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THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
CAMDEN COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO. L-1281-21

S&N MULTANI, LLC,
MARC and HEIDI DRAGISH,
and BRYAN POPIOLEK,

Plaintiffs,

v.

WINSLOW TOWNSHIP PLANNING
BOARD, ALFRED F. SALVATORE JR.,
DARYL A. SALVATORE SR., and
WINSLOW 30 DEVELOPERS, LLC,

Defendants.

Decided: February 15, 2022

Stuart J. Lieberman, Esq., and Carolyn T. Griffin, Esq., for plaintiffs, S&N Multani, LLC, Marc and Heidi Dragish, and Bryan Popiolek

Shirley Grasso, Esq., for defendant, Winslow Township Planning Board

Duncan M. Prime, Esq., for defendants, Alfred F. Salvatore, Jr., Daryl A. Salvatore, Sr., and Winslow 30 Developers, LLC

DEBORAH SILVERMAN KATZ, A.J.S.C.

INTRODUCTION

This action comes before this court by way of a Complaint in Lieu of Prerogative Writs pursuant to Rule 4:69-1. It is filed by plaintiffs, S&N Multani, LLC, Marc and Heidi Dragish, and Bryan Popiolek [hereinafter “plaintiffs”] against defendants, Winslow Township Planning

Board [hereinafter “Planning Board”], Alfred F. Salvatore, Jr., Daryl A. Salvatore, Sr., and Winslow 30 Developers, LLC [collectively hereinafter “Developers”].¹

On March 18, 2021, the Planning Board approved the Developers’ application to construct a 5,585 square foot Wawa convenience store and gas station. Plaintiffs seek an Order declaring the approval as arbitrary, capricious, and unreasonable, and finding that it violated the Municipal Land Use Law [hereinafter “MLUL”].² Defendants oppose. Upon careful consideration of the parties’ filings and arguments, the court hereby **GRANTS** plaintiffs’ requested relief.

PROCEDURAL HISTORY

On April 29, 2021, plaintiffs filed a Complaint in Lieu of Prerogative Writs docketed under CAM-L-1281-21, which included three counts: (1) the Planning Board’s site plan approval was arbitrary, capricious, and unreasonable; (2) the Planning Board lacked subject matter jurisdiction; and (3) the Planning Board’s decision to grant the Developers a variance violated the MLUL.³

On June 3, 2021, the Developers filed an Answer asserting seventeen separate defenses.

On June 4, 2021, the Planning Board filed an Answer asserting thirteen separate defenses.

On June 7, 2021, the court scheduled a Case Management Conference to be held on July 21, 2021.

On July 15, 2021, plaintiffs and Developers each filed separate statements of factual and legal issues pursuant to Rule 4:69-4. On July 16, 2021, the Planning Board filed its statement of factual and legal issues.

¹ The Planning Board and the Developers are collectively referred to as the defendants.

² N.J.S.A. 40:55D-1 to -163.

³ Pls.’ Compl. 6-9.

On July 26, 2021, the court issued an Order setting briefing deadlines, instructing the parties to draft a consolidated statement of factual and legal issues, and scheduling oral argument on November 10, 2021.

On August 3, 2021, the parties filed a consolidated statement of factual and legal issues.

On September 2, 2021, plaintiffs submitted their trial brief arguing: (1) the Planning Board did not have jurisdiction to approve Developers' application since the subject property is in a zoning district which does not permit the sale of gasoline and, thus, pursuant to N.J.S.A. 40:55D-70(d),⁴ the application required a use variance from the Zoning Board of Adjustment;⁵ and (2) that the Planning Board's decision was arbitrary, capricious, and unreasonable because

⁴ N.J.S.A. 40:55D-70(d) states:

The board of adjustment shall have the power to:

d. In particular cases for special reasons, grant a variance to allow departure from regulations pursuant to article 8 [C.40:55D-62 et seq.] of this act to permit: (1) a use or principal structure in a district restricted against such use or principal structure, (2) an expansion of a nonconforming use, (3) deviation from a specification or standard pursuant to section 54 of P.L.1975, c.291 (C.40:55D-67) pertaining solely to a conditional use, (4) an increase in the permitted floor area ratio as defined in section 3.1 of P.L.1975, c.291 (C.40:55D-4), (5) an increase in the permitted density as defined in section 3.1 of P.L.1975, c.291 (C.40:55D-4), except as applied to the required lot area for a lot or lots for detached one or two dwelling unit buildings, which lot or lots are either an isolated undersized lot or lots resulting from a minor subdivision or (6) a height of a principal structure which exceeds by 10 feet or 10% the maximum height permitted in the district for a principal structure. A variance under this subsection shall be granted only by affirmative vote of at least five members, in the case of a municipal board, or two-thirds of the full authorized membership, in the case of a regional board, pursuant to article 10 [C.40:55D-77 et seq.] of this act.

⁵ Pls.' Br. 5-9.

the proposed Wawa was in violation of Winslow Township Code § 294-108(A)(3) which prohibits the construction of a gas station within 2,000 feet of another gas station.⁶

On September 23, 2021, the court issued an Order amending the briefing deadlines and adjourning oral argument to December 15, 2021.

On October 1, 2021, the Planning Board filed its opposition brief arguing that its decision was not arbitrary, capricious, and unreasonable and that the court must defer to the decision unless plaintiffs prove that the Planning Board abused its discretion.⁷

On the same day, Developers filed their opposition brief arguing: (1) the application did not require a use variance because the proposed Wawa is not a gas station as defined by the Winslow Township Code, but rather, it is a roadside retail sales and service establishment;⁸ (2) plaintiffs failed to provide expert testimony to refute the testimony of defendants' experts or the Planning Board's determination that a use variance was not required;⁹ (3) plaintiffs failed to exhaust their administrative remedies prior to filing this Complaint pursuant to N.J.S.A. 40:55D-72(a)¹⁰ which required them to appeal the September 5, 2019, determination made by the Winslow Township Zoning Officer that the proposed Wawa was permitted on the subject

⁶ Pls.' Br. 9-11.

⁷ Planning Bd.'s Br. 2-4.

⁸ Developers' Br. 17-22.

⁹ Developers' Br. 22-23.

