
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000737-23T2

John Valentine and
Valentines Farm LLC,

CIVIL ACTION

Plaintiffs-Appellants,

ON APPEAL FROM

v.

SUPERIOR COURT,
LAW DIVISION
GLOUCESTER COUNTY

ZONING BOARD OF THE TOWNSHIP
OF MONROE, DANIEL TOMARCHIO,
LINDA TOMARCHIO, JOHN DOE,
JANE DOE, ABC CORPORATIONS,
XYZ LLC AND JOE SMITH
PARTNERSHIPS,

Honorable Benjamin C.
Telsey, A.J.S.C.
Sat below

Defendants-Respondents.

BRIEF FOR
APPELLANT JOHN VALENTINE AND VALENTINES FARM, LLC

ANDREW J. KARCICH,
ID 014431976
ATTORNEY FOR
APPELLANT JOHN
VALENTINE AND
VALENTINES FARM LLC
1000 WHITE HORSE RD
SUITE 703
VOORHEES, NJ 08043
(856) 309-0200
akarcich@lkylaw.com

Submitted: May 7, 2024

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PRELIMINARY STATEMENT

In August 2022, Defendants, Daniel and Linda Tomarchio (the "Tomarchios"), applied to the Defendant, Zoning Board of Monroe Township, Gloucester County (the "Board") for a use variance to allow an existing accessory structure to be larger than the principal use on their property at 3546 South Black Horse Monroe Township, New Jersey (the "Property"). The structure was a 2160 square foot garage where their home was only 1152 square feet. The Board granted the Tomarchios' application notwithstanding the fact that: (1) the notices published in advance of the hearing were defective in that they did not contain an accurate description of the Property and did not advise the public that the principal use of the property was a pre-existing non-conforming use, and did not accurately disclose what the accessory structure was to be used for, thereby depriving the Zoning Board of jurisdiction to hear the application because the notice was defective; (2) the grant of the Tomarchios' application was in conflict with the Monroe Township Master Plan; and (3) the Tomarchios failed to sustain their burden of proof for the grant of a use variance including both the negative and positive criteria. Therefore, Plaintiffs ask this court to reverse the trial court's decision to grant judgment in favor of the

Plaintiffs.

PROCEDURAL HISTORY

On August 18, 2022, the Zoning Board of Monroe Township heard the Application of the Defendants, Daniel Tomarchio and Linda Tomarchio (the "Tomarchios"), in which they requested a "use variance" to allow an existing accessory structure to be larger than the principal use on their property.¹ (Pa1-22). Plaintiffs, John Valentine and Valentine's Farm, LLC (jointly the "Valentines") objected on several grounds during the Zoning hearing. Notwithstanding the objections of the Valentines, The Board granted the Tomarchios' Application and issued a Resolution of approval for the variance.² (Pa40).³ On June 30, 2023, the Valentines filed a Complaint in Lieu of Prerogative Writs (the "Complaint") in the Superior Court of New Jersey, Law Division, Gloucester County, Docket No. GLO-L-1259-22 against the Board and the Tomarchios. (Pa51). The Board and the Tomarchios filed Answers on December 27, 2022 and December 28, 2022. (Pa65 and Pa 78). On July 24, 2023, the Valentines filed their Trial Brief. (Pa87) The Defendants filed their briefs on August 7, 2023 and August 8, 2023. (Pa98 and Pa102) On October 2, 2023, the Trial Court heard argument from the parties. On that same date, the Trial Court granted summary judgment in favor of the Defendants

¹ Hearing Transcript August 18, 2022 ("1T").

² Zoning Board Resolution transcript October 20, 2022 ("2T")

³ Plaintiffs'-Appellants' Appendix is cited as "Pa".

and dismissed all counts of the Complaint.⁴ (Pa134). The Valentines filed the instant appeal on November 9, 2023. (Pa136).

STATEMENT OF FACTS

The Tomarchios were the owners of 3546 South Black Horse Pike in Monroe Township, Gloucester County, New Jersey (the "Property")⁵, which was the subject of an application (the "2022 Zoning Application") before the Zoning Board of Monroe Township (the "Township").⁶ The Property is located in the RD-C (Rural Development-Commercial) Zoning District of Monroe Township. (Pa37) The Valentines are owners/operators of 3524 South Black Horse Pike in Monroe Township, which is adjacent to the Property.

In September 2020, the Tomarchios initially applied for an Application for a Zoning Permit with respect to the Property, swearing under oath they were going to install a 20' by 40' (800 sq. ft.) addition to an existing 30' by 40' building for use as a two car garage. (Pa23) They further swore that the purpose of the extended garage was for was for "parking." (Pa24). The plot plan submitted in connection with the with the 2020 Zoning Application was deceptive, as it only included a hand drawn sketch of the "garage" addition on an old survey from February 22, 2000, but did not show that any grading would be done. (Pa29) In addition, the garage in question would have heat and plumbing and would be used

⁴ Summary Judgment Transcript, October 2, 2023 ("3T")

⁵ The Tomarchios sold the Property in October of 2023.

⁶ The Zoning Board is a duly constituted board of the Township of Monroe ("Township"). The jurisdiction and authority of the Zoning Board is established by the New Jersey Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. and the Monroe Township Code, §175-30 to -32

for purposes other than parking and storage. (Pa4). The 2020 application was never completed.

In the subsequent 2022 Zoning Application, the Tomarchios requested a "use variance" to allow an existing accessory structure to be larger than the principal use on the Property.⁷ (Pa22) The Tomarchios had in 2017 constructed structures on the Property and performed other grading and improvements, which violated the Development Ordinances of the Township, without seeking the approval of the Planning or Zoning Boards. The improvements included an addition to an existing pole barn, site grading and construction of access roads. (Pa2)

In June 2022, the Tomarchios submitted the application for a "use variance" with respect to the Property (the "2022 Zoning Application"), which is the subject of this Appeal. (Pa1-22) The 2022 Zoning Application stated that the Tomarchios were asking for a variance to approve a "24' by 40'" 2-car garage addition to the existing pole barn which had previously constructed "with all required permits." (Pa2) The two applications are not consistent with respect to their representations regarding the nature and use of the Property and the accessory structure. The 2020 Zoning Application sought approval of a 20' by 40' addition (800 square feet) to an existing 30' by 40' building (1200 square feet) (total pole barn and addition 2000 square feet) for use as a two car

⁷ Township Code §175-89D provides that the combined square footage of the any accessory buildings shall not exceed the square footage of the principal building. Here, the accessory building is 2160 square feet and the principal structure is approximately 1152 square feet.

garage and yet the 2022 Zoning application sought the approval of an 24' by 40' structure (960 square feet) (total 2160 square feet). Somehow the structure on the Property had grown by more than 240 square feet from the 2020 approved structure, while the Tomarchios stated under penalties of perjury that both Applications were correct.

The 2022 Zoning Application was heard at a meeting of the Zoning Board on August 18, 2022 (the "Hearing"). The Tomarchios were required to give notice to the public of the Hearing.⁸

The Notice to Property Owners (the "Notice") mailed or delivered to the individuals on the "200 foot list"⁹ for the 2022 Zoning Application gives little or no information as to the true nature of the 2022 Application. (Pa31) The Notice is in fact deceptive, misleading and incomplete. The Notice states that the purpose of the hearing is for a "use variance." It reads in pertinent part:

The applicant is requesting a use variance to allow an accessory structure larger than the principle use on the property, along

⁸ The purpose of the notice requirement is to adequately apprise the public of "the date, time and place of the hearing, the nature of the matters to be considered and, in the case of notices pursuant to subsection 7.1 of this act, an identification of the property proposed for development by street address, if any, or by reference to lot and block numbers as shown on the current tax duplicate in the municipal tax assessor's office, and the location and times at which any maps and documents for which approval is sought are available pursuant to subsection 6b." N.J.S.A. 40:55D-11.

⁹ "Except as provided in paragraph (2) of subsection h. of this section, notice of a hearing requiring public notice pursuant to subsection a. of this section shall be given to the owners of all real property as shown on the current tax duplicates, located in the State and within 200 feet in all directions of the property which is the subject of such hearing ... " N.J.S.A 40:55D-12(b).

with any variances or waivers deemed necessary by the Board. The accessory structure is approximately 2160 square feet and the principal structure is approximately 1152 square feet.

However, the Notice fails to include the following critical information:

- a. That the Property is a residence;
- b. That the Property and the residence on it are located in the RD-C Zone, in which residences are not a permitted use;
- c. That the requested structure is for use as a garage or for that matter for any other use;
- d. That the additional structure was already existing;
- e. That the Tomarchios had performed significant grading and road construction in addition to the construction of the garage;
- f. That the Property is in an Agricultural Zone;
- g. That the "principal use" is a **pre-existing non-conforming use** which will be greatly expanded in terms of lot coverage, paved surfaces and intensity;
- h. That the existing conditions with lot coverage exceeded the lot coverage allowances of the zone, not including sidewalks, driveway, pool and concrete which would require a lot coverage variance; and
- i. That a residence and accessory residential structures are prohibited in the RD-C Zone.

Notice of the 2022 Zoning Application was also published on the Courier Post newspaper on August 4, 2022. (Pa32) The Notice of Publication provides even less information than the Notice. The Notice of Publication reads:

Be advised, the Monroe Township Zoning Board of Adjustment will hold a public hearing on August 18, 2022 at 6:30 p.m. in the municipal building located at 125 Virginia Avenue, Williamstown, NJ, on the first floor in the courtroom for the following applications:
1. #22-41 Dan & Linda Tomarchio - Use Variance
The applicants are requesting a use variance

to allow an existing accessory structure larger than the principal use on their property, along with any other variances or waivers deemed necessary by the Board. The property is located at 3546 S. Black Horse Pike, also known as Block 5901, Lot 5 in the RD-C Zoning District.

The same information omitted from the Notice was also omitted from the Notice of Publication in the newspaper.

At the Hearing for the 2022 Zoning Application, Linda Tomarchio was the only witness for the Defendants/Applicants. Plaintiffs, their counsel ("Karcich"), and Kevin Dixon, a licensed engineer and planner (severally the "Objectors"), appeared in opposition to the 2022 Zoning Application.

The Board moved to deem the Application Complete. Zoning Board Transcript (1T4:15) Karcich objected. (1T4:19) Karcich continued to object to the completeness of the 2022 Zoning Application. (1T5-T9) As expressed by Karcich, the Valentines' objections were as follows:

My issue with the completeness of the application is on several basis. First is the notice that was sent out and published in the newspaper. It noticed that the application was for a use variance. This is actually an application for three variances, rather than just a use variance. This property is a non-conforming use in the agricultural commercial zone. It is a residence; residences are not permitted either by allowed use or by conditional use. That makes this property a non-conforming, pre-existing, non-conforming use. Second, the application, I believe, should actually cover, deal with lot coverage issues, which were not noticed nor were they part of the application. (1T5:1-9).

Karcich argued that the Tomarchios needed at least two variances: a D(2) and a D(4), while the Notice of Publication and the 2022 Zoning Application only mentioned a use variance under D(1), - The Tomarchios had advertised for a "use" variance. Karcich also objected to the skimpy nature of the documents in the 2022 Zoning Application, and that the Application was for a garage to park vehicles while it was used for other purposes. (1T5:21-7:8)

The 2022 Zoning Application was deemed complete over the objections of Plaintiffs. (1T10:5) The 2022 Zoning Application was deemed complete even after the Board's Planner, Nicholas Dickerson acknowledged that he needed more information to determine if bulk and lot coverage variances might be required:

COE: I hate to put you on the spot, but the application as you reviewed it, and I've reviewed Mr. Kernan's report, as I understand it you evaluated this as an application for basically the size of the garage.

DICKERSON: That is correct.

COE: Okay, as you reviewed the application, did you see any issues as to lot coverage or bulk variances that may be needed?

DICKERSON: ***I don't believe there was enough information available to make that determination.*** (1T8:9-15) (Emphasis added).

This admission had no impact on the Board nor its solicitor and the Hearing continued.

When Ms. Tomarchio testified at the Hearing, she tried to address the negative criteria required for the variances by claiming that when Applicants added the garage "There was no extra grading done when we, when we did the garage." (1T11). There was

no other testimony from Tomarchio as to the negative criteria required. Ms. Tomarchio presented no testimony as to the required positive criteria.

On cross-examination she was forced to admit that the "driveway" was extended in connection with the addition of the 24' by 40' garage. (1T15-17) A side by side review of the 2007 aerial photos of the Property and the 2020 aerial photos of the Property, marked as Objectors 1 during the Hearing, clearly shows that extensive grading has been performed since the Tomarchios constructed the garage. (Pa36) Thus, Ms. Tomarchio's testimony at the Hearing was less than candid and the 2022 Zoning Application was deceptive as to the extent of grading done at the Property, as well as the use of the accessory structure.

The necessity of the garage for the purposes of storage was questionable at best. Ms. Tomarchio also testified that there was no real hardship to justify the grant of a variance in that if they removed certain equipment from the "pole barn" that they could park their vehicles in there. "So, if he had removed his workbenches and if he removed his shelving, the whole back is full of shelves, if he removed all the cabinets that he keeps his stuff in, if he took all of his motorcycles out, then maybe we could fit two vehicles in there." (1T19:20-2) referring to the illegally constructed garage. Ms. Tomarchio further admitted that the "garage for parking," was also going to be used for a gym and for storage, "Now that we have the space out there, we have a treadmill, we have a universal, we have equipment that we can to

work out and we use it every day." (1T34:4-6) When questioned about furniture and other items being stored outside of their home and in the yard, other than her vehicle Ms. Tomarchio responded, "Well, our vehicles would be in our yard. Everything else would not be able to be outside. We would have to again, clutter up our bedrooms and get rid of all of our equipment that we were able to put out back." (1T34:16-8) Though prompted and lead by the Solicitor and Board members, Ms. Tomarchio did not testify about having to clutter her yard with storage. She essentially testified that she would have to clutter the inside of her home if she did not have the extension to her pole barn. No additional items would be stored in their yard making it generally unsightly.

