SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No.: A-4095-23

THE ALLIANCE FOR SUSTAINABLE COMMUNITIES, GREGORY WESTFALL, KENNETH MAYBERG, PATRICIA BROWN, and MARY WOEHR, Appellants, vs. ROBBINSVILLE TOWNSHIP LAND USE BOARD and JOHNSON DEVELOPMENT ASSOCIATES, INC., Respondents.	**Civil Action** On Appeal From: Superior Court of New Jersey Mercer County - Law Division Docket No.: MER-L-1543-23 Sat Below: Hon. Robert Lougy, A.J.S.C.

BRIEF OF APPELLANTS THE ALLIANCE FOR SUSTAINABLE COMMUNITIES, GREGORY WESTFALL, KENNETH MAYBERG, PATRICIA BROWN, AND MARY WOEHR

LIEBERMAN BLECHER & SINKEVICH, P.C.
10 Jefferson Plaza, Suite 400
Princeton, New Jersey 08540
Tel: 732-355-1311 Fax: 732-355-1310
SJL@LiebermanBlecher.com
CMG@LiebermanBlecher.com

Of Counsel: Stuart J. Lieberman, Esq. (ID: 016521986)
On the Brief: C. Michael Gan, Esq. (ID: 229302016)

Dated: November 14, 2024

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PROCEDURAL HISTORY

On December 6, 2022, December 13, 2022, February 21, 2023, February 28, 2023, March 21, 2023, March 22, 2023, and March 28, 2023, the Board held public hearings for preliminary and final site plan approval for the Johnson application. On March 28, 2023, the Board approved the site plan application. On June 27, 2023, the Board adopted a Resolution of Memorialization. On August 10, 2023, Plaintiffs filed an action in lieu of prerogative writs.

On February 14, 2024, Plaintiffs filed a Motion for Leave to Amend the Complaint to add a claim of lack of quorum. On February 22, 2024, Applicant opposed the motion but requested the matter be remanded to the Board for a new vote to cure the lack of quorum argument. On March 1, 2024, the Trial Court entered an order remanding the matter to the Board for the limited purpose of allowing the Board to reconsider and re-adopt the Resolution.

On March 19, 2024, the Board re-adopted the Resolution of Memorialization. On March 20, 2024, Plaintiff Borough of Allentown dismissed its claims in this matter and is no longer participating in this matter. On April 25, 2024, Plaintiffs filed an Order to Show Cause for Preliminary and Temporary restraints, for an alleged violation of the Environmental Rights Act and the Freshwater Wetlands Protection Act, and Flood Hazard Area Permit. On May 7, 2024, Plaintiffs filed a Motion for Leave to File an Amended Complaint to add

claims of violation of Environmental Rights Act and Freshwater Wetlands Protection Act, and Flood Hazard Area Permit, as well as to add the current owner of the subject property as an indispensable party. On May 8, 2024, the order to show case for preliminary restraints was denied.

On May 10, 2024, Plaintiffs filed a request for emergent appeal on the denial of the Order to Show Cause for preliminary restraints. On May 10, 2024, the Appellate Division granted the request for leave to file an emergent motion on short notice, Docket No. AM-468-23. On May 17, 2024, the Appellate Division denied the motion for leave to appeal and motion for preliminary injunction.

On June 7, 2024, the Trial Court heard oral argument on Plaintiffs' Motion for Leave to File an Amended Complaint. On July 1, 2024, the Trial Court denied the Motion for Leave to File an Amended Complaint. On July 9, 2024, the Trial Court heard oral argument on the Prerogative Writ matter. On July 15, 2024, the Trial Court uploaded the Order dismissing Plaintiffs' Complaint with Prejudice.

STATEMENT OF FACTS

Defendant Johnson Development Associates, Inc. ("Applicant") sought preliminary and final site plan approval, and an additional three (3) variances and five (5) design waivers. The three variances involved the minimum side yard setback for the principal structure on Lot 31.02, the minimum buffer adjoining

the residential property as related to lot 31.02, and the height of the headache bar.[1] The five design waivers include (1) waiver of requirement for shade trees on the Robbinsville-Allentown Road right of way, (2) waiver of requirement for landscaping around the parking and loading areas, (3) waiver of requirement for landscaping of the islands within the parking area, (4) waiver of the internal pedestrian circulation requirement, and (5) waiver to use HDPE instead of Ductile Iron Pipe.

The Board held hearings on the application on December 6, 2022, December 13, 2022, February 21, 2023, February 28, 2023, March 21, 2023, March 22, 2023, and March 28, 2023[2].

As part of the application materials, Applicant submitted an environmental impact assessment as required by Township Ordinance. (Pa370-Pa529). The environmental impact assessment, among other things, discussed

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[1] Plaintiffs are not challenging any variance relief and/or waivers related to the "headache bar," a proposed clearance bar that may function as a physical impediment to discourage tractor trailers from turning left out of the site.

[2] The following references shall be used throughout the brief:
"1T" shall refer to the December 6, 2022 Transcript.
"2T" shall refer to the December 13, 2022 Transcript.
"3T" shall refer to the February 21, 2023 Transcript.
"4T" shall refer to the February 28, 2023 Transcript.
"5T" shall refer to the March 21, 2023 Transcript.
"6T" shall refer to the March 22, 2023 Transcript.
"7T" shall refer to the March 28, 2023 Transcript.
"8T" shall refer to the Transcript of Motion Hearing held on June 7, 2024.
"9T" shall refer to the Transcript of Trial held on July 9, 2024.

impacts to wildlife and the existence of threatened and endangered species. Plaintiffs were not permitted to present Senior Wildlife Biologist and Ecologist Michael McGraw, MES, QAWB, ACE, to testify as to the New Jersey Department of Environmental Protection ("NJDEP") recognized bald eagle sightings on the site, impacts to wildlife and fauna, and other related testimony regarding threatened and endangered species on the site. (4T19-1 to 4T19-8; 4T24-4 to 4T24-19). Plaintiffs were not permitted to cross-examine witnesses on any aspects of the Environmental Impact Statement. Members of the public were also not permitted to present comments or cross-examine witnesses on threatened and endangered species or wildlife.

As part of the application materials, Applicant submitted a community impact statement. (Pa235-Pa369). The community impact statement, among other things, required an analysis of the existing road network available to serve the proposed development, as well as the proposed road network within the development itself and the surrounding road network which will be affected by the proposed development. Applicant presented testimony on traffic impacts to the surrounding properties but did not address the effect of 24-hour truck traffic and other negative impacts. Plaintiffs were not allowed to present full testimony on the traffic impacts or the lack of an eastbound ramp on I-195 in response to Applicant's traffic testimony and Applicant's community impact statement.

(6T). Plaintiffs were not allowed to present testimony or exhibits regarding the prior application approvals for the subject property that required as a condition of approval the installation of an eastbound ramp onto I-195, or of the prior applicant's failure to comply with prior conditions of approvals for the subject property. (6T).

Plaintiff's stormwater expert Dr. Clay Emerson, PhD, P.E., CFM, of Princeton Hydro, testified at the meeting on March 21, 2023 that he reviewed the application materials and concluded the stormwater design was noncompliant with state and local rules. (5T21-19 to 5T42-13). Dr. Emerson testified that Applicant failed to meet groundwater recharge requirements, water quality requirements, or peak flow rate requirements under the stormwater regulations. (5T21-19 to 5T42-13).

Plaintiff's expert Gene Bove, noise consultant at GZA Environmental, testified on March 21, 2023 that Applicant's noise study is deficient and does not adequately model all potential noises of a warehouse operation. (5T159-22 to 5T163-24). On March 28, 2023, the Board approved Applicant's application for site plan approval. (7T). On June 27, 2023, the Board adopted Resolution ZB23-02-02, memorializing the approval of Applicant's application for site plan approval. (Pa2488-Pa2531). On March 19, 2024, the Board re-adopted the Resolution of Memorialization. (Pa2720-Pa2768).

On or about April 11, 2024, Defendant began site preparation work on the subject property by clearing a portion of the land in the area of a proposed warehouse, stripping the top soil, and importing acidic soils for stockpiling on the property. (Pa2769-Pa2774). On April 12, 2024, Plaintiffs filed an OPRA request with Robbinsville Township to seek information on any permits that were issued. (Pa2775-Pa2778). On April 18, 2024, Robbinsville Township provided the relevant OPRA response, with the site plans that showed the full extent of the planned soil disturbance. (Pa2779-Pa2792). Pursuant to the Soil Disturbance Permit issued by Robbinsville Township on March 21, 2024, Defendant is importing fill to be used for future construction activities. (Pa2780-Pa2792). On April 25, 2024, Princeton Hydro issued a report opining as to the existence of a previously unidentified wetland that was proposed to be filled in under the soil importation permit. (Pa2793-Pa2816).

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' COMPLAINT IN LIEU OF PREROGATIVE WRITS. (Pa2948-Pa2980).

"A trial court's interpretation of the law and legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Township Committee of Township of Manalapan, 140 N.J. 366, 378 (1995). Therefore, the standard of review by the Appellate Division is a *de*

novo review of the Trial Court's application of legal principles. Washington Commons, LLC v. City of Jersey City, 416 N.J. Super. 555, 560 (App. Div. 2010).

In reviewing a trial court's decision regarding the validity of a local board's determination, the reviewing court applies the same standards as the trial court. Fallone Properties, L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004). When reviewing a board's decision, the board's factual determinations are presumed to be valid. Klug v. Bridgewater Twp. Planning Bd., 407 N.J. Super. 1, 12 (App. Div. 2009). Thus, a board's decision regarding a question of fact "will not be overturned unless it is found to be arbitrary and capricious or unreasonable[.]"

However, "[a]lthough courts defer to the expertise of municipal agencies in reviewing discretionary exercises of an agency's statutory powers, the interpretation of an ordinance is primarily a question of law." Wyzkowski v. Rizas, 132 N.J. 509, 518 (1993). Therefore, "a board's decision regarding a question of law . . . is subject to a *de novo* review by the courts, and is entitled to no deference since a zoning board has 'no peculiar skill superior to the courts' regarding purely legal matters." Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Tp. of Franklin, 233 N.J. 546, 559 (2018) (quoting Chicalese v. Monroe Twp. Planning Bd., 334 N.J. Super. 413, 419 (Law Div. 2000) (citations

omitted)); see also 388 Route 22 Readington Realty Holdings, LLC v. Township of Readington, 221 N.J. 318, 338 (2015) ("In construing the meaning of a statute, an ordinance, or our case law, our review is de novo.").

In this matter, the Board's approval of Applicant's request for preliminary and final site plan approval was arbitrary, capricious, and unreasonable. The Applicant failed to meet its burden of proof, and the Board improperly prohibited Plaintiffs and other members of the public from presenting relevant testimony and exhibits to address Applicant's submissions and testimony. For the reasons set forth herein, the Board's approval of the application for preliminary and final site plan approval was arbitrary, capricious, and unreasonable, and must be reversed.

A. The Applicant Failed to Meet Its Burden of Proof for a (c)(2) Variance pursuant to N.J.S.A. 40:55D(c)(2) or the Design Waivers, Therefore the Grant of Variance Relief and Waivers Must Be Vacated. (Pa2961-Pa2972).

Before a board may grant variance relief, it is the applicant's burden to produce the supporting evidence. Jacoby v. Zoning Bd. of Adjustment of Borough of Englewood Cliffs, 442 N.J. Super. 450, 471 (App. Div. 2015) (citing Trinity Baptist Church v. Louis Scott Holding Co., 219 N.J. Super. 490, 500 (App. Div. 1987)). While municipal decisions are reviewed under an arbitrary and capricious standard, in granting a variance, a board of adjustment must comply with the statutory requirements. Kohl v. Fair Lawn, 50 N.J. 268, 275

(1967). A board acts in a manner that is arbitrary, capricious, or unreasonable if the board fails to meet a minimum standard of acting "honestly and upon due consideration." Witt v. Borough of Maywood, 328 N.J. Super. 432, 442 (1998) (citing Worthington v. Fauver, 88 N.J. 183, 204-05 (1982); Bayshore Sewerage Co. v. Dept. of Envtl. Protection, 122 N.J. Super. 184, 199 (Ch. Div. 1973)).

Pursuant to N.J.S.A. 40:55D-70(c)(2), variance relief may be granted where in an application relating to a specific piece of property the purposes of the MLUL would be advanced by a deviation from the zoning ordinance, and the benefits of the deviation would substantially outweigh any detriment. "A (c)(2) variance should not be granted when merely the purposes of the applicant will be advanced; rather, the grant must actually benefit the community." Jacoby, 442 N.J. Super. at 470-71 (citing Kaufmann v. Planning Bd., 110 N.J. 551, 563 (1988)). It is the applicant's burden to produce the evidence to support the granting of a variance. Jacoby, 442 N.J. Super. at 471.

The variances being challenged herein include (1) a side yard setback on proposed lot 31.02, from Building 2 of 91.9 feet, when a minimum side yard setback of 126 feet is required; (2) a proposed accessory sound attenuation wall on proposed lot 31.02 to be located 24 feet from the side property line when a minimum side yard setback of 126 feet is required; and (3) a landscape buffer of 38 feet in width adjacent to residential property when a minimum landscape

buffer of 50 feet in width is required. (Pa2522, Paragraph XXV). In granting these variances, the Board concluded that the variances were required to keep the development away from environmentally sensitive areas on the property and that it supported good civic design. (Pa2524, Paragraph XXX).

However, the site is a 90.88 acre tract. The property is not uniquely shaped or sized that would prevent Applicant from meeting the requirements. While the Applicant and Board are relying upon the environmental constraints to justify the granting of the variance relief, there is nothing in the record to support why the Applicant could not simply reduce the size of the 333,500 square foot or 167,364 square foot warehouse to accommodate the comparably minimal required side yard setbacks or the proper landscape buffer width. The granting of the variances does not make the project better for the public, it only advances the purposes of the Applicant to maximize development of the property. Jacoby, 442 N.J. Super. at 470-71.

The Trial Court held that the Applicant did not need to consider reducing the size of the development for a Board to grant a (c)(2) variance. (Pa2967). But the point is that the (c)(2) variances do not make the project better for the public but instead only advances the personal interests of the Applicant. If Applicant were to reduce the size and scope of the project, it would still be viable and would not require the variance relief sought. "A (c)(2) variance should not be

granted when merely the purposes of the applicant will be advanced; rather, the grant must actually benefit the community." Jacoby, 442 N.J. Super. at 470-71.

In addition to the (c)(2) variance relief, the Applicant also sought five design waivers, including (1) waiver of requirement for shade trees on the Robbinsville-Allentown Road right of way, (2) waiver of requirement for landscaping around the parking and loading areas, (3) waiver of requirement for landscaping of the islands within the parking area, (4) waiver of the internal pedestrian circulation requirement, and (5) waiver to use HDPE instead of Ductile Iron Pipe. In granting these waivers, the Board concluded that literal enforcement of the of the ordinance requirements would create a hardship on the Applicant or was impracticable. (Pa2526-Pa2527, Paragraphs XXXVII to XLII).

Again, none of these waivers makes the project better or advances the purposes of zoning. The purpose of the landscaping requirements and pedestrian walkways requirements is to promote the health, safety, and welfare of the community by (1) increasing water, air, and soil quality, (2) maintaining the unique rural character of the township, (3) enhancing land use relationships, (4) creating a comfortable environment for pedestrians, and (5) providing aesthetically pleasing civic design. Robbinsville Township Ordinance §142-47(A). There is clearly sufficient room on a 90.88 acre property for development while incorporating all the required shade trees along Robbinsville-Allentown

Road, landscaping around the parking and loading areas, landscaping within the parking area, and pedestrian walkway. The only reason the Applicant does not want to comply with these design requirements, is because Applicant seeks to maximize development without consideration of the purposes of the zoning.

For example, as to the shade trees, Defendants argue it would have created a hardship because of a conflict with utility lines. This would have applied to any property with similar frontage. There are plenty of properties with utility lines and trees co-existing. As to landscaping buffers, the Board found it would be impracticable. But the only reason it is impracticable is because the Applicant did not design for it and would prefer to maximize the space of the warehouses. There is nothing to show that the waivers would provide benefits to the public. There is nothing to show that the literal enforcement would be impracticable or impose a hardship, except for their own self-created impracticability by designing a 333,500 square foot and a 167,364 square foot warehouse.

Importantly, these design standards are expressly identified as applying "to any application for a major subdivision plan, preliminary major site plan, and final major site plan or building permit for any nonfarming or nonresidential development resulting in disturbance of an area of soil that is 5,000 square feet or greater." Robbinsville Township Ordinance §142-47(B). These weren't requirements that only applied to a certain zone that therefore should be waived

because the proposed application is not normally a permitted use in that zone; these requirements would have applied to the proposed application no matter where the application was located in the municipality. There is no valid basis to support the granting of the design waivers.

The Trial Court held that the design waivers were properly granted because it would lead to undue hardship if the Township's ordinances were literally enforced. (Pa2971). However, it would only create undue hardship because of the scope of development proposed by Applicant. The Applicant could have reduced the extent of the proposal to follow the design standards.

Simply saying conclusory statements that the variances and waivers will provide significant benefits and represent a better zoning alternative does not make it true. The fact is that the variances only benefit the Applicant in allowing them to max out two separate warehouses at the detriment of neighboring property owners in Allentown.

For the reasons set forth herein, the Board's decision to approve the variance relief and design waivers was arbitrary, capricious, and unreasonable, and the Board's approvals should be reversed.

B. The Proposed Stormwater System is Not Compliant, Therefore, the Board's Site Plan Approval Should Be Reversed. (Pa2972-Pa2975).

The New Jersey Stormwater Management Rules, N.J.A.C. 7:8-1.1 to -6.3 ("Stormwater Management Rules"), generally regulate three different

performance areas: groundwater recharge, water quality, and peak flow control. N.J.A.C. 7:8-5.4; N.J.A.C. 7:8-5.5; N.J.A.C. 7:8-5.6; N.J.A.C. 7:8-5.7. The goal of the Stormwater Rules is to minimize development impacts on the natural processes with regards to onsite groundwater recharge and stormwater runoff. N.J.A.C. 7:8-2.2. Technical guidance for stormwater management measures is contained within the New Jersey Stormwater Best Management Practices Manual ("BMP Manual"). N.J.A.C. 7:8-5.9; In re Stormwater Management Rules, 348 N.J. Super. 451, 457 (App. Div. 2006). As testified by Dr. Clay Emerson from Princeton Hydro, the application currently fails to meet the requirements for groundwater recharge, water quality treatment, and peak flow control. As such, Dr. Emerson testified to a reasonable degree of scientific certainty that the application does not comply with the stormwater rules.

In rejecting Plaintiffs' arguments here, the Trial Court held that it did not believe it was appropriate to review the conflicting testimony of the parties' experts and that the Board had discretion to decide which expert testimony to rely upon. (Pa2972-Pa2973). However, in failing to review the testimony of Plaintiffs' experts, the Trial Court failed to review if the Board's decision to reject of Plaintiffs' expert testimony was arbitrary, capricious, and unreasonable. The Trial Court further held that Plaintiffs failed to show that Defendant used the incorrect method as a matter of law. (Pa2975). However, Plaintiffs'

testimony and arguments clearly refer to the provisions of the BMP manuals that were not met, i.e. that the analysis was done incorrectly as a matter of law.

For the reasons set forth in detail below, the application presented to the Board does not meet the requirements of the stormwater management rules and BMP manuals, and therefore the approval must be vacated and reversed.

i. The Applicant Failed to Meet Groundwater Recharge Requirements. (Pa2956).

First, Applicant failed to meet the groundwater recharge requirements under the stormwater regulations. Pursuant to the Stormwater Management Rules, an Applicant must maintain the same amount of groundwater recharge for the site pre-development and post-development. N.J.A.C. 7:8-5.4(b). By maintaining the same amount of groundwater recharge pre- and post-development, the goal is to prevent an increase in the amount of stormwater runoff and therefore local flooding impacts offsite. N.J.A.C. 7:8-5.1; (5T21-19 to 5T22-7).

Groundwater mounding occurs when the groundwater table locally rises higher because the water is not conveyed away from the infiltration point at a fast enough rate. BMP Manual, Chapter 13, Page 1. In other words, groundwater recharge not only relies upon the vertical infiltration of water, but also the horizontal movement of the groundwater. The height of the groundwater mounding effect is influenced by the amount of infiltrated runoff, the soil

permeability, and the shape of the infiltration basin. BMP Manual, Chapter 13, Page 1-2. If the groundwater mound reaches the bottom of the basin, the rate of infiltration out of the basin is reduced and infiltration stops, creating a failed stormwater management system. BMP Manual, Chapter 13, Page 2.

To model groundwater mounding and determine if the proposed infiltration basin will function properly, the NJDEP permits the use of the Hantush Spreadsheet. BMP Manual, Chapter 13, Page 2. With the Hantush Spreadsheet, the design engineer inserts input values, and the spreadsheet will perform the calculations necessary to determine if the infiltration basin will function properly. BMP Manual, Chapter 13, Page 2. Therefore, the result of the analysis is dependent on accurate input values from the design engineer.

Here, it is undisputed that of the eleven (11) proposed groundwater recharge Best Management Practices ("BMPs"), only two (2) have acceptable permeability test results. (5T22-9 to 21). In response to the failed permeability test results, Applicant is proposing to replace the soil immediately below the BMPs, to the groundwater table, to increase the permeability and therefore infiltration rates. (5T22-22 to 5T23-3). While this might seem like a reasonable solution to the issue, the reality is that the Applicant failed to correctly complete the groundwater mounding analysis.

As described by Dr. Emerson, this is analogous to a bucket with a hole at the bottom to drain water. (5T23-4 to 5T23-8). The hole represents the groundwater table and the horizontal movement conveying the groundwater away from the BMP. (5T23-20 to 5T24-12). If the bucket was filled with low permeable soils, and it was replaced with stones that would be more permeable, the system will still not work as the bucket will still be constrained by the hole in the bottom. (5T23-9 to 5T23-25). However, while it may improve how fast the water gets to the groundwater table, the hole at the bottom did not get any bigger, and therefore the bucket would still ultimately overflow. In other words, the soil replacement does nothing to increase the horizontal conveyance of the groundwater away from the BMP. This will ultimately cause the system to fail.

Here, a review of Applicant's groundwater mounding analysis clearly shows errors in the input values, and therefore fails to prove that the infiltration basins will function as intended. (Pa1396-Pa1423); (5T25-15 to 5T27-20). In relevant part to this discussion are the input values for (1) the recharge rate, also known as the permeability rate, and (2) the horizontal hydraulic conductivity. BMP Manual, Chapter 13, Page 4-5. The recharge rate value is the infiltration rate from the permeability tests performed pursuant to Chapter 12 of the BMP Manual. BMP Manual, Chapter 13, Page 4. The horizontal hydraulic

conductivity is the rate at which water can move in the horizontal direction. BMP Manual, Chapter 13, Page 5.

However, the fact is that Applicant is only proposing soil replacement immediately below the infiltration basins. Applicant is not proposing to do soil replacement for the entire site or even in the areas surrounding the infiltration basins. Pursuant to the BMP Manual, in a scenario in which the design engineer proposes soil replacement below an infiltration basin, "[t]he horizontal hydraulic conductivity is the same as the original soil as the original soil since… the soil outside the basin footprint will not change." BMP Manual, Chapter 13, Page 36. The BMP Manual specifically reminds design engineers that:

> **soil replacement does not change the horizonal hydraulic conductivity of the soils outside the basin.** The low horizonal hydraulic conductivity will still limit the ability of the runoff to be dissipated into the saturated zone and may result in high groundwater mounding in the unsaturated zone. Therefore, the use of sand replacement in basin designs must still be carefully evaluated with a groundwater mounding analysis.
>
> [BMP Manual, Chapter 13, Page 38 (alteration in original)].

Therefore, the BMP Manual is clear that the Applicant should have used the horizontal conductivity of the original soil. BMP Manual, Chapter 13, Page 36. However, in each of the groundwater mounding analysis, Applicant used the horizontal conductivity rate of the replaced soils. (Pa1396-Pa1423). Applicant

should have used the original infiltration rates of the native soil. BMP Manual, Chapter 13, Page 36. Applicant has not shown that the infiltration basins will work as intended, and therefore has not met its burden of showing a compliant stormwater management system. (5T27-11 to 5T27-20).

For these reasons, the Board's findings that the stormwater management system will meet NJDEP requirements and that the stormwater management plan complies with the Township's ordinances is not supported by the record. (Pa2519, Paragraph III; Pa2521, Paragraph XIV). Therefore, the Board's approval of the site plan application was arbitrary, capricious, and unreasonable, and must be vacated and reversed.

ii. Applicant Failed to Meet the Water Quality Requirements. (Pa2956).

