

STATEMENT OF THE FACTS

On or about September 1, 1998, Plaintiff Kilburn Development, L.L.C. ("Kilburn") applied to the Midland Township Planning Board (hereinafter "the Planning Board" or "the Board") for preliminary major subdivision approval to create five single-family residential lots out of a 2.25-acre parcel designated as Block 2610, Lot 8. The parcel is irregularly shaped in an "L" fashion, with 112 feet of frontage on Twin Oaks Road and 435 feet of frontage on Robertson Drive. (Exhibit 8 at 1-2.) Under Kilburn's proposal, one of the five lots is to front on Twin Oaks Road. The remaining four lots will all front on Robertson Drive. (Exhibit 8 at 2; T4-8-10.)¹

Robertson Drive is a private and unimproved road only 12 to 14 feet wide where it extends along the subject property's frontage. (Exhibit 13 at 59; T4-3-5; T5-6-9.) The public portion of Robertson Drive ends a distance of 143 feet south of the subject property. Robertson Drive continues north of the property as a private lane or driveway all the way to Jackson Avenue. (T4-6-8; T5-9-11.) As the Board specifically found, Robertson Drive is "narrow, winding and unimproved to RSIS standards." (Resolution No. 1-2000, Finding of Fact No. 4 (Jan. 24, 2000).) As Intervenor Timothy Welks testified, "you can't get out of Robertson Drive without running into an oncoming car. And one of us has to back up. So it's tight." (T58-23-25.) A number of accidents have taken place on Robertson Drive, resulting in personal injuries. (T58-17-23.)

¹All transcript references are to the transcript of the Planning Board hearing held on November 8, 1999.

The subject property is located in the R-B Residential District, which permits single-family residential development on 15,000 square foot lots. While the proposed lots all conformed to the dimensional requirements of the zoning ordinance, a variance was nevertheless required because the four lots fronting on Robertson Drive will not front on a fully improved and accepted public right-of-way. (Exhibit 4.)

Kilburn proposed to improve Robertson Drive by (1) dedicating a 25-foot right of way along the frontage of its property (Lot 8) and that of an adjoining landowner (Lot 9), and (2) paving this "half-width" street to a width of up to 18 to 20 feet. (T15-17-20; T22-3-8.) In addition, Kilburn proposed to construct a "temporary" cul-de-sac at the north end of the proposed site improvements to Robertson Drive. (T4-19-23; T6-4-8.) The developer's intent was to provide a "half-width" improvement of Robertson Drive similar to what was done in front of Lot 10.01 (the so-called Montclair subdivision) on another portion of Robertson Drive to the south of the subject property. (T11-15-19.) In other words, the developer's intent was to improve the existing private right of way of Robertson Drive and then dedicate the improved street to the Township as a public thoroughfare, even though the street would not be accepted since it does not adhere to Township standards. (T40-6-20.) Moreover, as the Township Engineer, Eliot Clees, commented in his June 28, 1999 report to the Planning Board, "it does not appear that Robertson Drive north or south of the tract will be dedicated and improved by others any time soon." (Exhibit 13 at 61.)

Aside from the access variance, counsel for the applicant at the hearing agreed that the Residential Site Improvement Standards (RSIS) rules, N.J.A.C. 5:21-1 et seq., applied

to its proposed improvements to Robertson Drive. (T57-1-9.) The applicant therefore requested waivers or "de minimis exceptions" from the RSIS standards. Kilburn's engineer, Isaac D. Singer, testified that exceptions were required (1) to permit a right-of-way width of 25 feet where 50 feet is required for a low-intensity, residential access street, and (2) to permit a cartway width of 20 feet where 28 feet is required for such a street.² (T13-15-25; T14-1-5, -9-11; T15-9-12, -21-24; T16-1-5; T22-9-12.)

With respect to RSIS compliance, Township Engineer Eliot Clees stated, in his September 7, 1999 report to the Board, that proper classification of Robertson Drive for purposes of the proposed development was residential neighborhood classification, rather than rural. He further pointed out that the Planning Board could require new street extensions to match the width of existing street sections under N.J.A.C. 5:21-4.8(b).³ (Exhibit 14 at 66.)

