SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

WILL MARTIN and JUDY MARTIN, Administrators of the Estate of William Martin,	**SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-3827-23T1**
Plaintiffs/Appellants,	**CIVIL ACTION**
v.	
HOPEWELL TOWNSHIP LAND USE BOARD and GENORA ROSYPAL,	**ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY, CUMBERLAND COUNTY, LAW DIVISION, DOCKET NO. L-654-22**
Defendants/Respondents	**SAT BELOW: HON. BENJAMIN TELSEY, AJSC**

BRIEF OF PLAINTIFFS/APPELLANTS

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PRELIMINARY STATEMENT

Plaintiffs appeal a land use board's grant of a (c)(1) hardship variance to the neighboring property owner. This court should reverse. The application was premised significantly on the claim that the majority of the neighbor's property was undevelopable wetlands. There was no competent evidence of this before the land use board. The testifying experts – who had never been to the property – offered net opinions. Moreover, shortly after receiving variance approval, the neighbor sought and obtained a building permit to build exactly where she had earlier represented was undevelopable. More broadly, the board conflated minor financial inconvenience with the actual standard of "exceptional and undue hardship." Those concepts are not the same. For these reasons, and as explained more thoroughly within, Plaintiffs urge the court to reverse.

PROCEDURAL HISTORY[2]

In September 2022, Defendant Hopewell Township Land Use Board ("Board") conducted a hearing at which it granted Defendant Genora Rosypal's ("Rosypal") application for a variance. (Pa52-255).

In November 2022, Plaintiffs Will Martin and Judy Martin, administrators of the estate of William Martin, filed a complaint in lieu of prerogative writs, challenging the Board's resolution. (Pa1-23).

On June 24, 2024, the trial court issued an order affirming the Board's grant of the variance. (Pa278-279).

Plaintiffs filed a timely appeal. (Pa280-283).

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Pa# refers to the Plaintiffs' appellate appendix and page number.
T#:##-## refers to the hearing transcript of June 13, 2024.

STATEMENT OF FACTS

A. The subject property

Plaintiffs and Rosypal own adjacent properties on River Road in Hopewell Township. (Pa1¶¶1-3). Plaintiffs' property is farmland. (T131:25-132:4). Rosypal's property contained a residential structure that was rented out to tenants. (Pa2¶5). The structure was non-conforming because it did not meet the front-yard setback requirements or the agricultural buffer with respect to Plaintiffs' property.[3] (Pa2¶8). In May 2021, a fire substantially destroyed the house on Rosypal's property. (Pa2¶6). The structure was eventually demolished, leaving only a foundation. (Pa2¶6, Pa14¶3).

B. The unlawful zoning permit

In May 2022, Rosypal applied for a zoning permit which sought not only to restore the prior non-conforming structure, but to expand it. (Pa2¶¶9-10, Pa8-11). About one week after submitting the application, it was approved, notwithstanding that Rosypal neither sought nor obtained any variances. (Pa9). Only after the intercession of Plaintiffs' counsel did Hopewell Township rescind the unlawful zoning permit. (Pa2¶13, Pa41). The Township advised Rosypal that if she wanted to rebuild, it would have to conform to the setback requirements, or else she would

[3] The house was about 44 feet from River Road, whereas the front-yard setback requirement is 100 feet. (Pa14¶¶3-4). The agricultural buffer is 100 feet, whereas the house was located about 51 feet from Plaintiffs' property. (Pa14¶¶3-4).

have to apply for a variance. (Pa41).

C. The variance application and Board hearing

In September 2022, Rosypal filed a variance application before the Board. (Pa3‖14, Pa43-51). The hearing took place on September 21, 2022, at which Rosypal sought a c-1 variance for the front-yard setback, and a waiver of the 100' agricultural buffer. (Pa53-255). Rosypal testified in favor of the variance, as well as her two experts: Rami Nasser, an engineer, and Stephen Hawk, a planner. (Pa87@35:17, Pa104@52:19-23). Plaintiff Will Martin and his son Thomas Martin testified in objection, as did Plaintiffs' professional planner, Sally Birdsall. (Pa175@123:11, Pa183@131:23-132:2, Pa198@145:24-151:15). At the conclusion of the hearing, the Board voted in favor of the application. (Pa254@202:9-17).

Rosypal explained that she sought to rebuild a residential structure on the existing foundation, and to expand the foundation by about 10 feet. (Pa100@48:13-22). Even though she "would have much rather sold [the] lot," Rosypal testified that Plaintiffs made a "ridiculously low" offer to purchase the subject property which she rejected. (Pa101@49:6-18, Pa102@50:21).

Rosypal's engineer testified that the existing foundation was "usable" and "it'd be expensive" to rebuild one. (Pa90@38:15-22). The engineer – who admitted he had never been to Rosypal's property (Pa142@90:16-18) – also

claimed there was a stream at the northwest side of Rosypal's property and associated "wetlands buffers" that rendered only 35% to 40% of Rosypal's property usable. (Pa90@38:2-10). Neither the stream nor the buffer zone was displayed on or corroborated by Rosypal's application, a survey, a wetlands overlay, or any other document. Nevertheless, in the middle of the hearing, the engineer hand-drew this so-called "blue line stream" down the center of the survey which, in his estimation, would have prevented development in the westerly two-thirds of the property. (Pa51, Pa150@98:9-99-Pa152@100:16, Pa156@104:2-Pa157@105:4). Rosypal's planner echoed the engineer's testimony:

> . . . Button Run is at the westerly end of the property at or adjacent to it. There's wetlands associated with it. There's a flood zone associated with it. And then there's a . . . slope in this area . . . that is sharp and goes down towards the Button Run. So there's a portion of the property. It's roughly two-thirds of it I would say that's not available for development.
>
> [(Pa108@56:4-12).]

As before, none of this was displayed on, or corroborated by, Rosypal's application, survey, variance plan, or any other document. The planner admitted as much. (Pa223@171:9-12). The planner also testified that if the variance were not granted and the house was built in a conforming location, it would require "disrupting some phenomenal trees," "disrupting a lot of soil," and "mov[ing] the driveway." (Pa109@57:17-25). The planner admitted that nowhere in the

application or any of the documents submitted was there any indication of the trees or their layout. (Pa128@76:8-19). The planner agreed with the engineer that the existing foundation was a usable, unique feature. (Pa113@61:10-18). The planner also opined that the proposed location of the house was the "high point" of the lot, but admitted there was no elevation survey to corroborate the claim. (Pa130@78:6-24).

Plaintiffs' professional planner testified that the variance would expand the prior nonconformity because the application sought to increase the foundation by ten feet. (Pa177@125:10-22). Plaintiffs' son, Thomas Martin, testified that he farms Plaintiffs' property, which adjoins that of Rosypal. (Pa184@132:1-12). Thomas expressed concern that the reduction of the 100-foot agricultural buffer would be a safety issue for the Rosypal property, since he applies pesticides to Plaintiffs' property. (Pa185@133:5-8, Pa186@134:14-Pa187@135:24). Thomas also testified that he observed that the foundation on the Rosypal property has a "larger vertical crack in the corner" with "fire damage extending all the way down into the sill plate." (Pa190@138:7-12). Plaintiff Will Martin also testified. He explained that he offered to buy Rosypal's property from her for 30% more than the estimate of value in a broker's price opinion. (Pa200@148:12-22). Plaintiff agreed with his son that the application of pesticides to their property would imperil the neighboring Rosypal property unless the agricultural buffer were

respected. (Pa201@149:17-Pa202@150:11). At the conclusion of the hearing, the Board voted to grant the variance and waive the agricultural buffer. (Pa245@193:6-Pa254@202:13).

In October 2022, the Board issued Resolution #2022-07, which formalized its decision. (Pa13-23). In relevant part, the Board made the following findings of fact and conclusions of law:

- "moving the principal structure would require a series of other improvements including relocating the driveway, etc., and would otherwise be a hardship for the applicant," (Pa21);
- "the proposed new home will be located where it is the least environmentally detrimental to the local habitat," (Pa21);
- "tearing up the existing foundation would unnecessarily cause more waste and would be an environmental detriment," (Pa21);
- "the topographical conditions of the property and the wooded areas (that would require significant clearing) and wetlands areas in the western areas of the applicant's property are not available for development," (Pa22);
- "the pre-existing, usable foundation also presents a unique feature or exceptional circumstance," (Pa22);
- "the existing foundation is located at the 'high point' or highest elevation of the applicant's property, which further supports keeping the existing location of the principal foundation and structure," (Pa22).

D. Plaintiffs' complaint in lieu of prerogative writs

Plaintiffs timely filed a complaint in lieu of prerogative writs in November 2022, challenging the Board's resolution. (Pa1-23). The Board filed an answer, as

did Rosypal. (Pa24-30, Pa31-35).

While Plaintiffs' complaint was pending, Rosypal applied for and obtained a zoning permit to build a house on her property in the same location her experts had testified was "undevelopable" due to the alleged existence of the wetlands buffer and the Button Run "blue-line" stream. (Pa37‖9, Pa257-262).

On June 13, 2024, at the conclusion of oral argument, the court rendered an oral decision affirming the Board's resolution. (T43:4-56:13). On June 24, 2024, the court entered a conforming order. (Pa278-279). Plaintiffs filed a timely appeal. (Pa280-283).

LEGAL ARGUMENT

I: ROSYPAL'S APPLICATION WAS FUNDAMENTALLY FLAWED IN A VARIETY OF WAYS THAT RENDERED THE BOARD'S VARIANCE GRANT ARBITRARY AND CAPRICIOUS. (T8:25-26:18, 33:22-39:3, 43:4-56:13).

Plaintiffs believe that Rosypal's variance application was fundamentally flawed and incomplete, and that the court overlooked certain fatal defects in the hearing. Plaintiffs will address each in turn.

A. Governing law and standard of appellate review

N.J.S.A. 40:55D-70(c)(1)(C) permits a municipal land use board to grant a variance if "by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property . . . the strict application of any regulation . . . would result in . . . exceptional and undue hardship upon, the developer of such

property[.]" Under this statute, "undue hardship refers solely to the particular physical condition of the property, not personal hardship to its owner, financial or otherwise." Jock v. Zoning Bd. of Adjustment, 184 N.J. 562, 590 (2005). Hardship "is not synonymous with complete inutility due to land use restriction[.]" Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 29 (2013).

