FILED, Clerk of the Appellate Division, March 20, 2024, **A-000705-23**, **AMENDED**

66 KINDERKAMACK, LLC,	: SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000705-23
Plaintiff-Appellant,	: On Appeal From:
v.	: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: BER-L-1399-23
BOROUGH OF ORADELL ZONING BOARD OF ADJUSTMENT,	
Defendant-Respondent.	: Sat Below: Hon. Christine Farrington, J.S.C., ret'd, t/a

BRIEF OF PLAINTIFF-APPELLANT 66 KINDERKAMACK, LLC

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PRELIMINARY STATEMENT

The plethora of evidence wholeheartedly establishes that Defendant-respondent, the Borough of Oradell Zoning Board of Adjustment's ("Zoning Board") denial of plaintiff-appellant, 66 Kinderkamack, LLC's ("66 Kinderkamack" or "Plaintiff") second application for site plan approval and variance relief to permit the redevelopment of the vacant lot located at 66 Kinderkamack Road, Oradell, into a modern mixed-use building was arbitrary, capricious, unreasonable, and otherwise without basis in law or fact and contrast to the fundamental principles of sound planning in violation of the Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-1 et seq.

66 Kinderkamack presented insurmountable evidence to show that the application was inherently beneficial and that the proposed site is particularly suitable for the proposed use. On the other hand, the Zoning Board's denial, particularly of the (d)(1) Use Variance, failed to make any findings of fact and conclusions of law supported by substantial evidence with respect to either the positive or negative criteria.

The trial court likewise failed to address the Borough of Oradell's ("Borough") failure to make findings of fact and conclusions of law with respect to the Zoning Board's denial of the (d)(1) use variance or that the Borough's own conflicting ordinances improperly created the situation whereby 66

Kinderkamack had to apply for a (d)1 use variance to build any type of residential development with affordable housing. Specifically, in the B-3 zone (where the site is located), mixed uses are permitted provided the apartments are an undefined "efficiency apartment". A rudimentary review of the Borough's Master Plan, Ordinance No. 19-05 and settlement agreement between the Borough and Fair Share Housing Center, which expressly mandates that all multifamily dwellings be constructed in the Borough contain a minimum 15% set aside of affordable housing units that comply with the bedroom distributions set forth within Section 5:80-26.3 of the New Jersey Uniform Housing Affordability Controls ("UHAC"), prove that a multitude of discrepancies exist within the Borough's Code concerning any new development and the type of apartments contained therein. Therefore, it is self-evident that nearly any proposed development would necessitate and require a d(1) use variance, as what occurred here.

Along the same vein, 66 Kinderkamack presented substantial evidence concerning the positive criteria and overwhelming evidence that the application would not be a substantial detriment to the public good. Indeed, it is uncontested that 66 Kinderkamack's experts offered testimony illustrating that the application is consistent with the permitted uses in the B-3 zone, as well as the

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Land Use Plan of the 2018 Master Plan and the Borough's Affordable Housing Settlement Agreement.

Notably, no expert testimony exists to refute or rebut the credible testimony proffered by 66 Kinderkamack's experts. Indeed, the Zoning Board's denial merely rendered conclusions and ultimate findings with no correlation to supporting evidence other than the Zoning Board's thoughts that the proposal was too large. To substantiate this conclusion, the Zoning Board's resolution proffers guidance that was never raised during the hearings.

Lastly, when ruling on the second application, the trial court incorrectly determined that 66 Kinderkamack did not satisfy the positive criteria despite overwhelming testimony and evidence to the contrary. In making this determination, the trial court ignored the testimony that it was impossible for any commercial or mixed-use development to comply with the Borough's artificially low floor area ratio, as indicated in the Borough's own Master Plan.

Taken together as a whole, the Second Application for the redevelopment of the proposed site must be granted and the trial court's decision, which denied the application, must be reversed.

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PROCEDURAL HISTORY

In or around November 2021, 66 Kinderkamack applied to the Zoning Board, seeking a use variance and certain bulk variances, including a floor area ratio ("FAR") variance, preliminary and final site plan approval, and other relief (the "First Application"). Pa69. After multiple meetings and a public hearing, during which 66 Kinderkamack revised its plans numerous times to include the multiple recommendations and suggestions of the Zoning Board, the Zoning Board (in a 4-3 vote in favor of the application) denied the First Application on March 21, 2022, and adopted a memorializing resolution on April 18, 2022. Pa105.

In or around June 2022, 66 Kinderkamack again applied to the Zoning Board seeking, among other relief, a d(1) use variance and a d(4) FAR variance on a greatly reduced-sized project (the "Second Application"). Pa439. Similarly, the Second Application requested four (4) bulk variances. Id. After a public hearing spanning five (5) meetings, the Zoning Board denied the Second Application on November 21, 2022, and adopted a memorializing resolution on December 19, 2022. Pa144.

On March 15, 2023, 66 Kinderkamack filed a complaint in lieu of prerogative writs with the Superior Court of New Jersey challenging the Zoning Board's denial of the Second Application. Pa41. The case was briefed, and the

trial court heard oral argument on September 22, 2023. Concurrently on September 22, 2023, Judge Farrington issued an opinion and final Order, confirming the Zoning Board's denial of the Second Application. Pa1.

Thereafter, 66 Kinderkamack filed a notice of appeal on November 6, 2023. Pa438.

STATEMENT OF FACTS

A. The Borough of Oradell's Affordable Housing Obligation

On June 18, 2018, the Borough, and Fair Share Housing Center ("FSHC") entered into a settlement agreement (the "FSHC Settlement Agreement") to address the Borough's outstanding and non-conforming affordable housing obligations. Pa327. On July 24, 2018, the trial court approved the FSHC Settlement Agreement. Pa343.

Pursuant to the terms of the FSHC Settlement Agreement, the Borough, on February 26, 2019, adopted Ordinance No. 19-05, which mandated a set-aside of fifteen percent (15%) for affordable rental units on any multifamily residential development of five (5) dwelling units or more. Pa351. Simultaneously with Ordinance No. 19-05, the Borough adopted Ordinance No. 19-02, which specifically mandated that for any new construction in the Borough, such construction must contain one-, two-, and three-bedroom housing units to comply with the Borough's overlay zone. Pa358.

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B. The Property and the Borough's "B-3 Zone"

66 Kinderkamack is the contract purchaser of the property known as Block 113, Lot 5, located at 66 Kinderkamack Road, Oradell, New Jersey (the "Property"). Pa388. The Property is located in the Borough's Zoning District B-3 Zone (Business and Apartment District) ("B-3 Zone"), which permits business, professional and governmental offices, retail stores, as well as radio and television repair, furniture repair, and other similar service establishments furnishing services other than that of a personal nature. Pa389. Moreover, efficiency apartments and garden apartments that house four (4) or more dwelling units are the only permitted multifamily residential uses in the B-3 Zone. Id. The Borough Code does not define "efficiency apartments."

The Property encompasses 25,515 square feet, with two hundred and twelve (212) feet of frontage on Kinderkamack Road and one hundred (100) feet of frontage on Argyle Street. Pa388. The Property was previously improved with an automobile dealership with a single structure. After the automobile dealership closed, the structure was removed, however, it was determined that the Property was contaminated, and that the contaminants migrated to three adjacent properties. Presently, and at the time of 66 Kinderkamack's first and second applications to the Zoning Board, the existing Property was unoccupied and vacant and is in the process of environmental remediation. Id.

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C. 66 Kinderkamack's First Application

In or around November 2021, 66 Kinderkamack applied to the Zoning Board, seeking a use variance and certain bulk variances, including a FAR variance, preliminary and final site plan approval, and other relief. The First Application proposed constructing a three-story multi-use building with thirty-eight (38) residential units and 2,000 square feet of office space. Pa67. After comments from the Zoning Board, the First Application was revised to propose thirty-three (33) residential units and 951 square feet of office space. Pa95-Pa96. Of the thirty-three residential units, 66 Kinderkamack proposed twenty-nine (29) one-bedroom apartments, (one of which was affordable), three (3) affordable two-bedroom apartments, and one (1) affordable three-bedroom apartment. Pa67-Pa68. The First Application consisted of five hearings which took place on November 15, 2021, December 20, 2021, January 19, 2022, February 23, 2022, and March 21, 2022. See generally Pa64-Pa106. 66 Kinderkamack presented five witnesses: David Arabia, (one of 66 Kinderkamack's principals), Raymond Virgona, (a licensed architect), Daniel Reeves, (a licensed professional engineer), Michelle Briehof (a licensed traffic engineer) and Edward Kolling (a professional planner). See Pa69-Pa70, Pa74-Pa79, Pa84, Pa89.

D. The Zoning Board Denies 66 Kinderkamack's First Application

On March 21, 2022, the Zoning Board denied the First Application by a vote of 4-3 where five votes were required, which was later memorialized in a resolution dated April 18, 2022. See generally Pa64-Pa106. The Zoning Board found that a use variance was necessary because the proposed residential apartments (which included the mandatory two and three-bedroom affordable units) were not "efficiency apartments." Pa96. Further, the Zoning Board ruled that 66 Kinderkamack did not meet its burden for the use variance positive criteria. In addition, the Zoning Board found that the FAR and building coverage were too large for the Property. Pa98.

66 Kinderkamack did not appeal the April 18, 2022 Resolution, but instead opted to make additional substantial changes to its proposed development given the Zoning Board's comments during the time of denial.

E. 66 Kinderkamack's Second Application

In or around June 2022, 66 Kinderkamack again applied to the Zoning Board seeking, a d(1) use variance, d(4) FAR variance, (where 0.35 is permitted and 1.42 was proposed) and final site plan approval ("Second Application"). Pa434. The Second Application also requested four bulk variances for: (1) building height, where 35 feet is permitted, and 37.4 was being proposed; (2) building coverage, where 40 percent is permitted and 65.1 percent was proposed;

(3) total side yard setback, where 25 feet is permitted, and 12.2 feet was proposed; and (4) a front yard setback for the generator location where 10 feet is required and 6 feet was proposed. Id. It is important to note that the front yard setback variance was included in the Second Application solely at the express direction of the Zoning Board, which specifically requested that a generator be added to the proposed plans.

The Second Application proposed the development of a mixed-use building consisting of 1,180 square feet of office space, 1,246 square feet of retail space, and twenty-nine (29) residential units on two levels, five (5) of which were to be designated as Affordable Housing. Pa174, at 5:10-19. The five Affordable Housing residential units would count as ten (10) towards the Borough's overall outstanding affordable housing obligation. Id., at 5:20-23. 66 Kinderkamack further offered to provide $375,000 to be held in an environmental escrow to ensure that the neighboring properties are appropriately remediated from the underground contaminants from the former automobile dealership. Pa175, at 6:11-14.

Cognizant of the Zoning Board's comments in denying the First Application, 66 Kinderkamack's Second Application significantly reduced the intensity of the building's size. Specifically, the Second Application reduced the building length by almost twenty-four (24) feet and reduced the total building

area by over 6,500 square feet. Pa186, at 53:7-54:6. Moreover, the FAR was significantly reduced from 1.99 to 1.42 (which the Zoning Board determined to be 1.77). Id., at 53:17-25.

In support of the Second Application, 66 Kinderkamack presented expert testimony of Stephanie Del Monte, a principal of 66 Kinderkamack, Raymond Virgona ("Mr. Virgona"), a licensed architect who was qualified in this field, Matthew Neuls, P.E. ("Mr. Neuls"), a licensed professional engineer who was qualified in this field, Maurice Rached, P.E. ("Mr. Rached"), a licensed professional engineer and traffic engineer who was qualified in this field and who authored the Traffic Impact Study dated September 16, 2021 which was supplemented by a report dated July 6, 2022, and Charles Heydt, P.P. ("Mr. Heydt"), a professional planner who was qualified in this field.

At the Zoning Board's June 20, 2022, meeting, 66 Kinderkamack presented testimony from Ms. Del Monte, who testified regarding the reduction in the proposed size of the structure, the reduction in the number of units and the inclusion of five affordable housing units that were one, two and three bedroom units. Pa180, at 26:23-27-18. Mr. Virgona next testified that the building size had been reduced by twenty-four feet and building area had been reduced by 5,500 square feet and that retail space (as requested by the Zoning Board) had been added to the ground floor in addition to office space. Pa186, at

53:7-55:19. Mr. Virgona explained that the new FAR at 1.42 would be significantly less than the previous 1.99 proposed. Id. He noted that this plan complies with the Borough's Ordinance No. 19-05, which requires a 15% affordable set-aside for affordable rental units, and that the inclusion of the two and three-bedroom apartments, which were specifically implemented in the design to ensure compliance with the Borough Ordinance. Pa190, at 68:13-69:2. Mr. Virgona also explained that side yard variance from the First Application had been subsequently eliminated since the Second Application had considerably reduced the proposed building size. Pa188, at 60:10-61:25. Mr. Virgona testified that there was sufficient space between the Property and the neighboring properties on Argyle and Beverly Street. Pa191, at 72:4-11). He further opined that a double planting of evergreen trees would create a sufficient buffer between the development and the neighboring properties. Id., at 72:12-16.

As to the FAR, Mr. Virgona testified that the required .35 FAR is "completely unrealistic" as most properties in similar zones have a FAR of at least 1.0 or higher. Pa192, at 74:2-7. Mr. Virgona further stressed that based on the current FAR requirement, only a building with a floor area of 8,900 square feet would be permitted. As such, only one affordable unit could be produced there, especially since an elevator would be required. Taken together, Mr.

Virgona testified that there would "be no way to justify a $375,000 cleanup cost with a building of that size" and the cost associated with reconstructing the retaining wall. Id., at 74:21-75:3. Likewise, Mr. Virgona concluded that the (c) variance for the height of the building (2.4 feet higher than the maximum allowed) would be imperceptible to the public eye. Id., at 76:9-77:13.

Next, on July 18, 2022, counsel for 66 Kinderkamack confirmed that the affordable units proposed would comply with UHAC and clarified to the Zoning Board (based upon questions raised by the Zoning Board), that the environmental considerations pertaining to remediation and the costs associated therewith would not be taken into account as a basis for the granting of variance relief, but the environmental cleanup may be considered as an ancillory benefit to the proposal. Pa210, at 9:19-21. Counsel also raised a dispute pertaining to the calculation of FAR, with 66 Kinderkamack's professionals indicating that the FAR is 1.42 and the Zoning Board's professionals determined FAR to be 1.77.

Mr. Neuls next testified that the Second Application supplied more parking spaces than were necessary under the Borough's regulations, where fifty-seven (57) are required, and sixty-six (66) are proposed. Pa229-Pa230, at 9:22-10:20. Mr. Neuls detailed the landscape plan for the project with significant amounts of new trees to be placed on the site with staggered rows of plantings

atop retaining walls and along the fence line of approximately six (6) feet in height. Pa221, at 56:6-10. As to the FAR, Mr. Neuls asserted that the Borough has a different FAR calculation for the plan than 66 Kinderkamack, because 66 Kinderkamack does not include the lowest level of parking in its calculation as it is below the average grade. Pa237, at 34:24-36:1. Indeed, Mr. Neuls stated that "because the mid-line of the lowest level of parking is below the average grade, by definition, it should not be included in the FAR calculation." Id., at 35:4-8. As a result, the 66 Kinderkamack's FAR of 1.42 is correct and the Borough's contention that the FAR is 1.77 is incorrect. Id. Mr. Heyat explained that as a result of the onsite contamination, the New Jersey Department of Environmental Protection and the EPA were requiring what is known as a "cap" on-site to ensure no future contamination would occur on surrounding properties. Pa 394. The FAR relief was partially necessitated as the building envelope of the project was to also operate as the cap for the remediation. Id.