The testimony adduced before the Board established that, at a point south of Kilburn's proposed site improvements to Robertson Drive along Lots 8 and 9 and the widened pavement along Lot 10.01, the paved width of Robertson Drive narrows down to 11 feet in front of Lots 22 or 23 and 11. (T25-1; T26; T27-3-16; T66-4-22.) This narrow, 11-foot pavement width to the south of the proposed development extends for one block or 100 feet.

²Kilburn also initially indicated that an exception or waiver would be sought as to the sidewalk standards of the RSIS rules, but it later represented to the Board that sidewalks would be installed on one side of Robertson Drive if required by the Board.

³N.J.A.C. 5:21-4.8(b) provides that "[t]he municipal approving authority may require the right-of-way and cartway widths of a new street that is a continuation of an existing street to be at least the same widths as the existing street."

(T66-19-22.) Similarly, the proposed improvements would leave the private driveway in place to the north of the proposed development, which driveway would remain as wide as it is now, namely about 11 feet. (T58-25; T59-1-2; T66-15-18.) Thus, the proposed site improvements to Robertson Drive are surrounded by very narrow, 11-foot-wide paved areas, the traditional width of Robertson Drive throughout the entire area. (T66-24-25; T67-1-4.)

Township Police Officer Nathan Foulds commented in relevant part as follows on the consequences of a failure to make adequate widening improvements to Robertson Drive south of the proposed development:

I cannot tell from the plan whether the entire roadway will be widened to a minimum of 25 feet to allow for safe two-way traffic. If the new roadway does not allow for this two-way traffic from the last (northerly) lot going south to the current south end of Robertson Drive at Twin Oaks Road, I suggest that the roadway be made a one way. Reason: *The addition of these four houses could greatly increase the vehicular traffic on this section of very narrow dangerous roadway creating a potential hazard to vehicle and pedestrian traffic.*

(Exhibit 12 [Township Police Department's Report, dated June 25, 1999] (emphasis added).)

Furthermore, the testimony before the Board showed that the proposed improvements to Robertson Drive would result in cars having to make S-turns at each end of, i.e., both to the north and the south of, the improved portion of the roadway since "this New Robertson Drive is now offset 11 feet from the Old Robertson Drive." (T65-1-14.)

After a public hearing held on November 8, 1999, at which the objectors appeared and testified in opposition to Kilburn's application for subdivision approval, the Board voted, 6 to 2, to deny such approval. In its January 24, 2000 resolution memorializing its decision denying Kilburn's application for subdivision approval, the Board pointed out that "[i]ssues

have been raised by the Township Engineer as outlined in his reports . . . regarding RSIS compliance, the private status of Robertson Drive and problems associated with the lack of a connection to a public street and public access rights." (Resolution No. 1-2000, Finding of Fact No. 8 (Jan. 24, 2000).) The Board concluded that Kilburn "has not resolved these issues to the Board's satisfaction." (*Id.*)

The Board further found that "development is occurring on Robertson Drive in a piecemeal fashion that will eventually change the character of the area." (*Id.*, Finding of Fact No. 9.) The Board concluded that Kilburn's proposed residential development "adds an additional four lots to an otherwise narrow, winding and inadequate roadway thereby intensifying an undesirable and nonconforming condition." (*Id.*)

The Board also found that Kilburn "is unable to comply with RSIS standards for development which, in the Board's view, should be required in this instance given the deficiencies of the present roadway." (*Id.*) The Board concluded that Kilburn "has not demonstrated to the Board's satisfaction that the proposed road improvements adequately address access and traffic issues relating to this development." (*Id.*)

Based on the foregoing reasons, the Board decided to deny any relief from the RSIS standards, saying:

For these reasons, relief from RSIS standards, which are the minimum for residential development cannot be granted by the Board. Given the applicant's noncompliance with RSIS standards, the Board feels it would be contrary to sound planning principles and detrimental to the area in question to permit development to intensify an already nonconforming condition.

(*Id.*)

LEGAL ARGUMENT

I. **KILBURN WAIVED ITS ARGUMENT THAT THE RSIS RULES DO NOT APPLY TO ITS PROPOSED IMPROVEMENT OF ROBERTSON DRIVE.**

During the November 8, 1999 hearing held on Kilburn's application, counsel for Kilburn, Justin Dell, in response to the question whether the applicant agreed that the RSIS standards applied to Kilburn's proposed site improvements to Robertson Drive, stated as follows:

MR. DELL: Well, *I agree that these standards do apply, yes.* And in the notice that the Board, rather than the applicant sent out, they requested any additional waivers or variances that the Board may deem necessary. Going into this there was an issue as to whether or not they did apply. *I think based upon the position that the municipal engineer is taking, the planner, and what's developed through testimony I would agree that a waiver would be necessary.*

(T57-1-9 (emphasis added).) Based on these representations, the Board's attorney, Mr. Pentaro, concluded that there was no "disagreement" that the RSIS standards applied. (T57-10-11.)

