SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-2830-21
A-3320-21

STAVOLA ASPHALT COMPANY, INC. and STAVOLA LEASING, LLC,

Plaintiffs-Respondents,

v.

TOWNSHIP OF HOWELL ZONING BOARD OF ADJUSTMENT,

Defendant-Respondent,

and

I GREENWAY, LLC, II GREENWAY, LLC, and L & L PAVING COMPANY, a/k/a L & L PAVING CO., INC.,

Defendants-Appellants.

CLEAR THE AIR, LLC,

Plaintiff-Respondent,

v.

TOWNSHIP OF HOWELL
ZONING BOARD OF ADJUSTMENT,

Defendant-Respondent,

and

I GREENWAY, LLC,
II GREENWAY, LLC, and
L & L PAVING CO., INC.,

Defendants-Appellants.

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STAVOLA ASPHALT COMPANY,
INC., and STAVOLA LEASING, LLC,

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TOWNSHIP OF HOWELL ZONING
BOARD OF ADJUSTMENT,
I GREENWAY, LLC, II GREENWAY,
LLC, and L & L PAVING CO., INC.,

Defendants-Respondents.

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Argued May 21, 2024 – Decided June 17, 2024

Before Judges Enright, Paganelli and Whipple.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket Nos. L-2838-19 and L-2839-19.

Christopher E. Torkelson argued the cause for appellants I Greenway, LLC, II Greenway, LLC, and L & L Paving Co. Inc., in A-2830-21 (Eckert Seamans Cherin & Mellott, LLC, attorneys; Michael R. Butler and Christopher E. Torkelson, of counsel and on the briefs; Michael A. Alberico, on the briefs)

Ronald S. Gasiorowski argued the cause for respondent Stavola Asphalt Co., Inc. and Stavola Leasing, LLC, in A-2830-21 (Gasiorowski & Holobinko, attorneys; Ronald S. Gasiorowski, on the brief).

Andrew Bayer argued the cause for respondent Township of Howell Zoning Board of Adjustment, in A-2830-21 (Pashman Stein Walder Hayden, PC, attorneys; Andrew Bayer, of counsel and on the brief; Zachary Levy, on the brief).

Dennis M. Galvin argued the cause for respondent Clear The Air, LLC, in A-2830-21 (Davison Eastman Munoz Paone, PA, attorneys; Dennis M. Galvin, of counsel and on the brief).

Ronald S. Gasiorowski argued the cause for appellant Stavola Asphalt Co., Inc. and Stavola Leasing, LLC, in A-3320-21 (Gasiorowski & Holobinko, attorneys; Ronald S. Gasiorowski, on the brief).

Andrew Bayer argued the cause for respondent Township of Howell Zoning Board of Adjustment, in A-3320-21 (Pashman Stein Walder Hayden, PC, attorneys; Andrew Bayer, of counsel and on the brief)

Christopher E. Torkelson argued the cause for respondents I Greenway, LLC, II Greenway, LLC and L & L Paving Co. Inc., in A-3320-21 (Eckert Seamans Cherin & Mellott, LLC, attorneys; Michael R. Butler and Christopher E. Torkelson, of counsel and on the brief; Michael A. Alberico, on the brief).

PER CURIAM

In these back-to-back appeals, defendant L & L Paving Company [1] appeals from the April 14, 2022 order reversing the Howell Township Zoning Board of Adjustment's (ZBA) grant of use and height variances to construct defendant's bituminous concrete manufacturing plant in Howell Township's special economic development (SED) zone. We also consider plaintiffs' Stavola Asphalt Co., Inc., and Stavola Leasing, LLC's, (collectively Stavola)

[1] Also known as I Greenway, LLC and II Greenway, LLC.

appeal of the June 15, 2022 order denying its motion to enforce litigant's rights. We reverse the former and affirm the latter.

The record informs our decision. In 2016, brothers Lance and Lawrence Redaelli, owners of defendant, L & L Paving Co., purchased approximately thirty-five acres on Yellowbrook Road, with the intention of moving their paving business from Tinton Falls to Howell Township. The site was the previous location of the Kerr Pipe plant that closed in 2016.[2] The Howell Township Planning Board (Planning Board) granted defendant minor site plan approval to renovate the office, shop, and other existing structures on the site, and provide parking for vehicles and equipment storage.

Plaintiffs, Stavola owned property across the street on Yellowbrook Road where they manufactured asphalt. At the time, plaintiffs were the only producers of asphalt in Monmouth County. Clear the Air, LLC (CTA), was formed by the residents of Equestra at Colts Neck Crossing, an "over-55" residential development located near the site. Other businesses in the SED zone included Anchor Concrete, New Jersey American Water, containing a 140-foot water tower, and George Harms Construction. The purpose of the SED zone was "to provide for a variety of economic development

[2] Other testimony was that the pipe plant stopped operating in 2014.

opportunities in areas of the [t]ownship where rail and highway infrastructure are readily available." An ordinance provided that the decibel level in the SED zone needed to be lowered after 10:00 p.m. However, businesses in that zone were permitted to operate twenty-four hours per day.