The hearing continued on August 15, 2022, when Mr. Neuls testified to the stormwater management. He stated that the proposed management on site would provide better water drainage than what presently exists and that the proposed water quality would drastically improve. Pa122. Mr. Neuls also confirmed that water runoff will not increase and that there will be no runoff to or drainage along Kinderkamack Road. Pa230, at 6:8-7:21.

Next, Mr. Rached, 66 Kinderkamack's traffic engineer, provided the Zoning Board with the results of a traffic study conducted on multiple days and at multiple times and opined that the Second Application would have no or minimal impact on traffic conditions in the surrounding area as it would, on average, increase additional traffic volume by only a second or two. Pa238, at 78:5-81:24. Specifically, Mr. Rached testified that the mixed-use building proposed in the Second Application would generate six (6) entering vehicles and twelve (12) exiting vehicles in the morning and twelve (12) entering vehicles and ten (10) exiting vehicles during the evening. Id., at 78:5-12. Mr. Rached further testified that the proposed use would be significantly less intense than other uses permitted under the Zoning Ordinance and will provide significantly less traffic than the prior commercial use on the Property. Pa249, at 85:14-24.

Finally, 66 Kinderkamack's professional planner, Mr. Heydt, testified that 66 Kinderkamack's requested variance relief was justified. Regarding the d(1) use variance, Mr. Heydt opined that the requested relief meets the positive criteria under Medici v. BRP Co., 107 N.J. 1 (1987). Pa268-Pa269, at 41:11-43:20. First, Mr. Heydt testified that the Property was particularly suitable for the Second Application based on the location and size of the Property. Pa269, at 42:7-43:20. Mr. Heydt noted that the area surrounding the Property is a "mixed-

use neighborhood," containing both residential and commercial properties. Id., at 38:10-39:5.

Further, Mr. Heydt indicated that the proposed development is "highly compatible" with the permitted uses in the B-3 Zone. Pa391. He further noted that efficiency or studio apartments and one-bedroom units function essentially is the same manner, with occupancy usually by one or two persons. Id. While the B-3 Zone permits "efficiency units," the Borough does not define the term and in the Borough's Master Plan and in an adjacent zone (B-1), the Borough eliminated the concept of "efficiency units" as the concept was inconsistent with the Borough's affordable housing obligations. Mr. Heydt explained that the term commonly refers to studio apartments, which have "one habitable living space (i.e., shared living room and bedroom)." Id. In 66 Kinderkamack's application, absent the affordable units, all market units are one-bedroom units that would have the same intensity as studio apartments, therefore not necessitating a d(1) variance at all. Id.

Second, Mr. Heydt testified that the development advances the purposes of the MLUL. Pa392-Pa393. Notably, pursuant to N.J.S.A. 40:55D-2(e), the area is consistent with the surrounding area, the population density is appropriate, and the project will create a desirable visual environment. Id. The development's architecture and landscaping bring a desirable visible environment, especially

as the lot has remained vacant and unimproved for years. Pa271, at 52:15- 53:4. Moreover, the development will have minimal effect on the population density as the development will only generate a maximum of 44 to 57 new residents. Pa270, at 47:2-51:19. Based on the "efficiency created in this type of development," it was found that the development "does help support the commercial nature of Kinderkamack and also provides for a newer type of resident apartment in the [B]orough that is in demand[.]" Pa271, at 51:20-52:9. Mr. Heydt also highlighted the lack of development and multi-family units within the Borough, with very few projects approved in the prior decade. Pa271, at 50:23-51:1.

Third, the Property provides sufficient parking based on the Borough's ordinance and the Residential Site Improvement Standards ("RSIS"). Pa392. Indeed, the proposed development requires sixty-three (63) parking spaces for office and residential use. Id. The Second Application, in turn, proposed sixty-six (66) parking spaces, three above the required number. Id.

As to the d(4) FAR variance, Mr. Heydt opined that the "proposed increased floor area is supported by the lot size and location, permitted uses, oversized property, provided setbacks and buffers, appropriate building massing, and adequate parking." Pa393. In addition to the positive criteria for the use variance, Mr. Heydt further testified that the development provides for

appropriate setbacks and buffering, as the "provided setbacks will allow for light, air, open space between the adjacent properties and buildings" and "[t]he proposed landscaping will provide screening and buffering further minimizing any impacts from the proposed building." Id. Moreover, remediating contamination from the prior automobile dealership with the proposed building operating as the environmental cap for remediation will benefit not only the Property but the surrounding area as well. Pa394. 66 Kinderkamack proposed removing the contaminants on the surrounding properties and using the building envelope as a remediation cap to prevent contaminants from leaking to neighboring properties. Taken together with the improvements to stormwater management, Mr. Heydt concluded that the remediation will significantly benefit the Property and the neighboring properties. Id.

As to the bulk "c" variances, Mr. Heydt found that the development "substantially outweighs any detriments." Id. The building height, which exceeds the maximum building height by a mere 2.4 feet, would be mitigated by the slope of the building and the proposed setback. Id. Likewise, the building coverage complies with the maximum lot coverage requirement, while also providing for sufficient setbacks. Id. The total side yard, where 25 feet is required and only 12.2 feet is proposed, is appropriate because the Property is a "corner lot with two front yards, one rear yard (along the eastern property

boundary) and one side yard, there is no second side yard available to comply with this total side yard setback requirements." Id. Finally, the proposed generator location (which was being provided solely at the request of the Zoning Board) is necessary to access the utilities within the street right-of-way. 66 Kinderkamack will provide landscaping and fencing to screen and secure the generator. Id. Mr. Heydt further found that the proposed location of the generator does not interfere with the sightlines from any vehicles entering or exiting the proposed building. Id.

Finally, as to the negative criteria, Mr. Heydt stated that the requested variance relief would not result in a substantial detriment to the public good as the proposed use is consistent with the surrounding area, the proposed setback would maintain light, air, and open space, and the development will improve the streetscape. Pa395. Further, the Second Application would not result in a substantial impairment to the intent and purpose of the zone plan and applicable zoning ordinance. Id. While the B-3 Zone allows for "efficiency apartments," the 2018 Master Plan states, "[t]he restriction of units to efficiency apartments conflicts with Section 5:80-26.3 of the New Jersey Uniform Housing Affordability Controls ("UHAC")[.]" Pa276, at 73:5-22; Pa395-96. Mr. Heydt further highlighted the 2018 Master Plan's recommendation to eliminate the restriction of residential units to efficiency apartments as well as eliminating the

FAR standard within the adjacent B-1 Zone to create the promotion of residential units above store fronts. Id. As the same uses are permitted in the B-3 Zone as the B-1 Zone, in Mr. Heydt's professional opinion these recommendations should be taken into consideration. Id. Mr. Heydt further highlighted the Borough's inconsistent ordinances and affirmed that the Second Application was consistent with the Master Plan. He further noted that the proposed development will provide an appropriate population, with the stormwater improvements lessening the impact on adjoining properties with a lower amount of traffic than other permitted uses.

F. The Zoning Board Denies 66 Kinderkamack's Second Application

Following 66 Kinderkamack's presentation, the Zoning Board denied the Second Application by 4 votes to 3 against (a reversal of the 4 votes to 3 in favor of the larger project proposed in the First Application). Pa322, at 119:13-121:1. On December 19, 2022, the Zoning Board issued a resolution stating that it was, "not satisfied that approval of the application advances the purposes of the MLUL contained in N.J.S.A. 40:55D-1 et. seq. "specifically encouraging appropriate use of land which promotes the public health, safety and general welfare." Pa142. The Zoning Board further found that 66 Kinderkamack did not satisfy the positive and negative criteria for relief under N.J.S.A. 40:55D-70. Id. Lastly, the Zoning Board concluded that the goals and objectives of the 2018

Master Plan would be violated by approval of the Second Application. Id. The Zoning Board's conclusions were not substantiated by any of the testimony provided by 66 Kinderkamack's professionals and it is important to note that at no point, at any hearing, was testimony, other than a disagreement on the calculation of FAR, provided by any of the Zoning Board's professionals to dispute 66 Kinderkamack's presentation.

G. The Trial Court's Decision

66 Kinderkamack filed its complaint in lieu of prerogative writs arguing, among other things, that the Zoning Board's denial was arbitrary, capricious and unreasonable and that 66 Kinderkamack's Second Application should have been granted in its entirety. Pa41. The trial court issued a thorough opinion ruling in the Zoning Board's favor on virtually every issue briefed in the case. Pa1. The trial court incorrectly ruled that "the FAR is driven by the remediation cost, not that the FAR is restricting a conforming development." Pa30. The trial court essentially reached the inapplicable determination that the .35 FAR (a standard that is generally utilized solely for single-family homes) on the Property does not severely limit achieving any viable development or structure at the Property. Pa36. The trial court also gave extreme deference to the Zoning Board when it ruled that the proposed FAR was 1.77 instead of the 1.42 FAR despite the

Zoning Board presenting any evidence to rebut 66 Kinderkamack's experts. Pa31.

Furthermore, the trial court admitted that while the "proposed building would be new, meaning if new equates to aesthetically pleasing…it is not a characteristic which supports the promotion of MLUL goals." Pa38. Lastly, the trial court failed to weigh the testimony in support of the development by the immediately impacted neighbors and instead opined that "the Second Application ignores the huge impact upon the surrounding properties of its proposed FAR" and that the "multiple bulk variances supported the Zoning Board's finding that the site could not accommodate the deviation from the FAR." Pa37, Pa40.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

The review of an action in lieu of prerogative writs challenging the decision of a municipal body follows the same standard as the trial court in determining whether the municipal body acted "arbitrarily, capriciously, or unreasonably." Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 33 (2013). The trial court's decision to uphold the Zoning Board's decision is an issue of law that must be reviewed *de novo*. See Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 358 (2007); see also Hodges v. Sasil Corp., 189 N.J. 210, 220–21 (2007) (the New Jersey Supreme Court reviewing the Appellate Division's statutory interpretation de novo); Balsamides v. Protameen Chems., Inc., 160 N.J. 352, 372 (1999) ("[M]atters of law are subject to a de novo review.").

A zoning board's decision must be "supported by substantial evidence in the record and reflect a correct application of the relevant principles of land use law." Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 53, 58-59 (1999). A zoning board's decision to grant or deny a variance that is not supported by substantial evidence in the record is "arbitrary, capricious, or unreasonable" and should be set aside. See Cell South of N.J. v. Zoning Bd. of Adjustment of W. Windsor Twp., 172 N.J. 75, 88 (2002).

A zoning board of adjustment must not merely provide conclusionary language but must state findings of fact and conclusions of law to support the denial of a variance. Alpine Tower Co. v. Mayor and Counsel of Borough of Alpine, 231 N.J. Super. 239, 248 (App. Div. 1989). Specifically, as set forth in L.I.M.A. Partners, 219 N.J. Super. at 519-520, the Appellate Division held that a zoning board's denial of a variance was merely conclusionary and that the board statements contained in the transcript of the proceedings were an inadequate substitute for appropriate findings of fact and conclusions of law. Id.

When a board denies a variance, it must set forth in a resolution a statement of the specific findings of fact on which the board reached the conclusion that the statutory criteria for a variance were not satisfied. N.Y. SMSA v. Bd. of Adjustment of Twp. of Weehawken, 370 N.J. Super. 319, 334 (App. Div. 2004). "Denial of a variance on a summary finding couched in the conclusionary language of the statute is not adequate…Unless such findings are recited, a reviewing court cannot determine fairly whether the Zoning Board acted properly and within the limits of its authority in refusing a variance." Ibid. (citing Harrington Glen v. Bd. of Adjustment of Leonia, 52 N.J. 22, 28 (1968)).

Although a zoning board may reject an applicant's expert testimony, it must do so in reliance of contrary expert testimony rather than "bare allegations of unsubstantiated beliefs." N.Y. SMSA, 370 N.J. Super. 338. Importantly, a board has

the obligation to make its decision in substantiated proofs rather than unsupported allegations and if a board's denial is grounded upon non-expert testimony from its own members or concerns raised by members of the public and not qualified expert testimony, the denial is deemed arbitrary, capricious, and unreasonable. See Cell S. of N.J., Inc., 172 N.J. 75, 88 (2002).

A zoning board must approve a variance application where the applicant has established the statutory grounds for its approval. See Lang, 160 N.J. at 58 (board should not "deny variances where the proofs incontestably establish the need for variance relief and demonstrate no threat to the neighborhood or the zone plan"). Here, the Second Application was improperly denied by the Zoning Board and upheld by the trial court. 66 Kinderkamack presented sufficient proofs to warrant approval of the Second Application. Courts have found that a bulk variance is to be subsumed when the deviations from the bulk regulations "were necessarily included in the grant" of the use variance. O'Donnell v. Koch, 197 N.J. Super 134, 135 (App. Div. 1984). Indeed, generally "c" variances are subsumed in an appropriate "d" variance. See Puleio v. Bd of Adj., 375 N.J. Super. 613, 621 (App. Div.) certif. den. 184 N.J. 212 (2005).

II. THE TRIAL COURT ERRED IN DETERMINING THAT 66 KINDERKAMACK DID NOT SATISFY THE POSITIVE AND NEGATIVE CRITERIA FOR A D(1) USE VARIANCE (Pa35-38)

The Second Application sought the construction of a mixed-use development in the Borough's B-3 Zone, which permits business, professional and governmental offices, retail stores, as well as radio and television repair, furniture repair, and other similar service establishments furnishing services other than that of a personal nature. See Borough Code, §240-6.5I(1)(a). While the B-3 Zone permits multifamily housing, it only permits efficiency apartments and garden apartments housing four (4) or more dwelling units. See Borough Code, §240-6.5I(1)(a) and (b), and §240-6.5G(1)(e). While the Borough Code does not define "efficiency apartments," the Borough required 66 Kinderkamack to seek a use variance because it sought the construction of twenty-nine (29) residential units, which contain largely all one-bedroom apartments which were comparable to efficiency apartments, except for the required set aside for two and three bedroom units mandated under UHAC as well as the Borough's own conflicting ordinances.

An applicant seeking a "d" variance has the burden to "prove both positive and negative criteria" to a zoning board. Smart SMR of N.Y., Inc. v. Borough of Fair Lawn Bd. of Adjustment, 152 N.J. at 309, 323 (1998). The positive criteria are set forth in N.J.S.A. 40:55D-70(d)(1), which authorizes a zoning

board, "[i]n particular cases for special reasons, [to] grant a variance to allow departure from regulations pursuant to . . . [the Municipal Land Use Law] to permit . . . a use or principal structure in a district restricted against such use or principal structure."

