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ART AMMERMULLER, STEVEN BLOOM, and LINDA BLOOM,

Appellants,

v.

BELMAR ZONING BOARD OF ADJ., EDELMAN INVESTMENT GROUP LLC, 108 12TH AVENUE REDEVCO LLC, and RAINBOW HOSPITALITY INC.,

Respondents.

BRIAN MATTHEWS and CECELIA MATTHEWS,

Appellants,

v.

BELMAR ZONING BOARD OF ADJ., EDELMAN INVESTMENT GROUP LLC, 108 12TH AVENUE REDEVCO LLC, and RAINBOW HOSPITALITY INC.,

Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NOS. A-000953-23
A-000977-23

CIVIL ACTION
Consolidated Appeals from a Final Judgment of the Superior Court of New Jersey, Law Division, Monmouth County
Docket Nos. MON-L-779-23
MON-L-889-23

Sat Below: Hon. Gregory L. Acquaviva, J.S.C.

BRIEF ON BEHALF OF APPELLANTS ART AMMERMULLER, STEVEN BLOOM, and LINDA BLOOM

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Dated: March 20, 2024

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PRELIMINARY STATEMENT

The Belmar Inn is a 40-room hotel/rooming house that has stood on the beach block of 12th Avenue in Belmar since before 1940. Over the years, it has been a destination place for visitors enjoying their vacations in the summer months only a few steps from the beach. It also earned a reputation as a favorite party destination attracting renters during the summer months. Lack of maintenance and operational supervision previously caused problems for the Borough and surrounding area for many years. As of late, most of that has faded away, but its reputation earned, it became a favorite removal target of the municipality to eliminate problems it caused local officials.

The Belmar Board of Adjustment jumped when Edelman Investment Group, LLC, applied for a use variance to build a 24-unit, 57-foot-tall multifamily building on the site. And while an approval would stop the local officials' headache, it would create a new, even more nonconforming use.

An applicant for a use variance for a multi-family use in this single-family zone must prove both the positive criteria, and both prongs of the negative criteria. Edelman did not prove either prong of the negative criteria: that the use variance would not be substantially detrimental to the surrounding homes and neighborhood, and that the use variance would not substantially impair the intent or purpose of the zone plan and zoning ordinance.

Art Ammermuller, and Steven and Linda Bloom, abutting neighbors, sued because the new project will have many detrimental impacts that will materially affect the quality of their families' lives. There are major noise issues from a 47-space parking lot on the first floor of the building, which is open on all sides, and will generate noise, exhaust, and activity 24/7, 365 days a year, only a few feet from each property line. A roof-top amenity space will also generate disturbing noise. The height of the building will block light to both parties' rooftop solar panels reducing their effectiveness. The building will block ocean breezes plaintiffs now enjoy, and six balconies a few feet from the property line will invade their privacy, letting people peer into their yards. The Board did not explain why it disregarded these serious concerns.

The Board's Resolution is awash with words consuming 156 pages. But it does not include proof of, or even address the second prong of the negative criteria—that the project would not substantially impair the intent and purpose of the zone plan and zoning ordinance by an enhanced quality of proof. And even had the Board tried to apply the test, it would have failed because there is nothing in the record that proves that the use variance can be reconciled with its omission from the ordinance, and thus satisfy the enhanced quality of proof requirement established in *Medici v. BPR Co.*, 107 *N.J.* 1 (1987).

And to prove the positive criteria, an applicant must show that in the context of a specific parcel that strict adherence to the established zoning requirements would be less beneficial to the general welfare. The Board needed to find that the proposal was at least as beneficial to the general welfare as a single-family home would be if it were constructed instead. And that it did not and could not do, because no evidence was offered that could substantiate those required proofs.

Edelman's proof of the positive criteria was deficient, based almost entirely on alleged benefits of removing the Belmar Inn might achieve. The record is sparse on any benefits the massive, new apartment-style building would provide. The project included two other "d" variances, one for height and one for floor-area ratio. It also requires deviations from the bulk standards designed for this family neighborhood. The ten variances needed are not *de minimis*; they reveal a building too large and not particularly suitable for the site.

The Board's zeal to get rid of the Belmar Inn dragged it away from anything that might derail an approval, causing it to ignore the proofs required. The Board acted arbitrarily, capriciously, and unreasonably and its approval of Edelman's application should be reversed and vacated.

PROCEDURAL HISTORY

The Applicant, Edelman Investment Group, LLC, applied for a use variance and other variances before the Belmar, New Jersey Zoning Board of Adjustment. [Ja 450-460]. Public hearings on the application were heard on July 27, 2021[1], August 26, 2021, October 14, 2021, February 4, 2022, April 28, 2022, and July 28, 2022. [Ja 290]. The Board voted on July 28, 2022, to approve the application by a vote of six to one. [6T 131:1-23].

The matter was appealed to the Superior Court, Law Division, by Art Ammermuller, and Steven and Linda Bloom by way of Complaint filed on March 13, 2023. [Ja 12]. In a separate action, Brian and Cecelia Matthews also challenged the Board's decision in a Complaint filed on March 22, 2023. [Ja 51]. The matters were consolidated on May 10, 2023, by the Superior Court, Law Division. [Ja 253-255]. The Law Division conducted a bench trial on October 19, 2023, and issued an opinion on that date that affirmed the Board's decision and dismissed both complaints. [Ja 256-257].

Ammermuller and Bloom filed a notice of appeal to this Court on November 30, 2023. [Ja 1]. Matthews filed a separate notice of appeal to this

[1] Transcripts of the proceedings below are referenced in this brief as follows:
1T = July 27, 2021
2T = August 26, 2021
3T = October 14, 2021
4T = February 4, 2022
5T = April 28, 2022
6T = July 28, 2022
7T = October 19, 2023 (trial transcript)

Court on December 1, 2023. [Ja 6]. The appeals were consolidated by Order on December 26, 2023. [Ja 288].

STATEMENT OF FACTS

The Applicant, Edelman Investment Group, LLC, applied to the Belmar Zoning Board of Adjustment to construct a 24-unit, 4-story, 57-foot-tall apartment-style condominium building at 108, 108-1/2, and 112-114 12th Avenue in Belmar, New Jersey ("Property"). [Ja 450-460].

A. The Property and Surrounding Area: The Property is on the "beach block," only a few steps from the ocean. The Property comprises two lots, designated Block 110, Lots 12 and 13. Lot 12 is improved with a hotel/rooming house known as the Belmar Inn, which was constructed before 1940. [Ja 13; Ja 259]. Lot 13 is improved with two much smaller homes that are used as short-term rental properties. [Ja 52].

The surrounding area is mostly single-family homes, and two adjacent to the Property, those owned by Bloom and Matthews, are single-family dwellings[2]. Because of its location, the Belmar Inn and associated structures are busy during the summer and lightly used in the 9-month off season. Most lots in the surrounding area are 7,000 square feet in size.

[2] Ammermuller's lot is improved with a single family dwelling and three-family apartment, which is a pre-existing nonconforming use.

The Belmar Inn has a history of maintenance issues and operational concerns. [Ja 374; Ja 385-390]. It had required much attention from local officials, including the building and enforcement department, as well as a variety of noise and other sorts of complaints. [Ja 385-390]. At the time of the hearing, its use had diminished and was not being used to full capacity as it had. [Ja 341].

B. Zoning: The Property is in Belmar's R-75 zone, which allows only one type of residential use—single-family homes. [Ja 35-36]. The standards in the zone are typical for residential single-family properties, limiting height to 2-1/2 stories and 35 feet, minimal side-yard setbacks maximum, 20% floor-area ratio, and other bulk regulations. [Ja 1495-1498].

The Governing Body, to incentivize development at the site to replace the Belmar Inn, adopted the MF-75 overlay zone in 2008, which included the Property. [Ja 1413-1416]. That ordinance allowed townhouse-style cluster developments "to allow for transition from existing high density residential uses" [Ja 1413]. That zone provided one dwelling unit per 1,550 square feet of property.[3] [Ja1414].

[3] After the application was completed, the MF-75 zone ordinance was repealed, stating it was "unlikely to be developed, unnecessary, serves no useful purpose, and serves to detract from the intent and nature of the R-75 [Zone]." [Ja 1314-1316].

C. The Application: Defendant Edelman Investment Group, LLC ("Edelman" or "Applicant") applied to the Belmar Zoning Board of Adjustment seeking site-plan approval and 10 variances to construct a 24-unit, apartment-style condominium building with three floors of units, a parking garage on the first floor, open on all four sides, and an open amenity-common-area on the roof. [Ja 471; Ja 476]. Planned are six balconies each, facing the east and west side of the Property. [Ja 474-475]. The rear, north side, will face twelve balconies, as does the south, front of the building. [Ja 475].

The application required many variances, most importantly, a use variance under *N.J.S.A.* 40:55D-70(d)(1) ["d(1)"] because the apartment-style condominium building is not a permitted use in this zone. The only zoning permitted in residential zones community wide is single-family homes. The only exception is that multi-family, townhouse-style homes are conditionally permitted in the MF-75 overlay zone, which includes the Property. [Ja1413, Ja 1501]. In addition to the d(1) variance, two other "d" variances were required: 1) a variance for height under *N.J.S.A.* 40:55D-70(d)(6) because the building was 7.5 feet taller than allowed as defined for zoning purposes (the actual height is 22-feet taller than permitted in the zone), which is over 10% greater than the 35 feet allowed, and 2) a floor-area ratio ("FAR") variance under

N.J.S.A. 40:55D-70(d)(4) proposing 173 percent FAR when only 50 percent is permitted. [Ja 301]. The application also required other bulk variances:

- Number of stories – 4 proposed (2.5 permitted)
- Building coverage – proposed 71.11% (maximum 20% permitted);
- Lot (impervious) coverage – proposed 76% (maximum 40% permitted);
- Rear setback – proposed 18 feet (minimum 40 feet required);
- Combined side-yard setback – 10 feet (minimum 15 feet required);
- Parking spaces – proposed 47 (48 required);
- Front-yard setback – proposed 12 feet (to balconies) [minimum 20 feet required]

  [Ja 302].

C. The Hearings. There were six hearings, held between July 2021 and July 2022. The Applicant presented expert testimony in five areas: traffic, architecture, real estate appraising, engineering, and planning. Two town officials testified: the Belmar fire official and the code enforcement director. Co-Plaintiff, Cecilia Matthews, testified. Many members of the public, including Ammermuller and Steven Bloom, asked questions and commented in the public comment portion.

Richard DiFolco testified both as a professional engineer and professional planner on Edelman's behalf. He offered planning testimony that the proposal was particularly suitable as part of the d(1) use variance proofs. He asserted that locating the building here eliminated the Belmar Inn and was

beneficial for the community for that reason, in his opinion, satisfied the positive criteria proofs required to obtain a d(1) use variance.

DiFolco argued that the application furthered many goals of the Municipal Land Use Law, *N.J.S.A.* 40:55D-1, *et seq. (*"MLUL"), but most related to purported benefits from removal of the Belmar Inn, and not from the new building. He offered that the application would give Borough residents another form of year-round residential housing, even though the Governing Body, through the Belmar Zoning Ordinance ("BZO"), had not so provided anywhere in the community. [3T 148:4-11].

The net takeaway from DiFolco's testimony was this was an either-or proposition; either 24 brand-new condominium units would be developed or the Borough was stuck with the Belmar Inn. [3T 174:10-13]. He testified that because the Property had an existing unsuitable use, it made the Property particularly suitable for redevelopment with multi-family use. [3T 174:8-17]. He did not explain why replacing the nonconforming Belmar Inn with a prohibited use that was massive, far taller than what the R-75 Zone permitted, had far more building and impervious coverage than allowed in the zone, and greatly exceeded the appropriate setbacks for much smaller buildings made the proposed use particularly suitable for this site. He conceded that "The major factor is that the Belmar Inn exists at the site." [3T 175:5-13].

He provided no cogent reasoning that satisfied the negative criteria and its requirement to prove the application did not substantially impair the intent and purpose of the zone plan and zoning ordinance by an enhanced quality of proof—a critical proof element for a d(1) use variance.

Co-plaintiff Matthews presented an opposing expert—Peter Steck. He testified that Belmar's Master Plan and Master Plan Reexmination reports present a theme of multi-family uses being cut back, trending in favor of non-multi-family residential use. [4T 100:14-23]. He noted in his testimony the gross deviation proposed from the zoning standards in the R-75 zone. Steck pointed out that where the BZO provides standards for multi-family projects, it requires a 25-foot buffer to protect adjacent properties.[4] [4T 107:13-25].

Disagreeing with the Applicant's position that the new building would present a desirable visual environment, Steck opined that the proposed building would be discordant with any other structures in the area. [4T 109:6-8]. He observed that the tall building within five feet of the adjacent residential properties was not only imposing in terms of size but in terms of blockage of light, air, open space, and privacy. [4T 109:3-17].

[4] Perhaps enacted at a time when multi-family uses were permitted in two zones known as the MF-1 and MF-2.

Steck testified that the MF-75 overlay zone that authorized townhouse development on the property as a conditional use, was enacted as an incentive to developers to replace the Belmar Inn. He characterized it as a "bonus." [4T 111:1-17]. He stated the MF-75 zone was not a sign that a mid-rise, multi-family apartment building was desired in the zone by the Governing Body, as suggested by DiFolco. [4T 111:12-15]. Rather, he explained that it was enacted to serve as a "bonus" incentive to developers, encouraging a development that would replace the Belmar Inn in the manner written into the code. [4T 111:1-7, 114:11-14].

Steck asserted he did not believe the proposed use was particularly suited for the Property. [4T 114:23-24]. He noted the site could not even accommodate standard-sized parking spaces, it did not provide a 25-foot buffer, provided no open space in the ground area because of the tight design, and that the building will crowd the adjacent residential properties. [4T 114:24 to 115:4]. He believed that the other grossly deviant variances for FAR, height, building coverage, and lot coverage, undersized parking spaces, and inadequate setbacks showed the proposal was unsuitable for the Property. [4T 114:23 to 115:12].

Steck advanced that the Applicant had not satisfied the proofs under the negative criteria and enhanced burden of proof, and that the project would be a

substantial detriment to the public good. [4T 115:13-18]. He noted these detrimental impacts: privacy of the neighboring properties' light, air, and open space; exhaust from vehicles; lights, activity on the roof and noise. [4T 115:13-21]. Steck felt the proposed building is "so massive that it is arguable that [the application] is beyond the authority of the Board to approve and that the relief sought should only be granted by the Governing Body or a zone change." [5T 59:19 to 60:16].

Members of the public also testified, addressing their issues. Plaintiff Ammermuller testified that his concerns were multi-faceted. He felt his privacy would be destroyed with six decks close to his property line overlooking his yard, including one deck that would look directly into his bedroom and his daughter's bedroom at about 12 feet. [5T 129:23 to 130:3]. He also commented that he would not be able to spend time in his front or back yard enjoying time with his family without people watching them from the proposed building. [5T 129:21 to 130:6]. He was concerned that he had paid $30,000 to have solar panels installed on a rear building on his property and that the proposed building will block light to his solar panels from 2 p.m. forward, reducing their production by 40 percent. [5T 129:16-21]. He also was worried about having a parking garage with up to 47 vehicles located only three feet from his property line. [5T 130:6-8]. He objected to the noise that

would emanate from the parking garage and from the balconies on the building, and he also felt the breeze coming from the north or northwest would be blocked by the proposed building, making his yard and deck that much hotter. [5T 130:6-12].

Plaintiff Bloom was concerned with the noise from the ground-floor garage and noted that the ceiling was only nine feet high. He stated the neighbors would hear beeping, car alarms, and doors opening and closing. He was also unhappy about the potential impact of the exhaust fumes from the vehicles in the garage. [5T 148:13-22]. He further addressed his concern that no noise study had been performed regarding noise generated by the HVAC systems on the roof. [5T 149:22 to 150:17]. An HVAC contractor, he shared that his experience was that noise levels on the 26 condenser units proposed for the roof would be disturbingly loud, negatively affecting the neighboring properties. [5T 149:22 to 152:10]. Bloom had also installed solar panels on his home and believed that they would be rendered ineffective based on the shadowing from the new building, and he would lose $75,000 in solar credits. [5T 152:11-20]. Bloom, like Ammermuller, was also upset about losing privacy. [5T 155:11-14]. He also explained that from his perspective next to the Belmar Inn, the dire picture painted by the Applicant about how bad the

conditions were was overblown, advising that the present conditions are not as described by the Applicant. [5T 154:19 to 155:10].

Co-plaintiff Cecelia Matthews gave direct testimony identifying her many similar concerns. She believed the building would take away from the charm of Belmar and that the project significantly goes against Belmar's Master Plan. [5T 71:20-23]. She said the Belmar Inn in the 20 years she had lived there has never been a problem for her family. [5T 72:1-2]. She was gravely concerned with the size of what is being proposed and the proximity to her home. [5T 72:20-21]. She also noted the noise pollution from the cars, alarms, exhaust, and light pollution will, in her words, be "overwhelming and disturb the peacefulness we currently experience in our home and back yard." [5T 72:25 to 73:11]. She mentioned her concern about rooftop amenities and noise, and loss of privacy from the balconies on the building. [5T 73:16 to 74:6]. And she believed the size of the new building would be overwhelming. The homes directly behind hers did not bother her. [5T 80:24 to 81:3].

Former Mayor Matt Doherty spoke. He stated the Governing Body enacted the MF-75 ordinance to try to induce a development that would replace the Belmar Inn. That supported Steck's testimony. [5T 117:7-19].

Many other people spoke against the application. A few people from outside the neighborhood were in favor. [6T 12:10 to 65:4]. The Board voted

to conditionally approve the application by a 6-1 vote on July 28, 2022. [6T 130:23 to 131:23].

D. The Resolution: A summary of the Board's 156 page, unnecessarily long Resolution is impossible to provide in detail in the limited space here. It is organizationally difficult to follow. It contains some irrelevant sections not pertinent to the purpose of a resolution required under *N.J.S.A.* 40:55D-10. It does not address key issues, including the second prong of the negative criteria for variances, as the statue and caselaw requires. Not even a single mention of that critical element is found anywhere. Instead, the Resolution is mostly summary of testimony. We address those sections of the Resolution relevant to the legal issues here in the legal argument below.

But we focus on one section of the Resolution here: The Resolution includes a section entitled "Good Faith Debate and Analysis." [Ja 426]. In this section, the Board creates two lists, each listing the Board's conceptions of the arguments for and against the Application. It then states: "After weighing the positive and negative factors as referenced above, and after analyzing and weighing all the testimony, evidence, and public comments presented during the hearing process, six Board Members were persuaded/convinced to conditionally approve the application. [Ja 431]. The Resolution does not explain the specific rationale that supports that conclusion.

E. Court Decision: The matter was appealed to the Superior Court, Law Division, Monmouth County by Plaintiffs. A trial was held before the Hon. Gregory L. Acquaviva, J.S.C. on October 19, 2023. The judge believed the Board's findings were supported by the record and affirmed the Board's decision dismissing the Complaint in an Order and Opinion issued on the day of trial. [Ja 256]. A critical failure of the Opinion is that it did not adequately address the negative criteria and the enhanced quality of proof required for a use variance under *N.J.S.A.* 40:55D-70(d)(1) and the Supreme Court's decision in *Medici v. BPR Co., Inc.*, 107 *N.J.* 1 (1987).

Legal Argument

Standard of Review

When reviewing the decision of a trial court that has reviewed municipal action, the appellate court is bound by the same standards as was the trial court. *Fallone Properties, L.L.C. v. Bethlehem Twp. Plan. Bd*., 369 *N.J. Super.* 552, 561–62, (App. Div. 2004). While the Court defers to the factual findings of the Board, its focus must be on whether the Board adequately performed its function as revealed through the reasoning expressed in its Resolution. The only variance grant that can be sustained is one supported by substantial, credible evidence for every finding made by the Board. And those findings must be legally sufficient. *See Powerhouse Arts*

Dist. Neighborhood Ass'n v. City Council of City of Jersey City, 413 *N.J. Super.* 322, 332 (App. Div. 2010), *certif. den,* 205 *N.J.* 579 (2011). The Board's decision can be affirmed only if it exercised its discretionary authority properly. *Price v. Himeji*, 214 *N.J.* 263, 284 (2013). If not, the Board acted in an arbitrary and capricious manner mandating a reversal. *See Cell South of N.J. v. Bd. of Adj*., 172 *N.J.* 75, 89 (2002).

And though "the words 'arbitrary and capricious' may sound harsh, they are simply the standard of appellate review in particular cases." *Anastasio v. Planning Bd.,* 209 *N.J. Super*. 499, 522 (App. Div.), *certif. denied,* 109 *N.J.* 46 (1986). The arbitrary and capricious standard is "simply a finding of error." Cox & Koenig, *N.J. Zoning and Land Use Administration,* § 42-2.1 at p. 619 (Gann 2024 Ed). If the Court finds the reasons given do not qualify as substantial evidence, the proof requirements are not met. *See Kramer v. Bd. of Adj. of Sea Girt,* 45 *N.J*. 268, 296 (1965).

While the Court should not substitute its judgment for the Board's, *Rocky Hill Citizens v. Planning Board*, 406 *N.J. Super*. 384, 411-412 (App. Div. 2009), the review is "not simply a pro forma exercise in which [the court] rubber stamp[s] findings that are not reasonably supported by the evidence." *CBS Outdoor, Inc v. Lebanon Planning Bd*., 414 *N.J. Super.* 563, 578 (App.

Div. 2010), *quoting Chou v. Rutgers, State University*, 283 *N.J. Super*. 524, 539 (App. Div. 1995), *certif. denied,* 345 *N.J.* 374 (1996).

The Court must determine whether the Board has followed the statutory guidelines and properly exercised its discretion. *Id.* The Court should thus resist any urge to gloss over glaring problems in the name of deference to the local board. And while a board is entitled to deference in its findings when supported by the record, the Court owes less deference when a variance has been approved than when it has been denied. *Menlo Park Assoc. v. Planning Bd. of Tp. of Woodbridge*, 316 *N.J. Super.* 451, 460 (App. Div. 1998).

A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference. *Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan,* 140 *N.J.* 366, 378 (1995). A court is not bound by an agency's determination on a question of law. *See, e.g., Reich v. Fort Lee Bd. of Adj*., 414 *N.J. Super.* 483, 517 (App. Div. 2010), *citing Jantausch v. Borough of Verona*, 41 *N.J. Super.* 89, 96 (Law Div. 1956), *aff'd,* 24 *N.J.* 326 (1957).

I. The Board acted arbitrarily, capriciously, and unreasonably in approving Edelman's application, which did not provide proof of both the positive and negative criteria required to obtain a use variance under *N.J.S.A.* 40:55D-70(d)(1). [Ja 256; Ja281-282].

To prove a variance, an applicant must satisfy both the positive and negative criteria. The inadequacy of the positive criteria proofs in this

application are discussed in Point II below. We start with the negative criteria because of its overwhelming importance in a d(1) use variance case.

A. Proving the negative criteria: The legal framework

An applicant for any variance must establish the negative criteria. *Cell South, supra,* 172 *N.J.* at 82. The negative criteria require proofs that the grant of the use variance will not be substantially detrimental to the public good (the "first prong"), or substantially impair the intent and purpose of the zone plan and zoning ordinance (the "second prong").

In a non-inherently beneficial use-variance case, an additional burden is placed on an applicant—it must prove the second prong by "an enhanced quality of proof." *Medici, supra,* 107 *N.J.* at 4. This new standard arose out of the Supreme Court's concern with the tension between use variances and the master plan and zoning ordinance. The Court emphasized that zoning should be conducted by adopting zoning ordinances through the planning process rather than in an *ad hoc* manner via use variances. *Id.* at 20.

The *Medici* Court observed that the MLUL changed the prior statutory requirements that a zoning board could not grant a use variance but could only recommend approval to the governing body. The Court was worried that the "delegation of authority" that boards would now have under the MLUL increased "the likelihood that such variances may conflict with the intent of

the master plan and zoning ordinance to a greater extent than" when the governing body was vested with that authority. *Id.* at 20.

To address this concern, the Court elevated the proof standard to be met to justify approving the exceptional case of a d(1) use variance that justifies a departure from the zoning scheme established by a municipality's elected leaders. The Court gave life to a new standard, requiring applicants to show:

> [A]n enhanced quality of proof and clear and specific findings by the board of adjustment so the variance sought is not inconsistent with the intent and purpose of the Master Plan and Zoning Ordinance. The applicant's proofs and the board's findings must *reconcile the proposed use variance with the zoning ordinance's omission from the use from those permitted in the zoning district.* [*Id*. at 21; emphasis added].

To satisfy that standard, the Court suggested that:

> [i]t may be that the proposed use was one, like a health club, that was uncommon when the ordinance was last revised, but has since gained currency. Competent proofs to this effect could dispel the concern that exclusion of the use was *deliberate rather than inadvertent*. Likewise, a variance application to permit a commercial use to be established on residentially zoned property might also be supported by proofs demonstrating substantial changes in the character of the neighborhood surrounding the subject property *since the adoption of the ordinance*, in order to reconcile the apparent conflict between the ordinance and the proposed variance.
> [*Id.* at 21, fn.11; emphasis added].

Reconciliation of the master plan and zoning ordinance ensures "the negative criteria constitute an essential 'safeguard' to prevent the improper

exercise of the variance power." *Id.* at 21. *Medici* expected its new test would "narrow to some extent the discretion of boards of adjustment in reviewing variance appeals for uses that are deliberately excluded by the governing body from those permitted by the zoning ordinance." *Id.* at 5. The Court hoped this test would reinforce that the "negative criteria constitute an essential 'safeguard' to prevent the improper exercise of the variance power." *Id.* at 22.

The Court noted that the examples were not exhaustive and that other proofs could be offered to reconcile a use variance with the zoning ordinance. *Id.* But how can a use variance be reconciled with the ordinance if not by one of the Court's two examples? Fortunately, *Medici*'s language points the way: "Competent proofs . . . could dispel the concern that exclusion of the use was *deliberate rather than inadvertent.*" *Id.* at 21 fn. 11 (emphasis supplied).

Usually, to satisfy the enhanced quality of proof, an applicant must prove that events *after* adoption of the ordinance show that omitting the use from the zone was not intentional. *See, e.g., Funeral Home Management, Inc. v. Basralian,* 319 *N.J. Super.* 200, 214-215 (App. Div. 1999*); see also, Pagano v. Zoning Bd. of Adj. of Edison*, 257 *N.J. Super.* 382, 397 (Law Div. 1992)(proving intention rather than inadvertence by interpreting the zoning ordinance).

B. Applying the "second prong" of the negative criteria

Here, neither the Applicant, the Applicant's planner, the Board, nor the trial court tried to reconcile the use variance with Belmar's ordinance. While the Resolution has many sections, including some of dubious relevance, a section addressing the second prong of the negative criteria—the legislative command of *N.J.S.A.* 40:55D-70(d) that "no variance . . . may be granted without a showing that such variance . . . will not substantially impair the intent and purpose of the zone plan and zoning ordinance" notwithstanding—is not one of them. In the two places where the Resolution mentions the negative criteria—Pages 22 and 134 (Ja310, 423)—the second prong is unmentioned, and the words "impair" and "zone plan" are not found in the Resolution at all. And most critically, Edelman made no effort to show that apartment-style, multi-family uses were inadvertently omitted from the R-75 zone by Governing Body. Those fatal errors require reversal of the approval. Even if the Board tried to reconcile the omission of the proposed use from the single-family R-75 zone, it would have been unable, based on how Belmar chose to zone. The enhanced proofs required by *Medici* are unavailable here.

The only permitted residential use in the R-75 Zone, and all its residential zones, is single-family homes. [Ja 1501]. The BZO does not permit multi-family housing anywhere. The Borough's Schedule of Permitted

Residential Uses in the BZO has a line item for Multiple Dwellings, and no zoning district permits that use. [Ja1501]. This is clear evidence that Multiple Dwellings were not "inadvertently omitted" as footnote 11 of *Medici* suggests would be "competent proof" to satisfy the enhanced quality of proof. To the contrary, the BZO defines this use (Ja1330), and the Governing Body intentionally did not allow the use anywhere in the Borough. The Board's decision to grant a variance despite this clear decision—and to do so with no evidence justifying its decision or any explanation in the Resolution about why it did so—is an arrogation of the Governing Body's zoning power.

Case law establishes when the use is not permitted anywhere in the community, a use variance should not be granted. In *Saddle Brook Realty, LLC v. Saddle Brook Bd. of Adj.,* 388 *N.J. Super.* 67 (App. Div. 2006), the applicant sought to operate a Wendy's restaurant in a strip mall even though fast-food restaurants were prohibited everywhere in the community. *Id.* at 70. That panel, in applying the *Medici* criteria, found that the character of the town had not changed substantially since adoption of the ordinance, and the prohibition of the use throughout the community was strong evidence that the use variance could not be reconciled with the ordinance. *Id.* at 80.

While there is no specific prohibition here, including no other housing other than single-family homes in any residential zone is just as strong an

expression of the Governing Body's intent. Where the use is prohibited as in *Saddle Brook* or is simply not included in a residential zone anywhere in the community, as here, "arrogation of [the governing body's] planning responsibilities should be at the forefront of a board of adjustment's concern" when considering the application. *Id.*

Arguably, the only effort to justify satisfaction of the second prong came from Edelman's planner, who asserted that the MF-75 overlay zone's conditionally permitted townhouse-style homes proved the Governing Body intended multi-family buildings such as proposed for this site. But this effort falls flat upon scrutiny. Peter Steck, who testified on behalf of Matthews, noted the MF-75 overlay zone that had been created in 2008 and the amendment to the zoning ordinance allowing the alternative conditionally permitted use of single-family townhomes was to incentivize development that would replace the Belmar Inn, not spur multi-family developments. Steck characterized this as a "bonus." [4T 111:1-17; Ja1413].

And former Mayor Matt Doherty, who was on the Governing Body that adopted the MF-75 ordinance, speaking at the hearing as a member of the public, confirmed it was enacted to "encourage someone to do something with the Belmar Inn." [5T 117:13-19]. Former Mayor Doherty's testimony confirming Steck's analysis is dispositive—that ordinance was meant as an

incentive requiring a specific kind of structure with distinct limitations and not a sign the Governing Body intended multi-family uses generally in the zone.

It is apparent from the testimony of Steck and Doherty that DiFolco's position was baseless. Steck also noted that the MF-75 zone allowed townhouses, not multi-family, apartment-style buildings. [4T 111:12-15]. He explained that a townhouse is a vertical unit where no one lives above or below you, and that is the standard definition in the trade. [4T 110:17-21]. His analysis was that the Governing Body intended that the MF-75 overlay ordinance to allow only townhouse-style residences to replace the Belmar Inn, because that is what the ordinance says. He noted that, other than the existing density of 5.8 units per acre in the R-75 Zone, the MF-75 bonus incentive would permit a maximum of 28 units per acre on this lot. [4T 111:15-17]. The application proposes 49.8 units per acre. [4T 111:17-19].

§ 40-6.13(a) of the BZO includes a statement of purpose confirming the Governing Body's intent provide for a transition from the high-density residential uses exceeding units per acre to a multi-family "townhouse-style" cluster development. [Ja 1413]. If the apartment, multi-family type of use proposed here was intended, the Governing Body could have easily written the zoning differently but chose not to. And this proposal is not transitional in

nature. Instead, it puts the high-density development where the Governing Body did not want it.

And the record is devoid of any evidence that the Governing Body's failure to include multi-family apartment-style buildings as a permitted use was inadvertent. When the Governing Body acted to create an incentive for redevelopment of the site, it provided for a far less intense use than the proposal. It had the power to permit any use it felt was appropriate as a "bonus" or incentive. Omitting the proposed use from the BZO and MF-75 overlay zone was deliberate and not inadvertent. The Schedule of Uses for the Borough's Residential Districts has a line item for "Multiple Dwellings," but no zones permit them. This was a knowing decision, as detailed below.

The proposal also cannot be reconciled with the Belmar Master Plan, adopted in 1989, either, despite the general goal of spurring economic development. The land-use element, in § 7-6, states emphatically, "The Borough of Belmar, with its individual, single-family, detached dwellings, could well be destroyed if the intensity of land development increases significantly throughout the Borough." [Ja 1213; underline in original]. It further emphasized that preserving "the integrity of the Borough's single-family, residential districts from overdevelopment is important to the long-term future of Belmar as a quality shore community." [Ja 1213; underline in

original]. The underlined section for emphasis is the *only* underlined language in the entire Land Use Element, which is extraordinarily telling, given the lack of attention paid to this issue by the Board and the trial court. Also relevant to this application is the discussion about how floor-area ratios, maximum building coverage, and height restrictions were important to prevent "overcrowding and over-intensification of development which has occurred in many of the coastal communities." [Ja 1213]. The lack of attention to this critical provision of the Land Use Plan during the hearing is striking.

The latest reexamination of the Master Plan occurred in 2016. [Ja 1246]. Nowhere in the reexamination is there a suggestion that multi-family housing had become appropriate for the R-75 or any other residential zone. However, the reexamination highlighted that the Borough is primarily residential in character and mostly single family. [Ja 1311]. It notes that "Multi-Family is no longer a district or a Permitted Use in the Borough, as part of an attempt to encourage Belmar's transition into a year-round municipality with single-family-residential uses . . ." and even though there are clusters of mid- to high-density multi-family buildings in the R-75 district, "single-family is still encouraged at this time." [Ja 1311]. This change confirms that the Governing Body removed the use from the BZO, and dispels any notion that the exclusion of this use from the BZO was inadvertent as *Medici* requires to satisfy the

enhanced proof standard for the second prong of the negative criteria. *See Medici,* 107 N.J. *supra,* at 21, n.11.