In March 2017, defendant filed its initial application, and in April 2017, the Planning Board deemed the initial application complete. While the initial application was pending, the Planning Board conducted a re-examination of the township's master plan and recommended passage of an ordinance specifically prohibiting the manufacturing of asphalt or concrete[3] in the SED zone, and removing the manufacture of concrete products from the list of permitted uses.

On July 18, 2017, during a township council discussion of the Planning Board's recommendation, the deputy mayor explained the purpose of the ordinance was to prohibit future applications from companies that sought to manufacture concrete or asphalt, and it was not intended to address the merits of defendant's still-pending initial application. That same day, the council

[3] The terms "concrete" and "asphalt" were used somewhat interchangeably throughout the record. Defendant's initial application was for an asphalt manufacturing facility, and its ultimate application for a use variance was to construct a bituminous concrete manufacturing facility. For our purposes in this opinion, bituminous concrete and asphalt are the same substance.

passed ordinance O-17-21, removing manufacturing of concrete products as a permitted use, and also adding a specific prohibition against manufacturing concrete or asphalt in the SED zone.

In January 2018, as a result of plaintiffs' request for an interpretation, the ZBA enacted Resolution 18-01. The resolution stated a use variance would be necessary for any entity that sought site plan approval for a concrete or asphalt manufacturing operation in the SED zone. Prior to passing Resolution 18-01, the ZBA discussed extensively whether the township had prohibited asphalt manufacturing prior to 2017.

James Kennedy of Kennedy Consulting Engineers, LLC, prepared a report in support of defendant's application for site plan approval and a use variance to construct a bituminous concrete manufacturing facility. Kennedy's report included a traffic signal warrant analysis, environmental impact report, tree replacement report, stormwater management report, topographical survey map, traffic impact report, and other documents. The report stated the site had 81.7% impervious coverage.

The ZBA conducted fourteen hearings regarding defendant's application. At a hearing regarding defendant's application for a use variance, Lance Redaelli (Redaelli) testified the project would include an entrance and exit

onto Yellowbrook Road and an area where trucks could park waiting to get materials. Defendant's employees would instruct truck drivers not to use Cranberry Road, but instead to use Yellowbrook Road traveling toward Route 33. No trucks would be permitted to queue up on Yellowbrook Road. Instead, the truckers would be instructed to park on defendant's property and shut off their motors while waiting to be loaded. Also, concrete truckers often "oiled up" the body of their trucks with diesel fuel, which can be destructive when leaking onto roadways; Redaelli stated no trucks would be permitted to oil up at defendant's location. Instead, defendant would provide, a free-of-charge, alternative spray-down system using an environmentally friendly substance.

The site plan called for renovating a 10,000-foot portion of a manufacturing plant already in existence on the site, to be used for storage of equipment during the winter. Defendant would make no change to the existing office on the site.

Redaelli testified, normally the plant would finish operations by 5:00 p.m.; however, infrequently, the operation would be used at night, in emergency situations. When emergencies occurred, defendant would comply with all township noise ordinances, including the ordinance for lowered

decibel levels after 10:00 p.m. Additionally, trucks would be equipped with strobe lights to not create a sound disturbance at night.

Recycling would occur during the day and would involve recycled asphalt product (RAP) materials such as crushed asphalt, concrete, or millings brought in from jobs. Redaelli stated the height of a RAP pile would be no higher than thirty-five feet. RAP would be crushed and added to the newly produced product to the extent permissible by law. Redaelli expected to include fifty to sixty percent of RAP in its new product. Defendant intended to plant evergreen trees on top of berms to obstruct the view from Yellowbrook Road.

Redaelli expected to produce 200,000 tons per year of asphalt, 50,000 of which he would use in his paving operation. According to Redaelli, market demand in Monmouth County would only support that amount. Redaelli explained the plant would only need to operate three hours per day to produce 200,000 tons per year.

Redaelli conceded his equipment could produce 400 tons of asphalt per hour. Nevertheless, he anticipated only producing 833 tons per day, because that was what the market would support. His paving business did not work on the New Jersey Turnpike or the Garden State Parkway, but, instead, generally

did driveways and patch work. Seventy-five percent of his business was in Monmouth County, as such Redaelli considered it a benefit to the community in the county to have more than one supplier of asphalt.

Kennedy also testified the site plan included parking areas for employees, and trucks waiting to be loaded with asphalt, so they would not have to queue up on Yellowstone Road. Additionally, the site plan included a recycling area for RAP, space for equipment storage, a wood privacy fence, a quality control lab, and a separate ingress and egress for asphalt trucks and other vehicles. According to Kennedy, a height variance was necessary because defendant intended to use 90.6-foot silos to store produced asphalt.

Catherine Sutton-Choate, a representative of Astec, the manufacturer of the equipment used by defendant, explained how the equipment was designed to minimize air and noise pollution. She acknowledged defendant's facility would have the capacity to produce 400 tons of asphalt per hour.

Brook Crossan, a mechanical engineer, prepared defendant's environmental impact report and addressed concerns regarding noise. According to Crossan, there would be no negative impact to adjacent properties because asphalt would not be produced after 10:00 p.m. and trucks

could access the silos of asphalt that had already been produced during the day.

