PREPARED BY THE COURT

DANNY REALTY LLC, *Plaintiff,* v. TOWNSHIP OF PARSIPPANY-TROY HILLS ZONING BOARD OF ADJUSTMENT, *Defendant.*	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: CIVIL PART MORRIS COUNTY DOCKET NO: MRS-L-2538-21 Civil Action **ORDER**

THIS MATTER, having been opened to the Court on an action in lieu of prerogative writs by plaintiff, Danny Realty LLC, by the Turteltaub Law Firm L.L.C. (James M. Turteltaub, Esq., of counsel and on the papers), and upon opposition by defendant, Township of Parsippany-Troy Hills Zoning Board of Adjustment, by King Moench Hirniak & Collins, L.L.P. (Peter J King, Esq., of counsel and on the papers), and the Court having considered all submissions, oral argument having been heard on June 27, 2022, for the reasons set forth in the accompanying Statement of Reasons; and for good cause having been shown; therefore,

IT IS, on this 12th day of July, 2022;

ORDERED, that partial judgment is hereby granted in favor of plaintiff; and it is further

ORDERED, that plaintiff's application is remanded to defendant for reconsideration of the positive criteria pursuant to N.J.S.A. 40:55D-70 (d)(3), in accordance with the Municipal Land Use Law and the accompanying Statement of Reasons. The Court does not retain jurisdiction.

Hon. Stuart A. Minkowitz, A.J.S.C.

Opposed.
The Court has served a copy of this Order and accompanying Statement of Reasons on all parties via eCourts.

Danny Realty LLC, v. Township of Parsippany-Troy Hills Zoning Board of Adjustment
MRS-L-2538-21

STATEMENT OF REASONS

I. Procedural History

On May 24, 2021, Danny Realty filed an application (hereinafter, the "Application") for preliminary and final site plan approval to redevelop a combined gas station and convenience store with a gas station containing four multiproduct dispensers and a 1,475 square foot drive-through quick service coffee shop. (Certification of James Turteltaub, Esq., dated April 20, 2022 (hereinafter, "Turteltaub Cert."), Ex. D and F.) The Application would have required the grant a (d)(3) variance for conditional use approval regarding lot size and floor area. The Board held three hearings on the Application: June 9, 2021, July 28, 2021, and September 29, 2021. On September 29, 2021, the Board voted on the Application, resulting in a 4-3 vote against of approval, two votes less than the 5 votes required to grant the (d)(3) variance for conditional use approval. As a result, the Application was denied. The Board memorialized its decision in a resolution published on October 6, 2021 (hereinafter, "the Resolution"). Turteltaub Cert. Ex. C.

On November 30, 2021, Danny Realty filed a Complaint in Lieu of Prerogative Writs appealing the Resolution, and service was acknowledged on December 7, 2021. The Board filed and served its Answer on January 10, 2022. Plaintiff filed a trial brief on April 20, 2022. The Board filed its trial brief in opposition on June 1, 2022. Plaintiff filed a reply on June 13, 2022. Oral argument was heard on June 27, 2022.

II. Facts

Plaintiff, Danny Realty LLC, is a limited liability company of the State of New Jersey, with an address at 230 Main St., Madison, County of Morris, New Jersey 07940, owns the land, buildings and other improvements located at 25 Route 46, Parsippany-Troy Hills, County of

Morris, State of New Jersey, and designated as Block 770, Lot 1 on the official map of the Township of Parsippany-Troy Hills (hereinafter, the "Property"). The Township of Parsippany-Troy Hills Board of Adjustment (the "Board") is a duly constituted planning board under the Municipal Land Use Law ("MLUL"), with authority to review properly submitted development applications and has a business address of Parsippany-Troy Hills Town Hall, 1001 Parsippany Boulevard, Parsippany, County of Morris, New Jersey. At issue is a variance application to waive two conditions of the conditional use requirements for a quick service coffee shop use contained in Township of Parsippany-Troy Hills Code §430-96.D.1 and D.5. Specifically, plaintiff seeks variance on the basis that the Property is 0.742 acres, while one acre is required for a quick service coffee shop, as well as that the proposed building would be 1,475 square feet where 2,500 square feet is required. The Property is located in the B-2 Zone, which allows for dense retail, business, recreational and service use.

