

**COUNTRYSIDE DEVELOPERS,  
INC.,**

Plaintiff/Respondent

vs.

**TOWNSHIP OF MANALAPAN  
PLANNING BOARD,**

Defendant/Appellant

SUPERIOR COURT OF  
NEW JERSEY  
APPELLATE DIVISION

DOCKET NO. A-003448-22-T4

ON APPEAL FROM ORDER  
DATED June 29, 2023  
Superior Court of New Jersey  
Law Division, Monmouth County  
Docket No. MON-L-1406-21

Sat Below:  
Honorable David F. Bauman, P.J. Cv.

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**BRIEF OF DEFENDANT/APPELLANT  
TOWNSHIP OF MANALAPAN PLANNING BOARD**

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### PRELIMINARY STATEMENT

This appeal arises out of an action in lieu of prerogative writs wherein Plaintiff, Countryside Developers, Inc. (“Plaintiff”) challenges the denial of its application seeking preliminary and final site plan approval with ancillary design waiver relief by Defendant, Township of Manalapan Planning Board (“Planning Board”).

The subject Property contains approximately eighty (80) acres. Plaintiff proposed the construction of two warehouse buildings along with associated parking. The proposal was not “as of right” and Plaintiff required design waiver relief pursuant to N.J.S.A. 40:55D-51 from the Township’s Stream Corridor Buffer requirements codified at Section 95-8.12 of the Township Code. Plaintiff specifically proposed grading, a road as well as three (3) stormwater basins in violation of the required buffer requirements.

Plaintiff initially attempted to evade the buffer requirements by arguing that its design was fully compliant, and relief was not required. This argument, however, was rejected by the trial court which recognized the unambiguous language of the Ordinance.

The trial court, however, determined that the denial of the waiver relief was arbitrary, unreasonable and capricious. The trial court's decision was premised upon several fatally flawed holdings. The trial court accorded great deference to the engineering and planning testimony provided by Terry Sherman who was neither an engineer or planner. The trial court further determined that expert testimony was not necessary concerning the non-utility buffer relief and therefore accepted net testimony. The trial court also penalized the Planning Board for not asking enough questions or challenging testimony when the law does not require such actions. Rather, the Planning Board properly memorialized its findings of fact and conclusions of law in its memorializing Resolution. The trial court also failed to apply the correct standard for design waiver relief holding that an inability to "fully develop" a site required the grant of waiver relief. Finally, the trial court acknowledged that the Planning Board recited the correct standard of review with regard to traffic and that it also properly rejected testimony concerning general increases in traffic generation. The trial court, however, decided that despite the correct application of the law, it simply did not believe that traffic was not considered. This was based upon comments from the Class I (Mayor) member of the Planning Board. These comments were not accepted by the Planning Board as a body and were not part of the Resolution.

These errors resulted in a decision which was improper and should be reversed.

## PROCEDURAL HISTORY<sup>1</sup>

Plaintiff filed an application seeking preliminary and final site plan approval which the Planning Board denied on December 8, 2020 and memorialized in a Resolution dated March 25, 2021. (Da059-Da106).

Plaintiff filed an action in lieu of prerogative writs challenging the Planning Board denial on April 23, 2021. (Da33-Da44).

The Planning Board filed its Answer on May 27, 2021. (Da58).

The trial court issued an Order and written opinion reversing the decision of the Planning Board which was filed on June 5, 2023. (Da9 – Da32).

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<sup>1</sup> 1T-Transcript of Planning Board Proceedings dated July 11, 2019  
2T-Transcript of Planning Board Proceedings dated August 22, 2019  
3T-Transcript of Planning Board Proceedings dated October 24, 2019  
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dated March 11, 2022



The trial court issued an Amended Order and Final judgment dated June 29, 2023. (Da7-Da8).

The Planning Board subsequently filed a Notice of Appeal on July 14, 2023. (Da1-Da5).

## **STATEMENT OF FACTS**

This appeal arises out of an action in lieu of prerogative writs wherein Plaintiff Countryside Developers, LLC (“Plaintiff”) challenged the denial of its application seeking preliminary and final site plan approval along with design waiver relief from the requirements codified in the Code of the Township of Manalapan. The Plaintiff failed to meet its burden of proof to be granted relief from the Township Code and the Planning Board’s denial was proper. The Planning Board included a detailed statement of facts and conclusions of law in its memorializing Resolution (Da59-Da106). The Planning Board relies on those findings of fact and offers the following, which more specifically relate to the instant appeal.

### **A. The Subject Property**

The subject Property is irregularly shaped and contains 85,874-acres (+/- 3,740,652 square feet) and is situated southeast of the intersection of NJ Route 33 and Pegasus Boulevard with approximately 1,670 feet of frontage along the southerly side of NJSH Route 33 within the SED-20/W (Special Economic Development) Zone district and is currently used as active farmland

\*with limited woods. The northern portion of the subject Property is improved with one single-family dwelling and several agricultural buildings. (Da61).

### **B. The Proposed Development**

The Plaintiff sought preliminary and final site plan approval to construct two (2) warehouse buildings with a total floor area of 596,750 s.f., as well as an associated parking area with three hundred twenty-nine (329) spaces for passenger vehicles, one hundred four (104) loading spaces for tractor trailers, and an additional two hundred (200) trailer parking spaces (banked). Warehouse A was proposed to be located closer to NJSH Route 33 and have 294,500 s.f. of floor area of which 13,000 s.f. would be utilized as office space and have one hundred forty-six (146) standard-sized parking stalls, including six (6) handicapped accessible stalls, along its northerly elevations and fifty-five (55) oversized stalls measuring 60 feet long by 12.5 feet wide along its southerly elevations. Warehouse B was proposed to be located toward the rear of the site and have 302,250 s.f. of floor area of which 13,000 s.f. would be utilized as office space and have one hundred eighty-three (183) standard-sized parking stalls, including six (6) handicapped accessible stalls, along its southerly elevation and fifty (50) oversized stalls.

Proposed stormwater management improvements included four (4) retention basins (wet ponds) located on the northwesterly, middle, northern,

and easterly portions of the site. Landscaping and lighting improvements are also proposed. (Da61-62).

Access to the subject Property was proposed via a right-turn in only/right-turn-out-only ingress/egress drive extending from/to New Jersey State Highway (NJSH) Route 33 eastbound approximately 1,500 feet east of its intersection with Pegasus Boulevard. An additional right-turn-out-only egress was proposed extending to NJSH Route 33 eastbound approximately 900 feet east of its intersection with Pegasus Boulevard. Id.

### **C. The Required Design Waiver Relief**

Plaintiff did not submit an “as of right” application. The Plaintiff failed to comply with Section 95-8.12 of the Township Ordinance which regulates Stream Corridor buffer areas and therefore required relief pursuant to N.J.S.A. 40:55D-51. Section 95-8.12 requires that stream corridor buffers shall remain in their natural state, with no clearing or cutting of trees and brush, altering of watercourses, or regrading or construction. Plaintiff proposed a road, grading and three (3) detention basins in the required buffer area. Plaintiff’s proposed development included several incursions into the stream corridor buffer. This included grading, roads, drainage structures as well as utilities. (Da107-Da113).

Plaintiff's primary argument during the public hearings was that the stream corridor buffer ordinance was not applicable. The Planning Board rejected this purely legal argument. Plaintiff then relied upon testimony from its Engineer, Julia Algeo, P.E., that it simply was not possible to design the project in the absence of relief. Ms. Algeo, however, only provided net testimony to support this assertion which lacked any specifics at all. The Planning Board, therefore, rejected her testimony.

**D. Plaintiff Refused To Consider Any Design Alternatives Which Did Not Require Relief From the Stream Corridor Buffer Requirements.**

Plaintiff filed its application without identifying that design waiver relief was required pursuant to N.J.S.A. 40:55D-51. It was not until the Planning Board's professionals identified the required relief that Plaintiff even began to contemplate its implications. Plaintiff designed the plan without regard to the required relief and then had to backtrack to determine how to address the regulations. Plaintiff made a decision that while it was willing to engage in some redesign, it would not consider eliminating the required relief. The project could have been designed to comply but Plaintiff made a business rather than a planning decision to continue violating the ordinance. As previously stated and argued more fully infra., Plaintiff's engineer could not

identify any reasons which satisfied the statutory requirements to be granted relief pursuant to N.J.S.A. 40:55D-51.

**E. Plaintiff and the Trial Court Relied On An Outside Agency Review Process Which Was Not Before The Planning Board**

Plaintiff as well as the trial court gave substantial weight to the pursuit of outside agency approvals before the NJDEP. As an initial matter, the Planning Board's Resolution specifically states that it did not rely upon NJDEP permitting issues in rendering its decision. The NJDEP similarly did not review the Township's Stream Corridor Buffer Ordinance requirements in rendering its decisions. Plaintiff's recitation and the trial court's acceptance of these facts, therefore, are not relevant to the reasons the Planning Board denied the application.

**F. The Stream Corridor Buffer Ordinance** (Da114-Da116)

The Ordinance provides:

**B. Applicability:**

- (1) All tracts that are the subject of an application for subdivision, site plan, conditional use, or variance approval that fall in whole or in part within a stream corridor or stream corridor buffer or the Flood Hazard Overlay District shall be subject to the standards set forth in this section.
- (2) Review of any land disturbance in a stream corridor or stream corridor buffer or the Flood Hazard Overlay District shall be

undertaken as part of the application review by the municipal agency.

C. Standards.

(1) Permitted activities. Stream corridors and stream corridor buffers shall remain in their natural state, with no clearing or cutting of trees and brush (except for removal of dead vegetation and pruning for reasons of public safety), altering of watercourses, regrading or construction, except for the following activities:

(a) Wildlife sanctuaries, woodland preserves and arboretums, but excluding enclosed structures.

(b) Game farms, fish hatcheries, and fishing reserves, operated for the protection and propagation of wildlife, but excluding enclosed structures.

(c) Hiking, bicycle, and bridle trails, including bridges or other structures appurtenant thereto constructed.

(d) Trails or pathways, including bridges or other structures appurtenant thereto constructed and/or maintained by or under the authority of the Township for the purpose of providing access to public recreation areas.

(e) Fishing areas.

(f) Cultivation of the soil for agricultural or horticultural production, pasture, and similar agricultural uses undertaken in accordance with agricultural best management practices to reduce or prevent nonpoint source pollution.

(2) Location of activities on tracts partially within stream corridors.

(a) All new lots in major and minor subdivisions and site plans shall be designed to provide sufficient areas outside of stream corridors and stream corridor buffers to accommodate principal buildings and uses as well as any permitted accessory uses.

(b) The municipal agency may allow an average stream corridor buffer width of 100 feet from the one-hundred-year flood line, thus allowing reasonable flexibility to accommodate site planning when necessitated by the size and shape of the tract and physical conditions thereon. The stream corridor width may be reduced to a minimum of 75 feet from the one-hundred-year flood line provided there is an equivalent increase in the width elsewhere on site and that all relevant permits (e.g., stream encroachment, freshwater wetlands) are obtained.

(3) Activities in stream corridors and stream corridor buffers when there is no reasonable or prudent alternative. The municipal agency may permit the following in a stream corridor when subdivisions or site plans cannot be designed in the manner set forth in § 95-8.12C(1) if the municipal agency determines that there is no other reasonable or prudent alternative to placement in the stream corridor or stream corridor buffer.

