

May 14, 2021

**Via E-Mail**

City of Newark Zoning Board of Adjustment  
City Hall  
920 Broad Street  
Newark, NJ 07102

Re: ZBA Appeal 21-21-A  
400 Doremus Avenue  
Block 5070, Lot 11  
Hearing date: June 10, 2021

Dear Members of the Zoning Board of Adjustment:

The Zoning Officer erred in determining that Aries Newark LLC (“Aries” or “applicant”) need not obtain a use variance (or “D Variance”) to develop a proposed use that is expressly prohibited by the Zoning Code. Aries proposes to construct and operate a facility that will accept sewage sludge for processing, but the Zoning Code excludes “sludge processing” from the term “heavy manufacturing” and otherwise does not allow sludge processing in the applicable Heavy Industrial I-3 Zone. In stark contrast to materials Aries submitted for its air permit, Aries stripped “sludge” from the materials submitted to the Zoning Officer and Planning Board and instead used euphemistic terms to avoid mentioning the term “sludge” at all. Aries’s change in language inaccurately represented that Aries’s proposed use was not sludge processing and obscured the true nature of the project from the Zoning Officer. Ironbound Community Corporation<sup>1</sup> (“ICC”) therefore appealed the Zoning Officer’s determination and now urges the Zoning Board to (1) reverse the Zoning Officer’s determination because Aries’s proposed use is expressly excluded from the zone, and (2) void the determination because of Aries’s misrepresentations to the Zoning Officer about the nature of its proposed use.

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<sup>1</sup> This appeal followed multiple letters from ICC to the Planning and Zoning Boards concerning the issues raised in this appeal. *See, e.g.*, Letter from ICC to Allison Ladd, Deputy Mayor of Newark (Feb. 22, 2021) (attached as **Exhibit 1**); Letter from Jonathan Smith et al., on behalf of ICC, to Ras J. Baraka, Mayor of Newark, and Wayne Richardson, Central Planning Board of Newark (Mar. 8, 2021) (attached as **Exhibit 2**).

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**FACTUAL BACKGROUND**

**A.    Aries’s Initial Air Permit Application for a “Sludge Processing” Facility**

In August 2020, Aries submitted an air permit application to the New Jersey Department of Environmental Protection (“DEP”) for a “sludge processing plant” that will “process sludge for disposal” at 400 Doremus Avenue, within the Heavy Industrial I-3 Zone.<sup>2</sup> Throughout the application, Aries described the material it would accept as “sludge,” described the purpose of the facility as “sludge processing,” and described plant equipment to include “receiving stations for sludge, sludge storage, sludge dryers,” etc.<sup>3</sup> More specifically, the application explained that the facility would process “430 wet tons of domestic wastewater sludge daily” from third parties

<sup>2</sup> Aries Newark Sludge Processing Plant, DEP, Aries Newark LLC, Air Permit Application at 1 (Aug. 20, 2020) (“Aries Air Permit Application, Aug. 2020”) (attached as **Exhibit 3**).

<sup>3</sup> Aries Air Permit Application, Aug. 2020, **Ex. 3** at 1, 5, 7–17, 27, 30, 33, 35, 38, 42, 46, 51, 56, 59, 70, 71, 73.

like the Passaic Valley Sewerage Commission<sup>4</sup> (“PVSC”) at a water (moisture) content of 70–82%.<sup>5</sup> The facility would then pump this sludge to dryers which use heat from a thermal oxidizer to dry the sludge down to a moisture content of 10%.<sup>6</sup> Aries would then place the dried sludge into a gasifier which converts its volatile components and most of its carbon into gas, which is then burned in the same thermal oxidizer that dried the sludge.<sup>7</sup> Aries estimates that after emission controls, this process would annually emit up to 45 tons of sulfur dioxide, 19 tons of ozone-forming nitrogen oxides, 13 tons of particulate matter, and 12 tons of carbon monoxide.<sup>8</sup> This process also results in a “byproduct that consists primarily of ash and a small amount of residual unconverted carbon.”<sup>9</sup>

## **B. Aries’s Application to the Zoning Officer for a “Biochar Manufacturing Facility”**

After submitting its air permit application to DEP for a “sludge processing” facility, Aires submitted a memo to the Zoning Officer that expressly stated that the facility was *not* a sludge processing facility.<sup>10</sup> That memo instead used the term “biosolids” to describe the sludge material that Aries would accept at the facility, and described the purpose of the facility as the “manufacture of natural gas and biochar,” with “biochar” being a term Aries used to describe the ash byproduct.<sup>11</sup> The memo noted that this “natural gas” would be “consumed by Aries in its process”—*i.e.*, burned in the thermal oxidizers to provide heat to dry the sludge—and that the “biochar” ash can be used “in lieu of fly ash and/or Portland Cement in the manufacture of concrete.”<sup>12</sup> This memo argued that, because Aries was not “sludge processing,” Aries qualified as “Heavy Manufacturing” under the Zoning Code.<sup>13</sup>