And the Board's (and trial court's) acceptance of the Applicant's contention that this building offers an alternative housing option for people is in derogation of the specific policy in the Master Plan and Master Plan reexamination that seeks single-family development, not multi-family apartment/condominium style living. If that were desired, it would be in the ordinance and Master Plan. Belmar seeks only single-family development, as the most recent reexamination of the Master Plan confirms. Neither the Applicant nor the Board gets to decide when new types of housing are needed, since that is a planning and zoning function of the Governing Body. The Board must respect the decisions of the Governing Body and the policy in the Master Plan. If Belmar wants alternate housing options, that decision will fall to the Governing Body by way of rezoning and not the zoning board through use variances. This is exactly the kind of board action the *Medici* Court feared, and which spawned the enhanced quality of proof.

A short note on the trial court opinion is required. The trial court judge devoted one short paragraph to the second prong of the negative criteria and apparently also relied on the benefit of eliminating the Belmar Inn as a reason for affirming the Board. [Ja 282]. The Court did not mention the terms

"enhanced quality of proof" and did not engage in any analysis of whether the Board had adequately reconciled this variance with the Zoning Ordinance and Master Plan. The Court also bought into the idea that the additional range of housing options promoted the community's residential character, even though the ordinance and the Master Plan specifically sought only single-family homes. The general policy statements in the Master Plan cannot outweigh the specific policy determinations regarding multi-family housing in Master plan or the Governing Body's determination to eliminate it throughout the Borough.

The overwhelming evidence proves this proposed use variance cannot be reconciled with either the Master Plan or the Zoning Ordinance. There is nothing to indicate that omitting a project such as what was proposed was inadvertently omitted from the zone. The enhanced quality of proof was not satisfied. *See also, Funeral Home, supra,* 319 *N.J. Super.* at 213-215 (approval of variance for non-permitted use was error because board did not reconcile omission of use as there was no evidence that use was inadvertently omitted).

Edelman did not reconcile its requested d(1) use variance with the omission of the proposed use from the zoning ordinance. The Board acted arbitrarily, capriciously, and unreasonably in approving the application. The trial court did not address this issue in any meaningful way, and its decision to affirm the approval must be reversed, and the approval must be overturned.

C. Applying the "first prong" of the negative criteria

Use variances are granted only in exceptional cases because of the "legislative preference for municipal land use planning by ordinance rather than variance . . ." *Kinderkamack Road Assoc. v. Mayor and Council of Oradell,* 421 *N.J. Super.* 8, 12 (App. Div. 2011).

This first prong of the negative criteria requires the board to determine whether the applicant has proved the development will not be substantially detrimental to the public good. This prong is focused on the variance's effect on surrounding properties. *Medici, supra.*, 107 *N.J.* 1, 22-23, fn. 12. The board's task requires evaluating the impact of the use variance upon adjacent properties and to determine whether it will cause damage to the character of the neighborhood and constitute a substantial detriment to the public good. *Id.*

The Board did not explain its conclusion that there was no substantial detriment to the public good. It acknowledged in its Resolution that the testimony of Cecilia Matthews, an adjacent neighbor, through her direct testimony, "presented reliable, heartfelt, intelligent, cogent, compassionate, truthful and necessary testimony relative to the applicant's proposal, and the impact that the development would/could have on her family." [Ja 316]. Matthews' testimony, along with questions and testimony of Plaintiffs

Ammermuller and Bloom, raised many significant, negative effects the proposed building would have on their properties and the surrounding area.

Yet, the Board never justified why it did not find these serious, major concerns substantially detrimental. In a d(1) use-variance case the level of deference given to a board is less on an approval than a denial. *CBS Outdoor, supra,* 414 *N.J. Super.* at 568. The Board's failure to flesh out in at least some detail why these serious concerns were not considered substantially detrimental cannot be overlooked in the name of deference.

It is apparent from the Board's ardor to get rid of the Belmar Inn, it elevated whatever benefits its elimination would bring and avoided any serious consideration of the negative impacts of the proposed building on the neighborhood and the community. This is confirmed by comments made by the Board and the Applicant's engineer. In the Resolution, the Board noted:

> Perhaps some of the Board members would review the application differently if the subject parcel involved an undeveloped/vacant/virgin piece of land. [Ja 375].
>
> Had the within application involved a vacant, undeveloped, and virgin piece of land, perhaps the FAR Variance might not have been granted. [Ja 354].

Even the Applicant's planner so noted, stating, ". . . If the Belmar Inn wasn't there, if it was a vacant lot, you'd have a case to sell here." [3T 174:5-7].

Instead of specifically explaining why it felt the objectors' many

concerns were not a substantial detriment to the public good, it improperly weighed its conception of benefits against detriments, concluding the positive outweighed the negative. But the negative criteria are not subject to balancing good versus bad. It is supposed to function as a "fixed and far-reaching protective restriction. *Medici, supra.,* 107 *N.J.* at 22, citing *Ward v. Scott*, 11 *N.J.* 117, 126 (1952). The Board should have independently evaluated the issues raised on their own merit irrespective of whatever individual benefits it believed would be achieved by removing the Belmar Inn. Proof of both the positive and negative criteria are required for an approval.

The Resolution includes a list of arguments against and in favor of the proposal, and follows with the conclusory statement that, "[a]fter weighing the positive and negative factors . . . and after analyzing/weighing all of the testimony, evidence and public comments . . . six Board members were persuaded/convinced to conditionally approve the application." [Ja 426-431].

But this is the kind of conclusory finding eschewed in *Medici*, *supra,* 107 *N.J.* at 23. The arguments against as conceived by the Board are overly general to the point of being meaningless in assessing detriments. For example, one of the opposed arguments is listed as: "A concern that the height and length of the building herein may potentially affect the objectors." It has no detail, even though Ammermuller and Bloom detailed specific concerns:

The objectors described the problems with the height of the building blocking light, air, open space, and their solar panels, and the other apprehensions testified to. The Board does not specifically analyze these concerns.

Here are some of the misgivings raised by Ammermuller, Bloom, Matthews, and other members of the public who spoke:

1. Noise. Noise will be generated from several sources. With a huge building and large parking lot that accommodates 47 parking spaces (although most non-conforming in size), the noise from activity in and out for these units for year-round use, was of a major concern to the plaintiffs. A big parking lot less than ten feet from the property line will be a major noise generator. [5T 130:6-9].

Expected noise sources include engine noise from automobiles and louder engine noise from pickup trucks, idling engines (especially when remote starters are used, permitting the car to warm up or cool off for several minutes), loud beeps from key fobs locking and unlocking cars, backup beepers that are now on some vehicles and may be on all vehicles in the future, the occasional accidental car alarm, the exterior warning alarm on electric vehicles when operating in electric mode, trunks and hatchbacks slamming, individuals talking, horns honking, and motorcycles, which will echo in this open garage. [5T 148:13-18]. And that does not include the possibility of

vehicles playing loud (sometimes very loud) music on their radios with open windows that will also echo under the garage.

Because of the garage's open construction, there is nothing to buffer the sound, and the Applicant provided no testimony on why that concern is not substantial. If the argument is that the Belmar Inn is a noisy operation, at least that is only three months of the year, and none of the noise is generated from vehicles. And these adjacent property owners have indicated it is far less problematic than made out by the Applicant. [5T 154:19 to 155:10]. This facility will be a year-round disturbance to people who live only a few feet from the building and parking lot. If the Board did not feel this was a substantial detriment, it needed to explain so it could at least be reviewed by this Court as to whether it was a reasonable determination.

Another source of noise is the amenity rooftop space. There are 26 HVAC units on the roof. Bloom, an HVAC contractor by trade, questioned engineer DiFolco about noise generated from the HVAC units, gas heaters and hot water heaters that vent through the roof. DiFolco could not provide an answer. [4T 62:11 to 64:22]. That question was never answered. The developer indicated something would be placed around the HVAC units to buffer the noise but provided no proof that the remedy would eliminate the noise and not disturb the neighbors. The Board should have required Edelman to either

produce a noise expert or, at a minimum, produce other evidence that this proposed mitigation would be effective in reducing the noise, so it is not disturbing to the neighbors.

Another noise generator on the roof is from its use by the residents. There are no conditions in this Resolution that would prohibit loud amplified music, either through a system installed by the developer or the association for use by all or boom boxes and other music devices brought to the roof by the residents. There is no restriction on use of the amenity, so anyone who wants to play loud music at 3 a.m. may do so. And there were concerns about noise emanating from tenants' activities on the balconies. [5T 19:12-16].

The Board added a condition that "Applicant shall comply with all State Regulations regarding decibel levels." But there are no State Regulations applicable to residential property. *See N.J.A.C.* 7:29-1.2. This was a meaningless, half-hearted, half-baked attempt to address a major problem with the application that is unenforceable.

2. Light, Air, and Open Space. The Board accepted the incredible position taken by the Applicant that this development would provide adequate light, air, and open space. The 52-foot-tall stair towers on this building are only five feet from the property line. While the building may be 42.5 feet tall as defined for zoning regulation compliance, it is 57-feet tall to the top of the

elevator tower. The building including the lower parapet is 46 feet tall; to the upper parapet, 48 feet tall. [Ja 758, Ja 760]. That the building will not shadow and block light on neighbors on the east and west side of the building is inconceivable. And the light blockage's specific impacts were raised by the three property owners next to this site. Both Ammermuller and Bloom said this building would cast shadows over their solar panels they were already using and would reduce their efficiency. Ammermuller indicated that the solar panels effectiveness would be reduced by 40 percent from about 2 o'clock in the afternoon. [6T 49:19-22] and believed he would suffer a $30,000 loss. [5T 129:18-21]. Bloom testified the sun blockage on his solar panels would cause him a $75,000 loss. [5T 154:17-18]. The Board did not even request that Edelman provide a shadow study.

The R-75 Zone permits 35-foot-tall buildings. Even disregarding the overly tall building and elevator tower on the roof, the stair towers on the sides are only five feet from the residential property lines on both sides and 17 feet taller than permitted. That is a huge deviation. The Board ducked dealing directly with and explaining why these were not substantially detrimental. The objectors were also concerned with the diminution in the breezes they now experience that will be blocked by the large building. This went unaddressed.

3. Privacy. Ammermuller and Bloom were also troubled by the imposing nature of this huge building which occupies most of the Property, and the balconies protruding from the building only five feet from their properties. They indicated displeasure with the prospect of having people on balconies staring down into their yards and the lack of privacy. [5T 74:11-15].

Ammermuller testified the decks were five feet from his property line and one deck would be mere feet from his daughter's bedroom. [5T 129:24 to 130:3]. People treasure privacy in their home, and before that is destroyed, the Board had a duty to explain exactly why there was no detriment caused by balconies so close to each of the existing neighbors, with only a minuscule setback. But the Board paid no attention to this obvious problem.

4. Activity. Ammermuller and Bloom were also uneasy about the prospect of significant activity now being thrust upon them only a few feet from their properties. The parking garage, with 24-unit owners coming and going all day and night, interferes with the quiet lifestyle anticipated and expected in a single-family zone. The hustle and bustle of a 4-story building with activities taking place on the roof and on balconies hanging off the building creates an environment incongruous with what they experience and sought when they moved into their homes. The Board's failure to acknowledge and evaluate these impacts was in error.

The Board's evasion of direct consideration, analysis, and explanation of its conclusions about the specific concerns raised by Ammermuller, Bloom and Matthews violated its responsibility to properly apply the first prong of the negative criteria. That error was arbitrary, capricious, and unreasonable.

II. The Applicant did not prove that special reasons exist to permit a multi-family residential apartment-type building in the R-75 single-family residential zone; the Board's Resolution is not based on substantial credible evidence in the record to justify the approval. [Ja256, Ja278-281].

The MLUL states that "special reasons" are required for a use variance under *N.J.S.A.* 40:55D-70(d)(1), but gives no guidance on exactly what that means or how it is to be proved.

The courts have found three ways to prove special reasons (the "positive criteria") for a use variance under *N.J.S.A.* 40:55D-70(d)(1): (1) the proposed use inherently serves the public good; (2) the applicant will suffer undue hardship resulting in economic inutility if the variance is not granted; and (3) the use promotes the general welfare because the proposed use is "particularly suitable" for the site where it is to be located and vice versa. *Saddle Brook, supra,* 388 *N.J. Super.* at 76.

The use proposed here is not inherently beneficial, nor did Edelman so contend. Edelman's experts admitted that a permitted use could be developed, so there was no claim of undue hardship. Edelman moved forward, contending

that the proposal was "particularly suitable" for the site and satisfied the "positive" criteria for a use variance. *See Smart SMR of New York, Inc. v. Fair Lawn Bd. of Adj.,* 152 *N.J.* 309, 323 (1998).

Price, supra, is the foundational case on particular suitability. The Supreme Court summarized the inquiry as to what is particularly suitable as "whether the property is particularly suited for the proposed purpose, in the sense that it is especially well-suited for the use although the use is not permitted in the zone. 214 *N.J.* at 293. The Court adopted a site-specific approach. That involves evaluating whether the use in the context of the neighborhood and the surrounding properties is appropriate for the site and provides the benefits because it is being located there. *Id.* at 287-289.

The *Price* Court extensively analyzed the "particular suitability" test. The Court stated that the test is whether the project, "otherwise not permitted in the zone . . . will promote the general welfare as defined by the MLUL. *Id.* at 287. This statement confirms the long-held rule that an applicant needs to demonstrate that the variance would promote the general welfare because the use is peculiarly and particularly fitted to the specific location for which the variance was sought. *Medici, supra,* 107 *N.J.* at 4; *accord Stop and Shop Supermarket v. Bd. of Adj., Springfield,* 162 *N.J.* 418, 431 (2000).

In *Medici,* the Court had noted that the benefits to the general welfare derive "not from the use itself but from the development of a site in the community that is particularly appropriate for that very enterprise." *Id.* at 18. The *Medici* Court also noted that "all lawful uses of property can be said to promote the general welfare to some degree, with the result that if general societal benefits alone constituted an adequate special reason, a special reason almost always would exist for a use variance. As a result, any application for a use variance based upon particular suitability has always called for an analysis that is inherently site-specific." *Price, supra,* 214 *N.J.* at 288. Some examples of how the particular suitability standard is properly applied are:

(1) *Scheff v. Twp. of Mapleshade*, 149 *N.J. Super.* 448 (App. Div.), *certif. den.,* 75 *N.J.* 13 (1977): There, the court allowed a nonpermitted liquid-gas-storage facility on a site consisting of 80% wetlands that prevented the permanent construction of buildings. *Id.* at 458. The proposed liquid-gas tanks would stand on pilings and not interfere with the ebb and flow of water, and no other use of the land was feasible. *Id.* at 452. The unusual conditions of the site lent themselves to the proposed use more so than other uses, and was "tailor-made" for the use sought.

(2) *Anfuso v. Seeley*, 243 *N.J. Super.* 349 (App. Div. 1990): *Anfuso* involved a request to expand a small marina in a residential zone on the

Shrewsbury River. *Id.* at 353. In the court's words, "the operation of the marina at the site serves the general welfare and promotes the zoning purposes providing recreational waterfront activity for the citizens of New Jersey." *Id.* at 372. The specific location of the marina—on the river—provided the ability to promote waterfront activities serving the general welfare. A marina could obviously only be on a body of water.

(3) *Yahnel v. Bd. of Adj.*, 79 *N.J. Super.* 509 (App. Div.), *certif. denied,* 41 *N.J.* 116 (1963): In *Yahnel*, a telephone switching facility's technical constraints made its location vital to its ability to function. The specific "wire center" was found to be particularly suitable for the site because the site was the exact location where the use needed to operate properly.

In *Scheff, Anfuso,* and *Yahnel*, there was a palpable interconnection between the proposed use and the land characteristics or its unique location. Demonstrating particular suitability necessary to prove special reasons for a use variance must fit into this analytical framework. The Board's approval of the application, without credible proofs of suitability, is one of the bases for Ammermuller's and Blooms' appeals.

This case was presented based on the Applicant's position that the proposal is particularly suitable for the site. But the Board's Resolution shows it granted this application because it wanted to see the Belmar Inn removed.

And while the Board may consider the removal of a previously difficult, nonconforming use a benefit, that alone cannot sustain the significant proofs required to allow a new development, which does not conform to the zoning.

The sole benefits to the general welfare from removal of a pre-existing, non-conforming use is not a substitute for the searching examination required of the Board to determine whether the new use that will be built is particularly suitable. This proposal, which is also nonconforming, must provide general welfare benefits on its own based on what is proposed, in addition to whatever benefits might occur because the existing use is being eliminated, which would provide the same benefits no matter what replaced it. "Particular suitability," in the context of the specific parcel, means that "strict adherence to established zoning requirements would be less beneficial to the general welfare" than the proposed use. *Price*, *supra,* 214 *N.J.* at 287.

And that was not shown here. The proposal is no more beneficial to the general welfare than a conforming use or even this use if proposed with fewer units, a lower height, larger setbacks, and less coverage. Based on the evidence, the proposal is not even close to meeting the standard. While requiring ten variances is not disqualifying, it indicates that the size, height, and proximity of the proposal may not be compatible with its surroundings.

And the ordinary bulk and density requirements in the zone are not applied because they are intended for single-family homes, the Board still cannot ignore the ordinary applicable limits in the zone. *Id.* at 301 ("a zoning board, in considering a 'use' variance, must then consider the overall site design . . ."). The height of the building in relation to the environs; the amount of impervious coverage relative to the size of the site; the noise and disturbance from the rooftop amenity area; and the additional traffic and parking activity, the significant potential noise therefrom only a few feet from residential homes; the vehicle exhaust, causing potential air quality and annoyance issues, the grossly excessive FAR; the extra 1-1/2 stories and 22 feet (35 ft. v. 57 feet) of height, and losing privacy are all factors that the Board had to analyze and explain why this oversized building advanced the general welfare. The reasons, which include (i) providing electric vehicle charging, which the MLUL required anyway under *N.J.S.A.* 40:55D-66.20, (ii) using salt-tolerant shrubs, (iii) installing a sprinkler system and appropriate electrical wiring; (iv) complying with the ADA; (v) compliance with flood regulations, are required of any development and hardly justify what was proposed.

Peter Steck prepared an exhibit showing the extent of the deviations and, in many cases enormous deviations, from the zone standards. [Ja 1074]. For

example, the FAR is 432% greater than allowed; building coverage 355% more than allowed; height 143% taller than permitted in the zone, assuming only a 52-foot-tall building, which is to the top of the stair tower; and impervious coverages 200% greater than allowed. These are not minor deviations; they are massive departures from what is permitted here. These figures demanded serious attention and should have been at the forefront of the Board's decision-making process about whether the site was suited for this large a building.

Another sign of the unsuitability of the proposal is that of the 47 parking spaces, 43 did not comply with the New Jersey Residential Site Improvement Standards that require parking spaces that are at least 9' x 18'. *N.J.A.C.* 5:21-4.14. The Applicant tried to justify these drastically undersized spaces by providing tire bumpers that would allow a two-foot overhang, but if there was space for an overhang, why not provide spaces that complied. And about 30 spaces stick out from underneath the building such that their front bumpers will be as close as about five feet from the property line, covering more of permeable pavers underneath. [4T 97:18 to 98:17].

In considering the particular suitability of the lot, the Board should have been cognizant of the fact that the building was just too big for its surroundings. Its discordance with the single-family structures surrounding it and in the area was obvious. Those huge deviations from the standards for

height, improved lot coverage, building coverage, FAR mean something—they result in a building that is much too big for a lot zoned only for single family dwellings, or else townhomes, if all the conditions were met. The proposed parking lot is to be filled with undersized spaces and undersized drive aisles, the lack of any open space, the tiny setbacks to the neighbors considering the massive size of the building, balconies on top of the neighbors' yards, and a building that will shadow the neighbors' solar panels all yield one conclusion: this development is too large and not particularly suitable. *Cf., Lang v. Bd. of Adj. of Caldwell*, 160 *N.J.* 41, 56 (1999)(in a hardship variance case, the Court held a board of adjustment must consider whether the size of the structure was so unusually large it caused the need for the variance rather than the condition of the property).

And this building brings all its detriments to the property on a year-round basis. While the Belmar Inn historically created problems during the summer months, it was dead in the off-season. The surrounding neighborhood must now suffer the increased traffic, noise, disturbance, loss of privacy and discomfort of having a large building looming over their homes for nine months more during the year than any disruption that the Belmar Inn caused. The negatives of this large building next to smaller single-family homes will

be 400% greater from a time perspective than anything that occurs with the Belmar Inn.

The Applicant also tried to prove particular suitability by arguing the application furthered many goals in *N.J.S.A.* 40:55D-2 of the MLUL. But those claims made by Edelman's planner were mostly based on benefits alleged to accrue because of removal of the Belmar Inn, not based on any benefits the new structure itself was providing.

Space does not permit an analysis of every goal claimed to be satisfied. Most are inapposite and irrelevant to this application because they are based on benefits potentially gained by removal of the Belmar Inn, not due to benefits obtained due to the new building. Below are several examples:

1. Goal 2(c) of the MLUL is "to provide adequate light, air and open space." *N.J.S.A.* 40:55D-2(c). The Applicant claimed the project provided adequate light, air, and open space with no credible reasons given. DiFolco claimed the elevated building "provides adequate air circulation and the oversized lot tends to mitigate the cast of light on open space." [3T 156:12-16]. But no serious review of that statement could be viewed as credible by a board interested in evaluating the testimony.

Use of the parking garage will create exhaust, not fresh air. Three floors of rooms and all the solar panels, stair towers, HVAC units and other rooftop

structures will reduce any ocean breezes the neighbors now enjoy. The huge building will cast shadows on the adjacent properties only a few feet away; it will reduce light those properties now experience.

And the assertion that the oversized lot mitigates the cast of light on open space is not credible. First, there will be virtually no open space after this development is constructed. Second, the lot is undersized relative to the size of the building —it is built on top of Ammermuller's and Blooms' properties. The building coverage is 71.11% where only 20% is allowed, and the only open spaces are minimal strips of land around the building.

1. Goal 2(e). The Board cited this goal that seeks to promote establishment of appropriate densities. The Board twists itself into a pretzel trying to persuade this application will reduce the overall density from 89 dwelling units per acre to 49 dwelling units per acre. [Ja 376]. First, the Belmar Inn is not a residence. It is a rooming house that rents rooms to transient tenants for limited periods of time. Second, the Board's premise requires acceptance of the proposition that the 40 rooms in the Belmar Inn are dwelling units. The Belmar Inn has no dwelling units—the rooms are not considered dwelling units under any definition, including the definition in the Belmar ordinance. This is because Belmar defines a "Dwelling Unit" as "a building or part of a building with cooking, sleeping, and sanitary facilities

occupied by one family…" [Ja 1330]. The Belmar Inn rooms are single rooms not dwelling units, but the proposed condominium building will establish 49 dwelling units per acre on a permanent year-round basis. And because of the use variance, the Property will no longer be nonconforming. This increases the population density because the Belmar Inn is a transient use and none of the people there are considered part of the population of Belmar.

2. Goal 2(h). DiFolco also claimed that the building furthered this goal of the MLUL "to encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes which will result in a congestion or blight." This application sought approval for a non-permitted multi-family development, and did not include transportation improvements. This claim was irrelevant to this application.

3. Goal 2(m). DiFolco asserted the application furthered the goal in *N.J.S.A.* 40:55D-2(m), which is aimed at encouraging the "coordination of the various public and private procedures and activities shaping land development with a view of lessening the cost of such development to the more efficient use of land." But there is no coordination of public and private procedures here, such as a parking garage to serve both the developer's tenants and open for use

by the public. There is no coordination with the public as part of this application.

5. Economic Benefit. Edelman also argued through DiFolco, that the Belmar Master Plan sought economic development, which this application furthered. Frankly, every master plan has this goal. While DiFolco did not identify where in the Master Plan any recommendation like this was made, the important element is not that a community wants economic development, but how the master plan and the zoning ordinance recommends pursuing that goal.

And review of the 1989 Master Plan Land Use Element reveals a policy of maintaining the single-family, residential character to Belmar and keeping it separate from the two multi-family zones that existed at that time. [Ja 1213]. And by 2016, when the latest Master Plan reexamination report was issued, it notes that multi-family zones had been eliminated as permitted use in the Borough "as part of an attempt to encourage Belmar's transition into a year-round municipality with single-family residential uses with diverse dwelling unit types and design criteria." [Ja 354]. That part of the Master Plan Reexam also notes that the rezoning of the multi-family zones to R-75 had resulted in a large turnover of multi-family homes to single-family homes.

Applicant argued this project would provide alternate housing types for the community. But the task of creating different housing options falls on the

Governing Body. The zoning board has no power to zone by granting use variances to provide alternate housing options, especially when the Master Plan does not seek those options, and most particularly where the Governing Body has determined that this use is not appropriate and has eliminated it. Any basis like this for a use variance is an improper arrogation of the Governing Body's authority. *Saddle Brook, supra,* 388 *N.J. Super.* at 80. Providing new housing options with multi-family buildings is not encouraged by the Master Plan. There is no credible argument that there are benefits associated with providing another form of year-round residential housing that was not single family in nature.

CONCLUSION

For all the foregoing reasons, the Law Division's October 19, 2023, Order affirming the Defendant Board of Adjustment's decision to approve the application of Defendant Edelman Investment Group, LLC for preliminary and final site plan approval with use and bulk variances should be vacated and declared null and void.

Respectfully submitted,

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By: */s/ Daniel L. Steinhagen*___
Daniel L. Steinhagen, Esq.

Dated: March 20, 2024

ART AMMERMULLER, STEVEN BLOOM, AND LINDA BLOOM,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
APPELLANTS,	:	DOCKET NO.: A-000953-23
v.	:	CIVIL ACTION
BOROUGH OF BELMAR ZONING BOARD OF ADJUSTMENT, EDELMAN INVESTMENT GROUP, LLC, 108 12TH AVE REDEVCO, LLC, AND RAINBOW HOSPITALITY, INC.,	:	ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART MONMOUTH COUNTY
	:	DOCKET NO.: MON-L-779-23
RESPONDENTS.	:	SAT BELOW: HON. GREGORY L. ACQUAVIVA, J.S.C.

BRIAN MATTHEWS AND CECELIA MATTHEWS,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
APPELLANTS,	:	DOCKET NO.: A-000977-23
V.	:	CIVIL ACTION
EDELMAN INVESTMENTS, GROUP LLC, 108 12TH AVENUE REDEVCO, LLC, RAINBOW HOSPITALITY, INC., AND THE ZONING BOARD OF ADJUSTMENT OF BELMAR,	:	ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART MONMOUTH COUNTY
	:	DOCKET NO.: MON-L-889-23
RESPONDENTS.	:	SAT BELOW: HON. GREGORY L. ACQUAVIVA, J.S.C.

BRIEF FOR RESPONDENTS, 108 12TH BELMAR REDEVCO, LLC, EDELMAN INVESTMENT GROUP, LLC, AND RAINBOW HOSPITALITY INC.

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Dated: April 19, 2024

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TABLE OF APPENDIX[1]

[1] Edelman Investment Group, LLC, 108 12th Belmar Redevco, LLC, and Rainbow Hospitality Inc. supplement the Appellants' Joint Appendix with their own Appendix referred to as "Ea."

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Appellants, Brian and Cecelia Matthews, Steven and Linda Bloom, and Art Ammermuller ("Appellants") filed appeals challenging the trial Court's affirmance of the Borough of Belmar Zoning Board of Adjustment's ("Board") approval of Respondent, Edelman Investment Group, LLC's ("Edelman") application. Appellants are some neighboring property owners to the property in question.

At the Board, Edelman sought use, floor area ratio, height, and accompanying bulk variances for (1) the demolition of an intense preexisting, nonconforming commercial 40-unit Rooming House public nuisance known as the Belmar Inn and demolition of preexisting, nonconforming 3 adjoining dwelling units consisting of 11 bedrooms; and (2) the construction of a 24-unit modern Condominium Building. After a year of hearings on the application, the Board adopted a 156-page Resolution detailing the compelling reasons for the approval. Appellants are upset with the outcome of the Board's vote on the application, but discontent does not equate to legal reason to overturn the Board's well-supported and well-reasoned decision.

PROCEDURAL HISTORY

Public hearings on Edelman's application occurred on July 27, 2021, August 26, 2021, October 14, 2021, February 24, 2022, April 28, 2022, and July 28, 2022.[2]

[2] Transcripts for these hearings are abbreviated as follows: 1T for the transcript of the hearing of July 27, 2021; 2T for August 26, 2021; 3T for October 14, 2021; 4T for February 24, 2022; 5T for April 28, 2022; and 6T for July 28, 2022.

Ja[3] 290. The application was approved on July 28, 2022, and a Resolution was adopted by the Board on January 26, 2023. Ja 444-45. Actions in lieu of prerogative writ were filed on March 13 and 22, 2023 and were consolidated on May 10, 2023. Ja 12, 51, and 253. The trial Court conducted a hearing on the actions on October 17, 2023 and issued an Order and Statement of Reasons denying those actions and affirming the decision of the Board on October 19, 2023. Ja 256.

STATEMENT OF FACTS

Edelman was the applicant before the Board. Ja 298. Edelman's application included two lots; block 110, lot 12, which is owned by Rainbow Hospitality Inc. ("Rainbow"), and block 110, lot 13, which is owned by 108 12th Belmar Redevco, LLC ("Redevco"). Ja 298.[4]

After six public hearings over a course of a year, the Board approved the application with six of seven votes in favor of the application on July 28, 2022. 6T 130:23-131:23. On January 26, 2023 the Board adopted a 156-page Resolution approving Edelman's application. Ja 444-45.

Edelman's application sought approval of preliminary and final site plan, use variance, floor area ratio variance, height variance, and bulk variance, to: (1) demolish a preexisting, nonconforming 40-room commercial rooming house known

[3] Citations to "Ja" refer to Appellants' Joint Appendix.
[4] Block 110, lot 12 and block 110, lot 13 are collectively referred to as the "site," "combined site," "property, or "combined properties."

as the Belmar Inn on Block 110, Lot 12; (2) demolish a preexisting, nonconforming 2-family home (2 dwelling units containing 8 bedrooms) and another single-family home (3 bedrooms) on Block 110, Lot 13 (3 dwelling units and 11 bedrooms in total between the two structures on Block 110, Lot 13); and (3) construct a 24-unit condominium building. Ja 290, 298-99, and 1115.

Testimony in favor of Edelman's application was provided by Ms. Hearn (Architect); Mr. Shipers (Attorney and Principal of Edelman); Mr. Kennel (Traffic Expert); Mr. Lamicella (State Certified General Real Estate Appraiser); Mr. DiFolco (Professional Engineer and Planner); Mr. Dullea (Belmar Fire Official and Fire Department Administrator); and Mr. Poff (Director of Code Enforcement of the Borough of Belmar). Ja 297. Testimony in opposition was provided by Mr. Steck (Professional Planner) and Brian and Cecelia Matthews. Ja 297. Testimony was also presented by Mr. Freda (Borough Engineer); Ms. Bell (Borough Planner); Ms. Rodrigues (Assistant Borough Planner); and Mr. Bianchi (Borough Construction Official and Zoning Officer). Ja 297. 46 members of the public gave comments to the Board. Ja 303-04 and 421-22. The Board reviewed, considered, and analyzed 70 documents. Ja 291-97.

The Board made detailed findings in its Resolution, including, inter alia:

1. The properties are in the R-75 Zone, which permits, among other things, single family homes. Ja 324-25.

2. The Rooming House and the 3-dwelling units (the 2-family house and the single-family home) that Edelman sought to demolish are preexisting, nonconforming uses in the R-75 Zone, were active, and were not abandoned. Ja 325-28.

3. The Rooming House has an active license, contains 40 bedrooms, with a potential occupancy of approximately 80 persons. Ja 330.[5]

4. The approval of the Edelman application of a 24-Unit Condominium Use would be less intense and provides an opportunity to eliminate the existing, intense non-conforming uses. Ja 329-30.[6]

5. The 24-Unit Condominium as approved is significantly more suitable and compatible for the site than the existing 40-Unit Rooming House. Ja 330.

6. The Board observed "there is nothing inherently bad, evil, or wrong about Rooming House use / Boarding House use, or the individuals who occupy such structures. Rooming Homes serve an important societal interest and provide an important housing option for certain populations / segments of society." Ja 331.

7. That notwithstanding, the Board also acknowledges that Rooming House use, from a strict zoning standpoint, is an intense type of use. For instance, in a general sense, Rooming Homes typically involve:
    a. A very transient occupancy;
    b. A potentially intense parking demand, typically coupled with a limited or non-existent on-site parking supply;

[5] 3T 61:22-62:12, 97:2-18, 143:15-20, 144:10-12, and 155:3-7
[6] 1T 54:9-17, and 55:10-18; 3T 78:2-81:5, 159:1-14, 163:4-164:3, and 171:12-19.

> c. Potentially significant occupancy levels;
> d. Potential overcrowding, particularly on Summer weekends in Rooming Houses located in shore communities;
> e. Potential quality of life issues associated with potential raucous behavior of Rooming House occupants / guests;
> f. Potential density / intensity issues;
> g. Potential overcrowding issues;
> h. Potential excessive noise;
> i. Potential uncontained or uncontrolled trash; and
> j. Potential intense demand on Municipal Services, including the Borough's Emergency Responders.
>
> Ja 331.

