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PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COMPLAINT

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PRELIMINARY STATEMENT

This matter is an action in lieu of prerogative writs. Plaintiffs, Natalie Perretta, Michael Jakovcic, Kevin Scott, Lusheng Wang, Juliana Orduna, Megan Sharin, Caren Alvarado, Warren Youngclaus, Jennifer Okerson, and Marc Parisi, individually, and other similarly situated residential objectors ("Plaintiffs") challenge the approval by the Township of Howell Planning Board ("Planning Board") of three applications for the development of warehouse and/or distribution facilities, all located within a one mile-radius of one another in the Township of Howell, New Jersey and all being developed by the same parent company. Plaintiffs filed a single Complaint combining their challenges in one action for several reasons. First, while the three applications were each filed by limited liability company entities the three LLCs share the same parent company, Active Acquisitions. Second, the Planning Board made reversible errors common to all three applications. Third, judicial economy warrants this Court review and evaluate the common issues that serve as the nexus between the repeated reversible errors that occurred in each application and establish the meritorious basis of the Complaint.

Plaintiffs recognize combining three approvals in one action is unique. So too is one developer seeking approvals to develop over one million square feet of warehouse and/or distribution facilities within one mile of each other in the same municipality at locations not particularly suited to the traffic such high intensity development creates. "Warehouse sprawl" has become a considerable concern not just for residents and community groups, but for state officials and lawmakers as well, who in 2022, proposed at least four bills in the state legislature to address these concerns. J. Hurdle, *Warehouse 'sprawl' prompted pushback in 2022*, NJ SPOTLIGHT NEWS (Dec. 19, 2022).[1] (See Certification of Marc Parisi, dated October 18, 2023 ("Parisi Cert."),

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[1] See e.g., the following New Jersey State Assembly and Senate bills:A4475; A5027 & S3467; A5028 & S3468; A5073 & /S3356; and A5337 & S3664.

Exhibit A). Indeed, on September 7, 2022, the New Jersey State Planning Commision – Office of Planning Advocacy, adopted "*Distribution Warehousing and Goods Movement Guidelines*" as a policy to help, *inter alia*, municipalities in assessing public health impacts, environmental harms, and limited infrastructure and capacity in open space and farmland areas not designed to handle heavy truck traffic. (*Id*. at Exhibit B).

Here, the Planning Board asks this Court to ignore the totality of the on-site and off-site impacts of the development on the surrounding communities, and believe that the concerns raised do not apply because the same developer seeks three different approvals for the same use on three different properties situated within one mile of each other.

The Planning Board concedes that the Court has options apart from dismissal with prejudice. Instead, to reach the merits, the Complaint could be severed pursuant to *R*. 4:30. While denying any such bifurcation is necessary or suits any meaningful purpose, Plaintiffs will defer to the Court as to whether the Complaint should be trifurcated into three separate actions. If the Court separates the three applications, Plaintiffs respectfully request that in the interest of judicial economy and to avoid conflicting decisions on those common and reversible errors, this matter be adjudicated by the same Court.

Despite the Planning Board's assertion, the Complaint does identify the true applicant, that being the parent company of Active Acquisitions. Further, the Planning Board concedes that the Complaint was timely filed within 45 days, in accordance with *R*. 4:69-6(b)(3). It is settled law that Plaintiffs' alleged failure to join the three applicants as "indispensable parties" is not a fatal flaw nor a cause for dismissal with prejudice. The principal of Active Acquisitions, Seth Gerszberg, was aware of the Complaint within days of its filing and attempted to contact one of the Plaintiffs through a mutual third party, and at no time sought to intervene in this matter. (See

Parisi Cert, ¶¶ 6-9). The applicant knew of the Complaint and has not been prejudiced by not being named as a party herein.[2]

Indispensable parties may be joined in an action through a myriad of ways. Plaintiffs would consent to the applicant(s) joining should they request to do so. Alternatively, Plaintiffs can file an amended Complaint and join the applicant(s) in accordance with Court rules. Additionally, the Planning Board could have filed a third-party Complaint to join them to the action. It is settled law Plaintiffs' alleged failure to join the applicant(s) as indispensable party(ies) is not a fatal flaw such that it merits a dismissal with prejudice. Moreover, the Applicant's failure to intervene should be considered a concession that it does not believe itself to be an indispensable party.

