State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. PUC 00319-22
AGENCY DKT. NO. WO22010004

IN THE MATTER OF THE PETITION OF NEW JERSEY-AMERICAN WATER COMPANY, INC., FOR A DETERMINATION CONCERNING THE FENWICK WATER TANK, PURSUANT TO N.J.S.A. 40:55D-19.

James A. Boyd, Esq., and **Niall O'Brien**, Esq., for petitioner New Jersey-American Water Company, Inc. (Archer & Greiner, P.C., attorneys)

Louis P. Rago, Esq., for respondent Borough of Bernardsville Zoning Board of Adjustment (Law Offices of Louis P. Rago, attorneys)

Meliha Arnautovic and **Brandon Simmons**, Deputy Attorneys General, for Staff of the Board of Public Utilities (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Susan E. McClure, Managing Attorney of Water and Wastewater and Deputy Rate Counsel, **Christine Juarez**, Assistant Deputy Rate Counsel, and **Emily Smithman**, Deputy Rate Counsel, for Division of Rate Counsel (Brian O. Lipman, Director)

Phyllis J. Kessler, Esq., and **David B. Amerikaner**, Esq., for intervenor Paul Savas (Duane Morris, LLP, attorneys)

Richard S. Schkolnick, Esq. (Law Offices of Richard Schkolnick, LLC, attorneys), and **Robert J. Donaher**, Esq., co-counsel (Herold Law, P.A., attorneys), for participant Karen Martin

Record Closed: March 17, 2023 Decided: May 1, 2023

BEFORE **TRICIA M. CALIGUIRE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On December 17, 2021, the Zoning Board of Adjustment (Zoning Board) of the Borough of Bernardsville, Somerset County (Borough), respondent herein, adopted a resolution denying the application of New Jersey-American Water Company, Inc. (NJAW, Company) to replace an existing water tank with a newly constructed, larger water tank (Proposed Water Tank) at 425 Mendham Road, Tax Block 5, Tax Lot 5, in the Borough (Site). NJAW filed a petition on January 4, 2022 (Petition) with the New Jersey Board of Public Utilities (NJBPU) for a determination that the Proposed Water Tank is necessary for the service, convenience, and/or welfare of the public in the Company's service area and requested that the NJBPU issue an order that the zoning, site-plan review, and all other Municipal Land Use Ordinances or Regulations promulgated under the auspices of Title 40 of the New Jersey Statutes and the Land Use Act of the State of New Jersey shall not apply to the Proposed Water Tank, pursuant to N.J.S.A. 40:55D-19.

The matter was transmitted to the Office of Administrative Law (OAL) on January 13, 2022. On February 16 and 23, 2022, Paul Savas (Savas) and Karen Martin (Martin), respectively, filed motions seeking leave to intervene as a party, pursuant to N.J.A.C. 1:1-16.1 et seq. NJAW timely filed its opposition to the motions; on March 22, 2022, I issued an order granting the motion of Savas for leave to intervene, treating the motion of Martin for leave to intervene as a motion for leave to participate pursuant to N.J.A.C. 1:1-16.5, and granting Martin participant status.

On April 8, 2022, a prehearing order was issued incorporating a procedural schedule agreed to by the parties, and the hearing was scheduled for December 12 through 15, 2022, to be conducted via Zoom Video Communications, Inc. (Zoom), an audio-video platform licensed by the OAL for use during the COVID-19 emergency. By agreement of the parties, the portion of the procedural schedule pertaining to discovery was amended several times. On March 22, 2022, an order of confidentiality was entered.

On September 9, 2022, intervenor Savas moved to depose Vincent Monaco, former employee of NJAW, and Laura Cummings, executive director of the Southeast Morris County Municipal Utilities Authority (SMCMUA). On September 19, 2022, NJAW filed a letter brief in opposition to the motion. Savas replied on September 26, 2022, and on September 28, 2022, the motion to conduct depositions was denied.

On December 2, 2022, intervenor filed an informal motion seeking an order barring certain portions of the rebuttal testimony of Rate Counsel witness Howard Woods (Woods), or alternately, seeking an adjournment of the hearing to engage in additional discovery regarding certain statements made by Woods in rebuttal. On December 7, 2022, during a final prehearing telephone conference with the parties, I denied the request for an adjournment and set a schedule for responsive briefs regarding the request to bar portions of Woods' testimony. Petitioner responded to the motion on December 5, 2022, and Rate Counsel responded on December 9, 2022. On December 12, 2022, I issued a verbal order granting intervenor's motion to bar that portion of Woods' rebuttal testimony titled "Source of Supply." On December 14, 2022, this order was issued in writing to enable Rate Counsel to pursue interlocutory review.

On December 9, 2022, petitioner filed a motion to bar the testimony of intervenor and Zoning Board witnesses Kenneth Jones and Daniel Lincoln. Later the same day, intervenor filed a motion to limit and/or exclude testimony from petitioner's witness Donald Shields and Rate Counsel witness Woods. On December 12, 2022, prior to the commencement of the evidentiary hearing, I stated on the record that I would not rule on these motions until after the hearing, with my initial decision. As all witnesses had provided pre-filed testimony which I had already read, there could be little prejudice to

any party in permitting the testimony of all challenged witnesses. Accordingly, all witnesses were permitted to testify, and I agreed to accept responsive briefs on the motions in limine either immediately following the hearing or with the parties' post-hearing briefs. Any evidence, including testimony, deemed irrelevant, impermissible, or inadmissible would be disregarded.

The hearing was held on December 12, 13, and 14, 2022, by Zoom. The record remained open for the receipt of transcripts and submission of post-hearing briefs.

On December 19, 2022, Rate Counsel filed a request with the NJBPU for interlocutory review of the order barring a portion of Woods' rebuttal testimony. On December 22, 2022, intervenor filed an objection to this request which included three and one-half pages of "factual background." On December 23, 2022, petitioner filed an objection with the NJBPU to the "factual background" section of intervenor's letter brief. Additional responses were filed on December 23, 2022. Since, on January 11, 2023, the NJBPU denied Rate Counsel's request for interlocutory review, the matters alleged by the parties in connection with that request will not be considered in this initial decision but will be included in the file as transmitted.

At the close of the hearing, the parties were directed to notify my office upon receipt of all transcripts and that post-hearing submissions would be due from all parties thirty days later. On March 17, 2023, briefs were filed by all parties (except Staff of the NJBPU and respondent) and the record closed.[1]

[1] Respondent Zoning Board filed a letter brief on March 27, 2023, ten days after the deadline, with no explanation for the delay and without a request for an extension. By order dated March 29, 2023, the record was not re-opened, and this late filing was disregarded.

FACTUAL DISCUSSION AND FINDINGS

Background

By way of background, I **FIND** the following undisputed statements as **FACTS**:[2]

1. The Company is a public utility subject to regulation by the Board and obligated to provide safe, adequate, and proper water service to all its customers, N.J.S.A. 48:2-13 and 48:2-23, including the approximately 3,000 customers in the Borough of Bernardsville, Mendham Township, and Mendham Borough, who would be served by the Proposed Water Tank.

2. The Company describes the zone, or pressure gradient, encompassing the Borough of Bernardsville, Mendham Township, and Mendham Borough as the "Mendham Low Gradient" (MLG). The average daily demand of customers served by the Company in the MLG is one million gallons per day.

3. The Fenwick Tank[3] was built by the Bernardsville Water Company, a municipal utility that was eventually purchased by NJAW. The precise date of construction is not known but the Company believes it was built around 1954. In 1971, the Borough first enacted a zoning ordinance with conditional uses permitted, and the Fenwick Tank pre-dates that ordinance.[4]

4. The Site is a land-locked parcel of 17,677 square feet or 0.406 acres. The current development on the Site is the Fenwick Tank, a 250,000-gallon water-storage tank, surrounded by a chain-link fence. The Fenwick Tank is

[2] The undisputed background facts include statements from the Zoning Board resolution of December 17, 2021, which were not disputed in this proceeding. At the close of the evidentiary hearing, the parties were directed to review the resolution, specifically paragraphs 4, 5, and 8, and to submit any objections to the statements contained therein (other than the description of witness testimony in paragraph 8). No objections were made.

[3] Fenwick is the name of the family that sold the Site to the municipal water company.

[4] Although no documentary evidence was introduced on this point, since the Fenwick Tank predated the conditional-use ordinance, the parties agreed that the Zoning Board likely took notice that it was a pre-existing, non-conforming use.

42 feet diameter, roof height of 21 feet, solar-panel height of 29 feet, and an antenna height of 56 feet. When full, the Fenwick Tank has an elevation of 772 feet above sea level. Access to the Site (Tax Lot 5) from the public road is by a twenty-foot-wide gravel right-of-way through Tax Lot 3.

5. On January 6, 2012, NJAW entered a ten-year supply contract with the Morris County Municipal Utilities Authority (MCMUA) to purchase approximately one million gallons of water per day, with an annual minimum supply of 220 million gallons and an annual maximum supply of 237 million gallons.

6. The dispute that led to this matter began on May 11, 2018, when the MCMUA gave NJAW formal notice that it would not renew this supply contract and, by its terms, the contract would expire on January 6, 2022.[5]

7. To address the loss of the MCMUA supply, NJAW proposed to build new pipelines to bring additional water to the MLG from its own southern supplies; to rebuild the Oak Place Booster Station to increase pressure (and to use temporary pumps in the meantime); and to build a new, larger storage tank (the Proposed Water Tank).

8. The Proposed Water Tank is a 750,000-gallon water-storage tank, 64 feet diameter, roof height of 74 feet, railing height of 82 feet, and an antenna height of 83 feet. When full, the Proposed Water Tank would have an elevation of 818 feet above sea level.

9. The Company is also subject to regulation by the New Jersey Department of Environmental Protection (NJDEP), which issued a permit to construct

[5] The MCMUA agreed to provide NJAW 100,000 gallons/day after January 6, 2022. This “de minimus” supply was intended to reach the 50–60 “stranded customers” in the northernmost section of Mendham Township. P-1, Ex. G.

and operate the Proposed Water Tank.[6] The applicable NJDEP regulations provide, in pertinent part:

> Suppliers of water shall provide finished water storage as required pursuant to N.J.A.C. 7:19-6.7 and as follows:
>
> 1. Each public community water system shall provide storage for finished water as an integral part of its distribution system whether the water system has its own source(s) of water or buys water from another public community water system.
>
> 2. The location, size, type and elevation of the equalization reservoir, standpipe, or elevated storage tank shall be such as to ensure that the distribution system meets the pressure requirements established at N.J.A.C. 7:10-11.10(d).[7] A system designed to provide for fire protection shall, in addition, provide gravity storage.
>
> [N.J.A.C. 7:10-11.11(a).]

10. To construct the Proposed Water Tank, NJAW applied to the Zoning Board for variance relief from the following standards:

    a. Conditional Use Standards
    b. Maximum height of 35 feet (82 feet proposed)
    c. Minimum lot size of 534,600 sq. ft. (17,667 sq. ft. proposed)
    d. Maximum impervious coverage of 4,419 sq. ft. (4,645 sq. ft. proposed)
    e. Minimum side-yard setback of 75 feet (20.5 feet and 23.7 feet proposed)
    f. Minimum rear-yard setback of 100 feet (57 feet proposed)
    g. Minimum lot shape of 475 feet diameter (105 feet proposed)
    h. Minimum floor area of 1,500 sq. ft. (1,408 sq. ft. proposed)

[6] This permit, No. WCP200005, was issued January 7, 2021, pursuant to N.J.S.A. 58:12A-1.1 et seq., the New Jersey Safe Drinking Water Act.