(a) Recreational use, whether open to the public or restricted to private membership, such as parks, camps, picnic areas, golf courses, sports, or boating clubs, not to include enclosed structures, but permitting piers, docks, floats, or shelters usually found in developed outdoor recreational areas.

(b) Outlet installation for sewage treatment plants and sewage pumping stations and the expansion of existing sewage treatment facilities.

(c) Private or public water supply wells that have a sanitary seal, flood-proofed water treatment facilities, or pumping facilities.

(d) Dredging or grading when incidental to permitted structures or uses, including stream cleaning and stream rehabilitation work undertaken to improve hydraulics or to protect public health.

(e) Dams, culverts, bridges, and roads provided that they cross the corridor directly as practical.

(f) Sanitary or storm sewers.



(g) Utility transmission lines installed during periods of low stream flow in accordance with soil erosion and sediment control practices and approved by the State Soil Conservation District in a manner that will not impede flows or cause ponding of water.

(h) Stormwater management facilities such as detention basins and outfall facilities.

(i) Essential services.

(4) Prohibited activities. All activities not permitted pursuant to § 95-8.12c(1), (2) and (3) shall be prohibited. In no circumstance shall the following be permitted as exceptions to such subsections.

(a) Any solid or hazardous waste facilities, including but not limited to sanitary landfills, transfer stations, and wastewater lagoons.

(b) Junkyards, commercial and industrial storage facilities, and open storage of vehicles and materials.

(5) Provisions governing activities in stream corridors and stream corridor buffers.

(a) The applicant for any activity permitted in a stream corridor or stream corridor buffer shall rehabilitate any degraded areas within the stream corridor, in a manner acceptable to the municipal agency, as the case may be, unless the applicant demonstrates that it is economically infeasible to do so.

(b) The Applicant shall also:

[1] Rehabilitate or cure the effects of the disturbance caused during construction;

[2] Maintain the integrity of the surrounding habitat; and

[3] Maintain the existing ability of the stream corridor to buffer the stream.

(c) The Applicant shall provide whatever additional measures are necessary to ensure that areas designated as stream corridors and

stream corridor buffers will be preserved and to prevent additional encroachments in the stream corridor likely to occur as a result of the approval granted.

(d) The municipal agency may require conservation easements or deed restrictions ensuring that there will be no further intrusion on the stream corridor than that permitted by the activity approved.

(6) Submission requirements. An applicant for an activity in a stream corridor or stream corridor buffer shall submit to the municipality a map at a scale of not less than one-inch equals 100 feet of the project site delineating the following, using the best available information:

(a) One-hundred-year flood line which shall be the line formed by the area inundated by a one-hundred-year flood which is the flood estimated to have a one percent chance of being equaled or exceeded in any one year;

(b) State wetland boundary lines;

(c) The stream corridor and stream corridor buffer boundary;

(d) Any steep slopes located within the site; and

(e) The location of all improvements and land disturbance proposed to be located within any of the above.

## LEGAL ARGUMENT

### I. THE TRIAL COURT FAILED TO ACCORD THE PROPER PRESUMPTION OF VALIDITY TO THE DECISION OF THE PLANNING BOARD (TRIAL COURT AMENDED ORDER JUDGMENT DATED JUNE 29, 2023 (Da7-Da8) AND TRIAL COURT ORDER AND LETTER OPINION DATED JUNE 5, 2023 (Da9-Da32))

A strong presumption of validity attaches to a municipal body's actions which cannot be overturned unless found to be arbitrary, capricious and unreasonable. Pressler and Veniero, Current N.J. COURT RULES, Comment 5.4 in Rule 4:69-4 (GANN 2023). New Jersey Courts have consistently held that actions of municipal boards are presumed valid and will not be interfered with unless the local agency action is determined to be arbitrary, capricious and unreasonable. Manalapan Builders Alliance, Inc. v. Township Committee, 256 N.J. Super. 295, 304 (App. Div. 1992); New Jersey Shore Builders Ass'n. v. Township of Ocean, 128 N.J. Super. 135, 137 (App. Div. 1974), cert. denied, 65 N.J. 292 (1974). A court accords due deference to the local agency's broad discretion in planning and zoning matters and only reverses a local agency decision if it finds the decision to be arbitrary, capricious or unreasonable. Kramer v. Board of Adj., Sea Girt, 45 N.J. 268, 296 (1965); Nunziato v. Planning Board, 225 N.J. Super. 124, 133 (App. Div. 1988).

It is significant that the denial of variance relief is afforded greater deference than the grant of a variance. CBS Outdoor v. Lebanon Planning Bd., 414 N.J. Super. 563, 578 (App. Div. 2010); Med. Ctr. v. Princeton Tp. Zoning Board, 343 N.J. Super. 177, 199 (App. Div. 2001); see also Cox & Koenig, New Jersey Land Use and Zoning Administration, s. 42-2.1 (GANN 2023).

The decision of the Planning Board in the instant matter was neither arbitrary, unreasonable or capricious and was required to be accorded the presumption of validity and affirmed.

**II. THE TRIAL COURT IMPROPERLY HELD THAT THE PLANNING BOARD'S FAILURE TO ASK QUESTIONS OF THE APPLICANT'S PLANNER WAS EVIDENCE THAT DESIGN WAIVER RELIEF SHOULD HAVE BEEN GRANTED (TRIAL COURT AMENDED ORDER JUDGMENT DATED JUNE 29, 2023 (Da7-Da8) AND TRIAL COURT ORDER AND LETTER OPINION DATED JUNE 5, 2023 (Da9- Da32)**

The trial court specifically held that the Planning Board members' decision not to ask the Plaintiff's Planner any questions or to challenge his testimony during the hearing constituted evidence that design waiver relief pursuant to N.J.S.A. 40:55D-51 should have been granted. (Da24). The Planning Board, however, was not required to ask questions or challenge testimony during the public hearing process.

A planning board is not required to ask questions or even orally deliberate when making a decision. Rather, it can simply listen to testimony, make a motion and vote. Scully-Bozarth Post v. Burlington Planning Bd., 362 N.J. Super. 296, 312 (App. Div. 2003), certif. den. 178 N.J. 341(2003). The Appellate Division has further held: "a verbal discussion" is not mandatory as long as the ultimate resolution which will serve as the official statement of the ... board's findings and conclusions, is furnished to the board members in advance of the time they will vote, to

provide them ample time to study it and, if they deem it appropriate, request clarification or modification”. Jennings v. Bor. of Highlands, 418 N.J. Super, 405, 424 (App. Div. 2011). Remarks and questions by individual board members merely: “represent informal verbalizations of the speakers’ transitory thoughts, they cannot be equated to deliberative findings of fact.” New York SMSA v. Bd. of Adj. of Tp. of Weehawken, 370 N.J. Super. 319, 334 (App. Div. 2004).

The decision of the individual Planning Board members not to ask any questions of the Plaintiff’s Planner in the instant matter is irrelevant. Its decision was properly memorialized in its Resolution. The trial court’s reliance on this issue was therefore improper and its decision should be reversed.

**III. THE TRIAL COURT IMPROPERLY DEFERRED TO ENGINEERING TESTIMONY PROVIDED BY THE PLAINTIFF'S PLANNER (TRIAL COURT AMENDED ORDER JUDGMENT DATED JUNE 29, 2023 (Da7-Da8) AND TRIAL COURT ORDER AND LETTER OPINION DATED JUNE 5, 2023 (Da9- Da32))**

The trial court decision places heavy reliance on the testimony of the Plaintiff's Planner Creigh Rahenkamp, PP concerning relief from the stream corridor ordinance pursuant to N.J.S.A. 40:55D-51. This included testimony regarding the necessity of looping the water system as well as where connections to the water lines would be required. (Da23). Testimony concerning utility connections, however, can only be provided by an engineer or architect. N.J.A.C. 13:40-7.3(e). The planning testimony relied upon by the trial court therefore was beyond the expertise of the witness. The trial court accepted that the Planner did not possess the requisite qualifications to prepare the plans but nonetheless held that he could provide expert testimony concerning the plans. The trial court essentially held that a witness can offer expert testimony on plans which they are prohibited from preparing. This was improper and the decision of the trial court should be reversed.

The trial court also determined that the testimony of the Plaintiff's Planner opining that the absence of design waiver relief would not permit the Applicant to "fully develop" the property to be compelling. (Da23). The Municipal Land Use Law, however, does not establish the failure to "fully develop" a property as an element to be satisfied in a design waiver case pursuant to N.J.S.A. 40:55D-51.

The Municipal Land Use Law establishes the following burden of proof for design waiver relief:

The planning board when acting upon applications for preliminary site plan approval shall have the power to grant such exceptions from the requirements for site plan approval as may be reasonable and within the general purpose and intent of the provisions for site plan review and approval of an ordinance adopted pursuant to this article, if the literal enforcement of one or more provisions of the ordinance is impracticable or will exact undue hardship **because of peculiar conditions pertaining to the land in question.** N.J.S.A. 40:55D-51b (emphasis added).

In White Castle System, Inc. v. Planning Bd. of the Tp. of Middletown, (unpub.) 2014 WL 9865740 (App. Div. 2015) (Da375-381), the Applicant was a fast food restaurant which was a permitted use in the zone and required relief from only one section of the site design standards pursuant to N.J.S.A. 40:55D-51b for a buffer requirement. (Da378). The planning board denied the request for design waiver relief and therefore denied the request for



preliminary and final site plan approval. “The board specifically found the need for relief at issue was based on plaintiff’s intransigence with respect to the design of the building housing the restaurant, not on any ‘peculiar conditions pertaining to the land.’ In the words used by the Board, ‘[t]he owners of the property created this odd assemblage’. Under these circumstances, the Board found that moving the parking lot would not be ‘impracticable’ within the meaning of N.J.S.A. 40:55D-51(b).” (Da381).

The Appellate Division rejected the trial court’s view that the design waiver standard should be judged based upon notions of “reasonableness” under the plain language of the statute. Id. The Appellate Division then applied the presumption of validity to the Planning Board’s findings. Id. The Appellate Division affirmed the Planning Board decision. Id.

The trial court in the instant matter did not rely upon a case which holds that an ordinance requirement should be waived where its standards prevent the maximum development of a property. There was also no argument that the regulation would constitute a taking of the land if literally enforced. The trial court therefore did not apply the proper standard and its decision should be reversed.

**IV. THE TRIAL COURT'S RELIANCE ON THE TESTIMONY OF TERRY SHERMAN WAS IMPROPER (TRIAL COURT AMENDED ORDER JUDGMENT DATED JUNE 29, 2023 (Da7-Da8) AND TRIAL COURT ORDER AND LETTER OPINION DATED JUNE 5, 2023 (Da9- Da32))**

Testimony was provided by Terry Sherman who identified himself as a principal of the Plaintiff. The trial court specifically referenced Mr. Sherman's testimony concerning utility discharge points and utility crossings. (Da024). The trial court further took note of Mr. Sherman's business degree and years of development experience. Mr. Sherman, however, was not qualified as a professional engineer, professional architect or professional planner. Mr. Sherman therefore could not provide expert testimony regarding utilities, drainage facilities and location of drives. See N.J.A.C. 13:40-7.3. He was also prohibited from providing expert planning testimony without a planning license. See N.J.S.A. 45:14A-2. The trial court, in a footnote, highlights that Mr. Sherman has been a developer for over forty (40) years and that the Rules of Evidence would qualify him as an expert. (Da024).