Gary Dean, a civil engineer, discussed traffic impacts. He explained at the morning peak hour, there were roughly 100 vehicles on Yellowbrook Road and, in the afternoon peak hour, there were 175 vehicles. He opined defendant's operation would generate approximately 150 total trips per day, including trucks and automobiles, an increase of only 0.5 percent of traffic on Yellowbrook Road and Route 33. According to Dean, this traffic impact was far below the volumes of traffic that would be expected with a permitted use in the SED zone. Dean conceded his estimates were based upon defendant's stated intention to produce only 200,000 tons of asphalt per year.

Dean also discussed the need for a traffic signal at the intersection of Yellowbrook Road and Route 33 (the intersection), where there was already queuing during peak hours. According to Dean, if the New Jersey Department of Transportation agreed to place a traffic signal at the intersection, it could be paid for by the State, the municipality, or a developer contributing its pro rata share of the cost, based on the impact it had made on the traffic in the area. Dean reported defendant had agreed to pay its pro rata share of any signal light that would be placed at the intersection.

Christine Nazzaro-Cofone, a city planner, testified a variance was necessary because asphalt manufacturing was not a permitted use in the SED zone, due to the passage of O-17-21, and a height variance was necessary because of the height of the silos.

However, she agreed the site was particularly suited for the proposed use given the prior use of the property as the Kerr pipe plant, that plant had closed as of 2016; also the site had proximity to highways. Moreover, the character of the area was well established with "very commercial intensive industrial uses." In fact, concrete companies in the township were all clustered together, along with paving companies, in the SED zone.

With respect to the height variance, Cofone testified tall silos would permit the storage of asphalt produced during the day. This would support the goal of finishing the manufacturing of asphalt by a particular time of day or night, but still permitting trucks, when necessary to access materials during the night. According to Cofone, it would be impossible to see the silos from neighboring properties because the project included a six-foot berm on Yellowbrook Road with six- to eight-foot evergreens planted on top.

Cofone opined three purposes of the Municipal Land Use Law (MLUL) contained in N.J.S.A. 40:55D-2 would be advanced by this project: criteria G,

because the project provided sufficient space for a variety of uses; criteria M, because the project would revitalize an existing site, resulting in the efficient use of the land by removing thirteen acres of impervious coverage, and returning the land to green open space with planted trees and landscaping; and criteria H, because this use would create far less of a traffic impact than a permitted use, and defendant would make a pro rata contribution to its share of the intersection light. The Planning Board's planner opined criteria I of the MLUL was also satisfied because the site had been cleaned up and beautified.

Cofone discussed the positive and negative criteria. She stated the negative criteria were met because defendant would plant 250 trees, create berms, remove thirteen impervious acres, and only impact traffic by 0.5 percent. Additionally, the project would comply with noise ordinances, and defendant would provide landscaping, thereby improving the appearance of the site.

In contrast, speaking for plaintiffs, George Thompson, a civil engineer with experience in manufacturing asphalt, testified the proposed plant would have the capacity to produce significantly more than 200,000 tons per year of asphalt. Thompson opined peak efficiency would be able to produce between 800,000 and one million tons of asphalt per year. Based upon this level of

production, Thompson concluded that approximately five times the number of vehicles than Dean estimated would be traveling into the site each day.

According to Thompson, only a small percentage of RAP was permitted by the New Jersey Department of Environmental Protection to be used in the production of new asphalt; this results in large piles of RAP accumulating on the site, a current feature of every asphalt manufacturing plant in New Jersey. Thompson stated defendant's claim that it would use one hundred percent of the RAP was not realistic, although Redaelli never actually made that claim. Thompson also did not believe Redaelli would have sufficient control over the truckers coming to the site to restrict the spraying of fuel oil in the tanks, or the queuing on Yellowbrook Road.

Thompson noted the similarities and differences between defendant and the site's previous company, between the production of asphalt and the manufacture of concrete pipes. Additionally, Thompson explained the majority of public paving of roads occurs at night, so the plant would need to operate through the night if asphalt were being sold for public roads.

Norman Dotti, acoustical engineer, disagreed the proposed plant would adhere to the noise ordinances, particularly at night. However, he agreed that, within the SED zone, there were no limits on the hours of operation.

Carolyn Feigin, a civil engineer, disagreed with the analysis by the Planning Board's engineer, Jack Mallon, that the site application had complied with township ordinances. She opined the site plan would result in more impervious coverage and took issue with Kennedy's statements regarding runoff water, drainage, groundwater recharge, soil permeability, and storm water management. Syed Husain, an engineer, expressed concern about soil testing and pollution.

Joseph Staigar, a traffic engineer, disagreed with Dean's traffic report. Staigar opined if the plant produced at full capacity of its equipment, 360 trucks would enter and exit the site per day, although he conceded his estimates were based on a worst-case scenario and that might only occur a few times per year.

Peter Steck, plaintiffs' civil engineer and licensed planner, discussed the history of the use of the site and referred to photographs and maps prepared by Andrew Thomas, a planner. According to Steck, in 1963, the SED zone was an industrial zone that had a prohibition on asphalt manufacturing. Thereafter, the industrial zone became the SED zone, and Steck believed the prohibition on asphalt manufacturing continued. The site was used to manufacture

concrete pipes until 2014, which was permitted use in the industrial and the SED zone.