[7] The regulation requires that the water system provide a minimum water pressure of twenty pounds per square inch at street level under all flow conditions.

i. Maximum permitted disturbance of slope

j. Failure to abut a public street

11. NJAW also applied to the Zoning Board for approvals related to the construction of the Oak Place Booster Station, which were "ultimately approved." Petition, ¶ 27.

12. The Zoning Board denied the Company's application for conditional approvals related to the construction of the Proposed Water Tank by resolution dated December 17, 2021.

13. By Petition dated January 4, 2022, NJAW seeks waiver from the Zoning Board approvals necessary to construct the Proposed Water Tank.

Positions of the Parties and Disputed Issues

Petitioner puts its request to the NJBPU simply: the Fenwick Tank "is no longer sufficient" and must be replaced to "meet the needs of the [Company's] customers . . . and to fully comply with regulatory standards[.]" Despite evidence that the Proposed Water Tank is needed and that "there is no reasonable alternative location" to locate a new tank of the same size and at the same elevation, the Zoning Board denied petitioner's application to build the Proposed Water Tank. Opening Statement of New Jersey American Water Company, Inc. (December 5, 2022) at 1. The Company has met the requirements of N.J.S.A. 40:55D-19, proving that the Proposed Water Tank is necessary for the service, convenience, and/or welfare of the public and that no alternative site or sites are reasonably available to achieve an equivalent public benefit.

While the Zoning Board failed to submit an opening statement, its position can be determined based on its answer to the petition. The Zoning Board disputes petitioner's claims that the Site is suitable for the Proposed Water Tank and that no alternative site or sites are reasonably available, as NJAW "did not look at, study, or analyze any other site[.]" Response to Petition of Board of Adjustment (February 28, 2022), ¶ 8. The Zoning Board denies that the height of the Proposed Water Tank, 83 feet, is reasonable "in a

purely historical residential zone with a maximum height requirement of thirty-five feet." Id. ¶ 11. NJAW failed to respond to concerns raised by the Zoning Board (in the earlier proceedings). The cases cited by petitioner in support of its application are all dated, and the relevant statutes have since been modified. Finally, the Zoning Board asks the NJBPU to order NJAW to "fully and scientifically explore" alternative site(s) "that may be reasonably available for [an expanded water tank] to achieve an equivalent public benefit." Id. ¶ 39(2).

Rate Counsel supports the petition and concurs with NJAW that the only issue in this matter is whether the Company has met its burden under N.J.S.A. 40:55D-19. Not only has the Company proved that the construction of the Proposed Water Tank is reasonably necessary for the service, convenience, or welfare of the public and that no alternative site is reasonably available to achieve an equivalent public benefit, the Company has shown that "rejection of the proposed tank will risk the Company's ability to provide safe, adequate, and proper service, including fire service," to its customers in the affected service area. Opening Statement of the Division of Rate Counsel (December 1, 2022) at 1.

Intervenor characterizes the decision of the Zoning Board as "a well-reasoned, well-informed denial of NJAW's extraordinary, requested zoning relief[.]" Opening Statement of Intervenor Paul Savas (December 5, 2022) at 1. Intervenor argues that the Proposed Water Tank is not necessary for four reasons:

1. While the Company asserts that the Proposed Water Tank was necessitated by the loss of supply formerly obtained from the MCMUA, the Company has adequate supplies of water from its own sources and could have obtained additional supply from the SMCMUA. Either option makes an enlarged storage tank unnecessary.

2. The Company can meet regulatory requirements as to water storage and gravity storage through its existing system with the Fenwick Tank.

3. The Fenwick Tank already complies with regulatory requirements related to water pressure.

4. The Company could use its Horizon Drive Tank for an emergency fire-flow supply or could have upgraded and/or enlarged the Horizon Drive Tank.

Further, Intervenor argues that the Company failed to adequately consider alternative sites for the Proposed Water Tank, and that no inquiry into alternative sites was conducted prior to the hearing before the Zoning Board. Finally, intervenor claims that any benefits to the public from the Proposed Water Tank are outweighed by the negative impacts "on the zoning plan, zoning ordinances, and surrounding neighborhood in Bernardsville," including a "material adverse effect" on property values. Id. at 6.

Testimony

Along with the Petition, NJAW filed the direct and rebuttal testimony of one witness, with attached exhibits. Rate Counsel likewise filed the direct and rebuttal testimony of one witness, with attached exhibits. Intervenor filed the direct testimony of one witness, with attached exhibits, and in conjunction with the Zoning Board, filed the direct testimony of three witnesses, with attached exhibits. Staff of the NJBPU did not present witnesses. The testimony was expanded upon through cross-examination and re-direct examination during the remote hearing.

a. Motions to Limit or Strike Testimony

As noted in the procedural history above, motions were filed by petitioner and intervenor to limit or strike as inadmissible certain pre-filed testimony. Rulings on these motions were deferred.

Intervenor objects to all opinion testimony of petitioner witness Donald C. Shields (Shields) on the grounds that:

> (1) it is beyond the scope of the Zoning Board proceedings on appeal and introduced in violation of the exhaustion of administrative remedies requirement, and
>
> (2) it constitutes inadmissible net opinion of both technical and legal matters.
>
> [Intervenor's Motion In Limine to Exclude and Admissibility Objections to Certain Pre-Filed Testimony Submitted by Petitioner and Rate Counsel (December 9, 2022)[8] (Motion in Limine) at 2.]

With respect to intervenor's first argument, he summarizes Shields' testimony and notes how it deviates from or is inconsistent with the testimony presented at the Zoning Board hearing. He cites a decision of the Appellate Division that allegedly required a public utility to present a municipal authority with its "entire case for the necessity of the proposed structures or uses." Motion in Limine at 19 (citing N.J. Natural Gas v. Borough of Red Bank, 438 N.J. Super. 164 (2014)). Intervenor mischaracterizes the ruling in the cited case; the Red Bank court required the utility to first make an application to the local board, which it had not done, and then to appeal to either the NJBPU or trial court. 438 N.J. Super. at 184.

Intervenor may be of the mistaken impression that "exhaustion of administrative remedies" is a process other than that which has been conducted at the Zoning Board and the OAL over the past several years and/or that "exhaustion" would require petitioner to present the same evidence,[9] including witness testimony, at the OAL as was heard by the Zoning Board. If there is case law to support the latter theory, he has not presented it. Arguably, NJAW presented better evidence of its analysis of alternatives at the OAL than it had in front of the Zoning Board, but that is no reason to keep such evidence from the NJBPU.

[8] Intervenor objected to the admission of dozens of pre-filed statements of both Shields and Woods. While all statements of all witnesses were carefully considered in light of the rules of evidence and of the OAL, all testimony was admitted and given appropriate weight in this initial decision (notwithstanding the pre-hearing ruling on a portion of Woods' rebuttal testimony).

[9] Even though NJAW did present new evidence at the OAL hearing, the "scope of the proceeding" is the same; before the Zoning Board and the OAL, petitioner seeks a variance from the local zoning regulations for the same project.

Intervenor next claims that because Shields "failed to perform the modeling and formal analysis necessary to substantiate his opinion testimony," that testimony "should be barred in its entirety as net opinion lacking in the requisite empirical and evidentiary support." Motion in Limine at 21. "An expert who fails to perform modeling or some other form of independent analysis on highly technical subject matter . . . should be precluded from offering testimony." Ibid. (citations omitted). Interestingly, intervenor's witness, Giselle Diaz, testified at the hearing regarding her review of modeling conducted by the Company and her inability to conduct her own modeling, yet intervenor presents her testimony as sufficient to prove that petitioner did not meet the standards of N.J.S.A. 40:55D-19.

The "net opinion rule" prevents consideration of an expert's bare opinion that has no support in factual evidence or similar data. To bar Shields' direct, rebuttal, and hearing testimony, I would have to find that his opinion is not based on the factual evidence in the record, and I **FIND** that Shields' opinion was supported by information gleaned from his experience as an NJAW employee, factual evidence in the record, including evidence relied on by intervenor's expert, and the documents he reviewed, attached as exhibits to his direct and rebuttal testimony.

For the above reasons, I **CONCLUDE** that intervenor has not shown a procedural violation by petitioner nor that Shields' testimony was a net opinion and, therefore, I **ORDER** that the motion to strike Shields' testimony is **DENIED**.

Intervenor moves to strike the testimony of Rate Counsel witness Howard Woods on the grounds that Woods gave a net opinion and that he essentially agrees with NJAW's witness (Shields) "in virtually all respects." Motion in Limine at 7–8. Suffice it to say that if a rule preventing the testimony of a witness who agrees with another were to apply, then respondent and intervenor violated it by introducing testimony of several witnesses who gave strikingly similar descriptions of the negative impacts of the Proposed Water Tank on the surrounding neighborhood.

Intervenor claims that because Woods "bases his findings and legal conclusion almost exclusively on the expert testimony of Mr. Shields," that testimony "should be

barred in its entirety as net opinion lacking in the requisite empirical and evidentiary support." Motion in Limine at 21. "An expert who fails to perform modeling or some other form of independent analysis on highly technical subject matter . . . should be precluded from offering testimony." Ibid. (citations omitted). Woods testified credibly as to the materials he reviewed in his independent analysis of the issues as to which he offered testimony. See R-1 at 3–4. As Rate Counsel notes, the absence of modeling does not transform Woods' opinions into a net opinion. Letter Br. of Rate Couns. in Response to Intervenor's Motion in Limine (March 16, 2023) (Br. of Rate Couns. on Motion) at 6.

Finally, intervenor seeks to limit Woods' testimony on the grounds that portions of his testimony constitute a legal opinion. As noted by Rate Counsel, the New Jersey Rules of Evidence provide that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Br. of Rate Couns. on Motion at 7 (quoting N.J.R.E. 704).

For the above reasons, I **CONCLUDE** that Woods' opinion is not a net opinion, it was credibly based on facts in the record, and the similarity of his conclusions to those of Shields is not grounds for excluding his testimony, and I therefore **ORDER** that the motion of intervenor to limit or strike the testimony of Woods is **DENIED** (notwithstanding the earlier order striking a portion of Woods' rebuttal testimony).

Petitioner moved to exclude the testimony of Zoning Board/intervenor witness Kenneth Jones (Jones), a real-estate broker and appraiser, on the grounds that "testimony regarding property valuation . . . is irrelevant, would cause undue delay in the proceeding, and will not add any probative value to the Court's consideration of this merits of this matter under [N.J.S.A. 40:55D-19]." Letter Br. of Pet'r in Support of Motion to Exclude Testimony (December 9, 2022) (Pet'r's Motion in Limine) at 1. Specifically, testimony on the alleged "reduction of the Intervenor's home value . . . would ultimately have no bearing on the need for the [Proposed Water Tank]" and whether reasonable alternative sites are available. Ibid.

In response, intervenor cites cases (and my earlier Order on Intervention) which held that the Board must consider the need for the Proposed Water Tank in light of

"adversely affected local interests, including . . . impacts on property values[.]" Letter Br. in Response to Pet'r's Motion in Limine (March 17, 2023) at 2 (citations omitted). Jones' testimony focused on the anticipated diminution of value of properties adjacent to and near the Proposed Water Tank, issues arguably among those the Board is directed to consider when determining the application of N.J.S.A. 40:55D-19 to a utility project. I **CONCLUDE** that Jones offers relevant testimony and I therefore **ORDER** that the motion of petitioner to limit his testimony is **DENIED**.

Petitioner moved to exclude the testimony of Zoning Board/intervenor witness Daniel Lincoln (Lincoln) because "testimony regarding . . . historical significance is irrelevant, would cause undue delay in the proceeding, and will not add any probative value to the Court's consideration of the merits of this matter under [N.J.S.A. 40:55D-19]." Pet'r's Motion in Limine at 1. Specifically, testimony on the alleged "historic significance" of nearby homes "ultimately does not have any bearing on the need for the [Proposed Water Tank]" and whether reasonable alternative sites are available. Id. at 2.