At the Hearing, Plaintiff, John Valentine, testified that the Tomarchios had done work on their property in the area of the garage extension, which caused flooding onto his property that is adjacent to the Tomarchios' property by expanding their driveway with crushed stone. "They did a lot of grading to the property. They extended the driveway, they pushed the driveway. They built a driveway around the back of it. And they're causing me to flood." (1T23:1-2) Mr. Valentine testified that the flooding cause him to lose over 200 trees on his property. (1T23:18-22)

At the Hearing, Plaintiffs produced Kevin Dixon as an expert in planning and engineering. (1T26:17-9) Mr. Dixon testified as follows:

In fact, I am going to limit my comments to the fact that I am in attendance and listened to the testimony and I'm offering from experience, what I would recommend to my

Boards and that is that in any case of use variance, the applicant is required to provide special reasons. The applicant is required to provide testimony as to how the purposes of zoning are advanced by the grant of the variance that is being requested. For a use variance, the applicant is also required to provide site suitability test; why is this use particularly well suited for this site. I did not hear any of that testimony. Perhaps the applicant put their qualifications on the record and give the Board a qualified professional testimony as to those aspects of the variance application before you or bring a professional with them to do that at another time. In addition, I would also advise the Board that another test for the use variance would be to put testimony on the record as to why the governing body omitted this use from the ordinance. There's obviously limitations placed in this district as to what the coverage should be and what the building sizes should be and what the building uses should be. It's an expansion of a non-conforming use. We've heard conflicting testimony, and I'm not gonna take any side on it, the conflicting testimony, but rather, given that it's a use variance, those elements of the testimony should be on the record before this Board even is able to make an informed decision as to the merits intent and purpose of the zone plan. All of those things are required. If any one of them cannot be met, this Board really cannot, the applicant has not met the proofs, for this Board to grant the variance. And as far as I could hear, none of those has been offered to this Board. So I would simply, simply make a statement standing here, it is my opinion that the Board should require that testimony before the Board takes a vote on the next step, makes that decision on this application. If you have any questions, I'd be happy to ... (1T27:6-23, 1T28:1-6)

Mr. Dixon's testimony was not refuted. The Board disregarded

Objector's case entirely. The Board approved the 2022 Zoning Application without an expression of reasons for the approval on the night of the Hearing. The Board made no findings of fact before granting the approval of the Application. The testimony of Mr. Dixon and Mr. Valentine went without cross examination. The Tomarchios presented no expert witnesses. The Tomarchios did not testify in response to the testimony of Mr. Dixon or Mr. Valentine.

In granting the Approval the Board made no reference to the goals and objective of the Township's 2004 Master Plan. (Pa33-35) The Master Plan requires that: "Planning must be comprehensive in nature and direct the coordinated, efficient and orderly development of Monroe Township based on an analysis of present and future needs, and the promotion of the public health, safety and general welfare." (Pa34, Section A.1). The goals of the Master Plan are to:

1. "Encourage a pattern of compact and contiguous growth within appropriate areas of the Township";
2. "Direct growth to areas where infrastructure capacity is currently available or committed to be available in the future";
3. "Guide future development and community facilities to meet the needs of the residents of the Township, while ensuring that new development is compatible with existing development without degrading the Township's cultural and natural resources."
4. "Preserve the Township's natural and cultural resources that contribute to both the positive image and overall strength of the Township";
5. "Recognize that open space preservation must become the responsibility of the Township, and that the agricultural community alone will not be able to

continue to ensure that open space will remain in the Township forever:'

6. "Eliminate the potential for conflicts among dissimilar land uses" (Emphasis added); and

7. "Prevent development in sensitive environmental areas." (Pa35, Sections i, ii, v, vi, xiv).

The Board's action in the grant of the Application did nothing in recognition of the above standards and flies in the face of good planning.

Having approved the Application, the Board met on October 20, 2022 for the purposes of adopting a Resolution of Approval. (Pa40). At the October 20, 2022 meeting the Board Solicitor presented an overview of the record crated on the Hearing. The resolution itself was not read into the record. There is nothing in the record of the October 20, 2022 meeting to reflect that and of the Board members actually read the Resolution that they voted on. The wording of the Resolution is not supported by the facts presented at the Hearing. The Resolution appears to have been created by the Solicitor to justify the arbitrary and capricious nature of the Board's approval.

ARGUMENT

I. STANDARD OF REVIEW (Not raised below)

Courts reviewing the decision of a municipal zoning or planning board may overturn that decision if it is "arbitrary, capricious or unreasonable." *Kane Properties, LLC v. City of Hoboken*, 214 N.J. 199, 225 (1999). Factual determinations of a

zoning board are entitled to deference. On appeal of the trial court determination the review is *de novo*. *Id.* However, in this instance, the Zoning Board made **no** findings of fact for this Court to give deference to which deference may be given. The Zoning Board's failure to make any findings of fact at the Hearing and also to grant a variance to the Tomarchios is the very definition of "arbitrary, capricious and unreasonable." Therefore, the decision of the Zoning Board is entitled to no deference, and this Court should reverse the Trial Court's grant of summary judgment in favor of the Zoning Board and the Tomarchios.

II. THE TOMARCHIOS' NOTICE OF HEARING WAS DEFECTIVE UNDER NEW JERSEY'S MUNICIPAL LAND USE LAW AND DEPRIVED THE BOARD OF JURISDICTION TO HEAR THE 2022 ZONING APPLICATION (Pa32) (1T35:6-7, 1T35:19-22)

The requirements for public notice are set forth in the Municipal Land Use Law ("MLUL") N.J.S.A. 40:55D-1 to -99.

Specifically, N.J.S.A. 40:55D-11 provides:

Notices . . . shall state [1] the date, time and place of the hearing, [2] the nature of the matters to be considered and, in the case of notices pursuant to subsection 7.1 of this [A]ct, [3] an identification of the property proposed for development by street address, if any, or by reference to lot and block numbers as shown on the current tax duplicate in the municipal tax assessor's office, and [4] the location and times at which any maps and documents for which approval is sought are available pursuant to subsection 6b.

When a statute requires public notice, the notice given should be capable of being understood by an ordinary person. The notice should not require an attorney of planner to interpret its meaning of the notice and the applicant's intent. The language used in the notice should be in common sense English. *Perlmart of Lacey, Inc. v. Lacey Twp. Planning Bd.*, 295 N.J. Super. 234, 239 (App. Div. 1996). The notice **must** give "'an accurate description of what the property will be used for under the application.'" *Northgate Condo. Ass'n v. Borough of Hillsdale Planning Bd.*, 214 N.J. 120, 139-40 (2013) (quoting *Perlmart*, supra, 295 N.J. Super. At 238). "'The notice must be clear and unambiguous and must be readily intelligible to the average citizen. It must not be overly general or misleading.'" *Rockaway Shoprite Assocs., Inc. v. City of Linden*, 424 N.J. Super. 337, 347 (App. Div. 2011) (quoting *101A C.J.S. Zoning & Land Planning 6* (1979)), certif. denied, 209 N.J. 233 (2012).

The public should know what an applicant for a variance is asking the Zoning Board to do so that the affected individuals and all members of the general public can make an intelligent decision whether or not to participate in the hearing. *Perlmart*, supra, at 237-38. The requirement of clear and commonsense notice applies to educate the general public as well as Plaintiff in this matter. "[T]he purpose for notifying the public of the "nature of the

matter to be considered" is to ensure that members of the general public who may be affected by the nature and character of the proposed development are fairly apprised thereof so that they may make an informed determination as to whether they should participate in the hearing or, at the least, look more closely at the plans and other documents on file. *Perlmart, supra*, at 237-38. The notice given must be "clear and unambiguous" so that the notice can be "readily intelligible to the average person." *Rockaway, supra*, at 347 (quoting 101A C.J.S. *Zoning & Land Planning* 6 (1979)).

The Notices provided in this case as delivered to the persons on the 200-foot list and by publication in the Courier Post were vague and obscure at best and misleading at worst. Reference is made to the unpublished opinion of *Tonnelle USA, Inc. v. Township of N. Bergen Zoning Bd. Of Adjustment*, 2015 N.J. Super. Unpub. LEXIS 1574, 2015 WL 3966233. (Pa164) In this 2015 opinion, the Appellate Division found that after three (3) attempts by developer to publish notice of its application to the Zoning Board that developer's notice was still defective. The notices in this case similarly are misleading because they make reference to a "use variance" but fail to disclose the other variances and waivers which were required. While reference is made to a use variance, nothing in the Notices tells the public what the structure is to be used. *Northgate, supra* at 139-40.

The Notice also make reference to an "existing accessory structure larger than the principal use on their property." This statement certainly implies that the "existing structure" was previously approved by the Township, when in fact it had not. The Notices do not tell the public what the nature and use of the "existing structure" is or what it will be used for. Was it a garage, chicken coop, adult book store? The Notices do not provide any such information.

The defective Notices could not be "cured" by any public member reviewing the 2022 Zoning Application on file with the Board. The sketch plan submitted in the file is crude, inaccurate and amateurish. The prior applications in the file were misleading and inconsistent as they pertained to the actual square footage of the pole barn/garage. A letter dated September 3, 2020 from Zoning Officer Tara Park refers to the addition as being 24' by 28'. (Pa8) The Zoning Permit 20170493.000 shows the proposed addition to be permitted by the Zoning Ordinance, when it was not. (Pa3) Nowhere in the 2022 is Zoning Application there any reference to the Property being a nonconforming use which would be greatly expanded by the additional structure. Only a lawyer would recognize what the term "use variance" meant in the context of this Application and the Notices. The Notices clearly do not meet the common sense definition. *Perlmart supra*. It is so general as to be meaningless to the ordinary person. *Rockaway supra*.at 347. It asks

for a use variance. It does not tell the reader what the use is or why there is a need for a variance.

None of the Board's professionals nor the Zoning Officer pointed out in any of their reviews and reports that the 2022 Zoning Application was for the expansion of a nonconforming use. There was no review or commentary regarding lot coverage requirements nor whether the 2022 Zoning Application complied with the Zone RD3 Zone lot coverage or setback requirements. There is a lot grading review dated June 9, 2017, but it is based on faulty information submitted by the applicant in that Applicant apparently did not tell the reviewing engineer or Zoning Officer that the driveway would be extended around the side of the newly added garage, requiring grading. (Pa6-7)

Appropriate public notice is a jurisdictional requirement. *Twp. Of Stafford v. Stafford Twp. Zoning Bd. Of Adjustment*, 154 N.J. 62, 79 (1998); *Oliva v. City of Garfield*, 1 N.J. 184, 190 (1948). Unless proper notice is given the Board does not have jurisdiction to hear the Application. *Twp. Of Stafford v. Stafford Twp. Zoning Bd. Of Adjustment*, supra at 78. Without proper notice the Board's decision can have no effect.

The Notice being defective, the Board's approval of the Tomarchios' "use variance" is null and void for want of jurisdiction.

**III. THE BOARD'S GRANT OF THE 2022
ZONING APPLICATION IS SUBSTANTIALLY IN
CONFLICT WITH AND DEVIATES FROM THE
MONROE TOWNSHIP MASTER PLAN (Pa33)**

The Board's approval of the 2022 Zoning Application with its variances, flies in the face of the purported goals, objectives and concerns set forth in the 2004 Township Master Plan and substantially impairs the intent and purpose of that plan. The grant of the multiple variances must be voided as improperly granted.

As set forth more fully below at Legal Argument IV, the M.L.U.L., N.J.S.A. 40:55D-70, provides that:

No variance or other relief may be granted under the terms of this section, including a variance or other relief involving an inherently beneficial use, without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zoning plan and zoning ordinance.

In its Master Plan, the Township sent a signal to the public, its professionals and boards indicating that, *inter alia*, that Planning must be comprehensive in nature and coordinated, while ensuring that new development is compatible with existing development without degrading the Township's cultural and natural resources. In granting the Application the Board abandoned any attempt to comply with these goals and standards.

The Board allowed the significant expansion of a non-conforming use adjacent to an existing permitted agricultural use (the Plaintiffs property). The RD-C zone permits agricultural uses and makes no provision at all for residential uses. The conflict between residential and agricultural uses is well known. The Board approved an expansion of a use which was significantly in conflict with the Zone and the use of the adjacent property. The Board failed to take into consideration the environmental impacts of the expansion and disregarded the testimony of Mr. Valentine as to the flooding damage to his property. Having a residence in zone which allows intensive agricultural uses may bring the residences in conflict with the allowed farm uses when it comes to noise, dust, and animal smells arising from the permitted use next to a residential one.

The Tomarchios acknowledged that a use variance was required under subsection (d) when it advertised. However, the Tomarchios required at least three variances under subsection d (1), (2) and (5), though as previously stated, the Tomarchios only advertised for one. Regardless the standard for approval remains the same for all of the variances. Moreover, as previously noted, it is probable that the Tomarchios also needed c variances which were not included in the Notices nor picked up by the Board's professionals on their review of the application.

The standards for the grant of a use variance as opposed to the conditional use variance granted, are more stringent, as noted by the New Jersey Supreme Court in the case of *Coventry Square v. Westward Zoning Board of Adjustment*, 138 N.J. 285 (1994). The *Coventry Square* Court, citing *Medici v. BPR Co.*, 107 N.J. 1, 4 (1987) explained that a use or "special reasons" variance needs to satisfy both positive and negative criteria, and summarized the three circumstances that constitute special reasons for use variances as follows:

If the use for which a variance is sought is not one that inherently serves the public good, the applicant must prove and the board must specifically find that the use promotes the general welfare because the proposed site is particularly suitable for the proposed use ***. Alternatively, the statutory special reasons standard can also be addressed by proof of undue hardship, i.e., that the property cannot reasonably be developed with a conforming use. 138 N.J. 285,295-6.

The Supreme Court noted further that "the high standard of proof required to establish special reasons for a use variance is necessary to vindicate the municipality's determination that the use ordinarily should not be allowed in the zoning district." *Coventry Square*, supra at 297. Applicants did not meet this high burden of proof at the hearing.

Accordingly, the Board's Decision and Resolution must be voided.

