

**HEROLD LAW, P.A.**

Robert F. Simon, Esq. (009461992)  
25 Independence Boulevard  
Warren, New Jersey 07059-6747  
(908) 647-1022  
*Attorneys for Plaintiffs*

ANAND DASH and NEILL W. CLARK,  
  
Plaintiffs,

v.

TOWNSHIP OF SPARTA ZONING BOARD  
OF ADJUSTMENT, TOWNSHIP OF  
SPARTA PLANNING BOARD, and  
DIAMOND CHIP REALTY, LLC

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
SUSSEX COUNTY

DOCKET NO.

CIVIL ACTION

**COMPLAINT FOR DECLARATORY  
JUDGMENT RELIEF AND IN LIEU OF  
PREROGATIVE WRITS**

Plaintiffs, Anand Dash and Neill W. Clark (the “Plaintiffs”), by way of Complaint in Lieu of Prerogative Writs against defendants, Township of Sparta Zoning Board of Adjustment (the “Zoning Board”), the Township of Sparta Planning Board (the “Planning Board”), and Diamond Chip Realty, LLC (“Diamond” or the “Owner”) (collectively, “Defendants”), say:

**NATURE OF ACTION**

1. In this action, Plaintiffs seek a declaratory judgment determining that a pending land development application before the Planning Board submitted by Diamond Chip Realty, LLC, Planning Board Application Number 689 (the “Planning Board Application”), for property located at 33 Demarest Road, Sparta, also referred to on the official tax map of the Township of Sparta as Block 12008, Lot 23 (the “Property”), does not contemplate a principal use permitted in the Township’s Economic Development District.

2. Plaintiffs seek, in the alternative, a declaratory judgment determining that the Planning Board Application does not contemplate a principally permitted “warehouse” use, as defined in the Township of Sparta Comprehensive Land Development Code, but rather, a principal use prohibited in the Township’s Economic Development District, or alternatively, contemplates a “truck terminal” use conditionally permitted as a principal use in the Township’s Economic Development District.

3. Plaintiffs seek, in the alternative, a declaratory judgment determining that the Planning Board Application impermissibly contemplates a non-rail dependent building not adjacent to the railroad or a rail siding that exceeds 35 feet in height by greater than 10 feet or 10%, requiring a use variance pursuant to N.J.S.A. 40:55D-70d6 that can only be granted by the Zoning Board.

4. Plaintiffs seek a declaratory judgment determining that the Zoning Board, not the Planning Board, has jurisdiction to consider the Planning Board Application.

5. Plaintiffs further challenge the adoption of the resolution of the Zoning Board, memorialized on or about June 8, 2022 (the “Resolution”), concerning the denial of Plaintiffs’ April 4, 2022 application for an interpretation of the Township of Sparta’s Comprehensive Land Development Code (the “Township Code”) to the Zoning Board, pursuant to the Municipal Land Use Law, N.J.S.A. 40:55D-1 *et seq.* (the “MLUL”), Subsection 70(b) (the “Interpretation Application”), concerning the Planning Board incorrectly, illegally and summarily determining that the Planning Board Application is one for a permitted “warehouse” use.

6. Plaintiffs further challenge the Zoning Board’s failure to provide the Plaintiffs with the opportunity for a fair and full hearing on its Interpretation Application, for which it

rightfully applied pursuant to Subsection 70(b) of the MLUL and applicable New Jersey case law.

7. The Planning Board and Zoning Board, in dereliction of their respective public duties, and with a complete disregard for the legal rights of Plaintiffs and Township residents, including those resident owners of property in the neighborhood surrounding the Property, have failed to properly follow all applicable laws, including the New Jersey Constitution, the MLUL and the Township Code.

### **THE PARTIES**

8. Plaintiff, Anand Dash, Esq., is a resident of the Township of Sparta, with an address of 17 Ponderosa Trail, Sparta, New Jersey.

9. Plaintiff, Neill W. Clark, Esq., is a resident of the Township of Sparta, with an address of 224 Springbrook Trail, Sparta, New Jersey.

10. Plaintiffs, and their respective property rights, will be directly affected by the impacts caused by the Planning Board Application and the Zoning Board's failure to consider the Interpretation Application.

11. Defendant, Township of Sparta Zoning Board of Adjustment, including its members, is a municipal agency constituted by the Township of Sparta, pursuant to the MLUL, with offices located at 65 Main Street, Sparta, New Jersey.

12. Defendant, Township of Sparta Planning Board, including its members, is a municipal agency constituted by the Township of Sparta, pursuant to the MLUL, with offices located at 65 Main Street, Sparta, New Jersey.

13. Defendant, Diamond Chip Realty, LLC, is a New Jersey Limited Liability Company with an address of 33 Demarest Road, Sparta, New Jersey.

