

<p>MRP INDUSTRIAL NE, LLC;</p> <p style="text-align: center;">Appellant,</p> <p style="text-align: center;">v.</p> <p>THE LAND DEVELOPMENT BOARD OF THE TOWNSHIP OF WESTAMPTON,</p> <p style="text-align: center;">Respondent.</p>	<p>SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION</p> <p>Docket No.: A- 1517-22</p> <p>On Appeal From: SUPERIOR COURT OF NEW JERSEY CIVIL DIVISION, BURLINGTON COUNTY</p> <p>Docket No.: BUR-L-1240-22</p> <p>Sat Below: Hon. Jeanne T. Covert, A.J.S.C</p>
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BRIEF OF APPELLANT, MRP INDUSTRIAL NE, LLC

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Dated: December 5, 2023

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TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

1. Westampton Township Land Development Board Resolution 11-2022, Memorialized on May 4, 2022. (Pa187-Pa190).
2. Superior Court of New Jersey, Law Division, Burlington County Order Denying In Part Plaintiff's Action in Lieu of Prerogative Writs, entered on December 8, 2022. (Pa367-Pa368).

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PRELIMINARY STATEMENT

Appellant MRP Industrial NE, LLC (“MRP”) submitted an application to Respondent the Land Development Board (“Board” or “Planning Board”) in its capacity as a planning board, seeking Preliminary and Final Site Plan Approval (“Application”) to construct two industrial warehouse/distribution buildings on the Pew Farm in Westampton Township’s Industrial Zone (“I-Zone”). After thorough review, the Application was found administratively complete, and four public hearings were held on August 4, 2021, September 1, 2021, December 1, 2021 and April 6, 2022. Opposition raised during these meeting was largely focused on possible traffic congestion, all of which were addressed and resolved by applicable traffic engineering experts. The majority of the other objectors simply opposed the warehouse development despite the fact the Property was expressly zoned for that use.

Almost one year after the Application was submitted, counsel for objectors interjected a suggestion, challenging the Board’s jurisdiction. However, at no time during its review of the Application or its public hearings had Board professionals or Board counsel raised a question regarding the Board’s jurisdiction. In part, this likely resulted because Westampton Ordinances make clear the Board, sitting as a planning board, has jurisdiction to consider an application such as the one in the instant matter noting a use variance is not required under the plain language of the

Ordinances. Nevertheless, on April 6, 2022, the Board issued a Resolution that denied the Application, including a statement that it lacked jurisdiction to consider the substance of the Application.

The trial court's review of MRP's complaint for an action in lieu of prerogative writs challenging the Board's arbitrary and erroneous Resolution was erroneous. Without analysis of the applicable ordinances obviating the need for any use variance, the trial court erred by merely concluding that the Board could not grant use variances, and remanded the matter to the Zoning Board to determine whether a use variance was necessary and if so, whether that use variance should be granted.

For the reasons set forth herein, this Court is requested to reverse the trial court's December 8, 2022 Order. Further, the Court should direct the matter be remanded to the Board sitting as a planning board, for the adoption of a resolution approving the requested Application for Preliminary and Final Site Plan approval on the existing record, with customary and reasonable conditions of approval.

PROCEDURAL HISTORY

On August 4, 2021, September 1, 2021, December 1, 2021 and April 6, 2022, the Board held properly noticed public hearings for the Application seeking Preliminary and Final Site Plan Approval. (1T, 2T, 3T, 4T)¹. At its April 6, 2022

¹ The following references will be used throughout the brief:

meeting, the Board voted to deny the Application. (4T). On May 4, 2022, the Board adopted a Resolution of Approval memorializing the denial of the Application (“Resolution”). (Pa187-190). On July 5, 2022, Plaintiffs MRP Industrial NE, LLC and the Pew Family Plaintiffs filed an action in lieu of prerogative writs challenging the Board’s decision to deny the Application. (Pa328-346). On August 22, 2022, Defendant filed an answer to the complaint. (Pa347-366).

Following briefing and argument, the Superior Court Burlington County Law Division entered a December 8, 2022 Order Denying in Part the Relief Requested in Plaintiffs’ complaint. (Pa367-368). On January 23, 2023, Plaintiff MRP filed the instant appeal. (Pa369-383).

STATEMENT OF FACTS

Plaintiff MRP is the contract purchaser of real property located at 465 Woodlane Road, known as Lot 12 of Block 804 on the official tax map of Westampton Township, Burlington County (the “Property” or the “Pew Farm”). (Pa329). Colby M. Pew, Trustee Of The Remainder Trust UWO Barbara E. Pew; John S. Pew, III And Harold M. Pew, Co-Executors Of The Estate Of John Pew, Jr,

“1T” shall refer to the August 4, 2021 Westampton Land Development Board Hearing.
“2T” shall refer to the September 1, 2021 Westampton Land Development Board Hearing.
“3T” shall refer to the December 1, 2021 Westampton Land Development Board Hearing.
“4T” shall refer to the April 6, 2022 Westampton Land Development Board Hearing.
“5T” shall refer to the Transcript of Prerogative Writs Oral Argument held on December 8, 2022.

And Co-Trustees Of The John Pew, Jr., Revocable Trust Dated February 1, 2013 (collectively, “The Pew Family Plaintiffs”) are the current owners of the Property. (Pa329). The Property is a 44.2 acre parcel located east of Irick Road and the New Jersey Turnpike, with frontage on Irick Road (County Route 637), Woodlane Road (County Route 630) and the New Jersey Turnpike. (Pa329; Pa191-199; Pa231-244). It is located in Westampton Township’s I-Industrial Zone District (“I-Zone”). (Pa329; Pa191-199; Pa231-244). There are presently two principal uses of the Property: agriculture and a cellular communications tower (“Cell Tower”). (Pa231-244). The agricultural use is permitted in the I-Zone and occupies nearly the entire 44.2+/- acre Property. The Cell Tower occupies 900 square feet, less than 0.1% of the 1,925,325 total square feet of the Property. (Pa138; Pa139-185; Pa186).

The Cell Tower was approved by the Westampton Township Zoning Board of Adjustment by way of a Resolution of Approval dated December 16, 1997 that granted use and height variances pursuant to N.J.S.A. 40:55D-70(d), and site plan approval pursuant to the Zoning Board’s ancillary jurisdiction under N.J.S.A. 40:55D-76(2)(b). (Pa280-282). Upon its grant of variance and site plan approvals for the Cell Tower in 1997, the Zoning Board’s jurisdiction over the Property concluded.

On or about February 17, 2021, MRP filed the present Application before the Land Development Board, a combined planning and zoning board, requesting preliminary and final site plan approval with bulk variances to construct on the Property two industrial warehouse/distribution buildings totaling approximately 520,320 square feet, and associated site improvements. (Pa134-137). The proposed warehouse/distribution use is permitted as a principal use on the Property as of right pursuant to Westampton Ordinance Section 250-20A, which sets forth the permitted principal uses in the I-Zone. (Pa55-57). The Application only sought customarily granted bulk variance approvals for, among other things, the height and orientation of the buildings. (Pa134-137). Specifically, the Application sought building heights of 47 and 48 ft., where 45 ft. is permitted, so as to allow a parapet which would screen from view the rooftop equipment on the southerly building, and to orient the southerly building loading area in the “front” yard along Irick Road instead of in the rear yard adjacent to the Burlington County Special Services School, as required by relevant ordinances. (1T 110-16 to 1T 110-23; Pa134-137; Pa139-185). This building orientation was proposed by MRP after pre-application consultations with Board professionals. (1T136). The requested variances are bulk or “c” variances, cognizable under N.J.S.A. 40:55D-70(c), which are within the jurisdiction of the Land Development Board sitting as a planning board to hear MRP’s site plan Application.