8. There was voluminous testimony and evidence presented regarding quality of life problems originating from the existing Rooming House use, which included "a. Excessive noise; b. Trash and clutter; c. Lewdness; d. Site maintenance issues; e. Lack of on-site parking; and f. Intense on-street parking." Ja 331-32, 504, and 523-74[7]. On this topic, throughout the hearings, references were made to severe quality of life issues associated with the Belmar Inn and corresponding drain on municipal services. Applicant's Exhibit A-8 (Ja 504, 597-736) contained copies of police reports and code violations compiled through an Open Public Records Act request for the 5-year period prior to the application. Edelman's planner, Mr. DiFolco, PE, PP summarized the police reports and code violations as follows:

> [I]n 2015 there were 44 incidents. In 2016, 52 incidents. In 2017, 46 incidents. In 2018, six incidents, during much of 2018 the Belmar Inn

[7] 3T 46:1-73:23 (Mr. Dullea's (Fire Official and Fire Department Administrator of the Borough of Belmar) testimony) and 3T 74:2-91:7 (Mr. Poff's (Director of Code Enforcement and former Police Officer of the Borough of Belmar) testimony).

> was closed to correct code violations. In 2019, 43 incidents. In 2020, 53 incidents. In 2021 from January to March there were 21 incidents. Over the past five years[,] when opened[,] 265 reported incidents at the subject rooming house. These reported incidents all required expenditure of Borough resources, personnel, and equipment to respond to and investigate a specific incident….Based upon our review of the applicant's OPRA reports from the Borough, there have been a number of inspections and citations issued at the establishment in the past years. Reported incidents include fire safety violations, health code violations, first aid and police calls…
>
> 3T 133:1-11, 132:9-14.[8]

9. The 24-Unit Condominium would be significantly less intense than the existing Rooming House, and the reduction in intensity was measured and evaluated in various ways. Ja 332.

10. For example,

> [t]he existing 40-room Rooming House has a parking demand of approximately 72 off-street parking spaces (1.8 spaces per each unit) (where 0 such spaces exist); whereas the 24 unit condominium development approved herein will generate a parking demand of 48 off-street parking spaces. Thus, approval of the within Application represents a significant reduction in the overall parking required at the site and intensity of the site. (Parenthetically, approximately 6 off-street parking spaces currently exist on existing Lot 13)…. As referenced, the 24-unit condominium use approved herein will have a parking demand of 48 off-street parking spaces; whereas 47 such off-street parking spaces are proposed. Thus, the use approved herein will result in a

[8] In fact, the previous mayor and council president of the Borough of Belmar from 2007 to 2018, Mr. Doherty, provided unsolicited testimony during the public portion due to these very serious negative quality of life issues and their significant drain on municipal services. Mr. Doherty testified: "During that time, as was discussed before, we did vote for an overlay to try to encourage someone to do something with the Belmar Inn, because it was such a problem property in this town. Clearly it didn't work. It's now on the shoulders of the Zoning Board to approve a project like this to finally get rid of the Belmar Inn." 5T 117:13-19.

> technical parking deficiency of only 1 space. Given the Electrical Vehicle Parking Regulations, and the Applicant's compliance with the said Regulations, the Applicant is entitled to receive a parking credit of 5 spaces. Therefore, no Technical Parking Variance is required. It is quite clear that approval of the within Application will significantly reduce the overall parking deficiency at the site.
>
> Ja 332.

11. For further example, between the Rooming House and the three dwelling units, "the combined site currently has a total bedroom count of 51 bedrooms (40 bedrooms in the existing Rooming House and 11 bedrooms on Lot 13). The 24 unit condominium use approved herein will have a total of approximately 48-bedrooms. Thus, approval of the within Application represents a reduction in the number of overall bedrooms at the site." Ja 332-33.

12. For further example, "[t]he existing 40-unit Rooming House can lawfully house a total of approximately 80 occupants; whereas the 24 unit condominium use approved herein will likely house a maximum number of approximately 48 occupants. Thus, the overall occupancy rate at the site will be significantly minimized as a result of the within approval." Ja 333.

13. For further example, "[t]he garbage generated by a fully occupied 40 room Rooming House will clearly exceed the garbage typically generated by the 24 unit condominium development use approved herein." Ja 333.

14. For further example, "[t]he testimony and evidence presented…there is a general history of police / fire / ambulance / emergency calls to the existing

Rooming House site (when the Rooming House is fully / partially occupied). Statistically speaking, and generally speaking, it is expected that the 24 unit condominium use approved herein will result in a significantly lower demand for fire / polic[e] / ambulance / emergency calls to the site." Ja 333, 504, and 597-736.[9]

15. For further example, the 40-unit Rooming House can generate a more intense occupancy rate, more intense move-in rate, more intense move-out rate, more intense turnover rate, more intense occupancy changes "which can take place on a monthly, weekly, or daily basis" than the Condominiums presented. Ja 333-34.

16. For further example, "the existing Rooming House use is not necessarily required to have an on-site manager. The 24-unit condominium use approved herein will be managed by a lawfully formed professional Association…[T]he aforesaid Association will have formal rules and regulations, which should clearly provide a mechanism… by which any unruly behavior can be promptly and lawfully cured / abated." Ja 334.

17. For further example, there are significant quality of life and code issues at the existing Rooming House and Rooming House uses in general, specifically, "fire hazard issues, construction code issues, noise issues, trash issues, safety issues, quality of life issues, and over-crowding issues….[T]he potential for quality of life

[9] 3T 46:1-73:23 (Mr. Dullea's (Fire Official and Administrator) testimony) and 3T 74:2-91:7 (Mr. Poff's (Director of Code Enforcement and former Police) testimony).

issues will be significantly minimized by the 24-unit for sale condominium use approved herein. While the potential for Quality of Life issues will not be completely eliminated because of the approved condominium use, it is expected that…the potential for Quality of Life issues will be significantly reduced." Ja 334.

18. For further example, noise will be much less intense with the 24-unit condominium than the 40-unit Rooming House. Ja 334.

19. For further example, the current overall density of the combined site is 89 dwelling units per acre, whereas the condominium development approved will reduce the dwelling units per acre from 89 to 49. Ja 335.

20. For further example, the overall number of dwelling units at the combined site will be reduced from 43 to 24 in approving the condominium development, which is a "significant reduction in the overall intensity of the site" and a "significant reduction in the overall density of the site." Ja 335.

21. For further example, the 24-unit condominium development will generate less traffic and vehicles travelling "to, from, around and at the subject site" than the existing Rooming House and the existing 3 structures on Lot 13. Ja 336.

> 22. The Borough's Master Plan essentially evidences an intent to reduce the number of Rooming House dwellings or non-conforming structures within the Municipality – and approval of the within Application will help achieve such a goal. Continued Rooming House use at the site is not consistent with the Borough's Master Plan / Zoning Ordinance" and "is not in character with the surrounding neighborhood….Although the proposed 24-unit Condominium use is non-conforming, approval of the within Application will nonetheless

> significantly reduce the nature / extent of the pre-existing non-conformity. Reducing the…overall dwelling units at the combined site, from 43…to 24…represents a better overall Zoning alternative for the Borough[,]…will likely improve the value of surrounding properties[,]…[and] will likely improve quality of life for neighboring property owners.
>
> Ja 336-37.

23. The application "is actually…reduc[ing] the overall nature / extent of [] pre-existing non-conforming uses – and such an effort advances the goals and purposes of the New Jersey Municipal Land Use Law." Ja 337.

24. The condominium development will be occupied by year-round owners or year-round tenants, as opposed to the 40-unit Rooming House that has more summer/seasonal tenants. With year-round owners or year-round tenants, there will be a reduction in the quality of life issues associated with the summer/seasonal rentals from the combined site. Ja 337-38.

25. The "elimination of the Rooming Home could potentially reduce the demand on the Borough's Emergency Responders." Ja 338.

26. The 24-Unit Condominium Development "is certainly more conforming (and less intense) than the pre-existing non-conforming 40-Unit Rooming House (and 3 dwelling units) at the combined site." Ja 338.

27. "The significantly reduced intensity of the site, as approved herein, will be beneficial for the property, the neighborhood, and the community as a whole." Ja 338.

28. The Board considered the objectors' testimony, specifically the adjacent property owners' testimony. Ja 340.

Additional pertinent facts are discussed throughout the Legal Argument section of this brief.

LEGAL ARGUMENT

I. EDELMAN'S NOTICE WAS LEGALLY ADEQUATE AS IT SATISFIES THE LEGAL STANDARD OF FAIR NOTICE TO A LAY PERSON. (Ja 263-65 and 286).

Matthews Appellants assert that Edelman's notice was legally insufficient. This argument is flawed and should be readily and easily rejected.

N.J.S.A. 40:55D-11 sets forth the required contents of a notice of a variance application, providing that such notice "shall state the date, time and place of the hearing, the nature of the matters to be considered and, in the case of notices pursuant to [N.J.S.A. 40:55D-12], an identification of the property proposed for development by street address, if any, or by reference to lot and block numbers as shown on the current tax duplicate in the municipal tax assessor's office, and the location and times at which any maps and documents for which approval is sought are available pursuant to [N.J.S.A. 40:55D-10]." As to this notice requirement,

> …the purpose for notifying the public of the nature of the matters to be considered is to ensure that members of the general public who may be affected by the nature and character of the proposed development are fairly apprised thereof so that they may make an informed determination as to whether they should participate in the hearing or, at the least, look more closely at the plans and other documents on file.

> Thus, when a statute requires a notice to be given to the public, such a notice should fairly be given the meaning it would reflect upon the mind of the ordinary layman, and not as it would be construed by one familiar with the technicalities solely applicable to the laws and rules of the zoning commission. Consequently, the critical element of such notice has consistently been found to be an accurate description of what the property will be used for under the application.
> Perlmart of Lacey, Inc. v. Lacey Tp. Planning Bd., 295 N.J.Super. 234, 238 (App.Div. 1996) (quotation and citations omitted).

Edelman's notice is found at Ja 1115. The statute and case law requirements for a notice are satisfied as follows:

1. Date, time, and place of hearing, which was in the notice: "[A] public hearing has been ordered for Tuesday, July 27, 2021 at 6:00 P.M. at the Borough of Belmar Municipal Building located at 601 Main Street. Belmar, NJ 07719." Ja 1117.

2. Block and Lot numbers and street addresses, which was provided: "112-114 12th Avenue and 108 & 108 ½ 12th Avenue, Belmar, New Jersey and designated as Block(s): 110 Lots: 12 and 13 on the Borough Tax Maps." Ja 1115.

3. Nature of the matter to be considered such that a layman would be fairly apprised. This was provided, to wit:

> [T]he applicant, Edelman Investment Group, LLC, contract purchaser of the Belmar Inn, 112-114 12th Avenue, and 108 12th Ave Redevco, LLC, owners of 108 and 108 ½ 12th Avenue, [seeks] to raze The Belmar Inn and all other structures located on 108 and 108 ½ 12th Avenue and form one lot. Applicant proposes to construct 24 condominiums thereon. The first story will consist of entry, Foyer and elevator. The first floor will also have 47 EV wired (electric vehicle) parking stalls. Above the parking story shall be three stories of livable units, serviced by an elevator and two emergency stairwells. The applicant intends to

> construct an amenity deck on the roof, serviced by the elevator and stairwells. The deck will offer outdoor space for the unit holders.
>
> Ja 1115.

4. Information as to when and where the plans are on file and can be reviewed by the public: This was provided, to wit: "All documents relating to…this appeal / application that are on file may be reviewed by the public in the office of the Board Secretary and are available for inspection, Monday through Friday from 9:00 am to 4:00 pm." Ja 1117.

Matthews Appellants seek to create additional requirements of notice, not supported by law. They first argue that the height in the notice was misleading. This is unavailing. The notice indicated four stories (a parking level and three living stories) totaling 42.5 ft. plus an amenity deck[10] that the notice references not once, but twice. The notice expressly discloses that the "amenity deck on the roof" is to be "serviced by the elevator and stairwells." Ja 1115. Matthews Appellants argue the actual height is 57.2 ft., but they cite, without objection, to Ja308 (Resolution page 19) which states that the legal height of the building is 42.5 ft. notwithstanding an elevator shaft having a height of 57.2 ft., as the elevator is not to be included in the calculation by ordinance. Simply put, an ordinary lay person would be fairly apprised that a parking story, three living stories, and one amenity deck serviced by

[10] The amenity deck is constantly mischaracterized by the Matthews Appellants as a fifth story.

an elevator was being proposed by Edelman, as all of that is expressly contained in its notice. As the notice was a reasonable and fair appraisal of the application, a lay person could have elected to review the application or attend the hearing for further information if a minute or technical detail thereof was of interest to him/her.

Matthews Appellants lastly assert that Edelman misled the public by calculating the proposed Floor Area Ratio percentage without including the garage. Preliminarily, the notice need not contain information relative to the Floor Area Ratio. But notwithstanding this, there is no misleading of the public as the notice emphatically states that the proposed Floor Area Ratio calculation excludes the garage. The notice provides: "MAXIMUM FLOOR AREA RATIO (FAR)…Proposed: 173% (without garage)." Ja 1116.

Moreover, there is no portion of the Belmar Ordinance Code that requires the garage area to be included in the Floor Area Ratio calculation for residential applications. In fact, the Belmar Ordinance Code suggests the opposite. Comparing the definitions for "Floor Area, Gross" with "Floor Area, Gross, Residential," it can easily be seen that only in the non-residential context are "parking levels" to be included in the calculation of Floor Area Ratio; conversely, there is no inclusion of parking areas or garages in the residential floor area definition.[11] That is why the

[11] See Belmar Ordinance Code 40-2.4. The definition of "Floor Area, Gross" is "the sum of the area of all floors of all principal or accessory buildings, including parking levels, basements, and cellars, measured between the outside faces of exterior walls

Board Engineer and Board Planner did not contest the 173% calculation of Floor Area Ratio calculated by Edelman. Ja 1099 (The July 12, 2021 Report of Board Engineer Mr. Freda, P.E. and Board Planner Ms. Bell, A.I.C.P., P.P.).

For these reasons, the Edelman notice was legally sufficient, and thus the Board had jurisdiction to hear Edelman's application.

II. THE BOARD'S APPROVAL OF THE APPLICATION DOES NOT CONSTITUTE IMPERMISSIBLE REZONING. (Ja 276-77).

Matthews Appellants argue that the Board's approval of the Edelman application constitutes rezoning – a position wrong both legally and factually. The analysis of whether a Board effectively engages in rezoning focuses on

> whether the requested variance would substantially alter the character of the district as set forth in the applicable zoning ordinance. To make this determination,…factors [to be considered are]: (1) the size of the tract; (2) the size of the tract relative to the size and character of the district in which it is located and of the municipality as a whole; (3) the number of parcels into which the tract will be subdivided; and (4) the nature and extent of the variation from the district regulations that is sought.
> Twp. of North Brunswick v. Zoning Bd. of Adj. of North Brunswick, 378 N.J.Super. 485, 491, 876 A.2d 320 (App.Div.), certif. denied, 185

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or from the centerline of walls common to two structures or uses. For the purpose of determining required parking, areas used for parking will not be considered floor area." The definition of "Floor Area, Gross, Residential" is "the sum of the areas of the floor or floors of all principal and accessory buildings measured between the inside faces of exterior wall or from the centerline of walls common to two structures or uses." Giving normal meaning to the express words used by the legislative Belmar body, it stands to reason that Gross Floor Area in the commercial context includes parking levels/garages (since the legislative body explicitly included same in the definition) whereas as Residential Gross Floor Area does not include parking levels/garages (since the legislative body did not include same in the definition).

N.J. 266, 883 A.2d 1063 (2005), citing to Twp. of Dover v. Bd. of Adj. of Dover, 158 N.J.Super. 401, 412-13, 386 A.2d 421 (App.Div. 1978).

Resolution pages 127 and 128 (Ja 416-17) thoroughly addressed the purported "Potential – Re-Zoning" issue presented,[12] analyzing these factors:

- Against the aforesaid backdrop (regarding the potential Re-Zoning issue), the Board notes the following:
  a) The size of the tract itself;
  The Board Notes that the development parcel only contains approximately 21,000 SF (14,000 SF for existing Lot 12 and 7,000 SF for existing Lot 13).
  b) The size of the tract in relationship to the size and character of the District in which the tract is located;
  The within Application only involves one 14,000 SF parcel and one 7,000 SF parcel within the Borough's R-75 Zone.
  c) The size of the tract in relationship to the size and character of the Municipality;
  The within Application only involves one 0.48 acre parcel within the entire town (for the subject to-be-consolidated 2 Lots).
  d) The degree and extent to the variation from the Zoning Regulations being sought;
  While the Application does require Use / "d" Variance relief, the Board is cognizant that a) the 24-Unit Condominium Development approved herein represents a significantly less intense Use than currently exists and b) there are many other similar multi-family structures / uses in the vicinity and R-75 Zone.

[12] Note that pages 126 and 127 (Ja 415-16) of the Resolution also addresses "Spot Zoning." It is important to note that "spot zoning" is a different concept than "zoning by variance." Spot zoning is when a zoning ordinance is enacted to relieve a specific lot of zoning restrictions and regulations as opposed to a zoning ordinance being enacted to further a comprehensive zoning scheme. See, e.g., Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 249-50 (1954). Conversely, zoning by variance is a variance substantially altering the character of a particular district.

> Based upon the above, and based upon the other extensive testimony / evidence presented during the Public Hearing process, a majority of Board Members find that approval of the within Application does not constitute an impermissible Re-Zoning of the subject property.
> - In conjunction with the above, the Board finds that the conversion of the site from a non-conforming 40-Unit Rooming House use to a non-conforming 24-Unit Condominium use (as approved herein) will not so substantially alter the character of the District. As such, a majority of the Board finds that approval of the within Application does not constitute an impermissible Re-Zoning of the subject property. In fact, the majority of the Board finds that approval brings the parcel more into conformity with the Zoning District Requirements (over what currently exists).

As correctly noted by the Board and supported by the evidence, the Property in question is merely two lots within the R-75 district that has other multi-family structures and uses in the near vicinity.[13] Analyzing the Twp. of North Brunswick

[13] Page 64 (Ja 353) of the Resolution provides: "Given the fact that there are a number of other multi-family developments in the immediate area (including multi-family complexes much larger than the 24-unit Condominium Development approved herein), the Board finds that within site (with a history of hosting a non-conforming Rooming House) is particularly suited to host the use approved herein." Page 73 (Ja 362) of the Resolution states that some of the surrounding uses with proximity to the site include multi-family uses, multi-family structures, commercial hotels, and rooming homes. Pages 75-76 (Ja 364-65) of the Resolution detail 9 "multi-family developments within the immediate general area" to the site (including rooming houses, condominium developments, and apartments), providing their names, number of unites, and density. Page 76 (Ja 365) of the Resolution also details the surrounding adjacent areas of Twelfth Avenue within Block 110 and Block 120 consisting mainly of multi-family structures, and seasonal rentals with some single-family residence, noting that the existing land use patterns in the R-75 in this area does "not necessarily match the sing-family home zone designation" and noting that "[m]ulti-family housing is not uncommon in the subject portion of the R-75 Zone and immediate area." Page 76 (Ja 365) of the Resolution

"zoning by variance" factors, the proper conclusion is that there is no zoning by variance in the instant matter, and the trial Court's affirmance of the Zoning Board's decision on same must be upheld.

III. THE BOARD'S GRANT OF D(1) AND C VARIANCES WAS PROPER. (Ja 266-76, 278-82, 285-86).

The gravamen of both sets of Appellants' briefs is that the Board's grant of the application was arbitrary, capricious, and unreasonable. They are incorrect, as the Board's conclusions are well-supported and documented in the record.

Boards have a peculiar knowledge of local conditions, so courts must allow Boards wide latitude in the exercise of their delegated discretion. For that reason, a Board's land use decisions enjoy a presumption of validity, and the action of the board will not be overturned unless it is found to be arbitrary and capricious or unreasonable, with the burden of proof placed on the plaintiff challenging the action. Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Tp. of Franklin, 233 N.J. 546, 599 (2018) (citations omitted). A reviewing Court must not substitute its own judgment for that of a board even if it is doubtful about the wisdom of the action;

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further details other lots immediately nearby that have multi-family structures and a rooming house on them. As such, "the Board finds that the 24-Unit Condominium Development approved herein is not inconsistent with the surrounding uses," "is not incompatible with the other surrounding uses," and "is compatible with the surrounding uses." In fact, the 24-Condominium use "will blend in with the surrounding uses, from an operational standpoint, from an aesthetic standpoint, from a noise standpoint, from a traffic standpoint, and from a parking standpoint." Ja 365.

accordingly, a reviewing Court must not disturb a Board's decision unless there is a clear abuse of discretion. Cell S. of N.J. v. Zoning Bd. of Adjustment, 172 N.J. 75, 81-82 (2002) (citations omitted).

The 156-page Resolution of the Board was clearly not conclusory. Rather, it was exhaustive in the analysis of the evidence presented, conclusions reached, and decision on the application. The Board's decision to grant the use and accompanying variances was not arbitrary, capricious and unreasonable, as the Resolution contained more than ample factual basis for the decision. This Court should uphold the trial Court's affirmance that the Board's decision was not arbitrary or capricious as both the 'positive' and 'negative' criteria have been met.

Statutory authority for "bulk" or "c" variances is found at N.J.S.A. 40:55D-70(c). Statutory authority for "use" or "d"/"d(1)" variances is found at N.J.S.A. 40:55D-70(d)(1). The Supreme Court in Price v. Himeji, LLC, 214 N.J. 263 (2013) has held the following:

> An applicant seeking a use variance, N.J.S.A. 40:55D-70(d)(1), is required to prove the positive criteria by demonstrating one of the special reasons. Although we have recently observed that there are three categories of circumstances that constitute special reasons for a (d)(1) use variance, only one of them is implicated in this appeal. We focus, therefore, solely on the special reason we have described as being that the use promotes the general welfare because the proposed site is particularly suitable for the proposed use.….
>
> [D]emonstrating that a property is particularly suitable for a use does not require proof that there is no other potential location for the use nor does it demand evidence that the project 'must' be built in a particular

> location. Rather, it is an inquiry into whether the property is particularly suited for the proposed purpose, in the sense that it is especially well-suited for the use, in spite of the fact that the use is not permitted in the zone. Most often, whether a proposal meets that test will depend on the adequacy of the record compiled before the zoning board and the sufficiency of the board's explanation of the reasons on which its decision to grant or deny the application for a use variance is based." Price v. Himeji, LLC, 214 N.J. 263, 286-87 and 292-93 (2013) (citations and quotation omitted).

The Board designated an entire section of its Resolution to "Particular Suitability," even though many of the findings and recitals throughout the Resolution also factor into the particular suitability analysis. Ja 352-53.[14] The "Particular Suitability" Section (Ja 352-53), provided:

> - For the reasons which follow, and for the other reasons set forth herein, the Board finds that the subject property is particularly suited to host the 24-unit condominium development approved herein.
> - As referenced, the site currently hosts a non-permitted 40 bedroom Rooming House use, with a residential density of approximately 89 dwelling units per acre.
> - As such, and per New Jersey Case Law dealing with pre-existing non-conforming uses, as referenced elsewhere herein, the Board finds that the subject site is, in fact, particularly suited to host a non-conforming but much less intense condominium use (particularly a use which is appropriately parked).
> - The intense Rooming House site has historically operated with an approximate 72 space parking deficiency – and thus, subject to the conditions set forth herein, the Board finds that the site is particularly suited to host the 24-unit condominium development use, notwithstanding the technical space parking deficiency.
> - As indicated, the site has historically operated with an approximate 72 parking space deficiency – and thus, subject to the conditions set forth herein, the subject property is, in fact, particularly suited to host condominium use whereby the approximate 72 space on-

[14] See, also, e.g., 3T 152:18-156-1.

site parking deficiency will be reduced to a 1 space deficiency (which, with the EV credit, will satisfy Prevailing Requirements).

- The site has hosted an intense non-permitted Rooming House use for a number of years / decades – and, as such, the site is certainly particularly suited to host a much more benign, much less intense condominium use (as approved herein).
- Given the fact that there are a number of other multi-family developments in the immediate area (including multi-family complexes much larger than the 24-unit Condominium, Development approved herein), the Board finds that the within site (with a history of hosting a non-conforming Rooming House) is particularly suited to host the use approved herein.

Like in Price, the property in the instant matter is particularly suited to a multi-family development given its proximity to other multi-family structures and uses. It is further particularly suited given the decades of use as a Rooming House. Moreover, the property is particularly suited to a multi-family development of a 24-Unit Condominium Development as it removes a more intense, pre-existing, non-conforming 40-Unit Rooming House in favor of a less intense 24-Unit Condominium Development unassailably much more in line with the residential character of the surroundings. Finally, the property is particularly suited to a multi-family development, as multi-family developments are specifically permitted as conditional uses in the MF-75 Overlay Zone where this property is located.[15]

[15] Schedule 40-5-2A of the Belmar Ordinance Code (Schedule of Uses, Residential Districts to the Development Regulations (Zoning Ordinances) of the Borough of Belmar) provides that Multi-Family Cluster Development is a Conditional Use in the R-75 Zone. See, 2016 Mater Plan and Reexamination Report & Update, p. 10 ("Multi-family residences…are still an important asset in the Borough, particularly in the northeast section along Ocean Avenue, and allow a mix of uses, housing types,

Appellants' main argument with respect to site suitability is that the Board erred in comparing the 24-Unit Condominium Building proposal with the existing, commercial 40-Unit Rooming House. Appellants rely on Degnan v. Monetti, 210 N.J.Super. 174 (App.Div. 1986) for the proposition that the Board (and Edelman) cannot consider and compare the existing use of the property when determining whether particular site suitability (special reason) exists for the issuance of the use variance. **This is a misstatement of law, which ignores the seminal Supreme Court case of Kramer v. Bd. of Adjustment, 45 N.J. 268 (1965).** The Supreme Court in Kramer stated:

> Plaintiffs also argue that the Board…improperly based their determination on a comparison with the present [preexisting nonconforming use]. Also implicit in this argument is the fact that the Board is considering only the relative benefits and detriments of the proposed structure *vis a vis* the present structure, arbitrarily ignored a third alternative; that is…a complete reversion of the [ ] property to [the zoned] use….This view, however, was not adopted by [the Supreme Court].
>
> Kramer, supra, 45 N.J. at 291.

Not only did the Supreme Court permit the comparison of the proposed development with the preexisting nonconforming use in Kramer 21 years prior to Degnan, but the Supreme Court also took no issue with the Board doing the same 27

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and affordability. Multi-family cluster developments are still permitted as Conditional Uses in the R-75 zone."). The Property in question is in the MF-75 Overlay Zone in the R-75 Zone, which further supports the particular suitability of the property for use as a 24-Unit Condominium Development in accordance with the 2016 Master Plan Reexamination Report & Update. See Section IV, infra.

years after Degnan in Price, when it compared the proposed multi-unit residential building with the "existing onsite development [that] includes ten non-confirming units in need of substantial rehabilitation or development." Price, supra 214 N.J. at 275. This is akin to the instant matter where the existing 40-unit nonconforming, commercial Rooming House is dangerous, a public nuisance, in need of substantial rehabilitation, and is not in line with the residential character of the neighborhood. The Board's comparison between the preexisting, nonconforming 40-unit commercial Rooming House use and the proposed, lesser intense use as a 24-unit residential Condominium Building, was therefore legally permissible.

Degnan is further factually distinguishable from the instant matter. In Degnan, the property in question was an inoperative/abandoned sewerage treatment plant[16] owned by a public agency, calling into question, in part, the propriety of purchasing from a public agency and then a public agency granting a variance. The developer sought a variance to build 18 condominiums on land that had no existing use at the time. In the instant matter, the property in question is not owned by a public agency, the preexisting nonconforming uses are not abandoned, and Edelman was not seeking a variance for a more intense use; rather, unlike the developer in Degnan, Edelman sought a variance for a less intense use compared to the active, non-

[16] Because the sewerage treatment plant was inoperative/abandoned, there was no legal preexisting nonconforming use at the property. As such, the only use that could be considered there was the use for which the property was zoned.

abandoned preexisting nonconforming use. Furthermore, in Degnan, the developer had purchased the property; in the instant matter, Edelman has not purchased the property.

Appellants' argument that a Board cannot consider the preexisting, nonconforming use when deciding an application for a use variance for a less intense, more compatible use defies not just the Supreme Court in Kramer and Price but also logic and practicalities. Appellants would have Boards and reviewing Courts ignore existing realities and decide use variances in a vacuum solely against a hypothetical use that does not presently exist. Moreover, if Appellants' argument was the law of the land, then no use variances could ever be granted that would further a purpose of a municipality's master plan of removing deleterious preexisting nonconforming uses because such use variances would, by their very nature, not be in strict conformance with the zone.

It is also brought to this Court's attention the case of Puleo v. Zoning Bd. of Adjustment of Belmar, 2023 N.J.Super.Unpub. LEXIS 1685 (App.Div. 2023) (found at Ea 50); though unpublished and non-precedential, this recent Appellate Division decision pertained to the exact same legal issue within the same zone in the same municipality, and is factually similar to the matter at hand; the Appellate Division there, relying on Kramer, found:

> In addressing the appropriate comparator, the [trial] judge found the Board did not err by considering the application for non-conforming

> townhouse in comparison to the existing non-conforming rooming house. Our Supreme Court has rejected the argument that a board must demonstrate a property cannot be developed as a conforming use before it can approve variances. Kramer v. Bd. of Adjustment, 45 N.J. 268, 291, 212 A.2d 153 (1965)…Consistent with Kramer, [the trial judge] rejected plaintiffs' argument that the Board erred in comparing the proposed townhome project to the existing rooming house instead of a single-family residence on the property.
>
> Puleo, supra at *8-9.

Particular site suitability standard is not the only positive criteria addressed by the Board, which found that Edelman's application furthered purposes (a), (b), (c), (e), (g), (h), (i), (m), (n), and (j) of the MLUL (N.J.S.A. 40:55D-2). Ja 372-80.[17] In fact, aesthetic improvement alone (N.J.S.A. 40:55D-2(i)) can be a sufficient special reason to justify a d variance. Burbridge v. Mine Hill Tp., 117 N.J. 376, 387-88 (1990). Similarly, alleviation of parking congestion (N.J.S.A. 40:55D-2(b)) has been held to be a sufficient special reason to justify the grant of a variance. O'Donnell v. Koch, 197 N.J. Super. 134, 141 (App.Div. 1984). In the instant matter, the Board found not one, but ten special reasons were furthered by the application approval.

Purpose (a) is: "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(a). Relative to purpose (a),

[17] See, also, e.g., 3T 156:2-157:25.

> the Board finds that demolition of an intense, and pre-existing non-conforming use, and the construction of a 24-Unit Condominium in its place, will, in fact, promote the general welfare.
>
> Likewise, the significant reduction in intensity (40-unit Rooming House to 24-Unit Condominium Development), the significant reduction in overall parking demands, the significant reduction in the overall parking deficiency at the site (72 space deficiency being reduced to 1 space technical deficiency), the significant reduction in the number of overall dwelling units at the combined site (43 to 24), the reduction in the overall number of bedrooms at the combined site, and the significant reduction in the overall number of potential occupants at the combined site, will promote the general welfare.
>
> The Board Members also note that with the elimination of the overly intense and under-parked non-conforming Rooming House use, the demand for limited on-street parking spaces will be significantly reduced as well, which will undoubtedly promote the general welfare, particularly in the Summer months.
>
> Ja 373.

Purpose (b) is: "To secure safety from fire, flood, panic and other natural and man-made disasters." N.J.S.A. 40:55D-2(b). The Board found that the Rooming House was

> built in or before 1940 [and] currently does not have a fire suppression system. However, the 24-Unit Condominium Development…will be constructed in accordance with prevailing / modern Buildings / Construction / Fire Code Requirements. That is, the new Condominium development will be equipped to meet all existing Fire Code Requirements. Also, the new structure will be wind-rated and fire-rated. The new building will be constructed using modern technology and fire-retardant materials, when possible. As such, the Board finds that approval of the within Application will certainly help improve / secure / promote fire-related safety at the site.
>
> Ja 373.

The Board cited testimony and evidence presented concerning "health and safety issues associated with the existing structure," which included: "Issues with egress doors which do not function properly;…fire alarm violations;… improper use of space heaters;…improper blocking or use of the fire escapes; and… improper / extensive interior use of extension cords, power strips, etc." Ja 374. As such, the Board found that the approval of the Edelman application and the "elimination of such health and safety concerns will satisfy / advance the NJMLUL purpose of helping secure the public from fire." Ja 374.

Additionally relative to purpose (b), the Board found the Rooming House that was constructed on or before 1940,

> clearly does not satisfy all prevailing FEMA / Flood Regulations. Specifically, it appears that the existing site / structure is susceptible to major storm damage due to its proximity to the ocean-front, its elevation, and the approximately 82 year-old construction practice in effect when the Rooming House was built. However, the 24-Unit Condominium Development approved herein will be constructed in accordance with prevailing FEMA / flood regulations. As such, the Board can, and does find that approval of the within Application will help secure public safety from flood and other natural water-related and wind-related disasters.
>
> The aforesaid flood / water / wind improvements are even more significant / important, given the proximity of the development site to the nearby Atlantic Ocean.
>
> Ja 375.