According to Steck, there were similarities and differences between concrete pipe production and asphalt manufacturing. For example, asphalt is not a finished product when trucked off the premises, but the pipe manufacturer created a finished product; pipes could be manufactured inside a building and stored on the property, but asphalt could not; and pipes, unlike asphalt, did not need to be made at night.

Steck disagreed that MLUL criteria G was met because there was no nearby highway access, as Route 33 was one mile away from the site and noisy trucks would travel from defendant's site to the highway. Steck also disagreed that criteria M was met because the plant would include equipment with a much larger capacity to produce asphalt than what Redaelli stated he needed, making it an inefficient use of the land. Additionally, Steck disagreed that criteria H was met because defendant would contribute only a small amount of the cost of a traffic signal and the site was going to be overburdened with traffic.

Steck differed with Cofone's analysis that, at the planning meeting discussing O-17-21, when the Planning Board referred to the three concrete

companies in the SED zone, it intended to include the Kerr pipe plant as one of the three.

On May 20, 2019, the ZBA meeting was held in a larger venue, to accommodate members of the public who wished to attend and comment. At the end of the public commenting, Michael Sanclimenti, vice chairman of the ZBA, delivered the following statement:

> Once again, the SED zone has been around since the 1950's and we heard that, in testimony, that the plant and property that [defendant] purchased was always a concrete producing plant. It's been there since 1960. And also other plants have been there, including [plaintiffs'] with their, as advertised, asphalt on the site.
>
> When we look at two things here, the first issue is, is bituminous concrete a concrete product? As we just heard, concrete doesn't exist naturally, it needs to be mixed. You need to have aggregate, you need to have some type of binding. And whether you use water or oil, it binds together. It needs to be stored for asphalt, bituminous concrete, it needs to be stored in silos and kept warm. Whereas concrete pipe, concrete slab can be made outside or made inside and has to be stored. And finally[,] it has to be shipped to its destination. It can be shipped in small trucks, like bituminous concrete . . . the characteristics. But depending on the concrete product, it could be a very large truck. And depending on the situation, it could be done day or night.
>
> The second thing is the site that they purchased. It was submitted as evidence that the site started in 1960

> and then ceased operation in 2014. But the site was never abandoned by concrete product. It was never changed to a permitted use like a textile or lumber or leather products. It's always been a concrete producing plant. Even though it has[not] been in production for five years, th[e] [ZBA] has seen applications where a site ceased operations for over a decade and then started again.
>
> This application is not a new use, it is a continuation of what the site has always been for decades, and that has been a concrete producing plant.

The ZBA voted to approve defendant's application and on June 24, 2019, adopted a forty-nine-page resolution summarizing all the testimony and containing its findings.

The ZBA resolution stated as follows, in pertinent part:

> 25. The [ZBA] finds that [defendant] has satisfied the positive criteria for the requested use variances by demonstrating that the site is particularly suitable for the proposed use consistent with the analysis described by the New Jersey Supreme court in Price v. Himeji, 214 N.J. 263 (2013), and Medici v. BPR Co., 107 N.J. 1 (1987). The concurring [ZBA] [m]ember's findings of facts were in substantial agreement with the testimony of [defendant's] witnesses, as set forth above, and as further detailed below.
>
> 26. [ZBA] noted that the prior action of the [t]ownship [c]ouncil to prohibit concrete and asphalt manufacturing in the SED [z]one did not preclude a finding of particular suitability for this specific location based on detailed site-specific analysis. The testimony established the particular suitability of the

[defendant's] property, thus promoting the general welfare, based on:

> a. The zone has been an SED [z]one since the 1950's.
>
> b. The site contained a concrete manufacturing plant since at least 1960 to present day.
>
> c. The process of manufacturing concrete and asphalt is similar, with mixing and storage of product in silos, to be shipped out to customers.
>
> d. Both types of production require large trucks to convey materials to and from the site.
>
> e. The former concrete plant use was never abandoned, and there was no intention or overt act demonstrating abandonment of that use.
>
> f. The present application represents a continuation of a similar use that has been present for decades at this location.
>
> g. That the special reasons advance[d] by [defendant's] planner are more than adequate to satisfy the positive criteria needed for the approval of a use and height variance.
>
> h. That the plant is modern, environmentally friendly, and will meet and exceed[] New Jersey's environmental

> standards and also meets stringent California standards.
>
> i. The location is particularly suitable for the proposed use as it had been a concrete manufacturing plant for over [fifty] years.
>
> j. The area in which the site is located is a well[-]established commercial manufacturing area, containing, among others, Anchor Concrete, George Harms Construction and Stavola[].
>
> k. The rehabilitation of a run-down site, creation of a berm with evergreen trees, removal of over [thirteen] acres of impervious surface and agreement with the [defendant] to a number of conditions of approval all serve to satisfy the negative criteria.
>
> l. The purpose of the SED [z]one is met by this application as the proposed use is appropriate for this historically manufacturing area of Howell Township.
>
> m. [Defendant] agrees to recycle RAP to eliminate the concern for excessively high piles on the site, and such is environmentally friendly.