This court reviews land use board determinations under the same abuse of discretion standard as a trial court. Fred McDowell, Inc. v. Bd. of Adjustment of Twp. of Wall, 334 N.J. Super. 201, 212 (App. Div. 2000). That is, a decision will be overturned if it is "arbitrary, capricious or unreasonable." Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 58 (1999). "Because variances should be granted sparingly and with great caution, courts must give greater deference to a variance denial than to a grant." N.Y. SMSA, Ltd. P'ship v. Bd. of Adjustment, Twp. of Weehawken, 370 N.J. Super. 319, 331 (App. Div. 2004). For reasons that follow, Plaintiffs respectfully submit that the Board's decision was arbitrary, capricious, and unreasonable.

B. There was no competent evidence before the Board that the westerly portion of Rosypal's property was undevelopable.

Rosypal's property is shallow – but only on the extreme easterly side. (Pa51). A conforming house could be built elsewhere on the property without the need for variances. But according to the testimony of Rosypal's experts, the westerly two-thirds of her property was not developable due to the presence of a

stream, wetlands, and a wetlands buffer, thus contributing to the "hardship" under (c)(1). This alleged undevelopability played a significant role in the variance hearing. Though it was not depicted on any survey or other document, Rosypal's engineer stated that

> wetlands will be in this . . . location. We have a stream also on – at the northwest side of the property. . . . they can impose from 50 to 150 foot wetland buffers. So I think in this area, because what they have been doing lately is 150 foot buffers, so that would put the usable ground probably on 40 or 35% of the property could be used for that. Also we look at the flood hazard maps. Also a large portion of the property . . . falls within the flood zone. So they have to stay outside that area.
>
> [(Pa90@38:1-14).]

There was no survey, wetlands overlay or delineation, flood hazard map, aerial photographs, variance plan, or any other document in Rosypal's application that substantiated the existence or scope of the stream, wetlands, or wetlands buffer. (Pa151@99:13-22, Pa134@82:6-23). Rosypal's planner stated:

> So there is a shallow area [on the east of Rosypal's property]. Now, you could say . . . let's put a house over in an area further west, and then that – that shallowness doesn't exist, but you've heard from [the engineer] and you probably know from the documents that – that – been submitted, and your knowledge of the property, that the Button Run [stream] is at the westerly end of the property at or adjacent to it. There's wetlands associated with it. There's a flood zone associated with it. And then there's a – a slope in this area right in the middle of the property that – that is sharp and goes down towards the Button Run. So there's a portion of the property. **It's**

> **roughly two-thirds of it I would say that's not available for development.**
>
> [(Pa107@55:23-Pa108@56:12) (Emphasis added).]

The planner went on to explain that "you'd be hard pressed to build a house anywhere on that lot" to meet the wetlands setbacks, which he claimed were "substantial." (Pa222@170:21-24). He claimed that "if it's . . . 100 feet DEP buffer zone maybe, if it's 300 feet, there's no way you could build a house" anywhere but the eastern end of the property. (Pa223@171:4-6).

As earlier noted, the undevelopability of the westerly two-thirds of Rosypal's property was one of the bases upon which the Board found hardship. (Pa22). The trial court did not find it problematic that the stream/wetlands/buffer issue came up for the first time at the variance hearing, and was not supported by any evidence other than the experts' oral testimony. According to the trial court:

> The Plaintiffs had the opportunity to advance this argument before the Board and the Board made its determination based upon hearing the testimony of two qualified expert[s], as well as some information from the Plaintiff himself. So it's not arbitrary, capricious and unreasonable for the Board to rely upon two experts and this Plaintiff's testimony.
>
> [(T48:24-49:6).]

The trial court did not appreciate that the experts offered a net opinion, which is never competent evidence. A net opinion "is a bare conclusion unsupported by factual evidence." Ehrlich v. Sorokin, 451 N.J. Super. 119, 134 (App. Div. 2017).

The trial judge erred: simply because an expert testifies to a conclusion does not mean that the testimony is a sufficient basis upon which the Board can base its findings. At least two cases – both in the land use context – illustrate this principle. In Wilson v. Brick Twp. Zoning Bd. of Adjustment, the plaintiff sought a (c)(1) variance to construct a deck and pool in his back yard within the setbacks. 405 N.J. Super. 189, 193 (App. Div. 2009). The plaintiff's expert testified that construction of the deck and pool in accordance with the zoning requirements was "impossible," but provided "no detail . . . to support this conclusion[.]" Id. at 202. The surveys in evidence did not clearly corroborate the expert's opinion, which the panel found "conclusory." Id. at 202-03. In the case of Kogene Bldg. & Dev. Corp. v. Edison Twp. Bd. of Adjustment, the (c)(1) applicant's proofs were "lacking in several material respects." 249 N.J. Super. 445, 450 (App. Div. 1991). Among those failings was that:

> the testimony presented by plaintiff . . . was at best conclusory. The record does not indicate whether the proposed dwelling would adversely affect the aesthetics and character of the neighborhood, since plaintiff did not submit detailed plans demonstrating the dwelling's compliance with the building code and adequately describing its appearance.
>
> [Id. at 450.]

As Wilson and Kogene demonstrate, it is not good enough for an expert to simply state a conclusion. There must be corroboration for that conclusion, which

was lacking here. Rosypal could have produced a survey, overlay, or delineation that established the existence and extent of a stream, wetlands, or a wetlands buffer. She offered none of these, likely because it was simply untrue that the westerly portion of her property was undevelopable. In fact, shortly after the variance hearing, Rosypal sought and obtained a zoning permit to build a house in the identical location her experts had testified was "undevelopable." (Pa257-262).[4]

According to the trial court, Plaintiffs "suggested that this [case] is all about the wetlands and I don't see that, and I've reviewed everything. This is about – there's a lot of factors. It's the totality of the circumstances here, not just the wetlands." (T47:17-21). The Board did make several findings to support the grant, some of which did not have to do with the wetlands. But the wetlands were a significant part, and furthermore, Plaintiffs believe there are additional defects in the Board's other findings, which are addressed *infra*. These defects, cumulatively, should result in reversal.

C. That topography "favors" a location does not support a hardship variance.

Another of the Board's findings in support of the grant had to do with the

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[4] During oral argument, the trial judge asked Rosypal's counsel about how "significant" it was that Rosypal subsequently obtained a permit to build "in the area that was deemed wetlands." (T42:9-12). Rosypal's counsel stated that it was not significant: "We never said we could not build." (T42:13-14). This is obviously false, since Rosypal's planner explicitly testified "So there's a portion of the property. It's roughly two-thirds of it I would say that's not available for development." (Pa108@56:10-12). Rosypal's engineer testified identically.

topography of Rosypal's property. The Board concluded that "the existing foundation is located at the 'high point' or highest elevation of the applicant's property, which further supports keeping the existing location of the principal foundation and structure." (Pa22). The trial court commented on this finding, stating: "I place maybe a lot of weight in that." (T51:9-10). For reasons that follow, both the Board and the trial judge erred. The law is clear on this issue:

> **That the topography of land favors a given location does not warrant a hardship variance. Rather, topography of the land must create practical difficulties for complying with an ordinance.** Moreover, "undue hardship" involves the underlying notion that no effective use can be made of a property in the event the variance is denied. **Put another way, an owner is not entitled to have his property zoned for its most profitable use.**
>
> [Terner v. Spyco, Inc., 226 N.J. Super. 531, 548 (App. Div. 1988).]

It does not matter whether the proposed rebuilding site is the "high point" of the property.[5] There must have been some "practical difficulty" of topography that prevented Rosypal from building elsewhere. Not only was there no evidence of this. The fact that Rosypal promptly obtained a zoning permit to build in the center of her property – without the need for any variance, and in the area she earlier claimed was undevelopable – is proof positive that there was no "practical

[5] There was no elevation survey or any other documentary evidence to support this conclusion, which was based on abject conjecture.

difficulty" of topography that prevented her from building elsewhere. It was simply a matter of financial convenience for Rosypal. It was error for the Board to find this as a factor in granting the variance, and error of the trial court to place "a lot of weight" on this.

D. The Board erred in refusing to let Plaintiffs explore the specifics of negotiations, and the trial court erred in concluding that negotiations are irrelevant.

The Board permitted Rosypal to testify at length about negotiations with Plaintiffs to sell her property. She claimed that Plaintiffs made a "ridiculously low" offer, and that a property hadn't sold for such a low number "in 20, 30 years." (Pa101@49:16-19). Rosypal said she would "much rather have sold that lot," but not for what Plaintiffs were offering. (Pa102@50:21-23). When Plaintiffs' counsel attempted to explore this on cross-examination, the Board interrupted, determined that the issue was "outside the purview of the Board," and refused to let counsel continue. (Pa163@111:3-Pa165@113:10). The findings and conclusions of the implementing resolution ignored the negotiation issue entirely.

While the trial judge acknowledged that the Board effectively precluded Plaintiffs from exploring the issue, he did not think this was error: "what was entered into evidence was negotiations took place and that's fair. Only amounts and the specifics of those negotiations that weren't brought in. I don't see how those amounts are relevant in any way." (T54:23-55:6.). Case law says the

opposite. As our Supreme Court has explained, "the attempt made by a party to bring the property into conformity by purchasing from or sale to adjoining owners is a factor for consideration" when assessing a variance application, "even where the non-conforming status of the property was originally created through no fault of the then owner or his predecessor." Jock, supra, 184 N.J. at 594. "If it is feasible for the owner of the lot to purchase property from adjoining landowners, or if the owner refuses to sell the lot at a 'fair and reasonable' price, the owner might not suffer 'undue hardship.'" Kogene, supra, 249 N.J. Super. at 449. The Board does not have the discretion to ignore factors like this. "The efforts made to bring the property into compliance with the ordinance are factors that **must be considered. Those efforts may include attempts to acquire additional land or offers to sell the nonconforming lot to adjacent property owners.**" Ten Star Dom P'ship, supra, 216 N.J. at 29 (internal citation omitted) (emphasis added).