Purpose (c) is: "To provide adequate light, air and open space." N.J.S.A. 40:55D-2(c). The Board noted that the objectors sought "perfect," "abundant," or

"excessive" light, air, and open space, but correctly noted that purpose (c) does not require such an excess, but rather only for **adequate** light, air, and open space. Ja 374-75. The Board found that the goal of providing adequate light, air, and open space is furthered by the Edelman application, as the setbacks are adequate under the circumstances. The Board also found that the landscape design that incorporates low-maintenance, salt-tolerant shrubs will help beautify the property and provide adequate light, air, and open space around the site. Ja 375.[18]

In fact, the Edelman application actually provides significantly better setbacks compared to the pre-existing, non-conforming uses. This is best illustrated in the following table (see Ja 344):

Description of Setback:	**Existing Structures:**	**Edelman Application:**
Front Yard Setback to Balcony	6.17 ft.	13 ft.
Front Yard Setback to Building	18.1 ft.	20 ft.
Rear Yard Setback	3.8 ft.	16 ft.
Side Yard Setback to Stairwell	2.7 ft.	5 ft.
Side Yard Setback to Building	2.7 ft.	10 ft.
Combined Side Yard Setback to Stairwell	7.2 ft.	10 ft.
Combined Side Yard Setback to Building	7.2 ft.	20 ft.

[18] Appellants' argument with regard to MLUL purpose (c) only focuses on the effect on the abutting properties. However, purpose (c) is not so narrow. The Edelman application provides adequate light, air, and open space, as there is a roof top amenity deck that will provide same to the occupants of the building. The proposed building also has views of the ocean and balconies, further promoting this purpose. Looking at the abutting properties, which is only part of the consideration as to this MLUL purpose, the setbacks are actually significantly better, as is immediately discussed.

Purpose (e) is: "To promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment." N.J.S.A. 40:55D-2(e). The Board found that the application advances this purpose by replacing a "very intense use" of the 40-Unit Rooming House – intense in terms of scope of operations, the number of overall bedrooms, the number overall dwelling units, parking demands, transient nature of operations, and impact on the Borough's first and emergency responders. Ja 375-76. The Board found the application would significantly reduce all of the foregoing and would establish an appropriate population density, thus contributing to the well-being of persons, neighborhoods, and the community. Ja 376. Of note, the dwelling unit per acre will be reduced from the current 89 dwelling units per acre to 49, a far "more appropriate population density at the site." Ja 376.

As to the preservation of the environment prong of purpose (e), the Board found that the Edelman application "will advance environmental interests in a number ways" as the condominium development: (1) is not on vacant, undisturbed, environmentally sensitive land; (2) contains stormwater management facilities while the current use is devoid of same; (3) contains underground stormwater trench drain to retain all runoff on site; (4) will become "greener" as a result of landscaping improvements (which include low-maintenance, salt-water tolerant shrubs); (5)

significantly reduces the number of vehicular movements around the site along with the reduction of dwelling units from 43 to 24; (6) has included energy efficient features such as modern windows, modern doors, and modern insulation; (7) has make-ready charging stations for Elective Vehicles; and (8) has solar panels on the roof, creating clean energy and reducing energy grid demands. Ja 376-77.

Purpose (g) is: "To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens." N.J.S.A. 40:55D-2(g). The Board found, given the historical intense and nonconforming use of the 40-Unit Rooming House on the site, the construction of the 24-Unit Condominium Development would constitute sufficient space in an appropriate location, and provide a new housing alternative near the Atlantic Ocean that currently does not exist. Ja 377.

Purpose (h) is: "To encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes which result in congestion or blight." N.J.S.A. 40:55D-2(h). The Board emphasized that the intense 40-Unit Rooming House has **zero** off-street parking spaces. The Board found the Edelman application will result in significant design and transportation related improvements, including: the significant reduction

in overall intensity, density, and parking demands of the site; the significant reduction of the overall amount of traffic and vehicles servicing the site; 47 off-street parking spaces will be created (and the Edelman application has 52 credited parking spaces due to the Electric Vehicle credit); and the development has been designed to accommodate modern vehicles and the Borough's emergency, fire, police, and ambulance vehicles. The Board found these transportation improvements will promote the free flow of traffic around the site and reduce congestion that currently exists around the site. Ja 377-78.[19]

Purpose (i) is: "To promote a desirable visual environment through creative development techniques and good civic design and arrangement." N.J.S.A. 40:55D-2(i). The Board found the new building will be

> a marked visual / aesthetic improvement.
>
> The visual/aesthetic improvements (associated with the demolition of the existing 40-Unit Rooming House, and the construction of the 24-Unit Condominium Development at the site) will significantly improve the overall visual appeal / curb-appeal / aesthetic appeal of the subject property.
>
> A comparison of the pictures / images of the existing Rooming House building, coupled with the aesthetic / visual images / renderings of the proposed condominium building approved herein, is pronounced, dramatic, and very evident.
>
> The dramatic visual and architectural improvements associated with the approval of the within Application will be beneficial for the site, the neighborhood, and community as a whole….

[19] See, also, e.g., 1T 52:14-58:7.

> The placement of underground utilities at the site (as required as a condition of the within approval) will also significantly improve the overall curb appeal of the property.
>
> Ja 378-79.

As to the creative development techniques and good civic design arrangement prongs of purpose (i), the Board found the new condominium represents good civic design arrangements, as the 40-Unit Rooming House will be eliminated in favor of a much less intense use with compliant parking, in a beautiful, code-compliant building. Ja 379.

Purpose (m) is: "To encourage coordination of the various public and private procedures and activities shaping land development with a view of lessening the cost of such development and to the more efficient use of land" N.J.S.A. 40:55D-2(m). The Board found the significant reduction in intensity and development of the site represents a more efficient use of the land. Ja 379.

Purpose (n) is: "To promote utilization of renewable energy resources." N.J.S.A. 40:55D-2(n). The Board found the solar panels on the rooftop and the existence of 47 make-ready Electric Vehicle parking spaces contained in the application substantially promotes and advances this purpose. Ja 379-80.

Purpose (j) provides, in part: "To promote the conservation of… valuable natural resources in the State." N.J.S.A. 40:55D-2(j). Again, the Board found the presence of Electric Vehicle parking spaces with the necessary infrastructure associated therewith in the Edelman application advances this purpose. Ja 380.

As such, in addition to particular site suitability, there are ten positive criteria advanced by the Edelman application as detailed by the Board. The positive criteria was clearly met by Edelman, and the finding by the Board that the positive criteria was satisfied was not arbitrary, capricious, or unreasonable.

Attention is now turned to the negative criteria.

> Proof of the negative criteria requires the applicant to demonstrate, in accordance with the enhanced quality of proof, both that the variance "can be granted without substantial detriment to the public good" and that it "will not substantially impair the intent and purpose of the zone plan and zoning ordinance." N.J.S.A. 40:55D-70. The showing required to satisfy the first of the negative criteria focuses on the effect that granting the variance would have on the surrounding properties. The proof required for the second of the negative criteria 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.
>
> Price v. Himeji, LLC, 214 N.J. 263, 286 (2013) (citations omitted).[20]

As to the first of the negative criteria – that the variance can be granted without substantial detriment to the public good – the Board's Resolution contained a specific section entitled: "**Absence of Substantial Detriment to the Public Good**."

[20] Note the emphasis on the word substantial in both prongs of the negative criteria; a variance may often cause a detriment to the public good or impair the intent and purpose of the Master Plan and zoning ordinance, but that is not what is to be analyzed. Rather, it is whether the grant of the variance would cause substantial detriment to the public good and whether the grant would substantially impair the Master Plan and zoning ordinance. See, e.g., Yahnel v. Board of Adjustment, 79 N.J.Super. 509, 519 (App.Div.), certif. denied, 41 N.J. 116 (1963) ("The key word here is 'substantially.' It comes from the statute itself."); see, also, e.g., Medici v. BPR Co., 107 N.J. 1, 22 n.12 (1987).

Ja 423-24. The Board found that while there may be some potential limited detriment to the public good, the grant of the variance will **not** cause **substantial** detriment to the public good. Ja 423-24.

> Rather, with all due respect to those who oppose the Application, the permanent elimination / abandonment of the pre-existing non-conforming 40-unit Rooming House Use, and the construction of a 24-Unit Condominium Development in its place will, in fact, be beneficial for the site, the neighborhood, and the community as a whole. In fact, the Board Members have concluded the elimination of the 40 room Rooming House substantially benefits the public good.
>
> Ja 424.[21]

The Board also imposed conditions of approval to help further ensure the absence of any substantial detriment to the public good. Ja 424 and 437-43.

Appellants falsely equate themselves for the "public good;" put another way, Appellants only view the abutting properties (themselves) as the "public" for which the first of the negative criteria is focused. That is incorrect and should not be indulged by this Court. See Medici v. BPR Co., 107 N.J. 1, 22 n.12 (1987) (As to "the first prong of the negative criteria, that the variance can be granted without substantial detriment to the public good…the statutory focus is on the variance's effect on the surrounding properties… [and] the character of the neighborhood." (quotation omitted)). Removing the intense, nuisance, preexisting nonconforming commercial 40-Unit Rooming House use in favor of a less intense, residential

[21] See, also, e.g., 3T 158:1-160:16.

Condominium building within a residential neighborhood, will not cause substantial detriment to the public good; in fact, as the Board concluded, it is beneficial to the public good.

As to the second of the negative criteria – that the grant of the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance – the Resolution contained a section called: "**Goals and Objectives of the Master Plan**." Ja 380-81.[22] The Board found one goal of the Master Plan was to encourage economic development, and that the Edelman application, which would eliminate a 40-Unit Rooming House (a preexisting, nonconforming intense commercial use) and construct a 24-Unit Condominium Development, would further this goal. Ja 380.[23]

Another goal of the Master Plan is to promote the residential character of the community. Ja 380.[24] The Board found the Edelman application would promote this

[22] See, also, e.g., 3T 160:17-162:18.

[23] See 1989 Master Plan, p.3-1 ("…Borough officials can guide future development through determination of goals, objectives and policies for land use, **economic growth** and expansion of community facilities and utilities…") (emphasis added); p.6-2 (One principle of the Master Plan is: "Encouraging a development pattern which will protect and enhance the long term economic…interests of present and future residents of the Borough.")

[24] See 2016 Master Plan Reexamination Report and Update, p.62 ("The focus of the recommendations for the future land use patterns concentrate on preserving the character of the existing neighborhoods, while molding the redevelopment of the community to manage blight and vacancies; to enhance the utilization of land and character of the Borough; and to increase resiliency to natural hazards."). See 1989 Master Plan, p.6-2 (one principle of the Master Plan is to "[e]ncourag[e] residential development…") and p.6-3 (one policy of the Master Plan is to "encourage [the]

goal, given the nature of the surrounding uses (namely the multi-family surrounding uses) and as the commercial 40-Unit Rooming House has had negative impacts on the residential nature of the neighborhood. Ja 380-81.

Another goal of the Master Plan is to provide a broad range of housing options to Belmar residents. Ja 381.[25] The Board found the approval of the Edelman application will provide "another form of year-round occupancy options which will, in fact, promote the interest of the public as well as the aforesaid Master Plan goals / objectives." Ja 382.

In a different part of the Resolution, the Board stated that "[t]he Borough's Master Plan essentially evidences an intent to reduce the number of Rooming House dwellings… within the Municipality – and approval of the within application will help achieve such goal." Ja 337.[26] The Board stressed the "[c]ontinued Rooming

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continuation of and enhancement of the Borough of Belmar as a quality suburban/residential community…").

[25] See 1989 Master Plan, p.6-3 (one policy of the Belmar Master Plan is to provide "a variety of residential…uses which will encourage continuation of and enhancement of the Borough of Belmar as a quality suburban/residential community…").

[26] See, 2006 Master Plan Reexamination Report & Update, p.10 ("The Borough should continue to explore creative design techniques…to provide an incentive for the transition [of] non-conforming commercial uses in and about the oceanfront area to lower density residential housing." See, also, 2016 Master Plan Reexamination Report and Update, p.11 (noting the need to "incentivize the transition from non-conforming commercial uses on the oceanfront to lower density residential housing."). See, also, 1989 Master Plan, p.1-1 ("Seasonal homes have been converted to permanent structures, boarding homes have been converted to apartments and condominiums, and may small commercial and industrial uses which

House use at the site is not consistent with the Borough's Master Plan / Zoning Ordinance" as it is not "in character with the surrounding neighborhood." Ja 337. As such, the condominium, development, though technically nonconforming, will nevertheless reduce the intensity of the nonconformity at the site. Ja 337.

Accordingly, the positive and negative criteria are satisfied, and the Board's detailed analysis thereof demonstrates that its action in approving the use variance application was not arbitrary, unreasonable, or capricious.

Appellants also argue that the grant of the bulk variances were improper. Preliminarily, the grant of bulk variances is subsumed in the use variance analysis, as discussed above. Notwithstanding that, the Board specifically considered the bulk variances. Ja 404-08. Therein, and throughout the 156-page Resolution, the bulk variances for number of stories, front yard setback, combined side yard setback, rear yard setback, lot coverage/impervious coverage, building coverage, and off-street parking spaces were addressed.

Under a c(2) bulk variance analysis, the applicant does not need to show any hardship; rather, the applicant must show the grant of the bulk variance would advance the purposes of the Municipal Land Use Law; the benefits of the deviation would substantially outweigh any detriment; the variance can be granted without

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were appropriate and acceptable in Belmar in the 1930's – 1950's are not consistent with nor compatible with developments trends of the 1980's.")

substantial detriment to the public good; and the variance can be granted without substantial impairment of the zone plan. N.J.S.A. 40:55D-70(c)(2) and Kaufmann v. Planning Bd. of Warren, 110 N.J. 551, 553 (1988). As discussed, the granting of the bulk variances in connection with the use variance advances ten MLUL purposes. The bulk variances can be granted without substantial detriment to the public good, and, in fact, the benefits substantially outweigh any detriment as discussed at length (e.g., removal an intense commercial use in favor of a residential use within a residential neighborhood; removal of the nuisance/drain on municipal first responders; providing off street parking spaces where none exist at the Rooming House; etc.). Finally, again as discussed, there is no substantial impairment of the zone plan, and, in actuality, the zone plan and Master Plan are not impaired at all.

IV. THE PROPERTY IS IN THE MF-75 CONDITIONAL USE OVERLAY ZONE, FURTHER SATISFYING THE POSITIVE AND NEGATIVE CRITERIA OF THE EDELMAN APPLICATION AND GUTTING THE APPELLANTS' ARGUMENT THAT THE BOARD ENGAGED IN REZONING. (Ja 265-266).

The R-75 Zone contains a conditional use overlay zone, the Multi-Family MF-75 Zone. Belmar Ordinance Code 40-6, generally, and 40-6.13, specifically; and Ja 771. The purpose of the MF-75 Overlay zone is to permit as a conditional use the development of a "townhouse style"[27] cluster development in the place of "existing

[27] Note that there is no definition of townhouse or "townhouse style" in the Development Regulations of the Belmar Ordinance Code, or otherwise. Belmar Ordinance Code 40-2.4. There is a definition of Condominium within the

high density residential uses, exceeding seven dwelling units per lot, hotels and boarding houses." Belmar Ordinance Code 40-6.13. There are two zoning requirements for the MF-75 Overlay to apply:

1. The Property must be located between 10th Avenue and 12th Avenue and between Ocean Avenue and A Street. Belmar Ordinance Code 40-6.13(a). This was satisfied, as the Property is located on 12th Avenue and between Ocean Avenue and A Street. Ja 471-484.

2. The present use of the Property must exceed seven dwelling units per lot or a hotel or boarding house. Belmar Ordinance Code 40-6.13(a). This was

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Development Regulations portion of the Belmar Ordinance Code (Belmar Ordinance Code 40-2.4) and in the Taxation portion of the Belmar Ordinance Code (Belmar Ordinance Code 30-4.2). The definition of Condominium in the Development Regulations makes two things clear: (1) that condominium is a type of "ownership arrangement, not a land use; therefore it is allowed in any zone and under the same restrictions as the residential land uses that it comprises;" and (2) that a condominium is a dwelling unit that can be "any permitted dwelling type." Belmar Ordinance Code 40-2.4. As such, a townhouse is a condominium, just a certain type of condominium. See, also, Wedgewood Knolls Condominium Ass'n. v. West Paterson Borough, 11 N.J. Tax 514, 518 (Tax Court 1991) (noting that a certain development "is a townhouse-style residential condominium complex"); and Glenpointe Associates v. Teaneck Tp., 10 N.J. Tax 288, 296 (Tax Court 1988) (referring to townhouses as condominiums throughout). Additionally, the 1989 Master Plan of Belmar specifically provides that a townhouse is a condominium, stating: "The term 'condominium' is a legal term which simply refers to a form of ownership for multiple family housing. A 'condominium' project may consist of a duplex, a two family house, townhouse, garden apartment complex, mid-rise or high-rise development." 1989 Master Plan, p.7-6.

satisfied, as the Property has 43 dwelling units between the two lots, and one of the two lots contains a boarding house.

Since the zoning requirements for the applicability of the MF-75 Overlay have been met, the said overlay would permit (subject to certain bulk requirements as detailed in Belmar Ordinance Code 40-6.13(b)) as a conditional use the following development:

1. 14 dwelling units each containing 4 bedrooms (56 bedrooms total);
2. 3 off-street parking spaces per dwelling unit (42 total parking spaces for 14 dwelling units);
3. Each of the 14 dwelling units can be comprised of a basement and three full stories above, plus a roof top amenity deck;
4. A rear yard setback of only 10 feet;
5. Side yard setbacks of only 5 feet each; and
6. The elimination of any Floor Area Ratio maximum.

As indicated above, the MF-75 Overlay contemplates a "townhome style" development, but a "style" of development is not a land use per the Ordinance definition. A townhouse is a condominium according to the 1989 Master Plan as discussed above. Thus, from a land use standpoint, the Edelman application

represented the same type of land use as permitted by the MF-75 Overlay (multi-family condominium ownership), just not the same style of development.[28]

At the August 26, 2021 hearing, Edelman presented Exhibit A-30 (Ja 770), which set forth a side-by-side comparison of the existing land use characteristics of the property, the proposed land use characteristics, the MF-75 Overlay standards, and the R-75 Zone standards. As seen, the proposed 24-Unit Condominium development (that has 2 bedrooms per unit (total of 48 bedrooms)) compares favorably to the MF-75 Overlay (that permits 56 bedrooms (4 bedrooms multiplied by 14 units) and the 53 bedrooms in the current use.

The number of off-street parking spaces currently is 6 spaces (none for the Rooming House) for 53 total bedrooms. The MF-75 Overlay allows 42 parking spaces for 56 bedrooms. The Edelman application provides 47 off-street parking spaces for 48 bedrooms (essentially 1 parking space per bedroom, which is better than the MF-75 Overlay and drastically better than the current use of about one-tenth of a parking spot per bedroom).

Turning attention to the positive criteria of the Edelman application, the fact that the property is in the MF-75 Overlay is pertinent because it demonstrates

[28] In the single-family context, compare ranch style versus colonial style. A ranch and colonial are two distinct styles, but they are both a single-family residential land uses. This illustrates the point that the townhouse style is just one type of style of muti-family land use.

particular site suitability of the Property for the proposed multi-family use. The MF-75 Overlay allows townhouse style (a style of condominium) for the property, and the Edelman application is for a condominium development.

As to positive criteria/purpose (g) (N.J.S.A. 40:55D-2(g)), which seeks to provide sufficient space in appropriate locations for a variety of residential uses to meet the needs of all New Jersey citizens, the property being within the MF-75 Overlay is demonstrative of the fact that a multi-family development is appropriate for the site as it provides a different type of residential housing within the R-75 zone all while replacing a preexisting, nonconforming commercial Rooming House.

As to positive criteria/purpose (h) (N.J.S.A. 40:55D-2(h), which seeks to promote the free flow of traffic and avoid congestion, the Property being in the MF-75 Overlay furthers this purpose since the overlay requires significant off-street parking, which the Edelman application not just satisfies, but exceeds by 5 parking spaces (not even including the Electric Vehicle credit), whereas the current 40-Unit Rooming House has no off-street parking.

Now attention is turned to the second prong of the negative criteria of the Edelman application and how the property being in the MF-75 Overlay relates to same. The second prong of the negative criteria is the grant of the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance. The property being in the MF-75 Overlay shows that the grant of the Edelman

application would not substantially impair the intent and purpose of the zoning ordinance, as this specific type of condominium use (albeit in "townhouse style") was specifically contemplated as a conditional use for the Property in question.[29]

Finally, attention is turned to Matthews Appellants' argument that the Board engaged in Rezoning by granting the Edelman application. The fact that the Property is located in the MF-75 Overlay that permits as a conditional use a multi-family condominium development (albeit "townhouse style") entirely guts Matthews Appellants' argument. Essentially, the Board cannot be said to have effectively "rezoned" the area, when the aforesaid area specifically permits as a conditional use a multi-family condominium development which was presented by Edelman.

Briefly, a discussion on the subsequent repeal of the MF-75 Overlay is required, and a timeline is instructive. The Board approved the Edelman application on July 28, 2022 and adopted an approval resolution on January 26, 2023. **Four months thereafter**, Ordinance No. 2023-07 was first introduced at the April 11,

[29] Tangentially, the Edelman application could have been one for a conditional use variance (N.J.S.A. 40:55D-70d(3)) or possibly c(2) variances (N.J.S.A. 40:55D-70c(2)) of the several "Bulk and Area Requirements" (Belmar Ordinance Code 40-6.13(b)) of the MF-75 Overlay that the Edelman application did not meet, instead of one for a d(1) use variance. An application for a conditional use variance or for bulk variances from the Bulk and Area Requirements of the MF-75 Overlay would have a far easier standard than the d(1) use variance sought by Edelman. See Coventry Square, Inc. v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285, 287, 297-300 (1994).

2023 Mayor and Council meeting. Ea 43. This after-the-fact Ordinance has no legal bearing on the Edelman application, as N.J.S.A. 40:55D-10.5 provides:

> Notwithstanding any provision of law to the contrary, those development regulations which are in effect on the date of submission of an application for development shall govern the review of that application for development and any decision made with regard to that application for development. Any provisions of an ordinance, except those relating to health and public safety, that are adopted subsequent to the date of submission of an application for development, shall not be applicable to that application for development.

Thus, the Ordinance eliminating the MF-75 Overlay has no bearing on the Edelman application, as it was not in effect as of the filing of the Edelman application (nor was it even in effect as of the date of the Board's approval of the Edelman application or the date the Resolution was adopted).

V. THE BOARD'S GRANT OF THE D(4) FLOOR AREA RATIO VARIANCE WAS PROPER. (Ja 282-83 and 286).

A variance for floor area ratio ("FAR") is provided at N.J.S.A. 40:55D-70d(4). The standard for the grant of a d(4) variance is the same as that of a d(3) conditional use variance, not the heightened standard of a d(1) variance. Randolph Town Center Associates, L.P. v. Township of Randoph, 342 N.J.Super. 412, 416-17 (App.Div. 1999). "Like a conditional use variance applicant, FAR variance applicants must show that the site will accommodate the problems associated with a proposed use with larger floor area than permitted by the ordinance." Id. at 417.

The Board rendered findings specific to the grant of the Floor Area Ratio. Ja 353-55. The permitted floor area ratio is 50% in the R-75 Zone, and the Edelman application proposed 173% (though, it should be noted that: (1) the MF-75 Overlay, in which this property lies, does **not** have a maximum floor area ratio; and (2) the current floor area ratio of 116% is nonconforming).

> FAR restrictions…are…commonly employed techniques for limiting the **intensity** of use of property. Commercial Realty and Resources Corp. v. First Atlantic Properties, 122 N.J. 546, 561, 585 A.2d 928 (1991). FAR standards are generally utilized to regulate commercial uses, whereas density restrictions, which limit the number of dwelling units per acre, achieve the same effect for residential development. Randolph Town Center Associates, L.P., supra., 324 N.J.Super at 415 (citation omitted).

As such, floor area ratio maximums exist to help control the **intensity** of use. Here, the Board found the grant of the d(4) variance proper because the intensity with the Edelman application use "will be much less intense than the existing non-conforming Uses at the combined site." Ja 354. This has been factually supported as already discussed.

In the section dealing with FAR only, the Board further notes the subject site can accommodate the excess FAR in a number of ways, including: (1) "1 to 2 dedicated parking spaces for each of the 24-unit condominiums created hereunder;" (2) the Edelman application parking proposal "is nearly compliant with Prevailing Ordinance / RSIS Requirements" while the 40-Unit Rooming Housing offers **zero** off-street parking; (3) the Edelman application parking proposal is compliant with

the Electric Vehicle credit; (4) the storm-water run-off will be self-contained or otherwise directed to the curb, and will not run off on to the adjacent properties; (5) the elimination of the preexisting, nonconforming 40-Unit Rooming House "will significantly reduce the overall density / intensity at the site;" and (6) "[t]he proposed placement of the new structure, to an extent, maximizes light and air both on the site and to the adjacent properties." Ja 354-55.[30]

Accordingly, the Board found the site can accommodate the problems associated with a larger FAR. Since the FAR is designed to control intensity, and since the Edelman application is less intense than the preexisting, nonconforming use, this further supports the grant of the d(4) variance.

VI. THE BOARD'S GRANT OF D(6) THE HEIGHT VARIANCE WAS PROPER. (Ja 283-84 and 286).

A variance for height, which exceeds by 10 feet or 10% of the maximum height permitted in the district for a principal structure, is provided for by statute at N.J.S.A. 40:55D-70d(6). There is a

> relationship between height restrictions and public welfare because the height of a building could impact traffic congestion, fire hazards, public health, adequate light and air, and population density….Height restrictions like restrictions on density, bulk or building size, can also be a technique for limiting the intensity of the property's use….The Board could find that the benefit of a harmonious, consistent style of house outweighs any aesthetic detriment arising out of the excessive height of the structure. See N.J.S.A. 40:55D-2(i) (promoting a desirable

[30] See above discussion on MLUL purpose (c) detailing the improved setbacks of the Edelman application over the preexisting, nonconforming structures.

> visual environment). It is also possible that a variance would obviate the need for substantial excavation of the site, thereby conserving natural resources and preventing degradation of the environment. N.J.S.A. 40:55D-2(j). Finally, conserving property values in the neighborhood remains a purpose of land use regulation, even though that goal is not expressly stated in N.J.S.A. 40:55D-2. Home Builders League of S. Jersey, Inc. v. Township of Berlin, 81 N.J. 127, 144-45, 405 A.2d 381, 390-91 (1979).
> Grasso v. Borough of Spring Lake Heights, 375 N.J.Super. 41, 52-54 (App.Div. 2004) (some citations omitted).

In addition to any other positive criteria/special reasons supporting the grant of a d(6) height variance, the applicant "may establish special reasons by showing undue hardship or establishing that [the proposed building in excess of the height restriction does] not offend any purposes of the height restriction and would nonetheless be consistent with the surrounding neighborhood." Jacoby v. Zoning Bd. of Adjustment of Borough of Englewood Cliffs, 442 N.J.Super. 450, 463 (App.Div. 2015) (quotations omitted).

The maximum height in the R-75 Zone is 35 feet. The Edelman condominium would be 42.5 feet – only 1.5 feet greater than what currently exists. The Board made detailed specific findings as to the height variance sought by Edelman. Ja 358-62:

1. The height of 42.5 feet is necessary for aesthetic and functional reasons;

2. The height requested allows for ample and compliant ground-level parking to accommodate each unit's parking needs, thereby reducing the need for separate garages and driveways and improving the impervious coverage at the site;

3. Any further substantive reduction in height would likely detract from the beautiful and positive aesthetic impact as designed by the architect;

4. The height of the condominium structure will not be out of character or otherwise inconsistent with the height of other structures in the area;

5. The height given the ground level parking area is sound planning given the rise in sea levels and frequency of dangerous storms due to global warming and similar phenomena given the proximity of the Property to the ocean, providing for better safety of occupants of the proposed condominium structure;

6. The slight height deviation does not correspond to an increase in intensity at the Property, as the intensity of use is decreased by the application; and

7. The slight height deviation is not inconsistent with the height of other surrounding buildings; some surrounding developments along and near the ocean-front have similar heights of 38.5 feet and greater. Ja 358-62.

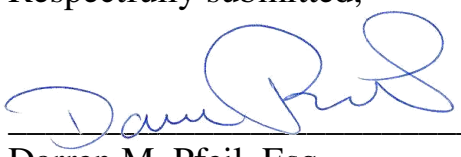
As recited in Grasso, height restrictions are created to address (1) traffic congestion, (2) fire hazards, (3) public health, (4) adequate light and air, (5) population density, and (6) intensity of use. The Edelman application does not run afoul of these purposes, thus supporting the grant of the d(6) variance. As to traffic congestion, the Board found (as established by the evidence and testimony presented) that the traffic would be vastly improved, because compliant on-site parking would be provided whereas currently none exists for the 40-Unit Rooming

House. The slight increase in height permits a garage to be located on the first floor of the condominium structure. As to fire hazards, the Edelman application is fire code compliant, with adequate ingress and egress, fire suppression system, fire retardant materials, etc. The 1.5 foot in height increase over the existing use/ the 7.5 foot in height increase over what is permitted in the R-75 zone will therefore not have a negative effect on fire hazard risks. The increase in height will not result in public health concerns either, as the serious quality of life issues associated with the preexisting, nonconforming uses will be eliminated. Adequate light and air are still being provided by virtue of the rooftop deck to the residents of the proposed development, adequate light and air is being provided to surrounding properties, and the increase in height is only 1.5 feet compared to the existing 40-Unit Rooming House structure. The next concern that height restrictions touch is population density, which is not negatively affected by the grant of the height variance. In fact, population density would decrease under the Edelman application compared to the preexisting nonconforming use (43 dwelling units existing vs. 24 proposed; and 89 dwelling units per acre existing vs. 49 proposed). Ja 376. The final item related to height restrictions is intensity of use, and here by granting the variance the intensity is actually decreased (less rooms, less emergency services resources spent, more off-street parking provided, etc.). The other purposes of the MLUL are furthered as previously discussed, and they are applicable to this analysis as well.

CONCLUSION

For the foregoing reasons, the trial Court's affirmance of the Board's approval of Edelman's application should be upheld.

Respectfully submitted,



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ART AMMERMULLER, STEVEN BLOOM, and LINDA BLOOM, Appellants, v. BELMAR ZONING BOARD OF ADJ., EDELMAN INVESTMENT GROUP LLC, 108 12TH AVENUE REDEVCO LLC, and RAINBOW HOSPITALITY INC., Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NOS. A-000953-23 A-000977-23 CIVIL ACTION Consolidated Appeals from a Final Judgment of the Superior Court of New Jersey, Law Division, Monmouth County Docket Nos. MON-L-779-23 MON-L-889-23 Sat Below: Hon. Gregory L. Acquaviva, J.S.C.
BRIAN MATTHEWS and CECELIA MATTHEWS, Appellants, v. BELMAR ZONING BOARD OF ADJ., EDELMAN INVESTMENT GROUP LLC, 108 12TH AVENUE REDEVCO LLC, and RAINBOW HOSPITALITY INC., Respondents	**REPLY BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS ART AMMERMULLER, STEVE BLOOM, and LINDA BLOOM** Of Counsel and On the Brief: Daniel L. Steinhagen, Esq. On the Brief: Ira E. Weiner, Esq.

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Legal Argument

The central theme of Ammermuller's and Blooms' ("Plaintiffs") challenge to the Belmar Zoning Board's approval of Edelman Investment Group's use variance application is that Edelman failed to demonstrate, through an enhanced quality of proof, that the use variance for a multi-family apartment building would not cause substantial impairment to the intent and purpose of the zone plan and zoning ordinance.

Both Defendants disregarded that argument. As it did in the Resolution, the Board entirely ignores the second prong of the negative criteria. Edelman does not address the enhanced quality of proof standard. Neither brief even mentions that proof standard, nor did the Resolution or the trial court's written decision. The faulty analysis merits reversal.

I. Defendants do not contest Plaintiffs' argument that the proofs and Board decision did not meet the second prong of the negative criteria by an enhanced quality of proof. [Ja 256; Ja281-282]

The Supreme Court strengthened the negative criteria in *Medici v. BPR Co.,* 107 *N.J.* 1 (1987), to narrow the power of a board of adjustment to grant use variances unless an applicant demonstrates there is a reason the governing body would allow a use in the zoning district. *Id.* at 4-5. It required reconciliation of the variance with the omission of the proposed use from the ordinance as part of the required proofs. *Id.* at 21-22. Here, not only was the

governing body aware of multi-family uses, it specifically removed them from the category of permissible uses in this exact location, as the 2016 Master Plan Reexamination Report confirms. [Ja1311]. By that one action, it became impossible for Edelman and the Board to reconcile the variance had they tried.

Because the Board and Edelman failed to analyze whether the variance could be reconciled with the ordinance, no further comment here is necessary. Plaintiffs rely on their arguments made in Point I of their merits brief—the application must be reversed because Edelman offered no proof of satisfaction of the second prong of the negative criteria. There was no evidence proving there was no substantial impairment of the intent and purpose of the zone plan and zoning ordinance by an enhanced quality of proof.