The ZBA found the use variance could be granted without substantial detriment to the public good and without substantial impairment of the zone and master plan because: granting approval would advance the master plan; the site would be partially wooded and would contain evergreen trees to

further minimize the negative impact on nearby residential properties; truck traffic would be controlled to minimize noise; and defendant would pay for its share of traffic signalization on the surrounding road. According to the ZBA, the application supported criteria G, M, H, and I of the MLUL.

The ZBA resolution specified twenty-six conditions to be met by defendant, including: truck drivers would have to be instructed not to use Cranberry Road; defendant would have to provide a free alternative spraying area and ensure that no diesel fuels would be sprayed into the trucks; asphalt manufacturing would have to end by 9:00 p.m.; RAP piles could not exceed thirty-five feet; no more than six silos could be installed; defendant would have to pay its share of traffic signalization; and no queuing of trucks would be permitted on Yellowbrook Road. By May 2019, defendant began to operate its facility.

On August 12, 2019, Stavola and CTA filed separate actions in lieu of prerogative writs challenging the ZBA's grant of approvals to defendant. On November 19, 2019, the trial court entered a sua sponte order consolidating the matters. The trial court heard argument on the appeals on September 24, 2020. On April 14, 2022, the trial court issued its written decision and order overturning the ZBA's grant of approvals to defendant.

Shortly after the court reversed the ZBA's grant of approvals, on May 22, 2022, the Township Department of Community Development & Land Use sent a notice of violation to defendant to cease operating the facility. Thereafter, plaintiffs filed a motion to enforce litigant's rights seeking a court order requiring defendant to stop its operation, which the trial court denied. Defendant appealed, and the ZBA submitted a respondent's brief siding with defendant, while CTA's brief sided with plaintiffs. Plaintiffs appealed the denial of its motion to enforce litigant's rights. We address each appeal in turn.

I.

Defendant's appeal.

As a threshold issue, defendant argues the court erred because plaintiffs lacked standing to challenge the approvals granted by the ZBA. We reject this argument.

According to N.J.S.A. 40:55D-4, an "interested party" is defined as

> any person, whether residing within or without the municipality, whose right to use, acquire, or enjoy property is or may be affected by any action taken under [the MLUL], or whose rights to use, acquire, or enjoy property under [the MLUL], or under any other law of this State or of the United States have been denied, violated or infringed by an action or a failure to act under [the MLUL].

Although plaintiffs are defendant's competitors, they nevertheless own a neighboring property and will be affected by any changes made to the site. CTA is also an interested party because it consists of residential property owners who live near the site.

Defendant argues the court erred in reversing ZBA's grant of a (d)(1) use variance[4]—a variance sought when seeking to use a structure in a manner currently restricted—because the court failed to properly analyze the positive and negative criteria. We agree.

The court found the evidence presented at the hearings did not support the ZBA's determination that the positive and negative criteria were met. The court found the MLUL goals contained in N.J.S.A. 40:55D-2 were not advanced by defendant's application, and in particular criteria G, H, M, and I were not satisfied. Moreover, the court rejected the ZBA's reliance on the property's prior use as a concrete pipe manufacturing plant as a basis to approve defendant's application. The court found no evidence was introduced to establish similarities between pipe manufacturing and asphalt production, or whether the pre-existing use of pipe manufacturing was abandoned. As such, the court held the positive criteria were not met.

[4] See N.J.S.A. 40:55D-70(d)(1).

Additionally, the court found defendant did not satisfy the negative criteria. The court did not believe defendant would produce only 200,000 tons of asphalt per year, because the plant had the capacity to produce significantly more than that amount. Therefore, the court disagreed with Dean's traffic estimates based upon production of only 200,000 tons per year and noted the ZBA never placed any limit on the amount of asphalt defendant could produce.

The court found granting the approvals would impair the township's master plan, because O-17-21—passed after defendant submitted its initial application—prohibited the manufacturing of asphalt and concrete in the SED zone. In addition, the court found that, based on the projected production of 200,000 tons per year, the cost to defendant of the traffic light would be only 0.5 percent, and more than ninety-nine percent would be borne by a governmental entity, making this contribution so minimal it did not qualify as a reason for finding that defendant satisfied the negative criteria.

The decision of a municipal board is entitled to substantial deference. Price, 214 N.J. at 284 (citing Kramer v. Bd. of Adj., 45 N.J. 268, 296 (1965)). The court may not substitute its judgment for that of the board. Burbridge v. Twp. of Mine Hill, 117 N.J. 376, 385 (1990). Courts reviewing a municipal board action are limited to determining whether the board's decision was

arbitrary, unreasonable, or capricious. Med. Ctr. at Princeton v. Twp. of Princeton Zoning Bd., 343 N.J. Super. 177, 198 (App. Div. 2001). A board's decision is presumptively valid. Kramer, 45 N.J. at 296. "[B]oards possess special knowledge of local conditions and must be accorded wide latitude in the exercise of their discretion." Sica v. Bd. of Adj., 127 N.J. 152, 167 (1992).