The Property is improved a gas station with six multi-product dispensers and a 2,018 square feet convenience store. Turteltaub Cert., Ex. D. In addition, the site has thirteen parking spaces. T1[1] 4:21-22. These uses were approved by Board in 2011. T1 2:14-15; 53:8. The Property is located on the southeast corner of the intersection of New Road and Route 46 with driveways that permit right-in and right-out access to each of these roads. Turteltaub Cert., Ex. D and L. To the immediate south of the Property along New Road is a strip shopping center which contains various uses including restaurants and a food market. T1 5:1-5.

Gasoline service stations are a conditionally permitted use under the Township Zoning Ordinance for which prior approval had been granted by the Board. See Turteltaub Cert., Ex.

[1] References to the transcript of the June 9, 2021 transcript are "T1". References to the transcript of the July 28, 2021 hearing are "T2". References to the transcript of the September 29, 2021 are "T3".

W. Quick service drive-through coffee shops are also a conditionally permitted use under the Township Zoning Ordinance. Turteltaub Cert., Ex. W. Danny's Application satisfied nine of the eleven conditions for a quick service drive-through coffee shop use. T1 56:20-22.

During the course of the Board's hearings on the Application, plaintiff presented the expert testimony of John Paulus, P.E., P.P., a licensed engineer and planner. Mr. Palus was qualified by the Board based on his extensive experience designing sites with combined gas stations and coffee shops similar to that proposed by the Application. T1 3:19. Mr. Palus testified to the overall site plan, on-site circulation, the proposed variances and need for same, and proposed gas station and drive-through quick serve coffee shop operations. T1 3:19 to 31:9; Turteltaub Cert., Ex. D, E and F.

Mr. Palus testified how the proposed project would be an improvement to the Property. He testified that the number of multi-product dispensers would be reduced from six to four. Mr. Palus also testified that the existing 2,018 square foot convenience store building would be demolished and replaced with a 1,475 square foot, drive-through quick service restaurant. The quick-service restaurant would have bathrooms, but no seating. The drive-through lane would have two order boards and be of sufficient size to accommodate thirteen cars. Mr. Palus further testified that a thirteen-car queue was more than needed to provide additional safety and ensure the safe flow of traffic. T1 8:13-18. In addition, the site has thirteen parking spaces when only nine parking spaces were required for the proposed development under the Ordinance. T1 7:15-16.

Nicholas Verderese P.E. testified on behalf of plaintiff regarding the site's proposed traffic circulation and the anticipated traffic impacts from the plaintiff's project. T1 31:10 to 48:4. Mr. Verderese was qualified by the Board as a licensed engineer and a professional operations engineer certified by the Institute of Transportation Engineers. T1 32:2-5. Further, Mr. Verderese was noted

as having more than 10 years of extensive experience in designing sites with combined gas stations and coffee shops similar to that proposed by the Application. T1 32:6-9.

Mr. Verderese gave testimony regarding the overall site plan, on-site circulation of the proposed gas station and drive-through quick serve coffee shop uses proposed in plaintiff's Application. Mr. Verderese testified to the findings that he made in a traffic study which he prepared for the proposed project ("Traffic Study"). Turteltaub Cert., Ex. I; T1 32:15 to 47:15. Mr. Verderese indicated that the New Jersey Department of Transportation's "Letter of No Interest" affirmed his findings regarding the anticipated traffic from the project and that the level of service delay at the intersection of New Road and Route 46 would be reduced. Turteltaub Cert., Ex. K. Mr. Verderese stated that thirteen parking spaces were planned whereas the Township ordinance required only nine parking spaces for the proposed uses. T1 34:22-23. Mr. Verderese further testified to the adequacy of the thirteen-car drive-through queue which was more than sufficient to accommodate the patrons of the proposed quick-service restaurant during periods of extraordinary volumes. T1 34:25 to 35:1. As part of his testimony, Mr. Verderese noted that the proposed queue would have two order boards which would reduce the time cars spent in line where there is only a single order board by 25%-30%. T1 36:2-6. Moreover, Mr. Verderese testified that the thirteen-vehicle drive-through queue is greater in size than those sites with only one order board located on the Garden State Parkway and Route 17 which have higher traffic volumes than the Property and are adequately served by their queue. T3 8:4-8; 36:22-25.