Jock and Kogene both make explicit that negotiations, including actual dollar amounts, are relevant factors in determining whether an applicant may be entitled to a variance. Ten Stary Dom establishes that such a factor "must be considered." The Board does not have the discretion to ignore it, as it did in this case. Nor, for the same reason, was the Board permitted to refuse Plaintiffs' efforts to explore the details of the negotiations during cross-examination of Rosypal. The trial judge therefore was wrong to conclude that this information

was not "relevant in any way." (T55:5-6).

E. The trial court improperly conflated minor financial inconvenience with the actual standard "exceptional and undue hardship."

The standard for a (c)(1) variance is "exceptional and undue hardship" arising from a physical condition of the property, "not personal hardship to its owner, financial or otherwise." Jock, supra, 184 N.J. at 590. Both the Board and the trial court improperly conflated minor financial inconvenience with undue hardship. This is most apparent with regard to two factors the Board found in granting the variance: the driveway issue and the tree-clearing issue.

The Board found that moving the principal structure would require "relocating the driveway," which it thought would be a hardship. (Pa21). The Board also believed that keeping the principal structure in the same place would be the least environmentally detrimental because locating it elsewhere would require the clearing of trees. (Pa21-22). To start, both of these concerns were illusory. As Rosypal's subsequent zoning application showed, she had no problem extending (not "relocating") the driveway or clearing some trees. (Pa259-260). More significantly, these concerns were more reflective of additional financial cost to Rosypal and not a unique feature of property that presents an "undue hardship." If having to clear some trees or extend a preexisting driveway a few feet counts as "undue hardship," it is hard to imagine any variance application ever being denied.

F. The Hawrylo case is critically distinguishable.

Lastly, the Board found that the preexisting foundation was a unique feature of the property, justifying a variance under Hawrylo v. Bd. of Adjustment, 249 N.J. Super. 568 (App. Div. 1991), and the trial court agreed. (Pa16, Pa22, T45:24-46:47:5). But in Hawrylo, the hardship variance was based on more than just the existence of a usable foundation. The building sought to be rebuilt on the preexisting site – a barn – "enhanced the goals of the master plan to keep the area's unique historic look," including the promotion of "agricultural uses." Id. at 583, 577. There is no like rationale in this case. In fact, the opposite is true: the erection of a residential structure within the buffer zone of Plaintiffs' property *derogates* the master plan by subordinating the agricultural uses of Plaintiffs' property to the convenience of Rosypal rebuilding in the same nonconforming place.

CONCLUSION

For these reasons, Plaintiffs respectfully ask that the court reverse.

Respectfully submitted,
GOLDENBERG, MACKLER, SAYEGH, MINTZ, PFEFFER, BONCHI & GILL,
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BY: _____
FRANCIS J. BALLAK, ESQ.

Dated: November 27, 2024

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JUDY MARTIN and WILL MARTIN, ADMINISTRATORS OF THE ESTATE OF WILLIAM MARTIN	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
	:	Docket No: A-003827-23T1
Plaintiffs	:	
	:	CIVIL ACTION
vs.	:	
	:	ON APPEAL FROM:
HOPEWELL TOWNSHIP LAND USE BOARD and GENORA ROSYPAL	:	SUPERIOR COURT OF NEW JERSEY CUMBERLAND COUNTY LAW DIVISION
Defendants	:	
	:	SAT BELOW:
	:	BENJAMIN C. TELSEY, A.J.S.C.
	:	

RESPONDENT HOPEWELL TOWNSHIP LAND USE BOARD'S STATEMENT IN LIEU OF BRIEF PURSUANT TO R. 2:6-4(c)

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TRANSCRIPT REFERENCES

The Transcript of the Hearing before Benjamin C. Telsey, A.J.S.C. dated June 13, 2024 is referred to as **T.**

INTRODUCTION

Respondent, Hopewell Township Land Use Board (the "Board") submits this Statement in Lieu of Brief pursuant to R. 2:6-4(c). This appeal arises from a quasi-judicial decision by the Board. It is respectfully submitted that the general public interest does not require that the Board file a formal brief. All issues are expected to be adequately addressed by the private parties.

BACKGROUND & PROCEDURAL HISTORY

Genora Rosypal owns the residential property at 226 River Road in Hopewell Township, Cumberland County. (Pa 13). The single-family residence that had been on the property was destroyed by fire. (Pa 13). The foundation remained. (Pa 14). Rosypal applied to the Hopewell Township Land Use Board for a "bulk" variance to place a new home on the existing foundation. (Pa 13-14, 43). The footprint would also be expanded by ten feet to accommodate the new home. (Pa 14).

The requested variance was needed because the proposed new home would not meet the front set-back requirement of Hopewell's land use ordinance. (Pa 48). It also would not satisfy the agricultural buffer set-back requirement of the ordinance. (See Pa 68-72).

Rosypal's variance application was considered at a public hearing of the Board. (Pa 53). The Board deemed that the application was complete as to the technical and administrative requirements of the ordinance. (Pa 79-83).

Rosypal submitted various exhibits in support of the variance application. (Pa 15). Rosypal then presented testimony in support of the variance application. Such testimony included testimony from Ms. Rosypal. (Pa 15, 95). Expert testimony on Rosypal's behalf was also presented by an engineer, who was also a professional planner. (Pa 15, 87). Further expert testimony on Rosypal's behalf was presented by a dedicated professional planner. (Pa 16, 104).

The Plaintiffs own property that borders the Rosypal property. (Pa 1). The Plaintiffs placed their various objections before the Board through testimony, including testimony from a planner retained on their behalf. (Pa 18-20).

The Board conducted a lengthy public hearing on the variance application. (See generally Pa 53-254). The Board voted to grant the requested bulk variance. The vote was 5-0, with one Board member abstaining. (Pa 22, 254). The Board members provided their reasons and rationale for their respective votes on the record. (Pa 251-54).

A Resolution was prepared and adopted. (Pa 13-23). The Resolution memorialized the hearing before the Board, the Board's findings of fact, and the Boards reasons and rationale for the variance grant. (Pa 13-23).

Plaintiffs then filed an action in lieu of prerogative writ with the Law Division. (Pa 1). The Law Division affirmed the Board's grant of the variance, and placed an oral opinion on the record. (T 43-56). This appeal followed. (Pa 280).

LEGAL ARGUMENT

As set forth in the Introduction above, it is expected that the private parties to this appeal will adequately address all issues. The Board is in general agreement with the arguments and positions that will be advanced by Genora Rosypal. Most importantly, the Board and Rosypal entirely agree that the Board did not act arbitrarily, unreasonably and/or capriciously in granting the subject bulk variance.

The standard of review for the grant or denial of a variance is the same as that applied by the Law Division. Advance at Branchburg II, LLC v. Twp. of Branchburg Bd. of Adjustment, 433 N.J. Super. 247, 252 (App. Div. 2013). Courts are to defer to decisions of local boards if they are adequately supported by the record, Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 61 (1999), and if they are not arbitrary, unreasonable, or capricious, Pullen v. Twp. of S. Plainfield Planning Bd., 291 N.J. Super. 1, 6 (App. Div. 1996).

Further, decisions by a land use board "enjoy a presumption of validity, and a court may not substitute its judgment for that of the board unless there has been a clear abuse of discretion." Price v. Himeji, LLC, 214 N.J. 263, 284 (2013). A board's factual determinations are entitled to "great weight" and should not be

disturbed unless there is insufficient evidence to support them. Rowatti v. Gonchar, 101 N.J. 46, 52 (1985).

When reviewing a board decision, a court must consider the issues before the board in their entirety and not focus on the legal sufficiency of one factor standing alone. Kramer v. Bd. of Adjustment, 45 N.J. 268, 287 (1965). For example, a court cannot consider a variance in isolation, but must consider it "in the context of its effect on the development proposal, the neighborhood, and the zoning plan." Pullen, supra, 291 N.J. Super. at 9.

The Legislature has delegated to municipalities the power to regulate local land use through the Municipal Land Use Law, N.J.S.A. 40:55D-1 *et. seq*. Land use boards also have the power to grant variances under N.J.S.A. 40:55D-70(c), commonly called "c" or "bulk" variances. The statute states, in relevant part, that a land use board has the power to grant variances:

> (1) [w]here: (a) by reason of exceptional narrowness, shallowness or shape of a specific piece of property, or . . . an extraordinary and exceptional situation uniquely affecting a specific piece of property…the strict application of any regulation pursuant to…this act would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the developer of such property…or] (2) where in an application or appeal relating to a specific piece of property the purposes of this act…would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment.

Rosypal's variance was pursued under subsection (c)(1). She had to show that exceptional or undue hardship would result if the variance was not granted. Chirichello v. Zoning Bd. of Adjustment, 78 N.J. 544, 552 (1979). The unique condition of her property had to have been the cause of the hardship. Lang, supra, 160 N.J. at 56. The hardship standard does not require the applicant to prove that without the variance the property would be zoned into inutility. Id. at 54. The applicant need only demonstrate the property's unique characteristics inhibit the extent to which the property can be used. Id. at 55.

The MLUL further provides that a (c) variance cannot be granted unless the applicant establishes what is colloquially referred to as the negative criteria, proving that "that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." N.J.S.A. 40:55D-70.

Also, "it is well settled that a land use board "has the choice of accepting or rejecting the testimony of witnesses. Where reasonably made, such choice is conclusive on appeal." Kramer, supra, 45 N.J. at 288; see also Bd. of Educ. of Clifton v. Zoning Bd. of Adjustment, 409 N.J. Super. 389, 434 (2009) ("Zoning boards may choose which witnesses, including expert witnesses, to believe.").

In this case, the Board heard extensive testimony from both parties and their respective experts. Further, the parties were represented by counsel. In reviewing

the transcript of the hearing, it appears that counsel were prepared and made a spirited presentation. In rendering their decision to grant Rosypal's variance, the various members of the Board stated their reasons and rationale on the record. Their reasons and rationale were grounded in the facts before them and took into account the relevant standards. There is no indication that their reasons or rationale were based upon impermissible considerations. The Board's decision was thereafter affirmed by the Law Division.

In sum, the Plaintiffs have not shown, and cannot show, that the Board acted in an arbitrary, unreasonable and/or capricious manner in granting the subject bulk variance to Genora Rosypal.

CONCLUSION

The action and decision by the Hopewell Township Land Use Board and the Law Division should be affirmed.

TESTA HECK TESTA & WHITE, P.A.