The MLUL, N.J.S.A. 40:55D-1 to -163, governs how local planning and zoning boards should make decisions regarding land use. N.J.S.A. 40:55D-2 sets forth the purposes of the MLUL, including in part:

> g. To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens;
>
> h. To encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes which result in congestion or blight;
>
> i. To promote a desirable visual environment through creative development techniques and good civic design and arrangement; [and]
>
> . . . .
>
> m. To encourage coordination of the various public and private procedures and activities shaping land development with a view of lessening the cost of such development and to the more efficient use of land.

A zoning ordinance must advance one purpose of the MLUL as described in N.J.S.A. 40:55D-2. Tanenbaum v. Twp. of Wall Bd. of Adj., 407 N.J. Super. 446, 457 (Law Div. 2006).

Zoning boards may grant a variety of variances "[i]n particular cases for special reasons." N.J.S.A. 40:55D-70(d). For example, similar to a (d)(1) variance, a (d)(2) variance is sought when an applicant seeks to expand a nonconforming use. N.J.S.A. 40:55D-70(d)(2). A (d)(6) variance is necessary when an applicant seeks permission to exceed the height restriction in the district. N.J.S.A. 40:55D-70(d)(6).

There are three categories of circumstances where our courts have found "special reasons" necessary for a (d)(1) use variance. Saddle Brook Realty, LLC v. Twp. of Saddle Brook Zoning Bd. of Adj., 388 N.J. Super. 67, 75-76 (App. Div. 2006). They are: (1) "where the proposed use inherently serves the public good, such as a school, hospital or public housing facility"; (2) where it would be an undue hardship for the property owner to use the property in "conformity with the permitted uses in the zone"; and (3) "where the use would serve the general welfare because 'the proposed site is particularly suitable for the proposed use.'" Ibid. (quoting Smart SMR of N.Y. Inc. v. Borough of Fair Lawn Bd. of Adj., 152 N.J. 309, 323 (1998)).

In Medici, our Supreme Court stated,

> Although certain commercial uses may inherently serve the general welfare in a particular community, the typical commercial use can be better described as a convenience to its patrons than as an inherent benefit to the general welfare. For such uses, any benefit to the general welfare derives not from the use itself but from the development of a site in the community that is particularly appropriate for that very enterprise.
>
> [107 N.J. at 18.]

A variance may only be granted if there is a showing it 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(d). This is known as satisfying the negative criteria.

Although N.J.S.A. 40:55D-70(d) does not explicitly require balancing the positive and negative criteria, a balancing test is implicit in the statutory requirement that the grant of a variance must be "without substantial detriment to the public good." Ibid.

Nevertheless, "[v]ariances to allow new nonconforming uses should be granted only sparingly and with great caution since they tend to impair sound zoning." Burbridge, 117 N.J. at 385 (alteration in original) (quoting Kohl v. Mayor & Council of Fair Lawn, 50 N.J. 268, 275 (1967)). A reviewing court, therefore, gives less deference to a grant than to a denial of a use variance.

Funeral Home Mgmt., Inc. v. Basralian, 319 N.J. Super. 200, 208 (App. Div. 1999). To affirm the grant of a use variance, a reviewing court must find both that the "board's decision comports with the statutory criteria and is founded on adequate evidence." Burbridge, 117 N.J. at 385.

The burden is on a challenger to show the ZBA's decision was incorrect. S & S Auto Sales, Inc. v. Zoning Bd. of Adj. for Stratford, 373 N.J. Super. 603, 615 (App. Div. 2004) (citing N.Y. SMSA Ltd. P'ship v. Bd. of Adj. of Bernards, 324 N.J. Super. 149, 163 (App. Div. 1999)). We apply the same standard of review that governs the trial court. Charlie Brown of Chatham, Inc. v. Bd. of Adj. for Chatham, 202 N.J. Super. 312, 321 (App. Div. 1985). A reviewing court must evaluate "the sufficiency of the factual record and the adequacy of the explanation of reasons given by the board in its resolution as the support for its decision." Price, 214 N.J. at 292. "Whether a proposed use variance should be granted . . . is an inherently fact-specific and site-sensitive" inquiry. Ibid.

The zoning board must determine "whether the property is particularly suited for the proposed purpose, in the sense that it is especially well-suited for the use, in spite of the fact that the use is not permitted in the zone." Id. at 293. "[W]hether a proposal meets that test will depend on the adequacy of the

record compiled before the zoning board and the sufficiency of the board's explanation of [its] reasons." Ibid. However, there is no requirement of "proof that there is no other potential location for the use nor does it demand evidence that the project 'must' be built in a particular location." Ibid.

As a preliminary matter, ZBA argues on appeal the court used an incorrect standard of review when it stated, "[t]he 'arbitrary and capricious' standard, although it 'may sound harsh', is simply a standard of appellate review, and a decision that a board has been arbitrary and capricious is simply a finding of error." In support, the court cited Anastasio v. Planning Board of W. Orange Tp., 209 N.J. Super. 499, 521-22 (App. Div. 1986).