Mr. Verderese testified that the proposed redevelopment would reduce the ability for cars to make left turns into or out of the Property from New Road. Turteltaub Cert. Exhibit H; T2 18:16. He further testified to the inclusion of additional signage in the Application to notify drivers they were not allowed to make left turns from New Road into the site. T1 66:11-12.

During the course of the June 9, 2021 hearing, a representative of the adjacent strip shopping center expressed her concern that the drive-through queue would back up into New Road and block her site's driveway. T1 73:21-23. Mr. Verderese responded to that concern, and the Application was amended to add a marked, "Do Not Block the Box" area. T2 4:23 to 5:98; 11:21 to 12:6.

Plaintiff also presented the testimony of John McDonough, P.P., a licensed professional planner, who addressed the justification for the variance relief sought from the Board. T1 48:10 to 73:23. He testified to his extensive experience being part of project teams that design sites with combined gas stations and coffee shops similar to that proposed by the Application.

Mr. McDonough testified that the proposed project would be consistent with the provisions of the B-2 Zone. T1 53:13-21. Mr. McDonough testified that the proposed project would improve how the Property functions and the public's safety by reducing the need for customers to get out of their cars. T1 51:17-22; 56:15-19; 56:23 to 57:1. In addition, Mr. McDonough testified that the Board had previously granted variances from four conditional use standards for which the Application sought the same variance relief. T1 53:7-12; 56:1-2. He also testified that the Application satisfied nine of the eleven conditional use standards for a drive-through restaurant. T1 56:21 to 57:3. A variance was required because the site did not meet the minimum lot size for the drive-through use. T1 56:21 to 57:3. Notwithstanding, Mr. McDonough stated that the Property was of sufficient size to accommodate the proposed drive-through use safely and efficiently without detriment to the surrounding area. T1 57:4-6.

Mr. McDonough further testified that the minimum building size was the second condition from which variance relief was required. T1 57:1-7. He stated that this variance was justified in part by the fact that there would be no seating in the location, which is atypical for a restaurant

with the primary service being provided by the drive-through window. T1 57:1-7; T3 39:15 to 40:14. Mr. McDonough testified the proposed site plan would be an improvement to the existing conditions. T1 55:4-11; 51:14-17. He further testified that the proposed development would not cause a detriment to the public health, would not negatively impact the surrounding area, and would not impair the Township's zone plan or master plan.

Prior to the Board's private conference, some Board members publicly expressed concern that they did not have evidence regarding the difference in the number of trips between the current convenience store use and proposed quick service coffee shop use. A Board member explained her concern that she was aware of a quick service restaurant in East Hanover, which had long lines, led her to believe that the proposed drive-through queue would not support the anticipated traffic. Turteltaub Cert., Ex. J.

Mr. Verderese addressed the Board's concerns in a supplemental traffic study that indicated that the number of trips to the Property for the drive-through use, as opposed to the existing convenience store during the morning peak hour, would increase by only one car into the site and four cars leaving the site. Turteltaub Cert., Ex. J. The supplemental traffic study also indicated that the number of trips to the Property for the drive-through use would decrease the number of trips generated by the existing convenience store by approximately 40% during the peak evening hour, when traffic was heaviest. Turteltaub Cert., Ex. J. Mr. Verderese reviewed the East Hanover quick service restaurant and determined that it had only a single menu board which could accommodate a maximum queue of twelve cars. Turteltaub Cert., Ex. J. He noted that in contrast, the proposed queue for the Property would accommodate thirteen cars that would be served by a double menu board. Mr. Verderese also indicated that plaintiff's proposed double menu board

would reduce the wait time required in the queue by 25%, and therefore, lessen the number of cars waiting in the queue. Turteltaub Cert., Ex. J.

Overall, Mr. Verderese determined that the East Hanover site confirmed his findings that the proposed queue and layout of the proposed redevelopment of the Property would be more than adequate to safely meet the demands of the use. T3 5:20 to 6:21. Mr. Verderese also testified that, overall, the number of trips to the Property for the drive-through represents a decrease in the number of trips generated by the existing convenience store. T3 5:5-11; 15:8-10.

