
JEFFREY BOVA, CELESTE BOVA, : SUPERIOR COURT OF NEW JERSEY
HIS WIFE, ARNOLD LOMITA : APPELLATE DIVISION
AND PAULINE LOMITA, HIS : DOCKET NO.: A-003881-23
WIFE AND OMEGA FARM, LLC

Plaintiffs/Appellants

VS.

TOWNSHIP OF JACKSON
PLANNING BOARD and BAIS
YAAKOV of JACKSON, INC.

Defendants/Respondents

: CIVIL ACTION

: ON APPEAL FROM:

SUPERIOR CRT OF NEW JERSEY
: LAW DIVISION, OCEAN COUNTY
Docket No.: OCN-L-1727-23

: SAT BELOW:

: HON. FRANCIS R. HODGSON, JR.,
A.J.S.C.

:

**BRIEF ON BEHALF OF PLAINTIFFS/APPELLANTS,
JEFFREY BOVA, CELESTE BOVA, ARNOLD LOMITA,
PAULINE LOMITA AND OMEGA FARM, LLC**

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² All briefs submitted by Plaintiffs/Appellants to the trial court are included in these appendices pursuant to N.J. Court R. 2:6-1(a)(2) because the trial court's oral decisions and Orders extensively refer to and rely upon numerous statements made in these briefs, both as to the Motion which is one issue on appeal, as well as with regard to the trial court's ultimate ruling being appealed.

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^{2,3 & 4} All briefs submitted by Plaintiffs/Appellants to the trial court are included in these appendices pursuant to N.J. Court R. 2:6-1(a)(2) because the trial court's oral decisions and Orders extensively refer to and rely upon numerous statements made in these briefs, both as to the Motion which is one issue on appeal, as well as with regard to the trial court's ultimate ruling being appealed.

PRELIMINARY STATEMENT

While it is important to allow religious organizations to construct schools for their congregations, it is equally important, if not more so, to ensure the approval of those construction projects is done in a fair and impartial manner that complies with all local land use requirements. In approving construction of the four-building school campus here, the Jackson Township Planning Board's proceedings were tainted by the undisclosed attorney-client relationship between the Planning Board Chair and counsel for Bais Yaakov of Jackson, Inc. ("BYJ" or "the Applicant"). The proceedings were further tainted by the infringement of Objectors' due process rights when their counsel was denied a full and fair opportunity to cross examine witnesses.

In addition, the Planning Board's Resolution fails to address, let alone mention, issues concerning the destruction of habitat for endangered and threatened species. Nor does the Resolution resolve issues involving on-site traffic control requirements. Further, the Resolution fails to explain the reasoning for granting variance and waiver relief that was identified as necessary by the Board's professionals.

For these reasons, the Planning Board's decision is arbitrary and capricious. The trial court erred in finding otherwise. Remand is required to

allow the Planning Board to correct these deficiencies by holding a new hearing free from conflicts of interest, and then memorializing its decision in a Resolution that provides factual findings and an explanation for its decision.

PROCEDURAL HISTORY

On October 4, 2023, BYJ submitted its application for preliminary and final site plan approval for construction of a four-building school campus at 245 East Veterans Highway (Block 15601, lots 2 and 6 and Block 15701, lot 15) located in the R-3 zone in Jackson Township (“the Property”). Pa 0503. On October 7, 2023, the Applicant submitted a Certificate of Zoning Permit, indicating by a check box that it was seeking a request for a site plan. Pa 0531. The box seeking a variance was not checked. *Id.* The Planning Board held hearings on February 21, 2023 and March 20, 2023.¹ On June 19, 2023, the Planning Board adopted a Resolution approving the preliminary and final major site plan application. Pa 0414-39.

On July 31, 2023, Objectors Jeffrey Bova and Omega Farms, LLC, joined by Mr. Bova’s wife, Celeste, as well as Arnold and Pauline Lomita (collectively “Plaintiffs”), filed a complaint in lieu of prerogative writs

¹ The transcripts will be designated as follows:
Motion on January 5, 2024: 1T
Trial on June 6, 2024: 2T.

challenging the Board's decision. Pa 0471-78. Having learned of the Planning Board Chair's attorney-client relationship with BYJ's counsel, Plaintiffs moved to supplement the record before the trial judge. Pa 0841-54. After hearing argument on January 5, 2024, 1T, the motion was denied that same day, Pa 0479-80. Trial was held on June 6, 2024. 2T. By order dated June 28, 2024, the trial court dismissed Objectors' complaint. Pa 0481. This appeal followed.

STATEMENT OF FACTS

At the outset of the February hearing, the Planning Board engineer, Doug Klee, noted the need for two variances – one for building height² and one for lot width.³ Pa 0003 (3:13-25).

Ernie Peters, the Board planner, noted the variances mentioned by Mr. Klee. Pa 0004 (4:23-24). In his report, Mr. Peters noted that the "Applicant may require Variance relief under N.J.S.A. 40:55D-70(c); commonly referred to as a 'c' or 'bulk' variance for minimum lot width and maximum building

² BYJ later confirmed that all building heights would comply with the zoning ordinance.

³ Jackson Township Ordinance § 244-6(A) defines lot width as "[t]he shortest horizontal distance between the side lot lines measured through the midpoint of a line parallel to the front lot line located at the minimum building setback line required in the zoning district where the lot is located. . . . On through lots, the lot width shall be determined as described herein, but only on that portion of the lot with frontage on the street that the building or structure directly faces or addresses." Pa 0587.

height.” Pa 0570. With respect to the lot width, Mr. Peters’s report observed that, even after the lots were consolidated, “[p]er §244-46D the minimum lot width required is 200 ft, whereas the lot width is not consecutive, and the northwesterly lot width is approximately 130 ft.” Pa 0562. His report also provided that the “Applicant may require Variance or Design Waiver relief for . . . more than one two-way access drive.”⁴ Pa 0570; *see also* Pa 0565 (noting a variance or waiver may be required pursuant to § 244-197(J)(1)(c)).

Donna Jennings, counsel for the Applicant, then made an opening statement. Pa 0007-0012 (7:23-12:5). Despite the written reports and oral statements made by both Planning Board professionals, she noted that the application “is essentially variance free.” Pa 0008 (8:13-15). Regarding the minimum lot width, Ms. Jennings stated that “the applicant believes that the site meets the minimum lot width standard.” Pa 0009 (9:8-10). She based her belief on the fact that the lots will be consolidated. Pa 0009 (9:13-15).

The site plan and aerial views submitted by the Applicant show that the consolidated lots do not have a contiguous frontage on East Veterans Highway. Pa 0633-40. Reference to Jackson Township’s tax maps will help to understand the exact layout of the Property. Sheet 156 of Jackson Township’s

⁴ Jackson Township Ordinance § 244-197(J)(1)(c) provides that “[n]ot more than one two-way access drive or two one-way access drives shall be permitted on any street.” Pa 0621.

tax map, Pa 0641, shows that lot 2 on block 15601 is roughly a trapezoid shape, with a rectangular leg extending from the northwest corner of the lot. The rectangular leg is approximately 635 feet long with 137 feet of frontage on East Veterans Highway. The base of the trapezoid appears to be approximately 950 feet, while the top is approximately 482 feet wide. Lot 6, also shown on sheet 156, has approximately 606 feet of frontage on East Veterans Highway, with approximately 757 feet along the top edge of the lot. Part of the top edge of lot 6 abuts lot 2, while the remainder of the top edge abuts lots 10 and 11. Lots 3, 4, and 5 are between the rectangular leg of lot 2 and the body of lot 6, thus creating a break in the frontage on East Veterans Highway, as Mr. Peters noted. Since Jackson Township Ordinance § 244-46(D) requires an 80-foot front yard setback in the R-3 zone, lots 3, 4, and 5 also create a break in the lot width, as defined by Jackson Township Ordinance § 244-6(A). Block 15701, lot 15, shown on sheet 157 of Jackson Township tax map, Pa 0642, abuts the top edge of lot 2.

Before introducing her first witness, Ms. Jennings noted that the Applicant was seeking relief from the requirements of Jackson Township Ordinance § 244-197(J)(1)(c), which restricts the number of access drives to a project. Pa 0009 (9:18-23). The proposed plan includes two two-way drives along East Veterans Highway. Pa 0009-10 (9:23-10:1).

Having concluded her remarks, Ms. Jennings called Aharon Rottenberg, a board member of and volunteer at the Lakewood Cheder School, to testify about the operations of the proposed school. Mr. Rottenberg explained that the proposed all-girls school campus would consist of four buildings: an elementary school with 54 classrooms and two multi-purpose rooms to accommodate approximately 1350 students; two high schools, each having 20 classrooms that will accommodate 500 students per school; and a gymnasium. Pa 0013-14 (13:18-14:14).

William Stevens, a professional engineer and professional planner who prepared the site plan, next testified for the Applicant. Pa 0086 (86:10). Mr. Stevens stated that the Applicant was not seeking any variances, but two waivers, one of which was to land bank 136 parking spaces. Pa 0086 (88:11-14). While not stated explicitly, it appears from Mr. Stevens's testimony that the second waiver was for the two two-way entrances. Using exhibit A2 as a visual aid, Pa 0634, Mr. Stevens described the two entrances and exits proposed for the property. Pa 0088-89 (88:22-89:3).

Mr. Stevens acknowledged that the lot width is not consecutive and "the north northwestern lot width is approximately 130 feet," where a minimum lot width of 200 feet is required.⁵ Pa 0099-100 (99:24-100:1). However, he

⁵ The second driveway is located on the 137-foot-wide rectangular leg of lot 2.

opined that a variance was not required because “[o]nce the lot is consolidated it will have over 600 feet of lot width and will be a fully conforming lot.” Pa 0100 (100:5-7).

After questions from Mr. Michelini, the Board members, Mr. Klee, and Mr. Peters, the meeting was opened to the public. Pa 0151 (151:20-21).

Several individuals expressed concern about various issues.

At the March 2023 hearing, the Applicant presented testimony from three witnesses: Ian Borden, a professional planner who designed the septic system and prepared the Environmental Impact Statement (“EIS”) required by Jackson Township Ordinance § 244-189; John Rea, a traffic engineer; and Melissa Mermelstein, the architect. Pa 0198-99 (3:25-4:8).

Mr. Borden spoke in detail about the proposed septic system, which will require three permits from the State of New Jersey. Pa 0200-06 (5:2-11:10). He did not mention the EIS in his direct testimony.

Jackson Township has enacted Ordinance § 244-189 requiring the submission of an EIS in conjunction with submission of development applications. Pa 0643-47. The ordinance sets forth the format and contents required for the EIS, including a site description and “inventory of environmental conditions on the site.” Jackson Township Ordinance § 244-189(B)(2), Pa 0644. Among other requirements, the inventory shall include

the following items:

(i) Wildlife. Prepare an inventory of all wildlife species which may utilize the subject site, including terrestrial and aquatic vertebrates and avian species. This inventory shall identify all such species which were encountered through on-site investigations. All habitat on-site which is unique to Jackson Township or the Ocean County region shall be identified. All habitat which is critical in the maintenance of wildlife shall also be identified. These areas may include but are not limited to stream corridors, Atlantic White Cedar swamps, extensive ecotone or cranberry bogs.

(j) Endangered or threatened species. Identify any endangered or threatened species (plant or animal) protected by the state or federal government which may utilize any portion of the site. The New Jersey Natural Heritage Program and/or the New Jersey Division of Fish, Game and Wildlife shall be contacted regarding all endangered or threatened species sizings within three miles of the project location for animals or 1.5 miles of the project location for plants. A description of the type of habitat utilized by any species identified within the limits described above shall be provided, as well as the identification of such habitat which is found on-site.

Jackson Township Ordinance § 244-189(B)(2)(i) & (j), Pa 0645.

This Ordinance further requires that the EIS include “an assessment of both the adverse and positive impacts during and after construction. The specific concerns that shall be considered include the following and shall be accompanied by specific quantitative measurements where possible and necessary: . . . (i) Disruption of wildlife habitats, particularly those of endangered and protected species.” Jackson Township Ordinance § 244-189(B)(3)(i), Pa 0646.

Based on the requirements of this Ordinance, Joseph Michelini, counsel for the Objectors, sought to explore the existence of endangered and threatened species on the Property.⁶ As Mr. Borden explained during cross examination, the New Jersey Department of Environmental Protection (“DEP”) has established five levels or rankings for conservation priority. Pa 0227-28 (32:21-33:12). The rankings identify habitat for endangered, threatened, and special concern wildlife species. New Jersey Landscape Project Version 3.3 at 21, Pa 0670. Mr. Borden acknowledged that he used the publicly available Landscape Project and the related maps in preparing the EIS. Pa 0227 (32:11-20). Rank 5 identifies habitat for “wildlife listed as endangered and threatened pursuant to the Federal Endangered Species Act of 1973.” New Jersey Landscape Project Version 3.3 at 21, Pa 0670. Rank 4 identifies habitat for species identified as endangered by the State of New Jersey, while rank 3 identifies habitat for species identified as threatened by the State of New Jersey. *Id.*

According to Mr. Borden’s testimony, and as reflected in the EIS, the rear of the Property within the riparian buffer area was ranked 3. Pa 0228

⁶ For the Court’s convenience, this paragraph and the next one summarize the cross-examination testimony regarding endangered and threatened species. As will be seen below, the cross examination on this topic was interrupted several times by the Board chairman, other Board members, the Board attorney, and Ms. Jennings. Many of these interruptions were unrelated to the question of endangered and threatened species.

(33:20-24). Mr. Michelini introduced exhibit O-1, a map printed from New Jersey's GeoWeb, which is the State's official source for mapping the habitat ranking of all property throughout the state.⁷ Pa 0241 (46:3-19). The map showed that parts of the Property that were to be developed were rank 4, contrary to the EIS prepared by Mr. Borden.⁸ Pa 0243 (48:1-6). In fact, the map showed that part of the site that was to be developed included habitat for an endangered species, the timber rattlesnake, and for a threatened species, the barred owl.⁹ *Id.* Specifically, the area to be developed included occupied habitat of the timber rattlesnake. In addition, there had been breeding sightings of the barred owl in that same area. Pa 0702.

While Mr. Michelini explored these issues during cross examination, Mr.

⁷ According to the website, "NJ-GeoWeb is an interactive application for viewing, querying and analyzing both local and statewide areas of interest and environmental information." [https://www.nj.gov/dep/gis/assets/Quick Start Guide for NJ-GeoWeb.pdf](https://www.nj.gov/dep/gis/assets/Quick%20Start%20Guide%20for%20NJ-GeoWeb.pdf) (last visited on 10/11/24). It embodies the information gathered by the New Jersey Landscape Project version 3.3. "Through geographic information systems (GIS) technology, the Landscape Project uses documented species location data and land-use/land-cover as well as species life history information to produce maps that depict habitat for endangered, threatened and special concern wildlife species throughout the state." Pa 0654. The EIS stated that it used the Landscape Project 3.3 in identifying wildlife habitat. Pa 0691.

⁸ The EIS stated that "[a]n overview of local Landscape Project mapping shows that urban land not valued as wildlife habitat is mapped surrounding the property. The rear portion of the site is mapped as Rank 3. There is no mapped threatened or endangered species habitat on or within close proximity to the site." Pa 0691.

⁹ The transcript understandably misspells the name of the owl as "bard" rather than "barred." Pa 0243 (48:3).

Shea, the Planning Board's attorney, interrupted, stating that "these are all considerations the DEP is going to be handling and rendering an opinion on. So when it comes down to species and upstreams and the sand and, these are all considerations the DEP, within their purview and jurisdiction are going to be handling." Pa 0229 (34:2-8). In response, Mr. Michelini explained that, based on Jackson Township's local ordinance that requires "the applicant [to] address threatened and endangered species, . . . there is concurrent jurisdiction and this board ought to be very concerned about it." Pa 0229 (34:10-17). Mr. Shea insisted that "these issues are outside jurisdictional [sic]." Pa 0229 (34:22).

When Mr. Borden and Ms. Jennings observed that the Environmental Commission had no concerns about the project,¹⁰ Tsvi Herman, Chairman of the Planning Board, asked for input from Jeffrey Riker, a member of the Environmental Commission and Planning Board.¹¹ Pa 0231 (36:2-5). Instead

¹⁰ Arguably, the Environmental Commission should have identified the inaccuracy in the EIS prepared by Mr. Borden. The Association of New Jersey Environmental Commissions ("ANJEC") recommends that, as part of the review process of a site plan application, Environmental Commissions review various sources of information including "the NJ Department of Environmental Protection's (DEP's) GeoWeb containing GIS data, at www.nj.gov/dep/gis/apps.html." *Site Plan/Subdivision Review: Protecting the environment during development*, An ANJEC Resource Paper, at 7. Pa 0714.

¹¹ Pursuant to NJSA 40:55D-23, a Planning Board shall include a member who is also a member of the Environmental Commission.

of commenting on wildlife habitat, Mr. Riker stated “let’s move on, okay. You’ve been up here for an hour picking on soil and this and that and it’s outside our jurisdiction.”¹² Pa 0232 (37:3-6). Kenneth Bressi, a member of the Planning Board, interjected that the DEP regulates the sewer and septic systems, topics that were unrelated to the discussion of endangered and threatened species habitat. Pa 0233-34 (38:2-39:1).

After this interruption, Mr. Michelini returned to his cross examination regarding the issue of endangered and threatened species. Pa 0234 (39:12-15). Echoing Mr. Shea, Mr. Borden testified that “the board does not have the authority of rejecting an application based upon the disturbance of an animal,” notwithstanding the clear provisions of Jackson Township Ordinance § 244-189. Pa 0235 (40:4-6). Mr. Herman again interrupted, stating “[p]lease, please correct me if I’m wrong but I believe the right to discuss these issues

¹² Prior to delving into the question of endangered and threatened species, Mr. Michelini had cross examined Mr. Borden on aspects of the proposed septic system and its impact on Mr. Bova’s well water. That cross examination included inquiry into the type of soil on the Property. In addition, Mr. Michelini questioned whether Mr. Borden’s record keeping and reporting was consistent with the requirements of Jackson Township Ordinance § 244-189. For example, the ordinance requires that “[t]he inventory required by this section shall be accompanied by a log indicating the dates, times, weather conditions and specific site locations of all on-site inspections.” Jackson Township Ordinance § 244-189(B). Pa 0643. Instead of a detailed log, the EIS simply states that “[s]everal site investigations of the project site were conducted by the author from June through September 2023.” Pa 0688 at § 2.0. The entire cross examination up to the point where Mr. Michelini turned to endangered and threatened species covered approximately 21 pages of transcript, which roughly translates to 20 minutes of discussion. Pa 0206-27 (11:17-32:10).

was by the environmental commission meeting which was held on, a few months ago.” Pa 0235 (40:4-6; 40:18-22). Mr. Riker picked up on this point, stating that the submission of a letter of interpretation to the Environmental Commission was the first step in the development process. According to Mr. Riker, “[e]verybody [apparently referring to neighboring property owners] looks at that letter and . . . throws it out.” Pa 0236 (41:7-9). Further, according to Mr. Riker, “the environmental commission is an advisory commission [and] [h]as no enforcement whatsoever.” Pa 0236 (41:12-13). Mr. Riker and his “colleagues up here know that when there’s something like egregious, you know, bald eagles, you know sitting out on a front lawn that we’re going to say something about it.” Pa 0236 (41:17-21). Mr. Riker continued, commenting that “a lot of this is well above our shoulders at the state.” Pa 0237 (42:5-6).

When Mr. Riker concluded his remarks, Terence Wall, the Administrator, questioned Mr. Borden about the septic system at Southwinds Village, a mobile home park in Jackson Township that Mr. Borden had previously mentioned in his testimony. Pa 0237-41 (42:7-46:2). Following Mr. Wall’s interruption regarding this unrelated topic, Mr. Michelini was able to return to his cross examination. He introduced exhibit O-1, the map showing the NJDEP ranking of the Property.