While the term "special reasons" is not defined in N.J.S.A. 40:55D-70(d)(1), "special reasons" are those that "promote the general purposes of zoning, enumerated in N.J.S.A. 40:55D-2." Burbridge v. Twp. of Mine Hill, 117 N.J. 376, 380 (1990). Those purposes include the promotion of adequate light, air and open space, the creation of a desirable visual environment through creative development techniques and good civic design and arrangement, the encouragement of transportation routes that will promote the free flow of traffic, and the promotion of public health, safety, morals, and general welfare. See N.J.S.A. 40:55D-2. One court has stated that special reasons exist whenever a variance proposes to secure any of the statutory zoning goals. See Yahnel v. Board of Adjustment of Jamesburg, 79 N.J. Super. 509, 517 (App. Div.), certif. denied, 41 N.J. 116 (1963). To show the positive criteria, an applicant must show that: "a proposed use is inherently beneficial, that the property owner would suffer an undue hardship by using the property as a permitted use, or that the proposed site is particularly suitable for the proposed use." Price v. Himeji,

LLC, 214 N.J. 263, 293 (2013); see also Saddle Brook Realty, LLC, 388 N.J. Super. at 76 (App. Div. 2006).

Use variances may be granted where "(1) 'special reasons' exist for the variance (the 'positive criteria'); and (2) the variance can be granted without substantial detriment to the public good and will not substantially impair the intent and purposes of the zone plan and zoning ordinance (the 'negative criteria')." Elco v. R.C. Maxwell Co., 292 N.J. Super. 118, 127 (App. Div. 1996)(citations omitted).

A. 66 Kinderkamack Carried Its Burden Regarding the Positive Criteria (Pa35-38)

The trial court provided no analysis relating to the positive criteria of the Second Application as to the d(1) use variance and conflated its analysis with the d(4) FAR variance. The Court should have parsed its analysis on each variance subject to the prerogative writ. It did not. While the trial court's inability to separate its analysis sets forth an independent basis for at minimum a remand back to the trial court, a review of 66 Kinderkamack's unopposed expert testimony demonstrates that it carried its burden as it relates to the d(1) use variance and the Zoning Board's decision should be reversed.

The Second Application sought to construct five (5) affordable units to help assist the Borough with its substantially unmet affordable housing obligation. Pa391. By including the affordable units, the Second Application clearly promotes the public health, safety, morals and general welfare of the

community and provides "sufficient space in appropriate locations for a variety of . . . residential [and] commercial uses . . . in order to meet the needs of all New Jersey citizens." See N.J.S.A. 40:55D-2(a) ("To encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare"); N.J.S.A. 40:55D-2(e)(g).

Under the current permitted uses, affordable units cannot be built in this zone because "efficiency units," (which are the only permitted uses in the B-3 Zone), cannot be used as affordable units under the applicable UHAC guidelines. See N.J.A.C. 5:80-26.3(b)(1) ("The combined number of efficiency and one-bedroom units is no greater than 20 percent of the total low-and moderate-income units."). The Borough's Ordinance No. 19-05, mandates that for every multifamily residential development of five (5) dwelling units or more, a set aside rate of fifteen (15%) must be Affordable Housing Units. Pa350. The Second Application sets aside seventeen (17%) of the units as affordable and is consistent with the Borough's mandatory affordable housing set-aside requirements. Pa390. Despite following the Borough's mandate, the Borough refuses to allow affordable units to be built in this zone of the Borough. The proposed units will uncontrovertibly help establish appropriate population densities and provide sufficient space for such use to provide housing for low

and moderate-income families and benefit the well-being of the Borough in furtherance of MLUL goals "e" and "g."

Further, the Second Application demonstrated that the proposed mixed-use building would further MLUL purpose "c," to provide for "adequate air, light, and open space." See N.J.S.A. 40:55D-2(c). With the increasing amount of development in New Jersey, a property's ability to maximize the space available is a primary objective of zoning boards, developers, and planning consultants. The Second Application maximizes the space available at the Property through underground parking constructed underneath the first level of the building that is fully compliant with applicable Borough regulations, and in fact provides three additional parking spaces than required by law. Pa392. Thus, the Second Application provided ample space and buffering to minimize the impact of the proposed building. Pa393.

The Second Application also provided an aesthetically desirable building designed to conform with the character of the surrounding community in furtherance of MLUL purpose "i." See N.J.S.A. 40:55D-2(i) ("To promote a desirable visual environment through creative development techniques and good civic design and arrangement"). As Mr. Heydt testified, the development promotes "a desirable visual environment through creative development techniques and design" as the development presents an aesthetically pleasing

building from an architectural standpoint and provides an increase of landscaping to improve the streetscape. Pa271, at 52:10-53:4.

Similarly, the project furthers MLUL's purpose “a” by furthering the public health and general welfare. The Property, which was previously contaminated by the prior use, requires significant remediation to itself as well as some of the neighboring properties. Pa174-Pa175, at 5:10-9:6. As part of the approval, 66 Kinderkamack would not only remediate the Property but would also provide an environmental escrow of $375,000 to remediate the surrounding neighborhood and adjoining properties. Id., at 5:10-9:6. Indeed, the physical building will serve as a cap to the Property, preventing the neighboring properties from being affected by the site. Pa394.

Finally, the Zoning Board’s own planning consultant did not refute or rebut any of the credible testimony provided by Mr. Heydt and 66 Kinderkamack’s other experts supporting the positive criteria. Indeed, other than the disagreement over the calculation of FAR, the Board presented no contrary expert testimony from its own professional staff or other licensed professionals regarding any aspects of 66 Kinderkamack’s application with the exception of review letters from the Borough’s engineer which were addressed by the Plaintiff during the application. See N.Y. SMSA, 370 N.J. Super. at 338 (finding a zoning board’s denial of a use variance arbitrary, capricious and unreasonable

where the board retained no expert of its own and heard no expert testimony that contradicted the applicant's expert's opinion). A board cannot rely on non-expert testimony from its members or concerns voiced by residents rather than qualified expert testimony to prove the adverse effects associated with a requested variance. Otherwise, such reliance would be arbitrary, capricious, and unreasonable. See Cell S. of N.J., 172 N.J. 75, 88 (2002). Here, the trial court failed to point to any expert testimony that refuted the positive criteria. See Pa107-45. Rather, the trial court relied solely on the concerns of members, who were driven by emotion and not qualified experts. In voting to deny the Second Application, the Zoning Board ignored the greater weight of the evidence in the record that supported a grant.

B. 66 Kinderkamack Carried Its Burden Regarding the Negative Criteria (Pa35-38)

The negative criteria are set forth in N.J.S.A. 40:55D-70, which states that the applicant must show that the variance "can be granted without substantial detriment to the public good[,]" and "will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." Price, 214 N.J. at 286 (quoting N.J.S.A. 40:55D-70). "The showing required to satisfy the first of the negative criteria," relating to the public good, "focuses on the effect that granting the variance would have on the surrounding properties." Id. (citing Medici, 107 N.J. at 17 n.12. The applicant "must reconcile the grant of the

variance for the specific project at the designated site with the municipality's contrary determination about the permitted uses as expressed through its zoning ordinance." Id. (citing Medici, 107 N.J. at 21).

Here, it is self-evident that the Second Application would not be a substantial detriment to the public good. To the contrary, Mr. Rached testified that 66 Kinderkamack's proposal would enhance the general welfare of the surrounding community since the proposed use would be significantly less intense than other uses permitted under the Zoning Ordinance. Pa249, at 85:14-24.

The B-3 Zone permitted uses include: retail stores, mercantile stores, professional and governmental offices, radio and television repair as well as furniture repair, and other similar service establishments furnishing services other than that of a personal nature. Pa407. Restaurants are also permitted as conditional uses. As Mr. Rached testified, a retail use or restaurant, for example, would not be as appropriate of a use compared to the non-conforming mixed-use building in the Second Application because the number of available parking spots would be lower and the constant inflow of deliveries in and out of the Property would be significantly larger. Pa250, at 87:11-17, 89:3-11 ("This development is not anticipated—we don't expect it to have an intense delivery, especially when compared to, for example, a larger development . . . for

example, a large restaurant that needs the deliveries constantly in and out, or some of the other uses that are permitted in the zone.”). Id.

Additionally, the Second Application would have no or minimal impact on traffic conditions in the surrounding area and would only increase additional traffic volume by a second or two. Pa248, at 78:5-81:24. For example, permitted uses in the zone would generate vehicular trips as high as 289 per day, whereas 66 Kinderkamack’s mixed-use proposal would only generate a maximum of eighteen (18) vehicular trips during morning peak hours and twenty-two (22) trips during peak evening hours. Id., 79:7-81:4. Uncontested, this reduced rate of traffic will positively impact the safety of those traveling near the Property, as well as those living in nearby residential neighborhoods.

Furthermore, 66 Kinderkamack’s Second Application would not negatively impact neighboring properties because the proposal is consistent with the permitted uses of the B-3 Zone. Pa391. Despite its location in the B-3 Zone, Mr. Heydt noted that the area surrounding the Property is a “mixed-use neighborhood,” as it contained both residential and commercial properties. Pa268, at 38:10-39:5. Indeed, Mr. Heydt highlighted both residential uses to the west and east of the Property and commercial uses to the north and directly adjacent to the south of the Property. Id., 38:16-22.

Finally, 66 Kinderkamack's Second Application does not impair the Land Use Plan of the Borough's Master Plan. As stated above, the B-3 Zone already contains a mix of uses and, notably, efficiency apartments are permitted. To that end, Mr. Heydt emphasized that the B-3 Zone allows for "efficiency apartments," but the Borough's own 2018 Master Plan acknowledges that, "[t]he restriction of units to efficiency apartments conflicts with Section 5:80-26.3 of [UHAC.]" Pa391. "Efficiency units" are not defined in the Borough Code but refer to studio units which have "one habitable living space (i.e., shared living room and bedroom)." Id. The market rate units proposed within the Second Application are one-bedroom units with the same intensity as studio apartments (except the affordable units that comply with UHAC). Id. Thus, 66 Kinderkamack overwhelmingly showed that the negative criteria was satisfied. Likewise, 66 Kinderkamack continuously revised its development application throughout the First and Second Application consistent with reasonable and appropriate conditions suggested by the Zoning Board members and the Zoning Board's professional staff to support approval of the application.

III. THE TRIAL COURT ERRED IN DETERMINING THAT 66 KINDERKAMACK DID NOT SATISFY THE POSITIVE AND NEGATIVE CRITERIA FOR THE D(4) FAR VARIANCE (Pa37-39)

Unlike a use variance for a non-permitted use, density variances do not require showing particular suitability to establish special reasons. See, e.g.,

Grasso v. Spring Lake Heights Bd. of Adj., 375 N.J. Super. 41 (App. Div. 2004); Grubbs v. Slowthower, 389 N.J. Super. 377 (App. Div. 2007). Indeed, "d" density variances do not have to demonstrate the lack of substantial impairment to the intent and purposes of the zone plan and zoning ordinance by an enhanced quality of proof. Cf., TSI East Brunswick v. Twp. of East Brunswick Bd. of Adj., 215 N.J. 26 (2013). 66 Kinderkamack required a FAR variance because the floor area ratio is 1.77, where the B-3 zone maximum is 0.35. Pa111.

In Price, the Supreme Court considered the appropriate proofs for a (d)(5) density variance when the applicant simultaneously sought a (d)(1) use variance. The Supreme Court recognized that an applicant seeking a use variance was proposing not to comply with the zoning ordinance, and that the bulk zoning standards designed for permitted uses may not be applicable. Id. at 299 ("There is little doubt about the fact that a use variance, by its nature, carries with it the implication that the ordinary bulk and density requirements of the zone will not be applied"); see also Kramer v. Bd. of Adjustment, 45 N.J. 268, 295 (1965) ("it is obvious that the height and front yard restrictions are intended to apply to single-family residences"); Puleio, 375 N.J. Super. at 613 (bulk variances are "subsumed" within the use variance). However, Price cautioned that boards should not totally ignore the ordinarily applicable limits for density, and should, instead, consider the reasons for those restrictions when evaluating the project.

Under Coventry Square, Inc. v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285 (N.J. 1994) as applied by Randolph and Grubbs, and as directed by Price, an applicant seeking a FAR variance must show special reasons exist to grant the variance by showing that the site "will accommodate the problems associated with the use even though the proposal does not comply with the conditions the ordinance established to address those problems." Coventry, supra, 138 N.J. at 299; Grasso, 375 N.J. Super. at 52; Grubbs, 389 N.J. Super. at 388-389. For the negative criteria, Coventry holds that the board of adjustment must evaluate the impact of the proposed [conditional] use variance upon the adjacent properties and determine whether or not it will cause such damage to the character of the neighborhood as to constitute a "'substantial detriment to the public good' . . . must be satisfied that the grant of the conditional-use variance for the specific project at the designated site is reconcilable with the municipality's legislative determination that the condition should be imposed on all conditional uses in that zoning district." Id. at 299. It is noteworthy that Coventry states, "The thrust of the proof addressed to the negative criteria is similar." Id.; see also TSI East Brunswick, 215 N.J. at 41.

As stated above, the trial court primarily analyzed the d(4) FAR variance in its opinion. See Pa24-27, Pa29-34, Pa39-40. However, the trial court exceeded its bounds by giving too much deference to the Zoning Board, reaching

inapplicable conclusions that ran counter to the Plaintiff's expert proofs, and making unfounded inferences regarding the Plaintiff's motives for the Second Application.

A. The Trial Court's Unsubstantiated Belief That Plaintiff's FAR Was Driven Solely By The Remediation Cost Was Not Valid (Pa37-39)

The trial court incredulously found that Plaintiff's proposed FAR was calculated and driven solely by the remediation cost and not by the size or area of the lot. In dismissing Plaintiff's prerogative writ, the trial court concluded that "it appears to the court that the FAR is driven by the remediation cost, not that the FAR is restricting a conforming development." Pa30. Further, the trial court held that "the applicant is in essence financing its environmental obligations on the backs of neighbors whose properties the owner has contaminated." Id. . In reality, nothing could be further from the truth. In making these findings, the trial court seemingly ignored the fact on July 18, 2022, counsel for 66 Kinderkamack specifically clarified for the Zoning Board (based upon questions raised by the Zoning Board) that the environmental considerations pertaining to remediation and the costs associated therewith *would not be taken into account as a basis for the granting of variance relief*, but the environmental cleanup may be considered a benefit to the proposal as

well as that the neighbors whose properties were contaminated testified in favor of the development.

Moreover, as a threshold matter, at no point was the Property contaminated by Plaintiff. All contamination to the Property and surrounding area was caused by the prior automobile dealership and service station that historically occupied the lot. Pa385. Indeed, the trial court misapplied the facts on this critical issue when rendering its Order.

Notwithstanding the foregoing, the trial court erred when it ruled that the FAR is not restricting a conforming development and made undue inferences regarding Plaintiff's "ulterior motives." Mr. Virgona testified that the required .35 FAR is "completely unrealistic" as most properties in similar zones have a FAR of at least 1.0 or higher. Pa192, at 74:2-7. To put the current limitations of the FAR into perspective, "the removal of just fully enclosing a garage on the first level in and of itself reduces the FAR by .3629." Pa177, 17:1-3.

Plaintiff admits that the proposed remediation cost was one of many contributing factors when determining the FAR, but it is uncontested that the FAR is calculated based on other properties in similar zones. Mr. Virgona concluded under the current FAR that there would "be no way to justify a $375,000 cleanup cost with a building of that size" and the cost associated with

reconstructing the retaining wall is certainly noteworthy, but it is not the only factor when Plaintiff calculated the proposed FAR. Id., at 74:21-75:3.)

B. The Trial Court Erred By Ruling That The Second Application Would Not Create A Desirable Visual Environment And Be Aesthetically Pleasing (Pa37-39)

It is uncontested that the Plaintiff's proposed development would create a desirable visual environment and substantially upgrade the vacant lot's current condition aesthetically in accordance with the MLUL purpose "i."