The Application proposes to replace the existing permitted agricultural use with a permitted warehouse/distribution use that would not involve any changes to the 900 square foot ground lease area of the Cell Tower, any co-location of additional antennae on the Cell Tower or changes to any existing site improvements related to the Cell Tower, including access, easements, drainage and utilities. The location and extent of the existing Cell Tower and its associated existing site improvements at all times have been shown on the survey and site development plans submitted to the Board. (Pa138; Pa139-185; Pa186). (Showing the Cell Tower is depicted on 33 sheets of the 47- sheet plan set, including the site survey, and every other site plan drawing that shows the Property in the vicinity of the Cell Tower.)

The Application was found to be administratively complete, and the Board found that they were configured appropriately as a Planning Board to hear the Application. Properly noticed public hearings on the Application were held on August 4, 2021, September 1, 2021, December 1, 2021 and April 6, 2022. (1T, 2T, 3T, 4T). In the course of these lengthy hearings, testimony from MRP's witnesses and expert professionals demonstrated compliance of the proposed development with applicable bulk and area standards, except those concerning, among other things, the requested bulk variances for building orientation and height. (1T, 2T, 3T, 4T). Further lay and expert testimony was presented by MRP's witnesses and

professionals verifying that the requested bulk variances would provide a better zoning alternative than routine application of the standards from which the bulk variances were sought, and that the requested bulk variances could be granted without substantial detriment to the public good or substantial impairment of the zone plan and zoning ordinance, thus satisfying the proofs of the Municipal Land Use Law. (1T, 2T, 3T, 4T). During the public hearings, the Board also received and discussed the professional review letters of its Planner and Engineer, and heard testimony and arguments from the public, individually and by way of counsel. (Pa191-199; Pa200-209; Pa210-219; Pa220-230; Pa231-244).

Public opposition to the proposed development emerged in the course of the virtual public hearings that challenged the nature of the proposed development even though the Property has been zoned as Industrial for several decades. (3T) Importantly, Westampton's I-Zone District has always allowed warehouse/distribution uses on the Property, and the proposed development is in substantial compliance with applicable bulk and area standards. More specific public and Board member concerns almost exclusively regarded traffic or issues outside the jurisdiction of the Board, such as the potential impact of the proposed development on the adjoining Burlington County roads and intersections, notwithstanding the acknowledgement of Board professionals of the exclusive jurisdiction of Burlington County over those roads and intersections.

No questions arose concerning whether review of the Application for the proposed development was within the jurisdiction of the Board. At the December 1, 2021 hearing, by which time the Application had been before the Board for almost ten months, the Board reviewed technical review letters prepared by the Board Planner and Engineer which asserted the proposed industrial warehouse use is permitted as of right. The Board professionals raised no concerns related to the continued cell tower use; rather their comments focused exclusively on compliance with site plan ordinance design standards and bulk standards of the proposed development. (3T). Further, MRP had submitted revised plans and supporting submissions to address all site design concerns raised by the Board professionals' initial review letters. (1T, 2T, 3T, 4T). MRP's site engineer, Chris Roche, highlighted the location of the Cell Tower in his introductory site orientation testimony at the beginning of the first substantive hearing on the Application on August 4, 2021. (1T 108-11 to 1T 108-15).

At the December 1, 2021 hearing, for the first time, a lawyer for the objectors suggested that because there is a Cell Tower located on the Property, use variance relief pursuant to N.J.S.A. 40:55D-70(d)1 was necessary to allow the second principal use of proposed warehouses. (3T). The objectors' counsel further insisted that because use variances are exclusively within the jurisdiction of

zoning boards of adjustment, the Board, constituted as it was in the form of a planning board, lacked jurisdiction to hear and decide the Application. (3T).

Following the December 1, 2021 hearing, the Board received a memorandum setting forth the analysis and opinion of MRP's Planner, Gregg Woodruff PP, AICP, LEED-AP BD+C, concerning the permitted nature of multiple principal uses (including the proposed warehouse along with the existing Cell Tower) on the Property consistent with Township Ordinances. (Pa231-244). Other submissions from counsel for the objectors, counsel for MRP, counsel for the Pew Family and counsel for the Board also analyzed the issue of multiple uses on properties in the Industrial Zone, including the Township's own municipal property which includes multiple uses and a cellular communications tower. (Pa231-244; Pa245-252; Pa253-256; PA257-258; Pa259-260; Pa261-327). None of the Board's professionals or its counsel raised jurisdictional concerns or suggested the Board could not proceed or advised relief was necessary other than site plan review and associated bulk variances. In December of 2021, almost one year after the Application had been filed with the Board, mention of the jurisdictional challenge emerged. (3T).

During the April 6, 2022 meeting, the Board arbitrarily voted to deny the Application stating the supposed need for use variance relief resulted in the Board's purported lack of jurisdiction. (4T). However, by way of its Resolution

11-2022, dated May 4, 2022, the Board actually proceeded to act and denied the Application. (Pa187-190).

MRP sought review by filing an action in lieu of prerogative writs. (Pa328-346). The Law Division judge concluded the Board's action of denying the Application was improper. Further, without review or discussion of the cited Ordinances allowing the Board's consideration of the Application for the as of right warehouse development without disturbing the existing Cell Tower, the judge ordered the matter remanded to the Zoning Board for determination of the need for a use variance. (Pa367-368, 5T). MRP appeals from the court's December 8, 2022 order, which it maintains is legally incorrect.

LEGAL ARGUMENT

The trial court's decision should be reversed, and the matter remanded to the Planning Board, because the trial court erroneously concluded a use variance was required, which the Planning Board lacked jurisdiction to grant, and thus, the Planning Board could not proceed with site plan approval. In reaching this conclusion, the court overlooked the unrefuted facts that: two principal uses currently existed on the Property; that the proposed development sought to continue the cell tower use that was already permitted and along with a by right principal use as, set forth in Plaintiff's site plan; and that two principle uses are specifically permitted on the Property by Westampton Ordinances §250-4, §250-

20. Considering these facts shows the Planning Board has jurisdiction as authorized by the Ordinances and the Municipal Land Use Law (“MLUL”) to consider and grant site plan approval of the unified and comprehensive two principal uses on the industrially zoned lot as set forth in Plaintiff’s Application without need of a use variance.

I. Standard of Review

When considering an appeal from an action taken by a planning board, courts will employ an arbitrary, capricious, or unreasonable standard of review. *Fallone Properties, LLC v. Bethlehem Twp. Planning Bd.*, 369 N.J. Super. 552, 560 (App. Div. 2004). In other words, “[t]he factual determinations of the planning board are presumed to be valid and the exercise of its discretionary authority based on such determinations will not be overturned unless arbitrary, capricious or unreasonable.” *Ibid.* However, “a court is not bound by an agency’s determination on a question of law, and the court’s construction of an ordinance under review is de novo.” *Id.* at 561 (internal citations omitted). Therefore, courts review de novo planning board decisions concerning questions of law, which includes questions regarding the scope of a planning board’s own authority or jurisdiction.

II. The Trial Court Erred In Concluding That Zoning Board Interpretation Was Necessary In This Case. (5T 27-24 to 28-2).

The trial court erroneously found that Zoning Board interpretation was necessary to determine whether a use variance was a prerequisite to site plan approval. Although Plaintiff's site plan application proposes two principal uses on the Property, a use variance is not necessary because of the plain language of applicable Ordinances. Therefore, the trial court's remand to the Zoning Board to determine whether a use variance is necessary is error and must be reversed.

Westampton Township Ordinance §250-4, allows mixed use of more than once principal commercial or industrial use on property in the Industrial Zone. (Pa3-13). As a preliminary matter, this is demonstrated by the facts that two principal uses have already been permitted on the Property since 1997. (Pa280-282). Plaintiff's site plan application merely proposes to maintain the existing cell tower use without any change to the use or physical changes to the leased area or equipment, then replace the current permitted agricultural use with a permitted, as-of-right industrial use. Possibly to thwart the allowed development, the Board erroneously concluded the existence of the Cell Tower on the Property obligated MRP to obtain a use variance pursuant to N.J.S.A. 40:55D-70(d)(1) to allow the proposed second principal use of the warehouses to replace the existing permitted principal use. Imposing the need for a use variance allowed the Board to interpose a suggestion it lacked jurisdiction to proceed to review the site plan application.