Dated: January 28, 2025

By: s/ *Justin R. White*
JUSTIN R. WHITE
Attorney for the
Hopewell Township Land Use Board

WILL MARTIN and JUDY MARTIN, Administrators of the Estate of William Martin, Plaintiffs/Appellants, v. HOPEWELL TOWNSHIP LAND USE BOARD and GENORA ROSYPAL, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-3827-23T1 CIVIL ACTION ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY CUMBERLAND COUNTY LAW DIVISION DOCKET NO.: CUM-L-654-22 SAT BELOW: HON. BENJAMIN TELSEY, A.J.S.C.

AMENDED BRIEF OF DEFENDANT/RESPONDENT GENORA ROSYPAL

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PRELIMINARY STATEMENT

This action arises out of a Complaint in Lieu of Prerogative Writs filed by the Plaintiffs, Will Martin and Judy Martin, Administrators of the Estate of William Martin ("Plaintiffs"), against the Defendants Genora Rosypal ("Applicant Rosypal") and the Hopewell Township Land Use Board (the "Board"). Plaintiffs challenge the Board's grant of a "c" hardship variance permitting a 44-foot front-yard setback where 100 feet is required and a design standard waiver for an agricultural buffer permitting a 51.3-foot buffer where 100 feet is required. The Board correctly found that Applicant Rosypal was entitled to a c(1) hardship variance because the Property contained an existing foundation where she seeks to place a new modular home. The testimony at the Board hearing established that moving the dwelling would require removing trees, moving the existing driveway, removing the existing foundation, and disturbing a significant amount of soil, all of which constituted a hardship upon Applicant Rosypal due to the existing geographic conditions of the Property and the existing foundation. Moreover, the Board granted a waiver from the agricultural buffer requirement because the testimony at the hearing established that the reduced buffer would not harm the neighboring farm. Accordingly, contrary to the Plaintiffs' assertions, the Board's decision was anything but arbitrary, capricious, or unreasonable.

PROCEDURAL HISTORY

On or about September 9, 2022, Applicant Rosypal applied to the Board for a c(1) hardship variance to permit a 44.4' front-yard setback where a 100' front-yard setback is required and a waiver from §220-40D(4) of the Township Code which requires a 100' landscape buffer within lots that share a lot line with an agricultural use. (Pa13-14). The Board granted Applicant Rosypal's requested variance and design waiver, memorializing its grant in Resolution No. 2022-07. (Pa13-23).

On or about November 14, 2022, the Plaintiffs filed a Complaint in Lieu of Prerogative Writs ("Complaint") challenging the Board's grant of the variance and waiver. (Pa1-7). The Board filed an Answer to the Complaint on January 20, 2023. (Pa22-30). Applicant Rosypal also filed an Answer to the Complaint on January 20, 2023. (Pa31-35).

On June 13, 2024, the parties appeared before the Hon. Benjamin C. Telsey, J.S.C. for oral argument. *See* 2T:1-61. Judge Telsey concluded that the Board's decision was not arbitrary, capricious, or unreasonable and declined to reverse or remand the matter to the Board. 2T56:6-10. On June 25, 2024, the Court entered a judgment dismissing the Plaintiffs' Complaint with prejudice. (Pa278-79). On August 6, 2024, the Plaintiffs filed a Notice of Appeal. (Pa280-87).

STATEMENT OF FACTS

I. The Parties

Applicant Rosypal is the owner of Block 88, Lot 12.01 on the Hopewell Township Municipal Tax map, more commonly known as 226 River Road (the "Property"). (Pa13). Plaintiffs, Will Martin and Judy Martin, are the Administrators of the Estate of William Martin. (Pa1). The Estate is the owner of Block 88, Lot 14 on the Hopewell Township Municipal Tax map, more commonly known as 220 River Road. *Ibid*.

II. The Property

Applicant Rosypal's Property contains 3.606 acres and previously contained a two-story, single-family dwelling. (Pa13). However, a fire destroyed that residence, with only the foundation surviving. *Ibid*. The Property is located in the Agricultural Zoning District. (Pa14). Single-family residences are a permitted use in the Agricultural District. *See Hopewell Township Municipal Code §220-29(D)(3)*. The Property is irregularly shaped, with a large western portion covered by trees and a very shallow eastern portion. (Pa265-66). The foundation from the prior residence is situated on the eastern portion of the Property, with a horseshoe shaped driveway that wraps around the back of the proposed dwelling. *Ibid*. The proposed dwelling complies with all bulk

standards except the front-yard setback (44.4' proposed where 100' is required). (Pa14).

III. The Application

Applicant Rosypal proposed to erect a new modular single-family home in the same footprint as the prior residence, except for a 10-foot extension to the west for a crawl space, using the existing foundation, which survived the fire. (Pa14). The proposed residence would conform to all bulk standards of the Agricultural district except for the front-yard setback, where 100 feet is required, and 44.4 feet is proposed. *Ibid.* The proposed residence will be 51.3 feet from the neighboring property line. *Ibid*.

IV. The Board Hearing

The Board held a hearing on the Application on September 21, 2022. (Pa13). Applicant Rosypal submitted the following exhibits to the Board:

A-1	Variance Plan prepared by Schaeffer Nassar & Scheidegg dated July 28, 2022;
A-2	Survey by Machael R. Vargo, P.L.S., P.P. dated June 28, 2022
A-3	Property Detail
A-4	Five pre-fire photos of the Property taken July 8, 2011

A-5 Six post-fire photos of the Property taken August 11, 2022

A-6 2016 Zoning Ordinance Schedule "A" dated April 1, 2016

A-7 Current Schedule A – District Regulations Ordinance 19-06 Published April 2022

A-8 Floorplan of proposed single-story modular home

A-9 Structural Inspection Report of foundation by Block Engineering, LLC dated October 7, 2021

[(Pa14-15)]

The Board first heard testimony from Applicant Rosypal's licensed professional engineer, Remi N. Nassar, P.E., P.P., C.M.E. Mr. Nassar explained that there is an existing foundation on the Property, which is not parallel to River Road; the front left corner is 44.4 feet from the Road, and the right corner is 65 feet, and that Applicant Rosypal is requesting a variance for the front-yard setback. 1T36:20-25[1]. The Property also contains a horseshoe-shaped driveway and many mature trees at the back, which creates a buffer. 1T37:4-13. There is

[1] 1T refers to the transcript of the September 21, 2022 Hopewell Township Land Use Board hearing (Pa52-255)
2T refers to the transcript of the June 13, 2024 oral argument before Judge Telsey, J.S.C.

tillable land about 75 feet from the location of the proposed home and based on Mr. Nassar's experience working in Cape May and Atlantic County, generally wetlands are present wherever farming stops. 1T37:21-25. Mr. Nassar estimated that only about 35% to 40% of the Property is usable due to wetlands and portions of the Property that fall within a flood zone. 1T38:1-14. Mr. Nassar concluded that the existing foundation was usable and that tearing down the existing foundation and rebuilding it would be a significant cost. 1T38:15-23. Mr. Nassar also concluded that the existing foundation could accommodate the proposed modular home. 1T38:24-39:5.

Applicant Rosypal testified that she owned the Property for about ten (10) years. 1T43:21-23. The Property has a full basement. 1T48:13-14. The crawl space and 10-foot extension needed to be added because the new home is a single-story home, and Applicant Rosypal wanted to ensure it remained a 3-bedroom home. 1T48:19-25. Plaintiff, who is the neighboring property owner, offered to purchase the Property; however, the parties could not agree upon a price. 1T49:16-24.

Stephen Hawk, P.P., A.I.C.P., Applicant Rosypal's professional planner, explained why the Applicant was entitled to a c(1) hardship variance. Mr. Hawk explained that moving the proposed dwelling to the westerly end of the Property would not be practical due to the presence of wetlands, a flood zone, and a sharp

slope. 1T55:24-56:12. According to Mr. Hawk, approximately two-thirds of the Property is not developable. *Ibid*. Mr. Hawk agreed with Mr. Nassar's conclusion that wetlands were present where farming did not occur. 1T56:17-23. Mr. Hawk also testified that the Property contains about 90 to 100 50- to 60-foot-high trees, which would be disrupted if the Applicant moved the proposed residence. 1T57:12-20. Moving the proposed residence would also disrupt a significant amount of soil. 1T57:20-24. Moreover, relocating the proposed residence would additionally require moving the existing driveway, which would cause an additional disruption to the soil. 1T57:24-58:8.

Mr. Hawk explained that a c(1) hardship variance was justified because both the trees and the existing foundation constituted exceptional characteristics of the Property. 1T58:24-59:7. Mr. Hawk stated the lot would meet the standard for a c(1) variance even if the existing foundation were absent. *Ibid*. In the *Hawrylo* case, the Court held that an existing foundation constituted a unique feature that would justify the grant of a c(1) variance. 1T59:7-60:7. Mr. Hawk concluded that the basis for the c(1) variance included the shallowness of the lot in the area available for development, the white pine trees, and the existing foundation. 1T61:4-11. Mr. Hawk further explained that under the Supreme Court's decision in *Kaufmann*, a Board can grant a hardship variance

if the hardship inhibits the extent to which the Applicant can use his or her property. 1T61:19-62:11.

Mr. Hawk next testified as to the negative criteria. Mr. Hawk found that the proposed 44-foot front-yard setback was typical of the lots on River Road. 1T62:16-63:17. Out of the thirty-two (32) homes on River Road, nineteen (19) have setbacks less than 60-feet, and nine (9) have setbacks less than 44-feet. *Ibid*. Thus, more than half of the front-yard setbacks on River Road are non-conforming. *Ibid*. The proposed residence meets every other design and zoning standard except for the agricultural buffer requirement. 1T65:13-67:17. The Applicant's use is permitted. *Ibid.* The Township's master plan designates the Property as environmentally sensitive. *Ibid.* One of the goals of the Township's master plan is to protect environmentally sensitive areas; the variance will further that goal by preventing the disturbance of the trees and soil on the Property. Accordingly, Mr. Hawk concluded that there was no substantial detriment to the zoning ordinance or master plan and that the benefits of the variance outweighed the minimal detriments. *Ibid*.