Simply put, should the Court direct, Plaintiffs stand ready to address any defect that may exist in its timely filed Complaint, including but not limited to, filing an amended Complaint, severing the Complaint into three separate actions, and/or joining the applicant(s) as additional party(ies). Therefore, it is respectfully submitted that it would be a miscarriage of justice and elevation of form over substance for the Complaint to be dismissed with prejudice and the Planning Board's motion should be denied.

PROCEDURAL HISTORY

On June 5, 2023, Plaintiffs filed a Complaint commencing this action in lieu of prerogative writs against the Planning Board. Plaintiffs' Complaint challenges the Planning Board's approval of three applications for the development of warehouses and/or distribution facilities located within one mile of each other. All three of the subject applications were filed by limited liability companies utilizing the same address, same phone number, and same email

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[2] Indeed, at the applicants' request, the Plaintiffs met and communicated with Seth Gerszberg, founder and owner of Active Acquisitions, LLC (the "parent company" for each applicant) to discuss the Complaint, during which time the Court stayed this pending motion.

address. (See Development Applications, Exhibit A-1, A-2, and A-3). Similarly, the Resolutions of Approval for all three applications include testimony from the Director of Development for Active Acquisitions and identify Active Acquisitions as the "parent company" for each of the applicants.

On July 10, 2023, the Planning Board filed a Motion to Dismiss the Complaint with prejudice. The Planning Board, however, acknowledged that the Complaint contains factual allegations common to all three applications, as well as factual allegations specific to each application. Yet the Planning Board seeks to have the entirety of the Complaint dismissed contrary to these allegations, even though, at a minimum, at least one of the applications should be able to continue under this filing. Thus, through its motion, the Planning Board seeks a "remedy" for pleading issues that is considerably more extensive and harsh than necessary to address any claim of deficiency.

Plaintiffs respectfully submit that the Planning Board's Motion to Dismiss should be denied in its entirety and the Plaintiffs should be allowed to proceed with their request that this Court review the aforementioned approvals to determine if same were arbitrary, capricious and unreasonable. The interests of justice mandate that the Plaintiffs be allowed to have a determination on the merits.

LEGAL ARGUMENT

POINT I

STANDARD OF REVIEW

In our State, perhaps more than any other, the prerogative writ has been used as a comprehensive safeguard against an official wrong. *Garrou v. Teaneck Tryon Co.*, 11 N.J. 294, 302 (1953).

In deciding a motion to dismiss under R. 4:6-2I, courts are required to search the allegations of the pleading in depth and with liberality to determine whether a cause of action is "suggested by the facts." *Printing Mart-Morristown v. Sharp Electronics Corp.,* 116 N.J. 739, 746 (1989) (quoting *Velantzas v. Colgate-Palmolive Co.,* 109 N.J. 189, 192 (1988)). To this end, our courts must "ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." *Id.* (quoting *Di Cristofaro v. Laurel Grove Mem. Park,* 43 N.J. Super. 244, 252 (App. Div.1957)).

Plaintiffs' Complaint contains factual allegations and cognizable causes of action that are supported by the records before the Planning Board. As presently before the Court, Plaintiffs only relief against official wrong is the right of review by this Court. The Planning Board's motion to dismiss with prejudice would completely deny Plaintiffs their right to pursue justifiable relief and must therefore be denied.

POINT II

PLAINTIFFS HAVE NOT FAILED TO NAME THE APPLICANTS AS INDISPENSABLE PARTIES

Our courts and court rules are cognizant of the extreme sanction of a dismissal with prejudice and frequently will look to other less drastic alternatives. "The rules of court are designed to expedite litigation and are intended for the equal benefit of all parties. The failure of one side to comply precipitates motions which not only consume the time of the courts and delay justice to other litigants, but also waste the time of counsel which could be devoted with profit to other matters. The effect of a dismissal is to impose too great a penalty upon a litigant who doubtless was personally blameless. There may be situations in which dismissal is the necessary sanction, but where other measures will fairly adjust such *mesne* controversies a dismissal should not be ordered." *Gnapinsky v. Goldyn,* 23 N.J. 243, 247-48 (1957).