The purpose of the water quality requirements is to filter suspended solids in stormwater before it enters into bodies of water or into the groundwater. N.J.A.C. 7:8-5.5. Here, in addition to several other BMPs, the Applicant is proposing fourteen (14) Filterra manufactured treatment devices ("MTDs"). A Filterra MTD works by having stormwater runoff flow into a curb cut and through planting soil with vegetation, to filter the runoff. (5T35-12 to 5T35-19). The runoff enters and flows through the soil, and treated water drains out of the soil into the downstream stormwater system. (5T35-12 to 5T35-19). As noted on the "Stormwater BMP Details 16" sheet, testified to by Dr. Emerson, and

admitted to by Mr. Webb, these MTDs must be freely draining and maintain aerobic conditions in order to properly function. (Pa2250-Pa2251). Without the aerobic conditions and freely draining soils, the system will not be able to effectively treat the runoff, and the vegetation will not survive.

In reviewing the plans, Dr. Emerson testified that the proposed MTDs will not be free draining. (5T36-2 to 5T36-25). As designed, the discharge pipe for the MTDs would have 7.5 ft of standing water that would never be able to drain. (5T36-11 to 5T37-6). The system is supposed to be aerobic, but because the system will be inundated, this will cause it to be anaerobic. (5T39-8 to 5T39-15). The plants will not survive, the soils will not be able to freely drain, and the system will not be able to treat the runoff for water quality as certified. (5T37-12 to 5T38-1). Furthermore, they will not be able to convey the correct amount of flow as designed due to the permanent standing water, which will cause the runoff to backup. (5T38-2 to 5T38-8).

In response, Mr. Webb did not contest the elevation discrepancy and the fact that there would be 7.5 feet of standing water. Mr. Webb only testified that there was a back flow preventer to be installed. (5T66-12 to 5T66-20). However, the issue is not that water would be re-entering the MTDs from the wetland, but that the pipe is at a lower level than the wetland and therefore would never fully drain. (5T72-5 to 5T72-23). Mr. Webb again did not contest this fact, nor did he

contest that this would cause the system to fail. As designed, the pipes will always have standing water, which will cause the MTD to not function correctly.

For these reasons, the Board's findings that the stormwater management system will meet NJDEP requirements and that the stormwater management plan complies with the Township's ordinances is not supported by the record. (Pa2519, Paragraph III; Pa2521, Paragraph XIV). Therefore, the Board's approval of the site plan application was arbitrary, capricious, and unreasonable, and must be vacated and reversed.

iii. Applicant Failed to Meet Peak Flow Rate Requirements. (Pa2956).

Pursuant to the stormwater regulations, an applicant only has to address runoff from the disturbed portion of the site when considering the peak flow rate reduction requirements. (5T40-17 to 5T41-16). For example, if a developer proposes to disturb five acres, the developer would only have to address runoff from the five acres. (5T41-5 to 5T41-16). This is the simplest and most common way of addressing the peak flow rate reduction requirements. Here, the Applicant is using a weighted average of the peak flow rate rather than the acreage of disturbance to determine peak flow rate reduction requirements. (5T41-17 to 5T41-20). Dr. Emerson testified that when the analysis is done with the more common method, the result is that the site fails to provide adequate peak flow rate reductions. (5T42-7 to 5T42-13).

It is clear that the applicant chose to use a less commonly used method in order to find a way to make the numbers work for their project. Mr. Webb did not contest that an analysis under the more commonly used method would result in non-compliance. Given the serious concerns of flooding these days, and especially with the Allentown water treatment plant and the downstream dam that may be impacted, the Applicant should be using the more conservative calculation method to determine peak flow compliance.

For these reasons, the Board's findings that the stormwater management system will meet NJDEP requirements and that the stormwater management plan complies with the Township's ordinances is not supported by the record. (Pa2519, Paragraph III; Pa2521, Paragraph XIV). Therefore, the Board's approval of the site plan application was arbitrary, capricious, and unreasonable, and must be vacated and reversed.

C. Applicant Failed to Perform an Adequate Noise Study to Conclude that the Proposed Development Would Not Violate the Noise Codes. (Pa2976-Pa2977).

As part of the application, Applicant submitted a report on operational sound levels prepared by Russell Acoustics, LLC. (Pa265-Pa277). Relying on the report, the Applicant concluded that the project will not exceed the maximum sound level standards as outlined in the local and State regulations. However, Applicant's report is severely flawed and contains inadequate data and analysis

to support the conclusion that the proposed project would not violate the noise codes.

Plaintiffs presented a noise expert, Gene Bove during the March 21, 2023 hearing, who outlined the deficiencies in Applicant's noise report. Noise is regulated under N.J.A.C. 7:29-1.2. Pursuant to the regulation, "[n]o person shall cause, suffer, allow, or permit sound from any industrial, commercial, or community service facility that, when measured at any residential property line of any affected person, is in excess of the following." N.J.A.C. 7:29-1.2(a) (emphasis added). Despite the requirement to measure sound at the residential property line, the Applicant conducted the analysis at the buildings. (5T159-22 to 5T160-10). This clear error results in a skewed conclusion that there are no impacts to the residential properties.

Furthermore, noise is regulated based on two methods, dBA and octave band. N.J.A.C. 7:29-1.2. Noise is also regulated based on type of noise, continuous and impulsive sounds. N.J.A.C. 7:29-1.2. Continuous noise is a continuous sound, and the noise code sets daytime limits at 65 dBA, and nighttime limits of 50 dBA. Impulsive noise is a sound that lasts less than a second. The noise code sets the daytime limit at 80 dBA and the nighttime limit at 80 dBA but no more than 4 times per hour. Impulsive sounds that may be

associated with warehouses include truck air braking, truck hitching, potentially back up alarms, slamming of doors, and other noises. (5T159-6 to 5T159-12).

Here, the Applicant only analyzed continuous sounds and did not do any analysis of impulsive sounds. (5T158-17 to 5T158-22). Not only did the Applicant ignore all impulsive noises, the Applicant did not analyze octave bands at all with the proposed project. (5T159-14 to 5T159-16). The report lacks adequate data and analysis to make a conclusion that there would be no impacts to the adjoining residential properties.

The Applicant's acoustic report relied upon the data from their testing of an accelerating "heavy truck." (5T160-14 to 5T160-21). Mr. Dotti testified that the sound level used was 75 dBA. However, Mr. Bove testified that in his professional experience, this level is low for this type of operation. In addition, Mr. Bove's data shows that the Applicant has not analyzed all the potential noise that will be generated by a truck, let alone the proposed project. An idling truck at the driver's side was 72 decibels, and on the passenger's side was 77 decibels; a truck passing by at slow speed was 80 decibels; air brakes were 90 decibels; hitching with the air brakes at the same time was 94 decibels. (5T161-3 to 5T161-17). The Applicant only analyzed the noise level of a truck driving through the site. (5T162-5 to 5T162-16). However, the operations of the warehouse will involve much more than just a truck driving around the site. A

warehouse will have trucks hitching, air braking, backing up, HVAC systems operating, doors slamming, gates opening and closing, and other noises. (5T162-17 to 5T163-24). None of these noises were considered or analyzed. The report lacks adequate data and analysis to make a conclusion that there would be no impacts to the adjoining residential properties.

In response to Mr. Bove's testimony, Mr. Dotti testified that personal vehicles are not covered by the noise regulations. (5T169-4 to 5T169-10). However, there is no such exception noted under the noise code. See N.J.A.C. 7:29-1.5. Mr. Dotti further testified that regulations did not literally apply to the property line. (5T170-3 to 5T170-10). However, the regulation states "when measured at any residential property line of any affected person." N.J.A.C. 7:29-1.2. Mr. Dotti is simply incorrect on these two issues.

Finally, Mr. Dotti admitted that he did not analyze all possible sounds, allegedly because he did not want to spend the time and money to do the modeling. (5T174-25 to 5T175-3). Mr. Dotti testified "I'm not going to waste the board's time and my client's money cranking through a ton of different hypotheticals to check off a box." (5T174-25 to 5T175-3). This testimony points out the exact issue with Applicant's noise study; the Applicant did the minimal necessary to simply check off a box. The Applicant did not seriously consider

the potential noise impacts to surrounding properties as required by the ordinance.

In rejecting Plaintiffs' arguments, the Trial Court affirmed the Board's decision that Mr. Dotti's testimony was more credible and held that Plaintiffs failed to show that Mr. Dotti utilized an incorrect methodology as a matter of law. (Pa2976-Pa2977). But this ignores the clear and undisputable failure of Mr. Dotti, who was required to measure the sound levels at the residential property line rather than at the building. N.J.A.C. 7:29-1.2(a); (5T159-22 to 5T160-10). Furthermore, it defies logic that the sound of one accelerating truck, moving at the center of the property, is the only operational sound that would occur at any given time at the proposed development of two large warehouses. (5T162-5 to 5T162-16). Plaintiffs have shown more than just a conflict of opinion; Plaintiffs have shown that Mr. Dotti failed to analyze the sound impact at the property line as required by N.J.A.C. 7:29-1.2(a), and that Mr. Dotti testified "I'm not going to waste the board's time and my client's money cranking through a ton of different hypotheticals to check off a box." (5T174-25 to 5T175-3).

For these reasons, the Board's findings that Applicant's noise report and testimony demonstrated that there would be no noise impacts is not supported by the record. (Pa2521, Paragraph XVII). The Applicant admitted that it only did a bare bones noise study to check off a box. (5T174-25 to 5T175-3).

Therefore, the Board's approval of the site plan application was arbitrary, capricious, and unreasonable, and must be vacated and reversed.

D. The Board Failed to Acknowledge Traffic Impacts and Made A Finding That Was Contrary to the Board's Prior Findings on the Same Site. (Pa2977).

In addition to the submission of an environmental impact assessment, the Applicant also submitted a community impact statement. However, Plaintiffs were not permitted to fully present testimony and respond to the Applicant's community impact statement or traffic impact study. It is accepted by all parties that Interchange 7 is incomplete and there is no access to east-bound I-195 from north-bound County Road 526 Robbinsville-Allentown Road, i.e. from the site. The result is that trucks will end up heading through Allentown, causing damage to building foundations as testified by the residents and getting stuck at the intersection, in order to reach the east-bound on-ramp at Interchange 8. Allentown is a national and state historic district that has been identified by Preservation New Jersey as one of the most threatened and endangered historic sites in New Jersey due to development at Allentown's borders.

The Applicant's traffic engineer, Mr. Disario, testified that trucks who wanted to go east-bound on I-195, would go west and make a U-turn at the 130 interchange to head back east, a six mile detour. As testified by Mr. Klein, forcing trucks to detour almost six miles is unrealistic and counterintuitive.

(6T14-21 to 6T16-16). Reviewing the Google aerial of the area, it is clear that there was no need prior to this application to have an east-bound ramp at Interchange 7. (6T14-21 to 6T15-14; Pa2434). The warehouses and therefore truck traffic were all north of I-195, which has full access to I-195 at Interchange 7. (6T14-21 to 6T15-14; Pa2434). The permitted uses at the site would have primarily involved car traffic, which would not have as much of an impact on Allentown. (6T14-21 to 6T15-14; Pa2434). With the use variance granted, it is necessary to consider the impact of the warehouse on Allentown.

Delia Downes testified that "even before this site for trucks traveling through this community, [they] are already under assault from them. Daily the Main Street in Allentown has trucks rumbling through town to warehouses at Matrix Park and on Manor Way. The historic homes shake. The windows rattles beginning at 5:30 in the morning." (3T67-5 to 3T67-11). Craig Rondinone testified how he and his wife had left the Jersey Shore to get away from the traffic, and that their old house was not built for this. (3T74-14 to 3T74-23). Mr. Rondinone testified that "house is really kind of starting to fall apart…literally the front of the house is starting to shift, and [he's] been told by the contractors it could be very likely due to all the trucks and all the traffic because the roads were not built for it and the houses were no built for this." (3T75-1 to 3T75-7).

Kevin Jean Louis testified how he had "recently spent thousands of dollars reinforcing [his] foundation because the vibrations were causing [the] walls to shake, [the] windows to shake, and really causing concern as to whether [the] floors w[ould] be able to hold." (3T101-6 to 3T101-10). Mr. Louis testified that they recently took in his father-in-law, but "can't let him walk the streets alone. Take that into consideration as we start to think about how these kind of projects are impacting people because of the fact that we simply are afraid to walk the streets, and when we do walk the streets, we're accosted to loud noise, truck drivers ignoring speeding limits, flipping us off because we simply want to cross a crosswalk, honking at us because we're trying to simply take our time." (3T101-11 to 3T101-22).

Barbara Pleva testified that she followed a tractor trailer, which did not go to Robbinsville, as Mr. Disario believed they would, but came to Allentown, to save half a mile by getting off that exit and going through Allentown instead. (6T131-7 to 6T131-20). The driver went "all the way through Main Street, over the curbs on High Street as the kids [were] walking to school." (6T131-21 to 6T131-23).

The Applicant has offered to construct the circle roundabout at Circle Drive, as recommended in the Moving Mindfully report. However, a circle roundabout will not stop truck traffic from entering Allentown. (6T16-5 to 6T16-

16). Instead, what would have been more beneficial for both the Applicant and Allentown would be completing a left turn from north-bound County Road 526, onto the existing east-bound on-ramp at Interchange 7. Adding the east-bound on-ramp at Interchange 7 is also recommended by the Moving Mindfully study. In fact, the Board had previously required the completion of the east-bound on-ramp at Interchange 7 as a condition of approval in a 1989 resolution of approval and 2008 resolution of approval for this site. (Pa2614-Pa2714).

In 1989, the Board had concluded that "the intersection of Main Street and Robbinsville-Allentown Road in Allentown is presently experiencing capacity problems." (Pa2623, Paragraph 27). The Board further concluded that "[a]t present, the nearest eastbound ramp on I-195 directly accessible to traffic from applicant's site is at the end of Allentown's Main Street, requiring a trip through the center of Allentown." (Pa2623, Paragraph 28). "Reconstruction of the eastbound ramp at Interchange No. 7 will reduce substantially site-generated traffic flows through the center of Allentown." (Pa 2625, Paragraph 32).

In 2008, the Board again conditioned the development of the site on the installation of the eastbound ramp of I-195 at Interchange 7, again finding that this would mitigate the traffic impacts to Borough of Allentown. (Pa2643-Pa2673). This was again confirmed in the final site plan approval. (Pa2706-Pa2714). The plans for the eastbound ramp were conceptually approved by

Mercer County and the New Jersey Department of Transportation in 2009. (Pa2717-Pa2719).

The Board found in 1989 and 2008 that the development of the subject property would have negative traffic impacts to Allentown, and as a condition of approval, required the installation of the proposed eastbound ramp and a left-turn ban out of the site. In 2021-2023, the Board has decided that an eastbound ramp is no longer necessary and dismissed the traffic concerns of Allentown. As such, the Board's findings regarding traffic are contrary to the Board's own findings in 1989 and 2008.

In rejecting Plaintiffs' arguments, the Trial Court held that the traffic impacts were not appropriate issues to be considered by the Board. (Pa2977). However, the Applicant opened the door to this testimony by providing testimony on the traffic circle and its position that there are no offsite impacts from this development. Plaintiffs and other members of the public are entitled to present testimony and evidence to refute that of the Applicant. Furthermore, as a bifurcated application, the negative criteria is required to be evaluated again during the site plan review. N.J.S.A. 40:55D-76(b). Therefore, traffic is an appropriate area for consideration by the Board.

For these reasons, the Board's findings regarding traffic impacts are not supported by the record. (Pa2521, Paragraph XVI). Therefore, the Board's

approval of the site plan application was arbitrary, capricious, and unreasonable, and must be vacated and reversed.

E. Applicant Was Required to Meet the Negative Criteria Again on the Request for Site Plan Approval for a Bifurcated Application. (Pa2978).

The Municipal Land Use Law permits applicants to bifurcate applications and submit an application for use variance first, and a subsequent application for any required approval of a subdivision, site plan, or conditional use. N.J.S.A. 40:55D-76(b). "No such subsequent approval shall be granted unless such approval can be granted without substantial detriment to the public good and without substantial impairment of the intent and purpose of the zone plan and zoning ordinance." N.J.S.A. 40:55D-76(b).

A use variance is not just a blanket license for a board to create a new use with its standards to be defined by the board members only. Allocco and Luccarelli v. Township of Holmdel, 299 N.J. Super. 491, 498 (Law Div. 1997). Although the granting of site plan approval normally only requires a determination as to whether specific ordinance provisions have been met, a subsequent approval following the granting of a use variance requires a specific determination as to whether the application continues to meet the negative criteria. Ibid. Therefore, bifurcation requires a developer to satisfy the negative criteria twice, once with the use variance application, and again at a subsequent site plan application. House of Fire Christian Church v. Zoning Bd. of

Adjustment of City of Clifton, 379 N.J. Super. 526, 539-40 (App. Div. 2005) (citing Meridian Quality Care, Inc. v. Bd. of Adj. of Tp. of Wall, 355 N.J. Super. 328, 340 (App. Div. 2002)).

"The impact of a project upon off-site traffic is required to be evaluated under the negative criteria." Allocco, 299 N.J. Super. at 498. Therefore, decisions such as Dunkin Donuts of N.J. v. Tp. of North Brunswick Planning Bd., 193 N.J. Super. 513 (App. Div. 1984) are not relevant in considering a subsequent request for site plan approval of a bifurcated application. Allocco, 299 N.J. Super. at 499. Other factors that must be considered again include traffic flow, traffic congestion, building orientation, and the nature of the surrounding properties. House of Fire Christian Church, 379 N.J. Super. at 540. Both on-site and off-site factors may be significant in deciding whether the subsequent site plan may be approved in conjunction with a previously approved use variance. Meridian Quality Care, Inc., 355 N.J. Super. at 341.

A review of the Resolution of Memorialization shows that the Board agreed that it was required to continue to consider the negative criteria in reviewing the site plan application in this matter. (Pa2525, Paragraph XXXVI). However, despite this acknowledgment, the Board improperly prohibited Plaintiffs and members of the public from testifying, presenting exhibits, and

cross-examining witnesses relating to issues that would go towards the negative criteria.

The Board's decision to prohibit Plaintiffs from presenting testimony on wildlife and curtailing the testimony on the traffic impacts also violated the municipal land use law. This prevented Plaintiffs from presenting relevant testimony on the negative criteria that must be considered by the Board in the scope of a review of a bifurcated application. The scope of what a Board should review in analyzing the negative criteria is a different analysis than the scope of what a Board can do to address the negative criteria. It is undisputed that the Applicant and the Board needed to address the negative criteria again in its review of the bifurcated application. A board must provide objectors a fair opportunity to address all issues in an application. N.J.S.A. 40:55D-10(d); Witt v. Borough of Maywood, 328 N.J. Super. 432, 453-54 (Law Div. 1998), aff'd o.b. 328 N.J. Super. 343 (App. Div. 2000) (nullifying the decision of a planning board that did not allow objectors the opportunity to address the full range of issues contained in an application).

The fact that the negative criteria was already addressed during the use variance application does not mean that the Board can simply rely upon that analysis in curtailing the scope of review during the site plan application. (Pa2519, Paragraph VI). To do so would go against the express statutory

requirements under the Municipal Land Use Law. N.J.S.A. 40:55D-76(b) expressly requires that in a subsequent application for site plan approval for bifurcated applications, "[n]o such subsequent approval shall be granted unless such approval can be granted without substantial detriment to the public good and without substantial impairment of the intent and purpose of the zone plan and zoning ordinance." If a board was simply able to rely on its analysis from the use variance hearing, this would make this statutory requirement superfluous.

While the use variance has been approved and affirmed by the courts, the Board has over broadened the applicability of the ruling. Generally, the analysis of a use variance involves the determination that a use variance is not inconsistent with the intent and purpose of the master plan and zoning ordinance, that the use promotes the general welfare, and a balancing of the positive and negative criteria. Medici v. BPR Co., 107 N.J. 1, 4-5 (1987). In contrast, the purpose of site plan review is to ensure compliance with the standards under the municipality's site plan and land use ordinances. W.L. Goodfellows, 345 N.J. Super. at 116. In bifurcated applications, the Board shall review the negative criteria again. N.J.S.A. 40:55D-76(b).

Having a use variance approval does not absolve the applicant's responsibility to present the necessary information to ensure compliance with

the standards under the municipal ordinances. This is especially relevant here when Robbinsville ordinance requires an analysis of traffic impacts and impacts to threatened and endangered species, among other items. Therefore, while it was upheld that the discussion of certain topics during the use variance application was properly excluded, the prior ruling related to the use variance application is not applicable to the current issue at hand, being the site plan application.

For these reasons, the Board improperly curtailed the review of negative criteria, and the Board's approval of the site plan application was arbitrary, capricious, and unreasonable, and must be vacated and reversed.

F. The Board Improperly Prohibited Plaintiffs and Other Members of the Public from Testifying, Presenting Exhibits, and Cross-Examining Witnesses Relating to Application Submissions. (Pa2978-Pa2979).

Pursuant to the Municipal Land Use Law ("MLUL"),

> The testimony of all witnesses relating to an application for development shall be taken under oath or affirmation by the presiding officer, and the right of cross-examination shall be permitted to all interested parties through their attorneys, if represented, or directly, if not represented, subject to the discretion of the presiding officer and to reasonable limitations as to time and number of witnesses.

[N.J.S.A. 40:55D-10(d) (emphasis added)].

The New Jersey Supreme Court has opined on this statute, explicitly finding that "[w]ith respect to most zoning and land use applications, the MLUL

'requires publics hearings[] [and] an opportunity for the public to be heard." Twp. of Stafford v. Stafford Twp. Zoning Bd. of Adjustment, 154 N.J. 62, 70 (1998) (citing Township of Berkeley Heights v. Board of Adjustment, 144 N.J. Super. 291, 300 (Law Div.1976)).

As such, a board must provide objectors a fair opportunity to address all issues in an application. N.J.S.A. 40:55D-10(d); Witt, 328 N.J. Super. at 453-54. A board may not arbitrarily deny any objector the right to testify or to cross-examine other witnesses. See *Cox & Koenig*, New Jersey Zoning and Land Use Administration, § 18-3.2, at 376 (2022) (citing Village Supermarket v. Mayfair, 269 N.J. Super. 224, 238 (Law Div. 1993)). In fact, a planning board's refusal to give a party a fair opportunity to present all of their witnesses "deprives the ultimate conclusion of legitimacy." Witt, 328 N.J. Super. at 454.

In this matter, Applicant submitted an environmental impact assessment and a community impact statement. As part of the environmental impact assessment, Applicant concluded that based on alleged lack of suitable habitat for threatened and endangered species, that there would be no adverse impacts on threatened and endangered species at the site. (Pa384-Pa385). The Resolution of Memorialization confirmed that the Board reviewed the environmental impact assessment. (Pa2518-Pa2519, Paragraph II). The Board specifically

found that "the Applicant's submitted [environmental impact assessment] to be sufficient." (Pa2519, Paragraph VII).

However, the Board refused to allow Plaintiffs to present a wildlife expert to discuss the potential impact of the development to threatened and endangered species on the site. (4T19-1 to 4T19-8; 4T24-4 to 4T24-19). Plaintiffs were ready to present witnesses to testify that Bald Eagles have been observed to be foraging on the site, and that the sightings had been recognized by the NJDEP. (4T19-1 to 4T19-4, 4T24-4 to 4T24-19). None of this was discussed or addressed in the environmental impact assessment. As a report that is part of the submitted application materials, Plaintiffs should have had the opportunity to present testimony that would have contradicted the report.

Simply because the NJDEP may have ultimate jurisdiction over threatened and endangered species, does not mean that the Board can prohibit public testimony on issues raised by Applicant's submissions and required to be reviewed by Robbinsville Ordinance. This is particularly true when the Board relied upon the environmental impact assessment and the Board expressly found that the environmental impact assessment was credible and sufficient. (Pa2519-Pa2520, Paragraph VII). This finding was made after the Board refused to allow Plaintiffs and potentially other public commentors from presenting testimony

and evidence that would have contradicted the environmental impact assessment.

Furthermore, Robbinsville Ordinance §144-77 states, in relevant part here, that "[n]o application for development shall be approved unless it has been affirmatively determined, after an environmental assessment, that the proposed project… will not result in a significant adverse impact on the environment." The environmental impact assessment is a key document in the application materials, as the ordinance clearly and unambiguously states that a Board cannot approve the site plan application without making an affirmative determination based upon the environmental impact assessment.