II. Even without considering the enhanced quality of proof standard, Edelman failed to present proof showing the variance would not substantially impair the intent and purpose of the zone plan and zoning ordinance, and neither Defendant justifies the Board's decision. [Ja 256; Ja281-282]

The Board did not consider the second prong of the negative criteria in its Resolution, and offers no reasons for its decision here either. Its failure to address the second prong of the negative criteria in the Resolution is reason to reverse the decision. *Id.* at 23 (setting forth requirements for resolution concerning second prong). And Edelman's efforts to supply reasons, while

improper, only address Belmar's Master Plan ("Plan"), which is only half of the requirement. And it does so in the wrong way as discussed below:

1. Economic Development. Edelman cites partial sentences of the Plan out of context to argue that economic growth is the Borough's aim. [Edelman Br. at p. 35-36]. That is a distortion of what the Plan seeks, and what the second prong required the Board to consider, had it fulfilled its statutory role. The Plan's operative section – the Land Use Element – makes specific recommendations of the path land use development in the future.

And as Plaintiffs highlighted in their merits brief, the Plan clairified that "[p]rotecting the integrity of the Borough's single-family districts from over-development is important to the long-term future of Belmar as a quality shore community." [Ja1213]. It stressed that "[f]loor area ratios and maximum building coverage on individual lots coupled with height restrictions are important in order to prevent overcrowding and intensification . . ." [Ja1213]. Edelman's 57-foot-tall, 24-unit project is hostile to and impairs those goals.

Residential development is not the "economic development" referred to in the Plan. What the Plan actually states is as follows: "encourage commercial, office, recreational and service development within the Borough which will provide employment for residents and contribute to a balanced economic and ratable base for the Borough." [Ja1206]. An apartment building

is none of those and it provide no jobs either. By contrast, the Belmar Inn is a commercial use that does provide a more balanced economic and ratable base. Edelman proposed to remove and replace it with a multi-family use antithetical to both the Plan and the zoning ordinance.

If as Edelman argues, its residential condominium project ('Condominium") is what the Plan was seeking because it purportedly provides an economic benefit, almost anything developed would also provide an economic benefit. A 50-story building in that location could provide economic benefit but would substantially impair the zone plan. The question here is not any benefits the Condominium might provide, but whether the use authorized by the variance substantially impairs the intent and purpose of zone plan and zoning ordinance, which here, seeks to protect the integrity of Belmar's single-family districts. If a general goal of producing economic benefits in a master plan can justify a use variance, then the Supreme Court's vision that the "negative criteria constitute an essential 'safeguard' to prevent the improper exercise of the variance power" will be vanquished. *Medici, supra,* 107 *N.J.* at 22. All master plan documents contain these generalized platitudes, and any board of adjustment could simply override a governing body's zoning decisions based upon such language.

2. Promoting Residential Character. Edelman also cites language in the Plan stating that one of its goals is to promote residential character of the community, and argues that its development would promote this goal "given the nature of the surrounding uses (namely the multi-family surrounding use. . . ." [Edelman Br. at p. 34-35]. But the surrounding uses are not multi-family uses. For example, the Resolution lists the Mayfair Hotel/rooming house on Ocean Avenue as an example of a multi-family building, just as it asserts for the Belmar Inn. [Ja364]. And that is even though these two properties are hotels, not multi-family buildings as discussed below. And the Resolution contorts reality contending the surrounding areas "consist mainly of multi-family structures and seasonal rentals with some single-family structures." [Ja365]. But the Board undertook no analysis to determine when either of those hotels, or the structures that are allegedly multifamily buildings were developed. If they predate the Governing Body's determination to eliminate multifamily uses, their existence in the vicinity of the subject property was entirely irrelevant to the Board's consideration of Edelman's use variance application because the changing character of the neighborhood (as described in footnote 11 of *Medici, supra*) is only relevant when the use is omitted, not when it is eliminated from the entire municipality, as was the case here.

Any suggestion that area around the Property is swamped with multi-family homes is a distortion fostered by twisting the Belmar Zoning Ordinance ("Ord.") definition of Multi-Family Building. *Ord* §40:2-4 defines "Multi-Family Building" as "any building containing three or more dwelling units." [Ja1342]. "Dwelling Unit" is defined as "a building . . . having cooking, sleeping, and sanitary facilities designed for, or occupied by one family and which is entirely separated from any other dwelling unit. . . ." [Ja1330]. And "Family" is defined as "one or more persons living together as a single entity or nonprofit housekeeping unit, as distinguished from individuals or groups occupying a hotel, club, fraternity or sorority house." [Ja1332]. By definition, a hotel is not a multi-family building.

Virtually all the buildings surrounding the property and in the general area are single-family homes. In 2016, the Planning Board recognized that there were only *2* multi-family residential uses on this block, with most at the far north end of the Borough. [Ja1303]. Thus almost all the properties cited by the in the first bullet point of page 76 of the Resolution as multi-family buildings are actually single family or two-family homes, presumably seasonal rentals. [Ja365]. That is why the bedroom counts and not the number of units are listed. And the apartment buildings referenced on page 75 of the resolution – located at the north end of the Borough – were not mentioned at all during

the hearings, so the Board's consideration and reliance upon them is entirely inappropriate. The telling line in the Board's resolution is "per prior information." [Ja364]. In its own Resolution, the Board acknowledged using information not in the record to justify its decision. This is improper as information not in the record cannot be considered by the Court. *See, e.g., Kempner v. Edison Twp.,* 54 *N.J. Super.* 408, 417 (App. Div. 1959).

The distortion of the ordinance's terms and perverting the actual character of the surrounding area is a critical pillar in the Defendants' argument. And that was done to avoid recognition of the inappropriateness of this overly tall, overly dense apartment building that is unlike anything in the vicinity and unlike anything permitted by the Ordinance.

Second, no evidence was offered that the neighborhood had substantially changed with new multi-family uses being built since the Plan was adopted in 1989. The 2016 Reexamination Report confirms the opposite—multi-family uses had converted to single-family homes. [Ja1311]. Granting a use variance based on a few long-standing nonconforming uses is a prescription for zoning creep. *Medici, supra,* reflects that where an informed governing body does not change the ordinance, a board of adjustment may reasonably infer its action was deliberate. *Id.* at 21. The implication of that language is that where no changes to the zoning are made, a board of adjustment should deny future use

variance requests. The situation here is even more pronounced – multi-family uses were once permitted, but are now not permitted and are slowly disappearing from Belmar. The last remaining few cannot be used to justify the creation of new non-permitted uses, because that turns the second prong of the negative criteria on its head.

Third, the Reexamination Report recognizes that while there were some nonconforming multi-family uses in the area, most are on or near Ocean Avenue. That area is where the MF-1 and MF-2 multi-family zones existed as described in the Plan. [Ja1311 at p. 1]. Those zones were eliminated and became part of the R-75 Zone and therefore, as noted above, cannot be considered for whether a use variance is justified after the elimination of the MF-1 and MF-2 zoning. *Id.*

Fourth, the Reexamination Report explains that eliminating the multi-family districts was "part of an attempt to encourage Belmar's transition into a year-round municipality with single-family residential uses . . ." *Id.* The Reexam also acknowledges that multi-family uses are a conditional use in the R-75 zone "but single-family is still encouraged at this time." [Ja1311].

Edelman crows that the Condominium is an alternative housing option and is consistent with the goals of the Plan. The Resolution falls in line with this contention. But neither Defendant cites to a specific recommendation in

either document that seeks more multi-family housing in this location. The Reexamination Report notes that the Borough's goal is just the opposite: to transition away from the existing nonconforming multifamily residential uses that the Board cited as a basis to grant the use variance to single-family homes, not the other way around. *Id.* And the Reexamination Report specifically finds that the R-75 Zone is considered a low-density zone in the Borough, with 0 to 6 units per acre. [Ja1293]. The proposed density here is 49.8 units per acre!

And while removing the Belmar Inn would eliminate an incongruent non-conforming use, the development only replaces it with another incongruent grossly non-conforming use, not recommended in the Reexamination Report, inconsistent with the Zoning Ordinance and Plan.

Fifth, while Edelman attempts and fails to show the project follows the Plan, it eschews any effort to prove the nonconforming use it proposes does not substantially impair the intent and purpose of the *zoning ordinance*, also a requirement of *N.J.S.A.* 40:55D-70(d)(1). So, what remains is a flawed and deficient argument pertaining to only half of the proof required for its relief.

Sixth, Edelman postulates that the Condominium is comparable to multi-family townhouses conditionally permitted in the MF-75 overlay zone. Edelman even theorizes that the development is better than one that could be

built as a conditional use.[1] But that zoning was offered as an inducement to clean up the Property only, and not intended to signal a change in direction in what zoning was desired in the neighborhood. And that is why the MF-75 contained very specific conditions to limit what could be built, including requiring that the only type of building allowed was townhouses subject to definite specifications and standards, not apartment-style condominiums.

And even if this theory was considered, Edelman's brief presented its comparison in such a disingenuous way it should be disregarded. On page 40, it sets forth what it purports are the six conditions of the MF-75 zone, which it claims the Condominium would satisfy or exceed:

1. *The zoning would permit 14 dwelling units, with four bedrooms per unit, totaling 56 bedrooms; the Condominium has only 48 bedrooms*. First, only 13 dwelling units are allowed. 14 units would exceed the restriction of only 1 unit per 1,550 square feet of land area, as the Property is only 21,000 square feet in area. [Ja476; 1414]. Second, nothing in the ordinance regulates bedroom counts, so the number of bedrooms proposed is immaterial.

[1] The trial court correctly disregarded Edelman's attempt to bring this development under the umbrella of the MF-75 zone as not germane because the matter was presented and decided by the Board as a d(1) use variance from the requirements of the R-75 Zone, not a conditional use variance from the requirements of the MF-75 zone which Edelman did not propose, did not seek, did not prove, and the Board did not grant. [Ja266].

2. *Three off-street parking spaces per dwelling unit are required, requiring a similar number of parking spaces (42), to the 47 proposed.* Parking for residential development is governed by the Residential Site Improvement Standards irrespective of what the ordinance provides. *See N.J.S.A.* 40:55D-40.5 (local standards for residential development preempted). The parking requirements for residential development are delineated at *N.J.A.C.* 5:21-4.14, Table 4.4. A 4-bedroom townhome requires 2.4 spaces. Even if Edelman could develop 14 units, only 34 parking spaces would be required. This is far less than the 47 spaces its plan requires.

3. *The 14 dwelling units can comprise a basement, three stories and a rooftop deck*. The ordinance does not discuss basements or roof-top amenity decks. Townhomes are limited to 35 feet/3-stories, just like single-family homes in the R-75 Zone. *Ord*. §40-6.13(b)(6). [Ja1414]. Edelman's building is much taller, which it does not mention.

4. *The rear-yard setback is 10 feet.* This is correct.

5. *Side-yard setbacks are only 5 feet each.* Edelman maintains that is the same as the Condominium, but that is only half true. The required side-yard setback is 10 feet for each side and 20 feet combined. *Ord.* §40-6.13(b)(4)(b). [Ja1414]. Five-foot setbacks are only allowed for "interior townhouse clusters developed with a shared access lane." *Id.* The

Condominium is not a cluster project, has no interior access lane or interior units, and thus, requires a 10/20-foot setback. But only five feet is proposed. Edelman again omits material parts of the ordinance.

6. *There is no floor-area-ratio maximum.* Edelman once more fudges what the ordinance provides. *Ord.*§40-6.13(b)(9) states, "Floor-area ratios applicable to the R-75 Zone, shall not apply where the density permitted herein is not exceeded." [Ja1414]. The Condominium's 24 units exceed the density restriction by nearly 100% since a maximum of only 13 units is permitted based upon the area of the Property. Were Edelman proposing a side-by-side townhouse development, it would need a huge floor area ratio variance (as it is proposing an FAR of 173% where only 40% is permitted). [Ja476].

7. Two other conditions the proposal would not comply with that are not listed are impervious coverage (maximum 75%; 76% proposed) and building coverage (maximum 50%; 71.11% proposed). [Ja 302; Ja1414].

8. And the primary condition is that any MF-75 development must be a side-by-side townhouse-style development, which the Condominium is obviously not. The Governing Body has a right to designate whatever kinds of building it will permit in the zone. *See N.J.S.A.* 40:55D-62(a). Under the MF-75 overlay regulations, the apartment-style 4-story condominium proposed is not only not a permitted use, it is not a permitted structure, both use variances.

The faulty effort to compare its project to a use it did not propose demonstrates how Edelman's project impairs the intent and purpose of the zoning ordinance. The judgment should be reversed, and the approval vacated.

III. Both the Board and Edelman do not justify the Board's failure to make specific findings and conclusions explaining why the many issues raised by Plaintiffs and the public were not a substantial detriment to the public good in violation of the first prong of *N.J.S.A.* 40:55D-70(d). [Ja 256; Ja281-282].

The Plaintiffs and other members of the public testified to many serious detriments that will occur if this project is built. The Defendants ignore them, though Edelman accuses Plaintiffs of "falsely equate[ing] themselves for 'the public good' and that they "only view the abutting properties (themselves) as the 'public' for which the first negative criteria[sic] is focused." [Edelman Br. at p. 34]. It misunderstands the law. None other than the New Jersey Supreme Court has directed that "the statutory focus is on the variance's effect on the surrounding properties . . . the board of adjustment must evaluate the impact of the proposed use variance upon the adjacent properties" and decide if there is damage to the character of the neighborhood. *Medici, supra,* 107 at 22, fn.12.

The issue is whether the proposal caused substantial detriments on adjacent properties, not whether the removal of the existing building has generalized positive aspects for the public. *Medici* required the Board to make specific findings and conclusions on those impacts once testimony was

adduced so that it could undertake the "discretionary weighing function" that balances the supposed positive attributes that Edelman touts in furtherance of the positive criteria against the negative impacts. *Id.* The statute does not allow a board to list the positives, ignore the negatives and vote.

The Defendants do not explain why a too tall building that will steal sunlight on the surrounding lots, affecting the neighbors use of their properties, and significantly decreasing the usability of two neighbors' solar panels is not substantially detrimental. They do not explain why a project with 24 units, excessive building coverage, excessive FAR, excessive impervious coverage, and inadequate setbacks will not be substantially detrimental to the single-family homes surrounding the property. They do not explain why the noise from the HVAC units planned for the roof will not be substantially detrimental without requiring proof that whatever will surround the HVAC units will eliminate the disturbing noise. They do not explain why unregulated noise and activity in the rooftop amenity space is not substantially detrimental. They do not explain why a 47-space parking lot with spaces only a few feet from the property lines, inundating the surrounding properties with noise and exhaust, is not substantially detrimental. And they do not explain why proposed balconies virtually hanging over the adjoining property lines, destroying the neighbors'

privacy and quality of life, is not substantially detrimental. Those failures warrant denial of the application and reversal of the approval.

CONCLUSION

The Board's preoccupation with eliminating the Belmar Inn dragged the Board away from its responsibility to make the necessary findings on the second prong of the negative criteria. What other explanation could there be for the omission of this mandatory requirement? That same rush to eliminate the perceived problems with the Belmar Inn led the Board to close its eyes to the problems Edelman's overdevelopment would foist upon Plaintiffs.

The record reflects that the Borough's Governing Body had, at one point, recognized that the use of its zoning power was the appropriate mechanism to correct the problems with the Belmar Inn. It was patently inappropriate for the Board to arrogate the decision about what should be developed on the property to itself, particularly where it ignored the Zoning Ordinance, the Master Plan, the Reexamination Report and the people whose homes were mere feet away.

The Law Division judgment affirming the Board's approval should be reversed and approval of Edelman's application should be vacated.

Respectfully submitted,
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Attorneys for Appellants Art Ammermuller, Steven Bloom and Linda Bloom

Dated: May 3, 2024 By:*/s/ Daniel L. Steinhagen*_____

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BRIAN MATTHEWS AND CECELIA MATTHEWS, Appellants, v. EDELMAN INVESTMENTS GROUP, LLC, 108 12TH AVENUE REDEVCO, LLC, RAINBOW HOSPITALITY, INC., and THE ZONING BOARD OF ADJUSTMENT OF BELMAR, Appellees.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000953-23 A-000977-23 On Consolidated Appeal from: SUPERIOR COURT OF NEW JERSEY, MONMOUTH COUNTY, LAW DIVISION Docket Nos.: MON-L-889-23 and MON-L-779-23 Sat below: Honorable Gregory L. Acquaviva, J.S.C.
ART AMMERMULLER, STEVEN BLOOM and LINDA BLOOM, Appellants, v. EDELMAN INVESTMENTS GROUP, LLC, 108 12TH AVENUE REDEVCO, LLC, RAINBOW HOSPITALITY, INC.,	

and THE ZONING BOARD OF ADJUSTMENT OF BELMAR,

Appellees.

BRIEF IN SUPPORT OF APPELLANTS BRIAN MATTHEWS AND CECELIA MATTHEWS APPEAL OF THE TRIAL COURT'S OCTOBER 19, 2023 ORDER

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PRELIMINARY STATEMENT

This appeal is brought by the Appellants, Brian Matthews and Cecelia Matthews ("Appellants" or "Matthews") who are appealing the trial court's Order denying Matthews' challenge of the Respondent Zoning Board of Adjustment of Belmar's (the "Board") approval of Respondent Edelman Investment Group, LLC's (the "Applicant"), application for a use variance and 10 bulk variances to construct a five story, 24-unit condominium building in the R-75 zone, which solely permits single family residences (the "Application"). The extraordinary zoning relief was arbitrarily granted by the Board due to its reliance upon illegal criteria presented by the Applicant and the Board's failure to properly analyze the applicable standards for the zoning relief sought in light of the statutory requirements and case law interpreting same.

Most significantly, the Board focused extensively on a false binary choice between the Application and the Belmar Inn, a pre-existing non-conforming rooming house use remaining in place. The binding *Degnan* decision is clear that reviewing an application by comparing it to the existing use is unequivocally prohibited. Instead, an application must stand on its own merits as applied to the zoning ordinance, master plan of the town, and the Municipal Land Use Law ("MLUL"). What's worse, binding case law is clear in its prohibition of a board considering financial feasibility of a proposed project,

i.e. so many units are needed at a minimum or the project can't be constructed. Despite that well settled law, the Board impermissibly allowed testimony from a real estate appraiser on behalf of the Applicant.

On appeal, the trial court erroneously dismissed the significance of *Degnan* dubbing it a "jurisprudential cul de sac". In actuality, the trial court misinterpreted *Degnan* and its interplay with relevant case law avoiding the binding precedent of its holding which is directly on point with the matter at hand.

The significance of this misinterpretation cannot be understated. The resolution adopted by the Board (the "Resolution") and the transcripts and proofs introduced at the hearings make clear that the Board's determination was based upon the improper and false "either/or" choice asserted by the Applicant. Indeed, "rooming house", the existing use, was referenced 371 times in the Resolution, whereas "Condominiums", the proposed use, was cited only 192 times. Indeed, the Applicant's and Board's attention was so focused on this binary choice that a member of the public remarked during one hearing that "if one were to walk in midstream, one would think that the application is about the Belmar Inn." In other words, in derogation of the MLUL and binding precedent, the Board focused on what the Applicant was replacing, not on what the

Application proposed. Accordingly, the trial court's denial of Matthews' request to overturn the Board's decision was in error and must be overturned.

PROCEDURAL HISTORY

Appellants submit this brief in support of their appeal of the Order entered by the Honorable Gregory L. Acquaviva, J.S.C. dated October 19, 2023 denying their appeal of the Board's approval of the Application. (Ja 6-11).

In 2018, the Applicant filed an initial application to construct a condominium complex on only Lot 12. (Ja 312). The Applicant voluntarily withdrew the 2018 Application after a hearing had commenced. (Ja 312).

On April 7, 2021, the Applicant filed a new development application to construct a 24-unit condominium building (the "Condominium") covering both Lot 12 and Lot 13. (Ja 450). The Board held public hearings with respect to the Application on July 27, 2021, August 26, 2021, October 14, 2021, February 24, 2022, April 28, 2022, and July 28, 2022.[1] (Ja 290). On January 26, 2023, the Board adopted a Resolution approving the Application. (Ja 290-449).

[1] Appellants cite to the Transcripts as follows: (i) July 27, 2021 Board hearing transcript: T1; (ii) August 26, 2021 Board hearing transcript: T2; (iii) October 14, 2021 Board hearing transcript: T3; (iv) October 14, 2021 Board hearing transcript: T4; (v) April 28, 2022 Board hearing transcript: T5; (vi) July 28, 2022 Board hearing transcript: T6; (vii) October 17, 2023 transcript of trial at the trial court: T7.

On March 22, 2023, Matthews filed a Complaint in Lieu of Prerogative Writ seeking to reverse the Board's grant of approval to the Respondents. (Ja 51-228). On April 13, 2023, an Answer was filed on behalf of the Applicant, Redevco and Rainbow. (Ja 241-250). On April 27, 2023, the Board filed an Answer. (Ja 229-240). On May 10, 2023, the trial court granted a Consent Order to Consolidate the Matthews appeal of the Application with an appeal brought by Art Ammermuller ("Ammermuller"), Steven Bloom and Linda Bloom (together the "Blooms"), who are neighbors of Matthews and were appealing the same approval. (Ja 253-255). After conducting a bench trial, the trial court entered an order denying the appeals of Matthews, Ammermuller and Blooms' together with a 29-page Statement of Reasons dated October 19, 2023. (Ja 256-287)

On December 1, 2023, Matthews filed a Notice of Appeal appealing the trial court's October 19, 2023 Order. (Ja 6-11). On December 26, 2023 the Honorable Mary Gibbons Whipple, J.A.D. entered an order granting Respondents' Motion to Consolidate this appeal with the appeal filed by Ammermuller and the Blooms. (Ja 288).

STATEMENT OF RELEVANT FACTS

Matthews are the owners of real property located at 109 11th Avenue, Belmar, New Jersey 07719. (Ja 51). The Applicant is a developer that seeks to

construct a five story, 24-unit condominium complex on property immediately adjacent to the Matthews' property located at 112-114 12th Avenue, Belmar New Jersey 07719, which is designated as Block 110, Lot 12 ("Lot 12") and 108 & 108 ½ 12th Avenue, Belmar, New Jersey 07719, which is designated as Block 110, Lot 13 ("Lot 13" and collectively with Lot 12, the "Property"). (Ja 450-454). Respondent Rainbow Hospitality Inc. ("Rainbow") is the owner of Lot 12 and Respondent 108 12th Avenue Redevco, LLC ("Redevco") is the owner of Lot 13. (Ja 450).

The Property is located in the R-75 Zone which only permits single family, residential homes. (Ja 304). At the time of the Application, the Property was also subject to the MF-75 "overlay" zone, which permitted multi-family use, specifically townhomes. (Ja 394-395). At the hearings there was testimony that the MF-75 overlay zone was created by the Borough to encourage the removal of pre-existing hotel type uses and by allowing for townhouse development, i.e. greater density than single family homes. (T3 98:18-T99:1; T4 110:22-25). Nonetheless, the Application was not brought under the MF-75 zoning ordinance. (Ja 450).

Lot 12 is currently occupied by the Belmar Inn, which is a rooming house with 40 units ("Belmar Inn"). (Ja 304). The Belmar Inn is a pre-existing, non-conforming use in the R-75 Zone. (Ja 304). Lot 13 is currently occupied by a

two-family home, which is also a pre-existing non-conforming use, and a single-family home. (Ja 304).

A. <u>The Applications</u>

The Applicant filed an initial application in 2018 (the "2018 Application") to construct a condominium complex on only Lot 12. (Ja 312). The Applicant voluntarily withdrew the 2018 Application after a hearing had commenced. (Ja 312).

On March 30, 2021, the Applicant, the contract purchaser of the Property, filed the Application with the Board seeking 11 variances on Lots 12 and 13. (Ja 450-454). The Application to "raze The Belmar Inn and all other structures located on 108 and 108 ½ 12th Avenue and form one lot," for final major site plan approval, and 11 variances including both use ("D"), and hardship or flexible bulk variances("C"). (Ja 450-456).

The requested use and bulk variances set forth in the Application are as follows:

<u>USE VARIANCE</u>

Permitted:	Single Family
Existing:	Non-conforming Rooming House with 40 bedrooms (Block 110, Lot 12) and Multi Family (3 unit) with 11 plus bedrooms (Block 110, Lot 13)
Proposed:	five story, 24 unit condominium/single family ownership;

SIDE YARD SETBACK
Required: 5 ft
Existing: 2.7 ft
Proposed: 5 ft

SIDE YARD SETBACK COMBINED
Required: 15 ft
Existing: 7.2 ft
Proposed: 20 ft, 10 ft to balcony

REAR YARD SETBACK
Required: 40 ft
Existing: 2.8 ft
Proposed: 18 ft

HEIGHT
Required: Two and a Half Story (35 ft)
Existing: Three Story (41 ft)
Proposed: 1 Story Surface Parking with Three Story Living above (42.5 ft)

MAXIMUM BUILDING COVERAGE
Required: 20%
Existing: 48.5%
Proposed: 71.11%

MAX LOT IMPERVIOUS COVERAGE
Required: 55%
Existing: 83.7%
Proposed: 80.01%

MAXIMUM FLOOR AREA RATION (FAR)
Required: 40%
Existing: 116%
Proposed: 173% (without garage)

PARKING
Required: 48 spaces
Existing: 6 spaces

Proposed: 47 spaces

WIDTH OF CURB CUT
VARIANCE REQUESTED FOR TWO CURB CUTS GREATER THAN
12 FEET

FLAT ROOF
VARIANCE REQUIRED FOR FLAT ROOF WITH AMENITY DECK

(Ja 455-456).

B. Public Hearings

The Board held public hearings with respect to the Application on July 27, 2021, August 26, 2021, October 14, 2021, February 24, 2022, April 28, 2022, and July 28, 2022. (Ja 290). During the public hearings, the Applicant presented eight witnesses including a Real Estate Appraiser, Professional Planner and Professional Engineer, Fire Official, Director of Code Enforcement, Architect, and Traffic Expert. (Ja 297). Matthews formally objected to the Application before the Board and presented testimony from three witnesses including a Professional Planner, Peter J. Steck ("Steck"), in opposition. (Ja 297).

Notably, over Matthews' objection, the testimony from the Real Estate Appraiser, Theodore J. Lamicella ("Lamicella") was presented by the Applicant. Lamicella's testimony was dedicated to the financial feasibility of the Application, i.e. that 24 units are required or the project, and the removal of the Belmar Inn, could not go forward. (T2 51:23-54:4). In that same vein, the

Applicant presented the testimony of Fire Official Ryan Dullea ("Dullea") and Director of Code Enforcement Robert Poff ("Poff") both of whom only addressed alleged violations and deficiencies with the Belmar Inn. (T3 46:14-73:20; T3 74:11-82:25). Notably, neither presented any affirmative information regarding the Application itself. (T3 46:14-73:20; T3 74:11-82:25). Additionally, the professional planner for the Applicant focused his analysis on the removal of the Belmar Inn and the residences on Lot 13, which he referred to as "animal houses". (T3 153:14-23) ("the opportunity to remove the Belmar Inn and three animal house dwellings and replace it with a less intense use would be, would enhance the neighborhood…").

Numerous members of the public also testified at the hearing either in support or opposition to the Application. (Ja 303-304).

On January 26, 2023, the Board adopted a Resolution approving the Application. (Ja 443-445). Over its 156 pages the Resolution summarizes the parties, the evidence proffered at the hearings, witness testimony, and variances requested by the Application, as well as a list of members of the public who participated in the hearings. (Ja 290-449). Among the Board's findings of facts was that Lots 12 and 13 were pre-existing non-conforming uses and that the Applicant sought the "retirement/abandonment" of the rooming house license and structures on Lots 12 and 13. (Ja 304-305).

C. The Trial Court

The Matthews filed a Complaint in Lieu of Prerogative Writ seeking to reverse the Board's approval to the Applicant. (Ja 51-228). After the Respondents answered the Matthews Complaint, the case was consolidated with an appeal brought by Ammermuller and the Blooms, who are neighbors of the Matthews and were challenging the same Board approval. (Ja 253-255). All parties submitted briefs in support of their positions and a trial was held before Judge Acquaviva by Zoom videoconferencing. (Ja 256-287).

During the trial, Judge Acquaviva identified the fundamental issue "is the appropriate navigation between *Kramer* and *Degnan*." (T7 5:19-25). Although, binding precedent, Judge Acquaviva inquired whether *Degnan* is "an outlier that has just been left to die on the vine." (T7 28:3-5).

Aside from the application of *Degnan*, Judge Acquaviva inquired as to the Board's consideration and application of requirements of the zoning ordinance. Judge Acquaviva pointedly asked Respondents' counsel to point to a specific part of the Resolution that compares the Application to the applicable zoning requirements. (T7 38:6-23; T7 44:4-25). Incredulously, neither of Respondents' counsel could do so. (T7 38:6-23; T7 44:4-25).

Following the trial, the Judge Acquaviva issued an Order denying Applicants' relief including a Statement of Reasons. (Ja 256-287). Notably, the Statement of Reasons only addresses the arbitrary, capricious, and unreasonable standard in its "standard of review" section, ignoring the *de novo* standard to be applied to legal issues. (Ja 262-263). In the substance of its ruling the trial court misinterpreted and misapplied *Degnan*, drawing conclusions that were inconsistent with the record and relevant case law. (Ja 268-276). Specifically, the trial court erroneously distinguished this case with *Degnan,* drawing factual conclusions that were counter to the record. (Ja 268-274). Further, the trial court wrongly concluded that *Degnan* is a "jurisprudential cul de sac," in failing to apply its still binding reasoning and holding to the present matter. (Ja 275).

STANDARD OF REVIEW

"[W]hen reviewing the decision of a trial court that has reviewed municipal action, we are bound by the same standards as was in the trial court." *Fallone Properties, L.L.C. v. Bethlehem Tp. Planning Bd.*, 369 N.J. Super. 552, 562 (App. Div. 2004). "It is well established that when a reviewing court is considering an appeal from an action taken by a planning board, the standard employed is whether the grant or denial was arbitrary capricious or unreasonable." *Id.* at 560. The high arbitrary, capricious or unreasonable

standard is to allow Boards of adjustment latitude due to their "peculiar knowledge of local conditions." *See Medici v. BPR Co.*, 10 N.J. 1, 23 (1987).

"On the other hand, however, ***a board's decision regarding a question of law … is subject to a de novo review by the courts***, and is entitled to no deference since a zoning board has no peculiar skill superior to the courts regarding purely legal matters." *Dunbar Homers, Inc. v. Zoning Bd. of Adjustment of Tp. of* Franklin, 233 N.J. 546, 559 (2018) (emphasis added) (internal citations omitted); *see also Piscitelli v. City of Garfield Zoning Bd. of Adjustment*, 237 N.J. 333, 350 (2019). Neither the Board nor the trial court are owed any deference as legal issues are subject to *de novo* review. *See Piscitelli v. Garfield ZBA*, 237 N.J. 333, 350 (2019).

LEGAL ARGUMENT

I. The Trial Court's Affirmance Of The Board's Approval Was Predicated On Illegal Considerations (Ja 268-276).

The trial court improperly upheld the Board's consideration of the binary choice between the non-conforming pre-existing Belmar Inn and the Application, as well as the Board's consideration of the economic viability of the Application. These illegal considerations permeate throughout the Board's analysis in the Resolution which granted the Application rendering the approval contrary to New Jersey law.

The Board's approval of the Application is illegally predicated upon the consideration of what the development proposed in the Application is replacing - the Belmar Inn rooming house. New Jersey case law, namely *Degnan v. Monetti,* expressly forbids such consideration. 210 N.J. Super. 174, 183-186 (App. Div. 1986). The trial court misinterpreted and discounted *Degnan* when denying Appellants' appeal of the Board's decision despite *Degnan* being "good law" which is binding upon that court. This Court must appropriately apply the controlling precedent of *Degnan* and reverse both the Board's and trial court's flawed decisions. Neither the Board nor the trial court are owed any deference as legal issues are subject to *de novo* review. *See Piscitelli v. Garfield ZBA*, 237 N.J. at 350.

In *Degnan*, the Appellate Division overturned the granting of a use variance where the trial court considered that "unless the property was developed it would remain an eyesore." *See Degnan*, 210 N.J. Super. at 182. In *Degnan*, the developer purchased an inoperative sewage plant located in a zone which permitted single family homes and applied for a use variance to construct 20 condominium units. *Id.* at 177. The zoning board granted approval and the trial court upheld that decision. *See id* at 180-81. On appeal, the Appellate Court reversed, ruling:

In substance, though the board set out 12 special reasons for granting the variance, they are of two types. Firstly, the board believed the project in itself would be desirable, a finding which seems to be independent of the present physical condition of the property. Secondly, by allowing the project to be built the property would be cleared of the remains of the sewer plant.

We deal initially with the first type of special reason. The board thought that the project would be attractive, was appropriate for the site, would enjoy the unique vista of the park, would supply resort recreation housing[,] and would conserve energy. ***While we do not question these conclusions, the difficulty with them is that there is no basis to conclude from the record that single family homes would also not be appropriate for this desirable area. The fact that there is a need for resort recreational housing can hardly justify the variance, for if a variance could be granted simply because of a supposed need for a use, zoning ordinances would become meaningless. It seems clear to us that if there are special reasons for a variance because of the nature of the use it should be because the use inherently serves the public good or welfare***…. While we do not suggest that the project would be undesirable, it hardly would be important to the public good or welfare. Further, the fact that the attached structures would be more energy efficient than single family homes cannot be the basis for relief as that would always be the case.