Concerning the waiver of the 100-foot agricultural buffer, Mr. Hawk explained that the provision centered around subdivisions and site plans for larger developments, even though it applies to any development. 1T68:7-69:4. The farm and the residence have existed harmoniously since 1963, and the trees

on the Property protect the residence from the drift of any pesticides used in the summer months. *Ibid*. Moreover, prevailing winds would not tend to blow in the direction of the residence; therefore, there is less of a risk of pesticides drifting from the farm to the residence. *Ibid*. Mr. Hawk further opined that moving the residence, which would require tree removal, would not be worth the marginal benefit of moving twenty additional feet away from the farm. 1T69:14-23. Mr. Hawk has experience as a farming consultant; based on his experience, he concluded that the reduced agricultural buffer would not harm the neighboring farm. 1T70:16-71:20. Mr. Hawk concluded that Applicant Rosypal was entitled to a waiver from the 100-foot agricultural buffer. 1T72:3-5. Mr. Nassar concurred with Mr. Hawk's conclusions. 1T72:19-22.

The Plaintiffs, through their counsel, objected to the Application. The objectors' counsel first questioned Mr. Hawk. Mr. Hawk again explained that while it was possible to relocate the proposed residence, the major disruptions to the trees and soil were not worth it. 1T77:7-24. Mr. Hawk also explained that the location of the prior residence was not arbitrary but rather was located at the high point of the Property. 1T78:3-19. Mr. Hawk further explained that he did not analyze the cost of relocating the proposed residence because his concern was with the impact on the trees and using the existing foundation rather than the cost. 1T81:3-6.

The objectors' counsel next questioned Mr. Nassar. Mr. Nassar explained that he did not personally test the foundation 1T90:70-92:8. Mr. Nassar did not observe any cracks in the foundation; even if cracks were present, they could be fixed. *Ibid*. Mr. Nassar testified that while he did not see the plans for the proposed modular home, foundations can typically handle such homes, and the foundation would need to be certified by an engineer before the Applicant could obtain a building permit. 1T93:13-24. In Mr. Nassar's experience, foundations from the '50s and '60s are much better than modern foundations and could support the modular home. 1T94:11-20. Mr. Nassar also read into the record the conclusion of the Klock Engineering report, which stated that the foundation was in good structural condition. 1T106:10-23. Mr. Nassar reiterated his conclusion that the foundation would support the proposed residence, a single-story, three-bedroom home. 1T107:24-108:2.

The objectors' counsel questioned Applicant Rosypal in detail regarding negotiations to purchase the Property. 1T110:6-113:11. However, the Board attorney correctly found that line of questioning irrelevant to the Application. *Ibid*.

Professional Planner Sarah Birdsall, P.P., A.I.C.P., testified in opposition to the Application. She agreed with Applicant Rosypal that the Property is an "extraordinary, environmentally gorgeous area." 1T124:17-127:3. Ms. Birdsall

contended that Applicant Rosypal had to demonstrate that it was absolutely necessary to extend the Property by 10-feet. *Ibid*. She further contended that the hardship was, in part, self-created because Applicant Rosypal sought to expand the structure. *Ibid*.

Thomas Martin testified in opposition to the Application. Mr. Martin explained that the Property was his brother's farm. 1T131:23-132:6. Mr. Martin's brother passed away in 2019, and he has been operating the farm since then. *Ibid*. When asked if the waiver of the 100-foot agricultural buffer would disrupt his farm, Mr. Martin referred to being on the farm with the tractor in the early morning hours, the presence of children's toys in the field, issues his brother had with 4-wheelers doing donuts in the field behind the house. 1T132:22-134:14. He also referenced that the operation of heavy machinery and use of pesticides could present a safety issue for the residence. 1T134:14-136:15. Mr. Martin also stated his opinion that the foundation was cracked. 1T136:16-183:20. Mr. Martin confirmed the presence of wetlands on the Property. 1T144:16-20.

Will Martin also testified in opposition to the Application. Mr. Martin testified to his negotiations to purchase the Property 1T146:1-148:22. He also believed the 100-foot agricultural buffer was necessary for the homeowner's safety 1T150:24-152:4.

The Board opened the meeting to members of the public. John Hitchner testified in favor of the Application, stating that Hopewell needs new housing stock and that Applicant Rosypal is a good landlord with a proven track record of making quality improvements to houses in the Township. 1T173:19-174:21. Thomas Martin spoke again in opposition to the Application and stated he believed that Applicant Rosypal required a use variance. 1T175:2-178:9.

After the public portion the Board discussed and voted on the Application. One member of the Board pointed out that they were a representative from the Environmental Commission and that the existing location of the residence was the area least detrimental to the local habitat and surroundings. 1T193:22-194:1. Board Member Shimp voted "yes" on the Application because he did not want more waste created by tearing up the existing foundation and granting the variance would have less of an impact on the environment. 1T199:5-12.

Board Member Tedesco voted to approve the Application because moving the residence west would be a hardship, and he did not believe the reduced agricultural buffer would be a significant detriment. 1T199:15-25. Board Member Strait voted "yes" because the site-specific circumstances outweighed any possible detriment and moving the residence west would create a substantial environmental impact for minimal gain. 1T200:3-10. Board Member Hepner voted "yes" because of the environmental impact of moving the residence.

1T200:18-25. Chairman Caggiano voted in favor of the Application because moving the residence would result in a significant environmental detriment and the proposed location is the best location for the lot. 1T201:11-202:8. Accordingly, the Board approved the Application with five (5) votes in favor and one (1) abstention. 1T202:14-17.

V. The Board's Resolution

The Board Memorialized its decision in Resolution No. 2022-07. (Pa13-23). The Resolution provides the following findings of facts and conclusions of law in support of the variance:

a. The proposed residence is a permitted use,
b. Relocating the residence would require a series of other improvements including relocating the driveway;
c. The site-specific circumstances outweigh any possible detriment;
d. The proposed increase of 10-feet to the foundation on the western side of the property to accommodate a 1-story home will result in less intensity on the easterly side of the property than a 2-story home;
e. The proposed residence will be located where it will cause the least environmental detriment;

f. Tearing up the existing foundation would unnecessarily cause waste and be an environmental detriment;

g. The eastern portion of the property is exceptionally shallow

h. The western portion of the property contains wooded areas and wetlands areas which are not available for development;

i. The pre-existing usable foundation constitutes a unique feature or exceptional circumstance;

j. The requested 44.4' front-yard setback is typical of the area – 19 out of 32 homes on River Road have front-yard setbacks of less than 60 feet, 9 of the homes have a front-yard setback less than 44 feet;

k. The detriment of the 44' front-yard setback is slight and outweighed by the hardship, and there is no substantial harm or impairment to the Township zoning code or Master Plan;

l. The property meets every code and design standard except the front-yard setback and agricultural buffer;

m. The property greatly exceeds the requirements for side-yard setbacks, rear-yard setbacks, and overall lot area;

n. The Township code specifically permits the Board to waive the agricultural buffer design standard,

o. The existing foundation is located at the "high point" of the property which further supports using the existing foundation.

[(Pa9-10)]

Based upon the totality of the aforementioned factors, the Board found that Applicant Rosypal established a hardship and that any detriment in granting the variance is slight and outweighed by the hardship. (Pa10).

VI. Judge Telsey's Decision

On June 13, 2024 the Honorable Benjamin C. Telsey, J.S.C. heard oral argument on the Plaintiffs' Prerogative Writs claim. Judge Telsey concluded that the Board's grant of the variance was not arbitrary, capricious, or unreasonable. *See* 2T47:1-56:10. Judge Telsey rejected the Plaintiffs' arguments regarding the wetlands issue noting that the Board was free to rely upon two experts with respect to the wetlands issue. 2T48:14-49:14. The Court also found that the existing foundation constituted a unique feature or exceptional circumstance justifying the variance. 2T51:16-18. With respect to the foundation being situated at the "high-point" of the Property, the Court determined even if that was not the case, it would not render the Board's decision arbitrary, capricious, or unreasonable due to the totality of the factors the Board relied upon in reaching its decision. *See* 2T51:6-15.

The negative criteria was satisfied because many other homes (19 of 32) had front-yard setbacks of less than 60-feet. 2T51:19-52:6. The Court also held that the Board is expressly permitted to waive the agricultural buffer design standard and that the waiver was reasonable. 2T53:22-25.

Moreover, the Court held that the presence of wetlands was not the determining factor in the Board's decision; rather, the existing foundation alone may have been enough to justify the variance. 2T54:13-22. The Court also did not find persuasive the Plaintiffs' claim that the Board should have heard detailed testimony regarding the Plaintiffs' offers to purchase Applicant Rosypal's Property. 2T54:23-56:1.

Based upon the multiple factors the Board outlined in its Resolution and which were supported by the record below, the Court held the Board's decision was not arbitrary, capricious, or unreasonable. *See* 2T51:6-15.

ARGUMENT

I. STANDARD OF REVIEW

New Jersey case law clearly defines the Court's role in reviewing the decisions of local planning or zoning boards. A local board's decision is presumed valid and will only be overturned if the plaintiff demonstrates the board's decision was "arbitrary and capricious or unreasonable." *Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Twp. of Franklin*, 233 N.J. 546, 558

(2018)(quoting *Grabowsky v. Township of Montclair*, 221 N.J. 536, 551 (2015)). This high burden of proof reflects the fact that local officials who are familiar with their community's characteristics and interests are in the best position to decide such applications. *Kramer v. Bd. of Adjustment, Sea Girt*, 45 N.J. 268, 296 (1965); *see also Price v. Himeji, LLC*, 214 N.J. 263, 284 (2013)(holding that local boards are entitled to wide latitude in the exercise of their discretion because of their "peculiar knowledge of local conditions."). The Court may not substitute its judgment for that of the Board's unless "there has been a clear abuse of the grant or denial of a variance." *Price, supra*, 214 N.J. at 284. This heavy burden is borne by the party challenging the Board's decision. *Ibid.* Accordingly, the Hopewell Township Land Use Board's grant of the Applicant's c(1) hardship variance enjoys a presumption of validity. *Ibid.*

As explained in detail below, Plaintiffs cannot and have not demonstrated that the Board's grant of the variance and design waiver was arbitrary, capricious, or unreasonable. Therefore, the Board's decision must be upheld.