Among other conclusions in the community impact statement was a statement regarding traffic impacts. (Pa242-Pa243; Pa278-Pa369). Although the Board did permit Plaintiffs to present a traffic expert, the Board improperly curtailed Mr. Klein's testimony. As part of the project, the applicant proposed to construct a roundabout off-site in order to address potential truck traffic that may head towards Allentown. (6T16-5 to 6T16-9). In response, Mr. Klein wanted to propose completing the interchange at Interchange 7 at I-195, to include an eastbound on-ramp. (6T16-17 to 6T16-20). By completing the eastbound on-ramp at Interchange 7, it would solve the problem of trucks

wanting to go through Allentown to connect to Interchange 8 where there is an eastbound ramp onto I-195. (6T15-1 to 6T15-24).

The Board curtailed Mr. Klein's testimony on the eastbound ramp, on the basis that it is an off-tract improvement that could not be considered. However, the testimony on the eastbound ramp was in response to Applicant having proposed a different off-tract improvement, being the roundabout. As such, the testimony should have been permitted, as a board must provide objectors a fair opportunity to address all issues in an application. N.J.S.A. 40:55D-10(d); Witt, 328 N.J. Super. at 453-54.

Furthermore, "[t]he impact of a project upon off-site traffic is required to be evaluated under the negative criteria." Allocco, 299 N.J. Super. at 498. Therefore, decisions such as Dunkin Donuts of N.J. v. Tp. of North Brunswick Planning Bd., 193 N.J. Super. 513 (App. Div. 1984) (holding that off-site traffic impacts are not considered for site plan applications) are not relevant in considering a subsequent request for site plan approval of a bifurcated application. Allocco, 299 N.J. Super. at 499. As this is a bifurcated application, off-site traffic impacts are again relevant for discussion because the Board must reconsider the negative criteria. N.J.S.A. 40:55D-76(b).

The Trial Court held that the excluded topics were all matters outside the jurisdiction of the Board and therefore properly excluded. (Pa2979). But this

was not just something that Plaintiffs and other members of the public unilaterally proposed to have the Board considered. Rather, Plaintiffs and other members of the public were responding to the submissions of the Applicant. Not only were these to contradict the submissions that the Applicant first provided, but the Board also subsequently relied on the Applicant's materials on threatened and endangered species and the traffic testimony, and found it credible and sufficient. (Pa2519-Pa2520, Paragraph VII). It is absurd to not allow Plaintiffs to provide testimony that would have contradicted the Applicant's submissions, and then find there was no contradictory evidence presented.

Furthermore, it is not the Trial Court's position nor the Board's position here to rewrite the township ordinances that explicitly required the Board to review and evaluate traffic impacts and threatened and endangered species. The Board may not have jurisdiction to preserve an area or establish buffer zones because of the existence of threatened and endangered species, but that does not mean the Board cannot evaluate the impacts of the proposed development on threatened and endangered species and require changes in the development design to mitigate impacts to threatened and endangered species. The township's ordinances clearly were written to complement the NJDEP regulations and not override them. See N.J. Ass'n of Sch. Adm'rs v. Schundler, 211 N.J. 535, 555 (2012) ("Whenever statutory analysis 'involves the interplay of two or more

statutes, we seek to harmonize [them], under the assumption that the Legislature was aware of its actions and intended' for related laws 'to work together.'").

For these reasons, the Trial Court erred in holding that Plaintiffs were not permitted to present testimony and evidence that would contradict the Applicant's submissions, and the approval must be reversed.

G. Board Members Were Improperly Counseled That There Was No Option To Vote No on the Application. (Pa 2980).

On March 28, 2023, the Board voted to approve Applicant's request for preliminary and final site plan approval. During the vote, Mr. Berdan stated that "I'd also like to go on record as saying I'm providing a yes, but I'm doing so in protest, based on town counsel and the guidance I was provided that I'm legally bound to provide a yes." (7T32-17 to 7T32-21). Boards are not legally bound to vote yes to a site plan application. An applicant is still bound to fully comply with the standards enumerated in the township ordinances. If a board member believed that the applicant failed to adequately address issues as required by the township ordinances, a board member could vote no on a site plan application or required additional information.

The fact that a board member was told he could only vote yes on the application is basis to reverse the approval. Even in bifurcated applications, a board's role is not to just rubberstamp development. A board still has to ensure that the development meets standards.

The Trial Court held that the quote was cited out of context and that it related to concerns about offsite traffic. (Pa2980). However, the quote stated that the Board Member was told "that I'm legally bound to provide a yes," not that the Board Member could not consider concerns with traffic safety. Legally bound to provide a yes is not the same thing as not being able to consider traffic safety. There are many other factors where the Board could have denied the application. For these reasons, the Board's decision should be vacated and reversed.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT. (Pa2937-Pa2947).

New Jersey Courts "review a trial court's decision to grant or deny a motion to amend the complaint for abuse of discretion." Port Liberte II Condo. Ass'n, Inc. v. New Liberty Residential Urban Renewal Co., LLC, 435 N.J. Super. 51, 62 (App. Div. 2014). "A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. Chavies, 247 N.J. 245, 257 (2021). "When examining a trial court's exercise of discretionary authority, we reverse only when the exercise of discretion was 'manifestly unjust' under the circumstances." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011).

R. 4:9-1 governs amended and supplemental pleadings and permits a party to amend its pleading as "a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is to be served, and the action has not been placed upon the trial calendar, at any time within 90 days after it is served." Thereafter, a party wishing to amend its pleading must do so by consent of its adversary or on motion for leave of the Court. Ibid.

Leave of court to amend a pleading "shall be given freely in the interest of justice." Ibid.; See also Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 500-01 (2006) (demonstrating that a motion for leave to amend should be liberally granted). The liberality afforded to motions for leave to amend a pleading applies at any stage of the proceedings, even after an appeal. Bustamante v. Borough of Paramus, 413 N.J. Super. 276, 298 (App. Div. 2010). Motions for leave to amend should also be granted in order to avoid the possibility of inconsistent verdicts and duplicative actions, especially where no undue prejudice to any party is shown. Brower v. Gonnella, 222 N.J. Super. 75, 80 (App. Div. 1987).

The limited restrictions imposed upon a motion such as this include only those situations where undue prejudice would result from the amendment, or where the proposed amendment would be futile. Town of Harrison Bd., 439 N.J.

Super at 178-79. In considering a motion to amend a pleading, the Court should not consider the ultimate merits of the proposed amendment. R. 4:9-1; Kernan v. One Washington Park, 154 N.J. 437, 456-57 (1998). Rather, the Court should consider an objection to a motion to amend a pleading only on the ground that the amendment fails to state a cause of action under the appropriate standard of R. 4:6-2(e). Maxim Sewerage v. Monmouth Ridings, 273 N.J. Super. 84, 90 (Law Div. 1993).

Here, the Trial Court abused its discretion in denying Plaintiffs' Motion for Leave to File an Amended Complaint on the basis that Plaintiffs lacked standing and that Mercer Industrial Properties, LLC is not an indispensable party. For the reasons set forth herein, the Appellate Division should reverse the order denying Plaintiffs' Motion for Leave to Amend the Complaint.

A. The Trial Court Erred in Denying Plaintiffs' Motion for Leave to Amend the Complaint to Add an Indispensable Party, Mercer Industrial Properties, LLC. (Pa2944).

As part of the Motion for Leave to Amend the Complaint, Plaintiffs sought to add Mercer Industrial Properties, LLC ("Mercer Industrial") as an indispensable party. In denying the motion, the Trial Court held that the proposed party would be unduly prejudiced in having to familiarize itself with the litigation. (Pa2944). The Trial Court also held that Plaintiffs failed to provide

a sufficient basis to determine how judgment in Plaintiff's favor would affect the rights and interests of the proposed Defendant. (Pa2944).

Mercer Industrial is the current property owner, therefore any decision on Plaintiffs' claims necessarily affects the rights and interests of Mercer Industrial. While Mercer Industrial may not have been the applicant for the land use approvals, it is now the beneficiary of those approvals and the party who is developing the site, as revealed on the Soil Importation Permit. (Pa2780-Pa2782). A decision in Plaintiffs' favor on the underlying case, which seeks to reverse the site plan approval, would certainly affect the rights and interests of Mercer Industrial. Therefore, the Trial Court abused its discretion when it held that it was unclear how Mercer Industrial may be affected by a judgment in Plaintiffs' favor in this case.

The Trial Court also held that granting Plaintiffs' Motion would unduly delay trial and require the submission of new briefs. (Pa2944). Mercer Industrial's main business address is registered at 100 Dunbar Street, Suite 400, Spartanburg, SC, 29306. (Pa2838). This is the address of the corporate headquarters of Johnson Development Associates, Inc., at 100 Dunbar Street, Suite 400, Spartanburg, South Carolina 29306. (Pa2840). There is no undue prejudice for Mercer Industrial to defend itself in this lawsuit as Mercer Industrial is Johnson Development. Applicant did not dispute this. This was

simply a procedural matter as Mercer Industrial is the current legal owner of the subject property and therefore an indispensable party.

Furthermore, there would have been no need for additional briefing, as adding the proposed new party does not add any new legal arguments. Mercer Industrial simply stands in the shoes of Johnson Development. There would also not have been any delay to the developer's ability to act in accordance with the land use approvals, as there is no injunction in place, and Mercer Industrial has in fact already begun acting allegedly in accordance with the land use approvals. (Pa2769-Pa2774). Therefore, the Trial Court abused its discretion in determining that adding Mercer Industrial, the current legal owner of the subject property, would have delayed anything.

For the reasons set forth herein, the Trial Court abused its discretion in denying Plaintiffs' Motion for Leave to Amend the Complaint to Add Mercer Industrial Properties, LLC, and should be reversed.

B. The Trial Court Erred in Denying Plaintiffs' Motion for Leave to Amend the Complaint to Add an Environmental Rights Act Claim and Violation of the Freshwater Wetlands Act. (Pa2943-Pa2947).

Plaintiffs' Motion for Leave to Amend the Complaint also sought to claims that Johnson Development is in violation of the Freshwater Wetlands Act and

the Environmental Rights Act[3]. (Pa2817-Pa2837). In denying the request, the Trial Court held that granting such leave would have caused significant prejudice to the remaining parties, as it would have required the rewriting of the prerogative writ trial briefs and delayed trials. (Pa2943). The Trial Court also held that Plaintiffs were aware of the claims for over a year but did not bring the claims until recently. (Pa2943).

However, the issue did not become ripe until April 11, 2024 when the site development work began. Upon review of the Soil Importation Site Plan, it was discovered that Defendant intended on filling in a previously unidentified wetland on the property. (Pa2780-Pa2792). An action pursuant to the Environmental Rights Act may be commenced "upon an allegation that a person is in violation, either continuously or intermittently, of a statute, regulation or ordinance, and that there is a likelihood that the violation will recur in the future." N.J.S.A. 2A:35A-4. Therefore, this claim only became ripe when Defendant's plans revealed they intend on filling in a previously unidentified wetland. This wasn't something known by Plaintiffs for over a year, and at any rate, no claim could have been brought until Defendants began site development on April 11, 2024. N.J.S.A. 2A:35A-4.

[3] The request to add a claim for violation of the Flood Hazard Area Permit was withdrawn during oral argument as said allegation became moot.

Furthermore, these claims would not have been appropriate to be included in the briefing for the prerogative writ action. As proposed by Plaintiffs, the prerogative writ action could have been argued as scheduled while these claims would have proceeded through discovery. The amendments would not have delayed the prerogative writ trial date, as it would have been bifurcated and handled separately.

Finally, the Trial Court also abused its discretion in holding that Plaintiffs did not have standing under the Environmental Rights Act to bring the claims due to a failure to provide the pre-action notice. (Pa2945). Plaintiffs had initially filed an Order to Show Cause for temporary and preliminary injunctive relief pursuant to the Environmental Rights Act. Pursuant to N.J.S.A. 2A:35A-11, if a plaintiff an action brought by order to show case can show immediate and irreparable harm will probably result, the Court may waive the notice requirement. Therefore, no notice was needed when this was originally filed, as Plaintiffs were alleging immediate and irreparable harm.

As the Trial Court indicated it was inclined to deny the request for preliminary restraints during oral argument held on May 7, 2024, Plaintiffs immediately drafted and sent out notices as required under N.J.S.A. 2A:35A-11. (Pa2841). The Trial Court agreed to adjourn the motion return date at Plaintiffs' request to allow the thirty-days to pass. (Pa2888-Pa2889). Therefore, the pre-

action notice letter was properly served, and the thirty-days passed before the Trial Court determined the outcome of the motion.

As such, the Trial Court abused its discretion to deny the motion on the basis that Plaintiffs failed to serve the proper notices, when Plaintiffs had (1) initially argued that there was immediate and irreparable harm and therefore no notices were required, (2) immediately served notices when it was determined the court was not inclined to find immediate and irreparable harm, and (3) the requisite thirty days passed before the trial court heard the motion. For the reasons set forth herein, the Trial Court's denial of Plaintiffs' Motion for Leave to Amend the Complaint to add violation of the Freshwater Wetlands Protection Act and Environmental Rights Act should be reversed.

CONCLUSION

In conclusion, for the reasons set forth herein, this Court should reverse the Trial Court's Order Dismissing the Complaint and reverse the approval of the site plan application. Furthermore, this Court should reverse the Order denying Plaintiffs' Motion for Leave to File an Amended Complaint.

Respectfully submitted,

LIEBERMAN BLECHER & SINKEVICH, P.C.
Attorneys for Plaintiffs-Appellant

Dated: November 14, 2024

/s/Stuart J. Lieberman
Stuart J. Lieberman, Esq.

ARCHER & GREINER, P.C.
A Professional Corporation
By: Jamie A. Slimm, Esquire (I.D. No. 014951997)
Niall J. O'Brien, Esquire (I.D. No. 036402005)
1025 Laurel Oak Road
Voorhees, NJ 08043
(856) 795-2121
jslimm@archerlaw.com
nobrien@archerlaw.com
Attorneys for Respondent, Johnson Development Associates

THE ALLIANCE FOR SUSTAINABLE COMMUNITIES GREGORY WESTFALL, KENNETH MAYBERG, PATRICIA BROWN, AND MARY WOEHR, Appellants, v. ROBBINSVILLE TOWNSHIP LAND USE BOARD and JOHNSON DEVELOPMENT ASSOCIATES, INC., Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-4095-23 On Appeal from Superior Court of New Jersey Mercer County – Law Division Docket No.: MER-L-1543-23 Sat Below: Hon. Robert Lougy, A.J.S.C.

BRIEF OF RESPONDENT, JOHNSON DEVELOPMENT ASSOCIATES, INC.

On the Brief: Jamie A. Slimm, Esq.
Of Counsel: Robert W. Bucknam, Jr., Esq.
Niall J. O'Brien, Esq.

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PRELIMINARY STATEMENT

This appeal was filed by objectors to the Preliminary and Final Site Plan and Variance approval granted by the Robbinsville Township Land Use Board ("Board") to Johnson Development Associates, Inc. ("Johnson Development"). Appellants are The Alliance for Sustainable Communities, Gregory Westfall, Kenneth Mayberg, Patricia Brown and Mary Woehr (collectively, "Alliance" or "Appellant").

The lengthy record from the Board proceedings shows that Johnson Development engaged in a deliberative application process resulting in a lawful decision by the Board; the Board was committed to a fair review of the application and a fair hearing process; and the Board considered extensive testimony from experts on behalf of Johnson Development, Alliance, and its own professional consultants. The Resolution sets out in detail the reasons for the Board's decision.

In a comprehensive written opinion, the Trial Court found that there was substantial credible evidence in the record to support the Board's determination to approve Johnson Development's application. Moreover, in a separate written opinion, the Trial Court also properly exercised its discretion in denying Alliance's motion to amend its complaint finding that Alliance did not have the requisite standing to do so and that the late filing would cause significant prejudice to

Defendants and would delay the trial. Accordingly, the Trial Court's decision should be upheld and affirmed.

PROCEDURAL HISTORY

Johnson Development joins in the Procedural History set forth in the initial brief of Alliance.

COUNTERSTATEMENT OF FACTS

I. JOHNSON DEVELOPMENT'S DEVELOPMENT APPLICATIONS

On February 16, 2022, Johnson Development submitted an application to the former Robbinsville Zoning Board of Adjustment [1] for Preliminary and Final Major Subdivision Approval; Preliminary and Final Site Plan Approval and Bulk Variance/Design Waiver Approval, all related to the development of a 90.88 +/- acre property, located along Allentown-Robbinsville Road with access along a private road, known as Corporate Boulevard in Robbinsville Township (the "Property"). *(DJa001*). The Property is located in the ORH – Office, Research and Hotel Zoning District, and is known as "Mercer Corporate Park"[2]. *(DJa001*).

[1] In January of 2023, the former Robbinsville Planning Board and Zoning Board of Adjustment were reconstituted as a combined Land Use Board. For purposes of this Brief, all references made to the Board shall mean both the former Zoning Board and the current Land Use Board.

[2] The Mercer Corporate Park, as approved by the Board in 2008, was intended to consist over 500,000 square feet of office space, 84,180 square feet of warehouse space and a 160-room hotel facility. *(Pa2622-Pa2681).*

A. Prior Use Variance Approval

In 2020, Johnson Development applied for and obtained use variance approval for the development of two (2) warehouse-distribution-office buildings to replace the office, warehouse and hotel uses as approved in 2008. *(DJa130*) As permitted by N.J.S.A. 40:55D-76.b., the application was bifurcated, with Johnson Development requesting only use variance approval (with subsumed bulk variances), with applications for all other approvals to be submitted after the approval of the use variance. That use variance application was approved and memorialized by the Board by Resolution ZB20-01-01 dated April 27, 2021[3]. *(DJa130*).

B. Prior Subdivision Approval

In 2022, Johnson Development applied for and obtained subdivision approval to divide the Property into three lots. *(DJa173).* The subdivision application was approved and memorialized by the Board by Resolution ZB22-02-02 dated December 13, 2022[4]. *Id*. at 173

[3] Appellant challenged the grant of use variance approval which was dismissed with prejudice by the Trial Court. By Opinion and Order dated July 25, 2024, the Appellate Division affirmed the decision of the Trial Court at Docket No. A-002509-21. The New Jersey Supreme Court denied the Alliance Petition for Certification on October 29, 2024. (C-141, September Term 2024).

[4] Appellant challenged the grant of subdivision approval which was dismissed with prejudice by the Trial Court. The appeal is scheduled for argument in the Appellate Division on February 12, 2025 (Docket No. A-3235-22).

C. Site Plan Approval

The February 16, 2022, subdivision application submission by Johnson Development included a companion application for Preliminary and Final Major Site Plan Approval. *(DJa001*). The Site Plan Application was reviewed by the numerous Board consultants and other municipal entities. The Site Plan Application, and its companion Subdivision Application, were reviewed for conformance with the Robbinsville Ordinances and it was determined that all required items were submitted. *(DJa078, DJa120*). The review reports issued by Board Professionals are part of the record on the site plan hearings. *(Pa1-Pa234).*

The public hearings on Johnson Development's site plan application were held before the Board on December 6, 2022, December 13, 2022, February 21, 2023, February 28, 2023, March 21, 2023, March 22, 2023 and March 28, 2023[5]. Johnson Development presented testimony in support of the Application from numerous fact and expert witnesses. Witnesses for the Board and on behalf of objectors (Plaintiff) also testified. During the public hearing, sixteen (16) members of the public also questioned witnesses and/or testified.

[5] Johnson Development adopts the transcript references utilized by Alliance in its Brief.

The Board voted to approve the Site Plan Application at the conclusion of the March 28, 2023, public hearing. On June 27, 2023, the Board adopted Resolution ZB22-02-02, memorializing the Site Plan Approval[6]. (*Pa2488*).

II. NJDEP PERMIT FOR PROPERTY

On February 18, 2021, Johnson Development was issued a Freshwater Wetlands Letter of Interpretation ("LOI") by the New Jersey Department of Environmental Protection ("NJDEP") verifying the locations of wetlands and wetlands transition areas and State open waters on its property. *(DJa*208) That LOI also established the resource value classification of those wetlands, and, therefore, the associated wetlands transition areas. As stated in the LOI itself, it was issued based upon submitted information and "upon site inspections conducted by [NJDEP] staff on September 21, October 1 and December 29, 2020." *Id*. The LOI verified the wetlands locations set forth in the associated plans submitted on behalf of Johnson Development, last revised January 25, 2021. *Id*. Plaintiffs appealed the issuance of that LOI but subsequently withdrew their appeal. *(DJa*211).

[6] A question arose as to whether the Board had a quorum to open the June 27, 2023, meeting and take action at that meeting. Johnson Development filed a Cross-Motion on February 22, 2024 seeking a limited remand to resolve this issue. The Trial Court granted that Cross-Motion and the Resolution was re-adopted on March 19, 2024. (*Pa2720*).

LEGAL ARGUMENT

I. THE JUDICIAL STANDARD OF REVIEW OF THE DECISION OF THE BOARD REQUIRES DEFERENCE UNLESS THERE HAS BEEN A CLEAR ABUSE OF DISCRETION.

The Appellate Division review of a challenge to the decision of a municipal board follows the same standard as the trial court: the Court must determine whether the municipal body acted arbitrarily, capriciously, or unreasonably. *Ten Stary Dom P'ship v. Mauro*, 216 N.J. 16, 33 (2013); *Jacoby v. Zoning Board of Adjustment of Borough of Englewood Cliffs*, 442 N.J. Super. 450, 462 (App. Div. 2015). The action of the local board is presumed to be valid. *Kenwood Associates v. Bd. of Adj. Englewood*, 141 N.J. Super. 1 (App. Div. 1976). This presumption is overcome only by a showing of clear and compelling evidence. *Dome Realty, Inc. v. City of Patterson*, 83 N.J. 212, 235 (1980); *Advance at Branchburg II, LLC v. Twp. of Branchburg Board of Adjustment*, 433 N.J. Super. 247, 253 (App. Div. 2013). The appellate court will not disturb the local board's decision absent a clear abuse of discretion and will not overturn the board's decision where there is adequate evidence supporting the decision and the decision comports with statutory criteria. *Price v. Himeji, LLC*, 214 N.J. 263, 284 (2013); *Burbridge v. Twp. of Mine Hill*, 117 N.J. 376, 385 (1990).

II. THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFF'S COMPLAINT (RESPONSE TO POINT I OF APPELLANT'S BRIEF).

A. The Trial Court Properly Held That Johnson Development Met Its Burden of Proof For A (c)(2) Variance And Design Waivers (Response to Point IA of Appellant's Brief).

Alliance claims that Johnson Development failed to meet its burden of proof for the grant of the "c(2)" variances claiming that there is nothing in the record to support that the "c" variances sought make the project better for the public. Alliance also claims that the design waivers do not make the project better or advance the purpose of zoning and therefore should have been denied. Accordingly, Alliance argues that the Trial Court erred in holding that the variances and design waivers were properly granted.

1. C(2) Variances

Pursuant to the Municipal Land Use Law ("MLUL"), a zoning board or planning board has the authority to grant bulk or "c" variances. *See* N.J.S.A. 40:55D-70(c). The "c" variances grant relief from zoning standards which do not involve the six categories of "d" variances specified in the statute.

The requested bulk variances here were treated as "c(2)" variances under the MLUL, wherein the Board is authorized to grant variance relief, upon satisfaction of the so-called positive criteria. Specifically, "Where in an application or appeal relating to a specific piece of property, the purposes of this act would be advanced by a deviation from the Zoning Ordinance requirements and the benefits of the

deviation would substantially outweigh any detriment." N.J.S.A. 40:55D-70c(2). As with all variances, such relief can only be granted when there is a showing that the so-called negative criteria are satisfied, i.e., that "there will be no substantial detriment to the public good and that the requested relief will not substantially impair the intent and purpose of the Zone Plan and the Zoning Ordinance." N.J.S.A. 40:55D-70.

As part of its Site Plan Application, and as referenced in the Resolution, Johnson Development sought certain bulk variances pursuant to N.J.S.A. 40:55D-70c(2). However, only three (3) of those variances (collectively, "Variances") are being challenged herein by Alliance. The challenged Variances approved by the Board allow (i) a side yard setback on proposed lot 31.02 from Building 2 of 91.9 feet, rather than 126 feet; (ii) a proposed accessory sound attenuation wall on proposed lot 31.02 to be located 24 feet from the side property, rather than 126 feet; and (iii) a landscape buffer of 38 feet adjacent to residential property, rather than 50 feet.

Alliance challenges the grant of the Variances based on the theory that Johnson Development should simply have reduced the size of the warehouse buildings to avoid the Variances. These statements form the basis of their entire argument and ignore the fact repeated in testimony to the Board that the proposed development met all density and intensity zoning standards, and were in fact

significantly below the maximum building and impervious coverages permitted by Ordinance and, therefore, building size was not an issue requiring relief under Johnson Development's site design. (1T61-3 to 61-6).