¹⁰ N.J.S.A. 40:55D-72(a) states:

Appeals to the board of adjustment may be taken by any interested party affected by any decision of an administrative officer of the municipality based on or made in the enforcement of the zoning ordinance or official map. Such appeal shall be taken within 20 days by filing a notice of appeal with the officer from whom the appeal is taken specifying the grounds of such appeal. The officer from whom the appeal is taken shall immediately transmit to the board all the papers constituting the record upon which the action appealed from was taken.

property within twenty days;¹¹ and (4) the Planning Board's decision was not arbitrary, capricious, and unreasonable as it was rendered after considering substantial evidence and listening to testimony.¹²

On October 16, 2021, plaintiffs filed their reply brief arguing: (1) that the proposed Wawa constitutes a gas station under the Winslow Township Code;¹³ (2) they were not in violation of N.J.S.A. 40:55D-72(a) since the Zoning Officer's September 5, 2019, determination letter was not disclosed to them despite diligent efforts to obtain any documentation supporting the Developers' application;¹⁴ and (3) the Planning Board's decision was arbitrary, capricious, and unreasonable because it violated the Winslow Township Code.¹⁵

On December 15, 2021, the court heard oral argument and ordered the parties to file and serve written closing statements by January 7, 2022.

On January 7, 2022, the Planning Board, the Developers, and plaintiffs each filed a closing statement. The Planning Board reiterated that (1) a use variance was not required because the proposed Wawa falls within the definition of a "roadside retail sales and service station"¹⁶ and (2) the Planning Board's decision was not arbitrary, capricious, or unreasonable.¹⁷ The Developers stated (1) the Zoning Officer already made the determination that the proposed Wawa met the definition of a "roadside retail sales and service" establishment;¹⁸ (2) the Planning Board did not dispute this zoning determination;¹⁹ and (3) plaintiffs failed to dispute this zoning

¹¹ Developers' Br. 23-25.

¹² Developers' Br. 25-26.

¹³ Pls.' Reply Br. 5-7.

¹⁴ Pls.' Reply Br. 7-9.

¹⁵ Pls.' Reply Br. 9-10.

¹⁶ Planning Bd.'s Closing Br. 1-6.

¹⁷ Planning Bd.'s Closing Br. 7-9.

¹⁸ Developers' Closing Br. 1-2.

¹⁹ Developers' Closing Br. 2.

determination and any testimony provided by the Developers' experts.²⁰ Plaintiffs concluded that a zoning ordinance cannot be ignored simply because it appears outdated and reiterated that gas stations cannot be constructed within 2,000 feet of each other.²¹

FINDINGS OF FACT

The Developers are the owners of 6.157 acres of irregularly shaped land in Winslow Township.²² The subject property is in the Township's Pinelands Area Rural Residential Zoning District [hereinafter "PR-1 residential zone"].²³ The Winslow Township Code does not explicitly state a gas station is a permitted use in a PR-1 residential zone but does state that roadside retail sales and service establishments are permitted.²⁴

On January 11, 2021, Developers submitted an application to the Planning Board seeking preliminary and final major site plan approval along with ten bulk variances and two design waivers in order to demolish the existing structure and construct a 5,585 square foot Wawa convenience store and gas station [hereinafter "proposed Wawa"].²⁵ The plan includes five multi-product dispensers with ten fueling stations and three underground storage tanks for fuel.²⁶ In addition, the application included a number of bulk variances and design waivers.²⁷ The bulk variance relief dealt with the specifications of the parking lot, landscaping considerations, and signage.²⁸

²⁰ Developers' Closing Br. 1-2.

²¹ Pls.' Closing Br. 1-3.

²² Consolidated Statement of Factual and Legal Issues 2.

²³ Consolidated Statement of Factual and Legal Issues 2.

²⁴ Consolidated Statement of Factual and Legal Issues 2; Winslow Township, N.J., Code § 296-11.

²⁵ Consolidated Statement of Factual and Legal Issues 2; Developers' Br. Ex. B.

²⁶ Consolidated Statement of Factual and Legal Issues 2; Developers' Br. 3.

²⁷ Consolidated Statement of Factual and Legal Issues 2-4.

²⁸ Consolidated Statement of Factual and Legal Issues 2-4; Developers' Br. 4-6.

On September 5, 2019, the Township Zoning Officer, Deborah Wells, issued a determination, by way of a letter, that the proposed Wawa qualified as a roadside retail sale and service establishment which is permitted in a PR-1 residential zone.²⁹

On March 18, 2021, the Planning Board held a hearing to determine whether to grant the Developers' application.³⁰ At the hearing, the Developers' professional planner, John McDonough, provided testimony pertaining to, among other things, the utility and safety of the proposed application.³¹ The Planning Board's professionals agreed with Mr. McDonough's testimony.³² Plaintiff, Marc Dragish, who resides near the subject property, provided testimony opposing the proposed Wawa.³³ Mr. Dragish argued: (1) a gas station is not a permitted use in a PR-1 residential zone; (2) gas stations are only listed as permitted uses in Pineland Commercial Zones [hereinafter "PC zone(s)"]; (3) there are five gas stations within a four mile radius of the subject property including plaintiff S&N Multani's gas station which is located across the street in a PC-3 zone; and (4) Winslow Township Code § 294-108 prohibits the construction of a gas station within 2,000 feet of another gas station.³⁴

After hearing testimony, the Planning Board concluded that the proposed Wawa is a permitted use, met the statutory criteria permitting the requested bulk variances, and approved the site plan via a vote.³⁵

On April 22, 2021, the Planning Board memorialized its decision by adopting two resolutions: the first found that the application was complete and the second approved it.³⁶ The

²⁹ Consolidated Statement of Factual and Legal Issues 2; Developers' Br. Ex. C.

³⁰ Consolidated Statement of Factual and Legal Issues 3; Tr. 71-84.

³¹ Consolidated Statement of Factual and Legal Issues 3-4.

³² Consolidated Statement of Factual and Legal Issues 4.

³³ Consolidated Statement of Factual and Legal Issues 4.

³⁴ Consolidated Statement of Factual and Legal Issues 4-5; Tr. 98-120.

³⁵ Consolidated Statement of Factual and Legal Issues 5.

³⁶ Consolidated Statement of Factual and Legal Issues 5.

latter resolution included the Planning Board's factual and legal basis for approving Developer's application.

On April 29, 2021, plaintiffs filed a complaint that challenged the Planning Board's approval of Developer's application.

CONCLUSIONS OF LAW

I. The Planning Board Acted Arbitrarily, Capriciously, and Unreasonably

Plaintiffs argue that the Planning Board acted arbitrarily, capriciously, and unreasonably. According to plaintiffs, the Developers should have applied for a use variance to operate a gasoline filling station in a PR-1 residential zone. Plaintiffs maintain that the Planning Board's approval of the Developers' application despite not having applied for this use variance was arbitrary, capricious, and unreasonable. Plaintiffs request that the court void all approvals associated with the variance relief and require the Developers to apply for a use variance from the Zoning Board of Adjustment.

