
Superior Court of New Jersey

Appellate Division

Docket No. A-003794-23

660 PASCACK REALTY, LLC	:	CIVIL ACTION
	:	
	:	ON APPEAL FROM THE
<i>Plaintiff-Appellant,</i>	:	ORDER OF THE
	:	SUPERIOR COURT
	:	OF NEW JERSEY,
vs.	:	LAW DIVISION,
	:	BERGEN COUNTY
	:	
TOWNSHIP OF WASHINGTON	:	DOCKET NO.: BER-L-4133-23
ZONING BOARD OF	:	
ADJUSTMENT,	:	Sat Below:
	:	
	:	HON. CHRISTINE A.
<i>Defendant-Respondent.</i>	:	FARRINGTON, J.S.C. (ret.)

BRIEF FOR PLAINTIFF-APPELLANT

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POINT ONE	
THE ACTION OF THE WASHINGTON TOWNSHIP BOARD OF ADJUSTMENT IN DENYING PLAINTIFF’S VARIANCE APPLICATION WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE AND THEREFORE ILLEGAL. AS A RESULT, THE TRIAL COURT’S JUDGMENT AFFIRMING THE BOARD’S ACTION WAS ALSO IN ERROR. THEREFORE, THIS COURT SHOULD ENTER A JUDGMENT: (1) REVERSING THE TRIAL COURT’S ORDER FOR FINAL JUDGMENT, AND (2) REMANDING THE MATTER TO DEFENDANT BOARD DIRECTING IT TO GRANT PLAINTIFF’S APPLICATION IN ITS ENTIRETY (Pa 1)	21
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PRELIMINARY STATEMENT

This appeal, arising out of a prerogative writ action, pertains to a local zoning board's denial of a use variance application, which denial was affirmed by the Law Division. In the present case, plaintiff/appellant 660 Pascack Associates, LLC, filed a use variance/site plan application to defendant/respondent Township of Washington Zoning Board of Adjustment seeking to develop a neighborhood commercial retail center in a residential zone.

The plaintiff's evidence in support of its application was presented over four Board hearings and included expert testimony of a site engineer, architect, traffic engineer and a land use planner which provided overwhelming evidence in support of the variance relief being sought and which met its burden of proof under the Municipal Land Use Law. It was the applicant's position that a special reason existed for the granting of the use variance because of unique characteristics of this site and that it would not cause substantial detriment to the public good, nor impair the intent and purpose of the zoning ordinance.

The record reflects the Board's total misunderstanding of the nature of the application and its confusion as to the action taken by the Board. The Board's resolution stated the plaintiff failed to prove that the use was not inherently beneficial to the general welfare which plaintiff never contended to be the special reason on which the request for a use variance was based.

At the conclusion of the final hearing, a Board member made a motion to approve which was seconded. There were no votes in favor of the motion. A Board member then made a motion to deny the variance which motion was adopted unanimously including the two members who initially moved and seconded the original motion to approve. At the time that the Board members voted to deny the application, there was no discussion and absolutely no commentary by Board members explaining the reasons for their respective votes. This procedure further supports the plaintiff's position that the Board's resolution of denial was arbitrary, capricious, and unreasonable.

The trial Court's decision consisted of 26 pages, the first 23 of which were devoted to summarizing the evidence presented at the hearings. The Court's opinion in the final three pages does not analyze the Board's resolution against the evidence presented at the hearings. The Court does not set forth any deficiencies in the proofs presented by the plaintiff. Although in affirming the Board's action, the trial Court concluded that it was not arbitrary, capricious, or unreasonable, there is no explanation in the decision as to why this was the case.

PROCEDURAL HISTORY

Plaintiff, 660 Pascack Realty, LLC, filed an application to defendant Washington Township Zoning Board for use variance, bulk variances, preliminary and final site plan approval, and waivers. (Pa 1049-1177) Plaintiff

sought approval under N.J.S.A. 40:55D – 70 (d) (1) for a use variance, to construct a retail commercial use in a residential zone. (Pa 1054) The applicant requested variances/waivers to permit parking in the front yard of the proposed development and to reduce the parking spaces from the required size of 10' x 20' to a reduced size of 9' x 18', the RSIS standard. (Pa 1054)

Four public hearings were held before the Board. (Pa 36 to Pa-1001) Although questions and comments were presented by members of the public at the hearings, no formal opposition was filed and no expert testimony was presented in opposition to the testimony provided by the applicant's experts. As noted, at the conclusion of the final hearing, the Board was entirely confused as to the motions to be voted above. At first, a motion was made and seconded to approve the application. The members did not know whether they were voting on a procedural motion to vote on the application or a substantive motion to approve or deny the application. Ultimately a motion was made and seconded to deny the application on the merits. The Board voted 5 to 1 to deny the application with the members who made and seconded the motion to approve voting to deny. (Pa 929-20 to Pa937-16) At its next meeting, at which the resolution was read into the record by the Board Attorney, the Board adopted a formal, written memorialization resolution of denial (Resolution 23-09). The vote to adopt the resolution of denial was unanimous 6 to 0. (Pa1002).

Curiously, the Chairman made the following comment: “I think the applicant presented a good case. I firmly believe it’s not an inherently beneficial use.” (Pa 1000-6)

Plaintiff filed the within action in lieu of prerogative writs charging that the Board’s decision and determination was arbitrary, capricious. and unreasonable. (Pa1031) The Planning Board filed an answer of general denial. (Pa1042)

On June 28, 2024, the matter was tried in the Law Division before Hon. Christine A. Farrington, J.S.C. (ret.) (Trial Transcript of June 28, 2024) On that same date, Judge Farrington affirmed the Board’s denial and issued an order for final judgment dismissing plaintiff’s complaint with prejudice. (Pa1) The Order was based upon the Court’s written decision also issued on that date. (Pa2)

Plaintiff filed a timely Notice of Appeal on August 5, 2024. (Pa27)

STATEMENT OF FACTS

The applicant/plaintiff is 660 Pascack Realty LLC, the owner of Block 2110, Lot 6 to 11, commonly known as 616-682 Pascack Road in the Township of Washington. (Pa 43-19) The property has a total of 2.4 acres. It fronts Pascack Road and Washington Avenue, a busy intersection in the Township, (Pa 24) Three of the corners at this intersection have commercial uses. (Pa 43-24) There is a motor vehicle gas station with a convenience store on one corner which was

previously granted a use variance by the Board, a dental office use converted from a bridal shop which was also approved by the Board (Pa 44-12), and a large restaurant/banquet facility known as “Seasons”. (Pa 44-6)

The application sought site plan approval for a neighborhood retail center which required use variance and certain bulk variances/waivers. (Pa 1049 to Pa 1055) The neighborhood commercial center would consist of two commercial buildings. One would be 2400 square feet and the other would be 14,700 square feet. (Pa 45-12) The site would be upgraded with substantial new landscaping and a substantial buffer for plantings. (Pa 46-2 to 11) The number of parking spaces would be conforming and would be in the front of the buildings. (Pa 46-12 to 18)

The subject property is in the AA District, which does not permit commercial use. (Pa 48-2) Plaintiff’s position before the Board was that the property was particularly well suited for the proposed use and that the applicant could therefore meet the statutory requirements for a use variance under N.J.S.A. 40:55D-70 (d). (Pa 48-5). The buildings would comply with all the appropriate setbacks contained in the AA zone District requirements (Pa 48-9 to 14). The applicant also sought a variance under N.J.S.A. 40:55D-70 (c) to permit one monument sign as well as two site plan waivers: 1) to permit the parking stalls, proposed at 9 x 18, to be smaller than that required by the code, 10 x 20,

and 2) to permit parking in the front yard oriented towards Pascack Road away from the residential rear boundary line. (Pa 48-15)

Calisto Bertin, P.E. testified as an expert witness on behalf of the applicant. (Pa 53-16) He confirmed the height of both buildings is less than what is permitted in the AA District (Pa 71- 6 to 22). He confirmed that ingress and egress would be approved by the Bergen County Planning Board (Pa 41-14 to 20) He confirmed that the 102 parking spaces proposed conform to the requirements under the Township Code as to the number of spaces. (Pa 76-1 to 18) He confirmed that there was adequate ingress and egress for emergency vehicles (Pa 76-14 to 18; Pa 92 – 6 to 10), and that the application met all dimensional and bulk requirements in the AA Zone (Pa 95-16).

Mr. Bertin testified that the proposed development would result in a significant reduction in the rate that water currently flows from the property, and would reduce water runoff by 26% for a 10 year storm, and 21% for the 100 year storm (Pa 107-11 to 14) The applicant stipulated that it would meet the Township Engineer's stormwater management requirements, which was confirmed by the Township Engineer and the Bergen County Planning Board. (Pa 109-8 to 20)

Gary W. Dean, P.E., an expert in traffic engineering, testified on behalf of the applicant. (Pa 337-19). He prepared a traffic analysis and provided

extensive, detailed testimony pertaining to the intersection of Pascack Road and Washington Avenue where the development would be constructed. (Pa 341-19 to 25) His traffic analysis was in two parts: 1) as it pertains to the property and its relationship to the roadway system surrounding the property; and 2) as it pertains internally to the property itself and what is being proposed by the developer. (Pa 341-24 to Pa 342-6)

Mr. Dean testified that the intersection of Pascack Road and Washington Avenue was rated as level of service F, northbound on Pascack Road was level of service D and traffic proceeding in the westerly direction was level of service E. (Pa 344-9 to 17) Based upon his review, he projected the applicant's development based on its size would generate 60 vehicles per hour. (Pa 355-21) His analysis was based upon well recognized ITE data and standards. His opinion was that the development would not have a detrimental effect on traffic conditions. Based on the improvements that have been proposed in widening the roadways, it was his opinion in terms of a "no-build analysis that every level of service during both peak hours would be a level service C or better. (Pa 361-5 to 9; Pa 362-1 to 5) and therefore, better than what currently exists. He concluded that there would be no negative impact on the traffic conditions created by the proposed development (Pa 358-5; Pa 369-5 to 11). He stated that ingress and egress relating to the site was directed and given approval by Bergen

County (Pa 368-14). Because Pascack Avenue is a county road, this entire access scheme had been vetted and dictated by Bergen County Planning Board (Pa 363-4 to 12). He confirmed this type of development was contemplated at the time Boswell Engineering as Traffic Consultant for the Bergen County Planning Board, designed the improvements for this intersection. (Pa 346-13 to 347-6)

Mr. Dean addressed the parking in the proposed neighborhood retail center and offered an opinion that it not only met Township's standards, but the traffic circulation proposed met all traffic engineering standards. (Pa 364-6 to 14) In essence, he confirmed that whether or not the site is developed, that the level of service will remain the same with the intersection improvements that are in the process of being completed, which is based in part by virtue of the easements granted by the applicant to Bergen County in completing the road widening. (Pa 371-11 to 20)

Paul Grygiel, P.P., a professional planning expert, testified to the applicant's request for variance relief. (Pa 595-11 to 18) Mr. Grygiel and plaintiff's counsel confirmed that the applicant was seeking a use variance under the third criteria of the statute namely: that that the site was particularly well suited for the proposed use because the factors that exist on the property, its location and setting make it particularly suitable to accommodate the proposed use. (Pa 608-12 to 17). Mr. Grygiel testified in detail regarding the positive and

negative criteria under the statute. and that the key word or litmus test as to the negative criteria is “substantially.” (Pa 610-7 to 10) He further explained that under New Jersey case law, specifically the Medici case (Medici v B.P.R. Co., 107 N.J. 1 (1987), an applicant for this type of use variance is required to present an “enhanced quality of proof,” in showing that the grant of the use variance would not be inconsistent with the intent and purpose of the master plan and zoning ordinance. (Pa-610-23 to 611-7)

As to the positive criteria, Mr. Grygiel opined that the site is particularly well suited to accommodate retail commercial development due to its location at a main intersection, its setting within the Township, and its size. It is a large property, over two acres, located at a busy. signalized intersection with a frontage on two main roads (Pa 610-23 to 27 to 12).

Describing the location of the subject property and its relationship to the busy intersection, Mr. Grygiel testified that there are three other corners that are nonresidential uses and other nonresidential uses nearby. (Pa 612-13 to 18) He opined: “So, while this is a single-family residential zone, in my opinion, it is no longer appropriate for single family. There are individual driveways and homes adjacent to this busy, heavily traveled intersection and backing out into Pascack Road is not safe.” (Pa 612-19 to 22)

Mr. Grygiel confirmed that to meet the positive criteria, the applicant has to prove that the proposed development would advance one of the purposes of the MLUL under N.J.S.A. 40:55D-2. (Pa 609-23 to 610-7) He confirmed that in his opinion the purposes of zoning would be advanced including promotion of the general health, safety, and welfare, which is purpose (a) of the statute. (Pa 615-16 to 21), that the development would provide sufficient space in appropriate locations and a variety of commercial and other uses as per purpose (g). (Pa 614-22) In addition, in his view, the proposed retail use of the property would fulfill purpose (h) by encouraging the location and design of transportation routes which promote the free flow of traffic, while discouraging the location of such routes as would lead to congestion or blight. (Pa 614-25 to Pa 616-5) In his opinion it would also fulfill purpose (i) in promoting a desirable visual environment by upgrading the appearance of the property (Pa 616-6). Finally, he offered the opinion that the proposal would advance purpose (m) of the MLUL by encouraging the coordination of various private and public procedures, such as intersection improvements and the addition of sidewalks. (Pa 616-9 to 13). In his opinion, not one purpose, but five purposes of the MLUL would be promoted.