Alliance then asserts that the statutory standards for the grant of c(1) variances should apply to the requested c(2) variances arguing, that "the site is a 90.88 acre tract. The property is not uniquely shaped or sized that would prevent Applicant from meeting the requirements…" (*Pb10*). The unique size or shape of a property is a factor which must be considered in determining hardship for a "c(1)" variance, but is not relevant to a "c(2)" variance analysis under the MLUL, N.J.S.A. 40:55D-70c(1).

The New Jersey Supreme Court considered the standards for the granting of "c(2)" variances in *Kaufmann v. Planning Bd. For Warren Tp.*, 110 N.J. 551 (1988), giving clear direction that c(2) variance relief could be granted in furtherance of protection of natural resources without the requirement that an applicant reduce the scope of otherwise permitted development. The Supreme Court in *Kaufmann* stated:

> We think that because of its lesser moment the c(2) variance need not be so closely confined to the general welfare. Rather, it may take its meaning as well from the other specific purposes of zoning set forth in the MLUL. For example, N.J.S.A. 40:55D-2j intends the prevention of "degradation of the environment through improper use of land." Thus a property crossed by a stream might call for an adjustment of side or front yards better to protect

> the stream bed, or a stand of trees might call for a shifting of lot sizes (if a minor subdivision). In some cases a height variance might better serve to conserve "open space…and valuable natural resources." N.J.S.A. 40:55D-2j.

Id. at 563. The Board in conformance with the direction of *Kaufmann*, found that the Variances furthered purposes of the MLUL in protecting environmentally sensitive areas and supporting good civic design. (*Pb10*).

Further and contrary to Plaintiff's arguments, Johnson Development provided substantial credible evidence to justify each of the "c(2)" Variances and the Board correctly found in its Resolution that it had met its burden.

a. Side Yard Setback Variance

Specifically, the Board found that the grant of the variance to allow a Side Yard Setback would provide:

> significant benefits of keeping development away from existing environmentally sensitive areas on the Property, and allowing truck loading to be relocated to the interior of the Property. . . . The Board finds that this a better planning alternative. The location of the Building partially in the side yard setback keeps the impacts of the development to the internal site. This also represents a good civic design consistent with N.J.S.A. 40:55D-2i and furthers the purpose of zoning at N.J.S.A. 40:55D-2(h) to encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes which result in congestion or blight.

(Pa2488, Pa2720, Para. XXVI). This finding was in response to testimony provided by Johnson Development's Engineer related to the configuration of the buildings (1T48 to 53) and Planner (4T50 to 73).

b. Variance for Location of Sound Attenuation Wall

The Board also found that the grant of the variance to allow the proposed accessory sound attenuation wall to be located 24 +/- feet from the side Property line instead of 126 feet as required would:

> provide significant benefits in allowing the sound attenuation structure to be located where it has been determined that it will be most effective and will help achieve compliance with NJDEP sound regulations. The sound wall would serve no purpose if it were located in compliance with the side yard setback requirement. Compliance with NJDEP sound regulations and allowing the sound wall to be located where it will provide the most effective sound reduction will further the purpose of N.J.S.A. 40:55D-2(a) to encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals and general welfare. The Board finds that this a better planning alternative and the location of the sound attenuation wall within the required setback also keeps the impacts of the development to the internal site. This also represents a good civic design consistent with N.J.S.A. 40:55D-2i. . .

(Pa2488, Pa2720, Para. XXVIII). This finding was in response to testimony provided by Johnson Development's Acoustical Consultant related to the required location of the sound attenuation wall in order to serve its purpose (1T58 to 60); Noise Expert (2T72 to 78) and Planner (4T50 to 73).

c. Variance To Reduce Landscape Buffer

Finally, the Board found that the grant of the variance to allow a landscape buffer of 38 +/- feet in width instead of 50 feet adjacent to residential property will provide:

> significant benefits of keeping development away from existing environmentally sensitive areas on the Property, and allowing truck loading to be relocated to the interior of the Property. The proposed landscape buffer is dense and provides significant buffering in concert with the sound attenuation wall. . . . The Board finds that the flexibility in the buffering requirements represents a good civic design consistent with N.J.S.A. 40:55D-2i and furthers the purpose of zoning at N.J.S.A. 40:55D-2(h) to encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes which result in congestion or blight.

(Pa2488, Pa2720, Para. XXX). This finding was in response to substantial testimony including as provided by Johnson Development's Engineer related to the landscape buffer (1T64 to 65); and Planner (4T50 to 73). This variance to allow a minor reduction in the required 50-foot buffer area is limited to approximately 105 feet of a parking drive aisle, while the buffer meets the 50-foot requirements along the entire remaining property line and the buffer was supplemented with a berm at the request of an adjacent property owner. (6T110-20 to 111-4).

For each of the three "c(2)" Variances challenged by Alliance, the Board referred to the testimony provided by Johnson Development's experts. Alliance

does not challenge Johnson Development's proofs under the negative criteria for the Variances.

The record below demonstrates that several Variances were the result of plan changes requested by Robbinsville Township Officials. (1T33 to 34; 1T67; 4T53; 4T65; 4T69). For example, Johnson Development was requested to reorient Building 2 to keep truck parking internal to the site, rather than facing adjacent properties. This design change mitigated impacts to the environmental areas both onsite and offsite, by, among other things, allowing for the orientation and location of buildings away from wetlands and flood hazard areas in the western part of the site. (*Pa2522*). Furthermore, the enhanced landscaped buffer requested by Board consultants, in addition to a sound attenuation wall, significantly mitigate impacts to surrounding properties. (*Pa2523*).

Thus, extensive testimony was provided as required by the MLUL for the c(2) variances, that the requested Variances provide significant benefits and represent a better zoning alternative for the site, and that the benefits provided significantly outweigh any detriment.

In holding that the Board did not act in an arbitrary, capricious or unreasonable manner in granting the variances, the Trial Court correctly found that the Board made various findings about the variances based upon the testimony of various fact and expert witnesses. (*Pa2966*). Importantly, the Trial Court noted,

the variances will confer substantial benefits to the local community. "Indeed, each of the requested variances reflect collaborative determinations by [Johnson Development] and township professionals to maximize the benefits to the public." (*Pa2966*). In doing so, the Trial Court explained that the law does not require Johnson Development to consider reducing the size of the development for the Board to grant the variance as Alliance suggests. (*Pa2967*).

2. Design Waivers (Site Plan Exceptions)

Alliance is also challenging the design waivers granted by the Board to allow Johnson Development not to provide: (i) shade trees along Robbinsville-Allentown Road; (ii) landscape screening around the proposed parking and loading areas; (iii) landscape islands within the parking areas; (iv) internal pedestrian circulation areas; and, (v) to allow the proposed sanitary sewer force main to be HDPE rather than ductile iron pipe (collectively, "Design Waivers").

The authority to grant design waivers (site plan exceptions) is provided by the MLUL which specifically states that a planning board "shall have the power to grant such exceptions from the requirements for site plan approval as may be reasonable and within the general purpose and intent of the provisions for site plan review and approval of an ordinance adopted pursuant to this article, if the literal enforcement of one or more provisions of the ordinance is impracticable or will

exact undue hardship because of peculiar conditions pertaining to the land in question." N.J.S.A. 40:55D-51(b).

The Court's review of design waivers, like variances, is limited to whether the grant was arbitrary and capricious action. *Coventry Square, Inc. v. Westwood Zoning Bd. of Adjustment*, 138 N.J. 285, 301 (1994).

a. Design Waiver For Shade Trees

With respect to the design waiver to allow Johnson Development not to provide shade trees along Robbinsville-Allentown Road, the Board specifically found, that

> the Design Waiver is necessary to avoid conflicts related to existing utility lines in the area along the roadway where the Shade Trees would be required by Ordinance. The Board finds that this design waiver can reasonably be granted because this condition is specific to the property and literal enforcement would impose a hardship on the Applicant.

(Pa2488, Pa2720, Para. XXXVIII).

The Board found that the planting of shade trees in that location would impose a hardship because of the location of utility lines along the street. *(Pa2488, Pa2720, Para. XL).* Plaintiff again urges that the requested design waiver was unnecessary simply because of the size of the Property and ignores the testimony provided and the Board's rationale related to the design waiver.

b. Design Waiver For Landscape Screening of Parking/Loading Areas

With respect to the design waiver related to the requirement for landscape screening around parking and loading areas, the Board specifically found:

> for this specific site the interior roadways are to remain private and not subject to the ordinance screening requirement for screening from public roadways. However, the Board also finds that the proposed berms located along the site's frontage provide screening, so that the buildings, associated parking lots and loading docks will not be visible to the public. Further, the Board finds that for the proposed Building 1 & 2, the associated trailer stalls are screened from Robbinsville-Allentown Road by the seven (7) foot landscaping berm located along the site frontage and are setback greater than 400 feet from the public right-of-way. The Board finds that adequate screening has been provided and that additional screening of the parking areas and loading docks from the private internal roadways on the subject property would be impracticable.

(Pa2488, Pa2720, Para. XXXIX).

c. Design Waiver For Landscape Islands

With respect to the design waiver related to the requirement for landscape islands within the proposed parking areas, the Board specifically found:

> Some planting islands and shade trees are proposed but the proposed landscaping does not meet the Ordinance requirements and a Design Waiver can be reasonably granted because the parking areas are internal would generally be for employees rather than visitors or the general public. . . . Literal enforcement of this requirement for the provision of the landscape islands is impracticable for the subject property.

(Pa2488, Pa2720, Para. XL).

Again, based upon the testimony of Johnson Development's witnesses, the Board correctly applied the required standard in recognizing that the overall landscaping proposed by Johnson Development achieved the purpose of the landscaping requirements and found that strict enforcement of the parking island requirements might also enlarge the footprint of development and reduce the external buffering. *Id.*

d. Design Waiver For Internal Pedestrian Circulation

With respect to the design waiver allowing Johnson Development not to provide internal pedestrian circulation areas, based upon the testimony provided, the Board found:

> the overall development and the specific use are not necessarily pedestrian friendly such as to require pedestrian access between the buildings. The proposed office-distribution-warehouse uses are designed to be independent of one another and to require strict adherence to this requirement for pedestrian access would impose a hardship on the Applicant. The Board notes that a multipurpose (walking, jogging, bicycling) path has been provided along the frontage of the site.

(Pa2488, Pa2720, Para. XLI).

The Board found that pedestrian facilities were provided where needed at the site and that adherence to the requirement for pedestrian circulation between the

independent buildings was unnecessary and would impose a hardship on Johnson Development.

Finally, with respect to the design waiver to allow the Applicant to utilize HDPE rather than ductile iron pipe for the sanitary sewer mains on the property, the Board specifically found:

> due to the size of this property and the scope of development that is allowed thereon as a result of that size, HDPE is more appropriate for use in connection with horizontal directional drilling. The Board's Sanitary Sewer Engineer also agrees that the directional drilling installation method requires the change in material to HDPE rather than the DIP contemplated by Ordinance. The Board finds that strict adherence to this requirement would impose an unnecessary hardship on the Applicant and that the design waiver can reasonably be granted.

(Pa2488, Pa2720, Para. XLII).

Alliance alleges that the only reason that Johnson Development requested the Design Waivers is to maximize the size of the development. This assertion ignores the considerable testimony provided by Johnson Development's experts demonstrating that the requested Design Waivers are reasonable in scope, provide benefits in terms of the overall site design and were made necessary by conditions specifically related to the Property, such that the literal enforcement of the Ordinance requirements would be impracticable or impose a hardship.

Alliance again attempts to obscure the required standard for the grant of design waivers by arguing that none of the requested Design Waivers "makes the

project better or advances the purposes of zoning." (*Pb11*). Alliance also again points to the size of the Property as proof that the Design Waivers were not needed but provides no citations to the transcript or Resolution that would show that Johnson Development argued or the Board found, that size of the Property was a material factor in the need for, or justification for the requested design waiver approvals.

The Trial Court aptly stated that "Plaintiffs cannot meet their burden merely by reciting Township Ordinances and asserting that Johnson Development only seeks to maximize the development of the property." (*Pa2972*). The Trial Court found that the record shows "the approval was reasonable in each instance and would lead to undue hardship of the Township's ordinances were literally enforced." (*Pa2971*). In addition, the Trial Court noted that the design waivers advance the public good as each waiver allows for development of the property in a more community-conscious manner. (*Pa2071-2972*).

B. The Trial Court Properly Held That Johnson Development Provided Substantial Credible Evidence Regarding The Proposed Stormwater System (Response to Point IB of Appellant's Brief).

Alliance argues that Johnson Development did not present a compliant site plan application and, as a result, the Board's approval should be reversed. In support of their argument, Alliance cites only the testimony of their own experts as evidence that Johnson Development's Application was not compliant. However,

Alliance ignores the testimony of Johnson Development's experts and the conclusions and testimony of the Board Professionals. Alliance appears to suggest that if testimony by objectors is presented, it must be accepted by a Board and an application must be denied on that basis.

It is certainly the duty of the applicant to present evidence sufficient to support its application for relief before a land use board. To that end, a substantial part of the evidence produced at hearings comes from experts produced by the applicant. Objectors are also permitted to provide expert testimony in opposition of an application. A board is not bound to accept the testimony of an expert. *See Klug v. Bridgewater Planning Bd.*, 407 N.J. Super. 1, 13 (App. Div. 2009); *El Shaer v. Plan. Bd. of Twp. of Lawrence*, 249 N.J. Super. 323, 330 (App. Div. 1991) (holding that the planning board was entitled to disregard the expert's conclusion, which lacked a study supporting the opinion, and instead rely on its own members' personal knowledge on conditions related to traffic, which was the center of debate).

Where there is conflicting testimony of experts, it is within the board's discretion to decide which expert's testimony it will accept. *See Hughes v. Monmouth Univ.*, 394 N.J. Super. 207, 232 (Law. Div. 2006); *Allen v. Hopewell Twp. Zoning Bd. of Adjustment*, 227 N.J. Super. 574, 581 (App. Div. 1988) (holding that it was within the province of the board of adjustment to accept or

reject the opinions of the expert planner presented by plaintiffs because there was sufficient evidence from which the board could reach its conclusion). A board is free to accept or to reject the opinions of an expert proffered by an applicant or objector. *See Hawrylo v. Bd. of Adjustment, Harding Twp.*, 249 N.J. Super. 568, 579 (App. Div. 1991) (holding that because of the expert testimony from the applicant and the board's professionals along with the purpose of the master plan the board properly disregarded the testimony of the plaintiff's expert planner).

Although the Board is not bound to accept expert testimony, its determination must be made on a "rational and reasonable basis." *Reich v. Fort Lee Zoning Board*, 414 N.J. Super. 484, 504-505 (App. Div. 2010). In *Reich*, the Court held that the board's denial of a variance was not factually substantiated where it accorded substantial weight to lay objectors' testimony, rather than to the applicant's expert's testimony. *Id*. at 505-507.

Above all, the board has the choice of accepting or rejecting the testimony of witnesses, and where reasonably made, such decision is conclusive on appeal." Cox & Koenig, New Jersey Zoning & Land Use Administration (GANN, 2024) § 18-4.2*; See also Kramer v. Bd. of Adjustment of Sea Girt*, 45 N.J. 268, 288 (1965).

As correctly stated by the Trial Court, "if competent testimony provides the necessary factual basis for a decision, the Board's decision withstands appeal. (*Pa2972*). In the present case, Johnson Development provided substantial credible

evidence to support its Application which was believable and competent. The fact that Alliance offered conflicting expert testimony is not a basis for a Court to reverse the Board's approval of the Application when such conflicting testimony was rejected by the Board and/or its own professionals, or credibly refuted by Johnson Development's professional consultants.

Alliance alleges that the proposed stormwater system is not compliant because their expert testified that it does not meet the groundwater recharge requirements (*Pb15*), does not meet the water quality requirements under the stormwater regulations (*Pb19*) and does not meet peak flow requirements in the stormwater regulations (*Pb21*). However, Johnson Development's expert, Kevin Webb, PE, LEED, AP, testified extensively regarding the proposed Stormwater Management Plan and the compliance of same. Further, Mr. Webb provided rebuttal testimony in response to Plaintiff's offered testimony related to the stormwater design. (5T63-22 to 69-14).

The Board's own Engineer agreed, testifying that, in his opinion, the plan complies with the NJDEP and Township Ordinance standards and would ultimately be approved by the NJDEP. (6T77-12 to 77-25):

> Mr. Webb provided testimony regarding the stormwater management and stated that the Applicant submitted modified plans based on new stormwater regulations including green infrastructure BMPs that also comply with current Township ordinances. One difference is that the Applicant proposes a constructed wetland, which will

> require the Applicant to reconstruct the existing pond on the property to be a different shape, to pump it down, and add wetland plantings. The Applicant also proposes to modify the southwestern infiltration basin that has fallen into disrepair into a constructed wetland type BMP. He also provided testimony about the BMPs that aimed at improving water quality and two bioretention BMPs that discharge into tributary to Indian Run.

(Pa2488, Para. 45, Pa2720, Para. 46).

Mr. Webb also testified that, the "design was revised so that the development meets the performance standards for peak flow attenuation and water quality upstream of the existing manmade lake basin. *(Pa2488, Para. 47, Pa2720, Para. 48).* Thus, the Board's finding that the "stormwater management design complies with the Township's Ordinances and is supported by the various studies and plan submitted by the Applicant" is based upon testimony at the Board hearing by the Engineer for Johnson Development and the Board Engineer. *(Pa2488, Pa2720, Para. XIV).* The Board also considered the testimony submitted on behalf of the objector, but found it to conflict with the record. *(Pa2488, Pa2720, Para. XIV).*

1. Groundwater Recharge Standard

Mr. Webb's direct and rebuttal testimony confirmed that the proposed stormwater design met the groundwater recharge standards under NJDEP stormwater regulations.

In direct rebuttal to Plaintiff's testimony regarding the stormwater system, Mr. Webb affirmed that through an iterative process in refining the stormwater system, his firm had consulted with the NJDEP and the NJDEP had affirmed that soils replacement was appropriate and beneficial for the design of a site containing impermeable soils and that the mounding analysis conducted with respect to the replacement soils was consistent with NJDEP methodology. (5T64-6 to 65-13).

2. Water Quality Standard

In response to the water quality comments and the concern expressed by Plaintiff's stormwater witness that manufactured treatment devices would be inundated with back water from the constructed wetlands, Mr. Webb testified that, in consultation with the NJDEP, two elements were included in the design that would prevent that inundation:

> One is, we have actually a design where the water quality storm that would flow through the inlets and ultimately those manufactured treatment devices has a diversion and it's diverted, that water's actually diverted away from the constructed wetlands and discharged to another point on the site where it maintains a free discharge. … As a belt and suspenders, we also put a back flow preventer on the pipe between the headwall that discharges into constructed wetlands and its nearest upstream manhole where those adapt the downstream infrastructure that for larger storms would accommodate the flows that go through the system, including the portions, again, those larger storms that would go through the Filterra units, but not really designed to accommodate that.

(5T66-1 to 66-20). Mr. Webb confirmed that these Best Management Practices were incorporated in conjunction with ongoing discussions with the NJDEP.

3. Peak Flow Rate Standard

With respect to peak flow analysis, Mr. Webb further responded to Plaintiff's testimony indicating that the analysis had been revised in consultation with NJDEP:

> In terms of the methodology that we had for the calculating our target flow rates, the weighted calculation method as was described, we have a partially developed site today and it's a site that also has stormwater management components, which as we've discussed and was referred to are partially complete. … in fact, with DEP's evaluation, our initial submission, they had request for us about changes in the way we measure and where we measure those peak flow compliance, including at that center lake basin, not just at the downstream analysis point.

(5T67-6 to 67-25).

4. Board Engineer Review

The Board Engineer agreed with Mr. Webb's rebuttal testimony, indicating that the stormwater design also met the Township Ordinance standards:

> [T]here's some questions about whether the small scale BMPs would be effective by replacing the soils to the seasonal high water table. That is, in fact, a common practice with DEP recommending that. In fact, requiring that…I am also fairly confident that, based on what we've reviewed, the DEP should approve it with some, maybe some minor tweaks, but I think they're probably at a point right now that it's practically approved…the township ordinance is based almost wholly on the model

> ordinance the DEP provided, as is with many other municipalities. So yes, I am confident that the applicant has met those standards, and that's why I'm confident the DEP will ultimately in some way approve this.

(6T76-3 to 67-25).

The Board reasonably decided to accept the testimony of Johnson Development's experts, based upon the opinion of its own Engineer regarding the stormwater management plan. This decision was reasonably made and conclusive for purposes of this appeal. Cox & Koenig, New Jersey Zoning & Land Use Administration (GANN, 2024) § 18-4.2*; See also Kramer v. Bd. of Adjustment of Sea Girt*, 45 N.J. 268, 288 (1965). The Trial Court agreed. (*Pa2973*).

C. The Trial Court Properly Held That Johnson Development Provided Substantial Credible Evidence Regarding The Noise Study (Response to Point IC of Appellant's Brief).

Alliance contends that Johnson Development's noise study is flawed and contains inadequate data to support the conclusion that the proposed project would not violate the standards set forth in the Township's noise ordinance. In support of their position, Alliance cites only the testimony of their own expert.

Johnson Development's acoustical consultant, Norman Dotti provided comprehensive testimony regarding the noise study. As stated in the Resolution, "the Board finds that the Applicant's noise report and testimony demonstrate that the development will not have significant noise impacts and will comply with NJDEP sound regulations. The Board further finds the testimony regarding noise

impacts presented on behalf of the objectors to be not sufficiently supported by the testimony and in the record." *(Pa2488, Pa2720, Para. XVII).*

In response to the testimony of Plaintiff's acoustical consultant, Gene Bove, Mr. Dotti provided rebuttal testimony to the Board, including that his modelling and report submitted to the Board had a number of conservative steps built into it to allow for tolerances and those measures have held up well in actual later field studies. (5T174-7 to 174-14). Mr. Dotti suggested that Mr. Bove's testimony should be given little weight because Mr. Bove had not submitted a study or any modelling to dispute Mr. Dotti's report. (5T173-16 to 173-20).

Above all, Mr. Dotti confirmed in rebuttal that the truck traffic at the site was the primary noise generator, and, with the warehouse buildings and the 40 foot high noise and landscape buffering set between the neighboring properties and the areas to be primarily accessed by truck traffic the "dominant sound" to be generated by the proposed development was adequately addressed. (5T175-10 to 176-7). Ultimately, as confirmed by Mr. Dotti, if noise emissions from the development do not comply with NJDEP Noise Regulations at N.J.A.C. 7:29-1.5, the facilities when constructed would be in violation of the sound limits established by the NJDEP and mitigative measures would need to be taken. However, Mr. Dotti's affirmed that his sound monitoring and modelling as set forth in his report led him to conclude with a reasonable degree of scientific certainty that this would

not be the case. With this knowledge, the Board reasonably decided to accept the testimony of Johnson Development's experts regarding the noise study, the modelling analysis that was conducted as part of the study and the scientific conclusions reached, rather than the testimony provided by the Plaintiff attempting to undermine those conclusions. This decision was reasonably made and conclusive for purposes of this appeal. Cox & Koenig, New Jersey Zoning & Land Use Administration (GANN, 2024) § 18-4.2*; See also Kramer v. Bd. of Adjustment of Sea Girt*, 45 N.J. 268, 288 (1965).

The Trial Court concluded that the Board properly exercised its discretion in opting to accept reasonable expert testimony in favor of Johnson Development making the Board's decision binding on appeal. Despite Alliance's suggestion that they have shown that Mr. Dotti's methodology was incorrect, the Trial Court found that their argument "focuses on the methodology of Defendant's expert" and fails to establish that Johnson Development's expert utilized an incorrect methodology as a matter of law since N.J.A.C. 7:29-1.2 established two methods to calculate sound levels. (*Pa2977*).

D. The Board Properly Considered Traffic Impact And Its Findings Were Not Inconsistent With Prior Findings For The Property (Response to Point ID of Appellant's Brief).

Alliance alleges that the Board failed to acknowledge traffic impacts and made a finding contrary to prior findings related to this site. They further allege

that they were not permitted to fully present testimony regarding the Traffic Impact Study and Community Impact Statement.