By contrast, defendants argue that the proposed Wawa qualified as a "roadside retail sales and service" establishment, which is listed as a permitted use in a PR-1 residential zone. According to defendants, the application represents a "hybrid use" that encompasses a convenience store and gas station, not yet contemplated by the Winslow Township Code. This viewpoint maintains that the proposed Wawa is more than a gasoline filling station. It provides a retail service through its convenience store, rendering it a "roadside retail sales and service" establishment.

The Planning Board maintains that rejecting the application in the face of the mountain of expert testimony provided by the Developers would have resulted in an arbitrary, capricious, and unreasonable action. The Developers note that plaintiffs never challenged any of the expert testimony that they provided at the public hearing. Additionally, the Developers affirmatively

sought a Zoning Determination by the Winslow Township Zoning Officer that this application was a “roadside retail sales and service” establishment and was not a “gasoline filling station.”³⁷

Plaintiffs advance an additional argument that under the Winslow Township Code, a gas station cannot be constructed within 2,000 feet of another gas station. In this case, the proposed Wawa would be across the street from an existing Conoco station.³⁸ This argument stems from a subsection of the Winslow Township Code that states, “No repair facilities shall be maintained . . . two thousand (2000) feet of another gasoline selling or service station.”³⁹ Plaintiffs argue the use of the word “another” means two gas stations cannot be constructed within 2,000 feet of each other. The Planning Board and the Developers reason that the use of “repair facilities” at the beginning indicates that this subsection applies only to repair facilities, which the proposed Wawa is decidedly not.

a. Standard of Review

A court will reverse a municipal board’s zoning decision only when it is arbitrary, capricious, or unreasonable. Kramer v. Board of Adjustment, 45 N.J. 268, 296 (1965). Local officials receive a greater degree of deference when enforcing zoning ordinances because they are “thoroughly familiar with their community’s characteristics and interests” Ibid. (citing Ward v. Scott, 16 N.J. 16, 23 (1954)). Given this, a court will respect a zoning decision unless a clear abuse of discretion exists. Cell S. of N.J. v. Zoning Bd. of Adjustment, 172 N.J. 75, 82 (2002).

³⁷ Developers’ Closing Br. 1.

³⁸ Despite being across the street from one another, the Conoco station was built in a PC-1 commercial zone.

³⁹ Winslow Township, N.J., Code § 294-108(A)(3).

Courts cannot override the judgment of the board in areas of factual disputes.⁴⁰ Ibid. Courts can, however, reverse a decision based on an erroneous legal conclusion. Meszaros v. Planning Bd., 371 N.J. Super. 134, 137-38 (App. Div. 2004). A municipal board's legal conclusion is "entitled to no special deference." Ibid.; see also Grancagnola v. Planning Bd., 221 N.J. Super. 71, 75 (App. Div. 1987) ("[T]he interpretation of an ordinance is purely a legal matter as to which an administrative agency has no peculiar skill superior to the courts."). In reviewing a board's legal interpretations—rather than the underlying facts—a court has an imperative to overturn mistaken application of the law.

b. Categorizing the Proposed Wawa

The parties disagree as to whether the proposed Wawa is a roadside retail sales and service establishment or a gasoline filling station. The Winslow Township Code expressly permits "[r]oadside retail sales and service establishments" in the PR-1 residential zone.⁴¹ By contrast, the ordinance does not include "gasoline filling stations" as a permitted use in the PR-1 residential zone, despite being listed in other zones. Id.

Before evaluating whether the omission of "gasoline filling stations" was intentional, the court must first evaluate whether the proposed Wawa even qualifies as a gasoline filling station. Defendants argue that the proposed Wawa is more than a gasoline filling station, it is a roadside retail sales and service establishment, which is a permitted use in the PR-1 residential zone.

Defendants state that the drafters of the Winslow Township Code intended the definition of a gasoline filling station to reflect a more traditional gas station, which includes a garage, repair shop, or service station.⁴² They rely on the fact that throughout the Winslow Township

⁴⁰ Both plaintiffs and the Planning Board note the deference given to municipal boards for findings of fact. Pls.' Br. 5; Planning Bd.'s Br. 3. The Planning Board has omitted that courts do not have to grant deference to a municipal board's legal interpretations.

⁴¹ See Winslow Township, N.J., Code § 296-11(A)(8).

⁴² Oral Argument at 8:50.

Code, the term “gasoline filling station” is always accompanied with language about a garage or service station.⁴³ For example, a permitted use in a commercial zone might allow “[g]asoline filling stations **and** garages.”⁴⁴

Both the Planning Board and the Developers highlight that the inclusion of garages, repair shops, and service stations demonstrate that this proposed Wawa does not meet the definition of a “gasoline filling station” as it only serves as a location to get gas, hoagies, and a cup of coffee.⁴⁵ At trial, the Developers noted, “It does no service whatsoever. It does nothing a garage would do. . . I can’t get an oil change. I can’t even buy oil there.”⁴⁶ According to defendants, the absence of a garage or repair shop means the term “gasoline filling station” is inapplicable to the Developers’ application.

Examination of the zoning ordinance underlies that garages and service stations are not always roped in with gas stations. As an example, Winslow Township Code § 294-101 is an ordinance that implicates both types of establishments. The ordinance begins by stating “An automobile garage, repair or service station **and/or** a station for the storage and sale of fuel, lubricating oil and accessories for motor vehicles”⁴⁷ Unlike defendants’ argument that gasoline filling stations are intrinsically linked with garages, this opening sentence demonstrates a duality, separating garages, repair shops, and service stations from gas stations. Because the ordinance states “and/or,” the court finds that the ordinance contemplates circumstances in which a “gasoline filling station” is not a repair or service shop. By this interpretation, the fact that the

⁴³ For example, a section of the Winslow Township Code that references gasoline filling stations is titled “Automobile garages, repair or service stations.” Winslow Township, N.J., Code § 294-108. According to defendants, this header indicates that when referencing gasoline filling stations, the ordinance intrinsically links them with garages, repair shops, and service stations.

⁴⁴ Winslow Township, N.J., Code § 294-34(B) (emphasis added).

⁴⁵ “Gasoline is retail. It is another item we sell. It’s hoagies, it’s coffee, it’s pain medicine, it’s gas.” Oral Argument at 8:59.

⁴⁶ Oral Argument at 8:59.

⁴⁷ Winslow Township, N.J., Code § 294-101 (emphasis added).

proposed Wawa only sells gasoline does not foreclose it from being categorized as a gasoline filling station.

Although the ordinance does not define the term “gasoline filling station,” statutory text must be given ordinary meaning. DiProspero v. Penn, 183 N.J. 477, 492 (2005). One cannot assign legislative intent beyond what is expressed by the plain language. O’Connell v. State, 171 N.J. 484, 488 (2002). When the words are clear, courts “need look no further.” Wilson ex rel. Manzano v. City of Jersey City, 209 N.J. 558, 572 (2012). Specifically, the courts cannot place in the ordinance an additional qualification that circumvents the plain meaning of the statute. DiProspero v. Penn, 183 N.J. 477, 492 (2005).