The trial court ruled that "the proposed building would be new, meaning if new equates to aesthetically pleasing it was. It is not a characteristic which supports the promotion of MLUL goals as any new building, such as a conforming one, would be aesthetically pleasing." Pa38. As Mr. Heydt testified, the good civic design and arrangement of the proposed building which utilizes different materials on its exterior from all sides (i.e., wood, stone), provides a wide variety of design and/or architectural elements thereby creating a desirable visual environment. Pa271, at 52:15-53:4. This is especially true, since the lot has remained vacant and unimproved for years. Indeed, the trial court failed to consider the present state of the Property in its current condition and how a proposed development, such as the one put forth by Plaintiff, would alter the landscape and surrounding area.

At the Zoning Board hearing, a resident of the Borough testified that: "aside from the main problems of contamination, the lot has hip-high weeds, wood and garbage bags. It is a mess and an eyesore and a blight on our neighborhood and our town." Pa305, at 51:1-5. Surly new trees at the Property line with new planting beds, shrubs, newly paved sidewalks and lawn areas would have a positive effect and be aesthetically and/or more visually desirable on one of the largest lots in the Borough (thereby advancing the Borough's ordinances and Master Plan). Pa393.

Furthermore, just because the proposed building "was not going to be a LEED building" (Pa37), does not mean that it was not proposing any "creative development techniques." Id. The Second Application maximized the space available through underground parking constructed underneath the first level of the building -- parking that once again, is fully complaint with applicable Borough regulations, and in fact provides three additional parking spaces than required by law. Pa392. By keeping the parking structure underground, Plaintiff did everything in its power to create as an aesthetically pleasing building as possible.

C. The Proposed Development Was Not Too Large Or Intense For The Proposed Site (Pa37-39)

The trial court's finding that the proposed development was too large for the Property was incorrect for a myriad of reasons and runs counter to Plaintiff's

experts which demonstrated that Plaintiff satisfied the negative criteria within the MLUL.

The trial court asserted that "Plaintiff's instance that it 'overwhelming showed that the negative criteria was satisfied' ignores the huge impact upon the surrounding properties of its proposed FAR." Pa37. Contrary to the trial court's findings, Plaintiff's expert, Mr. Rached, demonstrated that the Second Application would have no or minimal impact on traffic conditions in the surrounding area as it would, on average, increase additional traffic volume by only a second or two. Pa238, at 78:5-81:24. Indeed the trial court failed to give deference to Mr. Rached's testimony which stated that the mixed-use building proposed in the Second Application only would generate six (6) entering vehicles and twelve (12) exiting vehicles in the morning and twelve (12) entering vehicles and ten (10) exiting vehicles during the evening. Id., at 78:5-12.

Along the same vein, Mr. Rached further testified that the proposed use would be significantly less intense than other uses permitted under the Zoning Ordinance. Pa249, at 85:14-24. The B-3 Zone permitted uses include: retail stores, mercantile stores, professional and governmental offices, radio and television repair as well as furniture repair, and other similar service establishments furnishing services other than that of a personal nature. Pa407.

Restaurants are also permitted as conditional uses. As Mr. Rached testified, a retail use or restaurant, for example, would not be as appropriate of a use compared to the non-conforming mixed-use building in Plaintiff's Second Application because the number of available parking spots would be lower and the constant inflow of deliveries in and out of the Property would be significantly larger. Pa250, at 87:11-17, 89:3-11 ("This development is not anticipated—we don't expect it to have an intense delivery, especially when compared to, for example, a larger development . . . for example, a large restaurant that needs the deliveries constantly in and out, or some of the other uses that are permitted in the zone.").

Instead of giving deference to Plaintiff's traffic engineer (Mr. Rached), the trial court focused on a hypothetical assertion not based in fact or confirmed by an expert. The trial court ruled that Plaintiff's Second Application "ignores complaints of shadows resulting from the proposed building's height and proximity to the property line." Pa39. This is nothing more than mere speculation as the trial court could not have been equipped to determine the size, location, or duration of any shadow on any neighboring properties.

Further, Mr. Heydt opined that the "proposed increased floor area is supported by the lot size and location, permitted uses, oversized property, provided setbacks and buffers, appropriate building massing, and adequate

parking." Pa393. Regarding increased FAR Mr. Heydt testified that the development provides for appropriate setbacks and buffering, as the "provided setbacks will allow for light, air, open space between the adjacent properties and buildings" and "[t]he proposed landscaping will provide screening and buffering further minimizing any impacts from the proposed building." Id.

As such, the trial court's determination that the proposed building was too intense for the proposed site, runs counter to Plaintiff's experts and is speculative at best.

CONCLUSION

For the reasons set forth herein, this Court should reverse the Trial Court's determination and grant the Second Application.

Respectfully submitted,
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66 KINDERKAMACK, LLC Plaintiff. **VS.** **BOROUGH OF ORADELL ZONING BOARD OF ADJUSTMENT** Defendant.	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** **DOCKET NO.: A-000705-23** CIVIL ACTION On Appeal from the September 22, 2023 Order of the Superior Court of New Jersey, Law Division, Bergen County. Docket No.: BER-L-1399-23 Sat Below: Honorable Christine A. Farrington, J.S.C., ret'd, t/a

BRIEF OF DEFENDANT-RESPONDENT
BOROUGH OF ORADELL ZONING BOARD OF ADJUSTMENT

DATED: May 22, 2024

On the Brief:
Edward J. Buzak, Esq.

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PRELIMINARY STATEMENT

Defendant-Respondent, the Borough of Oradell Zoning Board of Adjustment ("Board"), is a duly constituted zoning board under the New Jersey Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-1, et seq. with authority to review properly submitted development applications. Plaintiff-Appellant, 66 Kinderkamack, LLC ("66 Kinderkamack") submitted an application to the Board seeking: (i) a use variance under N.J.S.A. 40:55D-70d(1); (ii) a floor area ratio variance under N.J.S.A. 40:55D-70d(4); (iii) multiple "bulk" variances under N.J.S.A. 40:55D-70c; and (iv) preliminary and final site plan approval. Plaintiff sought to construct a building containing 29 residential units on two levels, with 1,180 sq. ft. of office space and 1,246 sq. ft. of retail space on the ground level. The entire project was sought to developed on a privately owned, vacant 0.59 acre parcel located in Oradell's B-3 Business & Apartment Zone District ("B-3 Zone").

However, Oradell's Zoning Ordinance delineates certain specific permitted uses within the B-3 Zone and includes a residential use restriction. Plaintiff's proposed building contained a residential component that was not permitted under the Ordinance. Therefore, 66 Kinderkamack had to obtain approval for a use that is not permitted in the B-3 Zone. Given the size, scale and mass at which Plaintiff sought to construct the building, on a parcel that is only slightly more

than half an acre, the project also failed to comply with B-3 Zone requirements as to floor area ratio, combined side-yard setback, building height, building coverage and generator location. Plaintiff thus sought approval to deviate from zoning criteria for the aforesaid conditions as well. In short, its development application violated Oradell's Zoning Ordinance in substantial ways such that it required extensive variance relief.

Plaintiff's project necessitated six separate variances, which included significant d(1) use and d(4) floor area ratio variances. To secure approval, it was therefore incumbent upon 66 Kinderkamack to demonstrate through competent, credible evidence that the magnitude of the relief being sought was appropriate and warranted under the MLUL. As the applicant, Plaintiff alone bore the burden to show that the statutory criteria for each of the variances requested was satisfied to justify relief from zoning criteria. It alone had to meet every layer of proof for every one of the six variances sought.

The Board ultimately determined that Plaintiff did not meet its burden of proof to support the grant of any of the requested variances, and therefore denied the subject application. It adopted a comprehensive resolution memorializing its denial which provides factual and legal support for its decision. Plaintiff nonetheless commenced a civil action challenging the Board's decision.

On review, the Trial Court affirmed the Board's denial of the 66

Kinderkamack application as more than amply supported by the record, and therefore not arbitrary, capricious, or unreasonable. In doing so it applied the correct highly deferential standard of review and legal standards to assess whether the Board acted properly and within its authorized discretion. The Trial Court's Opinion is devoid of any indicia of reversible error. Its September 22, 2023 Order affirming the Board's denial of Plaintiff's application as memorialized by resolution adopted on December 19, 2022 must accordingly be sustained.

PROCEDURAL HISTORY

In June 2022, 66 Kinderkamack filed a d variance development application with the Board for approval to construct on Block 113, Lot 5 in the Borough of Oradell an intensive development as proposed in its design plans (the "Application"). The Board held five public hearings on the Application, on June 20, 2022; July 18, 2022; August 15, 2022; September 19, 2022; and November 21, 2022. At the final November 21, 2022 hearing, it denied same and memorialized its denial in a resolution adopted on December 19, 2022. Pa108-145; 172-291.

On March 15, 2023, 66 Kinderkamack filed a Complaint in Lieu of Prerogative Writs with the Superior Court, Law Division, challenging the Board's denial of the Application. Pa41.

On September 22, 2023, oral argument was held before the Honorable Christine Farrington, J.S.C. On the same date, Judge Farrington entered an Order, with accompanying written Opinion, affirming the Board's denial of the 66 Kinderkamack application as not arbitrary, capricious or unreasonable, and dismissing Plaintiff's Complaint with prejudice. Pa1-Pa40.

On November 6, 2023, Plaintiff filed a Notice of Appeal with the Superior Court, Appellate Division, challenging Judge Farrington's September 22, 2023 Order. Pa438.

COUNTER-STATEMENT OF FACTS

A. The Property

The subject property is located at 66 Kinderkamack Road and known as Block 113, Lot 5 on Oradell's Official Tax Map ("Property" or "Lot 5"). It is privately owned, approximately 25,515 sq. ft. (0.59 acres), vacant, and within Oradell's B-3 Business and Apartment Zone District. The prior use of the lot as a car dealership has left soil contamination on-site and on certain adjacent residential properties on Beverly Road, a parallel street to Kinderkamack Road. Pa109 at ⁋1.

B. Borough of Oradell Zoning Ordinance

Oradell's Zoning Ordinance, at §240-6.5(I), sets forth the use and bulk regulations for the B-3 Zone in which Lot 5 is located:

I. B-3 Business and Apartment.
- (1) Permitted uses shall be as follows:
  - (a) All uses permitted in the B-1 Zone. Bulk requirements of the B-1 Zone apply to construction under this section.
  - (b) **Garden apartment buildings** housing four or more dwelling units. Bulk requirements of the A-1 Zone apply to construction under this subsection.
- (2) **All other uses not set forth above are prohibited in this zone**.
- (3) Lot dimensions.
  - (a) The minimum lot dimensions are as follows:
    - [1] Width: 150 ft.
  - (b) The minimum yard requirements of a principal building are as follows:
    - [1] Front yard setback: 15 ft.
    - [2] The rear yard shall be used to meet the parking requirements of this chapter.

[3] Side yard setback. The minimum side yard shall be 10 feet; the minimum total of both side yards shall be 25 ft.

(c) Maximum building coverage: 40% of the total lot area.

(d) Maximum lot coverage, including buildings and impervious material, but excluding the water surface area of any swimming pool/pond: 85% of the total lot area, except that if all the parking is contained under the building, then the maximum lot coverage shall be 80% of the total lot area.

(e) **Floor area ratio: no more than 35%**.

(emphasis added). Pa415-416.

The permitted uses in the B-1 Business Zone which are also permitted in the B-3 Zone as above stated, are set forth at §240-6.5(G), as follows:

(a) Business, professional, and governmental office, including parking accessory thereto;
(b) Retail stores, or mercantile stores, excluding auction galleries and automotive sales or service establishments;
(c) Dancing, music, and art instruction studios;
(d) Radio and television repair, locksmiths, watch, clock and jewelry repair, upholstery and furniture repair and other similar service establishments furnishing services other than of a personal nature, but not including gasoline filling stations and other automotive services;
(e) Residential units in other than the ground floor are permitted, **provided that they are efficiency apartments**. (emphasis added).

Pa414-415.

There is no ambiguity in the Zoning Ordinance. Permitted residential uses in the B-3 Zone are limited to garden apartment complexes with four or more dwellings, and those that are permitted in the B-1 Zone. The B-1 Zone permits efficiency apartments provided they are not located on the ground floor.

C. 2018 Master Plan

The Oradell Planning Board undertook a re-examination of its municipal master plan in 2018 (“2018 Master Plan”). The 2018 Master Plan addresses land development regulations in Oradell and discussed rezoning certain areas of the Borough, but Lot 5 and neighboring area **were not** subsequently proposed for any rezoning. Pa137 at ⁋10. The criteria for the B-3 and B-1 Zones as to floor area ratio and the residential use restriction limiting residential units to efficiency and garden apartments were also not amended by the Governing Body and remain as aforesaid. Pa108-145; Da1-7.

The Borough's 2018 Land Use Element of the Master Plan identifies Lot 5 as a “Secondary Business” Land Use category. Lot 5 **is not** located within the Central Business District (“CBD”) Land Use category. Rather, “[t]he Secondary Business area is located on Kinderkamack Road, both north and south of the CBD to the Borough’s northerly and southerly municipal boundary lines. This area also is designated to address local service commercial needs consistent with the prevailing scale of two-story development in this area.” Da3; Pa406. Thus, the Secondary Business area and CBD are two entirely separate, non-overlapping areas.

The 2018 Master Plan made several observations as to the CBD. Although the CBD is a different zone from the B-3 Zone and Secondary Business area in which Lot 5 is located, Plaintiff’s planner nonetheless offered misleading testimony

by suggesting that such observations [i.e., encouraging the promotion of mixed-use development to include residential units above the first floor and the restriction of units to efficiency apartments conflicts with certain provisions of the New Jersey Uniform Housing Affordability Controls (UHAC)] were also made as to the B-3 Zone, when they were not. Pa276 at 72:9-73:25; Pa280 at 89:13-20; Pa282 at 95:3-8; Da1-7. Moreover, the instant matter is not a challenge to the validity of Oradell's Zoning Ordinance, so whether same is or is not inconsistent with UHAC as related to affordable housing units is not even part of this case.

D. <u>66 Kinderkamack's Development Application</u>

66 Kinderkamack is the contract purchaser of Lot 5. Pa179 at 23:20-22. In June 2022, it filed a d variance development application with the Board in connection with the parcel. The proposal, which is the subject of this litigation, sought approval to construct a building with 29 residential units on two levels, 1,180 sq. ft. of office space and 1,246 sq. ft. of retail space on the ground level, and a split-level parking garage with 66 spaces. Inclusive of the garage (which would have at-grade and below-grade floors), the building would be four stories. Pa110 at ¶3; Da1-16. The aforesaid was all sought to be built on a 0.59 acre lot, Plaintiff thus proposed development at a **<u>density of 49 units per acre</u>**. [29 units/.59 acre].

The residential component of the project violated the B-3 Zone criteria, which restricts residential use to efficiency and garden apartments. Plaintiff's project

proposed neither. Instead, it included 11 one-bedroom units, 14 one-bedroom with workspace units, 3 two-bedroom units, and 1 three-bedroom unit. Of the total units, 5 would be affordable units -- to include 1 one-bedroom unit, 3 two-bedroom units, and 1 three-bedroom unit. Da1-7; Pa115 at ¶13; Pa268 at 40:3-13; 22-24. Plaintiff could have sought approval for a project that complies with the B-3 residential use restriction; it chose not to do so.

