix, small batch concrete plant. (Pa448-T50:10) It is adjacent to an Atlantic City Electric substation and the high transmission towers associated therewith. (Pa446-T43:13) The Walters' Brothers Marine Construction with cranes and large equipment is next to the property. (Pa453-

T69:24) The County maintenance yard is just up the road. (Id.-T71:19) Across Woodbine-Ocean View Road is an industrial complex owned by the Plaintiffs. (Pa783-T11) Plaintiffs' tenants in that complex include a brewery, a boat storage and repair shop, a coffee maker, and a medical packaging company that brings in big tractor-trailers. (Id.)

### **3. Traffic**

David Shropshire, PE, PP, testified for the Applicant and presented his traffic studies, as well as his noise impact and visual impact assessments. (Pa590-T9-115) Mr. Shropshire testified that the traffic generated by the concrete plant would have a fairly small impact on the roadway system. (Pa592-T13:21) He testified that the County reviewed Mr. Murphy's site plans and asked for a widening of Woodbine-Ocean View Road along the property's frontage to provide for acceleration and deceleration lanes, with 12-foot shoulders on both sides. (Id.-T14:2) Pierson agreed to providing those lanes and shoulders. (Pa535-T86:22) Mr. Shropshire testified that other, permitted uses would generate a more intense traffic impact than this concrete plant, and that the plant would not significantly impact the levels of service on the area roads. (Pa592-T14:16) He concluded that from a traffic perspective, the plant would not be a substantial detriment to the public good, nor a substantial impairment to the zoning ordinance or master plan. (Id.-T15:1)

### **4. Noise**

Mr. Shropshire also conducted a sound level evaluation. (Da73; Pa593-T17) He testified that the closest residential property line is approximately 1,450 feet from the concrete plant's location. (Id.-T18:3) He explained that as the distance from a sound source increases, the sound intensity decreases. (Id.-T18:6) He testified that the anticipated noise levels at the proposed plant would comply with the state's Noise Control Act and its regulations. (Pa593-T20-26)

### **5. Visual Impact Assessment**

Mr. Shropshire testified about the visual impact assessment he prepared. He testified as to the stated purposes of the B-Business District, that the visual standards are intended to avoid visual intrusions and performance nuisances upon adjacent residences-residential zones, and that the visual impact on the traveling public would be minimal. (Pa595-T27-28)

He testified that the concrete plant would not be a visual nuisance to the residential zone because it is consistent with the existing visual environment, and because the plant will be set back about 450 feet from Woodbine-Ocean View Road, and the tree line would make anything disappear. He added that the height of the mobile concrete plant is not inconsistent with the heights of other structures in the area. (Id.-T28:9)

With respect to the visual impact on the traveling public, Mr. Shropshire testified that because there is a tree line along Woodbine-Ocean View Road, it is very difficult

to see much beyond that tree line except where there is a break therein. (Id.-T28:21) He noted that at Woodbine-Ocean View Road's speed limit of 50 miles-hour, it would have to be a substantial break in the tree line to create any visual impact. (Pa596-T29:5) He also described other structures in the area, including the tall electric transmission towers, the cranes at the adjoining property, and the 150-200 foot cell towers. (Id.-T29:10)

Given the industrial character of the immediate area and the existing tall structures in the vicinity, Mr. Shropshire testified that the area's visual environment is not inconsistent with a 50 to 60-foot tall concrete plant set back 450 feet from the road, and that there would not be a significant visual impact associated with the plant. (Id.-T29-31)

## **6. Environmental Impact Assessment**

The Applicant's engineer, Mr. Murphy, testified that there should be no significant impact to geology, soils, surface water, subsurface water, the topography, wetlands, or flood plains because the concrete plant will be placed in an area that is already disturbed and is currently used to store unused-leftover equipment. (Pa448-T51:1) Because the plant would be on pedestals, Mr. Murphy testified that there would be a negligible impact on the amount of impervious surface. (Pa449-T56:2) He added that there is an interior roadway on the property that goes to the area of the proposed plant; there will be no need to remove any vegetation; there is no

wildlife in this immediate area; and the location is already utilized as part of the sand mining operation. (Pa448-T52)

Mr. Murphy further testified that the concrete plant requires an air quality permit to be issued through the N.J.D.E.P. and he also referenced Mr. Shropshire's noise study. (Id.-T52:13) He also described the operation of the plant, and explained that the vent hood at the top of the plant filters dust and protects the air quality. (Pa452-T65:9) Mr. Murphy also discussed the location of wetlands on the property; that they are in the far northwest corner of the property – hundreds, if not thousands of feet away from where the concrete plant would be. (Pa450-T57:23)

Mr. Todd testified that the concrete plant will be equipped with a dust filtration system. (Pa535-T87:23) He testified that the mining operation has a water truck on-site to keep the dust down, and that a sweeper truck is also used to clean and control dust. (Id.-T88:5) He explained the water truck is used on the interior roadways on the property, as well as the parking area. (Pa535-T88:24) He also testified that they use a street sweeper for the interior roads, the parking area, and for both lanes of Woodbine-Ocean View Road in front of the property. (Pa536-T90:12)

Peter Lomax was recognized by the Board as an environmental expert. (Pa988-T68:20) Mr. Lomax referenced the conditions in Zoning Ordinance 185-41 under which the Board can grant a waiver of an environmental assessment. (Pa991-T77:4) He mentioned that one of those conditions is whether there is sufficient evidence

that indicates the proposed activity would have a negligible environmental impact, and then referred the Board to the environmental assessment checklist that was prepared by Mr. Murphy's engineering firm. (Id.) That environmental assessment checklist concluded that there would be *de minimis* environmental impacts, and Mr. Lomax concurred with that conclusion. (Id.-T77:23)

Mr. Lomax further testified that there are two limitations that would preclude a waiver, i.e., whether the proposed development would adversely impact (1) wetlands, or (2) Category 1 waters. (Id.-T78:14) He testified that while wetlands are present in areas adjacent to this site, and on portions of this site, "they are nowhere near the proposed activity," and the nearest Category 1 water is over 8,000 feet away. (Id.-T78:24) He also testified that the site of the concrete plant is in an existing disturbed area on an active mining site. (Id.-T78:7) He also noted that the concrete washout area is more than 851 feet away from the nearest wetland, and separated from that wetland by a road, a utility right-of-way, and a mine pond. (Id.-T79-81) He further noted that the proposed concrete plant will be more than 1,500 feet away from that same wetland and more than 8,000 feet from the nearest Category 1 water. (Id.-T81:4) He concluded that the Board could, in fact, grant a waiver for the environmental assessment. (Pa992-T83:1)

Mr. Lomax acknowledged the proximity of the Great Cedar Swamp, but pointed out that the area proposed for the concrete plant is not adjoining the Swamp. (Id.-

T84:14) Mr. Lomax pointed out that the site of the concrete plant is separated from the Conservation Zone, from wetlands, and from the Great Cedar Swamp by two mine ponds and significant distance. (Pa993-T85:1) He stated that the concrete plant is wholly contained within the Business Zone, is more than 1,800 feet from the Conservation Zone, and more than 3,000 feet from the R-10 Zone. (Id.-T86-87)

Significantly, Mr. Lomax testified that an Exhibit provided by the Plaintiff, showing the Great Cedar Swamp Natural Heritage Priority Site overlapping into the Pierson property, was superseded, and the Great Cedar Swamp is not currently mapped adjacent to or overlapping the Pierson property. (Id.-T87-88)

With respect to traffic impacts, Mr. Lomax testified that there is already a baseline of disturbance on Woodbine-Ocean View Road, and the minimal traffic impacts testified to by Mr. Shropshire would not have a negative impact on the area wildlife. (Pa994-T91-98) Mr. Lomax clarified that the traffic on Woodbine-Ocean View Road and the activity on the Pierson property already occurring is a baseline to which the wildlife in the area has acclimated. (Pa995-T96:6) Habitat fragmentation was also discussed, with Mr. Lomax concluding that fragmentation began decades ago, and that this concrete plant would not contribute at all to any habitat fragmentation. (Pa996-T99-101)

## **7. Public Comment**

In addition to Mr. Troiano's testimony in favor of the application, Plaintiffs presented three experts to testify in opposition to the application, to wit, Barbara Woolley-Dillon; Paul Kerlinger, Ph.D.; and Al Litwornia. (5T through 10T)

#### **8. Positive criteria required for use variances**

Both the Applicant's engineer (who is also a licensed planner), Brian Murphy, and Tiffany Morrissey, a professional planner, testified as to the positive criteria required for use variances. Mr. Murphy testified that there are several special reasons associated with the concrete plant that promote the purposes of zoning. (Pa445-T39:12) He testified that the application advances the purpose of encouraging municipal action to guide the appropriate use of land in a manner which will promote the public health, safety and general welfare, referencing N.J.S.A. 40:44D-2(a). He stated that it is appropriate to utilize the existing sand mind for the concrete plant, noting that three of the four components of concrete – sand, water and stone – are already on-site, and the other necessary infrastructure already on the property. (Id.)