As an initial matter, Mr. Sherman did not provide any testimony concerning his experience with warehouse development or development in the Township of Manalapan or experiences with stream corridors. This aside, the

general rule of evidence cannot overcome the statutory and administrative code requirements regarding expert testimony. The trial court's reliance on Mr. Sherman's testimony was therefore improper and its decision should be reversed.

**V. THE TRIAL COURT IMPROPERLY RELIED UPON THE TESTIMONY FROM THE PLAINTIFF'S ENGINEER (TRIAL COURT AMENDED ORDER JUDGMENT DATED JUNE 29, 2023 (Da7-Da8) AND TRIAL COURT ORDER AND LETTER OPINION DATED JUNE 5, 2023 (Da9- Da32))**

The trial court also relied upon the testimony from the Plaintiffs Engineer to support its decision. The trial court opinion, however, concedes that the engineering testimony was not "extensive". (Da026).

**A. The Trial Court Improperly Rejected The Planning Board's Rejection of the Engineering Presentation as Net Testimony**

The trial court rejected the Planning Board's argument that portions of the Plaintiff's engineering presentation consisted of impermissible net testimony. The Planning Board first begins with articulating the general law concerning net testimony.

"An expert opinion that is not factually supported is a net opinion or mere hypothesis to which no weight need be accorded." Nextel of New York,

Inc. v. Borough of Englewood Cliffs Bd. of Adjustment, 361 N.J. Super. 22, 43 (App. Div. 2003). In the land use context, a net opinion exists when the testimony of an expert “[c]ould not reasonably support the Board’s finding.” New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. of Adjustment, 160 N.J. 1, 16 (1999). In New Brunswick, the Supreme Court determined that the conclusion made that the presence of a communications monopole would “derail” development was unsupported by any studies or data, was tantamount to a net opinion.

New Jersey Courts have consistently rejected net opinions which are relied upon by land use boards. See, Bd. of Educ. of City of Clifton v. Zoning Bd. of Adjustment of City of Clifton, 409 N.J. Super. 515, 541 (Law. Div. 2006), aff’d, 409 N.J. Super. 389 (App. Div. 2009), and aff’d, 409 N.J. Super. 389 (App. Div. 2009). There, an environmental expert testified that diesel fumes can harm children with asthma regarding plans with a bus depot. However, he did not analyze the actual plans and admitted no knowledge of them. The Court found:

“This Court finds no reliable facts, data, or studies set forth in the record upon which the opinion of Dr. Bonagura could be supported. Dr. Bonagura states that the detriments of fumes from trucks depend on several factors listed above. However, Dr. Bonagura clearly has no knowledge as to the presence of these factors in this application. He knows nothing about the distances

from the site to the industrial parks, nothing about the proposed plan, nothing about the ventilation system, nothing about the volume of truck traffic, and nothing about the neighborhood. Dr. Bonagura's testimony amounts to bare conclusions, unsupported by factual evidence, based only on estimations and guessing. (Id. at 541).

Plaintiff's Engineer did not provide any specific testimony concerning the roadway, outfall structures or the grading. She focused solely on utilities and failed to analyze whether other design options were available. Her testimony was net and the Planning Board was required to reject it.

The trial court decision states: "And, as to the road crossing itself, the most reasonable and prudent alternative, as the engineer testified, was the existing road crossing itself, a commonsense observation that did not require detailed or technical explanation, let alone expert testimony. (7T32:l 7-21)." (Da26). The trial court therefore conceded that the testimony regarding the non-utility issues were not the subject of any expert analysis.

The trial court also relied on the Plaintiff's Engineer's testimony that obtaining approvals from the NJDEP addressed the Township stream corridor ordinance waiver requirements. (Da26). Merely reviewing a list of outside agency approvals does not constitute expert testimony. Further, the NJDEP did not evaluate the application pursuant to the Township's Ordinance

requirements. Rather, its sole focus was applying its own rules and regulations. The trial court never found that the Township ordinance was preempted and the NJDEP never determined that the Township Ordinance had been satisfied or that relief should be granted. The trial court's holding was therefore erroneous and should be reversed.

**B. The Trial Court Focused Solely on the Utility Portion of the Engineering Testimony**

The Plaintiff's Engineer provided her final testimony at the December 10, 2020 meeting. At that time, she referenced the testimony of Mr. Sherman and evaluated several previous land use approvals spanning back to the 1980's and provided her opinion that stream corridor buffer relief had been granted in those instances. She further testified that the utilities were required to receive waiver relief because the NJDOT would not permit private utilities in a public right of way. The trial court was persuaded by this testimony.

The required relief from the Township stream corridor ordinance, however, did not only address the utility issue. Relief was also required regarding the proposed grading, road and outfall structures. (Da107-Da113). As previously stated, the trial court held that expert testimony was not required on this issue. The trial court's own opinion concedes that limited testimony was provided by the Engineer, that expert testimony was not even required in

order to gain relief and chooses to focus on only one portion of the required relief. This selective approach was improper and the decision should be reversed.

The Planning Board specifically focused upon the Engineer's failure to address all elements of the design waiver relief.

The subject Property contains nearly 86 acres. Some of that area is constrained by environmentally sensitive areas such as wetlands and areas of steep slopes. Ms. Algeo's testimony primarily argued that the proposed utilities had to encroach into the buffer area. She did not testify at any length concerning the grading, road, drainage outfall structures. Ms. Algeo did not provide any testimony that the project could be designed to keep the non-utilities mentioned above out of the buffer. It was apparent that the project had been designed and the relief was later identified. This is not an impracticable situation, or a hardship based upon the physical characteristics of the subject Property. It has to do with monetary issues as well as convenience. (Da101).

The Planning Board Resolution goes on to find:

The Board finds that the failure to fully investigate as well as the availability of alternate design options makes relief inconsistent with the purposes of the Ordinance. the purpose is to: "Protect significant ecological components of stream corridors such as floodplains, woodlands, steep slopes and wildlife and plant life habitats within the stream corridors of the watershed; and prevent flood-related damage to the communities of the watershed." Section 95-8.12A(2).



The proposed plan does not fully protect the ecological components of the environment such as floodplains. The Applicant also did not address issues concerning plant life habitats. The Ordinance also states that its purpose is to: “Regulate the land use, siting and engineering of all development to be consistent with the intent and objectives of this chapter and accepted conservation practices.” Section 95-8.12A(6). The Applicant had the ability to engineer the subject Property and site all improvements to avoid encroaching into the required buffer. It simply decided on an alternate plan. The Ordinance further states that its purpose is to advance the purposes of the New Jersey Municipal Land Use Law with particular regard to those purposes set forth pursuant to N.J.S.A. 40:55D-2a,b,d,i, and j.” The Applicant did not specifically testify concerning these provisions of the Municipal Land Use Law. Further, any benefit of the deviation flows exclusively to the Applicant and does not advance any of these goals for the rest of the community.

Based upon the foregoing, the Board finds the Applicant failed to meet its burden of proof and that design waiver relief pursuant to both N.J.S.A. 40:55D-51 as well as the requirements of Section 95-8.12 is hereby denied. (Da102-Da103).

The trial court focused solely on the utility issue and actually conceded that the other encroachments into the stream corridor did not require any expert testimony. This was improper and its decision should be reversed.



**VI. THE TRIAL COURT IMPROPERLY DETERMINED THAT THE TOWNSHIP MAYOR AND THE PLANNING BOARD IMPROPERLY CONSIDERED TRAFFIC IMPACT (TRIAL COURT AMENDED ORDER JUDGMENT DATED JUNE 29, 2023 (Da7-Da8) AND TRIAL COURT ORDER AND LETTER OPINION DATED JUNE 5, 2023 (Da9- Da32))**

The trial court observed that there was extensive discussion regarding traffic. It further held that the Planning Board “swayed” from its jurisdiction. (Da32). The trial court, however, first fails to recognize that the Planning Board had jurisdiction to review the safety of ingress and egress to the subject Property. See Dunkin Doughnuts of N.J., Inc. v. Tp. of North Brunswick, 193 N.J. Super. 513 (App. Div. 1984). The trial court, therefore, proceeded from a flawed understanding of the traffic issue.

The trial court then goes on to explicitly recognize that the Planning Board Resolution states that its decision was not based upon traffic. (Da32). The opinion further recognizes that the Planning Board acts as a body rather than as individuals and that the Resolution represents the final decision. (Da32). The trial court, however, simply decided that the Planning Board somehow misrepresented its reasoning despite its correct articulation of the law. This was based solely upon individual comments offered by the Planning Board’s Class I (Mayor) Member. Again, the Planning Board did not adopt

any of the comments in its Resolution. The trial court's conclusion is not supported by any statute or case law and represents a complete deviation from well-established law developed over decades since the adoption of the Municipal Land Use Law. The trial court's purely subjective belief that the Planning Board's correct interpretation of the law regarding traffic generation was evidence of arbitrary, unreasonable or capricious conduct based upon comments of a Board Member was improper and should be reversed.

**CONCLUSION**

The actions of the Planning Board are entitled to an enhanced presumption of validity. The actions of the Planning Board were neither arbitrary, unreasonable nor capricious. The decision of the Planning Board must be affirmed for the foregoing reasons and the decision of the trial court should therefore be reversed.

Respectfully submitted,

**WEINER LAW GROUP LLP**

Attorneys for the Defendant/Appellant,  
Township of Manalapan Planning Board

Dated: October 11, 2023

  
\_\_\_\_\_  
**RONALD D. CUCCHIARO, ESQ.**

COUNTRYSIDE DEVELOPERS, INC.,

Plaintiff/Respondent

v.

TOWNSHIP of MANALAPAN  
PLANNING BOARD,

Defendant/Appellant

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

DOCKET NO. A-003448-22-T4

ON APPEAL FROM ORDERS DATED  
JUNR 5, 2023 AND JUNE 29, 2023

Superior Court Of New Jersey  
Law Division, Monmouth County  
DOCKET NO: MON-L-1406-21

Sat Below:

Hon. David F. Bauman, P.J.Cv.

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**BRIEF OF PLAINTIFF/RESPONDENT, COUNTRYSIDE DEVELOPERS,  
INC.**

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## **PRELIMINARY STATEMENT**

In the decision below, the Hon. David F. Bauman, P.J.Cv. (“Judge Bauman” or “Trial Court”), issued a comprehensive, written opinion that addressed all of the arguments raised by both Defendant/Appellant, Township of Manalapan Planning Board (“Board”) and Plaintiff/Respondent, Countryside Developers, Inc. (“Countryside”). In its Brief, the Board misconstrues and/or ignores the findings and conclusions of Judge Bauman in hopes of creating a point of error for this Court to seize upon. That effort on the part of the Board is disingenuous and unpersuasive.

In this matter, Countryside submitted an application for development that sought the construction of a permitted warehouse use that required no variances from the applicable zoning or bulk standards. The only relief required by Countryside was design waivers pursuant to N.J.S.A. 40:55D-51b to allow for certain, limited encroachments within the Township’s Stream Buffer (hereinafter defined), which Buffer bisected and impacted the subject property. In support of such waiver relief, Countryside presented unrefuted expert testimony from both a civil engineer and professional planner. Countryside’s request for relief was also supported by the Township Environmental Commission and in line with approvals that have been granted by the New Jersey Environmental Protection (“NJDEP”), which also had jurisdiction within the subject Stream Buffer. Despite the

overwhelming evidence in support of Countryside's requested design waivers, the Board, without any evidentiary support, simply denied Countryside's application. The Trial Court, after a thorough examination of the record before it, reversed the Board's decision.