Now, for the first time, Kilburn takes the position that its proposed improvements to Robertson Drive were not subject to the RSIS rules. In view of the statements of Kilburn's counsel at the November 8, 1999 hearing, however, Kilburn knowingly and intentionally waived its right to present such an argument.

II. THE RSIS RULES SUPERSEDE THE MIDLAND TOWNSHIP HALF-WIDTH STREET REGULATION.

In construing an administrative regulation, the courts apply the same rules of construction as are applied when interpreting statutes. *Cf. White Castle Systems v. Planning Board of City of Clifton*, 244 N.J. Super. 688, 691 (App. Div. 1990) (applying rules of statutory construction to zoning ordinances), *certif. denied*, 126 N.J. 320 (1991) (citing *AMN, Inc. v. South Brunswick Township Rent Leveling Board*, 93 N.J. 518, 524-25 (1983)). Thus, when construing statutes or regulations, in the absence of a specific definition, words are given their "ordinary and well-understood meanings." *Great Atlantic & Pacific Tea Co. v. Borough of Point Pleasant*, 137 N.J. 136, 143-44 (1994); *accord Manalapan Realty, L.P. v. Township Committee of Township of Manalapan*, 140 N.J. 366, 383 (1995).

Courts are required to adopt an interpretation "consonant with the probable intent of the draftsman 'had he anticipated the situation at hand.'" *Jersey City Chapter of Property Owners' Association v. City Council of Jersey City*, 55 N.J. 86, 101 (1969) (quoting *Dvorkin v. Dover Township*, 29 N.J. 303, 315 (1959)); *accord Bunk v. Port Authority of New York & New Jersey*, 144 N.J. 176, 190 (1996); *AMN, Inc. v. South Brunswick Township Rent Leveling Board*, 93 N.J. at 525; *White Castle Systems v. Planning Board of City of Clifton*, 244 N.J. Super. at 691. The interpreting court should not rely on "literalisms, technisms or the so-called rules of interpretation." *Jersey City Chapter of Property Owners' Association v. City Council of Jersey City*, 55 N.J. at 100; *City of Newark v. Township of Hardyston*, 285 N.J. Super. 385, 394 (App. Div. 1995), *certif. denied*, 143 N.J. 518 (1996). Rather, the court should rely on the breadth of the objectives of the regulation and the common sense of the

situation in order to further the agency's purpose. *Jersey City Chapter of Property Owners' Association*, 55 N.J. at 100; *City of Newark v. Township of Hardyston*, 285 N.J. Super. at 394.

The Residential Site Improvements Standards Act, N.J.S.A. 40:55D-40.1 et seq., provides that "[t]he standards set forth in the [RSIS] regulations . . . shall supercede any site improvements standards incorporated within the development ordinances of any municipality[.]" N.J.S.A. 40:55D-40.5. Kilburn nevertheless argues that the RSIS regulations do not apply to Kilburn's proposed improvement of Robertson Drive, but that rather its proposed improvement of that residential access street continues to be governed by the Midland Township "half-width" street, subdivision regulation.⁴ Kilburn premises this argument on the supposition that the RSIS rules do not apply where an improvement proposed to be made in connection with residential development involves the "layout [of] a street along the exterior side of the development." (Plaintiff's Trial Brief at 22.) Kilburn thereby ignores the plain meaning of N.J.A.C. 5:21-1.5, governing the scope and applicability of the RSIS rules.