A Board member then raised further concerns regarding a Starbucks that was built east of the Property on Route 46. T3 47:4-5. The Board member was concerned about traffic issues at this single-order board Starbucks. T3 47:4-5. Another Board member expressed concerns with left-hand turns being made across New Road. T1 38:23 to 39:4. Plaintiff responded with a proposal to install a "No Left Turn" sign on New Road, southbound. T1 32:23-33:4. Similarly, plaintiff proposed to add curbing in its existing driveway to prevent left turns being made out of its property. Turteltaub Cert., Ex. H. Mr. Verderese testified that half the traffic entered the site from New Road and then almost all of the traffic exited the site onto Route 46, not onto New Road, and that the Application would not alter this pattern. T1 33:3-9.

The Board's Planner's report dated September 9, 2021 concluded that the proposed, "no standing box," would resolve the Board's concerns regarding a backup of cars, and that the proposed stacking lane capacity was more than adequate to prevent backup of vehicles onto New Road. Turteltaub Cert., Ex. U.

The Board's Planner suggested that the closure of the New Road driveway would address the Board's concern, but Mr. Verderese informed the Board that the closure of this driveway would violate plaintiff's NJDOT access permit. This driveway was required in order to reduce the traffic

entering and exiting the site from Route 46. T3 26:11-20. One Board member stated her belief that the drive-through traffic would flow onto New Road and tie-up the already burdened New Road. T3 46:14 to 48:8.

A majority of the Board members ultimately voted to deny the Application. Their decision was memorialized in the Board's Resolution, dated, October 6, 2021. The Resolution concluded that the majority of the Board was concerned that the entrance and exit from New Road posed a safety issue that was not overcome by the Applicant. Turteltaub Cert., Ex. A.

The Resolution also stated that the majority of the Board was concerned that the traffic generated at the drive-through could spill out onto New Road, causing traffic issues, that the circulation of traffic on the site as it relates to traffic coming to get gas and traffic coming to go through the drive-through was not satisfactory, and that the requested relief and use are not ones that inherently serve the public good and promote the general welfare. Turteltaub Cert., Ex. A. The Resolution concludes that any benefit that the Applicant presented does not outweigh its detriments. Turteltaub Cert., Ex. A.

III. Action in Lieu of Prerogative Writs Standard

"[E]very proceeding to review the action or inaction of a local administrative agency would be by complaint in the Law Division . . ." through an action in lieu of prerogative writ. Selobyt v. Keough-Dwyer Correctional Facility of Sussex County, 375 N.J. Super. 91, 95 (App. Div. 2005) (quoting Central R.R. Co. of N.J. v. Neeld, 26 N.J. 172, 184-85, certif. denied, 357 U.S. 928 (1958)). In an action lieu of prerogative writs, a court is called upon to review the administrative action of agency, board or other governmental subdivision in accordance with R. 4:69-1 et seq., based upon the record before that body. See Fischer v. Bedminster Twp., 5 N.J. 534, 539 (1950);

Wyzykowski v. Rizas, 132 N.J. 509, 522 (1993); Willoughby v. Planning Bd. of Tp. Of Deptford, 306 N.J. Super. 266 (App. Div. 1997).

"Municipal action will be overturned by a court if it is arbitrary, capricious or unreasonable. However, municipal actions enjoy a presumption of validity. Thus, a challenge to the validity of a municipal ordinance or action must overcome the presumption of validity-a heavy burden." Bryant v. City of Atlantic City, 309 N.J. Super. 596, 610 (App. Div. 1998) (citations omitted). Public bodies are allowed wide latitude in the exercise of their delegated fact-finding discretion because of their peculiar knowledge of local conditions. See Kramer v. Bd. of Adj. of Sea Girt, 45 N.J. 268, 296 (1965). A Planning Board's decision on a land use application may be set aside only when arbitrary, capricious, or unreasonable. See id.; Cell S. of N.J. Inc. v. Zoning Bd. of Adj. of W. Windsor Twp., 172 N.J. 75, 81-82 (2002); New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. of Adj., 160 N.J. 1, 14 (1999). This standard comes from the recognition that local officials, who are familiar with a community's characteristics and interests, are best equipped to pass judgment on variance applications. See Kramer, 45 N.J. at 296. Therefore, "courts ordinarily should not disturb the discretionary decisions of local boards that are supported by substantial evidence in the record and reflect a correct application of the relevant principles of land use law." Lang v. Zoning Bd. of Adj. of Borough of N. Caldwell, 160 N.J. 41, 58-59 (1999).