In raising this jurisdictional issue, the Board cited Westampton Township Ordinance Section 250-22.1 which permits multiple uses on commercial and industrial sites where “all buildings are designed as [sic] united and comprehensive plan in accordance with applicable zoning standards[,]” and the Board’s determination “that the uses proposed by the Applicant are unrelated uses to occupy the same site as distinct and separate uses that happen to occupy the same property.” (Pa96-98; Pa187-190). The ordinance language cited by the Board as the basis for its decision requires that all buildings be designed as a united and comprehensive plan in order for multiple uses to be permissible on a single lot, but the cited ordinance language does not discuss any required relationship between different uses or structures other than buildings. The Board and its professionals never had any questions or made any recommendations about site plan revisions with respect to how to make the site plan more united and comprehensive. Further, the Board made no specific factual findings in Resolution 11-2022 concerning how the proposed warehouse buildings and existing Cell Tower structure were not part of a united and comprehensive plan. (Pa187-190).

Indeed, Plaintiff’s Application is not a new request to allow multiple uses on the Property. There have been two principal uses in existence on the Property since 1997. The Application merely proposes to replace the permitted agricultural with a permitted as-of-right industrial use in the Industrial Zone. No changes are

proposed related to the cell tower use. Importantly, the applicable Ordinance allows two principal uses on the Property so long as they are part of a united and comprehensive site plan, facts clearly detailed on the site plans for the Application.

The plain language of Westampton Township Ordinance § 250-4, defines “principal use,” and allows mixed use of more than one principal commercial or industrial use if the Planning Board finds that the uses are “part of a single site plan,” which Plaintiff properly demonstrated in its site plan. More specifically, Westampton Township Ordinance defines “principal use” as follows:

A use which is the main or principal use of the lot; it is the lot’s first, chief or most important use. While commercial or industrial developments and multifamily housing developments may have more than one principal building per lot, they may have only one principal use; however, mixed uses of more than one principal commercial or industrial use may be located on one lot if the Planning Board finds that the uses are part of a single site plan, with cross easements for utilities and stormwater management, and access, ingress and egress utilizing shared, common driveways.

[Westampton Township Ordinance § 250-4 (emphasis added) (Pa3-13).]

Thus, although industrial developments may have only one principal use, mixed uses of more than one principal commercial or industrial use are permitted, as long as the Planning Board finds that the uses are part of a single site plan, as is the case with this Application.

Here, the trial court erred by also failing to examine the Planning Board's refusal to consider the as-of-right warehouse use, with the previously approved cell tower use, as permitted multiple principle uses on the Industrial Zone lot in accordance with Ordinance § 250-4. (Pa3-13). Not only do the proposed principal uses qualify as "mixed uses of more than one principal commercial or industrial use," but the Plaintiff's proposed Application also demonstrates that the two principal uses were part of a "single site plan" in accordance with Ordinance § 250-4. (Pa3-13). That error requires reversal.

A. The Trial Court Erred In Failing To Examine The Two Principal Uses Proposed In Plaintiff's Site Plan Qualify As "Mixed Uses Of More Than One Principal Commercial Or Industrial Use." (5T 25-11 to 28-7).

Westampton Ordinance § 250-4 allows "mixed uses of more than one principal commercial or industrial use" in the Industrial Zone. (Pa3-13). However, the trial court did not consider this issue, which was raised by Plaintiff in its complaint in lieu of prerogative writs. Instead of finding the previously permitted cell tower use and proposed permitted as-of-right industrial use qualified as multiple principal commercial or industrial uses in accordance with the Ordinance, the judge merely ordered consideration of the need for a use variance must be made by the Zoning Board. This decision ignores the challenge presented.

One of the principal uses proposed in Plaintiff's site plan Application, a warehouse, is by-right a permitted industrial use in the industrially zoned lot.

Westampton Ordinance § 250-20(A)(3) expressly lists “permitted uses” in the Industrial Zone to include “distribution centers and warehouses.” (Pa56).

The integrated second principal use proposed in the Application, was to not disturb the existing Cell Tower. This should be considered a commercial or industrial use for the public improvement of life and safety. Although the Board contends otherwise, there is no basis to find the previously permitted cell tower use would not qualify as a “principal commercial or industrial use,” and it certainly does not qualify as any other use, such as residential, retail, and the like. These two compatible uses are unequivocally permitted on the Property.

B. The Trial Court Erred In Failing To Examine That The Two Permitted Principal Uses Proposed In The Application Were “Part Of A Single Site Plan.” (5T 25-11 to 28-7).

According to Ordinance § 250-4, multiple principal industrial or commercial uses are allowed on a site in the Industrial Zone as long as the Planning Board determines that the “uses are part of a single site plan, with cross easements for utilities and stormwater management, and access, ingress and egress utilizing shared, common driveways.” (Pa3-13). The Ordinance authorizes this decision to be made by the Planning Board not the Zoning Board. Unfortunately, the trial court would not consider the arbitrary action by the Board to conduct this review. Instead, the judge imposed an unnecessary use variance examination by the Zoning Board. Proper consideration would review the plain language of the Ordinance

and find the two principal uses proposed in Plaintiff's site plan Application – the previously permitted cell tower use and permitted as-of-right industrial warehouse use – were permitted in the Zone and were “part of a single site plan” complying with the Ordinance.

The Westampton Ordinances do not define the term “site plan,” but state that “[a]ny word or term not defined herein shall be used with a meaning of standard usage, unless such word or term is defined in the Municipal Land Use Law, and then that definition shall apply.” § 250-4A. (Pa3). “Site Plan” is defined in the Municipal Land Use Law (“MLUL”), N.J.S.A. 40:55D, as:

[A] development plan of one or more lots on which is shown (1) the existing and proposed conditions of the lot, including but not necessarily limited to topography, vegetation, drainage, flood plains, marshes and waterways, (2) the location of all existing and proposed buildings, drives, parking spaces, walkways, means of ingress and egress, drainage facilities, utility services, landscaping, structures and signs, lighting, screening devices, and (3) any other information that may be reasonably required in order to make an informed determination pursuant to an ordinance requiring review and approval of site plans by the planning board adopted pursuant to article 6 of this act.

[N.J.S.A. 40:55D-7.]

The site plans submitted in support of the Application show the existing and proposed conditions of the Property, including the existing cell tower along with the equipment enclosure at its base, as well as the proposed warehouse

development and associated site improvements. Thus, all information necessary for the Planning Board to make an informed decision regarding whether the existing and proposed development complies with Westampton's site plan Ordinances is demonstrated in the Application. The requirement of a "single site plan" is, therefore, met. (Pa138; Pa139-185; Pa186).

Further, no cross easements for utilities and stormwater management are necessitated by the existing and proposed development. The existing underground electrical and communications utilities serving the cell tower are shown on the submitted plans and are not proposed to be disturbed or altered by the proposed warehouse development. No utilities serving the proposed warehouse development are to be routed through the cell tower lease area. There are no existing stormwater management facilities supporting the Cell Tower, and no new stormwater facilities are proposed in the cell tower lease area to support the proposed warehouse development. The requirement of cross easements for utilities and stormwater is therefore inapplicable to the proposed two uses at the subject property. To change the unified and comprehensive planning between the Cell Tower and the other uses would be a brutally inefficient use of land and a violation of the MLUL.

Finally, the requirement for shared access is met by the existing and proposed uses and development, and no easements are necessary because the Cell

Tower's continued access rights are set forth in the Cell Tower tenant's lease. The existing access to the Cell Tower is by way of a shared driveway and maneuver area outside of the Cell Tower lease area. The driveway and maneuver area are also presently used and maintained by the Pew Plaintiffs for their existing use on the lot. Similarly, the submitted site plans show access, ingress and egress to the cell tower and to the proposed warehouses by way of a shared driveway, and also show the specific access provided for the cell tower lease area from the shared driveway. The proposed site plan, therefore, unifies the uses' access thereby meeting the access requirement.