**GENERAL ALLEGATIONS**

14. In accordance with Township Code §18-4.29 and Township Ordinance 21-01 (the “Rail Dependent Ordinance”), the Property is currently located in the Township’s Economic Development District (the “ED Zone”), the purpose of which is to allow for the location of office, research and industrial uses in a campus-like setting with good access to Route 15 and the railroad, while being properly buffered from residential uses.

15. Principal permitted uses in the ED Zone, which are “to be conducted wholly within a completely enclosed building or in a court enclosed on all sides by a suitable screening structure, except for on-site parking and loading incidental thereto, and public utility facilities not normally enclosed within a building”, include the following:

- i. Scientific research and development laboratories.
- ii. Office buildings for business, professional, executive and administrative purposes.
- iii. Storage buildings, warehouses and wholesale distribution centers.
- iv. Agricultural uses on a lot of five acres or more.
- v. Processes of manufacture, fabrication, assembly treatment or packaging conversion of products.
- vi. Indoor recreational uses including gymnastics, basketball, soccer, health clubs and other similar uses.
- vii. Transshipment facilities for the transfer of goods between rail and trucks.

16. Conditional Uses permitted in the ED Zone include the following:

- i. Public utilities.
- ii. Kennels.
- iii. Miniature and regular golf courses.
- iv. Golf driving range.
- v. Trucking terminals.
- vi. Soil removal operations.
- vii. Schools and institutions.
- viii. Accessory retail sales.

17. On or about November 2021, the Owner submitted an application to the Planning Board for the construction of a “warehouse park facility” consisting of a “multi modal industrial park” on the Property, which was submitted to the Planning Board as an application for a permitted use.

18. The Township Code defines “warehouse” as “a building used for the temporary storage of goods, materials or merchandise for later or subsequent distribution or delivery elsewhere for purposes of processing or sale.”

19. The Township Code’s definition of “warehouse” does not include the loading and unloading of freight from a rail line and tractor trailers to a warehouse building containing approximately 190 loading docks.

20. The Township Code’s definition of “Rail Dependent Uses and Structures” contemplates uses and structures in the ED Zone that are adjacent to and use the railroad and are adjacent to a rail siding.

21. Rail Dependent Uses and Structures, as defined in the Township Code, are not a principal permitted use in the ED Zone.

22. The Planning Board Application does not exclusively contemplate uses and structures in the ED Zone that are adjacent to and use the railroad and are adjacent to the railroad or a rail siding.

23. The Planning Board Application does not contemplate transshipment facilities for the transfer of goods between rail and trucks.

24. The Township Code defines a “trucking terminal” as “a premises which is used for the temporary parking of motor freight vehicles between trips and for the transfer of freight

between trucks or between trucks and rail facilities for shipment elsewhere and where the storage of freight or cargo is only temporary.”

25. If the Planning Board Application is determined to be one for approval of a trucking terminal, a conditionally permitted use in the ED Zone, the Property fails to comply with at least one of the conditions for said use; namely, that it be located within 500 feet of a State Highway.

26. A multi-modal industrial park is neither a permitted nor conditional use in the ED Zone under the Township Code and is thus a prohibited use.

27. Under the heading “Maximum Building Height”, the Rail Dependent Ordinance states in part that “[n]o structure shall exceed two and one-half (2-1/2) stories or thirty-five (35) feet in height except that rail dependent structures that use the railroad and are located adjacent to the railroad or a rail siding shall have an exception to allow a height up to two and one-half (2-1/2) stories and up to fifty-six (56) feet in height.”

28. Since the Planning Board Application impermissibly contemplates a non-rail dependent building not adjacent to the railroad or a rail siding that exceeds 35 feet in height by greater than 10 feet or 10%, it requires a use variance pursuant to N.J.S.A. 40:55D-70d6 that can only be granted by the Zoning Board.

29. Under the heading “Lot Area Ratio” the Rail Dependent Ordinance states that “[p]rincipal and accessory buildings shall not occupy more than 25% of the lot area. Storage and parking areas shall not occupy more than 25% of the lot area. However, rail dependent uses that use the railroad and are located adjacent to the railroad or rail siding may have a principal and accessory building coverage of up to forty-five (45%) percent and a storage and parking area coverage of up to forty-five (45%) percent of the lot area.”

30. Since the Planning Board Application does not exclusively contemplate rail dependent uses using a railroad and located adjacent to the railroad, it requires variance relief pursuant to N.J.S.A. 40:55D-70c for exceeding building coverage by greater than 25% of the lot area and for exceeding storage and parking area coverage by greater than 25% of the lot area.

31. Under the heading “Impervious Coverage”, the Rail Dependent Ordinance states that “The total impervious coverage of any one lot shall not exceed 40% of the total lot area. However, rail dependent uses that use the railroad and are adjacent to the railroad or rail siding may have a total impervious coverage of up to sixty-five (65%) percent of the total lot area.”