In his opinion, Judge Bauman sets forth detailed factual findings in support of his ultimate conclusion that the decision of the Board to deny Countryside's application for preliminary and final site plan approval and accompanying waiver relief was arbitrary, capricious and unreasonable. While the Board is free to challenge Judge Bauman's reasoning, it is not appropriate for the Board to misrepresent that reasoning. Yet that is what the Board has done in a number of instances in its Brief.

While the Board's tactic of distorting the Trial Court opinion may be unfortunate, it is not surprising given the underlying record that Judge Bauman was reviewing. To that point, the Trial Court succinctly and accurately concluded that "[the Board] point[ed] to no evidence in any of the 13 transcripts that directly refutes any of the testimony presented by plaintiff's witnesses." Da24. Now this Court is presented with that very same situation. Specifically, the Board is asking this Court to overturn the decision of Judge Bauman without pointing to anything in the record to support a reversal. The Board's efforts in that regard are to distract from the utter lack of merit underlying the Board's arguments. This Court should



reject the Board's tactics and affirm Judge Bauman's decision as it was based on a thorough examination of the underlying factual record which overwhelmingly supported Countryside's requested relief. That decision should not be disturbed.

### **COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY**

The Statement of Facts within the Board's Brief is disingenuous in both its framing and criticism of the factual record established before the Board as part of Countryside's application. Judge Bauman's detailed, written opinion more accurately describes the actual record that was established before the Board. So that this Court is provided with the same complete and factual recitation that was before Judge Bauman, Countryside offers this more complete Counterstatement of Facts with appropriate citations to the record that was before the Board.

### **The Parties and the Property**

Countryside is a corporation authorized to conduct business in the State of New Jersey and is the contract purchaser of the Property (hereinafter defined) that was the subject of the Application (hereinafter defined). Da77. The property at issue is located at 203 New Jersey State Highway 33, which is known and designated as Block 78, Lot 12.02 on the tax map of the Township (the "Property"). Da59. The Property is approximately 85.874 acres and is currently used as active farmland with limited woods and contains existing billboards along

the Property frontage. Da60. As the Property is actively farmed, it is nearly completely disturbed. Id.

The Property is located in the Township's Special Economic Development Zone (SED-20/W) (hereinafter the "SED-20/W Zone"), which permits warehouses and distribution center uses. Da34(¶8), Da46(¶8). As such and contrary to the suggestion of the Board's Brief, the use proposed by Countryside was, indeed, "by-right" as the proposed warehouse use was specifically permitted. Further, the Property has been zoned for commercial use for over 30 years. 7T:10:21-25.

### **The Application**

Countryside had made previous attempts to develop the Property for uses other than those permitted on the Property. 13T:40:4-41:13. The first application to the Zoning Board was for a use variance to construct a senior housing community with a set aside of affordable housing within the community. The Zoning Board denied that application. 13T:40:4-41:13. The second application to the Zoning Board was also for a use variance, but for a mixed-use development containing retail uses near the highway and senior housing to the rear of the Property. The Zoning Board denied that application, as well. 13T:40:4-41:13.

The application that is the subject of the present appeal was submitted to the Board on or about March 12, 2019 and sought preliminary and final site plan approval to permit the construction of two (2) warehouse buildings, initially with a

total floor area of 616,625 square feet, as well as an associated parking area with 329 spaces for passenger vehicles, 104 loading spaces for tractor trailers, an additional 200 trailer parking spaces (banked) and other associated site improvements (the “Application”). Da35(¶9), Da46(¶9). Warehouse A was originally proposed to be 313,875 square feet, including 13,000 square feet of office space, and Warehouse B was proposed to be 302,250 SF with 15,000 square feet of office space. 1T:9:4-10. The Application as submitted by Countryside was developed based on prior discussions and meetings with the Board’s professionals and advisory committees. As such, the design was not created in a vacuum without input or guidance from Township representatives. 7T:13:12-14:9.

The Board Planner acknowledged that the Application was for a permitted use and conformed to all use, bulk and area standards in the applicable zoning district. Da111.

While not requiring any relief from the applicable zoning regulations for the Property, the Board maintained that Countryside required a waiver from Township Code §95-8.12 (“Stream Buffer Ordinance”) for proposed disturbances in the Township’s Stream Corridor Buffer (“Stream Buffer”). Da99. Despite the Application conforming with all applicable zoning regulations and perhaps requiring a single design waiver, the Application was the subject of a public hearing that spanned thirteen (13) meetings conducted on July 11, 2019 (1T),

August 22, 2019 (2T), October 24, 2019 (3T), January 9, 2020 (4T), February 27, 2020 (5T), August 13, 2020 (7T) , September 10, 2020 (8T), September 24, 2020 (9T), October 8, 2020 (10T), October 22, 2020 (11T), November 12, 2020 (12T) and December 10, 2020 (13T).

**The Stream Buffer Ordinance and the Board’s Inconsistent Application of that Ordinance**

The Stream Buffer Ordinance regulates the type of development that can occur in a designated Stream Buffer. Da114-116. The Stream Buffer Ordinance allows certain activities to freely encroach in a Stream Buffer without any remedial measures to be taken and irrespective of whatever detrimental impact to the Stream Buffer that activity may cause. *Id.* at §C(1).

However, for other activities, such as those proposed by the Application, the Stream Buffer Ordinance requires a buffer width of 100 feet from the one-hundred year flood line, which may be reduced to 75 feet “provided there is an equivalent increase in the width elsewhere on site and that all relevant permits (e.g., stream encroachment, freshwater wetlands) are obtained.” *Id.* at §C(2)(b). The Stream Buffer Ordinance further provides that additional activities are permitted in the Stream Buffer “if the municipal agency determines that there is no other reasonable or prudent alternative to placement in the stream corridor or stream corridor buffer.” Da115(at §C(3)). Those activities include, in relevant part:

(b) Outlet installation for sewage treatment plants and sewage pumping stations and the expansion of existing sewage treatment facilities.

(c) Private or public water supply wells that have a sanitary seal, flood-proofed water treatment facilities, or pumping facilities.

(d) Dredging or grading when incidental to permitted structures or uses, including stream cleaning and stream rehabilitation work undertaken to improve hydraulics or to protect public health.

(e) Dams, culverts, bridges, and roads provided that they cross the corridor directly as practical.

(f) Sanitary or storm sewers.

(g) Utility transmission lines installed during periods of low stream flow in accordance with soil erosion and sediment control practices and approved by the State Soil Conservation District in a manner that will not impede flows or cause ponding of water.

(h) Stormwater management facilities such as detention basins and outfall facilities.

(i) Essential services.

Id. at §C(3).

The Stream Buffer Ordinance further provides that an applicant that conducts the above-referenced activities in the Stream Buffer shall be required to implement remedial efforts to mitigate that disturbance including rehabilitation of

disturbed areas and maintain the existing “ability of the stream corridor to buffer the stream.” Da115-116 (at §C(5)(3).)

At the proceedings before the Board, Countryside presented evidence establishing that the Board had not consistently applied the Stream Buffer Ordinance. Da117-130; Da131-189; Da190-209; Da210-230; Da231-301; Da302-313. Instead, the Board had systemically permitted disturbances within designated Stream Buffers for the installation of infrastructure without requiring applicants to present proofs or even seek relief from the Stream Buffer Ordinance. Examples cited included permitting buffer averaging and disturbances for detention ponds, detention basin discharge and outfall pipes, box culverts, detention pond spillways and headwalls, manholes, rip rap, road crossings, clearing and grading. These applicants did not request waivers, and the resolutions of approval for those applicants made no reference to any waiver or exception relief even being required. Da302-313; 7T:18:11-19:9; 7T:19:10-24; 7T:19:25-20:16; 7T:20:17-21; 7T:21:7-16; 7T:21:17-22; 7T:22:2-8; and 7T:22:24-23:4.

Countryside provided evidence of five (5) projects that were not required to seek waiver relief for construction of the same type of infrastructure being proposed by the Application. Da117-130; Da131-189; Da190-209; Da210-230; Da231-301. In light of that, Countryside maintained that the request for waiver relief should not have been required as the Board did not require it of similarly

situated applicants, thereby evidencing the Board's interpretation that waiver relief was not required under the Stream Buffer Ordinance. Da20. Judge Bauman rejected Countryside's argument in that regard, concluding that the language of the Stream Buffer Ordinance was clear and required Countryside to establish its entitlement to the waivers required by the Board. Id. Despite being required to seek such waivers, for the reasons established before the Board, and acknowledged by the Trial Court, Countryside established its entitlement to such waiver relief (despite the Board's prior history of not requiring the same relief of more favored applicants).

### **The Application's Requested Relief from the Stream Buffer Ordinance**

The initial site plan submitted in support of the Application utilized the averaging provision of the Stream Buffer Ordinance and provided a minimum 75-foot Stream Buffer with at least a 100-foot average buffer and sought a waiver for disturbances for a road crossing with utilities, a utility line, stormwater basin outfalls and some grading. 2T:46:8-16. The activities the Application proposed in the Stream Buffer were a road crossing with utilities perpendicular to the stream corridor at the location of an existing crossing (0.47 acre disturbance), a small disturbance for a utility transmission line (a public water main to be dedicated to the Township) (0.017 acre disturbance), two stormwater outfalls necessary for the detention basins (0.307 acre disturbance), and some grading work in areas that

were already disturbed by the agricultural use on the Property. 2T:47:14-48:4; 5T:12:19-13:15; Da314. Not all the proposed disturbances were permanent, as the grading activities would only be a temporary disturbance. 2T:48:7-20.

In order to mitigate the above-described activities in the Stream Buffer, which totaled less than one (1) acre, the Application initially proposed to revegetate 6 acres of agricultural area within the Stream Buffer and proposed a 24-acre conservation easement on the approximately 86-acre Property (approximately 28% of the total lot area). 5T:11:9-14; 5T:11:21-23. With respect to the Application's initial proposal, the Board Engineer's May 10, 2019 review letter stated that the Application met the buffer averaging provisions of the Stream Buffer Ordinance. Da317.

Further, the November 11, 2019 correspondence from the Township Environmental Commission stated, "The grading within 75 feet of the stream corridor buffer should not result in any negative environmental impact" and noted that Countryside committed to planting an area in excess of that required with native plantings. 7T:13:12-14:9. Da319. Additionally, in that November 2019 memo to the Planning/Zoning Department, the Township Environmental Commission stated it had no objection to the changes proposed by the Application and observed that Countryside would require receipt of a wetlands transition area waiver from the NJDEP. Da319.



### **The Public Hearing on the Application**

The public hearing commenced on July 11, 2019 with the testimony being dominated by issues of traffic. 1T generally. The Board, as acknowledged by its Resolution, has no jurisdiction over traffic issues as the New Jersey Department of Transportation (“NJDOT”) has that jurisdiction exclusively. Da96. Countryside has since received its necessary NJDOT approval. Da320-329.