Based on this memo, on November 4, 2020, the Zoning Officer issued a determination that found that Aries needed site plan approval and C variances for insufficient landscaping and shade trees, but that no D variance was required.<sup>14</sup> Consistent with Aries’s memo, the Zoning Officer determination used the term “bio-solids” to describe the sludge input and “bio-char” to describe the ash output, explaining that Aries proposed to receive “bio-solids . . . for manufacturing bio-

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<sup>4</sup> See Eric Klefer, “The Big Poop Debate: Proposed Waste Plant Causes Outcry in Newark,” Patch.com (Mar. 3, 2021), <https://patch.com/new-jersey/newarknj/newarks-great-poop-debate-proposed-waste-plant-causes-outcry> (noting Aries intends to contract with PVSC to accept and “process whatever the PVSC can throw its way and more”). PVSC’s most recent Sludge Quality Assurance report lists only “sludge”—not biosolids—as the material that leaves the treatment plant. Attached as **Exhibit 4**.

<sup>5</sup> Aries Air Permit Application, Aug. 2020, **Ex. 3** at 1.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 9.

<sup>9</sup> *Id.* at 1.

<sup>10</sup> Aries Memo to the Zoning Officer (n.d.) at 2 (“Aries Memo”) (attached as **Exhibit 5**).

<sup>11</sup> *Id.* at 1.

<sup>12</sup> *Id.* at 2.

<sup>13</sup> *Id.* at 1–2.

<sup>14</sup> Zoning Officer Determination (Nov. 4, 2020) (attached as **Exhibit 6**).

char and natural gas.”<sup>15</sup> The determination did not use the term “sludge” or “sludge processing.”<sup>16</sup>

### C. Aries’s Subsequent Submittals to DEP and the Planning Board

After this Zoning Officer determination, Aries continued to try to rebrand and recharacterize its facility as a “biochar manufacturing” facility that processes sludge. Aries’s follow up air permit submittals to DEP in November and December 2020, for example, largely erased the word “sludge” to replace it with “biosolids,” and erased the words “sludge processing” to replace them with the words “biochar production/manufacturing.”<sup>17</sup> Despite the change in terminology, Aries did not change the operations or processes it originally proposed in its August 2020 application for a “sludge processing plant” permit.<sup>18</sup>

Aries’s December 15, 2020 site plan application and other subsequent submittals to the Planning Board similarly continued to characterize the facility as “biochar manufacturing” under the “heavy manufacturing” use and avoided using the word “sludge” at all.<sup>19</sup> The Planning Board has proceeded on Aries’s application as if the facility were not a “sludge processing” facility, docketing the site plan application at its February 22, March 15, April 19, and forthcoming May 17, 2021 hearings.<sup>20</sup>

But DEP and others have rejected Aries’s newfound recharacterization of its facility as something other than “sludge processing.” For example, after Aries had reworked its application to DEP to rename the facility as a “biochar production plant” that accepts “biosolids,” DEP sent two letters to Aries explaining that its facility would still be regulated as a sludge processing facility, no matter the terms Aries prefers to use.<sup>21</sup> Similarly, after a public meeting in which Aries claimed its facility would not process sludge, the Newark Environmental Commission

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See Aries Newark LLC, Newark Biochar Production Facility Air Permit Process Description at 5, 6 (Nov. 30, 2020) (“Aries Air Permit Application, Nov. 2020”) (attached as **Exhibit 7**); Aries Newark Biochar Production Facility, DEP, Aries Newark LLC, Air Permit Application at 1 (Dec. 1, 2020) (attached as **Exhibit 8**).

<sup>18</sup> Compare Aries Air Permit Application, Aug. 2020, **Ex. 3** at 1 (“[Aries will] process and dispose of up to 430 wet tons of domestic wastewater sludge daily. . . . The facility will process domestic sludge of between 70 - 82% moisture from 3rd parties.”) with Aries Air Permit Application, Nov. 2020, **Ex. 7** at 3 (“The Facility will receive up to 430 tons/day of 70% to 82% domestic untreated sewage biosolids.”).

<sup>19</sup> See Aries Newark LLC, Central Planning Board Application at 1, 4 (Dec. 15, 2020) (attached as **Exhibit 9**); Letter from Stephen Hoyt, Pennoni Associates, Inc., to John Barree, City of Newark (Jan. 21, 2021) (attached as **Exhibit 10**); see also Aries Newark LLC, Environmental Justice and Cumulative Impacts Form (Jan. 20, 2021) (attached as **Exhibit 11**); Aries Newark LLC, Stormwater Management Report (Jan. 25, 2021) (attached as **Exhibit 12**).