Mr. Grygiel went on to testify as to how the proposed development satisfied the negative criteria, in that there would be no substantial detriment to

the public good. (Pa 618-8) He noted that every development will have an impact, but the question is whether such an impact will be “substantial” and whether it can be mitigated. (Pa 618-12 to Pa 618-18) In his opinion, in this case there would be some major improvements that would offset any negative impacts and improve existing conditions. (Pa 618-21) In terms of aesthetics and layout, he testified that the site would clearly benefit from reinvestment and redevelopment.

In his view, it would be reasonable to conclude that there would be some type of redevelopment of this property. In his opinion, this was not a property that is going to maintain its residential use in perpetuity. (Pa 619-11 to 14) He further opined that the use being proposed was viable and realistic and would provide site improvements that dovetail with the road intersection improvements. (Pa 619-18 to Pa 619-22)

Further regarding the negative criteria, the witness explained that the second part of the negative criteria is that an applicant is required to demonstrate that there will be no substantial impairment to the master plan and zoning ordinance. (Pa 623-17 to 20) He testified that the Township’s recent master plan re-examination was adopted in 2019. It referred to the site as Block 2010, lots 6 to 11. It indicated a nonresidential use may be appropriate with “adequate design and screening/buffering from adjacent residential properties,” which is exactly

what was being proposed by the applicant. (Pa 623-22 to Pa 624-4) The witness acknowledged that another objective stated in the master plan is to maintain existing land use patterns and that commercial uses should be limited to the existing class C retail business area. (Pa 624-5) The witness noted that there are some factors that warrant the Board's consideration of deviating from that recommendation of the master plan. (Pa 624-12) One factor is that portion of the master plan which states that nonresidential use may be appropriate for the site also in view of the intersection. (Pa 624-15) As further evidence that the property is not well-suited for residential use, the witness pointed out the fact that there was a use variance granted in 2019 for a dental office on the southeast corner of this intersection, which is also in the residential zone (Pa 625-2).

Further addressing the master plan, Mr. Grygiel stated that there have been changed circumstances since the 2019 re-examination report was adopted. (Pa 625-6 to 16) The installation of traffic signals, turning lanes, crosswalks and sidewalks all make the site a different one in terms of its setting as compared to the site that existed at the time of the master plan adoption and master plan re-examination adoption. (Pa 625-17 to 24).

Mr. Grygiel further stated that, from a planning perspective, in his opinion what the applicant is proposing is appropriate as it represents adequate design for this particular property. (Pa 627-18 to 23) He also stated that it was his

opinion that the current plan does work from a planning perspective and adequate design point of view, (Pa 628-11 to 21)

Mr. Grygiel testified as to the two waivers requested by the applicant. One was for the size of the parking spaces and the other related to prohibited parking in the front yard. (Pa 633-5 to 10) While the Township ordinance required parking spaces of 10' x 20', the applicant was proposing spaces of 9' x 18'. (Pa 633-20 to 24) He stated that in his opinion, it would be impracticable to require larger spaces. (Pa 627-10 to 15) It was further his opinion that 9' x 18' spaces are the standard most commercial developments elect, since they do not have to deal with a high turnover supermarket use or other certain other types of uses. (Pa 633-20) In his opinion, adding an additional two feet in depth to the spots would not have any beneficial planning benefit. It would only add additional pavement that is not needed, while reducing the number of parking spaces that could be provided (Pa 633-5 to 9).

Joseph Burgis, P.P., is the Township Planner. He reviewed the plaintiff's application and offered commentary to the Board as to the positive and negative criteria of the statute as applied to plaintiff's application. Mr. Burgis explained that the term "special reasons" is not defined in the statute. (Pa 738-3) However, through case law it is clear that if an applicant can identify one or more purposes of the MLUL being advanced by its proposal, same could qualify as a special

reason. (Pa 738-6) It was his opinion that some of the purposes of the MLUL suggested by the applicant as being advanced by the proposal were valid and “quite frankly, had some merit for you to consider.” (Pa 737-22) (Emphasis added).

Mr. Burgis talked about the negative criteria under the statute having a two-prong test. He explained that the applicant must first show that there is no substantial detriment to the public good. (Pa 739-1 to 6) This is defined by case law. (Pa 739-7) Reviewing the testimony of the applicant’s expert planner, he noted that the witness talked about storm water management improvements taking place and visual amenities occurring on site through the use of enhanced landscaping. (Pa 739-10) The applicant’s planner also talked about a better circulation system with three defined curb cuts rather than five driveways where people are backing out onto Pascack Road. (Pa 739-15) Mr. Burgis pointed out that it was up to the Board to determine whether these conditions represent issues of substantial detriment (Pa 739-20)

Referring to the second prong of the negative criteria, Mr. Burgis stated that an applicant must prove that there is no substantial impairment to the intent and purpose of the master plan. (Pa 739-20) He explained that the 2019 document is not the municipality’s master plan, but is merely a re-examination of the master plan, which was issued in the 1980s. (Pa 739-23 to Pa 740-2) The

witness referred to the applicant's counsel's reading of that portion of the master plan which states: "[A]nd the planning board recognizes that there may be other uses appropriate for these properties that could be considered public uses and have a benefit to the public." (Pa 740-21 to 24) He emphasized that the Board's focus should be on the word "public." (Pa 740-25)

Mr. Burgis further stated that the master plan also goes on to say: "At this time the [planning] board does not encourage permitting any nonresidential use on these properties, but it may be amenable to considering nonresidential uses here in the future with adequate design and screening and buffering from adjacent residential properties." (Pa 740-1 to 7)

Further regarding the second prong of the negative criteria, the witness pointed out that the applicant must prove that the proposed landscape amenities, the buffer planting, and the provision for a reduction in paved surface for parking and its replacement with additional landscape amenities satisfies that statement. (Pa 741-9 to 15)

The witness explained that what a master plan and master plan re-examination report does is simply identify policy statements that are for the Zoning Board to consider, and not to determine whether a particular project should be approved. (Pa 741-16 to 21)

Regarding the buffer proposed along the northern property line, he explained that there is presently a ten-foot buffer, and the applicant is adding eighteen feet of additional land by reducing the parking. (Pa 741-21 to Pa 742-15) This would then amount to a total of twenty-eight feet of landscaping along the northern property line. He stated that the Board must determine whether or not that is sufficient. (Pa 741-12)

Mr. Burgis also discussed the applicant's request for a waiver as to the size of the parking spaces. (Pa 744-19) He pointed out that the State of New Jersey has instructed that for all residential development, a 9' x 18' stall is what must be provided. (Pa 744-21) The State authorities do not talk about anything deeper than that. (Pa 744-24)

Significantly, in response to a question from the applicant's counsel, Mr. Burgis agrees that in terms of the special reason requirement there needs to be only one of the purposes of the MLUL applicable. (Pa-749-11 to 24)

The Township called John G. Yakimik, PE, a professional engineer from Boswell Engineering, the Township's Engineers, and the Bergen County Planning Board's Traffic Engineer as an expert witness. (Pa 829-11) Mr. Yakimik addressed the traffic issue. (Pa 843-3) He stated that this issue is also within the exclusive jurisdiction of the Bergen County Planning Board, because this is a county road. (Pa 843-19) His office reviewed the matter and sent its

comments to the County, which comments are under consideration. (Pa 838-22)

The applicant's counsel cross-examined Mr. Yakimik. The witness stated that, based upon the Boswell Engineering review, his office agreed with the traffic analysis prepared by the applicant's traffic expert, Mr. Dean. (Emphasis added) (Pa 843-22 to Pa 845-10) The witness pointed out that his firm was part of the design team that created the design for this intersection. (Pa 846-7 to 11)

Describing the process, Mr. Yakimik stated that at the time of the County's review of the intersection, which was engineered by Boswell Engineering on behalf of the County, a conceptual site plan for a retail center was reviewed because the County was in the process of obtaining road widening easements. (Pa 846-13 to 23) The proposed development that was considered at that time was a much more intense use because it incorporated a drive-through. (emphasis added). The current plan does not incorporate a drive through. (Pa 846-17 to 21).

It is important to note that the applicant stipulated that as a condition of approval, no drive-through would be permitted. (Pa 915-20)

In other words, his engineering firm had before it a more intensive developmental project than this plan when the intersection was designed. (Pa 846-25 to Pa 847-3) In reviewing the plan, Boswell Engineering considered projected future development and whether the intersection would accommodate that future development. (Pa 847-4 to 14) Referring to the traffic report prepared

by Mr. Dean, the Township Engineer pointed out that Mr. Dean, in his report, stated that the proposed development would not have a negative impact on the operating conditions. (Pa 847-15 to 18) In that report, Mr. Dean further opined that levels E and F would be improved to a level C without the development and would go to a level C with the development, based upon the proposed change in the traffic plan. (Pa 847-19 to 21) Mr. Yakimik agreed with that opinion. (Pa 847-22 to 25) His office also agreed with that part of Mr. Dean's report that states that the proposal by the applicant from a traffic perspective can be approved without any negative impact or undue traffic congestion on the site. ((Pa 848-1 to 6) His office also agreed with the opinion that, from a traffic perspective, this site is well-suited for its intended use. (Pa 848-7 to 11)

Following the testimony by Mr. Yakimik, the applicant's Exhibits A-1 through A 22 were moved into evidence (Pa 878-22 to 879-6). Then, after the Board's receipt of public comments on the application, the Board Attorney read the applicant's stipulations into the record. It is important to note that these 24 stipulations were based upon requests made by Board members during the course of the public hearings, and the applicant agreed to those requests. The stipulations are set forth in the transcript. (Pa 913-16 to Pa 919-18) With such stipulations having been made, the applicant concluded its presentation and rested its case.

At the conclusion of the applicant's presentation at the meeting of May 6, 2023, the Board Attorney called for a vote on the application with the applicant's stipulations that were made on the record before the Board. (Pa 929-21) A motion was made by the Vice Chairman to approve the application with such stipulations. He specifically stated: "I'll make a motion to approve the application based on all of the stipulations that have been mentioned." (Pa 930-1) The motion was seconded. (Pa 930-5) The Chairman then called for a roll call vote. (Pa 930-6) The Board members were confused as to exactly that for which they were voting. Some members thought they were voting on the application. Other members thought they were voting just to bring the matter to a formal vote. (Pa 930-7 to Pa 932-8)

The Board Attorney then suggested that the Board start the voting process over. (Pa 932-9 to 12). The Chairman then called for a motion to approve the application, but there was no response. (Pa 932-15) A Board member then made a motion to deny the application and the motion was seconded. (Pa 932-20 to 23) Once again, the Board members were confused as to what they were voting on. Again, there was no discussion or deliberation amongst the Board members pertaining to the merits of the application before the vote was taken. (Pa 933-2 to Pa 934-1) The Board Attorney once again tried to eliminate the confusion, stating that the Board was "...voting on the application to approve

or deny the application.” (Pa 936-8) A new roll-call vote was then taken on the motion to deny the application (Pa 935-12) Of the six Board members present at the meeting, five members voted to deny the application and one member voted to approve. (Pa 936-15-16) It was therefore officially declared that the application was denied. (Pa 937-16)

The Board members never verbalized their reasons for voting as they did. None of the Board members provided a basis or foundation for their decision. None of the Board members commented on the merits or lack thereof of the applicant’s presentation, nor were there any comments made as it pertains to the opinions provided by their own expert witnesses. Since this denial was merely verbal, the Board Attorney was authorized to prepare a formal, written memorialization resolution to be presented at the Board’s next meeting on June 20, 2023.

At such meeting, the Chairman called for a motion to adopt the memorialization resolution denying the application. (Pa 942-1 to 6) Such a motion was made and seconded. (Pa 942-7 to 9) The Board Attorney then read the entire, 25-page resolution of denial into the record. (Pa 943-11 to 995-22) The Board then unanimously voted to adopt the resolution denying the application. (Pa 999-9 to 1000-17) For the third time, there was no discussion on the resolution and none of the Board members explained their vote.

Interestingly, when the vote was completed, the Chairman opined “I think the applicant presented a good case. I firmly believe that it’s not an inherently beneficial use.” (Pa 1000-6).