First a Board may not deny an application based upon existing traffic conditions or because of its anticipated detrimental impact on off-tract traffic conditions. *Dunkin' Donuts of New Jersey , Inc.* 193 N.J. Super. 513, 515 (App. Div. 1984); *Lionel's Appliance Ctr. V. Citta,* 156 N.J. Super. 257, 268 (Law Div. 1978). ("A denial based in part on alleged traffic generated by other unrelated off site and off tract warehousing projects is plainly contrary to established case law."). Most importantly, the reports and testimony provided by Johnson Development's Traffic Engineer indicate that the impacts of the proposed project on surrounding roadways would not be significant.

The Traffic Impact Study submitted by Johnson Development and related testimony by its expert, Daniel Disario, P.E., concludes that the impacts from the proposed development will not be significant on the nearby roadway system. (*Pa278)*. The Mercer County Planning Board agreed and approved the Johnson Development's County Applications, thereby endorsing the proposed traffic improvements including the proposed roundabout and road widening along the County's Robbinsville-Allentown Road.

Many of the traffic-related comments made in opposition and cited by Appellant in their Brief are centered around <u>existing</u> traffic and noise related to

existing traffic outside of the Robbinsville Township in the Borough of Allentown. Note that the Borough of Allentown withdrew its appeal of this site plan approval.

Alliance also argued that the Board should consider whether higher intensity warehouse use, including fulfillment centers, would have additional traffic impacts. Mr. Disario confirmed for the Board (and Plaintiff's Traffic Engineer admitted) that the buildings proposed by Johnson Development were not sufficient in size to accommodate a fulfillment center type of warehouse and that, for any such building types, additional applications to the Board would be required. (6T42-6 to 44-18).

Despite Alliance's claims to the contrary, Johnson Development proved to the Board's satisfaction in both its submitted Traffic Report and in Mr. Disario's testimony, the traffic impacts from the development actually proposed as part of the Application will not have significant impacts on existing off site traffic and that proposed mitigative measures will significantly reduce traffic impacts at the site ingress and egress. *(Pa2488, Pa2720, Para. XVI).* In fact, the improvements proposed by Johnson Development along the County Roadway are consistent with a regional traffic study undertaken by Mercer County called the *Moving Mindfully Report.* (*Pa2347*) The Board's Traffic Engineer agreed with the findings of the Traffic Impact Study and the testimony provided by Johnson Development. *(Pa2488, Pa2720*).

Plaintiff also contends that the Board's findings regarding traffic are contrary to the Board's own findings in 1989 and 2008 and are not supported by the record. This conclusion is incorrect.

The Traffic Impact Study compared the projected traffic impact of the proposed two warehouse-distribution-office buildings to the office/warehouse/hotel development approved by the Robbinsville Planning Board in 2004 with amended approval in 2008. (*Pa278).* The reason for this comparison, as recognized by the Board Traffic Engineer, is that the prior approvals represent uses permitted by the current ORH zoning of the Johnson Development Property. (*Pa278).* The prior approved office/warehouse/hotel development involved more than 500,000 square feet of office space with more than 80,000 square feet of warehouse space and a 160 room hotel. Johnson Development's Traffic Engineer, Daniel Disario, P.E., described the projected traffic from that prior approval and concluded that the previously approved development would generate three times the amount of traffic projected for the warehouse-distribution-office uses proposed in the site plan application at issue on this appeal. Mr. Disario further explained that the purpose of the comparison was to demonstrate that the use variance for the proposed two buildings would generate less traffic than otherwise permitted on the property pursuant to the existing ORH zoning. *Id.* (*Pa278*).

The Trial Court properly rejected Alliance's traffic arguments finding that the development of an Interchange to Interstate 95 is an area where the Board lacks jurisdiction. (*Pa2977*).

E. Johnson Development Met The Negative Criteria For Site Plan Approval (Response to Point IE of Appellant's Brief).

Alliance contends that Johnson Development did not meet the negative criteria required for the grant of a Site Plan Application following a bifurcated use variance pursuant to N.J.S.A. 40:55D- 6.B. In support of their argument, Alliance argues that the Board curtailed the review of the negative criteria and improperly relied upon the use variance decision. Each of these allegations is inconsistent with the record.

Direct testimony was provided in support of the Application demonstrating that the proposed Site Plan and bulk variances as proposed and requested by Johnson Development were consistent with the testimony provided at the time of the grant of Use Variance Approval, and that the negative criteria for the prior grant of Use Variance Approval remained satisfied in the context of the Site Plan Application, as required by N.J.S.A. 40:55D-76b. Johnson Development's planner, Lance Landgraf, P.P., A.I.C.P., LB, was asked directly to "***describe why those original findings were made by this board, from a positive and negative criteria standpoint for those variances, when they were part of the use variance, still apply here***…" (4T61-2 to 61-7) (Emphasis added). Mr. Landgraf testified:

> As accepted by the board in the previous variances, these are recognized appropriate locations for the car and trailer parking in the 13 front yards. Additional car and trailer parking are proposed within the front yard of Building 2. No additional parking spaces are proposed overall. We're not adding parking. We're not adding truck spaces. Just reorientation of them tied to where the buildings are now located.

(4T67-10 to 67-18).

> We don't anticipate, no additional traffic, traffic congestion impacts. Traffic impacts themselves are mitigated through proposed road improvements that you heard Mr. Webb talk about and our traffic engineer talk about, Mr. Disario, both onsite and offsite, controlling traffic, how it leaves the property. The reconfigure of Building 2 should have only internal impacts and positive internal impacts to the site. Impact of the surrounding properties, in my opinion, I think will be limited. Commercial office space exists on the parcel. The new development does not conflict with that development on the site. Significant buffering and landscaping in and around the property, building orientation. This is from an aesthetic, or audible impacts. You'll hear Mr. Dotti talk, or he's already testified to that fact with audible impacts. Surrounding properties are industrial and commercial in nature, mostly large lot development. …. Site has access to existing roadways and streets, nearby access to county, state, interstate corridors which is why this is an appropriate location for this use. The side yard setback to Building 2 while reduced we think is ameliorated by the buffering of that area. It was something that the board had suggested to reorient that structure to eliminate offsite impacts. We agree with that.

(4T68-6 to 69-19). The question of the negative criteria for the prior use variance was then repeated as, "And in your review, does that prong that you testified to at the time of use variance approval still apply in the case of the use variances granted

and the bulk variances have been modified as you testified?" to which Mr. Landgraf responded "I think even more so. I think this is a better plan, better planning alternative for the site." (4T70-7 to 70-9).

Mr. Landgraf was similarly specific in his assessment of the second prong of the negative criteria for the use variance in connection with the site plan and variance approval application, testifying that:

> The board has in the past found that the warehouse distribution uses will not impair the intent and purpose of the Robbinsville Township Zone Plan. That's already been deemed for this site. It's already been deemed by this board. The proposed roadway improvements addressing traffic, drainage, parking issues associated with development, these findings remain appropriate in support of the bulk variances that we're still requesting for the site. Again, better planning option here. Location of the parking spaces on all four sides of the warehouse. Buildings are appropriate, allows for, as I said, for orderly parking, access to the structures, allows for the facilities' loading spaces to be more internal to the site. … That's creating a lot of these new front yards. That's kind of creating these variances on its own. The site plan approval for now permitted uses represents a unique opportunity for the coordinating development of the two proposed warehouse sites and incorporates the existing office building, allows for that traffic to circulate around Corporate Drive and safely out on to municipal and state highways. One of the last things you look at, not the last thing, but one of the last things in my notes that I looked at was the Robbinsville Master Plan from the reexamination from 2020. … So it was, therefore, recommended in 2022 as the commerce goal and its associated objectives to significantly revise and update, promote realistic forms of commercial development. Master plan went on to change that commerce goal to

> revise, and I'm going to quote, encourage new commercial development and redevelopment projects in designated areas of the community thereby balancing new development as ratables in the community. So that was one of the goals of the 2020. I don't think that's been done yet in your regulation, but that's one of the goals in the 2020 master plan.

(4T70-17 to 72-23).

Mr. Landgraf's testimony naturally repeated some of the testimony given as part of the prior use variance approval granted by the Board because Mr. Landgraf opined that the testimony and rationale related to the negative criteria for the grant of the use variance remained relevant and applicable in the context of the site plan and, especially in the context of the additional variances requested as part of the Site Plan Application. This is what is required under N.J.S.A. 40:55D-76.b.

In short, the testimony showed that the impacts of the proposed use remain internal to the Property and the requested Variances are of the same nature as those subsumed within the Use Variances granted by the Board, with only relatively minor additional Variances that enhance and improve the site design rather than create a detriment to the public good or impairment to the zone plan and zoning ordinance. As explained in testimony, and as should be noted again here, many of the Variances are the result of the change in the orientation of Building 2, which was requested by Robbinsville Township officials. *(Pa2488, Pa2720, Para. XXIII).* The Board properly found that there was no detriment to the public good

and no substantial impairment of the zone plan or zoning ordinances. *(Pa2488, Pa2720, Para. XXIV).*

Finally, Alliance alleges that the board curtailed testimony related to the negative criteria from Plaintiff's witnesses. As discussed throughout this brief, the only testimony that was not permitted to be given was related to subjects outside of the board's jurisdiction.

The Trial Court appropriately held the record and the Board's consideration of the evidence and necessary factors defeat Plaintiff's argument that the Board failed to consider the negative criteria. (*Pa2978*). Additionally, the Trial Court found that Alliance's position is not sufficient supported by binding or persuasive authority and the cases cited by Plaintiff are not binding authority. *(Pa2978).*

F. The Board Did Not Prohibit Plaintiff And Other Members Of The Public from Testifying And Cross Examining Witnesses Related To The Application. (Response To Point IF Of Appellant's Brief).

Alliance contends that the Board prevented the public from submitting public comments, presenting exhibits and cross-examining witnesses regarding the Application. Further, Alliance claims that the Board did not review the application materials once the application was deemed complete. These contentions are false and again misstate the record. Moreover, Alliance misinterprets the Trial Court's ruling.

The procedures of holding a hearing an any application for development are set forth in the Municipal Land Use Law. Among other things, the general requirements provide the right of cross examination permitted to all interested parties, and that the presiding officer has discretion to impose reasonable limitations as to time and number of witnesses. The agency may exclude irrelevant, immaterial or unduly repetitious evidence. *See* N.J.S.A. 40:55D-10a-e.

In the present case, Alliance had the opportunity to cross examine Johnson Development's witnesses, as well as present their own witnesses. Therefore, they cannot argue that they were not given the right of cross examination or a fair opportunity to present their witnesses. Instead, they are claiming that they were prohibited from presenting a wildlife expert to discuss threatened and endangered species, and that the testimony of their traffic expert was curtailed.

The Trial Court did not find Alliance's arguments persuasive. "First, it is uncontroverted that the right of objectors to testify at a hearing for an application for development before a local land use board is not absolute. See generally N.J.S.A. 40:55D. The presiding officer may place reasonable limits on the number of witnesses and the agency may exclude irrelevant, immaterial, or unduly repetitious evidence. *Id*. at (e), (f). Second, Plaintiffs had the opportunity to present their own witnesses and cross examine Johnson Development's witnesses.

Third, the subject matter of Plaintiffs' barred testimony was immaterial to the proceedings before the Board." (*Pa2979*).

Specifically, Alliance was not permitted to present testimony of a wildlife expert to discuss the potential impact of the project on threatened and endangered species. As the Board found, any determination related to threatened and endangered species is within the exclusive jurisdiction of the New Jersey Department of Environmental Protection ("NJDEP") in granting permits pursuant to the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50, et seq. and the Freshwater Wetlands Protection Act, N.J.S.A. 13"9B-1, et seq. Impacts to threatened and endangered species are considered by the NJDEP in connection with both permit applications, and such impacts may result in increased wetlands transition areas or Flood Hazard buffers. The NJDEP has exercised its primary jurisdiction by granting Johnson Development the partial release of a Conservation Restriction, finding that there was no suitable threatened and endangered species habitat found on the subject property and, therefore, there would be no impacts. *(DJa190).* The Board properly recognized that it lacked jurisdiction over the threatened and endangered species, and thus limited testimony on theoretical impacts. *(Pa2488, Pa2720, Para. VIII, IX).*

The Trial Court correctly held that "[w]hile the Board may consider environmental impacts, generally, and the Township Ordinances may discuss

endangered species, such language in a local ordinance cannot be viewed as bestowing Robbinsville Township jurisdiction over a matter which DEP possess significant statutory authority and primary jurisdiction over." (*Pa2979*). Moreover, "the assertions regarding specific endangered species and any habitat suitability were immaterial given the nature of the testimony offered. Such information was extraneous given the rights already afforded to Plaintiffs at the hearings to raise general environmental concerns. The assertion that the Board should have considered this information is a thinly veiled attempt to bypass DEP jurisdiction and procedures and have a local land use board substitute its knowledge for DEP's expertise in protecting endangered and threatened species." (*Pa2979*).

Plaintiff also contends that the testimony of its traffic expert, Mr. Klein, was curtailed related to his proposal to complete Interchange 7 at I-195. However, the Board lacks jurisdiction to consider these off-tract improvements since the interstate highway interchange is within the primary jurisdiction of NJDOT. *(Pa2488, Pa2720, Para. VI).* The Trial Court agreed. (*Pa2979-2980*).

Jurisdiction for access to the limited access I-95 highway is vested exclusively in the Commissioner of the Department of Transportation and the New Jersey Turnpike Authority pursuant to N.J.S.A. 27-1, *et seq.* Access from or to Robbinsville-Allentown Road is vested in the County of Mercer as a county

roadway. Alliance's traffic expert appears to have sought to introduce testimony that traffic impacts would be reduced, hypothetically, if there was an additional ramp or other access to I-95. This proposed testimony appears consistent with Alliance's inference that, as part of its development application, Johnson Development was obliged to cure all of the asserted traffic issues in the surrounding area in order to achieve approval of its application. This is simply not consistent with the MLUL or the statutory authority of the NJDOT, and the County Planning Board.

Regarding Alliance's proposed testimony regarding Interchange 7 of I-95, the Trial Court found that the Board properly constrained testimony of issues that the Board cannot consider. (*Pa2979-2980*).

G. The Board Was Not Improperly Counseled That It Had To Vote Yes On The Application. (Response To Point IG Of Appellant's Brief).

Alliance argues that the Board members were improperly counseled that there was no option to vote no on the Application. In support, Alliance makes much of the statement made by a Board member at the March 28, 2023 hearing when the vote took place to approve Johnson Development's Application. The Board member in question indicated that the vote was "yes" but that it was "based on town counsel and the guidance I was provided that I'm legally bound to provide a yes." (7T 32:17-21). However, Alliance's brief conveniently omits the

remainder of that Board member's statement that "[m]y protest is because of an intimate understanding of the township and my concerns with traffic safety." (7T32-22 to 32-24).

While the Board Attorney gave a summary of the Site Plan Application, including some legal guidance with respect to the vote, the only guidance given related to the law regarding a vote based on traffic issues stating that, "it would be improper for the board to deny the application based upon the existing traffic." (7T18-11to 18-13).

Plaintiff cites as a "fact that a board member was told he could only vote yes on the application," yet does not point to anywhere in the hearing transcript for a statement by the Board Attorney that any board member was obliged to vote "yes." Alliance provides no references to the transcript to support its bald allegation that any of the board members believed "that the applicant failed to adequately address issues as required by the township ordinances." (*Pb42*).

The Trial Court properly found that "[p]laintiffs' argument contorts the portion of testimony they cite in furtherance of their argument. The Board member Plaintiff's brief cites in favor of their argument voice their concerns based on offsite traffic." (*Pa2980*). In holding that Alliance's argument fails, the Trial Court also found that "the Board was properly counseled that existed (sic) case law

prohibited denying an application based on existing off-site traffic conditions." (*Pa2980*).

Accordingly, Alliance's claims that the Board was improperly counseled that it could not vote "no" on the Application, has no factual basis and the Trial Court's decision should be upheld.

III. THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT (RESPONSE TO POINT II OF APPELLANT'S BRIEF).

The Appellate Division review of a trial court's decision to grant or deny a motion to amend the complaint is for abuse of discretion. *Port Liberte II Condo. Ass'n v. New Liberty Residential Urban Renewal Co., LLC*. 435 N.J. Super. 51, 62 (App. Div. 2014). The Appellate Division will only reverse the trial court when examining its discretional authority when the exercise of discretion was "manifestly unjust" under the circumstances. *Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth*., 423 N.J. Super. 140, 174 (App. Div. 2011) (*quoting Union Cnty. Improvement Auth. V. Artaki, LLC*, 392 N.J. Super. 141, 149 (App. Div. 2007) "A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" *State v. Chavies*, 247 N.J. 245, 257 (2021) (*quoting State v. R.Y.*, 242 N.J. 48, 65 (2020)).

While the New Jersey Supreme Court has "made clear that 'Rule 4:9-1 requires that motions for leave to amend be granted liberally'" such liberal review is not boundless and "the granting of a motion to file an amended complaint always rests in the court's sound discretion." *Notte v. Merchs. Mut. Ins. Co.*, 185 N.J. 490, 501 (2006) (quoting *Kernan v. One Washington Park Urban Renewal Assocs.*, 154 N.J. 437, 456-57 (1998)). "That exercise of discretion requires a two-step process: whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile." *Id.* Moreover, "the factual situation in each case must guide the court's discretion, particularly where the motion is to add new claims or new parties late in the litigation." *Bonczek v. Carter-Wallace, Inc.*, 304 N.J. Super. 593, 602 (App. Div. 1997). The court considers, inter alia, "whether the newly-asserted claim would unduly prejudice the opposition party" or "cause undue delay of the trial." *Building Materials Corp. of America v. Allstate Ins. Co.*, 424 N.J. Super. 448, 485 (App. Div. 2012). Thus, knowing and purposeful delay in bringing a claim should be a fact considered by courts in reviewing whether to grant a late motion to amend a pleading. *Cf. id.* at 484–85 (observing that the reason for a late filing should be considered).

Additionally, if the amended claim nonetheless will fail because a subsequent motion to dismiss must be granted, the amendment should be denied. *See Notte*, 185 N.J. at 501; *Interchange State Bank v. Rinaldi*, 303 N.J. Super. 239,

256-57 (App. Div. 1997). For a claim to survive, a plaintiff must allege sufficient facts, and not only conclusory allegations, to support a cause of action. *Scheidt v. DRS Technologies, Inc.*, 424 N.J. Super. 188, 193 (App. Div. 2012).

A motion to amend is properly denied where its merits are marginal, its substance generally irrelevant to the main claim, and allowing the amendment would unduly protract the litigation or cause undue prejudice. *Cutler v. Dorn*, 196 N.J. 419, 441 (2008), reversed on other grounds, 390 N.J. Super. 238 (App. Div. 2007).

A. The Trial Court Properly Denied Alliance's Motion to Amend The Complaint To Add Mercer Industrial As A Defendant (Response to Point IIA of Appellant's Brief).

Alliance claims that the Trial Court abused its discretion in denying Plaintiff's Motion for Leave to File an Amended Complaint in finding that Mercer Industrial Properties, LLC is not an indispensable party. However, the facts of the case make clear that Alliance provided no evidence to justify their proposed amendment.

The proposed Amended Complaint collectively defined Johnson Development and Mercer Industrial Properties as the "Applicant". Thereafter, each and every allegation in the proposed Amended Complaint was directed toward the Applicant (which includes Johnson Development and Mercer Industrial), including the existing counts alleging that the Board acted in an

arbitrary, capricious and unreasonable manner and violated the MLUL by granting preliminary and final site plan approval to Johnson Development. Although Mercer Development may now be the owner of the property, it is not now nor has it ever been the applicant for a development application related to the property at issue in this case. Mercer Industrial has not had any involvement in the Application which is the subject of this litigation and appeal.

The Trial Court correctly held that allowing Alliance to amend their complaint to add Mercer Industrial would be prejudicial to Mercer Industrial since Mercer Industrial was not involved in the application process before the Board and Alliance did not assert any nexus between the principals of Johnson Development and those of Mercer Industrial beyond a common address which cannot establish that Mercer Industrial possesses any familiarity with this matter. (*Pa2944*). Therefore, the Trial Court's decision should be upheld.

B. The Trial Court Properly Denied The Motion to Amend In Finding That Alliance Does Not Have Standing To Add Claims Under The Environmental Rights Act (Response To Point IIB Of Appellant's Brief.)

Alliance argues that the Trial Court abused its discretion in denying Plaintiff's Motion for Leave to File an Amended Complaint to add claims under the Environmental Rights Act ("ERA") on the basis that Alliance lacked standing. A review of the relevant caselaw and the facts of this case make evident that Alliance's arguments must fail.

No action may be commenced under the ERA unless the plaintiff has provided notice to, among others, the NJDEP, unless the plaintiff can show that immediate and irreparable damage will result. N.J.S.A. 2A:35A–11. The purpose of this notice requirement is to protect the NJDEP's primary jurisdiction as the "legislature has entrusted to the DEP primary and supervisory enforcement powers under the various environmental protection legislation." *Howell Twp. v Waste Disposal,* 207 N.J. Super. 80, 94 (App. Div. 1986). Indeed, the notice requirement is designed to:

> protect against improper encroachment on that responsibility, the [ERA] provides that any action instituted pursuant to its authority requires notice to the DEP. Obviously, this notice requirement was designed to allow that agency to exercise value judgments in individual cases, e.g., whether it will join in that litigation or enforcement proceeding, whether other actions it may have taken already with respect to the particular problem or offender would render the litigation subject to collateral estoppel or res judicata principles, whether its expertise would assist the court, whether broad state interests would be sacrificed unduly to regional or personal interests by the instigators of that litigation, etc.

Id.

Alliance ignored these important notice requirements and provided notice to the NJDEP on May 8, 2024 ***after the filing of its motions for injunctive relief and to amend its complaint.*** *(Pa2841)*. Thus the 30-day requirement was not satisfied. As emphasized by the Appellate Division in *Howell Twp.*, the NJDEP should be

given the opportunity to substantiate or defend its decisions. Alliance did not give NJDEP that opportunity.

The Trial Court correctly found that plaintiff commenced their action by filing the motion for leave to amend the complaint, which occurred before they sent the requisite notice. "The ERA's notice provision does not contain a grace period while a plaintiff maybe litigating the issue of preliminary restraints; rather, the statute only provides a waiver of the notice requirements in circumstances Defendants have failed to meet. The plain text of N.J.S.A. 2A:35A-11 does not provide for additional circumstances where a court may relax the notice requirement." (*Pa2946*).

CONCLUSION

For the reasons set forth herein and as discussed in the trial court's opinion, the decision of the Board to grant Preliminary and Final Major Site Plan approval is supported by substantial credible evidence in the record and conforms fully with the Municipal Land Use Law and Robbinsville Township Ordinances. Therefore,

the decision of the Trial Court should be upheld and affirmed.

ARCHER & GREINER
A Professional Corporation
Attorneys for Respondent,
Johnson Development Associates

By: *Jamie A. Slimm*
JAMIE A. SLIMM, ESQUIRE
NIALL J. O'BRIEN, ESQUIRE

Dated: January 10, 2025
229832304 v3

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-004095-23T2

THE ALLIANCE FOR SUSTAINABLE COMMUNITIES, GREGORY WESTFALL, KENNETH MAYBERG, PATRICIA BROWN, AND MARY WOEHR, **Plaintiffs-Appellants,** **v.** **ROBBINSVILLE TOWNSHIP LAND USE BOARD, and JOHNSON DEVELOPMENT ASSOCIATES, INC.,** **Defendants-Respondents.**	**CIVIL ACTION** **ON APPEAL FROM ORDERS DATED JULY 1, 2024 AND JULY 15, 2024** **Docket No. MER-L-1543-23** **SAT BELOW:** **HON. ROBERT LOUGY, A.J.S.C**

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT, ROBBINSVILLE TOWNSHIP LAND USE BOARD

PARKER McCAY P.A.
9000 MIDLANTIC DRIVE, SUITE 300, BOX 5054
MOUNT LAUREL, NEW JERSEY 08054
(856) 596-8900

ATTORNEYS FOR DEFENDANT-RESPONDENT, ROBBINSVILLE TOWNSHIP LAND USE BOARD

January 10, 2025

Michael W. Herbert, Esquire/Atty ID # 007691992
Email: mherbert@parkermccay.com
Alicia T. Lipton, Esquire/Atty ID # 443802023
Email: alipton@parkermccay.com
ON THE BRIEF

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PRELIMINARY STATEMENT

This matter arises from a third-party appeal of an application approved by the Defendant/ Respondent, Robbinsville Township Land Use Board (the "Board"). The third-party Plaintiffs/ Appellants, The Alliance for Sustainable Communities, Gregory Westfall, Kenneth Mayberg, Patricia Brown, and Mary Woehr (collectively, the "Plaintiffs"), challeged three aspects of the approval: the use variance, subdivision, and site plan. The use variance approval was affirmed by the Trial Court and this Court. The subdivision approval was affirmed by the Trial Court, and awaits oral argument before this Court. This brief addresses Plaintiffs' appeal of final site plan approval, which was also affirmed by the Trial Court. In what is now the third appeal to the Appellate Division, Plaintiffs attempt to relitigate the issues resolved in the use variance litigation. For the reasons below, this Court should affirm the Trial Court's decision, and dismiss Plaintiffs' appeal.