Board decisions are presumed valid and the party attacking them has the burden of proving otherwise. See Cell S. of N.J., 172 N.J. at 81. A court will not disturb a board's decision unless it finds a "clear abuse of discretion." Id. at 82. In the case of an applicant appealing a board's denial of his application, the applicant bears "the heavy burden of proving that the evidence presented to the board was so overwhelmingly in favor of the applicant that the board's action can be said to

be arbitrary, capricious or unreasonable." Med. Realty Assocs. v. Bd. Of Adj. of Summit, 228 N.J. Super. 226, 233 (App. Div. 1988).

However, a board's factual findings are only entitled to deference if they have an adequate basis in the record. Advance at Branchburg II, LLC v. Branchburg Twp. Bd. of Adj., 433 N.J. Super. 247, 252 (App. Div. 2013). "[I]t is essential that the board's actions be grounded in evidence in the record." Fallone Properties, L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004). The board must "root their findings in substantiated proofs rather than unsupported allegations." Cell S. of N.J., 172 N.J. at 88.

"A board's interpretation of an ordinance is not entitled to any particular deference and is reviewed de novo because 'the interpretation of an ordinance is a purely legal matter as to which the administrative agency has no particular skill superior to the courts.'" Reich v. Borough of Fort Lee Zoning Bd. of Adj., 414 N.J. Super. 483, 499 (App. Div. 2010) (citing Jantausch v. Verona, 41 N.J. Super. 89, 96 (Law Div. 1956), aff'd. 24 N.J. 326). A court must give greater deference to variance denials than to grants of variances, since variances tend to impair sound zoning. Cerdel Constr. Co. v. Township Comm. of East Hanover, 86 N.J. 303, 307 (1981). Judicial review is meant to be a determination of the validity of the board's action; the court will not substitute its judgment for such a local determination. See Medici v. BPR Co., 107 N.J. 1, 15 (1987).

IV. Legal Analysis

a. Applicable Legal Standard

Plaintiff argues that the Board applied the incorrect legal standard in its denial of plaintiff's Application for a variance pursuant to N.J.S.A. 40:55D-70 (d)(3), and instead appled the higher standard required for grant of a variance pursuant to N.J.S.A. 40:55D-70 (d)(1). See Pl. Br. at 16.

The standard of review for the conditional use variance under N.J.S.A. 40:55D-70 (d)(3) sought by plaintiff is different than a variance for a prohibited use under N.J.S.A. 40:55D-70(d)(1). Coventry Square, Inc. v. Westwood Zoning Bd. of Adj., 138 N.J. 285, 297 (1994). A "conditional use" variance under N.J.S.A. 40:55D-70 (d)(3) is a use that is already permitted in a particular zone when certain specified conditions are satisfied. N.J.S.A. 40:55D-70(d)(3). While a "conditional use" is permitted under N.J.S.A. 40:55D-70(d)(3), a "use" is prohibited in a zone unless a variance is granted under N.J.S.A. 40:55D-70(d)(1). As a result, "the underlying municipal decision is quite different" for a N.J.S.A. 40:55D-70(d)(3) variance from the conditional use requirements than for a N.J.S.A. 40:55D-70(d)(1) variance, which is for approval of a use that is prohibited in the zone. Coventry, 138 N.J. at 297. It is undisputed that the Application proposes a use that is conditionally permitted in the B-2 Zone.

The analysis of a conditional use variance should focus on the nature of the deviation from the conditional use requirements rather than the use itself. Coventry, 138 N.J. at 297. In analyzing the deviation from the conditional use requirements, a board must evaluate the reason for the condition and how the requested deviation from the condition may affect the surrounding properties and the overall zone plan. Omnipoint Commc'n, Inc. v. Bd. of Adj. of Twp. of Bedminster, 337 N.J. Super. 398, 414 (App. Div.), certif. denied, 169 N.J. 607 (2001). Consequently, proofs in support of a conditional use variance must "justify the municipality's continued permission for a use notwithstanding a deviation from one or more conditions of the ordinance," as opposed to justifying the introduction of a use generally prohibited in the zone. Coventry Square, 138 N.J. at 298.