N.J.A.C. 5:21-1.5 states that "[t]hese rules shall govern *any site improvement* carried out or intended to be carried out in connection with any application for residential

⁴Section 134-90.2P of the Midland Planning and Development Code provides as follows:

Half streets shall be prohibited except where essential to the reasonable development of the subdivision in conformity with other requirements of these regulations and where the municipal agency finds it will be practical to require the dedication of the other half when the adjoining property is subdivided, the other half of the street shall be platted within such tract.

subdivision . . . before any planning board . . . created pursuant to the Municipal Land Use Law (N.J.S.A. 40:55D-1 et seq.)." N.J.A.C. 5:21-1.5(a) (emphasis added). The rule further provides that "[e]xcept as is otherwise specifically provided, these rules shall control all matters concerning the construction, alteration, addition, repair, removal, demolition, maintenance, and use of any site improvements constructed by a developer in connection with residential development." N.J.A.C. 5:21-1.5(b) (emphasis added). Finally, the rule also provides that "[t]hese rules shall apply to all site improvement work and appurtenant construction including streets, roads, parking facilities, sidewalks, drainage structures, grading and utilities which are undertaken by a developer in connection with residential development or use." N.J.A.C. 5:21-1.5(c) (emphasis added).

The term "site improvement" is broadly defined⁵ as including either "any construction work on" or any "improvement in connection with" a residential development that involves, among other things, a street or road. Clearly, Kilburn's proposed improvement to Robertson Drive was "on" the intended residential subdivision development: Existing Robertson Drive runs, and all of the proposed construction work would take place, entirely within the lot lines of the developer's property. (T37-22-25; T38-1-7.) Even assuming, however, that compliance with the RSIS rules would entail some offsite construction work on land immediately contiguous to Kilburn's, the term "on" would encompass such work. *See* Black's Law Dictionary 1240 (4th ed. 1968) (defining "on" as meaning "upon; as soon as; near to;

⁵The term "Site Improvements" is defined by the RSIS rules as meaning "any construction work on, or improvement in connection with, residential development limited to streets, roads, parking facilities, sidewalks, drainage structures, and utilities." N.J.A.C. 5:21-1.4.

along; along side of; adjacent to; contiguous to" (emphasis added)). And even if "on" were to be narrowly interpreted as meaning nothing more than "onsite,"⁶ the term "site improvements" also includes offsite improvements and "appurtenant" construction work⁷ undertaken "in connection with," i.e., in association with,⁸ a residential development.

Thus, N.J.A.C. 5:21-1.5, in unmistakably plain language, makes the RSIS rules applicable to Kilburn's intended improvement of Robertson Drive, even though that proposed residential access street lies along the exterior side of the proposed residential subdivision.

_____ Kilburn nevertheless argues that, in view of certain factors, "no implication of a provision *not present in the RSIS* should be made by this Court." (Plaintiff's Trial Brief at 22 (emphasis added).) Because "no provision is found in the RSIS for temporary [half-width road] arrangements of [the] type" permitted by the Midland subdivision regulations, so Kilburn's argument goes, the Court "should not imply such a prohibition, contrary to public policy." (*Id.* at 23.)

The basic flaw in this argument is that it again ignores the plain language of the scope rule, N.J.A.C. 5:21-1.5. That regulation clearly provides that the RSIS rules "*shall control all matters* concerning the construction . . . of site improvements constructed . . . in

⁶The MLUL and the RSIS rules define the term "onsite" as meaning located on the lot in question. N.J.S.A. 40:55D-5; N.J.A.C. 5:21-1.4.

⁷"Appurtenant" construction work is that work "accessory or incident to" the main or principal site improvement work. *See* Black's Law Dictionary at 133 (definition of "appurtenant").

⁸*See* Black's Law Dictionary at 374 (defining verb "connect" as meaning "to associate as in occurrence or in idea"); *see also id.* at 893 (defining phrase "in conjunction with" as meaning "in association with").

connection with residential development" unless those rules "otherwise *specifically* provide." N.J.A.C. 5:21-1.5(b) (emphasis added). "Specifically" means "[i]n a specific manner, *explicitly*, particularly, definitely." Black's Law Dictionary at 1571 (emphasis added).