"Where noncompliance with court rules is due to neglect or forgetfulness of counsel and not to any conduct of a litigant, and the other party has not been prejudiced, dismissal will not ordinarily be granted where other measures, short thereof, will suffice." *Schlosser v. Kragen,* 111 N.J. Super. 337, 346 (Law Div. 1970); *Savoia v. F.W. Woolworth Co.,* 88 N.J. Super. 153 (App. Div. 1965); *Devlin v. Surgent,* 18 N.J. 148 (1955); *Kazanjian v. Atlas Novelty Co.,* 34 N.J. Super. 362 (App. Div. 1955); *Gnapinsky v. Goldyn*, 23 N.J. 243 (1957); *Paxton v. Misiuk,* 34 N.J. 453 (1961).

The New Jersey Rules of Court do not require that an applicant be named in an action in lieu of prerogative writ. *See R.* 4:69-4. They merely require that an action in lieu of prerogative writ include the applicant's name and location of the property. Our rules do not require that the applicant be named nor do they provide that the applicant is an indispensable party. *See* R. 4:69-4. Case law provides that an applicant is an indispensable party when the challenge involves the granting of a variance. *Stokes v. Twp. of Lawrence*, 111 N.J. Super. 134, 138 (App. Div. 1970). ***The matter before this Court involves no such challenge. Here, Plaintiffs' issue is whether or not the prior site plan approvals by the Planning Board were arbitrary, capricious and unreasonable.***

If the Plaintiffs improperly failed to name the applicants, or a parent company, that can be remedied through leave of Court to file an amended Complaint. There is no prejudice to the applicant(s) because they were aware of the Complaint. Parisi Cert., ¶¶ 6-9. There certainly has been no prejudice to the Planning Board. The interests of justice are not served by dismissing a case when the failure to follow a Court rule was because of a legal judgment of counsel, not by any conduct of the litigant and the other party has not been prejudiced.

If this Court determines that Active Acquisitions (and/or its wholly owned LLCs) is/are an indispensable party(ies), then Plaintiffs should be allowed to amend their Complaint to add any such entity. *Ordinance 2354-12 v. West Orange*, 223 N.J. 589, 601 (2015) (allowing relaxation of the 45 days limitation period when an important public interest requires an adjudication by the court); *see also* *Borough of Princeton v. Mercer Cty.*, 169 N.J. 135, 152-53 (2001); *Reilly v. Brice*, 109 N.J. 555 (1988); *Brunetti v. Borough of New Milford*, 68 N.J. 576 (1975); *Tirpak v. Board of Adjustment*, 457 N.J. Super. 441, 446 (App. Div. 2019); *Kratovil v. Angelson*, 473 N.J. Super. 484, 502 (Law Div. 2020).

The main case argued by the Planning Board, the unpublished decision in *Nuckel v. Borough of Little Ferry Planning Bd.*, 2005 WL 3196583 (App. Div. 2005) (Certification of Donald A. Klein, Esq. dated July 10, 2023, Exhibit F), actually permitted adding the applicant beyond the 45 days period under *R.* 4:69-6(b)(3). In *Nuckel*, the Appellate Division did not hold that the applicant was an indispensable party and that a dismissal of the case was warranted. *See* Nuckel, 2005 WL at *2. Instead, the Appellate Division ***reversed the Law Division's dismissal, holding that the interests of justice required that the case proceed and that the applicant could be added after the 45 day limitations period***. *Id.*

There will be no prejudice to either the Planning Board or Active Acquisitions if this amendment is allowed. Active Acquisitions knew of the Complaint within a day or two of its filing, and therefore has had the opportunity to review the Complaint and prepare a defense. Active Acquisitions could have filed a motion to intervene if it believed that it was an indispensable party that needed to preserve its interests in this litigation. Active Acquisitions has not taken any such position, thereby reinforcing the argument that it does not need to be involved in this litigation.