Defendants ask the court to include garages and repair shops in the definition of a “gasoline filling station.” The plain meaning of a gasoline filling station, however, does not appear to include this qualification. Both sides cite the Merriam-Webster definition of “Gas Station.” The definition states, “a retail station for servicing motor vehicles especially with gasoline and oil.”⁴⁸ The Developers argue that the words “retail” and “servicing” remove the proposed Wawa from the definition of a gasoline filling station. Such a position would seem nonsensical. Is a Shell gas station that offers no repairs, any less a gas station? Does the fact that the sale of gasoline constitutes a sale of goods or commodities, i.e. retail, prevent it from being considered a gas station? By defendants’ logic, the answer would be “yes.” In this case, the proposed Wawa sells gasoline. Based on the plain language, it is evident that it should be categorized as a gasoline filling station.

Additionally, the Planning Board argues that the use of “gasoline filling station” was an archaic holdover from the days when garages and gasoline filling stations operated as a single

⁴⁸ Gas Station, Merriam-Webster, <https://www.merriam-webster.com/dictionary/gas%20station> (last visited Jan. 30, 2022).

entity.⁴⁹ The ordinances as written, according to the Planning Board, are not reflective of the times.⁵⁰ Specifically, the Planning Board notes the ordinance has no conception of the super Wawa model that has become so popular across the state.⁵¹

If the Planning Board believes an ordinance is archaic, the Planning Board raises this issue in the wrong forum. It is not the role of the court to legislate. As the Supreme Court has held, “it is our duty to interpret.” Wormack v. Howard, 33 N.J. 139, 143 (1960); see also Cherry Hill Twp. v. Oxford House, Inc., 263 N.J. Super. 25, 51 (App. Div. 1993) (“[T]he judiciary does not have the duty to create or redraft local legislation”). Higher courts have addressed this issue directly. The Supreme Court stressed that “the judicial role in reviewing a zoning ordinance is tightly circumscribed,” and a court cannot simply invalidate it. Harvard Enters., Inc. v. Bd. of Adjustment, 56 N.J. 362, 368 (1970). The Appellate Division held, “If a party considers a zoning ordinance outdated or arbitrary, it may go before a municipality’s governing body and seek an amendment to the zoning ordinance.” Avalonbay Cmtys., Inc. v. Twp. of S. Brunswick Zoning Bd. of Adjustment, 2018 N.J. Super. Unpub. LEXIS 1850, at *18 (App. Div. Aug. 2, 2018).⁵² Although this decision was unpublished and ultimately non-precedential, the principle is correct. The proper forum to correct an archaic ordinance is before a municipality’s governing body—not the court.⁵³

⁴⁹ Oral Argument at 8:47.

⁵⁰ Oral Argument at 8:47.

⁵¹ Oral Argument at 8:47.

⁵² Unpublished opinions are non-precedential pursuant to Rule 1:36-3 but can be instructive. Rogow v. Bd. of Trs., 460 N.J. Super. 542, 561 n.5 (App. Div. 2019).

⁵³ Other townships have updated their ordinances to include the Wawa model. See Mike Monostra, Cherry Hill Council passes zoning ordinance for gas stations in regional business district on first..., The Sun Newspapers (July 26, 2016) <https://thesunpapers.com/2016/07/26/cherry-hill-council-passes-zoning-ordinance-for-gas-stations-in-regional-business-district-on-first/> (requiring gas stations to include an accompanying retail use).

The court will next look at the function of the proposed Wawa. Plaintiffs argue that the physical characteristics of the proposed Wawa meet the dictionary definition of a gasoline filling station. Because the proposed Wawa has five fuel dispensers, ten fueling stations, and three underground tanks filled with gasoline, plaintiffs believe that it should be considered a gasoline filling station.

The Developers, on the other hand, describe the proposed Wawa as a “hybrid use.”⁵⁴ The Developers argue that the inclusion of the convenience store qualifies the proposed Wawa as a roadside retail sales and service establishment. At trial, counsel for the Developers said, “It is a use that does two things: it serves as a retail convenience and gasoline filler.”⁵⁵ They point out that the dual purpose of a retail convenience store and a gasoline filling station has become routine throughout the state.⁵⁶ Similarly, the Planning Board stated, “the Wawa convenience store with efficient fueling stations are [sic] more reflective of the current century, and provide a need and service to the residents of Winslow Township which is welcomed by Winslow as a whole.”⁵⁷ For these reasons, defendants believe that the proposed Wawa transcends the traditional definition of a gasoline filling station.

The court is not persuaded by the “hybrid use” argument. If a liquor store is not a permitted use in a residential zone but a retail store is, then a liquor store that also sells clothing would not suddenly become eligible. Similarly, if a “gasoline filling station” is not a permitted use in a residential zone, the fact that a “convenience store” is an equal part of the business does not suddenly make it eligible. The Developers portray gas as just another retail item. At trial, the Developers stated, “Gasoline is retail. It is another item we sell. It’s hoagies, it’s coffee, it’s

⁵⁴ Oral Argument at 8:58.

⁵⁵ Oral Argument at 8:59.

⁵⁶ Oral Argument at 8:58.

⁵⁷ Planning Bd.’s Statement of Factual and Legal Issues 3.

pain medicine, it's gas.”⁵⁸ It is the very addition of gas that makes the Developers' application ineligible. To hold otherwise would create loopholes of the entire code.

In addition, the Developers affirmatively sought a zoning determination by the Winslow Township Zoning Officer, who confirmed that the proposed Wawa qualified as a roadside retail sales and service establishment. The Developers argue that the Zoning Officer's determination should be given a high degree of deference because the Zoning Officer “holds a key position in the municipality with respect to enforcement of the ordinance.”⁵⁹ Since the Zoning Officer did not find the proposed Wawa to be a gasoline filling station, then the court should not either.

As discussed above, a local municipal board is afforded no special deference for its legal interpretations. Meszaros v. Planning Bd., 371 N.J. Super. 134, 137 (App. Div. 2004). Even the standard of review cited by the Planning Board notes that “[a] Court cannot substitute an independent judgment for that of the board's **in areas of factual disputes**.”⁶⁰ Accordingly, the court is not bound by the Zoning Officer's letter, which determined that the proposed Wawa was a roadside retail sales and service establishment. Her letter represents a legal interpretation of the ordinance, and no underlying facts of the application are in dispute. The letter stated, “Wawa Convenience Store and Gas Service Station is permitted by right in this zone” because the PR-1 residential zone “allows for Roadside Retail sales, Service Establishments and accessory uses incidental to the foregoing.”⁶¹ The court is flummoxed as to how an establishment the Zoning Officer described as a “Gas Service Station” does not meet the definition of a gasoline filling station.