66 Kinderkamack put forth a proposed development that so deviated from B-3 Zone criteria that approval of same required variance relief for the following:

1. **Use Variance pursuant to NJ.S.A. 40:55D-70d(1):**
   The proposed residential units were not efficiency or garden apartments, which are the only residential units permitted in the B-3 Zone District [see §240-6.5I(1)(a) and §240-6.5G(1)(e)], a use variance was thus required.

2. **Variance pursuant to N.J.S.A. 40:55D-70d(4) for Exceeding Floor Area Ratio:**
   A floor area ratio of 1.77 was proposed vs. the 0.35 maximum permitted (45,039 sq. ft. vs. 8,930 sq. ft. permitted, *a **500% increase** in the FAR*).

Bulk Variances pursuant to N.J.S.A.40:55D-70c:

3. **Side Yard Setback, Combined** variance:
   12.2 ft. proposed vs. 25 ft. required, a difference of 12.8 ft.

4. **Building Height** variance:
   37.4 ft. proposed vs. 35 ft. maximum permitted, a difference of 2.4 ft.

5. **Building Coverage** variance:
   65.1% proposed vs. 40% maximum permitted, a difference of 25.1%.

6. **Generator Location** variance:
   Generator proposed in front yard setback area vs. only permitted in rear or side yard of the building. Approximately 6 ft. setback to Argyle St. front

yard setback vs. 10 ft. required. [See §240-7.2E]

Pa111 at ⁋4; Pa133 at ⁋2; Da1-7.

The Borough Planner, Caroline Reiter, P.P., issued a July 12, 2022 report on the Application. Da1. The Borough Engineer, David R. Atkinson, P.E., also issued a report, dated June 15, 2022, last revised July 14, 2022. Da8.

Because the Application required variance relief pursuant to N.J.S.A. 40:55D-70d(1) and d(4), an affirmative vote of at least five Board members was required for approval. However, the motion to approve received only three YES votes, and four NO votes; the Application was thus determined to be denied. Pa132 at ⁋49; Pa144. The Board adopted a resolution memorializing its denial on December 19, 2022 ("Resolution"). Pa108-145.

Previously, Plaintiff sought approval to construct on Lot 5 a three-story building with 33 residential units, 951 sq. ft. of office space and 71 parking spaces which similarly sought d(1) use, d(4) floor area ratio and c bulk variance relief. The Board denied that application. Pa110 at ⁋2.

E. Plaintiff Proposed a 1.77 Floor Area Ratio ("FAR")

At the June 20, 2022 hearing, Plaintiff's counsel gave an overview of the current development plan for Lot 5. Counsel stated that the new plan has a FAR of 1.42 which was less than what had been previously proposed. Pa174 at 4:14-22. However, the Borough Planner disagreed, opining that the FAR for the current

project approximated 1.77 and that Plaintiff's engineer had miscalculated the FAR by omitting portions of the garage. She explained that based on Borough Zoning Ordinance definitions of "Floor Area, Gross" and "Floor Area Ratio", all of the parking garage except the lower-level garage floor that is located in the basement should be included in the FAR calculation. Plaintiff's engineer had improperly omitted portions of the lowest level uncovered and open portion of the parking garage in his computations to arrive at the incorrect 1.42 figure. Da1-7; Pa132 at ⁋48; Pa123-124 at ⁋30; Pa237 at 34:7-36:1; 36:11-14.

The Borough Engineer also opined that Plaintiff's proffered 1.42 FAR calculation was erroneous, and that the FAR being proposed was indeed 1.77:

> "The Applicant has revised the zoning table to indicate that a Floor Ratio Area of 1.42 is being proposed. As part of the calculation **the Applicant only counts for the enclosed portion of the ground floor lobby/garage area** which includes the retail and office space, however as stated in §240-2.2 of the Borough Code Floor Area, Gross is defined as "The sum of the gross horizontal area of all floors of a building from the exterior walls, or from the center line of a wall separating two buildings; and including attached or detached garages and accessory building, but excluding:
> a. residential basements; b. the floor area of rooms devoted to mechanical equipment accessory to the building and/or rooms with a ceiling height of less than six feet located in basements of nonresidential properties …." In addition, as stated in 240-2.2 of the Borough Code Floor Area Ratio is defined as "The sum of the gross horizontal area of all stories above gra[d]e, except for the basement floor of residential buildings or structures, compared to the total area of the site..." **The applicant shall revise the Floor Area Ratio to count for the entire floor area for the ground floor inclusive of the garage/parking. <u>Our office has calculated a Floor Area Ratio of 1.77</u>.**" Da11-12, emphasis added; Pa132 at ⁋48.

The correct FAR calculation of 1.77 was also confirmed by the Borough Construction Official. Pa211 at 10:11-18.

The Board concurred with its professionals who are familiar with Oradell zoning standards that the project in fact proposed a 1.77 FAR. With the maximum FAR permitted in the B-3 Zone at only 0.35, Plaintiff therefore sought to develop at a FAR ***five times greater*** than what was allowed, seeking to develop at 45,039 sq. ft. when only 8,930 sq. ft. was permitted. Pa140 at ¶14; Pa142 at ¶16.

F. Environmental Contamination Remediation

During the hearings, Plaintiff's counsel noted the prior use of Lot 5 as a car dealership, and that approval of the application would allow remediation of on and off-site contamination as her client's purchase contract provides for a $375,000 environmental cleanup escrow. Pa174 at 4:23-25; 5:24; Pa175 at 6:1-4; 11-14; Pa179 at 24:1-5; 24:24-25:1. She suggested that the proposed building size and scale are necessary to provide a cap for soil conditions. Pa175 at 6:21-7:5. Plaintiff's witnesses also intimated that remediation costs are a legitimate basis upon which to obtain a d(1) use or FAR variance. Pa192 at 74:8-75:10-25; Pa193 at 79:6-19. However, a private developer's remediation costs to clean up private property does not in any way form an adequate or justifiable basis upon which to secure variances. The notion that a private developer's financial ability to clean up private property is a relevant or otherwise legitimate consideration when seeking

variance relief from a zoning board has no support whatsoever in the law. The Statement of Facts in Paragraphs F and G herein are included only because Plaintiff raised the aforesaid notion and Defendant desires to respond to same factually, from the standpoint of what the record below actually reflects. Therefore, the inclusion of countervailing facts on these topics is for that sole purpose alone and is not to be construed as lending any legitimacy to Plaintiff's arguments. As discussed in the Legal Argument section of this brief and as the Trial Court correctly recognized, a private developer's remediation costs to clean up private property does not in any way form an adequate or justifiable basis upon which to secure d(1) use or d(4) FAR variance relief.

The suggestion that the building envelope size Plaintiff proposed was imperative to cap the soil contamination on Lot 5 was not supported by record evidence. Testimony indicated there were alternatives to effectively contain soil conditions with a smaller envelope, and that the envelope for which approval was sought, which exceeded the maximum permitted building coverage by upwards of 25%, was not a necessity for environmental remediation purposes, but simply reflected Plaintiff's desire for a building at such scale and mass, and on a 0.59 acre parcel. Pa242 at 56:14-19; Pa244-241 at 65:23-66:1. At no point was any evidence presented that cleanup of Lot 5 could not be accomplished without the requested d(1) use or d(4) FAR variance. Pa172-322.

G. Building Size and Scale and Intensity of Use Driven by Environmental Remediation Costs and Return on Investment Interests

What was also made clear during the hearings was that Plaintiff sought to develop at a higher density and more intense use to defray remediation costs that would be incurred if the Property were developed. In addressing the prospect of proceeding without the requested FAR and building coverage variances, the project architect repeatedly drew attention to the substantial environmental escrow in the purchase contract and stated that adherence to B-3 Zone standards would only permit a small building that would be inadequate in terms of providing an economic incentive to Plaintiff to develop Lot 5. The testimony disclosed that the proposed building size and intensity of use of the parcel was driven by cost-feasibility and return on investment priorities, rather than site suitability. Pa192 at 74:8-75:10-25; Pa193 at 79:6-19.

LEGAL ARGUMENT

POINT I

THE ZONING BOARD SET FORTH IN ITS MEMORIALIZING RESOLUTION REASONABLE BASES AND RATIONALE FOR THE DENIAL OF THE 66 KINDERKAMACK APPLICATION. THUS, THE TRIAL COURT PROPERLY FOUND THE BOARD'S DECISION WAS NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE (Pa23-Pa40)

As the Trial Court aptly recognized, it is of paramount importance to attribute significance to the Resolution that memorialized the Board's denial of the Application. Pursuant to N.J.S.A. 40:55D-10(g), the memorializing resolution sets forth the zoning board's factual findings and conclusions, expressed by those who vote to adopt same:

> The municipal agency shall include findings of fact and conclusions based thereon in each decision on any application for development and shall reduce the decision to writing. The municipal agency shall provide the findings and conclusions through:
>
> (1) A resolution adopted at a meeting held within the time period provided in the act for action by the municipal agency on the application for development; or
>
> (2) A memorializing resolution adopted at a meeting held not later than 45 days after the date of the meeting at which the municipal agency voted to grant or deny approval. Only the members of the municipal agency who voted for the action taken may vote on the memorializing resolution … The vote on any such resolution shall be deemed to be a memorialization of the action of the municipal agency and not to be an action of the municipal agency …

The Court in Scully-Bozarth Post #1817 of Veterans of Foreign Wars of U.S.

v. Planning Bd. of City of Burlington, 362 N.J. Super. 296, 312-313 (App. Div. 2003), made clear the import of a land use board's memorializing resolution:

> "The attorney's function is to draft a proposed resolution, acting as a scrivener for the board ... 'Sometimes several drafts are required … to give complete and accurate expression of the intent of the board.'... Whether the final version of the resolution, as adopted, differs from any comments publicly made by one or more members voting on it, or whether one or more members did not publicly comment at all, does not detract from **the resolution's status as the official statement of the board's findings and conclusions**." (internal citations omitted)

Here, the Board provided a plethora of bases and rationale explaining its findings, conclusions, and ultimate decision to deny the Application. Pa108-145. At 36 pages, the Resolution is comprehensive, and the analyses the Board gives for its determination based upon the evidence (or lack thereof) presented by the applicant are objectively reasonable. Pa23-27. That matters immensely because under well-settled law so long as a municipal board's decision has a "rational basis" in the record it is sufficient, presumed valid, not arbitrary, capricious or unreasonable, and as such is to be left undisturbed. The burden of proving otherwise is on the party attacking it who must overcome this presumption in favor of the board by "clear and compelling evidence." Kramer v. Bd. of Adj. of Sea Girt, 45 N.J. 268, 285 (1965); Burbridge v. Governing Body of the Twp. of Mine Hill, 117 N.J. 376, 385 (1990).

The Trial Court thus aptly made exceedingly clear the highly deferential

standard to which it was constrained in reviewing the Board's action on the Application, especially since variances had been denied:

> "The court grants substantial deference to the municipal zoning board's decision to grant or deny variances and related land use. N.J. 517, 529 (1993); D. Lobi Enters., Inc. v. Plan./Zoning Bd. of Sea Bright, 408 N.J. Super. 345, 360 (App. Div. 2009). Decisions of zoning boards to grant or deny applications are presumed valid … "A local zoning determination will be set aside only when it is arbitrary, capricious or unreasonable." Kramer v. Bd. of Adj. v. Sea Girt, 45 N.J. 268, 296 (1963).
>
> The burden is on the challenging party to overcome this highly deferential standard of review. See Smart SMR of N.Y., Inc. v. Borough of Fair Lawn Bd. of Adj., 152 N.J. 309, 327 (1998); Kramer, supra, 45 N.J. at 296. A court must not substitute its judgment for that of the local board unless there is a clear abuse of discretion. See Cell South, supra, 172 N.J. at 82 … 'there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved." …
>
> Consistent with this jurisprudential policy of deference to local board's peculiar knowledge of local conditions, **a reviewing court must afford "greater deference …. to [a] denial of a variance**[.]." Ne. Towers v. Zoning Bd. of Adjustment of Borough of W. Paterson, 327 N.J. Super. 476, 493-94 (App. Div. 2000)... This "heavier burden requires the proponent of the denied variance to prove that the evidence before the board was 'overwhelmingly in favor of the applicant.'" Nextel of N.yu. v. Borough of Englewood Cliffs Bd. of Adjustment, 361 N.J. Super. 22, 38 (App. Div. 2003)…A court's job is to determine whether the board followed the statutory guidelines, and properly exercised its discretion. Med. Ctr. at Princeton v. Princeton Zoning Bd. of Adj., 343 N.J. Super. 177, 199 (App. Div. 2001). A court's scope of review "is not to suggest a decision that may be better than the one made by the board, **but to determine whether the board could reasonably have reached its decision on the record**." Jock v. Zoning Bd. of Adj. of Twp. of Wall, 184 N.J. 562, 597 (2005)."

Pa33-35, emphasis added.

It also underscored the Board's provision of cogent reasons for its decision:

> "In its rebuttal brief, plaintiff argues the Resolution is invalid because it is based upon unsubstantiated opinion and beliefs of the Board and disregards the evidence ... **The Court finds <u>no evidence</u> supporting plaintiff's contention that the Resolution is not based upon the evidence produced at the hearing**…"

> "The **findings of the Board are substantiated in the record** …"

> "The Resolution concluded that the other variances required in addition for the use and FAR "mandated a conclusion that granting the use variance would substantially impair the intent and purpose of the Zone Plan and Zoning Ordinance." **<u>There is nothing in the record which refutes that</u>**."

Pa30, 32, 36, emphasis added.

As discussed in the balance of this brief, and which the Trial Court repeatedly confirmed, the Board addressed each layer of proof that 66 Kinderkamack was required to satisfy to warrant the extensive variance relief it sought, and set forth its reasoning as to why, in every instance, Plaintiff failed to meet its burden. The Trial Court concurred that the Board's factual findings and conclusions find ample support in the record and are consistent with the law. It thus found that Plaintiff failed to meet its heavy burden to show why the Board's denial should not be presumed valid or how the Board abused its discretion in reaching its decision. The Trial Court accordingly properly held that the Board's denial of the 66 Kinderkamack application was not arbitrary, capricious or unreasonable.

POINT II

THE ZONING BOARD'S DENIAL OF PLAINTIFF'S REQUEST FOR d(1) USE VARIANCE RELIEF WAS REASONABLE AND SUPPORTED BY THE RECORD. THUS, THE TRIAL COURT PROPERLY FOUND THE BOARD'S DECISION WAS NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE (Pa24, 30, 36-38)

The Board gave detailed reasons and analyses in its Resolution for denying Plaintiff's request for a d(1) use variance that were undergirded by the evidence (or lack thereof) presented by the applicant. The Trial Court thus properly found that the Board's denial of the Application was not arbitrary, capricious or unreasonable.

A. Criteria for "d" Variances.

New Jersey has a long-standing legislative policy favoring land use planning by ordinance, rather than by variance. Elco v. R.C. Maxwell Co., 292 N.J. Super. 118, 126 (App. Div. 1996); Comm. for a Rickel Alt., 111 N.J. 192 (1988). Variances therefore are appropriate only in exceptional cases where the justification is clear. Nigito v. Borough of Closter, 142 N.J. Super. 1 (App. Div. 1976), certif. den., 74 N.J. 265 (1977). The policy disfavoring variances is reflected in the MLUL and the basic law governing land use variances which is codified in N.J.S.A. 40:55D-70d, amended by L.1991, C.256.