Mr. Borden authenticated the exhibit, acknowledging that the map was “from the landscape website.” Pa 0242 (47:19-21). Mr. Borden further acknowledged that this official DEP map showed that “various portions of the lots in question including the portions that are going to be developed . . . [were] a rank four, which is different than what [his] report says is rank three.” Pa 0242 (47:12-25). He continued by admitting that the map “shows areas of the site that are going to be developed where it’s rank four, meaning that there’s Bard [sic] Owl breeding sighting [and] Timber Rattler snake occupied habitat.” Pa 0243 (48:1-6). Mr. Borden’s cross examination concluded with his admission that he did not “have any reason to believe that the New Jersey landscape website is wrong.” Pa 0243 (48:7-10).

When the hearing was opened to the public, other residents testified about environmental concerns, including wildlife. For example, Brian Schnaak, who lives at 16 Dunhill Road (block 15601, lot 16), stated he had seen two owls in his backyard in the past week.¹³ Pa 0325 (130:5-6). Mr. Schaank’s property abuts the Applicant’s property. Pa 0641. Mr. Bova discussed the requirements of his woodland management plan, which is part of his farm assessment. Pa 0354-55 (159:18-160:20). According to Mr. Bova, his

¹³ At the hearing on February 21, 2023, Mr. Schnaak (identified then as Brian Shock of 16 Dunhill Road) commented on the wildlife in the area, including owls, coyotes and whippoorwills. Pa 0163-64 (163:24-164:2).

“woodland management plan indicates that this whole area is a . . . rank 4 zone with habitat for Timber Rattlers as well as potential nesting and occupation by the owls . . . Bard [sic] Owl.” Pa 0355 (160:7-14).

During his closing remarks, Mr. Michelini brought Jackson Township Ordinance § 244-189 to the Board’s attention, stating that “not every town has an environmental impact statement ordinance. Jackson does. . . . They have it so that you, as board members, will consider the environmental impact of every application that comes before you.” Pa 0374 (179:2-8). Because of the dual jurisdiction established by the ordinance, “[i]t is not appropriate to simply say that’s the DEP’s job.” Pa 0374 (179:11-12). Mr. Michelini questioned how it would be possible to adequately address the issue when “a good portion of this site is a rank 4 when Mr. Borden’s report says that it’s a rank 3.” Pa 0374 (179:18-20). Exhibit O-1 “specifically shows where some of these buildings are and where some of the roadways are. It’s endangered and threatened habitat for Bard [sic] owl and Timber Rattlers.” Pa 0374 (179:21-25). Mr. Michelini suggested that more study needed to be done. Pa 0375 (180:2-3). He also highlighted the shortcomings in Mr. Borden’s methodology, noting that “[t]here was supposed to be log times, weather times, a specific written log of all the things that they did with the regard of the EIS that Mr. Borden admitted that he did not do.” Pa 0375 (180:6-10).

In its Resolution approving the site plan, the Planning Board made no mention of the endangered and threatened species, nor did it make any findings of fact as to the accuracy of the EIS prepared by the Applicant's expert or the credibility of the witnesses.

Turning to Mr. Rea, the traffic engineer, he testified about the traffic impact analysis he prepared. Pa 0247-86 (52:5-91:19).

The last witness called by the Applicant was Ms. Mermelstein, the registered architect who designed the school buildings. Pa 0288 (93:1). When Mr. Michelini attempted to cross examine Ms. Mermelstein on various design features of the buildings, such as the location of lighting on and near the buildings, the location of bells on the buildings, the size and use of the rooms, the overall size and visual impact of the buildings, the location of the loading docks, and the size of doorways, he was repeatedly interrupted by Ms. Jennings and Mr. Shea. Pa 0293-304 (98:19-109:19). Out of frustration, Mr. Michelini stopped his cross examination, stating "[y]ou guys have been trying to cut me off from the beginning and I don't appreciate it and I think it's wrong, and I think it is a basis for appeal. So having said that, I will stop my questions because obviously you don't want me to ask them." Pa 0304 (109:10-15).

When the meeting was opened to the public, several people spoke both

in opposition to and in support of the proposed school campus. After members of the public spoke, Mr. Bova testified. Mr. Riker left as Mr. Bova began his testimony. In addition to the description of his woodland management plan and the wildlife habitat, Mr. Bova expressed concern about the visual impact of the large school buildings, the imposition on his privacy, traffic and drainage. Pa 0357-65 (162:20-170:12).

Mr. Bova also expressed concern over comments he overheard in the hall about “this [being] a biased rejection.” Pa 0362 (167:16-17). He stated that “[t]his is not biased. My mother, I’m the son of a living Holocaust survivor. She was born in a camp, so, and this has nothing to do with bias. This just has to do with quality of life concerns that I have . . . So again, it’s not about the who, it’s just about the what and the where, and this is just not the right where.” Pa 0362-63 (167:17-168:12).

After Mr. Bova testified, an unidentified Board Member¹⁴ noted that it was after 11:00 pm, and that one of the Board members had left, as had many members of the audience. The Board Member moved “to continue to some other night [because they] still have closing arguments to make and I don’t

¹⁴ Although the transcript refers to the person who suggested continuing the hearing to another day simply as “Board Member,” Pa 0366 (171:16), the Resolution states that “Mr. Fleming made a motion to carry the matter to a future hearing date, which was seconded by Mr. Wall.” Pa 0432.

want to make a mistake like last time.” Pa 0366 (171:21-23). The Board Member further noted that “[t]here’s a lot to digest here. . . . Let’s take our time. Let’s do it correct.” Pa 0367 (172:8-9). By a vote of five to four, the motion was voted down. Pa 0368 (173:5-6). Mr. Herman voted to deny the motion. Pa 0368 (173:1).

After this vote, two more members of the public spoke.

Ms. Jennings presented her closing argument. Ignoring the variances and waivers identified by the Board’s professionals, as well as her own prior acknowledgement of the need for a waiver for the two proposed entrances, Ms. Jennings stated that “the application . . . is essentially variance free. The only thing we’re asking for is to land bank 136 of the 503 parking spaces.” Pa 0371 (176:12-16). She made no mention of the other issues identified by the Board’s professionals, such as the variance for lot width and the waiver for the two two-way entrances.

Although there was some confusion about allowing Mr. Michelini to provide closing arguments, he was ultimately allowed to do so. Pa 0372 (177:9-16). Noting the deficiencies in the EIS, as well as other missing information, he concluded by stating that “[i]n essence what you’re doing is you’re potentially approving something without all the appropriate information and that is a reason to deny things before the board.” Pa 0375 (180:17-21).

The Board voted unanimously to approve the application. Pa 0375-82 (180:25-187:5).

Shortly after the Application was approved at the hearing on March 20, 2023, Mr. Michelini learned that Mr. Herman, Chair of the Planning Board, was an editor and/or contributor to an online magazine called “Jackson Pulse.” Pa 0857 ¶ 13. Specifically, in the March 22, 2023 issue of Jackson Pulse, Mr. Herman wrote the Editor’s Note. Pa 0882-84. In this article, Mr. Herman commented on the “amazing growth and positive developments in Jackson over the past year,” citing as examples the fact that “[s]huls and yeshivos [sic] have received approval to build,” and the “first *mesivta* move[d] in.” Pa 0883. He continued by stating that “most recently, the township has changed its tone and demonstrated its willingness to work with our community.” *Id.* In addition, Mr. Michelini learned that Ms. Jennings represented Bais Medrash of Jackson (“BMOJ”) in connection with a site plan approval application in Jackson. Pa 0856 ¶¶ 4-5 & Pa 0860, 0863-67. Through a news article on APP.com, Mr. Michelini learned that Mr. Herman was a member of the board of BMOJ, and thus Ms. Jennings’s client. Pa 0856 ¶¶ 6, 10 & Pa 0869-71. This relationship was not disclosed at any time during the proceedings before the Board. Pa 0857 ¶¶ 9, 11-12.

STANDARD OF REVIEW

“It is well established that when a reviewing court is considering an appeal from an action taken by a planning board, the standard employed is whether the grant or denial was arbitrary, capricious or unreasonable.”

Fallone Props., L.L.C. v. Bethlehem Twp. Plan. Bd., 369 N.J. Super. 552, 560 (App. Div. 2004). “The arbitrary and capricious standard is analogous to the substantial evidence standard.” *Rocky Hill Citizens for Responsible Growth v. Plan. Bd. of Rocky Hill*, 406 N.J. Super. 384, 411 (App. Div. 2009). “Thus, while [the court] will give substantial deference to findings of fact, it is essential that the board’s actions be grounded in evidence in the record.”

Fallone Props., 369 N.J. Super. at 562. “A board acts arbitrarily, capriciously, or unreasonably if its findings of fact in support of a grant or denial of a variance are not supported by the record.” *Ten Sary Dom P’ship v. Mauro*, 216 N.J. 16, 33 (2013).

In order to facilitate a court’s review of a Planning Board’s decision, the Municipal Land Use Law (“MLUL”) requires that all decisions be formalized in writing and include findings of fact and conclusions of law. *New York SMSA v. Bd. of Adjustment of Twp. of Weehawken*, 370 N.J. Super. 319, 332 (App. Div. 2004) (citing N.J.S.A. 40:55D–10(g)).

The factual findings set forth in a resolution cannot consist of a mere recital of testimony or conclusory statements couched in

statutory language. Rather, the resolution must contain sufficient findings, based on the proofs submitted, to satisfy a reviewing court that the board has analyzed the [application]. Without such findings of fact and conclusions of law, the reviewing court has no way of knowing the basis for the board's decision.

Id. at 332-33.

Of course, in making their findings of fact, “boards may choose which witnesses, including expert witnesses, to believe. However, to be binding on appeal, that choice must be reasonably made.” *Bd. of Educ. of City of Clifton v. Zoning Bd. of Adjustment City of Clifton*, 409 N.J. Super. 389, 434 (App. Div. 2009) (internal citations omitted). Also, “the choice must be explained, particularly where the board rejects the testimony of facially reasonable witnesses.” *Id.* at 434-35.

As to legal questions, “a court is not bound by an agency’s determination on a question of law and the court’s construction of an ordinance under review is *de novo*.” *Fallone Props.*, 369 N.J. Super. at 561 (internal citations omitted). “[W]e give deference to a municipality’s informed interpretation of its ordinances, while nevertheless construing the ordinance *de novo*.” *DePetro v. Twp. of Wayne Plan. Bd.*, 367 N.J. Super. 161, 174 (App. Div. 2004). In addition, “[a] trial court’s interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.” *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378

(1995).

Here, the Board had to apply these requirements to its review of bulk variances¹⁵ and design waivers, each of which has its own statutory framework. A variance from a bulk or dimensional provision of a zoning ordinance is governed by N.J.S.A. 40:55D–70(c). Waivers are governed by N.J.S.A. 40:55D-51.

As to the motion to supplement the record, “[t]raditional rules of appellate review require substantial deference to a trial court’s evidentiary rulings.” *State v. Morton*, 155 N.J. 383, 453, 715 A.2d 228 (1998). “These decisions are reviewed under the abuse of discretion standard.” *Benevenga v. Digregorio*, 325 N.J. Super. 27, 32 (App. Div. 1999).

ARGUMENT

POINT I: THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING OBJECTORS’ MOTION TO SUPPLEMENT THE RECORD, EFFECTIVELY DISALLOWING CONSIDERATION OF THE PLANNING BOARD CHAIR’S UNDISCLOSED CONFLICT OF INTEREST. (1T 28:1-53:6, Pa0479-80, Pa0844-54)

The New Jersey Supreme Court has observed that “[p]ublic confidence in the integrity of our municipal planning and zoning boards requires that board members be free of conflicting interests that have the capacity to

¹⁵ “Provisions in a zoning ordinance that control the size and shape of a lot and the size and location of buildings or other structures on a parcel of property are known as bulk or dimensional requirements.” *Ten Stary Dom*, 216 N.J. at 28.

compromise their judgments.” *Piscitelli v. City of Garfield Zoning Bd. of Adjustment*, 237 N.J. 333, 338 (2019). “A conflict of interest arises whenever a public official faces ‘contradictory desires tugging [him or her] in opposite directions.’” *Id.* at 353 (quoting *Wyzykowski v. Rizas*, 132 N.J. 509, 524 (1993)). Stated differently, “[a] conflict of interest arises when the public official has an interest not shared in common with the other members of the public.” *Wyzykowski*, 132 N.J. at 524. “The question is whether there is a potential for conflict, not whether the conflicting interest actually influenced the action.” *Haggerty v. Red Bank Borough Zoning Bd. of Adjustment*, 385 N.J. Super. 501, 513 (App. Div. 2006).

Both statutory and common law “bar planning and zoning board members from hearing cases when a personal interest ‘might reasonably be expected to impair [their] objectivity or independence of judgment.’” *Piscitelli*, 237 N.J. at 338 (quoting N.J.S.A. 40A:9-22.5(d)). These “distinct sources of law [are] the Local Government Ethics Law, N.J.S.A. 40A:9-2.2;^[16]

¹⁶ The Local Government Ethics Law (“LGEL”) provides in part that

No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

N.J.S.A. 40A:9-22.5(d).

the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-69;^{17]} and the common law, which is now codified in those conflict statutes and still guides us in understanding their meaning.” *Id.* at 349-50. “Among the guarantees of the common law is the entitlement to a fair and impartial tribunal.” *Wyzykowski*, 132 N.J. at 522.

Here, in denying Plaintiffs’ motion to supplement the record, the trial court did not address Plaintiffs’ argument regarding the conflict arising from the attorney-client relationship between Ms. Jennings and Mr. Herman. Instead, the trial court framed the underlying issue as an

alleged conflict between the sharing of professionals, that is a professional — Ms. Jennings who represented a shul appearing before a zoning board, a separate board, where even assuming that Mr. Herman is a member of that shul, that the fact that she represents an applicant — the applicant in this case, before the planning board where Mr. Herman is the chairman.

1T 50:22-51:3. The trial court concluded that the alleged sharing of professionals is “too remote to give rise to any conflict of interest,” and therefore denied Plaintiffs’ motion to supplement the record. 1T 51:3-4.

In support of its decision, the trial court found “some . . . persuasive

¹⁷ *Piscitelli* involved a conflict of interest for members of the Garfield Zoning Board of Adjustment and thus cited N.J.S.A. 40:55D-69. The MLUL includes identical ethical restrictions for members of planning boards, stating in relevant part that “[n]o member of the planning board shall be permitted to act on any matter in which he has, either directly or indirectly, any personal or financial interest.” N.J.S.A. 40:55D-23(b).

application” in the unpublished case of *VNO 1105 State Highway 36 v. Twp. of Hazlet*, 33 N.J. Tax 20 (App. Div. 2021).¹⁸ 1T 50:6-7. *VNO* had nothing to do with attorney-client conflicts. Instead, that case resolved the question of “whether, because of their special place in the governmental firmament, tax assessors are categorically prohibited from offering expert opinions for taxpayers outside their municipality.” *VNO*, 33 N.J. Tax at 26. In concluding that tax assessors could offer expert opinions outside their municipality, the court considered tax laws and regulations, the *Handbook for New Jersey Assessors*, the ethics code of the Association of Municipal Assessors, the Local Finance Board’s interpretation and application of the LGEL, and the trial court’s inherent authority to disqualify expert witnesses. With the exception of the LGEL, none of these authorities are relevant to the question presented here regarding the potential conflict of interest created by the attorney-client relationship between the Planning Board chair and the Applicant’s counsel.

The present case is much more akin to the situation in *Piscitelli*, where a family that included three doctors sought site plan and variance approval. In addition to other connections between the family and members of the Garfield Zoning Board of Adjustment, objectors alleged “that any Zoning Board

¹⁸ In its oral decision, the trial court cited to Lexis rather than the published opinion. 1T 49:11-14.

members who were patients or who had immediate family members who were patients of [any of the three doctors] had a disqualifying conflict of interest.” *Piscitelli*, 237 N.J. at 339. The Court held “that if a Zoning Board member or his or her immediate family member had a meaningful patient-physician relationship with any of those three doctors during or before the Board proceedings, that Board member had a disqualifying conflict of interest.” *Id.* at 359. The Court based its decision on “the special nature of the patient-physician relationship -- a relationship in which the patient ‘reposes the greatest trust for healthcare decisions’ in the hands of the physician.” *Id.* (quoting *Perez v. Wyeth Labs. Inc.*, 161 N.J. 1, 30 (1999)). The Court recognized that “the deep bonds that develop between patients and their physicians are understandable.” *Id.*

The relationship between an attorney and their client is similarly close. Clients trust their attorneys with matters of the utmost importance and share intimate confidences with them. Clients choose their attorneys based on trust in their integrity and confidence in their legal acumen, professional judgment, and expertise. The connection created by the attorney-client relationship between Ms. Jennings and Mr. Herman could lead a member of the public to question the fairness and impartiality of any hearing involving Ms. Jennings.

In addition, Mr. Herman’s comments in the editorial in Jackson Pulse

praising the fact that Jewish religious schools and houses of worship had received building approvals could be construed as expressing bias in favor of the construction of religious schools. Essentially, he appeared to be commending his own actions on the Planning Board in approving the Applicant's site plan. His comments also conveyed a strong viewpoint in favor of expanding construction of religious schools and places of worship. Combined with Mr. Herman's attorney-client relationship with Ms. Jennings, these comments create an inference of potential bias.

Some of Mr. Herman's actions during the course of the hearings before the Planning Board support the impression that the hearing was not fair and impartial. For example, when Mr. Herman interrupted Mr. Michelini's cross examination of Mr. Borden, he echoed Ms. Jennings's comment during a prior interruption. That is, shortly after Ms. Jennings commented that the Environmental Commission had no concerns about the Application, Pa 0230 (35:18-19), Mr. Herman sought input from Mr. Riker, Pa 0231 (36:2-3). A few minutes later, Mr. Herman interrupted Mr. Michelini again, stating "[p]lease, please correct me if I'm wrong but I believe the right to discuss these issues was by the environmental commission." Pa 0235 (40:18-22). Mr. Herman made this statement despite Mr. Michelini's prior description of the Board's responsibilities. Pa 0229 (34:10-17).

Considering the attorney-client relationship between Ms. Jennings and Mr. Herman, Mr. Herman's deference to and reliance upon Ms. Jennings's comment makes sense. Most people would place greater confidence in the opinion of their own trusted legal advisor rather than an unknown attorney, like Mr. Michelini. Since this apparent deferral to or reliance on Ms. Jennings could lead a member of the public to question Mr. Herman's impartiality, he should have recused himself.

Similarly, Mr. Herman's vote to deny the motion to continue the March 2023 hearing due to the late hour and complexity of the issues could be perceived as favoring Ms. Jennings. Denying the continuance both ensured a decision for Ms. Jennings would be made that day, without delay, and avoided the inconvenience of requiring Ms. Jennings and her client to attend another evening meeting.

In light of the attorney-client relationship between Ms. Jennings and Mr. Herman, as well as the evidence of Mr. Herman's favorable view of constructing religious schools, the trial court abused its discretion in denying Plaintiffs' motion to supplement the record. The record should be expanded to include the exhibits attached to Mr. Michelini's November certification. Pa 0860-84. Once those documents are included in the record, this Court should conclude that Mr. Herman should have recused himself based upon his

attorney-client relationship with the Applicant's attorney.

"If a personal interest requiring disqualification exists, neither the failure to object nor the existence of sufficient votes absent that member's vote would change the requirement that the entire proceeding would be voidable."

Sugarman v. Twp. of Teaneck, 272 N.J. Super. 162, 169 (App. Div. 1994).

Therefore, Mr. Herman's participation in the hearings voided the Planning Board's decision and requires that the case be remanded for new proceedings.

Haggerty, 385 N.J. Super. 517 (voiding Board proceedings and requiring remand for a new hearing, even though there were sufficient other votes to pass) (collecting cases).