It should have been recognized that the applicant never proceeded with a use variance under the guidelines of a “inherently beneficial use.” This was stated at the initial hearing and was confirmed throughout all the hearings not only by applicant’s counsel, but by the applicant’s professionals and most importantly, the applicant’s planner. (Pa 49-19 to 50-2; Pa 608-2 to 17) The Chairman’s statement was never corrected by any Board Member, nor by Board Counsel. It is indicative of the fact that the Board had no understanding of what they were charged to review for a use variance under the pertinent statute and case law. Therefore, the Board never properly reviewed the application in rendering a decision because they lacked an understanding of how they were to review the application.

LEGAL ARGUMENT

POINT ONE

THE ACTION OF THE WASHINGTON TOWNSHIP BOARD OF ADJUSTMENT IN DENYING PLAINTIFF’S VARIANCE APPLICATION WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE AND THEREFORE ILLEGAL. AS A RESULT, THE TRIAL COURT’S JUDGMENT AFFIRMING THE BOARD’S ACTION WAS ALSO IN ERROR. THEREFORE, THIS COURT SHOULD ENTER A JUDGMENT: (1) REVERSING THE TRIAL

**COURT’S ORDER FOR FINAL JUDGMENT, AND (2)
REMANDING THE MATTER TO DEFENDANT BOARD
DIRECTING IT TO GRANT PLAINTIFF’S APPLICATION IN ITS
ENTIRETY (Pa 1)**

The Standard of Judicial Review

On an appeal from a judgment of the Law Division in a land use matter such as this, the same standard of review is applied by our Appellate Division as that which is applied by the trial Court in its review and evaluation of a decision by a local planning board or board of adjustment. N.Y. SMSA, L.P. v. Board of Adjustment of Weehawken, 370 N. J. Super. 319, 331, (App. Div. 2004) ; Charlie Brown of Chatham v Bd. Of Adjustment of Chatham, 202 N.J. Super 312, 321 (App. Div. 1985) In other words, the Appellate Division is required to determine whether the board’s action is “... grounded in evidence in the record,” or arbitrary, capricious, and unreasonable. Rocky Hill Citizens for Responsible Growth v. Planning Board of the Borough of Rocky Hill, 406 N.J. Super. 384, 412 (2009), citing Fallone Props. L.L.C., v. Bethlehem Twp. Planning Board, 369 N.J. Super 552, 560-562 (App. Div. 2004)

It is acknowledged that a determination of a land use board is presumed to be valid, and the exercise of its discretionary authority will not be overturned unless found to be arbitrary, capricious, and unreasonable. Dunbar Homes, Inc. v. Zoning Board of Adjustment of Township of Franklin, 233 N.J. 546, 558

(2018) (quoting Grabowsky v. Township of Montclair, 221 N.J. Super. 536, 551 (2015)). The burden is upon the plaintiff to prove such wrongful and illegal action. Jock v. Zoning Board of Adjustment, 184 N. J. 562 (2005); Cell v. Zoning Board of Adjustment, 172. N.J. 75 (2002). It is also well established that a reviewing court must determine if a land-use board has followed statutory guidelines and properly exercised its discretion in reaching its decision. Burbridge v. Mine Hill Township 117 N.J. 376 (1990); Kaufmann v. Planning Board of Warren Township, 110 N. J. 551 (1988).

It is further acknowledged that a reviewing court must extend deference to a board's decision, and greater deference should be afforded to a denial of a variance. Funeral Home Management v. Basralian, 319 N. J. Super. 200, 208 (App. Div. 1999) Therefore, the proponent of a denied variance must prove that the evidence before the board was "overwhelmingly in favor of the applicant." Nextel of N.Y. v. Borough of Englewood Cliffs Bd. of Adjustment, 361 N.J. Super. 22, 38 (App. Div. 2003); New York SMSA v. Weehawken Bd. Of Adj., supra, 370 N.J. Super. at 331

In its review of a board decision, the Law Division Court has an inherent and constitutional power to review relevant facts and make such independent findings thereon as necessary. See Pressler & Vernier, Current N. J. Court Rules (GANN) Comment 5 on R. 4:69-4. On appeals of prerogative writ actions, the

agency's fact findings should control if supported by substantial evidence in the record. However, the Court is not bound by determinations of legal issues by the local agency. See e.g., Fallone Prop. V Bethlehem Plan. Bd., 369 N.J. Super. 552, 561 (App. Div. 2004); El Shaer v Planning Board, 249 N.J. Super 323 (App. Div. 1991) certif. den. 127 N.J. 546 (1992). Therefore, judicial deference to fact finding does not extend to questions of law. See Wyzkowski v. Rizas 132 N.J. 509, 518 (1993); Durst v. Blairstown Twp. Zoning Board of Adjustment, 410 N.J. Super 314, 325-326 (App. Div. 2009).

The arbitrary and capricious standard is simply a standard of appellate review, and a decision that a board has been arbitrary and capricious is simply a finding of error. Anastasio Board of Township of West Orange, 209 N. J. Super. 499, 522 (App. Div.), certif. den. 107 N.J. 46 (1986). The arbitrary and capricious standard is equivalent to substantial evidence on the record below standard when an appellate court is reviewing a decision and determination of a trial court. Cell v Zoning Bd. of Adjustment, supra, 172 at 89, citing Rowatti v Gonchar, 101 N.J. 46 at 50-51 (1985). In applying this standard, the reviewing court must essentially determine whether the board below followed the statutory guidelines and properly exercised its discretion. Bressman v. Gash 131 N.J. 517, 526-528 (1993); Randolph Town Ctr. V. Randolph Township, 324 N. J. Super. 412, 418 (App. Div. 1999).

The Statutory Criteria for the Grant of a Use Variance

Plaintiff applied for a use variance under N.J. S. A. 40:55D-70 (d) (1) on the grounds that the use was particularly well suited for the site. In order to obtain such variance relief, an applicant must prove the positive and negative criteria of the statute. The phrase: “in particular cases for special reasons,” is the positive criteria. The phrase “... without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance” defines the negative criteria. There has developed an extensive body of New Jersey case law commencing in 1976, the year the MLUL was adopted, interpreting, and explaining these phrases and the positive and negative criteria under the statute.

“In particular cases” establishes the requirement that “an applicant must be able to distinguish the particular property to be developed from other properties in the zone. This is to be accomplished by satisfying the site suitability test incorporated in the special reasons or positive criteria.” Cox & Koenig, New Jersey Zoning & Land Use Administration, (GANN, section 31-2, page 684.) In this case, the plaintiff did not contend that a special reason existed for this reason. Nor did the plaintiff contend that it would suffer an undue hardship if a use variance were not granted. Brandon v Montclair, 124 N.J.L. 135, 149 (Sup. Ct. 1940);

Rather, in this case, plaintiff clearly and emphatically contended and established that a special reason existed because the unique characteristics of the site itself made it appropriate for the proposed new use. In other words, the applicant argued that the general welfare would be served because the use was especially well suited to the particular location for which the variance was sought. See Kohl v Mayor and Council of Fair Lawn, 50 N.J. 268, 279-280 (1967)

As further articulated in Cox & Koenig, New Jersey Land Use & Administration, supra, section 32-4.1, page 706:

“In the context of the positive criteria, site suitability is not concerned with ordinance zoning criteria but is instead focused on (1) why the location of the site within the municipality or region is particularly suited to the use despite the zoning and/or (2) what unique characteristics of the site itself make it particularly appropriate for the proposed use rather than a permitted use.”

The plaintiff provided overwhelming evidence to address these issues. No proof to the contrary was presented by any lay or expert witness. The only opposition presented was the unsubstantiated comments, opinions, and complaints by neighboring residents.

In order to determine whether, under the standard of review set forth above, the action of the Washington Township Zoning Board of Adjustment was arbitrary, capricious, or unreasonable, this Court, as did the Law Division, has the task of comparing the evidence presented, particularly but not limited to the

expert opinion evidence, to the Board's findings and conclusions. Simply stated, this Court is called upon to determine whether the findings and conclusions stated in the Board's resolution are supported by or contrary to such evidence.

In addition to expert testimony by the site engineer, project architect, and traffic engineer, plaintiff presented extensive expert testimony by Paul Grygiel, P.P., a professional planner, to prove the positive and negative criteria of the statute and to support the grant of the use variance applied for.

Plaintiff's Proofs as to the Positive Criteria

As to the positive criteria, Mr. Grygiel explained that, in his opinion, the two-acre site is particularly well suited to accommodate retail commercial development due to its location at a main intersection, and its size. The subject property is located at a busy signalized intersection with a frontage on two main roads with a gas station/convenience store, restaurant/banquet hall and dental office on the other three corners (Pa 611-1 to 7). These characteristics of the subject property were beyond dispute.

Plaintiff's expert planner stated that many changes have occurred to this intersection since the master plan and zoning ordinances were written, and these changes served as a positive change of what the master plan recognized as a crossroads in the Township (Pa 611-14 to 612-3).

Mr. Grygiel opined that, with the other three corners being nonresidential uses together with other nonresidential uses nearby, “So, while this is a single-family residential zone, in my opinion, it is no longer appropriate for single family” (Pa 612-19 to 22). He further confirmed that the only properties that front or have access to Pascack Road are commercial uses including a car sales lot, convenience store and gas station (Pa 613-7 to 15) .

He stated that among the factors that make this location more suitable for retail use are the access and visibility being added to an intersection like this, which is visible to passing traffic. Being visible and accessible to passing traffic speaks to the site’s suitability for retail use, particularly for a small-scale retail operation like this. (Pa 613-13 to 23) He stated that another factor is the size of the site being over two acres. (Pa 614-2)

The applicant’s planner stated that this proposed commercial use would be even more appropriate because of certain changes in the last few years, including substantial improvements to the transportation infrastructure and the road widening and addition of sidewalks, all helping to complete the road network, (Pa 614-19 to 25). The installation of sidewalks increases safety for the public. Also, regarding the positive criteria, he opined that the limited size of the shopping center and the small-scale use with the smaller businesses that would

be there would attract the type of tenants which would serve the local community (Pa 615-7 to 15) .

To meet the positive criteria an applicant has to prove that its proposed development would advance one of the purposes of the MLUL, under NJSA 40:55D-2. The applicant's planner fully and completely addressed this issue. He stated that, in his opinion, the positive criteria would be met, and the purposes of zoning would be advanced including the promotion of the general health, safety, and welfare, which is purpose (a) of the statute. (Pa 614-16 to 21) He testified that it would fulfill purpose (g) by providing sufficient space in appropriate locations for a variety of commercial and other uses. (Pa 614-22) He advised that the proposed retail use of the property would fulfill purpose (h) by encouraging the location and design of transportation routes which promote the free flow of traffic, while discouraging the location of such routes as would lead to congestion or blight. (Pa 614-25 to 615-5) He testified that purpose (i) would be fulfilled by promoting a desirable visual environment by upgrading the appearance of the property. (Pa 616-6) He also advised that the development would advance purpose (m) by encouraging the coordination of various private and public procedures, such as intersection improvements and addition of sidewalks.

In summary, the witness provided an opinion that the applicant met the positive criteria based on the plans that have been submitted as well as the stipulations that were made by the applicant during the course of the hearings based upon requests by Board Members. These stipulations included a stipulation that there would be no drive-through use for any prospective tenants, no parking to the rear of the building, upgrades to certain landscaping proposed, and stipulations as to the amount of lighting (Pa 617-2 to Pa 618-6).

Other than members of the public, many of whom had questions and negative comments not having any factual foundation or basis, no organized objection to the application was presented.

The Board's Planner, Joseph Burgis, offered his expert opinion on the key issues presented to the Board. He confirmed that in addition to site suitability, the applicant must show there are special reasons to support the grant of a use variance. (Pa 737-24 to 738-2).

He confirmed that case law is clear that if an applicant can identify one or more purposes of the MLUL being advanced by its proposal, same could qualify as a special reason (Pa 738-7). It was his opinion that purposes (a), (g) and (m) as testified by the applicant's planner, were valid and "quite frankly, had some merit for you to consider." (Pa 738-18 to 25). Mr. Burgis confirmed that the application only needed to prove that by the grant of the requested variance, one

of the general purposes under N.J.S.A. 40:55D-2 was being advanced and, in this instance, indicated that three purposes “had merit for the Board to consider” (Pa 154-22).

The Board’s Findings and Conclusions as to the Positive Criteria

Based upon this testimony, as expressed in its resolution, the Board made the following findings and conclusions as to the positive criteria.

- “That the plan does not represent a better planning alternative with the least impact on the property as a whole.” (Pa1025)

This finding is vague and amorphous. There is no requirement in the MLUL that an applicant must prove that its proposal requiring a use variance would “represent a better planning alternative,” with or without the unexplained “least impact on the property as a whole.”

- “The property is located in the AA residential zone and has residential properties located on the north and west side of the property. The applicant has provided insufficient evidence to convince the board that allowing a change of use for a commercial retail center would be a better planning alternative than what is permitted in the AA residential zone.” (Pa1025)

This repetitive finding is not made valid or even understandable because it is articulated twice.

