SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No.: A-3235-22

THE ALLIANCE FOR SUSTAINABLE COMMUNITIES and KENNETH MAYBERG, Appellants, vs. ROBBINSVILLE TOWNSHIP ZONING BOARD OF ADJUSTMENT and JOHNSON DEVELOPMENT ASSOCIATES, INC., Respondents.	**Civil Action** On Appeal From: Superior Court of New Jersey Mercer County - Law Division Docket No.: MER-L-2035-22 Sat Below: Hon. Robert Lougy, A.J.S.C.

BRIEF OF APPELLANTS THE ALLIANCE FOR SUSTAINABLE COMMUNITIES AND KENNETH MAYBERG

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PRELIMINARY STATEMENT

Johnson Development Associates, Inc. ("Applicant") seeks to construct two warehouses, as well as parking and site improvements, on the undeveloped portion of Mercer Corporate Park. After being granted a use variance in February 2021, Applicant is now seeking preliminary and final major subdivision approval in order to subdivide Lot 31 into three lots. On November 1, 2022, Robbinsville Township Zoning Board of Adjustment ("Board") approved Applicant's request for major subdivision by a 4-2 vote.

A land use board must ensure that every municipal ordinance requirement is satisfied before granting subdivision relief. However, during the subdivision hearing, Applicant failed to present any evidence or testimony on several topics explicitly required under the Municipal Land Use Law ("MLUL") and the applicable township ordinances. In addition, Plaintiffs, members of the public, and board members were prohibited from cross-examining the Applicant's witnesses on all application materials, and Plaintiffs were not permitted to present their expert witnesses on stormwater, wildlife, traffic, and noise, all items required under the Township Ordinances for major subdivision applications.

Furthermore, the Board's opinion that there are no impacts caused by the subdivision does not limit the scope of cross-examination or public testimony,

but such cross-examination and public testimony is supposed to help form the basis for the Board's decision. The Trial Court erred in holding otherwise, and that there was no contrary testimony on record when it was evident that the only reason there was no contrary testimony, is because the Board prohibited such testimony from Plaintiffs and the public.

For the reasons set forth herein, this Court should reverse the Trial Court's order and the Board's approval of Applicant's request for preliminary and final major subdivision should be reversed and remanded for further proceedings.

PROCEDURAL HISTORY

On November 1, 2022, the Board held a public hearing for preliminary and final major subdivision approval for the application. (1T[1]). On November 1, 2022, the Board approved the application. (1T100-13 to 1T100-14). On December 13, 2022, the Board adopted a Resolution of Memorialization (the "Resolution"). (Pa245-Pa253). On November 29, 2022, Plaintiffs The Alliance for Sustainable Communities and Kenneth Mayberg ("Plaintiffs") filed an action in lieu of prerogative writs, challenging the Board's decision to approve the major subdivision approval. (Pa270-Pa279). On January 4, 2022, Defendants filed an answer to the complaint. (Pa280-Pa291; Pa292-Pa300).

[1] The following references will be used throughout the brief:
"1T" shall refer to the Township of Robbinsville Zoning Board of Adjustment Hearing held on November 1, 2022.
"2T" shall refer to the Transcript of Prerogative Writ Oral Argument held on May 23, 2023.
"Pa" shall refer to Plaintiffs' Appendix.

On March 31, 2023, Plaintiffs filed its Brief in Support of Action in Lieu of Prerogative Writ. On April 21, 2023, the Board filed its Brief in Opposition to the Action in Lieu of Prerogative Writ. On April 21, 2023, the Applicant filed its Brief in Opposition to the Action in Lieu of Prerogative Writ. On May 8, 2023, Plaintiffs filed its Reply Brief in Further Support of the Action in Lieu of Prerogative Writ.

On May 26, 2023, the Superior Court of New Jersey, Mercer County Law Division entered an Order Dismissing Plaintiffs' Action in Lieu of Prerogative Writ and dismissed the complaint with prejudice. (Pa301-Pa313). On June 27, 2023, Plaintiffs filed the instant appeal. (Pa314-Pa321).

STATEMENT OF FACTS

On November 1, 2022, the Robbinsville Zoning Board of Adjustment held a hearing for an application by Johnson Development Associates, Inc. ("Applicant") for Lot 31. (1T). The application was bifurcated, and Applicant sought preliminary and final major subdivision approval. (1T5-18 to 1T5-23).

During the hearing, Applicant presented a civil engineer and professional planner who testified that it was proper to grant subdivision at this time. (1T10-24 to 1T11-4). Applicant's engineer, Kevin Webb, testified that the property would be subdivided into three new lots, and that the three new lots meet all applicable zoning criteria for the creation of new lots. (1T23-3 to 1T43-9).

Applicant's planner, Lance Landgraf, testified that the applicant satisfied all variance requirements, that all lot lines comply, and that Applicant would create cross-access easements to satisfy all issues on the property. (1T44-8 to 1T54-15).

Pursuant to Robbinsville Township Ordinance §142-77(B)(26)(f)[2], "[n]o application for development shall be approved unless it has been affirmatively determined, after an environmental assessment, that the proposed project: [1] Will not result in a significant adverse impact on the environment. [2] Has been conceived and designed in such a manner that it will not significantly impair natural processes. [3] Will not place a disproportionate or excessive demand upon the total resources available to the project site or to the impact area."

Applicant did not present an environmental impact assessment report or provide any testimony regarding an environmental assessment. In addition, Applicant did not present any testimony regarding whether the proposed development (1) will not result in a significant adverse impact on the environment; (2) has been conceived and designed in such a manner that it will not significantly impair natural processes, and (3) will not place a

[2] For ease of reference, Robbinsville Township Ordinances §142-77 and -78 are attached to Plaintiff's appendix at Pa254-Pa265 and Pa266-Pa269.

disproportionate or excessive demand upon the total resources available to the project site or to the impact area.

Plaintiffs The Alliance for Sustainable Communities and Kenneth Mayberg (collectively, "Plaintiffs") objected to the proceeding, as Applicant had failed to set forth any of the testimony required under the Municipal Land Use Law and township ordinances. (1T93-1 to 1T95-22). Other members of the public further testified against the proposed subdivision. (1T75-6 to 1T95-23). On November 1, 2022, the Board approved Applicant's application for major subdivision approval by a 4-2 vote. (1T97-7 to 1T100-19). On December 13, 2022, the board adopted a Resolution of Approval. (Pa245-Pa253).

LEGAL ARGUMENT

"A trial court's interpretation of the law and legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Township Committee of Township of Manalapan, 140 N.J. 366, 378 (1995). Therefore, the standard of review by the Appellate Division is a *de novo* review of the Trial Court's application of legal principles. Washington Commons, LLC v. City of Jersey City, 416 N.J. Super. 555, 560 (App. Div. 2010).

In reviewing a trial court's decision regarding the validity of a local board's determination, the reviewing court applies the same standards as the trial

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

However, "[a]lthough courts defer to the expertise of municipal agencies in reviewing discretionary exercises of an agency's statutory powers, the interpretation of an ordinance is primarily a question of law." Wyzkowski v. Rizas, 132 N.J. 509, 518 (1993). Therefore, "a board's decision regarding a question of law . . . is subject to a *de novo* review by the courts, and is entitled to no deference since a zoning board has 'no peculiar skill superior to the courts' regarding purely legal matters." Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Tp. of Franklin, 233 N.J. 546, 559 (2018) (quoting Chicalese v. Monroe Twp. Planning Bd., 334 N.J. Super. 413, 419 (Law Div. 2000) (citations omitted)); see also 388 Route 22 Readington Realty Holdings, LLC v. Township of Readington, 221 N.J. 318, 338 (2015) ("In construing the meaning of a statute, an ordinance, or our case law, our review is de novo.").

This case poses a question of law: whether the Applicant's request for preliminary and final major subdivision approval comported with the

requirements of Robbinsville Township Ordinances §§ 142-77 and 142-78. Therefore, the Board's decision to approve the application is subject to a *de novo* review and is entitled to no deference by this Court. Dunbar Homes, Inc., 233 N.J. at 559. Robbinsville Township Ordinances §§ 142-77 and 142-78 apply to applications seeking preliminary and final subdivision approval and set forth various proofs that must be met by an applicant. However, Applicant did not present evidence or testimony on the various topics required under the MLUL and the township ordinances. Furthermore, Plaintiffs were not permitted to present testimony or cross-examine applicant's witnesses on the full application materials in violation of the Municipal Land Use Law.

For the reasons set forth herein, the Board's approval of the application for preliminary and final major subdivision approval was arbitrary, capricious, and unreasonable, and must be reversed and remanded for further proceedings.

I. THE BOARD'S DECISION TO APPROVE THE APPLICATION FOR PRELIMINARY AND FINAL SUBDIVISION APPROVAL WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE AND VIOLATES THE MUNICIPAL LAND USE LAW, THEREFORE THE APPROVAL MUST BE REVERSED AND REMANDED. (PA304-PA306).

Pursuant to the Municipal Land Use Law ("MLUL"), "[a]n ordinance requiring approval by the planning board of either subdivisions or site plans, or both, shall include," among other requirements, certain provisions for preliminary and final approval of development. N.J.S.A. 40:55D-38(a). This

includes provisions such as the streets in the subdivisions or land development of suitable grade and located to accommodate traffic and firefighting and emergency equipment, adequate water supply, drainage, shade trees, sewerage facilities, and other utilities, protection and conservation of soil from erosion, and provisions governing the standards for grading, improvement and construction of streets or drives, and drainage and sewerage facilities. N.J.S.A. 40:55D-38.

The MLUL also permits additional provisions to be added to the ordinances requiring approval of either subdivisions or site plans, or both. N.J.S.A. 40:55D-39. This includes provisions such as for off-tract water, sewer, drainage, and street improvements which are necessitated by a subdivision or land development, standards encouraging and promoting flexibility and economy in layout and design, and requiring common open space. N.J.S.A. 40:55D-39. For ordinances requiring subdivision approval by the board, there are additional permitted requirements. N.J.S.A. 40:55D-40.

Robbinsville Township has adopted an ordinance in compliance with N.J.S.A. 40:55D-38 and -39, and as related to the current matter, N.J.S.A. 40:55D-40. Under Robbinsville Township Ordinance §§ 142-77 and 142-78[3],

[3] Robbinsville Township Ordinance 142-77 applies to preliminary major subdivision and preliminary site plan applications, while Robbinsville Township Ordinance 142-78 applies to final major subdivision and final site plan applications. Robbinsville Township Ordinance 142-78 refers and incorporates the requirements listed in section

"[a] preliminary submission is required of all subdivisions classified as major subdivisions and of all development proposals requiring site plan review."

Here, Applicant did not present evidence or testimony on the various topics required under the township ordinances adopted pursuant to the MLUL and the Board was therefore unable to make the requisite findings necessary for approval. Applicant argues after the fact that it did submit the required evidence and documents. However, even if the materials were considered part of the record, Plaintiffs were not permitted to present testimony or cross-examine witnesses on the application materials. (1T41-16 to 1T41-23; 2T22-15 to 2T22-22). Not only were Plaintiffs not allowed to present testimony or comments on the application materials, but board members were similarly shut down from attempting to ask questions regarding those application materials. (1T40-19 to 1T41-13).

For these reasons, the Board's approval of the application for preliminary and final major subdivision approval was arbitrary, capricious, and unreasonable, and must be reversed and remanded for further proceedings.

A. The Trial Court Erred In Determining that Applicant Had Met the Requirements of the Township Ordinances for Preliminary and Final Subdivision Approval. (Pa304-Pa306).

142-77, therefore the analysis is similar for both applications for preliminary approvals and applications for final approvals.

The Trial Court properly held that the application was a "major subdivision" as defined by Robbinsville Township Ordinances and the MLUL, and therefore the requirements of Robbinsville Township Ordinances §§ 142-77 and 142-78 applied to the application. However, the Trial Court then erred in determining that the Applicant had presented a full application.

The statutory grant of municipal power to zone and to control the subdivision of property is provided by the MLUL. Pizzo Mantin Group v. Twp. of Randolph, 137 N.J. 216, 223 (1994). As such, "a municipality may, by ordinance, require proposed subdivision plans to be submitted to the planning board." Id. at 225; N.J.S.A. 40:55D-37. If an ordinance is adopted, a subdivision ordinance must include standards for the approval. Ibid.; N.J.S.A. 40:55D-38. Therefore, municipalities must review a subdivision application in the context of the requirements of the ordinance. Id. at 228-30. The purpose of the ordinance is not to provide just a checklist item to complete, but provides the framework of how a board addresses the concern for public welfare and sound planning in regulating the subdivision of properties. Id. at 229-30.