POINT II: THE TRIAL COURT ERRED IN CONCLUDING IT WAS REASONABLE FOR THE BOARD TO DISREGARD TESTIMONY DEMONSTRATING THE EIS ERRONEOUSLY STATED THE PROPERTY INCLUDED NO ENDANGERED OR THREATENED SPECIES HABITAT. (2T 93:20-95:21, Pa0481, Pa0519-23, Pa0830-36)

In concluding that "the board was free to disregard [Mr. Bova's] testimony in the face of the [Environmental C]ommission's recommendation and the applicants' expert testimony," 2T 94:11-13, the trial court made both factual and legal errors. Turning first to the factual errors, the trial court misstated who testified about the GeoWeb map. Contrary to the trial court's statement regarding "Bova's lay opinion testimony . . . based on the review of the printed out geo map," 2T 94:7-9, Mr. Bova never discussed the GeoWeb

map during his testimony. Instead, he relied on photographs of his property and a plot plan of his property, and testified based on his personal knowledge about his property and his woodland management plan. Pa 0350-65 (155:11-170:12). In fact, Mr. Borden, the Applicant's expert, authenticated and then testified about the map. Pa 0241-43 (46:10-48:10). Relatedly, the trial court faulted Plaintiffs for not producing an expert to "introduce and explain the map and how it met -- and how it got conflicted with the expert report and the EIS." 2T 94:14-18. However, Plaintiffs did not need their own expert because the Applicant's expert, Mr. Borden, authenticated the map and refuted his own report when he admitted the EIS conflicted with the information on the official DEP map.

The trial court committed a legal error when it concluded that "the board properly deferred review of the alleged environmental issues to the DEP because -- as it is the agency with jurisdiction over wildlife habitat classifications." 2T 94:20-23. In support of this conclusion, the trial court cited, without explanation, *Dowel Assoc. v. Harmony Twp. Land Use Bd.*, 403 N.J. Super. 1, 30-31 (App. Div. 2008). 2T 94:23-24. However, *Dowel* does not support the trial court's conclusion.

Rather than making broad, sweeping assertions regarding the interplay between the roles of the DEP and planning boards, *Dowel* focused on

requirements for sewage disposal and stormwater management, concluding that state and federal statutes took precedence over the municipal ordinance. *Dowel*, 403 N.J. Super. at 31 (“It is clear, and undisputed, that a municipal ordinance cannot permit a wastewater discharge system inconsistent with DEP requirements.”). Nothing in *Dowel* suggests that planning boards are no longer able to apply and enforce their local ordinances addressing other environmental issues. Nor does *Dowel* suggest that every local ordinance is automatically preempted by state law. In fact, the New Jersey Supreme Court has concluded that regulations promulgated by the DEP pursuant to the Coastal Area Facility Review Act “do not preempt local zoning authority,” although local officials must take the policies reflected in those regulations into account in their zoning ordinances. *Lusardi v. Curtis Point Prop. Owners Ass’n*, 86 N.J. 217, 229 (1981). In addition, this Court has recognized that it was appropriate for a planning board to consider environmental issues, including protection of critical wildlife habitat for two endangered species and four threatened species. *Citizens United to Protect the Maurice River and its Tributaries, Inc. v. City of Millville Plan. Bd.*, 395 N.J. Super. 434 (App. Div. 2007).

Neither the trial court, the Applicant, nor the Planning Board cited any New Jersey statute or regulation that would conflict with or preempt Jackson

Township's ordinance regarding habitat for endangered and threatened species. Not only that, but there is no evidence that DEP was informed of the endangered and threatened species habitat issue. By contrast, in *Dowel*, this Court relied upon the fact that "it is clear that DEP, within its jurisdiction, was fully investigating and carefully considering all aspects of the project," *Dowel*, 403 N.J. Super at 23-24, in reaching its conclusion that DEP was the appropriate authority to regulate sewage disposal and stormwater management.

The lack of citation to, or even any mention of, a DEP statute or regulation also undermines the trial court's conclusion that N.J.S.A. 40:55D-22(b) authorized the Planning Board to "condition its approval upon the subsequent approval of" the DEP. 2T 95:4-6 (quoting N.J.S.A. 40:55D-22(b)). Unlike the testimony about the septic system, where Mr. Borden identified the permits that would be required from the State of New Jersey, *see, e.g.*, Pa 0243-46 (48:16-51:10), the Applicant provided no testimony or evidence that an application or any other information had been submitted to the DEP regarding endangered and threatened species.

Finally, the trial court erred when it observed that "Jackson Ordinance section 244-189 requires an EIS to be submitted to the township Environmental Commission who will provide a recommendation. There is no dispute that that is exactly what was done here." 2T 95:7-10. Concluding that

all this Ordinance required was the submission of an EIS, regardless of the contents of the EIS, ignores the detailed requirements set forth in the Ordinance.

Since the trial court erred both factually and legally in concluding that the Planning Board's decision regarding the environmental issues was not arbitrary and capricious, its decision is owed no deference. Remand is required so that the Board can receive complete and correct information and address the environmental issues identified in Jackson Township Ordinance § 244-189.

POINT III: THE BOARD'S DECISION WAS ARBITRARY AND CAPRICIOUS BECAUSE IT FAILED TO ADDRESS THE IMPACT ON ENDANGERED AND THREATENED SPECIES HABITAT AS REQUIRED BY JACKSON TOWNSHIP ORDINANCE § 244-189. (Pa0414-39, Pa0519-23, Pa0830-36)

Pursuant to the authority in the MLUL, Jackson Township has enacted an ordinance governing the preparation and submission of an EIS to the Planning Board in connection with site plan applications. Here, the Planning Board failed to even mention Jackson Township Ordinance § 244-189 in its Resolution, nor did it at any time address the errors in the EIS that the Applicant's expert acknowledged.

Most important among the errors, the EIS incorrectly identified the DEP habitat mapping of the Property. According to the EIS, "[a]n overview of local

Landscape Project mapping shows that urban land not valued as wildlife habitat is mapped surrounding the property. The rear portion of the site is mapped as Rank 3. There is no mapped threatened or endangered species habitat on or within close proximity to the site.” Pa 0691. The EIS repeats this error when it states that “[t]he property does not contain exceptional wildlife habitats due to the existing site conditions and surrounding development.” Pa 0693-94.

During cross examination, Mr. Borden contradicted the EIS, stating that “various portions of the lots in question including the portions that are going to be developed . . . [were] a rank four.” Pa 0242 (47:12-25). In addition, Mr. Bova testified that, based on his woodland management plan, his property, which adjoins the Applicant’s Property, is a rank 4. Pa 0355 (160:7-9).

Testimony from Mr. Borden and Mr. Bova established a credible basis to believe the EIS included erroneous information. The Board failed to resolve this factual dispute and made no mention of the wildlife habitat issue in the Resolution. Possibly, the Board missed this significant point due to the numerous interruptions of Mr. Michelini’s cross examination of Mr. Borden.

Since the Resolution fails to resolve factual disputes, assess witness credibility, or even mention the environmental issues, its decision is arbitrary and capricious.

POINT IV: THE PLANNING BOARD’S DECISION WAS ARBITRARY AND CAPRICIOUS BECAUSE THE PLANNING BOARD ABDICATED ITS RESPONSIBILITY TO ADDRESS ENVIRONMENTAL ISSUES AS REQUIRED BY JACKSON TOWNSHIP ORDINANCE § 244-189. (Pa0414-39, Pa0519-23, Pa0834-36)

The Planning Board abdicated its responsibility under Jackson Township Ordinance § 244-189 by deferring to the Environmental Commission’s three sentence letter, Pa 0827, instead of making its own determination as required by the MLUL. The Planning Board further abdicated its responsibility by assuming the DEP would review the issues concerning endangered and threatened species habitat without citing to any relevant DEP statute or regulation.

Although the Board generally can consider a recommendation from the Environmental Commission, the Environmental Commission’s role is only advisory. That advisory role does not supplant the Planning Board’s responsibility to ensure the site plan application conforms to all local requirements. *Shim v. Washington Twp. Plan. Bd.*, 298 N.J. Super. 395, 411 (App. Div. 1997) (noting that planning boards review on-site conditions “to assure compliance with the standards under the municipality’s site plan and land use ordinances.”).

Undermining its advisory role here, the Environmental Commission based its opinion on incorrect information. When presented with the incorrect

statement that no wildlife habitat would be impacted by the development, it makes perfect sense that the Environmental Commission would conclude that “[t]here are no immediate environmental concerns with the application.” Pa 0827. We have no way of knowing what the Environmental Commission would have said if it had reviewed the correct information that the development would impact the habitat of the endangered timber rattlesnake and threatened barred owl. As Mr. Riker commented, he and his “colleagues up here know that when there’s something like egregious, you know, bald eagles . . . we’re going to say something about it.” Pa 0236 (41:17-21). If the Environmental Commission would take action in connection with bald eagles, a species identified as endangered by the State of New Jersey,¹⁹ there is no reason to believe that it would ignore the timber rattlesnake, another species identified as endangered by the State. Importantly, the Planning Board, unlike the Environmental Commission, had clear and credible testimony from Mr. Borden and Mr. Bova that the proposed development would disturb habitat for endangered and threatened species. The Planning Board was obligated by both the MLUL and Jackson Township Ordinance § 244-189 to consider that

¹⁹ The NJDEP Fish and Wildlife’s Endangered and Nongame Species Program lists bald eagles as endangered. <https://dep.nj.gov/njfw/wildlife/endangered-threatened-and-special-concern-species/> (last visited 10/17/24).

information.

Besides abdicating its responsibilities in deference to the Environmental Commission, any argument that the Board addressed the potential harm to endangered and threatened species by conditioning its approval on the Applicant receiving all permits and approvals from relevant regulatory agencies fails for the reasons discussed above in Point II, *supra* at 32-33. That is, nothing in the record indicates that the Applicant submitted any information to the DEP regarding the endangered and threatened species habitat, nor has the Applicant or the Board identified any relevant statutory or regulatory requirement to do so.

Since the Board failed to consider the requirements of Jackson Township Ordinance § 244-189, its decision was arbitrary and capricious and requires remand.

POINT V: THE TRIAL COURT ERRED IN CONCLUDING PLAINTIFFS' DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN THE BOARD PREVENTED COUNSEL FROM EFFECTIVELY CROSS EXAMINING WITNESSES DURING THE HEARING. (2T 92:10-93:19, Pa0523-25, Pa0481, Pa0839)

The MLUL provides that “the right of cross-examination shall be permitted to all interested parties.” N.J.S.A. 40:55D-10(d). This right to cross examination is “subject to the discretion of the presiding officer and to reasonable limitations as to time.” *Id.*

The Supreme Court, in the leading case of *Kramer v. Bd. of Adjustment, Sea Girt*, 45 N.J. 268 [(1965)], put it best and most directly, observing that hearings must be conducted in a manner “consistent with fundamental standards of due process,” expressing that objectors are entitled to a fair hearing and noting the factfinders are bound in “good conscience to consider the evidence, to be guided by that alone and to reach . . . conclusion uninfluenced by extraneous considerations.”

DeMaria v. JEB Brook, LLC, 372 N.J. Super. 138, 146 (App. Div 2003) (quoting *Kramer v. Bd. of Adjustment, Sea Girt*, 45 N.J. 268, 280 (1965)).

In deciding whether a party has been denied due process, courts have considered a variety of factors. For example, in *Witt v. Borough of Maywood*, the Court found that the objectors were denied due process when the planning board failed to “continue[] the hearing to another date to allow all available evidence to be considered,” and displayed impatience during the hearing. 328 N.J. Super. 432, 454 (Law Div. 1998). The Court also considered the resolution adopted by the planning board in reaching its decision that the objector’s due process rights were violated. According to the Court,

[t]he Resolution adopted by the Planning Board is the hallmark of the Planning Board’s impatient attitude. It grants approval with the most conclusionary findings, without explaining the reasons or rationale for finding that Commerce had satisfied the positive and negative criteria of N.J.S.A. 40:55D–70(c)(1) or (2) in granting a critical variance adjacent to a residential district, and without making adequate findings and conclusions that would allow a trial court to even begin the explication process.

Id. Similar to the present case, “[t]he Planning Board did not even describe

what type of variance it was granting.” *Id.* at 454-55.

In the present case, Mr. Bova was not afforded a full and fair opportunity to cross examine the witnesses. As already discussed, Mr. Michelini was not able to effectively cross examine Mr. Borden regarding the endangered and threatened species habitat. He was interrupted repeatedly by the Board Chair, other Board members and the Board attorney. Many of the interruptions had nothing to do with the topic he was addressing, and several comments showed the Board member’s unjustified impatience. For example, Mr. Riker urged Mr. Michelini to “move on,” Pa 0232 (37:3), and Mr. Bressi interrupted to comment on sewer and septic systems, Pa 0233-34 (38:2-39:11).

The trial court concluded that Plaintiffs’ due process rights were not violated because instead of interfering with Mr. Michelini’s cross examination, “the board attempted to provide guidance to the plaintiffs’ counsel where it viewed the line of questioning as irrelevant or beyond the witness’ expertise, telling — instructing the attorney to move on.” 2T 93:2-5. The trial court further found no denial of due process because “there is no evidence of bias or board misconduct which would warrant a reversal.” 2T 93:7-8. The repeated interruptions based on topics unrelated to Mr. Michelini’s cross examination cannot possibly be characterized as providing guidance to counsel. To the contrary, the interruptions distracted the Board members from the issues

counsel was trying to address. The extent of that distraction is evident in the Resolution's failure to mention the problems with the EIS identified during Mr. Borden's cross examination. In addition, as already discussed, had the trial court granted Plaintiffs' motion to supplement the record, evidence of potential bias would have existed in the record. The trial court's conclusion that Plaintiffs' due process rights were not violated is not supported by the record.

Since Plaintiffs were denied due process, "[t]he only remedy which will protect and preserve the public interest is to provide for an entirely new hearing." *Witt*, 328 N.J. Super. at 455. Therefore, the Resolution should be vacated and the matter remanded for a new hearing before the Planning Board.

POINT VI: THE TRIAL COURT ERRED IN CONCLUDING A WAIVER WAS NOT REQUIRED FOR THE TWO TWO-WAY ENTRANCES PURSUANT TO JACKSON TOWNSHIP ORDINANCE § 244-197(J)(1)(c). (2T 88:18-90:8, Pa0481, Pa0525-27, Pa0829-30)

Jackson Township Ordinance § 244-197 sets forth the requirements for off-street parking in non-residential developments. Subsection 244-197(J)(1) provides the minimum design requirements for parking lots with 50 or fewer spaces. One of those minimum design requirements is that "[n]ot more than one two-way access drive or two one-way access drives shall be permitted on any street." Jackson Township Ordinance § 244-197(J)(1)(c). Pa 0621.

Pursuant to Jackson Township Ordinance § 244-197(J)(2)(a)(1), "[p]arking lots which have a capacity for parking more than 50 vehicles shall incorporate the

following minimum design standards . . . [a]ll the minimum design standards for small parking areas.” Pa 0622. Based upon this statutory scheme, and as recognized by Mr. Peters, Pa 0570; *see also* Pa 0565, the Applicant required a waiver for its proposed two two-way entrances.

Despite this statutory requirement, the trial court “disagree[d]” with Plaintiffs’ contention “that BYJ needed to seek a design waiver for the site proposal proposing two points of access.” 2T 88:23. In support of its position, the trial court first noted “that the applicant agreed to annually certify to the township that parking capacity has not exceeded current limitations, and if so, it will reappear and determine how many green bank spaces need to be constructed.” 2T 88:24-89:3. After this confusing and irrelevant reference to the land banking agreement, the trial court turned to Jackson Township Ordinance § 244-197(J)(2)((a)(3)(d)), which, according to the trial court, provides that “properties with frontage in excess of 500 feet on any one street shall be permitted two-way and one-way access drives provided for not more than two entrances and two exits.” 2T 89:155-18 (purportedly quoting Jackson Township Ordinance § 244-197(J)(2)((a)(3)(d))). The trial court noted that since “[t]he applicants’ [sic] frontage is well over 500 feet . . . no waiver was needed.” 2T 89:25-90:1. Therefore, the trial court concluded that “it is immaterial that the resolution does not address any further any waiver.” 2T

90:1-2.

In quoting Jackson Township Ordinance § 244-197(J)(2)(a)(3)(d), the trial court omitted a single, but significant, word: “continuous.” Including the omitted word, the ordinance provides that “[p]roperties having a continuous frontage in excess of 500 feet on any one street shall be permitted two-way and one-way access drives providing for not more than two entrance and two exit movements on the street.” Jackson Township Ordinance § 244-197(J)(2)(a)(3)(d) (emphasis added). Pa 0622. As previously explained, the Property’s frontage on East Veteran’s Highway was not continuous. Lots 3, 4, and 5 are between the rectangular leg of lot 2 and the body of lot 6, thus creating a break in the frontage on East Veterans Highway. One of the proposed two-way entrances is located on the 137-foot rectangular leg of lot 2 and the other is located on lot 6.

Normally, “[a] trial court’s interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.” *Manalapan Realty*, 140 N.J. at 378. Here, where the trial court misquoted the relevant ordinance, even less deference is due to its conclusion that the Resolution’s failure to mention the requirements of Jackson Township Ordinance § 244-197(J)(1)(c) was immaterial since no waiver was required.

The Applicant required a waiver from Jackson Township Ordinance

§ 244-197(J)(1)(c), which allowed only one two-way access drive to a project. Here, the Applicant proposed two two-way access drives. The Resolution fails to make any findings of fact or conclusions of law regarding this issue.

Not only was an explanation lacking, but the Resolution did not include this issue as one upon which the Board voted. The Resolution described the motion upon which the Board was asked to vote as being “to approve the Application and approve the green banking of the 136 parking spaces.” Pa 0433. Mention of the two two-way entries had disappeared. Simply ignoring this required waiver does not satisfy the requirements of N.J.S.A. 40:55D–10(g).

Since the trial court erred in concluding that the Board’s decision was not arbitrary and capricious because a waiver was not required pursuant to Jackson Township Ordinance § 244-197(J)(1)(c), this matter should be remanded for further proceedings.

POINT VII: THE TRIAL COURT ERRED IN CONCLUDING NO VARIANCE WAS REQUIRED BASED ON MINIMUM LOT WIDTH. (2T 91:3-92:9, Pa0481, Pa0510-18, Pa0837-39)

Before the trial court, Plaintiffs argued that the Resolution lacked factual findings and conclusions of law supporting the grant of a variance based on minimum lot width. The trial court concluded “that the record clearly shows that the applications and site plans did not seek variance relief for a minimum

lot width because there was none needed given the consolidation.” 2T 91:22-24. In part, the trial court based its conclusion on the fact that “the board planner’s review letter mentioned a potential need for a variance only if no consolidation occurred, but the record shows that BYJ planned to consolidate the lots.” 2T 91:11-14. This factual assertion conflicts with the evidence in the record.

In section III.B of his review letter, Mr. Peters provides a chart identifying the area and bulk standards requirements set forth in Jackson Township Ordinance §244-46(D) for the R-3 zone and comparing them to the Applicant’s proposed measurements.²⁰ Pa 0562. Immediately preceding the chart, the review letter notes that “[t]he following is based on the Applicant obtaining approving for the consolidation of Lots 2, 6 and 15.” *Id.* The chart identifies lot width as requiring a variance, and includes a footnote stating “[p]er §244-46D the minimum lot width required is 200 ft, whereas the lot width is not consecutive, and the northwesterly lot width is approximately 130 ft.” *Id.* During his testimony, Mr. Peters cited the need for this variance. Pa 0004 (4:23-24). The trial court’s factual finding is not supported by the record

²⁰ Although the Applicant did not seek a variance and insisted throughout the hearings that the Application was “essentially variance free,” *see, e.g.*, Pa 0008 (8:13), Pa 0371 (176:14-15), it was appropriate for the Board’s professionals to identify this potential variance. *O’Donnell v. Koch*, 197 N.J. Super. 134, 143 (App. Div. 1984) (noting “the Board has a duty . . . to take cognizance when bulk variances are required”).

and is therefore clearly erroneous.