II. APPLICANT ROSYPAL WAS ENTITLED TO A C(1) HARDSHIP VARIANCE.

New Jersey's Municipal Land Use Law ("MLUL"), *N.J.S.A.* 40:55D-1 *et seq.*, permits local land use boards to grant a variance where:

> by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the

> structures lawfully existing thereon, the strict application of any regulation pursuant to [*N.J.S.A.* 40:55D-62 *et seq.*] would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the developer of such property, grant, upon an application or an appeal relating to such property, a variance from such strict application of such regulation so as to relieve such difficulties or hardship [*N.J.S.A.* 40:55D-70(c)(1)(c)]

A variance under §70(c)(1)(c) is typically referred to as a hardship variance. The hardship to justify the grant of the variance must be related to the property's physical condition, not the owner's personal hardship. *Jock v. Zoning Bd. of Adjustment of Twp. of Wall*, 184 N.J. 562, 590 (2005).

An applicant seeking a hardship variance is not required to prove that the property would be "zoned into inutility" without the variance. *Lang v. Zoning Bd. of Adjustment of Borough of N. Caldwell*, 160 N.J. 41, 54 (1999). Rather, the applicant must demonstrate that strict enforcement of the zoning ordinance, in light of the property's unique characteristics, "imposes a hardship that may inhibit *the extent* to which the property can be used. *Ibid*. (citing *Davis Enterprises v. Karpf*, 105 *N.J.* 476, 493, 523 *A.*2d 137 (1987)(Stein, J.,

concurring; emphasis original). As always, an Applicant must also satisfy the negative criteria by demonstrating that the variance can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance. *Id*. at 57.

Accordingly, "applicants must satisfy two criteria for a hardship variance: (1) strict enforcement of the ordinance imposes a hardship that inhibits the extent to which the property can be used due to the property's unique characteristics, and (2) grant of the variance will not be a substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance. As explained below, Applicant Rosypal demonstrated the criteria for a hardship variance and the Board properly granted the same.

III. THE BOARD'S DECISION WAS NOT ARBITRARY, CAPRICIOUS, OR UNREASONABLE.

Applicant Rosypal demonstrated that (1) strict adherence to the zoning ordinance would limit the extent to which she could use her Property could be used due to the Property's multiple unique characteristics, and (2) the variance can be granted without substantial detriment to the public good and without impairing the intent and purpose of the zone plan and zoning ordinance.

With respect to the positive criteria, the Board found that the Property had multiple unique characteristics, including:

1. The existing foundation;
2. The easterly portion of the Property is exceptionally shallow;
3. Moving the principal structure would require relocating the driveway and tearing up the existing foundation resulting in unnecessary waste and environmental detriment;
4. Much of the western portion of the Property is not available for development due to the presence of wetlands; and
5. Developing the western portion of the Property would require significant clearing of its wooded areas;

As to the negative criteria, the Board found that Applicant Rosypal's proposed 44' front-yard setback was typical of the neighborhood, the Property meets every other zoning and design standard, and reconstructing the dwelling on the existing foundation advances the Master Plan's goals by preserving the wooded area on the Property.

A. The Existing Foundation.

There can be no real dispute that the existing foundation on the Property constitutes a unique characteristic supporting a c(1) variance. Section 70(c)(1)(c) specifically refers to "structures" on the subject Property as a basis for a hardship variance:

> Where…by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property **or the structures lawfully existing thereon**, the strict application of any regulation pursuant to [*N.J.S.A.* 40:55D-62 *et seq.*] would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the developer of such property, grant, upon an application or an appeal relating to such property, a variance from such strict application of such regulation so as to relieve such difficulties or hardship [*N.J.S.A.* 40:55D-70(c)(1)(c)(emphasis added)]

Moreover, the Appellate Court in *Hawrylo v. Bd. of Adjustment, Harding Twp.*, 249 N.J. Super. 568 (App. Div. 1991) addressed this very situation and held that an existing foundation constituted a "structure" that could justify the grant of a hardship variance. In reaching its decision, the Appellate Court

explained that the Legislature broadened *N.J.S.A.* 40:55D-70(c)(1)(c) to include "structures" as a basis for a hardship variance:

> We also reject plaintiffs' urging that only a geological condition qualifies as an "exceptional situation," or that, to make a property unique, a nonconforming structure cannot justify a hardship variance. Prior to 1984, the hardship triggering the grant of a variance had to be caused by exceptional narrowness, shallowness or shape of a specific piece of property or by reason of exceptional topographic conditions or other extraordinary and exceptional situation. The Legislature broadened the criteria specifically to include "an extraordinary or exceptional situation *uniquely affecting a specific piece of property or the structures lawfully existing thereon*" Despite plaintiffs' contrary claim, there is nothing to indicate that the term "structure lawfully existing thereon" was intended to preclude a nonconforming structure.
>
> [*Id.* at 80 (citations omitted; emphasis original)]

Accordingly, it is beyond dispute that the existing foundation on the Applicant Rosypal's property constitutes a basis for a hardship variance under *N.J.S.A.* 40:55D-70(c)(1)(c).

The Plaintiffs' attempt to distinguish *Hawrylo v. Bd. of Adjustment, Harding Twp.*, 249 N.J. Super. 568 (App. Div. 1991) from the case before the Court by arguing that *Hawrylo* by claiming the decision was not only based upon an existing foundation but also the fact that the application proposed to rebuild a barn that furthered the goals of the township's master plan. (Appellant's Brief, p. 18). The Court pointed out that the board did rely in part upon its master plan in granting the variance:

> It is clear from the comments and the resolution that the Board relied on what it believed to be the tenor of its 1984 master plan. That plan included a purpose to "promote ... open space ... natural resources and to prevent degradation of the environment through improper use of land." One of the master plan's primary goals was the "protection of rural development pattern and density," noting that the municipality had "been cited by contemporary historians as a primary example

> of a preserved 18th or early 19th century country-scape...."
>
> [*Hawrylo*, 249 N.J. at 576–77]

However, the crux of the issue before the Court was whether the existing foundation was a proper basis for granting a hardship variance:

> Plaintiffs urge that the remaining structure was and is nonconforming, and therefore not a "lawful structure." They contend that the Walkers established nothing more than that it would be cheaper for them to build a barn on the existing foundation rather than elsewhere on the property.
>
> [*Id.* at 579]

The Court upheld the grant of the variance because the existing foundation constituted a "structure" under *N.J.S.A.* 40:55D-70(c)(1). *Ibid*. Also significant, the Court rejected the argument that financial hardship is irrelevant in determining whether to grant a c(1) variance. *See Id.* at 581-83 ("…we cannot but conclude that financial hardship, short of confiscation, is not irrelevant.").

The Court only referenced the fact that rebuilding the barn furthered the township's master plan while briefly discussing the negative criteria:

> The evidence of compliance with the negative criteria as found by the Board here was overwhelming. **The Board found that restoring the barn site enhanced the goals of the master plan to keep the area's unique historic look**. The Board found that the old location accorded with the rights of all other neighbors except plaintiffs by maintaining the open meadow look, bordered by a hedgerow, and that the impact on the plaintiffs' property was minimal. The Board also found environmental benefits in conserving existing resources, while removing two unsightly existing structures. This finding of variance benefits to the neighborhood, in light of the master plan, arguably, would support a variance grant under subsection c(2), the so-called "flexible c" variance.
>
> [*Id.* at 583-84 (emphasis added)]

The fact that restoring the barn would enhance the goals of the township's masterplan was a relatively minor factor in the Court's decision. A closer review of *Hawrylo* leads to the inescapable conclusion that an existing foundation constitutes a "structure lawfully existing" on a property that may justify the

grant of a c(1) hardship variance. Therefore, the Plaintiffs' attempts to distinguish *Hawrylo* should be rejected – it is difficult to imagine a case more on point.

B. Relocating the Proposed residence is not practical.

There is ample evidence in the record that relocating the proposed dwelling would require clearing trees and disturbing large amounts of soil. Mr. Hawk testified that the Property contains 90 to 100 White Pine trees, which is a unique feature. 57:12-24. Relocating the dwelling would disrupt the trees and a significant amount of soil. *Ibid.* Relocating the residence would also necessitate removing the existing driveway, which would also entail disrupting the soil for, in the opinion of Mr. Hawk, a "minimal benefit." 57:24-58:8. Relocating the dwelling to the eastern portion of the lot is not practical because that portion of the property is quite shallow. 55:20-24.

It is also not practical to move the dwelling slightly to create a larger front-yard setback because, as explained by Mr. Hawk, doing so would still require removing trees, moving the existing driveway, grading out the old driveway, and installing a new driveway:

> Q. But the foundation can be moved over toward those trees without having actually –
>
> A. I -- I --

Q. -- took them down.

A. I thought about that. There is a -- a large dogwood that's right on the edge of the trees, so that's even closer to the house and that would be -- I believe it's right in here. I'm pointing to an area between the driveway and the -- the woods line. There's a couple other ornamental trees that I didn't describe that are -- are adjacent to the -- to the foundation. That's -- That's the dogwood right there and then there's those ornamental trees. And then there's the fact that the house is moved over and the driveway has to be moved, then you have to grade out the old driveway and put in a new driveway. So I thought that that -- the benefit of that, moving that over and getting slightly more front yard setback or more setback from the farm was not worth disturbing those existing conditions that were there.

[1T77:3-22]

Therefore, of all the options available, the Board correctly concluded that granting a variance for the front yard setback was a slight detriment significantly

outweighed by the hardship that would ensue by relocating the dwelling. *See Resolution 2022-07, pg. 10*.

C. Portions of the Property contain wetlands.

Where a Board reasonably accepts or rejects the testimony of witnesses, its decision is conclusive on appeal. *Kramer v. Bd. of Adjustment, Sea Girt*, 45 N.J. 268, 288 (1965)("However, it is well settled that the Board' has the choice of accepting or rejecting the testimony of witnesses. Where reasonably made, such choice is conclusive on appeal."). In this case multiple parties testified that there are wetlands present on the Property. Both Mr. Nassar and Mr. Hawk testified that re-locating the proposed dwelling to the western portion of the Property would present numerous practical difficulties. Mr. Nassar explained that based upon his experience and knowledge of Cape May and Atlantic County, generally wherever farming stops is where wetlands are present, and that wetlands would be located near the stream on the Property. 1T37:21-38:14. Mr. Hawk concurred with Mr. Nassar's opinion that there are wetlands present on the Property. 1T55:24-56:23. Thomas Martin, who has been farming the Property since 2019, also confirmed the presence of wetlands on the property. 1T144:16-145:10. Therefore, the Board's decision to accept the unrebutted testimony regarding the presence of wetlands on the Property was reasonably made and is conclusive on appeal.