Additionally, the Planning Board has not demonstrated that it has been prejudiced because Active Acquisitions is not a named party. The absence of the applicant(s) causes no prejudice to the Planning Board.

Based on the foregoing, it is respectfully submitted that by not naming Active Acquisition's (or its subsidiaries) in the Complaint is not grounds for a dismissal of this matter. Therefore, the Planning Board's motion to dismiss on this ground should be dismissed.

POINT III

PLAINTIFFS' COMPLAINT IS NOT TIME-BARRED AS TO ACTIVE ACQUISITIONS

Plaintiffs rely on and incorporate herein the arguments discussed and set forth in the preceding Point II.

Further, the Planning Board relies on *Stokes v. Twp. of Lawrence*, 111 N.J. Super. 134, 138 (App. Div. 1970), to support its contention that the successful applicant is an indispensable party. *Stokes* involved a challenge to the grant of a variance. The Complaint does not challenge the grant of a variance. The Planning Board relies upon this case to support their argument that Plaintiffs are now time-barred from joining the applicants as indispensable parties and there is no basis for enlarging the time to do so. The Planning Board's argument flies in the face of the *Stokes* Court decision.

Stokes found that while the plaintiffs failed to join the applicant as a defendant in the original complaint because of a mistaken belief the applicant was not a necessary party, the court found it "difficult to believe" the applicant was not aware of the action instituted by its neighbors. This demonstrates that an applicant's knowledge of the filed action is relevant to the decision on whether a complaint should be dismissed for failure to join an indispensable party.

As stated above, here there is direct evidence that the applicants are aware of Plaintiffs' Complaint. (Parisi Cert., ¶ 6-9. Moreover, instead of filing a motion to join them as a party, the Planning Board did not implead them in filing an answer, but rather seeks dismissal with prejudice. Further, no representative from the applicant(s) contacted Plaintiffs' counsel seeking to join the litigation by consent, which would have been agreed upon.

In *Stokes*, the applicant was joined after the 45-days appeal deadline and dismissal was sought for untimely joinder. The *Stokes* court held, "We are satisfied that it would be a manifest injustice if plaintiffs were not permitted to have their day in court. We hold that the trial court erred in dismissing their action as untimely. The judgment entered in the Law Division is reversed and the case is remanded for a trial on the merits."

The Planning Board's brief in support of its motion to dismiss with prejudice lacks candor to the Court, as they argue that dismissal is the only remedy. It is respectfully submitted that the Planning Board's filing of its motion without seeking to address any perceived deficiencies in a manner that allows the merits to be reached is not in the interest of its residents. Moreover, the selective presentation of the cases it relies upon to support its motion should result in the Planning Board being required to pay Plaintiffs' attorneys' fees for opposing this motion.

POINT IV

PLAINTIFFS HAVE STANDING TO REPRESENT OTHER SIMILARLY SITUATED RESIDENTIAL OBJECTORS.

Although the Planning Board alleges that the residents of Howell have no standing to sue on behalf of themselves individually, or to have the Court recognize that there are other similarly situated residents, that assertion is incorrect. In addition, there are other residents involved in this action who do not wish to be named in the caption. Most importantly, the issues raised in the Complaint affect all residents of the impacted areas. Moreover, whether or not there are other

residents who are affected by this action who are not named as Plaintiffs does not alter the standing of those who have been so named.

> "Whether a party has standing to pursue a claim is a question of law subject to de novo review." *Cherokee LCP Land, LLC v. City of Linden Plan. Bd.*, 234 N.J. 403, 414 (2018). Our Supreme Court recently pointed out that our "courts have long taken a liberal approach to standing in zoning cases and ... [thus] have broadly construed the MLUL's definition of 'interested party.'" Cherokee, 234 N.J. at 416.