Intervenor argues that Lincoln's testimony "pertains to the historic character of the neighborhood," which is relevant to the impact of the Proposed Water Tank "on the surrounding community" and whether the Site is "suitable for this particular use." Br. in Response to Pet'r's Motion at 3. Even though the Proposed Water Tank would not directly impact any historical buildings (NJAW does not propose to remove existing structures), I **CONCLUDE** that Lincoln offers relevant testimony and I therefore **ORDER** that the motion of petitioner to limit his testimony is **DENIED**.

b. Summaries of Testimony

Donald C. Shields (Shields) testified on behalf of the Company, for whom he serves as vice president of engineering, supporting NJAW, Virginia-American Water Company, Inc., and Maryland-American Water Company, Inc. He has over twenty-six years of experience in the water- and wastewater-utility engineering field. Shields identified his pre-filed direct and rebuttal testimony; his resume, which summarizes his education and professional experience, and the exhibits attached to his direct testimony.

P-1; P-24; P-2 to P-12. This is the first proceeding under N.J.S.A. 40:55D-19 in which Shields has testified. He did not participate in the hearings before the Zoning Board.

Shields explained that the primary purpose of any water-storage tank is "water storage [at elevation] to meet peak demands, such as fire flows and times of the day when water use is high [and to] provide water pressure, which is vital for adequate firefighting flows." P-1 at 4. For a potable water system, such as involved in this matter, "water storage tanks are reservoirs typically located . . . within the distribution system [which] hold potable water" during non-peak usage periods. The stored water is returned to the distribution system "to meet short term customer demands that may exceed the instantaneous capacity of the . . . distribution system." Id. at 5.

Peak demands result from greater customer usage at various times of the day, such as mornings when families get ready for work and/or school, and prepare meals, and late afternoons and evenings, when families return home, run appliances that use water, and engage in end-of-day activities.

Shields stated that the Company's "primary objective is to produce the water it provides to its customers from surface and ground raw water resources," and only 7 percent of the total supplied to all customers (not just those at issue here) comes "from purchased, finished water." P-1 at 9–10.

Shields stated that on January 6, 2012, NJAW entered into a ten-year supply contract with the MCMUA to purchase approximately one million gallons of water per day, with an annual minimum supply of 220 million gallons and an annual maximum supply of 237 million gallons. (Average daily demand of customers served by the Company is one million gallons per day.) Shields was aware that the MCMUA had a supply contract with the SMCMUA but did not know the sources of the water supplied by either utility (other than that some came from the Clyde Potts Reservoir[10]).

[10] In his pre-filed rebuttal testimony, Shields stated that the Clyde Potts Reservoir was not a reliable source of supply. P-2 at 6.

By letter dated May 11, 2018, the MCMUA notified NJAW that it would not renew the contract because it was "economically undesirable."[11] P-16. According to Shields, the Company would have preferred to maintain its agreement with the MCMUA, and the consequence of the unilateral decision by the MCMUA was that NJAW had to find an alternate source of supply and address the subsequent loss of pressure provided by the continuous flow of water from the MCMUA. Besides the loss of supply for its customers in the MLG, the reduction of pressure put NJAW at risk of non-compliance with certain requirements of the NJDEP for clean water and created a fire-safety issue.

NJAW continued to negotiate with the MCMUA and was able to obtain a commitment for 100,000 gallons/day. To make up the rest of the lost supply, NJAW proposed to build new pipelines to bring additional water to the MLG from its own southern supplies; to rebuild the Oak Place Booster Station to increase pressure (and to use temporary pumps in the meantime); and to build a new, larger storage tank to increase volume and pressure available for customers and firefighting.[12] The main issue driving this decision was the need for a reliable source of supply. Rather than depending on an outside entity which could decline to provide supply, NJAW took action to use its own sources of supply (from the south and east).[13] Such action included adding infrastructure (pipes) to get the supply to the MLG and, at issue here, expanding the storage tank.

To maintain the minimum required water pressure necessary to serve customers and to provide fire protection in the MLG, water must be stored at an elevation of at least 818 feet above sea level. The Fenwick Tank has adequate elevation[14] but is almost seventy years old and is undersized, with a 240,000-gallon capacity.[15] During peak demand periods in the summer, the level of water in the existing tank drops below that required for firefighting (in violation of NJDEP regulations).[16] Shields stated that the new

[11] Shields could not explain what this term means.
[12] The new pipelines and pipe reinforcement were completed before the Zoning Board acted on the variance application.
[13] Shields stated that the SMCMUA also refused to sell water to NJAW.
[14] N.J.A.C. 7:10-11(a)(2) requires gravity storage for fire protection.
[15] A capacity of 250,000 gallons is needed for firefighting and the average daily customer use in the MLG is 1,000,000 gallons/day.
[16] On cross-examination, Shields stated that he has no knowledge of fire incidents that were not adequately addressed by the existing tower.

tank (on the same location) would have a capacity of 750,000 gallons to support the average daily demand in the MLG.

Shields explained that the Company operates a regional water system and water is pumped into and out of the local area throughout the day. While he conceded that water is pumped out of the MLG to other parts of the NJAW system and, therefore, "to some extent," the size of the new tank is driven by the needs of customers outside the MLG, the flow of water out of the area does not mean there is too much water. Ideally, the tank is drained and refilled throughout the day.

The decision to build the Proposed Water Tank on the land where the Fenwick Tank is located was made due to the elevation of the Site, the highest point in Bernardsville. The Proposed Water Tank was designed to meet industry standards and has already been permitted by the NJDEP.

Shields stated that the Company did conduct a search to identify alternate locations for the tank, beginning in 2018, after the MCMUA terminated their contract. In considering alternative locations, NJAW looked for sites that meet the required elevation and would meet regulatory requirements for water pressure and volume capacity. Further, he noted that by building on higher ground, the height of the tank could be reduced. While forty-six properties were identified, none "met any kind of reasonable standard for [NJAW] to build." Tr. of December 12, 2022 (T-1) at 25:20–22; P-22. Some properties were not feasible due to being preserved, located on wetlands, and/or having homes on them, and most were not feasible due to being a non-conforming lot size. P-22. The minimum lot size of parcels is ten acres in the Borough of Bernardsville and five acres in Mendham, making the property very expensive to acquire, and even if a suitable lot were purchased,[17] the Company recognizes they would face the same local opposition they have encountered in this matter.

On cross-examination, Shields identified an email from Frank Marascia, then NJAW production manager for northern operations, to other NJAW officials, dated

[17] Shields has no knowledge regarding the value of the Site and the amount the Company could make by selling it.

February 13, 2018. I-8. Shields had not seen this document, which describes a pump station proposed by the SMCMUA, but was familiar with this proposal. He does not have firsthand knowledge of discussions between NJAW and the SMCMUA regarding this proposal.

Shields identified an email from Laura Cummings, executive director of the SMCMUA, to Marascia and another person not known to Shields, dated May 23, 2018. I-9. Shields had not seen this document nor spoken with Marascia regarding its contents.

Shields identified a memo from Vince Monaco, NJAW director of engineering, to Shields and several other NJAW officials, dated July 2, 2018. I-4. He described it as an "alternative analysis and supply replacement recommendation." T-1 at 115:22–23. This memo was written in response to the MCMUA decision to terminate its supply contract with NJAW, and the memo was described by Shields as:

> [It] was a we just lost supply, we've got to take action because it's going to expire in 2022, what are our alternatives and options to replace that source in a very short period of time in the world of engineering and permitting and design and construction.
>
> [T-1 at 156:20–157:1.]

Option 2 in the memo was a new supply contract with the SMCMUA on the same or similar terms as the agreement with the MCMUA. I-4 at 1. This option was deemed "feasible." Id. at 6. Option 2A, the same as Option 2 with a new Clyde Potts booster station in a new location, was deemed "somewhat feasible." Id. at 1, 6. To the best of Shields' knowledge, the Company did not pursue Option 2 or 2A, be that by further study or negotiations with the municipal utilities.

Howard Woods (Woods) was called to testify by Rate Counsel. He identified his pre-filed direct testimony, which included his resume (R-1), and his rebuttal testimony (R-2). Both were admitted into evidence without objection at the hearing, notwithstanding the December 9, 2022, motion of intervenor to exclude Woods' testimony in its entirety.

In his direct testimony, confirmed at the hearing, Woods stated that based on the petition, discovery responses, and direct testimony of other witnesses,[18] it is his opinion that the Proposed Water Tank is reasonably necessary for the service, convenience, and welfare of the public as it will provide reliable supply and meet the regulatory requirements for minimum pressure, storage capacity, and fire service. The existing tank, the Fenwick Tank, is too small to comply with current regulatory requirements for gravity-distribution storage in the related service area. Further, it is too low in elevation to maintain minimum service pressures for routine water service and for public fire protection.

Woods did not inspect the Site or surrounding properties; did not review models of the system, the MLG, and/or impacts of the Proposed Water Tank on the infrastructure upgrades already installed; and did not review how much water is sent to the MLG from other sources and how much water stays in the MLG.[19]

Woods is of the opinion that no alternative site or sites are reasonably available to achieve a public benefit equivalent to that of the Proposed Water Tank.[20] He reviewed the forty-six parcels identified by the Company as at sufficient elevation and explained why these are all undesirable (but did not visit any of the sites). See P-22. Some sites were "Green Acres,"[21] others are in residential areas and already have homes on them. Besides being in areas unsuitable for the Proposed Water Tank, the Company would have to spend a considerable amount of money to purchase the land, though Woods also stated that he is not qualified to testify regarding land valuation.[22] Such land-acquisition costs would be "investment in utility plant" that would be covered by the entire Company rate base in the form of higher rates. The required investment would include additional water-transmission mains and associated construction costs, an investment not needed by the Proposed Water Tank. Despite the significant additional costs of using an alternative site, none of the alternative sites result in additional benefits.

[18] During cross-examination, Woods confirmed that his direct testimony did not rely on personal materials prepared for the SMCMUA in connection with consulting work.
[19] Woods stated that any water pumped out of the MLG is used.
[20] Woods read the transcript of the hearing conducted by the Zoning Board and agreed that a discussion of alternative locations did not take place during that hearing.
[21] Frequent references were made to land preserved through the NJ Green Acres Program, N.J.A.C. 7:36-1, et seq.
[22] The assessed values of each of the forty-six alternative locations were included in the list Woods reviewed. (P-22.)

Woods has visited the residential neighborhood where the Site is located but not the actual Site. He agrees that it is an affluent area but noted that he did not consider the impacts to the immediate area and/or the value of the properties in the area. As an expert for Rate Counsel, Woods' job was to consider value and reliability of service, not impacts to the surrounding community.

Woods identified the Monaco memo of July 2, 2018, stating that he saw it when reviewing discovery responses but was already familiar with it, as it was provided to him by the SMCMUA before this litigation began. I-4. He stated that Option 2 was a new water-supply agreement with the SMCMUA. Based on documents produced by NJAW in this matter, specifically documents produced by Marascia, which included a memo reviewing the capabilities of the Clyde Potts water treatment plant, Woods knew that NJAW did not consider Option 2 feasible.

Woods stated that Option 2A, a new water-supply agreement with the SMCMUA and relocation of the Clyde Potts booster station downstream, was problematic for several reasons. Extensive modifications to the Clyde Potts treatment plant would have been needed to comply with NJDEP surface-water-treatment regulations. The existing booster station has only one source of supply, the Clyde Potts Reservoir, and if the station came offline for repair, there would be no supply for NJAW. Moving the station would create access to several sources of supply. Finally, reliability issues are caused by the existing booster station having only one pump and no standby power. While the Company deemed Option 2A "somewhat feasible" in May 2018, Woods stated that he believed this characterization changed to "not feasible."