<sup>20</sup> As of the date of this brief, Aries consented to adjournment of the application at all such hearings. The Planning Board has continued to docket and hear this application despite the automatic stay that began with the March 11, 2021 filing of ICC’s appeal. See N.J.S.A. 40:55D-75; Newark Code § 41:15-13-1.

<sup>21</sup> Letter from Gary Nickerson, DEP, to Stephen Hoyt, Pennoni Associates, Inc. (Jan. 26, 2021) (“DEP Deficiency Letter”) (attached as **Exhibit 13**); Letter from Gary Nickerson, DEP, to Stephen Hoyt, Pennoni Associates, Inc. (Mar. 18, 2021) (“DEP Sludge Letter”) (attached as **Exhibit 14**).

issued a report finding that the facility would indeed process sludge and that this proposed use is prohibited under the Zoning Code.<sup>22</sup> The Environmental Commission recommended that the Planning Board deny Aries's application based on the proposed facility's potential impacts to air quality, truck traffic, flooding, emergency preparedness, and other factors.<sup>23</sup>

## STANDARD OF REVIEW

New Jersey law allows the zoning boards of adjustment to “[h]ear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by an administrative officer based on or made in the enforcement of the zoning ordinance.” N.J.S.A. 40:55D-70(a); *see also Congregation Anshei Roosevelt v. Planning & Zoning Bd. of the Borough of Roosevelt*, No. A-1390-09T3, 2011 WL 408789, at \*9 (N.J. Super. Ct. App. Div. Feb. 9, 2011) (“The determination of whether to enforce a zoning officer’s decision generally is within the discretion of a zoning board.”). If error is found, the proper remedy is for the board to reverse the faulty order or determination. *See United Advert. Corp. v. Howell Twp. Planning Bd.*, No. A-3014-14T2, 2016 WL 5746629, at \*6 (N.J. Super. Ct. App. Div. Oct. 4, 2016); *Tricare Treatment Servs., L.L.C. v. Chatham Borough Planning Bd.*, No. A-0864-13T1, 2014 WL 6634839, at \*4 (N.J. Super. Ct. App. Div. Nov. 25, 2014).

## ARGUMENT

### **I. ARIES PROPOSES A PROHIBITED USE, SO THE BOARD SHOULD REVERSE THE ZONING OFFICER DETERMINATION THAT DID NOT REQUIRE ARIES TO SEEK A USE VARIANCE.**

The Board should reverse the Zoning Officer’s determination, which erroneously determined that no use variance was required. To the contrary, Aries’s proposed use—sludge processing—is prohibited in the I-3 Zone where Aries seeks to develop. While Aries freely admits that this proposed use is “sludge processing” in other contexts, Aries’s communications to the Zoning Officer affirmatively claimed that it would *not* process “sludge” and instead used the misleading term “biosolids.” Even if Aries prefers the term “biosolids,” biosolids are a type of sludge, so the facility would still be processing sludge. Whatever name is used, Aries’s proposed use is a prohibited use, so Aries must obtain a use variance to continue its application.

New Jersey law requires applicants for proposed uses not permitted in the applicable zone to obtain a use variance from the zoning board of adjustment. N.J.S.A. 40:55D-70(d); Newark Code § 41:12-5-4(1); *see also* N.J.S.A. 40:55D-60; Newark Code § 41:11-5-3(1) (providing that planning boards lack the power to grant use variances). Under the Newark Zoning Code, sludge processing is a prohibited use in the I-3 Zone. Newark Code § 41:4-3 (failing to list sludge processing under the list of I-3 permitted uses and noting “[a]ny use not listed below is . . . prohibited”); *id.* § 41:2-2 (excluding “sludge processing” from the definition of “Manufacturing,

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<sup>22</sup> Letter from Newark Environmental Commission to Ras J. Baraka, Mayor of Newark, and Wayne Richardson, Central Planning Board of Newark, Recommendations on the Aries Newark LLC Sludge Processing Facility, Application No. CPB 20-74 at 1–2 (Apr. 16, 2021) (attached as **Exhibit 15**).

<sup>23</sup> *Id.*

Heavy”). Here, Aries seeks to develop a lot in the I-3 Zone for the purpose of processing sludge.<sup>24</sup> The Zoning Officer therefore erred in determining that no use variance was necessary for this application.