IV. THE TOMARCHIOS FAILED TO SUSTAIN THEIR BURDEN OF PROOF FOR THE GRANT OF D VARIANCES UNDER NEW JERSEY'S MUNICIPAL LAND USE LAW AND THEREFORE THE BOARD'S GRANT OF 2022 ZONING APPLICATION MUST BE VOIDED (Pa1-Pa22) (1T9:16) (1T18:22-1T19:22)

The standards for granting a variance have been discussed by New Jersey's courts extensively. As a matter of background, the comments of the Appellate Division in the case of *Puleio v. North Brunswick Township Board of Adjustment*, 375 N.J. Super. 613, 619-620 (App. Div. 2005) are instructive. That court observed:

A variance is generally allowed because, although not in compliance, it is not offensive to the zoning ordinance. *Funeral Home Management, Inc. v. Basralian*, 319 N.J. Super. 200, 207, (App. Div. 1999). A zoning board may grant a variance to accommodate individual situations that require relief from restrictions otherwise applicable to the zone. *Ibid.* A variance relaxes the general rule of the ordinance to alleviate conditions specific to the particular piece of property. *Moriarty v. Pozner*, 21 N.J. 199, 210-211 (1956). Such an accommodation balances public and private interests and is in keeping with the principles of zoning principles. See *id.* at 211.

Nevertheless, there is also case law suggesting that the expansion of a non-conforming use is less favored than the grant of a use variance. Because of their incompatibility with the "objectives of uniform zoning, the courts have required that

consistent with the property rights of those affected and with substantial justice, they should be reduced to conformity as quickly as is compatible with justice." *Town of Belleville v. Parrillo's, Inc.*, 83 N.J. 309, 315 (1980). Expansion of the nonconforming use is not favored. *Urban v. Planning Bd.*, 124 N.J. 651 (1991); *Accord, Scully-Bozarth Post v. Burlington Planning Bd.*, 362 N.J. Super. 296, 315 (App. Div.), certif. den. 178 N.J. 34 (2003); *Conselice v. Borough of Seaside*, 358 N.J. Super. 327, 333 (App. Div. 2003); *Bonaventure Int'l v. Spring Lake*, 350 N.J. Super. 420, 432 (App. Div. 2002). Thus, not only is it the policy that nonconforming uses should not be expanded, such uses should, in fact, be limited or extinguished. By allowing the expansion of the nonconforming use the Board actually made it less likely that the use should be reduced to conformity as quickly as is compatible with justice." *Town of Belleville v. Parrillo's, Inc.*, 83 N.J. 309, 315 (1980).

Specifically, "there exists a 'strong legislative policy favoring land use planning by ordinance rather than by variance.'" *Funeral Home Managements, Inc. v. Basralian*, supra, 319 N.J. Super. at 207, (quoting *Elco v. R.C. Maxwell Co.*, 292 N.J. Super. 118, 126, (App. Div. 1996)); See Also *Kohl v. Mayor and Counsel of Fair Lawn*, 50 N.J. 268, 275, (1967) (use variance should be granted "sparingly and with great caution since they tend to impair sound zoning."). Liberally granting variances without adherence to the

strict standards required for granting them as the Board did in the case before the Court, violates sound planning practices and adherence to the dictates of the Master Plan.

A. D VARIANCES

The Supreme Court set forth the standard for the grant of a "D variance" pursuant to N.J.S.A. 40:55D-70(d)(3) in *Smart SMR v. Fair Lawn Bd. of Adj.*, 152 N.J. 309 at 323,

The statute thus requires an applicant to prove both positive and negative criteria to obtain a use variance. In general, the positive criteria require that an applicant establish "special reasons" for granting the variance. "The negative criteria require proof that the variance 'can be granted without substantial detriment to the public good' and that it 'will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.'" *Sica v. Bd. of Adj.*, 127 N.J. 152, 156 (1992).

The Zoning Board may not utilize its power to grant variances to usurp the legislative power delegated to the governing body to effect the zoning scheme. *Feiler v. Fort Lee Bd. of Adj.*, 240 N.J. Super. 250, 255 (App. Div. 1990)). In short, the Zoning Board may not rezone by variance, which it did in this instance.

The positive criteria or special reasons for the grant of a d variance must be established with sufficient credible evidence by Applicants. Here, the Tomarchios presented no testimony that the use variance met any of the positive criteria. The use is not inherently beneficial. The special reasons presented must meet

and support the general purposes of zoning. *Medici v. BPR Co.*, 107 N.J. 1 (1987). The term "special reasons" takes its definition and meaning from the general purposes of the zoning laws. Those purposes are found in N.J.S.A. 40:55D-2. *Burbridge v. Mine Hill*, 117 N.J. 376, 386 (1990).

The Applicant testified that the reason for the variance is that her house is too small and they have no storage. Resolution (Pa42-43) She did not testify that before the garage was expanded, she had anything stored in the yard outside. Applicant did not complain that her yard was cluttered with articles that she could not store in her home. The only purported special reason claimed in the Resolution granting the Tomarchios application might be generally classified as "aesthetics." The Board's find that the grant of the variance may improve the appearance of a nonconforming use alone is not sufficient reason to grant the variance. *Burbridge v. Mine Hill*, supra at 387. However, "aesthetic improvement of a nonconforming use to create better conformity with the existing use within the surrounding area would likely be a primary focus of a local zoning board in deciding whether to grant an expansion of that use." *Burbridge v. Mine Hill*, supra at 387. Here, the Tomarchios and Board contend that the grant of the variance will make the nonconforming use more slightly from a visual perspective, the garage extension does nothing to create better conformity with the adjoining uses. However, "aesthetic

improvement" entails more than mere beautification. *Id.* The beautification must encompass the general welfare. The Tomarchios did not demonstrate that the expansion of the garage would result in beautification of the site, as there was no evidence that the Property was unsightly before the garage was expanded. Ms. Ms. Tomarchio did not testify that there had been any storage of items in the back yard or surrounding areas. (1T9:16). In fact, Ms. Tomarchio testified that the items stored in the garage had been moved from inside her house. (1T) She provided no explanation why she needed an area of more than twice the size of her house for storage and parking two (2) vehicles. In fact, she testified that if her husband removed the lifts and equipment in the "pole barn" she could park her cars in the pole barn. (1T18:22-1T19:22). There was no testimony that parking vehicles outside of a garage would create an unsightly condition in the RC-3 zone, where it is expected to have farm vehicles and equipment parked in the open and where outside parking for workers and customers would be expected.

The thrust of the proof addressed to the negative criteria by the Applicants is similar. Respecting the first prong of the negative criteria, that the variance can be granted "without substantial detriment to the public good," N.J.S.A. 40:55D-70, the focus is on the effect on surrounding properties of the grant of the variance for the specific deviations from the conditions

imposed by ordinance. "The board of adjustment must evaluate the impact of the proposed use variance upon the adjacent properties and determine whether or not it will cause such damage to the character of the neighborhood as to constitute 'substantial detriment to the public good.'" *Medici, supra*, 107 N.J. at 22 n. 12, (quoting *Yahnel, supra*, 79 N.J. Super. at 519, (explaining weighing function of board of adjustment in respect of negative criteria)). Regarding the second prong, that the variance will not "substantially impair the intent and purpose of the zone plan and zoning ordinance," N.J.S.A. 40:55D-70(d), the board of adjustment must be satisfied that the grant of the variance for the specific project at the designated site is reconcilable with the municipality's legislative determination that the condition should be imposed on all uses in that zoning district. The Tomarchios here failed to meet this rigorous burden of proof as there was no testimony to these standards presented to the Board.

The Resolution of Approval is a skilled attempt by the drafter to create facts to justify the conduct of the Board in granting the Application which did not meet the standards necessary for approval. However, there are no facts sustain the Approval and the adoption of the Resolution. When did the Board meet to discuss and make its findings of fact? (Pa40-50) There is nothing in the record before the Board from which the Board could make the findings. A Board's resolution "must contain sufficient findings,

based on the proofs submitted, to satisfy a reviewing court that the board has analyzed the applicant's variance request in accordance with the statute and in light of the municipality's master plan and zoning ordinances." *N.Y. SMSA, Ltd. P'ship v. Bd. of Adjustment of Weehawken*, 370 N.J. Super. 319, 333 (App. Div. 2004).

The Resolution rejects the expert testimony of Kevin Dixon notwithstanding the fact that there was no opposing expert testimony. The Board was free to reject the Dixon testimony but needed to rely on contrary expert testimony. *Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment of W. Windsor*, 172 N.J. 75, 87 (2002). See also *15 High St. v. Borough of Helmetta Planning Bd.*, 2022 N.J. Super. Unpub. LEXIS 386, 2022 WL 710788. (Pa169) 15 *High St.* supra is quite instructive,

Here, the judge concluded that "[w]hile a board may reject expert testimony, it may not do so unreasonably, based only upon bare allegations or unsubstantiated beliefs." Judge McCloskey found the Board failed to present any contrary expert testimony to rebut or challenge plaintiff's expert s' testimony. He held "[b]y giving short-shrift to the [p]laintiff's experts' unrebutted testimony here, the Board in voting to deny the [a]pplication ignored the greater weight of the evidence in the record that supported a grant." As a result, Judge [*6] McCloskey determined denial of plaintiff's application was arbitrary, capricious, unreasonable, and improperly based on "the veiled or even expressed whims of the Board" rather than substantial evidence in the record. The judge stated, "the record . . . is bereft of

substantial evidence to support what was set forth in the Board's Resolution here and despite what it purported to detail otherwise. *15 High St. supra* at 6.

Here there was no contrary expert opinion presented. None of the Board's professionals gave any opinion one way or the other. The Board's findings and Resolution were "created" to grant the Tomarchios' variance when the Tomarchios failed to meet the burdens required for the grant of the variances.

CONCLUSION

Plaintiffs-Appellants therefore respectfully request that this Court reverse the trial court's order granting summary judgment to Defendants-Respondents, and hold that the Board did not have jurisdiction to hear the 2022 Zoning Application, that the 2022 Zoning Application was in conflict with the Master Plan, and that the Tomarchios failed to sustain their burden of proof for the grant of a variance.

THE LAW OFFICES OF
ANDREW J. KARCICH, LLC.

BY: /s/ Andrew J. Karcich
For Andrew J. Karcich

Dated: May 7, 2024

JOHN VALENTINE and`
VALENTINE'S FARM LLC,

Plaintiffs/Appellants

vs.

ZONING BOARD OF THE
TOWNSHIP OF MONROE,
DANIEL TOMARCHIO,
LINDA TOMARCHIO,
JOHN DOE, JANE DOE,
ABC CORPORATIONS,
XYZ LLC and JOE SMITH
PARTNERSHIPS,

Defendants/Respondents.

: SUPERIOR COURT OF NEW JERSEY
: APPELLATE DIVISION
: DOCKET NO. A-000737-23T2
:
: CIVIL ACTION
:
: APPEAL FROM ORDER OF:
: SUPERIOR COURT OF NEW JERSEY
: GLOUCESTER COUNTY
: LAW DIVISION
: DATED OCTOBER 2, 2023
:
: SAT BELOW:
:
: HON. BENJAMIN C. TELSEY, A.J.S.C.
:
:

**BRIEF OF RESPONDENT,
ZONING BOARD OF THE TOWNSHIP OF MONROE**

WEIR GREENBLATT PIERCE LLP
A Pennsylvania Limited Liability Partnership
Richard P. Coe, Jr., Esquire
Attorney I.D. No.: 029591987
35 Kings Highway East, Suite 200
Haddonfield, NJ 08033
(856) 740-1490
rcoe@wgpllp.com
*Attorney for Respondent,
Zoning Board of the Township of Monroe*

Submitted: June 14, 2024

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PRELIMINARY STATEMENT

Defendants, Linda Tomarchio and Daniel Tomarchio (the “Tomarchios”) applied to Defendant, Zoning Board of Adjustment of the Township of Monroe (“Zoning Board”), for a use variance to allow a garage to be larger than their house on property located at 3546 South Black Horse Pike, Monroe Township, New Jersey (the “Property”). The owners of an adjoining property, Plaintiffs John Valentine and Valentine’s Farm LLC (“Plaintiffs”), objected to the application by, in the words of the trial court, “throwing mud up against the wall and hoping something sticks.” (3T37-4 to 3T37-5). The Zoning Board was in a unique position to observe the lack of credibility of Plaintiffs’ objections and the trial court correctly concluded that the Zoning Board “properly considered the application” and “applied the right standard of law” in approving the use variance. (3T49-1 to 3T49-3).

Contrary to Plaintiffs’ arguments, the notice of hearing in this matter adequately expressed a commonsense description of the relief requested by the Tomarchios in a manner that an ordinary lay person could intelligently determine whether to object or to seek further information. Nothing further was required. Additionally, the Zoning Board properly considered the record and found that the Tomarchios satisfied both the positive and negative criteria of the Municipal Land Use Law (MLUL) in approving the variance. The

Zoning Board found that the proposed use promoted two separate purposes of zoning under the MLUL, and that the site was particularly suitable for the proposed use. The Zoning Board further found that variance could be granted without substantial detriment to the public good and would not substantially impair the intent and the purpose of the master plan and the zoning ordinance. Based on these findings, the trial court properly concluded that the Zoning Board did not act arbitrarily, capriciously, or unreasonably.

PROCEDURAL HISTORY

On August 18, 2022, the Zoning Board conducted the hearing on the Tomarchios' use variance application and Plaintiffs' objections thereto. (1T¹; Pa1 to Pa22). The Zoning Board's decision to approve the variance was memorialized in a Resolution adopted on October 20, 2022. (2T; Pa40 to Pa50).

On November 22, 2022², Plaintiffs filed a Complaint in Lieu of Prerogative Writs against the Tomarchios and the Zoning Board in the Law Division, Gloucester County, at Docket No. GLO-L-1259-22. (Pa51 to Pa64).

¹ Regarding the transcripts filed by Plaintiffs/Appellants, "1T" refers to the Zoning Board hearing transcript dated August 18, 2022, "2T" refers to Zoning Board hearing transcript dated October 20, 2022, and "3T" refers to the trial court hearing transcript dated October 2, 2023.

² In their Brief, Plaintiffs incorrectly state the Complaint was filed on June 30, 2023.