Under N.J.S.A. 40:55D-70d, a zoning board of adjustment may grant a d(1) use variance **only**:

(1) **"[i]n particular cases and for special reasons"** to permit a use

or principal structure in a district restricted against such use or principal structure (i.e., "positive criteria") ; **and**

(2) if the variance can be granted **"without substantial detriment to the public good"** and "**will not substantially impair the intent and purpose of the zone plan and zoning ordinance.**" (i.e., "negative criteria") (emphasis added)

The statute thus requires the applicant to prove **both** positive and negative criteria to secure a d variance.

1. Special Reasons/Positive Criteria.

The applicant may establish "special reasons" ("positive criteria") that justify a d variance for a non-permitted use based upon a showing that:

(1) the proposed use is "inherently beneficial" to the public good[1]; or
(2) the applicant will suffer "undue hardship" because the property cannot be reasonably adapted to a conforming use; or
(3) the proposed site is "particularly suitable" for the proposed use because it will promote the general welfare.

Saddle Brook Realty, LLC v. Twp. of Saddle Brook Zoning Bd. of Adj., 388 N.J. Super. 67, 75-76 (App. Div. 2006).

66 Kinderkamack advanced a positive criteria argument for a d(1) use variance based **solely** on particular suitability. Pa134-135 at ⁋⁋4-5; Pa257-290.

[1]Plaintiff misstates that its proposed development was an "inherently beneficial" use. Pb1. During the hearings Plaintiff did not attempt to justify the granting of a d(1) use variance on such a basis. Pa134 at ⁋4; Pa172-323. Further, it is undisputed that the subject project containing residential use is not an inherently beneficial use, notwithstanding the proposed affordable unit set aside. Advance at Branchburg II, LLC v. Branchburg Tp. Bd. of Adj., 433 N.J. Super. 247, 256 (App. Div. 2013) conclusively held that a set-aside of 20% of the units as affordable in a residential development **does not** make a project inherently beneficial.

For a d(1) use variance to be granted on that basis, an applicant must prove that the use promotes the general welfare because the **site** (Lot 5) is particularly suitable or appropriate for the proposed use. This constitutes the positive criteria or special reasons necessary to justify the granting of a d(1) use variance. The benefit to the general welfare derives not from the use itself but from the use of the property **at that specific location**. It is the **location** of the proposed development that triggers the ability to proffer the position, not the proposed use without regard to its location. Medici v. BRP Co., 107 N.J. 1, 18 (1987).

2. Negative Criteria.

N.J.S.A. 40:55D-70d further requires that an applicant establish the negative criteria, that the variance being sought can be granted:

(1) without substantial detriment to the public good; **and**
(2) without substantial impairment to the intent and purpose of the Zone Plan (i.e., Master Plan) and to the zoning ordinance in effect, with an enhanced quality of proof.

The **first prong** of the negative criteria test, "without substantial detriment to the public good," can be measured by the impact on the surrounding area, fiscal effects, and the provision of municipal services. Medici at 1, 4, 21, 22 n. 12.

The **second prong** of the negative criteria test, "without substantial impairment to the intent and purpose of the zone plan (i.e., Master Plan) and to the zoning ordinance" in effect, requires a reconciliation of why a particular use

should be allowed when the municipality has not designated it as a permitted use. The applicant must offer an "**enhanced quality of proof**" showing that the variance sought "is not inconsistent with the intent and purpose of the master plan and zoning ordinance" and "must reconcile the proposed use variance with the zoning ordinance's omission of the use from those permitted in the zoning district." Medici at 20-21. Because it is the role of the municipality's governing body to enact zoning ordinances, the enhanced level of proofs required is intended "...to narrow…the discretion of boards of adjustment in reviewing use-variance appeals for uses that are deliberately excluded by the governing body from those permitted by the zoning ordinance." Ibid at 5. This "effectuate[s] the legislature's apparent objective of encouraging municipalities to make zoning decisions by ordinance rather than by variance." Ibid.

B. Plaintiff Failed to Establish Special Reasons/Positive Criteria for a d(1) Use Variance By Reason of "Particular Suitability".[2]

Plaintiff argued it satisfied the positive criteria for a d(1) use variance, contending that Lot 5 is "particularly suitable" for the proposed non-efficiency/non-garden apartment building because the new development would promote the general welfare. In advancing that position, Plaintiff cited testimony

[2] Plaintiff misstates that the Trial Court did not provide an analysis relating to the positive criteria. Pb27. The Opinion and the excerpts herein show otherwise. Further, the posture Plaintiff took in attempting to have the Trial Court substantively "rehear" the Application anew was also improper, as on review the judiciary's role was to ascertain whether the Board had substantial basis in the record for its action on the Application.

offered by its planner suggesting the development will promote several of the purposes of zoning listed at N.J.S.A. 40:55D-2. However, merely asserting that a use will promote one or more purposes of zoning is inadequate to satisfy the positive criteria. It must also be shown that the specific site (Lot 5) is "peculiarly fitted" or "particularly suitable" for the proposed use, i.e., 29-unit building.

The Supreme Court in Fobe Assoc. v. Mayor and Council of Demarest, 74 N.J. 519 (1977) found the denial of a variance by a board of adjustment to permit a developer to build an apartment building in a single-family district was not arbitrary or capricious. The applicant argued there was a regional need for housing and therefore his project served the general welfare. The Court held the rule of Kohl v. Mayor and Council of Fair Lawn, 50 N.J. 268, 279-280 (1967) was applicable and that it must be shown that even where there was a need, the general welfare is served ***because*** the use is peculiarly fitted to the particular location for which the variance is sought.

66 Kinderkamack's reliance on the fact that its project will produce affordable units is also misguided. Plaintiff mischaracterizes its generosity and interest in providing affordable housing. Because it is seeking a use variance (and not proposing an as-of-right mixed-use project with efficiency apartments or garden apartments), Oradell's mandatory set-aside ordinance is triggered mandating that the developer set aside 15% of the units (if a rental project) or

20% of the units (if a sales project), for affordable housing. So Plaintiff had no choice but to set-aside units for affordable housing. Moreover, the Ordinance (like most mandatory set-aside ordinances) provides at §240-9.13 B(4):

> "B. Mandatory Set-Aside Requirement.
>
> (4) This requirement **does not create any entitlement for a** property owner or **applicant for** subdivision or **site plan approval, a** zoning amendment, **use variance**, or adoption of a redevelopment plan or rehabilitation plan in areas in need of redevelopment or rehabilitation, **or for approval of any particular proposed project**." Pa352-353, emphasis added).

Thus, Plaintiff's bootstrapping argument is disingenuous, and precluded by the very terms of the ordinance that mandates the set-aside of affordable units. The assertion that Plaintiff should be granted a d(1) use variance because its project will include affordable units is specifically precluded by the very ordinance that requires the set-aside Plaintiff so "generously" is willing to provide.

66 Kinderkamack also erroneously contends that the Board did not properly consider the testimony of its witnesses. Nowhere does the law mandate that a municipal board accept face value all the evidence presented by an applicant. "A board is free to accept or reject the opinions of a planner proffered by an applicant or objector." Hawrylo v. Bd. of Adj., Harding Tp., 249 N.J. Super. 568 (App. Div. 1991); El Shaer v. Planning Bd. of Tp. of Lawrence, 249 N.J. Super. 323, 329 (App.Div. 1991). The Board thus was entitled to give as much, or little, weight as it deemed appropriate to Plaintiff's experts. Equally

mistaken is the idea repeatedly raised by Plaintiff that the Board must cite alternate evidence to counter evidence presented by the applicant. That notion has no basis in law and eviscerates the burdens of proof that an applicant must bear under N.J.S.A. 50:55D-70d. Applying that strained logic, so long as an applicant puts forth any evidence to support its application, a variance request must be granted irrespective of the quality or persuasiveness of that evidence. The Trial Court aptly opined on the evidence Plaintiff offered:

> "The applicant's miscalculation of the FAR … **undermines** the testimony of its experts who relied upon the erroneous calculation in support of their testimony, including the architect, Raymond Virgona, the engineer, Matthew Neuls and the planner, Charles Heydt." Pa31 (emphasis added).

The Resolution, as the Trial Court underscored, illuminates the deliberative process the Board undertook to find that Plaintiff had not established that the proposed development would be particularly suitable for Lot 5. Pa23-27; 31-32. The Board focused on the necessary variances for the project and determined that the extent of the variance relief demonstrated that the proposal was too great in mass for a parcel comprising a land area of only 0.59 acres. There would be 29 residential units located on same, which equates to development at a **density of 49 units per acre** [29 units/0.59 acre]. The non-residential component, which previously comprised 951 sq. ft. of office space, had been increased to include 1,180 sq. ft. of office space and 1,246 sq. ft. of retail space:

> 7. ... the **Board continues to believe that the proposed**

development <u>is not particularly suitable for the subject property</u>. There are a number of reasons supportive of this determination. While the extent of the FAR relief at 1.77 is a reduction from the 1.99 required from the prior plan, nevertheless **the proposed FAR would result in a FAR five times greater than that permitted in the District. There was no testimony in support of the application which references a FAR of 1.77 on a property proximate to the subject premises, or for that matter anywhere within the Borough**...

8. **The excessive FAR implicated by the plan** is just one example which demonstrates that **the <u>proposal is simply too massive in scale for a parcel just slightly over one-half acre in size</u>**. **It is to be noted that building coverage is proposed at 65.1%, more than 50% greater than the 40% maximum permitted in the District.** The prior iteration of the plan proposed building coverage at 67.8%. This contrast demonstrates that the current design, like the previous proposal, is simply too large for the property. The reduction in building coverage from 67.8% to 65% is not significant … Had the building been reduced in size would have resulted in a corresponding reduction to the extent of the variance relief pertaining to both the FAR and building coverage.

“14. The Board continues to believe that the applicant is attempting to place on the property a building design that is too aggressive for the subject property, although the proposed FAR at 1.77 represents a reduction from the 1.99 FAR proposed under the prior application. This does not constitute a substantial reduction. The proposed FAR is dramatically higher than any other request for FAR deviation relief that the Board has considered over the past decade. **This act in and of itself demonstrates that the site is not particularly suitable for the proposed use** and that special reasons cannot be demonstrated so as to satisfy the positive criteria for the granting of d variance relief for a non-inherently beneficial use. The fact that other variances aside from the d(1) use variance and the d(4) FAR variances are required by the proposal mandates a conclusion that the granting of the use variance would substantially impair the intent and purpose of the Zone Plan and Zoning Ordinance.”

Pa135-136 at ⁋⁋7-8; Pa140 at ⁋14 (emphasis added); Pa133-134 at ⁋3.

The Trial Court therefore properly found that the Board more than adequately set forth a rational basis for finding that 66 Kinderkamack failed to demonstrate that Lot 5 is particularly suitable for the intense development proposed. Indeed, it could be easily concluded that the magnitude of the project at this particular location demonstrated that Lot 5 in fact is **particularly unsuitable** for the proposed high-density project. As noted by the Trial Court:

> "…the density proposed: 29 units on an 0.59 acre parcel equates to a density of 49 units per acre. The proposed FAR, would result in a FAR five times greater than that permitted in the zone as set forth in the Resolution. The building coverage of 65.1% proposed is as noted in the Resolution, fifty-percent greater than the forty percent permitted coverage … **Essentially in this application** and the previous, **the Board made clear that that proposed development was too large and intense for the site.**" Pa36, emphasis added.

> "The[sic] Board found the proposed project to be out of proportion with the neighborhood. This is supported by the record. The Board rejected the argument that the building was establishing an appropriate density and providing sufficient space for a variety of residential and commercial uses. The Board specifically found that the commercial use was token and that the development proposed did not meet the zone goal of a mix of residential and commercial use. ..
>
> The court finds the Board was not arbitrary, capricious or unreasonable in considering the minimal buffer zones between the proposed development and the homes on Beverly Road."
>
> Pa38, emphasis added; <u>see</u> <u>also</u> Pa24.

Plaintiff attempted to leverage Lot 5's contaminated condition for purposes of gaining an approval from the Board. It tried to justify and correlate the

need for the proposed mass of the building with the need to remediate contaminated soil. However, the testimony disclosed that the intensity of the development proposed for which approval was sought and variances needed, was **not** a necessity to accomplish remediation. Plaintiff's engineer testified that aspects of the project other than the building envelope slab would also serve to cap or contain soil conditions:

> Engineer: "The cap is the building, and then **there's other areas onsite outside the building** that'll be more **of a material that hasn't been determined**. But typically that's **clay or something like that**. That hasn't been placed yet." Pa242 at 56:14-19, emphasis added.
>
> "The cap – the building slab itself is a large **part of the cap.** The area of concrete that encompasses the floor is a large **part of the cap**." Pa244-245 at 65:23-66:1, emphasis added]

The testimony thus made clear there were alternatives to effectively contain soil conditions with a building envelope smaller than what was being proposed. Since components other than the envelope could serve to contain soil, remediation could still be accomplished with less building coverage. No evidence was put forth for the proposition that remediation could not be effectuated without the requested d(1) use, FAR, or building coverage variances. Pa172-323. The 65.1% proposed building coverage, which was 62% more than the 40% maximum permitted in the B-3 Zone, merely reflected the scale and mass at which Plaintiff, as a private developer, desired to develop Lot 5.

Plaintiff also tried to leverage the contaminated condition of Lot 5 by

suggesting that a "benefit" of approving its application would be the remediation of same and several adjoining private properties. Pb17. That proffer was likewise disingenuous. Municipalities have no obligation to remediate private property. Under various laws in New Jersey, the owner, operator, or prospective purchaser of private property that is contaminated is responsible for undertaking remediation. Such laws impose affirmative obligations on the aforesaid parties to effectuate remediation. Lot 5 therefore would be remediated one way or the other, be it by Plaintiff as the eventual property owner or another party, irrespective of whether the Board approved the Application.

Nonetheless, the Board was mindful that an approval would include remediation, and further explained its finding:

> 12. In its consideration of the request for the d(1) use variance and d(4) FAR variance, the Board has been mindful of the fact that the subject property is contaminated ... Testimony has been provided that approval … would permit not only the subject site to be remediated, but the three adjoining properties as well … **such factor cannot justify the approval of a project that overwhelms the subject** property. As noted, the deviation relief pertaining to the d(4) FAR variance is substantial. **Ultimately, the property owner will be mandated to remediate these environmental conditions, both on the subject site and neighboring properties. <u>The Board cannot justify permitting a development entirely inappropriate for the subject site as a quid pro quo for environmental cleanup</u>.** A development less massive in size could also accomplish this objective while mitigating the extensive FAR and building coverage variances. **Environmental contamination will eventually be required to be remediated. However, allowing an oversized and massive development which, if constructed, would remain for decades**

> **cannot serve as a basis for the granting of an extensive relief implicated by the within proposal.** Pa138-139 at ⁋12, emphasis added]

The testimony also revealed that remediation costs factored heavily into the project's proposed size and scale. In addressing the prospect of proceeding without a FAR variance, Plaintiff's Architect testified without equivocation that adherence to the 0.35 FAR zone standard would permit a building having a floor area of only 8,900 sq. ft., which would be inadequate in terms of offsetting costs and providing an economic incentive to remedy contamination:

> <u>Architect</u>: "… the building would be extremely small, **there'd be no way to justify a $375,000 cleanup cost with a building of that size**. And in addition, the site would have to be capped in addition to that amount that's been spoken about in escrow. The retaining wall would still have to be rebuilt because the remediation requires that to be the case. So, **it would be a very costly operation for just a small number of units** …" Pa192 at 74:21-75:5, emphasis added.