Dimarco v. Zoning Bd. of Adjustment of Edgewater, 2022 N.J. Super. Unpub. LEXIS 839, *8-9 (App. Div. May 18, 2022).[3]

N.J.S.A § 40:55D-4 defines and "interest party" as:

> Interested Party: (1) In a criminal or quasi-criminal proceeding, any citizen of the State of New Jersey; and (2) in the case of a civil proceeding in any court or in any administrative proceeding before a municipal agency, any person, whether residing within or without the municipality, whose right to use, acquire, or enjoy property is or may be affected by any action taken under this Act, or whose rights to use, acquire, or enjoy property under this Act, or under any other law of this State or of the United States have been denied, violated, or infringed upon by an action or a failure to act under the M.L.U.L.

Plaintiffs are all residents in the Township of Howell. Although some Plaintiffs have Freehold mailing addresses, this is only for post office station identification. Plaintiffs submit that they are all Howell Township residents whose rights to use, acquire, or enjoy their property is or may be affected by the development of the warehouses and/or distribution facilities approved by the Planning Board. Moreover the Planning Board has not proffered any evidence that challenges the residency of the Plaintiffs.

POINT V

PLAINTIFFS HAVE NOT IMPROPERLY JOINED IN THEIR COMPLAINT THREE SEPARATE PREROGATIVE WRIT ACTIONS, AS THE COMMON NEXUS TO BE RULED ON INVOLVES THE DIFFERENT PROPERTIES AND THE ENTIRE CONTROVERSY DOCTRINE REQUIRES THAT THE THREE SEPARATE PLANNING BOARD ACTIONS BE JOINED

[3] Pursuant to *R.* 1:36-3, a copy of this opinion is attached to the Certification of Bennet Susser, dated October 18, 2023 ("Susser Cert.") as Exhibit A. We are aware of no contrary unpublished opinion.

A. Common Nexus

Our courts encourage that controversies be presented in one forum if they generally arise from common operative facts. For example, *Garrou* found "uppermost in the minds of the constitutional delegates was the desire to end costly piecemeal litigation and eliminate procedural devices which frustrate just and simple determination on the merits." *Garrou,* 11 N.J. at 305. "Thus they provided generally for the expeditious adjudication of all matters in controversy between parties at one time and place and the court rules contain liberal provisions towards the same goal." *Id*.

The Planning Board's argument that Plaintiffs improperly joined three separate applications and decisions in one action is without merit. Plaintiffs filed one Complaint because of the common fact patterns with the applications and the common errors with decisions. The applicants are all limited liability companies under the same parent company, Active Acquisitions. The applications all pertain to the development of warehouses and/or distribution facilities for the same use. The subject properties are located within one mile of each other. The Resolutions of approval were all adopted on the same date.

The hearings involving the applications all involved similar witnesses, and in fact, Jeromie Lange, the Director of Development for Active Acquisitions, testified on behalf of all three applications. [SP-1085, 2/16/23 Tr., Pg 26 (17-20); Reso. 4/13/2023 Para. 9-23] [SP-1095, 2/2/23 Tr., Pg. 22 (2-6); Reso. 4/13/23 Para. 4-12] [SP-1102, 3/2/23 Tr., Pg 7 (6-9); Reso. 4/13/23 Para. 4-13][4]

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[4] Application SP-1085 was approved on February 16, 2023 and memorialized on April 13, 2023 and refers to the property at 29 Howell Road, also known as Block 164, Lot 5.01 on the Official Tax Map. Application SP-1095 was approved on March 16, 2023 and memorialized on April 13, 2023 and refers to the property at 375 Fairfield Road, also known as Block 177, Lot 8.01 on the Official Tax Map. Application SP-1102 was approved on March 2, 2023 and memorialized on April 13, 2023 and refers to the property at 308 & 413 Fairfield Road, also known as Block 168, Lots 17, 18, 19.02, 19.04 & 19.08.

Had these cases been filed as separate actions, the Court would have been justified to consolidate them. Most importantly, the common errors require review jointly. Plaintiffs' Complaint does not seek to comingle the records of the three matters, but rather identifies those counts common to all applications and those unique to each.

The Planning Board argues that the three matters should be severed. There is a public interest mitigating against this. Public taxes pay for the Planning Board to defend this action. Severing the Complaint into three separate actions would compel duplicate and triplicate expenses on the part of both Plaintiffs and the Planning Board and exhaust public, residents, and judicial resources.