An applicant for a conditional use variance must still prove the so-called negative criteria, i.e., that the variance [would] not cause "substantial detriment to the public good and [would] not

substantially impair the intent and the purpose of the zone plan and the zoning ordinance." N.J.S.A. 40:55D-70(d). For a conditional use variance, a board's focus regarding this issue must be on "the impact of the deviation, not the impact of the use." Coventry Square, 138 N.J. at 299.

Pertaining to positive criteria, an applicant, as in all "(d) variance" applications, must show "special reasons" justifying grant of the variance, and such showing will satisfy the positive criteria requirement. Id. To demonstrate "special reasons in a conditional use variance application, an applicant must demonstrate that the site proposed for the conditional use, in the context of the applicant's proposed site plan, continues to be an appropriate site for the conditional use notwithstanding the deviations from one or more conditions imposed by the ordinance. Id. at 298-99. If non-compliance with conditions does not affect the suitability of the site for the conditional use, special reasons satisfying the positive criteria are established. Id. Thus, a conditional-use variance applicant must show that the site will accommodate the problems associated with the use even though the proposal does not comply with the conditions the ordinance established to address those problems. Omnipoint, 337 N.J. Super. at 414.

The Resolution addressed the positive criteria by finding that, "the proposed uses do not inherently serve the public good, do not promote the general welfare, or are not suitable for the site." Resolution at 7-8. The Resolution does not address the unmet conditions of floor area and lot size, and instead focuses on the proposed use, and its lack of benefit or suitability.

There is no requirement, as with a conditional use variance, to prove the proposed use is an inherently beneficial use. Omnipoint, 337 N.J. Super. at 419. The value of a conditional use to the general public is implied by the municipality's determination that the use should be permitted so long as it meets certain requirements. Id. Furthermore, in the absence of any deviation from the enumerated conditions, the site is presumptively suitable." Id. Because the Board premised its

decision regarding the positive criteria on the use, rather than the Property's suitability for the use, notwithstanding its deviation from the conditions required for presumptive suitability, the Board partially applied the incorrect legal standard.

Regarding the requisite proofs of the negative criteria, an applicant for a conditional-use variance also focuses on the specific deviation and its potential effect on the surrounding properties and the zone plan. Id. at 114. In analyzing the first prong of the negative criteria, that the variance can be granted "without substantial detriment to the public good," a board "must evaluate the impact of the proposed [conditional-]use variance upon the adjacent properties and determine whether or not it will cause such damage to the character of the neighborhood as to constitute 'substantial detriment to the public good.'" Medici v. BPR Co., 107 N.J. 1, 22 n. 12 (1987)). In determining the second prong, whether the variance "will not substantially impair the intent and purpose of the zone plan and zoning ordinance," a board "must be satisfied that the grant of the conditional-use variance for the specific project at the designated site is reconcilable with the municipality's legislative determination that the condition should be imposed on all conditional uses in that zoning district." Coventry Square, 138 N.J. at 299.

As previously discussed, several Board members criticized the length of the drive through queue, citing concerns regarding traffic both on and off of the Property. Specifically, the Resolution indicates that four members of the Board expressed concerns in conference that accidents and substantial traffic would result from the addition of a drive through on the Property, and that this would create a dangerous condition. Resolution at 6. The Resolution further stated that the Property would be unable to accommodate the traffic for both the drive through and the gas station, and therefore determined that there would be a substantial negative impact to the traffic patterns on New Road as well as Route 46, as well as on the site proper. Resolution at 7-8. While

the Resolution does not address the impact of the Application on the zone scheme, it did address the impact of the Application on the public good. It did so, not by determining the impact of the traffic on adjacent properties, but instead by determining the risk additional traffic posed to the public was substantial. On these bases, the Resolution applied the proper legal standard regarding the negative criteria. Both the positive and negative criteria must be satisfied to entitle an applicant to variance relief, hence the partial incorrect application of the legal standard is of no moment, as the negative criteria was properly applied. Therefore, based on the foregoing, the Resolution cannot be overturned solely on the basis that the Board misapplied a portion of the legal standard governing the positive criteria, because the Board, applying the proper legal standard, determined that the negative criteria were not met. An application fails where the negative criteria are not met.

b. Sufficiency of the Resolution's Findings

Plaintiff argues that the Board failed to render factual findings on the proofs submitted because several members of the Board who voted against the application relied solely on personal beliefs and opinions for challenging Plaintiff's proofs, and that those unsupported opinions, standing alone, are not sufficient to deny the Application. Def at 4; Pl. Br. at 23. Defendant responds that Boards may, in the absence of evidence that a Board finds compelling, rely on that Board's members opinion as "testimony." Def. Br. at 23; Resolution at 7-8.