At the following meeting of August 22, 2019, while the relief from the Stream Buffer Ordinance was broached, the focus of the testimony and questions from the Board and public, again, reverted to issues of traffic. 2T:57-162. The root of the traffic objections was the route the trucks would need to take leaving the Property to return west to the New Jersey Turnpike. After discussions with NJDOT and board professionals, it was determined that Countryside would direct the tractor trailers straight through the Millhurst Jughandle (first jughandle to the east of the Property), which could not accommodate U-turns from tractor trailers due to geometry constraints, to the eastbound Route 33 overpass to Business Route 33 (“Flyover”) to make a U-turn. 1T:27:21-25; 9T:20:8-11.

At the August 22, 2019 meeting, the Township Mayor asked the Applicant if they attempted to acquire adjacent property for truck access to and from the Property because in his opinion, to “send 75% [of the truck traffic] eastbound for

the better part of a mile, turn them around, and send them back to go westbound, I'm no traffic engineer, but that doesn't sound ideal to me. I think we can do better. So I think we're going to do better." 2T:94:18-23. At the following meeting of October 24, 2019, the Board again focused on traffic and operational issues, despite its acknowledged lack of jurisdiction over same. 3T:18-43.

At the January 9, 2020 meeting, Countryside outlined proposed revisions to the site plan following interaction with NJDEP on the NJDEP permits necessary for the development of the Property consistent with the Application. 4T:8-65. At the February 27, 2020 meeting, Countryside summarized the revised site plan that had been initially discussed at the January 9, 2020 meeting. Those modifications, which reduced the proposed disturbances within the Stream Buffer, included the following:

- a. shifting the internal easterly access drive to the west approximately 20 feet, so drive was shifted further west into the site 20 feet. A modular block retaining wall is proposed along the entire length of the easterly access drive;
- b. as a result of that shift, the size of Building A was reduced by 9,009 SF, from 313,875 SF to 304,866 SF;
- c. the total number of parking spaces for Building A was reduced by 6 spaces from 152 to 146;

d. shifted Basin D to the west with the access drive that was shifted 20 feet; and

e. the previous grading and disturbed agricultural field within 75 feet of the Stream Buffer was eliminated to provide a minimum 75 feet undisturbed Stream Buffer.

5T:7:16-8:2.

Countryside also explained that all the disturbances being proposed were likewise the subject of the then pending applications before the NJDEP. 5T:28:14-18. All of those NJDEP permits have since been obtained approving the very disturbances that were the subject of the Application's requested waiver from the Stream Buffer Ordinance. 13T:10:12-22; Da330-339; Da340-347. As of the first meeting on July 11, 2019, Countryside had obtained a freshwater wetlands letter of interpretation ("LOI") from NJDEP and a NJDEP riparian flood hazard area permit. 1T:10:5-8. The Board Engineer acknowledged that Countryside received a NJDEP freshwater wetlands line and flood hazard area verification, and "that these environmental constraints have been used to establish the limits of disturbance site wide." Da318.

In December 2018, the NJDEP issued a Flood Hazard Area ("FHA") Verification Approval, File No. 1326-07-0001.1 FHA 180001. The NJDEP noted that the riparian zone extends 50 feet from the top of bank along both sides of each

regulated water on the Property (the unnamed tributary to the Manalapan Brook). The NJDEP instructed that a flood hazard area permit is required prior to undertaking any regulated activity in the riparian zone. Da348-353. Countryside received a FHA permit from the NJDEP on October 15, 2019 that authorized “the construction of two stormwater outfalls and the reconstruction of a private bridge along an unnamed tributary to Manalapan Brook and one stormwater outfall along Manalapan Brook, all in connection with the construction of two warehouse buildings, parking areas and associated stormwater management systems” and authorized a 0.17 acre disturbance of the riparian zone. Da340-347.

The May 28, 2020 NJDEP wetlands permit permitted a 0.017 acre disturbance for the utility lines, a 0.017 acre disturbance from ditches and swales, a 0.019 acre disturbance for a very minor road crossing, a 0.01 acre disturbance for stormwater outfalls and, additionally, granted the transition area waiver for a 1.4 acre area, which would be mitigated through enhancement measures shown on the restoration plan. Da330-339. In fact, the NJDEP permits permitted even greater disturbances than Countryside was presenting to the Board, because the NJDEP permits were issued based on plans last revised March 30, 2020, prior to the second round of revisions that were intended to reduce disturbances within the Stream Buffer. Id.

Per the above, Countryside had secured all the NJDEP wetlands and flood hazard area permits necessary to construct the improvements that were the subject of the Application and implicated by the waiver request. 8T:61:14-18. Those permits authorized the construction of the stormwater outfalls, the road crossing, and the utilities. These activities are essential to developing the Property and had been found reasonable and prudent by NJDEP. 7T:16:13-24.

In issuing those permits, the NJDEP recognized there was value in vegetating portions of the agricultural land as that would protect the stream corridor and Manalapan Brook. The enhancement of the stream corridor buffer in conjunction with the stormwater management plan for the project will overall improve the quality of water entering Manalapan Brook. 13T:10:13-11:2. NJDEP's conclusions in that regard were shared by the Township's own Environmental Commission that had "no objection" to the Application, recognizing both that NJDEP approval was required and that Countryside had "committed to plantings in area in excess of that required and with all native plantings..." Da319.

Despite the above concurrence between NJDEP and the Township Environmental Commission, the Board and its professionals indicated that there appeared no reason why the Application could not provide the 100-foot minimum buffer provided by the Stream Buffer Ordinance (in spite of the fact that the

Stream Buffer Ordinance specifically permitted buffer averaging). 5T:19:10-24.

In response to that concern, the Applicant again determined to further investigate additional revisions to increase the buffers on the Property. 7T:25:13-26:17.

To that end of further concessions, at the August 13, 2020 meeting Countryside presented another revised site plan that eliminated the need for any buffer averaging, provided the minimum 100-foot Stream Buffer and further reduced disturbances to the Stream Buffer. 7T:15:6-7; 7T:25:22-26:11. The modifications presented at the August 13, 2020 hearing, which were in excess of the requirements of the NJDEP permits and the recommendations of the Township Environmental Commission, included the following:

- a. Decreasing the size of Building A by 10,366 square feet from 304,866 square feet to 294,500 square feet;
- b. Reducing the number of parking spaces for Building A by 19 spaces, from 146 to 127;
- c. To comply with the Board professional's request, shifting the second driveway and basin D for a second time another 20 feet;
- d. Adding a modular block retaining wall to reduce the grading disturbances along the easterly length of the access road; and
- e. Shifting basins C and D 20 feet.

7T:15:15-24; 7T:25:22-26:11.

After this second round of site plan revisions, the Application, as requested by the Board Planner, maintained the minimum 100-foot stream corridor buffer throughout the site, eliminating any buffer averaging. Countryside also increased the area to be revegetated with natural species by one acre, from 6 acres to 7 acres, for a total 31.8 acre conservation easement, approximately 37% of the total lot area and thus further mitigating the proposed encroachments within the Stream Buffer as provided by the Stream Buffer Ordinance. 7T:27:10-23. The following activities still required limited encroachments in the Stream Buffer: the road crossing with sewer and water utilities, the utility crossing for the 12-inch water main required by the Township water department, and the three stormwater basin outfalls. 7T:16:14-16; 7T:26:14-25; 7T:28:14-29:5.

Near the end of the August 13, 2020 meeting, despite having no jurisdiction over the issue, the Township Mayor returned to the topic of traffic by stating that the traffic does not work for the Application, “hasn’t worked on day 1 and doesn’t work tonight.” 7T:45:8-16. Despite its acknowledgement that it has no jurisdiction over such issues, the topic of traffic dominated the meetings of September 10, September 24, October 8 and October 22, 2020. 8T; 9T; 10T; 11T generally.

At the October 22, 2020 meeting, the Township Mayor said the Board needed to make sure the warehouse fit into “the character and area of Manalapan”

and that traffic was a “major chunk” of whether it fits in their town. 11T:63:24-25; 11T:64:15-17. At every opportunity the public was given to comment, they voiced objections related to traffic. No one from the public objected to the proposed disturbances to the Stream Buffer. 2T:123-152; 10T:67-90; 11T:45-87; 13T:30-36.

The focus of the hearings then shifted to another topic over which the Board likewise recognized it had no jurisdiction – environmental regulation – with the November 12 and December 10, 2020 meetings addressing topics squarely within the regulatory ambit of the NJDEP. 12T; 13T generally. However, at the December 10, 2020 meeting, the Applicant did present expert testimony in further support of its requested waiver from the provisions of the Stream Buffer Ordinance. 13T:11-26.

With respect to the utility crossings, Countryside’s engineer, Ms. Julia G. Algeo, P.E., P.P., testified it would be essentially impossible for utilities to get to the Property without crossing the stream corridor because private utilities could not be located within the NJDOT right of way, as only public or township utilities can be located in the NJDOT right of way. Accordingly, the only way to connect to the existing utilities on the west of the Property is to cross the Stream Buffer. 13T:16:1-20. In Ms. Algeo’s opinion, the Application proposed the most prudent location for the utilities, including using the existing road as the area for one of the crossings. 7T:32:9-12.



With respect to the utility crossings, Countryside's planner, Mr. J. Creigh Rahenkamp, P.P., in a report dated November 9, 2020, explained that the water line would enter the site from State Route 33 at the location required by and approved by NJDEP. Though the water line would be publicly owned, NJDOT recognizes the route shown as a suitable alternative sufficient to trigger a bar against the line running in the State right of way. Da354.

Regarding the utilities, Mr. Rahenkamp testified that the facts are essentially that the Application had a point of entry for utilities coming into the Property. The proposed utilities needed to connect from east to west across the small stream crossing. 13T:20:6-17. There is a proposed roadway crossing at the location of an existing farm road crossing. Mr. Rahenkamp explained that the existing crossing would be slightly widened, but the culvert in that area would be improved, and a great degree of restoration would occur in accomplishing that improvement, in accordance with the Stream Buffer Ordinance. 13T:20:6-17.

Mr. Rahenkamp further explained that the stormwater discharges would be located where NJDEP regulations require them to be, i.e., allowing for discharge of stormwater into the waterways on the Property. 13T:20:18-22; Da354. Mr. Rahenkamp noted that the need for relief for these disturbances was unrelated to the intensity of the use. In other words, a small office building or age restricted development would still require stormwater outfalls, which would have to be

located in the same location as this Application, and utilities would still have to access the Property and connect from the east side of the Property to the west side, across the Stream Buffer, where they connect into the existing system. The disturbance was not about how much development is proposed or whether this particular use is appropriate. Rather, Mr. Rahenkamp acknowledged that the disturbances raised whether the Property could be developed for any use, and that such a consideration becomes relevant when the Board considers the standard for the exception. 13T:21:2-16.

With respect to waiver relief and the requirements of N.J.S.A. 40:55D-51, Mr. Rahenkamp explained that the standard is that strict compliance would be impractical or exact an undue hardship. He also reiterated that relief would be required regardless of whatever use was proposed. If the Application reduced the impervious cover by 10 or 20 percent, that would not change the fact that the basins would be located at the low point and they discharge where they need to discharge. Essentially, in Mr. Rahenkamp's opinion, strict enforcement of the Stream Buffer Ordinance is preventing any productive development on the Property which goes far beyond simply the standard threshold of impracticality. 13T:25:10-26:9.