32. Since the Planning Board Application does not exclusively contemplate rail dependent uses using a railroad and located adjacent to the railroad, it requires variance relief pursuant to N.J.S.A. 40:55D-70c for exceeding impervious coverage by greater than 40% of the lot area.

33. The Rail Dependent Ordinance ambiguously permits coverage by buildings, storage and parking areas on a lot in the ED Zone to exceed permissible impervious coverage in the ED Zone.

34. On or about March 2, 2022, an initial hearing on the Planning Board Application was held before the Planning Board, at which time Plaintiffs appeared as members of the public and questioned the Owner and its witnesses.

35. On or about April 6, 2022, Plaintiffs appeared again on the Planning Board Application, this time raising a legal question to the Planning Board regarding its jurisdiction over the Planning Board Application and the Owner’s proposed use of the Property, and whether its proposal was for a warehouse based in part on the expert witness testimony presented by Diamond.

36. At that time, Plaintiffs were advised by the Planning Board that if they had a question regarding an interpretation of the Township Code, an application for an interpretation of the Township Code should be made to the Zoning Board.

37. Thereafter, on or about April 4, 2022, Plaintiffs submitted their Interpretation Application, along with a letter brief to the Zoning Board, requesting a public hearing for an interpretation of the Township Code as to the use contemplated by the Planning Board Application.

38. The Interpretation Application included a request of the Zoning Board to determine whether the use proposed by Diamond - not just the label it attaches to its proposed use - is a permitted, conditional, or prohibited use within the ED Zone.

39. In making that determination, the Zoning Board was to compare the definition of warehouse in the Township Code with Diamond's actual description of its use as an multi-modal industrial park, and determine whether that use fits the definition of warehouse, trucking terminal or neither of those uses.

40. A hearing before the Zoning Board on the Interpretation Application was scheduled for May 11, 2022.

41. At the May 11, 2022 Zoning Board hearing, Plaintiffs were illegally advised by the Zoning Board that they had only five (5) minutes to present their statutorily permitted Interpretation Application to the Zoning Board.

42. At the conclusion of Plaintiffs' restricted presentation of their Interpretation Application, without being permitted to introduce their professional planning witness or sufficient time to present legal argument in support of the Interpretation Application, the Zoning Board failed to undertake its statutory responsibilities and instead summarily determined,



without any analysis of the applicable facts or law relevant to the Interpretation Application, that the Planning Board Application proposes a “warehouse” use, a permitted use in the ED Zone, and that jurisdiction over the Planning Board Application would remain with the Planning Board.

43. At no time did the Zoning Board address the substance of the Plaintiffs’ Interpretation Application or the facts underlying the Planning Board Application.

44. At no time did the Zoning Board allow Plaintiffs to make a comprehensive presentation on the Interpretation Application to the Board; present any witnesses; or allow testimony from the Plaintiffs’ Professional Planner, who was present at the hearing in support of the Interpretation Application.

45. The Zoning Board improperly refused to review the underlying facts of the Interpretation Application to determine whether the use proposed by the Planning Board Application was a warehouse or a trucking terminal or neither of these uses.

46. The Zoning Board improperly refused to allow a record to be made before it concerning the Interpretation Application.

47. On June 8, 2022, a memorializing resolution (the “Resolution”) was adopted by the Zoning Board improperly denying Plaintiffs’ Interpretation Application on jurisdictional grounds (after acknowledging that it had jurisdiction to hear the Interpretation Application) notwithstanding the limited powers of a planning board, which “do not include the resolution of a challenge to the interpretation of an ordinance,” see DePetro v. Tp. Of Wayne Planning Bd., 367 N.J. Super. 161, 169 (App. Div. 2004), stating that “jurisdiction was to remain with the Planning Board and that [the Zoning Board] would not review the underlying factual testimony to interpret whether the proposed use was a warehouse or a trucking terminal.” See copy of the June 8, 2022 Resolution, a true and accurate copy of which is attached hereto as **Exhibit “A”**.

48. The actions of the Zoning Board concerning Plaintiffs' Interpretation Application, and the Zoning Board's determination of same as memorialized in the Resolution, were arbitrary, capricious, unreasonable, null and void, invalid, illegal, and ultra vires.

**COUNT ONE**

**(Declaratory Judgment)**

49. Plaintiffs repeat and re-allege each and every allegation previously set forth in this Complaint as if set forth at length herein.

50. The Declaratory Judgment Act, N.J.S.A. 2A:16-51 et. seq., authorizes courts to declare rights, status and other legal relations so as to afford litigants relief from uncertainty and insecurity.

51. By reason of the foregoing, an actual or justiciable controversy exists between the Parties, and Plaintiffs have exhausted their administrative remedies.