Plaintiffs attempt to characterize Mr. Hawk and Mr. Nassar's testimony as impermissible "net opinions." However, Mr. Hawk and Mr. Nassar did not simply state "there are wetlands on the Property." Rather, they provided the "why and wherefore," of their conclusion. As explained above, Mr. Nassar stated that he is familiar with Cape May and Atlantic County and, in his experience, wetlands generally are present wherever farming stops. 1T37:21-38:14. Mr. Hawk concurred with that conclusion. Thomas Martin, who had been farming the adjacent property since 2019, conceded that wetlands were present. Therefore, the fact that there are wetlands present on the property was amply supported and the Board was well within its discretion to accept that testimony as true.

D. The Foundation being at the Property's high point was not the basis for the Board's decision.

Plaintiff claims that the Board's decision is arbitrary, capricious, and unreasonable because the Board's resolution mentions that the proposed location of Applicant Rosypal's dwelling is at the high point of the Property. The discussion of prior dwelling being at the high point of the Property was in response to a hypothetical question:

> Q. And if the existing foundation was not there
>
> and this was a -- a -- just a -- vacant land –
>
> A. Umhmm.

> Q. -- coming in here, would you be attempting to situate it where it is now or would you be looking to situate it further away from my client's tillable land?
>
> A. Well, there is another thing that we didn't talk about, and this is the high point of the lot. And, you know, I have a lot of respect for the old timers, they -- they knew where to put homes. They knew where -- Especially farmers. You drive the country roads. You drive Route 77 and you can see all those old homes are all on the high spots. Someone in 1963 said that's the best spot because it's the highest spot on the -- on the land and I agree with them. Could it be moved over? Would there be fill needed? Would there be destruct -- disruption of those trees and driveways? Yes. But if I was coming in now and an engineer, probably would say let's put it at the high spot.
>
> [1T77:25-78:19]

Thus, the discussion of the foundation being situated at the high point of the Property was in response to a hypothetical question of whether it would make sense to construct a dwelling in the same spot if the Property was vacant land.

That fact was not critical to the Board's decision – rather it was one of a myriad of factors supporting the grant of the variance. As explained in the Board's resolution, relocating the dwelling would result in a marginal benefit while needlessly disrupting trees and soil, tearing up the existing foundation, creating waste, and relocating the existing driveway.

E. Financial Hardship is Relevant to an Application for a c(1) hardship variance.

While the case law cited by the Plaintiffs indicates that financial hardship alone is not sufficient to justify a c(1) variance, multiple cases have held that financial hardship is a relevant factor. In *Hawrylo, supra,* the Court held that an applicant's financial burden was a relevant consideration. *Hawrylo,* 249 N.J. Super. at 585("[T]he Board's cited reasons, including reference to the applicant's financial burden, justified the variance."). That position has been followed in subsequent cases. *See Cohen v. Bd. of Adjustment of Borough of Rumson*, 396 N.J. Super. 608, 619 (App. Div. 2007)("As we explained in *Hawrylo*, under the amended statutory language, financial hardship is not irrelevant when determining whether a variance grant is warranted.").

As explained above, numerous factors went into the Board's determination that relocating Applicant Rosypal's proposed residence would constitute a hardship including the shallowness of the lot, the necessity of removing trees, disturbing significant amounts of soil, tearing down an existing

foundation, and relocating the existing driveway. Plaintiffs claim these concerns were "illusory" because Applicant Rosypal obtained a permit to relocate the proposed dwelling. However, that does not change the fact that relocating the residence comes with a host of practical burdens as explained above. The Plaintiffs' mere difference of opinion with the Board does not render its decision arbitrary, capricious, or unreasonable. The Board's decision was amply supported by the record. Moreover, of the fifteen (15) reasons listed for granting the variance in its Resolution there is no mention financial hardship. Even if there was no financial hardship to Applicant Rosypal, the variance is still justified based upon the existing foundation alone.

F. The Board properly limited testimony on negotiations to purchase the subject Property.

Plaintiffs' offer to purchase Applicant Rosypal's Property was wholly irrelevant and the Board correctly limited testimony on the issue. Where, as here, the basis for a hardship variance is not that the Plaintiff cannot use the Property for *any* purpose, but rather the hardship inhibits the *extent* to which an owner can use the property, such negotiations are not relevant:

> The only variance cases in which offers to purchase the affected property may properly be considered are those in which the offer is germane to the particular claim of hardship that is advanced to support the variance. As

> our cases demonstrate, **such offers have heretofore been found pertinent only where the claim of hardship is the inability to use the property for any purpose**. In such cases, the availability of a fair price for the property is directly relevant to the claim that without the variance, the property has in effect been confiscated by the zoning ordinance. **Absent a variance claim based on inutility, evidence of offers to purchase the affected property should be excluded since they are irrelevant to the statutory criteria on which the municipal board is required to base its decision**.
>
> [*Davis Enterprises v. Karpf*, 105 N.J. 476, 494 (1987)(citations omitted; emphasis added)]

The Supreme Court's language in *Davis* could not be clearer. Offers to purchase a property are relevant *only* where the claim of hardship is that the owner cannot use the property for *any* purpose. That was not the case here. Neither Applicant Rosypal nor her experts claimed that absent a variance she could make no use of the Property. Rather, the claim was that relocating the proposed dwelling would inhibit the *extent* to which Applicant Rosypal could

use her Property, present serious practical difficulties, and cause both environmental and financial waste. Accordingly, the negotiations between the parties regarding the sale of the subject Property were wholly irrelevant to Applicant Rosypal's request for a c(1) variance.

CONCLUSION

For the reasons above, the Board's grant of Applicant Rosypal's c(1) variance for a front-yard setback and waiver of the agricultural buffer requirement was not arbitrary, capricious, or unreasonable.

The exhibits and testimony at the hearing established that relocating the residence would entail significant environmental disturbances and practical difficulties for only a marginal benefit. Moreover, the variance would not constitute a substantial detriment to the zoning ordinance because most properties in the area have non-conforming front-yard setbacks.

The Board also properly granted Applicant Rosypal a waiver from the 100-foot agricultural buffer requirement because there was no competent evidence demonstrating that the reduced buffer size would adversely affect the neighboring farm. While the Plaintiffs may disagree with the Board's ultimate conclusions, mere disagreement or difference of opinion does not render a decision arbitrary, capricious, or unreasonable.

Accordingly, the Court should affirm the Trial Court and the Board's decisions.

Respectfully submitted,

NEHMAD DAVIS & GOLDSTEIN, P.C.

BY: *Raymond J. Went, Jr.*

RAYMOND J. WENT, JR., Esq.

Dated: February 6, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

JUDY MARTIN and WILL MARTIN, Administrators of the Estate of William Martin,	**SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-3827-23T1**
Plaintiffs/Appellants,	**CIVIL ACTION**
v.	
HOPEWELL TOWNSHIP LAND USE BOARD and GENORA ROSYPAL,	**ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY, CUMBERLAND COUNTY, LAW DIVISION, DOCKET NO. L-654-22**
Defendants/Respondents	**SAT BELOW: HON. BENJAMIN TELSEY, AJSC**

REPLY BRIEF OF PLAINTIFFS/APPELLANTS

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PRELIMINARY STATEMENT

Rosypal is conspicuously quiet about a foundational argument Plaintiffs make. She should not be permitted to represent before a land use board that she faces "exceptional and undue hardship" because the majority of her property is undevelopable wetlands, then separately obtain a zoning permit to rebuild in the precise location she earlier claimed was undevelopable. This implicates another of Plaintiffs' arguments that Rosypal makes only a token effort to address: tribunals and courts require *competent* evidence of a condition – not speculation. Here, it was lacking. The Board granted its variance in significant part based on testimony that was plainly false. Rosypal could have rebuilt in a conforming location without any hardship at all, as her zoning permit demonstrates. The order under review should be reversed.

STATEMENT OF FACTS

Certain assertions in Rosypal's statement of facts are not consistent with the cited portions of the record and are otherwise misleading. Rosypal's brief makes it appear that her engineer – Mr. Nassar – could competently testify to the condition and usability of the existing foundation.[1] In actuality, Mr. Nassar admitted he had never been to the property, and had no personal knowledge of the foundation's condition. The following exchange is relevant:

> Q: Mr. Nassar, how many times have you personally been out to the property?
>
> A: I haven't been to the property.
>
> . . . .
>
> Q: We don't have any report submitted to this Board about the condition of this foundation, do we?
>
> A: I don't think that's relevant, because if there's an issue with he foundation –
>
> Q: Well, --
>
> A: -- it can be fixed.
>
> Q: You have not tested the foundation yourself, have you?
>
> A: (No audible response.)
>
> Q: And there's no report to this Board about the condition of the

[1] "Mr. Nassar explained that he did not personally test the foundation. 1T90:70-92:8. Mr. Nassar did not observe any cracks in the foundation; even if cracks were present, they could be fixed." (Db10).

existing foundation –

A: No.

Q: -- is there?

A: No.

Q: Are you aware of whether or not there's any significant cracks to the existing foundation or not?

A: I can't (indiscernible few words).

Q: You have no knowledge?

A: Nope.

[Pa142@90:16-91:24.]

LEGAL ARGUMENT

I: THE BOARD RELIED ON FALSE AND SPECULATIVE TESTIMONY ABOUT FACTS CRITICAL TO THIS APPLICATION. (T8:25-26:18, 33:22-39:3, 43:4-56:13).

A. It was false that Rosypal's property was undevelopable due to wetlands. Her zoning application and approved permit demonstrate this.

One of Plaintiffs' main arguments is that Rosypal cannot obtain relief before the land use board on the premise that most of her property is undevelopable, then later obtain a zoning permit to do what she earlier claimed was impossible. Rosypal's opposition devotes a total of one sentence to this argument: "However, that does not change the fact that relocating the residence comes with a host of

practical burdens as explained above." (Db32).[2] Whether a "host of practical burdens" exists is a non-sequitur. It neither addresses Plaintiffs' argument, nor is it the legal standard at issue ("exceptional and undue hardship"). To the contrary, courts have looked with disfavor on a land use applicant who makes a stark about-face in her position in subsequent proceedings.