As to N.J.S.A. 40:55D-2(g), providing sufficient space in appropriate locations for a variety of uses, Mr. Murphy pointed out that the current use is similar and significantly larger in scope than the proposed concrete plant, and that it will use existing roadways and will assist in providing concrete to local residents. (Id.-T40:5) With respect to N.J.S.A. 40:55D-2(i), promoting a desirable visual environment through creative development techniques and good civic design and arrangement, he

noted the visual impact of the plant will be negligible, as it will be located behind 60-foot-tall trees and existing buildings, and 450 feet back from Woodbine-Ocean View Road. (Id.-T40:22)

Finally, as to N.J.S.A. 40:55D-2(m), encouraging land development with a view of lessening costs of development and more efficient use of land, Mr. Murphy pointed out that adding a concrete plant to an existing sand and gravel mine is remarkably efficient because in addition to most of the materials being on-site, so is the infrastructure of roadways, offices, entrances and storage. (Id.-T41:4)

The permitted height in this District is 35 feet. The height of the mobile concrete plant is 52.85 feet, and with the air-dust filter vent on top, its height is just over 61 feet. (Pa446-T41:22) Because the plant will be set back 450 feet from the road, the visibility of it is significantly less impactful. (Id.-T42:16) Mr. Murphy noted that the purpose of height restrictions is primarily to address light, air and open space. Given the high transmission towers in the area, the property's expansive size, the significant setback from the road, and the plant's location behind existing buildings, Mr. Murphy opined that the purposes of zoning would be promoted, and the height variance could be granted without substantial detriment to the public good. (Id.-T43:1)

Ms. Morrissey testified that the B-Business District's purposes include providing locations where business and industrial complexes can be developed. (Pa653-T3:8;

Pa656-T14:11and T16:3) She explained that the Master Plan includes the business area that includes existing commercial and business uses outside of the proposed commercial centers. (Pa656-T14:17) Ms. Morrissey testified that this B-Business District is distinct from the commercial centers in the Township in that this District permits industrial uses. (Pa653-T3-5)

She further testified that there are a variety of permitted and existing uses similar in nature to the proposed concrete plant in this district. (Pa653-T3:20) Noting that the property is across the street from an industrial area with a variety of business uses, an existing small batch concrete plant, and many businesses with large equipment associated therewith, she concluded that the proposed use is like those in the surrounding area. (Id.-T4-5) Ms. Morrissey opined that a concrete plant *could* be considered an accessory use to a mining operation, which would impose a lesser burden on the applicant in seeking a d(2) variance for expansion of a non-conforming use. (Pa1059-T35:4) Pierson chose the more conservative approach of seeking a d(1) use variance. (Pa1077-T105:6)

Ms. Morrissey testified that the site and proposed plant are particularly suited to one another, noting that sand mining customarily has associated concrete plants. (Pa1059-T35:4) She emphasized that the plant would be in an area already disturbed, with no need for additional clearing, and in the front portion of the property in the B-Business District, nowhere near the Conservation and Residential zones. (Pa655-

T9:1) She also stated the plant would comply with the state's Noise Control Act; that it is a use consistent with the zone's permitted uses; and will provide a needed service to the community. (Id.-T9:12)

Ms. Morrissey testified that in her professional opinion, the application promotes a desirable visual environment through creative development techniques and good civic design and arrangement, noting the site is already cleared, has truck traffic, and includes existing equipment. (Id.-T11:1) She also pointed out that the plant would reduce the number of trucks coming from Pierson's operation in Vineland to the area. (Id.-T10:3; Pa654-T7:21) With respect to the MLUL purpose of providing and encouraging transportation routes which promote the free flow of traffic while discouraging the location of facilities that result in congestion, Ms. Morrissey noted that this site is on a county truck route designed to handle truck traffic; that the additional truck traffic would not be substantial, as testified to by Mr. Shropshire; and that permitted uses could generate much more traffic than adding the concrete plant to the existing sand and gravel mining operation. (Pa655-T11:20; Pa657-T20:11)

Addressing the height variance, Ms. Morrissey noted that the site can accommodate a 60-foot-tall plant, referencing Mr. Shropshire's visual impact assessment. (Pa657-T17-20) Noting that the concrete plant would not be easily viewable, and only in breaks at the entrances-driveways; and that the cell towers and

high transmission towers which are significantly taller are not easily visible from the roadway, Ms. Morrissey concluded that the height of the plant would not create a substantial visual impact. (Id.)

Ms. Morrissey also testified that this use of a concrete plant at an existing sand and gravel mining operation would constitute a more efficient use of land. (Pa655-T12:9) She concluded that for all these aforementioned reasons, it was her professional opinion that the site and use are particularly suited to one another; that the proposed use advances multiple purposes of zoning; and also that the plant could be considered something akin to an accessory use to a sand mining operation. (Id.-T12-13; Pa1059-T35:4)

#### **9. Negative criteria required for use variances**

Ms. Morrissey testified that it was her professional opinion, in light of the Shropshire traffic study, visual assessment and noise evaluations, that this application would not substantially impair the intent and purpose of the zoning ordinance or master plan of the Township. (Pa653-T2-16) She noted that the mining operation is not in a residential or conservation zone. (Pa655-T10:18) She referenced the goals and objectives set forth in the Master Plan, specifically the goal to provide for an appropriate variety of land uses responsive to the development potential of the Township. She noted that the Master Plan's goals include providing for a mix of residential, commercial, industrial and resort development, while also limiting the

encroachment of noncompatible uses into established residential neighborhoods. (Pa656-T14:4) She pointed out that the concrete plant would not encroach into any residential neighborhood, and that it is in the zone where the Township encourages business and industrial uses. (Id.-T16:4)

With respect to the height variance, Ms. Morrissey noted that Mr. Shropshire's visual impact assessment concluded that the concrete plant would not be readily seen traveling along Woodbine-Ocean View Road. (Pa657-T17:21) She pointed out that there are cell towers in the vicinity that are taller than the concrete plant and that the plant would fit into the general area. (Id.)

Referencing any detriment to the public good, Ms. Morrissey reminded the Board that the application would not have a substantial impact on traffic; nor would it violate the noise regulations of the Noise Control Act; nor would it have any substantial visual impact. (Id.-T20-22) She testified that it was her professional opinion that the application presented no substantial detriment to the public good, nor any substantial impairment to the zoning ordinance or the master plan. (Pa658-T22) Finally, Ms. Morrissey testified that the benefits from granting this application substantially outweigh any detriments. (Id.-T22:12) Her testimony as to this second prong of the negative criteria is discussed, *supra* at page 15; and the Board's findings, based on her testimony, are set forth *infra* at pages 30-31.

#### **10. The previous applications- *res judicata***

Plaintiffs objected at the outset of the first hearing that this application should be barred based on the doctrine of *res judicata*. (Pa437-T5:1) The contention was that there were previous applications by Pierson for variances to add uses to the mining operation. Ms. Morrissey testified about the application that was submitted by Pierson in 2007, seeking variances for a Class B recycling facility, an asphalt plant, and a concrete plant. (Pa39-41; Pa1000-T113:3) That 2007 application was initially approved by the then-Zoning Board, but because of a public notice error, the approvals were vacated. (Pa425) A second application in 2008 proposed a Class B recycling facility and concrete plant, larger and different from the present application. (Pa42) That application was denied, and litigation ensued, which resulted in a settlement agreement and a Resolution adopted by the then-Zoning Board stipulating the denial of the 2008 application would have no *res judicata* effect. (Pa55) In 2011, Pierson submitted an application for a Class B recycling facility and an 82-foot tall concrete plant. (Pa61) That application was denied. (Pa76)

Ms. Morrissey testified about the significant differences between the prior applications and the one being considered herein. She noted that the current application contained no Class B recycling facility, and the proposed concrete plant is more than 20 feet shorter than the previously proposed plant. (Pa1000-T113:3) Furthermore, Ms. Morrissey testified that the proposed location of the concrete plant has been moved approximately 400 feet from the proposed location in the 2011

application. (Id.-T114-115) She also pointed out that the proposed concrete plant in this application is not a permanent structure, as was the case in the 2011 application. (Pa1001-T117:12) Ms. Morrissey also testified that the surrounding area has changed since the 2011 application, with the introduction of different industrial type uses in the area, and the increased size of uses such as the Walters' Marine Construction nearby. She pointed out that in 2011 the area at Walters' Marine was 50 percent wooded, and now it is mostly open. (Id.-T118:3)