In light of the above, Mr. Rahenkamp concluded that the proofs for a waiver pursuant to N.J.S.A. 40:55D-51 had been met. 13T:27:7-14; 13T:27:15-23. At the

conclusion of the testimony submitted by Countryside in support of a waiver from the Stream Buffer Ordinance, the Board offered no questions or comments and none of the Board professionals, objector groups or members of the public offered any expert testimony to rebut the reasoning and justifications offered by Ms. Algeo and Mr. Rahenkamp in support of the waiver request. 13T:26-29.

**Further Accommodations by the Countryside**

Despite the Application meeting or exceeding all zoning standards applicable to the Property, Countryside nonetheless agreed to incorporate many suggested revisions from the Board and/or public including:

- a. Countryside agreed to address all comments in the Township's Bureau of Fire Prevention review memo. 1T:20:3-10.
- b. The Township Mayor asked what would be provided for buffering between the back building and the residential zone and Countryside agreed to stipulate there would be no further development and preserve that area as a conservation easement. 1T:51:22-52:5.
- c. Countryside revised its plan to provide additional landscaping and a 6-foot-high solid fence to rear of the Property for the entire length of the parking lot to screen the parking lot for Building B from adjoining residential lots to the South. 4T:42:5-9.

d. With respect to trucks idling at the Property, Countryside would comply with all State regulations and agreed to post signs with the State administrative code idling limits by the loading bays or wherever the Board wanted them installed. 1T:71:15-19; 5T:42:22-43:10; 7T:27:10-23.

e. Countryside agreed to address all the comments from the Township Environmental Commission's November 11, 2019 report. 4T:6:23-7:7.

f. Countryside added additional landscaping of evergreens and shrubs between Basin C and the parking lot for Basin A to improve visual screening at the front of the site and added foundation plantings to three sides of buildings. 4T:43:14-22.

g. Countryside removed the proposed monument sign, and four directional signs were added along the easterly driveway to direct cars and trucks to their respective parking areas and loading areas. 4T:44:1-8.

h. Countryside agreed to address all technical comments from the Board's professionals. 13T:40:4-41:13; Da358-374.

i. As a condition of any approval, Countryside agreed to remove the existing billboards located on the Property. Da61(¶7); 1T:9:1-3; 2T:22:8-11.

**The Board Attorney's Instruction and the Board Vote**

Despite the overwhelming and uncontroverted evidence presented in support of the Application, the Application was unanimously denied by the Board 8-0 (the

“Denial”). 13T:48:1-19. The Board Attorney, prior to the vote, advised the Board that he believed relief from the Stream Buffer Ordinance was necessary and the standard was a waiver pursuant to N.J.S.A. 40:55D-51. That waiver was the only relief required for this Application, and relief under that section relates to peculiar conditions on individual pieces of property. 13T:36:8-21; 13T:36:25-37:2.

The Township Mayor (who objected to the application from “day 1” because of the traffic conditions [7T:45:4-23]) made a motion that the Board disapprove the application for not meeting the burden of proof for waiver relief. It was “[his] belief that relief is needed, and [he did not] feel this applicant has met the burden of proof to gain the site plan approval and the waiver relief.” 13T:46:25-47:7. No other board member gave any explanation of their vote in support of the Denial. 13T:48:1-19.

The Board’s Denial was memorialized by the Resolution dated March 25, 2021. Da59-106. Countryside appealed the Board’s Denial. Da33-44. After full briefing by the parties and a hearing, Judge Bauman issued his June 5, 2023 written opinion and order reversing the Board’s denial of the Application. Da1-32. On July 14, 2023, the Board initiated the present appeal. Da1-5.

### **LEGAL ARGUMENT**

The Board’s challenges to the Trial Court’s decision below misrepresent the import and totality of that decision. Rather than engage in any meaningful review

of Judge Bauman's rationale, the Board attempts to cherry pick a sentence or portion of a sentence from the decision below to create a legal straw man for the purpose of then knocking that straw man down. For the reasons set forth herein, the Board's efforts are meritless and, accordingly, Judge Bauman's decision should be affirmed by this Court. To be as direct as possible, the Point Headings herein respond directly to the Point Headings set forth in the Board's Brief.

**I. THE TRIAL COURT APPLIED THE CORRECT LEGAL STANDARD IN OVERTURNING THE BOARD'S DENIAL**

The Board chose to lead its Brief with the criticism that the Trial Court failed to apply the correct legal standard in rendering its opinion. The Board does not cite this Court to any portion of Judge Bauman's decision to support its argument because such an argument cannot be supported. To the contrary, Judge Bauman opened his legal discussion with a complete and correct recitation of the legal standard and the presumption of validity that attaches to the Board's action. Da17-19. Moreover, Judge Bauman, unlike the Board, actually recognized that the variance standard cited by the Board in its Brief (Db16) did not apply in this matter as Countryside was not seeking variance relief.

Judge Bauman correctly cited N.J.S.A. 40:55D-51 as the appropriate section of the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. ("MLUL") that should have guided the Board's decision making. Da21. The reference in the Board's

Brief to the variance standard is inapplicable. Further, the Board goes on in its Brief to baldly claim that its decision “in the instant matter was neither arbitrary, unreasonable or capricious and was required to be accorded the presumption of validity and affirmed.” However, in a theme that runs throughout the Board’s Brief, the Board cites no factual support for any of its legal citations. In sum, the Board presents this Court with legal string cites with no factual underpinning.

As correctly noted by the Trial Court, the standard for the granting of an exception, or waiver, from a site plan ordinance is set forth at N.J.S.A. 40:55D-51b and provides:

The planning board when acting upon applications for preliminary site plan approval shall have the power to grant such exceptions from the requirements for site plan approval as may be reasonable and within the general purpose and intent of the provisions for site plan review and approval of an ordinance adopted pursuant to this article, if the literal enforcement of one or more provisions of the ordinance is impracticable or will exact undue hardship because of peculiar conditions pertaining to the land in question.

Id., emphasis added.

Despite the suggestion of the Board’s Brief (Db16), a request for a waiver is not the same legal standard for the granting of a variance pursuant to N.J.S.A. 40:55D-70c(1) or (2). The Board attorney acknowledged that lessened standard of N.J.S.A. 40:55D-51b during his instruction to the Board and correctly advised the Board that Countryside did not have to prove the positive criteria as would be

required for a variance, but had to “show some level of the impractical nature of the situation or hardship as to why it is necessary.” 2T:49:16-22.

To obtain an exception or waiver, an applicant must demonstrate that the literal enforcement of one or more provisions of the ordinance is impracticable or will exact undue hardship because of peculiar conditions pertaining to the land in question. Judge Bauman correctly and keenly focused on that standard in evaluating the evidence that was presented to the Board. To that issue, the decision below focused on the uncontradicted testimony of both Countryside’s professional planner and engineer on the nature of the waivers requested by the Application. Da23-26. That evidence was overwhelming and addressed each of the proposed encroachments into the Stream Buffer.

With respect to the stormwater outfall structures, Mr. Rahenkamp testified that no matter what development was proposed for the Property, the outfall structures would need to be located in those low areas in the Stream Buffer. That testimony was validated by the fact that NJDEP had already approved the placement of those stormwater structures. Literal enforcement of the Stream Buffer Ordinance is impracticable or exacts undue hardship because of peculiar conditions pertaining to the Property, because without such a waiver the 86-acre Property could not be developed for any major development that would require stormwater management via detention basins and outfalls.



Further, with respect to the utility crossing, the proposed water line was required to leave the NJDOT right of way and traverse the Property. That was not Countryside's choice, but NJDOT's directive. As Ms. Algeo testified, there is no other practical way for the utility to connect from one side of the Property to the other without crossing the Stream Buffer. Furthermore, the reason the line is being installed to traverse the Property is so the water line can loop and connect to other properties further down the system in the future. Accordingly, literal enforcement of the Stream Buffer Ordinance is impracticable or exacts undue hardship because of peculiar conditions pertaining to the Property, because it prohibits required utility connections.

Finally, with respect to the road crossing, literal enforcement of the Stream Buffer Ordinance is impracticable or exacts undue hardship because of peculiar conditions pertaining to the Property, because absent the ability to cross the Stream Buffer, a portion of the Property would remain undevelopable. It is not and cannot be the intent of the Stream Buffer Ordinance to prohibit development of developable portions of property, as the Property already has a roadway crossing to permit the current farming uses that disturb nearly the entirety of the Property. The purposes of the Stream Buffer Ordinance are to:

- (1) Improve the management, care, and conservation of the water resources of Manalapan Township.

- (2) Protect significant ecological components of stream corridors such as floodplains, woodlands, steep slopes and wildlife and plant life habitats within the stream corridors of the watershed; and prevent flood-related damage to the communities of the watershed.
- (3) Complement existing state, regional, county and municipal stream corridor and flood hazard protection and management regulations and initiatives.
- (4) Coordinate the regulation of development within stream corridors in a manner complementary and consistent with the Township's other regulatory approaches regarding critical and environmentally sensitive areas, including the Township Flood Hazard Overlay District.
- (5) Reduce the amount of nutrients, sediment, organic matter pesticides, and other harmful substances that reach watercourses, and subsurface and surface water bodies by using scientifically proven processes including filtration, deposition, absorption, adsorption, plant uptake, biodegradation, denitrification and by improving infiltration, encouraging sheet flow, and stabilizing concentrated flows.
- (6) Regulate the land use, siting and engineering of all development to be consistent with the intent and objectives of this chapter and accepted conservation practices.
- (7) Conserve natural, scenic, and recreation areas within and adjacent to streams and water bodies.
- (8) Support the water resource policies of the New Jersey State development and redevelopment plan.
- (9) Advance the purposes of the New Jersey Municipal Land Use Law with particular regard to those purposes set forth pursuant to N.J.S.A. 40:55D-2a,b,d,i, and j.

Da114.

As recognized by the Trial Court, all of these objectives could still be achieved by granting Countryside its requested design waiver. The effect of the Board's denial regarding stormwater outfalls and utility lines was preventing any development of the Property. Likewise, the effect of the Board's denial for a waiver to allow the road crossing would prevent any development on the western portion of the Property and ignored the fact that there already exists a road crossing at the same location as was being proposed by the Application. In denying Countryside's requested waivers, the Board was not effectuating the purposes of the Stream Buffer Ordinance, but merely preventing the development of the Property for a use that, while expressly permitted, the Board apparently found objectionable for reasons outside the proper jurisdiction of the Board.

The Trial Court recognized the arbitrary and capricious nature of the Board's Denial and there is no basis to disturb that finding.

**II. THE TRIAL COURT DID NOT HOLD THAT COUNTRYSIDE'S ENTITLEMENT TO THE WAIVER WAS ESTABLISHED BY THE BOARD'S FAILURE TO ASK QUESTIONS**

As noted in the Preliminary Statement and above, the Board Brief chooses to unfairly extract portions of the Trial Court opinion to create a false narrative relative to the totality of the holding. Point II of the Board's Brief is a prime example of that inappropriate tactic when the Board maintains that:

The trial court specifically held that the Planning Board members' decision not to ask the Plaintiff's Planner any questions or to challenge his testimony during the hearing constituted evidence that design waiver relief pursuant to N.J.S.A. 40:55D-51 should have been granted. (Da24).

Db17, emphasis added.