Thus, the presumption is that the RSIS rules control, and only explicit language addressing the matter in question in specific terms will overcome that presumption. As Kilburn admits, the RSIS rules do not permit or otherwise address temporary, half-width streets. Indeed, Arthur Tighe of the Division of Codes and Standards, Department of Community Affairs, confirms that the RSIS standards "make no mention, expressly or impliedly about half-width streets." (Letter to William Callin Jr., from Arthur Tighe, Division of Codes and Standards, Department of Community Affairs, ¶ 1 at 1 (May 17, 2000).) Consequently, the RSIS rules prescribing minimum standards for the right-of-way width and cartway width of residential access streets apply to preclude any such temporary "half-street" arrangement. In other words, the RSIS rules supersede the Midland Township subdivision regulations, insofar as those regulations permit temporary half-width streets in certain limited circumstances.⁹

Nor is this application of the RSIS rules contrary to public policy. Our Supreme Court has recognized that the RSIS Act and the MLUL "share the same purpose and legislative intent—to establish reasonable physical improvement standards *to protect the public health,*

⁹Arthur Tighe of the Division of Codes and Standards, Department of Community Affairs, has likewise implicitly concluded that the RSIS rules apply: "In any case, I would think that a de minimis exception would be necessary to allow the temporary half width." (Letter to William Callin Jr., from Arthur Tighe, Division of Codes and Standards, Department of Community Affairs, ¶ 2 at 1 (May 17, 2000).)

safety, and welfare." *New Jersey State League of Municipalities v. Department of Community Affairs*, 158 N.J. 211, 227 (1999), *aff'g* 310 N.J. Super. 224, 229 (App. Div. 1998) (emphasis added). Similarly, the intent of the RSIS rules is "[t]o avoid unnecessary cost in the construction process, *and to provide site improvement standards that are both sound and cost effective.*" N.J.A.C. 5:21-1.3(a)(2) (emphasis added). In other words, public health and safety are not to be sacrificed in pursuit of the goal to reduce construction costs. The RSIS rules "are to be interpreted *as the minimum required to ensure public health and safety*" as well as "the maximum that may be required in connection with residential development." N.J.A.C. 5:21-1.5(b) (emphasis added). As the Midland Township half-width street improvement regulation falls below the "minimum" standards of the RSIS, its supersession by the RSIS promotes rather than undermines the state's public policy.

Kilburn complains that application of the RSIS forces it either to forgo development of the subject property for a period of time until it can arrange with adjoining landowners to assume part of the cost of improving Robertson Drive as a full-width, residential access street, or to develop the property for fewer homes. This, however, is a legitimate choice for Kilburn to have to make. While it is true that the Township cannot force Kilburn to undertake at its own cost to make full-width improvements to Robertson Drive as a condition of subdivision plat approval, *see Divan Builders v. Planning Board of Township of Wayne*, 66 N.J. 582 (1975), neither can Kilburn force the Planning Board to accept an unsafe, substandard residential access street as the sole means of ingress and egress to four of the five lots in the proposed subdivision.

Nor is *Cameron & Cameron v. Planning Board*, 250 N.J. Super. 296 (App. Div. 1991), to the contrary. *Cameron* involved a *site plan approval* for a commercial development, not a residential subdivision development subject to the RSIS rules.

In short, even assuming Kilburn has not waived the right to raise the issue, the RSIS standards clearly applied to the proposed improvements to Robertson Drive, superseding the Midland Township "half-width" street regulation.

III. THE BOARD PROPERLY REFUSED TO GRANT EXCEPTIONS TO THE RSIS RULES GOVERNING THE RIGHT-OF-WAY WIDTH AND CARTWAY WIDTH OF RESIDENTIAL ACCESS STREETS.

_____The RSIS rules provide that "[t]he municipal approving authority [, in this case, the Planning Board,] *may* grant such *de minimis* exceptions from the requirements of the site improvement standards as may be reasonable and within the general purpose and intent of the standards," but only if "the literal enforcement of one or more provisions of the standards is impracticable or will exact undue hardship because of peculiar conditions pertaining to the development in question." N.J.A.C. 5:21-3.1(a). Kilburn argues that it was "mandatory" for the Board to grant exceptions from the requirements of the RSIS rules regarding right-of-way width and cartway width. (*See* Plaintiff's Brief at 26.) As will be shown below, however, the Board was without power to grant the requested, *non-de minimis* exceptions. Alternatively, the Board properly exercised its discretion to deny the requested exceptions.

A. The Requested Exceptions Were Not "De Minimis."

The Planning Board may grant only "de minimis exceptions" from the RSIS rules. It has no authority to grant non-*de minimis* exceptions or waivers. Waivers can only be granted by the Site Improvement Advisory Board and then only based on a "danger to public health and safety that would be caused by adherence to a standard specified in this chapter." N.J.A.C. 5:21-3.2(b). Thus, unless the variances requested by Kilburn from the RSIS rules qualified as *de minimis* exceptions, the Board had no authority to grant them.