When these facts are reviewed, error is found by the trial court's failure to reverse the Planning Board's conclusion regarding the need for a use variance and the concomitant refusal to consider the Application for development of the as-of-right warehouse use integrated with the previously approved cell tower use as permitted multiple principle uses of the Industrial Zone lot. Not only were two principal uses, including the same cell tower use, already permitted on the lot, but the two proposed principal uses also satisfy the requirements of Westampton Ordinances § 250-4 and § 250-20. Reversal of the trial court's December 8, 2022 Order is warranted.

III. The Trial Court Erred In Concluding The Planning Board Lacked Jurisdiction To Grant Site Plan Approval Of The Permitted Compatible, Integrated, Two Uses On The Property. (5T 25-11 to 28-7).

In light of the above, the trial court erred in concluding the Planning Board lacked jurisdiction to consider the Application. The trial court further erred in failing to order the Planning Board to grant site plan approval with customary and reasonable conditions. As demonstrated, the two principal uses in Plaintiff's proposed site plan are permitted on the Industrial Zone lot without need for a use variance, and the site plan fully conforms with the applicable ordinances.

If a use variance is required for approval of a site plan application under the MLUL, N.J.S.A. 40:55D-70(d), then jurisdiction lies solely with the Zoning Board of Adjustment. However, the facts at bar demonstrated a use variance was not necessary. Accordingly, there was no need for Zoning Board interpretation. Rather, the authority and jurisdiction to consider the site plan application submitted by Plaintiff lies exclusively with the Planning Board. Westampton Ordinances § 149-7 ("The Land Development Board is authorized to adopt bylaws governing its procedural operation. It shall also have the following powers and duties: . . . To administer the provisions of the Land Subdivision Ordinance . . . and the Design and Site Plan Review Ordinance in accordance with the provisions of said ordinances and the [MLUL]."); §196-3 ("[T]he applicant shall submit six copies of the preliminary site plan to the administrative official, who shall . . . transmit the

site plans to the Land Development Board for review except for those site plans connected with a use variance which shall be submitted to the Zoning Board of Adjustment.”).

“While site plan review gives the board wide discretion to assure compliance with the objectives and requirements of the site plan ordinance, ‘it was never intended to include the legislative or quasi-judicial power to prohibit a permitted use.’” *PRB Enterprises, Inc. v. South Brunswick*, 105 N.J. 1, 7 (1987) (quoting *Lionel’s Appliance Center, Inc. v. Citta*, 156 N.J. Super. 257 (1978)). Here, the Planning Board was obliged to consider and approve the submitted site plan application unless there were deviations from other applicable ordinance standards that could deprive the Planning Board of jurisdiction or otherwise justify denial. *Pizzo Mantin Group v. Randolph Twp.* 261 N.J. Super. 659, 228-229 (App Div. 1993), *affirmed as modified*, 137 N.J. 216 (1994). The MLUL specifically provides that “[t]he planning board *shall*, if the proposed subdivision complies with the [subdivision] ordinance and this act, grant preliminary approval to the subdivision.” *Pizzo.*, 137 N.J. 216, 226 (1994) (citing *N.J.S.A.* 40:55D–48).

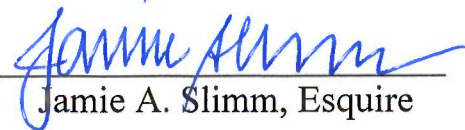
Plaintiff’s proposed site plan abides by the applicable Ordinances and does not present any deviations from those Ordinances that could deprive the Planning Board of jurisdiction or otherwise justify its denial of the application. Therefore, the Planning Board was required to grant site plan approval at this juncture. The

trial court erred not only in finding that the Planning Board lacked jurisdiction to consider Plaintiff's site plan application, but also in failing to order the Planning Board to grant site plan approval.

CONCLUSION

For the foregoing reasons, the trial court's decision should be reversed, because the trial court erroneously remanded the matter to the Zoning Board for determination as to whether a use variance is required in this case, and because the trial court concluded that the Planning Board therefore lacked jurisdiction to grant site plan approval. This Court should respectfully remand the matter to the Planning Board for approval of the Application with customary and reasonable conditions.

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Jamie A. Slimm, Esquire

Dated: December 5, 2023

<p>MRP INDUSTRIAL NE, LLC</p> <p style="text-align: center;">Appellant,</p> <p>v.</p> <p>THE LAND DEVELOPMENT BOARD OF THE TOWNSHIP OF WESTAMPTON</p> <p style="text-align: center;">Respondent</p>	<p>SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION</p> <p>DOCKET NO.: A-001517-22</p> <p>ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, BURLINGTON COUNTY LAW DIVISION DOCKET NO. BUR-L-1240-22</p> <p>Sat Below: Honorable Jeanne T. Covert, A.J.S.C.</p>
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**BRIEF OF RESPONDENT
THE LAND DEVELOPMENT BOARD
OF THE TOWNSHIP OF WESTAMPTON**

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PRELIMINARY STATEMENT

This is the Answering Brief of Respondent Land Development Board of the Township of Westampton (“Board” or “Defendant”) to Appellant MRP Industrial NE, LLC’s (“MRP” or “Plaintiff”) appeal of the December 8, 2022 Law Division Order dismissing Plaintiff’s challenge to Defendant’s denial of Plaintiff’s land development application within the Township of Westampton.

Defendant Planning Board is a 9-regular member joint board that must contract to a 7-member zoning board for applications involving N.J.S.A. 40:55D-70d variance relief under the Municipal Land Use Law (“MLUL”). Plaintiff’s application before the Board sought preliminary and final major site plan approval with bulk variances and waivers to construct two industrial warehouse/distribution buildings and associated site improvements at the property. After four (4) public hearings to consider Plaintiff’s Application, the Board ultimately concluded that it lacked jurisdiction under the MLUL to hear and decide Plaintiff’s application because the proposed multi-use development may require N.J.S.A. 40:55D-70d use variance relief. Plaintiff’s application for site plan approval without use variance relief was then denied and dismissed by the Board.

On appeal to the Law Division, Plaintiff argued that no use variance is required so that all actions taken by the Board to dismiss and deny Plaintiff’s Application are arbitrary, unlawful, and subject to reversal. However, Plaintiff had no better luck with the trial judge than the Defendant Board. Assignment Judge Covert correctly dismissed Plaintiff’s complaint while at the same time remanding the matter back to the Board for

further development of the record. Defendant Board was also directed to include more detailed factual findings and conclusions of law in its written memorializing resolution. The Board was specifically instructed to reconfigure as a 7-member zoning board rather than a 9-member planning board and to interpret the Township Zoning Ordinance in accordance with the MLUL. While Defendant argued below that the Board had jurisdiction as a planning board to determine whether Plaintiff's Application required use variance relief, once the trial court found the Board's memorializing resolution lacked adequate factual findings and conclusions of law, the only available and correct remedy for the court was to remand the matter back to the Board for further proceedings and to prepare an amended memorializing resolution.

As the party challenging the Board's denial of a use variance application, Plaintiff continues to bear the heavy burden of demonstrating that Defendant's reasonable, good faith interpretation of its own ordinance was so arbitrary, capricious, and unreasonable that it must be vacated and set aside by a reviewing court. Relying solely on a conclusory and erroneous ordinance interpretation that fails to consider legislative intent, Plaintiff asked the trial court below and now asks this Honorable Court on appeal to substitute its own judgment for that of the Board's. In so doing, Plaintiff proposes a dramatic change to the fundamental character of Westampton's Industrial Zone and indeed the scope and extent of permitted principal uses throughout the municipality. The trial court correctly and reasonably declined Plaintiff's invitation

to do so, leaving such matters to the local officials familiar with their community and entrusted by statute to guide furtherance of the public good and welfare.