Robbinsville Township has adopted Ordinances §§ 142-77 and 142-78, which govern the submission requirements of preliminary and final plats for major subdivision applications. These items include, but are not limited to, details and cross-sections all existing and proposed watercourses and drainage

swales, existing contours of property, locations of all existing structures and existing and proposed front, rear, and side yard setback distances, dimensions necessary to confirm conformity with the setback requirements, height requirements, and yard area requirements, proposed lighting, required buffer area and proposed screening and landscaping, vehicle access and egress to and from the site, traffic control related features, plans and computations for storm drainage systems, plans of proposed improvements and utility layouts, and an environmental impact assessment (including wildlife, particularly endangered or protected species). Robbinsville Township Ordinance §142-77. In addition, "[n]o application for development shall be approved unless it has been affirmatively determined, after an environmental assessment, that the proposed project: [1] Will not result in a significant adverse impact on the environment. [2] Has been conceived and designed in such a manner that it will not significantly impair natural processes. [3] Will not place a disproportionate or excessive demand upon the total resources available to the project site or to the impact area." Robbinsville Township Ordinance §142-77(B)(26)(f).

Not only does the Robbinsville Township Ordinance require these explicit items to be covered for the approval of subdivision application, these are submissions required by the MLUL as well. Pursuant to the MLUL, "[a]n ordinance requiring approval by the planning board of either subdivisions or site

plans, or both, shall include" certain provisions for preliminary and final approval of development. N.J.S.A. 40:55D-38(a). This includes provisions such as the streets in the subdivisions or land development of suitable grade and located to accommodate traffic and firefighting and emergency equipment, adequate water supply, drainage, shade trees, sewerage facilities, and other utilities, protection and conservation of soil from erosion, and provisions governing the standards for grading, improvement and construction of streets or drives, and drainage and sewerage facilities. N.J.S.A. 40:55D-38.

During the November 1, 2022 hearing, there was no evidence or testimony provided on many of the requirements set forth in Robbinsville Township Ordinances §§ 142-77 and 142-78. (See 1T23-3 to 1T43-9; 1T44-8 to 1T54-15). None of the required items are identified in the resolution of approval as having been presented during the hearing. (Pa245-Pa253). The only exhibits presented were three items: (1) Existing Conditions Exhibit, (2) Proposed Subdivision Exhibit, and (3) Preliminary Major Subdivision Plat. (Pa212-Pa244). There is absolutely nothing in the record to meet the requirements identified in Robbinsville Township Ordinance §§ 142-77 and 142-78.

Any attempts by board members to go into some of the required information under the ordinances were improperly shut down. A board member tried asking questions relating to stormwater management. (1T30-12 to 1T31-

23). Analysis of stormwater management for subdivision applications is required under the MLUL and the township ordinance. N.J.S.A. 40:55D-38(b)(3); N.J.S.A. 40:55D-38(c); Robbinsville Township Ordinance §142-77(B)(19), (21). Mr. Webb did not directly respond to the question and stated it was an issue for site plan review. (1T32-1 to 1T32-7).

Furthermore, it is apparent that the Applicant is not even considering other documents that were supposed to be part of the application materials, part of the subdivision application. In response to the instruction to not discuss stormwater, the board member tried to reference the fact that there was a stormwater report in the materials. (1T40-19 to 1T41-13). In response, the Applicant's attorney responded "That is part of site plan… Number one, that is part of the site plan review. That's in the file for that. We're working – you just need a supplemental submission related to the stormwater management that will be part of the site plan application going forward. That's not part of this application." (1T41-16 to 1T14-23). Therefore, even if the ordinance simply required these as checklist submission items not to be discussed, which they are not, the Applicant's own testimony is that these materials were not submitted for the subdivision application. The record for the subdivision approval only includes the three exhibits and the testimony during the hearing.

Without evidence submitted or testimony about the enumerated requirements, the explicit requirements of both the MLUL and the municipal ordinances were not met. Most importantly, there is nothing in the record to support any finding that the project "has been affirmatively determined, after an environmental assessment, that the proposed project: [1] Will not result in a significant adverse impact on the environment. [2] Has been conceived and designed in such a manner that it will not significantly impair natural processes. [3] Will not place a disproportionate or excessive demand upon the total resources available to the project site or to the impact area." Robbinsville Township Ordinance §142-77(B)(26)(f). A review of the resolution shows no such finding, as none could be made. See Pa245-Pa253. This determination is expressly required under the ordinance, and expressly made clear that it applies to major subdivision applications. The approval not only violates the Robbinsville Township ordinances pertaining to the review of major subdivision applications, but also by implication the MLUL.

It is well established law that the burden of proving the right to relief sought in an application is on the applicant. See Jacoby v. Zoning Bd. of Adjustment of Borough of Englewood Cliffs, 442 N.J. Super. 450, 471 (App. Div. 2015); Chirichello v. Zoning Board of Adjustment, 78 N.J. 544, 559-60

(1979). Here, there is simply an absence of the required information necessary to make a decision on the subdivision application.

For these reasons, the Board's approval of the application for preliminary and final major subdivision approval was arbitrary, capricious, and unreasonable, and must be reversed and remanded for further proceedings.

B. The Trial Court Erred In Finding That The Board Did Not Hear Contrary Testimony Pertaining to the Subdivision Application When The Record Reflects That The Board Prohibited Such Testimony. (Pa312, 2T24-21 to 2T25-20).

In upholding the Board's approval of Applicant's request for preliminary and final major subdivision approval, the Trial Court held that "the Board heard no contrary testimony that pertained to the subdivision application." (Pa312). However, this finding completely ignores the record wherein the Board prohibited Plaintiffs from submitting such testimony.

Pursuant to the Municipal Land Use Law,

> The testimony of all witnesses relating to an application for development shall be taken under oath or affirmation by the presiding officer, and the right of cross-examination shall be permitted to all interested parties through their attorneys, if represented, or directly, if not represented, subject to the discretion of the presiding officer and to reasonable limitations as to time and number of witnesses.
>
> [N.J.S.A. § 40:55D-10(d) (emphasis added)].

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

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

As such, a board must provide objectors a fair opportunity to address all issues in an application. N.J.S.A. § 40:55D-10(d); Witt v. Borough of Maywood, 328 N.J. Super. 432, 453-54 (Law Div. 1998), aff'd o.b. 328 N.J. Super. 343 (App. Div. 2000) (nullifying the decision of a planning board that did not allow objectors the opportunity to address the full range of issues contained in an application). A board may not arbitrarily deny any objector the right to testify or to cross-examine other witnesses. See *Cox & Koenig*, New Jersey Zoning and Land Use Administration, § 18-3.2, at 376 (2022) (citing Village Supermarket v. Mayfair, 269 N.J. Super. 224, 238 (Law Div. 1993)). In fact, a planning board's refusal to give a party a fair opportunity to present all of their witnesses "deprives the ultimate conclusion of legitimacy." Witt, 328 N.J. Super. at 454.

Here, the Board Attorney made the decision that "tonight just so everyone understands is just the subdivision. It's the drawing of lines on the property, where those lines will be drawn and so forth… So if you want to come up and talk about many of the issues that were spoken about during the use variance portion of this, remember a use variance was already granted." (1T6-3 to 1T6-

5; 1T6-25 to 1T7-12). The Board Attorney further stated "I ask that you keep your opinion to what he presents, not to go outside and, outside of the application and talk about things again that were already during the use variance part of this or really things that are going to be part of the site plan… Tonight we're just talking about where we're going to draw the lines." (1T8-4 to 1T8-9; 1T8-10 to 1T8-12).

When board members tried to ask questions on the application materials, such as the stormwater management issues, the Board Attorney prohibited the cross-examination on topics outside the limited testimony provided by Applicant's witnesses on the subdivision lines. (1T40-19 to 1T40-24). The Board Attorney stated "we really need to keep this separate and apart form the site plan and all those issues that will occur then." (1T40-19 to 1T40-21). The Applicant's attorney also responded and stated "that is part of site plan. Let me answer your, your question sir. Number one, that is part of site plan review. That's in the file for that… That is not part of this application." (1T41-16 to 1T41-23). Applicant's attorney further stated that "we're not going to testify about [the development that will be reviewed as part of the site plan]. (1T42-3 to 1T42-20).

Plaintiffs argued during the hearing that based on the language of Robbinsville Ordinances §§ 142-77 and 142-78 required a full review of the

application materials and not just a limited review of the proposed new lot lines. (1T56-6 to 1T61-17). The Board Attorney refused to allow such discussions and stated, "all of that is going to be dealt with at site plan." (1T57-16 to 1T58-2).

From these discussions during the meetings, it was clear that the Board and the Applicant were not going to permit Plaintiffs from presenting its witnesses on stormwater, noise, traffic, and wildlife, which were all required under Robbinsville Ordinances §§ 142-77 and 142-78. Any cross-examination of Applicant's witnesses on these issues were similarly not going to be permitted as both the Board and Applicant's attorney already prevented board members from doing so. During oral argument, Mr. Herbert stated he did not permit cross-examination or testimony regarding the environmental impact assessment or any other topic that had previously been mentioned during the use variance application. (2T22-15 to 2T22-22). Mr. Herbert also held that the community impact statement, required by Robbinsville Ordinances for major subdivision applications, was not permitted to be reviewed. (2T23-8 to 2T23-12).

As such, the Trial Court erred in finding that there was no contrary testimony provided, as no contrary testimony was permitted to be presented. This is in direct violation of the MLUL, which expressly requires the public to have the opportunity to cross-examine witnesses on all aspects of the application. Either the application did not incorporate the documents and was

not ripe for approval by the board, or the application documents were all included and the public and board members were improperly limited in its ability to cross-examine Applicant's witnesses and to present public comments and Plaintiffs' own expert witnesses.

For these reasons, the Board's approval of the application for preliminary and final major subdivision approval was arbitrary, capricious, and unreasonable, and must be reversed and remanded for further proceedings.

C. The Trial Court Erred in Holding that the Submission of the EIA was Sufficient Is Contrary to the Requirements Under the MLUL. (Pa311-Pa313; 2T25-21 to 2T27).

In affirming the Board's approval, the Trial Court further reasoned that it was sufficient that "[t]he Board had the [environmental impact assessment] before it," and that "the report had undergone extensive professional review." (Pa312-Pa313). According to the Trial Court, "[n]either the statute nor the ordinances compel the Board to take testimony on all issues if those issues are substantiated in the record before it." (Pa313). However, this proposition runs counter to the procedural requirements of board hearings.

"[P]lanning board hearings are trial-like and adversarial." In re Freshwater Wetlands Statewide Gen. Permits, 185 N.J. 452, 455 (2006). These hearings "serve as the focal point for resolution of conflicting interests between public restraints on the use of private property and the owner's right to utilize

his land as he wishes." Commons v. Westwood Zoning Board of Adjustment, 81 N.J. 597, 610 (1980) (quoting Chirichello v. Zoning Board of Adjustment, 78 N.J. 544, 556 (1979)). Therefore, "[f]undamental fairness demands an opportunity to test the trustworthiness of evidence adduced before an administrative agency and to explain or rebut it." Sanders v. Planning Board of Warren, 140 N.J. Super. 386, 394 (App. Div. 1976) (citing Abelsons, Inc. v. City of Newark, 83 N.J. Super. 205, 209 (App. Div. 1964)).

The right to public comment and to cross-examine extends to members of the board as well. "Members of the board of adjustment and the board attorney have the right to question the applicant and all witnesses with respect to any matter relevant to the application, whether the subject has first been introduced by a party to the proceeding or not." *Cox & Koening*, § 18-3.2 at 257 (2023) (citing Commons, 81 N.J. at 610). "The MLUL contemplates active involvement by planning boards in their review of subdivisions…That discretion is best exercised by a process in which planning boards affirmatively interact with developers when reviewing proposed subdivisions." Pizzo Mantin Group v. Twp. of Randolph, 137 N.J. 216, 232-33 (1994).

Therefore, contrary to the Trial Court's conclusion, the Board had an obligation to permit testimony and cross-examination by Plaintiffs and members of the Board on all issues and materials pertaining to the application. The

Board's acknowledged failure to do so was a denial of procedural fairness and subjects the Board's approval for reversal. DeMaria v. JEB Brook, LLC, 372 N.J. Super. 138, 146 (Law Div. 2003) (citing Kramer v. Board of Adjustment, 45 N.J. 268, 280 (1965)).

Moreover, with respect to the environmental impact assessment requirement of § 142-77(B)(26)(f), merely submitting an environmental impact assessment is not sufficient to comply with the Ordinance. Pursuant to § 142-77(B)(26)(f):

> No application for development shall be approved unless it has been affirmatively determined, after an environmental assessment, that the proposed project: [1] Will not result in a significant adverse impact on the environment. [2] Has been conceived and designed in such a manner that it will not significantly impair natural processes. [3] Will not place a disproportionate or excessive demand upon the total resources available to the project site or to the impact area.
>
> [Robbinsville Township Ordinance § 142-77(B)(26)(f)].