While Aries categorized its proposed use as “heavy manufacturing,”<sup>25</sup> the Zoning Code expressly lists “Sludge Processing” as a process that is not permitted under “Manufacturing, Heavy.” Newark Code § 41:2-2. The Zoning Code leaves no doubt that any type of sewage sludge facility is prohibited, excluding not just “Sludge Processing” but also “Sludge . . . Incineration, Sewage Disposal . . . Biomass Incineration . . . [and] Power Plants over 150 megawatts using . . . waste or waste byproducts including . . . sludge.” *Id.* Thus, the “Heavy Manufacturing” category does not cover sludge processing and, therefore, cannot save the Zoning Officer’s determination that no use variance was required.

Aries’s memo to the Zoning Officer claims that its facility is not “sludge processing” based on its representation that “[t]he biosolids Aries uses as a raw material are treated at the point of generation as required by regulations of the United States Environmental Protection Agency [EPA] and the New Jersey Department of Environmental Protection so that it is otherwise safe for use as a land supplement or for landfill cover” and that these “biosolids have already been ‘processed’ before they are brought to the Aries facility.”<sup>26</sup> Here, Aries uses the term “biosolid” in conformance with industry practice to rebrand treated sludge as “biosolids” and avoid the negative connotations of the term “sewage sludge.”<sup>27</sup> But the mere fact that sludge has undergone some processing or carries the “biosolids” label does not mean that the substance is no longer “sludge.” DEP has already notified Aries that it considers “biosolids” to be a type of sewage sludge, explaining that,

. . . biosolids are categorized as sewage sludge under the Department’s applicable regulations, and that sewage sludge is considered a solid waste. . . . While there is no state or federal definition of the term “biosolid,” the Department’s NJPDES rules, at N.J.A.C. 7:14A-1.2, define sewage sludge as including “any material derived from sewage sludge.” Under this definition, “biosolids”, which appear to be a form of processed sewage sludge, fall within this regulatory definition. . . . Accordingly, biosolids are considered a solid waste under the above-referenced regulatory definitions and the project is therefore required to comply with [sewage sludge regulations].<sup>28</sup>

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<sup>24</sup> See Aries Air Permit Application, Aug. 2020, **Ex. 3** at 1 (“Aries Clean Energy is developing a project in Newark, New Jersey to process sludge for disposal, the ‘Newark Sludge Processing Plant’”); DEP Deficiency Letter, **Ex. 13** at 1, 2; DEP Sludge Letter, **Ex. 14**.

<sup>25</sup> Aries Memo, **Ex. 5** at 1; Central Planning Board Application, **Ex. 9** at 1.

<sup>26</sup> Aries Memo, **Ex. 5** at 1–2.

<sup>27</sup> See Expert Report of Dr. Ranajit Sahu (“Sahu Report”), Aries Newark LLC Sludge Processing Facility, Application No. CPB 20-74 at 3 (May 14, 2021) (attached as **Exhibit 16**).

<sup>28</sup> DEP Sludge Letter, **Ex. 14**.

EPA regulations similarly define “sludge” to broadly include “a material derived from sewage sludge,” 40 C.F.R. § 503.9(w), and do not otherwise carve out an exemption for “treated sludge” or “biosolids” from this definition.<sup>29</sup> Thus, Aries’s facility processes “sludge” regardless of whether it accepts sludge that is rebranded as “biosolids” or has otherwise received some treatment before arriving at the facility.

And this sludge is “processed” once it arrives at the facility, despite Aries’s representations otherwise to the Zoning Officer.<sup>30</sup> The dictionary defines “processing” as “the treatment of raw material, food, etc. in order to change it, preserve it, etc.”<sup>31</sup> Nothing in that definition suggests that just because the sewage first undergoes some “processing” by being changed into sludge at a wastewater treatment plant, then the sludge is no longer “processed” when it is pumped, dried, converted into gas and ash, and burned at the Aries facility. DEP’s letter to Aries confirms that the facility is processing sludge, stating “[sludge] will be stored and processed at the proposed facility.”<sup>32</sup>

In addition, Aries’s representations to the Zoning Officer are wrong as a factual matter because Aries’s proposed project design indicates that the facility is clearly processing sludge. Aries’s application materials indicate that the facility will accept material that is 70–82% moisture, and that it will use pumps to transport this wet sludge before it is dried down to a 10% moisture content suitable for gasification.<sup>33</sup> The pumping and drying operations at the facility would be either impossible or unnecessary if the material was something other than sludge.<sup>34</sup> As the term *bio-solids* suggests, treatments that make sludge suitable as a land supplement result in a solid or paste-like substance with a much lower moisture content than what will be processed at Aries’s facility.<sup>35</sup> Further, most of the material processed at Aries’s facility is coming from PVSC, a wastewater treatment facility that produces sludge only.<sup>36</sup> Despite Aries’s preference to use the euphemistic term biosolids to describe its operations, it is processing sludge and that is a prohibited use in Newark.