The Zoning Board filed its Answer on December 27, 2022, and the Tomarchios filed their Answer on December 28, 2022. (Pa65 to Pa86).

On June 30, 2023, the Zoning Board moved for partial summary judgment on Plaintiffs' improper and completely baseless allegation that the Zoning Board and its professionals engaged in a conspiracy to suppress objections to the application. (Da1 to Da24). Plaintiffs never opposed the motion, effectively admitting the impropriety of their pleading.

On July 24, 2023, Plaintiffs filed their Trial Brief in support of the merits of the zoning appeal. (Pa87 to Pa97). The Tomarchios and the Zoning Board filed their submissions with the trial court on August 7, 2023 and August 8, 2023. (Pa98 to Pa122; Da25 to Da36).

The trial court conducted a hearing on the zoning appeal and the Zoning Board's motion for partial summary judgment on October 2, 2023. (3T). By Order dated October 2, 2023, the trial court dismissed the Complaint in its entirety, with prejudice. (Pa134 to Pa135; 3T4-1 to 3T4-14; 3T49-7 to 3T49-9). Plaintiffs filed the instant appeal on November 9, 2023. (Pa136 to Pa150).

COUNTERSTATEMENT OF FACTS

The Property at issue in this appeal is located in the RD-C (Rural Development--Commercial) Zoning District of Monroe Township, Gloucester County. (Da8 to Da11). The Tomarchios requested a use variance to allow an

existing accessory structure to be larger than the principal use on the Property. (Pa1 to Pa22). Township Code §175-89D provides that the combined square footage of the any accessory buildings shall not exceed the square footage of the principal building. Here, the accessory building is 2160 square feet, and the principal structure is approximately 1152 square feet. Accordingly, a use variance was required. (Da10).

The Tomarchios had previously applied for all necessary permits and inspections for the accessory structure, but the former Zoning Official mistakenly failed to advise the Tomarchios that they needed a use variance. The former Zoning Official mistakenly approved the structure without a use variance. (1T10-9 to 1T11-18).

A public hearing on the application was held on August 18, 2022. Plaintiffs objected to the application. (1T). Plaintiffs first complained about the adequacy of the notice for the hearing. Contrary to Plaintiffs' arguments, the hearing notice complied with the requirements of N.J.S.A. 40:55D-11, as the notice provided: (1) the date, time and place of the hearing; (2) nature of the matters considered; (3) identification of the property by street address or lot and block number; and (4) location and times at which any maps and documents concerning the application. (Da33 to Da34)³. Plaintiffs' objection

³ As they did before the trial court, Plaintiffs provided an incomplete copy of the published hearing notice in their Appendix, omitting the second page. The

was overruled, and the hearing proceeded to the merits of the application. (1T9-3 to 1T10-7).

At the hearing, Ms. Tomarchio testified that the purpose of the garage is to park vehicles and provide storage for household and personal items since the residence is small and has no basement. (1T10-9 to 1T10-20; 1T13-8 to 1T13-21). The personal items include workbenches, cabinets, exercise equipment, and motorcycles. (1T10-16 to 1T10-20; 1T13-8 to 1T13-21; 1T19-20 to 1T19-22). Some of the personal items and the vehicles would be out in the yard if they did not have the garage. (1T34-8 to 1T35-5). The garage is not used for commercial purposes. (1T13-14 to 1T13-17).

Ms. Tomarchio further testified that there is no negative impact on neighbors. The garage is 50 feet from the Plaintiffs' property, and no other neighbor has complained about the garage. (1T11-19 to 1T12-5). No extra grading was done. The Tomarchios are not the cause of any water issues on Plaintiffs' property, which predate the Tomarchios' purchase of the Property (1T11-20; 1T36-20 to 1T37-8).

Plaintiff John Valentine and his friend/engineer/planner Kevin Dixon testified on behalf of Plaintiffs. (1T20-16 to 1T28-9). The Board did not find Mr. Valentine's complaint that the accessory structure is flooding his property

complete published notice is reproduced in Respondent's Appendix at pages Da33 and Da34.

and killed “289 trees” to be credible. Plaintiffs presented no photographic, expert, or other evidence to show any such flooding or loss of trees due to any alleged conditions originating at the Property. Mr. Dixon was certainly qualified to provide such testimony, but chose not to do so, which was most telling about the credibility of Plaintiffs’ complaints. (Pa48).

However, certain important facts were revealed by the exhibits presented by Plaintiffs. The garage is approximately 300 feet from Plaintiffs’ residence as depicted in the photos produced by Plaintiffs using the scale of the photos. (Pa36). The garage is surrounded on three sides by a natural barrier of trees and is placed and constructed in a visually attractive manner. (Pa36).

The Board did not find the testimony of Mr. Dixon to add anything to the analysis of the issues before the Board. Mr. Dixon presented no report and prepared no analysis of the engineering or planning issues. He merely stated his opinion of the positive and negative criteria. The Board and its professionals were already aware of the criteria and the framework for the Board’s decision on the application. (Pa48; 1T25-10 to 1T28-9).

The Zoning Board’s Planner presented his report, which had the following technical findings:

1.1 Proposal

The applicant seeks use variance approval for a previously constructed 24 ft. x 40 ft. 2-car garage addition to an existing 30 ft. x 40 ft. pole barn.

1.2 Existing Conditions

The 1.79± acre parcel is located at 3546 S. Black Horse Pike (a.k.a. U.S. Route 322). The property contains an existing 1-story frame dwelling (approximately 1,152 s.f.) with stone driveway and associated improvements, a 30 ft. x 40 ft. metal garage with a 24 ft. x 40 ft. addition, concrete pad, a swimming pool with deck and accessory shed surrounded by chain link fence. The property is served by private well and septic and is zoned RD-C, Rural Development - Commercial District.

1.3 Surrounding Land Uses

The surrounding parcels adjacent to the north, south and across from the PIQ are also zoned RD-C, Rural Development-Commercial and contain a mix of residential and commercial uses as well as undeveloped land. Properties directly adjacent to the property in question contain a residence to the north and a vacant property with a billboard to the south.

3.1 Use

1. In accordance with § 175-89D, any accessory buildings or structures shall be permitted on a lot associated with a principal structure, building or use, except on qualified farmland. The total combined square footage of any accessory building(s) or structure(s) shall not exceed the square footage of the principal building. All farmland structures shall adhere to the setback requirements of this chapter. The plan does not conform to these requirements, proposing 2,160 sq. ft. when the principal structure is approximately 1,152 sq. ft. As proposed, a use variance is required.
2. The applicant must demonstrate sufficient “special reasons” why the proposed use carries out a purpose of zoning, or how the refusal to allow the project would impose on the applicant an undue hardship. In addition,

the applicant must demonstrate that the requested use variance can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance.

(Da8 to Da11(emphasis in original)).

Based on the application materials, photographs, evidence submitted, testimony of the Tomarchios and the Plaintiffs, and the applicable law, the Zoning Board made the following findings of fact and conclusions of law as memorialized in its Resolution:

1. The proposed use satisfies the positive criteria of the Municipal Land Use Law as it promotes two separate purposes of zoning under the Municipal Land Use Law, and the site is particularly suitable for the proposed use (Pa47); and

2. The proposed use (a) promotes the general welfare and (b) promotes a desirable visual environment and, therefore, satisfies two purposes of zoning set forth in N.J.S.A. 40:55D-2a and 40:55D-2l. The accessory structure and addition will enable the Tomarchios to maintain a neat and orderly property so that items such as vehicles, equipment, tools and the like are stored inside the structure and not in the yard.

Maintaining a neat and visually attractive property promotes the general

welfare of the community and promotes a desirable visual environment in the area of the Property, as well as the community at large (Pa47); and

3. The site is particularly suitable for the proposed use. The site contains 1.79 acres and has sufficient space to accommodate the accessory structure. The aerial photograph submitted by Plaintiffs and the photos submitted by the Tomarchios demonstrate that the accessory structure is surrounded on three sides by a natural barrier of trees and is placed and constructed in a visually attractive manner. The site already contains a residential structure and, therefore, the addition of an accessory garage is a natural and expected improvement to the Property. Moreover, the surrounding parcels and those across from the Property contain a mix of residential and commercial uses, as well as undeveloped land. The parcel immediately to the south of the Property contains an advertising billboard. Taking these neighboring uses into consideration, the site is particularly suitable for the proposed accessory structure (Pa47); and

4. The proposed use also satisfies the negative criterion of the Municipal Land Use Law. The variance can be granted without substantial detriment to the public good and will not substantially impair

the intent and the purpose of the zone plan and the zoning ordinance (Pa47); and

5. The focus of the “substantial detriment” prong of the negative criteria is on the impact of the variance on nearby properties. The Zoning Board found that there is no “substantial detriment” on nearby properties. As depicted in the Plaintiffs’ own exhibit, the accessory structure is at least 300 feet from the Plaintiffs’ residence, which contradicts the Plaintiffs’ testimony. There is a large natural barrier of trees between the accessory structure and the Plaintiffs’ residence. The accessory structure is placed and constructed in a visually attractive manner as depicted in the photographs. The Property already contains a residential structure and, therefore, the addition of an accessory garage is a natural and expected improvement to the Property. Moreover, the surrounding parcels and those across from the Property contain a mix of residential and commercial uses, as well as undeveloped land. The parcel immediately to the south of the Property contains an advertising billboard. Taking these neighboring uses into consideration, the accessory structure does not present a “substantial detriment” to the neighboring properties (Pa47); and

6. The Zoning Board also found that the proposed use will not impair the intent and purpose of the zone plan and the zoning ordinance. As noted in the Board Planner's report, the Property is currently zoned Rural Development—Commercial, which could allow even more intensive uses at the Property, such as retail sales and services. The Property already contains a residential structure and, therefore, the addition of an accessory garage is a natural and expected improvement to the Property. Moreover, the surrounding parcels and those across from the Property contain a mix of residential and commercial uses, as well as undeveloped land. The parcel immediately to the south of the Property contains an advertising billboard. These existing conditions were taken into account when the zone plan and zoning ordinance were adopted. Indeed, as stated in Township Code §175-160:

Rural Development Zoning Districts

A. Purpose.

(1) The rural development zoning district is transitional in nature. It is fragmented by existing development and agricultural uses. The area is relatively open in nature and is, thus, important from a cultural, visual and ecological standpoint. *The intention of the Zoning Plan and Ordinance is to both maintain, where practical, the existing character of the district and preserve it as land reservoirs for future community development. The uses in this district are controlled essentially by the Township so long as they have only a moderate impact. (emphasis added).*

Thus, the existing residential use of the Property, and accessory structures that one would typically find in the community with such uses, were already anticipated in the Zone. Thus, it cannot be said that such an accessory structure impairs the intent and purpose of the Zone and the Zoning Ordinance. In fact, the accessory structure could potentially support a conforming commercial use at the Property at some future point (Pa48); and

7. The Board did not find the Plaintiffs' complaint that the accessory structure is flooding his property and killed "289 trees" to be credible. The Plaintiffs presented no photographic, expert, or other evidence to show any such flooding or loss of trees due to any alleged conditions originating at the Property (Pa48); and

8 The Board did not find the testimony of Plaintiffs' friend/planner, Kevin Dixon, to add anything to the analysis of the issues before the Board. Mr. Dixon presented no report or other analysis of the planning issues. He merely stated his opinion of the positive and negative criteria. The Board and its professionals were aware of the criteria and the framework for the Board's decision on the application (Pa48).

Based on the foregoing findings, the Zoning Board granted the requested use variance from the requirements of Township Code §175-89D to allow the existing accessory structure to be larger than the principal use on the Property, where the accessory building at issue is 2160 square feet and the principal structure is approximately 1152 square feet. (Pa48 to Pa49). The Zoning Board imposed the following reasonable conditions on the approval:

1. The Applicants must secure all necessary outside agency approvals and Township Permits, including Construction Permits and Approvals and Pinelands Certificate of Filing and Approvals, that may be necessary; and
2. The Applicants shall maintain their escrow account and satisfy any outstanding escrow obligations; and
3. The accessory structure shall be used solely for personal storage and not be used for any commercial purpose. No living area shall be constructed in the structure; and
4. The Applicants shall comply with any development fee requirement as may be determined by the Construction Official; and
5. The accessory structure shall be constructed and placed in accordance with all plans and surveys submitted as part of the application; and

6. The Applicants shall submit an updated survey and obtain updated lot grading approval.

(Pa49).

The decision of the Board was memorialized in Resolution 57-2022 adopted on October 20, 2022. (Pa40 to Pa50). The Resolution was provided to the Zoning Board in advance of the meeting at which was adopted. Each of the Zoning Board members adopted the findings of fact and conclusions of law as the basis for his decision. (2T3-7 to 2T7-2). The trial court observed that the Resolution sets forth the Zoning Board’s findings and reasoning in “great detail”. (3T41-14 to 3T43-12).

ARGUMENT

POINT I

DEFERENTIAL STANDARD OF REVIEW
(Pa73-Pa74; 3T35-4 – 3T49-9)

On a review in the Superior Court, the factual determinations of a zoning board enjoy a presumption of validity. A board’s determinations will not be overturned unless arbitrary and capricious or unreasonable, and the burden of proving such is upon the plaintiff. *Dunbar Homes, Inc. v. Zoning Bd. of the Twp. of Franklin*, 233 N.J. 546, 558 (2018); *Grabowsky v. Twp. of Montclair*, 221 N.J. 536, 551 (2015); *Price v. Himeji, LLC*, 214 N.J. 263, 284 (2013); *Toll*

Bros., Inc. v. Burlington County Bd. of Chosen Freeholders, 194 N.J. 223, 256 (2008); *Jock v. Zoning Bd. of Adjustment of the Twp. of Wall*, 184 N.J. 562, 597 (2005); *Cell v. Zoning Bd. of Adjustment of West Windsor Twp.*, 172 N.J. 75, 81-82 (2002); *Berninger v. Board of Adjustment of Midland Park*, 254 N.J. Super. 401, 407 (App. Div. 1991), *aff'd o.b.*, 127 N.J. 226 (1992). The rationale for the "arbitrary and capricious" standard is that local citizens familiar with their community's characteristics and interests, rather than courts, are in the best position to assess the merits of variance applications. *CBS Outdoor v. Lebanon Planning Bd.*, 414 N.J. Super. 563, 577 (App. Div. 2010); *Medical Ctr. at Princeton v. Princeton Twp. Zoning Bd.*, 343 N.J. Super. 177, 198 (App. Div. 2001)(citing *Ward v. Scott*, 16 N.J. 16, 23 (1954) and *Hawrylo v. Board of Adjustment of Harding Twp.*, 249 N.J. Super. 568, 578 (App. Div. 1991)).