Pursuant to the clear and unambiguous language of the ordinance, it must be "affirmatively determined" by the Board that the proposed development will not have the various negative impacts listed in Robbinsville Township Ordinance § 142-77(B)(26)(f).

However, absent testimony on any of the environmental criteria explicitly listed in in § 142-77(B)(26)(f), the opportunity for Plaintiffs or individual Board members to cross-examine Applicant's witnesses on said topics, or the

opportunity for Plaintiffs to present their own witnesses on these topics, there is no evidence that the Board considered the environmental impact assessment when granting subdivision approval. It cannot reasonably be concluded that the Board considered the environmental impact of the application and then "affirmatively determine[d]" that the project satisfied the listed environmental impact assessment criteria.

Furthermore, after a decision has been reached by a board, the board's findings of facts and conclusions of law must be embodied in the form of a written resolution. N.J.S.A. 40:55D-10(g). The resolution serves as the board's official findings and conclusions of law with respect to an application. N.J.S.A. 40:55D-10(g). The resolution must contain sufficient findings based on the proofs submitted to satisfy a reviewing court that the board has analyzed an application in accordance with the relevant statue and zoning ordinances. New York SMSA, L.P. v. Bd. of Adjustment of Tp. Of Weehawken, 370 N.J. Super. 319, 333 (App. Div. 2004). A resolution cannot just contain a mere recital of testimony of conclusory statements. Id. at 332.

Here, the Board's resolution does not contain a single finding of fact or conclusion of law regarding any of the environmental impact assessment factors in § 142-77(B)(26). There is no support for any argument that the Board reviewed and considered the environmental impact assessment, and

affirmatively determined that there would be no significant adverse impact on the environment. Even if the environmental impact assessment was considered part of the record, then it was contrary to well-established law to prohibit Plaintiffs and other members of the public from presenting testimony on subjects that are required to be considered in reviewing an application for major subdivision.

For these reasons, the Board's approval of the application for preliminary and final major subdivision approval was arbitrary, capricious, and unreasonable, and must be reversed and remanded for further proceedings.

D. The Trial Court Erred in Finding That a Review of the Application by Board Professionals or that a Conclusion that There Will Be No Impacts is Sufficient Reasoning to Prohibit Public Review and Comment on Application Materials. (Pa311-Pa313; 2T25-21 to 2T27).

After the filing of Plaintiffs' initial brief in the action in lieu prerogative writ, the Board and Applicant argued that the application package was submitted as part of the subdivision application despite the testimony placed on the record that it was not. (Pa307). In affirming the Board's approval, the Trial Court found that the record shows the Applicant had submitted numerous reports that had been reviewed by the Board's professionals and deemed complete. (Pa311). However, having an application reviewed by a technical review committee and being deemed complete has nothing to do with the public's right to submit public comments and to cross-examine witnesses on the topic.

Having an application deemed complete simply begins the time period for action by a municipal agency. N.J.S.A. 40:55D-10.3. Being deemed complete does not "diminish[] the applicant's obligation to prove in the application process that he is entitled to approval of the application." N.J.S.A. 40:55D-10.3. Therefore, simply because the Board's professionals had issued review memorandums, and that the technical review committee had deemed the application complete, does not automatically mean that the Board has no role in the review of the application materials, or that the public is not permitted to present comments or cross-examine witnesses on the application materials.

The Court also found that the subdivision application only involved line-drawing and concluded that it had no environmental impact. (2T28-4 to 2T28-12). However, just because that may be the ultimate conclusion reached by a board, does not mean that the public is prohibited from presenting testimony on certain application materials such as the environmental impact assessment or the community impact statement. It does not prevent the cross-examination of witnesses on all application materials, just because the ultimate conclusion of the board may be that there is no impact. The MLUL and caselaw on the subject is clear that the public has the right of cross-examination on an application. N.J.S.A. 40:55D-10(d). To prohibit testimony and cross-examination on topics because of the anticipated conclusion by the Board, is putting the cart before the

horse; the anticipated findings of the board does not serve to limit the testimony, public comments, and cross-examination to be presented during a hearing; the testimony, public comments, and cross-examination of the witnesses is supposed to create the basis for the findings of the board.

For these reasons, the Trial Court erred and the Board's approval of the application for preliminary and final major subdivision approval was arbitrary, capricious, and unreasonable, and must be reversed and remanded for further proceedings.

II. THE APPLICANT MUST MEET THE REQUIREMENTS OF N.J.S.A. 40:55D-38 AND ROBBINSVILLE TOWNSHIP ORDINANCES §§ 142-77 AND 142-78 EVEN THOUGH THE APPLICATION HAS BEEN BIFURCATED. (PA305-PA306).

Applicant attempts to argue was that this is a tri-furcated[4] application and that it would all be dealt with at site plan review. (1T41-16 to 1T41-23; 1T42-3 to 1T42-20). However, as is the more typical case when dealing with a bifurcated use variance application and subsequent site plan application, the fact that it is bifurcated does not mean an applicant is able to simply ignore aspects of a use variance application that would be more appropriate to discuss at site plan. An applicant would still need to deal with all the necessary proofs and submissions for a use variance application, and then all the necessary proofs and submissions

[4] A use variance was previously granted on February 21, 2021. The subdivision, subject of this appeal, was granted on November 1, 2022. The site plan application, currently under appeal in the Law Division, was granted on March 23, 2023.

for the site plan application. This isn't just a situation where they dedicated one meeting to subdivision issues only and other meetings for the site plan issues, with one comprehensive resolution; these applications are being dealt with separately, in other words were bifurcated.

Similarly, here, the Applicant's subdivision application must be able to stand on its own and satisfy the requirements of the statute and ordinance. The only difference is that the Board must continue to consider the negative criteria during this process. See N.J.S.A. 40:55D-76(b) ("No subsequent approval shall be granted unless such approval can be granted without substantial detriment to the public good and without substantial impairment of the intent and purpose of the zone plan and zoning ordinance"). With a bifurcated use variance and site plan application, it is standard practice to still submit at a minimum a conceptual site plan during the use variance stage, to show the board and public what is being proposed. There is absolutely nothing that states that a bifurcated application means an applicant no longer needs to comply with certain requirements.

Furthermore, in the context of bifurcation of a use variance and site plan application, courts have held that if the variance and site plan issues are highly interrelated, bifurcation is not appropriate. Scholastic Bus Co. Inc. v. Zoning Bd. of Borough of Fair Lawn, 326 N.J. Super. 49, 59 (App. Div. 1999); House

of Fire Christian Church v. Zoning Bd. of Adjustment of City of Clifton, 379 N.J. Super. 526, 539-40 (App. Div. 2005). To the extent that the Applicant is arguing that everything required for review of a subdivision application will be handled during the review of site plan, this is effectively a concession that bifurcation is not appropriate. As it stands now, there is nothing in the record to satisfy the requirements for an application for subdivision approval, and nothing in the record to support the granting of subdivision approval as required under the MLUL and the municipal ordinances.

For these reasons, the Board's approval of the application for preliminary and final major subdivision approval was arbitrary, capricious, and unreasonable, and must be reversed and remanded for further proceedings.

CONCLUSION

In conclusion, for the reasons set forth herein, this Court should reverse the Trial Court's order and remand the application to the Board.

Respectfully submitted,

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Dated: October 16, 2023

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THE ALLIANCE FOR SUSTAINABLE COMMUNITIES AND KENNETH MAYBERG, Appellants, v. ROBBINSVILLE TOWNSHIP ZONING BOARD OF ADJUSTMENT AND JOHNSON DEVELOPMENT ASSOCIATES, INC., Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-3235-22 On Appeal From: Superior Court of New Jersey, Mercer County – Law Division Docket No.: MER-L-2035-22 Sat Below: Hon. Robert Lougy, A.J.S.C. Mercer County

BRIEF OF RESPONDENT, ROBBINSVILLE TOWNSHIP ZONING BOARD OF ADJUSTMENT

On the Brief: Alena Hyatt, Esq. and John C. Lowenberg, Esq.

Of Counsel: Michael W. Herbert, Esq.

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Robbinsville Land Development Ordinance

PRELIMINARY STATEMENT

The Appellants in this matter oppose the preliminary and final major subdivision approval granted by Respondent Robbinsville Zoning Board of Adjustment (the "Board") to Respondent Johnson Development Associates, Inc. ("Johnson Development" or the "Applicant").

In a comprehensive written opinion, the trial court dismissed the Alliance complaint with prejudice. The trial court found that there was substantial credible evidence in the record to support the Board's determination to grant Johnson Development's preliminary and final major subdivision application.

The record shows that the Board thoroughly reviewed Johnson Development's application that culminated in a resolution memorializing the lawful decision made after a procedurally and substantively proficient public hearing.

Johnson Development applied for major preliminary and final subdivision approval to subdivide a 90-acre property into three lots. The Robbinsville Ordinance defines a major subdivision as:

> "Any division of land containing an aggregate of not more than three lots (two new lots and the remaining parcel), each fronting on an existing street or streets, not involving any new street or the installation of any street improvements or the extension of Township facilities; not involving any street(s) requiring additional right-of-way width as specified in the Master Plan or Official Map and the street requirements of this chapter, unless such additional right-of-way width, either along one or both sides of the street(s), as applicable, shall be deeded to the Township or to the appropriate governmental authority prior to classification as a minor subdivision; not adversely affecting the

> development of the remainder of the parcel or adjoining property and not in conflict with any provision of the Master Plan, Official Map or this chapter; and not being a further division of an original tract of land for which previous minor subdivision(s) have been approved by the Township since 1967. The original tract of land shall be considered any tract in existence as of 1967. Any readjustment of lot lines resulting in no new lots shall be classified as a minor subdivision."
>
> [§ 142-7.]

The Robbinsville ordinance contains what is referred to as a "creeping major subdivision provision". That means that if there were previous subdivisions made on the property after a certain year, a subsequent minor subdivision is converted into a major subdivision so as to prevent the total number of lots exceeding the maximum number of lots imposed by the ordinance. In this case, while the proposed subdivision meets four of a five part ordinance standard, it does not qualify as a minor subdivision because the property was subject to a prior subdivision after 1967.

In this case, the approved subdivision merely involved the drawing of lot lines on the Township's tax maps to create new lots. No physical disturbance or development was authorized by the Board's subdivision approval. Further, any impacts from the proposed eventual development were associated with the site plan, rather than the subdivision application.

Johnson Development's application contained all required documents by the Board, which were available to the public and considered by the Board during the subdivision hearing. Nowhere in the Municipal Land Use Law ("MLUL") or

Robbinsville's Ordinances demands that the Applicant provide testimony on every single component of an application if it is not identified as an issue. Appellants exaggerate and enlarge this obligation to manufacture a cause of action. Specifically, Appellants allege that Johnson Development did not submit an Environmental Impact Statement ("EIS"), even though the EIS was clearly included in the Complete Application Package.

At the public hearing, Johnson Development offered unopposed testimony by qualified counsel and professional planners on all subdivision criteria. The Board conducted a fair hearing, afforded the public a meaningful opportunity to voice any concerns, and voted to approve Johnson Development's application. To memorialize its decision the Board adopted a detailed resolution that included its reasoning for its decision, which was supported by ample evidence from the record. Accordingly, the trial court correctly ruled that the Board properly approved the application and its decision should be upheld.

PROCEDURAL HISTORY

Respondent Robbinsville Township Zoning Board joins in the Procedural History set forth in the initial brief of Alliance.

COUNTER-STATEMENT OF FACTS

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

LEGAL ARGUMENT

I. THE JUDICIAL STANDARD OF REVIEW OF THE DECISION OF THE ROBBINSVILLE ZONING BOARD REQUIRES DEFERENCE TO THE BOARD.

We hereby incorporate Johnson Development's Judicial Standard of Review as if fully set forth herein.

II. THE TRIAL COURT PROPERLY FOUND THAT THERE IS SUBSTANTIAL CREDIBLE EVIDENCE IN THE RECORD TO SUPPORT THE PRELIMINARY AND FINAL MAJOR SUBDIVISION APPROVAL AND THE ROBBINSVILLE ZONING BOARD OF ADJUSTMENT RESOLUTION OF MEMORIALIZATION CONTAINS ADEQUATE FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING THE GRANT OF THE SUBDIVISION.

A. The Trial Court Properly Determined that the Applicant Met the Requirements of the Township Ordinances.

Alliance asserts that Johnson Development failed to establish adequate proofs for the Board to approve the Applicant's preliminary and final major subdivision application. Pb9. Further, Alliance alleges that, even if the Applicant presented adequate proofs, Alliance was forbad from presenting its own testimony or cross-examine witnesses on the Applicant's submissions. Ibid. The trial court specifically found that the Board did not act arbitrarily, capriciously, or unlawfully when it approved preliminary and final major subdivision. Pa313.