We recognize, of course, that as an economic matter the record supports a conclusion that in consideration of Monetti's acquisition cost, single family dwellings are not practical for the premises. ***But quite aside from the general reluctance of courts to consider economics in reviewing applications for special reasons use variances, see Cerdel Constr. Co., Inc. v. East Hanover Twp., 86 N.J. 303 (1981), there are particular reasons why such factors should not be considered here. Monetti finds himself in an unfortunate economic situation because he voluntarily put himself there. In short, we see no reason why he should be aided in extricating himself from what may not have been a wise purchase by being granted a variance. We are particularly emphatic on the point because it is clear beyond doubt that the property is highly desirable and, except for the cost of purchase, would be a suitable site for single family development.***

> We have, of course, not lost sight of the circumstances that the sewerage authority set a minimum price of $275,000 for the property. We conclude, however, that this fact is not germane. Certainly neither Monetti nor anyone else was compelled to acquire the property at that or any price. If Monetti believed the price was too high to allow development of the property in accordance with the zoning, he simply should not have purchased it. Had no purchaser met the authority's price it would have been encouraged to reconsider the minimum price. In any event the authority by its setting of a price could not compel the board to grant a variance.
>
> As we indicated, a second basic reason for granting the variance relates not to what will be built but rather what will be removed. ***But in the circumstances of this case we do not regard removal of the sewerage facilities, desirable as that may be, as a special reason for granting the variance for there is no question but that development of the property in accordance with the zoning ordinance would have exactly the same remedial consequence. Further, as there are no impediments to constructing single family dwellings on the property except for the cost of acquiring and clearing the land, a factor we will not consider, the positive goal of removing the structures should be attained in accordance with the ordinance***.

Id. at 183-85 (emphasis added).

Degnan is clear that a board may not rely on what is being removed, but must only consider the proposed development on its own merits. *Id.* at 185. Thus, the Board's express reasoning throughout the Resolution in the matter at bar which compares the proposed development to the pre-existing non-conforming Belmar Inn runs afoul of *Degnan's* binding legal precedent. (Ja 290-449). Here, as in *Degnan*, the Board reasoned that "in the absence of extraordinary circumstances, the opportunity to perpetually eliminate an intense

non-conforming use "[…] may not be presented again in the foreseeable future." (Ja 330).

It cannot be disputed that the Application was considered solely against the context of the pre-existing Belmar Inn, instead of the requisite zoning standards governing the Application. Indeed, "rooming house" was cited 371 times throughout the Resolution in reference to the Belmar Inn. Moreover, the very language of the Board itself makes it readily evident that it considered the false binary choice of the pre-existing Belmar Inn remaining if the proposed 24-unit Condominium was not approved. Indeed, the focus of Applicant's presentation before the Board was to emphasize the negative of the Belmar Inn evidenced by testimony from Ryan Dullea ("Dullea") the fire official and fire department administrator of Belmar and Robert Poff ("Poff"), the director of code enforcement in Belmar. These officers' testimony focused solely on issues with the Belmar Inn such as maintenance, malfunctioning doors, heating issues, garbage, disorderly persons calls, and smoking inside. (T2 49:5-102:9; T3 16:9-44:4, 47:7-73:23, 74:4-91:6). At no point did they offer any testimony regarding the proposed development itself.

Moreover, the Respondents conceded their aim of making the Board's decision an impermissible either/or proposition both during the hearings and before the trial court. (T6 84:3-7) (during closing argument, Applicant's counsel

stated "[t]he elephant is the Belmar Inn. The elephant is the target that the mayor and council have been trying to get rid of since 2008. It is somewhat of a binary choice"). In short, it is beyond dispute that the Applicant's presentation at the Board hearings, which was adopted by the Board, did not focus on the R-75 standards but a comparison to the Belmar Inn, which is illegal pursuant to *Degnan*.

The trial court erroneously distinguished *Degnan* from this case for three reasons, all of which are counter to the factual record. First, the trial court concluded that the Board's decision in *Degnan* "was animated by the developer's financial motivations," which it asserts did not happen here because "the Board expressly observed that the developer's financial concerns were irrelevant to its determination." (Ja 270). In actuality, the record shows that financial considerations were presented to the Board. Indeed, during the Board hearings the Applicant dedicated an expert witness for the very purpose of placing evidence of financial feasibility of the Application, ***over the objection from Appellant***. (T2 51:23-54:4). Notably, Lamicella testified that the Property could be developed with two single family homes, although the highest and best use would suggest not to do so – confirming that financial considerations drove this Application. (T2 62:20-25). In short, the Applicant sought to convince the

Board that no one could afford to buy and remove the Belmar Inn unless they could develop 24 condominium units for sale.

The Board was clearly swayed by this testimony in granting the Application. The trial court's conclusion that the Board did not consider the financial viability of the Application just because it says so does not hold water and is not supported by the record as evidenced by the fact that the Board heard testimony from the real estate appraiser over Appellant's objection.

Second, the trial court claims that the Board sufficiently compared the Application to the R-75 requirements, which is directly contrary to the Resolution and the Applicant's own words. (Ja 271). Indeed, neither the Board nor the Applicant could point to ***a single instance*** in the Resolution that compared the Application to the R-75 standards. (T7 38:6-23) (When asked whether the resolution shows a comparison of the application to R-75 standards, Applicant's attorney answered "did they say let's consider it solely as a R-75 single family zone, I don't believe they did that … The comparator is the Belmar Inn") T44:4-25; (When also asked whether a section specifically compared the application to the R-75 zone, the Board's attorney could not reference such a section). In fact, during the bench trial the Applicant's attorney doubled down arguing that "the comparator is the Belmar Inn." (T7 38:6-23). Unable to reference any section of the Resolution that analyzes the Application against the

R-75 zoning requirements, the trial court could only reference that such consideration "permeates" the Resolution. (Ja 271). In reality, the Application is explicitly and unequivocally compared to the Belmar Inn throughout the Resolution, a clear violation of *Degnan*. As such, the trial court's attempt to distinguish *Degnan* from this case is plainly contradicted by the record.

Third, the trial court attempts to distinguish the replacement of the inoperative sewage plant in *Degnan* with the replacement of the Belmar Inn in the case at bar. (Ja 272). However, in both cases, the non-conforming pre-existing uses must be abandoned for the subsequent development to occur. It necessarily follows that in both cases any benefit afforded by replacing what previously existed is realized regardless of what is built in place of the pre-existing use. In other words, an application for a fully conforming single-family home on Lot 12 would result in the removal of the Belmar Inn, just like the Application at bar. For that reason, *Degnan* makes clear that what is being replaced must not be considered. *See Degnan* 210 N.J. Super. at 185 ("we do not regard removal of the sewerage facilities … as a special reason for granting the variance for there is no question but that development of the property in accordance with the zoning ordinance would have exactly the same remedial consequence"). As such, the trial court's reliance on the differentiation between

an abandoned pre-existing use and an active pre-existing use is a distinction without a difference and not a basis to circumvent the clear holding of *Degnan*.

Moreover, in order for the Condominium to be constructed, it would have to dispose of an ongoing legal use. (Ja 305). Applicant's position that the Belmar Inn is a detriment and must be removed is contradicted by the Appellants, all neighbors who prefer the existing use to an overbuilt, 5 story condominium structure. (*See e.g.* T6 56:19-58:11) (A neighbor testified "I vehemently, I cannot stand this plan"); (*see also e.g.* T6 47:8-48:12) (A neighbor testified "I've gone to just about every meeting about this applicant. What I've seen is that most of the people, most of them that live around it, are against this plan"). The same is true for the use on Lot 13, despite Applicant's attempt to paint these residences in a poor light, repeatedly referring to them as the "animal houses". (T2 64:10-17; T3 146:3).

In a further effort to avoid the holding of Degnan, the trial court relies upon the clearly distinguishable case of *Kramer v. Board of Adjustment,* 45 N.J. 268 (1965). In *Kramer*, the applicant sought variance relief to construct a hotel at a property that already featured a non-conforming pre-existing hotel use. *See Kramer*, 45 N.J. at 274. Objectors argued that "the Board in considering only the relative benefits and detriments of the proposed structure *vis a vis* the present structure, arbitrarily ignored a third alternative; that is, no hotel at all, and a

complete reversion […] to single-family residential use." *Id.* at 291. The *Kramer* Court held that the record supported the board's approval because the board did consider a third alternative and that there were sufficient special reasons to affirmatively support the variance. *Id.* at 291-292. Further, it was concluded that the negative criteria was met because the new proposed hotel would be less of a hazard to the community than the existing deteriorating hotel. *Id.* at 293.

However, the *Kramer* court's analysis reveals an important distinction from *Degnan*. *Kramer's* reasoning includes a reference to the concurring opinion in *Grundlehner v. Dangler*, a case which involved the approval of an application for "a building permit ***to construct an extension*** which would be ten feet" to an existing funeral home. 29 N.J. 256, 259 (1959) (emphasis added). *Kramer* rejects the concurring opinion in *Grundlehner* that states "[before] ***a variance to substantially extend or enlarge a preexisting nonconforming use*** may be granted…municipal officials should first determine whether a variance to *create* the use in the first instance would have been granted." *See Kramer*, 45 N.J. at 291 (quoting *Grundlehener*, 29 N.J. at 274-275 (1959)). Accordingly, it is clear that the precedent in *Kramer* solely considers an application ***to extend or enlarge a preexisting non-conforming use***. This is distinct from *Degnan*, which concerns whether what is being replaced, an abandoned pre-existing non-

conforming use, can be considered by a board. This interpretation is supported by the fact that *Degnan* cites *Kramer* but does not apply it to the issue of whether what is being replaced by an application should be considered. The reason *Kramer* is not referenced in this regard is clear – *Kramer* and *Degnan* address different circumstances.

Applying these cases here, the non-conforming pre-existing use of the rooming house is not being expanded, but is being abandoned and replaced with 24 condominium units – making *Degnan* the applicable, binding precedent.[2] The Application seeks to "raze the Belmar Inn and all other structures" which is undoubtedly destruction and abandonment of the pre-existing use. Accordingly, *Degnan* is directly on point and the trial court's reliance on *Kramer* is misplaced and must be reversed.

Likewise, the trial court's contention that *Degnan* has not been cited by a published case is of no moment. This could be the result of any number of reasons, such as the issue simply not being brought before the court or zoning

[2] It is well-established that "[a]bandonment of a nonconforming use terminates the right to its further use." *S & S Auto Sales, Inc. v. Zoning Bd. Of Adjustment for Borough of Stratford*, 373 N.J. Super. 603, 613 (App. Div. 2004). The destruction of a pre-existing nonconforming use terminates that use. *See Hay v. Board of Adjustment*, 37 N.J. Super. 461, 468 (App. Div. 1995) (variance to replace a non-conforming pre-existing gas station with a new building that was also a gas station was denied).

boards properly following the *Degnan* precedent, neither of which effects the prevalence of *Degnan*. The trial court's decision must be overturned as it incorrectly disposed of *Degnan*, which governs here. It follows that the Board's consideration of the pre-existing use of the Belmar Inn in comparison to the Application is illegal and its approval must be reversed.

II. The "D" Variances Do Not Meet The Positive And Negative Criteria (Ja 278-286).

The variances sought in the Application plainly cannot meet the requisite criteria of the MLUL. Importantly, the lion share of benefits of the Application include that it is an improvement over the Belmar Inn – an illegal consideration. While this reason alone is enough to find the conclusions of the Board and trial court erroneous on a legal basis, the Board's application of the positive and negative criteria is arbitrary, capricious and unreasonable.

The MLUL sets forth specific criteria that must be considered and met in order for a D variance to be granted. "D" variances are provided for in N.J.S.A. 40:55D-70(d), which states in pertinent part:

> The board of adjustment shall have the power to:
>
> > d. **In particular cases for special reasons**, grant a variance to allow departure from regulations …
> >
> > […]

> **No variance or other relief may be granted under the terms of this section**, including a variance or other relief involving an inherently beneficial use, **without a showing that such variance or other relief 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.** . . . An application under this section may be referred to any appropriate person or agency for its report; provided that such reference shall not extend the period of time within which the zoning board of adjustment shall act.
>
> [N.J.S.A. 40:55D-70(d) (formatting modified for readability)(emphasis added).

"Because of the legislative preference for municipal land use planning by ordinance rather than variance, use variances may be granted only in exceptional circumstances. *Kinderkamack Road Associates, LLC v. Mayor & Council of Borough of Oradell*, 421 N.J. Super. 8, 12-13 (App. Div. 2011). A municipal board of adjustments may permit a use variance only where "special reasons" are demonstrated, which is otherwise known as "positive criteria." *See id.*; *see also* N.J.S.A. 40:55D-70(d)(1); *see also New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. Of Adj.*, 160 N.J. 1, 6 (1999).

The Board wrongfully granted three "D", otherwise known as use variances: A) a "use variance" wherein a five story, 24-unit condominium use was sought in a zone that permitted only single-family residential use, B) a floor area ratio ("FAR") variance was sought proposing an increase from 40% to 173%,

excluding the parking level, C) a height variance was sought where the required height is two and a half stories (35 feet) and the proposed height is four stories (42.5 feet).[3]

A. Applicant Failed To Meet The Positive And Negative Criteria And Failed to Show That The Property Is Particularly Suitable For The Use Proposed.[4]

Applicants have not, because they cannot, show that the Condominiums are particularly suitable to the Property, which is required by the MLUL. Instead, the Board found that the Condominium is particularly suited to the Property in comparison to the Belmar Inn, which is an illegal comparison. (Ja 352-353) (The particularly suitable section in the Resolution compares the Condominiums to the Belmar Inn in all of its substantive bullet points). It is clear why the Applicant and Board resort to this comparison – because they cannot show that the Condominium is particularly suitable when considering the single-family residential zoning standards. By extension, the trial court's adoption of the Board's reasoning, despite the Board's failure to show particular suitability, is arbitrary, capricious and unreasonable and must be reversed.

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[3] Although the Board found that the height of the Condominium is 42.5 feet, the highest point of the Condominium is 57.2 feet. (Ja 308).

[4] Matthews incorporates and joins the arguments raised in the Ammermuller and Blooms Appellants' brief addressing the positive and negative criteria.

Generally, there are three situations in which "special reasons may be found: (1) where the proposed use inherently serves the public good, such as a school, hospital or public housing facility; (2) where the property owner would suffer "undue hardship" if compelled to use the property in conformity with the permitted uses in the zone; and (3) where the use would serve the general welfare because the proposed site is particularly suitable for the proposed use." *Saddle Brook Realty, LLC,* 388 N.J. Super. at 76. At all times, the board must keep in mind that the only "special reasons" that can be considered are those which promote the general purposes of zoning. *See Medici v. BPR Co.,* 107 N.J. 1, 10, 18 (1987).

To support a finding of special reason that "the use would serve the general welfare because the proposed site is particularly suitable for the proposed use", (1) positive criteria must be shown pursuant to the purposes of zoning ***and*** (2) the site must be shown to be particularly suitable. *See Burbridge v. Mine Hill Tp.*, 117 N.J. 376, 386-387 (1990); *see also Cox & Koenig, New Jersey Zoning and Land Use Administration* at 484 (Gann 2020) ("*N.J. Zoning and Land Use*"). "[P]articularly suitable means that the 'general welfare is served because the use is peculiarly fitted to the particular location for which the variance is sought.'" *Price*, 214 N.J. at 287 (quoting *Kohl v. Fair Lawn*, 50 N.J. 268, 279 (1967)).

Here, the Applicant applied under the third special reason – that the use would serve the general welfare because the proposed site is particularly suitable for the proposed use. (T3 152:18-154:23) (DiFolco, the Applicant's Planner, discusses the Condominiums only in the context of the "particularly suitable" standard and the "promotion of general welfare"). Accordingly, the Applicant must show that the Property is particularly suited for the Condominium use, which it utterly failed to do. The Application itself requires ***11 variances*** including a FAR variance ***five times*** in excess of what is permitted and a height variance that is ***double*** what is permitted, which begs the question – if the Property is so well suited for the Condominium why does the Application blow the current zoning requirements out of the water? The enormity of the Condominium stands in stark contrast to the surrounding single-family residences that are a maximum of 2 ½ stories tall whereas the Condominium will be comprised of 24 residences and will be ***five*** stories tall – dwarfing the surrounding homes.

The Resolution attempts to rationalize that the Application is particularly suitable to the Property by concluding it is suitable relative to the pre-existing Belmar Inn, which is an illegal consideration as addressed at length above. (Ja 352-353). This flawed reasoning is later furthered by the trial court. (Ja 278) ("In finding the Property particularly suitable, Board observed that the Property

has historically been utilized for an intense purpose and, as such, is suited for 'much less intense condominium use'"). As stated by Matthews' professional planner:

> The applicant clearly has not shown that this is particularly suited, because they can't even fit standard sized parking spaces on the property. You can't have a 25-foot buffer. You have to put your open space on the roof on the fourth floor when it's supposed to be on the ground. You crowd the neighbors. While the applicant, who I applaud the applicant for having solar panels on the roof, at the same time, he's blocking the neighbor's solar panels. Nice guy, puts on solar panels, you don't necessarily applaud someone for having a building that's five stories or four stories and panels and blocking the light that's supposed to have some protection from the neighbor.

(T4 114:23-115:12). Applicant cannot and has not shown that the Condominiums are particularly suited to the Property.

B. <u>The Positive And Negative Criteria Have Not Been Met.</u>

In addition to the particularly suitable standard, positive and negative criteria must also be shown by the Applicant. *See* N.J.S.A. 40:55D-70(d). The positive criteria articulated by the Board are based on the purported benefits of what the Condominium is replacing, rather than the benefits the Condominium will be producing itself, which is impermissible. (Ja 372-380). The positive criteria or special reasons take its definition from the purposes of zoning set forth in the MLUL:

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;

b. To secure safety from fire, flood, panic and other natural and man-made disasters;

c. To provide adequate light, air and open space;

d. To ensure that the development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities, the county and the State as a whole;

e. To promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment;

f. To encourage the appropriate and efficient expenditure of public funds by the coordination of public development with land use policies;

g. To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens;

h. To encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes which result in congestion or blight;

i. To promote a desirable visual environment through creative development techniques and good civic design and arrangement;

j. To promote the conservation of historic sites and districts, open space, energy resources and valuable natural resources in the State and to prevent urban sprawl and degradation of the environment

> through improper use of land;
>
> k. To encourage planned unit developments which incorporate the best features of design and relate the type, design and layout of residential, commercial, industrial and recreational development to the particular site;
>
> l. To encourage senior citizen community housing construction;
>
> m. To encourage coordination of the various public and private procedures and activities shaping land development with a view of lessening the cost of such development and to the more efficient use of land;
>
> n. To promote utilization of renewable energy resources; and
>
> o. To promote the maximum practicable recovery and recycling of recyclable materials from municipal solid waste through the use of planning practices designed to incorporate the State Recycling Plan goals and to complement municipal recycling programs.

N.J.S.A.40:55-D-2.

While the Resolution did mention each factor, as referenced by the trial court, it predicated its reasoning that the Application meets subsections (a), (b), (e), (g), (h), (i), and (m) of the MLUL ***exclusively*** on the proposed removal of the Belmar Inn. (Ja 372-380). By way of example, which is indicative of the Board's reasoning as to the body of the MLUL purposes, the first line to support subsection (a) "that the Application encourages 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", the Resolution states:

> ***As referenced quite extensively elsewhere herein***, the Board finds demolition of an intense, and pre-existing non-conforming 40-unit rooming House, the permanent abandonment of such a use, and the construction of a 24-Unit Condominium Development in its place, will, in fact, promote the general welfare.

(Ja 373) (emphasis added). Significantly, "the zoning purpose most often relied on to provide special reasons" relies on the impermissible criteria of what is being demolished – the Belmar Inn. *Burbridge*, 117 N.J. at 386. Notably, there is not a single reason in this first point of the Resolution as to why the Condominiums themselves promote section (a) of the MLUL purpose. It bears repeating that a conforming or even less intense application would of necessity replace and remove the Belmar Inn. Likewise, each of sections (b), (e), (g), (h), (i), and (m) rely on the purported benefits afforded by the demolition of the Belmar Inn. (Ja 372-380).

Aside from the Board's impermissible reasoning repeatedly citing to and relying upon the Belmar Inn as a basis for granting approval, the record demonstrates that there is not substantial evidence in the record to support other findings. For example, the Board's finding that the Condominium "provides adequate light, air, and open space" is meritless when considered in light of testimony from adjacent lot owners that their solar panels will be negatively

affected because the Condominium will block sunlight from their roofs. (T6 129:16-21) (Art Ammermuller testified that "I paid $30,000.00 for solar panels in the rear building of my property. The shadow from this project will cover my panels from 2 p.m., reducing my production by 40 percent); (T5 152:11-25) (Bloom testified that the Condominiums will block his light and negatively affect his solar panels).

Further, the Condominium cannot possibly promote open space, or it would not be requesting a 173% FAR variance where 40% is permitted, a building coverage variance where 71.11% was proposed and only 20% is permitted, and large setback variances, among other immense variance relief. (Ja 455-456). In fact, the only open space in the proposed development is on the roof. (T4 104:20-105:4) (Steck testifying "[n]ow if you look at the property, there is virtually no place on the ground" meaning no yard, no place to socialize, play catch, etc.). Accordingly, the Board's conclusion that the Condominiums promote "adequate light, air, and open space" is arbitrary, capricious, and unreasonable.

In regard to MLUL purpose (e) – to promote the establishment of population densities- the Board's conclusion that the Condominiums "will significantly reduce the overall residential density" is incorrect. (Ja 376). Steck testified that "the density in terms of number of dwelling units as defined in the

ordinance is going up substantially" because the Belmar Inn's units are not dwelling units. (T4 103:17-104:4). Accordingly, the density is actually increasing and the Board's conclusion that the density is being reduced is incorrect. Moreover, the comparison of the Application's density to that of the Belmar Inn is a false and improper justification for such a finding.

The Board concluded that the MLUL purposes (n) and (j) "to promote utilization of renewable energy resources" and "promote conservation of valuable natural resources in the State" are met because solar panels and electric vehicle parking spaces are to be installed on the Property. (Ja 379-380). However, the ability to have electronic vehicle parking spaces and solar panels is not exclusive to the Condominium. Any permitted use constructed on the Property could also have solar panels and electronic vehicle parking spots installed. In fact, at least two of the surrounding properties, the Ammermuller and Bloom residences, have solar panels installed on their homes. (T5 152:11-25). As such, the existence of electric vehicle spaces and solar panels do not automatically merit granting a use variance when a permitted use would accomplish the same thing.

The positive criteria asserted in the Resolution are overwhelmingly based on the illegal comparator of the Belmar Inn, not the R-75, single family residential zone requirements. While the trial court was swayed by the length of the

Resolution, the extensive reasoning is predicated on removing the Belmar Inn, not its own merits. (Ja 281) ("The foregoing, beyond peradventure, that the Board's conclusions regarding the positive criteria were painstakingly recounted in the Resolution"). Indeed, although the Resolution is undoubtedly lengthy, it is critically flawed as it is based on an illegal binary choice which permeates the entirety of the Board's decision. As such, the positive criteria has not been met and the trial court's decision to uphold the Board's decision is arbitrary, capricious and unreasonable.

C. <u>The Negative Criteria Have Not Been Met.</u>

The trial court again adopts the Board's plainly erroneous reasoning as to how the negative criteria has been met. An applicant must show that the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance, or substantially impair the public good. *See Medici*, 107 N.J. at 6; *see also Com. for a Rickel Altern. v. City of Linden*, 111 N.J. 192, 202-203 (1988). The negative criteria must balance the positive and negative effects of a zoning application. *See e.g. Yahnel*, 79 N.J. Super. at 519. "If on adequate proofs the board without arbitrariness concludes that the harms, if any, are not substantial, and impliedly determines that the benefits preponderate, the variance stands." *Id.* at 519.

Contrary to the Board's belief that the objecting supporters are "of no material/legal importance to the Zoning Board Members", the public comments of such harm are instructive as to the effect of the proposed Condominiums on the surrounding neighborhood.[5] (Ja 421). The Matthews, in particular, voiced concerns of noise pollution due to the new parking lot with approximately 40 spaces, 12 balconies looking down into their home and yard, and light pollution. (T6 72:15-74:23, 78:1-13, 93:1-7). Additionally, Ammermuller testified that he will no longer be able to "hang out in [the] front yard or back yard" because of the numerous decks 12 feet from his home. (T6 129:16-130:12). Indeed, the balconies of the Condominiums will be a mere five feet from the neighbor's property lines that solely have views of the surrounding backyards and even into the neighbors' windows. (T4 40:5-15; T5 74:1-6, 78:21-25).

Aside from the Matthews and Ammermuller, many other members of the public raised similar concerns of noise, parking, and traffic. (T5 148:13-149:11). It is clear that the individuals who live in proximity to the Condominiums will suffer hardship by having a five story, 24-unit

[5] Notably, the members of the public that testified in support of the Applications reside nowhere near the proposed Condominiums. (T5 121:25-122:24, 157:17-160:22; T6 51:13-55:10).

Condominium, towering over their homes with balconies only feet away with views of nothing else but surrounding neighbor's bedrooms.

Additionally, the Applicant failed to show, and the Board did not properly consider, that the Condominiums disregards and frustrates the intent of the Borough's Master Plan. It is undisputed that the area is zoned as R-75 and the Application is seeking variances from R-75 requirements. (T3 15:13-17). R-75 permits single family residential homes. A five story, 24-unit condominium complex is akin to high-density residential uses exceeding seven dwellings per lot. There is nothing in the ordinances establishing the R-75 zone that would suggest the Borough intended for a condominium building to be permitted in a zone.

It is telling that the Master Plan is not mentioned once in the section of the Resolution where the Board addresses the negative criteria. (Ja 423-424). However, where the Resolution does address the Master Plan, it was stated that a goal of the Master Plan is to "preserve the character of the community" and to "promote/preserve the established residential character of the community." (Ja 380). The building of a five story, 24-unit Condominiums does not accomplish these goals as it is "so much taller than what is there today" and it contravenes the trend of the Master Plan to "encourage ***non***-multi-family residential use" as testified by Steck. (T4 100:20-23, 101:6-10) (emphasis added). For that matter,

Steck outright and unequivocally testified that "the strongest opinion is that the Applicant can't meet the negative criteria under the enhanced burden of proof" because of the "[p]rivacy of the neighbors, light, air, and open space, car exhausts, lights, activity on the roof, noise." (T4 115:13-25). There is simply no basis in logic or law that a five story, 24-unit Condominium complex, that eviscerates all zoning requirements, furthers the purpose of the Master Plan which seeks to preserve the residential character of the community.

Again, the trial court assumes the Board's improper reasoning that by eliminating the Belmar Inn, the public benefits. (Ja 282) ("removal of the Belmar Inn in favor of a less intense, more modern, residential complex with improved aesthetic appeal, modern construction, and myriad engineering enhancement designed to reduce flooding near the Atlantic Ocean is assuredly beneficial to the public good"). This further shows that the Application was granted and then upheld by the trial court based on what is removed instead of the merits of the Application, which *Degnan* forbids.

Indeed, variances have been denied on the basis of failing to meet the negative criteria for far less. *See Kinderkamack*, 421 N.J. Super. at 23 (holding that a residential property used solely for setback requirements for an adjacent use did not meet the negative criteria because the Master Plan sought to "preserve and enhance residential character" while such a variance would

"encroach upon a residential zone."); *see also Koslow, et al. v. Municipal Council of Tp. Of Wayne*, 52 N.J. 441, 449 (1968) (noted the negative criteria was not met because the use of a soil removal operation did not keep with the planned development of the area, and dust, erosion, and traffic problems would have an adverse effect on land values). Perhaps the greatest indication that the Application does not meet the negative criteria, i.e. that it will not be a substantial detriment to the zone plan, zoning ordinance, and public good, is the fact that the Application utterly eviscerates the criteria established by the Borough for the R-75 zone. As such, the Board's conclusion, adopted by the trial court, that the Application meets the negative criteria is not based upon substantial credible evidence, is arbitrary, capricious, and unreasonable and must be reversed.

D. The Positive and Negative Criteria Were Not Established And The FAR Variance Approval Should Have Been Reversed By The Trial Court.

FAR is defined as "the sum of the area of all floors of buildings or structures compared to the total area of the site." N.J.S.A. 40:55D-4. Variances from FAR controls can only be granted by boards of adjustments, but not planning boards because FAR variances can pose a greater threat to the zone plan and public good than other dimensional controls. *See Commercial Realty v. First Atlantic*, 122 N.J. 546, 561 (1991); *see also Randolph Town Ctr. v. Randolph Twp.*, 324

N.J. Super. 412, 415 (App. Div. 1999). FAR variances can only be brought as a "D" variance upon the showing of "special reasons" by showing that the site will accommodate the problems associated with a floor area larger than the permitted ordinance. *See Randolph Town Ctr.,* 324 N.J. Super. at 417. To obtain a FAR variance, it does not need to be shown that the site is particularly suited for more intensive development. *Id.* at 416-417.

Appellant notes that all of the arguments set forth above regarding the failure of the Applicant to satisfy the positive and negative criteria apply equally here. Like the proposed use variance, the Applicant sought a FAR variance that completely blows away the requirements of the R-75 Zone. The permitted FAR is 50% whereas the proposed FAR is 173%. (Ja 353). Even the Board acknowledges that this variance "represents a significant deviation." (Ja 353).

The trial court deferred to the Board's reasoning in the Resolution stating that "[t]he Board observed that the excess FAR can be accommodated by the additional parking provided on site, the self-contained nature of stormwater runoff, the reduced intensity of the proposed complex vis-à-vis the Property's existing, more intense use, and the appropriate placement of the proposed complex to maximize light and air on the neighboring properties." (Ja 283). Notably, the trial court again improperly bases its reasoning in the context of replacing the Belmar Inn instead of the R-75 standards.

In any event, the record does not support that light and air are maximized on the neighboring properties. The Board's finding that the Condominium "provides adequate light, air, and open space" is meritless when considered in light of testimony from adjacent lot owners that their solar panels will be negatively affected because the Condominiums will block sunlight from their roofs. (T6 129:16-21) (Art Ammermuller testified that "I paid $30,000.00 for solar panels in the rear building of my property. The shadow from this project will cover my panels from 2 p.m., reducing my production by 40 percent); (T5 152:11-25) (Bloom testified that the Condominiums will block his light and negatively affect his solar panels.) Accordingly, the trial court's decision to affirm the Board's decision is unsupported by the record and is counter to New Jersey law.

E. The Positive And Negative Criteria Were Not Established And As Such The Height Variance Should Have Been Denied.

"[A] height of a principal structure which exceeds by 10 feet or 10% the maximum height permitted in the district for a principal structure" is governed by a "D" variance. N.J.S.A. 40:55D-70d(6). The zoning board of adjustment has exclusive jurisdiction when a structure's height variance application exceeds the maximum height permitted by ten feet or 10%. *See e.g.*, *Shri Sai v. Township of Voorhees*, 406 N.J. Super. 497, 504 (App. Div. 2009). Special reasons for a

height variance may be established by demonstrating undue hardship, or that the additional height of the structure "would not offend any of the purposes of the [] height limitation." *See Grasso v. Borough of Spring Lake Heights,* 375 N.J. Super. 41, 52-53 (App. Div. 2004).

As mentioned above, the Condominium would not only be the highest building in the neighborhood, but also includes a roof deck for the residents to congregate, barbecue, socialize along with other activities, and significantly offends the purpose of the height requirement. The Property is located in a single-family residential zone and it follows that the height requirements are in accordance with same. (T4 95:13-96:5) (Steck testified that "[t]he character of the immediate area ranges from one and a half to two and a half stories with the exception of the three story components Belmar Inn"). As testified to by the surrounding lot owners, the height of the Condominium will result in new residents looking down directly into the surrounding residential homes and yards. (T5 72:1-2, 73:12-15, 73:16-74:15). The height variance, roof deck and all, aggravates the purpose of the zoned area and clearly offends the surrounding compliant properties. Accordingly, the trial court's conclusion that the "height is not out of character" is counter to the record before it. (Ja 284).

Accordingly, the Board's approval and the trial court's affirmation of the height variance is arbitrary, capricious, and unreasonable because it does not

address the proper legal standard and does not even attempt to justify that the height variance does not offend the purpose of the height requirement in the zoning ordinance.

III. The Board Improperly Granted The Bulk Variances Sought In The Application (Ja 285-286).

Insofar as any bulk variances were not subsumed by the use variance relief, the Board wholly fails to show why the Application meets the requisite bulk variance standards. In fact, the Board does not analyze the appropriate bulk variance requirements in conjunction with the sought after bulk variance relief at all. The MLUL established "c" variances based on subsection (c) of N.J.S.A. 40:55D-70:

> The board of adjustment shall have the power to:
>
> c. (1) Where: (a) by reason of exceptional narrowness, shallowness or shape of a specific piece of property, or (b) 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 structures lawfully existing thereon, the strict application of any regulation pursuant to article 8 of this act would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the developer of such property, grant, upon an application or an appeal relating to such property, a variance from such strict application of such regulation so as to relieve such difficulties or hardship[.]

> c. (2) [W]here in an application or appeal relating to a specific piece of property the purposes of this act or the purposes of the "Educational Facilities Construction and Financing Act" . . . would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment, grant a variance to allow departure from regulations pursuant to article 8 of this act[.]