PROCEDURAL HISTORY

In February of 2022, Codefendant/ Respondent, Johnson Development Associates, Inc. ("Johnson Development" or the "Applicant"), submitted an application for Preliminary and Final Major Site Plan Approval to the Board to develop a 90.889 +/- acre parcel, commonly known as Mercer Corporate Park in Robbinsville Township (the "Property"). The application also requested

bulk variances and design waivers. The Applicant sought development approvals for the following improvements: (1) a 333,580 square foot warehouse building, with 277 car parking spaces, and 40 truck and trailer spaces; (2) a 167,392 square foot warehouse building, with 135 car parking spaces, and 25 truck and trailer spaces; and (3) retention of an existing 61,500 square foot office building, with 306 parking spaces, and related site improvements. (1T.27:1-15, 45:25 through 46:1-4).[1]

The Applicant presented the application over the course of six (6) hearings: December 6, 2022, December 13, 2022, February 21, 2023, February 28, 2023, March 21, 2023, and March 28, 2023. (Pa2491, Sec 9). On the sixth night, the Board voted to approve the application. (Pa2529-Pa2530).

On June 27, 2023, the Board adopted Resolution No. Z.B.22-02-02, which memorialized the Site Plan approval. (Pa2488-Pa2531).

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[1] There are nine (9) volumes of transcripts, one from each of the seven (7) hearings before the Defendant Land Use Board and two (2) from the hearings before the Trial Court. The transcripts shall be designated as follows:

1T: December 6, 2022
2T: December 13, 2022
3T: February 21, 2023
4T: February 28, 2023
5T: March 21, 2023
6T: March 22, 2023
7T: March 28, 2023
8T: Motion Hearing held on June 7, 2024
9T: Trial held on July 9, 2024

On August 10, 2023, Plaintiffs filed a Complaint in Lieu of Prerogative Writs, which challenged the Board's Site Plan approval. (Pa2890-Pa2906). On May 7, 2024, Plaintiffs filed a motion for leave to amend the Complaint. (Pa2946).

On June 7, 2024, the Trial Court heard oral argument on Plaintiffs' motion, and denied the motion via a written decision on July 1, 2024. (See 8T, Pa2937-Pa2947).

On July 9, 2024, the Trial Court heard oral argument on the substantive claims in Plaintiffs' Complaint in Lieu of Prerogative Writs, and denied and dismissed the requested relief via a written decision on July 12, 2024. (See 9T, Pa2948-Pa2980).

On August 28, 2024, Plaintiffs filed a Notice of Appeal with the Appellate Division. (Pa2981-Pa2986).

STATEMENT OF FACTS

We hereby incorporate Johnson Development's Counterstatement of Facts as if fully set forth herein.

ARGUMENT

I. THE JUDICIAL STANDARD OF REVIEW FOR DECISIONS RENDERED BY THE ROBBINSVILLE LAND USE BOARD REQUIRES DEFERENCE TO THE BOARD'S DETERMINATIONS, EXCEPT IN CASES OF A CLEAR ABUSE OF DISCRETION.

The Appellate Division applies the "same standard when reviewing a trial court's decision on an appeal from a decision of a board of adjustment." See, e.g. CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd./ Bd. of Adjustment, 414 N.J. Super. 563, 577 (App. Div. 2010) (citing D. Lobi Enters. v. Planning./Zoning Bd. of Borough of Sea Bright, 408 N.J. Super. 345, 360 (App. Div. 2009); N.Y. SMSA, L.P. v. Bd. of Adjustment of Twp. of Weehawken, 370 N.J. Super. 319, 33 (App. Div. 2004)).

A zoning board's land use decisions "enjoy a presumption of validity." Price v. Himeji, LLC, 214 N.J. 263, 284 (2013). "It is well-settled that a decision of a zoning board may be set aside only when it is 'arbitrary capricious or unreasonable.' A Court will not substitute its judgment for that of a board 'even when it is doubtful about the wisdom of the action.' Because a board of adjustment's actions are presumed valid, the party 'attacking such action has the burden of proving otherwise.' Accordingly, [a Court] will not disturb a board's decision unless [it] finds a clear abuse of discretion." Cell South of N.J., Inc. v. Zoning Bd. of Adjustment of West Windsor Twp., 172 N.J. 75, 81-82 (2002)

(internal citations omitted). That discretion, while considerable, must still be "supported by substantial evidence in the record and reflect a correct application of the relevant principles of land use law." Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 59 (1999).

Significantly, "zoning boards, because of their peculiar knowledge of local conditions, must be allowed wide latitude in their delegated discretion." Price, 214 N.J. at 284 (2013). Therefore, "[t]he proper scope of judicial review is not to suggest a decision that may be better than the one made by the board, but to determine whether the board could reasonably have reached its decision on the record." Jock v. Zoning Bd. of Adjustment, 184 N.J. 562, 597 (2005).

As will be shown, the Board's decision was supported by substantial evidence, and the Board appropriately applied relevant principles of land use law.

II. THE TRIAL COURT CORRECTLY FOUND THAT THE BOARD'S SITE PLAN APPROVALWAS PROPER, AND WAS NOT ARBITRARY, CAPRICIOUS, OR UNREASONABLE.

(RAISED BELOW: Pa2948-Pa2980)

Plaintiffs argue that the Board's site plan approval, with accompanied by bulk variances and design waivers, was arbitrary, capricious, and unreasonable, and therefore, the Trial Court's dismissal was in error. (Pb6-Pb8). To support this argument, Plaintiffs allege that the Board's findings were

"not supported by the record" (Pb19, Pb21, Pb22, Pb26, Pb31), and the Board improperly prohibited "Plaintiffs and other members of the public from testifying, presenting exhibits, and cross-examining witnesses." (Pb36-Pb42). Plaintiffs also argue that the Applicant did not satisfy the burden of proof for the requested bulk variances and design waivers. (Pb8).

Plaintiffs not only misinterpret the law, but also disregard the record. The Board acted within its discretion and based its decision on substantial evidence in the record when it approved the Site Plan application, bulk variances, and design waivers. Here, as the Trial Court correctly concluded, the Board did not act in an arbitrary or unreasonable manner in granting Site Plan approval to the Applicant.

A. THE BOARD'S DECISION TO GRANT THE APPLICANT'S BULK VARIANCES AND DESIGN WAIVERS WAS PREDICATED ON SUBSTANTIAL CREDIBLE EVIDENCE.

(RAISED BELOW: Pa2961-Pa2972)

Plaintiffs allege that the Applicant failed to satisfy its burden for the "flexible" bulk variances and design waivers. (Pb8, Pb13). However, Plaintiffs ignore the applicable standard of review, the deference owed to local land use board decisions, and the positive and negative criteria for bulk variances. A proper application of the law confirms the Board's approval of the application and the Trial Court's affirmance of the decision. The Board's decision is

"supported by substantial credible evidence from the record as a whole." Charlie Brown of Chatham, Inc. v. Bd. of Adjustment for Chatham Twp., 202 N.J. Super. 312, 330 (App. Div. 1985). Consequently, the Trial Court's decision must be upheld.

1. The Record Contains Substantial Credible Evidence to Support the Bulk Variances Granted Under N.J.S.A. 40:55D-70(c)(2).

Pursuant to Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-1 to -163, a zoning board or planning board may grant bulk variances, also known as (c) variances, provided the required criteria are met. N.J.S.A. 40:55D-70(c). Section 70(c) of the MLUL authorizes two categories of bulk variances: (c)(1) variances, known as "hardship variances", and (c)(2) variances, known as "flexible variances." Id. For a land use board to grant variance relief, an applicant must establish the positive and negative criteria. See, e.g., Ten Stary Dom Ptp. v. Mauro, 216 N.J. 16, 30 (2013).

To establish the positive criteria for a "flexible" (c)(2) variance, the applicant must demonstrate that the deviation advances the purposes of the MLUL, and the benefits of the deviation substantially outweigh any detriment. N.J.S.A. 40:55D-70(c)(2). N.J.S.A. 40:55D-2 outlines the purposes of the MLUL, which include considerations like promotion of the general welfare,

provision of adequate light, air, and open space, and establishment of appropriate population densities.

The applicant must also establish the negative criteria: the variance can be granted without substantial detriment to the public good, and it will not substantially impair the intent and the purpose of the zone plan and zoning ordinance. N.J.S.A. 40:55D-70. With respect to a (c)(2) application, the New Jersey Supreme Court has stated:

> no c(2) variance should be granted when merely the purposes of the owner will be advanced. The grant of approval must actually benefit the community in that it represents a better zoning alternative for the property. The focus of a c(2) case, then, will be not on the characteristics of the land that, in light of current zoning requirements, create a "hardship" on the owner warranting a relaxation of standards, but on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community. (Kaufmann v. Planning Bd. for Warren, 110 N.J. 551, 563 (1988)).

As part of its application, the Board approved three bulk variances pursuant to N.J.S.A. 40:55D-70(c)(2): (1) side yard setback of 91.2 feet on proposed Lot 31.02, when a minimum of 126 feet is required; (2) side yard setback of 24 feet for a proposed accessory sound attenuation wall on proposed Lot 31.02, when a minimum of 126 feet is required; and (3) a landscape buffer of 38 feet in width, adjacent to residential property, when a minimum of 50 feet is required. (Pb9-Pb10).

Plaintiffs argue that the tract is large, and the Property is not uniquely shaped, so nothing prevents the Applicant from developing the site in conformance with the bulk standards. (Pb10). Rather, the Plaintiffs argue that the Applicant should have reduced the size of the structures. Id. Essentially, the Plaintiff argues that the bulk variance relief does not satisfy the "hardship variance" criteria under N.J.S.A. 40:55D-70(c)(1). The Applicant did not seek a hardship variance under (c)(1); it sought a flexible variance under (c)(2). Just because the Plaintiffs believe that the Applicant would have been unable to satisfy the hardship criteria, does not preclude the Board from granting a flexible variance. The Trial Court recognized this, and confirmed that "the [MLUL] does not require that [the Applicant] consider reducing the size of the development in order for a Board to grant a (c)(2) variance, nor is the Board required to find the property possesses unique characteristics that would prevent an applicant from meeting the requirements in the normal course under the (c)(2) variance standard." (Pa2967).

The Board found that the bulk variances were necessary to preserve environmentally sensitive area, and were consistent with sound civic design principles. (Pa2524, Sec. XXX). Plaintiffs concede this finding. (Pb10). In addition, Plaintiffs conveniently ignore that the Applicant's original site plan application was by right. (1T.28:3-5). At the request of the Township's

professionals, the Applicant modified the design, by rotating one of the buildings, and adding the sound attenuation wall after completion of a sound study. These revisions created the three deviations that required variance relief. (Id.:28:6-20; 58:14-23). As the Resolution and record illustrates, the benefits of the deviations created by these revisions far outweigh any detriments, and further the purposes of zoning.

For the side yard setback variance, the Applicant's planner, Mr. Lance B. Landgraf ("Mr. Landgraf"), provided testimony on the benefits of the revised designs. He explained that the rotation of the building represented a more favorable planning approach, as it directed the noise, visual impact, and activity of the parking areas inward, rather than outward toward neighboring properties. (2T.97:1-7). While the project morphed since the use variance hearing, Mr. Landgraf testified that the current proposal was a much better plan. (Id.:98:4-12). He indicated that the proposal advanced several key objectives of zoning, including N.J.S.A. 40:55D-2(h), which aims "to encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes which result in congestion or blight." (Id.:112:5-10). Mr. Stuart Wiser, the Board Planner ("Mr. Wiser"), affirmed Mr. Landgraf's evaluation, particularly for the positive and negative criteria. (Id.:113:7-13). The Trial Court found

that this testimony provided "sufficient evidence in the record" to support the Board's findings. (Pa2963).

For the accessory sound wall setback variance, Mr. Landgraf testified that the proposed location on Proposed Lot 31.02 is the most effective position to substantially mitigate any potential noise from the Property. (2T.99:15-22). For the landscape buffer variance, he testified that the rotation of Building 2 resulted in a reduction of the buffer to thirty-eight (38) feet, where a fifty (50) foot buffer was required. (Id.:102:16-21).

The Board also correctly found that the there was no substantial impairment to the public good, no substantial impact to the zone plan or zoning ordinance, and the benefits of the proposed deviations outweigh any detriments. (Pa2523, Sec. XXVII; Pa2524, Sec. XXXI). The Board made the following findings: the enhanced landscape buffering and appropriate sound mitigation measures effectively addressed potential impacts on surrounding properties and the public, caused by the setback deviations (Pa2523, Sec. XXVII); the reorientation of Building 2 will allow the building to function as a sound barrier, representing a superior planning alternative (Id., Sec. XXVI); the placement of the building, partially within the side yard setback, ensured that the developmental impacts were kept internal to the site, which is "a good civic design consistent with N.J.S.A. 40:55D-2(i)" (Id., Sec. XXVI); the

variances further the purpose of N.J.S.A. 40:55D-2(a), which seeks "*to encourage municipal action to guide the appropriate use and development of all lands in this State, in a manner which will promote the public health, safety, morals and general welfare"* (Id., Sec. XXVIII); the sound wall helps achieve compliance with state sound regulations, and serves no functional purpose if it was located outside the side yard setback (Id., Sec. XXVIII); the onsite environmental constraints justify the reduction in buffering, as it provides adequate space for warehouse-distribution-office uses, furthering the purpose of N.J.S.A. 40:55D-2(g) (Pa2524, Sec. XXX); and the proposed increase in landscaping along the buffer, along with the height of the berm, as was deemed sufficient (Id., Sec. XXXI).

Based on this substantial credible testimony, the Board correctly found that the Applicant established the positive and negative criteria for a flexible (c)(2) variance. (Pa2522, Sec. XXIII; Pa2526, Sec. XXXVI).

2. The Record Contains Substantial Credible Evidence to Support the Granted Design Waivers.

In addition to the (c)(2) variances, Plaintiffs challenge the design waivers granted by the Board: (1) to forgo shade trees on the Robbinsville-Allentown Road right-of-way; (2) to forgo landscaping around the parking and loading areas; (3) to reposition the landscaping on the islands in the parking area to other locations around the site; (4) to forgo internal pedestrian

circulation areas; and (5) to use high-density polyethylene ("HDPE") pipe instead of ductile iron pipe. Again, Plaintiffs' arguments are misplaced.

Under the MLUL, a Board may grant design waivers when approving a site plan if it is:

> reasonable and within the general purpose and intent of the provisions for the site plan review and approval of an ordinance adopted pursuant to this article, if the literal enforcement of one or more provisions of the ordinance is impracticable or will exact undue hardship because of peculiar conditions pertaining to the land in question. (N.J.S.A. 40:55D-51(b))).

Said another way, waivers must be reasonable under the facts, and are no more than an acknowledgement by the board that the condition of the property is satisfactory and meets the requirement of the local ordinance. Garofalo v. Burlington Twp., 212 N.J. Super. 458, 464 (Law Div. 1985). Courts utilize the arbitrary, capricious, and unreasonable standard to review decisions on waivers. Coventry Square, Inc. v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285, 301 (1994).

Here, Mr. Landgraf testified to Applicant's requested design waivers. First, for the shade trees along Robbinsville-Allentown Road, Jersey Central Power & Light, the site's electric company, discourages the placement of trees beneath power lines in the right-of-way. (2T.105:4-12). To mitigate potential issues, the Applicant proposed to relocate the trees behind the right-of-way.

(Id.:105:13-17). The Board found this waiver request to be reasonable, especially since the condition was unique to the property, and strict enforcement would impose a hardship for the Applicant. (Pa2526, Sec. XXXVIII).

Second, for the landscaping around the parking and loading areas, the Applicant contended that the proposed design fulfilled the intent of the ordinance. Mr. Landgraf also testified that the site was well designed and well buffered, which justified the waiver. (1T.90:24-25 through 91:1-9; 2T.106:6-11). The Board concluded that, in light of the unique characteristics of the site, the waiver was appropriate as the interior roadways will be private, the proposed berms along the site's frontage will provide screening, and there will be an adequate distance between the trailer stalls around Buildings One and Two and Robbinsville-Allentown Road. Therefore, the Board found that additional screening would be impractical. (Pa2526-Pa2527; Sec. XXXIX).

Third, for the landscaping requirements within the parking and loading areas, the Applicant cited issues with maintaining trees in parking lot islands. (1T.90:16-17). Instead, the Applicant suggested consolidating the trees around the perimeter, a solution Mr. Landgraf testified was appropriate. (Id.:90:18-23). The Board found that strict compliance with the landscape island requirements would necessitate expansion of the development footprint, which

would compromise the robust landscaping proposed for the site. (Pa2527, Sec. XL). As such, the Board concluded that literal enforcement would be impracticable for the Property. (Id.).

Fourth, for the installation of internal pedestrian circulation areas, Mr. Landgraf testified that the site was not pedestrian friendly since the two buildings were designed as independent uses. (2T.107:19-25). While the site features a multipurpose path along the frontage and sidewalks to service each building individually, there will be no pedestrian interconnection between the three buildings. (Id.:108:1-8). The Board found this to be reasonable, noting the presence of the multipurpose path along the front of the site, and that the buildings uses were designed to be independent from each other. (Pa2527, Sec. XLI).

Finally, for use of HDPE pipe, rather than ductile iron pipe for the sewer design, the directional drilling under Interstate 195 requires HDPE. (2T.108:13-16). The Board's sewer engineer, Carmela Roberts ("Ms. Roberts"), expressed no objection to the Applicant's proposal. She also noted that use of HDPE would be "great for going under 195, and it will be great for them if they need to have any repairs or do any maintenance in the future[,]" particularly since the Applicant will own and maintain the pump station. (1T.94:21-25, 95:6-9). The Board found the waiver to be reasonable, as the use

of HDPE would be more appropriate for directional drilling, given the size of the property and the scope of development. (Pa2527, Sec. XLII).

Contrary to the Plaintiffs' claims, the Board's bulk variance and design waiver approvals were not arbitrary, capricious, or unreasonable. Instead, as outlined above, the Board's decision was supported by substantial credible evidence in the record. The record supports this, as does the Board's comprehensive resolution. The Board and Trial Court decisions must be affirmed.

B. THE BOARD'S DECISION MUST BE AFFIRMED BECAUSE THE APPLICANT SATISFIED THE BURDEN OF PROOF FOR SITE PLAN APPROVAL.

(RAISED BELOW: Pa2972-Pa2980)

It is well-established that "a [planning] board's role in considering a site plan application is circumscribed." Meridian Quality Care, Inc. v. Bd. of Adjustment of The Twp. of Wall, 355 N.J. Super. 328, 344 (App. Div. 2002). A planning board's authority in reviewing an application for site plan review is "to assure compliance with the standards under the municipality's site plan and land use ordinances." Shim v. Wash. Twp. Planning Bd., 298 N.J. Super. 395, 411 (App. Div. 1997); see also William M. Cox & Stuart R. Koenig, N.J. Zoning and Land Use, § 23-10 at 339 (2023). "[O]rdinarily, the denial of a site

plan application would be a 'drastic action' when the pertinent ordinance standards are met." Shim, 298 N.J. Super. at 411.

Here, the Applicant presented a fully compliant application over six (6) nights of hearings. During this time, Plaintiffs presented five experts, and cross-examined the Applicant's experts. The Plaintiffs also engaged with sixteen (16) members of the public, who provided testimony on stormwater management, traffic, noise, environmental features, and migratory birds. (Pa2505, Sec. 93). Throughout the six hearings, all parties, including the Plaintiffs, were afforded the opportunity to elicit direct testimony and cross-examine the Applicant's witnesses. (Pa2518-Pa2519, Sec. II).

The Board's Site Plan approval was consistent with the Township Ordinance, supported by substantial credible evidence in the record, and entitled to deference. The Board's decision must be affirmed.

i. THE BOARD PROPERLY DETERMINED THAT THE APPLICANT'S PROPOSED STORMWATER SYSTEM COMPLIED WITH THE APPLICABLE REQUIREMENTS.

(RAISED BELOW: Pa2972-Pa2976)

Plaintiffs argue that the Applicant's proposed stormwater system does not comply with New Jersey Stormwater Management Rules, N.J.A.C. 7:8-1.1 to -6.3. (Pb13-Pb15). Plaintiffs rely upon testimony from their expert witness

to challenge the Board's conclusions regarding groundwater recharge, water quality, and peak flow requirements. (Pb14, Pb15-Pb22).

It is well-settled that zoning boards conduct quasi-judicial proceedings. Central 25, LLC v. Zoning Bd. of City of Union City, 460 N.J. Super. 446, 464 (App. Div. 2019). "Zoning boards must make factual determinations based on the record developed before them and decide whether the applicant has satisfied the statutory criteria for variances." Id. (citing Baghdikian v. Bd. of Adjustment of Ramsey, 247 N.J. Super. 45, 49 (App. Div. 1991)). In carrying out this duty, zoning boards must determine credibility and decide whether to accept or reject testimony. Id. at 464–65 (citing Griggs v. Zoning Bd. of Adjustment of Princeton, 75 N.J. Super. 438, 446 (App. Div. 1962)). Where such credibility determinations are reasonably made, they are conclusive on appeal. Id. (citing Reinauer Realty Corp. v. Nucera, 59 N.J. Super., 201 (App. Div. 1960). This discretion extends to the opinions of expert witnesses who testify before the Board. Allen v. Hopewell Twp. Zoning Bd. of Adjustment, 227 N.J. Super. 574, 581 (App. Div. 1988) ("It is within the province of the board of adjustment to accept or reject the opinions of . . . the expert planner. . . .").

Here, Plaintiffs challenge the Board's stormwater management conclusions based on testimony provided by their expert. As outlined below,

the record supports the Board's acceptance of the expert testimony provided by the Applicant and Board engineers, and rejection of the Plaintiffs' engineer.

Kevin Webb, the Applicant's engineer ("Mr. Webb"), provided detailed expert testimony regarding stormwater management rules and regulations, and the mechanics, effectiveness, and compliance of the proposed stormwater management system. (1T.99:17-25 through 106:1-6). He testified that the plans and the application were prepared in compliance with current stormwater regulations and Township ordinances, and were under review by the New Jersey Department of Environmental Protection ("NJDEP"). (Id.:40:10-19, 100:8-13).

The Board's consulting engineer, Robert Hunter ("Mr. Hunter"), also reviewed the stormwater measures as the plans evolved with input from the NJDEP and his review letter. (Pa2519, Sec. III). Mr. Hunter testified: "[W]e've reviewed this time and time again. I do believe that this is an approvable design, certainly through township Standards, and I believe DEP will approve this." (1T.106:10-13). The Board's Resolution affirmed this conclusion, giving significant weight to the Board Engineer's testimony. (Pa2519, Sec. III).

In contrast, Plaintiffs presented testimony from Dr. Clay Emerson, PhD, P.E., CFM ("Dr. Emerson"), of Princeton Hydro, to challenge the Applicant's

stormwater proposal. The Borough of Allentown (the "Borough") presented Loralie Totten, P.E. ("Ms. Totten"), of Crest Engineering Associates, Inc., to testify on the potential stormwater impacts to the Borough. However, the Board determined that the testimony presented by Plaintiffs and the Borough was insufficiently supported by the record. (Pa2521, Sec. XIV). The Board determined that the Applicant's stormwater management design complied with the Township's Ordinances and was adequately supported by the studies and plans submitted by the Applicant. (Id.).

Plaintiffs now recount the expert testimony presented the Board through a detailed analysis of New Jersey Stormwater Management rules and regulations, and Dr. Emerson's testimony. (Pb15-Pb21). Ultimately, Plaintiffs request that the Court substitute the Board's judgment with its own. However, this Court cannot "review the wisdom of [a planning board's] decision, rather . . . [it] merely 'determine[s] whether the board could reasonably have reached its decision." Pullen v. Twp. of S. Plainfield Planning Bd., 291 N.J. Super. 1, 7 (App. Div. 1996).

Credibility decisions and factual determinations are the core of what local land use boards do. The record supports the Board's determinations on the expert testimony, and that those decisions were reasonably made. As a result, the Board's decisions to accept the testimony from Mr. Webb and Mr.