⁵⁸ Oral Argument at 8:59.

⁵⁹ Developers' Br. 18-19 (citing Cox & Koenig, New Jersey Zoning & Land Use Administration § 2-8.1 (GANN 2021).

⁶⁰ Planning Bd.'s Br. 2-3 (citing Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965) (emphasis added)).

⁶¹ Developers' Br. Ex. C.

The court finds plaintiffs' arguments more persuasive. The proposed Wawa more closely aligns with the term "gasoline filling station" than a roadside retail sales and service establishment. Even the Board Engineer, William Loughney, at the public hearing referred to the proposed Wawa as a gas station. Mr. Loughney, noted that the fire protection information was listed as not applicable to the Developer's application, but "as a gas station, I figure it might be [applicable]."⁶² While a portion of its business model includes a retail component, the court cannot ignore the clear fact that a business that operates as a gas station meets the definition of a gasoline filling station.

c. Use Variance Requirement

The court has thus determined that the proposed Wawa constitutes a gasoline filling station, and accordingly the next step is determining whether such a use required a use variance in the PR-1 residential zone.

1. Statutory Interpretation

In statutory construction, the primary goal is effectuating the Legislature's intent. Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 231 (1998); see also Sussex Commons Assocs., LLC v. Rutgers, 210 N.J. 531, 540-41 (2012) (describing it as the court's obligation to determine legislative intent). Courts first look to the text's plain language. Merin v. Maglaki, 126 N.J. 430, 434 (1992); see also Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 128 (1987).

The Winslow Township Code describes what is a permitted use in a PC-1 commercial zone in relevant part:

§ 296-27 Permitted Uses.

With the PC-1 District, land may be used and buildings or structures may be used, altered or erected for the following uses:

⁶² Tr. 21 ln. 2-7.

A. Retail or personal service establishments, including though not necessarily limited to, the following:

...

B. Gasoline filling stations and garages in accordance with the standards for garages and filling stations under § 294-102 of the Zoning Ordinance of the Township of Winslow and in accordance with the standards for the protection of water quality under Article XV of this chapter.

[Winslow Township, N.J., Code § 296-27.]

Similarly, almost identical provisions can be found in the Winslow Township Code for permitted uses in PC-2, PC-3, and PC-4 commercial zones.⁶³ The specific inclusion of “gasoline filling stations” as a permitted use is also the case for the C District and CM District.⁶⁴

Plaintiffs advise the court that the Winslow Township intentionally omitted “gasoline filling stations” from a permitted use in a PR-1 residential zone.⁶⁵ Here, the Winslow Township Code specifically lists “gasoline filling stations” as a permitted use for commercial zones, but not for residential zones. Thus, per plaintiffs’ argument, one can assume that gasoline filling stations are not a permitted use in residential zones.

This argument follows the maxim *expressio unius est exclusio alterius*.⁶⁶ See Cyktor v. Aspen Manor Condo. Ass’n, 359 N.J. Super. 459, 472 (App. Div. 2003). Under this approach, when a term is included in one part of a statute but notably absent elsewhere, one can infer that it was intentionally omitted. See Ryan v. Renny, 203 N.J. 37, 58 (2010) (calling this concept “elementary”); see also Best v. C&M Door Controls, Inc., 200 N.J. 348, 360 (2009) (describing

⁶³ See Winslow Township, N.J., Code § 296-31(E)-(F); see also Winslow Township, N.J., Code § 296-51.14(A)-(B); see also Winslow Township, N.J., Code § 296-52.14(A)-(B); see also Winslow Township, N.J., Code § 296-52.19(A)-(B).

⁶⁴ See Winslow Township, N.J., Code § 294-34(A)-(B); see also Winslow Township, N.J., Code § 294-30(E), (G).

⁶⁵ See Winslow Township, N.J., Code § 296-11.

⁶⁶ “Express mention of one thing implies exclusion of all others.”

these omissions as “purposeful”); see also Cyktor v. Aspen Manor Condo. Ass’n, 359 N.J. Super. 459, 472 (App. Div. 2003). The entire statute must be read together to derive meaning. Fiore v. Consol. Freightways, 140 N.J. 452, 466 (1995). Invoking this legal axiom requires a “clear and compelling” implication that is neither conjectural nor purely theoretical. Gangemi v. Berry, 25 N.J. 1, 11 (1957). Such an approach in statutory interpretation can be helpful in discerning legislative intent but should not be adhered to as a rigid rule of law. Allstate Ins. Co. v. Malec, 104 N.J. 1, 8 (1986).

Where a statute clearly employs a term in one place but excludes it elsewhere, a court should not infer the term applies where excluded. State v. Drury, 190 N.J. 197, 215 (2007); Ge Solid State v. Dir., Div. of Taxation, 132 N.J. 298, 308 (1993). Here, it is clear and compelling that the Winslow Township Code explicitly lists “gasoline fillings stations” as a permitted use in four commercial zones yet omits this use in the PR-1 residential zone. First, “gasoline filling stations” receive their own individual subsection as a permitted use for each commercial zone. Listing this term as its own subsection indicates that the drafters were deliberately considering this use. Therefore, omitting the term as a permitted use in a residential zone appears deliberate.

Next, when the term “gasoline filling stations” is included in commercial zones, this use carries additional environmental requirements.⁶⁷ Plaintiffs argue that the heightened environmental standards for “gasoline filling stations” in commercial zones demonstrate that their exclusion in residential zones was intentional. The court agrees. It would be senseless to assume that a gasoline filling station must adhere to water quality standards in a commercial zone but adheres to no such standards in a residential zone. Residential zones should logically have higher environmental standards than commercial zones.

⁶⁷ Oral Argument at 9:06.

In fact, in reviewing applications for gasoline filling stations, courts note the unique danger these establishments pose to public health and the environment. Socony Mobil Oil Co. v. Ocean, 56 N.J. Super. 310, 320 (Law Div. 1959); see also Schmidt v. Board of Adjustment, 9 N.J. 405, 411-12 (1952). In rejecting a gasoline filling station's application, one court stated "the business of storing and handling gasoline at filling stations . . . is attended with a peculiar degree of danger to life and property, due to its propensities and that the noxious odors, noise and traffic hazards emanating from the conduct of such a business" Socony Mobil Oil Co. v. Ocean, 56 N.J. Super. 310, 320 (Law Div. 1959). Another held that gasoline stations "while necessary, may be inimical to the public safety and general welfare" Schmidt v. Bd. of Adjustment, 9 N.J. 405, 411-12 (1952). Plaintiffs note, "By framing themselves as a 'roadside retail sales and service establishment,' Developers effectively runaround these provisions."⁶⁸ The court agrees. Defendants' interpretation would require gas stations adhere to strict environmental standards in commercial zones, but simultaneously allow gas stations to circumvent this requirement entirely in residential zones.