In his analysis of whether the Proposed Water Tank is reasonably necessary for the service, convenience, and welfare of the public, Woods did not consider Options 2 or 2A because the Company selected Option 4, the least-cost alternative.

Giselle Diaz (Diaz), of Boswell Engineering, testified on behalf of the intervenor. Diaz identified her pre-filed testimony, I-1, and her resume, I-28. As a licensed professional engineer, she has twenty-five years of experience in the fields of water and

wastewater, including asset management for utilities and planning water systems. Diaz was retained by the Zoning Board to assist its engineer in reviewing the NJAW application for a zone variance. To do that, she reviewed all application documents, attended all (virtual) meetings, and went to the NJAW offices to review their models.[23]

To prepare her direct testimony in this matter, Diaz reviewed all the discovery materials produced in this matter and the pre-filed testimony of Shields. Since then, she has also reviewed all the rebuttal testimony and answers to interrogatories from other witnesses and collaborated with counsel. Diaz also performed her "own review of the facts and circumstances surrounding the [Proposed Water Tank] in light of the documents [and testimony produced by all parties in discovery]." (I-1 at 6:81–82.)

Generally, Diaz concluded that the Proposed Water Tank is not reasonably necessary as NJAW has already replaced the water supply formerly purchased from the MCMUA and has upgraded its infrastructure sufficient to meet regulatory requirements for supply, storage, and fire flows. Overall, Diaz is of the opinion that the costs of the Proposed Water Tank significantly outweigh the benefits. She stated that, based on the documents and testimony presented in this case, she cannot be certain that the Proposed Water Tank "is the only alternate and it is necessary to achieve" safe, adequate, and proper service to customers in the MLG. Tr. of December 13, 2022 (T-2) at 32:8–14.

Diaz stated that her understanding is that NJAW justified the Proposed Water Tank on (1) the loss of the MCMUA supply; (2) the need for additional storage capacity, regardless of the source of the water, to serve the MLG; (3) inadequate pressure to serve the MLG; and (4) risk of inadequate fire flows in the MLG.

With respect to each of the above-stated reasons, Diaz first stated that based on her review of emails provided in discovery, by June 2018, NJAW decided against entering into a new contract with the MCMUA because of operational issues and decided to use its own water supplies. She cited the Monaco email of November 27, 2018, in which

[23] In reviewing the NJAW models, Diaz only saw outputs, but verified the information presented by the Company before the Zoning Board. She was not asked to comment on whether NJAW's models are "sound."

Monaco stated that it was "most cost-effective" to replace the lost MCMUA supply with its own sources. Ex. I-1 at 8:128–30. Diaz is critical of NJAW's decision to use its own supply rather than to (1) negotiate (both in 2018 and presently) with the SMCMUA for the direct purchase of water from the Clyde Potts Reservoir;[24] and/or (2) to resolve the technical issues that led to the MCMUA decision to terminate its contract with NJAW.

Second, Diaz stated that she reviewed the Company's NJDEP construction permit, and it provides for a minimum-storage requirement that the Company can meet using the Fenwick Tank, proof that the Proposed Water Tank is not necessary as long as the Company provides alternate sources to serve the higher elevation areas in Mendham Township. I-2 at 12.

Third, with respect to water-pressure requirements, specifically, N.J.A.C. 7:10-11.11(a)(2), Diaz stated that the Company is already in compliance using only the Fenwick Tank and there is no evidence that changing the source of supply, and/or using the Company's own supplies, will adversely impact the pressure supplied to customers in the MLG.

Fourth, Diaz stated that the Horizon Drive Tank, located in the Mendham High Gradient (MHG), has more than enough capacity and therefore can share capacity with the MLG under fire-flow conditions. Diaz has seen no model results or engineering reports to support the Company's contention that the Proposed Water Tank is necessary to ensure adequate pressure for fire events. See I-29.

At the hearing, however, Diaz stated that due to the absence of modeling and/or meter records, she could not confirm (or even effectively dispute) NJAW claims regarding low water pressure in the MLG due to the loss of the MCMUA supply, insufficient supply for fire events, average daily demand in the MLG, peak demand in the MLG, the impact of recent upgrades on the Company system, and/or that a larger tank is necessary and the alternatives to the Proposed Water Tank are insufficient.

[24] Diaz stated that she saw no evidence that the SMCMUA could only supply 600,00 gallons per day and saw documents stating otherwise. I-1 at 10.

Before Diaz went to the NJAW offices to review models, she sent an email to the Company and asked to see specific models, all of which were provided. She did not ask for additional information at any time, not while working for the Zoning Board nor during this proceeding.[25] Though she helped counsel draft interrogatories posed to NJAW, she said that because Shields did not answer all those interrogatories, she could not adequately evaluate his responses, especially regarding the Horizon Tank. Based on NJAW planning documents, Diaz stated that use of the Horizon Tank was an alternative to the Proposed Water Tank, as the Horizon Tank could be used for storage and for fire flow during emergencies. There was testimony that the Horizon Tank was not a viable option, but Diaz never saw modeling to prove that assertion.

Though Diaz conceded that the Proposed Water Tank would provide more storage capacity and greater water pressure, she could not opine on whether it would make the system more reliable, as she never saw a model of the system.

Diaz stated that it is her opinion that the Company failed to substantiate that the Proposed Water Tank is reasonably necessary,[26] meaning that the Company failed to show that no other alternatives can provide the pressure needed in the MLG. Later, she clarified that to her, "reasonably necessary" means "that there's no other alternative [to the Proposed Water Tank and] I do not have . . . enough information to say that this is the only option." T-2 at 49:13–18. She contrasted the need for the tank with the impacts on the Borough, including those impacts discussed at the Zoning Board hearing.

Diaz agreed that the costs of alternatives would include property acquisition, construction, new water lines, and easements. She could not opine on whether the use by NJAW of its own water supplies reduces the need for a storage tank, due to lack of modeling.

[25] Diaz stated that she could not have asked for more information on her own, as she was hired by the Zoning Board.

[26] Though Diaz gave her opinion regarding the reasonable necessity of the Proposed Water Tank, she later conceded that the applicable statute, N.J.S.A. 40:55D-19, does not use the word "reasonably" to qualify the word "necessary." T-2 at 82:3–14.

Kenneth Jones (Jones) testified for the Zoning Board. He is an NJ-licensed real-estate broker, NJ-certified general real-estate appraiser, educator, photographer, and drone pilot. Jones identified his pre-filed testimony, I-22. He was retained in this proceeding to appraise the Savas and Martin properties and estimate the diminution in value, if any, due to the construction of the Proposed Water Tank. He prepared three reports: "Detrimental Influences on Owner-Occupied Residential Real Estate Values," I-25, and appraisal reports of the fee simple real property rights for each of the Savas and Martin properties, I-23 and I-24.[27]

Jones stated that in real estate, location is the single "most influential component that drives value." T-2 at 94:18–20. The issue he considered in drafting the former report is showing market evidence of negative impacts to value. To better illustrate the impact of negative influences — such as having a large water tank nearby — on property values, Jones analogized to homes in New Jersey shore communities. Those without an ocean view are worth approximately 40–50 percent less than homes along the ocean, meaning that the negative influence of losing the ocean view is 40–50 percent.

The two properties considered here are in the "luxury market," where people who buy and sell are more sensitive to exterior influences. Buyers "are much more selective, primarily because they can afford to be[.]" T-2 at 97:14–15. "One of the issues that is critical to luxury properties is the perception of seclusion, quality, something unique about the property that other people don't have." T-2 at 97:24–98:1.

The Savas home, approximately 16,000 sq. ft., and closest to the Proposed Water Tank, was built in the early 1900's. The view of the Proposed Water Tank from this "incredible home" will greatly diminish its uniqueness, with an estimated negative influence of 50 percent of the value of the home.[28] The Martin home, built in the late 1890's, will also lose its unobstructed view and suffer an estimated negative influence of

[27] Jones concludes that the appraised value of the Savas home, at 440 Mendham Road, as of January 4, 2022, is $7,150,000. I-23 at 0039. Jones concludes that the appraised value of the Martin home, at 421 Mendham Road, as of January 4, 2022, is $4,300,000. I-24 at 0107.

[28] There is also a small house on the Savas property (which is currently occupied) close to the existing tank. Jones did not include this house in his appraisal but noted that the value of that small house would be very diminished by the Proposed Water Tank.

40 percent of the value of the home. In doing his analysis, Jones could not find studies of the value reduction to residential homes from construction of a new or expanded water tower because "as far as I could find, [water towers] don't exist in places where luxury real estate exists." T-2 at 102:6–14.

While Jones visited both properties, he could not tell whether the Proposed Water Tank would be visible from the homes. Since there are trees between the existing tank and the homes, he expects that the tank would be visible during the fall through the spring. He further clarified that his analysis was not just based on the view from the homes, but the view from the street. The reputation of these properties would be affected by "being next to an eyesore." Such a use is incongruent with the entire area.

Daniel Lincoln (Lincoln) testified for the Zoning Board. He identified his pre-filed testimony, ZB-1. Lincoln is a licensed architect, and a founding and current member of the Bernardsville Historic Preservation Advisory Commission (HPAC), for which he served as chairman for approximately twenty years. In this role he advised the Borough Planning Board and Zoning Board on historic content of existing buildings, developed walking tours of historic landmarks, and conducts historic-preservation educational programs. Lincoln was chairman of the HPAC when NJAW appeared before the Zoning Board. He identified the memorandum he prepared for the Zoning Board regarding the HPAC's review of the application. ZB-2. In this memo, Lincoln explained why the Savas and Martin homes are historically significant and described concerns about the adverse effect of the Proposed Water Tank.

To determine the historic value of a building or property, Lincoln reviews old maps of the property and books with information regarding the former use of such property to determine if a building is in fact "historic."[29] Generally, "historic" refers to buildings more than 100 years old. Some properties may have been nominated for the New Jersey Register of Historic Places.[30] Some may have hosted historic incidents.

[29] The HPAC memo describes the review of maps and books with respect to the Site and an adjacent property, both of which are described as among "the most significant historic properties in Bernardsville with late 19th Century and early 20th Century and owner importance." ZB-2 at 1.

[30] Lincoln stated that the Historic Sites Council of the New Jersey Historical Preservation Office would have jurisdiction to review and approve the Proposed Water Tank if any "public funds" were to be involved in its

Lincoln is familiar with the Site. He stated that the existing tank is "almost invisible" because it is not tall. From the street, the view of the tank is obscured by the small house (which on its own, is eligible for historic listing). This small house could currently be sold on its own, but if the Proposed Water Tank is built, this house will become "un-sale-able," in Lincoln's opinion.

Lincoln described the potential impact of the Proposed Water Tank on the neighborhood as follows:

> [Mendham Road] is really one of the most beautiful roads in . . . the Somerset Hills. [It's] just a pleasure to drive on.
>
> . . . .
>
> . . . [I]t just kind of all bleeds together in terms of the landscaping and the architecture and the stone walls and [it's] a really beautiful place. Having a structure this tall . . . would be just really a shock. It's so out of place with the nature of that neighborhood, that I would be speechless. . . . [A]nybody driving by, seeing that tower there, which would be highly visible, it's [sic] just would be so out of place. And they would just wonder why . . . this happened. It just doesn't belong there.
>
> [T-2 at 132:3–25.]

In his memo to the Zoning Board, Lincoln made similar statements:

> If the Master Plan intent is to protect our historic resources and the unique character of Bernardsville, then some significant effort should be undertaken by the Applicant to modify the height, and shape of this enormous tower. Inherently beneficial reasoning is all well and good, but the Applicant should also understand that they have a responsibility to the historic character of the area and their neighbors. And they should also remember that the tower will [sic] VERY visible and possibly a constant annoyance, not only to the neighbors, but also every person who drives by.

construction. Not only is this issue outside the scope of this proceeding, but it is also unclear whether the term "public funds" includes utility rates approved by a public agency, and this line of questioning was stopped. In his pre-filed rebuttal testimony, Shields counters that such review is not necessary. P-2 at 16.