In concluding that no variance was required, the trial court also relied on testimony from “BYJ’s engineer [who] confirmed that the application met the bulk standard despite initial reports indicating otherwise.” 2T 91:19-21. The trial court is correct that Mr. Stevens, after acknowledging that “the north northwestern lot width is approximately 130 feet,” where a minimum lot width of 200 feet is required, stated his opinion that “[o]nce the lot is consolidated it will have over 600 feet of lot width and will be a fully conforming lot.” Pa 0099-0100 (99:23-100:7). To the extent Mr. Stevens’s testimony reflects factual statements, those facts are contradicted by the Board’s professionals. To the extent Mr. Stevens is interpreting the zoning ordinance, his interpretation cannot substitute for the Board’s analysis and interpretation of the minimum lot width requirement. It is the Board’s responsibility to interpret the ordinance and determine if it applies to the present application. N.J.S.A. 40:55D-70(b).

While courts “give deference to a municipality’s informed interpretation of its ordinances,” *DePetro*, 367 N.J. Super. at 174, no legal authority allows a court to defer to the interpretation of an ordinance by an applicant’s engineering expert. The trial court committed legal error by deferring to the Applicant’s engineer’s legal interpretation of the ordinance.

The trial court erred in concluding that a variance for minimum lot width was not needed. Remand is required to resolve this issue.

POINT VIII: THE BOARD'S DECISION WAS ARBITRARY AND CAPRICIOUS BECAUSE THE RESOLUTION LACKED FACTUAL FINDINGS OR CONCLUSIONS OF LAW TO SUPPORT ITS GRANT OF A VARIANCE AND WAIVERS. (Pa0414-39, Pa0510-18, Pa0837-39)

“[A] resolution cannot consist of a mere recital of testimony.” *New York SMSA*, 370 N.J. Super. at 332. Further, a resolution “cannot consist of . . . conclusory statements couched in statutory language.” *Id.* Instead, a “resolution must contain sufficient findings, based on the proofs submitted, to satisfy a reviewing court that the board has analyzed the [application].” *Id.*

Instead of providing findings or analysis, the Resolution simply recounts testimony and quotes the MLUL. For example, focusing on the minimum lot width variance, the Resolution first states “the Applicant has requested the following variance[]: a. Minimum Lot Width (244-46D): 200 FT Required; 130 FT Proposed.” Pa 0419. The next mention of the variance appears in connection with Mr. Stevens’s testimony. There, the Resolution provides that “Mr. Stevens testified that the site plan (Exhibit A-2) is not requesting any variances.” Pa 0422. These paragraphs are obviously inconsistent. The Resolution also summarizes Mr. Stevens’s opinion that a variance is not required due to the consolidation, Pa 0425, and references Ms. Jennings’s statement that the application is “essentially variance free,” Pa 0432. Nothing

else is mentioned regarding the minimum lot width variance until “[i]n conclusion, the Board finds that the Applicant here has met its burden in demonstrating the need for ‘bulk’ (c) variance relief as set forth herein.” Pa 0434

It is impossible to understand how the Resolution can conclude the Applicant met its burden when the Applicant maintained throughout the proceedings that no variance was required. As a result, the Applicant provided no evidence or testimony regarding the positive and negative criteria required to satisfy its burden under N.J.S.A. 40:55D–70(c).

The Resolution similarly lacks any findings or analysis related to the waiver required for two two-way entrances. Even more egregious is the Resolution’s failure to even mention the impact on endangered and threatened species habitat, other than acknowledging the admission of “Exhibit 0-1, New Jersey Geo website landscape map.” Pa 0428. No discussion or analysis of this issue exists. No credibility determinations are made. Lacking this analysis, this Court “has no way of knowing the basis for the board’s decision.” *New York SMSA*, 370 N.J. Super. at 332-33.

In sum, the Resolution lacks any explanation as to how and why the statute applies to the specific facts presented here. Given the cookie cutter recitation of the statutory language and the utter lack of any explanation for

the Board's decision, this matter should be remanded so the Board can correct this error.

CONCLUSION

For the foregoing reasons, Plaintiffs/Appellants ask that the trial court's order denying Plaintiffs' motion to supplement the record be reversed, the trial court's order dismissing Plaintiffs' complaint be vacated, and the Resolution be vacated and the application remanded for further hearing so that the Planning Board can correct the errors identified above and ensure the application is reviewed in a fair and impartial proceeding where Plaintiffs' due process rights are protected.

Respectfully submitted,

s/ Joseph Micheline

Joseph Micheline
Attorney for Plaintiffs/Appellants

JEFFREY BOVA, CELESTE BOVA, HIS WIFE, ARNOLD LOMITA AND PAULINE LOMITA, HIS WIFE AND OMEGA FARM, LLC, Plaintiffs/Appellants, v. TOWNSHIP OF JACKSON PLANNING BOARD and BAIS YAAKOV OF JACKSON, INC., Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003881-23 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, OCEAN COUNTY DOCKET NO.: OCN-L-1727-23 SAT BELOW: HON. FRANCIS R. HODGSON, JR., A.J.S.C.
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**BRIEF ON BEHALF OF DEFENDANT/RESPONDENT
BAIS YAAKOV OF JACKSON, INC.**

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PRELIMINARY STATEMENT

In this land use matter, Plaintiffs are engaging in an expedition to scour the record before the Jackson Township Planning Board (“Board”) in an attempt to overturn the Board’s approval of this fully conforming Application. Defendant Bais Yaakov of Jackson’s (“BYJ”) filed its Application to the Board, seeking approval to construct three private, religious schools on property located at 245 East Veterans Highway, identified as Block 15601, Lots 2 and 6, and Block 15701, Lot 15 on the Township of Jackson’s (“Township”) tax maps (collectively, “Property”). The Application requested no variances, and one design waiver. Following two hearings, the Board approved the Application and memorialized the decision in a Resolution dated June 19, 2023.

Plaintiffs, who are neighboring objectors, filed a complaint in lieu of prerogative writs, challenging the approval. The trial court denied Plaintiffs’ motion to expand the record to include extraneous documentation related to, among other things, a baselessly asserted conflict of interest, and following trial, the trial court affirmed the Board’s decision. On appeal, Plaintiffs argue that the trial court’s decisions were erroneous under a multitude of feeble theories.

BYJ respectfully requests that this Court affirm the trial court’s orders. As will be more thoroughly fleshed out below, this fully conforming Application was variance free and only needed one design waiver. The Board was therefore

statutorily-obligated to grant BYJ an approval. In addition, the trial court did not err in dismissing Plaintiffs' motion to expand the record because there was no conflict of interest between the undersigned and the Board Chairman, as the only connection between them was that the Board Chairman was allegedly a member of a shul that the undersigned represented in a different application before the Township Zoning Board of Adjustment, a separate board.

Finally, Plaintiffs' remaining arguments are without merit for the following additional reasons: (1) the record supports the Board's decision to accept the Environmental Commission's recommendation that there were no environmental issues that would hinder the Property's development; (2) the Board properly did not consider environmental issues because same is beyond its jurisdiction; (3) the Board properly exercised its discretion in limiting Plaintiffs' duplicative and irrelevant cross-examination; (4) the record and a plain interpretation of Jackson Township Ordinance Section 244-197 support the trial court's conclusion that a lot width variance and design waiver for providing more than one access driveway were not required; and (5) the minor, technical deficiencies in the Resolution are not sufficient to render same arbitrary, capricious, and unreasonable.

BYJ respectfully requests that this Court affirm the trial court's Orders denying Plaintiffs' motion to supplement the record and dismissing its complaint with prejudice.

PROCEDURAL HISTORY & COUNTERSTATEMENT OF FACTS¹

On October 4, 2022,² BYJ filed an Application for preliminary and final major site plan approval to construct three private, all-girls, religious schools and a gymnasium with related site improvements. Pa0530, 0414, 0416, 0634-0635.³ Two of the schools will be for high school-level students and one will be an elementary school. Pa0417-18, 0634. The property is located at 245 East Veterans Highway in Jackson Township, identified as Block 15601, Lots 2 and 6, and Block 15701, Lot 15 on the Township's tax maps ("Property"). Pa0530. The Property is 37.9 acres and is located in the R-3 Residential Zone, where schools and the accessory gymnasium are permitted. Pa0418, 0530, 0611.

¹ The Procedural History and Statement of Facts are combined because they are intertwined.

² Plaintiffs mistakenly state that the Application was filed on October 4, 2023. See Pb2.

³ Citations to the record are as follows: Pa refers to Plaintiffs' Appendix; Pb refers to Plaintiffs' Brief; Da refers to Defendant BYJ's Appendix; 1T refers to the Motion Transcript, dated January 5, 2024; and 2T refers to the Trial Transcript, dated June 6, 2024.

In its Application, BYJ sought relief for one design waiver to depart from Jackson Ordinance Section 244-197(N) with respect to the minimum number of parking spaces. Pa0008 (8:12-23), 0570. Here, students are prohibited from driving to school so the parking demand for these Orthodox Jewish schools are less than that of a public or private school that permits their students to have a vehicle on campus. Pa0090; 100 (90:4-9; 100:18-25). Consequently, BYJ sought to land bank⁴ 136 of the 503 required parking spaces, thus meeting the parking requirement without having to construct the extra spaces. Pa0564.

Two public hearings were held before the Planning Board on February 21, 2023, and March 20, 2023. See Pa0001-0413. Plaintiffs objected to the Application. Pa0006 (6:5-8).

On February 21, 2023, BYJ first appeared before the Planning Board. Pa0003 (3:1-3). At the hearing, Aharon Rottenberg, BYJ's representative, testified in his capacity as a fact witness to provide operational testimony about the schools for the benefit of the Board. Pa0012-13 (12:23 to 13:3). First, he confirmed that BYJ is seeking to construct three all-girls schools and a gymnasium on the Property. Pa0013 (13:18 to 14:14).

⁴ Land banking parking spaces is the practice of designating a portion of property as a parking area and preserving the space as landscape, rather than constructing the parking spaces.

The schools will all operate from September to June with summer camps occurring at the Property in the summer months. Pa0023-0024 (23:25 to 24:12). Approximately half of the students enrolled at the school will attend the summer camps. Pa0024 (24:8-13). For the elementary school, school starts at 9:15 a.m., the vast majority of the students will be dropped off at school by bus, and 30 buses arrive each morning. Pa0017-0018 (17:19 to 18:2). Dismissal is staggered based on grade level but generally commences at 3:00 p.m. and ends at 4:30 p.m. Pa0019-0020 (19:18 to 20:12). BYJ's Representative opined that parking at the school will be sufficient because the students are prohibited from driving. Pa0021-0022 (21:4 to 22:1).

Each of the two high schools will have approximately 500 students each. Pa0022 (22:2-15). School will be in session at the high schools from 8:30 a.m. to 4:30 p.m. Pa0022 (22:15-17). Unlike the elementary school, dismissal times are not staggered. Pa0022 (22:23-24). The campus' gymnasium will be shared amongst the elementary school and the high schools. Pa0023 (23:10-13).

In response to a question from the Board's Planner regarding the sufficiency of parking on the Property were an event to take place, Mr. Rottenberg stated that such events would be held during hours when school is not in session and/or at a different high school's auditorium in Lakewood. Pa0071-0073 (71:20 to 73:5). Mr. Rottenberg also agreed, as a condition of

approval, that BYJ would construct the 136 proposed land banked parking spaces if the Board deemed it necessary. Pa0073-0075 (73:6 to 75:6).

After Mr. Rottenberg's testimony concluded, BYJ's engineer, William Stevens ("Engineer") testified. He described the Application, testifying it required no variances and BYJ was seeking two design waivers. Pa0087-0089 (87:7 to 89:13). The site will have two entrances and exits, with a signalized intersection at the main entrance towards the center of the Property. Pa0088-0089 (88:22 to 89:3).

Next, the Engineer addressed the parking requirements, stating that 169 parking spaces are required for the elementary school, and 167 parking spaces are required for each of the two high schools, resulting in a total requirement of 503 parking spaces. Pa0089-0090 (89:16 to 90:4), 0634, 0635. The Engineer further testified that because of BYJ's request to land bank 136 spaces, BYJ is proposing to construct only 367 parking spaces, which is sufficient because the students are not permitted to drive to school. Pa0090, 100 (90:4-9; 100:18-25), 0634. Because there is sufficient space to construct all 503 of the required parking spaces, the Engineer reiterated that BYJ would abandon the land banking proposal if the Board felt that same was necessary. Pa0100-01 (100:23 to 101:18), 0634-0635. The land banked parking area is located in the center of the Property. See Pa0634-0635.

The Engineer then addressed the two potential bulk variances called out in the Board Consultants' review letters, which were for minimum lot width and maximum building height. Pa0099-100 (99:21 to 100:9), 0545, 0562. First, regarding building height, the Engineer testified that the architectural plans erroneously indicate that the building height will be thirty-six feet, whereas a maximum of thirty-five feet is permitted in the R-3 Zone. Pa0100 (100:9-14); Pa0613. This typographic error will be corrected so that BYJ will comply with the Ordinance's height requirement. Pa0100 (100:9-14). Thus, no variance was needed to exceed maximum building height.

As it pertains to minimum lot width, the Engineer testified that this variance is also not needed. Pa0100 (100:7-9). Once the Lots are consolidated, as was proposed, the combined lot width will be over 600 feet, which conforms with the Ordinance's 200-foot minimum requirement. Pa0100 (100:1-7), 0634. Plaintiffs did not produce an expert to refute the Engineer's testimony.

A second hearing was held before the Board on March 20, 2023. Pa0196. The Applicant presented the expert testimony of its Planner, Traffic Engineer, and Architect. Pa0198-0199 (3:25 to 4:8). First, BYJ's Planner, Ian Borden ("Planner"), who is the expert who prepared the Environmental Impact Statement ("EIS"), testified that BYJ is proposing to utilize a septic system to

dispose of waste because public sewer is not available for the Property. Pa0199-200 (4:2 to 5:17), 0684-0701, 0827.

Plaintiffs' counsel cross-examined BYJ's Planner. Pa0206-0243 (11:13 to 48:12). When questioned about New Jersey Department of Environmental Protection ("DEP") landscape project conservation priority, BYJ's Planner asserted that the Property was Rank three. Pa0227-0228 (32:10 to 33:24). Regarding whether the Property being mapped in Rank four would make a difference, BYJ's Planner asserted that no development is proposed in any location where such a designation could theoretically apply and as such is not material to the Board's consideration of the Application before it. Pa0234-235 (39:12 to 40:10). In addition, the Board noted that the Jackson Township Environmental Commission had a meeting months prior to this hearing wherein it considered BYJ's Application and found there were no environmental issues present that would preclude development. Pa0235-0236 (40:18 to 42-6); Pa0827. The Board's Attorney correctly noted that environmental issues exceed the Board's jurisdiction. Pa0229 (34:2-23).

Plaintiffs did not present an expert witness to contradict BYJ's Planner's testimony nor the EIS that was submitted as part of the Application. Instead, Plaintiffs solely presented a screen shot from New Jersey GeoWeb, marked as Objector's Exhibit O-1. Pa0241-0242 (46:3 to 47:2), 0702. The screenshot,

which shows certain portions of the Property being mapped as Rank four, does not reflect the findings the Planner made in the EIS, nor does it disturb the Environmental Commission's conclusion that there were no environmental issues with the Application. Pa0242-0243 (47:4 to 48:10); 0702, 0827. Contrary to Plaintiffs' contention, BYJ's Planner did not admit that the EIS was erroneous. Pa0241-0243 (46:3 to 48:10). Rather, in response to Plaintiffs' counsel's direct questions, BYJ's Planner merely stated that the exhibit shows area that are going to be developed as Rank four and he did not have any reason to believe the website screen shot was incorrect. Ibid. Furthermore, BYJ is not developing any part of the Property that is within a 300-foot riparian buffer. Pa0225 (30:1-17).

BYJ's Traffic Engineer, John Rea, testified next. Pa0247 (52:2-24). His office prepared a Traffic Impact Study that was submitted as part of the Application. Pa0726-0762. The Traffic Engineer described BYJ's proposal to install a traffic signal at the main entrance intersection, stating that BYJ had engaged in discussions with Ocean County⁵ about effectuating that proposition. Pa0248 (53:20-25), 0731. He also provided that a left turn lane at the main

⁵ Ocean County maintains jurisdiction over East Veterans Highway because it is a county road.

entrance and a deceleration lane for traffic turning right into the site are also proposed. Pa0249 (54:1-7), 0732. He further concluded that with the proposed roadway improvements, the studied intersections and site driveways will operate at acceptable levels of service. Pa0254-0256 (59:5 to 61:9), 0732-0733. Finally, he confirmed that BYJ satisfied the Ordinance's parking requirements because installing the land banked parking spaces was unnecessary.⁶ Pa0256-0257 (61:9 to 62:11), 0732. Overall, he stated that the site is "very properly prepared" with regard to issues such as circulation, parking areas, and drop-off areas for parents. Pa0257-0258 (62:12 to 63:7).

Plaintiffs' counsel cross-examined the Traffic Engineer. Pa0272-0286 (77:23 to 91:19). Once again, no contrary expert testimony was provided.

Finally, BYJ's Architect, Melissa Mermelstein testified. Pa0288 (93:10-17). She described the floor plans of the buildings, elevations, the materials to be used in construction, and the aesthetic makeup of the buildings. Pa0289-0290 (94:1 to 95:16), 0820-0826. The Architect also confirmed that no variance was

⁶ As a condition of approval, BYJ agreed to build the land banked parking spaces, if necessary, in the future. Pa0008 (8:12-23), 0435.

needed for building height because the buildings will not exceed the thirty-five-foot maximum permitted in the R-3 Zone.⁷ Pa0290-0291 (95:17 to 96:3).

On cross-examination, contrary to Plaintiffs' objections, Plaintiffs' counsel peppered the Architect with many improper questions that exceeded the scope of her expertise because they related to engineering issues. Pa0297-0303 (102:2-12; 105:17 to 108:21). The Board Attorney advised Plaintiffs' counsel of this and that any response she provided related to engineering questions would amount to lay testimony. Pa0301 (106:10-23). Instead of continuing his cross-examination solely with questions pertaining to architectural issues, Plaintiffs' counsel instead asked the Architect about school operations. Pa0303-0304 (108:19 to 109:8). When the Board Attorney reiterated that Plaintiffs' counsel was asking questions beyond the Architect's expertise, Plaintiffs' counsel made the declaration that the Board was infringing on his right to cross-examine witnesses and ceased his questioning. Pa0303-0304 (108:22 to 109:19). Plaintiffs did not produce an expert witness to contradict the Architect's testimony.

⁷ Plaintiffs claimed BYJ failed to request a variance for the maximum building height of the building but abandoned that argument in this appeal.

Following the conclusion of the public portion of the hearing, the Board unanimously approved BYJ's Application. Pa0375-0382 (180:25 to 187:5). The Board's approval was memorialized in a well-reasoned and thorough twenty-five page Resolution on June 19, 2023. Pa0414-0439.

Plaintiffs filed their complaint in lieu of prerogative writs on July 31, 2023. Pa0471-0478. Later, Plaintiffs filed a motion to supplement the record to include documentation related to a baseless alleged conflict of interest between the Planning Board Chairman and the undersigned. 1T5:10 to 9:6. The alleged conflict, Plaintiffs contend, is found to exist not with regard to this Application, but instead arises because the Chairman is allegedly a member of a separate congregation, BMOJ, Inc. ("BMOJ"), whom the undersigned represented in a separate matter before the Jackson Township Zoning Board of Adjustment, a separate board.⁸ 1T6:20 to 7:9; 1T9:25 to 11:3.

That motion was heard on January 5, 2024. 1T. Though an appeal from a planning board decision is limited to the record that was established before the board at the municipal level, Plaintiffs argued the existence of this supposed attorney-client relationship between the undersigned and the Planning Board

⁸ While related, the Jackson Township Planning Board and the Jackson Township Zoning Board of Adjustment are two distinct municipal entities that are made up of different board members.