Ms. Morrissey concluded that with additional industrial uses being approved by the Board over the years in the surrounding area, coupled with the significant changes to the application in terms of (1) a 25% reduction in height, (2) the fact that the current plant is a mobile concrete plant and not a permanent structure as was previously proposed, (3) the relocation of the concrete plant about 400 feet away from the previously proposed location, siting it further away from a residential zone, and (5) the elimination of the Class B recycling facility, when all combined, creates a sufficient difference between the applications to overcome any argument that *res judicata* precluded consideration of this application. (Pa1000-T113-120)

## **B. THE ORDINANCES**

### **1. Chapter 185**

Chapter 185-1 to -192 of the Dennis Township Code is the Township's Zoning Ordinance. Section 185-25 comprises the Township's B-Business District

ordinances. There is no mention of “light industrial” or “heavy industrial” in Chapter 185. The Zoning Ordinance does not define “industrial,” “heavy industrial,” or “light industrial.” §185-7 (Pa170-173)

Section 185-41K addresses Environmental Assessment Reports. (Pa211) Chapter 185-41K(5) allows waivers from the requirement of an Environmental Assessment Report if the Board finds that sufficient evidence is submitted to support a conclusion that the proposed development will have a negligible environmental impact. (Pa212) If the development will affect wetlands and C-1 waters, a waiver cannot be granted. (Id.) The Board granted a waiver of the Environmental Assessment Report (Pa119) based on the testimony of Peter Lomax. (Pa991-T68-106)

## **2. Chapter 95**

Chapter 95 of the Township Code governs the permitting and operational aspects of mining in the Township. (Pa149) Items addressed in Chapter 95 include, *inter alia*, permits and fees; general regulations for resource extraction; lighting; hours of operation; fencing; and signage. (Id.)

## **C. THE MASTER PLAN**

The 2012 Master Plan’s goals and objectives are, in relevant part, as follows:

### **Goal #1 – To provide for an appropriate variety of land uses responsive to the development potential of Dennis Township.**

- Provide for a mix of residential, commercial, industrial and resort development, open space and conservation districts in appropriate locations.

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- Foster a well-integrated and balanced community with a mix of residential, commercial, agricultural and other types of land uses and guide *economic* activities into compact centers. (emphasis added)

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- Limit the encroachment on non-compatible uses into established residential neighborhoods, such as sand extraction operations and heavy industrial type uses.

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**Goal #2 – To guide development into compact Centers along the Route 9 corridor**

- Encourage moderate density development within Township Centers to concentrate development into walkable pedestrian friendly Centers.
- Encourage mixed use development including residential and commercial uses within the Center core areas
- Provide for a range of commercial activities in the Centers where the circulation, utility and community service systems are best suited to handle the resulting volumes.
- Provide appropriate design controls for commercial development to encourage good design and to ensure an attractive compatible appearance with the Township’s vision and historic character.
- Encourage creative development techniques to maintain the Township’s rural character by guiding development to the Township Centers and limiting development in the Environs.

**Goal #3 – To maintain and expand existing Village Centers**

- Continue to regulate development that is consistent with unique character of each village.
- Encourage mixed use development including residential and commercial uses within the village commercial areas
- Provide opportunities for home based retail business uses in the Dennisville village residential area.
- Provide for pedestrian improvements that will facilitate connections within the villages.
- Establish design guidelines that are compatible with the existing village character.

- Encourage businesses and services in the Village commercial area that support local community needs.
- Promote the development of attractive and safe neighborhood commercial Centers through the use of site and building design guidelines.

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**Goal #5 – To protect sensitive environmental areas from inappropriate development and to provide comprehensive protection for a broad range of natural resources**

- Incorporate Township Natural Resource Inventory to provide comprehensive background information on natural resources.
- Consider establishment of a Shade Tree Commission.
- Continue to provide and augment environmental assessment regulations to identify and protect sensitive environmental resources.
- Establish minimum lot criteria to protect ground water quality.
- Require management programs to protect wetlands, vegetation, fish and wildlife, agricultural lands, water and air quality.
- Require proper management of forestry and resource extraction activities and reclamation.
- Establish controls on the permitted disturbance of critical resources during land development.
- Retain natural vegetation in new construction to position new development into the landscape.
- Outside of the Centers, retain a scenic landscape edge along all roads to buffer and to maintain the unique scenic attributes of the Township's environment.

**Goal #6 – To provide for safe and efficient movement of traffic within and through the Township.**

- Provide a road network which separates through traffic from local traffic and directs through traffic to the regional roadway network.
- Promote pedestrian facilities within the Township Centers.
- Work with state and county officials to improve current transportation deficiencies.

- Plan for a bike systems [sic] that will provide connections throughout the Township connecting neighborhoods and activity generators by utilizing separated greenways bike paths and on road bike facilities.
- Promote commercial uses with off-peak times trip generation to reduce congestion.
- Prevent hazardous traffic patterns and high congestion by limiting roadway connections and driveways accessing onto state and county roadways consistent with regulations.
- Require street trees and open space buffers to enhance visual quality and to protect adjacent land uses from the noise, dirt and glare of traffic along all roads.
- Encourage the campground operations to work with the Township and the County of Cape May to develop alternative transportation programs such as shuttle operations to serve campground visitors and to reduce summer vehicular traffic activity.

#### **D. THE DECISION & RESOLUTION**

After eleven hearings over the course of thirteen months, the Dennis Township Consolidated Land Use Board (the Board) voted unanimously on August 24, 2023 to grant Pierson the d(1) use and d(6) height variances and the several waivers. (Pa104; Pa1138) Resolution 2023-18 was adopted by the Board on November 16, 2023, memorializing the findings and conclusions of the Board. (Pa104-126) The Resolution summarizes the findings of the Board, albeit not the findings of fact hoped for by Plaintiffs, noting “[t]he Board found as fact the testimony of the Applicant’s professionals as set forth above...” (Pa118)

The Board determined that *res judicata* did not foreclose this application, finding the current application was materially different from the previous applications. (Pa116) Specifically, the Board found:

- the 2011 application (denied in 2012) included a request for approvals for a concrete plant and a Class B recycling facility, in addition to the existing mining operation, whereas the current application seeks approval only for the addition of a concrete plant, and no recycling facility;
- the height variance previously requested was for 82 feet, while the current application seeks a variance for a structure 52.85 feet and 61.41 feet to the top of the dust filtration vent, which is a 25% height variance reduction;
- the size of the proposed concrete plant is smaller than the previous plant size;
- the location of the proposed concrete plant is significantly different from that proposed in the previous application, as it has been moved away from sensitive environmental areas and away from residential properties and moved closer to the front of the property;
- the current application proposes off-site improvements for traffic control;
- the current application includes a commitment to clean Woodbine-Ocean View Road to control dust;
- the area surrounding the Applicant's property has evolved and changed over time;

- the adjacent property which holds Walters' Marine Construction has significantly expanded to include storing cranes, tractor trailers, and earth moving equipment;
- a local concrete facility known as Fehrle is operating a concrete facility across the street in the same B-Business District;
- the property across the street is a reclaimed portion of a mining operation where the Township approved an industrial park as part of the mining operation, and the industrial park is occupied by various commercial uses such as the recently approved Klebauer application that proposed a masonry operation with outside storage of masonry items and trucks;
- the law has changed favorably to the Applicant with the Hare decision provided to the Board by the Applicant, noting that while it is an unreported decision, it is persuasive as to how the Appellate Division viewed concrete plants as accessory uses (Hare v. Township of Barnegat Planning Board, 2016 WL 1228847 at \*1 (App.Div. 2016)(Pa427))

The Resolution acknowledges that the Board could have relied upon Hare, but notes that the Board would have granted the same relief without reference to Hare.

The Resolution then memorializes the Board's vote to:

- Grant Preliminary and Final Site Plan approval;

- grant a d(1) use variance to allow multiple uses on the property and the addition of the concrete plant as an additional use associated with the existing mining operation;
- grant a d(6) height variance from the maximum permitted height of 35 feet for the proposed height of 52.85 feet to the top of the plant's structure and 61.41 feet to the top of the dust filtration vent;
- determine that a variance was not required for allowing more than one principal structure on a single lot which may not allow the subdivision of the lot in a manner that each structure and resulting lot would conform to the zoning and subdivision regulations;
- determine that the (c) variance for allowing equipment and machinery or other structure or facility closer than the required 200 feet to any property line (Dennis Township Code §185-64(D)(1)(a) was subsumed into the d(1) variance;
- grant a waiver from the Township's requirement for Stormwater Management Calculations including any borings (Dennis Township Code §163-4A);
- grant a waiver from the requirement of providing soil borings on the Environmental checklist; and

- grant a waiver from the requirement of providing an Environmental Assessment.