Indeed, Aries’s representations to the Zoning Officer that it would accept “treated biosolids” runs counter to the overwhelming weight of Aries’s own statements in other contexts that what Aries

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<sup>29</sup> See 40 C.F.R. § 127, App. A (“[T]he term ‘sewage sludge’ [see 40 CFR 503.9(w)] also refers to the material that is commonly referred to as ‘biosolids.’ EPA does not have a regulatory definition for biosolids but this material is commonly referred to as sewage sludge that is placed on, or applied to the land to use the beneficial properties of the material as a soil amendment, conditioner, or fertilizer. EPA’s use of the term ‘biosolids’ in this appendix is to confirm that information about beneficially used sewage sludge (a.k.a. biosolids) is [subject to same regulatory requirements as sewage sludge].”); see also 40 C.F.R. § 127.2(d) (referring to EPA’s “Federal Sewage Sludge (Biosolids) Program” without distinguishing between the two terms).

<sup>30</sup> See Aries Memo, **Ex. 5** at 1–2 (“[The proposed use] is not “sludge processing” [because] the biosolids have already been ‘processed’ before they are brought to the Aries facility.”).

<sup>31</sup> Oxford Learner’s Dictionary, “Definition of Processing,” <https://www.oxfordlearnersdictionaries.com/definition/english/processing> (last visited May 14, 2021).

<sup>32</sup> DEP Deficiency Letter, **Ex. 13** at 1, 2.

<sup>33</sup> Aries Air Permit Application, Aug. 2020, **Ex. 3**; Aries Air Permit Application, Nov. 2020, **Ex. 7**.

<sup>34</sup> Sahu Report, **Ex. 16** at 3–4.

<sup>35</sup> *Id.*; see also 40 C.F.R. § 503, App. B (noting that, to be safe for land application, sludge must at a minimum be treated by aerobic or anaerobic digestion, composting, air drying, or lime stabilization).

<sup>36</sup> *Id.* at 3; see also note 4 *supra*.

intends to do is process untreated “sludge.” Aries’s patent for the gasification technology it will use at the proposed Newark facility explains that its technology uses a “process [that] begins with . . . removing water content from the wet *sewage sludge*” and that the “dried *sludge* . . . is now slowly added to begin heat generation” in the gasifier.<sup>37</sup> As noted above, Aries’s initial air permit application to DEP admits throughout that the facility processes “sludge.”<sup>38</sup> A subsequent submittal to DEP for the proposed Newark facility changes most references from “sludge” to “biosolids” but nevertheless continues to admit that the material the facility will accept is “untreated.”<sup>39</sup> Aries’s own website and statements by Aries’s CEO similarly use the term “sludge” to describe the material processed by the company’s technology.<sup>40</sup> EPA, DEP, and other state agencies have categorized the facilities operated by Aries or its predecessor company as “sludge processing” facilities, notwithstanding Aries’s preference for the term “biosolids.”<sup>41</sup>

Thus, neither the law, the facts, nor Aries’s own statements allow Aries to be exempt from the Zoning Code’s prohibition on “sludge processing” facilities. The Zoning Officer determination that no use variance was required was therefore in error and should be reversed.

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<sup>37</sup> Aries Gasification, LLC Patent at 15, 16, 19, No. US 10,696,913 B2 (June 30, 2020) (attached as **Exhibit 17**) (emphasis added).

<sup>38</sup> Aries Air Permit Application, Aug. 2020, **Ex. 3**.

<sup>39</sup> Aries Air Permit Application, Nov. 2020, **Ex. 7** at 6.

<sup>40</sup> Prior statements by Aries CEO Greg Bafalis made no distinction between “sewage sludge” and “biosolids.” See Ben Messenger, “IN-DEPTH: Aries Clean Energy: Taking Gasification Mainstream in the US,” *Waste Management World* (Mar. 12, 2019), <https://waste-management-world.com/a/in-depth-aries-clean-energy-taking-gasification-mainstream-in-the-us> (“‘The great thing about fluidised beds is that they scale fairly easily,’ notes Bafalis. ‘The vessel itself, how we seed the *sludge*, the ability to gasify the *sludge*, the operating system around that, are all part of the patent. There are other fluidised bed systems that do other feedstocks, mainly coal... but this will be the largest gasification of *biosolids* that we can find anywhere in the world.’” (emphasis added)). The landing page of Aries’s website acknowledges that biosolids are “treated sludge.” Aries Clean Technologies, <https://ariescleantech.com/> (last visited May 13, 2021) (attached as **Exhibit 18**). And an Aries webpage uses the terms “biosolids” and “sludge” interchangeably in text and a detailed diagram of their gasification technology which repeatedly explains how “sludge” is received, stored, and processed. Aries Clean Technologies, “Fluidized Bed Gasification,” <https://ariescleantech.com/gasification/fluidized-bed-gasification/> (last visited May 13, 2021) (attached as **Exhibit 19**).