It is well settled that pursuant to the MLUL, an ordinance requiring approval by the planning board of either subdivisions or site plans, or both, shall include certain enumerated provisions for the processing of applications for development.

N.J.S.A. 40:55D-38(a). The MLUL also provides guidance regarding the discretionary contents of municipal ordinances related to subdivision and site plan review and approval. See N.J.S.A 40:55D-39; N.J.S.A. 40:55D-40. As indicated above, the Township ordinances §§ 142-77 and 142-78 serve these purposes.

Municipal Land Use Law ("MLUL") provides that if a proposed subdivision complies with the MLUL and local ordinances, than a planning boards "shall ...grant preliminary approval." Meridian Quality Care, Inc., v. Bd. Of Adjustment of the Twp. of Wall, 355 N.J. Super 328, 344 (App. Div. 2002) (citing Pizzo Mantin Grp. V. Twp. of Randolph, 137 N.J. 216, 228 (1994) (quoting N.J.S.A. 40:55D-48)). The Supreme Court held that the planning board has a limited role in the review of subdivision approval, and the board does not have broad authority to consider a subdivision application in light of general welfare, under the purposes of zoning pursuant to the MLUL, or general principles of sound planning apart from the standards of applicable local subdivision and zoning ordinances. Pizzo Mantin Grp., 137 N.J. 216 at 228.

Under the MLUL, an ordinance that requires subdivision or site plan approval, or both, by the planning board shall include submission and processing provisions that ensure: 1.) consistency of the layout with the requirements of the zoning; 2.) sufficiency of width and suitable grade for streets and suitability to accommodate traffic and provide access for firefighting and emergency equipment; 3.) adequate

water supply, drainage, shade trees, sewage facilities and other utilities; 4.) regulation of land designated as subject to flooding; and 5.) protection and conservation of soil and other considerations. N.J.S.A. 40:55D-38(a)-(b). Further, the ordinance shall contain provisions governing standards for grading, improvement and construction of streets or drives, for any required walkways, curbs, gutters, streetlights, shade trees, fire hydrants and water, and drainage and sewage facilities. N.J.S.A. 40:55D-38(c). The MLUL also provides that a subdivision or site plan shall conform to local zoning ordinances. N.J.S.A. 40:55D-38(c); N.J.S.A. 40:55D-39.

Township Ordinances § 142-77 and § 142-78 require a preliminary and final submission, respectively, for all subdivisions classified as major, and for all development proposals requiring site plan review. § 142-77; § 142-78. The plain language of § 142-77 and § 142-78 requires that an applicant include an EIS in its application. § 142-77(B)(26). Specifically:

> No application for development shall be approved unless it has been affirmatively determined, after an [EIS], that the proposed project: [1] Will not result in a significant adverse impact on the environment. [2] Has been conceived and designed in such a manner that it will not significantly impair natural processes. [3] Will not place a disproportionate or excessive demand upon the total resources available to the project site or to the impact area.

[Id. at (B)(26)].

Here, the record before the Board demonstrates unequivocally that the submitted Subdivision Application conformed in all respects with the MLUL and Robbinsville Ordinances. Johnson Development submitted an Application for Subdivision approval and an Application for Site Plan approval at the same time. Pa001-Pa077; Pa78-Pa119[1]. The overall submission package contained certain reports and other material, including, but not limited to, an EIS. Pa067; Pa097. That EIS was reviewed by the Board Engineer, Planner, Traffic Engineer and various other Township professionals and Johnson Development addressed all comments related to the document. Pa313. The Board Engineer concluded that the Subdivision and Site Plan Applications met "the intent of the Township design standards." Transcript of 11.1.23 hearing, page 37. The Board's Resolution included a specific finding that the requested subdivision does not adversely affect the public's health, safety, or welfare. Pa250. Further, the EIS was included in Exhibit A-1 entitled "Complete Application Package" which was introduced by the Board Secretary in advance of the hearing. Pa067. Appellant's allegations that the application was deficient or lacking information is false.

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1 On February 16, 2022, Johnson Development submitted its initial Application to the Board. On May 27, 2022, Johnson Development submitted its Amended and Supplemental Application to the Board.

The trial court properly relied on the appropriate legal standard for the grant of a major subdivision. Pa310-311. Under Robbinsville Township Ordinances §§ 142-77 and 142-78, a major subdivision is defined as "[a]ny division of land not classified as a minor subdivision." Ibid.; see also N.J.S.A. 40:55D-5 (similarly defining "major division"). The trial court correctly determined that the Applicant applied for a preliminary and final major subdivision approval and Johnson Development included numerous reports, including an EIS. Pa311. The Board's Planner, Engineer, the Board Traffic Engineer, and various other Township departments reviewed the EIS and the trial court determined that the application was complete. Ibid.

Ultimately, the trial court found that the Applicant's representatives testified that it did not intend any site work or disturbance before the Board considered the Applicant's Site Plan Application, which was reflected in the resolution. Court order p. 12. Thus, the Board's consideration of the subdivision application consisted of a "picture with different dotted lines, reflecting the subdivision's new lots." Court order p. 12. Artfully stated by the trial court, "[a]lthough a picture saves a thousand words, it has no adverse effect on the public's health, safety, or welfare." Ibid. Therefore, the court specifically found that the application has no environmental impact.

In conclusion, the trial court properly held that the Board did not act arbitrarily or capriciously when approving the subdivision, based on substantial credible evidence in the record and recorded so in the resolution set out to memorialize its decision. Pa313.

B. The Trial Court Properly Determined that Appellant's Assertion that the Board was required to Hear Counter Testimony is without merit.

Alliance alleges that the Board "prohibited" Appellants from submitting counter testimony to the application and essentially preventing itself from hearing pertinent information that would have assisted it in making an informed decision on the application. However, Alliance omits the fact that it never attempted to submit any counter testimony to the Board. Accordingly, by Alliance's own admission, the trial court correctly found that "the Board heard no contrary testimony that pertained to the subdivision." Pa312.

The general requirements are that plans and documents for which approval is sought must be on file and available for public inspection at least ten days prior to the hearing, the testimony of all witnesses related to an application must be taken under oath or affirmation by the presiding officer, with the right of cross-examination permitted to all interested parties, and that the presiding officer has discretion to impose reasonable limitations as to time and number of witnesses. The rules of evidence are not applicable to the hearing, and the agency may exclude irrelevant, immaterial or unduly repetitious evidence. See N.J.S.A. 40:55D-10a-e.

The trial court, citing Shim v. Washington Twp. Planning Bd., illustrated that while a Planning Board has an obligation to provide the public with a fair opportunity to be heard, it may limit testimony on duplicative or irrelevant matters. Pa37. Shim v. Washington Township Planning Board, 298 N.J. Super. 395 (App. Div. 1997). In Shim, the Court found that the chairperson did not improperly close the record, preventing the Alcoholic Beverage Commission from commenting on a site plan application for a daycare within a church because it was unnecessary and out of scope as testimony was limited to discussing traffic.

Alliance's brief merely states that the Board's attorney limited testimony on the application before the board, i.e., the major subdivision. Pb16-18. Moreover, Alliance freely admits that it never attempted to cross-examine any witnesses during the hearing. Id. at 18. Rather, Alliance merely speculated that any attempt to cross-examine witnesses on irrelevant subject matters would be prevented by the Board's counsel. Ibid. Therefore, because of Alliance's speculation, it chose not to attempt to cross-examine any witnesses at the hearing.

Accordingly, the trial court properly found that the Board did not hear any contrary testimony that pertained to the subdivision application and the trial court's decision should be upheld. See Pa312.

C. The Trial Court Properly Determined that the Submission of the EIS complies with the Requirements under the MLUL.

Alliance alleges that the trial court's determination that the Applicant's submission of the EIS, without also taking specific testimony on the EIS, was insufficient under the MLUL, and is "is counter to the procedural requirements of board hearings." Pb19. This assertion has no legal or factual basis.

There is no dispute that "[a]n [EIS] is required to be submitted on ...preliminary major subdivisions and/or preliminary site plans [applications]." § 142-77B(26). However, the Ordinances explicitly allow the Board to waive any requirements related to the EIS. § 142-77B(26)(g). Specifically, the Ordinances states that the Board, "may waive any provision of this § 142-77B(26), [EIS], if deemed not applicable." Ibid.

Here, while the Board has the authority to waive the requirement for an EIS, the Board chose to defer consideration of environmental and other impacts until its review of Johnson Development's Application for Site Plan Approval. Transcript of 11.1.23 hearing page 33-34. This deferment is reasonable because the subdivision approval was for the creation of a total of three (3) lots, including two (2) new lots, each of which would be the location for one of the new proposed warehouse-distribution-office buildings (which would be subject of the companion Application for Site Plan Approval submitted at the same time). Transcript of 11.1.23 hearing page 33-34. The one (1) remaining lot would contain the existing office building.

Transcript of 11.1.23 hearing page 5, 33-34. Therefore, since no improvements were proposed as part of the subdivision application, no resulting environmental impacts would occur if the application was granted. Thus, the Board, in its discretion, did not need to review the EIS and could properly wait until its review of Johnson's Development's Application for Site Plan Approval.

The trial court accurately found that the Board demonstrated unequivocally that the submitted Subdivision Application conformed in all respects with the MLUL and the Ordinances. Pa311-312. This included the finding that the EIS was included in Exhibit A-1 entitled "Complete Application Package" which was introduced by the Board Secretary in advance of the hearing. Pa312. Further, the trial court found that the overall submission package contained certain reports and other material, including, but not limited to, the EIS, that the Board Engineer reviewed the EIS, and that the Applicant addressed all comments related to the document. Ibid. The Board Engineer concluded that the Subdivision and Site Plan Applications met "the intent of the Township design standards." Pa199. Further, the trial court found that the Board's Resolution specifically included a finding that the requested subdivision does not adversely affect the public's health, safety, or welfare. Pa312.

Accordingly, Alliance's allegations that the Board was compelled to take testimony on the EIS is false. The trial court properly found that the submission of the EIS and the Board's deferment to consider the potential environmental impacts

was more appropriate for the Site Plan Approval. Pa312. Therefore, the trial court's decision should be upheld. The trial court reviewed the parties submissions and properly found that the record demonstrates that the Applicant submitted numerous reports and that those reports were reviewed by several of the Board's professionals, including the Planner, the Engineer, the Board Traffic Engineer, and various other Township departments. Pa311. Further, the trial court found that the Applicant's representatives testified that the subdivision would not affect the public's health, the Board heard no contrary testimony that pertained to the subdivision application, the Board is not compelled to elicit testimony on topics that are not pertinent to the application before it**.** Pa312.

D. The Board properly reviewed the necessary application materials and the public was given the appropriate opportunity to present comments and/or cross-examine witnesses on the application for the subdivision.

Alliance asserts that the Board prevented the public from submitting public comments and cross-examining witnesses regarding the application. Pb23. Further, Alliance claims that Board did not review the application materials once the application was completed. Id. at 24. This is objectively untrue and has no support in the record.

The Resolution clearly indicates that the Board reviewed multiple documents submitted by the Applicant. Pa248. Further, the Board heard testimony from the Applicant's Attorney and the Applicant's Professional Planner and several members

of the public commented on the application. Pa249. After careful consideration, the Board included a specific finding that the requested subdivision does not adversely affect the public's health, safety, or welfare. Pa250.

Accordingly, the trial court correctly found that the Board did not "put the cart before the horse" and properly followed the necessary procedures and supported its findings in the record. Moreover, as indicated above, Alliance admits to not attempting to cross-examine any witnesses because it felt like the Board would not allow the objection. However, such a conclusion is purely speculative due to Alliance's own choice not to cross-examine the witnesses. See Pb18.

Additionally, the Board opened the hearing up to the public and heard four (4) members of the public provide testimony. Transcript of 11.1.23, Hearing Page 40-48. Accordingly, Alliance's claims have no factual basis and the trial court's decision should be upheld.

III. THE APPLICANT SUBMITTED ALL NECESSARY DOCUMENTATION TO OBTAIN SUBDIVISION APPROVAL.

Alliance alleges that the Board permitted the Applicant to "ignore" aspects of the subdivision application and that the application for the subdivision was inadequate and lacking sufficient proofs for acceptance. However, Alliance again ignores the several documents submitted by the Applicant and the findings of the trial court.

The record shows that the Applicant provided all of the necessary documentation to obtain subdivision approval. The application submitted by Johnson Development on February 16, 2022, and supplemented on May 27, 2022, sought subdivision approval and also included a companion application for site plan approval. Pa001-Pa077; Pa78-Pa119. The overall submission contained all of the required reports and materials specified in the MLUL and the §§ 142-77 and 142-78. Pa245. Specifically, the submission included an EIS, Nosie Study, Storm Water Management Report, Traffic Impact Study and other utility improvement plans and reports. Pa001-Pa077; Pa78-Pa119. The applications were processed and reviewed by the Board Professionals concurrently.