The arbitrary and capricious standard is a deferential standard of review for agency action. See *PADNA v. City Council of Jersey City*, 413 N.J. Super. 322, 332 (App. Div. 2010), *certif. den.*, 205 N.J. 79 (2011). Superior Court review is intended to be a determination of the validity of the agency's action, not substitution of the court's judgment therefor. *CBS Outdoor*, *supra*, 414 N.J. Super. at 578; *Rocky Hill Citizens v. Planning Bd. of Boro. of Rocky Hill*, 406 N.J. Super. 384, 411-412 (App. Div. 2009); *Burbridge v. Mine Hill Twp.*, 117

N.J. 376 (1990). See also *Bressman v. Gash*, 131 N.J. 517, 526-528 (1993); *Randolph Town Ctr. v. Randolph Twp.*, 324 N.J. Super. 412, 418 (App. Div. 1999). “[L]and use decisions are entrusted to the sound discretion of the municipal boards, which are to be guided by the positive and negative criteria set forth in the enabling statutes.” *Kaufmann v. Planning Bd. for Warren Twp.*, 110 N.J. 551, 558 (1988).

Applying the foregoing standard of review to the present case leads to only one conclusion—the Zoning Board acted properly in granting the requested use variance and the same should be affirmed.

POINT II

NOTICE WAS PROPER UNDER THE MUNICIPAL LAND USE LAW **(Pa74; 3T35-4 – 3T38-5)**

Contrary to Plaintiffs’ argument, the hearing notice and the published notice complied with all of the requirements of N.J.S.A. 40:55D-11, as they provided: (1) the date, time and place of the hearing; (2) nature of the matters considered; (3) identification of the property by street address or lot and block number; and (4) location and times at which any maps and documents concerning the application are available. (Pa31; Da32 to Da33).

The test for adequacy of a notice is whether it “inform[s] the public of the nature of the application in a *commonsense* manner such that the ordinary lay person could intelligently determine whether to object or to seek further

information.” Cox & Koenig, *New Jersey Zoning and Land Use Administration* (Gann), §18-1.2 (citing *Perlmart v. Lacey Township Planning Board*, 295 N.J. Super. 234 (App. Div. 1996)(emphasis added)). Here, the notice stated:

The applicant is seeking a use variance to allow an accessory structure larger than the principle [sic] use on the property, along with any other variances deemed necessary by the Board. The accessory structure is approximately 2160 square feet and the principle [sic] structure is approximately 1152 square feet.

The notice adequately expressed a “commonsense” description of the relief requested by the Tomarchios, in a manner that an “ordinary lay person could intelligently determine whether to object or to seek further information”.

Nothing further is required by N.J.S.A. 40:55D-11.

Whether the application and corresponding notice were expressed in terms of an expansion of a preexisting nonconforming use, or a new, non-allowed use, is immaterial to the adequacy of the notice. The burden of proving the positive and negative criteria of the Municipal Land Use Law, N.J.S.A. 40:55D-70d, remains the same. Cox & Koenig, *New Jersey Zoning and Land Use Administration* (Gann), §33-2.1. Moreover, although the expansion of a preexisting nonconforming use ordinarily requires a d(2) variance, “the addition of an entirely new non-permitted accessory...use should require a d(1) variance.” Cox & Koenig, *New Jersey Zoning and Land*

Use Administration (Gann), §33-2.1. Here, the notice expressed in a “commonsense” manner the relief requested by the Tomarchios—a use variance to allow a structure of a particular size expressed in square feet exceed the size of the principal structure on the Property, also expressed in square feet. The notice need not express citations to the Township Code or particular provisions of the Municipal Land Use Law in order to inform an “ordinary lay person” of the nature of the relief requested.

Plaintiffs also complained that other variances were necessary and not noticed. Despite being represented by an attorney (Andrew Karcich, Esq.) and a friend/engineer/planner (Kevin Dixon, P.E., P.P.) *Plaintiffs never identified what the bulk variances might be.* This is not surprising, because Mr. Dixon never prepared any professional analysis of the issues before the Zoning Board. (1T25-11 to 1T27-4). Mr. Dixon only offered his commentary on the positive and negative criteria for a use variance, a standard that is well known by the Zoning Board. (1T27-5 to 1T28-9). Thus, he added nothing to the consideration of the issues before the Zoning Board. The application before the Zoning Board was for a use variance. The Zoning Official would determine in the first instance if there were any bulk variance issues, and none were identified by her. The “issue” of additional bulk variances is simply a red

herring and part of Plaintiffs’ effort of “throwing mud up against the wall and hoping something sticks.”

Ultimately, the Zoning Board deemed the Tomarchios’ application complete because it was complete and proceeded to hear the merits of the application. Other than giving statutory notice of the hearing in accordance with N.J.S.A. 40:55D-11, a “complete application” is not a jurisdictional prerequisite to board action in any event. Cox & Koenig, *New Jersey Zoning and Land Use Administration* (Gann), §14-3.1.

POINT III

THE TOMARCHIOS SATISFIED THE CRITERIA FOR A USE VARIANCE AND THE ZONING BOARD PROPERLY EXERCISED ITS DISCRETION IN GRANTING THE SAME
(Pa74; 3T38-10 – 3T49-9)

As with all subsection “d” variances, the applicant must satisfy both the “positive” and “negative” criteria of N.J.S.A. 40:55D-70, which provides in relevant part:

d. In particular cases for special reasons, grant a variance to allow departure from regulations pursuant to article 8 of this act to permit:

- (1) a use or principal structure in a district restricted against such use or principal structure,
- (2) an expansion of a nonconforming use,

A variance under this subsection shall be granted only by affirmative vote of at least five members, in the case of a municipal board

No variance or other relief may be granted under the terms of this section, including a variance or other relief involving an inherently beneficial use, without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.

The applicant bears the burden of proving both the positive and negative criteria. *Nash v. Bd. of Adjustment*, 96 N.J. 97 (1984). Generally, to satisfy the positive criteria, an applicant must prove that the use promotes the general welfare because the proposed site is particularly suitable to the proposed use. *Cell S. of N.J. v. Zoning Bd. of Adjustment*, 172 N.J. 75, 83 (2002). Further, to satisfy the negative criteria, in addition to proving that the variance can be granted without substantial detriment to the public good, an applicant must demonstrate through an enhanced quality of proof, that the variance sought is not inconsistent with the intent and purpose of the Master Plan and Zoning Ordinance. *Id.*

Applying the language of the Municipal Land Use Law, the Zoning Board made the following findings of fact and conclusions of law:

1. The proposed use satisfies the positive criteria of the Municipal Land Use Law as it promotes two separate purposes of zoning under the Municipal Land Use Law, and the site is particularly suitable for the proposed use; and

2. The proposed use (a) promotes the general welfare and (b) promotes a desirable visual environment and, therefore, satisfies two purposes of zoning set forth in N.J.S.A. 40:55D-2a and 40:55D-2l. The accessory structure and addition will enable the Tomarchios to maintain a neat and orderly property so that items such as vehicles, equipment, tools and the like are stored inside the structure and not in the yard. Maintaining a neat and visually attractive property promotes the general welfare of the community and promotes a desirable visual environment in the area of the Property, as well as the community at large; and

3. The site is particularly suitable for the proposed use. The site contains 1.79 acres and has sufficient space to accommodate the accessory structure. The aerial photograph submitted by Plaintiffs and the photos submitted by the Tomarchios demonstrate that the accessory structure is surrounded on three sides by a natural barrier of trees and is placed and constructed in a visually attractive manner. The site already contains a residential structure and, therefore, the addition of an

accessory garage is a natural and expected improvement to the Property. Moreover, the surrounding parcels and those across from the Property contain a mix of residential and commercial uses, as well as undeveloped land. The parcel immediately to the south of the Property contains an advertising billboard. Taking these neighboring uses into consideration, the site is particularly suitable for the proposed accessory structure; and

4. The proposed use also satisfies the negative criteria of the Municipal Land Use Law. The variance can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and the zoning ordinance; and

5. The focus of the “substantial detriment” prong of the negative criteria is on the impact of the variance on nearby properties. The Zoning Board found that there is no “substantial detriment” on nearby properties. As depicted in the Plaintiffs’ own exhibit, the accessory structure is at least 300 feet from the Plaintiffs’ residence, which contradicts the Plaintiffs’ testimony. There is a large natural barrier of trees between the accessory structure and the Plaintiffs’ residence. The accessory structure is placed and constructed in a

visually attractive manner as depicted in the photographs. The Property already contains a residential structure and, therefore, the addition of an accessory garage is a natural and expected improvement to the Property. Moreover, the surrounding parcels and those across from the Property contain a mix of residential and commercial uses, as well as undeveloped land. The parcel immediately to the south of the Property contains an advertising billboard. Taking these neighboring uses into consideration, the accessory structure does not present a “substantial detriment” to the neighboring properties; and

6. The Zoning Board also found that the proposed use will not impair the intent and purpose of the zone plan and the zoning ordinance. As noted in the Board Planner’s report, the Property is currently zoned Rural Development—Commercial, which could allow even more intensive uses at the Property, such as retail sales and services. The Property already contains a residential structure and, therefore, the addition of an accessory garage is a natural and expected improvement to the Property. Moreover, the surrounding parcels and those across from the Property contain a mix of residential and commercial uses, as well as undeveloped land. The parcel immediately to the south of the Property contains an advertising billboard. These existing conditions

were taken into account when the zone plan and zoning ordinance were adopted. *See* Township Code §175-160.

(Pa47 to Pa48).

The Zoning Board's findings and conclusions were proper in every regard and carefully followed the statutory standards of the Municipal Land Use Law. Furthermore, the Zoning Board properly considered and rejected Plaintiffs' arguments. The Zoning Board did not find the Plaintiff John Valentine's complaint that the accessory structure is flooding his property and killed "289 trees" to be credible. Plaintiffs presented no photographic, expert, or other evidence to show any such flooding or loss of trees due to any alleged conditions originating at the Property. Plaintiffs' friend/engineer/planner Kevin Dixon was certainly qualified to provide such testimony, but chose not to do so, which was most telling about the credibility of Plaintiffs' complaints. (Pa48).

Moreover, the Zoning Board found that Mr. Dixon's testimony did not add anything to the analysis of the issues before the Board. Mr. Dixon presented no report and prepared no analysis of the engineering or planning issues. He merely stated his opinion of the positive and negative criteria. The Board and its professionals were already aware of the criteria and the framework for the Board's decision on the application. (Pa48). Moreover, the

Zoning Board is not bound to accept the testimony of any expert. *See Klug v. Bridgewater Planning Bd.*, 407 N.J. Super. 1, 13 (App. Div. 2009) ("[w]e emphasize that a planning board is not required to accept the testimony of an expert"); *Clifton City BOE v. Clifton City Zoning Bd. of Adjustment*, 409 N.J. Super. 389, 434 (App. Div. 2009); Cox & Koenig, *New Jersey Zoning & Land Use Administration* §18-4.4 (Gann). This is especially true where, as here, the expert's opinion is "unsupported by any studies or data". *See Cox & Koenig, New Jersey Zoning & Land Use Administration* §18-4.4 (Gann)(citing *New Brunswick Cellular v. Bd. of Adj.*, 160 N.J. 1, 16 (1999); *Clifton City BOE v. Clifton City Zoning Board of Adjustment*, 409 N.J. Super. at 435; *Nextel of N.Y. v. Englewood Cliffs Bd. of Adj.*, 361 N.J. Super. 22, 43 (App. Div. 2003)).

POINT IV

THE ZONING BOARD PROPERLY CONSIDERED THE SPECIFICS OF THE MASTER PLAN AND ZONING ORDINANCE (Pa74; 3T46-21 – 3T48-3)

As noted above, the Zoning Board properly considered Township Code §175-160 which speaks to the specific intent and purpose of the Rural Development Zones in the context of the broader generalities of the Master Plan cited by Plaintiffs. As stated in Township Code §175-160:

Rural Development Zoning Districts

A. Purpose.

(1) The rural development zoning district is *transitional in nature*. It is fragmented by existing development and agricultural uses. The area is relatively open in nature and is, thus, important from a cultural, visual and ecological standpoint. *The intention of the Zoning Plan and Ordinance is to both maintain, where practical, the existing character of the district and preserve it as land reservoirs for future community development. The uses in this district are controlled essentially by the Township so long as they have only a moderate impact. (emphasis added).*

(Da27 to Da31). Thus, the existing residential use of the Property, and accessory structures that one would typically find in the community with such uses, were already anticipated in the Zone as part of the existing character of the Zone to be preserved. Thus, it cannot be said that such an accessory structure impairs the intent and purpose of the Master Plan and the Zoning Ordinance. In fact, the accessory structure at the Property could potentially support a conforming commercial use at the Property at some future point. Ms. Tomarchio testified that the previous owners of the Property had a dump truck business which they operated out of the garage. (1T14-6 to 1T14-10).

POINT V

**THE ZONING BOARD'S DECISION
WAS PROPERLY MEMORIALIZED**
(Pa110-Pa112; 3T39-18 – 3T49-9)

Contrary to Plaintiffs' argument, the Zoning Board properly memorialized its findings and decision. There is nothing in the Municipal Land Use Law that requires the reasons for board action to be stated at the time of

the vote. Indeed, as stated in Cox & Koenig, *New Jersey Zoning & Land Use Administration* §19-1:

Board members are not required to engage in public deliberations on an application before voting on a motion to grant or deny relief. *Scully-Bozarth Post. Burlington County Planning Bd.*, 362 N.J. Super. 296, 312 (App. Div. 2003), certif. den., 178 N.J. 34 (2003). Instead, the application may be approved or denied by voice vote with no statement of reasons being placed on the record by individual members. And see *Jennings v. Borough of Highlands*, 418 N.J. Super. 405, 424 (App. Div. 2011), citing *Scully-Bozarth* for the proposition that when board members vote on an application for development "a verbal discussion" is "not mandatory, as long as the ultimate resolution, which will serve as the official statement of the ... board's findings and conclusions, is furnished to the board members in advance of the time they will vote, to provide them ample time to study it and, if they deem it appropriate, request clarification or modification."