<sup>41</sup> Eight years ago, EPA considered a MaxWest facility that uses the same technology to be a “sewage sludge gasifier,” noting that MaxWest “provides that the biosolid feed to the gasifier is sewage sludge.” Letter from Edward Messina, Office of Compliance, EPA, to Jeff Snyder, Chief Marketing Officer, MaxWest Environmental Systems Inc. (Dec. 19, 2013), <http://www.energyjustice.net/files/incineration/epa-maxwest.pdf>. After 18 months of operating this facility, MaxWest went bankrupt, and Aries subsequently bought that technology to use in its proposed New Jersey facilities. See Ben Messenger, “Aries Clean Energy: Taking Gasification Mainstream in the US,” note 40, *supra*. As noted above, DEP has found that Aries’s proposed facility is a sewage sludge processing facility. DEP Deficiency Letter, **Ex. 13**; DEP Sludge Letter, **Ex. 14**. And the Massachusetts Environmental Protection Agency classified Aries’s proposed facility there as a “sewage sludge” processor, despite Aries marketing the facility as a “biosolids gasification facility.” Letter from Everose Shluter, Assistant Dir., Mass Wildlife, to Kathleen A. Theoharides, Epsilon Associates Inc., Environmental Notification Form at 1 (Dec. 30, 2020), [https://www.taunton-ma.gov/sites/g/files/vyhlif1311/f/pages/20201230\\_enf\\_ariescleanenergy.pdf](https://www.taunton-ma.gov/sites/g/files/vyhlif1311/f/pages/20201230_enf_ariescleanenergy.pdf) at 1; Mass. EPA, *Notice of MEPA Remote Consultation Session/Video Conference*, EEA No. 16311 (Jan. 2021), [https://www.taunton-ma.gov/sites/g/files/vyhlif1311/f/pages/aries\\_notice\\_of\\_mepa\\_remote\\_consultation\\_session.pdf](https://www.taunton-ma.gov/sites/g/files/vyhlif1311/f/pages/aries_notice_of_mepa_remote_consultation_session.pdf).



## **II. THE ZONING OFFICER'S DETERMINATION IS VOID FOR BEING BASED ON THE APPLICANT'S MISREPRESENTATIONS.**

Not only is the Zoning Officer determination incorrect, but it is also void for having been based on Aries's material misrepresentations. Determinations of planning and zoning boards and their officers are void when based on an applicant's misrepresentation of the proposed use. *Zoning Bd. of Adjustment of Green Brook Twp. v. Datchko*, 142 N.J. Super. 501, 505 (App. Div. 1976) (affirming town's rescission of land use approvals to store owners who had represented that they would sell "transistor radios . . . stereo tapes, all small item categories" but instead operated an adult bookstore). This is because "[t]he township, the zoning officer and the zoning board have a substantial public interest in preserving the integrity of the zoning ordinance." *Id.* at 508. In addition, "misrepresentations den[y] the municipal agencies of an opportunity to review all of the facts before determining the propriety of the [land use] approval . . . in the light of proper zoning considerations." *Id.* Even rezoning ordinances are themselves invalid if based on the misrepresentations of the affected property owner. *See Trinity Cemetery Ass'n, Inc. v. Twp. of Wall*, 170 N.J. 39, 42 (2001) (noting rezoning was based on applicant's indicated proposed use of a "pastoral, park-like" cemetery but applicant's true intention was to build "large mausoleum structures . . . surrounded by a massive stone wall").

Here, Aries did not provide all "necessary" information so that the Zoning Officer may "render a determination as to the type of application required," per the Zoning Code. Newark Code § 41:15-12-1(1). Aries's memo to the Zoning Officer affirmatively claimed that the facility was *not* a "sludge processing" facility, instead using euphemistic terms like "biosolids" and "biochar manufacturing" to claim that the facility was allowed as a "heavy manufacturing" use.<sup>42</sup> Aries's failure to disclose the true proposed use is a material misrepresentation because it hampers the Zoning Officer's ability to carry out her duty to "compare the contents of a submission to the requirements of the municipal ordinance." *Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Twp. of Franklin*, 233 N.J. 546, 562 (2018). Based on the inaccurate contents of Aries's submission, the Zoning Officer relied on these misrepresentations to similarly describe the project as using "biosolids" for "manufacturing bio-char and natural gas," and to thereby conclude that no use variance was required.<sup>43</sup> This misrepresentation renders the Zoning Officer's determination void.