> Those feelings may not be in the best interest of their company. The Applicant should perhaps seriously consider selling or trading this property for one that will not be so very visible.
>
> [ZB-2 at 2.]

David Greenebaum (Greenebaum) testified on behalf of the Zoning Board. He has been a resident of Bernardsville for twenty-three years and has served on the Zoning Board for seventeen years, the last nine as chairman. Greenebaum chaired and attended all meetings regarding the application of NJAW for a conditional-use variance, dimensional variances, and preliminary and final site-plan approval. He identified his pre-filed testimony, ZB-3, and the resolution that memorializes the Zoning Board decision on the NJAW application. ZB-4.

The Zoning Board made a unanimous decision to deny the Company's application. While the resolution sets forth several specific reasons to deny the application, at the OAL hearing Greenebaum stated that the principal issue was whether the proposed use, the Proposed Water Tank, was congruous with the area. Greenebaum stated that any new construction should not impact neighboring properties. In this case, so many aspects of the proposed use did not fit. There is no facility of equal height anywhere in Bernardsville and the trees do not grow that high. The Proposed Water Tank would be "the most visible thing in town." Tr. of December 14, 2022 (T-3) at 12:12–13. Further, construction would be disruptive and would take two years due to the difficulty of reaching this small site. The carriage-house driveway is the access easement from Mendham Road to the Site and the long construction period could make that house unusable during that time.

Greenebaum stated that the Zoning Board attempted to discuss whether new contracts with the MCMUA and/or the SMCMUA were possible, but it "seemed like there was information not being disclosed." T-3 at 13:21–22. The Zoning Board was only told that the utilities had no water to provide to NJAW, that the original supply contract was terminated without reason. It is not unusual for the Zoning Board to ask questions about business issues when an applicant asks "for something that is dramatically different than what the zone permits[.]" T-3 at 26:8–14. NJAW applied for a substantial variance from approved use, the Zoning Board wanted to mitigate the impact and had the sense that

renegotiation with the MCMUA would avoid the need for the variance. See T-3 at 30:23–31:6. All members of the Zoning Board were frustrated by incomplete answers from NJAW.[31]

Greenebaum is familiar with the Site and with Mendham Road. He described the road as "bucolic," with large properties and stately homes. The property that completely surrounds the Site is "very prestigious" and was well taken care of by its owners. T-3 at 15:1–10.

While the Zoning Board was very concerned regarding the impact of the Proposed Water Tank on the neighborhood, they treated this application like all others and were very careful. Significantly, Greenebaum stated that NJAW told the Zoning Board that **no** other sites were considered. Greenebaum referenced the record developed by the Zoning Board to support his statement. T-3 at 28:16–23, 29:10–12.

c. Credibility Analysis, Discussion, and Additional Findings

Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. The Supreme Court of New Jersey described the analysis of credibility as follows:

> Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.
>
> [In re Estate of Perrone, 5 N.J. 514, 522 (1950); see also Spagnuolo v. Bonnet, 16 N.J. 546 (1954); State v. Taylor, 38 N.J. Super. 6 (App. Div. 1955).]

In order to assess credibility, the witness' interest in the outcome, motive, or bias should be considered. A fact finder "is free to weigh the evidence and to reject the

[31] In his pre-filed testimony, Greenebaum stated that "there was much testimony" regarding NJAW's negotiations with the MCMUA, but "the [Zoning] Board remained totally unclear as to what role financial negotiations played in the termination of [the MCMUA supply] agreement, and whether or not a revised monetary agreement would have avoided the need" for the Proposed Water Tank. ZB-3 at 4.

testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Perrone, 5 N.J. at 521–22; Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958) (trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony).

Accordingly, assessing credibility does not mean determining who is telling the truth, but rather requires a determination of whose testimony is "worthy of belief" based upon numerous factors, including the witness' demeanor, his or her ability to recall specific details, and the consistency of testimony under direct and cross-examination, "the significance of any inconsistent statements or evidence, and otherwise gathering a sense of the witness's candor." AT&T Commc'ns of N.J., Inc., et al. v. Verizon N.J., Inc., 2004 N.J. AGEN LEXIS 764, *63 (July 2, 2004).

All the witnesses were professional in demeanor and were reasonable and candid. They responded to questions based on their recollections and, to some extent, by reference to exhibits. Given that all had submitted pre-filed testimony, there were very few questions that they could not answer, with two exceptions noted below. Shields, Woods, and Diaz appeared more objective than the witnesses for the Zoning Board, but their interests in whether the Proposed Water Tank is built in Bernardsville are professional, not personal. Jones, Lincoln, and Greenebaum did not even try to hide their disdain for the Proposed Water Tank.

Shields was the only witness to testify for petitioner and he had limited information regarding the consideration by NJAW of, and the negotiations with the SMCMUA for, a contract with the SMCMUA to replace water formerly supplied by the MCMUA. It initially seemed curious that Monaco, the author of the July 2018 memo analyzing alternatives in the wake of the MCMUA decision to terminate its contract with NJAW, was not called to testify. In front of the Zoning Board, NJAW employee Dana Wright described alternative methods considered by the Company (that did not include the Proposed Water Tank) and which do not seem to be included in the Monaco memo. P-8 (Tr., Borough of Bernardsville

Board of Adjustment Meeting (April 5, 2021)); cf. I-4. Wright also was not called to testify. Yet, Shields was credible as he explained that the Company was pressed to explore alternatives and adopt a solution quickly, as less than four years is not much time to design, permit, and construct new facilities. Shields was knowledgeable regarding the main obstacles to pursuing a contract with the SMCMUA and to using the Horizon Tank to aid in firefighting (as was urged by intervenor). He also was knowledgeable regarding the decision not to pursue using any of the forty-six other locations to site a new water tank.

Despite statements of several witnesses regarding costs and benefits, there was scant evidence presented as to the actual estimated costs of the various methods considered by petitioner, including those presumably lower-cost alternatives described by Wright before the Zoning Board and the options described in the Monaco memo. Only Rate Counsel witness Woods, appropriately enough, stated that NJAW had selected the least cost feasible alternative (the "do nothing" option being low cost but not feasible), and there was no evidence presented to counter that conclusion. Shields did state that there were "significant costs" associated with the alternative methods urged by Diaz, particularly upgrading or replacing the Horizon Tank, but no party offered an estimate of such costs or a comparison of those costs (and associated system modifications) to the cost of the Proposed Water Tank.

There was credible testimony and documentary evidence regarding the high costs of using an alternative location for the Proposed Water Tank, which would include property acquisition costs (approximately the appraised value), and distribution system improvements and additions. See P-22.

Diaz was competent, professional, and extremely careful in her answers, often not responding with a "yes" or "no" but explaining instead how she could not answer because of the absence of specific records or modeling. In her pre-filed testimony, Diaz stated that NJAW "failed to substantiate its assertion that the [Proposed Water Tank] is reasonably necessary," and that, even accounting for some benefits, those benefits are significantly outweighed by the costs of construction and the impacts to the Borough of Bernardsville. At the hearing, Diaz stood by this statement but was much less emphatic overall, saying

many times that she was unable to state that the Proposed Water Tank was necessary due to an absence of modeling. By defining "reasonable necessity" to mean that there are no alternatives and the chosen alternative is the only option, Diaz weakened her testimony. (Logically, if the chosen alternative is the only option, it is necessary.)

Boswell Engineering, Diaz's firm, submitted a letter to the Zoning Board on July 27, 2021, after her initial review of petitioner's models, stating in pertinent part:

1. Without the MCMUA interconnection, the model confirmed the existing system does not have the required pressure during morning hours during peak months;

2. Under peak conditions, with the Proposed Water Tank and Oak Place Booster Station, no MCMUA interconnection and the tower mountain pumping station off, there is sufficient pressure throughout the system; and

3. With the Fenwick Tank and Oak Place Booster Station, the tank can be filled but is emptied quickly and there is not sufficient duration for a fire flow event.

[P-2, Ex. A.]

When asked to explain her previous statements, Diaz stated that in the course of the present proceedings (at the OAL), she had access to discovery materials that she did not have previously, changing her conclusions about the NJAW model:

> I just don't know if when the scenarios were run – we call them scenarios when there's difference alternatives [put] into the model. If those included infrastructure improvements that I saw during reading all the discovery, including . . . reinforcement of the system, and all – I'm not sure if that was included in the model.
>
> [T-2 at 18:6-13.]

At no time during the Zoning Board process or the current proceedings did Diaz ask the petitioner for additional information on the models she previously reviewed or for

new modeling with different inputs. She requested but did not receive "engineer reports or model output" that NJAW may have done that would support Shields' testimony regarding the use of the Horizon Tank. T-2 at 54: 7-9.

Intervenor makes much of the failure of petitioner to enter into a new supply agreement with the SMCMUA, even though such an agreement was an option considered by the Company early on. Shields testified that the SMCMUA did not have adequate infrastructure and treatment facilities and, significantly, could only provide a portion of the needed supply. See P-1 at 20; P-2 at 15. On cross-examination, intervenor asked Shields for information regarding negotiations with the SMCMUA and asked Shields to identify documents that support that such negotiations did take place. Shields stated that the issues described in the May 11, 2018, letter from MCMUA executive director Larry Gindoff to NJAW "were part of the discussions and negotiations that led [NJAW] to not [pursue] any additional discussions with [the SMCMUA]." P-16; T-1 at 98:16–20.

Ignoring Shields' testimony, intervenor complains that "NJAW did not present any witness to testify concerning negotiations . . . with SMCMUA," including any representative of the SMCMUA. Intervenor and Participant Joint Post-Hearing Facts and Conclusions of Law (March 17, 2023), ¶¶ 55, 56. Here, it is necessary to note that intervenor's motion to depose SMCMUA executive director Laura Cummings (Cummings) was denied by order which included the following:

> Even if Cummings' response to [intervenor's then-outstanding] subpoena [for documents related to negotiations between NJAW and SMCMUA for the sale or potential sale of water] does not include the information Savas would seek in a deposition, no reason has yet been given to expect that she would not appear at the hearing if subpoenaed to testify.
>
> [Letter Order (September 28, 2022) at 2–3.]

While intervenor obtained documents from the municipal authorities related to their respective negotiations with NJAW, intervenor did not issue a subpoena to appear at the hearing to Cummings nor to any official from the MCMUA. See Letter Br. of Pet'r at 16. Nor did he issue subpoenas to the NJAW employees named in the various documents

used to cross-examine Shields and Woods. Intervenor relies instead on the absence of documentary proof that the Company continued to pursue a contract with the SMCMUA and/or continued to conduct and share modeling of potential changes to both systems to facilitate such a contract to prove that the Company failed to analyze this alternative in good faith.

Jones was extremely self-assured and knowledgeable regarding the luxury-real-estate market. He contends that "[v]iew quality is arguably the most significant external influence on the value of owner-occupied real estate, especially in the luxury home sector." (I-22 at 8:132–33.) The view to which Jones refers is that available to the owners of the home and the view of the property to passersby (typically in cars) and visitors. In his reports, Jones used three case studies of the negative value of "detrimental conditions" on the value of owner-occupied residential real estate. I-23 at 0051. In the first, homes directly facing State Highway Route 9 South and the Garden State Parkway, without sound walls and with partial and seasonal view obstruction, were worth 15.87 percent less than comparable homes not adjacent to the busy roads. I-23 at 0051–53. In the second, homes directly opposite single-story warehouse buildings with loading docks and unrestricted truck traffic were worth 13.60 percent less than comparable homes not located across from warehouses.