Pressing return on investment priorities further, the Architect said adhering to the 40% building coverage zone criteria would yield a footprint and floor area ratio that likewise would be insufficient to offset costs:

> <u>Architect</u>: "Even if you were to apply the 40 percent maximum lot coverage, which is still rather constricting. That would result in a footprint of 10,200 square feet. If you double that and you make that a two-story building with parking, that would result in a floor area ratio of about 1.2 … that would still not provide a very substantial number of units **to offset the costs of the cleanup**… **in short, I think the project makes sense. <u>It can support the high cleanup costs</u>**…" Pa192 at 75:12-21, 23-25 emphasis added.

"Even though it's 29 units, there are 24 market units. So, essentially the

> five-unit affordables do not provide an asset to the builder, to the developer ... so … you got to view this economically as a 24-unit project because that's really what the developer is gaining from this. **Those 24 units have to offset** the cost of all the site work, improvements and so on and so forth, **and the remediation of course**." Pa193 at 79:6-9, 13-19, emphasis added.

Indeed, Plaintiff concedes that "**[t]aken together, [Applicant's Architect] testified that there would "be no way to justify a $375,000 cleanup cost with a building of that size**." Pb11-12, emphasis added.

The record makes so exceedingly clear that an overriding motive for 66 Kinderkamack seeking FAR and d(1) use variances was not site suitability, but profit margins, that the Trial Court opined:

> "Plaintiff argues that 0.35 FAR severely limits achieving a viable development on the property. Plaintiff has also argued the cost of the remediation makes development of a less intense development not financially viable. **It appears to the court that the FAR is driven by the remediation cost** ... If the remediation is removed from the equation, meaning the property owner completes the remediation and repairs the damage to the neighbor's property what is left? …**The applicant is in essence financing its environmental obligations on the backs of the neighbors whose properties the owner has contaminated. <u>This is not a prong of a positive criteria. Nor is it a basis to approve the variances, facts which the Board recognized</u>.**" Pa30, emphasis added.
>
> "**Nor was the Board's rejection of the quid pro quo for remediation of adjoining offsite properties unreasonable**." Pa38, emphasis added.

The emphasis on cost-feasibility severely undercut Plaintiff's contention that Lot 5 is particularly suitable for the new development. It revealed that extreme deviations from zone criteria were sought to facilitate developing the

parcel at a level of intensity that Plaintiff felt was needed to realize a return on investment that was satisfactory to it as a private developer. However, a variance can only be granted if the Board, on the basis of the evidence presented before it, determines that the public interest as distinguished from the purely private interest of an applicant would be best served by permitting the proposed use. The Supreme Court opined in Beirn v. Morris, 14 N.J. 529, 534 (1954):

> "These considerations are manifestly insufficient for the exertion of the statutory power to vary the terms of the general regulations. The landowners acquired the property fully cognizant of the use restrictions, avowedly to make a more profitable use of the lands than conformance to the use regulation would permit, if that could be accomplished – such as would serve their own private business interests at the time; and **the profit motive is not an adequate ground for a variance**." (internal citations omitted, emphasis added).

"It is well settled that an applicant is not entitled to a variance in order to effectuate the most profitable use of his property, at least so long as permissible uses are feasible." Ring v. Mayor and Council of Borough of Rutherford, 110 N.J. Super. 441, 445 (App. Div. 1970); Bern v. Borough of Fair Lawn, 65 N.J. Super. 435, 450 (App. Div. 1961). "If the argument is that a building of smaller dimensions or fewer apartments would not be as profitable, it is fundamental that mere economic hardship is not a sufficient special circumstance upon which to ground a variance." Hill Homeowners Ass'n v. Zoning Bd. of Adj. of City of Passaic, 129 N.J. Super. 170, 175 (L. Div. 1974). In the affordable housing context, the Supreme Court in Mount Laurel II, Southern Burlington County

N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983), opined "[z]oning does not require that land be used for maximum profitability, and on occasion the goals of zoning may require something less." Ibid. at 274, n. 34.

In light of the record and law, the Board did not unreasonably find that Plaintiff's emphasis on cost-feasibility betrayed disingenuity and diminished its contention that Lot 5 is particularly suitable for the massive development being proposed. The Trial Court concurred:

> "Essentially in this application and the previous, the Board made it clear that that proposed development was too large and intense for the site. The applicant's arguments that a more intense development was required to compensate the developer in light of the necessary environmental remediation do not overcome that argument. Further that argument is undermined by plaintiff's engineer who testified the building was a part of the cap on the contamination and the balance of the cap would typically be clay or some other material. **As noted by the Borough the cost of remediation is not a factor to be considered in granting a (d) variance. The possible remediation of neighboring properties while beneficial to those private interests are also not factors which are required to be weighed by the Board in evaluating the positive and negative criteria. As argued by the Borough, even if the remediation could only be successfully undertaken because of the profits generated by the proposed project, "that does not constitute a recognized judicially acceptable basis upon which a use and FAR variances can be granted. Further, the record is devoid of evidence that the remediation of the property could not be accomplished without the (D) variance.** The Board found that the private interests of the applicant, i.e., a project intense enough to cover the environmental remediation and turn a profit did not translate to an advancement of the public interest. Our Supreme Court early held such private interest to be "manifestly insufficient for the exertion of the statutory power to vary the terms of general regulations." Beirn v. Morris, 14 N.J. 529 (1954). Here as in Beirn, the profit motive is not an adequate basis for a variance." Pa36-37, emphasis added.

In concluding that the Property is not suitable for the proposed project, the Board also delineated multiple purposes of the MLUL that would be undermined by same, and thus contrary to the public interest:

> 16. … the Board does not believe that the ... purposes of the MLUL would be advanced by the granting of such variance relief … the promotion of the general welfare as set forth in *N.J.S.A. 40:55D-2a* cannot serve as the basis for the granting of relief in view of the substantial nonconformities proposed which would be inconsistent with the character of the surrounding neighborhood and contrary to the Master Plan. Other purposes of the MLUL..would similarly not be promoted …the Goal of appropriate population densities as set forth in *N.J.S.A. 40:55D-2e* will not be promoted in view of a development discordant with the surrounding neighborhood. The Goal of providing sufficient space for a variety of uses as set forth in *N.J.S.A. 40:55D-2g* is not supported by the evidence in view of the substantial variance relief, lack of appropriate buffers, and a plan that is contrary to the Goals and Objectives of the Master Plan …the Goal of a desirable visual environment through creative development techniques … as set forth in *N.J.S.A. 40:55D-2i* cannot support the granting of relief. It is assumed that any new construction may, to some extent, be aesthetically pleasing. Aesthetics alone cannot prevail over **a FAR five times greater than that permitted in the Zone and other proposed nonconforming conditions which characterize the development proposal**…." Pa142 at ⁋16, emphasis added.

The reasons the Board gave for its determination that 66 Kinderkamack failed to make the requisite showing of the special reasons/positive criteria for a d(1) use variance under N.J.S.A.40:55D-70, more specifically that Lot 5 is "particularly suitable" for the proposed development are record-based and rationale. The Trial Court thus properly found that the Board's denial of the Application was not arbitrary, unreasonable, or capricious.

C. Plaintiff Failed to Satisfy the Negative Criteria for a d(1) Use Variance.

Without waiving any of the foregoing arguments that the denial of the Application should be upheld by virtue of the sole fact that the Board reasonably found Plaintiff did not meet the N.J.S.A. 40:55D-70 positive criteria for a d variance, Defendant sets forth below how Plaintiff also failed to satisfy the negative criteria, a showing that is just as critical to an applicant's burden of proof.

1. Plaintiff failed to demonstrate that variance relief could be granted "without substantial detriment to the public good".

With respect to the first prong of the negative criteria -"without substantial detriment to the public good"- Plaintiff submitted insufficient evidence to show that the new development would not negatively impact the area surrounding Lot 5. In the interests of brevity, Defendant incorporates by reference as if fully set forth in this brief subsection the arguments contained in Point II above and Point III below. By way of supplementation, Defendant further states as follows.

As set forth in Point II(B) above, the Board explained why it viewed 66 Kinderkamack's proposal as too oversized for a parcel just over one-half acre in size. It also concluded that granting variance relief would contravene multiple purposes of the MLUL (as well as Oradell's Master Plan), and thus be at odds with the public interest as cited above in Paragraph 16 of the Resolution.

The record reflects that the Board had adequate basis upon which to find

that Plaintiff did not carry its burden to demonstrate that its project could be approved "without substantial detriment to the public good". Again, Plaintiff has not met its heavy burden to show why the Board's determination, as explained and supported in its Resolution should not be presumed to be valid or how the Board abused its discretion in reaching its findings. For the aforesaid reasons as well, the Board's denial of the Application was not unreasonable, arbitrary, or capricious, and the Trial Court therefore properly concurred.

2. Plaintiff failed to demonstrate that variance relief could be granted "without substantial impairment to the intent and purpose of the Master Plan and to the zoning ordinance in effect".

The record also reflects that the Board had adequate basis to find that Plaintiff failed to meet its burden of proof as to the second prong of the negative criteria. Plaintiff failed to reconcile its proposed non-efficiency/non-garden apartment residential use with Oradell's Master Plan and Zoning Ordinance which omitted such types of residential units from those permitted in the B-3 Zone.

A municipality's master plan is significant because its purpose is to guide the use of lands within the municipality in a manner which protects public health and safety and promotes the general welfare. The role of the governing body is to enact zoning ordinances based on the master plan, more specifically, the land use element of the plan. §22:6. *Master plan and related activities*, 35 N.J. Prac.,

Local Government Law §22:6 (4th ed.). The importance of the master plan can be seen from the fact that a municipality cannot adopt a zoning ordinance until it has adopted the land use plan and housing plan elements of the master plan. Governing bodies are to provide for a re-examination of the master plan at least every 10 years. Ibid; N.J.S.A. 40:55D-62; N.J.S.A. 40:55D-89.

Plaintiff argues that permitting the construction of its proposed building containing non-efficiency/non-garden apartment units on Lot 5 would not be inconsistent with Oradell's Master Plan or Zoning Ordinance. However, the Board disagreed. As aforesaid, the law does not mandate that a municipal board accepts face value all the evidence presented by an applicant. The Board gave clear bases for its conclusion that Plaintiff had not shown, with sufficient and enhanced proofs, that the grant of a use variance for the project would not run counter to the intent and purpose of Oradell's Master Plan and Zoning Ordinance restricting residential units in the B-3 Zone to efficiency and garden apartments:

> "5. … an applicant must provide "an enhanced quality of proof that the variance sought is not inconsistent with the intent and purpose of the Master Plan and Zoning Ordinance, proof which must reconcile the proposed use variance with the Ordinance's omission of the use as being permitted in the particular zone." (Quoting Medici at 21).
>
> 6. The court in Medici further noted that such proof may take the form that the character of the community has changed substantially since the adoption of the master plan and zoning ordinance which may demonstrate that a variance for a use omitted from the ordinance is not incompatible with the intent and purpose of the

governing body when the ordinance was passed. Ibid. at 21. Other proof may relate to substantial changes to the character of the neighborhood since the adoption of the ordinance or a demand for a use not anticipated when the ordinance was last revised. Ibid. fn 11. See also Saddle Brook Realty, LLC v. Township of Saddle Brook Zoning Bd. of Adj., 388 N.J. Super. 67, 79 (App. Div. 2006).

9. As has been noted, when a use variance is sought, an enhanced qualify of proof is required that the use is not inconsistent with the Master Plan and Zoning Ordinance, which must reconcile the proposed use with the Ordinance's omission of the use as being permitted in the zone. Medici, supra, 107 N.J. at 21. Such evidence may include proof that the character of the community has changed since the adoption of the 2018 Master Plan. **It is to be noted that the Zoning Ordinance pertaining to the B-3 District was not modified as a result of the adoption of the Master Plan. These circumstances may demonstrate that a variance for a use not permitted in the B-3 District is incompatible with the intent and purpose of the Governing Body in connection with the Zoning Ordinance.**

10. During the public hearings, no contention was advanced by the applicant that the character of the surrounding neighborhood has changed since the 2018 Master Plan and since the Zoning Ordinance was last revised, factors which may justify the granting of relief. The Board finds that neither the character of the Borough generally, nor the neighborhood proximate to the property, has changed in any substantial manner since the last revisions of the Master Plan and Ordinance. This conclusion is confirmed by the 2018 Land Use & Central Business District Elements of the Master Plan ("2018 Plan") which notes that the Borough's population growth has been 33 persons, or 0.4%, between 2000 and 2014 (2018 Plan, at p. 119) and that a net growth of eleven (11) dwelling units occurred between 2000 and 2015 (Id. at 129-130). The 2018 Plan notes that the Borough's population has remained relatively static since the 1990's (Id. at 119). **It should also be noted that the 2018 Plan discussed rezoning certain areas of the Borough, but the property and neighboring area were not proposed for any rezoning**.

14. … The fact that other variances aside from the d(1) use variance

> and the d(4) FAR variances are required by the proposal mandates a conclusion that the granting of the use variance would substantially impair the intent and purpose of the Zone Plan and Zoning Ordinance."

Pa135 at ⁋⁋5-6; Pa136-137 at ⁋⁋9-10; Pa140 at ⁋14, emphasis added.

Indeed, the Trial Court aptly opined:

> "The Resolution of denial makes clear that the Board rejected plaintiff's argument that the use variance sought was not inconsistent with the Master Plan which was re-examined in 2018. The Board rejected plaintiff's contention that the surrounding neighborhood had changed since the most recent re-examination finding the Borough's population growth had been 33 persons or .4% between 2000 and 2014. The Board further found a net growth of eleven (11) dwelling units between 2000 and 2015. The Board noted that the 2018 Master Plan discussed rezoning certain areas but the applicant's property and neighboring areas were not proposed for rezoning." Pa36.

It is universally acknowledged that to the extent authorized, municipalities have the right to regulate land through legislation and local zoning ordinances. Cox and Koenig, *New Jersey Zoning and Land Use Administration*, §1-1, 1-2 (2022 Ed.). The court in <u>Hay v. Bd. of Adj. of Borough of Fort Lee</u>, 37 N.J. Super. 461, 464 (App. Div. 1955) opined "[a] prime purpose of zoning is to bring about the orderly physical development of the community by confining particular uses to defined areas." The court in <u>Bove v. Bd. Of Adj. of Borough of Emerson</u>, 100 N.J. Super. 95, 101-102 (App. Div. 1968) likewise stated:

> "The rationale of our statutory scheme respecting local zoning is that the Board of Adjustment is charged with the responsibility of

> applying expert discretion to matters coming within its cognizance and that interference by an appellate court is permissible only for redress against arbitrary, capricious or unreasonable action … **As a reviewing court we may not exercise anew the jurisdiction of the administrative agency. 'This philosophy is even more cogently applicable to a case where we review a denial of a variance than where we review a grant, for generally speaking more is to be feared from a breakdown of a zoning plan by ill-advised grants of variances than by refusals thereof.**'" (internal citations omitted)(emphasis added).