52. By reason of the foregoing, Plaintiffs' rights, status and/or other legal relations are affected by the MLUL, applicable case law, and the Township Code.

53. Plaintiffs request that the Court issue a declaratory judgment pursuant to N.J.S.A. 2A:16-53, affording Plaintiffs relief from uncertainty, declaring that: 1) the use proposed by the Planning Board Application is not permitted in the ED Zone; 2) in the alternative, the use proposed by the Planning Board Application is for a conditionally permitted trucking terminal use that fails to meet at least one of the conditions for such a use; 3) in the alternative, the use proposed by the Planning Board Application requires a variance pursuant to N.J.S.A. 40:55D-70d6; and 4) that jurisdiction for review of the Planning Board Application lies with the Zoning Board, not the Planning Board.

**WHEREFORE**, Plaintiffs demand declaratory judgment relief against Defendants as follows:

- a. Declaring that the use proposed by the Planning Board Application is for a use not permitted in the ED Zone;
- b. In the alternative, declaring that the use proposed by the Planning Board Application is for a conditionally permitted trucking terminal use that fails to meet at least one of the conditions for such a use, requiring a variance under N.J.S.A. 40:55D-70d3;
- c. In the alternative, declaring that the use proposed by the Planning Board Application requires a variance pursuant to N.J.S.A. 40:55D-70d6;
- d. Declaring that jurisdiction for review of the Planning Board Application lies with the Zoning Board, not with the Planning Board.
- e. Declaring that the Planning Board Application shall be transferred from the Planning Board to the Zoning Board;
- f. Precluding development incident to the Planning Board Application until such time as all required relief is obtained from the Zoning Board;
- g. Invalidating the actions of the Zoning Board at its May 11, 2022 meeting denying ZBOA Application #09-22 as ultra vires and without effect;
- h. Invalidating the actions of the Zoning Board at its June 8, 2022 memorialization of the Resolution for ZBOA Application #09-22 as ultra vires and without effect;
- i. Invalidating the Resolution for ZBOA Application #09-22;
- j. Awarding Plaintiffs attorney's fees, costs of suit, and such other and further legal and equitable relief as this Court deems just and proper.

**COUNT TWO**

**(Improper Denial to Hear Plaintiffs' §70(b) Interpretation Application)**

54. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs of this Complaint as if set forth at length herein.

55. The Zoning Board has the power to hear and decide requests for an interpretation of the Township Code.

56. Requests for an interpretation of a municipal zoning ordinance to a board of adjustment may be taken by any interested party, such as Plaintiffs.

57. The Zoning Board improperly declined to hear and decide Plaintiffs' Interpretation Application after stating that it had jurisdiction over same, based on the incorrect and inconsistent legal theory that it did not have jurisdiction to hear same.

58. The Zoning Board's actions were in violation of the MLUL, as said statute unambiguously imposes a binding obligation to provide an interested party with the opportunity to file and pursue an interpretation request and to otherwise exhaust administrative remedies pursuant to N.J.S.A. 40:55D-70(b).

59. An actual controversy existed that warranted action by the Zoning Board, and that the Zoning Board's inaction as to Plaintiffs' Interpretation Application was improper and illegal.

60. The determination of the Zoning Board to decline to consider or take action on the Plaintiffs' Interpretation Application was wholly unsupported by legal precedent, statutory law, the Township Code, and the facts set forth in the record below.

61. The Resolution improperly fails to contain sufficient findings based on the contents of the Interpretation Application.

62. The Resolution improperly relies on an erroneous interpretation of New Jersey case law to support the Zoning Board's determination on the Interpretation Application.

63. The Resolution improperly contains reasons for denial of the Interpretation Application that were not articulated on the record during the underlying hearing before the Zoning Board.

64. The Resolution fails to meet the requirements of N.J.S.A. 40:55D-10g.

65. The Zoning Board's failure to hear or consider Plaintiffs' Interpretation Application, and its determination as set forth in the Resolution, represented a fundamental misapplication of the law, was not logically or legally supportable, and was arbitrary, capricious, unreasonable, illegal, null and void, invalid, ultra vires, and an abuse of discretion.