For this reason and those further set forth herein, Respondent Board respectfully requests that the Appellate Division affirm the December 8, 2022 order of the trial court in its entirety.

PROCEDURAL HISTORY

On August 4, 2021, September 1, 2021, December 1, 2021 and April 6, 2022, the Board held public hearings for the Application seeking Preliminary and Final Site Plan Approval. (1T, 2T, 3T, 4T).² At its April 6, 2022 meeting, the Board voted to deny the Application. (4T). On May 4, 2022, the Board adopted Resolution 11-2022 (the “Resolution”) memorializing its denial of Plaintiffs’ Application. (Pa187-190). On July 5, 2022, Plaintiffs filed an action in lieu of prerogative writs challenging the Board’s decision to deny the Application. (Pa328–346). On August 22, 2022, Defendant filed an answer to the complaint. (Pa347–366).

Following briefing and argument, the Superior Court Burlington County Law Division entered a December 8, 2022 Order Denying in Part the Relief Requested in Plaintiffs' complaint. (Pa367-368). On January 23, 2023, Plaintiff MRP filed the instant appeal. (Pa369–383).

² The following references will be used throughout the brief: “1T” shall refer to the August 4, 2021 Board Hearing; “2T” shall refer to the September 1, 2021 Board Hearing; “3T” shall refer to the December 1, 2021 Board Hearing; “4T” shall refer to the April 6, 2022 Board Hearing; and “5T” shall refer to the Transcript of Prerogative Writs Oral Argument held on December 8, 2022.

STATEMENT OF FACTS

Defendant is a joint land use board consisting of Class I, Class II, Class III, and Class IV members organized pursuant to N.J.S.A. 40:55D-69 and Westampton Township Code § 149-1 et seq. (Da001–002). The Board exercises all powers of both a planning board and zoning board of adjustment. N.J.S.A. 40:55D-25. The Board’s Class I and Class III members may not participate in applications involving N.J.S.A. 40:55D-70d relief. N.J.S.A. 40:55D-25c.(2).

On or about February 17, 2021, MRP filed its Application before the Board seeking preliminary and final major site plan approval with bulk variances and waivers to construct two industrial warehouse/distribution buildings and associated site improvements at the Property. (Pa134–137). At the time of MRP’s filing, the Property contained two principal uses: an agricultural use and a Cell Tower use. (Pa231–244). Plaintiffs propose through the Application to replace the existing agricultural use with the proposed warehouse distribution use. (Pa134–137). Westampton Township Code Section 250-20A permits the existing agricultural use and proposed warehouse use only as individual principal uses within the Township’s Industrial Zone. (Pa55–57). The Cell Tower is not a permitted principal use in the Industrial Zone and was only approved after receiving use variance approval from the Board in 1997. (Pa280–282).

The Board held public hearings to consider the Application on August 4, 2021, September 1, 2021, December 1, 2021, and April 6, 2022. (1T, 2T, 3T, 4T). During the September 1, 2021 public hearing, counsel for an objector first raised the issue of a

potential “D variance” being required for the Board to approve the Application. (2T 117-24 to 118-3). The necessity for use variance relief was discussed at length during the Applicant’s next public hearing on December 1, 2021. (3T). The Application was then continued to a future meeting date to permit the Board, Applicant, and other interested parties to assess the use variance issue. (Id.).

Prior to the Applicant’s final public hearing, the Board received various opinion letters from the Board professionals, Applicant’s professionals, and the objector opining on the need for use variance relief to permit the Applicant’s proposed dual principal use of the Property. (Pa231-244; Pa245-252; Pa253-256; PA257-258; Pa259-260; Pa261-327). At the April 6, 2022 public meeting, having considered all of the foregoing, the Board determined based upon the advice and opinion of its professionals that N.J.S.A. 40:55D-70d(1) use variance relief was required to permit the Application. (4T). The Board thereafter voted to deny the pending Application on procedural grounds because the Board lacked jurisdiction to consider or grant N.J.S.A. 40:55D-70d use variance relief. Id.

The Board’s procedural denial of the Application was memorialized by written Board Resolution 11-2022, adopted on or about May 4, 2022. (Pa187-190). Plaintiffs’ appeal of the Board’s decision to the trial court and appeal of the trial court’s decision to this court followed.

STANDARD OF REVIEW

A local land use board is accorded wide latitude to exercise its delegated discretion due to its peculiar knowledge of local conditions and familiarity with community characteristics and interests. Medici v. BPR Co., 107 N.J. 1, 14–15 (1987) (quoting Kramer v. Bd. of Adj., Sea Girt, 45 N.J. 268, 296 (1965)). When reviewing the decision of a municipal land use board, a reviewing court must give deference to the board’s determination absent a finding that it acted in an arbitrary, capricious, or unreasonable manner. Price v. Himeji, LLC, 214 N.J. 263, 284 (2013); Kramer, 45 N.J. at 296; New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. of Adj., 305 N.J. Super. 151, 165 (App. Div. 1997), rev’d on other grounds, 160 N.J. 1 (1999).

On appeal from the Law Division, a reviewing appellate court applies the same deferential standard as the trial court below. Grubbs v. Slothower, 389 N.J. Super. 377, 382 (App. Div. 2007) (quoting Fallone Props., L.L.C. v. Bethlehem Twp. Plan. Bd., 369 N.J. Super. 552, 561 (App. Div. 2004)). A court typically need only determine whether the board’s decision “is supported by the record and is not so arbitrary, capricious, or unreasonable as to amount to an abuse of discretion.” Price v. Himeji, 214 N.J. at 284 (quotations and citations omitted); see also Kenwood Assocs. v. Bd. of Adj., 141 N.J. Super. 1, 4 (App. Div. 1976) (“The role of a judge in reviewing a local variance determination is solely to ascertain whether the action of the board is arbitrary”). “Even when doubt is entertained as to the wisdom of the

board's action, there can be no judicial declaration of invalidity absent a clear abuse of discretion by the Board." Chicalese v. Monroe Twp. Plan. Bd., 334 N.J. Super. 413, 419 (Law Div. 2000) (citing Pullen v. So. Plainfield Planning Bd., 291 N.J. Super. 303, 312 (Law Div. 1995), aff'd, 291 N.J. Super. 1, 6 (App. Div. 1996)).

There is a rebuttable presumption that the local public body has correctly exercised its discretion and that its decision is "presumptively valid." Price, 214 N.J. at 284 (citing Cell S. of N.J., Inc. v. Zoning Bd. of Adj., 172 N.J. 75, 81 (2002)). The challenging party bears the heavy burden of proving that the board's action was unreasonable. Spring Lake Hotel & Guest House Assoc. v. Borough of Spring Lake, 199 N.J. Super. 201, 210 (App. Div. 1985); Lincoln Heights Assoc. v. Twp. of Cranford Planning Bd., 314 N.J. Super. 366, 389 (Law Div. 1998), aff'd, 321 N.J. Super. 355 (App. Div.), certif. denied, 162 N.J. 131 (1999).

LEGAL ARGUMENT

Plaintiff argues on appeal that the trial court erroneously remanded this matter back to the Zoning Board. Plaintiff contends the Zoning Board's interpretation is not necessary because the plain language of the controlling municipal ordinances is apparently unmistakably clear—so much so that the only reasonable construction of the various, interwoven ordinances is the one proposed by Plaintiff. Plaintiff further contends that no use variance is required to permit multiple principal uses at the Property because two principal uses already occupy the parcel and the individual uses are permitted by Township Ordinance.

Contrary to Plaintiff's assertions, the Board correctly construed the relevant provisions of the Westampton Zoning Ordinance as only allowing multiple principal uses on a single lot in the Industrial Zone when an application satisfies certain ordinance criteria. Plaintiff's mixed-use Application failed to meet this ordinance criteria because, among other reasons, the Property contains two entirely unrelated principal uses that have nothing to do with each other and therefore meet neither the letter nor the intent of the Westampton Zoning Ordinance.