In Bray v. Cape May City Zoning Bd. of Adjustment, 378 N.J. Super. 160 (App. Div. 2005), for example, applicants obtained site plan approval from a planning board by representing that they were developing a "tourist/guest house," which was a permitted use in that zone. Id. at 161. Years later, the applicants sought a zoning board for an opinion that the facility they built was actually a hotel (not a permitted use) out of which they could operate a restaurant as an accessory use. Id. at 161-62. The Appellate Division applied judicial estoppel against the applicants: having represented to the board that they were building a "tourist/guest house," and having been given approval on that basis, they were stuck with that position, and not allowed to claim the development was actually a hotel. Id. at 162, 167. This case involves a similar dynamic. Rosypal took one position before the Board, and obtained relief in significant measure because of that position. She later took a directly contrary position. Just as in Bray, this court should apply judicial estoppel to prevent her from "playing fast and loose" with the system. Id.

[2] Db# refers to Rosypal's brief and page number.

at 166.

B. The experts' testimony about wetlands and buffer zones was a speculative net opinion.

Rosypal believes the Board was permitted to accept the testimony of her experts that the presence of wetlands impeded the development of the westerly two-thirds of her property, notwithstanding the total lack of any documentary evidence to substantiate this. Plaintiffs disagree. An expert cannot speculate; such testimony is a net opinion. Townsend v. Pierre, 221 N.J. 36, 55 (2015). Yet the testimony of Rosypal's experts regarding the existence and extent of wetlands is just that. It was not based on their firsthand observations. It was not based on a wetlands delineation or overlay. It was not based on aerial photographs. It was not based on anything in Rosypal's variance plan or application. It was conjecture based on their belief that "wherever you see farms stop farming, that's where the wetlands are." (Pa89@37:21-24). That is patently insufficient. The extent to which the wetlands impeded development was also abject speculation. Rosypal's planner testified that the wetlands buffer could be anywhere between 50 to 150 feet. (Pa90@38:5-6). But because there was no actual wetlands delineation or overlay, there was no competent evidence about any buffer – something evident from the planner's own testimony: "My testimony is that if they're going to move the house toward – towards the stream, you **might not be able to comply with all the requirements.**" (Pa156@104:24-Pa157@105:1) (Emphasis added). This

epitomizes Plaintiffs' point. The expert doesn't know. He is simply guessing. Without competent and detailed evidence to corroborate the existence and extent of wetlands and associated buffer zones, the experts' testimony about the undevelopability of the westerly portion of the property was speculation, and therefore, a net opinion.[3]

Rosypal makes no effort whatsoever to distinguish, and does not even mention, Wilson v. Brick Twp. Zoning Bd. of Adjustment, 405 N.J. Super. 189 (App. Div. 2009) and Kogene Bldg. & Dev. Corp. v. Edison Twp. Bd. of Adjustment, 249 N.J. Super. 445 (App. Div. 1991). As Plaintiffs already explained, Wilson and Kogene stand for the proposition that an expert's testimony before a land use board must find corroboration in the documentary evidence. Here, there was none. A board is not permitted to rely on an expert who speculates about the existence of wetlands, then speculates further about a buffer zone.

II: THERE IS NO "EXCEPTIONAL AND UNDUE HARDSHIP" – ONLY MINOR FINANCIAL INCONVENIENCE. (Pa21-22).

Rosypal claims that relocating the residence "is not practical" because it would "require tree clearing trees and disturbing large amounts of soil," as well as "moving the existing driveway, grading out the old driveway, and installing a new

[3] Rosypal claims that Thomas Martin testified to the presence of wetlands. That is correct, but deceptive: he testified to their presence on *Plaintiffs'* property, not Rosypal's. (Pa196@144:16-145:6). Mr. Martin never testified to the presence of wetlands, their extent, or any buffer, on Rosypal's property.

driveway." "Practicality" is not the prevailing legal standard; rather, "exceptional and undue hardship" is. None of the foregoing concerns satisfies that standard.

"Disturbing soil" is not "exceptional and undue hardship". Rather, that is what happens any time structures are built on land.

Clearing a handful of trees is not "exceptional and undue hardship" – it is, at best, a minor financial inconvenience. As our Supreme Court has said, financial inconvenience is not congruent with exceptional and undue hardship. Jock v. Zoning Bd. of Adjustment, 184 N.J. 562, 590 (2005) ("undue hardship refers solely to the particular physical condition of the property, not personal hardship to its owner, financial or otherwise."). In view of this crystal-clear pronouncement by our Supreme Court, it is not clear why Rosypal continues to insist that "financial hardship is relevant to an application for a [hardship] variance." (Db31-32). It is not. To the extent Hawrylo so holds, it is no longer good law in light of our Supreme Court's subsequent pronouncement in Jock.

The testimony of Rosypal's expert that it would be necessary to move the existing driveway and grade out the old one suffers from two defects. First, it is false. As Rosypal's own zoning permit shows, no moving or grading-out of the existing driveway is necessary. (Pa260). Rather, all that would be required is a short extension to the existing driveway.[4] (Pa260). Second, this is clearly just

[4] Because Rosypal sought and obtained the zoning permit after the Board hearing,

financial inconvenience, not exceptional and undue hardship. Jock at 590.

III: THE FOUNDATION BEING AT THE "HIGH POINT" WAS UNQUESTIONABLY ONE OF THE FACTORS THE BOARD RELIED ON. (Pa22)

Rosypal claims that the Board's grant of relief was not at all premised on the existing foundation being located at the "high point" of the property. This is not a *bona fide* argument. Rosypal's expert testified that the structure was located at the high point, and the Board adopted that conclusion in the plain language of its implementing resolution.

Rosypal's expert said:

> [T]here is another thing that we didn't talk about, and this is the high point of the lot. And, you know, I have a lot of respect for the old timers, they . . . knew where to put homes. . . . Someone in 1963 said that's the best spot because it's the highest spot . . . on the land and I agree with them.
>
> [(Pa130@78:6-14).]

It is irrelevant whether this was given in answer to a hypothetical question, since this is factual testimony given by the expert about the subject property, not about some hypothetical property. More importantly, the Board's resolution lists this among the reasons for the grant: "the existing foundation is located at the 'high point' or highest elevation of the applicant's property, which further supports keeping the existing location of the principal foundation and structure[.]" (Pa22).

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the Board did not appreciate that this testimony was false.

In the face of this, it is puzzling why Rosypal devotes an entire point heading to claiming that "the foundation being at the Property's high point was not the basis for the Board's decision." (Db29). It clearly was part of it. It is equally clear that this consideration is impermissible. Terner v. Spyco, Inc., 226 N.J. Super. 531, 548 (App. Div. 1988).

IV: EVIDENCE OF NEGOTIATIONS IS NOT LIMITED TO "INUTILITY" CASES. (T54:23-55:6)

Relying on Davis Enterprises v. Karpf, 105 N.J. 476 (1987), Rosypal asserts that negotiations to purchase a property are only relevant when the claim of hardship is that the owner cannot use the property for "any purpose." Jock, which postdates Karpf, suggests otherwise. The variance applicant in Jock did not claim that his property would have been zoned into inutility absent the grant; the Supreme Court nevertheless held that "the attempt made by a party to bring the property into conformity by purchase from or sale to adjoining owners is a factor for consideration, even where the non-conforming status of the property was originally created through no fault of the then owner or his predecessor." 184 N.J. at 594.

V: HAWRYLO AND THE FOUNDATION ISSUE. (Pa21)

Plaintiffs and Rosypal fundamentally disagree on the meaning of Hawrylo and its application to this case. According to Rosypal, Hawrylo stands for the proposition that a preexisting and usable foundation, standing alone, is a sufficient

basis to grant a (c)(1) hardship variance. But that is not what Hawrylo says or even implies. The case is more nuanced than Rosypal makes it out to be. The existing foundation was one aspect of the case, but not the only one. It was also significant that the structure the applicant sought to rebuild – an old barn – was "consistent with the master plan objective of preserving the rural character of [the] Township[.]" Hawrylo, 249 N.J. Super. at 576.[5] It was furthermore meaningful that the applicant proposed to mitigate the detriment to the neighboring property owner by providing landscape screening. Ibid. Rosypal calls these "relatively minor factors" in the decision. Plaintiffs disagree. These were factors that, in the aggregate, permitted relief. There is no suggestion that any single one of these, standing alone, would have entitled the applicant to relief. And it bears repeating – because Rosypal offers no argument to the contrary – that there is no like rationale in this case. Erecting a new modular home in a rural farming community produces the *opposite* effect as Hawrylo in that it derogates rather than furthers the master plan. The case is clearly distinguishable.

Rosypal also claims that an engineering report establishes the suitability of the existing foundation. It is clear the report was stale because it was made before

[5] The Board also considered the expense to the applicant in having to pour a new foundation elsewhere, id. at 581, a consideration no longer permissible under the more recent Jock case.

the demolition of the structure on the property. (Pa277).[6] The engineer admitted that he did not have the ability to view significant portions of the foundation. (Pa277). In contrast, Thomas Martin was able to view the foundation *after* demolition, and thus had a better view of things. He testified unequivocally about the presence of a large vertical crack in the corner with damage extending down into the sill plate. (Pa190@138:7-12). The Board erred in accepting an admittedly limited and stale report over the testimony of someone who observed the foundation with his own eyes after the demolition.

Finally, it is also apparent that the foundation issue ultimately devolves to a consideration of financial inconvenience. As Rosypal's own expert testified, "It'd be expensive to build it. . . . It – it's expensive to rebuild a foundation, especially in today's market." (Pa90@38:20-23). This is not a proper consideration. Jock at 590.

[6] "Due to a fire that has damaged the house you plan to raze the wood framed house and replace it. . . . The **visible** foundation walls were observed for any signs of structural deficiency. . . . The left side of the front foundation wall and the front portion of the left side foundation wall were covered with paneling at the time of the inspection so the foundation walls behind the paneling could not be observed." (Pa277).

CONCLUSION

For these reasons, Plaintiffs respectfully ask that the court reverse.

Respectfully submitted,
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Attorneys for Plaintiffs

BY:_____
FRANCIS J. BALLAK, ESQ.

Dated: February 14, 2025