WHEREFORE, Plaintiffs demand relief against Defendant as follows:

- a. Declaring that the use proposed by the Planning Board Application is for a use not permitted in the ED Zone;
- b. In the alternative, declaring that the use proposed by the Planning Board Application is for a conditionally permitted trucking terminal use that fails to meet at least one of the conditions for such a use, requiring a variance under N.J.S.A. 40:55D-70d3;
- c. In the alternative, declaring that the use proposed by the Planning Board Application requires a variance pursuant to N.J.S.A. 40:55D-70d6;
- d. Declaring that jurisdiction for review of the Planning Board Application lies with the Zoning Board, not with the Planning Board.
- e. Declaring that the Planning Board Application shall be transferred from the Planning Board to the Zoning Board;

- f. Precluding development incident to the Planning Board Application until such time as all required relief is obtained from the Zoning Board;
- g. Invalidating the actions of the Zoning Board at its May 11, 2022 meeting denying ZBOA Application #09-22 as ultra vires and without effect;
- h. Invalidating the actions of the Zoning Board at its June 8, 2022 memorialization of the Resolution for ZBOA Application #09-22 as ultra vires and without effect;
- i. Invalidating the Resolution for ZBOA Application #09-22;
- j. In the alternative, declaring that the Zoning Board has jurisdiction to consider the Interpretation Application under N.J.S.A. 40:55D-70(b), and remanding this matter to the Zoning Board to provide Plaintiffs with the legally required opportunity to present testimony and documentary evidence pursuant to said Interpretation Application; and, for the Zoning Board to hear and decide Plaintiffs' Interpretation Application;
- k. Awarding Plaintiffs attorney's fees, costs of suit, and such other and further legal and equitable relief as this Court deems just and proper.

**COUNT THREE**

**(Civil Action for Deprivation of Rights)**

66. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs of this Complaint as if set forth at length herein.

67. Plaintiffs reasonably expected to have the Zoning Board and its officials and agents, as government officials, exercise its duty to properly act pursuant to the statutory terms set forth in the MLUL and the Township Code to protect Plaintiffs' constitutionally protected property rights.

68. All actions taken by the Zoning Board were done under color of law.

69. The actions of the Zoning Board constitute a final decision by the Zoning Board.

70. The Zoning Board knew or should have known that it had the authority to review the Interpretation Application.

71. The actions of the Zoning Board, and its officials and agents, in intentionally failing to exercise proper discretion when it refused to interpret the Township Code, and in improperly allowing the Owner to proceed with its Planning Board Application without first hearing the Interpretation Application, was not logically or legally supportable, was arbitrary, capricious and unreasonable, was an abuse of discretion, and constitutes a denial of the property rights of the Plaintiffs under color of state law, contrary to the Constitution of the State of New Jersey.

72. Officials and agents of the Zoning Board knew or should have known that Plaintiffs had a statutory right to present their Interpretation Application yet improperly declined to interpret the Township Code based upon the information and records presented and established before it, and intended to be presented before it, in connection with the Interpretation Application.

73. Plaintiffs' Constitutional rights were established rights at the time these rights were violated by Defendant.

74. Plaintiffs' rights were established under the New Jersey Civil Rights Act, N.J.S.A. 10:6-1, et seq. (the "NJCRA").

75. Plaintiffs' rights were established under the MLUL.

76. The actions taken by the Zoning Board caused the deprivation of Plaintiffs' due process rights by denying Plaintiffs their Constitutionally-protected due process right to a full and fair hearing.

77. Plaintiffs' property rights and due process rights were established and well-settled at the time of the deprivation caused by the arbitrary, capricious, and unreasonable actions of the Zoning Board.

78. Officials, officers, agents and employees of the Zoning Board knew or should have known that the Plaintiffs could lawfully proceed with the requested interpretation of the Township Code based upon the information and records that were or could have been established before it and documents submitted with the Plaintiffs' Application.

79. The Resolution's findings were arbitrary, capricious, unreasonable, contrary to law, and unsupported by the record, and the Zoning Board's actions deprived Plaintiffs of their Constitutionally-guaranteed property rights and due process right to a fair hearing.

80. The Zoning Board failed to hear and/or consider in an unbiased and fair manner evidence and legal arguments that were or should have been allowed to be presented at the Zoning Board hearing in support of Plaintiffs' Interpretation Application.

81. The procedures, actions, and decisions of the Zoning Board deprived Plaintiffs of their due process rights and demonstrates egregious government misconduct that shocks the conscience.

82. The procedures, actions, and decisions of the Zoning Board in denying Plaintiffs' request for a hearing pursuant to N.J.S.A. 40:55D-70(b) was arbitrary, capricious, unreasonable, contrary to law, and a manifest abuse of power.



83. The procedures, actions, and decisions of the Zoning Board in approving the Resolution were arbitrary, capricious, unreasonable, contrary to law, and a manifest abuse of power.

84. The procedures, actions, and decisions of the Zoning Board in denying the Interpretation Application for the reasons stated in the Resolution shocks the conscience.

85. Plaintiffs reasonably expected to have the Zoning Board exercise its duty to properly act to protect Plaintiffs' Constitutional due process, equal protection and property rights.

86. The actions of the Zoning Board in denying the Interpretation Application and adopting the Resolution were not logically or legally supportable, were arbitrary, capricious, unreasonable, and unsupported by the record, were an abuse of discretion, and constitutes a denial of the property and liberty rights of the Plaintiffs under color of state law and in violation of the Constitution of New Jersey, the NJCRA, and the MLUL.