Chairman was a conflict of interest that warranted expansion of the record. Ibid. The trial court noted that “While a party may make a motion to expand the record of the board’s decision on appeal, such a motion should only be granted in very rare circumstances. [See] Haggerty v. [Red Bank] Borough Zoning [Bd.] of Adjustment, 385 N.J. Super. 501, 515, [n.4] (App. Div. 2006).” 1T44:13-17.

The trial court denied Plaintiffs’ motion. Pa0479-0480. First, the court reasoned that the cases where conflicts of interest existed between a board member and an applicant were in situations that “involved direct applicants before a board. Here, we do not have that. We have the attorney representing an alleged interested party before a zoning board, a separate board, and also representing an applicant before the [P]lanning [B]oard where Mr. Herman was the chairman.” 1T36:18-24. Importantly, the court recognized that a conflict is not sufficient to taint the board proceedings “where the potential conflicting interest is too remote or to[o] speculative.” 1T38:6-9. The Court delineated that “[O]ur courts have emphasized the idea that, ‘[l]ocal governments cannot operate effectively if recusals occur based on ascribing to an official a conjured or imagined disqualifying interest.’ [Piscitelli v. Garfield Zoning Bd. of Adjustment, 237 N.J. 333, 353 (2019).]” 1T38:10-13. In addition, the trial court explained that there are four types of conflicts: direct pecuniary interests, indirect pecuniary interests, direct personal interests, and indirect personal

interests, concluding that none of which are present here. 1T38:14 to 39:4; 50:21 to 51:4.

Further, the trial court reasoned that courts in this state have rarely found a conflict in a situation “when there is no prospect of financial advantage to the public official or his or her family or friends.” 1T47:10-16. Because there was no direct involvement or participation here in connection with the BMOJ application, the trial court, relying on Sugarman v. Township of Teaneck, 272 N.J. Super. 162, 166 (App. Div. 1994), concluded that the connection was too remote to create the appearance of a conflict. 1T48:9 to 49:4 (internal citations omitted).]

The trial court further found that it was unaware of a case where a conflict was found on the basis that two different applicants shared a common professional in applications before two different boards. 1T49:5-9. In addition, the Board Chairman’s comments in the *Asbury Park Press* and the *Jackson Pulse* demonstrate no evidence of bias and do not create a conflict of interest because they do not discuss the merits of BYJ’s Application and the comments that were made in the *Asbury Park Press* predate the Board Chairman’s tenure on the Board. 1T50:9 to 51:24; Pa0869-0872, 0882-0884.

On June 6, 2024, trial in this matter occurred. See 2T. The trial court ruled in favor of BYJ, dismissing Plaintiffs’ complaint with prejudice. Pa1.

First, the trial court found that the Board's decision to grant BYJ a design waiver to land bank 136 of the 503 required parking spaces was reasonable. 2T88-16 to 17. Plaintiffs did not present any evidence to challenge the unrefuted testimony that permitting the waiver was reasonable in light of the fact that students will not be driving to school and land banking the spaces was more aesthetically pleasing than constructing extraneous spaces. 2T86-25 to 88-17.

Next, regarding Plaintiffs' argument that the Resolution failed to discuss the need for a design waiver for two, two-way access driveways, the trial court found that BYJ did not need to seek relief for this alleged non-conformity; therefore it is immaterial that the Resolution did not mention it. 2T89-25 to 90-2. Because each of the proposed parking lots contains over 100 parking spaces, and the Property's frontage exceeds 500 feet, no design waiver was required based on Ordinance Section 244-197(J)(2)(a)(3)(d). 2T89-22 to 90-2; Pa0622.

The trial court next addressed Plaintiff's contention that the Board's decision was arbitrary, capricious, and unreasonable because BYJ's Application required a variance for minimum lot width. 2T91-3. While the Board's Planner and Engineer called out the potential need for a lot width variance, the record reflects that once the lots are consolidated — as was proposed and provided as a condition of the approval — the width of the newly consolidated lot will be 660 feet, exceeding the 200-foot minimum. 2T91-11-18; see Pa0634.

The court then found that Plaintiffs' argument that their due process rights were violated because their attorney was not permitted to engage in sufficient cross-examination was without merit. The court reasoned that under the totality of the circumstances, "the [B]oard properly exercised its authority limiting what was viewed by the [B]oard as repetitive and irrelevant cross-examination." 2T92-13 to 16.

The trial court then addressed Plaintiffs' arguments that the Board did not properly consider environmental issues. 2T93-20 to 21. The court reasoned the Board's decision was not arbitrary, capricious, and unreasonable because the record shows that BYJ complied with Jackson's Ordinance 244-189 when it submitted an EIS, and the Township's Environmental Commission reviewed same and concluded that there were no environmental issues present on the site. 2T93-24 to 94-4; see Pa0643-0647, 0684-0701, 0827 . Furthermore, the trial court noted that BYJ supplied expert testimony, and the Board was free to place greater weight on that testimony than the lay testimony supplied by Plaintiffs. 2T94-5 to 13.

Finally, the trial court addressed the sufficiency of the Board's twenty-five page Resolution. 2T96-13; see 0414-0439. Preliminarily, the trial court noted that because the Application required no variances, and BYJ agreed to abandon its request to land bank the parking spaces if the Board requested the

parking spaces be built, BYJ was essentially entitled to an approval as of right. 2T98-1 to 12. In light of this, although there were some errors in the Resolution with regard to called out variance relief and design waivers, “the [trial] [c]ourt [was] satisfied that . . . any errors in the [R]esolution are minor and shouldn’t submit the applicant to a remand under the circumstances.” 2T99-6 to 11. Thus, the trial court dismissed Plaintiffs’ complaint with prejudice. 2T99-24 to 25. Thereafter, Plaintiffs filed this appeal.

STANDARD OF REVIEW

A planning board's decision is entitled to a presumption of validity, and the reviewing court accords substantial deference to the board. Davis Enters. v. Karpf, 105 N.J. 476, 485 (1987); Cell S., Inc. v. Zoning Bd. Of Adjustment, 172 N.J. 75, 81-82 (2002). "The proper scope of judicial review . . . is not to suggest a decision that may be better than the one made by the board of adjustment or planning board, but to determine whether the board could reasonably have reached its decision." Davis Enters., 105 N.J. at 485 (citing Kramer v. Board of Adjustment, Sea Girt, 45 N.J. 268, 285, 212 A.2d 153 (1965)). Therefore, a board's decision should not be disturbed unless it was arbitrary, capricious or unreasonable. Price v. Himeji, LLC, 214 N.J. 263, 284 (2013) (quoting Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965)). The scope of review is limited, and the reviewing court must restrict its evaluation to the record that was established before the planning board. Kempner v. Edison Twp., 54 N.J. Super. 408, 417 (App. Div. 1959) Pullen v. S. Plainfield Plan. Bd., 291 N.J. Super. 303, 312 (Law Div. 1995), aff'd 291 N.J. Super. 1, 6 (App. Div. 1996). The burden to overcome the presumption of validity accorded to the board rests with the challenging party. Dunbar Homes, Inc. v. Zoning Bd. Of Adjustment of Twp. of Franklin, 233 N.J. 546, 558 (2018). The deference that is provided to municipal board decisions is founded on the recognition that members of a board, as

members of the community, have particularized knowledge and expertise regarding their community's characteristics and are best equipped to evaluate the merits of an application. See CBS Outdoor, Inc. v. Borough of Lebanon Plan. Bd., 414 N.J. Super. 563, 577-78 (App. Div. 2010).

In addition, as it pertains to Plaintiffs' motion to supplement the record, the trial court's decision to admit or deny extraneous evidence that was not before the Planning Board is also entitled to substantial deference because the decision to admit or exclude evidence is within the trial judge's discretion. Bd. of Educ. of Clifton v. Zoning Bd. of Adjustment of Clifton, 409 N.J. Super. 389, 430 (App. Div. 2009). Accordingly, this court will employ an abuse of discretion standard of review. Ibid. Under the abuse of discretion standard of review, "[r]eversal is unwarranted unless the trial judge's ruling was 'so wide of the mark that a manifest denial of justice resulted.'" Ibid. (quoting State v. Carter, 91 N.J. 86, 106 (1982)).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFFS' MOTION TO SUPPLEMENT THE RECORD BECAUSE NO CONFLICT OF INTEREST EXISTED BETWEEN THE BOARD CHAIRMAN AND THE UNDERSIGNED.

As stated above, when a party challenges the validity of a decision from the planning board, judicial review of that decision is limited to the record that was established before the board. Generally, neither party is permitted to refer to or rely on matters or evidence that were not in the record. Kempner, 54 N.J. Super. at 417; see also N.J.S.A. 40:55D-17(a) (“Such appeal shall be decided by the governing body only upon the record established before the board of adjustment.”). Accordingly, motions to supplement the record on appeal are only granted in very rare circumstances. See Haggerty v. Red Bank Borough Zoning Bd. of Adjustment, 385 N.J. Super. 501, 515 n.4 (App. Div. 2006).

The facts of this case do not warrant expanding the record because Plaintiffs’ argument that a conflict of interest existed between the undersigned and the Board Chairman is without merit. Surely, planning board members may not participate in the evaluation of an application where “their direct or indirect private interests may be at variance with the impartial performance of their public duty.” Randolph v. Brigantine Plan. Bd., 405 N.J. Super. 215, 225 (App.

Div. 2009) (quoting Aldom v. Borough of Roseland, 42 N.J. Super. 495, 501 (App. Div. 1956)). “No member of the planning board shall be permitted to act on any matter in which he has, either directly or indirectly, any personal or financial interest.” N.J.S.A. 40:55D-23.

There are four types of conflicts that would require a board member’s recusal: (1) direct pecuniary interests; (2) indirect pecuniary interests; (3) direct personal interest; and (4) indirect personal interests. Wyzykowski v. Rizas, 132 N.J. 509, 525-26 (1993). The New Jersey Supreme Court in Wyzykowski explained:

(1) “Direct pecuniary interests,” when an official votes on a matter benefitting the official’s own property or affording a direct financial gain; (2) “Indirect pecuniary interests,” when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or family member; (3) “Direct personal interest,” when an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance, as in the case of a councilman’s mother being in the nursing home subject to the zoning issue; and (4) “Indirect Personal Interest,” when an official votes on a matter in which an individual’s judgment may be affected because of membership in some organization and a desire to help that organization further its policies.

[132 N.J. at 525-26 (citing Michael A. Pane, Conflict of Interest: Sometimes a Confusing Maze, Part II, New Jersey Municipalities, March 1980, at 8-9).]

The gravamen of the inquiry for determining whether a conflict exists that is sufficient to taint municipal proceedings turns on whether there is the appearance of the potential for a conflict. Randolph, 405 N.J. Super. At 227 (quoting Thompson v. Atlantic City, 190 N.J. 359, 374 (2007)). However, where the argued conflicting interest is too remote or speculative, such an attenuated conflict does not taint the proceedings. Piscitelli v. Garfield Zoning Bd. of Adjustment, 237 N.J. 333, 353 (2019).

Here, Plaintiffs' argument fails. First, upon reading Plaintiffs' brief, it would be easy to assume that the BMOJ shul that the Board Chairman is alleged to be a member of is the subject of the Application in this appeal. Simply, it is not. BYJ's Application in this case was to the Planning Board for the construction of three schools. The BMOJ matter involved an application to the Zoning Board to construct a shul that was filed after the Planning Board took action on BYJ's Application. See Pa0863-0865. The Board Chairman is a member of the Planning Board, not the Zoning Board, and the two applications are before two completely different boards to construct different types of development on separate pieces of property.

Further, Plaintiffs repeatedly state that an attorney-client relationship exists between the Board Chairman and the undersigned. This is simply untrue. BMOJ, the applicant in the separate matter, not the Board Chairman, maintained

an attorney-client relationship with the undersigned's Firm. "When . . . the prospective client requests the lawyer to undertake the representation, the lawyer agrees to do so and preliminary conversations are held between the attorney and client regarding the case, then an attorney-client relationship is created." Herbert v. Haytaian, 292 N.J. Super. 426, 436 (App. Div. 1996). Thus, the Board Chairman is clearly not the undersigned's client. Nor has the undersigned ever discussed the BMOJ Application with the Board Chairman or have knowledge that the Board Chairman is a member of BMOJ. Plaintiffs' counsel is simply attempting to engage in a fishing expedition.

The trial court's decision to deny Plaintiffs' motion to expand the record clearly was not "so wide of the mark that a manifest denial of justice resulted." Carter, 91 N.J. at 106. The trial court reasoned "there is no allegation of direct participation, but only that the attorney in another matter before a different board where [the] Board Chairman [sic] is a congregant -- or alleged to be a congregant -- is also the attorney in . . . this [A]pplication before the [P]lanning [B]oard. It is this Court's view that the connection is too remote." 1T48:22 to 49:4. As the trial court correctly found, the cases upon which Plaintiffs rely involved various situations where there was a direct connection between the applicant or application that was before the board and a member of that respective board.

Plaintiffs turn to Piscitelli for support; however, as the trial court noted, that case is distinguishable from this matter. In Piscitelli, two of the properties that were the subject of the zoning board application were co-owned by a physician who was the president of the Garfield Board of Education. 237 N.J. at 338-39. Several of the board members were either directly employed by the Board of Education or had family members that were employed by the Board of Education. Ibid. Because of the potential influence the president of the Board of Education could potentially have had over certain aspects of some of the board member's employment, a personal interest could exist. Id. at 357-58. Further, several of the board members were patients or had immediate family members who were patients of the doctors who were other co-owners of the property. Id. at 339. Regarding this disqualifying interest, the Court held "if a Zoning Board member or his or her immediate family member had a meaningful patient-physician relationship with any of those three doctors during or before the Board proceedings, that Board member had a disqualifying conflict of interest. We reach that conclusion because of the special nature of the patient-physician relationship — a relationship in which the patient 'reposes the greatest trust for health-care decisions' in the hands of the physician." Id. at 359 (emphasis in original) (quoting Perez v. Wyeth Labs. Inc., 161 N.J. 1, 30 (1999)).

Contrary to Plaintiffs’ analysis, each of the disqualifying interests in Piscitelli arose from the application that was before the board in that case. Id. at 357-59. Thus, there was a direct connection between one or more of the board members and the applicant. Here, the undersigned maintained an attorney-client relationship with BMOJ, in connection with a separate application before a different board that the Board Chairman does not serve on. The Board Chairman’s relationship to the undersigned is at best attenuated, and there is no direct relationship between the Board Chairman and BYJ in this matter before the Planning Board. That the trial court turned to VNO 1105 State Highway 36 v. Twp. of Hazlet, 33 N.J. Tax 20 (App. Div. 2021) for “some . . . persuasive application” should not be sufficient to disturb its judgment. 1T50:5-8. The court only turned to that case after finding that the alleged connection was too remote and even tempered his own reliance on that case by stating it is an unpublished opinion not directly on point. 1T50:5-8. He readily admitted that Plaintiffs’ counsel failed to cite to a single case that was factually similar, and he also could not find any authority to support Plaintiffs’ counsel’s claim of a conflict of interest that would disqualify the Board Chairman from acting on the BYJ Application. 1T:49:5-9; 51:11-18.

To be sure, none of the four categories of conflicts, as described in Wyzykowski, are applicable. See Wyzykowski, 132 N.J. at 525-26. There is no

evidence in the record below which demonstrates that the Board Chairman has any direct relationship to BYJ or the undersigned. Thus, the Board Chairman's affirmative vote on the Application did not directly benefit his own property, result in a financial gain, or involve a relative or close friend in a non-financial way. Neither is this purported conflict an indirect pecuniary interest or indirect personal interest as there is no evidence that the Board Chairman financially benefitted by approving BYJ's Application and/or that he will personally benefit from the construction of the all-girls schools.

Further, Plaintiffs' argument that the Board Chairman's commentary in an editorial in the *Jackson Pulse* from 2023 created the appearance of bias in favor of BYJ's Application is similarly without merit. See Pa0882-0884. A public statement by a board member does not automatically demonstrate the existence of bias. Kramer, 45 N.J. at 282. As the Supreme Court stated in Kramer, when public commentary does not discuss the viability or subject matter of the application, a conflict does not exist. Id. at 282-83. Here, the editorial in the *Jackson Pulse* did not discuss the merits of BYJ's Application. Thus, the Board Chairman's comments do not taint the Planning Board's approval, and the trial court did not abuse its discretion in denying the motion to supplement the record. See also Lincoln Heights Ass'n v. Twp. of Cranford Plan. Bd., 314 N.J. Super. 366, 383 (Law Div., aff'd, 321 N.J. Super. 355 (App.

Div. 1999) (“The campaign statements cited by [plaintiff] as indicating partiality in favor of the Edwards' application did not address the Edwards supermarket in particular, nor did they indicate the particular site on which a new supermarket was to be situated.”).

Finally, there is no evidence to support Plaintiffs’ argument that the Board Chairman’s conduct at the Planning Board hearings illustrates that the proceedings were unfair and impartial. The Board Chairman merely agreed with the undersigned, stated procedural facts, and voted against a motion to carry the March 23 hearing to a later date. Under Plaintiffs’ logic, a board member agreeing with a certain representation made by an applicant over the opinion of an objector constitutes a showing of impartiality. Logically, were this to be true, planning boards would not be able to function efficiently. Thus, the trial court did not abuse its discretion in denying Plaintiffs’ motion to supplement the record and the January 5, 2024 order should be affirmed.

POINT II

THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS' COMPLAINT BECAUSE THE PLANNING BOARD WAS REQUIRED TO APPROVE THIS FULLY CONFORMING APPLICATION.

Pursuant to well-established caselaw and the Municipal Land Use Law (“MLUL”), N.J.S.A. 40:55D-1 to -163, the planning board must grant an approval to a conforming application, and the failure of the board to do so is arbitrary, capricious, and unreasonable. See N.J.S.A. 40:55D-46(b). “A planning board has no authority to deny site plan approval based on its view that a use permitted under the zoning ordinance . . . is inconsistent with principles of sound zoning.” Saratoga v. Borough of W. Paterson, 346 N.J. Super. 569, 582-83 (App. Div. 2002). The MLUL therefore establishes that so long as an applicant’s proposal complies with the township’s ordinance, it “shall” grant preliminary and final major site plan approval. N.J.S.A. 40:55D-46(b), -50(a).

This court’s decision in Saratoga supports this foundational concept of land use law. There, the plaintiffs challenged an ordinance that rezoned an adjoining parcel to permit high density residential development. Saratoga, 346 N.J. Super. at 581. Importantly, this court, in rejecting the plaintiffs’ argument, held:

A planning board’s authority in reviewing an application for site plan or subdivision approval is

limited to determining whether a development plan conforms with the zoning ordinance and the applicable provisions of the site plan or subdivision ordinance. A planning board has no authority to deny site plan approval based on its review that a use permitted under the zoning ordinance, such as, in this case, high density residential development, is inconsistent with principles of sound zoning.

[Id. at 582 (emphasis added).]

Thus, so long as the applicant's proposal complies with the municipality's zoning ordinance, the planning board must approve the application, and the failure to do so violates the MLUL and is arbitrary, capricious, and unreasonable.

In addition, this Court had occasion to recognize these standards in Morris County Fair Housing Council v. Boonton Township, 230 N.J. Super. 345 (App. Div. 1989) where the applicant applied for site plan approval and variance relief related to a deviation from the minimum landscape buffer requirements. In Morris, the board denied the application because it believed the applicant could not develop the site without the variance and compliance with the buffer requirement was particularly important in light of the altered facades of the Mount Laurel units. This Court held that the board acted arbitrarily and capriciously in denying site plan approval and the buffer variance because the applicant would not commit to a particular architectural style, reasoning "a

planning board cannot deny an application for site plan approval based on architectural considerations if the application meets the standards set forth in the site plan ordinance.” Id. at 357 (citing Sheston Oil v. Borough of Avalon Plan. Bd., 214 N.J. Super. 593, 598-99 (App. Div. 1987)); see also Wawa Food Market v. Plan. Bd. of Ship Bottom, 227 N.J. Super. 29, 40 (App. Div. 1988) (“While site plan review gives the Board wide discretion to assure compliance with the objectives and requirements of the site plan ordinance, ‘it was never intended to include the legislative or quasi-legislative power to prohibit a permitted use.’” (quoting PRB Enters., Inc. v. S. Brunswick Plan. Bd., 105 N.J. 1, 7 (1987))).