Because of the Legislature's strong policy preference for planning by ordinance, "only exceptional cases warrant use variances." Funeral Home Mgmt., Inc. v. Basralian, 319 N.J. Super. 200, 2007 (App. Div. 1999).

Here, the Board elucidated why approving the Application would be inconsistent with Oradell's 2018 Master Plan:

> "The Board finds that certain Goals and Objectives of the 2018 Plan would be contravened by the approval of the application. More particularly, the 2018 Plan references the Objective of "Preserving and protecting the residential character…by restricting incompatible land uses…from established residential areas, and limiting intensities of use to the levels, and locations, prescribed therein" (Id. at p. 11). The Policy Statement associated with this Goal notes that attached residential development should only be permitted in those areas specified in the Plan and should be precluded from other areas. The residential component associated with the application, the Board finds, would be contrary to this objective. Pa139 at ⁋13.
>
> "… the within application continues to violate the Goal of providing buffer zones to separate incompatible land uses (see 2018 Master Plan at page 13)…continues to provide a distance of only ten (10) feet from the building to the rear yards of property along Beverly Road. This proposed condition …would, in the Board's opinion, violate the Objective of the Master Plan that an **appropriate buffer zone be provided to separate incompatible land use from single-**

> **family residences.** In the Board's opinion, the plan as proposed would clearly violate this Goal." Pa140 at ⁋13, emphasis added.

Once again, Plaintiff has not met its heavy burden to show why the Board's determination, as explained and supported in its Resolution as well as the record generally, should not be presumed valid or how the Board abused its discretion in reaching its findings. What the Plaintiff did offer the Board reasonably found was unpersuasive. For instance, during the hearings Plaintiff's planner referenced recommendations in the 2018 Master Plan relating to FAR and efficiency apartments in the Central Business District ("CBD") area and attempted to use said recommendations as a basis for variance relief. However, when queried by the Borough Planner, Plaintiff's planner conceded that the subject parcel, Lot 5, is not even located in the CBD, but in the B-3 Zone which is a distinct area separate and apart from the CBD. Pa276 at 72:9-73:25; Pa280 at 89:13-20; Pa282 at 95:3-8.

POINT III

THE ZONING BOARD'S DENIAL OF PLAINTIFF'S REQUEST FOR d(4) FAR VARIANCE RELIEF WAS REASONABLE AND SUPPORTED BY THE RECORD. THUS, THE TRIAL COURT PROPERLY FOUND THE BOARD'S DECISION WAS NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE (Pa31, 36-40)

Floor area ratio controls are controls on intensity of use, and the term "floor area ratio" is defined in N.J.S.A. 40:55D-4 as "the sum of the area of all floors of buildings or structures compared to the total area of the site." FAR therefore is calculated by taking the sum of all the area of floors of buildings or structures in square feet and dividing by the total area of the site in square feet. Thus, the FAR regulates the square footage of floors and not height. Variances from FAR controls may be granted only by boards of adjustment under subsection d(4) of N.J.S.A. 40:55D-70, and not by planning boards, because variances of this type pose a greater threat to the zone plan and public good than other dimensional controls, which are regulated under subsection (c). Commercial Realty v. First Atlantic, 122 N.J. 546, 561-563 (1991); see also Randolph Town Ctr. v. Randolph Twp., 324 N.J. Super. 412, 415 (App. Div. 1999).

Any application to "increase…the permitted floor area ratio" is therefore cognizable only under N.J.S.A. 40:55D-70d(4) and, like the d(1) use variance, relief can be granted only upon a showing of "special reasons" (the positive criteria) **and** provided that the variance can be granted "without substantial

detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance." (negative criteria). It has been held that in establishing special reasons for a FAR variance, Coventry Square v. Westwood Zoning Bd. Of Adj., 138 N.J. 285 (1994), and not Medici v. BPR Co., 107 N.J. 1 (1987) controls. Randolph Town Ctr v. Tp. of Randolph, supra. at 416. Therefore, the applicant for a FAR d(4) variance must show that the site will accommodate the problems associated with a floor area larger than that permitted by the ordinance. Id. at 417.

Here, the record reflects that the Board reasonably found Plaintiff failed to satisfy the criteria for d(4) variance relief under N.J.S.A. 40:55D-70. The Board has largely addressed the failure of Plaintiff to justify the granting of the FAR variance as part of Point II(B) and II(C) above related to the d(1) use variance. Those sections include an enumeration of the reasons why the Board determined the small 0.59 acre Property could not accommodate the intensity and mass of the development being proposed and why a variance for the same could not be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance. Defendant supplements that reasoning with the following.

It cannot be over emphasized that Plaintiff sought a variance to allow a FAR of 1.77, when the maximum FAR permitted in the B-3 Zone is only 0.35.

The deviation of 1.42 is ***five times greater*** than what is allowed and, by any form of rational measurement and evaluation, an extreme deviation from the zoning requirements. As applied to the intensity of the actual development for which approval was sought, Plaintiff sought to develop a project consisting of 45,039 sq. ft. when only 8,930 sq. ft. was permitted under zone criteria. Pa111 at ⁋4; Pa113 at ⁋2; Pa 140 at ⁋14; Pa142 at ⁋16.

The Board articulated and applied the relevant standards and principles that govern its discretion when considering a request for FAR relief:

> "11. The Board recognizes that when relief pertaining to a d(4) variance is implicated, the applicant has a lesser burden of proof than when a d(1) use variance is implicated. More particularly, an applicant for an FAR variance need not show that the site is particularly suited for a more intensive development, as is the case with a use variance. Randolph Town Center v. Township of Randolph, 324 N.J. Super. 412, 416 (App. Div. 1999). An applicant for such relief must show that the site will accommodate the problems associated with a floor area larger than that permitted by Ordinance. **The Board is unable to conclude that this property, which is only slightly greater than one-half acre in size, can accommodate such a massive proposed development. The fact that other variances pursuant to *N.J.S.A. 40:55D-70c*, such as a building coverage 50% greater than that permitted and a combined side yard setback of 12.2 feet (25 feet required) constitutes substantial evidence that the proposal is simply too large for the subject site.**"
>
> "8. **The excessive FAR implicated by the plan** is just one example which demonstrates that **the proposal is simply too massive in scale for a parcel just slightly over one-half acre in size**. It is to be noted that building coverage is proposed at 65.1%, more than 50% greater than the 40% maximum permitted in the District. The prior iteration of the plan proposed building coverage at 67.8%.

This contrast demonstrates that the current design, like the previous proposal, is simply too large for the property. The reduction in building coverage from 67.8% to 65% is not significant … Had the building been reduced in size would have resulted in a corresponding reduction to the extent of the variance relief pertaining to both the FAR and building coverage."

"14. **The Board continues to believe that the applicant is attempting to place on the property a building design that is too aggressive for the subject property**, although the proposed FAR at 1.77 represents a reduction from the 1.99 FAR proposed under the prior application. This does not constitute a substantial reduction. **The proposed FAR is dramatically higher than any other request for FAR deviation relief that the Board has considered over the past decade.** This act in and of itself demonstrates that the site is not particularly suitable for the proposed use and that special reasons cannot be demonstrated so as to satisfy the positive criteria for the granting of d variance relief for a non-inherently beneficial use. The fact that other variances aside from the d(1) use variance and the d(4) FAR variances are required by the proposal mandates a conclusion that the granting of the use variance would substantially impair the intent and purpose of the Zone Plan and Zoning Ordinance."

Pa138 at ⁋11; Pa136 at ⁋8; Pa140 at ⁋14, emphasis added.

The Trial Court therefore aptly opined:

"The court finds no evidence supporting plaintiff's contention that the Resolution is not based upon the evidence produced at the hearing. **Specifically, the Borough's ordinance supports the 1.77 FAR calculation**." Pa31, emphasis added.

"Plaintiff's insistence that it "overwhelmingly showed that the negative criteria was satisfied" ignores the huge impact upon the surrounding properties of its proposed FAR. The assertion is self-serving and ignores the small yard distance to six adjoining single-family home properties which sit lower than the applicant's property and are separated by the retaining wall which was proposed to be replaced. It further ignores the complaints of shadow

> resulting from the proposed building's height and proximity to the property line. The court further finds as to plaintiff's assertion that the proposed use would be significantly less intensive than other uses permitted by ordinance finds that this is not only speculative, but fails to appreciate that the permitted use, mixed residential and retail is part of the Master Plan scheme for the district of which this parcel constitutes more than one-half the area.
>
> Regarding the calculation of the FAR, the court notes floor area ratio is defined in N.J.S.A. 40:44D(4) as the sum of the area of all floors of buildings or structures compared to the total area of the site. It has been stated that variances from FAR are reserved to zoning board because they can pose a greater threat to the zone plan and public good than other dimensional controls. Applications for variances from FAR must show the site will accommodate the problems associated with a floor area space larger than permitted by the ordinance. FAR ordinances may exclude particular structures and buildings. Mt. Hill v. Zoning Bd. of Middletown, 403 N.J. Super. 210 (App. Div. 2008), certif. den. 197 N.J. 475 (2009). The Borough of Oradell's ordinance does not contain such exclusions. Finding none, **the court is constrained to find that the Borough's calculation of the proposed FAR is the correct one and that the FAR variance requested by plaintiff is five times greater than that permitted.** The court finds the denial of the variance, in conjunction with the other variances required by plaintiff, including lot coverage, height and side yards is not unreasonable, arbitrary nor capricious… The Court finds the need for multiple bulk variances supports the Board's finding that the site could not accommodate the deviation from the FAR." Pa38-40, emphasis added.

The record again confirms that the Board properly exercised its discretion in finding that Plaintiff did not present sufficient proofs to warrant a variance for a FAR of 1.77. For this reason as well, the Trial Court properly found the Board's denial of the Application was not arbitrary, capricious or unreasonable.

POINT IV

THE ZONING BOARD'S DENIAL OF PLAINTIFF'S REQUEST FOR c VARIANCE RELIEF WAS REASONABLE AND SUPPORTED BY THE RECORD. THUS, THE TRIAL COURT PROPERLY FOUND THE BOARD'S DECISION WAS NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE (Pa40)

Plaintiff sought c variance relief pursuant to N.J.S.A. 40:55D-70c for combined side yard setback, building height, building coverage, and generator location. In order to grant such relief, the Board must find that the applicant satisfied the applicable positive criteria set forth in N.J.S.A. 40:55D-70c(1) or c(2) and the same negative criteria as for a (d) variance.

Under N.J.S.A. 40:55D-70c(1), the Board can grant c(1) or so-called "hardship" variances from zoning ordinance regulations where:

> "(a) by reason of exceptional narrowness, shallowness or shape of a specific piece of property, (b) or by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the structure lawfully existing thereon,
>
> the strict application of any regulations … would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the developer of such property."

The Board may not exercise its power to grant a c(1) variance otherwise warranted, however, unless the "negative criteria" has also been satisfied, i.e., without a showing that such variance can be granted: (a) without substantial detriment to the public good; and (b) will not substantially impair the intent and

purpose of the zone plan and zoning ordinance. N.J.S.A. 40:55D-70.

To meet the c(2) positive criteria for variance relief, the applicant must show that, as related to the property in question: (1) the purposes of the MLUL would be advanced by a deviation from the zoning ordinance requirement; (2) the benefits of the deviation from the applicable zoning requirement would substantially outweigh any detriment; and the negative criteria, (1) the variance can be granted without substantial detriment to the public good; and (2) the granting of the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance. Wilson v. Brick Twp. Zoning Bd., 405 N.J. Super. 189, 198 (App. Div. 2009).

The Board explained why it found Plaintiff failed to satisfy the criteria for a c bulk variance relief under both N.J.S.A. 40:55D-70c(1) and c(2):

> "15. The Board finds that the variances sought pursuant to *N.J.S.A. 40:55D-70c* relating to combined side yard setback, building height, building coverage and generator location may not be granted under the *c(1)* or *c(2)* standards. There has been no demonstration of any exceptional property conditions or topography or other exceptional situation that would justify the finding of hardship so as to permit the granting of relief under the c*(1)* standard. The Board believes that the **only hardship that may exist here is necessarily self-created by the applicant's desire for a building that is too large for the subject parcel.** In its consideration of the *c* variances, the Board has particularly focused on building coverage, which at a proposed 65.1% is more than 50% above the maximum permitted. This substantiates the Board's finding that the applicant is seeking to shoehorn a building on a parcel that is relatively quite small in configuration when the proposed development is considered. In this regard, **the Board finds that any hardship is self-created by the**

> **applicant's desire for a building that is too large for the subject parcel**.
>
> 16. In addition, the Board does not believe that the *c(2)* standard may be met and that purposes of the MLUL would be advanced by the granting of such variance relief … the promotion of the general welfare as set forth in *N.J.S.A. 40:55D-2a* cannot serve as the basis for the granting of relief in view of the substantial nonconformities proposed which would be inconsistent with the character of the surrounding neighborhood and contrary to the Master Plan. Other purposes of the MLUL as set forth in *N.J.S.A. 40:55D-2* would similarly not be promoted … the Goal of appropriate population densities as set forth in *N.J.S.A. 40:55D-2e* will not be promoted in view of a development discordant with the surrounding neighborhood. The Goal of providing sufficient space for a variety of uses as set forth in *N.J.S.A. 40:55D-2g* is not supported by the evidence in view of the substantial variance relief, lack of appropriate buffers, and a plan that is contrary to the Goals and Objectives of the Master Plan. Finally, the Goal of a desirable visual environment through creative development techniques and good civic design and arrangement as set forth in *N.J.S.A. 40:55D-2i* cannot support the granting of relief. It is assumed that any new construction may, to some extent, be aesthetically pleasing. Aesthetics alone cannot prevail over a FAR five times greater than that permitted in the Zone and other proposed nonconforming conditions which characterize the development proposal. Accordingly, the Board concludes that the variances pursuant to *N.J.S.A. 40:55D- 70c* should be denied." Pa140-142 at ¶¶15-16, emphasis added.

The Trial Court opined, "[i]n conjunction with the (c) variances, the Board found that the property had no exceptional characteristics or topography, and that any hardship was self-created. **The court finds those statements and reasons to be supported by the record**." Pa40, emphasis provided.

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CONCLUSION

The Board summarized its decision as follows:

> "17. …the Board determines that the criteria for the granting of the d(1) use variance, the d(4) FAR variance, and the c variance relief, and site plan approval should be denied. Approval of the proposal, the Board finds, would substantially impair the intent and purpose of the Zone Plan and Zoning Ordinance and would violate Goals and Objectives detailed in the Master Plan. A residential development with a structure less massive in scale than that which is proposed in the within application, would be more compatible with the surrounding area and more consistent with the land use plan." Pa142 at ⁋17.

The record reflects that the Board had reasonable and sufficient bases upon which to deny the 66 Kinderkamack application for two substantial variances under N.J.S.A. 40:55D-70d(1) (use) and (4) (FAR); four variances under N.J.S.A. 40:55D-70c; and site plan approval. The Resolution makes evident that the Board properly exercised its authorized discretion in adjudging that Plaintiff failed to meet its proofs for relief. The Trial Court thus did not err in finding that the denial of the 66 Kinderkamack application was not arbitrary, capricious or unreasonable; its Order of September 22, 2023 affirming the Board's decision and dismissing Plaintiff's complaint with prejudice should accordingly be affirmed.

Respectfully submitted,

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Dated: May 22, 2024 Edward J. Buzak, Esq.