A resolution deciding the outcome of a variance application must contain sufficient findings that are based on the proofs submitted and the record before the Board. New York SMSA v. Bd. of Adjustment of Weehawken, 370 N.J. Super. 319, 332-33 (App. Div. 2004). A municipal land use board must "articulate the standards and principles that govern their discretionary decisions in as much details as possible." Holmdel Builders Ass'n v. Holmdel, 121 N.J. 550, 578 (1990) (quoting Crema v. DEP, 94 N.J. 286, 301 (1983)). N.J.S.A. 40:55D-10(g) requires municipal land use boards to render written findings and conclusions on "any application for

development." The record must contain sufficient evidence to support the land use board's factual findings. Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 58-59 (1999); Darst v. Blairstown Twp. Zoning Bd. of Adjustment, 410 N.J. Super. 314, 325 (App. Div. 2009). A board cannot only cite "testimony or conclusory statements" to support the denial of a variance. Id. at 332-33 ("[t]he factual findings set forth in a resolution cannot consist of a mere recital of testimony or conclusory statements couched in statutory language.").

N.J.S.A 40:55D-10(g) requires the Board to "prepare a writing that includes findings of fact and conclusions of law for each decision on any application." Id. at 334 (emphasis added). There must be a "statement of the specific findings of fact on which the Board reached the conclusion that the statutory criteria for a variance were not satisfied." Id. (emphasis added). "Without such findings of fact and conclusions of law, the reviewing court has no way of knowing the basis for the board's decision." Id. at 333.

Although municipal board members may utilize personal experience with, and knowledge of, local conditions in assessing an application, Medici, 107 N.J. at 15, they must also fulfill "statutory standards ordained by the legislature." Id. at 22 (quoting Kramer v. Bd. of Adjustment of Sea Girt, 45 N.J. 268, 296 (1965)). The Board must evaluate the evidence and testimony presented during the hearings and make findings of fact and conclusions of law as memorialized in a resolution. Kane Properties, LLC v. City of Hoboken, 214 N.J. 199, 230 (2013) (MLUL merely restricts the governing body to the evidence and testimony presented during the hearing). The Board must make its final evaluation based on the record as a whole. Id. at 230 (citing Evesham Twp. Bd. of Adjustment v. Evesham Twp. Council, 86 N.J. 295, 301 (1981)); see also Lang, 160 N.J. at 58-59 (board members may use their peculiar knowledge of local conditions as long as there is substantial evidence in the record to support a board's ultimate determination). The wide

latitude given to a board due to its presumed knowledge and expertise on local conditions is predicated "on the existence of adequate evidence in the record supporting the board's determination either to grant or deny variance relief." Lang, 160 N.J. at 58 (emphasis added).

Here, several members of the Board substituted their personal opinions regarding traffic flows for the knowledge and experience of the expert testimony provided over the course of three hearings. Indeed, duly sworn and qualified professional engineers and planners testified repeatedly that traffic patterns, and specifically repudiated concerns raised by members of the Board in both sworn testimony and submitted written reports. The Township's experts supported the conclusions of plaintiff's experts, concluding that the Application would result in decreased traffic. The Board members had no substantive critique or response to that information. T9/29/21 9:16-10:10. Same is reflected by the Resolution, which reiterates that all testimony given to the Board supported the project, and that no testimony was given that supported the notion that traffic would be worsened, or that dangerous conditions may result from approval of the Application. See generally, Resolution.