Further, in Pizzo Mantin v. Township of Randolph, the Supreme Court, in reviewing a subdivision application, held that a planning board’s authority is limited by the municipality’s zoning and land use ordinance. 137 N.J. 216 (1994). In that case, plaintiff submitted an application for preliminary major subdivision approval and variances for minimum lot width standards. Id. at 228. The board originally denied the application, and plaintiff revised its submission such that its new application for preliminary major subdivision required no variances and met all bulk requirements. Ibid. The board however, denied the fully conforming application due to “general considerations” of public welfare,

“general purposes” of the land use laws, and “sound planning.” Ibid. The Court reversed the planning board’s denial of the application, concluding that:

[A] planning board does not have the broad authority to consider a subdivision application in light of general welfare or of the purposes of zoning under the MLUL or general principles of sound planning apart from the standards of applicable local subdivision and zoning ordinances.

[Id. at 228.]

The Pizzo Mantin Court also reasoned N.J.S.A. 40:55D-48 requires that, on compliance with the subdivision ordinance and the MLUL, the Application “shall be approved.” Id. at 229. A planning board’s review of a subdivision application “must be made within the framework of the standards prescribed by the subdivision and, if pertinent, zoning ordinances.” Ibid. Thus, the Court reaffirmed the principle that when an applicant establishes conformance with the pertinent ordinance requirements, the board must grant an approval. See also Florham Park Inv. Assoc. v. Plan. Bd. of Madison, 92 N.J. Super. 598 (Law Div. 1966) (stating the board’s decision denying fully conforming subdivision application because of concern that at some time in the future a portion of the property would be taken for road widening was arbitrary and unreasonable); see generally Dunkin’ Donuts of N.J., Inc. v. N. Brunswick Twp. Plan. Bd., 193 N.J. Super. 513 (App. Div. 1984) (stating that an application may not be denied

because of off-site conditions when it meets the site plan ordinance requirements).

Here, BYJ's Application for preliminary and final major site plan approval did not require any variances and only sought one design waiver to land bank 136 parking spaces. Private schools are a permitted principal use and a gymnasium is a permitted accessory use in the R-3 Zone, which is where the Property is located. Pa0611.⁹ Neither the Application submitted on October 4, 2022, nor the site plans show that BYJ needed variance relief for minimum lot width. Pa0530; 0634. The only reason the legal notice called out a potential variance for lot width, "if deemed necessary," was out of an abundance of caution because the Board Consultants erroneously pointed out in their review letters that same might be required. Da52.

The record that was before the Board and the trial court clearly shows that BYJ's Application complies with the lot width requirement. Indeed, as BYJ's Engineer testified, once the lots are consolidated, the new lot width will be 660

⁹ While Jackson Ordinance Section 244-46 notes that Subsection A(7), which permits private schools, was repealed. That action was subsequently found to be unlawful in WR Property LLC v. Twp. of Jackson, Docket No.: 17-3226 (MAS) (DEA), 2021 WL 1790642, at *13 (D.N.J. May 5, 2021), and that subsection was reinstated. Da66-81.

feet, greatly exceeding the 200-foot minimum that is required in the R-3 Zone. Pa0100 (100:1-9).

As the trial court noted, while the Board Planner's review letter called out a potential lot width variance, "the record clearly shows that the [A]pplication[] and site plans did not seek variance relief for . . . minimum lot width because there was none needed given the consolidation." 2T91:21-24. Further still, because BYJ agreed to construct the 136 land banked parking spaces if the Board requested it, BYJ would have been entitled to an approval as of right. 2T99:18-20. Thus, given the Board's particular expertise on land use matters and knowledge of the particular conditions of Jackson Township, and the substantial evidence presented in support of the Application, which was uncontradicted by countering expert testimony, the Board's decision was not arbitrary, capricious, or unreasonable. The trial court's Order dismissing Plaintiffs' complaint should therefore be affirmed.

POINT III

THE TRIAL COURT PROPERLY FOUND THAT THE PLANNING BOARD'S DECISION WAS NOT ARBITRARY, CAPRICIOUS, AND UNREASONABLE BECAUSE BYJ COMPLIED WITH ORDINANCE SECTION 244-189.

Next, Plaintiffs argue that the trial court erred when it reasoned that the Board could disregard Plaintiffs' non-expert testimony that there were alleged errors in BYJ's EIS and that the Board did not have jurisdiction to consider environmental issues or otherwise condition its approval on the Applicant obtaining DEP approval.¹⁰ Pb29-37. There is nothing in the trial court's opinion related to these issues that would warrant reversal. Again, decisions of the Planning Board are accorded a presumption of validity. The trial court did not err when it reasoned that the record supports the Board's decision to not give weight to Plaintiffs' non-expert testimony and the assumption that the EIS was defective.

Jackson Township Ordinance Section 244-189 requires the applicant to prepare an EIS and submit same to the Environmental Commission for their consideration. Pa0643-0647. As the trial court noted, the Applicant complied with that requirement, and the Environmental Commission issued its advisory

¹⁰ This section responds to Plaintiffs' Points II, III, and IV.

opinion stating that “There are no immediate environmental concerns with the [A]pplication.” Pa0827. On cross-examination, Plaintiffs presented their arguments that the EIS was based on erroneous information. That the Board decided to accept BYJ’s expert testimony over Plaintiffs’ lay testimony does not make its decision arbitrary, capricious, or unreasonable. See N.Y. SMSA, LP v. Bd. of Adjustment, Twp. of Weehawken, 370 N.J. Super. 319, 323, 328-29, 338 (App. Div. 2004) (finding the positive expert testimony provided by the applicant could not be overcome when the objector’s presented no expert testimony of their own and relied upon the lay testimony that the construction of the proposed telecommunications antennas on an apartment building roof would diminish property values); Bd. of Educ. of Clifton, 409 N.J. Super. at 435 (“The Board cannot rely upon unsubstantiated allegations, nor can it rely upon net opinions that are unsupported by any studies or data.”); Reich v. Borough of Fort Lee Zoning Bd. of Adjustment, 414 N.J. Super. 483, 505, 507 (App. Div. 2010) (reversing the board’s denial of a use variance where the board “accorded substantial weight to the testimony of lay objectors” and rejected the plaintiff’s expert’s undisputed survey that demonstrated the availability of parking).

Further, there are no factual errors apparent in the trial court’s analysis that would warrant disturbing its judgment. That Mr. Bova did not discuss the GeoWeb map during his testimony is irrelevant. The Court, in referencing

“Bova’s” lay opinion testimony could just as easily be construed as not an error at all and could merely be interpreted as the Court referring to Plaintiffs in general, as Mr. Bova is a named Plaintiff in this case. 2T94:5-13. Additionally, contrary to Plaintiffs’ arguments, BYJ’s Planner did not authenticate the GeoWeb map to such an extent that it contradicted his own testimony.¹¹ Rather, BYJ’s Planner merely agreed with Plaintiffs’ counsel that Exhibit O-1 was indeed a screenshot from GeoWeb and that he had no particular reason to dispute its veracity. See Pa0241-0243 (46:3 to 48:10), 0702. Notably, Plaintiffs leave out that BYJ’s Planner confirmed that it would make no difference whether the Property was Rank four or not because BYJ is not proposing to develop any portion of the site that these environmental parameters could theoretically apply. See Pa0234-235 (39:12 to 40:10).

In addition, the trial court properly found that the “the [B]oard properly deferred review of the alleged environmental issues to the DEP because . . . it is the agency with jurisdiction over wildlife habitat classification.” 2T94-20 to 23. That Jackson Township maintains an ordinance that requires an EIS to be submitted to the Environmental Commission does not bestow upon the Board

¹¹ Plaintiffs’ brief, on several occasions, falsely states that BYJ’s Planner testified that development would occur in threatened and endangered species habitat. Pb30, 34, 36.

the sweeping ability to deny a conforming site plan application based upon minute, unsupported environmental constraints. The MLUL clearly provides that planning boards do not have the power to withhold an approval simply based upon what an outside agency, such as the DEP, may or may not do with an application. See N.J.S.A. 40:55D-22(b).

In W.L. Goodfellows and Company of Turnersville, Inc. v. Washington Township Planning Board, this Court reversed the board's denial of site plan approval because of the applicant's failure, at the time of the hearings, to obtain a drainage easement. 345 N.J. Super. 109, 116-18 (App. Div. 2001). Because the board's consultant's found the drainage plan was feasible, the board was required to grant the approval conditioned upon the plaintiff obtaining the easement. Id. at 117-18. Here, the Board was powerless to withhold BYJ's approval based upon whether or not the DEP would approve the project. Further, the Resolution specifically conditions the approval based on BYJ obtaining all applicable outside agency approvals. That BYJ had not yet obtained DEP approval for the project at the time of this litigation is irrelevant as same will be done during the resolution compliance period once this litigation has concluded. There is no evidence in the record to support that BYJ has not complied with Jackson Ordinance Section 244-189, nor do Plaintiffs state with any particularity which portions of that provision BYJ had failed to satisfy.

POINT IV

**THE TRIAL COURT DID NOT ERR IN
CONCLUDING THAT PLAINTIFFS’ DUE
PROCESS RIGHTS WERE NOT VIOLATED
BECAUSE THE BOARD PROVIDED
PLAINTIFFS’ COUNSEL WITH AMPLE
OPPORTUNITY TO CONDUCT HIS CROSS-
EXAMINATION.**

The MLUL provides that an objector has a right to cross-examine the applicant’s expert witnesses. See N.J.S.A. 40:55D-10(d). That right, however, is not limitless. The Board chairperson has the discretion to limit duplicative or irrelevant testimony. Shim v. Washington Twp. Plan. Bd., 298 N.J. Super. 395, 413-14 (App. Div. 1997) (quoting William M. Cox, New Jersey Zoning and Land Use Administration § 27–3.4 at 454 (15th ed. 1996)).

Plaintiffs argue the trial court erred because their Attorney was not given a fair opportunity to cross-examine BYJ’s witnesses. Pb37-40. In support, Plaintiffs contend that while questioning BYJ’s Planner, several Board Members and the Board Attorney interrupted Plaintiffs’ counsel, stifling his ability to effectively conduct his cross-examination. Pb39.

Here, there is no evidence in the record to support Plaintiffs’ due process arguments. The trial court concluded that the record unveiled that Plaintiffs were “given nearly two hours for cross-examination” and did not find the Board’s conduct unlawful. 2T92:18 to 93:8. Rather, “the [B]oard attempted to provide

guidance to the [P]laintiffs' counsel where it viewed the line of questioning as irrelevant or beyond the witness' expertise, . . . instructing the attorney to move on and only then instructed the attorney to move on." 2T93:2-6.

A review of the proceedings unveils that Plaintiffs' due process rights were not violated because any interruption in Plaintiffs' counsel's cross-examination was due to repetitious and irrelevant questioning. In Shim, this Court recognized that cross-examination is subject to the control of the board. 298 N.J. Super. at 413. There, the Court rejected the plaintiffs' due process arguments because their questioning focused on the irrelevant desire to exact "a promise from the Church that it would not oppose any operation or future transfer of plaintiffs' liquor license." Ibid. The Court also reasoned that the board did not err when it dismissed the plaintiffs' irrelevant assertion "that the Church's proposal should be rejected because of the Church's tax-exempt status" and disallowed commentary from the Alcoholic Beverage Commission because those contentions were immaterial. Ibid. The Court concluded that the board did not act arbitrarily and capriciously, expressing that "[w]hile objectors are entitled to be heard, 'they should be kept orderly by the chairperson, and the chair may reasonably limit duplications of testimony or testimony as to irrelevant matters.'" Id. at 413-14 (quoting Cox, supra, § 27-3.4 at 454).

Here, Plaintiffs' counsel was provided sufficient opportunity to cross-examine BYJ's Planner. While Plaintiffs' counsel was interrupted, such conduct did not demonstrate "unjustified impatience." Pb39. The record demonstrates that the reason for the Board's interjections was due to his continued and repetitious insistence that BYJ's Planner's EIS was erroneous and focused on issues that were beyond the jurisdiction of the Board. For example, when the Board Attorney advised Plaintiffs' counsel that the environmental concerns he was raising were beyond the Board's jurisdiction, he continued a similar line of questioning. The Board, at that point decided to exercise its discretion and curtail Plaintiffs' counsel's line of questioning. The Board did not foreclose questioning entirely and only sought to keep it limited to relevant issues.

Plaintiffs' reliance on Witt v. Borough of Maywood, is distinguishable. In Witt, the plaintiffs were not provided with the opportunity to address all of the relevant planning issues in the application when the board refused to carry the meeting to a future date. 328 N.J. Super. 432, 454 (Law Div. 1998). There, the plaintiffs were not provided "even a chance to convince the [p]lanning [b]oard that approval of the site plan and variances was wrong." Ibid. Unlike Witt, the Board's lack of patience displayed to Plaintiffs' counsel was due to his own irrelevant and duplicative questioning. The record supports the trial court's

finding the Plaintiffs were provided a significant amount of time to cross-examine BYJ's witnesses.

POINT V

THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT DESIGN WAIVER RELIEF WAS NOT REQUIRED PURSUANT TO ORDINANCE SECTION 244-187(J)(1)(C) BECAUSE BYJ WAS PERMITTED TO HAVE MORE THAN ONE ACCESS DRIVE.

Next, Plaintiffs argue that this matter should be remanded because BYJ needed design waiver relief for providing two access drives. Pb40-43. BYJ's Application provided for two access drives on East Veterans Highway leading to the three parking lots that contain over 100 spaces each. While the trial court's interpretation of the Ordinance is not entitled to deference, Manalapan Realty, 140 N.J. 366, 378 (1995), BYJ was permitted to have two access drives and the Resolution's failure to mention it is immaterial.

Jackson Township Ordinance Section 244-197 illuminates the design standards for off-street parking for non-residential developments. Subsection 197(J)(1) states that parking lots with fifty or fewer spaces "shall be designed to provide the following minimum design requirements." Pa0621 (emphasis added). Included among those requirements, subsection 197(J)(1)(c) provides that "[n]ot more than one two-way access drive or two one-way access drives shall be permitted on any street." Pa0621. With regard to parking lots that contain fifty or more spaces, Subsection 197(J)(2)(a) provides that the minimum design standards of subsection 197(J)(1)(c) shall be incorporated. Pa0622.

Importantly, however, for large parking lots, “[p]roperties having a continuous frontage in excess of 500 feet on any one street shall be permitted two-way and one-way access drives providing for not more than two entrance and two exit movements on the street[,]” pursuant to Subsection 197(J)(2)(a)(3)(d). Ibid. (emphasis added).

Taken together, the use of the term “minimum design standards” at Subsection 197(J)(2)(a) for large parking lots implies that large parking areas are required to have at least one access drive, and where the property has a continuous frontage of at least 500 feet, that property is permitted to have not more than two full movement access drives on a street pursuant to Subsection 197(J)(2)(a)(3)(d). Pa0622. Plaintiffs’ reliance on Subsection 197(J)(1)(c)’s restriction for small parking lots is inapplicable here. Logic dictates that large parking areas, such as here, that provide for 300-plus parking spaces would be allowed under the Ordinance to have more than one access point to provide for greater circulation capabilities and safety due to the volume of vehicles entering and exiting the site. See generally Mountain Hill, L.L.C. v. Zoning Bd. of Adjustment of Twp. of Middletown, 403 N.J. Super. 210, 236 (App. Div. 2008) (“[R]estrictions in zoning ordinances must be clearly expressed and doubts are resolved in favor of the property owner.” (quoting Graves v. Bloomfield Plan. Bd., 97 N.J. Super. 306, 312 (Law Div. 1967))).

Furthermore, as stated above, Subsection 197(J)(2)(a)(3)(d) provides “Properties having a continuous frontage in excess of 500 feet on any one street shall be permitted two-way and one-way access drives providing for not more than two entrance and two exit movements on the street.” Pa0622. The trial court found that BYJ’s property had frontage in excess of 500 feet and was therefore permitted to have two full movement access drives. 2T96:2-5. That decision is supported by the record.

Plaintiffs argue that the Property does not have continuous frontage exceeding 500 feet and thus cannot have two access drives. Pb42. While the entirety of the Property’s frontage is not continuous, the continuous frontage on existing Lot 6 is 530 feet. See Pa0634; 2T52:22 to 53:6. Thus, notwithstanding the fact that having the requirement to not have more than one access drive is inapplicable, the Property nonetheless has continuous frontage in excess of 500 feet, satisfying Subsection 197(J)(2)(a)(3)(d). BYJ therefore did not need to seek a design waiver from Section 197(J)(1)(c), and the trial court’s decision relating to same was not erroneous.

POINT VI

**THE TRIAL COURT’S DECISION SHOULD BE
AFFIRMED BECAUSE NO VARIANCE FOR LOT
WIDTH WAS REQUIRED.**

The trial court found that a review of the record confirms that BYJ neither sought a variance for lot width, nor was one required. The court reasoned that once BYJ consolidated the lots, the 200-foot lot width requirement was met. 2T91:11-24. The trial court noted that lot consolidation is a condition of the approval, and BYJ’s Engineer’s testimony, the Application, and site plans demonstrate that the Property has a lot width of 660 feet. 2T91:19-24.

Plaintiffs argue that the trial court erred in concluding that a lot width variance was not required because it should have rejected BYJ’s Expert’s testimony and deferred solely to the Board Planner’s review letter, which provided that a lot width variance may be required. Pa0562, 0570; Pb43-46.

Here, the site plans demonstrate that the lot width will comply with the Ordinance requirements. At the beginning of the first hearing, the Board’s Planner stated that “[w]e had noted variances that [the Board Engineer] had discussed previously and would like some testimony to make a determination as to what relief is specifically required for this [A]pplication.” Pa0004-0005 (4:23 to 5:2). BYJ’s Engineer refuted these contentions:

[T]his project is not proposed to be subdivided[,] and I think that was part of the confusion that in the past,

school applications like this were. But this one is not. Once the lot is consolidated[,] it will have over 600 feet of lot width and will be a fully conforming lot. So that would not require a variance, in my opinion.

[Pa0100 (100:1-9).]

BYJ's Engineer's position that a lot width variance was not required was not disputed by either the Board's Planner or Board's Engineer at any point during the two hearings. Thus, once the lots are consolidated the lot width of the Property will be 660 feet, which exceeds the 200-foot minimum by 460 feet, meaning that no variance was required. Pa0100 (100:1-7); Pa0634.

The Board granted BYJ an approval after hearing the testimony at the February and March hearings, and reviewing the Application, plans, and other supporting documentation. The Board was satisfied that no variance relief was necessary, and it approved this fully conforming Application as required pursuant to the MLUL. See N.J.S.A. 40:55D-46(b); N.J.S.A. 40:55D-50(a). Further, Plaintiffs did not provide contrary expert testimony to refute BYJ's position, nor did they assert at the public hearings that such relief was required. Therefore, the record supports the trial court's decision and the Board's determination should be upheld.

POINT VII

THE TRIAL COURT CORRECTLY CONCLUDED THAT MINOR DEFICIENCIES IN THE RESOLUTION DO NOT RENDER THE BOARD'S DECISION ARBITRARY, CAPRICIOUS, OR UNREASONABLE.

Finally, Plaintiffs argue that the Board's decision was arbitrary, capricious, and unreasonable and a remand is required because the twenty-five page Resolution is defective. Pb46-48. Pursuant to the MLUL, a resolution cannot consist of mere recitations of hearing testimony, nor may it make conclusory statements that are couched in statutory language. N.Y. SMSA, LP, 370 N.J. Super. at 332-33; Cell S., Inc., 172 N.J. at 88. In making the determination as to whether a resolution is statutorily sufficient, the focus is on whether the Board's decision is supported by substantial evidence in the record. Kramer, 45 N.J. at 298.