The trial court appropriately found that the subdivision application stood on its own and the application provided sufficient evidentiary support in the record for the Board's decision. PA312-313. Accordingly, the trial court properly determined that Alliance failed to demonstrate that the Board acted arbitrarily, capriciously, and unreasonably in approving the subdivision approval and the trial court decision should be upheld.

CONCLUSION

For all of the reasons discussed in the trial court's opinion and in this brief, the decision of the Board to grant the subdivision requested by the Applicant is supported by substantial credible evidence in the record and conforms fully with

applicable legal requirements. The Board's memorializing resolution contains all necessary findings of fact and conclusions to explain the Board decision. The Board did not act arbitrary, capriciously or unreasonably and therefore, the decision of the Board should be upheld and affirmed.

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THE ALLIANCE FOR SUSTAINABLE COMMUNITIES AND KENNETH MAYBERG, Appellants, v. ROBBINSVILLE TOWNSHIP ZONING BOARD and JOHNSON DEVELOPMENT ASSOCIATES, INC., Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-3235-22 On Appeal from Superior Court of New Jersey Mercer County – Law Division Docket No.: MER-L-2035-22 Sat Below: Hon. Robert Lougy, A.J.S.C.

BRIEF OF RESPONDENT, JOHNSON DEVELOPMENT ASSOCIATES, INC.

On the Brief: JAMIE A. SLIMM, ESQ.
NIALL J. O'BRIEN, ESQ.

Dated: January 10, 2024

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PRELIMINARY STATEMENT

This appeal was filed by objectors to the Preliminary and Final Major Subdivision approval and related relief granted by Respondent Robbinsville Township Zoning Board of Adjustment ("Zoning Board" or "Board") to Respondent Johnson Development Associates, Inc. ("Johnson Development"). Appellants are The Alliance for Sustainable Communities and Kenneth Mayberg (collectively, "Alliance" or "Appellant").

The record from the Zoning Board proceedings shows that Johnson Development submitted all of the documents required to be submitted with its application by the Township's Ordinance and which were available for review by the public and considered by the Zoning Board. The application included detailed plans and expert reports including a detailed Environmental Impact Assessment and Stormwater Management Plan. Additionally, the Zoning Board heard testimony from Johnson Development's witnesses, had available its own professional consultants at the hearing, and examined the application materials. In a comprehensive written opinion, the trial court found that there was substantial credible evidence in the record to support the Board's determination to approve Johnson Development's preliminary and final major subdivision application and that the Zoning Board properly concluded that the subdivision application was

complete. Accordingly, the Trial Court correctly ruled that the Board properly approved the application and its decision should be upheld.

PROCEDURAL HISTORY

Respondent Johnson Development joins in the Procedural History set forth in the initial brief of Alliance except to add the following additional history.

Alliance filed a complaint in lieu of prerogative writs on November 29, 2022, which action was docketed MER-L-2035-22. (*Pa270-Pa279*). After briefing, a remote oral argument was held on May 23, 2023 before the Honorable Robert Lougy, A.J.S.C.

By Order and Opinion dated May 26, 2023, the Trial Judge dismissed the Alliance's complaint with prejudice. (*Pa301-Pa313*).

The Trial Judge's opinion addressed the Zoning Board record, Robbinsville Ordinances SS 142-77 and 142-78, the Resolution of Approval and all issues raised in the Alliance Complaint. (*Pa311*). The Trial Judge found that the application was for a major subdivision and therefore the requirements of the Robbinsville Ordinances apply. (*Pa311*). The Trial Judge further concluded that the Zoning Board record demonstrated that Johnson Development submitted numerous reports, including an Environmental Impact Assessment, which were reviewed by the Zoning Board professionals (*Pa301-Pa311*); the Board heard no contrary testimony, including on behalf of Appellant, to Johnson Development's

presentation that the subdivision would not affect public health safety and welfare or on the environment (*Pa312*); and that while the MLUL and Robbinsville Ordinances require specific documents to be submitted, there is no requirement that the Zoning Board elicit testimony on topics that are not within its jurisdiction or pertinent to the application before it. (*Pa313*).

The Alliance filed a Notice of Appeal on June 27, 2023. (*Pa314-Pa321*).

On November 15, 2023, Johnson Development filed a motion to strike Point II of Alliance's brief. Alliance filed opposition on November 27, 2023. On December 11, this Court denied the motion stating that the merits panel can decide the weight of the issues in the motion and address it on appeal. *(Da001).*

COUNTERSTATEMENT OF FACTS

On February 16, 2022, Johnson Development submitted an application to the Robbinsville Zoning Board of Adjustment for Preliminary and Final Major Subdivision Approval; Preliminary and Final Site Plan Approval and Bulk Variance/Design Waiver Approval, all related to the development of a 90.88 +/- acre property, located along Allentown-Robbinsville Road with access along a private road, known as Corporate Boulevard in Robbinsville Township (the "Property"). (*Pa001-Pa055*). The Property was then shown as Block 41.01, Lot 31 on the Official Robbinsville Township Tax Maps[1] (1T23-23 to 1T23-24). The

[1] The following references will be used throughout the brief:
"1T" shall refer to the Transcript of the November 1, 2022 Robbinsville Zoning Board of Adjustment Hearing.

Property is located in the ORH – Office, Research and Hotel Zoning District, and is known as "Mercer Corporate Park" due to prior approvals for office, warehouse and hotel development which, for the most part never occurred. (1T24 to 1T25; *Pa001-Pa055; Pa078-Pa090*). The land uses surrounding the Property include vacant land and Route I-95 within one quarter mile to the north, farmland to the east, farmland immediately to the south, with Allentown Borough further south across Indian Lake, Indian Run and farmland and residences to the west. (1T24).

A portion of the Property had been previously developed and is occupied by a 61,500 +/- square foot office building, within the Mercer Corporate Park and is served by a private road known as Corporate Boulevard and certain storm water management and utility facilities. (1T24; *Pa242*). The Mercer Corporate Park, as approved by the Robbinsville Planning Board in 2008, was intended to consist of a total of 508,700 square feet of office space, 84,180 square feet of warehouse space and a 160-room hotel facility. (*Pa244*).

In 2020, Johnson Development applied for and obtained use variance approval for the development of two (2) warehouse-distribution-office buildings rather than the office, warehouse and hotel uses as approved in 2008. (*Pa120 - Pa149*). As permitted by N.J.S.A. 40:55D-76.b., the application was bifurcated, with Johnson Development requesting only use variance approval (with subsumed

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"2T" shall refer to the Transcript of Prerogative Writs Oral Argument held on May 23, 2023.

bulk variances), with applications for all other approvals to be submitted after the approval of the use variance. As part of that use variance application, Johnson Development also identified certain variances that were known would exist at the time of the development of the Property, and those variances were deemed to be subsumed within the use variance approval granted by the Zoning Board, including a variance for a lot that would be proposed as part of the later subdivision application (proposed Lot 31.03) to front on Corporate Boulevard, the existing private road, rather than a public street as required by Robbinsville Ordinance. That use variance application was approved and memorialized by the Zoning Board by Resolution ZB20-01-01 dated April 27, 2021. (*Pa120-Pa149*). Appellant in the matter at issue here challenged the grant of that use variance approval and that appeal was dismissed with prejudice by the trial court. An Appeal has been argued and awaits decision in the Appellate Division at Docket No. A-002509-21.

The Application submitted by Johnson Development on February 16, 2022, and supplemented on May 27, 2022, was deemed complete by the Zoning Board Technical Review Committee on August 2, 2022, and, pertinent to this Appeal, sought subdivision approval for the creation of a total of three (3) lots, including two (2) new lots, each of which would be the location for one of the new proposed warehouse-distribution-office buildings (which were subject of the companion

Application for Site Plan Approval submitted at the same time), with one (1) remaining lot that would contain the existing office building. (*Pa001-Pa055; Pa078-Pa090*). The subdivision plan submitted for approval by Johnson Development depicted the location and configuration of the three (3) lots, and indicated that access to all three lots was to be provided by the existing internal road known as Corporate Boulevard. (1T29). The subdivision was also necessary because, while Resolution ZB20-01-01 granted an additional use variance to allow more than one principal use on the un-subdivided single lot, a condition of that approval was that the use variance would be temporary. (*Pa120-Pa149*). The grant of subdivision approval would allow each new warehouse-distribution-office use to be located on its own lot, thereby eliminating the need for that use variance. (*Pa120-Pa149*). No new variances were requested or determined to be necessary by the Zoning Board for the subdivision and no land disturbance or other development activities were proposed or approved pursuant to the Subdivision Approval granted by the Zoning Board. (1T30-17 to 1T31-4; 1T48-9 to 1T48-22). Because the Corporate Drive roadway already exists, the subdivision merely provided for the drawing of additional lot lines on the Robbinsville Township Tax Maps. (*Pa312*).

The overall submission by Johnson Development for the Subdivision Approval, at the same time, also included a companion Application for Site Plan

Approval. (*Pa001-Pa055; Pa078-Pa090*). Upon approval, the Site Plan Application would allow for the physical development of the Property. That overall submission requesting Subdivision and Site Plan Approvals contained certain reports and other material, including an Environmental Impact Assessment, a Sound Study, a Storm Water Management Report, Traffic Impact Study and numerous other plans and reports. (*Pa001-Pa055; Pa078-Pa090*). The Subdivision Application and the Site Plan Application were reviewed by the following Robbinsville Zoning Board consultants and other municipal entities: Board Planner, Board Engineer, Board Traffic Engineer, Board Architect and Landscape Architect; Board Sewer and Water Utility Engineer, and various Robbinsville Township departments (Fire, construction, public works, police, tax assessor, affordable housing and environmental commission). In its review letter dated August 10, 2022, the Board Planner stated that "given the nature of the approval sought, this review is undertaken as separate Subdivision and Site Plan Applications." (*Pa178-Pa189*). The Subdivision and Site Plan Applications were reviewed for conformance with the Robbinsville Ordinances and it was determined that all required items were submitted. (*Pa178-Pa189*).

In addition, Johnson Development attended two (2) Technical Review Committee Meetings with the Zoning Board Professionals and reviewed comments related to all of the submitted materials for both the subdivision application and

site plan application. (1T73 to 1T74). Johnson Development responded to those review comments both at the Technical Review Committee Meetings and by written Response Letters prior to the ultimate determination of Completeness on August 10, 2022. (*Pa178-Pa189*). These included responses made to the comments of the Board Engineer on the Environmental Impact Assessment. (*Pa190-Pa199; Pa200-Pa219; Pa220-Pa230; Pa241*).

The public hearing on Johnson Development's subdivision application was held on November 1, 2022. Defendant Zoning Board received testimony in support of the Application from Kevin Webb, P.E. Civil Engineer, Langan Engineering and Lance Landgraf, Planner, PP, AICP, LB, Landgraf & Associates, for Johnson Development. (1T11). Mr. Landgraf also provided testimony that the subdivision was consistent with the prior grant of use variance approval and that the negative criteria for the use variance approval remained satisfied. (1T48 to 1T51). No testimony or evidence was presented to the Zoning Board that disputed any of that testimony.

The Zoning Board public hearing on the Site Plan Application was also scheduled to begin at that same meeting. However, Johnson Development requested that the Zoning Board's consideration of the Site Plan Application be deferred to a later date and that the Zoning Board consider the subdivision only at the November 1, 2022, meeting. (1T5 to 1T6; 1T14 to 1T18). During the public

hearing, four members of the public questioned witnesses and/or testified. (1T75-14 to 1T95-24). Most of the public who spoke at the hearing resided outside of Robbinsville Township.

The Zoning Board voted to approve the Subdivision Application at the conclusion of the November 1, 2022, public hearing. On December 13, 2022, the Board adopted Resolution ZB22-02-02, memorializing the Subdivision Approval. (*Pa245-Pa253*).

The Robbinsville Township Zoning Board of Adjustment concluded in Resolution: ZB22-02-02 that the application was deemed complete, that Johnson Development had met all requirements for subdivision approval and that the subdivision was consistent with zoning and subdivision requirements. (*Pa245-Pa253*). The Board specifically found that Johnson Development, subject to certain conditions, had met the criteria set forth in the Robbinsville Subdivision Ordinance for major subdivision approval and that the subdivision did not adversely affect the public's health, safety, or welfare. (*Pa245-Pa253*). The Subdivision Approval was conditioned upon posting any required bonds and escrow, providing final plans to the Township and agreeing to certain subdivision plan revisions requested by the Zoning Board. (*Pa245-Pa253*). Also, the Zoning Board indicated that, as a condition of approval, Johnson Development must comply with all testimony placed upon the record. (*Pa245-Pa253*). This testimony included Johnson

Development's acknowledgement that there would be no development proposed in connection with the subdivision, and there would be no site work or disturbance before site plan approval was granted. (1T32 to 1T39). The Zoning Board also found that the subdivision "cannot be considered a planned development because it is located in the ORH Zone…and there are no ORH zoning provisions authorizing planned development." (Id.)