The Board determined that the Applicant satisfied the positive criteria and negative criteria necessary for the variance relief. More specifically, the Board determined that the Applicant satisfied the positive criteria, finding:

- The Applicant proved its burden of special reasons in that the application promotes four (4) specific purposes of zoning, which the Board applied to all the requested (d) variances as follows:
  - \*g. to provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens;
  - \*h. to encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes which result in congestion or blight;
  - \*i. to promote a desirable visual environment through creative development techniques and good civic design and arrangement; and

\*m. to encourage coordination of the various public and private procedures and activities shaping land development with a view of lessening the cost of such development and to the more efficient use of land.

The Board further determined the Applicant satisfied the necessary negative criteria, finding no substantial detriment to the public good and no substantial impairment of the intent of the zone plan and zoning ordinance for the following reasons:

- There will be limited, if any, visual impact to the neighborhood as testified to by the Applicant's professionals and as deemed fact by the Board, *supra*;
- There will be limited, if any, impact of sound to the neighborhood as testified to by the Applicant's professionals and as deemed fact by the Board, *supra*;
- There will be limited, if any, traffic impact to the neighborhood as testified to by the Applicant's professionals and as deemed fact by the Board, *supra*;
- There will be limited, if any, impact on the environment as testified to by the Applicant's professionals and as deemed fact by the Board, *supra*;
- There will be no safety impacts to the neighborhood as testified to by the Applicant's professionals and as deemed fact by the Board, *supra*.

The Board further found an enhanced quality of proof by clear and specific findings that the d(1) and d(6) variances are not inconsistent with the intent and purpose of

the Master Plan and Zoning Ordinance, and reconciled the Zoning Ordinance's omission from those permitted in the district.

More specifically, the Board found that the Applicant met the Medici standard with respect to reconciling the proposed use with the zoning ordinance's omission of the specific use, i.e., a concrete plant, from the permitted uses in the district for the following reasons:

- The articulated purpose of the B-Business District “to provide locations within the Township where business industrial complexes may be developed;”
- The proposed use to be added to the mining operation is more akin to the permitted uses for all of the reasons testified to by Ms. Morrissey and accepted as fact by the Board, *supra*;
- A similar use is located and permitted in the business zone and in close proximity to the Applicant's location;
- The Hare case suggests that such use can be found to be an accessory use to a mining operation even though the use is not identified as an accessory use;
- These facts reconcile the proposed use with the ordinance despite not being specifically listed as a permitted use.

Consequently, the Board found the granting of the variances is not inconsistent with the intent and purpose of the Master Plan and zoning ordinance.

The Board further found that the Applicant demonstrated that the site is particularly suited for the use sought because:

- The resources necessary for making concrete are, for the most part, already on-site;
- There is a net reduction in truck traffic in the area from co-locating the concrete plant at the site where there are resources and other trucks coming to the site to pick up those resources;
- The site is located on a county truck route with existing access to that truck route;
- The existing access to the county truck route will be improved with acceleration and deceleration lanes to be built by the Applicant; and
- The concrete plant will be located in an already disturbed area, and will not impact conservation areas or residential areas.

The Board determined that the Applicant met its burden of showing special reasons by promoting the four (4) specific purposes of zoning noted *supra* because:

- The application provides sufficient space in appropriate locations, both private and public, to meet the needs of our citizens since there is a need for additional concrete facilities in Cape May County, and the ability of

this site to cater to that need; the site's proximity to a major county truck route; re-use of already disturbed areas; the distance from residential neighborhoods; noise control; shelter from the sight lines along Woodbine-Ocean View Road; and the plant's distance from environmental lands supports this location; and

- The location and design of transportation routes will promote the free flow of traffic while discouraging location along routes resulting in congestion since the site sits on a major truck route; the Applicant's experts addressed the limited impact, if any, on the access road; and the access road is being enhanced to make the site even safer; and
- It promotes a desirable visual environment through creative development techniques and good civic design and arrangement since the design re-uses existing disturbed areas; it uses resources already on-site which will lessen the burden on infrastructure; the plant's visibility will be lessened and hidden by existing trees, existing structures, and the distance from the roadway; it uses the expansion of acceleration and deceleration lanes to improve not only access to the site, but assists traffic movement around trucks entering or exiting the property, which lanes currently do not exist; and

- It promotes an efficient use of land since much of the raw material needed to make concrete is being extracted on the site; the plant will be located on an already disturbed area of the property; there are currently existing access points to a county truck route; and the plant will be quite distant from residential and conservation areas.

With respect to the waivers from Stormwater Management Calculations and Soil Borings, the Board found such waivers to be reasonable because the site is already strictly licensed, the location for the plant is already disturbed, and the property will use existing runoff patterns. The Board also found the waiver for an Environmental Assessment Report reasonable, based on Mr. Lomax's testimony that the disturbed area where the concrete plant operations will occur is not near an environmentally sensitive area that would require a study.

Finally, the Board approved the Preliminary and Final Site Plan requests based on the engineer's requests and comments and the Applicant's willingness to meet all of the Board Engineer's recommendations. The Board specifically found the Applicant's professionals to be credible and truthful; and found the Applicant's professionals' testimony factual and supportive of the variances, waivers and site plan approvals.

In conclusion, the Board found that the Applicant proved the special reasons and the negative criteria by an enhanced quality of proof for the use and height

variances; that the Applicant met the standards for site plan approval; and that the Applicant met the standards for the waivers approvals, based on the extensive and thorough testimony set forth by the Applicant's experts. (Pa104-126)

#### **E. THE TRIAL COURT'S DECISION**

The trial court filed a Memorandum of Decision that addressed the arguments proffered by the parties; detailed the specific findings that supported the Board's decisions; found that the Board's decisions were supported by ample evidence in the record; and concluded that the Board's decision to grant Pierson's application for the variances and waivers was not arbitrary, capricious, or unreasonable. (Pa2-22)

### **LEGAL ARGUMENT**

#### **I. STANDARD OF REVIEW (Pa8; Pa12)**

Land use decisions are entrusted to the sound discretion of the municipal boards, which are to be guided by the positive and negative criteria set forth in the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. ("MLUL"). Kaufmann v. Planning Bd. for Warren Tp., 110 N.J. 551, 558 (1998). A local zoning determination will be set aside only when it is arbitrary, capricious, or unreasonable. Kramer v. Board of Adjustment, Sea Girt, 45 N.J. 268, 296 (1965). The essence of an arbitrary and capricious action is a determination predicated on unsupported findings. In re Boardwalk Regency Corp., 180 N.J. Super. 324, 334 (App.Div. 1981), *aff'd and modified*, 90 N.J. 361 (1982).

Because local boards have peculiar knowledge of local conditions, they must be allowed wide latitude in the exercise of their delegated discretion. Kramer at 296. The Legislature has recognized that local citizens familiar with a community's characteristics and interests are best equipped to assess the merits of a variance application. Ward v. Scott, 16 N.J. 16, 23 (1954). A land use board's factual determinations are presumed to be valid, and the proper scope of judicial review is not to substitute its own judgment for that of the board's, but to determine whether the board could reasonably have reached its decision on the record. Kramer at 296; Davis Enterprises v. Karpf, 105 N.J. 476, 485 (1987).

It is within the province of the Board to accept or reject the opinions of the various experts who testified for both the Applicant and the objecting Plaintiffs. Allen v. Hopewell Tp. Zoning Bd. of Adjustment, 222 N.J. Super. 574, 581 (App.Div. 1988)(citing Davis Enterprises at 485)). The Board in this matter accepted the opinions and testimony of the Applicant's experts. There is nothing unreasonable about that determination, Plaintiffs' disappointment notwithstanding. The findings of the Board are clearly supported by the evidence in the record below, sufficient to provide a rational basis for the decision.

The trial court clearly reviewed the submissions of the parties and considered the arguments of counsel before rendering its decision. (1T; Pa2-22) The court provided

a well-reasoned decision and found the Board's decision was not arbitrary, capricious, or unreasonable, and thus, the courts' ruling should be upheld.

**II. THE TRIAL COURT PROPERLY AFFIRMED THE BOARD'S DECISION THAT THE APPLICATION WAS NOT PRECLUDED BY *RES JUDICATA* (Pa12-14)**

It is undisputed that the principle of *res judicata* applies to applications heard by a land use board. Bressman v. Gash, 131 N.J. 517, 526 (1993). As articulated by the Court in a later decision:

If an applicant files an application similar or substantially similar to a prior application, the application involves the same parties or parties in privity with them, there are no substantial changes in the current application or conditions affecting the property from the prior application, there was a prior adjudication on the merits of the application, and both applications seek the same relief, the later application may be barred. It is for the Board to make that determination in the first instance.

[Ten Stary Dom Partnership v. Mauro, 216 N.J. 16, 39 (2013).]