The Trial Court made no such holding. The Trial Court did observe that members of the Board did not ask "any questions of the applicant's planner," (Da24), but that observation was not the basis for the Trial Court's reversal of the Board's Denial. Rather, as the Trial Court explains, in detail, Countryside offered detailed testimony as to the justification for each of the requested waivers. Da23-26. With respect to the Board's position that Countryside had failed to carry its burden of proof in presenting such testimony, the Trial Court correctly observed:

In its opposition brief, [the Board] points to no evidence in any of the 13 transcripts that directly refutes any of the testimony presented by plaintiff's witnesses.

Da24.

The Trial Court did not focus on whether or not the Board itself, asked any questions. Rather the Trial Court focused on whether the record offered any evidence to counter the positions of Countryside's experts. It did not. As such, the Board's Denial was not being reversed by the Trial Court because the Board failed

to ask questions, but because there was no basis in the record for the Board to deny Countryside's requested waivers in light of the evidence presented.

While the Board may have had the authority to reject the opinions of Countryside's experts, the Board "may not do so unreasonably, based only upon bare allegations or unsubstantiated beliefs." New York SMSA, L.P. v. Bd. of Adj. of Twp. of Weehawken, 370 N.J. Super. 319, 338 (App. Div. 2004). See also Ocean Cty. Cellular Telephone Co. v. Twp. of Lakewood Bd. of Adj., 352 N.J. Super. 514, 535-536 (App. Div. 2002) (finding that the zoning board, in denying an application for use variance approval, improperly relied upon objectors' unfounded fears about radio frequency emissions). In addition, despite its knowledge of local conditions, a board cannot reject expert opinion based on perceptions or speculation which are unsupported by the evidence in the record. Reich v. Borough of Fort Lee Zoning Bd. of Adj., 414 N.J. Super. 483, 504-507 (App. Div. 2010). Here, the Board did not even offer "bare allegations or unsubstantiated belief," but, instead, rejected the expert testimony offered without any rationale. New York SMSA, supra, 370 N.J. Super. at 338. Such a result, as acknowledged by the Trial Court, cannot be sustained under applicable case law.

In Reich, the Appellate Division reversed a zoning board's denial of a use variance for the expansion of a dentist's office where the board had accepted the subjective opinions of its own members over the applicant's expert traffic

testimony. Reich, supra, 414 N.J. Super. at 505-507. The applicant provided expert traffic engineering testimony that the proposed expansion of the dentist's office would not result in increased parking demand during the times that the office would be in operation, i.e., Wednesdays and Fridays. Id. at 505. No expert testimony was offered by the Board or the public in opposition to the applicant's expert testimony. Id. The zoning board members, however, questioned the applicant's expert testimony, finding that the parking demand would likely increase as a result of the proposed expansion because parking demand is generally higher on Mondays, Tuesdays and Thursdays and because medical professionals routinely close their offices on Wednesdays and Fridays. Id. There was no factual support in the record for these findings. Id. Nevertheless, based on such assumptions, the zoning board rejected the applicant's expert testimony and denied the application due to adverse parking impacts. Id. at 496-497, 505-507. In reversing that decision, the Appellate Division found that the board members' findings were mere perceptions without any factual support and should not have been afforded greater weight than the applicant's expert testimony. Id. at 505-507. Determining that the applicant's expert testimony provided sufficient support for the use variance, the Appellate Division reversed the board's denial of same. Id.

Here, similar to Reich, supra, the Board rejected Countryside's expert testimony without even articulating a reason for why it did so. As a result, the sum

and substance of the Board's decision-making process in this matter was to reject the evidence and expert conclusions offered by Countryside and deny the Application without any rationale whatsoever. The Trial Court properly rejected such an arbitrary approach explaining:

In its opposition brief, defendant points to no evidence in any of the 13 transcripts that directly refutes any of the testimony presented by plaintiff's witnesses. Rather, defendant now seeks to minimize the import of their testimony by arguing that the testimony of the experts was either a net opinion or outside the scope of their expertise, which the Board was free to reject. For example, defendant asserts that the Board properly rejected testimony from plaintiff's engineer as a net opinion because the engineer "did not provide any specific testimony concerning the roadway, and full structures [sic] or the grading." (Def. Br., at 21). Defendant further contends that the engineer's opinion was a net opinion because "she focused solely on utilities and failed to analyze whether other design options were available." (Id.).

Even if plaintiff's engineer focused solely on utilities, that would not necessarily render her testimony on that or any other issue a "net opinion." A net opinion is one where an expert omits the whys and wherefores for that opinion; it cannot rest on conclusions alone with no factual support. See, e.g., Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002). The Board purportedly rejected the testimony of plaintiff's engineer concerning the utilities because, in its view, she "conceded that the utilities could have been extended to the subject property by extending them along the frontage of Rt. 33," but "rejected this design due to cost." Resolution, at 43. Defendant fails to cite to the record to support this assertion, and in fact the record does not

support it. What the record does support is the engineer's opinion that "it would basically be impossible" for the utilities to get to the site "without crossing the stream corridor" because the DOT does not accept private utilities within the DOT right-of-way. (13T16:1-20) That sets forth the whys and wherefores of her opinion. Moreover, to install the utilities along the Route 33 frontage was rejected not as cost-cutting measure as defendant contends, but because "that would create additional stream corridor disturbances," See 7T31:3-32:9. The Board's contention that plaintiff based its determination "on monetary issues as well as convenience" (Resolution, at 43) is unsupported by the record. As far as utility crossings was concerned, it was arbitrary, capricious and without basis in the record for the Board to have rejected plaintiff's argument concerning utilities as a cost-cutting measure. And, in any event, the expert did not issue "net opinions" because she provided the reason and factual predicates for those opinions as clearly reflected in the record. There was no legitimate basis for the Board to disregard the engineer's testimony.

Da24-25, emphasis added.

Here, as the Trial Court recognized, the Board's Resolution not only rejected the testimony of Countryside's expert without any rationale, it contained findings that were not even supported by the record. Judge Bauman appropriately rejected the Board attempt to re-write the record before it. As the Board has provided no basis to disturb those findings, the Court should affirm the decision below.

**III. THE TRIAL COURT DID NOT IMPROPERLY RELY ON TESTIMONY BY COUNTRYSIDE'S PLANNER AND EVIDENCE IN SUPPORT OF THE REQUESTED WAIVERS WAS OFFERED BY MULTIPLE EXPERT WITNESSES**



The Board's misrepresentations of the Trial Court's opinion continue in Section III of the Board's Brief. Db19-21. First, the Board argues that the Trial Court was accepting engineering testimony from Countryside's planning expert in violation of the New Jersey Administrative Code, specifically, N.J.A.C. 13:40-7.3. Db19. Such a claim comes despite the Trial Court squarely addressing and rejecting that claim. As the Trial Court explained, Mr. Rahenkamp offered an opinion as to why he believed, in his expert opinion, the waiver relief should have been granted. Da27. In doing so, Mr. Rahenkamp provided testimony as to the details of the plans that were before the Board for consideration in support of his conclusion. As recognized by the Trial Court, there was nothing improper about such a scope of testimony:

Defendant now contends that the planner's testimony was incompetent, beyond his expertise and properly rejected. At the hearing, however, the Chairperson deemed Mr. Rahenkamp's credentials "sufficient," (13T18:16-19:1), no objection or cautionary instruction to the Board as to his testimony was lodge by the Board attorney (13T26:8-21), and not a single member of the Board posed any questions to Mr. Rahenkamp (13T:28-2-29:14).

In its brief, defendant cites N.J.A.C. 13:40-7.3 for the proposition that the Board correctly disregarded the testimony of plaintiff's planner Mr. Rahenkamp, because he testified as to certain aspects of the plan that were beyond his expertise as defined by this subsection of the Administrative Code. Although N.J.A.C. 13:40-7.3 could be read to preclude a planner from *preparing*

certain aspects of a site plan, it would not necessarily preclude a planner from *testifying* as to them, and defendant cites no authority to the contrary. Mr. Rahenkamp testified, among other things, that waiver relief should be afforded because strict compliance with the Stream Buffer Ordinance would be impracticable or would extract an undue hardship for the reasons exhaustively explained in his testimony. Nothing in the Administrative Code cited by the defendant warranted wholesale rejection of Mr. Rahenkamp's testimony on the waiver issue, no instruction by the Board attorney to disregard the testimony is reflected in the record, and in fact the Chairperson deemed MR. Rahenkamp's qualifications "sufficient" as noted above. For the Board to now assert otherwise is arbitrary and capricious.

Da27, italics in original, underscore added.

To accept the Board's argument, no expert, other than the civil engineer could offer an opinion that involves information gleaned from the civil site plan at issue. Such a proposition by the Board, as recognized by the Trial Court, is without any supporting authority. Moreover, it is absurd. As this Court can well recognize, any expert or lay witness presented in support of a development application will reference or rely upon a set of site plan drawings that are prepared and signed by a civil engineer. That does not render that expert unqualified to offer his/her opinion on a given topic. Mr. Rahenkamp's testimony presents a perfect example of where such expert testimony properly overlaps.

In fact, Mr. Rahenkamp, as a professional planner was uniquely qualified to render an opinion as to whether or not "the literal enforcement of one or more

provisions of the ordinance is impracticable or will exact undue hardship because of peculiar conditions pertaining to the land in question,” which was the central issue presented. See N.J.S.A. 40:55D-51b. In order to form an opinion on that issue, Mr. Rahenkamp had to address the factual background issues as to why the encroachments into the Stream Buffer would be necessary. Without such a foundation, the Board would surely cry (and later does) that Countryside’s experts were rendering “net opinions.” The hypocrisy of the Board’s positions was not lost on the Trial Court and should not be lost on this Court.

The Board then seeks to discredit the Trial Court’s decision on the basis of the Trial Court’s failure to analyze and rebut the unpublished Appellate Division decision of White Castle System, Inc. v. Planning Bd of the Tp. Of Middletown, 2014 WL 9865740 (App. Div. 2015). Da375-384. However, the lack of a specific mention of the unpublished White Castle holding does not salvage the Board’s Denial. Further, the Trial Court clearly addressed the principles of that decision by concluding that the requested waivers were not being sought by virtue of fiscal convenience. Da25.

In White Castle, an applicant sought to construct a fast-food restaurant on a property abutting residential uses. Under the applicable zoning code, such a use required the applicant to provide fifty-foot (50’) landscape buffers around parking areas. Despite that buffer requirement, the applicant proposed much reduced

buffers going so far as to reduce one buffer area to 8.5 feet. Da377. In response to the planning board's suggestion to increase that buffer and/or relocate certain parking areas, the applicant refused citing, in part, an inconvenience to the future patrons of its restaurant. Da378. Finding that the facts presented did not warrant the granting of waiver relief, the planning board denied the application. The trial court reversed that planning board determination, ostensibly because the trial court concluded that the concept of "impracticality" was met by the applicant showing that its proposal was "the best the Applicant could do to conform to every requirement except for the buffer requirement." Da380.

The Appellate Division, in reversing the trial court's determination, properly held that "inconveniencing its future patrons by having to walk a longer distance" did not carry the applicant's burden pursuant to N.J.S.A. 40:55D-51b. Da380. In reinstating the planning board decision, the Appellate Division recognized that the board's view of "impracticality" was appropriately based on the intent of the subject buffer ordinance. Id.