LEGAL ARGUMENT

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

The standard of review of the action of a local zoning board of adjustment is well settled. The Appellate Division review of a challenge to the decision of a municipal board follows the same standard as the trial court: the Court must determine whether the municipal body acted arbitrarily, capriciously, or unreasonably. *Ten Stary Dom P'ship v. Mauro*, 216 N.J. 16, 33 (2013); *Jacoby v. Zoning Board of Adjustment of Borough of Englewood Cliffs*, 442 N.J. Super. 450, 462 (App. Div. 2015). The action of the local board is presumed to be valid. *Kenwood Associates v. Bd. of Adj. Englewood*, 141 N.J. Super. 1 (App. Div. 1976). This presumption is overcome only by a showing of clear and compelling evidence. *Dome Realty, Inc. v. City of Patterson*, 83 N.J. 212, 235 (1980); *Advance at Branchburg II, LLC v. Twp. of Branchburg Board of Adjustment*, 433

N.J. Super. 247, 253 (App. Div. 2013). The appellate court will not disturb the local board's decision absent a clear abuse of discretion and will not overturn the board's decision where there is adequate evidence supporting the decision and the decision comports with statutory criteria. *Price v. Himeji, LLC*, 214 N.J. 263, 284 (2013); *Burbridge v. Twp. of Mine Hill*, 117 N.J. 376, 385 (1990). Neither the trial court nor the appellate court will substitute its judgment for that of the board invested with the power and duty to pass upon the application. *Kenwood Associates v. Board of Adjustment*, 141 N.J. Super. 1, 4 (App. Div. 1976).

"Although courts defer to the expertise of municipal agencies in reviewing discretional exercises of an agency's statutory powers, the interpretation of an ordinance is primarily a question of law." *Wyzykowski v. Rizas*, 132 N.J, 509, 518 (1993). Therefore, the appellate court's review is de novo. *388 Route 22 Readington Realty Holdings, LLC v. Township of Readington,* 221 N.J. 318, 338 (2015).

II. THE BOARD'S DECISION TO APPROVE THE APPLICATION WAS NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE OR IN VIOLATION OF THE MUNICIPAL LAND USE LAW.

A. The Trial Court Properly Held that that Johnson Development's Application Met The Requirements of the Robbinsville Ordinances. (Response to Point IA of Appellant's Brief).

Alliance argues that the trial court erred in finding that Johnson Development had met the requirements of the Robbinsville Township Ordinances

for Preliminary and Final Subdivision Approval. Alliance also contends that the trial court erred because there was no testimony presented concerning many of the requirements of the Ordinances. A review of the Ordinances in connection with the facts of this case make evident that Alliance's arguments must fail.

It is well settled that pursuant to the Municipal Land Use Law ("MLUL"), an ordinance requiring approval by the planning board of either subdivisions or site plans, or both, shall include certain enumerated provisions for the processing of applications for development. N.J.S.A. 40:55D-38(a). The MLUL also provides guidance regarding the discretionary contents of municipal ordinances related to subdivision and site plan review and approval. *See* N.J.S.A. 40:55D-39; N.J.S.A. 40:55D-40. Consistent with the MLUL, Robbinsville Township has adopted ordinances for these purposes. Specifically, Robbinsville Township Ordinances 142-77 and 142-78 set forth the development application review procedures for the submission of preliminary and final plans for subdivisions and those development proposals requiring site plan review. (*Pa254-Pa265; Pa266-Pa269*).

Alliance claims that the November 1, 2022, decision of the Zoning Board to grant Subdivision Approval was arbitrary, capricious and unreasonable because insufficient proofs were submitted by Johnson Development necessary for the Board to decide the Subdivision Application. Specifically, Alliance claims that Johnson Development did not provide an Environmental Impact Assessment or

provide any testimony regarding an environmental assessment in violation of the MLUL and Robbinsville Township Ordinances. This statement forms the basis for their entire argument and is factually incorrect.

The MLUL defines a subdivision as, "the division of a lot, tract or parcel of land into two or more lots, tracts, parcels or other divisions of land for sale or development. The following shall not be considered subdivisions within the meaning of this act, if no new streets are created: (1) divisions of land found by the planning board or subdivision committee thereof appointed by the chairman to be for agricultural purposes where all resulting parcels are 5 acres or larger in size, (2) divisions of property by testamentary or intestate provisions, (3) divisions of property upon court order, including but not limited to judgments of foreclosure, (4) consolidation of existing lots by deed or other recorded instrument and (5) the conveyance of one or more adjoining lots, tracts or parcels of land, owned by the same person or persons and all of which are found and certified by the administrative officer to conform to the requirements of the municipal development regulations and are shown and designated as separate lots, tracts or parcels on the tax map or atlas of the municipality. The term "subdivision" shall also include the term "resubdivision." N.J.S.A. 40:55D-7. A site plan is defined 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. Consistent with these statutory definitions, and because the Corporate Drive access for the Property already existed, it is inarguable that the proposed subdivision, by itself, conveys no rights to develop buildings or other improvements on the subject property because site plan approval is also required for the development of commercial buildings, associated driveways, parking areas and all of the other features subject to site plan review. In this case, the Subdivision Approval merely allows for the drawing of lines on the municipal tax maps to create new lots. (1T32). This also allowed Johnson Development to purchase two of the lots created by the subdivision. No new site disturbance, impervious coverage, buildings or other development were permitted by the subdivision that would impact environmental features or storm water drainage. Conversely, the site plan application was required to, and did address all proposed site development and impacts. (*Pa001-Pa055*).

The record before the Zoning Board demonstrates unequivocally that the submitted Subdivision Application conformed in all respects with the requirements of the Robbinsville Ordinances. (1T68 to 1T69; 1T73; *Pa001-Pa055*). Johnson Development submitted an Application for Subdivision approval and an Application for Site Plan approval at the same time. (*Pa001-Pa055*). While Appellant asserts that no Environmental Impact Assessment was submitted, the overall submission package contained certain reports and other material, including, but not limited to, an Environmental Impact Assessment. That Environmental Impact Assessment was reviewed by the Board Engineer and Johnson Development addressed all comments related to the document. (*Pa190-Pa199; Pa200-Pa219; Pa220-Pa230; Pa241*). The Board Engineer concluded that the Subdivision and Site Plan Applications met "the intent of the Township design standards." (*Pa178-Pa189*). The Board's Resolution included a specific finding that the requested subdivision does not adversely affect the public's health, safety, or welfare. (*Pa245-Pa253*). Further, the Environmental Impact Assessment was included in Exhibit A-1 entitled "Complete Application Package" which was introduced by the Board Secretary in advance of the hearing. Alliance's allegations that the application was deficient or lacking information in violation of the Robbinsville Township Ordinances is not consistent with the record of the hearing.

Appellants accurately point out that Robbinsville has adopted Ordinances which govern the submission requirements for subdivision applications. Robbinsville Township Ordinance 142-77B(26). (*Pa254-Pa265*). However, they neglect to mention that the Robbinsville Ordinances also explicitly allow the Board to waive any requirements related to an environmental impact assessment. The Ordinance specifically provides that the Board, "may waive any provision of this 142-76B(26), environmental impact assessment, if deemed not applicable." Robbinsville Township Ordinance 142-77B(26)(g). (*Pa254-Pa265*).

However, the authority to waive the requirement for an Environmental Impact Assessment was not exercised in the present case, instead, the Board properly deferred consideration of any environmental and other impacts until its review of Johnson Development's Application for Site Plan Approval. The subdivision application sought subdivision approval for the creation of a total of three (3) lots, including two (2) new lots, each of which would be the location for one of the new proposed warehouse-distribution-office buildings (which would be reviewed in the context of the companion Application for Site Plan Approval submitted at the same time), with one (1) remaining lot that would contain the existing office building. Since no improvements were proposed as part of the subdivision application and, therefore, no resulting environmental impacts, there was no need for in depth review by the Zoning Board of any issues raised within

the Environmental Impact Assessment (or in the other technical reports) in connection with its consideration of the subdivision. However, because Johnson Development requested that the Zoning Board defer review of the site plan application to a later date, all of the issues related to the physical development of the property, including traffic impacts, storm water management facilities, and all other impacts were properly deferred to the Zoning Board's review of Johnson Development's Application for Site Plan Approval. Any review of such impacts in connection with the Zoning Board's review of the subdivision would have been limited to rote testimony and the unavoidable conclusion that there are so such impacts related to the subdivision.

The trial court agreed with this argument finding that, because the subdivision application was considered separately, it constituted approval of a picture with different dotted lines showing the new lots being created and which had no adverse effect on the public's health, safety, or welfare. (*Pa312*). Further, the Trial Court properly found that testimony was presented to the Zoning Board confirming that no site work or disturbance could take place before the Board's consideration of the Site Plan Application and that the Zoning Board's Resolution approving the subdivision properly included compliance with that testimony as a condition of the subdivision approval. The Trial Judge found that "[i]n other

words, the line-drawing itself has no environmental impact, one way or the other." (*Pa312*).

In sum, the Trial Court found that the subdivision did not adversely affect the public's health, safety, or welfare and upheld the Board's decision finding that Johnson Development's application was complete and in compliance with the Robbinsville Ordinances.

B. The Trial Court Did Not Err In Finding That The Board Did Not Hear Contrary Testimony (Response to Point IB of Appellant's Brief).

Appellant claims that the trial court erred in finding that the Zoning Board heard no contrary testimony related to the subdivision application and further argues that the Board did not permit any testimony to be presented in violation of the MLUL. This characterization of the Zoning Board hearing and the Trial Judge's deliberation is not accurate and the record is clear that there was no such violation of the MLUL.

The procedures for holding a hearing on any application for development, including an application for subdivision as a bifurcated application to the zoning board of adjustment are set forth in the Municipal Land Use Law. The general requirements are that plans and documents for which approval is sought must be on file and available for public inspection at least ten days prior to the hearing, the testimony of all witnesses related to an application must be taken under oath or

affirmation by the presiding officer, with the right of cross-examination permitted to all interested parties, and that the presiding officer has discretion to impose reasonable limitations as to time and number of witnesses. The rules of evidence are not applicable to the hearing, and the agency may exclude irrelevant, immaterial or unduly repetitious evidence. *See* N.J.S.A. 40:55D-10a-e.

Appellant's citation to the law on this issue focuses on the right of the public to be heard. However, its reliance on the cited caselaw is misplaced and inconsistent with the facts of the instant matter. In *Witt v. Borough of Maywood*, 328 N.J. Super. 432 (Law Div. 1998), the Court reversed variance and site plan approval on the grounds that the Board had deprived the objectors of a fair opportunity to participate in and present evidence at the hearing. The Court concluded that the Board had failed to provide a fair opportunity for public comment because objectors did not have the opportunity *until after midnight* to present their witnesses on the application and ruled that the Board should have continued the hearing to another date to allow all available evidence to be considered. In the present case, Alliance was given a fair opportunity to participate in the hearing: counsel for Alliance was present at the hearing, spoke at length at the hearing and, contrary to the assertions in Appellant's Brief, elected not to question witnesses or present witnesses of his own. (1T56 to 1T71).

In spite of Appellant's claim to the contrary, Appellant's counsel did not, at any time during the Zoning Board hearing, ask to introduce witnesses to provide testimony on any of the topics cited by Appellant in its Brief, including environmental issues, storm water, or other concerns. (1T56 to 1T64; 1T71 to 1T75). Appellant could have introduced witnesses to provide any testimony that might attempt to show that the drawing of lines on the municipal tax map would have such impacts but did not do so. This was pointed out to Appellant's counsel during oral argument at the trial court, yet counsel renews those claims here. (2T18 to 2T19). As a result, Johnson Development's testimony that there would be no such impacts was not disputed on the record. Unlike the objectors in *Witt,* Alliance was given a full opportunity during a hearing held and concluded during normal hearing hours, to comment and, if it did not avail itself of that opportunity, has only itself to blame.

It should be noted that where members of the public are given a full opportunity to express their views during the hearing, it is not grounds for reversal if the board chairman did not announce that objectors had the right to cross examine witnesses for the applicant. *Shim v. Washington Township Planning Board*, 298 N.J. Super. 395, 413 (App. Div. 1997).

In the present case, Alliance had an opportunity to cross examine Johnson Development's witnesses, and present their own witnesses. Although counsel for

Alliance attended the hearings, counsel chose not to question Johnson Development's witnesses or present any witnesses on behalf of Appellant. Having not taken the opportunity at the hearing, Alliance cannot now claim that the Board did not allow contrary testimony or that the trial court erred in finding that no contrary testimony was provided.