For the reasons above, the court finds that the ordinance intentionally omitted "gasoline filling stations" as a permitted use in a PR-1 residential zone. Where a use is not listed among the permitted uses, then the court may view this as an implied prohibition. See New York C.R. Co. v. Ridgefield, 84 N.J. Super. 85, 91 (App. Div. 1964) (finding the zoning ordinance prohibits uses not explicitly listed in the permitted uses).

In this case, the ordinance governing the PR-1 residential zone provides,

§ 296-2 Purpose.

The purposes of this chapter are to:

...

⁶⁸ Pls.' Br. 8.

G. Prohibit incompatible uses. To prohibit uses, buildings or structures which are incompatible with the character of development of the permitted uses within specified zoning districts.

[Winslow Township, N.J., Code § 296-2(G).]

Given this directive, the court finds that the Developers should have applied for a use variance from the zoning board of adjustment. The ordinance clearly contemplated that “gasoline filling stations” should be considered an incompatible use within the PR-1 residential zone. The court will next examine whether two principal uses existed, representing another reason that the Developers should have applied for a use variance.

2. Principal Use

A use variance is sought under N.J.S.A. 40:55D-70(d), and it is often referred to as a “d” variance. Bulk variance relief is sought under N.J.S.A. 40:55D-70(c) and is referred to as a “c” variance. It is generally accepted that a d-variance is required where two principal uses exist and one use is not permitted. See Fin. Servs. v. Little Ferry Zoning Bd. of Adjustment, 326 N.J. Super. 265, 274-75 (App. Div. 1999) (finding the ‘[i]nstallation of a second principal use would intensify the use beyond the restrictions contained in the ordinance,’ and would require a d variance.”). The Appellate Division has held that “to qualify as an accessory use, the proposed use had to be one customarily incidental and subordinate to a permitted principal use.” Fin. Servs. v. Little Ferry Zoning Bd. of Adjustment, 326 N.J. Super. 265, 274-75 (App. Div. 1999). The Appellate Division explicitly held that a use variance was required when a developer proposes a second principal use that is not permitted. Id. at 276. Accordingly, one factor to determine whether a use variance is required will be whether two principal uses exist.

Plaintiffs emphasize that there is no accessory use to the property. By the Developers’ own admission, both uses—the gasoline station and the convenience store—are seen as equally

important to the enterprise. According to plaintiffs, this indicates that there are two primary uses for the property.

The Developers have not denied the assertion that two principal uses exist: the convenience store and the gasoline station. In fact, throughout their briefs and during trial, the Developers have routinely referred to the property as a “hybrid use.”⁶⁹ At trial, the Developers stated, “It is a use that does two things: it serves as a retail convenience and gasoline filler.”⁷⁰

Moreover, the Developers identified a definition for establishments similar to the proposed Wawa from a land use treatise entitled The Completed Illustrated Book of Development Definitions.⁷¹ The treatise states that for gasoline stations and convenience centers “attempts to distinguish whether one of the uses is principal and the other secondary or accessory are of little value. Convenience stores on the same lot as gasoline stations have become so commonplace that where the size of the parcel of land can accommodate both and land use regulations permit them, they are now almost always provided together.”⁷² The definition provided by the Developers ironically supports plaintiffs’ argument that two principal uses exist.

For properties, such as the proposed Wawa, neither the gas station nor the convenience store can be considered an accessory use. Providing gas is as indispensable to the enterprise as the convenience store. Given that the court held above that “gasoline filling stations” are not a permitted use in a PR-1 residential zone, the Developers should have applied for a use variance for this portion of their business.

⁶⁹ Oral Argument at 8:59.

⁷⁰ Oral Argument at 8:59.

⁷¹ Treatises are not binding on this court. Developers’ Br. 19 (citing Harvey S. Moskowitz, et al., The Completed Illustrated Book of Development Definitions, 226 (4th Ed. 2015)).

⁷² Harvey S. Moskowitz, et al., The Completed Illustrated Book of Development Definitions, 226 (4th Ed. 2015).

II. Adjacent Gas Stations

The parties disagree whether § 294-108(A)(3) of the Winslow Township Code prohibits a gas station from being built within 2,000 feet of another gas station. In this case, a Conoco gas station is across the street from the property at issue. Plaintiffs rely on § 294-108 to support their argument, which provides in relevant part:

(A) An automobile garage, repair or service station and/or a station for the storage and sale of fuel, lubricating oil and accessories for motor vehicles may be established, erected or enlarged under the provisions of this chapter, provided that, along with the general design standards set forth in this Article, the following specific requirements are followed:

...

(3) No repair facilities shall be maintained on the front portion of the lots, or in the front portion of the first story of the building, within thirty-five (35) feet of the street, or in any portion of the lot or building within five hundred (500) feet of the premises of a school, hospital, church or public recreation building theater of public library, or **two thousand (2000) feet of another gasoline selling or service station.**

[Winslow Township, N.J., Code § 294-108(A)(3) (emphasis added).]

Plaintiffs state that subsection (3)'s use of "repair facilities" may seem to exclude gas stations, but it is actually a catch-all phrase. Prohibiting construction within 2,000 feet of "another" gasoline selling or service station demonstrates that this restriction applies to gas stations—not just repair facilities.

The Developers, on the other hand, note that subsection (3) begins by stating "[n]o repair facilities," rendering it inapplicable to an establishment that only allows for the filling of gas

without repair stations or garages. At trial, the Developers explained, “It’s gas and diesel. We do no other service type use here other than those things.”⁷³

a. Statutory Interpretation

The court must review the plain meaning of the ordinance, as the plain meaning is the starting point of statutory interpretation. State v. Cagno, 211 N.J. 488, 523 (2012); In re Young, 202 N.J. 50, 63 (2010). Based on the plain meaning, the court finds credence with both arguments. On one hand, the use of the words “[n]o repair facilities” to start the subsection appear to limit the restriction to repair facilities, such as an auto repair shop or mechanic. On the other hand, the use of the word “another” before gasoline selling station does indicate that the drafters did not want two gasoline selling stations beside each other. Moreover, in the umbrella section above the subsection at issue, the language states that for “[a]n automobile garage, repair or service station and/or a station for the storage and sale of fuel, lubricating oil and accessories for motor vehicles . . . the following specific requirements are followed.” This language seems to apply the following conditions to each type of facility listed in the umbrella.