- “In this application the proposed use is not an inherently beneficial use like a hospital so the applicant argues that the site is particularly suited for commercial use. The board makes a finding of fact that the evidence provided by the applicant for ‘special reasons’ to support the granting of the use variance is insufficient for the board to approve same. As per Mr.

Burgis' testimony, the applicant's argument for the free flow of traffic is unconvincing since the road improvement plan existed prior to the application. The desirable visual environment argument is also unconvincing since the applicant owns the properties and allowed the dwellings located on the properties to deteriorate into the poor condition that currently exists." (Pa1025-1026)

While the Board properly referred to its planner's opinion questioning the validity of the applicant's contention as to two of the purposes of the Act being advanced by the proposal, the Board completely ignored the further opinion offered by Mr. Burgis that the three other purposes of the MLUL suggested by the Applicant's Planner as being advanced by the proposal, "quite frankly had some merit for you to consider." Since the Board did not address these other purposes in its resolution, it is axiomatic that they were not considered.

The Board found that the evidence presented by the applicant as special reasons to support the granting of the use variance was insufficient for the Board to approve same. It stated:

"As per Mr. Burgis's testimony, the applicant's argument for the free flow of traffic is unconvincing since the road improvement plan existed prior to the application. The desirable visual environment argument is also unconvincing since the applicant owns the properties and allowed the dwellings located on the properties to deteriorate into the poor condition that currently exists. (Pa 990)

Regarding this repetitive finding, the Board does not address the special reason advanced by the applicant that the site is particularly well suited for this development. As mentioned above, nor did the Board consider the other

purposes which the applicant contended or advanced and did not mention the Burgis testimony on the purpose or purposes he felt had merit. Here, as reflected in the Chairman's comments when the Board voted on the application, the Board seems to have misunderstood the positive criteria in that it conflated the requirement that the proposal advance one of the purposes of the MLUL and never addressed the question whether the property was particularly well suited for this commercial development.

Based upon the above comparison between the Board's findings and the applicant's proofs on the positive criteria, it may fairly be concluded that the Board's findings were woefully deficient to support its determination that plaintiff's application for a use variance should be denied.

Plaintiff's Proofs as to the Negative Criteria

The Board's findings and conclusions as to the negative criteria are also arbitrary, capricious, and unreasonable and therefore find no support in the extensive record presented to it.

Addressing the negative criteria, Mr. Grygiel presented expert planning testimony that the proposed development satisfies the first prong of the negative criteria, namely that there would be no substantial detriment to the public good. (Pa 617-8) The witness did not merely echo the statutory language or provide a

net opinion without any basis therefor. On the contrary, he presented detailed testimony as to the specific reasons why he reached this conclusion.

He noted that every development will have an impact, but the question is whether such an impact will be “substantial” and whether it can be mitigated. (Pa 618-19) In his opinion, in this case there would be improvements that would offset any negative impacts and improve existing conditions. (Pa 618-21) In terms of aesthetics and layout, he testified that the site would clearly benefit from reinvestment and redevelopment. Mr. Grygiel explained that this is not a property that is going to maintain its residential use in perpetuity. (Pa 619-11) He further opined that the use being proposed is viable and realistic and would provide site improvements that dovetail with the road intersection improvements. (Pa 619-19)

He projected that potential tenants would be of the type that would serve the surrounding community. In addition, the proposed development contains adequate parking that complies with the retail requirements. It also includes landscaping lighting and storm water management improvements to reduce stormwater runoff and pedestrian connections and access, all being designed in a way to try to minimize impacts and benefit the surrounding area (Pa 619-11 to 17). He further testified that the lighting levels would be reduced after a business is closed. The plan provides for significant buffers along the side of the property

where the adjacent residential uses are located as well as no parking proposed to the rear of the building. (Pa 619 -18 to 25)

Further regarding the negative criteria, the witness explained that the second part of the negative criteria essentially requires the applicant to demonstrate that there will be no substantial impairment to the master plan and zoning ordinance. (Pa 623-17) He testified that the Township's recent master plan re-examination, which was adopted in 2019, refers to this site and states specifically that a nonresidential use may be appropriate with "adequate design and screening/buffering from adjacent residential properties." (Pa 623-21 to 624-9) That is precisely the situation presented by the plaintiff's application.

Mr. Grygiel acknowledged that another objective stated in the master plan is to maintain existing land use patterns, and that commercial uses should be limited to the existing class C retail business area. (Pa 624-5) He noted that there are some factors that warrant the Board's consideration of deviating from that recommendation of the master plan. (Pa 624-12) One factor is that statement in the master plan previously noted that says nonresidential use may be appropriate for this site. (Pa 624-16) It is important to remember that the master plan amendment was done before the major intersection improvements were proposed and now constructed so that the traffic concern that may have been an underlying factor when the 2019 master plan re-examination report was

prepared, is no longer a consideration from a planning perspective. (Pa 625-6 to 24)

As further evidence that the property is not well-suited for residential use, the applicant's planner pointed out that there was a use variance granted in 2019 for a dental office on the southeast corner of this intersection, and to expand a gas station and a use variance for a convenience store as part of the gas station. (Pa 625-2) The planner confirmed that the modifications to the intersection were paramount in terms of the changed circumstances since 2019, and include the installation of new traffic signals, turning lanes, crosswalks, sidewalks, all making the site a different one in terms of its setting from the site that existed in 2019 when the master plan re-examination report was adopted (Pa 625-17 to 25). At the time of the re-examination of the master plan, the intersection that has now been developed was not in place or even being considered (Pa 625-17 to 24). Mr. Grygiel therefore opined and concluded that, from a planning perspective, the applicant's proposal is appropriate and represents an adequate design for this particular property. (Pa 627-13 to 23)

Joseph Burgis, the Township Planner, never offered a specific opinion as to whether or not the applicant's proof satisfied the negative criteria. He did advise the Board, however, that the 2019 re-examination report is not the master plan and that the underlying master plan was very old because it was adopted in

the 1980's. (Pa 739-23 to Pa 740-2) It is extremely significant to note that in paragraph 40 of its resolution the Board acknowledged Mr. Grygiel's testimony that: "In his opinion the 2019 re-examination statement regarding recommendations about the applicant's property does have merit to consider when evaluating the aspect of the negative criteria." (Pa 1020) As further acknowledged by the Board, Mr. Burgis also stated: "When considering this element of the negative criteria, the Board has to evaluate whether the proposed improvements satisfy the statement regarding no substantial detriment to the public good." (Pa 739-1 to 6) The Board failed to state how or in what manner it actually considered these issues.

As previously addressed, there was no countervailing opinion testimony presented that the applicant did not satisfy the negative criteria or that the grant of the variance requested would cause substantial detriment to the public good and would substantially impair the intent and purpose of the zone plan and zoning ordinance. The record is clear --- there were no deliberations by Board members. Not one Board member, prior to calling this matter for a vote, expressed an opinion on the merits of the application. The Board's collective silence is a prime example of how arbitrary and capricious their actions were.

The Board's Findings and Conclusions as to the Negative Criteria

Despite this overwhelming, cogent testimony that the proposal would not cause substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and zoning ordinance, the Board made the following findings and conclusions in its resolution regarding the negative criteria:

- “The relief requested by the applicant’s cannot be granted without substantial detriment to the public good and without substantially impairing the intent or purpose of the zone ordinance of the Township of Washington.” (Pa 1025)
- That the proposed commercial retail center is likely to have a substantial detrimental impact upon other properties in the neighborhood and would not blend into the surrounding properties.(Pa 1025)

These “findings and conclusions” are a textbook example as to when a local land use board merely echoes the language of the statute without an explanation of the reasons or basis for such findings and conclusions. Again, the Board conducted no analysis but merely stated additional conclusions that:

- The use and aesthetics of the property is out of character with residential properties that are directly adjacent to the property on the north and west side. (Pa 1025)

The Board never acknowledged three intense commercial uses that exist on the other corners of the intersection.

In addition to once again mouthing the language of the negative criteria of the statute, the Board here merely states the obvious, namely that a commercial use is being proposed in a residential zone. There is no evidence in the record to support this conclusion of a negative effect or impact, let alone a substantial negative effect. Nor is there any explanation as to how or why there will be a substantial detriment to neighboring properties.

The Board expressed its legitimate concern regarding the traffic conditions which would be generated by the proposal in that:

- The applicant is adding traffic to an already busy intersection and would require a vehicle exiting the parking lot that wishes to travel north on Pascack Road to make a left-hand turn by crossing three lanes of traffic. (Pa 1026)

The Board isolated this one “fact” from the detailed traffic report and testimony by Gary W. Dean, P.E., the applicant’s traffic expert, all of which was positive. The Board also ignored the testimony of its own traffic expert, John G. Yakimick, P.E., that he agreed with Mr. Dean. The Board also ignored the fact that, with regard to the houses on the site, residents currently back out of their driveways onto a busy county road, which is also a dangerous traffic condition.

As to its concern regarding traffic, the Board further stated the following findings and conclusion:

- “Mr. Dean stated that the Board was right to be concerned about this [the left turn onto Pascack Road] and that making this turn would not be

easy. As Mr. Dean testified, the difficulty of making this could cause the driver to make a right turn onto Pascack, then a left turn onto McKinley Avenue for a shortcut to go around the block and through a residential neighborhood to work its way back north.” (Pa 1026)

- Mr. Bertin testified that there will be more traffic with the proposed commercial center compared to a residential dwelling in the same location. (Pa 1026-1027)

Firstly, the finding regarding a difficult left turn out of the proposed commercial center has absolutely no meaning or significance. Again, no traffic expert testified against the application, let alone rendered an opinion that such a condition would create a traffic hazard, result in accidents, or would substantially impair the public good. With its reference to one, isolated potential negative situation contained in Mr. Dean’s expert traffic report and testimony, the Board showed that it was stretching to find a basis for its conclusion that the applicant did not satisfy the negative criteria. In making these findings, the Board pointed out nothing to support its conclusion in the testimony of Mr. Yakimick, its own traffic engineer, primarily because Mr. Yakimick agreed with Mr. Dean and did not offer any negative opinions. Also, the Board ignored the fact that the Bergen County Planning Board, which has exclusive jurisdiction over county roads, has provisionally approved the traffic plan and this application.

Regarding its second finding, as to Mr. Bertin's testimony, the Board merely stated the obvious, namely that a commercial use would generate more traffic at the same location as a residential use. If this were an acceptable reason to deny an application for a use variance to permit a commercial use in a residential zone, no application would be granted. In other words, the creation of some, limited additional traffic by a commercial use in a residential zone does not equal a substantial detriment to the public good.

The Board went on to find:

- That the proposed retail center would create more noise, air and light pollution, more frequent garbage pickup and deliveries, foot and vehicle traffic that would be present if the properties were developed as single-family dwellings, which are permitted in the AA zone. (Pa1026)

There was no testimony presented to the Board regarding the noise, air, and light pollution which would be caused by the commercial center. While there were some concerns raised regarding the lighting of the property, the applicant's site engineer testified extensively about the controls and stipulations that would be put in place to minimize any light spillover to adjoining residential properties. There is nothing whatsoever in the extensive record of the hearings before the Board that even mentions more noise or air pollution. Once again, the Board set forth a naked conclusion and failed to explain how such unspecified "noise, air and light pollution" would create a substantial detriment to the public good.

- The board stated that it was also unconvinced that there will be enough landscape buffering on the west side of the property, since Mr. Bertin testified that the westerly border will have a minimum 20-foot buffer area and that the western neighbors can expect to see 8 to 10 feet of the building until the proposed spruce trees grow over time, which will take many years. (Pa 1027)

The Board's resolution also included purported findings and conclusions regarding the second part of the negative criteria that (under Medici v. B.P.R. supra, 107 N.J. 1) an enhanced quality of proof must be demonstrated by the applicant to prove that the variance would not be inconsistent with the intent and purpose of the master plan and zoning ordinance and must reconcile the proposed use variance with the zoning ordinance's omission of the use from those permitted in the zoning district.

The Board cited the testimony of the applicant's planner, as previously stated, that an objective of the Township's master plan is to maintain existing land use patterns and to limit commercial land use to the existing class C commercial area. It found that:

- The site plan and testimony provided that only residential properties border the applicant's property on the north and west side. (Pa1025)

However, the Board completely ignored the testimony and undisputed fact that there are three commercial uses at the intersection, namely: a combined gas station and convenience store, a dental office, and Seasons, a high-end

restaurant/catering facility and venue. The Board also ignored the testimony that it previously granted a use variance to permit the dental office in this AA residential zone and to expand the gasoline service station/convenience store on the other two corners of the intersection.

Further regarding the master plan, the Board found as follows:

- Mr. Burgis testified that another goal of the master plan is to maintain the quiet single-family residential suburban character and provide community-oriented services. The board finds that the additional traffic, noise, and light pollution do not maintain the quiet single-family residential suburban character. (Pa1027)

Based on the proofs presented, it was unfair and disingenuous to characterize the area as a “quiet single-family residential suburban zone” where the subject property is located at a busy intersection and there are three other commercial uses at the intersection. Again, there was no proof before the Board to support a conclusion that additional “noise and light pollution” would be generated.