Jones stated that the third case study was most significant. He used the higher average values of New Jersey shore properties with ocean views as compared to homes without such views to opine on the projected loss of value to homes along Mendham Road if the Proposed Water Tank is built. His argument was not persuasive for several reasons. First, a home on the ocean may well be worth 50 percent more than a home across the street from the ocean (or with no view of the ocean), but more than just the view is lost at the latter location. Homes right on the ocean may have direct beach access, may have more privacy, and are less likely to have traffic on the ocean-side. Second, Jones compares the view of the homes on Mendham Road from the street, not from within the home, to the view of the ocean from homes with no obstructions between the home and the ocean. Jones stated that the view from the street would be tarnished by the Proposed Water Tank. He did not compare the existing view from inside the homes toward Lot 5, where the Fenwick Tank is located, to the view from the homes should the

Proposed Water Tank be built. (He admitted to never entering the relevant homes.) Third, he states that this study "supports the commonly held opinion among residential real estate professionals that certain types of detrimental influences" matter more in the luxury-home market. Id. at 0058. Jones' data, limited though it may be, shows that homes with ocean views may be worth more than 50 percent more than homes without such views, and homes facing industrial buildings near heavy truck traffic and/or homes along a busy highway may garner 13–15 percent less than comparable homes located away from industrial buildings and/or the highway. It is not persuasive evidence that in a residential neighborhood that already has a water tank, the reduction in value of the closest home by the expansion of the tank (notwithstanding any disruption during the construction process) is 50 percent.

Lincoln was credible in his description of his work for the HPAC and regarding his opinion of the impact of the Proposed Water Tank in the neighborhood. But he did not state that any structure in that neighborhood has an official historic designation. Further, Lincoln did not state that any particular historic structure will be demolished, or directly impacted in any way, by the proposed construction.

As Lincoln explained, the designation of a building as "historic" is a function first, of its age, and then, as a result of its history—events that were held there, famous people who lived or visited there, and how the building was used. It follows, then, that the historic value of a building is not dependent on current conditions, unless the current or planned use of an area involves the demolition or renovation such that the character of the structure will be changed. For the most part, Lincoln testified as to how the Proposed Water Tank is out of keeping with the character of the neighborhood such that property values may suffer; he gave no credible explanation of how any historic building will lose its historic value. Further, he did not say that any building in the neighborhood is on the National or New Jersey Registries of Historic Properties, but only that many are eligible for such listings.

Greenebaum was a credible witness and frankly admitted that the main reason the Zoning Board denied NJAW's application for variances was that the Proposed Water Tank

was incongruous with the area.[32] He added, however, that NJAW was not forthcoming before the Zoning Board on the reasons for the termination of the MCMUA contract. "Not forthcoming" may be a matter of semantics; at the Zoning Board hearings, the questions that NJAW witnesses stated they could not answer included:

> - Do State regulations require the MCMUA to continue to provide water to NJAW?
> - Once a water supply contract has been established, is the vendor (in this case, the MCMUA) legally able to unilaterally terminate the contract?[33]
> - What is the real reason the MCMUA terminated the contract?
> - Did NJAW terminate the contract with the MCMUA for financial reasons?
> - If NJAW offered to pay the MCMUA more, would the contract have been renewed; why did NJAW not offer to pay more?
>
> [P-6 (Tr., Borough of Bernardsville Board of Adjustment Meeting (November 16, 2020) and P-8 (Tr., Borough of Bernardsville Board of Adjustment Meeting (April 5, 2021).]

The Company appeared before the Zoning Board seven times and while some of the above questions were not answered immediately, they were answered. Where NJAW fell short before the Zoning Board was in answering "where else can this structure be located?" and "is this the only place it can be placed?". T-3 at 28:7-12.

Additional Findings

Based on the above, I **FIND**:

[32] Early on, the Company explained that the Proposed Water Tank would not generate noise, odors, or dust, as it would not have motors or pumps on-site. P-7 (Tr., Borough of Bernardsville Board of Adjustment Meeting (March 1, 2021)). These statements were not challenged.
[33] Questions of law were deferred to the attorneys.

1. There was a dearth of evidence presented regarding what are traditionally referred to as “environmental impacts.” Questions were raised during the Zoning Board process about noise and/or air pollution and no evidence to counter the Company’s position was presented by opponents of the Proposed Water Tank. The Proposed Water Tank has not been shown to have any adverse impact on the ambient noise levels or air quality in the neighborhood nor to result in an increase in truck or foot traffic.

2. The Fenwick Tank was built at an ideal location for a water tower, the highest point in Bernardsville. The original owner of the Site, the Fenwick family, and the original owner of the Fenwick Tank left no record of consideration given to the congruity of a water tank with other structures in the neighborhood.

3. NJAW owns the Site but did give consideration, albeit after the Zoning Board denial of the variance application, to forty-six alternative sites. For credible reasons, including the reasonable expectation that similar opposition to the Proposed Water Tank would be mounted by neighbors of the forty-six identified properties and by the local zoning and planning boards, NJAW identified the Site as the most suitable location for the Proposed Water Tank.

4. The opposition to the Proposed Water Tank is based on aesthetics and the potential reduction in the value of the homes in the neighborhood. The Proposed Water Tank will be twice as tall as the Fenwick Tank and will be visible from Mendham Road. There was no credible evidence that the Proposed Water Tank will result in a diminution of historic value of historic structures in the neighborhood. Further, credible evidence was introduced that negative influences — a busy highway, an industrial facility, and/or an obstructed view of natural resources — serve to reduce the value of nearby residential properties. The evidence was not persuasive, however, that the best estimate of the reduction in the value of the property owned by intervenor and participant should the Proposed Water Tank be built is found

by a comparison of the lower value of homes in beach communities without beach views to the value of homes in the same communities with beach views.

5. The transcripts from the Zoning Board proceedings include discussions of proposals by NJAW to reduce the visual impact of the Proposed Water Tank, whether by painting the exterior and/or planting tall-growth trees around the perimeter of the Site. See P-13; P-23.

6. NJAW considered alternative methods to replace the water supply and pressure formerly provided by the MCMUA and made a credible case that each of the other options considered were not chosen for reasons of reliability, practicality, and costs.

LEGAL ANALYSIS AND CONCLUSIONS

Legal Standard/Burden of Proof

In this administrative proceeding, the Company has applied for a waiver from local municipal approvals that would otherwise be required for it to construct the Proposed Water Tank, pursuant to N.J.S.A. 40:55D-19. That statute provides, in pertinent part:

> In such case appeal to the Board of Public Utilities may be taken within 35 days after action by the governing body. A hearing on the appeal of a public utility to the Board of Public Utilities shall be had on notice to the agency from which the appeal is taken and to all parties primarily concerned, all of whom shall be afforded an opportunity to be heard. If, after such hearing, the Board of Public Utilities shall find that the present or proposed use by the public utility . . . of the land described in the petition is necessary for the service, convenience or welfare of the public . . . and that no alternative site or sites are reasonably available to achieve an equivalent public benefit, the public utility . . . may proceed in accordance with such decision of the Board of Public Utilities, any ordinance or regulation made under the authority of this act notwithstanding.

The purpose of the statute is to authorize the NJBPU to exempt a public utility from local-ordinance control when the interests protected by the local zoning regulations need to be subordinated to the "broader public interest" served by the public utility, N.Y. Cent. R.R. v. Ridgefield, 84 N.J. Super. 85, 94 (App. Div. 1964), and when the company has made the necessary presentation.

It is well established that NJAW has the burden of proof on the need for the Proposed Water Tank, the feasibility of the Company's method, plans and actions, and the consideration given to alternatives, as well as the suitability of the site chosen for the proposed structure.

> The hearing before the board on the utility's petition to establish a discordant use in a prohibited zone was not intended by the Legislature to be simply a pro forma approval of management's decision . . . . Further consideration of the matter should not be limited to the ordinary factors which govern a decision as to whether the public convenience and necessity will be served by a course of operation or conduct proposed by a utility. The issue is broader: (a) Is the projected deviation from the zoning ordinance sufficiently necessary for the convenience and welfare of the public in connection with the service provided by the utility to warrant its authorization; and (b) If so, can the impact of the discordancy on the locality be lessened by imposition of reasonable conditions designed to preserve aesthetic and other relevant zoning considerations?" [In re Monmouth Consol. Water Co., 47 N.J. 251, 259 (1966).]
>
> [In re Petitions of Pub. Serv. Elec. & Gas Co., 100 N.J. Super. 1, 12–13 (App. Div. 1968).]

It has also been held that the NJBPU may condition any approval under N.J.S.A. 40:55D-19 on reasonable modifications[34] that more appropriately balance the local public interest with the broader utility franchise area's interest:

> Suffice it now in recapitulation merely to say that the Board's obligation is not a perfunctory one; it is called upon to inquire diligently and act positively and affirmatively to properly discharge the duty, implicit in the statute, of accommodating local interests of consequence in the light of the broader public welfare which has to be served and is entitled to primary consideration. This can frequently be done by the Board's imposition, fully within its powers, of reasonable conditions designed to preserve relevant zoning considerations or to apply some, but not all, of local zoning ordinance provisions. While the choice as to location and method of additional facilities rests in the first instance with utility management, we are clear that the Board does have the authority to require modifications, including changes in route, where important local considerations can be given recognition without sacrificing the wider public interest.
>
> [State v. Jersey Cent. Power & Light Co., 55 N.J. 363, 370–71 (1970).]

The New Jersey Supreme Court has also stated that the "[a]lternative sites or methods and their comparative advantages and disadvantages to all interests involved, including cost, must be considered in determining such reasonable necessity." In re Pub. Serv. Elec. & Gas Co., 35 N.J. 358, 377 (1961). Still further, considerations when judging the sufficiency of this Petition must go beyond engineering and economic factors:

> We do not read this language of the court [in In re Public Service Electric & Gas Co., 35 N.J. 358, 381 (1961)] as an expression that the Legislature has imposed upon the Board an affirmative role of planner on a regional basis, in the same way that the Legislature has conferred planning functions upon county and municipal planning agencies, on a more limited geographical basis. Rather, we interpret the quoted statement as expressing the view that the Board, in exercising its powers in situations such as this, must take into consideration not merely the engineering and economic

[34] As stated above, the record reflects that discussions regarding modifications to the Proposed Water Tank to address community concerns were limited at best; while landscaping proposals were made by the Company, the record is incomplete as to any community response.

> aspects of the project, but also planning considerations, including those of an aesthetic character, in the balancing of interests.
>
> [In re Petitions of Pub. Serv. Elec. & Gas Co., 100 N.J. Super. at 14–15.]

More recently, the legal standards implicated in the statute have been expressed thusly:

> [N.J.S.A. 40:55D-19 requires] the Board [to] . . . consider the site, the community zoning plan and zoning ordinances, the physical characteristics of the plot, and the surrounding neighborhood. In re Pub. Serv. Elec. & Gas Co., 35 N.J. 358, 377 (1961). When determining reasonable necessity, the Board must consider alternative sites and their advantages and disadvantages, including their costs. Ibid. The Board also must weigh all of the parties' interests, and where those interests are equally balanced, it must give the utility preference in light of the Legislature's clear intent that the broad public interest to be served is greater than local considerations.
>
> [In re Petition of S. Jersey Gas Co. for a Determination Pursuant to the Provisions of N.J.S.A. 40:55D-19, 447 N.J. Super. 459, 480–81 (App. Div. 2016) (citations omitted).]