Thus, the Board should find the Zoning Officer's determination to be void, and Aries must not be allowed to bypass the use-variance procedure by misleading the Zoning Officer. To do otherwise would threaten the "substantial public interest in preserving the integrity of the zoning ordinance." *Datchko*, 142 N.J. Super. at 508.

## **III. THE ZONING BOARD HAS JURISDICTION OVER ICC'S APPEAL.**

### **A. ICC is an Interested Party.**

The Municipal Land Use Law ("MLUL") provides that appeals to the Zoning Board may be made by "any interested party," N.J.S.A. 40:55D-72(a), defined as "any person, whether residing

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<sup>42</sup> Aries Memo, **Ex. 5**.

<sup>43</sup> Zoning Officer Determination, **Ex. 6**.

within or without the municipality, whose right to use, acquire, or enjoy property is or may be affected” by the appealed action, N.J.S.A. 40:55D-4. Courts have found community organizations and appellants within the same neighborhood as the applicant to be “interested parties.” See *Johnson v. Downe Twp.*, No. A-4403-13T2, 2016 WL 7148400, at \*3 (N.J. Super. Ct. App. Div. Dec. 7, 2016); *Historic Paulus Hook Ass’n v. Zoning Bd. of Adjustment for City of Jersey City*, A-4001-08T2, 2010 WL 520496, at \*7 (N.J. Super. Ct. App. Div. Feb. 16, 2010).

Here, ICC is an “interested party” under the MLUL. ICC is a 501(c)(3) nonprofit organization headquartered in the Ironbound neighborhood, where Aries proposes to build and operate its sludge processing facility. ICC’s mission is to serve and represent Ironbound residents whose wellbeing and the use and enjoyment of their properties would be adversely affected by the air pollution and other environmental impacts of the Aries plant if it were approved and constructed. In addition, ICC has offices and runs programming at five locations in the Ironbound, including two locations that are just over one mile from Aries’s proposed site, and ICC’s use and enjoyment of those properties would also be adversely affected if the facility were approved and constructed.

## **B. ICC’s Appeal Is Timely.**

The MLUL provides that appeals to the Zoning Board “shall be taken within 20 days,” N.J.S.A. 40:55D-72(a); see also Newark Code § 41:15-13, but does not specify the event that triggers the commencement of the twenty-day limitations period, *Harz v. Borough of Spring Lake*, 234 N.J. 317, 322 (2018). New Jersey courts have held that “the time for appeal begins to run from the date an interested person knew or should have known of the permit’s issuance.” See *id.* (quoting *Trenkamp v. Burlington Twp.*, 170 N.J. Super. 251, 267–68 (Law. Div. 1979)); see also *Sitkowski v. Zoning Bd. of Adjustment of Lavallette*, 238 N.J. Super. 255, 260 (App. Div. 1990). This approach is necessary “because no provision requires the administrative officer to notify a nearby property owner about the issuance of a zoning permit, [so] the property owner may not know of the official action until well beyond the twenty-day limitations period.” *Harz*, 234 N.J. at 322; *Trenkamp*, 170 N.J. Super. at 268. And because “[t]he law does not saddle the public with an obligation requiring the constant scrutiny of voluminous official documents,” *Trenkamp*, 170 N.J. Super. at 259, New Jersey courts have found that this twenty-day period runs from the time the appellant or appellant’s counsel obtained a copy of the document, and not from the date of the document’s issuance. See, e.g., *Vorhies v. Bd. of Adjustment of Twp. of Rockaway*, No. A-1213-18T4, 2020 WL 5361142, at \*3 (N.J. Super. Ct. App. Div. Sept. 8, 2020).

While the Zoning Officer issued her determination on November 4, 2020, no public notice was provided, and this determination was not made available to the public until the Planning Board posted its agenda for the hearing scheduled for February 22, 2021. ICC became aware that Aries’s proposed facility was not a permitted use on February 22, 2021, after reviewing the Newark Zoning Ordinance in preparation for the Planning Board hearing later that day. As soon as this issue came to its attention, ICC sent a letter to the Planning Board explaining that Aries was a prohibited use.<sup>44</sup> ICC did not obtain the Zoning Officer determination that is the subject of

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<sup>44</sup> See Letter from ICC to Allison Ladd, Deputy Mayor of Newark (Feb. 22, 2021), **Ex. 1**.

this appeal until March 3, 2021 after several attempts to obtain the document by contacting the Zoning Officer, Planning Board, and Zoning Board by phone and email.<sup>45</sup> It was only upon obtaining the Zoning Officer determination that ICC first reviewed its contents and discovered that the determination was based on Aries's misrepresentations. ICC then filed this notice of appeal as soon as possible, along with a follow-up letter to the Planning Board and others on this issue.<sup>46</sup> Thus, ICC did not know about the Zoning Officer determination until March 3, 2021, and this appeal is timely.