87. The actions taken by the Zoning Board caused the deprivation of Plaintiffs' Constitutionally-protected property rights by denying Plaintiffs a lawful interpretation of the Township Code.

88. Having acted without lawful warrant under color of state and laws to deprive Plaintiffs of their Constitutional rights, the Zoning Board is liable to Plaintiffs under the MLUL, NJCRA, and the New Jersey Constitution.

89. Said actions of the Zoning Board rendered the Zoning Board's findings, and the Resolution adopted in furtherance of same, invalid, arbitrary, capricious, unsupported by the record, and contrary to law.

90. Plaintiffs are without alternative relief, administrative or otherwise, and therefore resort to intervention by the Court.

WHEREFORE, Plaintiffs demand judgment against the Zoning Board as follows:

- a. Finding that the Zoning Board's actions resulted in an intentional deprivation of Plaintiffs' property and due process rights;
- b. Invalidating the actions of the Zoning Board at its May 11, 2022 meeting denying ZBOA Application #09-22 as ultra vires and without effect;
- c. Invalidating the actions of the Board at its June 8, 2022 memorialization of the Resolution for ZBOA Application #09-22 as ultra vires and without effect;
- d. Invalidating the Resolution for ZBOA Application #09-22;
- e. Damages pursuant to N.J.S.A. 10:6-1, *et seq.*;
- f. For reasonable attorneys' fees and expert fees pursuant to N.J.S.A. 10:6-2(f);
- g. For attorneys' fees, costs of suit and interest; and
- h. For any and all such other relief as this Court deems equitable and just.

**HEROLD LAW, P.A.**  
Attorneys for Plaintiffs

By: /s/ Robert F. Simon  
Robert F. Simon

Dated: July 27, 2022

**CERTIFICATION PURSUANT TO RULE 4:5-1**

I hereby certify that the matter in controversy is not the subject of any other court proceeding or arbitration. To the best of my knowledge and belief, no other parties need to be joined at this time, and no other proceedings are contemplated at this time.

**HEROLD LAW, P.A.**  
Attorneys for Plaintiffs

By: /s/ Robert F. Simon  
Robert F. Simon

Dated: July 27, 2022

**DESIGNATION OF TRIAL COUNSEL**

Robert F. Simon, Esq. is hereby designated as trial counsel for the within matter.

**HEROLD LAW, P.A.**  
Attorneys for Plaintiffs

By: /s/ Robert F. Simon  
Robert F. Simon

Dated: July 27, 2022

**CERTIFICATION OF TRANSCRIPTS**

Pursuant to R. 4:69-4, I hereby certify that I have ordered the transcripts of all relevant hearings, and that same shall be supplied to the court within the time period required under said Rule.

**HEROLD LAW, P.A.**  
Attorneys for Plaintiffs

By: /s/ Robert F. Simon  
Robert F. Simon

Dated: July 27, 2022

# **EXHIBIT “A”**

**RESOLUTION**  
**Township of Sparta**  
**Zoning Board of Adjustment**  
**In the Matter of Anand Dash and Neill W. Clark**  
**Application Number #9-22**  
**Decided on May 11, 2022**  
**Memorialized on June 8, 2022**  
**Interpretation**

**WHEREAS**, Anand Dash, Esq. and Neill W. Clark, Esq. (hereinafter the "Applicants") have made application to the Sparta Zoning Board of Adjustment for an interpretation pursuant to N.J.S.A. 40:55D-70(b) to determine whether the proposed warehouse met the definition of a warehouse in the Township's Zoning Ordinance for property known as Block 12008, Lot 23, as shown on the Tax Map of the Township of Sparta, owned by Diamond Chip Realty, LLC, located at 33 Demarest Road, in the Economic Development ("ED") Zone District (hereinafter the "Subject Property"); and,

**WHEREAS**, a public hearing was held on May 11, 2022, after the Board determined it had jurisdiction; and,

**WHEREAS**, the Board determined it had adequate and appropriate jurisdiction as required under not only the Municipal Land Use Law but specific directives of the New Jersey Department of Community Affairs Bureau of Local Government Services allowing for virtual meetings to be held with all participants appearing through virtual meetings; and,

**WHEREAS**, the Applicants are attorneys and represented themselves at the public hearing.

**NOW THEREFORE**, the Zoning Board of Adjustment makes the following findings of fact, based on evidence presented at its public hearing, at which a record was made.

The application before the Board is a request for an interpretation pursuant to N.J.S.A. 40:55D-70(b) that the proposed warehouse use in the Diamond Chip Realty, LLC ("DCR") application did not meet the definition of a warehouse, which is permitted in the ED Zone and the Planning Board should retain jurisdiction, and that the proposed use a trucking terminal, which is a conditional use in the ED Zone. If the trucking terminal conditions are not met, DCR would be required to seek a variance from the conditions of the conditional use.