Courts that have dealt with the same issue—whether a gas station can be within 2,000 feet of another gas station—interpreted local ordinances that stated this much more explicitly. The Supreme Court interpreted a Madison Township Zoning Ordinance that provided the following:

E. Gasoline filling stations, Public garages and auto repair shops may be permitted in a C-1, C-2, or C-3 Commercial Zone provided that the following standards and conditions are complied with:

...

2. The proposed use shall be located on a lot . . . the lot lines of which are located not less than two thousand (2000) feet from an existing gasoline filling station, public garage or auto repair shop.

⁷³ Oral Argument at 8:59.

[Harvard Enters., Inc. v. Bd. of Adjustment, 56 N.J. 362, 364 (1970).]

The Supreme Court upheld the proximity regulation imposed on gasoline filling stations, given “fire, traffic, aesthetic considerations” that the ordinance likely contemplated. Id. at 369. Another court ruled on a statute that began by listing ten restrictions for “public garages,” which included “[n]o gasoline filling station may be erected within 500 feet of an existing gasoline station.” Exxon Co. v. Bd. of Adjustment, 196 N.J. Super. 183, 185-86 (Law Div. 1984). While the court reversed the local board’s denial of a gas station’s application, it still upheld the validity of this ordinance. Id. at 194. Although the second half explicitly banned gas stations within 500 feet of another gas station, the fact that the umbrella section began with “public garages” did not dissuade the court from applying it to all gas stations.

The court may employ other canons of statutory interpretation only when the plain meaning is unclear. McGovern v. Rutgers, 211 N.J. 94, 108 (2012); see also Aponte-Correa v. Allstate Ins. Co., 162 N.J. 318, 323 (2000) (considering “extrinsic factors, such as the statute's purpose, legislative history, and statutory context to ascertain the legislature's intent.”); see also Sanders v. Langemeier, 199 N.J. 366, 374 (2009) (“In the event that the language is not clear and unambiguous on its face, we look to other interpretive aids to assist us in our understanding of the Legislature’s will.”); see also State v. Froland, 193 N.J. 186, 194 (2007) (examining other sources when the plain meaning is unclear). Here, the language at issue is less clear than those found in similar ordinances, so the court must review sources beyond the language.

The legislative history behind the ordinance is absent. Thus, the court cannot discern the intent of the drafters based on comments made at the time of ratification. When the legislative history is missing, the court should examine the apparent purposes of the ordinance. State v. Bastian, 78 N.J. Super. 49, 57 (Law. Div. 1962). To do so, the court examines what the intended policy is. State v. Pavao, 239 N.J. Super. 206, 210 (App. Div. 1990); see also Tozzo v. Universal

Underwriters Ins. Co., 261 N.J. Super. 586, 589 (App. Div. 1993) (“The primary rule for construing a statute is to read it so as to effectuate the probable purpose with which it was enacted.”).

In this case, the purpose of Winslow Township Code § 294-108(A)(3) appears to be both a public safety concern and an aesthetic concern. First, on the issue of public safety, the ordinance seems to protect other establishments, such as schools, churches, or public recreation buildings, from being near automotive facilities. Would this concern be mitigated if the ordinance merely prohibited repair facilities from being in close proximity to these protected groups? As discussed in Schmidt and Socony, gas stations threaten public health through the emission of noxious odors, and their operation results in unique hazards to the public. Socony Mobil Oil Co. v. Ocean, 56 N.J. Super. 310, 320 (Law Div. 1959); see also Schmidt v. Bd. of Adjustment, 9 N.J. 405, 411-12 (1952). If public safety was a factor behind the proximity regulation, then the ordinance should include gas stations.

An additional policy reason is likely an aesthetic consideration. As discussed in Harvard, aesthetic issues are traditionally associated with gas stations. Harvard Enters., Inc. v. Bd. of Adjustment, 56 N.J. 362, 369 (1970). The court doubts that only applying the ordinance to repair shops—and not gas stations—would alleviate this concern.

Furthermore, this ordinance is not an isolated instance of gasoline proximity restrictions. In fact, it is common for local ordinances across the state to ban the construction of a gas station within a certain distance from another gas station.⁷⁴ Admittedly, the drafting of other ordinances

⁷⁴ See Eatontown Borough, N.J., Code § 89-44(C)(2)(14)(h) (“No gasoline-filling station or service station shall be located nearer than 2,000 feet to any other filling station . . .”); see also Edison Township, N.J., Code § 37-35.3(b)(3) (“The minimum distance between gasoline stations or automobile service stations on the same side of the road shall be 3,000 feet.”); see also Passaic, N.J., Code § 317-23(F)(1)(h) (prohibiting a gas station from being built within 1,000 feet of another existing gas station).

leaves far less confusion than the ordinance at issue. That said, it would not be outside the realm of possibility that another township adopted a similar stance.

Accordingly, the court finds that the ordinance prohibits the building of a gas station within 2,000 feet of another gas station. The court finds that the ordinance's use of the word "another" before gas station, how other courts have interpreted similar provisions, and the probable policy considerations of the ordinance all lead to this conclusion.

b. Proximity Regulations for Gas Stations

Because the court found that the ordinance prohibits the construction of a gas station within 2,000 feet of another gas station, the Developers should have sought a variance from the zoning board of adjustment. The Appellate Division has ruled explicitly on the issue of whether an application in noncompliance with a proximity regulation requires a use variance. Darrell v. Governing Body of Clark, 169 N.J. Super. 127, 131 (App. Div. 1979). The court reasoned, "If bulk requirements are variable under subsection (c), we see no reason why distance requirements . . . should not be similarly variable under subsection (d)." Ibid. This decision applied specifically to a gas station that fell within 1,500 feet of another gas station—in contravention of the local zoning ordinance. Id. at 129.

The Supreme Court subsequently upheld the Appellate Division's requirement that a gas station apply for a d-variance through the zoning board of adjustment. Darrell v. Governing Body of Clark, 82 N.J. 426, 428 (1980). The Court found that an applicant in violation of a proximity regulation required a conditional use, which should be processed as a d-variance. Ibid. As the Court noted, the legislative history of the MLUL supports this conclusion. Ibid. Upon inspection, the drafters amended N.J.S.A. 40:55D-70 to "require that any variance for a conditional use be processed as a 'd' (special reasons) variance" Sponsors' Statement to S. 1125 32 (L. 1979, c. 216).

Conditional uses are neither permitted uses nor prohibited uses.⁷⁵ When an application does not comply with conditions imposed by the ordinance, the zoning board of adjustment has exclusive jurisdiction to determine whether to grant a conditional use variance pursuant to 40:55D-70(d). Coventry Square v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285, 295 (1994)); see also White Castle v. Planning Bd. of City of Clifton, 244 N.J. Super. 688, 692-93 (App. Div. 1990) (emphasizing applications that deviate from ordinance conditions must apply for a conditional use through the zoning board, which has exclusive jurisdiction in this area).