While the RSIS rules give some "examples" of *de minimis* exceptions,¹⁰ they do not otherwise provide any guidance as to what constitutes a *de minimis* exception. In this case, Kilburn sought a 50% reduction in required right-of-way width, from 50 feet to 25 feet, and a reduction in required cartway width of from 30% to 50%, namely from 28 feet to 20 or 18 feet, or to as few as 14 feet. Wherever the line may ultimately be drawn between *de minimis*

¹⁰The RSIS rules provide that

(f) Examples of de minimis exceptions include, but are not limited to, the following:

1. Reducing the minimum number of parking spaces and the minimum number of parking stalls;
2. Reducing the minimum geometrics of street design, such as curb radii, horizontal and vertical curves, intersection angles, centerline radii, and others;
3. Reducing cartway width; and
4. Any changes in standards necessary to implement traffic calming devices.

N.J.A.C. 5:21-3.1(f).

and non-*de minimis* exceptions, these substantial percentage reductions in required right-of-way and cartway width are clearly not *de minimis*. The request to reduce required right-of-way width from the prescribed 50 feet for a residential access street to only 25 feet would have created a street with substantially less right-of-way than even that required for a rural street or lane (40 feet). See N.J.A.C. 5:21-4.8(a) & Table 4.3. Similarly, the request to reduce required cartway width from the prescribed 28 feet to no more than 20 feet would entirely eliminate the prescribed 8-foot parking lane. *Id.*

The opinion of Arthur Tighe of the Department of Community Affairs (DCA) that a *de minimis* exception is "appropriate" for a "temporary half width street" appears to be premised on the assumption that Kilburn's construction of the "half-width" street is part of a "phased construction" or "staged construction" of a full-width street. (See Letter to William Callin Jr., from Arthur Tighe, Division of Codes and Standards, Department of Community Affairs, ¶¶ 2, 3 at 1-2 (May 17, 2000).) In other words, the DCA, in rendering its opinion, assumed that a full-width street would be constructed in the foreseeable future in accordance with a definite plan for phased or staged construction of the street improvement.

In actuality, however, no assurances were given by Kilburn to the Board that the other half of the proposed half-width street improvement would ever be dedicated and constructed. Thus, it is at best highly uncertain whether the half-width street will indeed be only a "temporary" one or if it will remain a half-width street permanently or indefinitely. The opinion of the DCA that the grant of a *de minimis* exception for a temporary half-width street is appropriate is therefore not persuasive on the facts of the instant case.

In sum, because the requested exceptions were clearly non-*de minimis*, the Board had no authority to grant such exceptions.

B. The Board Properly Exercised Its Discretion To Deny The Exceptions.

It is well established that the burden of proving the right to relief sought in a land use application remains, at all times, with the applicant. *Chirichello v. Zoning Board of Adjustment of Monmouth Beach*, 78 N.J. 544 (1979); *Allocco v. Township of Holmdel*, 299 N.J. Super. 491 (Law Div. 1995). Moreover, a reviewing court is required to presume that the Board's exercise of its discretionary authority is valid,¹¹ and the burden is upon the party challenging the action to prove that the Board was arbitrary, capricious, or unreasonable in its decision. *Burbridge v. Governing Body of Township of Mine Hill*, 117 N.J. 376 (1990); *Anastasio v. Planning Board of West Orange*, 209 N.J. Super. 499 (App. Div.), *cert. denied*, 107 N.J. 46 (1986).

The Planning Board's grant of a request for a *de minimis* exception is required by the RSIS rules to be based on a finding that the requested exception "meets the following criteria":

¹¹"The generalized design standards for subdivision ordinances prescribed by the MLUL, e.g., N.J.S.A. 40:55D-38, necessarily invoke the planning board's expertise and familiarity with local conditions and implicate the exercise of discretion by planning boards." *Pizzo Mantin Group v. Randolph Township*, 137 N.J. 216 (1994). Moreover, as recognized by Arthur Tighe, Division of Code and Standards, the Department of Community Affairs "has neither the ability nor the authority to review applications" for *de minimis* exceptions. Rather, denial or approval of Kilburn's application "rests with the appropriate local approving authority," in this case the Planning Board. (Letter to William Callin Jr., from Arthur Tighe, Division of Codes and Standards, Department of Community Affairs, at 2 (May 17, 2000).)