I. The Trial Court Correctly Determined that a Zoning Board Interpretation Was Necessary Given the Differing Interpretations Offered by the Plaintiff, Defendant, and Objector (5T 27-24 to 28-2)

The trial court's decision to dismiss Plaintiff's Complaint and remand this matter back to the Defendant Board for further development of the record and adoption of additional findings of fact and conclusions of law must be affirmed as

consistent with both the Municipal Land Use Law, N.J.S.A. 40:55D-2 et seq., controlling case law, leading land use commentary. See, e.g., DePetro v. Twp of Wayne Planning Bd., 367 N.J. Super. 161, 169 (App. Div. 2004), cert denied, 181 N.J. 544 (2004), and New Jersey’s leading land use treatise. See Cox at 26-2.3.

As explained within the trial court’s well-reasoned, written Amplification of Oral Opinion, the MLUL mandates that only the zoning board of adjustment may “[h]ear and decide requests for interpretation of the zoning map or ordinance or for decisions upon other special questions upon which such board is authorized to pass by any zoning or official map ordinance, in accordance with this act.” N.J.S.A. 40:55D-70(b). In construing this provision, the Appellate Division has held that “when an objector disagrees with the interpretation made by the planning board in taking jurisdiction, the appropriate municipal forum is the zoning board.” See DePetro v. Twp. of Wayne Planning Bd., 367 N.J. Super. 161, 169 (App. Div. 2004) cert. denied 181 N.J. 544 (2004). (Pa384-386).

In this matter, the Board received +5 interpretations of the controlling ordinances from its own professionals, the Applicant’s professionals, the objector’s professionals, and members of the public. (Pa21to Pa225). Given the disagreement between Plaintiff’s expert witness and the Objector’s expert witness regarding the ordinance, the appropriate forum to resolve this dispute was before the zoning board and not the planning board. The trial court’s decision should therefore be affirmed.

II. The Trial Court Correctly Dismissed Plaintiff's Complaint and Remanded this Matter to the Board For the Board to Expand Upon its Decision As Memorialized by Resolution (5T 27, 28)

While the Court admits it did not reach the issue as to whether a use variance was required to permit Plaintiff's multiple principal uses at the Property, the Court nevertheless appropriately remanded this matter to the Board for further review from the Zoning Board, development of the record below, and expansion of the Board's memorializing resolution. Plaintiff contends on appeal to this Court that not only should the trial court have not dismissed Plaintiff's complaint, but the Court should have instead ordered the approval of Plaintiff's application with reasonable conditions. (Pb22). However, even if the Court were to find the Resolution deficient in some way, the remedy is not to grant the use variance relief sought by Plaintiffs, but to remand the matter back to the Board for adequate fact finding. Smith v. Fair Haven ZBA, 335 N.J. Super. 111, 123 (App. Div. 2000). This is particularly true in the case of a use variance denial because there is "more to be feared from . . . ill-advised grants of variance than by refusals thereof . . ." Cox & Koenig, at § 42-2.1.

III. The Board Properly Interpreted and Applied the Ordinances to Conclude the Applicant Required a Use Variance to Permit Multiple Principal Uses at the Property (5T 25-11 to 28-7)

The trial court did not make a determination regarding the need for a use variance because the court found Defendant lacked jurisdiction to determine whether a use variance is required while configured as a 9-member planning board. (Pa387). The Court instead remanded the matter to the Zoning Board for an interpretation pursuant

to the MLUL. Plaintiff contends on appeal that all of the foregoing actions constitute reversible error. (Pb20–22). However, rather than fatal to the trial court’s order, any error is actually harmless because Plaintiff’s application requires a use variance based on the Defendant’s well-reasoned and correct interpretation of the controlling municipal ordinances. Accordingly, the decision of the trial court must be affirmed because Plaintiff’s challenge required remand for either an interpretation under N.J.S.A. 40:55D-70b or use variance relief under N.J.S.A. 40:55D-70d.

A. Judicial Review of the Board’s Ordinance Interpretation

A planning board has the inherent jurisdiction to determine the meaning of an ordinance in connection with a pending application. See, e.g., *Fallone Prop. v. Bethlehem Plan. Bd.*, 369 N.J. Super. 552, 566–67 (App. Div. 2004); *Terner v. Spyco, Inc.*, 226 N.J. Super. 532 (App. Div. 1988). However, this determination is purely a legal issue that is reviewed de novo by the Superior Court. See, e.g., *Piscitelli v. Garfield ZBA*, 237 N.J. 333, 350 (2019); *Bubis v. Kassin*, 184 N.J. 612, 627 (2005); *Wyzykowski v. Rizas*, 132 N.J. 509, 518 (1993); *DePetro v. Tp. Of Wayne Planning Bd.*, 367 N.J. Super. 161, 169 (App. Div.), certif. den. 181 N.J. 544 (2004).

While reviewed anew and not entitled to a presumption of validity, courts will accord deference to a board’s informal ordinance interpretation due to the board’s unique and peculiar knowledge of local circumstances and conditions. Fallone, 369 N.J. Super. at 561–62; see also *Price v. Strategic Capital*, 404 N.J. Super. 295, 301–02 (App. Div. 2008). This is particularly true where a board must interpret an ordinance

as part of its review because “the planning board can be expected to have some insight into the legislative intent at the time of the enactment.” Cox & Koenig at § 42-2.1.

B. Principles of Zoning Ordinance Interpretation

Zoning ordinances are to receive a reasonable construction and must be liberally construed in favor of the municipality. State, Tp. of Pennsauken v. Schad, 160 N.J. 156, 171 (1999); Atlantic Container v. Eagleswood Planning Bd., 321 N.J. Super. 261, 270 (App. Div. 1999). The principles governing the interpretation of zoning ordinances are the same as those governing the interpretation of other ordinances and legislation in general. See Schad, 160 N.J. at 170; AMN, Inc. v. So. Bruns. Tp. Rent Leveling Bd., 93 N.J. 518, 524–25 (1983).

The paramount goal of zoning ordinance interpretation is to discover and effectuate the local legislative intent. Atlantic Container, 321 N.J. Super. at 270; White Castle v. Planning Bd., 244 N.J. Super. 688, 690–92 (App. Div. 1990), certif. den. 126 N.J. 320 (1991). Legislative intent is considered one of the most certain means of establishing the true sense of an ordinance’s terms. Clifton v. Passaic County Board of Taxation, 28 N.J. 411, 421 (1958); Caputo v. The Best Foods, 17 N.J. 259, 265 (1955). The first step to determine legislative intent requires an examination of the language within the ordinance. Schad, 160 N.J. at 170. If the language is clear and unambiguous, its meaning controls; if, however, the language is susceptible to different interpretations, then extrinsic factors, such as the ordinance's purpose, legislative history and context must be considered.” Id. Even

where legislative intent may be derived from the language used in an ordinance, “[w]here a literal reading will lead to a result not in accord with the essential purpose and design of the act, the spirit of the act will control the letter.” Id.; N.J. Builders, Owners and Managers Association v. Blair, 60 N.J. 330 (1972).

Distinct provisions of a zoning ordinance addressing the same subject matter should be read and construed together as one legislative enactment. Clifton, 28 N.J. at 421; Key Agency v. Continental Cas. Co., 31 N.J. 98, 103 (1959). In addition, more specific ordinance provisions control over general provisions. W. Kingsley v. Wes Outdoor Advertising Co., 55 N.J.336, 339 (1970); Lawrence v. Butcher, 130 N.J. Super. 209 (App. Div. 1974).

C. Westampton’s Zoning Ordinance Prohibits Any Use Not Expressly Permitted, Including Multiple Principal Uses on Any Lot Not Expressly Zoned for Multiple Uses

Because Plaintiff’s proposed dual principal use of the Property for a cell tower and warehouse is not expressly permitted by the Township Code, use variance relief to allow the non-conforming use configuration is required. However, Plaintiff argues that the two uses are permitted at the Property without the need for further variance relief. (Pb12-21). This is incorrect and inconsistent with settled law.