The Board’s additional findings with regard to the master plan were that:

- The applicant’s proposed use is inconsistent with the intent and purpose of the master plan and zoning ordinance and has provided insufficient evidence to justify deviation from the goal of the master plan to maintain existing land use patterns and to limit commercial land use to the existing class C retail area. (Pa1027)
- The board finds this to be especially true where the applicant has a higher threshold of proof to overcome and where five of the seven members must approve the D-1 variance. (Pa1028)

The Board has demonstrated a selective memory regarding testimony as to the master plan and ignored the fact that the master plan emanated from the 1980's when circumstances regarding this intersection were very different and were even different at the time of the re-examination of the master plan in 2019. The master plan projected commercial uses at this intersection, and it is submitted that the projection was based upon an assumption that someday the intersection would be upgraded and that someday has now come.

Finally, the Board's finding that this applicant "had a higher threshold of proof," was utterly wrong. As stated in N.J.S.A. 40:55D-70 (d): "A variance under this subsection shall be granted only by affirmative vote of five members, in the case of a municipal board..." Therefore, a super-majority vote of approval is required in every use variance case presented to a local board, and there was nothing particular in this case which created a "higher threshold of proof" or which requires a greater number of votes to approve.

The Board's resolution consisted of 25 pages, 21 of which were a recitation of the record and 4 pages of which were findings and conclusions that lacked basis or foundation. There was no discussion on the resolution of denial once it was moved and seconded. There was not one comment or reason uttered by any Board Members explaining their vote. The Board ignored the proofs and, without saying so, based its negative decision on the unsubstantiated objections

of the public. While such comments by the public may be considered, they cannot form the sole basis for such determination when juxtaposed against the opinions of the applicant, and the Board's expert witnesses that provided expert testimony and reports that supported the applicant's proposal and were not contradicted.

It is recognized that a board is free to reject the testimony of any expert but may not do so arbitrarily. The basis for the rejection of the applicant's experts' opinions cited in the resolution simply does not appear in the record. It is recognized that a court should "not disturb discretionary decisions of local boards that are supported by substantial evidence in the record and reflect a correct application of the relevant principles of land use law" Lang v. Zoning Bd. of Adjustment of N. Caldwell, 160 N.J. 41, 58-59 (1999); "The action of a board will not be overturned unless it is found to be arbitrary, capricious or unreasonable". Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Twp. of Franklin, 233 N.J. 546, 558 (2018); "A board acts arbitrarily, capriciously or unreasonably in its findings of fact in support of its decision are not supported by the record" Ten Strydom P'ship v. Mauro, 216 N.J. 16, 33 (2013), Smart SMR of N.Y., Inc. v. Fair Lawn Bd. of Adjustment, 152 N.J. 309, 327 (1998), Leimann v. Bd. of Adjustment of Cranford, 9 N.J. 336, 340 (1952).

It is submitted in this instance that the evidence before the Board was overwhelmingly in favor of all of the necessary proofs relative to a use variance. The statements made in the resolution of denial are not supported by the testimony in the record established by the plaintiff. As previously stated, the record is void of any comments by Board members that provided a reason, basis or foundation for the decision that was rendered. As previously stated, the resolution is not supported by the record that was established.

The trial Court's decision consisted of 26 pages. (Pa3 to Pa26) In the first 22 pages the Court essentially reviewed and discussed the extensive evidence on the record presented by plaintiff/appellant as applicant and noted: "There was no contrary testimony presented by the Board." (Pa23). In the remainder of its decision, the trial Court then analyzed the Board's resolution in light of such evidence and stated: "[T]he question then becomes is the Board's denial based upon admissible evidence in the record. The Court finds that although the Board could have granted the application on the evidence presented by the applicant, its failure to do so is not arbitrary, capricious, or unreasonable." (Pa23)

In its attempt to answer this question, the Court set forth the Board's primary findings and conclusions in its resolution of denial. (Pa23-Pa24) The Court then summarized the arguments of the plaintiff/applicant and of the defendant Board as to the propriety of the Board's decision. In conclusion the

Court simply stated: “The Court cannot find on this record [that] the denial was arbitrary, capricious, or unreasonable.” (Pa25)

However, the Court did not explain its decision. Although it referred in detail to the testimony of plaintiff’s expert witnesses, it did not point out any evidence in the record which supported the Board’s action. Nor did it mention any deficiencies in the proofs presented by plaintiff to establish the statutory criteria for the grant of a use variance under N.J.S.A. 40:55D-70 (d). To the contrary, the Court mentioned key portions of the proofs which were presented by plaintiff to justify its request for relief.

For example, with regard to the special reason which plaintiff was required to prove as an essential element of the positive criteria, the Court noted: “Plaintiff did argue and establish a special reason existed because of the unique characteristics of the site and that the general welfare would be served because the proposed new use was particularly suited to the particular location for which the variance was sought.” (emphasis added) (Pa24)

The Court correctly noted, also with regard to the positive criteria, that plaintiff was required to prove that the proposed use advanced one of the general purposes of zoning under N.J.S.A. 40:55D-2. The Court further pointed out that the Board rejected two of the purposes suggested by plaintiff ---- the free flow of traffic and the improvement in aesthetics. (Pa 23) The Board’s rejection in

this regard was based upon the opinion of the Board's expert planner, Joseph Burgis. However, the Court ignored, as did the Board, the other purposes of zoning put forward by plaintiff as to which Mr. Burgis stated, "quite frankly has some merit for you to consider." (Pa 737-22) The Court also ignored, as did the Board, its planner's opinion that only one of the purposes of zoning need be proven to establish this element of the statute. (Pa 749-11 to 22).

A comprehensive review of the record would reflect that one of the main, if not the main reason for the Board's denial was its concern about increased traffic that might be generated by a commercial use, such as that proposed by plaintiff, at the intersection of Pascack Road and Washington Avenue. The Court stated that "The Board found the increased traffic would be a substantial detriment at an already busy intersection" and a vehicle exiting the proposed parking lot would have difficulty making a left turn.

As well, the Court noted that: "The Board appears to have been focused on traffic at an intersection which had been drastically modified, from the conditions which existed in the past." (Pa24) The Court also referred to the Board's finding that: "... The proposed commercial development would generate more traffic than the existing one-family homes..." (Pa24) However, neither the Court nor the Board explained how such findings were based upon the record. Here again, to the contrary, the detailed testimony of the plaintiff's

traffic expert, Gary W. Dean, P. E, was that, primarily based upon the improvements which Bergen County had already made to the intersection, there would be no negative impact resulting from the development of the subject property for a commercial use. (Pa 362-5 to 10) Most significantly, both the trial Court and the Board also completely ignored the opinion testimony of John Yakimik, P.E., the Board's traffic engineer, which agreed with the testimony of plaintiff's expert. Specifically, Mr. Yakimick also opined that the proposed development would not have a negative impact on traffic and that, from a traffic engineering point of view, the site was well suited for its intended use (Pa 848-7 to 11). It is important to remember that both traffic engineers agreed that the level of service which has now been improved since the original master plan and the 2019 re-examination master plan was adopted, has now been improved by virtue of the improvements to the intersection, and that the level of service would not change based upon the applicant's proposal for a neighborhood commercial retail center at this location.

Although it is well established that a board is not bound to accept the testimony of an applicant's expert, Klug v. Bridgewater Planning Board, 407 N. J. Super. 1, 13 (App. Div. 2009), it is extremely unusual, to say the least, for a board to reject the testimony of its own expert witnesses. This is obviously because, while an applicant's expert may be less than completely objective, a

board's expert is presumed and expected to offer an opinion that would comport with the best interests of the municipality.

In summary, the trial Court erred in upholding the Board's resolution denying plaintiff's use variance application, and in entering an Order for Final Judgment dismissing plaintiff's complaint with prejudice. This was essentially because the Court failed to explain how and why the Board's findings and conclusions were based on the evidence, or lack thereof, presented at the hearings.

CONCLUSION

For the reasons stated herein, it is respectfully requested that this Court enter a judgment in favor of plaintiff, 660 Pascack Realty, LLC, and against defendant, Township of Washington Zoning Board of Adjustment, (1) reversing the Order for Final Judgment of the Law Division affirming the Board's resolution denying plaintiff's variance application, and (2) remanding the matter to the Board with directions to adopt a resolution granting said application for use variance, bulk variance, site plan approval and waivers in all respects.

Respectfully submitted,

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Attorneys for Plaintiff

Dated: February 5, 2025

By: /s/ Bruce E. Whitaker
Bruce E. Whitaker, Esq.
For the Firm

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003794-23

-----X
660 PASCACK REALTY, LCC

Plaintiff/Respondent

v.

TOWNSHIP OF WASHINGTON
ZONING BOARD OF ADJUSTMENT

Defendant/Appellant
-----X

CIVIL ACTION

ON APPEAL FROM:

LAW DIVISION: BERGEN
COUNTY

Docket No. BER-L-4133-23

SAT BELOW:

HON. CHRISTINE FARRINGTON, JSC
(ret.)

**BRIEF ON BEHALF OF DEFENDANT/RESPONDENT
TOWNSHIP OF WASHINGTON ZONING BOARD OF ADJUSTMENT**

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PRELIMINARY STATEMENT

The issue which is the subject of this litigation focuses on whether the Washington Township Zoning Board of Adjustment (hereinafter the "Zoning Board") acted properly in denying the Plaintiff's site plan approval, which included a significant use variance in direct contravention of, and inconsistent with, the Township of Washington's (hereinafter the "Township") Master Plan.

At the outset, Plaintiff concedes it is not seeking reversal of the Zoning Board's decision based upon a claim that the proposed use is "inherently beneficial". Instead, the sole rationale for the reversal is that the Plaintiff was entitled to variance relief pursuant to N.J.S.A. 40:55D-70 (d) (1) for "special reasons". (Pb 1)

As will be demonstrated herein, the Zoning Board's decision was proper based on the evidence and testimony presented and should be affirmed. The trial court properly dismissed the Plaintiff's Complaint, as the Zoning Board was well within its rights and properly exercised its powers in denying a use variance which was in direct conflict with the Township's Master Plan.

PROCEDURAL HISTORY

The Zoning Board is in agreement with the Plaintiff's recitation of the Procedural History of the application and the proceedings below.

COUNTER-STATEMENT OF FACTS

The Zoning Board accepts the factual recitations in Plaintiff's Statement of Facts, but does not agree with any conclusions contain therein.

POINT I

THE BOARD'S DECISION WAS NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE AND MUST BE AFFIRMED

It is well-established that on a review in the Appellate Division, the factual determinations of a Board are presumed to be valid. The Board's exercise of its discretionary authority based on such determinations will not be overturned unless arbitrary and capricious or unreasonable. Plaintiff has the burden of proving that the action of the Board was arbitrary, capricious or unreasonable. Grabowsky v. Tp. of Montclair, 221 N.J. 536, 551 (2015); Price v. Hineji, LLC, 214 N.J. 263, 284 (2013). See generally Cox & Koenig, New Jersey Zoning and Land Use Administration (GANN 2016), §42-2.1. Plaintiff agrees with these principles. (Pb 22)

In reviewing the agency's action, the Court must consider whether the Board followed the statutory guidelines and properly exercised its jurisdiction. Burbridge v. Mine Hill Tp., 117 N.J. 376 (1990). Judicial review is intended to be a determination of the validity of the agency's action, not a substitution of the Court's judgment therefor. CBS Outdoor v. Lebanon Plan. Bd., 414 N.J. Super. 563, 578 (App. Div. 2010).

Where there is conflicting testimony or evidence, the Board must decide which facts are true, and may accept or reject the testimony of witnesses. The Court must determine only "whether the Board's decision was arbitrary, unreasonable or capricious."

New York SMSA, L.P. v. Bd. of Adj. of Twp. of Weehawken, 370 N.J. Super. 319, 331 (App. Div. 2004). "[W]e will give substantial deference to findings of fact" that are "grounded in evidence in the record[,]". Fallone Properties, LLC v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004), and we "cannot substitute an independent judgment for that of the Boards in areas of factual dispute[s]". Kramer v. Bd. of Adj., Sea Girt, 45 N.J. 268, 296 (1965). If the Board has made the decision reasonably, the courts have found that the Board's choice is conclusive on appeal. Allen v. Hopewell Tp. Zoning Bd., 227 N.J. Super. 574, 581 (App. Div.), *certif. den.* 113 N.J. 655 (1988); Reinauer Realty Corp. v. Nucera, 59 N.J. Super. 189 (App. Div. 1960), *certif. den.* 32 N.J. 347 (1960).

In the present matter, the Board's decision, which is entitled to a presumption of validity, was wholly proper and justified by the laudable purpose of honoring the zoning scheme of the Township of Washington. Plaintiff has failed to sustain its burden of proving that the Board's decision was in any way arbitrary, capricious or unreasonable. As such, the Board's determination should be affirmed.