1. It is consistent with the intent of the Site Improvement Act;
2. It is reasonable, limited, and not unduly burdensome;
3. It meets the needs of public health and safety; and
4. It takes into account existing infrastructure and possible surrounding future development.

N.J.A.C. 5:21-3.1(g). Based on the record of this case, the Board properly concluded that it could not make the required finding.

Grant of the requested exceptions would not be consistent with the intent of the Site Improvement Act. That Act, like the MLUL, has the purpose and intent "to establish reasonable physical improvement standards *to protect the public health, safety, and welfare.*" *New Jersey State League of Municipalities v. Department of Community Affairs*, 158 N.J. at 227 (emphasis added). The Board could reasonably conclude that to grant the exceptions requested by Kilburn from the prescribed right-of-way and cartway widths, thereby allowing for an indefinite period of time a "half-width" residential access street to serve as the sole means of access to the four lots in question, would have unduly compromised the public health, safety, and welfare in direct violation of the intent of the Site Improvement Act.

Nor would grant of the exceptions have been reasonable or limited. The grant of the exceptions would have reduced the prescribed right-of-way width by 50% and the required cartway width by at least 30%, entirely eliminating the required eight-foot parking lane. Residents of the proposed subdivision, as well as their invitees, would have been left with no safe, on-street parking area and with no assurance that enough right of way would ever be dedicated in the future to allow for the expansion of Robertson Drive to a full-width,

residential access street. Thus, the grant of the exceptions would have been unreasonable and "unduly burdensome."

Grant of the exceptions would have also resulted in an isolated, "half-street" improvement that does not meet the needs of public health and safety. Aside from the hazards posed by eliminating the required parking lane, grant of the exceptions would have also created dangerous bottlenecks at each end of the proposed improvements to Robertson Drive along where the cartway width narrows, requiring drivers to make S-turns both going into and out of the improved sections of Robertson Drive. Residents of the subdivision and their invitees would have been required to access the subdivision by means of roadway that, at least in part, remains too narrow to safely handle two-way traffic. The Board therefore reasonably concluded that "[t]he applicant has not demonstrated to the Board's satisfaction that the proposed road improvements adequately address access and traffic issues relating to this development." (Resolution No. 1-2000, Finding of Fact No. 9 (Jan. 24, 2000) (emphasis added).)

Finally, granting the exceptions would not have taken into account the existing infrastructure and possible surrounding future development. The existing infrastructure, namely the private driveway north of the proposed improvement of Robertson Drive and the narrow, 11-foot cartway width just south of that improvement, were wholly inadequate to handle traffic to and from the proposed subdivision, as reported by the Township Police Department. The Board specifically found that the proposed subdivision would add four lots "to an otherwise narrow, winding and inadequate roadway" and therefore concluded that

compliance with the RSIS standards "should be required in this instance *given the deficiencies of the present roadway.*" (Resolution No. 1-2000, Finding of Fact No. 9 (Jan. 24, 2000) (emphasis added).)

Moreover, the Board also found that "it is evident . . . that development is occurring on Robertson Drive *in a piecemeal fashion* that will eventually change the character of the area." (*Id.* (emphasis added).) Thus, given that a "half-width" street development had already been permitted on a portion of Robertson Drive south of the property, i.e., the Montclair subdivision on Lot 10.01, the Planning Board would have been hard put to justify denying further exceptions permitting such "half street" developments elsewhere at intervals along the entire length of Robertson Drive north of where the full-width street ends, further aggravating health and safety problems.

Nor is this case governed by the Appellate Division's recent decision in *Green Meadows at Montville, LLC v. Planning Board of Township of Montville*, 329 N.J. Super. 12 (App. Div. 2000). In *Green Meadows*, the plaintiff proposed to develop an 8.5-acre tract by subdividing the property into eight lots for one-family homes. The plaintiff proposed using an existing cul-de-sac, Kokora Street, as the access street to its subdivision. Kokora Street was approximately 885 feet long and had a 40-foot right of way, but its improved width was only 12 to 14 feet. The plaintiff developer's plan called for extending Kokora Street an additional 850 feet into its tract and paving the surface of the street a uniform width of 20 feet *along its entire length.*