The underlying matter for which the interpretation was sought is an application filed by DCR, Planning Board Application No. 689. The underlying application was filed with the Planning Board for site plan approval, with no variances, for the development of an 880,000 square foot warehouse facility. The matter was heard on March 2, 2022 and April 6, 2022, at which time the Planning Board heard testimony from the Applicant with regard to the proposed use, input from the Board Professionals, as well as entertained questions from objectors, including Applicants Dash and Neill.

On or about April 4, 2022, the Applicants filed an application for interpretation of Section 18-4.29, the Economic Development District, in which warehouses are permitted uses and trucking terminals are conditional uses, as defined in Section 18-2 of the Comprehensive Land Management Code as follows:

**Trucking Terminal** - Shall mean a premises which is used for the temporary parking of motor freight vehicles between trips and for the transfer of freight between trucks or between trucks and rail facilities for shipment elsewhere and where the storage of freight or cargo is only temporary.

**Warehouse** - Shall mean a building used for the temporary storage of goods, materials or merchandise for later or subsequent distribution or delivery elsewhere for purposes of processing or sale.

The Applicants submitted a Letter Brief dated April 4, 2022. Steven P. Gouin, Esq., Giordano, Halleran, & Ciesla, PC, the attorney for the underlying Applicant DCR, submitted a responsive Letter Brief dated May 6, 2022. A subsequent Letter Brief was submitted by the Applicants on May 11, 2022. The Board and its professionals reviewed the application and related submissions, as well as were provided access to the underlying application material, however, transcripts from the Planning Board hearings were not provided.

At the Zoning Board meeting, the Applicants provided a supplemental argument, relying primarily on *DePetro v. Township of Wayne Planning Board*, 842 A.2d 266 (2004) for the premise that the board of adjustment, rather than the planning board, is the proper forum for a request for interpretation of a zoning ordinance with the context of a site plan application. As set forth in N.J.S.A. 40:55D-70, the board of adjustment shall have the power to:

(b) Hear and decide request for interpretation of a zoning map or ordinance or for decisions upon other special questions upon which such board is authorized to pass by any zoning or official map ordinance in accordance with this act;

The Applicants cite the *DePetro* case throughout their Letter Briefs and Zoning Board presentation in an attempt to establish that a planning board does not have the power to make determinations with regard to site plan applications and municipal ordinances. However, the fact pattern for the *DePetro* case involved whether the proposed use as a self-storage facility was a commercial or non-commercial use to determine whether it was permitted or prohibited in the business zone. In *DePetro*, unlike the DCR application, the use, self-storage, was not specifically listed as a permitted use in the zone. The proposed warehouse use, in the subject underlying planning board matter, is permitted in the ED zone. The Applicants' position is that the proposed use meets the definition of trucking terminal, not warehouse. Accordingly, the Applicants are requesting that the Zoning Board substitute its interpretation of the proposed use for that of the Planning Board.

Ultimately, in the *DePetro* case, the Court affirmed the Planning Board's decision that the self-storage use was permitted in the zone, and did not remand the case to the Zoning Board for an interpretation.

The powers of the land use boards are statutorily defined in the Municipal Land Use Law. Jurisdiction to hear site plan applications, when the underlying use is permitted, lies with the Planning Board, pursuant to N.J.S.A. 40:55D-25(a)(2) and applications for use variances lie within the jurisdiction

of Zoning Board, pursuant to N.J.S.A. 40:55D-70(d). The Applicants argued that the Planning Board is not empowered with the ability to determine if the use met the definition in the ordinance, as part of the site plan application. A request for an interpretation from the zoning board, of an application currently pending before the planning board, would take away the ability to make determinations regarding the zoning ordinances from the planning board.

After hearing arguments from both the Applicants and the Attorney for the underlying Applicant, as well as advice from its professionals, the Board made a determination that jurisdiction was to remain with the Planning Board and that it would not review the underlying factual testimony to interpret whether the proposed use was a warehouse or a trucking terminal.

**NOW THEREFORE**, the Zoning Board of Adjustment makes the following conclusions of law, based on the foregoing findings of fact.

The application before the Board is a request for “b” interpretation whether the proposed use before the Planning Board is a warehouse or a trucking terminal, per the definition in the Township’s Ordinance.

The Municipal Land Use Law at N.J.S.A. 40:55D-70(b) provides that the Board of Adjustment has the power to hear and decide requests for interpretations of the zoning map or Ordinance or for decisions upon other special questions upon which the Board is authorized to pass by any zoning or official map Ordinance in accordance with the law. This power is uniquely given to Boards of Adjustment by the Municipal Land Use Law and no other entity has the authority to make these types of determinations. In making its decision, it is the Board’s responsibility to carefully analyze the section of the local ordinance which is being reviewed in comparison to the facts which are presented. The Board is responsible for specifically indicating the basis of its decision and how it applies to the individual set of facts so that in the future, the decision can be applied to other like situations.