The Board properly denied the Plaintiff's request for site plan approval for a use not permitted under the Township's Land Use Ordinances nor contemplated by the Master Plan. By doing so, it exercised its powers to act in a way that would advance the

Township's Master Plan and zoning scheme, not on derogation thereof.

This expression of self rule must not be overlooked. The Town Fathers understood the importance of having some degree of control over what types of uses are allowed in the various zones throughout the Township. Clearly, a sprawling retail complex at an already overburdened four (4) way intersection is not something contemplated for a zone limited to single family residences.

In Kohl v The Borough of Fair Lawn, 50 N.J. 268, 234 A.2d 385 (1967), a decision cited by the Plaintiff in support of its requested relief, the Court reversed the Appellate Division's granting of use variance relief to the applicant. In so doing, the Court initially observed:

Variances to allow new nonconforming uses should be granted only sparingly and with great caution since they tend to impair sound zoning. Grundlehner v. Dangler, 29 N.J. 256, 266 (1959); Beirn v. Morris, 14 N.J. 529, 536 (1954); Lumund v. Board of Adjustment of Borough of Rutherford, 4 N.J. 577, 585 (1950). While our courts have recognized that the determinations of the local governing bodies are not to be viewed with a general feeling of suspicion and are not to be overturned unless arbitrary or unreasonable, they have consistently required that local zoning action comply with the statutory requirements. See Andrews v. Ocean Twp. Board of Adjustment, 30 N.J. 245, 249 (1959). For the granting of a variance under subsection (d) of N.J.S.A. 40:55-39, two critical findings are required: 1) that "special reasons" exist for the variance; 2) that the variance "can be granted without substantial detriment to public good and will not substantially

impair the intent and purpose of the zone plan and zoning ordinance."

50 N.J. at 275-276

The Court continued:

In the first opinion in Ward v. Scott, 11 N.J. 11 (1952), this Court rejected the contention that subsection (d) of the statute was unconstitutional for want of a sufficient standard for the term "special reasons." We held that this language gained validating content from the purposes of zoning set forth in N.J.S.A. 40:55-32.[3] No more specific standards for special reasons have been given by our courts beyond those general standards of Section 32. Because of the nature of the subject no precise formula is feasible and each case therefore must turn on its own circumstances. Andrews, supra at 251. However, the lack of a precise formula does not mean that carte blanche has been given to local governing bodies in finding special reasons for the grant of variances. Otherwise, variances could be awarded indiscriminately merely because they do not offend the negative criteria of the statute.

50 N.J. at 276

In reversing the granting of that use variance, the Court addressed some of the criteria advanced in the matter at bar by the Plaintiff. At issue in Kohl was the "proposed construction of a half-million dollar expansion of an industrial complex in a residential zone". In the matter at bar, the Plaintiff seeks to ignore the existing single-family residential use, where four (4) single family homes had existed, to construct a massive commercial project at an extremely busy intersection, to include parking for nearly one (100) cars which would cause havoc on this already dangerous intersection.

The Court in Kohl found:

To justify the extensive expansion contemplated here by the increase in attractiveness of the property would open the way for any land to be used for any purpose, so long as the negative criteria are satisfied, if the facilities housing the use make the premises prettier than formerly. Such result would be contrary to established fundamentals of sound zoning. See Pieretti v. Mayor and Council of Town of Bloomfield, 35 N.J. 382, 388-389 (1961), where this Court held that similar considerations – including the screening of unsightly activities from view – did not constitute special reasons for a variance to enlarge a nonconforming use. See also Monmouth Lumber Co. v. Ocean Township, 9 N.J. 64 (1952). We may take judicial notice that in this state there are many industrial plants which because of their architecture and landscaping present a more attractive appearance than many residences. But this cannot justify the intrusion of such plants into an area zoned solely for residential use.

50 N.J. at 277

In denying the use variance, the Court focused upon the scope of the improvement proposed by that applicant:

The variance granted in the present case permits not merely the replacement of two relatively small frame structures but allows more than a five-fold increase in floor space compared with the buildings to be removed. The undisputed facts in the case show that 6,300 square feet of non-fireproof office floor space is being "replaced" by 35,180 square feet of fireproof space. Certainly, denominating this more than five to one exchange as a "replacement" is egregious understatement. The planned "replacement" more than doubles the size of Dairies' existing facilities.

50 N.J. at 277-278

In the matter at bar, the circumstances are strikingly similar. Plaintiff seeks to replace four (4) single family homes with seventeen thousand one hundred (17,100) square feet of

commercial retail space in two (2) huge commercial buildings. (Pb 5) Although there was no testimony in the record of the multiple by which the requested project would expand the intensity of the use, simple math tells us that the intensity would more than double if the project was approved.

Unlike the applicant in Kohl, Plaintiff did not, and does not now claim, that the special reason "was an inherently beneficial use" under Medici v BPR Co., 107 N.J. 1, 12-15 (1987). Plaintiff also did not, and does not now claim, that it would suffer an undue hardship if the requested use variance was not granted. Clearly, there is no hardship, as the property can be utilized for the use that existed when Plaintiff acquired it. Rather, Plaintiff claims that the special reason is that "the unique characteristics of the site itself made it appropriate for the proposed new use" citing the Kohl decision. (Pb 26)

Of course, Kohl in no way supports Plaintiff's bold assertion that this piece of property is appropriate for the intense proposed use advanced by Plaintiff. The Court observed:

Where, however, the use is not of the type which we have held of itself provides special reasons, such as a school or hospital, 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. (Citations omitted) This is so because nearly all lawful uses of property promote, in greater or lesser degree, the general welfare. Thus, if the general social benefits of any individual use – without reference to its particular location – were to be regarded as an adequate special reason, a special

reason almost always would exist for a use variance. Mere satisfaction of the negative criteria of the statute would then be all that would be required to obtain a variance under subsection (d). (citation omitted) In *Ward*, supra, 16 N.J. 16, this Court approved a variance permitting construction of a supermarket in a residential zone. The use was permitted not because a supermarket per se serves the general welfare, but because a supermarket at the particular location did "meet current needs of nearby areas which have already been developed and future needs of other nearby areas which have not yet been developed." Id. at 22. Likewise, in *Yahnel v. Board of Adjustment of Jamesburg*, 79 N.J. Super. 509 (App. Div. 1963) a telephone wire center was permitted in a residential zone not merely because telephone facilities in general serve the public welfare but because the facts showed that suitable service could be provided only by establishing the wire center at the particular location. (Emphasis added)

50 N.J. at 279-280

In *Kohl*, the Court held that "there was no showing that the promotion of the general welfare could be accomplished only by an expansion of Dairies at its present location". (50 N.J. at 280) The same holding should occur here; that the Plaintiff has not shown that "the promotion of the general welfare" could "only" be accomplished by the construction of the massive project proposed by the Plaintiff.

The Court also addressed the negative criteria, as follows:

Nevertheless, we find it difficult to believe that an expansion of the magnitude permitted by the variance would not "substantially impair the intent and purpose of the zone plan and zoning ordinance." It would seem that, regardless of the effect on property values, the doubling of this industrial operation could lead to no other result than to detract from the residential character of an area otherwise devoted to private

homes. Compare Cooper v. Maplewood Club, 43 N.J. 495 (1964). This effect is particularly apparent in the proposed construction and operation of the 14 foot high loading dock which would extend 478 feet out into Dairies' property parallel to, and but a few feet from, the property lines of homes which Dairies' expert testified constituted "one of the nicest and highest type residential areas in Fair Lawn." (emphasis added)

50 N.J. at 283

Similarly, in the matter at bar, it is "difficult to believe that an expansion of the magnitude permitted by the variance would not "substantially impair the intent and purpose of the zone plan and zoning ordinance".

In Medici v BPR Company, 107 N.J. 1, 526 A.2d 109 (1987), the Court had occasion to reconsider the Kohl decision in the context of "a use-variance application for a commercial use that does not 'inherently serve' the public good" which is the situation in the matter at bar. (107 N.J. at 4) In Medici, the Court unanimously reversed the Appellate Division's judgement sustaining the variance and remanded for further proceedings.

In Medici, the applicant sought to construct a hotel in an industrial zone. The Appellate Division concluded that it was neither arbitrary, capricious, or unreasonable for the Board to have determined from the evidence that there was a "public need" for a motel in the area and that the site, because of its shape and its proximity to highways and commercial development, was "particularly suitable" for use as a motel. (107 N.J. at 8-9)

In reversing, the Court held as follows:

We now reaffirm the holding in Kohl that if the use for which a variance is sought is not one that inherently serves the public good, the applicant must prove and the board must specifically find that the use promotes the general welfare because the proposed site is particularly suitable for the proposed use.[1] In addition, in view of the 1985 amendments to the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -112, set forth in N.J.S.A. 40:55D-89, -89.1 (requiring periodic review by the governing body of master plans and zoning ordinances and establishing a presumption of unreasonableness for ordinances not so reviewed) and N.J.S.A. 40:55D-70.1 (requiring annual reports by boards of adjustment of variance requests and recommendations for ordinance revisions), we deem it appropriate to require an enhanced quality of proof, as well as clear and specific findings by the board of adjustment, that the grant of a use variance is not inconsistent with the intent and purpose of the master plan and zoning ordinance. Such proofs and findings must satisfactorily reconcile the grant of a use variance with the ordinance's continued omission of the proposed use from those permitted in the zone, and thereby provide a more substantive basis for the typically conclusory determination that the variance "will not substantially impair the intent and purpose of the zone plan and zoning ordinance." N.J.S.A. 40:55D-70(d). This added requirement will apply in all use-variance cases. We anticipate that its application will not significantly limit the use-variance mechanism, but will narrow to some extent the discretion of boards of adjustment in reviewing use-variance appeals for uses that are deliberately excluded by the governing body from those permitted by the zoning ordinance. It will also effectuate the legislature's apparent objective of encouraging municipalities to make zoning decisions by ordinance rather than by variance. (emphasis added)

107 N.J. at 4-5

The Court set forth a plethora of decisions against permitting a use variance for a commercial use in a residential

zone, observing that "municipal denials of commercial variances were routinely upheld":

Since commercial uses did not necessarily promote the general welfare, commercial-use variances granted by municipalities were frequently set aside for a lack of proof of special reasons, and municipal denials of commercial variances were routinely upheld. See, e.g., *Mayer v. Montclair Bd. of Adjustment*, 32 N.J. 130 (1960) (reversing judgments of Appellate Division and Law Division sustaining variance for automobile junkyard in light-industrial zone; Court upheld municipality's finding that applicant failed to prove special reasons); *Mahler v. Board of Adjustment of Fair Lawn*, 94 N.J. Super. 173 (App. Div. 1967) (reversing Law Division decision that set aside the municipal denial of a use variance for a home professional office for a dentist), *aff'd*, 55 N.J. 1 (1969); *Wajdengart v. Broadway-Thirty-Third Corp.*, 66 N.J. Super. 346 (App.Div. 1961) (reversing grant of a variance to permit offstreet parking in residential zone); *Suesserman v. Newark Bd. of Adjustment*, 61 N.J. Super. 28 (App.Div. 1960) (reversing the grant of a variance to create a parking lot for a catering establishment in a residential zone); *Schoelpple v. Woodbridge Township*, 60 N.J. Super. 146 (App.Div. 1960) (reversing the grant of a variance to permit construction of supermarket in residential zone); *Mocco v. Job*, 56 N.J. Super. 468 (App.Div. 1959) (reversing grant of variance to permit second floor of tavern to be used for dancing); *Whitehead v. Kearny Zoning Bd. of Adjustment*, 51 N.J. Super. 560 (App.Div. 1958) (reversing grant of variance to permit construction of swimming pool to supplement private tennis club facilities); *Izenberg v. Board of Adjustment of Paterson*, 35 N.J. Super. 583 (App.Div. 1955) (reversing grant of variance for six-story apartment house in one-family residential zone); *Skaf v. Zoning Bd. of Adjustment of Asbury Park*, 35 N.J. Super. 215 (App.Div. 1955) (reversing grant of variance for women's club facility to be located in residential zone). But cf. *Mistretta v. City of Newark*, 33 N.J. Super. 205 (Law Div. 1954) (upholding grant of variance to permit bank to construct a parking area in residential zone).

107 N.J. at 13-14

The Court concluded by re-affirming the principles set forth in Kohl:

We take this opportunity to reaffirm the principles set forth in Justice Proctor's opinion in Kohl v. Fair Lawn, supra, 50 N.J. 268. A use-variance application for a commercial use not permitted by the zoning ordinance must satisfy the statutory special-reasons standard. That standard has generally been defined in relation to the purposes of zoning, see N.J.S.A. 40:55D-2, and our decisions have emphasized the promotion of the general welfare as the zoning purpose that most clearly amplifies the meaning of special reasons. See Andrews v. Ocean Township, supra, 30 N.J. at 250. Although certain commercial uses may inherently serve the general welfare in a particular community, the typical commercial use can be better described as a convenience to its patrons than as an inherent benefit to the general welfare. For such uses, 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.