ZBA contends, if the court believed that arriving at an incorrect result was a sufficient reason to overturn the ZBA approvals, the court could substitute its judgment for the ZBA. We find the trial court erred in its statement that "a decision that a board has been arbitrary and capricious is simply a finding of error." Instead, "a determination predicated on unsupported findings is the essence of arbitrary and capricious action." In re Application of Holy Name Hosp., 301 N.J. Super. 282, 295-96 (App. Div. 1997). In zoning matters, arbitrary and capricious means "contrary to fundamental principles of zoning or the [zoning] statute." Rumson Ests., Inc.

v. Mayor & Council of Fair Haven, 350 N.J. Super. 324, 331 (App. Div. 2002) (alteration in original). Thus, the trial court applied an incorrect standard of review.

Positive criteria

Defendant argues the site is particularly well suited for manufacturing asphalt because of its large size, location, highway access and the various industrial uses in the area, including manufacturing of concrete pavers and asphalt. Also, the site has a history of use for the manufacturing of concrete pipes.

The court found the evidence did not support a finding that the site was particularly suited for asphalt manufacturing. Specifically, the court found the prior use of the site for concrete pipe manufacturing "was the main reason" the ZBA approved defendant's application. But according to the court, there was a "substantial gap in the proofs presented on the prior use, and lack of use, of the property." Thus, the court held the record did not support the ZBA's grant of the (d)(1) variance. We disagree.

The ZBA resolution summarized the evidence and determined: the site was particularly suited for asphalt manufacturing, because the SED zone was well-established for commercial manufacturing; the location was particularly

suitable for the proposed use, especially given the historical use of the site; the project included rehabilitation of a run-down site, and the purpose of the SED zone was met by the application. Moreover, The ZBA resolution contained multiple references to the historical use of the site as well as a finding that the prior use of the site was not abandoned. These findings supported the ZBA determination the site was particularly suited for manufacturing asphalt and concrete. Therefore, the ZBA findings were based on competent evidence in the record.

The court concluded there was insufficient evidence to determine whether the prior use was similar to asphalt manufacturing and whether it had been abandoned. Here, evidence of abandonment and whether concrete pipe and bituminous concrete were the same are irrelevant to granting a (d)(1) variance.

We reject defendant's argument the ZBA's resolution should be invalidated because it mistakenly included findings that the prior use as a pipe manufacturing plant was not abandoned and defendant intended to continue a prior use. Although the prior use of the site was an important factor for the ZBA, it included multiple other reasons for its determinations. Thus, the prior

use was not the only basis for finding the site was particularly suitable for defendant's project.

Next, defendant argues the court erred in finding the project did not satisfy any goal of MLUL, N.J.S.A. 40:55D-2. Rather, defendant contends four MLUL goals were met, including criteria G (to provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial, and industrial uses and open space), M (to promote more efficient use of land), H (to promote the free flow of traffic while discouraging congestion or blight), and I (to promote a desirable visual environment).

The court found no support for a finding that any purpose of the MLUL was met. The court rejected the city planner Cofone's statement the site plan met criteria G, because Cofone had not found a specific need for the construction of an asphalt plant in the area. However, the MLUL does not require the finding of a specific need for an asphalt plant to meet criteria G. To satisfy criteria G, defendant did not need to show a specific need for an asphalt plant. See Price, 214 N.J. at 293 ("demonstrating that a property is particularly suitable for a use does not require proof that there is no other potential location for the use[,] nor does it demand evidence that the project 'must' be built in a particular location").

Here, the record supported a finding criteria G was met, because the project proposed to revitalize thirteen impervious acres operating according to the highest environmental standards, providing both industrial and open space. This revitalization would provide "sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens." N.J.S.A. 40:55D-2.

Discussing criteria H, the court concluded the evidence was insufficient to prove the project would have less of an impact on traffic than a permitted use, because the judge did not agree that only 200,000 tons of asphalt would be produced each year.

There was conflicting testimony on criteria H. Redaelli testified market conditions in Monmouth County would only support 200,000 tons per year and Dean testified that permitted uses would have a much more significant impact on traffic than what defendant proposed. Cofone testified that criteria H was met because the project would have far less of a traffic impact than would be the case for other uses permitted in the zone, and there was already traffic congestion in the area.

The court rejected Redaelli's statement and accepted Thompson's opinion that significantly more than 200,000 tons per year would be produced by defendant. However, the ZBA was authorized to make factual findings based on evidence in the record. "So long as there is substantial evidence in the record, the court may not interfere with or overturn the factual findings of a municipal board." New Brunswick Cellular Tel. Co. v. Twp. of Edison Zoning Bd. of Adj., 300 N.J. Super. 456, 465 (Law. Div. 1997). "Even when doubt is entertained as to the wisdom of the [b]oard's acceptance of certain evidence or its rejection of other testimony, there can be no judicial declaration of invalidity absent a clear abuse of discretion by the board." Ibid.

The ZBA resolution did not contain a clear statement that criteria H was met, but instead included a general statement that the special reasons advanced by Cofone were more than adequate to satisfy the positive criteria. However, the ZBA's summary of factual findings included Dean's traffic estimate and Redaelli's statement that only 200,000 tons would be produced per year. It did not include Thompson's analysis that much more concrete would be produced. We conclude there was competent evidence in the record to support that criteria H was met.