Moreover, the Resolution merely states that Board members "had concerns" or "believed" that the negative criteria were in doubt. See Resolution at 6-8. It is undisputed that the Resolution contains no factual basis for its conclusion regarding the negative criteria, other than a one sentence reference to a report by the Township planner. See Resolution at 7; Turtletaub cert., Ex. U. The referenced report was a one-page correspondence, indicating that the Board's traffic concerns would be resolved by a closure of the New Road entrance. Turtletaub cert., Ex. U. The report implicitly relied on the Board's assertion that there were valid traffic concerns, though no expert testified to that effect. Id. The report did not state that traffic safety concerns existed in the opinion of the Township planner, nor did it address the sufficiency of the Application's proposed solutions

for any possible traffic safety concerns. Id. The Township planner did not testify, and his report is the only factual basis cited by the Resolution in support of its conclusion that the negative criteria were not met due to traffic concerns.

Boards must use an objective articulable standard to evaluate the sufficiency of presented evidence, and such must be reflected in the written resolution memorializing a board's decision. PRB Enters., Inc. v. S. Brunswick Planning Bd., 105 N.J. 1, 8 (1987). The MLUL's authorization for a municipality to adopt a zoning ordinance that provides for conditional uses constitutes a legislative recognition that certain types of uses, while generally desirable, are not suitable for every location within the district, and that it is sometimes difficult to deal with the special problems inherent in such uses through the zoning ordinance. Id. (quotations omitted). However, it is impermissible for a governing body to delegate its zoning power to the municipal planning board by authorizing the board to approve conditional uses without providing "clear and ascertainable standards to guide the exercise of the Board's discretion." Id. at 9; Jackson Holdings, LLC v. Jackson Tp. Planning Bd., 414 N.J. Super. 342, 349 (App. Div. 2010).

No such standards were identified or relied upon by the Board in deciding that the drive through queue was insufficient to accommodate the conditional use despite the only expert evidence on the record pointing to the contrary. Indeed, despite the Township's determination that such use was appropriate for the location, the dissenting Board members substituted their own lay opinion for the evidence on the record, and did not articulate why the experts' opinions were erroneous or incredible, or in what ways the Applicant's record was deficient.

The Board argues that the burden of proof is on an applicant, and that because plaintiff's experts did not address some alleged 24 separate conditions that were unfulfilled,[2] the Board was

[2] The Board maintains that plaintiff should have addressed not only the two unmet conditions for the proposed conditional use variance, but also the met conditions, the conditions for the already-granted variance for the gas

not persuaded that plaintiff met the necessary burden. Def. Br. at 6-7. This position is not reflected by the Resolution, which accurately lists that relief was sought as to a conditional use variance as it related to two conditions that were unmet by the Application, specifically setbacks and floor area. Resolution at 2. This result is precisely the abuse of discretion identified in Jackson Holdings and PRB Enters. Failing to set forth clear and articulable standards and substituting the unsupported opinion of several members of the Board for the evidence in the record resulted in the Board's abuse of its discretion in determining that the negative criteria were not satisfied. Exxon Co., U.S.A. v. Township of Livingston, 199 N.J. Super. 470, 477 (App.Div.1985).

Without an articulation of standards by which the Board evaluated the evidence in rendering its decision, and without any independent factual support in the record for the Board's conclusions regarding dangerous traffic conditions, the Court concludes that the Resolution's legal determinations regarding the negative criteria, and ultimate decision, as it related to the negative criteria, was arbitrary, capricious, and unreasonable. Kane Properties, LLC v. City of Hoboken, 214 N.J. 199, 230 (2013).

V. Conclusion

For the foregoing reasons, the Court grants partial judgment in favor of plaintiff because the Application meets the negative criteria as explained in Coventry Square. Further, the Board applied the incorrect legal standard in its evaluation of the positive criteria per Coventry Square. The Court remands the Application to the Morristown Zoning Board of Adjustment for consideration of the positive criteria per N.J.S.A. 40:55D-70(d)(3), in accordance with the

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station conditional use, and the conditions for the already granted, but no-longer-sought, convenience store conditional use. Def. Br. at 17. The Resolution limits its scope to the two at-issue conditions discussed supra, and so the Court limits its analysis to same. Further, the Board has presented no law supporting the notion that pre-existing nonconforming uses may be considered in denying a conditional use variance. The Court, therefore, declines to address these arguments.

Municipal Land Use Law and this decision. The Court does not retain jurisdiction. A conforming Judgment accompanies this Statement of Reasons.