The case law cited by the Planning Board on this point relates to the Court limiting its review to only the record before the approving agency. That is not at issue here, as Plaintiffs do not seek to supplement the record. Rather, Plaintiffs ask this Court to exercise its constitutional power to review the merits of both the common and unique errors set forth in the respective records. If the Court believes severing the Complaint outweighs the interests of judicial economy and efficiency, then Plaintiffs will disunite the Complaint in accordance with R. 4:30. Therefore, the Planning Board is not justified in asking the Court to impose the most severe and harshly punitive remedy if a deficiency is identified, and the Complaint must not and should not be dismissed with prejudice.

As stated above, Plaintiffs respectfully request should this Court decide the Complaint be trifurcated into three separate actions, then the Court exercise its discretion to adjudicate all three actions. This will ensure fairness the alleged errors common to all Complaints are decided uniformly so as to avoid conflicting decisions by other judges.

B. Entire Controversy Doctrine

The entire controversy doctrine embodies the principle that the adjudication of a legal controversy should occur in one litigation before only one court; accordingly, all parties involved in a litigation should at the very least present in that proceeding all of their claims and defenses that are related to the underlying controversy. The doctrine has become such a fundamental aspect of judicial administration that it was codified in the 1947 Constitution, Article 6, section 3, paragraph 4. That provision provides:

> Subject to rules of the Supreme Court, the Law Division and the Chancery Division shall each exercise the powers and functions of the other division when the ends of justice so require, and legal and equitable relief should be granted in any cause so that all matters in controversy between the parties may be completely determined.

The entire controversy doctrine has evolved "to eliminate delay, prevent harassment of a party and unnecessary clogging of the judicial system, avoid wasting the time and effort of the parties, and promote fundamental fairness." *Barres v. Holt, Rinehart and Winston, Inc.*, 74 N.J. 461, 465 (1977). "No principle of law is more firmly established than that a single or entire cause of action cannot be subdivided into several claims, and separate actions maintained thereon." *Ricketti v. Barry*, 775 F.3d 611 (3d Cir. 2015) (quoting *Smith v. Red Top Taxicab*, 111 N.J.L. 439, 440-41 (E.&A. 1933).

The Planning Board argues there is not a core set of facts that applies to all three applications. The records show otherwise. All three applications were filed by LLCs under the parent company, Active Acquisitions. All three applications seek to develop warehouse and/or distribution facilities. All three subject properties are located in the Township of Howell and within one mile of each other. All three applications held hearings in which the Director of Development for Active Acquisitions testified. All three applications submitted Environmental Impact Reports that relied upon an outdated Conservation Element of the Township's Master Plan. All three

applications failed to consider the cumulative environmental impacts of the proposed developments.

Based on the foregoing, the Planning Board's motion to dismiss with prejudice based on this ground should be denied in its entirety.

POINT VI

PLAINTIFFS DID NOT IMPROPERLY RELY ON MATTERS *DE HORS* IN THE RECORD OF EACH OF THE THREE PLANNING BOARD PROCEEDINGS.

Plaintiffs are not attempting to supplement or modify the evidence appearing in the record for each of the three applications, nor are Plaintiffs attempting to "mix and match" the records. The Complaint clearly and succinctly includes pleadings of alleged common errors made on all three applications as well as, when applicable, alleged errors made on each specific application.

The Planning Board misrepresents to this Court that Plaintiffs did not disclose in the Complaint that Application SP-1085 was the subject of prior litigation. This is patently false. (See Complaint at ¶¶ 45-46, 49, 58-60). Plaintiffs provided information in their pleading about the procedural history of application SP-1085.

Because the Planning Board lacks candor regarding this point. Plaintiffs respectfully request that the Court order the Planning Board to pay Plaintiffs' attorneys' fees for defending this motion. As this is the only argument made by the Planning Board on this point, the motion to dismiss should be denied in its entirety.

POINT VII

COUNT IV OF THE COMPLAINT STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The Planning Board seeks dismissal with prejudice of Count IV of Plaintiffs' Complaint over one pleading related to SP-1095 (Comp. at ¶ 148), but completely ignores the claims set forth in the majority of Count IV in which relief can and should be granted.