As the Bressman Court recognized, the court should not preclude a zoning board from considering a second application for a variance if the application contains sufficient changes. 131 N.J. at 527 (citing Russell v. Board of Adjustment of Tenafly, 31 N.J. 58, 66 (1959)). Furthermore, the requirement of sufficient change in the application or in the conditions surrounding the property to warrant consideration of the application by the board is to be liberally construed in favor of the applicant in accordance with the purpose of boards of adjustment to provide the necessary flexibility to the zoning ordinance. Russell at 66. In Russell, the second application

included an increase in the front setback from 25 to 30 feet, and a decrease in the building coverage from 18 to 12 percent. The Court held that the board therein had not abused its discretion in considering the second application. 31 N.J. at 67. The Board's exercise of discretion should only be overturned by a reviewing court if the decision is arbitrary, capricious, or unreasonable. Bressman, 131 N.J. at 527.

The changes in the application herein from previous applications are much more substantial than those found sufficient to defeat *res judicata* challenges in Bressman and Russell. The Board found, as did the trial court, that there were significant, material changes from previous applications. (Pa13) The trial court pointed out the differences found by the Board, adopted by the court: (1) the elimination of the asphalt plant; (2) the elimination of the Class B recycling facility; (3) the re-location of the concrete plant to a site much further away from the Conservation zone<sup>1</sup>; (4) the reduction in the size of the concrete plant itself; and (5) the significant reduction (25%) in the height of the concrete plant.

These material and significant changes from the previous applications, as well as the changes in the surrounding properties and the intensification of the uses of the surrounding properties, were found by the trial court to sufficiently support the

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<sup>1</sup> Plaintiff's argument that moving the concrete plant 400 feet further away from sensitive areas is a *de minimis* change on a 165-acre site (Pb33) is misleading. It is not the relationship between the distance moved and the total area of the property that is relevant; rather, it is the distance the plant is moved further away from the Conservation zone and residential areas that is relevant.

reasonableness of the Board's decision that the current application was not barred by *res judicata*. (Pa14) Plaintiffs' argument that the intensification of use at the adjoining property, Walters' Marine, is not a valid consideration in the *res judicata* analysis because the use at that property is a permitted use must fail. (Pb34) The fact that the intensified use is permitted is irrelevant here. Relevant here is that since the previous applications, the use **has** changed and intensified, and the character of the area **has** changed and intensified, which *are* relevant factors in considering *res judicata*. In determining whether *res judicata* bars an application, the Board is only deciding whether the application and/or the surrounding properties are different.

Plaintiffs place undue emphasis on the Resolution wherein it states, as one of thirteen reasons why *res judicata* did not preclude this application, that the "the law has changed favorably to the Applicant with the Hare decision... Though an unreported case it is persuasive of how the New Jersey Appellate Division views batch concrete plants as accessory uses...." (Pb37; Pa118) Perhaps the language in the Resolution could have been worded more precisely, but it bears reminding that this is but one of thirteen reasons why the Board rejected Plaintiffs' objection to the application on *res judicata* grounds. Furthermore, Ms. Morrissey clarified her reference to Hare on cross-examination when she explained that the point she was trying to make is that it is not unusual to have concrete plants as accessory uses at sand mining operations. (Pa1059-T34:13) The Board did not consider this

application on the basis of an accessory use, it simply acknowledged the fact that it is not an aberration to find a concrete plant at a sand/gravel mining operation. Plaintiffs exaggerate the implication of the Board's reference to Hare when insisting it should be construed as a "fatal and reversible error." (Pb38) As stated in the Resolution, the Board would have approved the application whether Hare applied or not. The Resolution was specifically worded such that a reviewing court could exercise its original jurisdiction to find Hare an appropriate case to rely upon, if it chooses to do so.

The Board's decision that *res judicata* did not bar the application was reasonable, as the trial court properly found.

**III. THE TRIAL COURT PROPERLY AFFIRMED THE BOARD'S FINDINGS THAT THE APPLICANT SATISFIED THE POSITIVE AND NEGATIVE CRITERIA NECESSARY FOR A USE VARIANCE (Pa14-20)**

The Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. ("MLUL") gives zoning boards the authority to grant variances, upon a showing (1) of special reasons, commonly referred to as the positive criteria, and (2) that the variance can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the master plan and zoning ordinance, referred to as the negative criteria. N.J.S.A. 40:55D-70(d); Burbridge v. Governing Body of Tp. of Mine Hill, 117 N.J. 376, 384-85 (1990)(citations omitted).

When, as here, an application does not concern an inherently beneficial use, such as a hospital or school, a use variance requires (1) satisfying the positive criteria by showing special reasons as to why the use promotes the general welfare because the site is particularly suited for the proposed use; and (2) satisfying the negative criteria by proving the variance can be granted without substantial detriment to the public good, and demonstrating through an enhanced quality of proof that the variance is not inconsistent with the intent and purpose of the master plan and zoning ordinance. Smart SMR v. Borough of Fair Lawn Board of Adjustment, 152 N.J. 309, 323 (1998). Furthermore, the enhanced quality of proof regarding the negative criteria requires specific findings by the Board. Medici v. BPR Co., 107 N.J. 1, 4 (1987).

The proper scope of judicial review is to determine whether the board could have reasonably reached its decision on the record. Kramer v. Board of Adjustment, Sea Girt, 45 N.J. 268, 296 (1965); Davis Enterprises v. Karpf, 105 N.J. 476, 485 (1987).

#### **A. POSITIVE CRITERIA**

The requirement of special reasons takes its definition and meaning from the general purposes of zoning articulated in N.J.S.A. 40:55D-2. Kohl v. Mayor of Fair Lawn, 50 N.J. 268, 276 (1967). When the use for which a variance is sought is not an inherently beneficial use like a hospital, the applicant must satisfy the positive criteria by showing that the general welfare is served because the use is peculiarly fitted to the particular location for which the variance is sought. Smart SMR, 152

N.J. at 323. To satisfy the negative criteria, in addition to proving that the variance can be granted without substantial detriment to the public good, the applicant must show with an enhanced quality of proof that the requested variance is not inconsistent with the intent and purpose of the master plan and the zoning ordinance. Ibid. (citing Medici, 107 N.J. at 21-22).

The Board found that the site is particularly suited for the proposed concrete plant because of the size of the property; its location; highway access; the various industrial uses in the area; and that the general welfare is served by providing a location for the manufacturing of concrete. (Pa15) The Board specifically found that four (4) of the purposes of zoning were advanced by the application, specifically N.J.S.A. 40:55D-2(g), (h), (i) and (m). (Pa123-124)

Those purposes of zoning are, in relevant part:

g. to provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all citizens;

h. to encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes which result in congestion or blight;

i. to promote a desirable visual environment through creative development techniques and good civic design and arrangement; and

m. to encourage coordination of the various public and private procedures and activities shaping land development with a view of lessening the cost of such development and to the more efficient use of land. (Pa120)

The Board applied the facts of the application to these purposes, finding that they are promoted because the application provides sufficient space in appropriate locations, both public and private, to meet the needs of Dennis Township's citizens since there is a need for additional concrete facilities in Cape May County; the ability of this site to cater to that need; the site's proximity to a major county truck route; the plant would be sited in an already disturbed area; it will be located a sufficient distance from residential neighborhoods; there would be no noise violations; the visual impact is sufficiently addressed; and the plant is sufficiently distanced from environmental areas. (Pa122; Pa125)

The trial court found that these Board findings were well supported by the testimony of Pierson's experts, David Shropshire, Brian Murphy and Tiffany Morrissey, which was accepted as credible and truthful by the Board. (Pa15)

The property is located on a major county truck route and the traffic impact is acceptable, according to the testimony of Mr. Shropshire. The county road where the property is located will be improved by the Applicant, making the route even safer

with the addition of acceleration and deceleration lanes, and widened shoulders. The application re-uses an existing disturbed area; the plant will use resources already on site; and existing tree lines and structures lessen the visual impact, especially when coupled with the significant distance from Woodbine-Ocean View Road.

Our courts have consistently emphasized the promotion of the general welfare as the zoning purpose that “most clearly amplifies the meaning of special reasons.” Medici, 107 N.J. at 18. The Medici Court elaborated that with respect to a commercial use that is not an inherently beneficial use, “any benefit to the general welfare derives not from the use itself but from the development of a site in the community that is particularly appropriate for that very enterprise.” Ibid. As stated by the Court in Burbridge v. Governing Body of Tp. of Mine Hill, 117 N.J. 376, 393 (1990), “[T]he question is whether the special reasons, *taken as a whole*, are founded affirmatively in one or more of the zoning objectives set forth in [the statute].” 117 N.J. 376, 393 (1990)(quoting Kramer, 45 N.J. at 287. The Burbridge Court added, “it is in nowise controlling that one or more of the reasons standing alone would not be legally sufficient.” Ibid. (quoting Ward v. Scott, 16 N.J. 16, 21 (1954)). The Board made detailed, specific findings as to the several special reasons that this application promotes, clearly satisfying the positive criteria for the use variance. The trial court held that these findings were well supported in the record of the Applicant’s experts’ testimony, and the court’s decision should be upheld.