With regard to the Resolution, the trial court found that although there were errors therein, specifically with regard to indicating that lot width and building height variances and certain design waivers were sought, those errors were minor. 2T99:6-11. In the trial court's view, those deficiencies were not sufficient to warrant subjecting this fully conforming application — with the exception of one design waiver — to a remand. 2T99:9-11. In addition, because BYJ agreed to construct the land banked parking spaces if the Board deemed

same necessary, this Application was essentially entitled to an approval as of right. 2T99:18-23.

In N.Y. SMSA, LP, this Court found the board's resolution deficient because it merely identified the applicant, described the site plan, summarily discussed the testimony presented, restated only a select number of comments made by the board and public, and offered only a "sole conclusory statement . . . couched in statutory language." N.Y. SMSA, LP, 370 N.J. Super. at 333. In addition, in Morris County Fair Housing Council Boonton Township, a planning board resolution was deficient because it was comprised of almost exclusively quotations from the board's consultant's review letters and several statements in one of the reports was erroneous and inconsistent with other evidence contained in the record. 228 N.J. Super. 635, 647 (Law Div. 1988).

These cases are distinguishable. As the trial court held, the Resolution's deficiencies do not rise to such a level to warrant a remand. See Shakoore Supermarkets, Inc. v. Old Bridge Twp. Plan. Bd., 420 N.J. Super. 193, 199-200 (App. Div. 2011). As stated previously, the record demonstrates that BYJ did not need to seek relief for a minimum lot width variance or a design waiver to provide more than one access drive. Further, a detailed recitation of findings related to Plaintiffs' irrelevant and immaterial environmental issues was unnecessary. Thus, given the fully conforming nature of BYJ's Application, any

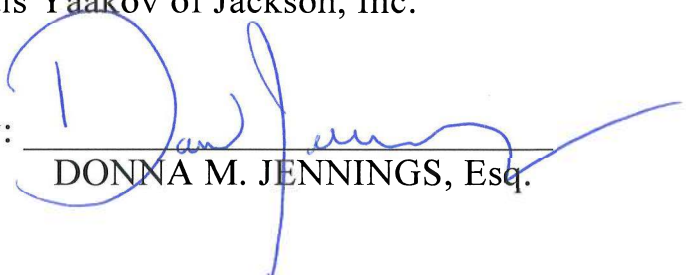
technical deficiencies present in the Resolution amount to harmless error and do not warrant a remand. See generally State v. Lazo, 209 N.J. 9, 26 (2012) (“The harmless error standard ‘requires that there be “some degree of possibility that [the error] led to an unjust result. The possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached.”’” (alterations in original) (first quoting State v. R.B., 183 N.J. 308, 330 (2005)) (and then quoting State v. Bankston, 63 N.J. 263, 273, 307 A.2d 65 (1973))).

CONCLUSION

For the foregoing reasons, BYJ respectfully requests that this Court affirm the trial court's Orders denying Plaintiffs' motion to supplement the record and dismissing Plaintiffs' complaint with prejudice.

Respectfully submitted,

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By: 

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Dated: January 24, 2025

JEFFREY BOVA, CELESTE BOVA,	:	SUPERIOR COURT OF NEW JERSEY
HIS WIFE, ARNOLD LOMITA AND	:	APPEALATE DIVISION
PAULINE LOMITA, HIS WIFE AND	:	DOCKET NO.: A-003881-23
OMEGA FARM, LLC	:	
	:	APPEAL FROM
Plaintiffs/Appellants,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION: OCEAN COUNTY
vs.	:	DOCKET NUMBER: OCN-L-1723-23
	:	
TOWNSHIP OF JACKSON	:	
PLANNING BOARD and BAIS	:	SAT BELOW
YAAKOV OF JACKSON, INC	:	HON. FRANCIS R. HODGSON, JR.,
	:	A.J.S.C.
	:	
Defendants/Respondents.	:	

**BRIEF ON BEHALF OF DEFENDANT/RESPONDENT
JACKSON PLANNING BOARD**

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PRELIMINARY STATEMENT

Defendant Jackson Township (“Jackson”) Planning Board (“PB”) adopts the Preliminary Statement of Defendant Bais Yaakov of Jackson’s (“BYJ”) Response Brief (“Db”). (Db1-3).

PROCEDURAL HISTORY & STATEMENT OF FACTS

PB adopts the Procedural History & Statement of Facts from BYJ’s Response Brief. (Db3-17)

STANDARD OF REVIEW

PB adopts the Standard of Review from BYJ’s Response Brief. (Db18-19)

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE PLAINTIFF’S MOTION TO SUPPLEMENT THE RECORD BECAUSE NO CONFLICT OF INTEREST EXISTS

In the present matter, Tzvi Herman’s (“Mr. Herman”) membership of a shul, that of BMOJ, Inc. (“BMOJ”), that was previously represented by Ms. Donna Jennings, Esq. (“Ms. Jennings”) does not qualify as a conflict of interest. Ms. Jennings previously represented BMOJ in a separate matter before the Jackson

Township Zoning Board of Adjustment (“ZB”). 1T6:20 to 7:9; 1T9:25 to 11:3. In Jackson, the ZB is an entirely separate and distinct quasi-judicial board which shares no jurisdiction with the PB.

In Grabowsky v. Township of Montclair, 115 A.3d 815, 817 (N.J. 2015), the Supreme Court of New Jersey grappled with whether a zoning ordinance, which permitted the construction of an assisted-living facility, should be invalidated due to the mayor and councilmember’s leadership in a church that would be adjacent to the proposed facility. The Supreme Court of New Jersey recognized that the church was not a primary member of the application, but the neighboring properties and property owners are certainly considered to have an interest in the application as interested parties. Further, the court emphasized that, although membership in an organization does not automatically impute the interests of that organization to the members, the unique circumstance of a leadership position can be reasonably interpreted to impute the interests of that organization to the members, the unique circumstances if a leadership position can be reasonably interpreted to impute those organizational interests. Thus, in the present matter, the trial court correctly concluded that this association was “too remote to give rise to any conflict of interest.” 1T 51:3-4.

Mr. Herman’s comments in an editorial piece with the Jackson Pulse do not rise to the level of a conflict of interest. Pursuant to Wyzkowski v. Rizas, 132 N.J. 509, 524 (1993), “[a] conflict of interest arises when the public official has an

interest not shared in common with the other members of the public.” It is reasonable to infer that a great many individuals within Jackson would have favorable thoughts and deliver positive statements regarding the establishment of religious schools. Additionally, in Wyzkowski, the Supreme Court of New Jersey outlined certain interests that, if held by the voting member, would violate the conflict of interest standard, stating:

- (1) Direct pecuniary interests, when an official votes on a matter benefitting the official's own property or affording a direct financial gain;
- (2) Indirect pecuniary interests, when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or family member;
- (3) Direct personal interest, when an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance . . . ; and
- (4) Indirect Personal Interest, when an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies.

In the present matter, Mr. Herman exhibits none of these four categories of conflict of interest. BMOJ was not a party to the application that was heard before that PB and which is the subject of this litigation. The application was brought by BYJ. BYJ has no affiliation with Mr. Herman or BMOJ. Further, the BMOJ application is before the ZB and not the PB. Mr. Herman has no affiliation with the Jackson ZB. By alleging that a connection existed between Mr. Herman and Ms.

Jennings, the Plaintiff was simply attempting to fabricate an issue where none existed for the purpose of going on an unwarranted phishing expedition.

Based upon the above, the trial court's decision to deny Plaintiffs' motion to expand the record clearly was not "so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982).

Further, the Plaintiffs' argument that Mr. Herman's editorial in the *Jackson Pulse* created a conflict or bias is entirely without merit. See Pa0882-0884. A public statement by a board member does not automatically demonstrate the existence of bias. Kramer v. Board of Adjustment, Sea Girt, 45 N.J. 268, 285, 212 A.2d 153 (1965). At no point in time did Mr. Herman discuss the merits of the BYJ application publicly. The *Jackson Pulse* article solely dealt with BMOJ. No crossover contamination exists for the Plaintiffs to rely upon to claim improper bias. Thus, Mr. Herman's *Jackson Pulse* comments do not taint the PB's approval, and the Trial Court did not abuse its discretion in denying the motion to supplement the record.

POINT II

THE APPLICATION WAS A FULLY CONFORMING APPLICATION AND THE TRIAL COURT PROPERLY DISMISSED THE PLAINTIFFS' COMPLAINT AS A CONSEQUENCE THEREOF

Pursuant to the Municipal Land Use Law ("MLUL") N.J.S.A. 40:55D-1 et. Seq., a Planning Board must grant an approval to a conforming application. Failure to do so is arbitrary, capricious, and unreasonable. N.J.S.A. 40:55D-46(b). This is

well established law and a foundational principal to the MLUL. Therefore, as long as an applicant's application complies with the township's ordinance, it "shall" grant preliminary and final major site plan approval. N.J.S.A. 40:55D-46(b). A significant amount of caselaw sets forth this base layer standard of the MLUL: Saratoga v. Borough of W. Paterson, 346 N.J. Super. 569, 582-83 (App. Div. 2002); County Fair Housing Council v. Boonton Township, 230 N.J. Super. 345 (App. Div. 1989); Florham Park Inv. Assoc. v. Plan. Bd. of Madison, 92 N.J. Super. 598 (Law Div. 1966); and Pizzo Mantin v. Township of Randolph, 137 N.J. 216 (1994).

In the present matter, the BYJ application was variance free and only sought a single design waiver to land bank 136 parking spaces in exchange for open area for children to play on. Within the R-3 Zone, private schools are a permitted principal use and a gymnasium is a permitted accessory use. Pa0611. As such, for all intents and purposes the BYJ application was totally conforming and pursuant to the MLUL the applicant was entitled to an approval based upon ordinance compliance.

However, this is simply not true and such an allegation is a red herring. BYJ's Application complies with the lot width requirement as it was constructed from the very beginning to include a lot consolidation. The lot consolidation was a condition of the approval. (2T91:11-18). Once the lots are consolidated, the new lot width will be 660 feet, greatly exceeding the 200-foot minimum that is required in the R-3

Zone. Testimony was provided on this very issue during the hearing multiple times. Pa0100 (1T100:1-9).

Additionally, Plaintiffs did not provide any expert testimony to contradict BYJ's presentation that the Application was totally conforming, nor did they provide any evidence that a lot width variance was required. Thus, given the Board's particular expertise on land use matters, the PB's decision was not arbitrary, capricious, or unreasonable, and the Trial Court's Order dismissing Plaintiffs' complaint should therefore be affirmed.

POINT III

THE PLANNING BOARD'S DECISION WAS NOT ARBITRARY, CAPRICIOUS, AND UNREASONABLE BECAUSE BYJ COMPLIED WITH ORDINANCE SECTION 244-189

During the pendency of this litigation the Trial Court found that the record established that BYJ complied with Ordinance Section 244-189. That section of the Township's zoning ordinance required BYJ to prepare an EIS in conformance with the submission requirements contained therein. Subsection C further states that the EIS "shall be submitted to the Environmental Commission for its review and recommendation." Pa0647. BYJ complied with this checklist requirement. BYJ prepared an EIS and submitted it to the Environmental Commission for review. The Environmental Commission reviewed the EIS and issued its recommendation to the PB for its consideration. The result was that the Environmental Commission did not

find any environmental constraints that would prohibit the construction of the schools. Pa0827.

Plaintiffs argue that the Planning Board should have disregarded the Environmental Commission's findings based upon Plaintiffs' non-expert testimony. However, BYJ's Planner testified that the Property was not environmentally compromised, which is further confirmed in the Environmental Commission's review. Further, the approval was conditioned upon BYJ obtaining any applicable outside agency approvals, which would include that of the DEP. Pa0436. There was thus substantial, if not overwhelming, evidence in the record to support the Board's decision.

Simply because the PB decided to accept BYJ's expert testimony over Plaintiffs' lay testimony does not make its decision arbitrary, capricious, or unreasonable. This legal precedence can be found within Bd. of Educ. of Clifton, 409 N.J. Super. at 435, as the Court found that a "Board cannot rely upon unsubstantiated allegations, nor can it rely upon net opinions that are unsupported by any studies or data." In addition, the Trial Court properly found that "the [B]oard properly deferred review of the alleged environmental issues to the DEP because ... it is the agency with jurisdiction over wildlife habitat classification." (2T94-20 to 23). The MLUL clearly provides that planning boards do not have the power to

withhold an approval simply based upon what an outside agency, such as the DEP, may or may not do with an application. N.J.S.A. 40:55D-22(b).

POINT IV

THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE PLAINTIFFS' DUE PROCESS RIGHTS WERE NOT VIOLATED AS THE PLAINTIFFS WERE PROVIDED A SIGNIFICANT AMOUNT OF TIME TO CONDUCT THEIR CROSS EXAMINATION

Although the MLUL provides that an objector has a right to cross-examine the applicant's expert witnesses, this right is not infinite and boundless. N.J.S.A. 40:55D-10(d). To make sure that parties do not deviate too far afield from what a Board has the jurisdiction to hear, the MLUL grants the Board chairperson the right to limit duplicative and/or irrelevant testimony. Shim v. Washington Twp. Plan. Bd., 298 N.J. Super. 395, 413-14 (App. Div. 1997).

Plaintiffs argue they were not given a fair opportunity to cross-examine BYJ's witnesses. Pb37-40. Plaintiffs contend that while questioning BYJ's Planner, the PB Attorney interrupted Plaintiffs' counsel, preventing counsel from effectively conducting his cross-examination. Pb39.

However, the Trial Court concluded that the Plaintiffs were "given nearly two hours for cross-examination" and did not find the Board's conduct violative of due process. 2T92:18 to 93:8. Rather, "the [B]oard attempted to provide guidance to the [P]laintiffs' counsel where it viewed the line of questioning as irrelevant or beyond

the witness' expertise, ... instructing the attorney to move on and only then instructed the attorney to move on." 2T93:2-6.

To support the Trial Court's own findings, even a cursory review of the record would uncover that no due process rights were violated. The Plaintiffs' cross-examination was ripe with repetitious and irrelevant questioning. For example, when advised that the environmental concerns Plaintiffs' counsel was raising were beyond the PB's jurisdiction, he continued a similar line of questioning. This occurred repeatedly for well over two hours. Only then did the PB exercise its right under the MLUL to limit the counsel's line of questioning to relevant issues within the PB's jurisdiction. Thus, the record supports the Trial Court's finding that the Plaintiffs were provided a significant amount of time to cross-examine BYJ's witnesses.

POINT V

THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT BYJ WAS PERMITTED TO HAVE MORE THAN ONE ACCESS DRIVE AND THAT DESIGN WAIVER RELIEF WAS NOT REQUIRED PURSUANT TO ORDINANCE SECTION 244-187(J)(1)(C)

Jackson Township Ordinance Section 244-197 sets forth the design standards for off-street parking for non-residential developments. Subsection 197(J)(1) states that parking lots with fifty or fewer spaces "shall be designed to provide the following minimum design requirements." Pa0621. Included among those requirements, subsection 197(J)(1)(c) provides that "[n]ot more than one two-way access drive or two one-way access drives shall be permitted on any street." Pa0621.

With regard to parking lots that contain fifty or more spaces, Subsection 197(J)(2)(a) provides that the minimum design standards of subsection 197(J)(1)(c) shall be incorporated. Pa0622. Importantly, Subsection 197(J)(2)(a)(3)(d), for large parking lots, “[p]roperties having a continuous frontage in excess of 500 feet on any one street shall be permitted two-way and one-way access drives providing for not more than two entrance and two exit movements on the street.” Pa0622.

When all of the above referenced subsections are looked at in conjunction to one another it becomes clear that large parking areas are required to have **at least** one access drive. Additionally, from a health and safety standpoint common sense clearly provides that a 300 plus parking spaces should be allowed more than one access point if not expressly prohibited by ordinance. No such prohibition or restriction exists in Jackson for parking areas this large. Graves v. Bloomfield Plan. Bd., 97 N.J. Super. 306, 312 (Law Div. 1967) “restrictions in zoning ordinances must be clearly expressed and doubts are resolved in favor of the property owner.”

Plaintiffs argue that the Property does not have continuous frontage exceeding 500 feet and thus cannot have two access drives. Pb42. However, this is simply not true. The trial court found that BYJ’s property had frontage in excess of 500 feet and was therefore permitted to have two access drives. 2T96:2-5. While the entirety of the Property’s frontage is not continuous, the continuous frontage on Lot 6 is 530

feet. Pa0634; 2T52:22 to 53:6. Therefore no waiver or variance was required and the Trial Court did not err in its conclusion.

POINT VI

THE TRIAL COURT'S DETERMINATION THAT MINOR DEFICIENCIES IN THE RESOLUTION DO NOT RENDER THE BOARD'S DECISION ARBITRARY, CAPRICIOUS, OR UNREASONABLE SHOULD NOT BE OVERTURNED

Pursuant to the MLUL, a resolution cannot consist of mere recitations of hearing testimony, nor may it make conclusory statements that are couched in statutory language. N.Y. SMSA, LP v. Bd. of Adjustment, Twp. of Weehawken, 370 N.J. Super. 319, 323, 328-29, 338 (App. Div. 2004). In making the determination as to whether a resolution is statutorily sufficient, the focus is on whether the Board's decision is supported by substantial evidence in the record. Kramer v. Board of Adjustment, Sea Girt, 45 N.J. 268, 285, 212 A.2d 153 (1965).

With regard to the Resolution, although the Trial Court found de-minimis errors, there existed no statutory deficiencies 2T99:6-11. The Court further found that these de-minimis errors did not warrant subjecting a fully conforming application to a remand. 2T99:18-23. The reason for this is because the Resolution meticulously reiterated the facts and circumstances which occurred within the hearing, and adequately contained the reasoning for the PB's decision. A detailed recitation of findings related to Plaintiffs' irrelevant and immaterial environmental issues was unnecessary and did not need to take place.

In N.Y. SMSA, LP, this Court found the board's resolution deficient because it provided a mere skeleton outline of the information and testimony presented and simply restated a select number of comments made by the board and public, and offered only a "sole conclusory statement ... couched in statutory language." N.Y. SMSA, LP, 370 N.J. Super. at 333. Such is not the case presently before the Court. As such, the Resolution's de-minimis deficiencies do not rise to such a level to warrant a remand. Shakoor Supermarkets, Inc. v. Old Bridge Twp. Plan. Bd., 420 N.J. Super. 193, 199-200 (App. Div. 2011).

Thus, given the fully conforming nature of BYJ's Application, any technical deficiencies present in the Resolution amount to harmless error and do not warrant a remand. As specified in State v. Lazo, 209 N.J. 9, 26 (2012) the harmless error standard "requires that there be 'some degree of possibility that [the error] led to an unjust result ... The possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached.'"

CONCLUSION

For the foregoing reasons, the PB believes that the Appellate Court should affirm the Trial Court's orders denying Plaintiffs' motion to supplement the record and dismissing Plaintiffs' complaint with prejudice.

Respectfully submitted,

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By: _____
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JEFFREY BOVA, CELESTE BOVA, : SUPERIOR COURT OF NEW JERSEY
HIS WIFE, ARNOLD LOMITA : APPELLATE DIVISION
AND PAULINE LOMITA, HIS : DOCKET NO.: A-003881-23
WIFE AND OMEGA FARM, LLC

Plaintiffs/Appellants

VS.

TOWNSHIP OF JACKSON :
PLANNING BOARD and BAIS :
YAAKOV of JACKSON, INC. :
P.J.CH.P

Defendants/Respondents

: CIVIL ACTION

: ON APPEAL FROM:

SUPERIOR CRT OF NEW JERSEY
: LAW DIVISION, OCEAN COUNTY
Docket No.: OCN-L-1727-23

: SAT BELOW:

: HON. FRANCIS R. HODGSON, JR.,
A.J.S.C.