The second step pursuant to N.J.S. 40:55D-10g(2) is the required articulation of the reasons supporting the decision in findings of fact and legal conclusions set forth in a memorializing resolution which, in most cases, is prepared for adoption at a subsequent meeting. See 19-2.5. A carefully prepared, detailed resolution containing findings and conclusions that fully explain the basis on which the board has acted, with ample reference to the record and the statutory standards, may serve to sustain the board's action even in the face of no deliberation on the record.

In the same manner that a court often decides a time-sensitive matter from the bench to be followed perhaps by a written opinion containing the court's findings, reasoning and conclusions, a board is afforded a statutory opportunity to do the same.

Here, the draft Resolution was prepared based on the record before the Zoning Board and was provided in advance of the Zoning Board's consideration of the

Resolution on October 20, 2022. The Zoning Board’s Solicitor gave an oral presentation of the draft Resolution at the October 20, 2022, and the Zoning Board was satisfied with its contents and voted for approval of the Resolution and the use variance based on the findings and conclusions set forth in the Resolution. (2T3-8 to 2T7-2; Pa40 to Pa50). There is nothing in the Municipal Land Use Law that requires a Resolution to be read at length into the record, or for the members of the Zoning Board to separately certify that they have read the Resolution, as Plaintiffs suggest. (Pb13).

POINT VI

**THE THIRD COUNT OF THE
COMPLAINT WAS PROPERLY DISMISSED**
(Da1-Da24; 3T4-1 – 3T4-14)

In the trial court, Plaintiffs took the unfortunate step of smearing the Zoning Board’s professionals with a completely baseless allegation that they improperly met off the record with the Tomarchios and the Zoning Board “for the purpose of devising methods for suppressing objections to the subject application” in violation of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. This outrageous allegation is false and there is not a shred of evidence to support it⁴. (Da3 to Da24). Plaintiffs also falsely allege that such a meeting

⁴ Contrary to the allegations of paragraph 58 of the Complaint, the Zoning Board’s professionals did not have meetings or communications with the Tomarchios, the Board, or each other “for the purpose of devising methods for suppressing objections to the subject application.” (Da3 to Da24).

was “disclosed” at the hearing on the application. No such disclosure appears in the record because no such meeting ever occurred. (1T and 2T). The Application in this matter was properly heard on the record at a regularly scheduled and noticed meeting of the Zoning Board in compliance with the Open Public Meetings Act, N.J.S.A. 10:4-9, -10 and -12. (1T).

Moreover, although no meeting occurred between the Zoning Board professionals and the Tomarchios prior to the hearing in this case, such a meeting would have been proper as “it is almost universal practice for a board to permit its professionals to deal informally and directly with professionals of the applicant in order to expedite consideration of [an] application.” Cox & Koenig, *New Jersey Zoning and Land Use Administration* (Gann, 2023), §18-4.4. *See also Morris County Fair Housing v. Boonton Twp.*, 220 N.J. Super. 388, 400-01 (Law Div. 1987), *aff’d*, 230 N.J. Super. 345 (App. Div. 1989). Such meetings are commonplace in land use matters in New Jersey. (Da19).

Plaintiffs never opposed the motion to dismiss the Third Count, effectively admitting the impropriety of their pleading. The trial court properly dismissed this Count separate and apart of its dismissal of the remainder of Plaintiffs’ zoning appeal. (3T4-1 to 3T4-14).

CONCLUSION

It is respectfully submitted that this Court should affirm the decision of the trial court dismissing Plaintiffs' Complaint in its entirety, with prejudice. As the trial court observed, the Zoning Board's Resolution contains all necessary findings of fact and conclusions of law and properly memorializes the Zoning Board's decision. The Zoning Board did not act arbitrarily, capriciously, or unreasonably and carefully followed the record evidence. Furthermore, the Zoning Board properly considered and rejected Plaintiffs' complaints as lacking credibility.

WEIR GREENBLATT PIERCE LLP
A Pennsylvania Limited Liability Partnership

s/Richard P. Coe, Jr. _____
Richard P. Coe, Jr., Esquire
*Attorney for Defendant Zoning Board of
Adjustment of the Township of Monroe*

Dated: June 7, 2024

JOHN VALENTINE AND
VALENTINE'S FARM LLC,

Plaintiffs/Appellants,

v.

ZONING BOARD OF THE
TOWNSHIP OF MONROE, DANIEL
TOMARCHIO, LINDA
TOMARCHIO, JOHN DOE, JANE
DOE, ABC CORPORATIONS, XYZ
LLC AND JOE SMITH
PARTNERSHIPS,

Defendants/Respondents.

SUPERIOR COURT OF NEW
JERSEY
APPELLATE DIVISION
DOCKET NO. A-000737-23T2

CIVIL ACTION

ON APPEAL FROM SUPERIOR
COURT OF NEW JERSEY
GLOUCESTER COUNTY
LAW DIVISION
DATED OCTOBER 2, 2023

SAT BELOW:

HON. BENJAMIN C. TELSEY,
A.J.S.C.

**BRIEF OF RESPONDENTS,
DANIEL TOMARCHIO AND LINDA TOMARCHIO**

Parker McCay, P.A.
3840 Quakerbridge Road,
Suite 200
Hamilton, New Jersey 08619
(609) 620-7814
Michael W. Herbert, Esq.
mherbert@parkerMcCay.com
I.D. No.: 007691992
Attorney for Respondents,
Daniel and Linda Tomarchio

Submitted: July 26, 2024

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Plaintiff/Appellants (“Appellants”) in this matter fail to establish a factual or legal basis for the Court to disrupt a sound decision made by the co-defendant/Respondent Zoning Board of Adjustment of the Township of Monroe (the “Board”). The notice by Applicants/Defendants/Respondents (“Applicants”) was found to be legally sufficient, the Board held a proper hearing with the Appellants present, and the Appellants had the opportunity to cross-examine the Applicants, as well as call their own witnesses. Nevertheless, the Board was satisfied with the *pro se* Applicant’s presentation and authored a complete and well-reasoned Resolution Memorializing its decision. The Superior Court properly found that the Board’s granting of the Applicant’s variance was not arbitrary, capricious, or unreasonable. It was well grounded in the record and in compliance with the established precedent, statutes, and Monroe Township zoning ordinances.

STATEMENT OF FACTS

The Applicants will rely on the Statement of Facts, submitted by the co-respondents, the Board. To summarize, Appellants, John Valentine and Valentine’s Farm, LLC are owners/operators of 3524 South Black Horse Pike, Monroe Township. The Respondent Zoning Board is a duly constituted Board of the Township of Monroe. The jurisdiction and authority of the Zoning Board is

established by the New Jersey Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq. and Monroe Township Code, § 175-30 to 32.¹ (Pa 40)

The Applicants are the owners of 3546 South Black Horse Pike, Monroe Township (the “Property”), which was the subject of an application before the Zoning Board and the property is located in the RD-C (Rural Development-Commercial) Zoning District of Monroe Township. This property is where the Applicants currently reside and they submitted their application *pro se*. (Pa 1-30; 1T10-9-1T11-18)

The Applicants requested a use variance to allow an accessory structure to be larger than the principal use on the property. Township Code §175-89D provides that the combined square footage of any accessory buildings shall not exceed the square footage of the principal building. The accessory building is 2,160 square feet and the principal structure is approximately 1,152 square feet. Accordingly, a use variance was required. (Pa 88; 1T15-12-IT-13)

The Zoning Board determined that the Applicant’s Notice complied with the Municipal Land Use Law (the “MLUL”) and expressed the relief sought in a common sense manner, as required by established precedent. See Cox & Koenig, New Jersey Zoning and Land Use Administration (Gann), § 18-1.2 (citing Perlmart

¹ Plaintiff’s Appellants Appendix is cited as “Pa”, while Co-Defendant, Zoning Board of the Township of Monroe is cited as “Da”. “T” references Court transcript.

Specifically, the notice stated:

“The applicant is seeking a use variance to allow an accessory structure larger than the principle [sic] use on the property, along with any other variances deemed necessary by the Board. The accessory is approximately 2160 square feet and the principle [sic] structure is approximately 1152 square feet.” (Da10) (Pa31)

The above Notice was provided to all necessary parties and a public hearing was held on August 18, 2022, where the Applicants represented themselves pro se. (Pa 40-41; 1T10-9-1T10-20; 1T13-8-1T13-21) At the hearing, plaintiff objected to the application. Appellants took issue with the Notice of the hearing and had the opportunity to be heard by the zoning board. Nevertheless, based on the application materials, photographs, evidence submitted, testimony of the Applicants and the Appellants, and the applicable law, the Zoning Board granted the requested use variance from the requirements of Township Code §175-89D to allow the existing accessory structure to be larger than the principal use on the property, where the accessory building at issue is 2,160 square feet and the principal structure is approximately 1,152 square feet, with the necessary reasonable conditions for approval. (1T11-19-1T37-8) On October 20, 2022, the Board’s decision was memorialized in Resolution 57-2022. (Pa 40-50)

PROCEDURAL HISTORY

We rely upon the Procedural History filed by the Defendant/Respondent Zoning Board of the Township of Monroe. On June 30, 2023, an Action in Lieu of Prerogative Writ was filed by Appellants. (Pa 51; 2T3-7-2T7-2) On October 2, 2023, the Trial Court heard the matter and dismissed the Complaint. (Pa 134; 3T41-14-3T43-12)

LEGAL ARGUMENT

The Respondent/Applicants hereby join in and rely upon the arguments presented to this Court by co-defendant Respondent Monroe Township Zoning Board.

POINT I

THE LOWER COURT PROPERLY FOUND THAT APPELLANTS FAILED TO ESTABLISH THAT THE APPLICANT'S NOTICE OF HEARING WAS DEFECTIVE.

(Pa 30-Pa 37; 3T35-4-3T38-5)

One of Appellants' contentions throughout their Appellant brief is that the Applicants failed to provide proper Notice of the hearing. However, nothing in Applicants' submissions or in the Trial Court's ruling indicate that the Notice failed to comply with N.J.S.A. 40-55D-11. The statute demands that the Notice provide: (1) the date, time and place of the hearing; (2) nature of the matters considered; (3) identification of the property by street address or block and lot number; and (4) location and times available of any maps and documents concerning the application. Moreover, the test for adequacy of a Notice is whether it "inform[s] the public of the

nature of the application in a commonsense manner such that the ordinary lay person could intelligently determine whether to object or seek further information.” Cox & Koenig, New Jersey Zoning and Land Use Administration (Gann), § 18-1.2 (citing Perlmart v. Lacey Township Planning Board, 295 N.J. Super. 234 (App. Div. 1996)).

Additionally, whether the application and corresponding Notice were expressed in terms of an expansion of a preexisting nonconforming use, or a new, non-allowed use, is immaterial to the adequacy of the Notice. The burden of proving the positive and negative criteria of the Municipal Land Use Law, N.J.S.A. 40:55D-70(d), remains the same. Cox & Koenig, New Jersey Zoning and Land Use Administration (Gann), §33-2.1. Moreover, although the expansion of a preexisting nonconforming use ordinarily requires a (d)(2) variance, “the addition of an entirely new non-permitted accessory...use should require a d(1) variance.” Cox & Koenig, New Jersey Zoning and Land Use Administration (Gann), §33-2.1.

In this case, the Notice stated:

The applicant is seeking a use variance to allow an accessory structure larger than the principle [sic] use on the property, along with any other variances deemed necessary by the Board. The accessory is approximately 2160 square feet and the principle [sic] structure is approximately 1152 square feet.

[July 18, 2022 Notice to Property Owners]. (Pa 31)

Here, the Notice properly expressed in a “commonsense” manner, the relief requested by the Applicant. A lay person could understand that Applicants were requesting a use variance to allow a structure of a particular size, expressed in square feet, to exceed the size of the principal structure on the property, also expressed in square feet. The Notice needs not express citations to the Township Code nor particular provisions of the MLUL, in order to inform an “ordinary lay person” the nature of the relief requested. Thus, the Board properly determined that the Notice adequately expressed a “commonsense” description of the relief requested by the Applicants in a manner that an ordinary lay person could intelligently determine whether to object to or seek further information. (Pa 31)

Additionally, plaintiff’s contention that Applicants did not give proper Notice because their pro se application was not “complete” does not hold the legal weight plaintiffs assert. Specifically, other than giving statutory Notice of the hearing, in accordance with N.J.S.A. 40:55D-11, a “complete application” is not a jurisdictional prerequisite to Board action. Cox & Koenig, New Jersey Zoning and Land Use Administration (Gann), §14-3.1. Accordingly, an incomplete application is not a basis for plaintiff’s relief and the Applicants provided adequate notice under the statute. (Pa 37)

POINT II
THE SUPERIOR COURT PROPERLY FOUND THAT THE
BOARD'S APPROVAL OF THE APPLICATION COMPLIES
WITH THE TOWNSHIP OF MONROE'S MASTER PLAN
(Pa 45-Pa 48; 3T46-21-3T48-3)

In their submission, Appellants contend that the approval violates the Master Plan because what the Applicant requested was a significant expansion of a non-conforming, in an agricultural zoned area of the town. However, Appellants fail to support this conclusion or argue against how the Resolution clearly explained how the variance conformed to the Master Plan. (Pa 45-47)

The Zoning Board found that the proposed use will not impair the intent and purpose of the zoning plan and the zoning ordinance. As noted in the Board Planner's report, the property is currently zoned Rural Development—Commercial, which could allow even more intensive uses at the Property, such as retail sales and services. (Pa 47) Materially, Appellants leave out of their Court submissions the fact that the Applicant's property already contains a residential structure and therefore, the addition of an accessory garage is a natural and expected improvement to the property.