## **Height Variance**

A height variance requires an applicant to show that the increased height of a structure does not offend the purpose of the height restriction. Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41, 52 (App.Div. 2004). The trial court specifically referenced the testimony of Mr. Murphy and Mr. Shropshire that also supported Ms. Morrissey's opinion that the height of the concrete plant would not create a substantial visual impact given its distance from Woodbine-Ocean View Road, the existing tall structures in the vicinity, and the siting of the plant behind mature 60-foot tall trees and existing buildings on the property. (Pa16-17)

The Board's grant of the height variance is supported by evidence in the record, and the trial court's decision that the variance was not arbitrary, capricious, or unreasonable should be upheld.

## **B. NEGATIVE CRITERIA**

In addition to satisfying the positive criteria, a use variance applicant must also satisfy the two prongs of the negative criteria, that the variance can be granted without substantial detriment to the public good, and that the variance will not substantially impair the intent and purpose of the master plan and zoning ordinance. N.J.S.A. 40:55D-70.

### **1. Public Good**

With respect to the first prong of the negative criteria, that the variance can be granted without substantial detriment to the public good, the focus is on the variance's effect on the surrounding properties. Medici, 107 N.J. at 22. Boards are to evaluate the impact upon adjacent properties and determine whether the variance will cause such damage to the character of the neighborhood as to constitute substantial detriment to the public good. Ibid.

The Board found that Pierson satisfied this prong of the negative criteria, noting the limited visual impact; the limited, if any, noise impact; the limited traffic impact; and the limited, if any, impact environmentally – all testified to by Pierson's experts, and accepted as factual and true by the Board. The Board also found there would be no negative safety impacts. (Pa120) The trial court held these Board findings were properly supported by the record. (Pa18)

## **2. Intent and Purpose of the Master Plan and Zoning Ordinance**

The proof required for the second prong of the negative criteria must reconcile the grant of the variance with the municipality's omission of a concrete plant as a permitted use in the B-Business District. The Board's Resolution should contain sufficient findings, based on proofs submitted, to satisfy a reviewing court that the Board has analyzed the Master Plan and zoning ordinance, and determined that the governing body's omission of the proposed use is not incompatible with the variance granted. Medici, 107 N.J. at 21-23. The Board did reconcile the variance with the

master plan and zoning ordinance; the Resolution contained detailed findings based on proofs submitted; and the trial court was satisfied that the findings were reasonable.

Much undeserved attention has been paid by Plaintiffs to the unpublished decision of Hare v. Township of Barnegat Planning Bd., 2016 WL 1228847. (Pb37-38; Pb38-40) The concept of a concrete plant being considered an accessory use to a sand mining operation simply illustrates how the construction of a concrete plant at a sand mine makes sense. The infrastructure is on-site; most of the raw materials are on-site; it is not incongruous to locate a concrete plant at a sand mining operation.

Plaintiffs' insistence that the scant mention of Hare is a fatal blow to the thoughtfully and carefully analyzed decision that the Applicant satisfied the second prong of the negative criteria overstates the impact of the Hare decision on the Board. The Board's Resolution acknowledges the suggestion that a concrete plant located at a sand mining operation does not appear out of place. The Applicant did not seek a d(2) variance for the concrete plant as an accessory use. The Applicant sought, and was granted, a d(1) variance with its attendant stricter requirements. Plaintiffs' suggestion that the mere mention and reference to the Hare decision is conclusive evidence that the Board did not have any idea what it was doing; what was required for a d(1) variance; and what testimony it should or should not have accepted or rejected is just absurd. The Applicant did not request a d(2) variance, nor was it

granted a d(2) variance. Again, as stated in the Resolution, the Board would have approved the application whether Hare applied or not. It was specifically worded such that a reviewing court could exercise its original jurisdiction to find Hare an appropriate case to rely upon, if it chooses to do so. Plaintiffs' argument that even mentioning the unpublished case is reversible error should be disregarded.

The Board found that this second prong of the negative criteria was met, referencing testimony of Ms. Morrissey, Pierson's planner, that (1) the purpose of the B-Business District is to provide locations where business and industrial complexes may be developed; (2) the proposed use is more akin to permitted uses in the zone; and (3) a similar use in this zone is located and permitted just across the road. (Pa121-122) The Board found these facts reconcile the proposed use with the zoning ordinance, and thus concluded that the variances would not be inconsistent with the intent and purposes of the Master Plan and zoning ordinance. (Ibid.) These findings by the Board in its Resolution go far beyond a mere conclusory statement that the variance could be granted without substantial impairment to the zoning ordinance and Master Plan, criticized in Medici. Recognizing the analysis based upon the testimony proffered at the numerous hearings, the trial court determined that these findings were reasonable and accurate. (Pa19)

The property is located in a zone that permits industrial uses, and is surrounded by industrial uses. The concrete plant's location is sufficiently distanced from the

Conservation Zone and Residential Zone; it abuts a wooded area and the Atlantic City Electric substation; and there are high transmission towers running through the area. These facts support the Board's finding that the concrete plant would not substantially impair the intent and purpose of the Master Plan and zoning ordinance.

Every use variance results in a deviation from the zoning ordinance and master plan. That fact notwithstanding, zoning boards have the power under the MLUL to grant use variances when an applicant satisfies the necessary criteria. The trial court concluded that the negative criteria had been satisfied by an enhanced quality of proof, the Board's findings as to this issue were amply supported by the record, and were not arbitrary, capricious, or unreasonable. (Pa20)

#### **IV. THE TRIAL COURT PROPERLY UPHELD THE BOARD'S GRANT OF SEVERAL WAIVERS AS REASONABLE AND AMPLY SUPPORTED BY THE RECORD (Pa21)**

The Board's decision to grant the waivers for stormwater management calculations, soil borings, and an Environmental Assessment was reasonable and the trial court found as much. (Pa21) The Dennis Township Code authorizes the Board to require an environmental impact study where an application's environmental impact may, in the Board's reasonable judgment, affect any of the purposes for which this article or the Zoning Chapter was enacted. (§185-41K) Section 185-41K(5) specifically grants the Board the authority to waive the requirement for an Environmental Assessment Report if sufficient evidence is submitted to support a

conclusion that the proposed development will have a negligible environmental impact. Section 185-41K(5)(c) provides that any development affecting wetlands and C-1 waters shall not be granted a waiver from this requirement.

Pierson's environmental expert, Peter Lomax, testified that the concrete plant would not be anywhere near environmentally sensitive areas or wetlands or Category-1 water. He testified that the plant would be located on an already disturbed area of the 165-acre property, and would have no effect on the geology of the area. The Board found Mr. Lomax's testimony sufficient to support granting the waiver.

Plaintiffs argue that the waiver should not have been granted because the property contains wetlands. (Pb41) This contention ignores the testimony and the fact that this property is 165 acres, and the wetlands are in a far corner of the property, more than 1500 feet away from the proposed concrete plant's location. (Pa992-T81:4) Mr. Lomax further testified that the C-1 water is more than 8,000 feet away. (Id.-T82) The Environmental Assessment requirement is based on a development's *effect* on environmental purposes, not on a development's location on a parcel that may or may not include wetlands or C-1 water.

Plaintiffs overstate the impact of the expiration date of the Letter of Interpretation ("LOI") from the NJDEP. (Pa379; Pa1056-T22:23) Mr. Lomax testified that he personally inspected the site, and determined that the wetlands delineation had not changed to any significant degree since the LOI issued. That fact, and the fact that

the concrete plant would be almost 2,000 feet away support his determination that the proscription of §185-41K(5)(c) was not in play. (Pa1056-T23:4)

Pierson provided an Environmental Assessment Checklist. (Pa336) Both Mr. Murphy and Mr. Lomax testified about the contents of that checklist. It was determined that the plant would have no effect on the geology of the area. The waiver for soil borings was supported because no significant ground disturbance was anticipated given that the plant is placed on pedestals. The trial court properly found sufficient evidence in the record to support the Board's decision to grant the waivers.

### **CONCLUSION**

For all of the foregoing reasons, the Board respectfully requests that this Court uphold the well-reasoned and carefully considered decisions set forth in the Board's Resolution that the trial court held was not arbitrary, capricious, or unreasonable.