The township's subdivision standards limited the length of dead-end streets to no more than 1,000 feet. The developer's planned extension would have made Kokura Street approximately 1,735 feet long, thus necessitating the grant of a waiver. The planning board denied the required waiver but indicated that it would have granted such a waiver if the developer had agreed to reduce the number of proposed lots from eight to seven. In upholding the Law Division's reversal of the planning board's denial of a waiver of the 1,000-foot limitation on the length of cul-de-sacs, the Appellate Division agreed with the trial judge's assessment that "the total improvement that would result from the cul-de-sac which the developer proposes to build, *coupled with what he propose[s] to do to improve the existing proportions of Kokora Street* that road's going to be a lot better off for everybody after this subdivision, whether . . . seven or eight lots . . . go[] in." *Id.* at 21 (emphasis added). The Appellate Division further agreed that the denial of the waiver was arbitrary and unreasonable.

Green Meadows is distinguishable from this case for several reasons. First, *Green Meadows* involved a request for a waiver of a local subdivision regulation, not a request for a *de minimis* exception from the RSIS rules. It was undisputed that the planning board in *Green Meadows* had the authority to waive the township subdivision regulation limiting the length of dead-end streets, pursuant to N.J.S.A. 40:55D-51(b). By contrast, the Planning Board in this case could only grant *de minimis* exceptions from the RSIS rules, not waivers of such rules. Thus, unlike in *Green Meadows*, a substantial question has been raised in this case as to whether the Planning Board even had the authority to grant such large deviations

from the RSIS rules as were requested by Kilburn, namely a 50% reduction in the prescribed right-of-way width and at least a 30% reduction in the required cartway width.

Second, the access road at issue in *Green Meadows* already had a uniform right-of-way width of 40 feet. Under Kilburn's proposal, on the other hand, the portion of Robertson Drive that extends along the outer edge of the proposed residential development would have only a 25-foot right-of-way width, with no assurance that it will ever be widened in the future by the dedication of additional right of way by adjoining property owners.

Third and perhaps most significantly, the developer in *Green Meadows* proposed to widen the paved surface of the access road from its existing 12 to 14 feet to a uniform 20 feet *along the entire length of the access street*. In this case, Kilburn has proposed, at most, to widen to 18 to 20 feet the paved surface of *only that portion of Robertson Drive adjoining lots 8 and 9*, thereby leaving dangerous bottlenecks to the north and south of the proposed improvements to Robertson Drive where the paved surface of the access street narrows to 11 feet. Finally, the arbitrariness of the decision of the planning board in *Green Meadows* stemmed in large part from its having indicated a willingness to grant a waiver of the 1,000-foot limitation on the length of cul-de-sacs if the developer agreed to reduce the number of lots in the proposed subdivision from eight to seven. The Midland Township Planning Board made no such suggestion in this case.

In short, the Planning Board properly exercised its discretion to deny the requested *de minimis* exceptions. Kilburn has failed to overcome the presumption of validity attaching

to the Board's decision; nor has Kilburn carried its burden of proof to demonstrate that the Board acted arbitrarily or unreasonably in denying the exceptions.

IV. EVEN ASSUMING THE BOARD ACTED ARBITRARILY IN DENYING THE RSIS EXCEPTIONS, THE CASE MUST BE REMANDED TO ALLOW THE BOARD TO MAKE APPROPRIATE FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE UNACCEPTED ROAD VARIANCE.

The Planning Board's decision nowhere addresses whether or not Kilburn should be granted a variance under N.J.S.A. 40:55D-35 from the zoning requirement that its proposed residential development front on a fully improved and accepted public right of way. Consequently, even assuming the Court concludes that the Board acted unreasonably in denying the requested *de minimis* exceptions from the RSIS standards, the matter must be remanded to the Board for further proceedings regarding the access variance. The Board should be directed to make appropriate findings of fact and conclusions of law regarding the grant or denial of the requested access variance in order to enable the courts on appeal to engage in a proper judicial review of the Board's decision.

CONCLUSION

In view of the arguments made and authorities cited above, the Midland Township Planning Board's decision of January 24, 2000 denying subdivision approval to Plaintiff Kilburn Development should be affirmed. Alternatively, the matter should be remanded to the Board with directions to make appropriate findings of fact and conclusions of law regarding Kilburn's application for a variance from the requirement that its residential development front on a fully improved and accepted public right of way.