Hunter, and reject the testimony from Dr. Emerson and Ms. Totten, are conclusive on appeal.

ii. THE BOARD'S FINDINGS REGARDING THE APPLICANT'S NOISE STUDY ARE SUPPORTED BY THE RECORD.

(RAISED BELOW: Pa2976-Pa2977)

Plaintiffs argue that the Applicant's noise study was "flawed", and lacks sufficient data to support the Board's findings regarding compliance with NJDEP sound regulations. (Pb22-Pb23; Pb26-Pb27). Again, Plaintiffs urge that the Court substitute its judgment for the Board's credibility determinations and factual findings, specifically for the rejection of the Plaintiffs' expert, Gene Bove ("Mr. Bove").

The Applicant presented Norman Dotti ("Mr. Dotti"), of Russell Acoustics, as its sound expert. Mr. Dotti testified to the Applicant's sound study, findings, and recommendations. Specifically, the study analyzed the existing sound levels to predict the development's potential impact. (2T.56:14-21, 59:14-20). To collect the data, he placed sound markers above the residential area, and the proposed warehouse site. The data is measured in dBA, the primary metric used by the State of New Jersey, and collected for three (3) continuous days, twenty-four (24) hours a day. (Id.:57:14-21, 58:20-25, 61:24-25). Mr. Dotti's report concluded one areas on the site already

exceed the nighttime sound limit for residents. (Id.:72:11-17). To mitigate the noise, he recommended installation of a sound attenuation wall atop an existing berm. (Id.:73:11-18). With the proposed rotation of the building and sound attenuation wall, Mr. Dotti concluded that the project would be compliant with NJDEP's nighttime noise limits. (Id.:78:8-10).

Based on Mr. Dotti's report and corresponding testimony, the Board accepted Mr. Dotti's expert testimony. Plaintiffs challenge the acceptance of Mr. Dotti's expert testimony, citing alleged deficiencies in his report. (Pb22-Pb27). For example, Plaintiffs argue that Mr. Dotti should have also analyzed impulsive sounds and octave bands for his study. (Pb23-Pb24). Yet, notably absent from Plaintiffs' argument, is a citation to any regulation that mandates analysis of all impulsive sounds and octave bands generated by the project, and their impact on the site's surrounding properties. (Pb24-Pb25). As evidenced by the record, Mr. Dotti did not measure all of the potential noises generated from the proposed development, because he was not required to do so. (Pa2514, Sec. 128-129). Rather, NJDEP sound regulations allow continuous airborne sound to be measured in dBA, octave bands, *or* impulsive sounds. N.J.A.C. 7:29-1.2 (emphasis added). Plaintiffs even acknowledge this in their brief. (Pb23).

Ultimately, the Board found that the Applicant's noise study, and Mr. Dotti's expert testimony, demonstrated that the development would not have significant noise impacts, and would comply with NJDEP sound regulations. (Pa2521, Sec. XVII). The Board's reliance on this evidence was reasonable, and supported by the record. Therefore, the Board's decision to accept Mr. Dotti's expert testimony, and reject Mr. Bove's, is conclusive on appeal.

iii. THE BOARD PROPERLY CONSIDERED THE TRAFFIC IMPACT STUDY IN CONNECTION WITH THE SITE PLAN APPLICATION AND DID NOT ISSUE A FINDING INCONSISTENT WITH ITS PRIOR DETERMINATIONS.

(RAISED BELOW: Pa2977)

Plaintiffs argue that the Board did not adequately address the traffic impacts, and made findings inconsistent with its prior conclusions regarding the site's traffic. (Pb27). As elaborated in Section D below, they also argue that the Board improperly restricted testimony related to the Applicant's community impact and traffic impact statements. (Id.). Like the Board's conclusions on stormwater management and noise, the Board's decision on traffic is supported by substantial credible evidence in the record.

The Applicant's traffic engineer, Daniel Disario ("Mr. Disario"), prepared a traffic study for the site. His study utilized the industry standard for traffic engineers—the Institute of Transportation Engineers' Trip Generation

Manual ("ITE"). (1T.129:3-9). Upon comparison of the original and revised site plans, he concluded that the revised proposal would generate 240 trips during the morning and evening peak hours, compared to over 800 trips from the original plan. (Id.:130:5-7, 131:8-13; Pa289-Pa291). While the revised plans would still result in more vehicles on the road, the existing road system can accommodate the projected increase without any significant additional traffic burden. (Id.:130:21-25). Ultimately, Mr. Disario concluded that the project would not have a significant traffic impact. (Id.:130:19-20).

Despite Mr. Disario's expert testimony—based on the industry standard for traffic engineering—Plaintiffs argue that the Board's findings on traffic are inconsistent with conclusions from 1989 and 2008. (Pb30-Pb31). Plaintiffs overstate the conditions imposed on other applicants from the two previous approvals.

In 1989, Trafalgar House Real Estate, Inc. ("Trafalgar") sought preliminary site plan approval for construction of an office and hotel complex. (Pa2614). Trafalgar proposed reconstruction of the eastbound ramp, at its sole cost and expense, to address the potential site-generated traffic impacts voiced by the Borough. (Pa2623). The 1989 Trafalgar Resolution stated that the proposed reconstruction would require NJDOT approval, and that "the absence of the ramp will not adversely impact ingress and egress to the development.

Accordingly, the ramp is not an integral part of the development, and is separate from it." (Pa2623-Pa2624) (emphasis added). As a condition of approval, Trafalgar had to submit *applications* for all necessary approvals for construction of the eastbound ramp, and had to keep the Township of Washington and the Borough apprised of the status. (Pa2633).

In 2008, Thompson Realty Co. of Princeton ("Thompson") sought minor subdivision and amended preliminary and final site plan approval for construction of a warehouse building. (Pa2643). Like Trafalgar, Thompson agreed to pursue approvals for the ramp's construction. (Pa2678). Specifically, the Resolution stated that "the construction of the ramp will not be required to permit the construction and occupancy of the flex office/warehouse building to be built on the 17.78 acre tract concurrently subdivided from the Property." (Pa2678).

Neither the 2008 Trafalgar Resolution nor 2008 Thompson Resolution require *actual* construction of the eastbound ramp. Rather, both resolutions require the applicants to *pursue* the necessary approvals. Pursuit of approvals, and actual construction, are two very different things.

C. THE BOARD ADEQUATELY CONSIDERED THE NEGATIVE CRITERIA, AND DID NOT IMPROPERLY LIMIT ITS REVIEW.

(RAISED BELOW: Pa2978)

Plaintiffs argue that the Applicant did not meet the negative criteria upon its review of a bifurcated application, and as such, the Board's site plan approval was arbitrary and capricious. (Pb36). However, these claims are contradicted by the record.

As acknowledged by Plaintiffs, the Board recognized its obligation to evaluate the negative criteria upon review of the site plan application. (Pb33; Pa2525, Sec. XXXVI). On February 28, 2023, Mr. Landgraf presented substantial testimony on the positive and negative criteria for the bifurcated use variance and site plan applications. See 4T. 61:2-7, 67:10-18, 68:6-69:19, 70:7-9, 70:17-72:23. The Board concluded:

> [The Applicant] do[es] not anticipate any impact to traffic congestion impact due to mitigation through proposed road improvements; new development won't conflict with existing development on the site; any impact to surrounding properties will be limited; there is significant buffering and landscaping for aesthetic and audible impacts; and the site has access to existing roadways and streets and nearby access to county, state and interstate corridors. The reorientation of the buildings as requested by Township officials actually reduces impacts to surrounding properties by providing additional buffering by way of the buildings. (Pa2510-Pa2511, Sec 102).

Mr. Landgraf also assessed the impact of the proposal on the Master Plan and Zoning Plan, and concluded that the bulk variances and site design aligned with the analysis conducted during the use variance approval process. (Pa2511, Sec. 103). He further determined that the modified bulk variances were consistent with the Robbinsville Zone Plan and Zoning Ordinance, and did not result in any substantial impairment to either. (Id.). The Board acknowledged that Mr. Landgraf's and Mr. Wiser's opinions on the negative criteria for the use variance remain satisfied for the site plan review, and that the Applicant's proofs met the requirements under N.J.S.A. 40:55D-76 for subsequent approvals. (Pa2526, Sec. XXXVI).

The Board's decision on the satisfaction of the negative criteria for the bifurcated site plan application is supported by substantial evidence in the record, and should be affirmed by this Court.

In addition, Plaintiffs allege that the Board improperly prohibited them and other members of the public from testifying, presenting exhibits, and cross-examining witnesses on matters affecting the evaluation of the negative criteria. Similarly, Plaintiffs contend the Board improperly excluded testimony on wildlife, and restricted testimony on traffic impacts. (Pb34). As provided below, the record contains no evidence to support either claim.

D. THE BOARD CONDUCTED A THOROUGH REVIEW OF THE APPLICATION MATERIALS, AND PROVIDED THE PUBLIC WITH A FAIR OPPORTUNITY TO COMMENT AND CROSS-EXAMINE WITNESSES REGARDING THE SITE PLAN APPLICATION.

(RAISED BELOW: Pa2978-Pa2980)

Plaintiffs allege that the Board acted improperly barred them, along with other members of the public, from providing testimony, presenting evidence, and cross-examining witnesses in connection with the application. (Pb33-Pb34, Pb36). Specifically, Plaintiffs contend that the Board unjustly denied their request to present expert testimony from wildlife and traffic experts. (Pb39-Pb41).

The MLUL provides procedural requirements for development application hearings: the application's plans and accompanying documents must be filed, and made available for public review, at least ten days before the hearing; all witness testimony must be under oath or affirmation, administered by the presiding officer; and all interested parties shall have the right to cross-examination, if represented, or directly, if not represented. N.J.S.A. 40:55D-10. The Board maintains the "discretion to limit testimony and cross-examination in a reasonable manner." Shakoor Supermarkets, Inc. v. Old Bridge Twp. Planning Bd., 420 N.J. Super. 193, 205 (App. Div. 2011) (citing Lincoln Heights v. Cranford Planning Bd., 314 N.J. Super. 366 (Law

Div. 1998), aff'd o.b., 321 N.J. Super 355 (App. Div.), certif. denied, 162 N.J. 131 (1999); Village Supermarket v. Mayfair, 269 N.J. Super. 224, 238 (Super. Ct. 1993).

In this case, the Applicant submitted an Environmental Impact Statement ("EIS"), prepared by Langan Engineering & Environmental Services ("Langan"), in compliance with Robbinsville Ordinance 142-77(B)(26) and (27). The EIS concluded that the site lacked species-specific habitats for threatened and endangered species, and anticipated no adverse impacts on such species. (Pa384-Pa385). Mr. Langan's findings were based on a habitat assessment, which analyzed the NJDEP Landscape Project Mapping report. The report identified the potential presence of two species-based habitats for the State Threatened Grasshopper Sparrow and Savannah Sparrow, and noted that the last observation of the sparrows was in 1991. (Pa385). The report concluded that the site was unsuitable as a habitat for these species. (Id.).

On June 23, 2021, NJDEP issued a Threatened and Endangered Species Correspondence, and determined that the site was devoid of habitats for threatened and endangered species. (Pa497-Pa498). The United States Department of the Interior, Fish, and Wildlife Service also issued a letter that analyzed the Property, and concluded that no critical habitats, refuge lands, or fish hatcheries existed within the project area under its jurisdiction. (Pa515).

Based on the EIS, NJDEP Correspondence, and the U.S. Department of the Interior, the Board determined that the proposed project would not have an undue negative impact on the site's environmental features. (Pa2520). Despite Plaintiffs' claims to the contrary, there was simply no credible evidence in the record to support the allegation that bald eagles were present on the site. (Pb38).

The Board conducted an extensive review of the application over the six nights of hearings. During these hearings, Plaintiffs were afforded ample opportunity to present their case, including testimony from five expert witnesses: (1) Dr. Clay Emerson, PhD, P.E., CFM, as a stormwater engineer expert; (2) Loralie Totten, P.E., as a stormwater engineer expert; (3) Carlos Rodrigues, PP, FAICP, as a professional planner; (4) Gene Bove, Certified Noise Consultant, as an acoustic expert; and (5) Lee Klein, P.E., PTOE, as a traffic expert.

Plaintiffs argue that the Board restricted testimony on the Interstate 195 ramp. At the hearing, it was acknowledged that the Board received "significant public comment related to existing traffic and the concern that existing traffic and noise will be exacerbated by the grant of this application[,]" yet, Plaintiffs also claim that the Board limited this very testimony. (7T.18:4-8); (Pb39-Pb40). Mr. Klein, Plaintiffs' traffic engineer, testified to the potential benefits

of constructing the ramp: "[i]f that eastbound on-ramp were there, it would be better for, I believe this applicant and it would be [b]etter for Allentown. It would be better in general on the traffic that would be there." (6T.15:20-24). Plaintiffs cannot reasonably claim their testimony was improperly limited when their expert provided testimony on the exact issue.

Plaintiffs had the opportunity to cross-examine the Applicant's professionals. Plaintiffs' and the Borough's attorneys cross-examined Mr. Webb on the Applicant's stormwater management plan, Mr. Dotti on sound study, and Mr. Disario on truck traffic. The Applicant, Plaintiffs, and the Borough were permitted to submit closing summations, which were reviewed on the record during the hearing of March 28, 2023. (7T.5:12-17).

Regarding public testimony, sixteen members of the public spoke on February 21, 2023, and seven spoke on March 22, 2023. (Pa2505, Sec. 93; Pa2516-Pa2517). Multiple members spoke about the impacts from the development on the alleged wildlife on the Property. Plaintiffs cannot reasonably argue that the Board improperly prohibited their ability to testify, present exhibits, and cross-examine witnesses. The decisions from the Board and Trial Court must be affirmed.

E. THE BOARD RECEIVED PROPER GUIDANCE ON VOTING PROCEDURES AND WAS NOT INSTRUCTED TO APPROVE THE APPLICATION.

(RAISED BELOW: Pa2980)

Plaintiffs argue that Board Members were improperly advised to vote for the Applicant's request for Site Plan approval. (Pb42). Specifically, when Board members voted to approve the application at the March 28, 2023 hearing, one member expressed that he was voting "yes" solely due to legal counsel's guidance—"I'm legally bound to provide a yes." (Pb42); (7T.32:17-21). Plaintiffs take this statement out of context, and fail to include the remainder of the Board member's statement—"[m]y protest is because of an intimate understanding of the township and my concerns with traffic safety." (Id.:32:22-24). While the Board Attorney summarized the Site Plan application, and provided legal guidance regarding the vote, the only advice related to traffic issues was the following statement: "[I]t would be improper for the board to deny the application based upon the existing traffic." (Id.:18:11-13). At no point did the Board Attorney instruct any Board member that "he could only vote yes on the application," (Pb42), and Plaintiffs do not provide a citation to the record to support this allegation.

The Board Attorney's advice was entirely proper. A site plan application cannot be denied based on existing off-site traffic conditions. See Dunkin'

Donuts of N.J., Inc. v. N. Brunswick Planning Bd., 193 N.J. Super. 513, 515 (App. Div. 1984) (holding "a planning board . . . is without authority to deny site plan approval because of off-site traffic conditions"); see also Lionel's Appliance Ctr., Inc. v. Citta, 156 N.J. Super. 257, 269 (Law Div. 1978) (holding a "planning board may deny a site plan application only if the ingress and egress proposed by the plan creates an unsafe and inefficient vehicular circulation"). As the Trial Court correctly held, the Board member's statement was cited out of context, and related solely to concerns about offsite traffic. (Pa2980). Accordingly, the Board's and Trial Court's decisions must be affirmed.

III. THE TRIAL COURT PROPERLY DENIED PLAINTIFFS' MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT.

(RAISED BELOW: (Pa2937-Pa2947)

A. STANDARD OF REVIEW

Rule 4:9-1 governs motions to amend pleadings, providing that "unless amendment is sought while still a matter of right, the amendment of pleadings is allowed only 'by leave of court which shall be freely given in the interest of justice.'" Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 500-01 (2006) (quoting R. 4:9-1). The New Jersey Supreme Court has made clear that "R. 4:9-1 requires that motions for leave to amend be granted liberally." Id. at 501 (quoting Kernan v. One Wash. Park Urban Renewal Assocs., 154 N.J. 437, 456

(1998)). Nevertheless, the decision to allow an amendment is entrusted to the trial court's sound discretion. Id.; see also Pressler & Verniero, Current N.J. Court Rules, cmt. 2.2.1 on R. 4:9-1 (2025).

On appeal, a trial court's decision to deny leave to amend will only be overturned upon a showing of "a clear abuse of discretion." Franklin Med. Assocs. v. Newark Pub. Sch., 362 N.J. Super. 494, 506 (App. Div. 2003) (citations omitted). An "abuse of discretion is demonstrated if the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005). "In exercising that discretion, a court must go through 'a two-step process: whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile.'" Grillo v. State, 469 N.J. Super. 267, 275 (App. Div. 2021); see also Notte, 185 N.J. at 501. Ultimately, the "achievement of substantial justice is the fundamental consideration." Jersey City v. Hague, 18 N.J. 584, 602 (1955).

"[T]he factual situation in each case must guide the court's discretion, particularly where the motion is to add new claims or new parties late in the litigation." Bonczek v. Carter-Wallace, Inc., 304 N.J. Super. 593, 602 (App. Div. 1997); see also Du-Wel Prods., Inc. v. U.S. Fire Ins. Co., 236 N.J. Super.

349, 364 (App. Div. 1989). In the context of seeking new claims late in the litigation, "[o]ne circumstance to consider is the reason for the late filing." Bldg. Materials Corp. of Am. v. Allstate Ins. Co., 424 N.J. Super. 448, 484-85 (App. Div. 2012). "Other considerations include whether the newly-asserted claim would unduly prejudice the opposing party, . . . cause undue delay of the trial, or constitute an effort to avoid another applicable rule of law." Id. at 485 (citing Kimmel v. Dayrit, 154 N.J. 337, 343 (1998)). Further, "courts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law. In other words, there is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted." Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 257 (App. Div. 1997); see also Webb v. Witt, 379 N.J. Super. 18, 28 (App. Div. 2005) (noting that "where the proposed cause of action is not sustainable as a matter of law, the judge may refuse leave to amend").

Overall, "[l]ateness of the motion [to amend] coupled with apparent lack of merit virtually dictates denial." Verni ex rel. Burstein v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 197 (App. Div. 2006) (quoting Pressler, cmt. 2.2.2 on R. 4:9-1 (2006).

B. PLAINTIFFS' PROPOSED AMENDMENTS WOULD CAUSE UNDUE PREJUDICE TO DEFENDANTS AND THE PROPOSED DEFENDANT.

(RAISED BELOW: Pa2943-Pa2944)

"It is well settled that an exercise of [a reviewing court's] discretion will be sustained where the trial court refuses to permit new claims and new parties to be added late in the litigation and at a point at which the rights of other parties to a modicum of expedition will be prejudicially affected." Du-Wel, 236 N.J. Super. at 364 (citing Wm. Blanchard Co. v. Beach Concrete Co., 150 N.J. Super. 277, 299 (App. Div. 1977)).

Plaintiffs argue that their motion for leave to amend, which would add entirely new claims, does not result in undue prejudice to the Defendants, or the proposed Defendant, Mercer Industrial Properties, LLC ("Mercer Industrial"). (Pb45-Pb48). They further argue that Mercer Industrial, as the owner of the Property, is an indispensable party, emphasizing that "any decision on Plaintiffs' claims necessarily affects the right and interests of Mercer Industrial." (Pb46). Accordingly, Plaintiffs argue that the Trial Court "abused its discretion" when it denied their request to join Mercer Industrial. (Pb47).

R. 4:28-1 addresses whether a party should be joined. It states, in relevant part:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process shall be joined as a party to the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest in the subject of the action and is so situated that the disposition of the action in the person's absence may either (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other inconsistent obligations by reason of the claimed interest.

"Whether a party is indispensable depends upon the circumstances of the particular case." Allen B. Du Mont Labs., Inc. v. Marcalus Mfg. Co., 30 N.J. 290, 298 (1959). As a general rule, "a party is not truly indispensable unless he [or she] has an interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between the litigants without either adjudging or necessarily affecting the absentee's interest." Id. However, the "absence of an indispensable party does not deprive the" court of jurisdiction to adjudicate the issues among the parties who were joined." Toll Bros., Inc. v. Twp. of W. Windsor, 334 N.J. Super. 77, 91 (App. Div. 2000). "Indispensability is usually determined from the point of view of the absent party, and in consideration of whether or not his rights and interests will be adversely affected." Pressler, cmt. 3.1 on R. 4:28-1 (2025).

The Trial Court's decision to deny Plaintiffs' motion for leave to amend was a proper exercise of its discretion, and should be upheld. The motion to

amend was made nine months after the action commenced, and less than six weeks before the scheduled trial date. Granting leave to amend at this late stage would not only cause undue delay, but also prejudice the rights of the Defendants and proposed defendant, Mercer Industrial, who would be forced to incur additional costs and expenses to respond to the new claims. As the Trial Court held, the belated amendment would result in significant disruption and delay, especially when the Plaintiffs had prior knowledge of the underlying facts when they filed their original Complaint.

Plaintiffs' argument that Mercer Industrial is an indispensable party is also unpersuasive. While R. 4:28-1 permits joinder of a party if their absence would impair the ability to provide complete relief, or if the party claims an interest in the action, that standard is not met here. The absence of Mercer Industrial did not prevent the Trial Court from granting full relief among the existing parties, nor does it pose a substantial risk of inconsistent obligations. Mercer Industrial's ownership does not make it indispensable to the resolution of Plaintiffs' claims. A party is only indispensable when their interest is so closely tied to the case that a judgment could not fairly be rendered without affecting their rights. Mercer Industrial had no involvement in the development applications subject to this appeal, so its interests are not so deeply intertwined with the core issues of this case to require joinder.

The Trial Court appropriately considered the undue prejudice to the existing Defendants and Mercer Industrial if the amendment were granted, and the additional costs of prolonged litigation. The Trial Court's decision should be affirmed.

C. PLAINTIFFS' PROPOSED AMENDMENTS ARE FUTILE.

(Raised Below: Pa2945-Pa2947)

Plaintiffs' motion for leave to amend their Complaint also lacked merit. A court determines whether a proposed amendment would be futile by asking "whether the amended claim will nonetheless fail and, hence, allowing the amendment would be a useless endeavor." Notte, 185 N.J. at 501. In doing so, the court evaluates whether the amendment can survive a motion to dismiss for failure to state a claim. See Webb, 379 N.J. Super. at 28 (noting that "[a] motion for leave should be decided pursuant to the same standard as a motion to dismiss for failure to state a claim"). "When deciding a motion to dismiss under Rule 4:6-2(e), the test to determine 'the adequacy of the pleading' is 'whether a cause of action is "suggested" by the facts.'" Doe v. Estate of C.V.O., 477 N.J. Super. 42, 54 (App. Div. 2023) (quoting MasTec Renewables Constr. Co. v. SunLight Gen. Mercer Solar, LLC, 462 N.J. Super. 297, 309 (App. Div. 2020)).

Plaintiffs argue that the Trial Court erred when it found that they lacked standing to bring a claim under the Environmental Rights Act ("ERA"), N.J.S.A. 2A:35A-1, to -14. (Pb45, Pb49). As a matter of law, permitting Plaintiffs' ERA claim would be futile.

In enacting the ERA, the New Jersey Legislature determined that "the integrity of the State's environment is continually threatened by pollution, impairment and destruction, that every person has a substantial interest in minimizing this condition, and that it is therefore in the public interest to enable ready access to the courts for the remedy of such abuses." N.J.S.A. 2A:35A-2. Accordingly, the ERA provides that:

> Any person may commence a civil action in a court of competent jurisdiction against any other person alleged to be in violation of any statute, regulation or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment. The action may be for injunctive or other equitable relief to compel compliance with a statute, regulation or ordinance, or to assess civil penalties for the violation as provided by law. The action may be commenced upon an allegation that a person is in violation, either continuously or intermittently, of a statute, regulation or ordinance, and that there is a likelihood that the violation will recur in the future. [N.J.S.A. 2A:35A-4].

However, the ERA only "grants a private person standing to enforce an environmental protection statute as an alternative to inaction by the government[,] which retains primary prosecutorial responsibility. [The] ERA

does not itself provide any substantive cause of action." Superior Air Prods. Co. v. Nl Indus., 216 N.J. Super. 46, 58 (App. Div. 1987). The NJDEP "must normally be free to determine what solution will best resolve a problem on a state or regional basis given its expertise and ability to view those problems and solutions broadly." N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., 453 N.J. Super. 272, 294 (App. Div. 2018) (quoting Howell v. Waste Disposal, 207 N.J. Super. 80, 95 (App. Div. 1986)).