Defendant argues the court did not address criteria M of the MLUL, the goal of which, according to N.J.S.A. 40:55D-2, is "[t]o encourage coordination of the various public and private procedures and activities shaping land development with a view of lessening the cost of such development and to the more efficient use of land." The court briefly addressed criteria M and characterized Cofone's testimony as stating that criteria M was satisfied by going through a public procedure to request a use variance. However, Cofone also stated that criteria M was met because the project was an efficient use of the land, given that there were other asphalt manufacturing-type uses in the area, with excellent regional highway access and it was efficient to group asphalt-related companies together in the SED zone.

Although, the MLUL and case law do not define what constitutes "more efficient use of the land" we conclude criteria M was met for the reasons stated by Cofone and Redaelli. Based on our review of the record, the evidence supported a finding defendant would reduce impervious surface area and add to some existing structures.

Defendant argues the court erred in rejecting criteria I. Criteria I seeks to "promote a desirable visual environment through creative development techniques and good civic design and arrangement." N.J.S.A. 40:55D-2. The

court found criteria I did not refer to a beautification that had already occurred and there was no proof a permitted use would not result in the same beautification. Also, because the cleanup had already occurred after defendant received minor site plan approval in 2016, this should not be a basis for granting the use variance. Beautification "is inextricably entwined with notions of the general welfare." Burbridge, 117 N.J. at 387-88. A zoning board may consider aesthetics with respect to a (d)(1) variance, but "ambience alone can seldom be a proper basis for special reasons." Id. at 392. Thus, there was evidence to support that defendant would beautify the site by building berms with tall evergreen trees planted on top, meeting criteria I.

Only one goal of the MLUL must be met, yet Cofone's testimony—corroborated by other evidence in the record—supported finding MLUL criteria G, M, or H were met. The ZBA was within its discretion to accept her testimony. We conclude the trial court erred in finding that no purpose of the MLUL was advanced by the project, and that, therefore, the positive criteria were not met.

Negative criteria

Defendant argues the court ignored proofs establishing the project would not substantially negatively impact the surrounding community. To satisfy the

negative criteria, a project must not cause a "substantial detriment" to the public good and substantially impair the intent and purpose of the zone plan and zoning ordinance. Medici, 107 N.J. at 22.

Here, the two main areas of concern were noise and traffic. The court rejected Redaelli's statement that only 200,000 tons per year of asphalt would be produced, leading the court to similarly reject evidence that traffic would be only minimally impacted. However, multiple witnesses testified the noise ordinances would be upheld, and there would be a relatively small impact on traffic in the area. As such, the ZBA was within its discretion to rely on this evidence, as well as Redaelli's statement, as to how much asphalt defendant would produce based on market conditions. New Brunswick Cellular, 300 N.J. Super. at 465.

The ZBA assails the court's determination granting defendant's application would impair the township's master plan. In fact, the ZBA found that granting the (d)(1) variance would actually advance the goal of the master plan by using land in the most appropriate way.

The court focused on the ZBA not making an exception for defendant's application after changing the township's master plan, with O-17-21, seven months after defendant filed its initial application. Relying on Township of

North Brunswick v. Zoning Board of Adjustment of North Brunswick, 378 N.J. Super. 485, 494 (App. Div. 2005), the court found the ZBA ignored O-17-21. North Brunswick stands for the proposition that, when a zoning board resolution ignores a recent rezoning ordinance, it can be considered as evidence that the zoning board failed to satisfy the negative criteria. 378 N.J. Super. at 494. Here, the ZBA resolution included the passage of O-17-21, stating the ordinance "did not preclude a finding of particular suitability for this specific location based on detailed site-specific analysis." We agree the ZBA was authorized to grant a (d)(1) use variance for the project, notwithstanding the recent passage of O-17-21, so long as the standard for granting that variance was met.

The ZBA determination was supported by competent evidence and was not an abuse of the discretion. Defendant established the negative criteria because the noise ordinance would be observed, there would be no production of asphalt during the night, and the impact on traffic would be minimal. The grant of the approvals did not substantially impair the master plan because the SED zone had a cluster of concrete and asphalt production companies in the immediate vicinity of defendant's site.

We conclude the court erred ruling the positive criteria were not met because the record supports the ZBA finding that because there were similar types of businesses in the SED zone, a concrete manufacturing facility was particularly suited to the location. Also, the size of the property, its historical use, and the goals of the SED zone were all reasons that the positive criteria were met. As such, the record supported a finding that at least one of the goals of the MLUL were met. Lastly, the negative criteria were met, because there would be no substantial detriment to the area in terms of noise or traffic and the project did not interfere with the Township's master plan.

Defendant argues the court erred by reversing the ZBA's grant of a (d)(6) height variance. Based on our review of the record, the evidence supported the ZBA's approval of the height variance for the reasons stated in its resolution.

We need not reach defendant's remaining arguments.

II.

Plaintiff's appeal.

Plaintiffs argue the court erred in denying their motion to enforce litigant's rights. Based on our conclusion in the companion appeal, this issue is moot. "An issue is 'moot when our decision sought in a matter, when rendered, can have no practical effect on the existing controversy.'" Redd v.

Bowman, 223 N.J. 87, 104 (2015) (quoting Deutsche Bank Nat'l Tr. Co. v. Mitchell, 422 N.J. Super. 214, 221-22 (App. Div. 2011)).

Any remaining arguments raised by the parties are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.