The Harvard decision was the first iteration of this principle. Justice Hall's concurrence stated that for applications in noncompliance with a proximity regulation, the applicant shall seek a use variance, "which requires the existence of 'special reasons' as well as meeting the negative criteria."⁷⁶ Both Harvard and Darrell discussed this principle in the context of gas stations proximity regulations. See generally Harvard Enters., Inc. v. Bd. of Adjustment, 56 N.J. 362 (1970); see generally Darrell v. Governing Body of Clark, 82 N.J. 426 (1980).

Given that this court has interpreted the statute to prohibit the construction of gas stations within 2,000 feet of each other, the Developers are not in compliance with the conditions set forth in the ordinance. The Developers proposed a gas station across the street from an existing gas station. Accordingly, based on prior precedent and the legislative intent of the MLUL, the Developers needed to seek a conditional use variance from the zoning board of adjustment pursuant to N.J.S.A. 40:55D-70(d).

⁷⁵ The Supreme Court noted it was not originally understood whether conditional use variances were to be treated as a d-variance, but caselaw has made it clear that conditional uses are to be treated as prohibited uses, "imposing on the applicant the same burden of proving special reasons as it would impose on applicants for use variances." Coventry Square v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285, 295, 297 (1994))

⁷⁶ The statute cited by Justice Hall was the former section N.J.S.A. 40:55-39(d), which has been embodied in the modern section N.J.S.A. 40:55D-70(d)(3). See Loscalzo v. Pini, 228 N.J. Super. 291, 300 (App. Div. 1988) (discussing how N.J.S.A. 40:55-39(d) was the predecessor to N.J.S.A. 40:55D-70(d)).

III. Violation of the MLUL

The third count of plaintiffs' complaint alleged that the Developers violated the MLUL through its variance relief. Plaintiffs stated that pursuant to N.J.S.A. 40:55D-70(c)(2), the detriments outweighed the benefits for the requested variance relief.

The Developers addressed this argument in their papers. Defendants noted that at the public hearing, experts discussed in depth the ways in which the proposed Wawa would advance the purposes of the MLUL. Developers' professional planner, John McDonough, informed the Planning Board that the proposed Wawa advanced several purposes of the MLUL. Specifically, the proposed Wawa would advance (a), (c), (g), (h), (i), and (m), which are, respectively, promoting general welfare, providing for appropriate light air and open space, providing for a variety of uses in appropriate locations, promoting the free flow of traffic, promoting a desirable visual environment, and using land efficiently. Later, however, plaintiffs did not address this argument in their briefs or at trial. Likewise, the Planning Board did not bring it up.

The court finds this argument irrelevant to the present matter. This argument is made pursuant to N.J.S.A. 40:55D-70(c), which deals with bulk variance relief. The Developers' bulk variance relief is not at issue before the court. The issue is whether the Developers should have sought a use variance pursuant to N.J.S.A. 40:55D-70(d). For this reason, whether the proposed Wawa advanced the purposes of the MLUL through its bulk variance relief is irrelevant, and not considered.

IV. Exhausting Administrative Remedies

The Developers argue that plaintiffs failed to exhaust administrative remedies and pursued a reversal of the Planning Board's determination beyond the 20-day statutory limit as outlined in N.J.S.A. 40:55D-72(a). Thus, according to the Developers, plaintiffs should be barred from making this application.

First, the Planning Board's determination related to the Developers' application for bulk variance relief. The Planning Board enumerated its findings of facts and conclusions in its Resolution. These findings of fact pertained solely to the bulk variance. There were no determinations that plaintiffs could appeal as the question of whether a use variance was required was absent.⁷⁷

Second, the statute that the Developers cite—N.J.S.A. 40:55D-72(a)—applies only to appeals filed under N.J.S.A. 40:55D-70(a). Sitkowski v. Zoning Bd. of Adjustment, 238 N.J. Super. 255, 259-60 (App. Div. 1990). N.J.S.A. 40:55D-72(a) deals with affected parties, but it does not cover appeals pertaining to legal interpretations. In fact, courts have permitted appeals past the 20-day limitation when there is a question of a legal interpretation. Id. at 260 (noting that the language of this statute and public policy concerns “would seem to militate strongly in favor of permitting requests for an interpretation to be made without reference to a time restriction.”); see also Jantusch v. Verona, 41 N.J. Super. 89, 94 (Law Div. 1956) (stating the expiration of a statutory time limitation will not be upheld when a zoning determination was made contrary to the zoning ordinance).⁷⁸ Despite the Developers' argument to the contrary, N.J.S.A. 40:55D-72(a) does not “cloak[] the holder with complete immunity from future challenges” outside the statutory time limit. Sitkoswski v. Zoning Bd. of Adjustment, 238 N.J. Super. 255, 261 (App. Div. 1990).

⁷⁷ The Developers note that their expert opinions were never discounted by plaintiffs during the public hearing. The public hearing, however, revolved only around the bulk variance relief sought. It did not revolve around whether the Wawa should be considered a roadside retail sales and service establishment or a gasoline filling station. At the public hearing, there was no mention as to the applicability of the use variance apart from a single conclusory comment by the Developers' counsel. For the same reasons plaintiffs did not object to the Resolution, plaintiffs did not object to experts that discussed only bulk variance relief.

⁷⁸ The Supreme Court has even referred to it as the “right” of affected persons to file an Order to Show Cause in Superior Court, in lieu of an appeal to the Planning Board. Harz v. Borough of Spring Lake, 234 N.J. 317, 336 (2018).

Lastly, the Developers argue that plaintiffs' failure to exhaust administrative remedies should bar this application. Courts have recognized that an exception to this requirement exists "where the only issue to be resolved is a legal one." Matawan v. Monmouth Cty. Bd. of Taxation, 51 N.J. 291, 296-97 (1968); see also Wilbert v. De Camp, 72 N.J. Super. 60, 68 (App. Div. 1962) ("Where the disposition of a matter depends solely on the decision of a question of law, the interests of justice do not require exhaustion of administrative remedies before resort may be had to the courts."). The court has already discussed in depth how no material facts were in dispute. The disputes were solely questions of law. Specifically, the issues in this case were whether the proposed Wawa qualified as a gasoline filling station, and whether the ordinance's omission of a gasoline filling station required a use variance. For these reasons, the court does not find that plaintiffs' action was procedurally barred.

CONCLUSION

For the reasons set forth above, the court finds that the Planning Board acted arbitrarily, capriciously, and unreasonably. The court shall require the Developers to apply for a use variance from the Zoning Board of Adjustment. The court will issue an order consistent with this decision.


DEBORAH SILVERMAN KATZ, A.J.S.C.

Dated: February 15, 2022