As Justice Proctor explained in Kohl v. Fair Lawn, supra: [I]f the general social benefits of any individual use without reference to its particular location were to be regarded as an adequate special reason, a special reason almost always would exist for a use variance. [50 N.J. at 280.]

Cf. Mocco v. Job, supra, 56 N.J. Super. at 477 ("The facts relied upon present no justification for the conclusion that the particular site in this residential district must be the location for the variance here sought in order to promote the 'general welfare.'"); Cunningham, "Control of Land Use," supra, 14 Rutgers L.Rev. at 93 n. 261.

107 N.J. at 18

Of great significance is the fact that the Governing Body of the Township of Washington has not taken steps to revise the Township's zoning ordinance since the adoption of the

Reexamination of the Master Plan, which occurred in 2019. (Pb 11)

The following passage from Medici should carry great weight here:

Thus, the mandatory re-examination by the planning board of the master plan and zoning ordinance, at least every six years, is intended to inform the governing body of the need for revisions in the plan and ordinance based on significant changes in the community since the last such re-examination. Similarly, the annual reports by boards of adjustment summarizing variance requests throughout the year and recommending amendments to the zoning ordinance are designed to avoid successive appeals for the same types of variance by encouraging the governing body to amend the ordinance so that such appeals will be unnecessary. When an informed governing body does not change the ordinance, a board of adjustment may reasonably infer that its inaction was deliberate.

107 N.J. at 20-21

The Court also observed:

The added requirement that boards of adjustment must reconcile a proposed use variance with the provisions of the master plan and zoning ordinance will reinforce the conviction expressed in *Ward v. Scott*, that the negative criteria constitute an essential "safeguard" to prevent the improper exercise of the variance power.

107 N.J. at 22

The Court concluded with the advice to future boards:

The board's resolution should contain sufficient findings, based on the 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 prohibition of the proposed use is not incompatible with a grant of the variance. If the board cannot reach such a conclusion, it should deny the variance. To the extent this requirement narrows the discretion of boards of adjustment to grant use variances for uses intentionally and persistently excluded from the zoning ordinance by the governing body, we believe it accurately reflects the strong

legislative policy favoring zoning by ordinance rather than by variance. (emphasis added)

107 N.J. at 23

In the matter at bar, this Zoning Board, in good conscience, could not find that the proposed commercial retail use was consistent with the Master Plan because it simply is not. The Board's detailed and comprehensive findings, as set forth in its unanimously adopted Resolution, are set forth in the Plaintiff's Brief and will not be repeated verbatim here. (Pb 31 through 33 and 38 through 43)

The Master Plan does not contemplate commercial retail development in the subject zone. While the 2019 Reexamination Report does suggest "a non-residential use may be appropriate with adequate design and screening/backslash buffering from adjacent residential properties", (Pb 11) the Governing Body has not modified the Master Plan to accept that recommendation. As a result, it is clear that the Plaintiff cannot show the proposed variance "will not substantially impair the intended purpose of the zone plan and zoning ordinance" because the Master Plan does not contemplate retail commercial development in the subject zone. [N.J.S.A. 40:55D-70(d)]

Moreover, the Plaintiff's expert acknowledged that "another objective stated in the Master Plan is to maintain existing land use patterns and that commercial use should be limited to the

existing class C retail business area". (Pb 12, quoting 5T40-5 to 9 and Pa624-25) Plaintiff's application was in direct conflict with that objective and thus, was properly denied by the Zoning Board.

The Zoning Board's expert planner referenced the Township's Master Plan's goal to "maintain the quiet single-family residential suburban character and community oriented services in the town". (5T58-11 to 15) He also indicated that in the commercial retail zone further south on Pascack Road, there is a 50 foot buffer required to separate residential properties from commercial, while the Plaintiff is only proposing a 20 foot buffer herein. (5T62-12 to 19)

Plaintiff did offer some testimony addressing at least one (1) purpose of the Municipal Land Use Law. The Board's expert planner did suggest that the Plaintiff's testimony on the positive criteria "had some merit for you to consider". (Pb 14) However, as Plaintiff concedes, nowhere did the Board's expert concede that the Plaintiff had met its enhanced burden of meeting the positive criteria. As also conceded by Plaintiff, the Board's Resolution established that it did consider the testimony regarding the criteria, but found, as set forth in the Resolution, that the Plaintiff had not met its burden. (Pb 31-32) Disagreement with the proofs presented does not equal the applicable standard of "arbitrary, capricious or unreasonable".

Conversely, Plaintiff's proofs addressing the negative criteria were woefully lacking. Moreover, the Board's planner made no such encouraging comment regarding those proofs. In fact, his testimony did illustrate that the Plaintiff had not met the negative criteria. (Pb 14 - 16) Plaintiff failed to establish that there would be no substantial impact to the Master Plan and zoning ordinances.

Of course, allowing the construction of a sprawling retail commercial development in a residential zone where retail is specifically limited to the Class C Retail Business Zone by the Master Plan constitutes a substantial impact to the Master Plan and zoning ordinances. The contrast is as simple as yes versus no. The Governing Body has expressed its intent in the Master Plan, not in a Reexamination of that Plan where the recommendations have not be implemented or adopted by the Governing Body. Quite simply, the proposed development ignores the Master Plan and zoning ordinances. Clearly, ignoring the law of the Township is quite substantial.

Plaintiff sets forth the Board's finding regarding the negative criteria at pages 38 thorough 43 of it Brief. The Board's findings, supported by substantial testimony at the hearing, can be summarized as follows:

The proposed commercial retail center would substantially impair the intent and purpose of the zoning ordinances;

The proposed commercial retail center will have a substantial detrimental upon the other neighboring residential properties;

A commercial retail use is out of character with the residential properties adjacent to the property on the north and west;

The proposed development will add traffic to an extremely busy intersection and would require vehicles exiting the busy retail center to make a left-hand turn across three (3) lanes of traffic;

The difficulty in making that left-hand turn would cause motorists to make a right turn instead then travel through the residential neighborhood to return to the Pascack Road main thoroughfare;

There will be more traffic with the proposed retail commercial center compared to four (4) residential houses in the same location;

The commercial retail development would create more noise, air and light pollution, more frequent garbage pick up and deliveries, would add foot and vehicle traffic that would not be present if the properties were developed as single-family dwellings;

The sprawling commercial retail development would be visible to the residential neighbors in this residential zone;

The project would destroy the quiet, single-family residential character of the residential zone; and

The proposed use is inconsistent with the intent and purpose of the master plan and zoning ordinance.

(Pb 38-43)

The Plaintiff has failed to meet both the positive and negative criteria, thus making the proposed development inconsistent and in direct conflict with the existing Master Plan and zoning ordinances of the Township. Therefore, the Board's denial of the Plaintiff's request for a use variance and site

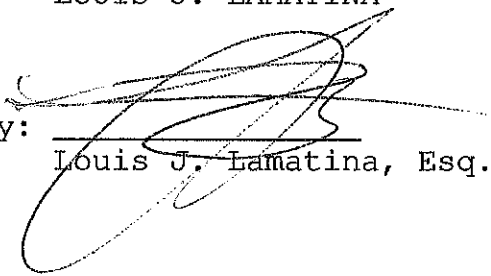
plan approval and the trial court's dismissal of Plaintiff's Complain, should be upheld by this Court.

CONCLUSION

The determination of the Zoning Board of the Township of Washington in this matter, which is entitled to a presumption of validity and which has been affirmed by the Law Division, was proper based on the testimony and evidence presented. Plaintiff has failed to sustain its burden of proving that the Board's decision was, in any way, arbitrary, capricious or unreasonable. For all of the reasons set forth herein, it is respectfully submitted that the decision of the Zoning Board must be affirmed.

Respectfully submitted,

THE LAW OFFICE OF
LOUIS J. LAMATINA

By: 
Louis J. Lamatina, Esq.

Superior Court of New Jersey

Appellate Division

Docket No. A-003794-23

660 PASCACK REALTY, LLC	:	CIVIL ACTION
	:	
	:	ON APPEAL FROM THE
<i>Plaintiff-Appellant,</i>	:	ORDER OF THE
	:	SUPERIOR COURT
	:	OF NEW JERSEY,
vs.	:	LAW DIVISION,
	:	BERGEN COUNTY
	:	
TOWNSHIP OF WASHINGTON	:	DOCKET NO.: BER-L-4133-23
ZONING BOARD OF	:	
ADJUSTMENT,	:	Sat Below:
	:	
	:	HON. CHRISTINE A.
<i>Defendant-Respondent.</i>	:	FARRINGTON, J.S.C. (ret.)

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Defendant's legal arguments as contained in its respondent's brief do not address the key points of plaintiff's appellate brief comparing the Board's unsupported findings and conclusions with the overwhelming evidence in the record presented by plaintiff to support the positive and negative criteria under N.J.S.A. 40:55D-70. Rather than meet plaintiff's arguments head-on, the defendant apparently seeks to divert the Court's attention from the critical issues in this case by articulating gross exaggerations of plaintiff's application and mischaracterizations of the area of the Township in which the proposal was to be developed. Defendant has also failed to explain why the decision of the trial Court was correct and why its judgment should be affirmed.

Defendant also submits extensive quotations from Supreme Court decisions in Kohl v. Fairlawn 50 N.J. 268 (1967) and Ward v. Scott, 11 N.J. 11 (1952). While these opinions, respectively 58 and 73 years old, still constitute "good law," as will be discussed herein, the facts in those cases are clearly distinguishable from the facts in the case at bar.

Moreover, as did the Board's resolution which is the subject of this prerogative writ appeal, defendant herein again attempts to justify its decision by merely echoing the statutory language that plaintiff has not established a special reason for the positive criteria of the statute and that it has not met its burden of proving the

negative criteria that the proposed use would not substantially impair the zone plan and zoning ordinance. Instead of explaining why or how the extensive proofs presented by plaintiff at the hearings failed to establish the statutory criteria under N.J.S.A 40:55D-70, defendant totally mischaracterizes the nature and extent of the plaintiff's application by incorrectly and unjustifiably stating that the development constituted "a sprawling retail complex" and that the area in question was a "zone limited to residences." (Db6)

Plaintiff does not intend to reiterate the arguments contained in its initial brief. However, it will endeavor to explain how, based on the evidence and expert testimony presented, these characterizations are not only grossly incorrect and unjustified, but are unfair. Therefore, although it is not disputed that a zoning board of adjustment has the authority to reject an application for the development of a commercial use in a residential zone, in the face of compelling proofs such as those presented here, it must have a good reason for doing so and cannot do so by merely adopting a resolution mischaracterizing the nature and extent of the application, echoing the statutory criteria and ignoring the overwhelming evidence presented to justify the grant of relief requested.

PROCEDURAL HISTORY

Plaintiff-Appellant relies upon the Procedural History included in the original brief.

STATEMENT OF FACTS

Plaintiff-Appellant relies upon the Statement of Facts included in the original brief.

LEGAL ARGUMENT **POINT ONE**

DEFENDANT HAS OFFERED NO REASONS TO EXPLAIN WHY ITS RESOLUTION DENYING PLAINTIFF'S VARIANCE APPLICATION WAS NOT CONTRARY TO THE EVIDENCE PRESENTED AT THE HEARINGS AND THEREFORE WAS NOT ARBITRARY, CAPRICIOUS AND UNREASONABLE (Pa1)

Defendant's argument in support of the Board's denial of plaintiffs' variance application may be summarized as follows: Plaintiff's use variance application which sought approval for "... a sprawling retail complex at an already overburdened four-way intersection is not something contemplated for a zone limited to single family residences." (Db6)¹

However, contrary to defendant's mischaracterization of the project, the unrefuted evidence presented by plaintiff at the hearings before the Board clearly established that: 1) This was not a "sprawling retail complex", but was rather a neighborhood community shopping center, consisting of two, one story buildings

¹ In accordance with R. 2:6-8, Db refers to defendant's responding brief and Pb refers to plaintiff's initial appellate brief.

having a total of 17,100 sq. ft. on two acres; 2) Although it is undisputed that the intersection of Pascack Road and Washington Avenue is a “busy intersection” in a suburban town, extensive evidence established that the so-called “overburdened four-way intersection” was to be significantly improved by the County of Bergen, with the assistance and participation of Washington Township, as testified to by plaintiff’s engineer and plaintiffs’ traffic expert and confirmed by defendant’s traffic expert, thereby alleviating any congestion; 3) While the subject property is located in the AA Residence Zone of the Township, the zoning ordinance permits other uses besides single-family residences including professional home offices and municipal buildings; 4) Presently existing land uses in the zone include townhouses and, specifically at the three other corners of the intersection, a restaurant/catering facility, a gas station and used car lot and a dental office; and 5) The four existing homes on the property in question have been sold to plaintiff and are no longer currently occupied as residences.