For example, it is well-settled that where a zoning ordinance permits specific uses, it is assumed that any use not specifically listed is prohibited. See, e.g., L.I.M.A. Partners v. Borough of Northvale, 219 N.J. Super. 512, 515 (App. Div. 1987); Bartlett v. Middletown Twp., 51 N.J. Super. 239, 258–59 (App. Div. 1958) (noting that by

specifically listing permitted uses, municipalities regulate and restrict the construction and use of buildings within that district to only those uses specifically enumerated). While many zoning ordinances state that any use that is not identified as permitted is deemed prohibited, even in the absence of this express language, the presumed legislative intent is that only those uses listed in the ordinance are permitted. See Fin. Serv. v. Little Ferry Zon. Bd. of Adj., 326 N.J. Super. 265, 274–75 (App. Div. 1999).

Here, a d(1) use variance is required to permit the Applicant's multiple principal uses at the Property. Wyzykowski v. Rizas, 132 N.J. 509, 521 (1993); Sun Co. v. Zoning Bd. of Adjustment of Avalon, 286 N.J. Super. 440, 446 (App. Div.), certif. denied, 144 N.J. 376 (1996). Use variances run with the land and relate to specific parcels of land—it does not matter that the cell tower only occupies a small portion of the Property. As explained in the Cox treatise:

Assuming that a variance has been granted, and that the property owner has commenced utilization of the property in accordance with the terms of the variance granted, the property nonetheless may remain subject to certain limitations expressed or implied affecting its future use.

Where a d variance has been granted, for example, any future site plan or subdivision should generally be considered only by the zoning board of adjustment. With both "c" and "d" variances, however, there is at least an implied condition in some cases that no substantial change will be made to the property without further application to the board which granted the variance and this is particularly so where a plot plan (not necessarily a formal site plan) was submitted to the board and the proposed layout was an important consideration in the grant of the variance.

Cox & Koenig, at § 28-4.1, p. 424 (emphasis added).

Plaintiffs propose a substantial change to the Property by swapping the agricultural farmland use that existed at the time the cell tower variance was approved with a warehouse development. The warehouse use is subject to the Board's review both as a second principal use at the Property and as it relates to the cell tower's original variance approval. Without d(1) use variance relief, Defendant Board could not approve Plaintiff's application. For this reason alone, the trial court's decision to remand this matter back to the zoning board for an interpretation and use variance hearing (as needed) was correct and should be affirmed by the Court.

D. The Application Does Not Meet the Required Criteria to be Permitted as a Mixed Use of More than One Principal Commercial or Industrial Use

Even if Plaintiff proposed two industrial or commercial uses that may be permitted as a mixed use at the Property, Plaintiff's Application still fails to meet the relevant ordinance criteria to allow these principal uses to exist on the same lot. As stated in Section 250-4's definition of "principal use:" "mixed uses of more than one principal commercial or industrial use may be located on one lot if the Planning Board finds that the uses are part of a single site plan, with cross easements for utilities and stormwater management, and access, ingress and egress utilizing shared, common driveways." (emphasis added) (Pa10-11).

Section 250-4's requirement that cross easements be provided for utilities and stormwater management is a required condition that must be found by the Board to

exist to allow “mixed uses of more than one principal commercial or industrial use” at the same Property. This requirement applies equally to Plaintiffs’ proposal as to any other proposed mixed-use development in the Industrial Zone. Accordingly, Plaintiffs would require a use variance to permit the proposed mixed use at the Property where Plaintiffs do not meet the enumerated requirements set forth within Section 250-4’s definition of “principal use.” The trial court correctly directed Plaintiff to appear before the Zoning Board and this decision should be affirmed.

E. Conclusion

In sum, Westampton’s Zoning Ordinance simply cannot be contorted so as to lawfully and logically arrive at the conclusion that a use variance is not required to permit Plaintiff’s proposed mixed uses at the Property, particularly where the two uses have no intended design relation to each other whatsoever. As stated in Resolution 11-2022, the proposed uses are “distinct and separate principal uses that happen to occupy the same property.”(Pa187-89). The Board correctly determined that this configuration is not permitted in the Industrial Zone without a use variance and correctly denied the Application on procedural grounds due to a lack of jurisdiction. Defendant respectfully requests that the Board’s action below and trial court’s decision be affirmed and this matter dismissed with prejudice.

CONCLUSION

For the reasons set forth herein, Plaintiffs have not met their heavy burden to establish that the Board's use variance determination below was in any way arbitrary, capricious, unreasonable, or otherwise unlawful. Defendant respectfully requests that the Court affirm the trial court's order and Board decision below and dismiss the entirety of Plaintiff's Complaint with prejudice.

Respectfully submitted,

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Dated: January 4, 2024

By: /s/ Stephen J. Boraske
Stephen J. Boraske, Esquire

<p>MRP INDUSTRIAL NE, LLC;</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>THE LAND DEVELOPMENT BOARD OF THE TOWNSHIP OF WESTAMPTON,</p> <p style="text-align: center;">Defendant.</p>	<p>SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION</p> <p>Docket No.: A- 1517-22</p> <p>On Appeal From: SUPERIOR COURT OF NEW JERSEY CIVIL DIVISION, BURLINGTON COUNTY</p> <p>Docket No.: BUR-L-1240-22</p> <p>Sat Below: Hon. Jeanne T. Covert, A.J.S.C</p>
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REPLY BRIEF OF PLAINTIFF, MRP INDUSTRIAL NE, LLC

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PRELIMINARY STATEMENT

In its opposition brief, Defendant materially misrepresents the facts and issues on appeal in this matter. Defendant incorrectly contends that the issue on appeal is whether an interpretation from the Land Development Board (sitting as a Zoning Board) is necessary given the “differing interpretations” of the relevant ordinances. (Db12-13). However, the issue on appeal is not whether Zoning Board review is necessary to interpret the controlling ordinances. The question is whether the Land Development Board (sitting as a Planning Board) has jurisdiction to approve Plaintiff’s site plan application for the permitted by-right use of the property as set forth in the Township Ordinances. No ordinance interpretation is necessary, no use variance is necessary, and the Planning Board has jurisdiction to grant Plaintiff’s site plan application.

As Plaintiff demonstrated in its initial appellate brief, the two uses proposed in Plaintiff’s site plan are expressly permitted because “mixed uses of more than one principal commercial or industrial use” that “are part of a single site plan” are permitted in the Industrial Zone in accordance with Westampton Ordinance § 250-4. (Pa3-Pa13). MRP’s application proposed two principal commercial or industrial uses that were part of a unified and comprehensive site plan. Defendant does not provide any argument to the contrary.

Further, the two uses proposed in Plaintiff's site plan are expressly permitted by Westampton Township Zoning Ordinances and prior approvals, and Defendant provides no information which contradicts this fact. Therefore, Defendant's argument that any use not expressly permitted by the applicable ordinances is deemed prohibited is irrelevant. (Db17-18). Nonetheless, the case law Defendant relies on in support of its contention that any use not identified as permitted in the relevant ordinances is deemed prohibited is distinguishable. Notably, the Westampton Township Zoning Ordinances do not state that any use not expressly permitted is prohibited.

For the reasons set forth herein and in Plaintiff's initial brief, Plaintiff requests that this Court reverse the trial court's December 8, 2022 order.

LEGAL ARGUMENT

I. The Planning Board Had Jurisdiction To Rule On Plaintiff's Site Plan Application. (5T 27-24 to 28-2).

Defendant mistakenly contends that the issue on appeal is whether Zoning Board review is necessary given the "differing interpretations" of the relevant ordinances. (Db12-13). However, the issue is and always was solely whether the Planning Board had jurisdiction to rule on Plaintiff's site plan application. The reason the Planning Board determined that it did not have jurisdiction was not because of any differing ordinance interpretations; rather, it was because it incorrectly found that a use variance was necessary for site plan approval.