In further support of its argument, Alliance relies on comments made by the Zoning Board Attorney providing explanations to the Board and public about the nature of the hearing and matters that were, or were not, subject to the Board's jurisdiction. ("[T]onight just so everyone understands is just the subdivision. It's the drawing of lines on the property, where those lines will be drawn and so forth.... So, if you want to come up and talk about many of the issues that were spoken about during the use variance portion of this, remember a use variance was already granted.") (1T6-3 to 1T6-5; 1T6-25 to 1T7-12). ("I ask that you keep your opinion to what he presents, not to go outside and, outside of the application and talk about things again that were already during the use variance part of this or really things that are going to be part of the site plan... Tonight we're just talking about where we're going to draw the lines.") (1T8-4 to 1T8-9; 1T8-10 to 1T8-12). These comments were appropriate to ensure the orderly progression of the hearing, something the Board attorney is allowed to do. *Cox & Koenig, New Jersey Zoning and Land Use Administration, SS 3-5.3* (2023). At no time did the Board attorney

refuse to allow Alliance's attorney to ask questions or present witnesses. Any inference to the contrary is false. (1T56 to 1T64; 1T71 to 1T75).

C. The Environmental Impact Assessment Was Submitted In Accordance With The Ordinance Requirement (Response to Point IC of Appellant's Brief).

Alliance claims that the trial court erred in finding that the submission of the Environmental Impact Assessment and associated extensive professional review was sufficient to meet the requirements of the MLUL. Alliance's argument is largely a reiteration of Points IA and IB. To that end, Johnson Development relies on sections II A and II B, *supra*, of this Brief.

Alliance contends that the Board had the obligation to permit testimony and cross examination on all issues and materials pertaining to the application. As aptly stated by the trial court, "[n]either the statute nor the ordinances compel the Board to take testimony on all issues if those issues are substantiated in the record before it." (*Pa301-Pa313*).

Instead, the Zoning Board focused on the issues that were relevant to the subdivision in its consideration of the subdivision application with consideration of other reports, plans and other documents properly submitted by Johnson Development but relevant to the site plan application, to be considered during the Board's consideration of that application. The Trial Court in focusing "on the plain language of the [municipal ordinance] and use [of] common sense to

effectuate the legislative purpose," agreed with this approach. *(Pa311; Pa313)*, *citing Dunbar Homes, Inc.*, 448 N.J. Super. at 598 (*quoting Morristown Assocs. v. Grant Oil Co.*, 220 N.J. 360, 380 (2015).

Alliance contends that the submission of an Environmental Impact Assessment is not sufficient to comply with the Robbinsville Ordinances without discussion on the record. As properly found by the Trial Court, with no environmental or other impacts resulting from the subdivision, as set forth in the Reply to Point II A, this is an improper interpretation of the Ordinances.

D. The Trial Court Did Not Err In Finding That A Review By Board Professionals Is Sufficient And That There Is No Environmental Impact Of The Subdivision (Response to Point IID of Appellant's Brief).

Alliance contends that the Zoning Board prevented the public from submitting public comments and cross-examining witnesses regarding the application. Further, Alliance claims that the Zoning Board did not review the application materials once the application was deemed complete. These contentions are false and again misstate the record.

The Resolution clearly indicates that the Zoning Board reviewed multiple documents submitted by Johnson Development. (*Pa245-Pa253*). Additionally, the Board heard sufficient testimony from Johnson Development's witnesses regarding the details of the application. (1T23 to 1T55). In granting the application, the memorializing Resolution specifically states, *inter alia*, that the

requested subdivision does not adversely affect the public's health, safety, or welfare. (*Pa245-Pa253*).

Additionally, the Board opened the hearing up to the public and heard four (4) members of the public provide testimony. At no point were any of those members of the public prevented from speaking. (1T86 to 1T94). Accordingly, Alliance's claims have no factual basis and the trial court's decision should be upheld.

III. APPELLANT'S CHALLENGE TO BIFURCATION IS UNTIMELY AND INAPPROPRIATE (RESPONSE TO POINT II OF APPELLANT'S BRIEF).

Appellant appears to be arguing that the bifurcation of the use variance from the subdivision and site plan was not appropriate, and that Johnson Development did not provide adequate proofs and submissions for the Applications. This argument fails because (1) a challenge to bifurcation is untimely, and (2) all necessary documentation to obtain subdivision approval was submitted in accordance with the Robbinsville Ordinances.

Bifurcated use variance approval was granted by Zoning Board Resolution ZB20-01-01, dated April 27, 2021. (*Pa120-Pa149*). "Bifurcation" as authorized by N.J.S.A. 40:55D-76b has a specific meaning under the MLUL, providing that, when a "d" Variance is required, a "developer may elect to submit a separate application requesting approval of the variance and a subsequent application for

any required approval of a subdivision, site plan or conditional use. The separate approval of the variance shall be conditioned upon grant of all required subsequent approvals by the board of adjustment." Bifurcation does not refer to the sequence of the grant of various component approvals by the Zoning Board that are part of the "required subsequent approvals…" contemplated under the Statute. Bifurcation, in the election of the developer, allows the developer to proceed with the use variance application and later return to request all other "required subsequent approvals." Here, Appellant seeks to blur the process under which the Land Use Approvals were considered and approved by the Zoning Board.

Johnson Development contends that this argument is improper and must be disregarded as noted in our motion to strike. In denying the motion, this court specifically held that the merits panel can decide the weight of issue presented. (*Da001)*.

In this appeal, Alliance must be limited to the challenge of the straight forward, simplistic division of the Property as approved by the Zoning Board, as that was the only matter before the trial court, addressed in the identified order subject to appeal. (*Pa301-Pa313; Pa314*). Alliance cannot again interject an issue from the use variance approval by objecting to Johnson Development's election to submit the use variance application before all of the other "required subsequent approvals." Its arguments have been presented and are pending before this Court

in a separate appeal. Therefore, any challenge to bifurcation are not appropriate here and the trial court's decision must be upheld.

Notwithstanding the fact that any challenge to bifurcation is untimely and inappropriate, Johnson Development provided all of the necessary documentation to obtain subdivision approval, which is the subject of the instant appeal. Alliance mistakenly alleges that the application was "tri-furcated" and, as such, Johnson Development did not include all necessary proofs and submissions for each application. This statement is not factually correct. The application submitted by Johnson Development on February 16, 2022, and supplemented numerous times before the Zoning Board hearing, sought subdivision approval and site plan approval and the overall submission contained all of the required reports and materials specified in the MLUL and the Robbinsville Township Ordinances 142-77 and 142-78. (*Pa254-Pa265; Pa266-Pa269*). To the extent that Appellant is now arguing that Johnson Development requested a further 'bifurcation' of the additional approvals required in addition to the Zoning Board's use variance approvals that assertion simply disregards the nature of the application submitted by Johnson Development on February 16, 2022, and the manner of the Zoning Board's deliberations. At the November 1, 2022, hearing, at the request of Johnson Development, and as described clearly by the Zoning Board Attorney, consideration of the site plan application and all of the issues related to it were

deferred to a later date and the November 1, 2022, hearing was limited to the Zoning Board's consideration of "drawing of lines" in connection with the Subdivision. (1T6). The subdivision approval granted by the Zoning Board was simply one of the additional approvals required to be granted as part of the second "prong" of the bifurcation of the use variance application from those additional approvals pursuant to N.J.S.A. 40:P55D-76.b. Further, the grant of the subdivision then allowed the Zoning Board to consider the site plan application in the context of the new lots on which the proposed buildings will be located, which is also necessary to confirm conformance with such requirements as individual lot coverages and building setback requirements, among others.

CONCLUSION

For the reasons set forth herein and as discussed in the trial court's opinion and in this brief, the decision of the Board to grant the subdivision approval requested by the Applicant is supported by substantial credible evidence in the record and conforms fully with the Municipal Land Use Law and Robbinsville Township Ordinances. Therefore, the decision of the trial court should be upheld and affirmed.

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

By: _____
JAMIE A. SLIMM, ESQUIRE
NIALL J. O'BRIEN, ESQUIRE

Dated: January 10, 2024

228269901 v3

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No.: A-3235-22

THE ALLIANCE FOR SUSTAINABLE COMMUNITIES and KENNETH MAYBERG, Appellants, vs. ROBBINSVILLE TOWNSHIP ZONING BOARD OF ADJUSTMENT and JOHNSON DEVELOPMENT ASSOCIATES, INC., Respondents.	**Civil Action** On Appeal From: Superior Court of New Jersey Mercer County - Law Division Docket No.: MER-L-2035-22 Sat Below: Hon. Robert Lougy, A.J.S.C.

REPLY BRIEF OF APPELLANTS THE ALLIANCE FOR SUSTAINABLE COMMUNITIES AND KENNETH MAYBERG

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Dated: January 24, 2024

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

1. Robbinsville Zoning Board of Adjustment Resolution of Memorialization ZB22-02-02, adopted on December 13, 2022. (Pa245-Pa253).

2. Superior Court of New Jersey Law Division, Mercer County Order Dismissing Plaintiffs' Action in Lieu of Prerogative Writ, entered on May 26, 2023. (Pa301-Pa313).

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

Defendants' briefs can be summarized as Defendants' attempts to mold what occurred during the zoning board hearing into support for Defendants' position. But Defendants assertions are not supported by the transcripts, not supported by the resolution, and are contradicted by their own statements during the Board hearing and arguments before the trial court.

At the heart of the matter is that either (1) the application materials were part of the record, and therefore the Board members and members of the public was improperly limited in their cross-examination and testimony, or (2) the application materials were not part of the record and therefore the application was incomplete. Defendants cannot argue that the application materials were part of it and yet no one was allowed to ask questions on the application materials.

Defendants also argue that Plaintiffs did not attempt to present their witnesses. Plaintiffs were not going to make a circus out of the proceedings when it was abundantly clear from Board Attorney that he was not going to permit testimony or cross-examination on the issues intended to be raised by Plaintiffs. Plaintiffs took the appropriate action and simply made the arguments to preserve the issue on appeal.

For the reasons set forth herein and in Plaintiffs' initial brief, this Court should reverse the Trial Court's order and remand the application to the Board.

PROCEDURAL HISTORY

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

STATEMENT OF FACTS

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

LEGAL ARGUMENT[1]

I. THE BOARD'S DECISION TO APPROVE THE APPLICATION WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE AND VIOLATES THE MLUL, THEREFORE THE APPROVAL MUST BE REVERSED AND REMANDED.

A. Applicant's Own Statements on The Record Indicate the Application Materials Was Not Part of the Record.

Defendant Robbinsville Township Zoning Board of Adjustment ("Board") argues that the overall submission package for the subdivision and site plan application included all the documents and information required by the Municipal Land Use Law ("MLUL") and the township ordinances. (BDb7). Defendant Johnson Development Associates, Inc. ("Applicant") makes the same

[1] The following references will be used throughout the brief:
"1T" shall refer to the Township of Robbinsville Zoning Board of Adjustment Hearing held on November 1, 2022.
"2T" shall refer to the Transcript of Prerogative Writ Oral Argument held on May 23, 2023.
"Pa" shall refer to Plaintiffs' Appendix.
"Pb" shall refer to Plaintiffs' Brief.
"BDb" shall refer to Robbinsville Township Zoning Board of Adjustment's Opposition Brief.
"ADB" shall refer to Johnson Development Associates, Inc. Opposition Brief.

argument and further notes that the Board professionals had reviewed all the materials. (ADb15).

However, the testimony on the record at the subdivision hearing shows otherwise. In response to the instruction to not discuss stormwater, a board member tried to reference the fact that there was a stormwater report in the materials. (1T40-19 to 1T41-13). In response, the Applicant's attorney responded "That is part of site plan… Number one, that is part of the site plan review. That's in the file for that. We're working – you just need a supplemental submission related to the stormwater management that will be part of the site plan application going forward. That's not part of this application." (1T41-16 to 1T14-23) (emphasis added). The position that the application materials were submitted and considered by the board is the complete opposite position of what Defendants advanced during the Board hearing. Furthermore, as briefed in Plaintiffs' initial brief, review of the application materials by board professionals is not sufficient, and it is still subject to cross-examination by the Board members and members of the public. (Pb23-Pb25).

The Board also relies upon the fact that the resolution identifies a specific finding that the requested subdivision does not adversely affect the public's health, safety, or welfare. (BDb7). However, this finding is not supported by the record. "The factual findings set forth in a resolution cannot consist of a mere

recital of testimony or conclusory statements couched in statutory language." New York SMSA, L.P. v. Bd. of Adjustment of Tp. of Weehawken, 370 N.J. Super. 319, 333 (App. Div. 2004) (citing Harrington Glen, Inc. v. Bd. of Adjustment of Leonia, 52 N.J. 22, 28 (1968)).