Defendant’s attempt to characterize the area in question as a “quiet, single-family residential zone” is not only contradictory but duplicitous. From any planning point of view, the “busy intersection” of which defendant complains has been developed with the nonresidential uses mentioned above and therefore is entirely inconsistent and incompatible with the so-called “zone limited to single family residences.” (Db6) In the immediate area in which plaintiff proposed its

development, the residential zoning designation is in complete disparity with the way in which the area has been developed.

The law concerning the grounds for a grant of a use variance is not at issue in this case. What is at issue is the application of that established law to the facts of this case as proven on the record of hearings before the Washington Township Board of Adjustment on plaintiff's application for a variance to permit a neighborhood shopping center in a zone designated for residential use.

Defendant's argument includes a repetitive statement of the obvious that the proposed use is not one which is inherently beneficial to the general welfare or where an undue hardship exists. Plaintiff made it very clear in the outset of its presentation to the Board, and endeavored to make it very clear to the trial Court, that it was not seeking a variance based on either of those grounds but on the alternate basis for a use variance allowed under subsection (d) (1), namely: that a special reason exists because the proposed use is peculiarly well suited to the particular location for which the variance is sought.

A significant portion of defendant's brief is devoted to a discussion of the "special reasons" grounds for the grant of a use variance under N.J.S.A. 40:50 5D – 70 (d) (1) (Db7). Defendant herein relies upon extensive quotations from Kohl v Borough of Fair Lawn, 50 N.J. 268 (1967), particularly that portion of the Supreme

Court's opinion which cites a previous Supreme Court decision in Ward v Scott, 11 N.J. 11 (1952).

Citing Kohl, defendant states: "No more specific standards for special reasons have been given by our courts beyond those general standards of section 32 [N. J. S. A. 40:55 – 32]" (Db-6) Although that statement may have been accurate when Kohl was decided 58 years ago and when Ward was decided 73 years ago, such statement at present is totally inaccurate. While the New Jersey Supreme Court decisions in these cases have, of course, not been set aside, it is fair to say that in the period of time since these cases were decided, and especially subsequent to the enactment of the Municipal Land Use Law, N.J.S.A. 40: 55D-1 et. seq., a substantial body of New Jersey case law has developed expanding the principles of land use law set forth therein and affording clarification and guidance to local boards and trial courts as to what constitutes "special reasons." (See Medici v BPR Co. 107 N.J. 1, 17-18 (1987))

Defendant argues that the present case is "strikingly similar" and presents facts exactly like the facts in Kohl. (Db8) Defendant's analogy in this regard is far-fetched and indeed reflects the weakness of the Board's position. There the variance application was for the proposed construction of a then half million-dollar expansion² of an industrial complex in a residential zone. It involved the replacement

² It is significant to note that \$500,000 in 1967 dollars would be worth 4.6 million dollars in 2024 (See amortization.org)

of two relatively small frame structures with a building that allowed for more than a five-fold increase in floor space (6300 square feet was to be replaced by 35,180 square feet) compared with the two houses to be removed. More specifically, the proposal included a two story, 76' x 115' addition to an existing processing plant, a new structure of 115 x 195', a 50' x 115' addition to an existing storage building and a loading dock 25 ft x 148 ft to accommodate 32 vehicles at one time. In addition, the applicant proposed an 8-foot wall around the perimeter of the property. The parties agreed that the area was a single "high-class residential neighborhood". (50 N.J. at 270) Unlike in the present case, a group of objectors presented a real estate expert who testified that the new construction would depreciate real estate values in the neighborhood.

The Court found no need to consider whether the negative criteria of the statute had been met but held: "We find it difficult to believe that an expansion of the magnitude permitted by the variance would not 'substantially impair the intent and purpose of the zoning plan and zoning ordinance.'" (50 N.J. at 283) The Court further stated: "The doubling of this industrial operation could lead to no other result than to detract from the residential character of an area otherwise devoted to private homes." (ID) With regard to the positive criteria, the court rejected the special reasons presented by the applicant that property values in the neighborhood would

be enhanced and that the new, greatly enlarged facility would be fireproof and more anesthetic.

It is difficult to understand why the defendant also cites Ward v. Scott in support of its position. That case involved the grant of a variance to a construction company for the development of a commercial use in a residential zone. However, there, the Supreme Court affirmed a decision of the Appellate Division upholding the grant of a variance.

The reason defendant submits that this case is similar to Kohl is because here “plaintiff seeks to replace four (4) homes with seventeen thousand, one hundred (17,100) square feet of commercial retail space into two (2) huge commercial buildings.” (Db8,9) However, a review of the record does not support the contention that the proposed development was either a “massive commercial project”, or that the two buildings were “huge”, or that the parking for nearly 100 cars would create a traffic problem.

The facts of present case are clearly distinguishable from the facts of Kohl v. Fair Lawn because: 1) that case involved a variance for an industrial use while this case involves a variance for a commercial use; 2) there was no testimony in this case to establish that specific area in which the development was proposed was conceded to be a “high-class residential neighborhood.” 3) there was also no testimony here

that the proposed construction would depreciate real estate values in the neighborhood, and 4) perhaps most significantly the nature and extent of the enormous construction project proposed in Kohl was entirely different from neighborhood shopping center presented by plaintiff.

The detailed testimony of plaintiff's experts as to the size and scope of the project as well as the improvement in traffic conditions completely contradict the defendant's naked conclusion that the proposed use would create an unsafe traffic condition.

Instead of the decision in Kohl v Fair Lawn, supra, the template for this Court's determination whether to affirm or reverse the Board's resolution of denial is based upon the current principles of zoning law articulated in Medici v. BPR., supra 107 N.J. 1. As discussed in plaintiff's initial brief, the proofs presented here in support of the instant variance application followed the guidelines of Medici. That case involved a use variance application for a proposed, four-story motel with 114 rooms and a restaurant. The Supreme Court stated that in a case not involving a use which is inherently beneficial or in a case involving a claimed hardship where the property could not be feasibly be developed for its designated use, an applicant must prove and a local zoning board must find that the use promotes the general welfare because the proposed site is particularly suitable for the proposed use. (107 N. J. at

16)

There, the Court further stated that in such cases where a commercial use that does not “inherently serve the public good” “an enhanced quantity of proof is required”... that the grant of the use variance is not inconsistent with the intent and purpose of the master plan and zoning ordinance. (107 N.J. at 21)

In an effort to suggest that plaintiff failed to establish the negative criteria that its proposed use was consistent with the master plan, defendant mentions but seeks to minimize a statement in the Township’s 2019 re-examination report that a “nonresidential use may be appropriate [in a residential zone] with appropriate design and screening / buffering from adjacent residential properties.” (Db6) Both the Board and its attorney have ignored the testimony of plaintiff’s planning expert that there is a statement in the master plan that says nonresidential use may be appropriate for the site also in view of the intersection. (Pa623-22 to 624-15), that as a smaller scale commercial project, it is designed to be very cognizant of the neighboring residential properties and is designed to limit impact (Pa626-7), and that from a planning perspective what the applicant is proposing is appropriate insofar as it represents an adequate design for this particular property (Pa627-14)

As plaintiff stated in its initial brief, its planning expert acknowledged that “another objective stated in the master plan is to maintain existing land use patterns and that commercial uses should be limited to the existing class C commercial area.” (Pb12;Pa624-5) Joseph Burgis, P.P, the Board’s Planner, referenced the Township’s

master plan goal to “maintain the quiet single-family residential areas.” But, as pointed out in plaintiffs’ initial brief, substantial credible and unrefuted expert testimony was presented to establish that the general area surrounding the subject property and surrounding area could hardly be characterized as “the quiet, single-family residential area” referred to in the re-examination report. In other words, in the vicinity of the plaintiff’s proposed development there was no such area to be maintained. As previously stated, in its resolution the Board acknowledged its planner’s testimony that: “in his opinion the 2019 re-examination statement regarding recommendations about the applicant’s property does have merit to consider when evaluating the aspect of the negative criteria”.(Pb14; Pa737-22)

Defendant further ignores the expert testimony of Mr. Burgis that a master plan re-examination report simply identifies a policy statement for the zoning board of adjustment to consider, and not to determine whether a particular project should be approved.” (Pb15; Pa741-16 to 21). Therefore, it is inaccurate to say that plaintiff’s proposed use should be denied because it is inconsistent with the Township’s master plan. Rather, it should more accurately be stated, with respect to the area in question to be developed, that the master plan adopted more than forty years ago is incompatible with the manner in which the area has since developed.

Plaintiff, as applicant, clearly understood and established on the record that, in addition to proof that the site was particularly well-suited to the use proposed,

another element of the special reason positive criteria which it was required to prove was that the proposed development would advance one of the purposes of zoning as set forth in N.J.S.A. 40:55 D-1. Plaintiff's planning expert opined that four subsections of the statute describing the purposes of zoning would be advanced by the proposal. The Board's Planner offered an opinion rejecting two of the four purposes but found merit in at least one of the purposes and did not question or reject the other. Significantly, the Board's Planner also advised the Board that an applicant is required only to prove that one of the purposes of zoning would be advanced by the grant of the variance. (Pb16; Pa749-11 to 24)

As to the negative criteria, plaintiff fully recognized that, under Medici, it also had the burden to prove that there would be no substantial detriment to the zone plan and zoning ordinance. The "enhanced quality of proof" articulated in Medici required the plaintiff, as applicant, to also establish that the proposed use would not be inconsistent with the master plan. The Board improperly focused on only one section of the 1980 master plan that one of the purposes of the master plan is to "maintain the quiet, single-family residential suburban character and community-oriented services in the town." The Board ignored the fact that, although such purpose may have been appropriate in 1980, once this area of the Township, including three of the four-corner intersection was developed with non-residential uses, this characterization no longer applied. Simply stated, there no longer existed

a “quiet single-family residential area” in the area where plaintiff proposed its development. Rather, a more appropriate statement of the 2019 master plan re-examination report that “a non-residential use may be appropriate with adequate design and screening/buffering from adjacent properties,”(Pa624-15) should not have been ignored. With regard to a review of the proposed development in light of the master plan, defendant Board ignored the unchallenged and unrefuted testimony of plaintiff’s expert planner that:

- In 2019, the Board granted a use variance for the establishment of a dental office on the southeast corner of the intersection in this residential zone. (Pa625-6 to 16)
- The proposed plan works from an adequate design point of view and planning perspective because the plans provide for more than adequate screening and buffering to protect adjacent residential properties.(Pa627-18 to 23)
- Although the application does not directly follow the master plan as to the location of commercial uses, this can be reconciled since the circumstances that warrant permitting this use include that it is a smaller scale commercial project which is cognizant of surrounding uses, the intersection as now developed was not in place in 2019. (Pa625-17 to 626-10)

In summary and conclusion, the defendant Board’s resolution of denial was arbitrary, capricious, and unreasonable, or, in other words, simply wrong because it ignored overwhelming expert testimony in support of the application for a use variance, including but not limited to that:

- The proposed development was not a sprawling retail complex but rather a neighborhood commercial center consisting of two buildings, one 2400 square ft. and the other 14,700 square ft. for a total of 17,100 square ft., both having a height of only one story.

- Further contrary to defendant's assertion that the proposal was for "a sprawling retail complex," the site was a large property consisting of over two acres located at a busy, signalized intersection with frontage on two main roads, one being a county road. (Pa610-23 to 611-7)
- There would not be a negative impact involving increased traffic because, as agreed by both plaintiff's and the Township's traffic engineers, the installation of traffic signals, turning lanes, crosswalks, and sidewalks would all improve existing traffic conditions. (Pb12; Pa625-17 to 24)
- Because of the busy intersection (which had already been designed for and to be substantially and significantly improved), with three existing non-residential uses on three corners of the intersection and other non-residential uses nearby, regardless of the present zoning, the site was no longer appropriate for single-family development. (Pa611-16 to 21)
- Rather, the site was more suitable for retail use in light of the vehicular access being added due to the future road improvements, the visibility of the site to passing traffic and the size of the site. (Pa613-13 to 23)

Therefore, the substantial if not overwhelming evidence in the record below in addition to the fact that, other than the comments of objecting neighboring property owners no contrary factual or expert opinion evidence was presented to contradict plaintiff's proofs, called out for a grant of plaintiff's use variance and site plan application. Under such circumstances, the Board did not, as required, follow the statutory guidelines, and did not properly exercise its discretion. Bressman v Gash, 131 N.J. 517, 526-528 (1993). Apparently, in an effort to satisfy objecting residential property owners in the neighborhood the Board adopted a woefully defective resolution denying the application.

CONCLUSION

For the reasons stated herein as well as for the reasons stated in plaintiff's appellate brief, this court should enter a judgment in favor of plaintiff, Pascack 660, LLC and against defendant, the Township of Washington Zoning Board of Adjustment, declaring the Board's resolution of June 20, 2023 to be null and void and directing the Board to adopt a resolution granting said application for use a variance, bulk variances, site plan approval, and waivers in all respects.

Dated: April 21, 2025

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