Count IV of the Complaint alleges the Planning Board's approval of SP-1085 was arbitrary, capricious and unreasonable because the evidence in the record lacked proofs to show that the proposed sound attenuation wall will in fact mitigate noise such that the operations of the proposed use will be in compliance with state and local noise regulations. Whether or not a sound attenuation wall is designed adequately to achieve its intended purpose is absolutely within the scope of a planning board's site plan review. It would defeat the purpose of constructing a sound wall, between a warehouse and a residence, if it was shown to be insufficient to mitigate the anticipated noise. The sole purpose of the sound attenuation wall is to prevent noise from tractor trailers traveling along the neighboring residents property in order to protect the health, safety and welfare of the Township's residents.

The instant action seeks relief through this Court's review of the Planning Board's approval of SP-1085 site plan and the proposed sound attenuating wall, and a finding that the ensuing decision was arbitrary, capricious and unreasonable. The sound wall needed variance relief from buffer requirements, however the Complaint does not challenge the grant of the variance; rather Plaintiffs dispute the sufficiency of the sound wall. Plaintiffs intend to set forth more detailed arguments in their briefs and at trial.

Count IV, therefore, clearly contains factual issues that are properly before this Court for determination. For the forgoing reasons, Count IV should not be dismissed with prejudice.

POINT VIII

COUNT I OF THE COMPLAINT STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The Planning Board incorrectly asserts that the laws of site plan review precluded its review of the cumulative impacts of all three applications including, but not limited to, noise and air pollution. The Planning Board wrongly claims that such considerations are not codified in the Township's zoning, site plan, or other land development ordinances. Further, the Planning Board inaccurately contends that these issues are outside its jurisdiction.

Plaintiffs' Complaint specifically references Township of Howell Ordinance 188-6, Environmental Impact Report. (See Comp. ¶ 127). This Ordinance is codified under "Land Use" and subsection "Development Application Requirements." *Township of Howell Land Use Ordinance*, §188-6. Susser Cert., Exhibit B.

Ordinance 188-6(A) requires that: "an environmental impact report shall accompany every application for development … Said environmental impact report shall be coordinated with the natural resources inventory in the Township of Howell." *Id*.

Impacts to air, water, and noise pollution are specifically governed by Ordinance 188-6(A)(6): "A listing and evaluation of adverse environmental impacts which cannot be avoided, ***with particular emphasis upon air or water pollution, increase in noise,*** damage to natural resources, displacement of people and businesses, displacement of existing farms, increase in sedimentation and siltation, increase in municipal services and consequences to municipal tax structures. ***Off-site impact shall also be set forth and evaluated.***" (emphasis added). ***Id.***

Environmental impacts are also addressed in Ordinance 188-6(D): "Upon completion of all reviews and public hearings, the Planning Board ***shall consider*** the environmental impact record and ***if the Planning Board finds that the proposed development will result in substantial***

damage to any of the elements of the environment set forth in this section which is not adequately resolved or avoided by the applicant's proposal, the Planning Board may deny the application. " (emphasis added). ***Id.***

Ordinance 188-6(E) enumerates the "elements" the Planning Board shall consider and are as follows:

(1) Stability of the soil during and after the proposed alteration.

(2) Drainage patterns and effect on surface water runoff.

(3) Effect on springs.

(4) Potential effect on animals and significant plant species.

(5) ***Potential air and water pollution, especially any potential increase in siltation.***

(6) Effect of any construction plans or other environmental changes on critical slope areas or sewage disposal systems.

(7) Problems related to rock removal.

(8) Amount of resulting nonagricultural displacement of soil.

(9) ***Potential noise pollution.***

(10) Increase in amount of industrial waste.

(11) Increased problems of industrial or nonindustrial waste disposal (subject to review of such problems by the Board of Health).

(12) Circumstances or conditions that are peculiar to the site or to the application under consideration, that are not generally applicable to sites or applications in the same general locality, and that would result in imposition of an undue burden on the applicant if an environmental impact report were required.