Further, in In re Monmouth Consolidated Water Co., 47 N.J. at 259–60, the Court said that in applying N.J.S.A. 40:55D-19, the NJBPU must consider:

> the suitability of the locus chosen for the utility structure, the physical character of the uses in the neighborhood, the proximity of the site to residential development, the effect on abutting owners, its relative advantages and disadvantages from the standpoint of public convenience and welfare, whether other and equally serviceable sites are reasonably available by purchase or condemnation which would have less impact on the zoning scheme, and last, but by no means least, whether any resulting injury to abutting or neighboring owners can be minimized . . . . The board should weigh all of these factors and while no controlling weight should be given to purely local considerations, they should not be ignored.

Given the relative positions of the parties here on whether the Company properly evaluated alternatives to the Proposed Water Tank and/or alternative locations for a new and larger water tank, the following from the earliest Appellate Division case on that issue is worthy of consideration:

> No hard and fast rule may be laid down on this score. We do not think it obligatory on the utility to set up a lot of straw men and then knock them down. As part of its case in establishing basic necessity for the improvement itself apart from the location it should, however, show that the means or method proposed to meet the public need is reasonable and desirable, perhaps in relation to customary practices and methods in the industry and the company's existing methods, as well as any other pertinent factors, including any substantially greater expense of an alternative method which might be reflected in higher charges to its customers. Beyond this, the burden of demonstrating a feasible alternative method ought to devolve on the objectors, as should a showing of alternative sites beyond those brought forward by the applicant.
>
> [In re Application of Hackensack Water Co., 41 N.J. Super. 408, 426–27 (App. Div. 1956) (emphasis added).]

I **CONCLUDE** that NJAW has the burden of proving that the deviation from the local municipal zoning regulations is sufficiently necessary for the service, convenience, and welfare of the public in connection with the service to be provided by the utility to warrant authorization of the Proposed Water Tank. The NJBPU, and therefore this forum as well, is required to balance the regulatory requirements, economic issues, planning considerations, aesthetic character, local concerns, and broader general public interests in order to determine if the Company's proposal meets the statutory requirements.

Reasonably Necessary

Here, the Company must show that the Proposed Water Tank is necessary and that expansion at the current location is necessary. NJAW and Rate Counsel argue that the need to replace and/or enlarge the Fenwick Tank (and improve infrastructure) arose with the loss of supply previously provided by the MCMUA. Intervenor argues that the

lost supply can be easily replaced, including by NJAW's own sources. Br. of Intervenor at 33–34.

The Company did not say that it cannot use its own supplies; Shields testified that the Company prefers to use its own supplies. He also stated that the water previously purchased from the MCMUA was sourced at a higher elevation than the Fenwick Tank, and the Fenwick Tank would be fed and filled by gravity. The replacement supplies must be pumped uphill to the higher elevation and the Fenwick Tank "does not have the adequate capacity to meet the water distribution requirements for gravity storage." Pet'r's Br. at 11–12.

Alternative Methods

In determining the reasonable necessity of the Proposed Water Tank, alternative methods must be considered to see if they are "reasonable, practical, and permanent alternatives to the construction of the proposed facility." In re the Appeal of Jersey Cent. Power & Light Co. Pursuant to N.J.S.A. 40:55D-19 from a Decision of the Twp. of Tewksbury Land Use Bd., BPU Dkt. No. EO09010010 at *16 (Sept. 14, 2009). The alternatives should be considered in relation to the utility's existing methods and the customary practices of the industry. Tewksbury, BPU Dkt. No. EO09010010 at *14; Hackensack, 41 N.J. Super. at 426–27. However, once the utility company makes its showing as to the alternative methods, "the burden of demonstrating a feasible alternative method ought to devolve on the objectors." Hackensack, 41 N.J. Super. at 426–27; In re Petition of Jersey Cent. Power & Light Co. Pursuant to N.J.S.A. 40:55D-19 for a Determination that the Montville-Whippany Project is Reasonably Necessary, BPU Dkt. No. EO15030383 at *3 (Nov. 21, 2017).

The alternative methods considered here were to renew the water-supply contract with the MCMUA; enter a new water-supply contract for approximately 900,000 gallons/day with another vendor, including the SMCMUA; use the Company's own supply from other locations with associated infrastructure upgrades, including a larger tank on

the same location; or use the Company's own supply from other locations with associated infrastructure upgrades, including a replacement tank in another location.[35]

Intervenor and the Zoning Board rely heavily on the proposition that the Company failed to pursue the easiest and most logical alternative, that being a new water-supply contract with the MCMUA or the SMCMUA. Again and again, they criticize the Company and its witnesses for failing to disclose the particulars of the negotiations with the two authorities. Although the words may not have been spoken, the strong implication is that had the Company simply offered either utility authority more money, it could have secured a supply contract for the necessary 1,000,000 gallons of water/day. The best way to have made that point would have been to subpoena the testimony of an official at each authority and to have asked him or her, under oath, for the real reason—be it money or something else—that the respective authority is not selling NJAW one million gallons of water each day for the foreseeable future. If the reason given was that NJAW refused to pay what the NJBPU (and Rate Counsel) would have considered a fair amount, with little or no adverse impact on monthly ratepayer bills, intervenor would have a strong argument that the Company did not adequately consider reasonable alternatives to the Proposed Water Tank. But those witnesses were not called.

As early as the first Zoning Board hearing, Greenebaum raised the issue of whether the MCMUA had a legal obligation to continue to supply NJAW notwithstanding the terms of the supply contract. But neither respondent nor intervenor provided the legal basis by which a municipal utility could be required to enter (or continue with) a contract with any third party, much less another public utility. And, in pressing this option and strongly suggesting that it was simply a matter of money (that is, NJAW paying a municipal utility more), intervenor fails to consider that had NJAW overpaid for supply when less expensive options, such as using its own supplies, were available, NJAW would risk such costs being disallowed in all rate cases over the life of such new contracts.

[35] As stated above, NJAW also considered enlarging the Fenwick Tank and/or increasing the size of the water distribution pipes but these alternatives did not meet requirements for pressure and flow throughout the MLG. P-8 (Tr., Borough of Bernardsville Board of Adjustment Meeting (April 5, 2021)).

Intervenor further argues that NJAW is calculating water-storage requirements for the MLG incorrectly, overestimates peak demand, and fails to explain why the use of the Horizon Tank was not a feasible alternative for firefighting.[36] Int. Br. at 34–35 (citing N.J.A.C. 7:19-67). Diaz's pre-filed testimony supports these arguments, but at the hearing, as discussed above, she demurred, stating that the absence of modeling made it impossible to state that the Proposed Water Tank is not necessary.

Alternative Locations

To determine if a proposed site is reasonably necessary, the BPU must look at whether NJAW demonstrated good-faith efforts to obtain the most suitable location and showed an absence of alternative sites that are reasonably available to achieve equivalent public benefit with less adverse impact on the environment, community, and local zoning. Tewksbury, BPU Dkt. No. EO09010010 at *13–16. The Board will consider the Proposed Water Tank in light of the community's zoning plan, the physical characteristics of the site, and the surrounding neighborhood. Pub. Serv., 35 N.J. at 377. There is no way to know what considerations, if any, were given to the character of the surrounding neighborhood when the Bernardsville Water Company first built the Fenwick Tank. It appears that the main consideration was that the Site was the highest point in Bernardsville. We can only be certain that when they sold the Site, the Fenwick family deemed the use to be of sufficient necessity and the amount paid to be of reasonable value. The question now is whether the Company has a reasonable alternative to using this location for the Proposed Water Tank.

There is no argument that the Company considered alternate locations to the Site before appearing before the Zoning Board. A review of the transcripts from the Zoning Board meetings settles that dispute. Trs., Borough of Bernardsville Board of Adjustment Meetings (November 16, 2020, and April 5, 2021). But the record reflects that NJAW did identify forty-six potential sites and review each of them prior to filing the present Petition.

[36] Rate Counsel argues that only a portion of the water stored in the Horizon Tank can be used for the MLG without causing service problems in the Mendham High Gradient. RC Br. at 10.

Once alternate sites were identified, NJAW used reasonable site-selection criteria when deciding that there is no better site with no less impact for the Proposed Water Tank than the one it already owns where a tank is already sited.

The reasons that the Company decided against any of the alternate locations are:

1. The Company does not own any of these parcels; land-acquisition costs would be a substantial investment in utility plant that would translate to higher bills for NJAW customers. All of the parcels are located in the same general area as the Site, in which land costs are very high.

2. The new Oak Place Booster Station has been built (with Zoning Board land-use approval). This station was proposed to supply water to the MLG in connection with the Proposed Water Tank; no additional infrastructure will be needed to put the Proposed Water Tank into service.

3. None of the alternate sites are near existing water-transmission mains, meaning that the costs of constructing new mains must be added to the total investment in utility plant. No evidence was presented opposing Shields' testimony that the approximate cost would be $1,000,000 for every 1,500 feet of 16" main.

4. New rights-of-way may be required for construction and maintenance of connections between the new tank and new distribution system, potentially adding to the total investment in utility plant and potentially resulting in delays while such easements are negotiated.

5. Construction of new connections would require disruption of public streets, with police and/or other security and construction costs adding to the total investment in utility plant.

6. Some of the sites at adequate elevation are developed with single-family homes and there is no guarantee that the homeowners would be willing to

sell. Several are in Mendham Borough, where zoning prohibits public-utility facilities. Others are already preserved through the Green Acres and/or Farmland Preservation programs and are therefore unavailable.

7. As a practical matter, construction of an 83-foot water tank anywhere in Morris and/or northern Somerset County will be met with the same neighborhood opposition the Company experienced in this case. It is noteworthy that no opponent of the Proposed Water Tank suggested an alternate location; they only offered alternate methods.

Intervenor argues that petitioner was required to call witnesses regarding the impact of the Proposed Water Tank on the community's zoning plan, on the physical characteristics of the Site, and on the surrounding neighborhood, and that petitioner's failure to do so "is fatal to its case." Intervenor Br. at 37. I disagree. It is highly unlikely that NJAW could have found an expert in real estate, planning, and/or property valuation who would have testified, under oath, that an 83-foot water tower in a residential neighborhood would increase property values or have no impact. The issue for the NJBPU is not whether the Proposed Water Tank is consistent with the Bernardsville zoning plan (it is not), or whether it is similar in architectural style to other structures in the neighborhood, but whether NJAW tried in good faith to find another site "reasonably available to achieve equivalent public benefit with <u>less</u> adverse impact on the environment, community, and local zoning."[37]

I **CONCLUDE** that while alternative sites were identified and may be just as functional (be at proper elevation, reasonable proximity to existing infrastructure), there has been no showing that an alternative location is reasonably available (i.e., affordable) and will achieve the equivalent public benefit with <u>less</u> adverse impact on the environment, community, and local zoning plans. Even if the Company could purchase a new site for approximately the amount for which it could sell the Site, unlikely enough given that a larger site would likely be required under current zoning rules, it is not realistic to presume that the reaction of those neighbors and of the local zoning board will be any

[37] Neither party cites case law in which the Board is directed to modify its analysis when the property at issue is already owned by the utility, as it is here.

different from what NJAW has experienced in its attempt to enlarge a water tank on property it already owns.

In closing, a more detailed review of the first case reported on N.J.R.S. 40:55-50, the predecessor statute to N.J.S.A. 40:55D-19, and cited above, is appropriate. The Hackensack Water Company owned property in a residential neighborhood where it built a storage tank before the town enacted the zoning ordinance under which the tank became a non-conforming use. 41 N.J. Super. at 409. The water company needed a larger tank and proposed to build a new one, three times the height of the original, on the same property. Like Bernardsville, the population of the host borough, Carlstadt, "[had] remained stable with little increase for the past 25 years and its character [was] established."[38] 41 N.J. Super. at 415.