Respectfully submitted,

*Jon Batastini*

\_\_\_\_\_  
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Dated: September 15, 2025

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STONEY 9, LLC, ROBERT A.  
CARR, and DEBORAH L. CARR,

Plaintiffs,

v.

PIERSON PLEASANTVILLE,  
LLC  
d/b/a R.E. PIERSON  
CONSTRUCTION CO. d/b/a/  
R.E. PIERSON MATERIALS;  
TOWNSHIP OF DENNIS  
CONSOLIDATED LAND  
USE BOARD,

Defendants.

APPELLATE DIVISION  
DOCKET NO. 2377-24

On Appeal From:

SUPERIOR COURT OF NEW JERSEY  
CAPE MAY COUNTY  
LAW DIVISION  
DOCKET NO. CPM-L-000030-24

Sat below:

The Honorable Michael J. Blee,  
A.J.S.C.

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REPLY BRIEF IN SUPPORT OF APPELLANTS, STONEY 9, LLC,  
ROBERT A. CARR, AND DEBORAH L. CARR'S APPEAL FROM  
MARCH 11, 2025 ORDER

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**TABLE OF CONTENTS**

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED .....	iii
TABLE OF AUTHORITIES .....	iv
PRELIMINARY STATEMENT.....	1
LEGAL ARGUMENT.....	2
I.    The Board impermissibly usurped the zoning authority of the governing body (Raised below, Pa17-19).....	2
II.   The Board’s findings are so inconsistent with the plain language of the zoning ordinance such as to render its decision arbitrary and capricious (Raised below, Pa14).....	10
III.  The Board’s findings that there is a need for additional concrete production are not supported by sufficient evidence in the record (Raised below, Pa5).....	11
CONCLUSION.....	12

**TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING  
APPEALED**

Order Dismissing Plaintiffs' Complaint In Lieu of Prerogative Writ ... (Pa1)

**TABLE OF AUTHORITIES**

**CASES**

AMG Associates v. Springfield Tp., 65 N.J 101 (1974).....7, 8

Feiler v. Fort Lee Bd. of Adjustment, 240 N.J. Super. 250 (App. Div. 1990).. 2

Dunbar Homes, Inc. v. Zoning Bd., 233 NJ. 546 (2018)..... 10

Grundlehner v. Dangler, 29 N.J. 256 (1959).....8

Hay v. Bd. of Adjustment, 37 N.J.Super. 461 (1955)..... 8

James R. Ientile, Inc. v. Zoning Bd. of Adj., 271 N.J. Super 326 (App. Div. 1994).....10

Leimann v. Bd. of Adj., Cranford, 9 N.J. 336 (1952).....2

Medici v. BPR Co., 107 N.J 1 (1987)..... 2, 3, 4, 6, 10, 11

Paruszewski v. Twp. of Elsinboro, 154 N.J. 45 (1998).....2

Twp. of Dover v. Bd. of Adjustment of Dover, 158 N.J.Super. 401 (App.Div.1978)..... 2, 7, 8

**STATUTES and OTHER AUTHORITIES**

N.J.S.A. 40:55D-62..... 2

**PRELIMINARY STATEMENT**

Appellants submit the following reply brief in support of their appeal from the March 11, 2025 order entered by the Superior Court of New Jersey Cape May County Law Division, which dismissed their Complaint in Lieu of Prerogative Writs against the Dennis Township Consolidated Land Use Board (the “Board”) and Pierson Pleasantville, LLC (“Pierson”).

Mining operations are a specifically prohibited use in every zoning district in Dennis Township (the “Township”). Concrete plants are not permitted as a principal or conditional use in any zoning district in the Township. Despite three previous unsuccessful use variance applications by Pierson, and, as well, Pierson’s lawsuit filed against the Board and the Township, the governing body has never amended its zoning ordinances to allow concrete plants in any zone.

Notwithstanding the foregoing, the Board has taken it upon itself to grant Pierson multiple use variances to operate a non-conforming concrete plant on a site already containing a specifically prohibited non-conforming use, thereby violating fundamental principals of sound zoning, disregarding its own master plan and ordinances, and usurping the legislative authority of the governing body. In short, the Board took it upon itself to sit as the governing body.

## LEGAL ARGUMENT

### **I. THE BOARD IMPERMISSIBLY USURPED THE ZONING AUTHORITY OF THE GOVERNING BODY. (Raised Below, Pa17-19)**

A municipal governing body is vested with the ultimate responsibility of establishing the essential land use character of the municipality through the adoption of zoning ordinances that divide the municipality into districts, identify the uses permitted in each district, and impose general limitations on construction. Paruszewski v. Twp. of Elsinboro, 154 N.J. 45 (1998); N.J.S.A. 40:55D–62. A board of adjustment may not, in the guise of a variance proceeding, usurp “the legislative power reserved to the governing body of the municipality to amend or revise the plan....” Feiler v. Fort Lee Bd. of Adjustment, 240 N.J. Super. 250, 255 (App. Div. 1990) citing Leimann v. Bd. of Adj., Cranford, 9 N.J. 336 (1952).

In Twp. of Dover v. Bd. of Adjustment of Dover, 158 N.J. Super. 401 (App. Div. 1978), the Court discussed the criteria for determining when a variance grant constitutes an impermissible exercise of the zoning power and described the basic inquiry in such a case as “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.” Id. at 412–413.

Medici v. BPR Co., 107 N.J. 1 (1987) addresses the factors to be considered and standards to be applied in connection with a use-variance

application for a commercial use that does not *inherently* serve the public good. In light of legislative amendments requiring periodic re-examination of master plans and annual reports from the board of adjustment to the governing body (which were designed to avoid successive appeals for the same types of variance by encouraging the governing body to amend the ordinance), our Supreme Court deemed it appropriate to require an enhanced quality of proof that the grant of a use variance is not inconsistent with the intent and purpose of the master plan and zoning ordinance. Id. at 21. Those proofs and findings must satisfactorily reconcile the grant of a use variance with the continued omission of the proposed use from those permitted in the zone. Id.

Notably, the Medici Court stressed that “[r]econciliation on this basis becomes increasingly difficult when the governing body has been made aware of prior applications for the same use variance but has declined to revise the zoning ordinance.” Id. Moreover, the Court instructed that “[w]hen an informed governing body does not change the ordinance, a board of adjustment may reasonably infer that its inaction was deliberate.” Id. at 20–21. The Court described this enhanced standard as a “formidable burden” [Id. at 25] and explained that it is intended to narrow the discretion of boards of adjustment in reviewing use-variance appeals for uses deliberately excluded by the governing

body and to effectuate the legislature’s objective of encouraging municipalities to make zoning decisions by ordinance rather than by variance. Id. at 5.

Here, Respondents contend that the Board properly found that Pierson met the enhanced standard of Medici for the following reasons, none of which satisfactorily reconcile the grant of the use variances with the zoning ordinances continued omission of the proposed use from those uses permitted in the zone:

- The articulated purpose of the B-Business District “to provide locations within the Township where business and industrial complexes may be developed;”
- The proposed use to be added to the mining operation is more akin to the permitted uses for all of the reasons testified to by Ms. Morrissey and accepted as fact by the Board;
- A similar use is located and permitted in the business zone and in close proximity to the Applicant’s location;
- The Hare case suggests that such use can be found to be an accessory use to a mining operation even though the use is not identified as an accessory use; and
- These facts reconcile the proposed use with the ordinance despite not being specifically listed as a permitted use.

Board Db30-31; Pierson Db20.

In response to the first reason proffered by Respondents, Chapter 185-25B of the Code [B-Business District] clearly lists all principal permitted uses in the zone and states that “[u]ses in this district should be free from objectionable odors, fumes, dirt, vibration and noise.” Permitted uses include storage, sales,

and rentals. No heavy industrial uses are permitted in the zones in which the Pierson Property is located. Pa191-192. Moreover, Chapter 185-4 provides that “[a]ll uses not expressly permitted in this chapter are prohibited.” Pa159.

Regarding the second reason, the assertion that the proposed use is “akin” to the permitted uses in the zone is simply and demonstrably false. The proposed operation of a concrete plant in the B-Business District runs directly contrary to the clear and plain language of the zoning ordinance. Pa191-192. It is not at all “akin” or similar to the permitted uses of sales, storage, and rentals, which are of a light industrial nature and free from objectionable odors, fumes, dirt, vibration and noise, as reflected in the zoning ordinance. Id.

With respect to the third reason proffered, the claim that a similar use is located and permitted in the business zone and in close proximity to the Applicant’s location is not only immaterial but likewise demonstrably false as the record makes clear that the Fehrle masonry operation never sought or obtained land use approval for a small batch concrete operation in connection with its masonry business. Pa384-405. Moreover, to the extent that it was an approved operation, it would negate the argument that there is a need for additional concrete production or any real public benefit to be derived from approving a commercial concrete plant. Furthermore, because the Fehrle masonry operation pre-dates the Pierson use variance applications previously

denied by the Board, it does not represent a change in the character of the zoning district that might legitimately reconcile the variance with the continued omission of the use from those permitted in the subject zone. Id.