In this case, the particular environmental statute Plaintiffs seek to enforce through the ERA is the New Jersey Freshwater Wetlands Protection Act ("FWPA"), N.J.S.A. 13:9B-1, to -30.[2] (Pb47). The FWPA provides a "comprehensive scheme for the regulation and protection of New Jersey's freshwater wetlands." In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 482 (2004) (citing N.J.S.A. 13:9B-2). The Act also provides protection for "transition areas," which are "areas of land adjacent to freshwater wetlands." Id. at 484 (citing N.J.S.A. 13:9B-3). To ensure proper implementation of private enforcement under the ERA, which depends on agency inaction, the ERA establishes mandatory pre-suit notice requirements:

> No action may be commenced pursuant to this act unless the person seeking to commence such suit shall,

[2] In Footnote 3 of their brief (Pb48), Plaintiffs note that their original request to add a claim for a violation of the Flood Hazard Area Permit was withdrawn during oral argument because it became moot.

> at least 30 days prior to the commencement thereof, direct a written notice of such intention by certified mail, to the Attorney General, the Department of Environmental Protection, . . . and to the intended defendant; provided, however, that if the plaintiff in an action brought in accordance with the "N.J. Court Rules, 1969," can show that immediate and irreparable damage will probably result, the court may waive the foregoing requirement of notice. (N.J.S.A. 2A:35A-11).

The notice requirement is designed to provide the government with a sufficient opportunity to participate in the litigation and enable the NJDEP to:

> exercise value judgments in individual cases, *e.g.*, whether it will join in that litigation or enforcement proceeding, whether other actions it may have taken already with respect to the particular problem or offender would render the litigation subject to collateral estoppel or res judicata principles, whether its expertise would assist the court, whether broad state interests would be sacrificed unduly to regional or personal interests by the instigators of that litigation, etc. (Howell, 207 N.J. Super. at 95).

Here, Plaintiffs failed to comply with the notice requirement, and are barred from further their ERA claim. Plaintiffs did not serve a pre-action notice with the NJDEP until May 8, 2024, a day after it filed the motion to amend. (Pa2841-Pa2842). Said another way, Plaintiff did not file the statutorily required pre-action notice with the NJDEP prior to the "commencement" of the suit.

Plaintiffs acknowledge that they did not provide timely notice to the NJDEP:

> Plaintiffs had initially filed an Order to Show Cause for temporary and preliminary injunctive relief pursuant to the Environmental Rights Act. Pursuant to N.J.S.A. 2A:35A-11, if a plaintiff in an action brought by order to show cause (sic) can show immediate and irreparable harm will probably result, the Court my waive the notice requirement. Therefore, no notice was needed when [their motion for injunctive relief] was originally filed, as Plaintiffs were alleging immediate and irreparable harm. As the Trial Court indicated it was inclined to deny the request for preliminary restraints during oral argument on May 7, 2024, Plaintiffs immediately drafted and sent out notices as required under N.J.S.A. 2A:45A-11.

Plaintiffs' argument conflicts with the statutory requirements of the ERA's notice provision. While N.J.S.A. 2A:35A-11 permits a court to waive the notice requirement in circumstances where immediate and irreparable harm is demonstrated, this waiver applies strictly at the point of filing the request for preliminary restraints. Plaintiffs' attempt to cure the defect by sending notices *after* the Trial Court indicated that it may deny the request for an injunction, cannot retroactively satisfy the statutorily required notice. See Player v. Motiva Enters. LLC, 240 F. App'x 513, 524 (3d Cir. 2007) (holding "[N.J.S.A. 2A:35A-11] is a mandatory condition precedent to commencing a private suit under the [ERA]"); see also Dalton v. Shanna Lynn Corp., No. A-0048-10T1, 2012 WL 1345073, at *12 (App. Div. Apr. 19, 2012) (observing that the notice

requirement "has been held to be a mandatory condition precedent to commencing a private cause of action")[3].

The ERA's notice provision is not merely procedural; it is a fundamental prerequisite designed to provide potential defendants, and the NJDEP, an opportunity to resolve alleged violations or intervene before litigation. Allowing Plaintiffs to circumvent the requirement, by sending notice *after* instituting the claim, would contradict the express statutory language, the law's intent, and incentivize procedural shortcuts. The Trial Court agreed with this interpretation:

> The ERA's notice provision does not contain a grace period while a plaintiff may be litigating the issue of preliminary restraints; rather, the statute only provides for a waiver of the notice requirement in circumstances Defendants have failed to meet. The plain text of N.J.S.A. 2A:35A-11 does not provide for additional circumstances where a court may relax the notice requirement. (Pa2946).

When Plaintiffs failed to furnish requisite notice under N.J.S.A. 2A:35A-11, they cannot "proceed in accordance with the rights accorded in the [ERA]." Howell, 207 N.J. Super. at 95. As such, Plaintiffs lack standing, and therefore cannot state a claim under the FWPA.

[3] Pursuant to R. 1:36-3, the unpublished decision is included in Defendant's Appendix at Da01-Da08.

The Trial Court properly considered all relevant factors, did not rely on improper considerations, and made no clear error in judgment. Accordingly, the Trial Court's decision to deny Plaintiffs' motion was not an abuse of discretion, and should be affirmed.

CONCLUSION

For the foregoing reasons, the Robbinsville Land Use Board respectfully urges that this Court uphold the Trial Court's decision, dismiss Plaintiffs' Complaint, and affirm the Trial Court's denial of Plaintiffs' motion for leave to amend their complaint, with prejudice.

PARKER McCAY P.A.
Attorneys for Defendant-Respondent,
Robbinsville Township Land Use Board

BY: */s/ Michael W. Herbert*
MICHAEL W. HERBERT, ESQUIRE

Dated: January 10, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No.: A-4095-23

THE ALLIANCE FOR SUSTAINABLE COMMUNITIES, GREGORY WESTFALL, KENNETH MAYBERG, PATRICIA BROWN, and MARY WOEHR, Appellants, vs. ROBBINSVILLE TOWNSHIP LAND USE BOARD and JOHNSON DEVELOPMENT ASSOCIATES, INC., Respondents.	**Civil Action** On Appeal From: Superior Court of New Jersey Mercer County - Law Division Docket No.: MER-L-1543-23 Sat Below: Hon. Robert Lougy, A.J.S.C.

REPLY BRIEF OF APPELLANTS THE ALLIANCE FOR SUSTAINABLE COMMUNITIES, GREGORY WESTFALL, KENNETH MAYBERG, PATRICIA BROWN, AND MARY WOEHR

LIEBERMAN BLECHER & SINKEVICH, P.C.
10 Jefferson Plaza, Suite 400
Princeton, New Jersey 08540
Tel: 732-355-1311 Fax: 732-355-1310
SJL@LiebermanBlecher.com
CMG@LiebermanBlecher.com

Of Counsel: Stuart J. Lieberman, Esq. (ID: 016521986)
On the Brief: C. Michael Gan, Esq. (ID: 229302016)

Dated: January 31, 2025

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TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

1. Superior Court of New Jersey Law Division, Mercer County, Order Denying Plaintiffs' Motion for Leave to File an Amended Complaint, entered on July 1, 2024. (Pa2937-Pa2947)

2. Superior Court of New Jersey Law Division, Mercer County, Order Dismissing Plaintiffs' Complaint, entered on July 12, 2024. (Pa2948-Pa2980)

TABLE OF AUTHORITIES

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PROCEDURAL HISTORY

Plaintiffs rely on the procedural history set forth in its initial brief.

STATEMENT OF FACTS

Plaintiffs rely on the statement of facts set forth in its initial brief.

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' COMPLAINT IN LIEU OF PREROGATIVE WRITS. (Pa2948-Pa2980).

A. The Applicant Failed to Meet Its Burden of Proof for a (c)(2) Variance pursuant to N.J.S.A. 40:55D(c)(2) or the Design Waivers, Therefore the Grant of Variance Relief and Waivers Must Be Vacated. (Pa2961-Pa2972).

In response to this point, Defendants argue that Plaintiffs are conflating a c(1) variance standard with c(2) variance standard in the discussion of "unique size or shape of property." However, c(2) variance relief is granted when in an application relating to a specific piece of property, the purposes of the MLUL would be advanced from a deviation from the zoning standards. N.J.S.A. 40:55D-70(c)(2). The point here is that there is no reason why Defendants cannot meet the zoning standards on this property and still build a sufficiently sized warehouse. "A (c)(2) variance should not be granted when merely the purposes of the applicant will be advanced; rather, the grant must actually benefit the community." Jacoby v. Zoning Bd. of Adjustment of Borough of Englewood Cliffs, 442 N.J. Super. 450, 470-71 (App. Div. 2015).

Simply because "the proposed development met all density and intensity zoning standards, and were in fact significantly below the maximum building and impervious coverages permitted by ordinance," (Jb8[1]), does not mean that the requested c(2) variances should automatically be approved. Those standards must be read in context with the actual conditions of the property. Arguing that if the property was perfect, the applicant could have built even more than what is being proposed here, is not a valid reason for the granting of c(2) variance relief. While Defendants argue that the variance relief creates benefits to the community, the issue is that they created the situation which now requires the variance relief to provide the benefit to the community. Applicant could have incorporated the sound wall or placed the required amount of landscape buffering without variance relief, by incorporating these into the site layout instead of trying to fit everything else onto the site as an afterthought.

Defendants next argue that there were valid hardships to support the design waivers. As to shade trees, Defendants argue it would have created a hardship because of a conflict with utility lines. This would have applied to any property with similar frontage. There are plenty of properties with utility lines and trees co-existing. As to landscaping buffers, the Board found it would be

[1] "Jb" refers to Defendant Johnson Development Associates, Inc. Brief.
"Bb" refers to Defendant Robbinsville Township Land Use Board's Brief.

impracticable. But the only reason it is impracticable is because the Applicant did not design for it and would prefer to maximize the space of the warehouses. There is nothing to show that the waivers would provide benefits. There is nothing to show that the literal enforcement would be impracticable or impose a hardship, except for their own self-created impracticability.

Again, none of these waivers make the project better or advances the purposes of zoning. These design standards are expressly identified as applying "to any application for a major subdivision plan, preliminary major site plan, and final major site plan or building permit for any nonfarming or nonresidential development resulting in disturbance of an area of soil that is 5,000 square feet or greater." Robbinsville Township Ordinance §142-47(B). These weren't requirements that only applied to a certain zone that therefore should be waived because the proposed application is not normally a permitted use in that zone; these requirements would have applied to the proposed application no matter where the application was located in the municipality.

For the reasons set forth herein, the Board's decision to approve the variance relief and design waivers was arbitrary, capricious, and unreasonable, and the Board's approvals should be reversed.

B. The Proposed Stormwater System is Not Compliant, Therefore, the Board's Site Plan Approval Should Be Reversed. (Pa2972-Pa2975).

As to the deficiencies of the stormwater management plan, Defendants only cite the testimony of the Applicant's expert and argue that the system is compliant. However, Defendants fail to directly address Plaintiffs' arguments that the determination was not "rational or reasonable." Plaintiffs provided the testimony with citations to the Stormwater Management Rules and New Jersey Stormwater Best Management Practices Manual ("BMP Manual") standards that were not met, explaining how the Board's decision was not rational or reasonable.

For the reasons set forth in detail in Plaintiffs' initial brief, the application presented to the Board does not meet the requirements of the stormwater management rules and BMP manuals, and therefore the approval must be vacated and reversed.

C. Applicant Failed to Perform an Adequate Noise Study to Conclude that the Proposed Development Would Not Violate the Noise Codes. (Pa2976-Pa2977).

In opposition, Applicant argues that Mr. Dotti rebutted the testimony of Plaintiffs' expert. However, it is undisputable that Mr. Dotti failed to demonstrate all the possible noises on the site and only modeled the noise of one truck in movement, driving around the roadway in the middle of the site. (5T162-5 to -16). Truck traffic may be the dominant noise, but it will certainly be more than just one truck driving at the middle of the site at any given time

for a site with two warehouses. Furthermore, it is undisputed that Mr. Dotti conducted the sound modeling at the building walls. This is not in compliance with the noise code, which requires the impact to be measured at the property line. N.J.A.C. 7:29-1.2(a).

Most importantly, Defendants also ignore Mr. Dotti's admission that he did not analyze all possible sounds not because he could not do so or because it was not relevant, but because he didn't want to spend the time and money to do the modeling. (5T174-25 to 5T175-3). Mr. Dotti testified "I'm not going to waste the board's time and my client's money cranking through a ton of different hypotheticals to check off a box." (5T174-25 to 5T175-3). This testimony points out the exact issue with Applicant's noise study; the Applicant did the minimal necessary to simply check off a box. The Applicant did not seriously review the potential noise impacts to surrounding properties as required by the ordinance.

In contrast to the Trial Court's holding, the issue was beyond just an argument that Mr. Dotti used the incorrect methodology. (Pa2976-Pa2977). The one methodology used by Mr. Dotti was not even done correctly as the regulations require measurements to be taken at the property line rather than at the building. N.J.A.C. 7:29-1.2(a); (5T159-22 to 5T160-10). Furthermore, it defies logic that the sound of one accelerating truck, moving at the center of the property, is the only operational sound that would occur at any given time at the

proposed development of two large warehouses. (5T162-5 to 5T162-16). Plaintiffs have shown more than just a conflict of opinion, but a lack of real analysis done by Mr. Dotti. There is a growing issue that applicants are just going through the motions to check off submission requirements without truly doing a meaningful study to provide the necessary information required by the local ordinances and the municipal land use law.

For these reasons, the Board's findings that Applicant's noise report and testimony demonstrated that there would be no noise impacts is not supported by the record. (Pa2521, Paragraph XVII). The Applicant admitted that it only did a bare bones noise study to check off a box. (5T174-25 to 5T175-3). Therefore, the Board's approval of the site plan application was arbitrary, capricious, and unreasonable, and must be vacated and reversed.

D. The Board Failed to Acknowledge Traffic Impacts and Made A Finding That Was Contrary to the Board's Prior Findings on the Same Site. (Pa2977).

Defendants argue that (1) it is improper for a board to deny an application based on off-site traffic impacts, and (2) that Applicant presented sufficient testimony to support the conclusions on traffic. However, Defendants ignore the issue at hand, which is that Applicant was permitted to present testimony about off-site traffic and a proposal to install a round-about consistent with the regional traffic study, but Plaintiffs were not permitted to provide testimony on

off-site traffic and another proposal that had previously been a condition of approval imposed by this very Board. It is easy to say that Applicant presented sufficient testimony when Plaintiffs were not permitted to present the full extent of Plaintiffs' traffic testimony.

Defendants also argue that the Board's findings here on traffic are not contrary to the Board's findings in 1989 and 2008 because the development plans are significantly different. However, the factual findings cited by the Board in 1989 and 2008 are not limited to the prior development plans but are more broadly related to traffic impacts to Allentown. In 1989, the Board had concluded that "the intersection of Main Street and Robbinsville-Allentown Road in Allentown is presently experiencing capacity problems." (Pa2623, Paragraph 27). The Board further concluded that "[a]t present, the nearest eastbound ramp on I-195 directly accessible to traffic from applicant's site is at the end of Allentown's Main Street, requiring a trip through the center of Allentown." (Pa2623, Paragraph 28). "Reconstruction of the eastbound ramp at Interchange No. 7 will reduce substantially site-generated traffic flows through the center of Allentown." Pa 2625, Paragraph 32).

In 2008, the Board again conditioned the development of the site on the installation of the eastbound ramp of I-195 at Interchange 7, again finding that this would mitigate the traffic impacts to Borough of Allentown. (Pa2643-

Pa2673). This was again confirmed in the final site plan approval. (Pa2706-Pa2714). The plans for the eastbound ramp were conceptually approved by Mercer County and the New Jersey Department of Transportation in 2009. (Pa2717-Pa2719).

The Board found in 1989 and 2008 that the development of the subject property would have negative traffic impacts to Allentown, and as a condition of approval, required the installation of the proposed eastbound ramp and a left-turn ban out of the site. In 2021-2023, the Board has now decided that an eastbound ramp is no longer necessary and dismissed the traffic concerns of Allentown. As such, the Board's findings regarding traffic are contrary to the Board's own findings in 1989 and 2008.

Defendants argue that off-site traffic impacts cannot be considered by the Board. However, the Applicant opened the door to this testimony by providing testimony on the traffic circle and its position that there are no offsite impacts from this development. Plaintiffs and other members of the public are entitled to present testimony and evidence to refute that of the Applicant. Furthermore, as a bifurcated application, the negative criteria is required to be evaluated again during the site plan review. N.J.S.A. 40:55D-76(b). Therefore, traffic is an appropriate area for consideration by the Board.

For these reasons, the Board's findings regarding traffic impacts are not supported by the record. (Pa2521, Paragraph XVI). Therefore, the Board's approval of the site plan application was arbitrary, capricious, and unreasonable, and must be vacated and reversed.

E. Applicant Was Required to Meet the Negative Criteria Again on the Request for Site Plan Approval for a Bifurcated Application. (Pa2978).

As to the negative criteria, Defendants argue that the Applicant presented sufficient testimony for the review of negative criteria in a bifurcated application. However, Defendants again miss Plaintiffs' argument, which is that Plaintiffs were not permitted to provide Plaintiffs' full proposed testimony on the same issues.

Plaintiffs were prevented from presenting relevant testimony on the negative criteria that must be considered by the Board in the scope of a review of a bifurcated application. The scope of what a Board should review in analyzing the negative criteria is a different analysis than the scope of what a Board can do to address the negative criteria. It is undisputed that the Applicant and the Board needed to address the negative criteria again in its review of the bifurcated application. A board must provide objectors a fair opportunity to address all issues in an application. N.J.S.A. 40:55D-10(d); Witt v. Borough of Maywood, 328 N.J. Super. 432, 453-54 (Law Div. 1998), aff'd o.b. 328 N.J. Super. 343 (App. Div. 2000) (nullifying the decision of a planning board that

did not allow objectors the opportunity to address the full range of issues contained in an application).

While Defendants argue that wildlife and traffic are outside the Board's jurisdiction and therefore properly excluded from this review, Defendants also state that all application materials were part of the record. That means the environmental impact statement where Applicant made conclusions on threatened and endangered species, and the community impact statement wherein traffic was considered, were part of the record and support for the Board's decision. Again, it is easy to say the record does not have evidence contradicting these conclusions when Plaintiffs were not permitted to present testimony or exhibits on these issues.

For these reasons, the Board improperly curtailed the review of negative criteria, and the Board's approval of the site plan application was arbitrary, capricious, and unreasonable, and must be vacated and reversed.

F. The Board Improperly Prohibited Plaintiffs and Other Members of the Public from Testifying, Presenting Exhibits, and Cross-Examining Witnesses Relating to Application Submissions. (Pa2978-Pa2979).

In opposition, Defendants argue that the proposed testimony that the Board prohibited Plaintiffs from presenting was properly denied because it was outside the Board's jurisdiction and irrelevant. This is entirely incorrect.

As required under township ordinance for site plan and subdivision applications, Applicant submitted an environmental impact assessment and a community impact statement. As part of the environmental impact assessment, Applicant concluded that based on alleged lack of suitable habitat for threatened and endangered species, that there would be no adverse impacts on threatened and endangered species at the site. (Pa384-Pa385). The Resolution of Memorialization confirmed that the Board reviewed the environmental impact assessment. (Pa2518-Pa2519, Paragraph II). The Board specifically found that "the Applicant's submitted [environmental impact assessment] to be sufficient." (Pa2519, Paragraph VII).

However, the Board refused to allow Plaintiffs to present a wildlife expert to refute the Applicant's statements in the environmental impact statement on impacts to threatened and endangered species. (4T19-1 to 4T19-8; 4T24-4 to 4T24-19). Plaintiffs were ready to present witnesses to testify that Bald Eagles have been observed to be foraging on the site, and that the sightings had been recognized by the NJDEP. (4T19-1 to 4T19-4, 4T24-4 to 4T24-19). None of this was discussed in the environmental impact assessment. As a report that is part of the submitted materials, Plaintiffs should have had the opportunity to present testimony that would have contradicted Applicant's report.

Simply because the NJDEP may have ultimate jurisdiction over threatened and endangered species, does not mean that the Board can prohibit public testimony on issues raised by Applicant's submissions and required to be reviewed by Robbinsville Ordinance. This is particularly true when the Board relied upon the environmental impact assessment and the Board expressly found that the environmental impact assessment was credible and sufficient, as required by township ordinance. (Pa2519-Pa2520, Paragraph VII). For the Board to make the finding without permitting Plaintiffs to provide testimony or evidence on the subject, is arbitrary, capricious, and unreasonable.

Among other conclusions in the community impact statement was a statement regarding traffic impacts. (Pa242-Pa243; Pa278-Pa369). The Board curtailed Mr. Klein's testimony on the eastbound ramp, on the basis that it is an off-tract improvement that could not be considered. However, the testimony on the eastbound ramp was in response to Applicant having proposed a different off-tract improvement, being the roundabout.

For these reasons, the Trial Court erred in holding that Plaintiffs were not permitted to present testimony and evidence that would contradict the Applicant's submissions, and the approval must be reversed.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT. (Pa2937-Pa2947).

A. The Trial Court Erred in Denying Plaintiffs' Motion for Leave to Amend the Complaint to Add an Indispensable Party, Mercer Industrial Properties, LLC. (Pa2944).

In opposition to the request to add Mercer Industrial Properties, LLC ("Mercer Industrial") as an indispensable party, Defendants simply argue that Mercer Industrial was not the applicant and therefore any relief afforded here would not impact Mercer Industrial. However, this position ignores the fact that as the current property owner, Mercer Industrial has an interest in the outcome of this litigation as the current beneficiary of the approvals being challenged. If Plaintiffs were to succeed on the appeal of the prerogative writ matter or the proposed Environmental Rights Act claims, the ability of Mercer Industrial to develop the site would be impacted. Mercer Industrial, as the current owner of the property and beneficiary of the approvals, clearly falls within the definition of an indispensable party.

For the reasons set forth herein, the Trial Court abused its discretion in denying Plaintiffs' Motion for Leave to Amend the Complaint to Add Mercer Industrial Properties, LLC, and should be reversed.

B. The Trial Court Erred in Denying Plaintiffs' Motion for Leave to Amend the Complaint to Add an Environmental Rights Act Claim and Violation of the Freshwater Wetlands Act. (Pa2943-Pa2947).

In opposition to the request to add an Environmental Rights Act Claim and Violation of the Freshwater Wetlands Act, Defendants rely upon the

argument that Plaintiffs failed to file a pre-action Environmental Rights Act notice prior to instituting the action. However, the notice was filed prior to the filing of any complaint. The proposed claims were not filed and could not have been filed until the Trial Court decided if it would grant leave to file the amended complaint. The motion was adjourned and returnable after the required 30-day notice had passed. Since the 30-day period had passed and the NJDEP did not take action, Plaintiffs had standing to pursue the matter, and the Court abused its discretion in denying the motion to amend.

N.J.S.A. 2A:35A-11 states that "if the plaintiff can show that immediate and irreparable damage will probably result, the court may waive the foregoing requirement of notice." Therefore, Plaintiffs filed an order to show cause for preliminary and temporary restraints. While the Trial Court denied the request, there was no notice needed when the order to show cause was originally filed, as Plaintiffs were alleging immediate and irreparable harm. Defendants' position that a party could never seek relief for an immediate and irreparable harm and always must wait 30 days, would go completely against the express statutory language of N.J.S.A. 2A:35A-11.

Since the Trial Court indicated it was not inclined to find immediate and irreparable harm, Plaintiffs immediately filed the pre-action notice and the motion for leave to file an amended complaint was not heard or decided until

after the required 30 days passed. This would have been no different than if the motion had been withdrawn and refiled 30 days after the notice had been served or if Plaintiffs simply filed a new complaint thereafter. Therefore, the Trial Court abused its discretion to deny the motion on the basis that the notices were not served.

For the reasons set forth herein, the Trial Court's denial of Plaintiffs' Motion for Leave to Amend the Complaint to add violation of the Freshwater Wetlands Protection Act and Environmental Rights Act should be reversed.

CONCLUSION

In conclusion, for the reasons set forth herein and in Plaintiffs' initial brief, this Court should reverse the Trial Court's Order Dismissing the Complaint and reverse the approval of the site plan application. Furthermore, this Court should reverse the Order denying Plaintiffs' Motion for Leave to File an Amended Complaint.

Respectfully submitted,

LIEBERMAN BLECHER & SINKEVICH, P.C.
Attorneys for Plaintiffs-Appellant

Dated: January 31, 2025

/s/Stuart J. Lieberman
Stuart J. Lieberman, Esq.