The company described the plot it already owned as the best available due to topography; "other possible sites at anywhere near the necessary altitude [had] disadvantageous features and all were in areas also municipally zoned for residential purposes." Id. at 417. Opposition to the proposal included:

> [I]njury from location at this particular site in the light of the actual characteristics of the neighborhood and the zone plan. The testimony was confined to the quite natural objections of nearby residents and of the community generally based on aesthetic aspects and some claimed interference with light and air, and to the opinion of a local real estate broker, not very solidly grounded, that adjacent property values would decrease substantially.
>
> [Ibid.]

Appeal was taken from the ruling of the NJBPU that construction of the new tank "is reasonably necessary for the service, convenience or welfare of the public." Ibid. As this was a case of first impression, the Court first found that the NJBPU acted consistent with the authority given to it by the Legislature:

[38] Of course, home values in Bernardsville in 2022 are far greater than they were in Carlstadt in 1955 (and still are today), but the homeowners in Carlstadt were also unhappy about the new, larger water tank.

> [T]he Legislature has said the broad public interest in utility services shall prevail over local interests expressed through prohibiting provisions of a municipal zoning ordinance where the site of the building or structure "is reasonably necessary for the service, convenience or welfare of the public."
>
> [Id. at 419–20.]

While "[m]unicipal zoning ordinances likewise bear a real and substantial relation to the public welfare[,] . . . such regulation is basically from the local aspect for a local public purpose [and] the legislative intent is clear that such local regulation, however beneficent and important, is of secondary importance to the broader public interest involved in assuring adequate water service to a much larger area." Id. at 423. Even recognizing that intent, the Court stated that local concerns must be considered, including "the provisions of the local zoning ordinances and the community zone plan finding expression through it, as well as the actual physical characteristics of the plot involved and the surrounding neighborhood." Id. at 424.

Then, the Court laid out the considerations followed by the NJBPU and successive reviewing courts since:

> It is reasonable necessity for the proposed site in the light of all the facts and circumstances and balancing all interests that is the test prescribed. One of such circumstances generally is the availability of other locations, not municipally restricted, or, if so, less likely to cause injury to the neighborhood, and their comparative advantages and disadvantages with the plot for which approval is sought. Such evidence should ordinarily be tendered by the petitioner and was presented here. Another such factual circumstance, and no more than that, may well be, in certain cases, the possibility of other methods of attaining the needed improvement or addition to facilities not involving the site at all, or by a different and less objectionable kind of building or structure. No hard and fast rule may be laid down on this score. We do not think it obligatory on the utility to set up a lot of straw men and then knock them down. As part of its case in establishing basic necessity for the improvement itself apart from the location it should, however, show that the means or method proposed to meet the public need is reasonable and desirable, perhaps in relation to customary practices and methods in the industry and the company's existing methods, as well as any other

> pertinent factors, including any substantially greater expense of an alternative method which might be reflected in higher charges to its customers. Beyond this, the burden of demonstrating a feasible alternative method ought to devolve on the objectors, as should a showing of alternative sites beyond those brought forward by the applicant.
>
> [Id. at 426–27.]

As stated above, respondent and intervenor presented alternative methods by which NJAW might have chosen to counter the loss of one million gallons of water per day from the MCMUA, none of which were deemed preferable to the decision of the Company to use its own supplies and make necessary modifications to existing infrastructure. After NJAW showed that its chosen alternative would provide gravity storage, equalization volume storage for peak demands in the MLG, and adequate pressure for fire flows, the burden was on respondent and intervenor to show a reasonable alternative at a reasonable expense. Respondent and intervenor did not prove that any alternative method was available to the Company at a reasonable cost to the ratepayers. Respondent and intervenor did not recommend any alternative locations; they did not so much as offer evidence in support of any of the forty-six locations identified by petitioner as qualified by elevation.

CONCLUSIONS

Upon considering the documentary and testimonial evidence provided in the matter, and weighing the relevant factors and considerations outlined above, I **FIND** and **CONCLUDE**:

1. That the Proposed Water Tank is reasonably necessary to provide safe, adequate, and reliable water services in New Jersey;

2. That the Proposed Water Tank is reasonably necessary for the service, convenience, and welfare of the public;

3. That the petitioner considered alternative methods to building the Proposed Water Tank, rebuilding the Oak Place Booster Station, and improving and adding infrastructure;

4. That the petitioner considered alternative sites for the Proposed Water Tank;

5. That the Proposed Water Tank located at the Site is reasonable considering the alternatives; and

6. That based upon the record, the Proposed Water Tank is not adverse to the environment, the public health, and/or the public welfare.

Considering the foregoing, I further **CONCLUDE** that petitioner should be able to construct the Proposed Water Tank as proposed; that the Local Land Use and Zoning Ordinance, and any other ordinances, rules, or regulations promulgated under the auspices of the Municipal Land Use Law of the State of New Jersey, should not apply to the construction, installation, and operation of the project; and that the petition of the New Jersey Water Company, Inc., should be granted as to the site, located at 425 Mendham Road, Bernardsville.

ORDER

It is hereby **ORDERED** that the Petition of New Jersey Water Company, Inc., seeking a determination pursuant to the provisions of N.J.S.A. 40:55D-19 that the construction of a water tank in the Borough of Bernardsville in Somerset County, New Jersey, is reasonably necessary for the service, convenience, or welfare of the public, and that the zoning and land-use ordinance of the municipality and its county shall have no application thereto, is hereby **GRANTED** as to the proposed site, located at 425 Mendham Road.

I hereby **FILE** my initial decision with the **BOARD OF PUBLIC UTILITIES** for consideration.

This recommended decision may be adopted, modified or rejected by the **BOARD OF PUBLIC UTILITIES,** which by law is authorized to make a final decision in this matter. If the Board of Public Utilities does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SECRETARY OF THE BOARD OF PUBLIC UTILITIES, 44 South Clinton Avenue, P.O. Box 350, Trenton, NJ 08625-0350,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 1, 2023 

DATE **TRICIA M. CALIGUIRE,** ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/cb

APPENDIX

WITNESSES

For petitioner

Donald C. Shields

For Rate Counsel

Howard Woods

For respondent and intervenor

Kenneth Jones

Daniel Lincoln

David Greenebaum

For Intervenor

Giselle Diaz

EXHIBITS

Petitioner

P-1 Direct Testimony of Donald C. Shields

P-2 Bernardsville Negative Impacts

P-3 Mendham Borough/ Township Negative Impacts

P-4 Site Existing Conditions & Demolition Plans

P-5 Ground Elevation Plans

P-6 Transcript of Audio-Recorded Meeting on November 16, 2020

P-7 Transcript of Audio-Recorded Meeting on March 1, 2021

P-8 Transcript of Audio-Recorded Meeting on April 5, 2021

P-9 Transcript of Audio-Recorded Meeting on June 21, 2021

P-10 Transcript of Audio-Recorded Meeting on August 2, 2021

P-11 Transcript of Audio-Recorded Meeting on September 20, 2021

P-12 Transcript of Audio-Recorded Meeting on October 4, 2021

P-13 Witness and Exhibit List

P-14 Fenwick Tank Site

P-15 Site Existing Conditions & Demolition Plans

P-16 Letter dated May 11, 2018, to Thomas Shroba P.E. from Larry Gindoff

P-17 Letter dated April 15, 2020, to Stephen R. Bishop from Brad Carney

P-18 Letter dated February 26, 2021, Borough Response to Boswell Review

P-19 Fenwick Tank Replacement Project Site Plans

P-20 Elevation Plans

P-21 Letter dated April 19, 2012, to Steven Tambini from Glenn Schweizer

P-22 Alternative Site Lists

P-23 Landscape Plans with Elevations

P-24 Rebuttal Testimony of Donald C. Shields

Staff of the Board

S-1 to S-15 Petitioner's Responses to Staff Discovery (Admitted without Objection/No Testimony Presented at Hearing)

Rate Counsel

R-1 Pre-filed Direct Testimony of Howard Woods

R-2 Pre-filed Rebuttal Testimony of Howard Woods

Respondent and Intervenor

ZB-1 Pre-filed Testimony of Daniel Lincoln

ZB-2 Bernardsville Historic Preservation Advisory Committee Memorandum, dated November 13, 2020

ZB-3 Pre-filed Testimony of Daniel Greenebaum

ZB-4 Resolution of Borough of Bernardsville Zoning Board of Adjustment, dated December 17, 2021.

Intervenor

I-1 Pre-Filed Direct Testimony of Giselle Diaz, P.E., Boswell Engineering, October 21, 2022

I-2 Exhibit A to Diaz Pre-Filed Testimony: page from Petitioner's response to Intervenor's discovery requests based on the pre-filed direct testimony of Donald Shields, Interrogatory 4

I-3 Exhibit B to Diaz Pre-Filed Testimony: Petitioner's response to Rate Counsel discovery request RCR-E-21

I-4 Exhibit C to Diaz Pre-Filed Testimony: July 2, 2018 Memorandum by Vince Monaco of NJAW, Bates-stamped as INT0001244-INT0001249

I-5 Exhibit D to Diaz Pre-Filed Testimony: Petitioner's response to Rate Counsel discovery request RCR-E-6

I-6 Exhibit E to Diaz Pre-Filed Testimony: series of NJAW internal emails, Bates-stamped as INT0001278

I-7 Exhibit F to Diaz Pre-Filed Testimony: May 11, 2018 from Morris County Municipal Utilities Authority to NJAW, Bates-stamped as INT0001242-INT0001243

I-8 Exhibit G to Diaz Pre-Filed Testimony: series of NJAW internal emails, Bates-stamped as INT0001748-INT0001749

I-9 Exhibit H to Diaz Pre-Filed Testimony: series of emails between NJAW personnel and SMCMUA personnel, Bates-stamped as INT0001756

I-10 Exhibit I to Diaz Pre-Filed Testimony: series of internal NJAW emails and emails between NJAW personnel and SMCMUA personnel, Bates-stamped as INT0001759-1760

I-11 Exhibit J to Diaz Pre-Filed Testimony: June 5, 2018 memorandum by Vincent Monaco, Bates-stamped as INT0001901-INT0001904

I-12 Exhibit K to Diaz Pre-Filed Testimony: email from Howard Woods to Laura Cummings of SMCMUA, Bates-stamped as SAVAS0162-SAVAS0163

I-13 Exhibit L to Diaz Pre-Filed Testimony: NJDEP construction permit issued to NJAW dated January 7, 2021 (Attachment 1 to NJAW response to Rate Counsel discovery request RCR-E-27)

I-14 Exhibit M to Diaz Pre-Filed Testimony: Letter from NJDEP to MCMUA and NJAW dated October 22, 2020, Bates-stamped as SAVAS0164-SAVAS0165

I-15 Exhibit N to Diaz Pre-Filed Testimony: Page from Petitioner's response to Intervenor's discovery requests based on the pre-filed direct testimony of Donald Shields, Interrogatories 29-30

I-16 Exhibit O to Diaz Pre-Filed Testimony: Petitioner's response to Rate Counsel discovery request RCR-E-11, p. 1-30

I-17 Exhibit P to Diaz Pre-Filed Testimony: Pages from Petitioner's response to Intervenor's discovery requests based on the pre-filed direct testimony of Donald Shields, Interrogatories 16-18

I-18 Exhibit Q to Diaz Pre-Filed Testimony: Petitioner's response to Rate Counsel discovery request RCR-E-11, p. 1-67

I-19 Exhibit R to Diaz Pre-Filed Testimony: excerpts of internal NJAW emails, Bates-stamped as INT0001320-INT0001321

I-20 Exhibit S to Diaz Pre-Filed Testimony: Petitioner's response to Rate Counsel discovery request RCR-E-14

I-21 Exhibit T to Diaz Pre-Filed Testimony: Petitioner's response to Rate Counsel discovery request RCR-E-11, p. 1-68

I-22 Pre-Filed Direct Testimony of Kenneth J. Jones, October 21, 2022