Moreover, the surrounding parcels and those across from the property contain a mix of residential and commercial uses, as well as undeveloped land. The parcel immediately to the south of the property contains an advertising billboard. These existing conditions were expressly taken into account when the zoning plan and

zoning ordinance were adopted. Specifically, the Rural Development Zone purposed purpose clearly states,”... [t]he intention of the Zoning Plan and Ordinance is to both maintain, where practical, the existing character of the district and preserve it as land reservoirs for future community development.” Township Code §175-160 (A)(1). (Pa 46)

Accordingly, by the plain unambiguous language of the ordinance, the Applicant’s existing residential and accessory structures were taken into account and anticipated in the zone. To say otherwise is to intentionally ignore the language of the Code. The zone will continue to have the same character as it always has and the structure fits within the plain language of the purpose of the code. Therefore, Applicant’s properly presented their application to the Zoning Board and established how their application conforms to the Master Plan. (Pa 48)

POINT III
THE TRIAL COURT PROPERLY FOUND THAT APPLICANTS MET THE NECESSARY BURDEN OF PROOF AND THE FINDINGS OF FACT OF THE BOARD WERE NOT ARBITRARY AND CAPRICIOUS OR UNREASONABLE.

(Pa 41-Pa 94; 3T38-10-3T49-9)

Appellants contend that the Applicants failed to satisfy their burden of proof because they relied on the aesthetic improvement of the property and did not show how the variance would improve the general welfare of the zone. Further, the Appellants allege that the Applicants did not properly show that the variance would

not have a substantial effect on the surrounding properties; and that the Resolution is an attempt to “create facts to justify” the Board’s conduct. However, failed to analyze the facts with the relevant law and at best, simply disagrees with the Board’s conclusion because the Board found the *pro se* Applicants more credible than the plaintiff’s expert. The Superior and Appellate Courts is not a venue to re-litigate facts already established by the Board, and plaintiff’s desire to get a second bite at the apple, is an insufficient basis to remand the application. (Pa 48)

For review in the Superior and Appellate Courts, it is well established that the factual determinations of a Zoning Board enjoy a presumption of validity. A Board’s determinations will not be overturned unless arbitrary and capricious or unreasonable, and the burden of proving such is upon the plaintiff. Dunbar Homes, Inc. v. Zoning Bd. of the Twp. of Franklin, 233 N.J. 546, 558 (2018); Grabowsky v. Twp. of Montclair, 221 N.J. 536, 551 (2015); Price v. Himeji, LLC, 214 N.J. 263, 284 (2013); Toll Bros., Inc. v. Burlington County Bd. of Chosen Freeholders, 194 N.J. 223, 256 (2008); Jock v. Zoning Bd. of Adjustment of the Twp. of Wall, 184 N.J. 562, 597 (2005); Cell v. Zoning Bd. of Adjustment of West Windsor Twp., 172 N.J. 75, 81-82 (2002); Berninger v. Board of Adjustment of Midland Park, 254 N.J. Super. 401, 407 (App. Div. 1991), aff’d o.b., 127 N.J. 226 (1992). The rationale for the "arbitrary and capricious" standard is that local citizens familiar with their community's characteristics and interests, rather than courts, are in the best position

to assess the merits of variance applications. CBS Outdoor v. Lebanon Planning Bd., 414 N.J. Super. 563, 577 (App. Div. 2010); Medical Ctr. at Princeton v. Princeton Twp. Zoning Bd., 343 N.J. Super. 177, 198 (App. Div. 2001) (citing Ward v. Scott, 16 N.J. 16, 23 (1954) and Hawrylo v. Board of Adjustment of Harding Twp., 249 N.J. Super. 568, 578 (App. Div. 1991)).

The arbitrary and capricious standard is a deferential standard of review for agency action. See PADNA v. City Council of Jersey City, 413 N.J. Super. 322, 332 (App. Div. 2010), certif. den., 205 N.J. 79 (2011). Superior Court review is intended to be a determination of the validity of the agency's action, not substitution of the Court's judgment therefor. CBS Outdoor, supra, 414 N.J. Super. at 578; Rocky Hill Citizens v. Planning Bd. of Boro. of Rocky Hill, 406 N.J. Super. 384, 411-412 (App. Div. 2009); Burbridge v. Mine Hill Twp., 117 N.J. 376 (1990). See also Bressman v. Gash, 131 N.J. 517, 526-528 (1993); Randolph Town Ctr. v. Randolph Twp., 324 N.J. Super. 412, 418 (App. Div. 1999). Further, in Kaufmann v. Planning Bd. for Warren Twp., 110 N.J. 551, 558 (1988), the N.J. Supreme Court determined that, "land use decisions are entrusted to the sound discretion of the municipal boards, which are to be guided by the positive and negative criteria set forth in the enabling statutes." Accordingly, it is well established that great deference goes to the factual findings of the Board and the Superior and Appellate Courts should not disrupt those findings unless the plaintiff satisfies their burden and shows that the

Board's action is arbitrary, capricious, and unreasonable. The guiding point as to whether the action is proper, is the relevant statutes. (Pa 48-49)

As with all subsection "d" variances, the Applicant must satisfy both the "positive" and "negative" criteria of N.J.S.A. 40:55D-70. Additionally, under section (d), in particular cases for special reasons, a grant variance can be provided if, 1.) a use or principal structure in a district restricted against such use or principal structure; or 2.) an expansion of nonconforming use. N.J.S.A. 40:55D-70(d)(1) and (2). Further, a variance from N.J.S.A. 40:55D-70(d), "shall be granted only by affirmative vote of at least five members, in the case of a municipal board." Ibid. Additionally, no variance or other relief may be granted under the terms without a showing from the Applicants that the proposed variance will not cause a substantial detriment to the public good and will not substantially impair the intent and the purpose of the zoning plan and zoning ordinance. See *ibid.* (Pa 41, 45)

The Applicant bears the burden of proving both the positive and negative criteria. *Nash v. Bd. of Adjustment*, 96 N.J. 97 (1984). Generally, to satisfy the positive criteria, an Applicant must prove that the use promotes the general welfare because the proposed site is particularly suitable to the proposed use. *Cell S. of N.J. v. Zoning Bd. of Adjustment*, 172 N.J. 75, 83 (2002). Further, to satisfy the negative criteria, in addition to proving that the variance can be granted without substantial detriment to the public good, an Applicant must demonstrate through an

enhanced quality of proof, that the variance sought is not inconsistent with the intent and purpose of the Master Plan and zoning ordinance. Ibid.

In this case, the Board made the following findings of fact and conclusions of law on the Applicants' request:

1. The proposed use satisfies the positive criteria of the Municipal Land Use Law as it promotes two separate purposes of zoning under the Municipal Land Use Law, and the site is particularly suitable for the proposed use; and
2. The proposed use (a) promotes the general welfare and (b) promotes a desirable visual environment and, therefore, satisfies two purposes of zoning set forth in N.J.S.A. 40:55D-2a and 40:55D-2l. The accessory structure and addition will enable the Applicant to maintain a neat and orderly property so that items such as vehicles, equipment, tools and the like are stored inside the structure and not in the yard. Maintaining a neat and visually attractive property promotes the general welfare of the community and promotes a desirable visual environment in the area of the Property, as well as the community at large; and
3. The site is particularly suitable for the proposed use. The site contains 1.79 acres and has sufficient space to accommodate the accessory structure. The aerial photograph submitted by Plaintiffs and the photos submitted by the Applicants demonstrate that the accessory structure is surrounded on three sides by a natural barrier of trees and is placed and constructed in a visually attractive manner. The site already contains a residential structure and, therefore, the addition of an accessory garage is

a natural and expected improvement to the Property. Moreover, the surrounding parcels and those across from the Property contain a mix of residential and commercial uses, as well as undeveloped land. The parcel immediately to the south of the Property contains an advertising billboard. Taking these neighboring uses into consideration, the site is particularly suitable for the proposed accessory structure; and

4. The proposed use also satisfies the negative criteria of the Municipal Land Use Law. The variance can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zoning plan and the zoning ordinance; and
5. The focus of the “substantial detriment” prong of the negative criteria is on the impact of the variance on nearby properties. The Zoning Board found that there is no “substantial detriment” on nearby properties. As depicted in the Plaintiff’s own exhibit, the accessory structure is at least 300 feet from the Plaintiff’s residence, which contradicts the Plaintiff’s testimony. There is a large natural barrier of trees between the accessory structure and the plaintiffs’ residence. The accessory structure is placed and constructed in a visually attractive manner as depicted in the photographs. The property already contains a residential structure and, therefore, the addition of an accessory garage is a natural and expected improvement to the property. Moreover, the surrounding parcels and those across from the property contain a mix of residential and commercial uses, as well as undeveloped land. The parcel immediately to the south of the property contains an advertising billboard. Taking these neighboring uses into consideration, the accessory structure does not

present a “substantial detriment” to the neighboring properties; and

6. The Zoning Board also found that the proposed use will not impair the intent and purpose of the zoning plan and the zoning ordinance. As noted in the Board Planner’s report, the property is currently zoned Rural Development—Commercial, which could allow even more intensive uses at the Property, such as retail sales and services. The property already contains a residential structure and, therefore, the addition of an accessory garage is a natural and expected improvement to the property. Moreover, the surrounding parcels and those across from the property contain a mix of residential and commercial uses, as well as undeveloped land. The parcel immediately to the south of the property contains an advertising billboard. These existing conditions were taken into account when the zoning plan and zoning ordinance were adopted. Indeed, as stated in Township Code §175-160:

Rural Development Zoning Districts

A. Purpose.

(1) The rural development zoning district is transitional in nature. It is fragmented by existing development and agricultural uses. The area is relatively open in nature and is, thus, important from a cultural, visual and ecological standpoint. The intention of the Zoning Plan and Ordinance is to both maintain, where practical, the existing character of the district and preserve it as land reservoirs for future community development. The uses in this district are controlled essentially by the Township so long as they have only a moderate impact. (emphasis added).

(Pa 94-96)

Thus, the Board made a detailed findings of fact to lead to its legal conclusion that the Applicants properly satisfied their necessary burdens. The Resolution relies on reliable and component evidence to make its determination. For example, the Board heard plaintiff's objections regarding Notice and ruled that Notice was proper and expressed common sense description of relief. (Pa 31). Applicant, Ms. Tomarchio, was duly sworn and plaintiff's had the full right to cross examine her. (Pa 43) Appellants even had a full opportunity to object to the application and bring his own expert witness to support his objection. (Pa 43-44) They properly reviewed the evidence and came to the correct conclusion under the law. Appellants' disagreement with the interpretation of the law is insufficient to warrant relief from the court.

Moreover, Appellants' response asserted that the Board was forbidden from rejecting Appellants' expert testimony of Kevin Dixon. However, this is simply not true under the precedent. The Zoning Board is not bound to accept the testimony of any expert. See Klug v. Bridgewater Planning Bd., 407 N.J. Super. 1, 13 (App. Div. 2009) ("[w]e emphasize that a planning board is not required to accept the testimony of an expert"); Clifton City BOE v. Clifton City Zoning Bd. of Adjustment, 409 N.J. Super. 389, 434 (App. Div. 2009); Cox & Koenig, New Jersey Zoning & Land Use Administration §18-4.3 (Gann). An expert's opinion need not

automatically be disputed by another expert if the proposed expert fails to give a probative opinion to the Board. Here, the Board found Dixon's testimony offered nothing to the Board's analysis because he failed to support his claims regarding flooding and/or destruction of trees. Without a proper foundation for these statements, the Board need not rely on expert testimony alone. (Pa 48)

CONCLUSION

The Appellate Court must affirm the decision of the Trial Court affirming the Zoning Board and dismiss plaintiff's claim with prejudice. The Board's memorializing resolution contains all necessary findings of fact and conclusions to support the Board's decision. The Board did not act arbitrary, capriciously or unreasonably and therefore, the decision of the Zoning Board must be upheld and affirmed.

PARKER McCAY P.A.
Attorneys for Defendants
Daniel and Linda Tomarchio

By: /s/Michael W. Herbert, Esq.
MICHAEL W. HERBERT

Dated: July 26, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000737-23T2

John Valentine and
Valentines Farm LLC,

CIVIL ACTION

Plaintiffs-Appellants,

ON APPEAL FROM

v.

SUPERIOR COURT,
LAW DIVISION
GLOUCESTER COUNTY

ZONING BOARD OF THE TOWNSHIP
OF MONROE, DANIEL TOMARCHIO,
LINDA TOMARCHIO, JOHN DOE,
JANE DOE, ABC CORPORATIONS,
XYZ LLC AND JOE SMITH
PARTNERSHIPS,

Honorable Benjamin C. Telsey,
A.J.S.C.

Defendants-Respondents.

Sat below

REPLY BRIEF FOR
APPELLANT JOHN VALENTINE AND VALENTINES FARM, LLC

ANDREW J. KARCICH ID
014431976 ATTORNEY
FOR APPELLANT JOHN
VALENTINE AND
VALENTINES FARM LLC
1000 WHITE HORSE RD
SUITE 703
VOORHEES, NJ 08043
(856) 309-0200
akarcich@lkylaw.com

Submitted: September 6, 2024

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AMENDED PROCEDURAL HISTORY

On August 18, 2022, the Zoning Board of Monroe Township heard the Application of the Defendants, Daniel Tomarchio and Linda Tomarchio (the “Tomarchios”), in which they requested a “use variance” to allow an existing accessory structure to be larger than the principal use on their property. (Pa1-22). Plaintiffs, John Valentine and Valentine’s Farm, LLC (jointly the “Valentines”) objected on several grounds during the Zoning hearing. Notwithstanding the objections of the Valentines, The Board granted the Tomarchios’ Application and issued a Resolution of approval for the variance on October 20, 2022. (Pa87-97).¹ In the hearing of October 20, 2022 none of the Zoning Board Members acknowledged on the record that they had received the proposed resolution, had reviewed it and after having reviewed it agreed with its findings and conclusions. Pa40 2T6:5 to 2T7:3. On November 22, 2022², the Valentines filed a Complaint in Lieu of Prerogative Writs (the “Complaint”) in the Superior Court of New Jersey, Law Division, Gloucester County, Docket No. GLO-L-1259-22 against the Board and the Tomarchios. (Pa131-144). The Board and the Tomarchios filed Answers on December 27, 2022 and December 28, 2022. (Pa145-157 and Pa. 158-166). On July 24, 2023, the Plaintiffs filed their Trial Brief. The Defendants filed their briefs on August 7, 2023 and August 8, 2023. On October 2, 2023, the Trial Court heard

¹ Plaintiffs’-Appellants’ Appendix is cited as “Pa”.