Fourth, as set forth at length previously, the Hare decision is unpublished, inapplicable, easily distinguishable, and does not represent a change in the law. Moreover, the fact that it was considered at all, even if only partially and not determinatively, demonstrates that the Board applied an incorrect legal standard.

Finally, the statement that “these facts reconcile the proposed use with the ordinance despite not being specifically listed as a permitted use” is a naked conclusion and not a reason to explain how anything has changed in the law or the zoning district to reconcile the variance with the governing body’s inaction.

In light of the foregoing, Respondents’ proffered justifications do not support a finding that Pierson met the enhanced and “formidable burden” of Medici. It bears repetition that there were three (3) prior variance applications filed by Pierson seeking to establish a concrete plant on the site, as well as a lawsuit in which the Township was a named defendant, resulting in a settlement memorialized by a resolution adopted by the Township. Pa59-60. Despite these three prior applications, the lawsuit, and the legislatively required master plan re-examination and annual reports from the Board, the governing body never changed the zoning ordinance. Our Supreme Court has instructed that a board

may reasonably infer that the governing body's inaction was deliberate. Instead, the Board has taken matters into its own hands and usurped the zoning authority of the governing body by granting the variances despite the inaction of the governing body to change the zoning plan to allow the proposed prohibited use.

Also material in considering the issue of the Board's usurpation of legislative authority is the considerable size of the Pierson property, which at over 165 acres represents a sizeable and significant portion of the entire Business District, and an even greater share of the business activity in that zoning district. In this regard our Supreme Court has stressed that when "a large tract or a substantial area comprising several tracts" is involved, "the situation is beyond the intended scope of the variance procedure." Dover Twp., supra at 412. (citing AMG Associates v. Springfield Tp., 65 N.J. 101 (1974)).

Here, Pierson acknowledges the subject "site is over 165 acres in size, significantly larger than the 1.5-acre minimum lot size required in the "B" district (approximately 100 times larger). Pierson Db1. Pierson notes in its brief that "[t]he Master Plan acknowledges that the business zone itself only accounts for approximately 1.1% of the total land area within the Township" and "there is not a lot of land area available for business type uses." Pierson Db37-38. When a variance pertains to a substantial portion of or an entire zone district, a board's variance begins to closely resemble zoning, which is the exclusive

province of the governing body. AMG Assocs. v. Twp. of Springfield, 65 N.J. 101, 109 (1974).

“Ultimately, the basic inquiry in each case must be whether the impact of the requested variance will be to substantially alter the character of the district as that character has been proscribed by the zoning ordinance. That inquiry requires analysis and evaluation of such factors as the size of the tract itself; the size of the tract in relationship to the size and character both of the district in which it is located and the municipality as a whole... and the nature, degree and extent of the variation from district regulations which is sought. The test of whether the board has been engaging in proscribed legislation must ultimately be one of both geographic and functional substantiality vis-a-vis the plan and scheme of the municipality's zoning ordinance.” Dover Twp., supra at 401, 412.

Finally, although land use laws may confer a right to continue a pre-existing nonconforming use, “the policy of the law is to restrict them closely [.]” Hay v. Bd. of Adjustment, 37 N.J.Super. 461, 464, (1955). This is because their “tendency is to subvert rather than support sound planning.” Grundlehner v. Dangler, 29 N.J. 256, 274, (1959). While a municipality may not take active steps to extinguish nonconforming uses... they must wait with “fervent hope that they would in time wither and die and be replaced by conforming uses.” Id.

The Dennis Township master plan and zoning ordinances express a clear intention to phase out all mining operations, reclaim the land, and convert them to conforming uses such as the industrial park across from Pierson. Pa149-157. By adding another non-conforming use to a pre-existing, non-conforming and specifically prohibited use, the board violated fundamental concepts of sound zoning and blatantly arrogated to itself the power to reject existing zoning and to substitute its composition to that of the governing body. This is reflected in the comments of Member Chambers at the final board hearing, when he stated “[t]he plant is going where it belongs basically in Dennis Township. That’s a you know, high volume area of trucks so forth all the time and the plant’s gonna blend in right there. I you know, I mean, that’s where it should be in Dennis Township and nowhere else... I think it’ll be a good fit.” Pierson Db16.

A municipal governing body is vested with the ultimate responsibility of establishing the essential land use character of the municipality through the adoption of zoning ordinances that identify the uses permitted in each district. That is, however, not what occurred here. If the governing body wanted to allow concrete plants in the subject zones, the appropriate course of action would be for it to revise the zoning ordinances. It has had ample notice and opportunity to do so but has steadfastly declined. The Board’s variance grant accordingly constitutes an impermissible exercise of zoning power and should be reversed.

**II. THE BOARD’S FINDINGS ARE SO INCONSISTENT WITH THE PLAIN LANGUAGE OF THE ZONING ORDINANCE SUCH AS TO RENDER ITS DECISION ARBITRARY AND CAPRICIOUS. (Pa14)**

In Pierson’s responsive brief, the testimony of its planner, Tiffany Morrissey, which was accepted as fact by the Board, is recounted as follows:

In discussing Medici and its requirements Ms. Morrissey testified that concrete is permitted and accepted as already approved in this zone. She testified the use is more akin to the permitted uses. The use at issue that is the nonconforming use is the mining use which is a pre-existing non-conforming use and the new use is a permitted use in the area. Pa0656-4T16:12-25 and Pa0657-4T17:1-9; that the use is customarily associated with mining operations and supports the standard expressed in Medici. Finally, she testified the mine is in a business zone and not a conservation or residential zone and therefore the site could be redeveloped and reclaimed in accordance with the permitted uses in the B Zone which as shown in the surrounding area includes uses similar to the industrial park across the street, marine repair etc.

Pierson Db12.

Here, again, the assertion that concrete plants are permitted and accepted as already approved in the zone is tangibly false based on the clear language of the ordinances. A court owes no deference to a land use board’s interpretation of an ordinance or decisions on matters of law. James R. Ientile, Inc. v. Zoning Bd. of Adj., 271 N.J. Super 326 (App. Div. 1994). This is so because zoning boards have “no particular skill superior to the courts regarding purely legal matters.” Dunbar Homes, Inc. v. Zoning Bd., 233 NJ. 546, 559 (2018). The fact that the Board accepted this testimony and relied upon it renders its decision

arbitrary, capricious, and unreasonable. Additionally, in the Board's Resolution, it accepted as fact Ms. Morrissey's testimony that "[t]his is really an accessory use" [Pa110] and that "the new redi-mix concrete plant is a de-facto permitted use in the area because the use is customarily associated with mining operations." Pa113. These findings by the Board are patently erroneous and renders its decision arbitrary, capricious, and unreasonable. Indeed, there is no legal or factual support for such a finding in the language of the master plan or zoning ordinances.

**III. THE BOARD'S FINDINGS THAT THERE IS NEED FOR ADDITIONAL CONCRETE PRODUCTION ARE NOT SUPPORTED BY SUFFICIENT EVIDENCE IN THE RECORD. (Pa5)**

In Medici, supra 107 N.J., the Court emphasized the absence of evidence of inadequate hotel capacity in the community in rendering its decision reversing the judgment of the Appellate Division, specifically finding that "[t]he testimony in the record fell far short of demonstrating that the existing hotel and motel room capacity in the vicinity was so inadequate that the provision of additional rooms would benefit the general welfare..." Id. at 24. Here too, there is likewise a dearth of evidence in the record to support the conclusion that there is a need for additional concrete production in Dennis Township, or that any public benefit would be derived from granting the use variances sought by Pierson to operate a ready-mix concrete plant on its pre-existing non-conforming mining operation. In fact, the only testimony in

the record that the Respondents point to is that of Ernest Troiano, Jr. who appeared remotely on the phone during the public comment portion of the July 27, 2023 hearing before the Board. Pierson Db4; Board Db5. In his testimony, Mr. Troiano acknowledged he is not a resident of Dennis Township, does not own property there, and he is a customer of Pierson and owner of a concrete contracting company. Pa1064. Moreover, Mr. Troiano offered no competent evidence concerning the current production capacity or need for concrete in Dennis Township or Cape May County, no figures, no studies, no reports, or anything other than his own anecdotal thoughts and opinions on the Pierson application. Pa1063-1064. The Board's findings, therefore, regarding there being a public benefit arising from the need for additional concrete production are not supported by sufficient evidence in the record.

### **CONCLUSION**

For the reasons set forth herein, Appellants respectfully request that the Court reverse both the Board and the trial court.

Respectfully submitted,

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