:

**REPLY BRIEF ON BEHALF OF PLAINTIFFS/APPELLANTS,
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PRELIMINARY STATEMENT

The continuing efforts of Bais Yaakov of Jackson, Inc. (“the Applicant” or “BYJ”) and the Planning Board of Jackson Township (“the Planning Board” or “the Board”) to trivialize the serious concerns identified by Plaintiffs/Appellants should not distract this Court from the errors made by the Planning Board in granting BYJ’s application and the trial court in dismissing Plaintiffs’ complaint. Specifically, in adopting Resolution 2023-13, the Planning Board disregarded the errors identified in the Environmental Impact Statement (“EIS”) submitted by the Applicant, failed to make any factual findings or conclusions of law, and ignored potentially required variances and waivers identified by its own professionals. Further, the entire proceeding before the Planning Board was tainted by the undisclosed attorney-client relationship between Board Chairman Tsvi Herman and Donna Jennings, counsel for the Applicant. The trial court erred in denying Plaintiffs the opportunity to expand the record in order to address this issue. Far from “feeble theories,” these are errors that require remand to ensure the Planning Board conducts a full and fair hearing.

ARGUMENT

POINT I: THE COURT SHOULD DISREGARD BYJ’S COUNSEL’S EFFORTS TO EXPAND THE RECORD WITH UNSWORN FACTUAL STATEMENTS IN HER BRIEF. (1T 28:1-53:6, 0479-80, 0844-54)

As set forth in Plaintiffs' opening brief, Plaintiffs moved to expand the record before the trial court based on information their counsel learned after the proceedings before the Planning Board concluded. Specifically, counsel learned that Ms. Jennings represented Bais Medrash of Jackson ("BMOJ") in connection with a site plan approval application in Jackson. Pa 0856 ¶¶ 4-5 & Pa 0860, 0863-67. Through a news article on APP.com, Joseph Michelini, Plaintiffs' counsel, learned that Mr. Herman was a member of the board of BMOJ, and thus Ms. Jennings's client. Pa 0856-57 ¶¶ 6, 10 & Pa 0869-71. The trial court denied the motion to expand the record, effectively denying Plaintiffs the opportunity to investigate this apparent conflict of interest.

In her brief before this Court, Ms. Jennings provides new facts, stating that she has not "discussed the BMOJ Application with the Board Chairman," nor does she "have knowledge that the Board Chairman is a member of BMOJ." Br. on Behalf of Def./Resp. Bais Yaakov of Jackson, Inc. at 23 [hereinafter "BYJ Br."]. Not only is this a blatant effort to expand the record before this Court based on unsworn factual statements from Ms. Jennings, but it is also clearly untrue in part. Ms. Jennings is well aware that Mr. Herman is a member of the board of BMOJ based on the news article submitted by Plaintiffs in the trial court. Pa 0856-57 ¶¶ 6, 10 & Pa 0869-71.

This Court should ignore this effort to expand the record and instead

remand the matter in order to allow Plaintiffs the opportunity to investigate the facts underlying the apparent undisclosed attorney-client relationship between the Board Chairman and counsel for the Applicant.

POINT II: THE APPARENT ATTORNEY-CLIENT RELATIONSHIP BETWEEN THE BOARD CHAIRMAN AND BYJ'S COUNSEL CREATES A CONFLICT OF INTEREST. (1T 28:1-53:6, 0479-80, 0844-54)

Instead of addressing the alleged attorney-client relationship between the Board Chairman and BYJ's counsel as the basis for a conflict of interest, the trial court characterized the issue as the alleged sharing of professionals. Based on this characterization, the trial court concluded that the connection between Ms. Jennings and Mr. Herman was "too remote to give rise to any conflict of interest," and therefore denied Plaintiffs' motion to supplement the record. 1T 51:3-4.

Both BYJ and the Planning Board echo the trial court's framing of the conflict issue, characterizing it as the alleged sharing of professionals. Drawing on this conclusion, BYJ argues that "[t]he Board Chairman's relationship to [BYJ's counsel] is at best attenuated, and there is no direct relationship between the Board Chairman and BYJ." BYJ Br. at 25. As repeatedly explained by Plaintiffs, the potential conflict is based on an alleged attorney-client relationship between the Board Chairman and BYJ's counsel, not a sharing of professionals. Describing an attorney-client relationship as

“attenuated” contradicts ethics rules and case law. *See, e.g., Delaney v. Dickey*, 244 N.J. 466, 484 (2020) (“[P]reserving the fiduciary responsibility that lawyers owe their clients’ is a principle to which this Court is firmly committed.” (quoting *In re S.G.*, 175 N.J. 132, 139 (2003))); *In re Honig*, 10 N.J. 74, 78 (1952) (“All fiduciaries are held to a duty of fairness, good faith and fidelity, but an attorney is held to an even higher degree of responsibility in these matters than is required of all others.”).

The apparent attorney-client relationship between the Board Chairman and BYJ’s counsel creates a conflict of interest because the Board Chairman’s “personal interest ‘might reasonably be expected to impair [his] objectivity or independence of judgment.’” *Piscitelli v. City of Garfield Zoning Bd. of Adjustment*, 237 N.J. 333, 338 (2019) (quoting N.J.S.A. 40A:9-22.5(d)). “The question is whether there is a potential for conflict, not whether the conflicting interest actually influenced the action.” *Haggerty v. Red Bank Borough Zoning Bd. of Adjustment*, 385 N.J. Super. 501, 513 (App. Div. 2006).

Taking a different, but similarly misplaced, approach, the Planning Board bases its opposition on the fact that the Zoning Board “is an entirely separate and distinct quasi-judicial board which shares no jurisdiction with the [Planning Board].” Br. on Behalf of Def./Resp. Jackson Twp. Planning Bd. at 2 [hereinafter “Planning Bd. Br.”]. The conflict Plaintiffs allege arises from

the apparent attorney-client relationship between the Planning Board Chairman and BYJ's counsel, which has nothing to do with the jurisdictional differences between the Zoning and Planning Boards.

Based on the Board Chairman's apparent, and undisclosed, conflict of interest, this Court should remand this matter for a new hearing, free of any conflicts.

POINT III: THE APPLICATION FAILS TO COMPLY WITH THE REQUIREMENTS OF JACKSON TOWNSHIP ORDINANCE § 244-197(J)(1)(c). (2T 88:18-90:8, 0481, 0525-27, 0829-30)

Jackson Township Ordinance § 244-197 sets forth the requirements for off-street parking in non-residential developments. As explained in Plaintiffs' opening brief, the statutory scheme set forth in Jackson Township Ordinance § 244-197(J) required a waiver for the Applicant's proposed two two-way entrances.

In seeking affirmance of the trial court's decision that no waiver was required, BYJ attempts to rewrite the requirements for off-street parking in non-residential developments set forth in Jackson Township Ordinance § 244-197 and ignores the clear facts presented in the record. "As a general rule of statutory construction, we look first to the language of the statute. If the statute is clear and unambiguous on its face and admits of only one interpretation, we need delve no deeper than the act's literal terms to divine the

Legislature's intent." *State v. S.R.*, 175 N.J. 23, 31 (2002) (quoting *State v. Butler*, 89 N.J. 220, 226 (1982)).

The plain language of Jackson Township Ordinance § 244-197(J)(2)(a)(1) requires that "[p]arking lots which have a capacity for parking more than 50 vehicles shall incorporate . . . [a]ll the minimum design standards for small parking areas." Pa 0622. One of those minimum design requirements is that "[n]ot more than one two-way access drive or two one-way access drives shall be permitted on any street." Jackson Township Ordinance § 244-197(J)(1)(c). Pa 0621. Jackson Township Ordinance § 244-197(J)(2)(a)(3)(d) provides an exception to those minimum design standards for "[p]roperties having a continuous frontage in excess of 500 feet on any one street." Pa 0622. Those properties "shall be permitted two-way and one-way access drives providing for not more than two entrance and two exit movements on the street." *Id.*

Instead of looking at the plain language of the ordinance, BYJ asks this Court to consider what the language of the ordinance "implies." BYJ Br. at 43. The Court should decline the invitation to read meaning into the ordinance and simply apply its plain language. That plain language limits the number of entrances to a nonresidential property unless there is continuous frontage in excess of 500 feet. Although BYJ asserts that "the Property nonetheless has

continuous frontage in excess of 500 feet, satisfying Subsection 197(J)(2)(a)(3)(d),” BYJ Br. at 44, the two two-way entrances are not located in that continuous frontage. Instead, the entrances are split between the two, noncontinuous sections of frontage on East Veteran’s Highway. That is, as is clearly apparent from BYJ’s plans, one of the proposed two-way entrances is located on the 137-foot rectangular leg of lot 2 and the other is located on lot 6.¹ Pa 0633-40, 0641. Lots 3, 4, and 5 are between the rectangular leg of lot 2 and the body of lot 6, thus creating a break in the frontage on East Veterans Highway.

Applying the plain language of the ordinance to the facts on record, the proposed design plan does not fall within the exception set forth in Jackson Township’s Ordinance § 244-197(J)(2)(a)(3)(d). Since the application did not satisfy the exception in the ordinance, the application required a waiver pursuant to Jackson Township Ordinance § 244-197(J). Therefore, this matter should be remanded for further proceedings.

**POINT IV: THE ENVIRONMENTAL IMPACT STATEMENT
SUBMITTED BY BYJ DID NOT COMPLY WITH THE
REQUIREMENTS OF JACKSON TOWNSHIP ORDINANCE § 244-189.
(2T 93:20-95:21, 0481, 0519-23, 0830-36)**

Both BYJ and the Board raise various arguments regarding the issues

¹ As discussed in detail in Plaintiffs’ opening brief, this quirk in the Property’s layout also impacts the application of the definition of lot width.

Plaintiffs identified with the Environmental Impact Statement (“EIS”) prepared by BYJ’s expert, Ian Borden. None of these arguments have any merit.

BYJ argues that the trial court correctly found that BYJ complied with Jackson Township Ordinance § 244-189 which, according to BYJ, “requires the applicant to prepare an EIS and submit same to the Environmental Commission for their consideration.” BYJ Br. at 34. In a similar vein, the Board asserts that BYJ complied with the “checklist requirement” of submitting an EIS. Planning Bd. Br. at 6. These arguments confuse and conflate the requirements of N.J.S.A. 40:55D-10.3 and Jackson Township Ordinance § 244-189, which have different purposes.

Section 40:55D-10.3 sets forth the requirements for determining when “[a]n application for development shall be complete for purposes of commencing the applicable time period for action by a municipal agency.” For that purpose, an “application shall be deemed complete upon the expiration of the 45-day period for purposes of commencing the applicable time period, unless . . . the application lacks information indicated on a checklist adopted by ordinance.” N.J.S.A. 40:55D-10.3. Submission of an EIS is apparently one of the items included in Jackson Township’s checklist.

On the other hand, Jackson Township Ordinance § 244-189 sets forth in great detail the purpose of and requirements for an EIS. Pa 0643-47. Among

those detailed requirements, the ordinance establishes fourteen subject areas to be addressed in the inventory of environmental conditions, as well as fourteen topics required for “an assessment of both the adverse and positive impacts during and after construction.” Jackson Township Ordinance § 244-189(B)(2) & (3). In preparing the EIS, the ordinance requires that “as much original research as necessary shall be conducted to develop the environmental impact statement. The inventory required by this section shall be accompanied by a log indicating the dates, times, weather conditions and specific site locations of all on-site inspections.” Jackson Township Ordinance § 244-189(B). In fact, recognizing the detailed and technical nature of the information required in the EIS, the ordinance provides that “the reviewing Board may enlist the services of a qualified environmental scientist to review the materials submitted by the applicant.” Jackson Township Ordinance § 244-189(A)(2)(d).

As is apparent from comparing these two statutory mandates, they serve very different purposes. While submission of the EIS is a procedural requirement pursuant to N.J.S.A. 40:55D-10.3, Jackson Township Ordinance § 244-189 establishes the substantive requirements for an EIS. BYJ and the Board imply that submission of an EIS to the Environmental Commission for its review and recommendation is all that Jackson Township Ordinance § 244-

189 requires. To the contrary, that section requires either the Planning Board or the Zoning Board of Adjustment to review the EIS. § 244-189(A)(2)(d). The Environmental Commission's role is limited to providing a recommendation to the Board. § 244-189(C). That advisory role is consistent with the state statute authorizing the creation of environmental commissions. N.J.S.A. 40:55D-27 (noting that the members of an environmental commission "shall have no power to vote or take other action required of the board"). Nothing in the record or the Resolution indicates that the Board performed its required review. Not only that, but the Board, by failing to do anything more than acknowledge the Applicant's submission of the EIS in the Resolution, apparently ignored the deficiencies in the EIS identified by Mr. Michelini. BYJ and the Board similarly seek to ignore these deficiencies. BYJ Br. at 34; Planning Bd. Br. at 7.

During his often-interrupted cross examination of Mr. Borden, Mr. Michelini established that Mr. Borden had not complied with various requirements set forth in Jackson Township Ordinance Section 244-189. For example, Mr. Borden failed to submit "a log indicating the dates, times, weather conditions and specific site locations of all on-site inspections" as required by Jackson Township Ordinance Section 244-189(B). Pa 0221-22 (26:5-27:2). In fact, during one of the interruptions from the Board attorney,

Mr. Michelini brought these shortcomings to the attention of the Board, by observing that he “believe[d] [he had] shown a couple of inaccuracies already.” Pa 0230 (35:23-24). In addition, as discussed in Plaintiffs’ opening brief, Mr. Borden admitted during cross examination that the EIS incorrectly identified the wildlife ranking of the site.² Besides requiring an EIS to identify endangered and threatened species on the site to be developed, Jackson Township Ordinance § 244-189(B)(2)(j) requires an applicant to contact “[t]he New Jersey Natural Heritage Program and/or the New Jersey Division of Fish, Game and Wildlife . . . regarding all endangered or threatened species sizings within three miles of the project” when preparing an EIS. Plaintiffs provided testimony that property abutting the Applicant’s property was a “rank 4 zone with habitat for Timber Rattlers as well as potential nesting and occupation by the owls . . . Bard [sic] Owl.” Pa 0355 (160:7-14). The EIS made no mention of the endangered and threatened species habitat on the adjoining property, further demonstrating the inaccuracy of the EIS. The Board made no findings

² BYJ faults Plaintiffs for “leav[ing] out that BYJ’s Planner confirmed that it would make no difference whether the Property was Rank four or not because BYJ is not proposing to develop any portion of the site that these environmental parameters could theoretically apply.” BYJ Br. at 36. However, BYJ’s recounting of Mr. Borden’s testimony omits a significant fact: in making this comment, Mr. Borden was only addressing the ranking of the area within the 300-foot riparian buffer where no development was proposed. Pa 0234 (39:12-25). Since development was prohibited in this buffer area, the ranking of that area makes no difference. However, BYJ acknowledged the error in the EIS regarding the rankings of the rest of the site, noting that Mr. Borden “merely stated that the exhibit shows area [sic] *that are going to be developed* as Rank four.” BYJ Br. at 9 (emphasis added).

or conclusions regarding these inaccuracies.

This Court has recognized the difference between an application being complete for purposes of N.J.S.A. 40:55D-10.3 and the need for accuracy in the materials submitted in support of an application. In *Schmidhausler v. Plan. Bd. of Borough of Lake Como*, 408 N.J. Super. 1 (App. Div. 2009), this Court compared the procedural requirement of an application's completeness with the need for accuracy in the application materials. In that case, as part of its application, the applicant had submitted a survey that was later found to contain mistaken information. Upon realizing the mistake in the survey, the applicant provided a corrected survey. The trial court had reasoned that the original, inaccurate survey deprived the planning board of jurisdiction over the application. This Court concluded that the inaccuracy of the survey "did not retroactively cause the application to be incomplete." *Id.* at 12. However, this Court then noted that

N.J.S.A. 40:55D-10.3 states in pertinent part:

[t]he municipal agency may subsequently require correction of any information found to be in error and submission of additional information not specified in the ordinance or any revisions in the accompanying documents, as are reasonably necessary to make an informed decision as to whether the requirements necessary for approval of the application for development have been met. The application shall not be deemed incomplete for lack of any such additional information or any revisions in the accompanying documents so required by the municipal agency.

Id. (quoting N.J.S.A. 40:55D–10.3).

Clearly, N.J.S.A. 40:55D–10.3 establishes a baseline for an application’s completeness, but then authorizes planning boards to require applicants to correct inaccuracies in the application materials. Instead of following this statutory mandate, the Board here simply ignored the inaccuracies in the EIS. The trial court erred when it observed that “Jackson Ordinance section 244-189 requires an EIS to be submitted to the township Environmental Commission who will provide a recommendation. There is no dispute that that is exactly what was done here.” 2T 95:7-10. Concluding that all § 244-189 required was the submission of an EIS, regardless of its contents, ignores the distinction between the form and the substance of an application. In addition, the trial court disregarded the distinction between the roles of the Board and the Environmental Commission.

Remand is required to allow the Applicant to submit a corrected, accurate EIS for the Board’s review, as required by Jackson Township Ordinance § 244-189.

POINT V: THE PLANNING BOARD’S DECISION WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE BECAUSE IT FAILED TO MAKE REQUIRED CREDIBILITY DETERMINATIONS. (2T 93:20-95:21, 0481, 0515-23, 0830-34)

BYJ observes “[t]hat the Board decided to accept BYJ’s expert testimony over Plaintiffs’ lay testimony does not make its decision arbitrary,

capricious, or unreasonable.” *Id.* at 35. The Board similarly notes that “because the PB decided to accept BYJ’s expert testimony over Plaintiffs’ lay testimony does not make its decision arbitrary, capricious, or unreasonable.” Planning Bd. Br. at 7. These assertions are not supported by the record or legal precedent.

As an initial matter, the Board was of course free to accept or reject the testimony provided by Mr. Borden and Jeffrey Bova. However, the Board was required to explain its reasons for doing so. *Board of Educ. of City of Clifton v. Zoning Bd. of Adjustment City of Clifton*, 409 N.J. Super. 389, 434-35 (App. Div. 2009) (“Zoning boards may choose which witnesses, including expert witnesses, to believe . . . [but] the choice must be explained, particularly where the board rejects the testimony of facially reasonable witnesses.”). Since the Resolution lacks any discussion of the EIS and the disputed facts surrounding its accuracy, it is impossible for this Court to know the Planning Board’s reasons for rejecting all of the testimony on the environmental issues. *New York SMSA v. Bd. of Adjustment of Tp. of Weehawken*, 370 N.J. Super. 319, 333 (App. Div. 2004) (“[T]he resolution must contain sufficient findings, based on the proofs submitted, to satisfy a reviewing court that the board has analyzed the [application]. . . in light of the municipality’s . . . zoning ordinances. Without such findings of fact and conclusions of law, the reviewing court has

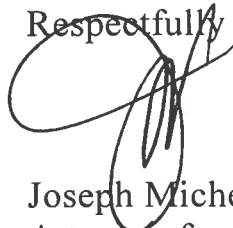
no way of knowing the basis for the board's decision." (internal citations omitted)). Absent any statement or explanation in the Resolution, BYJ and the Board ask this Court to simply assume that the Board weighed the evidence, made credibility determinations, and reached a decision to disregard the inaccuracies identified in the EIS. Precedent prohibits this Court from making that assumption. The Board was required to provide an explanation of its decision.

Remand is required to allow the Board to explain its decision to disregard the testimony and evidence identifying inaccuracies in the EIS.

CONCLUSION

For the foregoing reasons, Plaintiffs ask that the trial court's order denying Plaintiffs' motion to supplement the record be reversed, the trial court's order dismissing Plaintiffs' complaint be vacated, and the Resolution be vacated and the application remanded for further hearing so that the Planning Board can correct the errors identified above and ensure the application is reviewed in a fair and impartial proceeding where Plaintiffs' due process rights are protected.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Joseph Michelini', is written over a circular stamp or seal.

Joseph Michelini
Attorney for Plaintiffs/Appellants