² Plaintiffs’_Appellants’ Brief of May 15, 2024 mistakenly used June 30, 2023 as the filing date.

argument from the parties. On that same date, the Trial Court granted summary judgment in favor of the Defendants and dismissed all counts of the Complaint. (Pa166-167). The Valentines filed the instant appeal on November 9, 2023. (Pa. 168-182).

SUPPLEMENTAL STATEMENT OF FACTS

For the sake of brevity the Plaintiffs incorporate by reference the Statement of Facts as submitted in their Brief of May 15, 2024 except as set out below:

Defendant Zoning Board's Brief contains the following recitation, "No extra grading was done." On cross-examination Defendant Linda Tomarchio was forced to admit that the "driveway" was extended in connection with the addition of the 24' by 40' garage. (Pa.52-54, T15-17). A side by side review of the 2007 aerial photos of the Property and the 2020 aerial photos of the Property, marked as "Objectors 1" during the Hearing, clearly shows that extensive grading has been performed since the Tomarchios constructed the garage. (Pa35). Thus, Ms. Tomarchio's testimony at the Hearing was less than candid and the 2022 Zoning Application was deceptive as to the extent of grading done at the Property.

However, the transcript is clear that extensive grading had been done on the Property. (Pa52-54, 1T15:17)

Having approved the Application by vote on August 22, 2022, the Board met again on October 20, 2022 for the purposes of adopting a Resolution of Approval. (Pa86-96). At the October 20, 2022 meeting the Board Solicitor presented his overview of the record allegedly created at the August Hearing. The

resolution itself was not read into the record, but the Solicitor summarized it for the Board Members. There is nothing in the record of the October 20, 2022 meeting to reflect that any of the Board members actually read the Resolution that they voted on and approved for adoption. In the hearing of October 20, 2022 none of the Zoning Board Members acknowledged on the record that they had received the proposed resolution, had reviewed it and after having reviewed it, agreed with its findings and conclusions 2T6:5 to 2T7:3. Some of the Board Members voted “Yes, for the reasons stated by the Solicitor.” Pa40. From the record of the approval a fair reading of the transcript leads to the conclusion that the Board Members did not in fact read the proposed resolution.

The Brief of the Zoning Board Defendant makes a statement not supported by any part of the record, “The Resolution was provided to the Zoning Board in advance of the meeting at which was adopted. Each of the Zoning Board members adopted the findings of fact and conclusions of law as the basis for his decision.” Zoning Board Defendant’s Brief D12. The transcript contains nothing to support this baseless allegation and in fact the transcript has no reference to the statement in the aforesaid brief.

ARGUMENT

I. THE TOMARCHIOS’ NOTICE OF HEARING WAS DEFECTIVE UNDER NEW JERSEY’S MUNICIPAL LAND USE LAW AND DEPRIVED THE BOARD OF JURISDICTION TO HEAR THE 2022 ZONING APPLICATION Pa32

While the Respondents argue vociferously that the Tormarchio's notice of the Zoning Board hearing ("Notice") was proper in all respects they fail to articulate how the Notice actually meets the standards of the Municipal Land Use Law ("MLUL") N.J.S.A. 40:55D-1 to -99. Specifically, N.J.S.A. 40:55D-11 provides:

Notices . . . shall state [1] the date, time and place of the hearing, [2] the nature of the matters to be considered and, in the case of notices pursuant to subsection 7.1 of this [A]ct, [3] an identification of the property proposed for development by street address, if any, or by reference to lot and block numbers as shown on the current tax duplicate in the municipal tax assessor's office, and [4] the location and times at which any maps and documents for which approval is sought are available pursuant to subsection 6b.

The Plaintiffs acknowledge that the Notice in question meets the requirements of N.J.S.A. 40:55D-11 as it provided: (1) the date, time and place of the hearing; (3) identification of the property by street address or lot and block number; and (4) location and times at which any maps and documents concerning the application are available. What the Notice lacks is the specificity required in N.J.S.A. 40:55D-11 (2) "the nature of the matters considered." The actual Notice was in fact overly general and by being overly general it was in fact misleading. *Rockaway Shoprite Assocs., Inc. v. City of Linden*, 424 N.J. Super. 337, 347 (App. Div. 2011) (quoting *101A C.J.S.*

Zoning & Land Planning 6 (1979)), certif. denied, 209 N.J. 233 (2012).

The Notice simply states,

The applicant is seeking a use variance to allow an accessory structure larger than the principle [sic] use on the property, along with any other variances deemed necessary by the Board. The accessory structure is approximately 2160 square feet and the principle [sic] structure is approximately 1152 square feet. Pa32

The Notice fails to specify what kind of “accessory structure” the Applicant proposes nor what the accessory structure is to be used for. It further fails to identify the actual use of the “principal structure.” While the applicant was seeking approval of a structure which was almost double the size of the principal structure, it failed to inform the citizenry of the Township what was the use intended by the proposed variance and structure. From the hearing transcript it appears that the Applicant was seeking approval for a garage, but the term “garage” appears nowhere in the Notice. [1T7:20] The “principal structure” was a single family residence, but the term “residence” appears nowhere in the Notice. The use of the principal structure in the matter before the Court is critical as the current use of the Property is a nonconforming use. The zone in question is the Rural Development Zoning District in which residences of any kind are not allowed. Pa 37. Yet the public was deprived of any information except the size of the accessory and principal structures, as none of that information is contained in the Notice. For all

intents and purposes the principal structure could have been a refinery and the accessory structure a gasoline storage tank. How were the citizens of the Township to know otherwise based on the Notice given? *Northgate Condo. Ass'n v. Borough of Hillsdale Planning Bd.*, 214 N.J. 120, 139-40 (2013). The notice **must** give “an accurate description of what the property will be used for under the application.” *Northgate Condo. Ass'n v. Borough of Hillsdale Planning Bd.*, 214 N.J. 120, 139-40 (2013)(quoting *Perlmart of Lacey, Inc. v. Lacey Twp. Planning Bd.*, 295 N.J. Super. 234, 238 (App. Div. 1996)). The word “use” never appears in the Notice. The term “garage” never appears in the Notice.

The Notice also make reference to an “existing accessory structure larger than the principal use on their property.” Pa31 and 32. This statement certainly implies that the “existing structure” was previously approved by the Township, when in fact it had not. The Notices do not tell the public what the nature and use of the “existing structure” is or what it will be used for. The Notices do not provide any such information.

The Respondents make an argument which is a non sequitur as it applies to the defective notice in the matter before this Court.

Whether the application and corresponding notice were expressed in terms of an expansion of a preexisting nonconforming use, or a new, non-allowed use, is immaterial to the adequacy of the notice. The burden of proving the positive and negative criteria of the Municipal Land Use Law, N.J.S.A. 40:55D-70d, remains

the same. *Cox & Koenig, New Jersey Zoning and Land Use Administration* (Gann), §33-2.1. Defendant Zoning Board's Brief p. 17

The burden of proof at the zoning board hearing has absolutely nothing to do with the required notice to the public under the M.L.U.L. The public was entitled to know what the current use was and what the intended use of the “accessory structure” was going to be and that a nonconforming use was going to be significantly expanded. That the current use of the Property was nonconforming should be a fact made known to the public as part of the Notice. The issue of the burden of proof has no application to the required notice under N.J.S.A. 40:55D-11. The Zoning Board seeks to have this Court wander down a dead-end path with its pretzel logic.

Appropriate public notice is a jurisdictional requirement. *Twp. Of Stafford v. Stafford Twp. Zoning Bd. Of Adjustment*, 154 N.J. 62, 79 (1998); *Oliva v. City of Garfield*, 1 N.J. 184, 190 (1948). Unless proper notice is given the Board does not have jurisdiction to hear the Application. *Twp. Of Stafford v. Stafford Twp. Zoning Bd. Of Adjustment*, supra at 78. Without proper notice the Board's decision can have no effect.

The Notice being defective, the Board's approval of the Tomarchios' “use variance” is null and void for want of jurisdiction.

II. THE BOARD'S GRANT OF THE 2022 ZONING APPLICATION IS SUBSTANTIALLY IN CONFLICT WITH AND DEVIATES FROM THE MONROE TOWNSHIP MASTER PLAN Pa33

The Board's approval of the 2022 Zoning Application with its variances, flies in the face of the purported goals, objectives and concerns set forth in the 2004 Township Master Plan and substantially impairs the intent and purpose of that plan. The grant of the multiple variances must be voided as improperly granted.

The Defendant Zoning Board argues that the Property, being a nonconforming use, "already contains a residential structure and, therefore, the addition of an accessory garage is a natural and expected improvement to the Property." Defendant Zoning Board's Brief pp 21-2. As a nonconforming use any addition or expansion of the use flies in the face of the Master Plan. The expansion of a non-conforming use is less favored than the grant of a use variance. Because of their incompatibility with the "objectives of uniform zoning, the courts have required that consistent with the property rights of those affected and with substantial justice, they should be reduced to conformity as quickly as is compatible with justice." *Town of Belleville v. Parrillo's, Inc.*, 83 N.J. 309, 315 (1980). Expansion of the nonconforming use is not favored. *Urban v. Planning Bd.*, 124 N.J. 651 (1991); Accord, *Scully-Bozarth Post v. Burlington Planning Bd.*,

362 N.J. Super. 296, 315 (App. Div.), certif. den. 178 N.J. 34 (2003); *Conselice v. Borough of Seaside*, 358 N.J. Super. 327, 333 (App. Div. 2003); *Bonaventure Int'l v. Spring Lake*, 350 N.J. Super. 420, 432 (App. Div. 2002). Thus, not only is it the stated policy of the courts of this state that nonconforming uses should not be expanded, such uses should, in fact, be limited or extinguished quickly.

Also, the Defendant Zoning Board makes reference to the fact that there is a billboard on an adjacent property. However, what the impact of the billboard has as to whether the grant of the variance has on the Master Plan is lost on counsel for the Plaintiffs.

The Master Plan for the Rural Development Zoning District seeks to protect the open nature of the zone. “The intention of the Zoning Plan and Ordinance is to both maintain, where practical, the existing character of the district and preserve it as land reservoirs for future community development.” Da27 to Da31. By allowing the garage by variance the Zoning Board violates the intent of the Master Plan in several ways. It reduces the area for agricultural uses in the zone, reduces the open nature of the zone and reduces the acreage for use as a reservoir for future community development. The addition of the structure on the Tormarchio’s property expands the residential character of the Property and decreases the available land for conforming uses.

In its Master Plan, the Township sent a signal to the public, its professionals and boards indicating that, *inter alia*, that Planning must be comprehensive in nature and coordinated, while ensuring that new development is compatible with existing development without degrading the Township's cultural and natural resources. In granting the Application the Board abandoned any attempt to comply with these goals and standards.

**III. THE ZONING BOARD'S RESOLUTION
WAS NOT PROPERLY ADOPTED Pa40-
Pa50, 2T3:8 to 2T7:2**

After the Zoning Board met to hear the Application and voted to approve the "use variance" it met again on October 22, 2022 to adopt a resolution of approval ("Resolution"). At the October meeting the Zoning Board Solicitor apparently had prepared a resolution for the Zoning Board. The Solicitor summarized the Resolution for the Zoning Board Members. Without deliberation or discussion the Zoning Board Members then adopted the Resolution of approval.

However, the procedure of adopting the resolution was defective. As set forth in the Zoning Board's brief, "The Zoning Board's Solicitor gave an oral presentation of the draft Resolution at the October 20, 2022, and the Zoning Board was satisfied with its contents and voted for approval of the Resolution and the use variance based on the findings and conclusions set forth in the Resolution. (2T3:8 to 2T7:2; Pa40 to Pa50)." Defendant Zoning Board's Brief p 27. There was a

critical missing element in the procedure used to adopt the Resolution. There is nothing in the record of the October 20, 2022 hearing which documented the following:

1. That all of the Zoning Board Members had the proposed resolution to review before the meeting;
2. That all of the Zoning Board Members had read the proposed Resolution; and
3. That the proposed resolution accurately reflected the testimony, findings of fact and conclusions of law.

At a minimum the members of the Zoning Board should have acknowledged reading and approving the Resolution as drafted. We do not believe that the Legislature asks too much of municipal governing bodies when it insists upon a review of a planning board's report. In an analogous situation, where planning board members voted on an application for development without discussion, we held that a verbal discussion in that circumstance is not mandatory, **as long as the ultimate resolution, which will serve as the official statement of the planning board's findings and conclusions is "furnished to the board members in advance of the time they will vote, to provide them ample time to study it and, if they deem it appropriate, request clarifications or modifications."** *Scully-Bozarth Post #1817 of Veterans of Foreign Wars of U.S. v. Planning Bd. of Burlington*, 362 N.J. Super. 296, 312, (App. Div.), *certif. denied*, 178 N.J. 34, (2003). We further implied that members should acknowledge "on the record that they read it, understood it, and agreed with it as drafted." *Id.* at 313. Emphasis added.

The Zoning Board failed to meet the "minimum" standard required of *Scully-Bozarth* cited by the Respondents as being controlling for the adoption of the resolution of approval. In this matter.

CONCLUSION

Plaintiffs-Appellants therefore respectfully request that this Court reverse the trial court's order granting summary judgment to Defendants-Respondents, and hold that the Board did not have jurisdiction to hear the 2022 Zoning Application, that the 2022 Zoning Application was in conflict with the Master Plan, and that the Resolution of Approval was improperly adopted.

THE LAW OFFICES OF
ANDREW J. KARCICH, LLC.

BY: /s/ Andrew J. Karcich
For Andrew J. Karcich

Dated: September 6, 2024