(emphasis added). ***Id.***

Accordingly, the Planning Board's claim that it lacked the jurisdiction to explore environmental impacts upon the Township's land use is undermined by the above-referenced Ordinances that specifically empowered (and mandated) the Planning Board to consider and evaluate. This includes off-site impacts as well. This argument by the Planning Board clearly lacks any factual basis.

Based on its assertion in it motion papers, the Planning Board's argument that these considerations were not within its purview should be deemed as an admission that no such considerations were made by them, thereby demonstrating why this Court should review the approvals. The Planning Board's failure to consider the environmental impacts, as required by the aforementioned ordinance and in the evidence of record, was arbitrary, capricious and unreasonable. Accordingly, Count I of the Complaint states a claim upon which relief can be granted and should not be dismissed with prejudice.

POINT IX

PLAINTIFFS VOLUNTARILY WITHDRAW COUNT VIII OF COMPLAINT

Upon review, Plaintiffs agree to voluntarily withdraw Count VIII from the Complaint.

POINT X

COUNT III OF THE COMPLAINT STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The Planning Board asserts that the Environmental Impact Reports submitted by the applicant for each of the three applications, are valid notwithstanding that such reports rely upon an outdated Environmental Resource Inventory. The Planning Board contends that the Environmental Impact Reports accurately depict the conditions which "actually exist" on the various properties. In making this argument, the Planning Board misrepresents to this Court the significance of the Environmental Resource Inventory, which is statutorily the Conservation Element of the Township of Howell's Master Plan.

The New Jersey Municipal Land Use Law requires every municipal planning board to adopt a Master Plan. Planning Boards may adopt various elements, including a Conservation Element. The Planning Board adopted a Conversation Element on December 29, 1988; February 2, 2006; January 15, 2009; and most recently on September 23, 2021.

Statutory law governs the creation of master plan elements. N.J.S.A. § 40:55D-28(a), provides:

> a. The planning board may prepare and, after public hearing, adopt or amend a master plan or component parts thereof, to guide the use of lands within the municipality in a manner which protects public health and safety and promotes the general welfare.

N.J.S.A. § 40:55D-28(b), details what a master plan shall generally contain:

> The master plan shall generally comprise a report or statement and land use and development proposals, with maps, diagrams and text, presenting, at least the following elements (1) and (2) and, where appropriate, the following elements (3) through (17)[5]:

N.J.S.A. § 40:55D-28(b)(8) addresses the present and future preservation, conservation, and utilization of natural resources:

> A conservation plan element providing for the preservation, conservation, and utilization of natural resources, including, to the extent appropriate, energy, open space, water supply, forests, soil, marshes, wetlands, harbors, rivers and other waters, fisheries, endangered or threatened species wildlife and other resources, and which systemically analyzes the impact of each other component and element of the master plan on the present and future preservation, conservation and utilization of those resources.

The Environmental Resource Inventory or Conservation Element is a vital element of the Planning Board's Master Plan for the reasons stated in the above-referenced statue. As development proliferates in a municipality, the quality and quantity of various resources change. This is perhaps the fundamental reason why a municipality adopts updated elements to its Master Plan.

Within this framework, this is precisely what the Planning Board did on September 23, 2021 when adopting an updated Environmental Resource Inventory or Conservation Element. As

[5] These elements are listed in N.J.S.A. § 40:55D-28, and include such aspects as ***land use, housing, circulation, conservation, environmental sustainability and public access***.

previously stated, Ordinance 188-6 requires applicants to provide Environmental Impact Reports "coordinated with the natural resources inventory in the Township of Howell."[6]

The Planning Board failed to require the applicant in each application to provide Environmental Impact Reports coordinated with the Conservation Element of the Master Plan. This failure is a claim upon which relief can be granted, and accordingly Count III should not be dismissed with prejudice.

CONCLUSION

For all of the reasons stated above, Plaintiffs respectfully request that Defendant's Motion to Dismiss be denied in its entirety.

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[6] The Natural Resources Inventory is the same as the "Environmental Resource Inventory" or "Conservation Element", all referring to the same document.