## CONCLUSION

For the reasons explained above, the Zoning Board should reverse or otherwise declare as void the Zoning Officer determination appealed here and require Aries to seek a use variance before proceeding with its prohibited use. To hold otherwise would threaten "the integrity of the zoning ordinance" by allowing applicants to avoid the use-variance procedure entirely merely by misrepresenting their prohibited use to the Zoning Officer. *See Datchko*, 142 N.J. Super. at 508.

Dated: May 14, 2021

Respectfully submitted,

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<sup>45</sup> See Email from Rachel Stevens, Counsel for ICC, to Planning Board Staff (Mar. 2, 2021) (attached as **Exhibit 20**); Email from Rachel Stevens, Counsel for ICC, to Zoning Officer and Planning Board Clerk (Mar. 3, 2021) (attached as **Exhibit 21**).

<sup>46</sup> See Letter from Jonathan Smith et al., Counsel for ICC, to Zoning Officer Susan Brown, Notice of Appeal of Zoning Determination (Mar. 11, 2021); Letter from Jonathan Smith et al., on behalf of ICC, to Ras J. Baraka, Mayor of Newark, and Wayne Richardson, Central Planning Board of Newark (Mar. 8, 2021), **Ex. 2**.

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*Counsel for Ironbound Community  
Corporation*

\* Notification of multi-jurisdictional practice  
attached to March 11, 2021 Notice of Appeal

## TABLE OF EXHIBITS

- Exhibit 1:** Letter from ICC to Allison Ladd, Deputy Mayor of Newark (Feb. 22, 2021)
- Exhibit 2:** Letter from Jonathan Smith et al., on behalf of ICC, to Ras J. Baraka, Mayor of Newark, and Wayne Richardson, Central Planning Board of Newark (Mar. 8, 2021)
- Exhibit 3:** Aries Newark Sludge Processing Plant, DEP, Aries Newark LLC, Air Permit Application (Aug. 20, 2020)
- Exhibit 4:** Passaic Valley Sewerage Commission, Sludge Quality Assurance Report
- Exhibit 5:** Aries Memo to the Zoning Officer (n.d.)
- Exhibit 6:** Zoning Officer Determination (Nov. 4, 2020)
- Exhibit 7:** Aries Newark LLC, Newark Biochar Production Facility Air Permit Process Description (Nov. 30, 2020)
- Exhibit 8:** Aries Newark Biochar Production Facility, DEP, Aries Newark LLC, Air Permit Application (Dec. 1, 2020)
- Exhibit 9:** Aries Newark LLC, Central Planning Board Application (Dec. 15, 2020)
- Exhibit 10:** Letter from Stephen Hoyt, Pennoni Associates, Inc., to John Barree, City of Newark (Jan. 21, 2021)
- Exhibit 11:** Aries Newark LLC, Environmental Justice and Cumulative Impacts Form (Jan. 20, 2021)
- Exhibit 12:** Aries Newark LLC, Stormwater Management Report (Jan. 25, 2021)
- Exhibit 13:** Letter from Gary Nickerson, NJDEP, to Stephen Hoyt, Pennoni Associates, Inc. (Jan. 26, 2021)
- Exhibit 14:** Letter from Gary Nickerson, NJDEP, to Stephen Hoyt, Pennoni Associates, Inc. (Mar. 18, 2021)
- Exhibit 15:** Letter from Newark Environmental Commission to Ras J. Baraka, Mayor of Newark, and Wayne Richardson, Central Planning Board of Newark, Recommendations on the Aries Newark LLC Sludge Processing Facility, Application No. CPB 20-74 (Apr. 16, 2021)
- Exhibit 16:** Expert Report of Dr. Ranajit Sahu (“Sahu Report”), Aries Newark LLC Sludge Processing Facility, Application No. CPB 20-74 (May 14, 2021)
- Exhibit 17:** Aries Gasification, LLC Patent, No. US 10,696,913 B2 (June 30, 2020)
- Exhibit 18:** Aries Clean Technologies, <https://ariescleantech.com/> (last visited May 13, 2021)
- Exhibit 19:** Aries Clean Technologies, “Fluidized Bed Gasification,” <https://ariescleantech.com/gasification/fluidized-bed-gasification/> (last visited May 13, 2021)

**Exhibit 20:** Email from Rachel Stevens, Counsel for ICC, to Planning Board Staff (Mar. 2, 2021)

**Exhibit 21:** Email from Rachel Stevens, Counsel for ICC, to Zoning Officer and Planning Board Clerk (Mar. 3, 2021)