N.J.S.A. 40:55D-70 (formatting modified for readability). "N.J.S.A. 40:55D-70(c)(1) permits a variance from a bulk or dimensional provision of a zoning ordinance, such as frontage, when, by reason of exceptional conditions of the property, strict application of a bulk or dimensional provision would present peculiar and exceptional practical difficulties or exceptional hardship to the applicant." *Ten Stary Dom Partnership v. Mauro*, 216 N.J. 16, 29 (2013). Exceptional circumstances include the particular circumstances of the property such as dimensions of the property or exceptional features, but does not include personal hardships specific to the property owner. *See id.* To receive a c(1) variance, it must also be shown that "the variance will not result in a substantial detriment to the public good or the zoning plan – the so-called negative criteria." *Nash v. Board of Adjustment*, 96 N.J. 97, 102 (1984).

"N.J.S.A. 40:55D-70(c)(2) permits a variance for a specific property, if the deviation from bulk or dimensional provisions of a zoning ordinance would

advance the purposes of the zoning plan and if the benefit derived from the deviation would substantially outweigh any detriment." *Ten Stary Dom Partnership*, 216 N.J. at 30 (2013). Positive criteria must show that "[t]he grant of approval must actually benefit the community in that it represents a better zoning alternative for the property." *Kaufmann v. Planning Bd. For Warren*, 110 N.J. 551, 563 (1988). "The focus of a c(2) case, then, will be not on the characteristics of the land that, in light of current zoning requirements, create a "hardship" on the owner warranting a *relaxation* of standards, but on the characteristics of the land that present an opportunity for *improved* zoning and planning that will benefit the community." *Id.* A c(2) variance must also show negative criteria – "proof that the variance would not result in substantial detriment to the public good or substantially impair the purpose of the zone plan." *Id.* at 565.

Where a use variance is sought and there are also bulk variances required for the project and the applicant proves special reasons for the use variance, those special reasons can also entitle the applicant to bulk variances to build in violation of the side yard, parking, and bulk restrictions. *See Kessler v. Bowker*, 174 N.J. Super. 478 (App. Div. 1979); *see also O'Donnell v. Koch*, 197 N.J. Super. 134 (App. Div. 1984). However, bulk requirements are not always subsumed by the grant of a use variance. *See O'Donnell*, 197 N.J. Super. at 145.

As set forth at length above, the Board relied on the comparator of the Belmar Inn when considering the Application instead of the correct context of the R-75 standards. For that reason alone, the positive and negative criteria analysis assumed by the trial court must be overturned. For a more substantive analysis of the positive and negative criteria, Appellants direct this Court to the arguments made above as the same reasoning equally applies here. (Ja285-286).

IV. Granting An Application For a 24-Unit Condominium In A Zone Permitting Single-Family Residences Constitutes Re-Zoning (Ja 276-277).

The power to adopt or amend a zoning ordinance is granted to the governing body. *See* N.J.S.A. 40:55D-62. "[T]he board is not free to grant variances from existing requirements just because it disagrees with those requirements." *Kaufmann*, 110 N.J. at 564. A zoning board cannot exceed its statutory powers by imposing its own view as to the most appropriate use for a particular portion of a municipality through a use variance. *See Township of North Brunswick v. Zoning Bd. of Adjustment of Tp. Of North Brunswick*, 378 N.J. Super. 485, 490 (App. Div. 2005). "The basic inquiry in each case must be whether the impact of the requested variance will be to substantially alter the character of the district as that character has been prescribed by the zoning ordinance." *Dover v. Board of Adjustment*, 158 N.J. Super. 401, 412-413 (App. Div. 1978). That inquiry requires analysis and evaluation of such factors as the size of the tract

itself; the size of the tract in relationship to the size and character both of the district in which it is located and the municipality as a whole; the number of parcels into which it is anticipated that the tract will be subdivided if subdivision is part of the plan, and the nature, degree and extent of the variation from district regulations which is sought. *Id. at 413.*

The Board's grant of the Application constitutes re-zoning as it is a complete and utter departure from a single-family residence, which is the only permitted use in the subject zone. The variances are completely out of character with the purposes set forth in the Master Plan, two of which are to "preserve the character of the community" and "preserve the residential character of the community." (Ja 380-381). The Board exceeded its jurisdiction by defying the zoning put in place by the legislature by allowing a 24-unit condominium complex where the permitted use is for a ***single***-family residence, not ***24-family*** residences.

The trial court focused its analysis on the size of the Property, but failed to so much as mention the effect of the Condominium on the character of the neighborhood. (Ja 277) ("The modest development here on a modest parcel pales in comparison"). While the size of the Property is not necessarily notable, the effect and extent of the variances granted is incredible and will undoubtedly change the character of the neighborhood. *See Dover v. Board of Adjustment,*

158 N.J. Super. at 413. Steck, who analyzed the ordinances, Master Plan and surrounding area, concluded that "…the deficiencies are so large one could argue this is really a legislative matter. Something this far afield from the zoning ordinance really ought to be done by the governing body and not by this Board because not only has this applicant not, in my opinion, satisfied his burden of proof, but this is so massive one could argue this is too great for this Board to grant variances for something this, of this size." (T4 120:7-20). It is clear that the magnitude in the variances granted by the Board will alter the single-family residential zone and as such constitutes re-zoning. *See Vidal v. Lisanti Foods, Inc.*, 292 N.J. Super. 555, 564 (App. Div. 1996) (held that a grant of a variance constituted a *de facto* rezoning because the applications alter the use of the zones at issue).

Although it is true that the Property is only .48 acres, a 5-story condominium that dwarfs the surrounding neighborhood of single-family residences changes the character of the neighborhood. The application even far exceeded the requirements of the MF-75 overlay requirements that were in place at the time so much so that the Respondents did not bring the application under that ordinance which sought to encourage multi-family development. Thus, the Board must not be permitted to exceed their jurisdiction and the trial court's affirmation of the granted variances must be overturned.

V. The Applicant Failed To Provide Adequate And Proper Notice To The Public In Accordance With The MLUL (Ja 263-265).

Notice must be given by the applicant, for most zoning and land use proceedings, at least 10 days prior to the date of the hearing to certain designated groups and people. *See* N.J.S.A. 40:55D-12. The notice "shall state the date, time and place of the hearing, the nature of the matters to be considered and, … an identification of the property proposed for development by street address, …. and the location and times at which any maps and documents for which approval is sought are available[.]" N.J.S.A. 40:55D-11. It is "plain that the purpose for notifying the public of the 'nature of the matters to be considered' is to ensure that members of the general public who may be affected by the nature and character of the proposed development are fairly apprised thereof so that they may make an informed determination as to whether they should participate in the hearing or, at the least, look more closely at the plans and other documents on file." *Pelmart of Lacey, Inc. v. Lacey Tp. Planning Bd.*, 295 N.J. Super. 234, 237-238 (App. Div. 1996). "[T]he critical element of such notice has consistently been found to be an accurate description of what the property will be used for under the application." *Id.* The service of statutory notice is a

jurisdictional requirement and noncompliance results in a board lacking the authority to act. *See Oliva v. City of Garfield*, 1 N.J. 184 (1948); *see also Brower Dev. v. Planning Bd.*, 255 N.J. Super. 262 (App. Div. 1992).

The trial court failed to address that the notice provided to the public is misleading. The notice provided to the public purposefully downplayed two of the most extreme conditions of the Application – the height and FAR. The height is listed as "1 Story Surface Parking with Three Story Living above" but does not represent the amenity deck as a fifth floor. As such, when the hearing began on July 27, 2021 – the only hearing that was noticed - the Condominium included five floors. (Ja 1116). It was only during that August 26, 2021 hearing ***after an objection from Matthews*** that the toilet rooms were removed from the roof. (Ja 306-309). Thus, the Board admits in its Resolution that the Condominium was a five-story building while the notice asserted it was a four-story building. Worse, the notice states that the Condominium is 42.5 feet high, but the highest point is actually 57.2 feet. (Ja 308). This is misleading to a layman who would reasonably think that the height of a building is measured from its highest point. *See Pelmart of Lacey, Inc.*, 295 N.J. Super. at 237-238.

Additionally, the notice does not include the garage when stated that the FAR variance sought is "173% (without garage)." (Ja 1116). By only providing the FAR variance sought without the parking garage, the Applicant avoids including

the eye popping 250% variance relief being sought. The purpose of giving notice was violated by failing to include that the FAR with the garage is 250% (77% greater than noticed) and that the Condominium was five stories, not four. Neither of these critical factors are addressed by the trial court which conclusively states that notice was sufficient. (Ja 263-265). Accordingly, the public notice misled the public, and the Board did not have the jurisdiction to continue the hearing. *See Oliva v. City of Garfield*, 1 N.J. 184 (1948).

CONCLUSION

Based on the foregoing, Plaintiffs submit that this Court must overturn the trial court's Order denying Matthews' order requesting that the Board's grant of the Application be overturned.

Dated: Ocean, New Jersey
March 20, 2023

Respectfully submitted,

ANSELL GRIMM & AARON, P.C.

/s/ Lawrence H. Shapiro
Lawrence H. Shapiro, Esq.

BRIAN MATTHEWS AND CECELIA MATTHEWS, Appellants, vs. EDELMAN INVESTMENTS GROUP, LLC, 108 12th AVENUE REDEVCO, LLC, RAINBOW HOSPITALITY, INC., AND THE ZONING BOARD OF ADJUSTMENT OF BELMAR, Respondents	:SUPERIOR COURT OF NEW JERSEY :APPELLATE DIVISION :DOCKET NO.: A-000953-23 : A-000977-23 : : CIVIL ACTION : :ON CONSOLIDATED APPEAL FROM: :SUPERIOR COURT OF THE NEW :JERSEY, MONMOUTH COUNTY, LAW :DIVISION : : : :DOCKET NO.: MON-L-889-23 :DOCKET NO.: MON-L-779-23 : : SAT BELOW: : :HON. GREGORY L. ACQUAVIVA, J.S.C. :
ART AMMERMULLER, STEVEN BLOOM AND LINDA BLOOM, Appellants, vs. EDELMAN INVESTMENTS GROUP, LLC, 108 12th AVENUE REDEVCO, LLC, RAINBOW HOSPITALITY, INC., AND THE ZONING BOARD OF ADJUSTMENT OF BELMAR, Respondents	: : : : : : : : : : : : : : : :

BRIEF ON BEHALF OF DEFENDANT / RESPONDENT BELMAR ZONING BOARD OF ADJUSTMENT

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On the Brief

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The Respondent Zoning Board incorporates the Appendix of the Appellants and that of the Respondent.

PRELIMINARY STATEMENT

The subject proposal constitutes / represents a better overall zoning alternative for the Borough of Belmar.

1. The Appellant's representatives submitted a Development Application to the Borough of Belmar, with respect to the property located at 108, 108 ½ , 112-114 Twelfth Avenue, Belmar, New Jersey (more formally identified as Block 110, Lots 12 & 13).

Ja 450 - 460

2. The subject property is located in the Borough's R-75 Zone.

Ja 290

3. The Respondent's representatives propose to effectuate the following:

   a. Consolidation of existing Lot 12 and existing Lot 13;
   b. Demolition of an existing Rooming House on Lot 12;
   c. Retirement / abandonment of the Rooming House License associated with existing Lot 12;
   d. Demolition of existing dwellings / structures on Lot 13;
   e. Construction of a 4-story building with 24 Condominium Units; and
   f. Installation of other site improvements.

Ja 450 – 460 / Ja 290

4. Such a proposal requires Preliminary and Final Site Plan Approval, Use Variance Approval, Floor Area Ratio Variance Approval, Height Variance Approval, and Bulk Variance Approval.

Ja 290

5. Pursuant to New Jersey Case Law, there are a number of different standards which apply to the specific Variance relief requested.

6. The Respondent Zoning Board properly identified the relevant Legal Standards and appropriately applied the facts to the Prevailing Legal Standards.

7. The Respondent Board Members extensively reviewed the matter (over 6 Public Hearings, spread over a 12-month period) in accordance with the aforesaid Legal Standards.

Ja 290

8. For the many detailed reasons set forth herein, and as otherwise set forth in the Respondent Board Resolution (including, the elimination of a pre-existing non-conforming Rooming House, the significant reduction in the intensity / density between the pre-existing non-conforming use and the proposed use, the belief that the site can accommodate the subject proposal, the approval of a use which represents a better overall zoning alternative, and the satisfaction of the positive / negative criteria), the Respondent Zoning Board found that the relevant Legal Standards were satisfied and, as a result, the subject Application was conditionally approved.

Ja 290

The Respondent Board Hearing Process was fair, thorough, detailed, and impartial.

1. As a review of the extensive Hearing transcripts will confirm, the Respondent Board Hearing Process was conducted in a fair, thorough, impartial, conscientious, dedicated, and quasi-judicial fashion, worthy of judicial affirmation.

Procedural History

1. The Applicant submitted a Development Application to the Borough of Belmar, with respect to the property located at 108, 108 ½ , and 112-114 Twelfth Avenue, Belmar, New Jersey (more formally identified as Block 110, Lots 12 & 13).

Ja 450 - 460

2. The Respondent's Development Application essentially sought approval to effectuate the following:

a. Consolidation of existing Lot 12 and existing Lot 13;
b. Demolition of an existing Rooming House on Lot 12;
c. Retirement / abandonment of the Rooming House License associated with existing Lot 12;
d. Demolition of existing dwellings / structures on Lot 13;
e. Construction of a 4-story building with 24 Condominium Units; and
f. Installation of other site improvements.

Ja 450 – 460 / Ja 290

3. Such a proposal requires Preliminary and Final Site Plan Approval, Use Variance Approval, Floor Area Ratio Variance Approval, Height Variance Approval, and Bulk Variance Approval.

Ja 450 / Ja 290

4. The Respondent Belmar Zoning Board of Adjustment conducted a number of Public Hearings on the following dates:

July 27, 2021 (T1);
August 26, 2021 (T2);
October 14, 2021 (T3);
February 24, 2022 (T4);
April 28, 2022 (T5); and
July 28, 2022 (T6). Ja 290

5. At the conclusion of the aforesaid Hearing Process, based upon the testimony and evidence presented, a majority of the Zoning Board Members voted to conditionally approve the subject Application (and the requested relief).

6T P 130-131

6. A memorializing Resolution was thereafter adopted on or about January 26, 2023.

Ja 290

7. One of the Appellants, (Ammermuller et al) thereafter filed a Complaint in Lieu of Prerogative Writs, appealing the Zoning Board Decision (to the Trial Court).

Ja 12 - 30

8. The Respondent Zoning Board filed an Answer to the Trial Court Complaint.

Ja 31 - 41

9. The second Appellant (Matthews, et al) thereafter filed a second Complaint in Lieu of Prerogative Writs, appealing the Zoning Board Decision (to the Trial Court).

Ja 51 – 67

10. The Trial Court consolidated the 2 Trial Court Cases.

Ja 253 - 255

11. The Trial Court Trial occurred before the Honorable Gregory Acquaviva, J.S.C.

12. After the Trial, in a written Opinion, dated on or about October 19, 2023, the Trial Court affirmed the Zoning Board Decision.

Ja 258 - 288

13. A Final Court Order was entered on or about October 19, 2023.

Ja 256 - 257

14. One of the Appellants thereafter filed the within Appeal to the Appellate Court.

Ja 1

15. The second Appellant thereafter filed the within Appeal to the Appellate Court

Ja 6

16. The two Appellate Court Complaints were essentially consolidated.

Ja 288

Table of Zoning Board Hearing Dates

STATEMENT OF FACTS

1. The Belmar Zoning Board of Adjustment is a duly organized Land Use Board, operating and existing in accordance with the Laws and Regulations of the State of New Jersey and the Borough of Belmar.

2. Representatives of Edelman Investment Group, LLC (the "Applicant"), submitted a Development Application to the Borough of Belmar.

Ja 450 - 460

3. The subject Development Application involved the properties located at 108, 108 ½, and 112-114 Twelfth Avenue, Belmar, NJ, more formally identified as Block 110, Lots 12 and 13 (R-75 Zone).

Ja 450 - 460

4. The 2 subject Lots, as aforesaid, are contiguous to each other.

5. The 2 contiguous Lots, as aforesaid, will be collectively identified as the "site", the "combined site", the "property" and / or the "combined properties".

6. Details pertaining to the 2 existing subject Lots include the following:

Block 110, Lot 12

Street Address:	112 – 114 Twelfth Avenue
Size:	14,000 SF
Existing Use:	Rooming House Use
Zoning classification:	Pre-existing non-conforming use
License status:	The Rooming House License is active.
Number of units in the Rooming House:	40
Occupancy capacity:	Approximately 80 persons plus staff
Structure construction date:	Upon information and belief, the Rooming House was constructed prior to 1940.
Number of off-street parking spaces:	Zero
Height:	41.5 ft.
Number of stories:	3 plus a basement which is ½ above ground

Block 110, Lot 13

Street Address:	108 – 108 ½ Twelfth Avenue
Size:	7,000 SF
Existing Use:	2-family home (front structure) and a single-family home (rear structure)
Zoning classification:	The 2 structures (with 3 overall dwelling units) existing on 1 Lot constitute a pre-existing non-conforming use.

Dwelling unit details:	Front structure: 2-family home (2 dwelling units) 8 overall bedrooms Rear structure: Single-family dwelling 3 overall bedrooms
Number of off-street parking spaces:	6
Zoning notes:	The testimony suggested that one or more of the three structures on the site have received so-called animal house violations (i.e., a violation or violations of Prevailing Municipal Quality of Life Regulations).

Ja 298-299

7. In conjunction with the submitted Application, the Applicant's representatives sought approval to effectuate the following:

- Consolidation of existing Lot 12 and existing Lot 13;
- Demolition of an existing Rooming House on Lot 12;
- Retirement / abandonment of Rooming House License associated with existing Lot 12;
- Demolition of existing dwellings / structures on Lot 13;
- Construction of a 4-story building with 24-condominium units; and
- Installation of other site improvements;

Ja 450 – 460 / Ja 290

8. Some of the specific details pertaining to the subject proposal include the following:

- The proposed condominium building will contain 4 stories.

- The proposed 4 stories will be utilized as follows:

  Level 1: Parking, Lobby, Elevator, and Trash / Recyclables
  Level 2: Residential Units
  Level 3: Residential Units
  Level 4: Residential Units

- There will be an active roof-top on the proposed building. The roof-top details include the following:

  a. Amenity Deck
  b. Elevator Room
  c. 2 stairwells
  d. Solar Panels (on the rear of the roof)
  e. Air conditioning Condensers (on the rear of roof)

- The proposed building, per Ordinance Definition / Classification, will have a height of 42.5 ft.

- The proposed condominiums will generally range in size from approximately 1,362 SF to approximately 1,439 SF.

- Each of the 24 condominiums will have 2 bedrooms

- The proposed materials include the following:

  - Traditional sand colored stucco building;
  - Soft white trim;
  - Brown metal roof;
  - Metal railings;
  - Chocolate doors and windows;

- As referenced above, each condominium unit will contain 2-bedrooms.

- The proposed condominium building will be fire-sprinklered, in accordance with Prevailing Regulations.

- While all individuals will be welcome in the condominium, and in that the same will not be officially restricted, it is anticipated that the units will be primarily marketed to young professionals, empty nesters, and the general public.

- It is anticipated that units will be sold – although, the renting of the units is an option. However, the Applicant's representatives indicated that to the extent any units are rented, the rental period will be for a minimum 1-year rental period.

- Other proposed site improvements include the following:

    - Installation of curbing;
    - Installation of driveways;
    - Installation of paver sidewalks;
    - Installation of underground utilities; and
    - Planting of landscaping.

Ja 299 - 301

9. The Application, as submitted, required Preliminary and Final Site Plan Approval, Use Variance Approval, Floor Area Ratio Variance Approval, Height Variance Approval, and Bulk Variance Approval.

Ja 450 / Ja 290

10. The Belmar Zoning Board of Adjustment is statutorily authorized to grant the requested relief.

11. Representatives of Edelman Investment Group, LLC, publicly noticed / advertised for the initial Zoning Board meeting (in accordance with the Prevailing Law / Custom).

Ja 913 - 946

12. During the Public Hearing process, the Applicant was represented by William J. Shipers, Jr., Esq. and David Lonski, Esq.

Ja 291

13. During the Public Hearing process, Objectors / Appellants Brian Mathews and Cecelia Mathews formally objected to the Development Application. The said Objectors (Brian Mathews and Cecelia Mathews) were represented by Rick Brodsky, Esq.

Ja 291

14. The Members of the Zoning Board heard an extensive amount of testimony from the Applicant's representatives, the Objectors' representatives, and the Public at large.

15. Specifically, the Defendant Zoning Board conducted Public Hearings which occurred on or about July 27, 2021, August 26, 2021, October 14, 2021, February 24, 2022, April 28, 2022, and July 28, 2022.

Ja 290

NOTE: As referenced in the Legal Briefs of other counsel, the Transcript references are as follows:

T1: July 27, 2021 Zoning Board Hearing
T2: August 26, 2021 Zoning Board Hearing
T3: October 14, 2021 Zoning Board Hearing
T4: February 24, 2022 Zoning Board Hearing
T5: April 28, 2022 Zoning Board Hearing
T6: July 28, 2022 Zoning Board Hearing

16. Throughout the Public Hearing process, sworn testimony, on behalf of the Board was presented by the following:

- Gerald Frieda, Board Engineer;
- Christine Bell, Borough Planner;
- Isabel Rodriguez, Assistant Borough Planner; and
- Ted Bianchi, Zoning Officer

Ja 297

17. During the Public Hearing process, approximately 46 Members of the Public asked questions and / or expressed opinions in favor of, and / or against the subject Application. (Additionally, some Members of the Public did not appear to expressly support or object to the Application.)

Ja 303 - 304

18. It is respectfully submitted that the subject Zoning Board Hearings were conducted in a fair, thorough, respectful, deliberate, and legally-sanctioned fashion.

19. The Public Hearings conducted by the Respondent Belmar Zoning Board were conducted in accordance with Prevailing Provisions of the New Jersey Municipal Land Use Law.

20. At the conclusion of the Public Hearing process, after debate and analysis of the testimony submitted regarding the proposal, and the impact of the proposal, the Respondent Zoning Board voted to conditionally approve the Application.

6T, P130-131

21. Six Zoning Board Members voted to approve the subject Application while 1 Zoning Board Member voted against the Application.

6T, P130 Line 23 – Page 131 Line 23

22. Per Prevailing New Jersey Municipal Land Use Law, a minimum of 5 affirmative vote "yes" votes were required to approve the subject Use Variance Application.

23. As referenced above, 6 affirmative "yes" votes were received and thus, the Application was approved.

6T, P130 Line 33 – Page 131 Line 23

24. A Memorializing Resolution (with associated index), containing approximately 156 pages, was thereafter adopted.

Ja 290 and Ja 446 - 449

25. The Resolution adopted by the Respondent Zoning Board carefully identified and memorialized the Board's lawful analysis of the Application, the testimony presented by the Applicant's representatives, the testimony presented by the Objectors' representatives, the testimony presented by the Members of the Public, and an overall analysis of the relief sought.

Ja 290

26. The Board's Resolution sufficiently detailed the Board Members' collective reasons for conditionally approving the Application.

Ja 290

27. The Boards' extensive Resolution of Conditional Approval carefully identified all, or substantially all, arguments made by the Applicant's representatives, the Objectors' representatives, and the Public at large, during the very extensive Public Hearing process.

28. The Decision of the Respondent Zoning Board was neither arbitrary, capricious, nor unreasonable.

29. Thereafter, Art Ammermuller, Linda Bloom, and Steven Bloom (who, upon information and belief were not formally represented during the Public Hearing process) filed a separate action in Lieu of Prerogative Writs (to the Trial Court), seeking to overturn the subject decision of the Defendant Zoning Board.

Ja 12 - 30

30. Subsequent thereto, Objectors Brian Mathews and Cecelia Mathews filed a second / independent action in Lieu of Prerogative Writs (to the Trial Court), seeking to overturn the subject decision of the Defendant Zoning Board.

Ja 51 - 67

31. Pursuant to a Consent Order, the 2 subject cases were consolidated into one Trial Court Action.

Ja 253 - 255

32. Trial in the matter, before the Superior Court, Law Division, occurred before the Honorable Gregory Acquaviva, J.S.C.

Ja 256

33. After the Trial, in a written Opinion, the Trial Court affirmed the decision of the Respondent Zoning Board of Adjustment.

Ja 255 - 258

34. A Final Court Order was entered on or about October 19, 2023.

Ja 256 - 257

35. The Appellants independently filed an appeal to the Appellate Court.

36. The 2 Appellate Court Cases were essentially consolidated.

LEGAL ARGUMENT

POINT 1

The actions of the Belmar Zoning Board were neither arbitrary, capricious, nor unreasonable; accordingly, the Board decision should be affirmed.

It is well settled that the function of the Court in reviewing a local development – related determination is not whether the Board could have properly granted the Applicant's request; it is whether the Board acted in an arbitrary, capricious, and/or unreasonable fashion in reviewing the same. Burbridge vs. Mine Hill Township, 117 N.J. 376, 385 (1990); Rowatti vs. Gonchar, 101 N.J. 46, 51-5T (1985); Kramer vs. Bd of Adjust., Sea Girt, 45 N.J. 268,296 (1965); Rexon vs. Board of Adjustment, Haddonfield, 10 N.J. 1, 7 (1952). That is, judicial review is intended to be a validation of a Board's action – not an opportunity for a Court to substitute its judgment for that of the Board. Rowatti vs. Gonchar, 101 N.J. 46

(1985). For, as was stated in Kaufmann vs. Planning Board for Warrant Township, 110 N.J. 551, 558 (1988);

> *(The Court has) not signaled a shift in emphasis from the traditional roles of courts in reviewing Planning or Zoning Board Applications… such land use decisions are entrusted to the sound discretion of the municipal board, which are to be guided by the positive and negative criteria set forth in the enabling statutes.*
>
> Id 110 N.J. at 558

As stated in a 1953 New Jersey Supreme Court decision, a trial court must view the actions of the Zoning Board as presumably correct. Rexon, 10 NJ 1, 7 (1952). Land Use Boards, and members thereof, because of their particular knowledge of a local town, must be afforded wide latitude in discretion in reviewing / approving applications. Tirpac vs. Borough of Point Pleasant Beach Bd of Adjustment and Borough of Point Pleasant Beach (L-002918-17), page 2 citing Ward vs. Scott 16 NJ 16, 23 (1954). The burden of proof lies with the challenging party – and the standard of review is based on whether the Board's decision can be found to be arbitrary, capricious, and/or unreasonable. Tirpac, citing Kramer. Through the Public Hearing process, through the Board's deliberative process, and through the detailed Board Resolution, the Board Members properly reviewed and analyzed the Application, and the impact approval of the same would have on the site, the neighborhood, and the Belmar community as a whole. It is respectfully submitted that for the reasons set forth herein, and for the reasons / Findings as set forth in the Resolution of Conditional Approval, sufficient testimony / evidence was

presented (during the public hearing process) to justify the requested Variance relief. As such, the Board approved the Application – and the Appellate Court should not disturb the Board decision (or Trial Court decision) in the said regard.

POINT 2

The Applicant's Public Notice was sufficient, and there is no basis to overturn the Board decision with respect to the said Notice.

During the Public Hearing process (i.e. after the first Public Hearing was concluded), a question was raised (by the Attorney for Brian Matthews and Cecelia Matthews) as to the sufficiency of the Notice provided by the Applicant's representatives. The Board and the Board Attorney squarely and promptly addressed the said issue and properly concluded that Notice was, in fact, sufficient. The Board Resolution extensively detailed the specific and pain-staking process the Board undertook in reviewing the Notice, and finding that the same was acceptable. Relevant excerpts from the Resolution include the following:

Notice

- *Under the New Jersey Municipal Land Use Law, an Applicant is required to provide notice in accordance with prevailing Statutory / Ordinance requirements.*
- *Essentially, the New Jersey Municipal Land Use Law requires Applicants to provide notice at least ten (10) days prior to the hearing date.*
- *Additionally, in conjunction therewith, the Applicant is required to serve notice on the individuals / entities identified on the Property Owner List prepared by the Borough's tax office (or an agent thereof).*
- *The Applicant's representatives publicly noticed in accordance with the aforesaid requirements.*

- *At the outset of the first public hearing on the matter (on or about July 27, 2021), the Board attorney inquired as to whether any individual / representative had any questions, comments, concerns, and/or objections relative to the sufficiency of the notice provided by the Applicant's representatives.*

- *No objections to the notice were presented by any Attorney at the July 27, 2021 Public Hearing*

- *In furtherance thereof, the notice was accepted by the Board / Board Attorney, and the Board Attorney publicly advised that the Zoning Board had jurisdiction over the matter.*

- *In furtherance of the above point, the Public Hearing process commenced.*

- *Approximately 4 hours of testimony were presented at the July 27, 2021 Public Hearing.*

- *Ultimately, the July 27, 2021 Public Hearing was carried to August 26, 2021.*

- *At the continued Public Hearing of August 26, 2021, and despite the lack of concerns expressed at the prior meeting, the Attorney for Objecting Matthews expressed several questions, comments, and concerns regarding the sufficiency of the notice.*

- *The objecting Attorney's concerns with regard to the notice included the following:*

    i. *There was a concern that the Applicant's notice referenced a 4-story building, with a proposed building height of 42.5 ft;*

    ii. *There was a concern (unverified) that despite the contents of the notice, the proposed building was a 5-story building, with an unverified height of 57.2 ft.;*

    iii. *There was a concern that a Setback Variance may not have been specifically referenced in the notice;*

iv. *There was a concern that the notice may have contained an erroneous piece of information;*

v. *There was a concern that the Applicant's notice was deliberately misleading;*

vi. *Per the objecting attorney, the alleged notice deficiencies only came to light immediately before the continued / adjourned Hearing, per the expressed concerns of the objecting Planner.*

- *The Objectors' attorney was allowed to publicly argue / advocate his thoughts in the said regard.*

- *The Applicant's attorney was also allowed to publicly respond to the aforesaid post-hearing commencement notice objections / complaints.*

- *The Applicant's Attorney indicated that the notice was not deficient or misleading.*

- *Thereafter, the Board Attorney inquired as to whether, out of an abundance of caution, the Applicant's Attorney was inclined to further adjourn the meeting to a new date, with an obligation to provide new notice.*

- *The Applicant's Attorney was not inclined to delay the Hearing process or re-notice.*

- *The Board Attorney publicly lamented as to the difficult position of the Land Use Board – in that approximately 4 hours of testimony had already been presented, and now, well into the Public Hearing process, a notice objection was officially entered into the Record.*

- *The said issue was further reviewed by the Board Members and/or the Board professionals.*

- *The Board attorney advised that the public notice aspect of the Application is very important – and, in fact, the Board Members were advised that if the notice is not sufficient, the Board has no jurisdiction to act. That is, the Board Members were made aware that if lawfully sufficient / timely notice was*

not presented, the Zoning Board would not even be in a position to hear / adjudicate the case.

- *The Board attorney also explained that the proposed purpose of the notice statute is so that individuals who received the notice can review the information, and determine if they have any questions regarding the Application, whether they want to review the Application in greater detail, whether they want to support the Application, and/or whether they want to oppose the Application.*

- *The Board attorney furthermore explained that, pursuant to prevailing case law and statute, the public notice is required to contain the following:*

    a. *The day / date / time of the hearing;*

    b. *The block / lot designation, and the street address (if such a street address exists);*

    c. *The nature of the matter to be considered; and*

    d. *The information as to when and where the plans are on file and can be reviewed by the public.*

- *The Board attorney explained that, in the opinion of the Board attorney, the notice provided was sufficient, and that the same satisfied prevailing requirements.*

- *The Board notes that the Applicant's proposed building is a 4-story building, as extensively reviewed / discussed during the Public Hearing process, and as furthermore confirmed, on the record, by the Borough Engineer.*

- *The Applicant's notice, describing the building as a 4-story building, was correct. (Parenthetically, during the Public Hearing process, the Applicant's representatives agreed to remove the toilet rooms from the roof-top, further evidencing / confirming the proposed building as a 4-story building.*

- *The Applicant's building height (per the Prevailing Borough Ordinance) is 42.5 ft., the height which was advertised in the Public Notice.*

- *Although the elevator shaft has a height of 57.2 ft., in accordance with the Prevailing Borough Ordinance, the Applicant's proposed building has a height of 42.5 ft., as referenced in the Applicant's notice.*

- *Based upon the testimony and evidence presented, the Applicant's notice was not intentionally or unintentionally misleading.*

- *The Board attorney advised that the Objectors' concerns, as aforesaid, did not void, nor otherwise compromise the publicly issued notice.*

- *The information in the Public Notice did not cause confusion amongst the Public.*

- *The issued public notice was not designed to cause confusion or angst, amongst the public.*

- *The Board attorney also explained that the notice provided (by the Applicant's representatives) was sufficient.*

- *The Board attorney also advised that the actual notice provided by the Applicant's representatives did not compromise the hearing process, or the Objectors' ability to participate in the hearing process.*

- *The Board attorney also publicly commented (and was appreciative of the fact) that notwithstanding the Objectors' concerns with the Applicant's notice, the Objectors (and their attorney) were physically present at the said meeting.*

- *Notwithstanding the aforesaid notice concerns, the Board attorney advised that the Objectors were present and prepared to listen / argue / debate the merits of the case.*

- *Notwithstanding the aforesaid notice concerns, the Board notes that significant members of the Public (who received notice of the application, or who otherwise were interested in the Application) were, in fact, present for the Board Hearings.*

- *The Applicant's notice was clearly sufficient to alert the many members of the public as to the nature of the proceedings.*

- *The Public Hearing process, consisting of 6 Public Hearings, spread out over a 1-year period, was heavily attended by many members of the public.*

- *The Applicant's notice was clearly sufficient, as 46 different members of the public expressed comments in connection with the Application (over the 6 Public Hearings).*

(Emphasis added)
Ja 813 – 946 and Ja 305 - 309
2T, P6 Line 17 – P21 Line 14

For the reasons set forth above, it is submitted at the Applicant's / Respondent's Notice was more than sufficient – and, the said Notice issue is not a basis for the Court to overturn the Board decision (or the Trial Court decision).