Here, although the Board Resolution attempted to frame its basis for denial on the fact that Countryside was requesting its waivers on the basis of financial or economic concerns, Judge Bauman properly concluded, on the record presented, that the Board's claim was unfounded:

The Board purportedly rejected the testimony of plaintiff's engineer concerning the utilities because, in its view, she "conceded that the utilities could have been extended to the subject property by extending them along the frontage of Rt. 33," but "rejected this design due to cost." Resolution, at 43. Defendant fails to cite to the record to support this assertion, and in fact the record does not support it.

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Moreover, to install the utilities along the Route 33 frontage was rejected not as cost-cutting measure as defendant contends, but because "that would create additional stream corridor disturbances," See 7T31:3-32:9. The Board's contention that plaintiff based its determination "on monetary issues as well as convenience" (Resolution, at 43) is unsupported by the record.

Da24, 25, emphasis added.

The record is replete with evidence demonstrating that Countryside did not seek its waiver because to do otherwise would be "inconvenient," as was the case in White Castle. To the contrary, as Countryside's experts explained, the encroachments for utilities, stormwater infrastructure and a roadway crossing were necessary for the development of any use on the Property. Further, unlike the applicant in White Caste, Countryside made a number of revisions to mitigate any impact within the Stream Buffer, consistent with the Stream Buffer Ordinance. Such efforts were recognized as sufficient by the Township Environmental Commission and even after that Township Environmental Commission

endorsement of Countryside’s mitigation proposals, Countryside took even additional mitigation measures. Again, while the Board points this Court to legal standards, such as those set forth in White Castle, the Board fails to point this Court to any facts to support such legal conclusions. By contrast, the Trial Court opinion employs the appropriate, thorough and correct analysis based upon the record established. That opinion should be affirmed.

**IV. THE TRIAL COURT DID NOT ACCEPT OR RELY ON EXPERT ENGINEERING TESTIMONY OFFERED BY COUNTRYSIDE’S REPRESENTATIVE, TERRY SHERMAN**

The Board’s Brief also inaccurately ascribes to the Trial Court a finding that Terry Sherman, a principal of Countryside, was offering “expert testimony regarding utilities, drainage facilities and location of drives” and such expert testimony was the basis for the Trial Court decision. As with nearly every argument in the Board’s Brief, this claim is belied by the record and the Trial Court opinion. Terry Sherman did not offer expert testimony on utilities, drainage or drives. Rather, the testimony attributable to Terry Sherman and relied upon by the Trial Court was as follows:

These utility discharge points and 90-degree road and utility crossings are essential in order to develop the property and have been found reasonable and prudent by the DEP.

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[Countryside] has committed to planting an area in excess of that required and with all native plantings, including milkweed.

Da24, 29.

Recognizing that you need to discharge stormwater drainage and have utility and roadway crossings (over a Property bisected by a stream) is not technical information that only an expert can provide testimony on. Such basic development principles are something that someone who has been in the development business for over forty (40) years, as Mr. Sherman has, can be deemed qualified to comment on. Further, the testimony relative to the landscaping measures that were being proposed by Countryside was also not an expert finding as to the adequacy or nature of that landscape. Rather, Mr. Sherman's testimony on that point was demonstrating Countryside's willingness to exceed the recommendations of the Township Environmental Commission. Da29. That Countryside was exceeding the recommendations of the Township Environmental Commission was one of the facts underlying the Trial Court's proper rejection of the Board argument below that Countryside's "proposed plan [did] not fully protect the ecological components of the environment" and "did not address issues concerning plant life habitats." Id. Such a bald claim within the Board Resolution was one of the many rejected by Judge Bauman.

Those type of contentions advanced by the Board were contrary to not only the actual proceeding before the Board, but, as aptly recognized by the Trial Court, portions of the Board’s own Resolution that acknowledged “additional landscaping was also now proposed with the presently open agricultural areas of the Township stream corridor buffer,” and that with respect to those additional landscaped areas, all of them would be “protected by a conservation easement.” Da29. In sum, Countryside, consistent with the Stream Buffer Ordinance, was proposing substantial re-vegetation of a Property that is currently devoid of such landscaping as it is an active farm site. Id.

The Trial Court’s recognition of the foregoing was not only grounded in the limited testimony by Terry Sherman, but a review of the entirety of the substantial factual record.

**V. AS PROPERLY RECOGNIZED BY THE TRIAL COURT, COUNTRYSIDE’S EXPERTS DID NOT OFFER “NET” OPINIONS, BUT EXPERT OPINIONS THAT WERE IMPROPERLY IGNORED BY THE BOARD**

As the Board had no actual evidence to support the conclusions reached in its Denial, it was forced to resort to the claim that the expert testimony offered by Countryside’s experts (who were accepted as qualified by the Board) offered “net” opinions. It is an argument rooted in desperation rather than evidence in the record and was properly rejected by the Trial Court. In its Brief, as it did below, the



Board focuses on the testimony of Countyside’s Engineer, Ms. Algeo, claiming that because Ms. Algeo’s testimony “focused solely on utilities and analyze whether other design options were available,” somehow rendered her testimony net opinion. Db25. Even if this Court were to accept that Ms. Algeo’s testimony was so limited (which a review of the record reveals was not) that does not render her testimony a net opinion. Again, this was a topic squarely addressed and rejected by the Trial Court. Da24-25.

The Board then attempts to argue that because some of Ms. Algeo’s testimony was based on “commonsense observation” it was somehow, therefore, “not the subject of any expert analysis.” Db25. The Board’s argument in that regard is frivolous. The issue referenced by the Board relates to Countryside’s request for relief to allow for a road crossing in the Stream Buffer. One of the strongest (if not dispositive) arguments in favor of such relief was the fact that the Property already contained such a road crossing in the same location. 7T32:17-21, Da26. Allowing a road to be placed where a road already exists does not require expert analysis. The Board criticism of the the Trial Court’s acceptance of a “commonsense observation” (Da26) should tell this Court everything it needs to know relative to the “merit” of the Board’s appeal as the Board is now taking issue with commonsense.

Moreover, the Board's attempt to suggest that the Trial Court treated Countryside's receipt of NJDEP approvals as some sort of preemption over the Board's authority to issue waivers is similarly unfounded. Db25-26. As explained at the hearing before the Board, the Stream Buffer was not only an area regulated by the Township Ordinance, but NJDEP regulations. As such, that Countryside was able to secure NJDEP approval of the proposed Stream Buffer encroachments, while not dispositive on the Board, was certainly evidence to support Countryside's position that its proofs in support of its design waivers were sufficient. That fact, again while not viewed by the Trial Court as dispositive, was nonetheless further proof that the Board's Denial was, in its totality, arbitrary, capricious and unreasonable. Da26.

The Trial Court's recognition that NJDEP had approved the same encroachments being requested of the Board was not improper given the obvious environmental expertise of the NJDEP. It must also be recalled that the Township's own Environmental Commission was supportive of the measures being undertaken by Countryside on the Property. In rejecting all of that evidence, the Board was acting arbitrarily, capriciously and unreasonably and the Trial Court acknowledgement of the same should not be disturbed by this Court.

Finally, the Board attempts to bootstrap on the language of its own Resolution, rather than the record, as justification for its Denial. Db27-28.

However, again as recognized by the Trial Court, the findings in that Resolution were not supported by the actual record. At numerous points in the Trial Court opinion, Judge Bauman recognized the findings of the Resolution, but rejected such findings as they were not supported by any facts.

It is clear that the Resolution was an attempt by the Board to create a preferred record rather than reflect the actual record. That was inappropriate. As the Trial Court properly concluded based on the record established before the Board the decision of the Board to deny the Application was arbitrary, capricious and unreasonable. That Trial Court holding should be affirmed by this Court.

**VI. THE TRIAL COURT DID NOT BASE ITS DECISION ON THE FACT THAT THE TOWNSHIP MAYOR AND THE BOARD WERE FOCUSED ON TRAFFIC RELATED ISSUES**

At page 20 of the Trial Court decision, the Trial Court reaches the following conclusion:

Based on a thorough review of the record, the court concludes that 1) a waiver was required; 2) plaintiff presented essentially un rebutted evidence that literal application of the Stream Buffer Ordinance would be impracticable because of peculiar conditions pertaining to the property; 3) a waiver would have been reasonable and within the general purpose and intent of the provisions for site plan review; and 4) it was arbitrary and capricious for defendant to have denied the waiver. The court finds that the purpose of the Stream Buffer Ordinance, codified under Township Code §95-8.12(A) would have been effectuated had the Board granted the waiver.

Da30.

In reaching the above conclusion (and throughout the entirety of the discussion leading to that conclusion), the Trial Court makes no mention of traffic as a basis for its decision. However, to ignore the reality of the proceedings before the Board would have been disingenuous. Although the Board's Resolution properly acknowledged that the Board had no jurisdiction over traffic related issues on a State Highway, it is beyond any reasonable dispute that traffic concerns were at the heart of the Board's Denial. The public hearing spanned thirteen (13) public meetings and at nearly every single meeting, the Board commented and questioned Countryside on traffic related issues. Further, members of the Board did not even attempt to disguise their opposition to the Application on the improper grounds of traffic.

Specifically, despite the limitations of the law, the Township Mayor (and Board member), who vocally and vehemently was opposed to the Application "since day 1" because the proposed traffic plans "just doesn't work," suggested Countryside acquire contiguous land. 7T:44:1-13; 7T:48:2-20. At the outset of the hearings, The Township Mayor asked if Countryside attempted to obtain the property to the east to provide access there, because in his lay opinion, sending 75% of the truck traffic eastbound for a mile to turn around and go westbound,

“doesn’t sound ideal to me. I think we can do better. So I think we’re going to do better.” 2T:94:18-23. Countryside provided ample expert and factual testimony that there were no alternatives, even though the very topic was later acknowledged by the Resolution as legally irrelevant.

At a later hearing, the Township Mayor instructed the Board that it needs to make sure the warehouse fits in the character and area of Manalapan and traffic is a major chunk of whether it fits in their town (11T:63:24-25; 11T:64:15-17), despite the well-established case law in New Jersey that off-site traffic cannot be a consideration in denying a site plan application for a permitted use. See Dunkin’ Donuts of N.J. v. Tp. of North Brunswick, 192 N.J. Super. 513, 515 (App. Div. 1984).

In recognizing the foregoing reality in the latter portion of its opinion, the Trial Court was only addressing an issue that Countryside had raised below. Further, while the Trial Court indicated that “the Board may have been swayed both by public opinion and by its own stated objection to the plan filed with the DOT,” the Trial Court did not reverse the Board’s denial of the requested design waivers on such grounds. Da32. Rather, the Trial Court’s reversal of the Denial was based on the Board’s failure to properly consider the testimony presented in support of Countryside’s request for waiver relief. Da20. Accordingly, the Board’s attempt to claim that the Trial Court’s “subjective” beliefs were the basis

for the decision below is, once again, an inaccurate reading of the Trial Court opinion. Therefore, this Court should affirm the Trial Court's opinion below and dismiss the Board's appeal.

**CONCLUSION**

For the reasons set forth above, Countryside Developers, Inc., respectfully requests that the Court affirm the decision of the Trial Court and dismiss the appeal of the Township of Manalapan Planning Board.

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Attorneys for Plaintiff,  
Countryside Developers, Inc.



By \_\_\_\_\_  
Richard J. Hoff, Jr., Esquire

Dated: November 17, 2023