In the underlying application, the Applicant submitted a site plan application for a warehouse use. The Planning Board accepted jurisdiction of the matter and began the public hearings. The Planning Board has the power, under N.J.S.A. 40:55D-25 to review a site plan, which is defined in N.J.S.A. 40:55D-7 as follows:

"Site plan" means a development plan of one or more lots on which is shown (1) the existing and proposed conditions of the lot, including but not necessarily limited to topography, vegetation, drainage, flood plains, marshes and waterways, (2) the location of all existing and proposed buildings, drives, parking spaces, walkways, means of ingress and egress, drainage facilities, utility services, landscaping, structures and signs, lighting, screening devices, and (3) any other information that may be reasonably required in order to make an informed determination pursuant to an ordinance requiring review and approval of site plans by the planning board adopted pursuant to article 6 of this act. (N.J.S.A. 40:55D-37 et. Seq.)


While the Applicants argue that the authority to make the initial interpretation lies exclusively with the Board of Adjustment, the Planning Board has accepted jurisdiction of this application and has the reviewing authority to determine "whether the development plan conforms with the zoning ordinance and the applicable provisions of the site plan ordinance." Cox & Koenig, New Jersey Zoning and Land Use Administration, Section 23-10, p. 491 (Gann, 2021). The zoning board is not granted the power to review a decision or substitute its judgment for that of the planning board. N.J.S.A 40:55D-70(b). The Applicants have requested that the Zoning Board review the factual basis for the application that was pending before the Planning Board. However, "Boards of Adjustment and Planning Boards have always had to interpret the meaning of the zoning ordinance in connection with and incident to application for other relief (e.g. subdivision, site plan or zoning variance applications made to a board having jurisdiction)." Cox, 574. The Planning Board is clearly empowered to review site plan applications where the underlying use is permitted. Cox 491.

It is well within the Planning Board's purview to make the determination as to whether a site plan application meets the requirements of the Zoning Ordinance. This concept and procedure are well established, as a matter of law, in the practice of Land Use and Zoning in New Jersey.

**NOW, THEREFORE, BE IT RESOLVED** by the Zoning Board of Adjustment that the application of Neill Clark and Anand Dash for Block 12008, Lot 23, as shown on the Tax Map of the Township of Sparta, located at 33 Demarest Road, in the Economic Development Zone, requesting a "b" interpretation is determined to be as follows:

1. The Zoning Board of Adjustment does not have the legal authority under the Municipal Land Use Law to review a matter pending before the Planning Board.
2. The Zoning Board of Adjustment shall make no factual findings with regard to the request for an interpretation of the Zoning Ordinance pursuant to N.J.S.A. 40:55D-70(b).
3. The underlying application filed by Diamond Chip Realty LLC, Planning Board Application No. 689, shall remain under the jurisdiction of the Planning Board.

The undersigned secretary certifies the within resolution was adopted by this Board on May 11, 2022, and memorialized herein pursuant to N.J.S.A. 40:55D-10(g) on June 8, 2022.

  
George Parker, Chairman

I certify that the above Resolution is a true copy of a Resolution adopted by the Board of Adjustment on June 8, 2022.

  
Diana Katzenstein, Secretary

**Dated:** 6/9/2022

**Prepared by:** Alyse Landano Hubbard, Esq.

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**VOTE FOR MOTION**

Motion Introduced By: Chairman Parker

Motion Seconded By: Vice Chairman Laury

<b>ROLL CALL</b>	<b>YES</b>	<b>NO</b>	<b>ABSTAIN</b>	<b>ABSENT</b>
Dr. George Parker – Chairman	X			
Kenneth P. Laury – Vice Chairman	X			
Michael Jozefczyk	X			
Michael Sylvester	X			
Richard LaRuffa	X			
Michael Leondi	X			
John Finkeldie	X			
LeeAnne Pitzer				
Kelly McClurkin				

**VOTE FOR MEMORIALIZATION**

Motion Introduced By: Vice Chairman Laury

Motion Seconded By: Mr. Jozefczyk

<b>ROLL CALL</b>	<b>YES</b>	<b>NO</b>	<b>ABSTAIN</b>	<b>ABSENT</b>
Dr. George Parker – Chairman	X			
Kenneth P. Laury – Vice Chairman	X			
Michael Jozefczyk	X			
Michael Sylvester	X			
Richard LaRuffa				X
Michael Leondi	X			
John Finkeldie	X			
LeeAnne Pitzer				
Kelly McClurkin				