In New York SMSA, the board's resolution set forth no factual findings, and merely identified the applicant, describes the proposed site, summarizes in a cursory fashion the testimony presented, and reiterated selected comments. New York SMSA, L.P., 370 N.J. Super. at 333. The same occurred here[2]. (Pa245-Pa253). "This is exactly the sort of resolution that has repeatedly been recognized as deficient by the courts." Ibid. (citing Medici v. BPR Co., 107 N.J. 1, 23 (1987); Harrington Glen, Inc., 52 N.J. at 28; Smith v. Fair Haven Zoning Bd. of Adjustment, 335 N.J. Super. 111, 123 (App. Div. 2000); Loscalzo v. Pini, 228 N.J. Super. 291, 305 (App. Div. 1988); Morris County Fair Housing Council v. Boonton Tp., 228 N.J. Super. 635, 646 (Law Div. 1988)).

For these reasons, the Board's approval of the application for preliminary and final major subdivision approval was arbitrary, capricious, and unreasonable, and must be reversed and remanded for further proceedings.

[2] Plaintiffs further note that the argument before the Board during the hearing had nothing to do with any alleged planned development, therefore the resolution contains an inaccurate summary of the proceeding.

B. Defendants' Own Arguments Belies Its Attempts to Argue Nothing Improper Occurred In Limiting Testimony And Cross-Examination.

The Board argues that "[Plaintiffs] merely speculated that any attempt to cross-examine witnesses on irrelevant subject matters would be prevented by the Board's counsel." (BDb10) (emphasis added). Applicant again makes the same argument (ADb19). As an initial note, the Board's position that the subject matters would have been "irrelevant" confirms that the Board Attorney would have prevented the cross-examination and testimony. But more to the point, this was not mere speculation, but already ruled upon by the Board Attorney during the hearing and confirmed by the Board Attorney during the oral arguments before the trial court.

During the Board hearing, the Board Attorney made the ruling that "tonight just so everyone understands is just the subdivision. It's the drawing of lines on the property, where those lines will be drawn and so forth… So if you want to come up and talk about many of the issues that were spoken about during the use variance portion of this, remember a use variance was already granted." (1T6-3 to 1T6-5; 1T6-25 to 1T7-12). The Board Attorney further stated "I ask that you keep your opinion to what he presents, not to go outside and, outside of the application and talk about things again that were already during the use variance part of this or really things that are going to be part of the site plan…

Tonight we're just talking about where we're going to draw the lines." (1T8-4 to 1T8-9; 1T8-10 to 1T8-12).

When board members tried to ask questions on the application materials, such as the stormwater management issues, the Board Attorney prohibited the cross-examination on topics outside the limited testimony provided by Applicant's witnesses on the subdivision lines. (1T40-19 to 1T40-24). The Board Attorney's instructions to the board members that "we really need to keep this separate and apart from the site plan and all those issues that will occur then." (1T40-19 to 1T40-21). Plaintiffs argued during the hearing that the language of Robbinsville Ordinances §§ 142-77 and 142-78 required a full review of the application materials and not just a limited review of the proposed new lot lines. (1T56-6 to 1T61-17). The Board Attorney refused to allow such discussions and stated, "all of that is going to be dealt with at site plan." (1T57-16 to 1T58-2).

During oral argument before the trial court, the Board Attorney confirmed he did not permit cross-examination or testimony regarding the environmental impact assessment or any other topic that had previously been mentioned during the use variance application. (2T22-15 to 2T22-22). The Board Attorney also held that the community impact statement, required by Robbinsville Ordinances

for major subdivision applications, was not permitted to be reviewed. (2T23-8 to 2T23-12).

As such, the Trial Court erred in finding that there was no contrary testimony provided, as no contrary testimony was permitted to be presented. There is no requirement for "magic words" to be stated when the record is abundantly clear that the Board's Attorney was not going to permit testimony or cross-examination on the issues intended to be raised by Plaintiffs. Plaintiffs were not going to make a circus out of the proceedings and proceed to call up each of Applicant's witnesses, some of whom weren't even presented and is unclear if they were present that night, to cross-examine and be denied. Plaintiffs were not going to call up each of Plaintiffs' expert witnesses to have them be interrupted and denied the opportunity to testify. Plaintiffs took the appropriate action and simply made the arguments to preserve the issue on appeal. (1T56-6 to 1T74-23).

For these reasons, the Board's approval of the application for preliminary and final major subdivision approval was arbitrary, capricious, and unreasonable, and must be reversed and remanded for further proceedings.

C. The Consideration of the EIA Was Not Waived Or Deferred by the Board.

The Board argues that the Environmental Impact Assessment ("EIA") was waived and/or deferred to review during the site plan. (BDb11). Applicant

makes a similar argument that a review of the EIA was deferred by the Board. (ADb16-ADb17). This is not supported by the record. The Board's citation to the transcript of the hearing does not show the Board deferring consideration of the EIA to the Site Plan. The citation was to the Applicant's engineer testifying on the subdivision application. (1T33-1 to 1T34-25). Applicant does not provide any citations to support this argument, because there is none. Nowhere in the transcript is there a decision by the Board to waive or defer discussion relating to the EIA. (See 1T). The resolution does not show a decision by the Board to waive or defer discussion relating to the EIA. (Pa245-Pa253). There was never any waiver or deferral of the EIA.

Furthermore, Defendants misstate the ordinance and leave out the most important part. "The appropriate Board, upon recommendation of the Environmental Commission, may waive any [requirement of the EIA], if deemed not applicable." (Robbinsville Township Ordinance 142-77(B)(26)(g); Pa261) (emphasis added). There is nothing in the record that shows any recommendation by the Environmental Commission to waive any provision of the EIA. Therefore, any waiver or deferral was inappropriately granted.

For these reasons, the Board's approval of the application for preliminary and final major subdivision approval was arbitrary, capricious, and unreasonable, and must be reversed and remanded for further proceedings.

D. The Record Does Not Support The Assertion That The Board Was Permitted To Review All the Application Materials.

Finally, the Board relies upon the resolution as support that the Board did review the full application materials and thoroughly considered all the application materials. (BDb13). Applicant again makes the same argument. (ADb23). The transcript does not support that finding and in fact contradicts it.

When board members tried to ask questions on the application materials, such as the stormwater management issues, the Board Attorney prohibited the cross-examination on topics outside the limited testimony provided by Applicant's witnesses on the subdivision lines. (1T40-19 to 1T40-24). The Board Attorney stated "we really need to keep this separate and apart from the site plan and all those issues that will occur then." (1T40-19 to 1T40-21). The Applicant's attorney also responded and stated "that is part of site plan. Let me answer your, your question sir. Number one, that is part of site plan review. That's in the file for that… That is not part of this application." (1T41-16 to 1T41-23). Applicant's attorney further stated that "we're not going to testify about [the development that will be reviewed as part of the site plan]. (1T42-3 to 1T42-20).

Plaintiffs argued during the hearing that the language of Robbinsville Ordinances §§ 142-77 and 142-78 required a full review of the application materials and not just a limited review of the proposed new lot lines. (1T56-6 to

1T61-17). The Board Attorney refused to allow such discussions and stated, "all of that is going to be dealt with at site plan." (1T57-16 to 1T58-2).

During oral argument before the trial court, the Board Attorney confirmed he did not permit cross-examination or testimony regarding the environmental impact assessment or any other topic that had previously been mentioned during the use variance application. (2T22-15 to 2T22-22). The Board Attorney also held that the community impact statement, required by Robbinsville Ordinances for major subdivision applications, was not permitted to be reviewed. (2T23-8 to 2T23-12). There is simply nothing in the record to support Defendants' assertion that the Board had reviewed and considered all the documents and information submitted.

For these reasons, the Board's approval of the application for preliminary and final major subdivision approval was arbitrary, capricious, and unreasonable, and must be reversed and remanded for further proceedings.

II. APPLICANT FOR THE THIRD TIME MISCONSTRUES PLAINTIFF'S ARGUMENTS REGARDING BIFURCATION.

A. Applicant misconstrues Plaintiffs' arguments relating to the bifurcation.

Despite being corrected by Plaintiffs' reply brief before the trial court and by Plaintiffs' opposition to Applicant's motion to strike filed in the Appellate Division, the Applicant simply repeats its opposition brief before the trial court

and ignores the real argument. Plaintiffs are not arguing that the bifurcation of the use variance application and the site plan application was inappropriate. Plaintiffs are arguing that even though the application has been bifurcated, the Applicant still must meet the requirements under the MLUL, N.J.S.A. 40:55D-38, and the Robbinsville Ordinances §§ 142-77 and 142-78, for applications for subdivisions. (Pb25-Pb26).

Plaintiffs' citations to cases relating to bifurcation of use variance and site plan applications, were explicitly identified as analogous situations, and not as the primary argument. (Pb25-Pb26). Nowhere in this appeal are Plaintiffs allege that bifurcation, as the term of art under N.J.S.A. 40:55D-76b relating to use variances and site plan applications, was improper.

Defendants' position during the subdivision hearings before the Board and during oral argument before the Trial Court was that the issues would be dealt with at site plan. (1T41-16 to 1T41-23; 1T42-3 to 1T42-20; 2T9-12 to 2T9-23; 2T22-1 to 2T22-11). Plaintiffs are arguing here that the subdivision application must stand on its own and Applicant was required to submit all the required information under the MLUL and the township ordinance for subdivision applications. As part of the application, Plaintiffs and the other members of the public should have had the right to cross-examine Defendant's witnesses on

those matters. This did not happen, and therefore this Court should reverse the Trial Court's order and remand the application to the Board.

B. Applicant and Board described the Application as "Trifurcated".

Applicant also argues that Plaintiffs are mis-identifying the application as "Trifurcated." (ADb26). However, the two applications and request for relief were separated, and there are separate resolutions for each[3]. This isn't just a situation where they dedicated one meeting to subdivision issues only and other meetings for the site plan issues, with one comprehensive resolution; these applications are being dealt with separately, in other words bifurcated.

In fact, Applicant's own arguments supports Plaintiffs' description of the process. In their opposition brief, Applicant stated "[t]he application submitted by [Applicant] on February 16, 2022… sought subdivision approval and site plan approval and the overall submission contained all of the required reports and materials specified in the MLUL and the Robbinsville Township Ordinances 142-77 and 142-78." (ADb26). Applicant then states "At the November 1, 2022, hearing, at the request of [Applicant], …. consideration of the site plan application and all of the issues related to it were deferred to a later date and the November 1, 2022, hearing was limited to the Zoning Board's consideration of "drawing of lines" in connection with the Subdivision." (ADb26-ADb27).

[3] The site plan, currently under appeal in the Law Division, was granted on March 23, 2023 and a resolution of memorialization adopted on June 27, 2023.

Applicant in its opposition brief reiterated and admitted what Plaintiffs have been arguing; that Plaintiffs and other members of the public were not permitted to fully cross-examine or comment on the issues for subdivision as required by the MLUL and the township ordinances. The Board improperly limited any cross-examination to the "drawing of lines" rather than the full scope of the subdivision application.

The Board's argument is simply that all the required documents and information were submitted and reviewed by the Board as part of the combined application. (BDb15). As set forth in Plaintiffs' initial brief, it is not enough to simply have the Board professionals review the documents and information. It is the Board that must make a determination and make findings of fact and conclusions of law. N.J.S.A. 40:55D-10(g). The public is entitled to cross-examine the witnesses. N.J.S.A. 40:55D-10(d).

Furthermore, in refusing to respond to a board member's question on the documents submitted, the Applicant's attorney stated "That is part of site plan… Number one, that is part of the site plan review. That's in the file for that. We're working – you just need a supplemental submission related to the stormwater management that will be part of the site plan application going forward. That's not part of this application." (1T41-16 to 1T14-23) (emphasis added).

Defendants are taking an opposite argument than what Applicant had advanced before the Board.

Finally, during the site plan hearings, the Board's Planner, Stuart Wiser, had described this application as "trifurcated." Defendant's planner, Lance Landgraf, also agreed with the description of a "trifurcated" application. Therefore, using the term "trifurcated" was not something made up by Plaintiffs, but by Defendants.

For these reasons, the Board's approval of the application for preliminary and final major subdivision approval was arbitrary, capricious, and unreasonable, and must be reversed and remanded for further proceedings.

CONCLUSION

In conclusion, for the reasons set forth herein and in Plaintiff's initial brief, this Court should reverse the Trial Court's order and remand the application to the Board.

Respectfully submitted,

LIEBERMAN BLECHER & SINKEVICH, P.C.
Attorneys for Appellant The Alliance for Sustainable Communities and Kenneth Mayberg

Dated: January 24, 2024

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