In support of its contention, Defendant relies in part on *DePetro v. Township of Wayne Planning Board*, 367 N.J. Super. 161 (App. Div. 2004). (Db13). The court in *DePetro* stated that “[t]he functions of a municipal Planning Board are enumerated and legislatively limited,” and “do not include the resolution of a challenge to the interpretation of an ordinance such as that brought by plaintiffs.” *DePetro*, 367 N.J. Super. at 169. In *DePetro*, the plaintiffs, “residents of the Township of Wayne and shareholders in an entity that competes with the self-storage facility business of defendant SUSA Partnership,” appealed from trial court orders “upholding, with modifications, a grant by the Township of Wayne Planning Board of preliminary and final site plan approval for the construction of a self-storage facility by SUSA.” *Id.* at 164. The court found that the plaintiffs’ “challenge to the interpretation of a zoning ordinance, raised within a proceeding in the Planning Board to approve a site plan, was statutorily unauthorized,” and that the plaintiffs, therefore, “lacked standing to appear before the Planning Board, because the issues that [the] plaintiffs sought to raise there were beyond that Board’s statutory jurisdiction.” *Id.* at 169.

Here, however, unlike in *DePetro*, Plaintiff did not seek a determination as to whether its proposed use was permitted in the “I” Zone. Rather, Plaintiff sought approval of its site plan application for a by-right permitted use, which fits squarely in the jurisdiction of the Planning Board. The plain language of

Westampton Township Ordinance § 250-4 defines “principal use,” and allows mixed use of more than one principal commercial or industrial use if the Planning Board finds that the uses are “part of a single site plan,” which Plaintiff properly demonstrated in its site plan. (Pa3-Pa13).

Assuming for the sake of argument that the Planning Board had to make an interpretation of the ordinances, a fact which Plaintiff categorically denies, it had the statutory authority to do so under the Municipal Land Use Law. Defendant’s argument that Zoning Board interpretation is necessary given the “differing interpretations” of the relevant zoning ordinances, therefore, merely distracts from the real issue on appeal, which is whether the Planning Board had jurisdiction to consider Plaintiff’s site plan Application. The plain language of the Ordinances make clear that the Planning Board did have jurisdiction to hear the Application for permitted by-right uses, and that the trial court erred in finding otherwise.

II. The Westampton Township Zoning Ordinances Permit Mixed Uses Of More Than One Principal Use On Property In The Industrial Zone. (5T 25-11 to 28-7).

Westampton Township Ordinance § 250-4 expressly permits “mixed uses of more than one principal commercial or industrial use . . . on one lot if the Planning Board finds that the uses are part of a single site plan.” (Pa3-Pa13) (emphasis added). As Plaintiff demonstrated in its initial appellate brief, MRP’s application proposed two principal commercial or industrial uses that were part of a single site

plan in accordance with Westampton Township Ordinance § 250-4. Defendant does not provide any argument to the contrary.

As previously demonstrated, the already permitted Cell Tower use and permitted as-of-right industrial use proposed in Plaintiff's site plan qualify as "mixed uses of more than one principal commercial or industrial use" that "are part of a single site plan." One of the principal uses proposed in Plaintiff's site plan Application, a warehouse, is by-right permitted use in the Industrial Zone. The other principal use proposed in the Application was the existing Cell Tower, which was at all times integrated with the warehouse use as part of a united and comprehensive site plan.

Further, Plaintiff has demonstrated that the "uses are part of a single site plan, with cross easements for utilities and stormwater management, and access, ingress and egress utilizing shared, common driveways" in accordance with the Ordinance. (Pa3-Pa13). The site plans submitted in support of the Application show the existing and proposed conditions of the Property, including the existing Cell Tower along with the equipment enclosure at its base, as well as the proposed warehouse development and associated site improvements. Thus, all information necessary for the Planning Board to make an informed decision regarding whether the existing and proposed development complies with Westampton's site plan Ordinances is demonstrated in the Application. Additionally, no cross easements

for utilities and stormwater management are necessitated by the existing and proposed development, and the requirement for shared access is met by the existing and proposed uses and development.

Thus, Defendant's argument that any use not expressly permitted in the applicable ordinances is prohibited is irrelevant. (Db17-18). Nonetheless, the case law Defendant relies on in support of its contention that any use not identified as permitted is deemed prohibited is distinguishable from the facts in this matter. Defendant relies on *L.I.M.A. Partners v. Borough of Northvale*, 219 N.J. Super. 512 (App. Div. 1987), *Bartlett v. Middletown Twp.*, 51 N.J. Super. 239 (App. Div. 1958), and *Fin. Servs., L.L.C. v. Zoning Bd. of Adjustment of Borough of Little Ferry*, 326 N.J. Super. 265 (App. Div. 1999). (Db17-18). An in-depth review of these cases reveals that Defendant's reliance is mistaken.

In *L.I.M.A. Partners v. Borough of Northvale*, the Board of Adjustment of the Borough of Northvale (1) "granted a use variance and site plan approval for the erection" of three dish antennas on one of the plaintiffs' properties but denied the plaintiffs' use of an additional portable dish antenna, and (2) denied the plaintiff's application "for a use variance to permit the erection of dish antennas" on a second, different property, and the plaintiffs filed preogative writs actions attacking both orders. *L.I.M.A. Partners*, 219 N.J. Super. at 513-16. The plaintiffs also "challenged the constitutionality of Northvale's zoning ordinance, insofar as it had

been construed to prohibit the erection of dish antennas.” *Id.* at 516. Notably, in its discussion of the facts, the Appellate Division stated that “the parties agree that the zoning indirectly prohibits dish antennas by failing to list them as a permitted use and by expressly stating that all uses not permitted are prohibited.” *Id.* at 515 (emphasis added).

In *Bartlett v. Middletown Township*, the plaintiffs, “four residents and taxpayers of the Township of Middletown, brought an action in lieu of prerogative writs seeking to set aside in its entirety an amendatory zoning ordinance adopted by the township on March 6, 1957, on the general ground that it did not represent a reasonable exercise of municipal power.” *Bartlett*, 51 N.J. Super. at 244. The trial court ultimately ruled for the defendants, and dismissed the plaintiffs’ complaint because they “had failed to sustain their burden of establishing that the amendatory zoning ordinance was arbitrary or unreasonable.” *Ibid.* The *Bartlett* court does not, at any point, state that, by specifically listing permitted uses, municipalities regulate and restrict the construction and use of buildings within that district to only those specifically enumerated.

In *Financial Services, L.L.C. v. Zoning Board of Adjustment of Borough of Little Ferry*, the defendant the Little Ferry Zoning Board of Adjustment “denied [the] plaintiffs’ application to permit a check-cashing business in an existing structure at the site of a gas station located on a nonconforming lot.” *Fin. Servs.*,


326 N.J. Super. at 267. The trial court affirmed the Board's decision, and the plaintiffs appealed. *Ibid.* The Appellate Division noted that "the ordinance was exclusionary for those uses not specifically permitted." *Id.* at 270 (emphasis added). Later, in reaching its decision, the court noted that "[t]he ordinance specifically provides uses expressly prohibited are not permitted." *Id.* at 274 (emphasis added). No where does the court state or imply that, in the absence of express language to the contrary, the "presumed legislative intent" when construing a zoning ordinance is that only uses specifically listed in the ordinance are permitted.

Significantly, the Westampton's Township Zoning Ordinances do not expressly state that any use not expressly permitted is prohibited, and Defendant does not provide any citations to the ordinances to support this contention. Thus, *L.I.M.A. Partners* and *Financial Services* do not apply. Second, no where in the *Bartlett* opinion does the court refer to municipalities limiting permitted uses only to those specifically listed.

CONCLUSION

For the foregoing reasons and those set forth in MRP's initial brief, the trial court's decision should be reversed, and the matter remanded to the Planning Board for approval of the Application with customary and reasonable conditions.

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Dated: 1/18/24

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