POINT 3

The Memorializing Resolution Sufficiently and Accurately reflected the Testimony / Evidence Presented and Findings of Fact / Conclusions of Law adopted by the Board.

A Municipal Court Decision must be founded within the statutory criteria and must be substantially grounded in competent evidence. Mere conclusionary language in a Resolution is contrary to the Requirement that the Board makes specific Findings of Fact based upon the evidence presented. Reinaver Realty Corp. vs. Paramus, 34 N.J. 404, 419 (1961); Medici vs. VPR Company, 107 N.J. 1 (1987). Additionally, as referenced in the Cox reference book (Section 28-5.1), Courts should not only review transcripts and exhibits from a Land Use Board meeting, but the Court should also give substantial weight to the Memorializing Resolution (Cox, citing Skully-Bozarth Post #1817 of the Veteran of Foreign Wars vs. Planning Board of the City of Burlington, 362 N.J. Super. 296, 311-312 (App.

Div. 2003); New York SMSA, L.P. vs. Bd. of Adjustment of Tp. of Weehawken, 370 N.J. Super. 319, 333-334 (App. Div. 2004).

In the within matter, and as more clearly referred to elsewhere herein, contrary to the allegations of Appellants, the Zoning Board authorized the preparation of, and the Respondent Zoning Board adopted, a detailed Resolution which fairly and accurately recited the testimony presented, and the Board's official review regarding the specific aspects of the subject Application. That is, the Board Resolution clearly identified all potential issues, the Board Findings relative to the same, and the bases for the Board Decision. As required by Law, the Resolution of Conditional Approval (memorializing the Board action) very appropriately analyzed the merits of the proposal, the merits of the objections, the balancing of the mitigating and aggravating factors associated with the subject Application, the impact the same would have on the community, and the Applicant's ability to successfully address the various applicable legal standards. As referenced / memorialized in the attached Resolution, the Board Members publicly discussed / debated / analyzed a number of very important factors / issues associated with the subject proposal, including, but not limited to, the following:

- The various Legal Standards;

Ja 310

- The credibility of the Applicant's representatives and the Objector representatives;

Ja 316 - 319

- Recognition of and, analysis of the competing / contradictory testimony presented by the various Applicant / Objector Professionals;

Ja 321 - 324

- The nature of the pre-existing non-conforming Rooming House Use;

Ja 324 - 330

- The nature of the proposed non-conforming use;
- The impact of the proposed non-conforming use will have on the community;
- A comparison of existing / proposed uses;

Ja 330 - 343

- The nature of the pre-existing non-conforming structure;
- The nature of the proposed structure;
- A comparison of the existing structure and the proposed structure;

Ja 343 - 344

- An overall parking analysis of the existing site and the proposed site;

Ja 344 - 352

- The particular suitability of the subject property;

Ja 352 - 353

- The nature and Legal Standards associated with the requested Floor Area Variance relief;

Ja 353 - 355

- The existing / proposed density;

Ja 355 - 358

- The density of other surrounding properties;

Ja 356 - 358

- The nature of the height relief associated with the proposal;

Ja 358 - 358

- The nature of the surrounding uses;

Ja 362 - 367

- The architectural / aesthetic benefits associated with approval of the Application;

Ja 367 - 372

- The nature / extent of the purposes of the New Jersey Municipal Land Use Law advanced by approval of the subject Application;

Ja 372 - 380

- The discussion regarding the goals and objectives of the Master Plan which would be advanced by approval of the Application;

Ja 380 - 381

- The nature of site accessibility improvements associated with the Application;

Ja 381 - 383

- Recognition that the Applicant's proposed economic benefits are not relevant in the context of a Zoning Board Application;

Ja 392 - 394

- The benefits / detriments associated with the requested Bulk Variance relief;

Ja 404 - 408

- Recognition that the fact that the subject property could possibly be developed as a permitted single-family use is not necessarily dispositive of the requested Variance relief;

Ja 414 - 415

- The nature / extent of mitigating conditions of approval;

Ja 418 - 420

- The nature of existing Construction Code / Building Code issues associated with the existing structure;

Ja 383

- Improved site circulation details associated with the proposal;

Ja 391 - 392

- Confirmation that despite the Applicant's request to the contrary, the Applicant was not entitled to any Multi-Family Cluster Zone density bonus;

Ja 394 - 395

- Recognition that approval of the subject Application does not constitute a re-zoning of the subject property;

Ja 415 - 418

- Recognition that the Applicant's proposal represents a better overall zoning alternative for the Borough of Belmar;

Ja 420 - 421

- Recognition of the absence of substantial detriment to the public good (associated with the subject Application);

Ja 423 - 424

- Recognition of the good-faith debate and analysis Board Members undertook in connection with the subject Application process;

Ja 426 - 431

- Recognition of the non-unanimous nature of the Board approval of the subject Application;

Ja 431

- Recognition of the quasi-judicial nature of the proceedings; and

Ja 433 – 436

- Recognition of the efforts of Boad representatives to ensure that the long and extensive Public Hearing process was effectuated in a thorough, impartial, and judicial-like setting.

Ja 433 - 436

Accordingly, the Respondent Zoning Board argues that the submitted Resolution is legally sufficient to a) justify the Board's conditional approval of the subject Application and b) withstand judicial scrutiny.

POINT 4

Economic benefit is not a basis for approval of a Variance Application – and, in the within situation, despite Appellants' claims to the contrary, the Board did not approve the Application based upon economic issues.

Throughout the Public Hearing process, at times, either the Applicant's representatives, or the Objecting representatives suggested, or seemed to suggest, that the idea for the 24-unit Condominium Development proposal may have been generated by economic interests. That is, at times, either the Applicant's representatives and / or the Objecting representatives suggested that the number of Units associated with the proposal was not necessarily driven by the size of the property, the shape of the property, or other site-related issues. Rather, at times, there was a suggestion that economic issues decided and shaped the general nature of the proposal, and the associated relief sought. There was extensive testimony, evidence, and arguments presented on the said issue. The Board Resolution succinctly identified

the nature of the discussion in great detail. Specifically, relevant excerpts from the Resolution include the following:

Economics

- *Throughout the public hearing process, at times, the Applicant's representatives, through direct testimony, or through cross-examination, suggested, or seemed to suggest, that the idea for the 24-Unit Condominium Development proposal (as approved herein) may have been generated by economic interests. That is, at times, the Applicant's representatives appeared to suggest that the number of units proposed was not necessarily driven by the size of the property, the shape of the property, or other site-related issues. Rather, at times, the Applicant's testimony suggested that the economics of the situation did not warrant any development, unless a minimum of 24 condominium units could be constructed at the site.*

- *The said testimony, or portions thereof, seemed to generate significant debate / discussion between the parties and their representatives.*

- *The Board Members can certainly understand the rationale for the Applicant's desire for the Zoning Board to consider economic arguments.*

- *However, the Board Members were, as a matter of law, reluctant to approve any Application because of economic-related arguments.*

- *The Board finds that, as a matter of law, approving an Application because of economic factors would establish a negative and troubling precedent.*

- *The Board finds that, as a matter of law, approving an Application because of economic factors would be legally untenable.*

- *The Board finds that approving an Application because of economic factors would likely lead to judicial criticism / critique (in the event of any litigation.)*

- *The Board finds that approval of an Application because of economic factors could be viewed (by a reviewing court) as arbitrary, capricious, and unreasonable.*

- *The Board is aware that, per New Jersey Law, no Applicant is entitled to have its / his / her property zoned, or developed, for the most profitable use.*

- *The Board herein is not approving the Application because of the Applicant's apparent economic need for a minimum of 24 units at the site. Rather, and importantly, the within Application is being approved because of all of the factors set forth herein, and because of the credible professional testimony associated therewith.*

- *If economic factors were considered as a basis for approving the within Application, then, in that event, similar economic arguments would also need to be considered as a basis to approve <u>all</u> other Applications (where economics is cited, or even referenced, as a basis of approval.)*

- *If economics factors were considered as a lawful basis for approving the within proposal, in analyzing applications, the Board would only need to consider the testimony of economists, as opposed to the traditional zoning testimony presented by planners, engineers, architects, and the like. The Belmar Zoning Board is not prepared / authorized to endorse such a flawed concept.*

- *The within Application has been approved, after much intense debate and discussion, because of the Applicant's ability to satisfy, to the satisfaction of a majority of the Board Members, the legal standards associated with the requested Variance relief.*

- *The Applicant's economic interests and economic motives, are <u>not</u> a relevant basis as to why the within Application has been approved.*

(Emphasis added)
Ja 392 - 394
6T Page 91 Line 6 - 22

As referenced above, the Board clearly found that the Applicant's economic motives are not, and cannot be, a relevant basis as to why an Application is approved. Moreover, the Board Members specifically found that economic issues were not the basis for the Board's conditional approval of the Application. As such, it is requested that the Appellate Court not disturb the sound decision of the Zoning Board / Trial Court.

POINT 5

Approval of the subject Application does not constitute a Re-Zoning.

During the Public Hearing process, some individuals opposed to the Application suggested that approval of the subject Application would, in fact, constitute an improper Re-Zoning of the subject property. Respectfully, the Defendant Zoning Board rejects such an argument. That notwithstanding, there was extensive testimony, evidence, and arguments presented on the said issue. The Board Resolution succinctly identified the nature of the discussion in great detail. Specifically, relevant excerpts from the Resolution include the following:

Potential – Re-Zoning

- *Throughout the Public Hearing Process, there was some questions / comments / concerns / inferences raised by some suggesting that the Board should not approve the within*

Application because, such an approval would, essentially, constitute an effective Re-Zoning of the property.

- *The Board recognizes that the said question is, in fact, a fair question.*

- *Towards that end, The Zoning Board representatives are guided by the information set forth in the New Jersey Zoning and Land Use Administration Book, as authored by William M. Cox (2018 Edition. Specifically, the said reference guide provided the following information / guidance on the topic:*

> *The basic inquiry in each case must be whether the impact of the requested Variance will be to substantially alter the character of the District as that character has been prescribed in the Zoning Ordinance. That inquiry requires analysis and evaluation of such factors as the size of the tract itself; the size of the tract in relationship to the size and character both of the District in which it is located and the Municipality as a whole; the number of parcels into which it is anticipated that the tract will be subdivided if so division is part of the plan, and the nature, degree, and extent of the variation from District Regulations which is sought. The test of whether the Board has been engaging in proscribed legislation must ultimately be one of both geographic and functional substantiality vis-à-vis the plan and the scheme of the Municipality's Zoning Ordinance.*
>
> *New Jersey Zoning and Land Use Administration, (2018 Edition), Page 611, Citing Tp. of Dover vs. Bd. of Adj. of Tp. Of Dover (Citations omitted)*

The Board analyzed the subject Application within the context of the above Guidelines.

- *Against the aforesaid backdrop (regarding the potential Re-Zoning issue), the Board notes the following:*

a) *The size of the tract itself;*

The Board notes that the development parcel only contains approximately 21,000 SF (14,000 SF for existing Lot 12 and 7,000 SF for existing Lot 13).

b) *The size of the tract in relationship to the size and character of the District in which the tract is located;*

The within Application only involves one 14,000 SF parcel and one 7,000 SF parcel within the Borough's R-75 Zone.

c) *The size of the tract in relationship to the size and character of the Municipality;*

The within Application only involves one .48 acre parcel within the entire town (for the subject to-be-consolidated 2 Lots)..

d) *The degree and extent to the variation from the Zoning Regulations being sought.*

While the Application does require Use / "d" Variance relief, the Board is cognizant that a) the 24-Unit Condominium Development approved herein represents a significantly less intense Use than currently exists and b) there are many other similar multi-family structures / uses in the vicinity and R-75 Zone.

Based upon the above, and based upon the other extensive testimony / evidence presented during the Public Hearing process, a majority of Board Members find that approval of the within Application does not constitute an impermissible Re-Zoning of the subject property.

- *In conjunction with the above, the Board finds that the conversion of the site from a non-conforming 40-Unit Rooming House use to a non-conforming 24-Unit Condominium Development use (as approved herein) will not so substantially*

> *alter the character of the District. As such, a majority of the Board finds that approval of the within Application does not constitute an impermissible Re-Zoning of the subject property. In fact, the majority of the Board finds that approval brings the parcel more into conformity with the Zoning District Requirements (over what currently exists).*
>
> Ja 415 - 418

For the foregoing reasons, the Zoning Board respectfully requests that the Court not disturb the Conditional Approval of the Belmar Zoning Board of Adjustment.

POINT 6

A Monmouth County Trial Court recently affirmed a Belmar Zoning Board of Adjustment Approval on a case with a very similar factual pattern to the facts set forth herein.

A Monmouth County Trial Court recently affirmed (and an Appellate Court upheld) a Belmar Zoning Board of Adjustment decision on a case involving a very similar factual / legal pattern to the facts set forth herein. Specifically, on or about May 29, 2019, the Belmar Zoning Board of Adjustment conditionally approved the Application of Down to Earth Construction, LLC with respect to the property located at 102 Second Avenue, Belmar, NJ (more formally identified as Block 10 Lot 1). In the said case, the Applicant's representatives sought Preliminary and Final Site Plan Approval, Use Variance Approval, Height Variance Approval, and Bulk Variance Approval to effectuate the following:

- Demolition of an existing 34-bedroom Rooming House; and

- Construction of a 6-unit Condominium project.

A memorializing Resolution was adopted on or about August 22, 2019. Thereafter, Objectors Joseph Puleo, Rita Puleo, and Joel Russell instituted a Lawsuit to overturn the aforesaid conditional approval. The said case was formally identified as Joseph Puleo, Rita Puleo, and Joel Russell vs. Zoning Board of Adjustment of the Borough of Belmar and Down to Earth Construction, LLC, Docket No. MON-L-3682-19 (Ea50-53). Counsel of record in the above case were as follows:

- Objectors: The Objectors were represented by Rick Brodsky, Esq. during the Public Hearing process and, were represented by Lawrence H. Shapiro, Esq. during the Trial Court Litigation.)
- Applicant: The Applicant was represented by William J. Shipers, Esq.
- Zoning Board: The Zoning Board was represented by the undersigned.

As referenced, Plaintiff Puleo Objectors instituted a Lawsuit to overturn the Board's Conditional Approval of the subject Application. Specifically, among other things, in the Puleo case, the Plaintiffs therein essentially also sought to have the Court overturn the Decision based upon claims which included, but were not necessarily limited to, the following:

- A claim that the Applicant's Notice was deficient;
- A claim that approval of the Application constituted improper spot zoning;

- A claim that the Board improperly relied on economic reasons as a basis for the approval;
- A claim that the Applicant's representatives did not meet the positive and negative criteria, as required by New Jersey Municipal Land Use Law; and
- A claim that the Board did not properly consider appropriate criteria in analyzing the subject case.

After a trial in the subject Puleo case, the Trial Court (Judge Grasso-Jones, J.S.C.) affirmed the Conditional Approval of the Belmar Zoning Board of Adjustment. The said Decision was ultimately affirmed by the Appellate Court (Appellate Court Docket No: A-002275-21) (Ea50-53). Though the facts of the 2 cases are similar, but not identical, and though the 2 Applications obviously involve 2 different pieces of property (both located in the Borough's R-75 Zone), it is respectfully submitted that the aforesaid Trial Court analysis (whether ultimately affirmed, reversed, or remanded on Appeal) provides additional persuasive reasons as to why the instant approval should be affirmed as well. Some of the relevant excerpts from the aforesaid Puleo Decision include the following:

> *…The Notice correctly identified the Application as seeking Variances to permit the construction of 6 residential condominiums. The Notice accurately described what the property was to be used for. The determination of the ZBA (Zoning Board Attorney) said Notice was legally acceptable, and the adoption of that determination by the ZBA, was correct, and no basis exists for disturbing the same.*
>
> Puleo vs. Belmar Zoning Board, et al, Page 9
> Trial Court Decision

... "Spot Zoning" is a concept generally applied to the Municipality's Determination as to how the parcel of land should be (Zoned) – the Zoning designation that should be assigned, which will govern the development of the property as to the Use to which the land will be put, absent the grant of a Use Variance. ... A review of the Evidence presented before the ZBA below indicates that the Decision of the ZBA to grant the Use Variance permitting the construction of the 6-Condominium project cannot be found to constitute "spot Zoning" through Variance Approval. By definition the granting of a Use Variance involves approval to an Applicant to develop a property for a Use other than as permitted in the Zone. Within 2 or so blocks surrounding the property in question there are many Condominium projects and Apartment Complexes with much higher density than was approved by the ZBA for the property in question. The Resolution adopted by the ZBA indicates that the Board concluded by elimination of the Pre-Existing Non-Conforming Use and developing a 6-unit Condominium project would be a better solution for the entire area; it would make the property compatible with surrounding uses. Plaintiffs' contention that the Decision of the ZBA constitutes "spot Zoning" is rejected.

Puleo vs. Belmar Zoning Board, et al, Pages 9-11
Trial Court Decision

... The Resolution adopted by the ZBA below is 108-pages long, single-spaced, on legal sized paper. The Resolution contains an extensive Table of Contents. The Court has reviewed the Resolution in its entirety. The Resolution is clearly not "conclusionary," it contains an exhaustive analysis of the Evidence presented and the ZBA's conclusions reached on Decision of the Application. The ZBA Decision cannot be said to be "arbitrary, capricious, and unreasonable" due to lack of factual basis or analysis in the Resolution.

Puleo vs. Belmar Zoning Board, et al, Page 12
Trial Court Decision

... as set forth in the Resolution the ZBA determined that the Hotel (or "Rooming House") Use was a Pre-Existing, Non-Conforming Use on the property. Hotel or "Rooming House" Use is not a permitted Use, and it is thus a prohibited Use under the Borough's Zoning Regulations. While the Hotel is not currently open for business, the Pre-Existing Non-Conforming Hotel use has not been abandoned by

the Owner of the property. The ZBA determined that the proposed 6-Townhouse Condo Units proposed for the site were "significantly more suitable / more compatible for the site than the existing 34-Unit Rooming House."

Puleo vs. Belmar Zoning Board, et al, Page13
Trial Court Decision

... approval of Down to Earth's proposed 6-Unit Condominium project and the associated demolition of the Hotel would result in abandonment of the Pre-Existing Non-Conforming Use. No one would in the future be able to operate a Hotel / Rooming House on the site, unless a new Use Variance were to be granted. The 34-Unit Hotel, (at or near occupancy), would result in more people staying in the site during the Summer Season than would be staying in the property in the 6-Condominium Units proposed. The Application provided for 12 on-site parking spaces, where 14 would be required under Belmar's Zoning Regulations, a 2-parking space deficiency. The current Hotel should provide 34-parking spaces under Belmar's Zoning Regulations, though the fact is that the property provides no on-site parking, thus resulting in a 34-parking space deficiency. The proposed 6-Unit Condominium project will provide a lower number of dwelling units on the site than the pre-existing Hotel Use, and thus results in a lower density than the pre-existing Hotel Use and will result in a lower impact on emergency services providers in the Borough.

Puleo vs. Belmar Zoning Board, et al, Page 13
Trial Court Decision

Plaintiffs contend that the ZBA should not have approved the Application, which exchanges a Pre-Existing, Non-Conforming Hotel Use to a Non-Conforming Multi-Family Condominium Use. Plaintiffs contend that the Applicants presented no Evidence, other than impermissible financial reasons, as to why the property could not be developed as a single-family home, which is permitted in the Zone. Plaintiffs thus contend that it was arbitrary, capricious, and unreasonable for the ZBA to approve the Application, which replaces one Non-Conforming Use for another, Non-Conforming Use. Puleo / Russell essentially contends that the appropriate comparator for the ZBA's analysis, when considering the Application for a Use Variance to develop 6-Condominium Units, was the single-family residential use permitted in the Zone, that is, that the ZBA needed to determine that

the property could not be developed as a single-family residence before granting a Use Variance for a 6-Condominium project. Puleo / Russell contend that the only Evidence presented that the property could not be developed as a single-family home (or perhaps 2 single-family homes if the property was subdivided, with Variances needed) was the sale price demanded by the Owner of the property. Puleo / Russell contend that the amount of money that the Seller wanted to receive for the property, even if supported by expert critical testimony at the Hearing, is not an appropriate factor for consideration by the ZBA, and that the Application should thus have been denied.

Down to Earth and the ZBA contend that the Evidence presented, as established in the Resolution adopted by the ZBA, show that while the proposed Use is a Non-Conforming Use, it is a better choice for the property than the current Hotel, and that the Applicant presented satisfactory Evidence with reference to both (the) positive and negative criteria. Defendants essentially contend that the appropriate comparator for the ZBA's analysis was not simply a single-family residential use permitted in the Zone, but rather, that because there was a Pre-Existing, Non-Conforming Hotel on the site, the ZBA could compare the proposed Condo project to the Pre-Existing, Non-Conforming Hotel Use The ZBA did not rely upon the sale price demanded by the Seller as the basis for finding that single-family residential use is not possible, because the ZBA did not use single-family residential use as the comparator. The argument made by Puleo / Russell that the purchase price of the property is an inappropriate factor to be considered by the ZBA need not be considered by this Court. The ZBA considered the proposed multi-family (6-Condominium Units) in comparison with the Pre-Existing Hotel Use, and the Court will consider whether this is a legally permissible analysis by the ZBA.

(Emphasis added)
Puleo vs. Belmar Zoning Board of Adjustment, et al
Pages 14-15
Trial Court Decision

There can be no question that the ZBA below provides substantial reasons in the Resolution granting the Application for its Decision. As noted above, Plaintiffs are essentially arguing that the ZBA was not using the correct comparator in reaching its Decision, and that the ZBA should have, but did not, compare the proposed

Condominium project to the permitted single-family use. Plaintiffs contend that because the ZBA did not perform that comparison, the Decision of the ZBA to grant the Application was arbitrary and capricious and must be reversed.

… A careful review of the ZBA Resolution indicates that unlike in Kramer in the present matter, the ZBA did not conclude that the property cannot be developed in accordance with the permitted single-family Residential Use. The ZBA did not conclude that the property in question is particularly suited for the proposed Condominium project, as compared to single-family Residential Use, because the cost of the property precluded single-family development. Rather, the ZBA determined that the property is particularly suited for the proposed Condominium project, as compared to Use of the 34-Room Hotel, the Pre-Existing Non-Conforming Use. The ZBA did not reach any conclusion in the Resolution as to whether the property could be developed in accordance with the permitted single-family Residential Use…

The New Jersey Supreme Court and Kramer rejected the argument that the proposed Use (in that matter, a Hotel, in the present matter, a 6-unit Condominium project) needed to be compared to the permitted Use (in that matter and in the present matter, single-family Residential). The Court noted that while the analysis has been proposed in the concurring Opinion in Grundlehner vs. Dangler, 29 NJ 256 (1959), it had not been adopted by the majority in that matter, or in subsequent Decisions. Guided by the Court in Kramer, this Court concludes that in the present matter the ZBA was not required to determine that the property in question could not be developed in accordance with the single-family Residential Zone in order to grant the Use Variance requested, allowing development of a multi-family 6-Unit Condominium project.

(Emphasis added)
Puleo vs. Belmar Zoning Board of Adjustment, et al
Pages 16-19
Trial Court Decision

The Court's review of the ZBA's Decision, and the reasons stated therefore, is to determine whether the ZBA's Decision, based upon a comparison of the proposed Use to the currently existing, Non-Conforming Use, was arbitrary, capricious, and unreasonable. The

> *Court cannot find that the ZBA's Decision to grant the Use and accompanying Variances were arbitrary, capricious, and unreasonable – the Resolution contained a more than ample factual basis for the ZBA's Decision. The Court cannot find that the determination of the ZBA below that the Applicant had met both the "positive" and "negative" criteria was arbitrary, capricious, and unreasonable, and the decision of the ZBA below is thus affirmed.*
>
> Puleo vs. Belmar Zoning Board of Adjustment, et al
> Page 21
> Trial Court Decision

Knowing that the Puleo Case and the within Case are similar, but not identical, and knowing that the 2 Cases obviously involve 2 different pieces of property (both located in the Borough's R-75 Zone), it is respectfully submitted that the aforesaid Trial Court / Appellate Court reasoning has a persuasive bearing on the within Case, and provides additional reasons as to why the instant Decision of the Belmar Zoning Board of Adjustment should be affirmed.

POINT 7

Respectfully, the Appellants' collective reliance on the Degnan Case is misplaced.

The Appellants' representatives cite, in detail, the Degnan et al vs. Monetti, Board of Adjustment of the Township of Berkeley, et al Case, 210 N.J. Super.174 (1986), as a basis as to why the subject decision of the Belmar Zoning Board of Adjustment should be reversed. Respectfully, Appellants' collective reliance on the said Case is misplaced. Moreover, the underlying principles of the Degnan Case actually underscore and highlight why the subject Decision of the Belmar Zoning Board of Adjustment should be affirmed.

The Degnan Case involved an Applicant's receipt of a Use Variance Approval to construct 18-Condominium Units on the site of an inoperable Sewerage Treatment Plant. (Per the referenced Case, the remaining structures on the subject Berkeley site included a brick building, a 10' X 12' X 14' concrete "degritter," and a 70' X 60' concrete sewerage tank.) Degnan, 210 N.J. Super at 177. The local Board of Adjustment approved the Application, and the Trial Court ultimately affirmed the same. In reversing and remanding the said Decision, the Degnan Appellate Court held the following:

> *In substance, though the Board set out 12 special reasons for granting the Variance, they are of 2 types. Firstly, the Board believed the project in itself would be desirable, a finding which seems to be independent of the present physical condition of the property. Secondly, by allowing the project to be built, the property would be cleared of the remains of the Sewer Plant.*
>
> *We deal initially with the first type of special reason. The Board thought that the project would be attractive, was appropriate for the site, would enjoy the unique vista of the Park, would supply Resort Recreation Housing and would conserve energy. While we do not question these conclusions, the difficulty with them is that there is no basis to conclude from the record that single-family homes would also not be appropriate for this desirable area. The fact that there is a need for Resort Recreational Housing can hardly justify the Variance, for if a Variance could be granted simply because of a supposed need for use, Zoning Ordinances would become meaningless. It seems clear to us that if there are special reasons for a Variance because of the nature of the use it should be because the use inherently serves the public good or welfare. ...While we do not suggest that the project would be undesirable, it hardly would be important to the public good or welfare. Further, the fact that the attached structures would be more energy efficient than single-family homes cannot be the basis for relief as that would always be the case.*

We recognize, of course, that as an economic matter, the record supports the conclusion that in consideration of Monetti's acquisition cost, single-family dwellings are not practical for the premises. But aside from the general reluctance of the Courts to consider economics in reviewing Applications for Special Reasons Use Variances (citations omitted), there are particular reasons why such factors should not be considered here. Monetti acquired the property with the intention of seeking a Variance for Condominiums. A major cost factor in any development of the property is clearly the cost of acquiring the property and removing the remains of the Plant. Monetti finds himself in an unfortunate economic situation because he voluntarily put himself there. In sort, we see no reason why he should be aided in extricating himself from what may not have been a wise purchase by being granted a Variance. We are particularly emphatic on the point because it is clear beyond doubt that the property is highly desirable and, except for the cost of purchase, would be a suitable site for single-family development.

We have, of course, not lost sight of the circumstances that the Sewerage Authority set a minimum price of $275,000.00 for the property. We conclude, however, that this fact is not germane. Certainly neither Monetti nor anyone else was compelled to acquire the property at that or any price, If Monetti believes the price was too high to allow development of the property in accordance with the Zoning, he simply should not have purchased it. Had no Purchaser met the Authority's price, it would have been encouraged to reconsider the minimum price. In any event the Authority by its setting of a price could not compel the Board to grant a Variance.

As we indicated, a second basic reason for granting the Variance relief is not what will be built but rather what will be removed. But in the circumstances of this Case we do not regard removal of the Sewerage Facilities, desirable as that may be, as a special reason for granting the Variance, for there is no question but that development of the property in accordance with the Zoning Ordinance would have exactly the same remedial consequence. Further, as there are no impediments to constructing single-family dwellings on the property except for the cost of acquiring and clearing the land, a factor we will not consider, the positive goal of removing the structure should be attained in accordance with the Ordinance…

> *Overall, notwithstanding the deference which we pay to the decision of the Board, we find no basis to sustain its actions or the Judgment in the Trial Court dismissing the Case.*
>
> Degnan, 210 N.J. Super at 183-186

There are many, many factors which appropriately and unequivocally distinguish the Degnan facts / legal analysis from the facts and legal circumstances of the within Case. Some of the aforesaid impactful / disqualifying / limiting / clarifying / distinguishing factors include the following:

a. While the Degnan site contained old deteriorating structures for an abandoned inoperative Sewerage Treatment Plant Use (Degnan 210 N.J. Super at 177), the subject Belmar Inn Rooming House Use is an active / non-abandoned use.

b. The New Jersey Municipal Land Use Law is quite clear that in order for a pre-existing non-conforming use to be abandoned, there must be an intent to abandon and some overt physical act in furtherance of such an intent to abandon.

c. With an abandonment of the prior Sewerage Treatment Plant Use in the Degnan scenario, such a non-conforming Sewerage Treatment Plant Use could not be resurrected at the Berkeley site, absent a further / formal grant of a Use Variance by the Berkeley Township Zoning Board of Adjustment.

d. With an active / current Use / License intact, the pre-existing Rooming House Use (at the Belmar Inn site) can continue, indefinitely, until any potential official abandonment

e. The continued and on-going existence of an active / current / non-abandoned Rooming House Use / License at the Belmar Inn site dramatically, substantively, and definitively changes the nature of the overall legal analysis / applicability of the Degnan case.

f. The Degnan Court rightfully stands for the position that a developer cannot seek assistance from a Zoning Board to bail

> one out of an "unfortunate economic situation" or from a transaction which might not have been a "wise purchase."
>
> Degnan 210 N.J. Super at 184

In the Belmar Inn situation, per the testimony and evidence presented, the Applicants herein (or Agents thereof) are Contract Purchasers of the subject property, presumably contingent upon receipt of necessary Land Use Approvals. Importantly, the Zoning Board's conditional approval of the Belmar Inn Application was not in any way designed / intended to provide the Applicants' representative with a successful exit ramp from any type of unfavorable real estate transaction.

g. The Degnan Court clearly references a number of economic and cost factors on which the underlying Board of Adjustment presumably relied in granting the Use Variance Application.

> Degnan 210 N.J. Super at 184

In the within situation, to the best of the knowledge, information, and belief of the undersigned, there were no meaningful / significant discussions in the record regarding the Contract price for either Lot, financing terms, closing dates, etc.

h. The Degnan Court specifically held that "but, in the circumstances of this Case," we do not regard removal of the Sewerage Facilities, desirable as that may be, as a special reason for granting the Variance, for there is no question that the development of the property in accordance with the Zoning Ordinances will have exactly the same remedial consequence.

> Degnan 210 N.J. Super at 185 (emphasis added)

Respectfully, the circumstances of the within Belmar Inn Case are extraordinarily different from those set forth in the Degnan Case, particularly given the fact that the Belmar Inn has an existing / open / current / active Rooming House License. Respectfully, in the present circumstances of the Belmar Inn Case, as a condition of the approval, the existing Rooming House Use / License will be officially abandoned, and the same is a legitimate and relevant reason (in addition to the many other reasons set forth during the Public Hearing process) helping to justify the Variance relief sought.

i. As referenced elsewhere herein, in the Case entitled Puleo, et. al. vs. Belmar Zoning Board / Down to Earth Docket No. MON-L-3682-19 (Ea50-53), in a Case with a very similar fact pattern as herein, a Monmouth County Trial Court Judge specifically held that the abandonment of an active Rooming House Use was, in fact, a legitimate basis for the Board to consider in approving a Use Variance Application.

j. The Degnan Court clearly and unequivocally recognized the Court's general reluctance "to consider economics" in a Use Variance Application. Degnan 210 N.J. Super at 184
In the Belmar Inn Case, and despite the repeated arguments of the Appellants' representatives to the contrary, the Belmar Zoning Board of Adjustment did not in any way, shape, or form rely on economic reasons as a basis for granting the Use Variance relief. Specifically, during the Public Hearing process, the Board Attorney publicly cautioned the Board as follows:

> *...So, there was some testimony regarding economic interests, about what's good economically, and what makes sense economically, and certainly we can understand that that's important for the Applicants, but I would respectfully suggest that the way New Jersey law has been interpreted, in my opinion, economic factors should not be a basis as to why you're approving an Application. You can approve the Application for a number of reasons and we've gone over that, but, respectfully, economic reasons have typically been critically reviewed from any judicial reviewing Court, if there is ever litigation, and I will respectfully suggest that the, a reviewing Court would consider any decision based on economic factors... to be basically (ripe) for (it) to be (declared) arbitrary and capricious or unreasonable.*
>
> 6T Page 91 Line 6 -22

> Additionally, as set forth in the Resolution (Ja392-394), the Board clearly and unambiguously recognized and held that economics is not, and cannot be, a basis for the granting of Variance relief.

k. At the conclusion of the Degnan Opinion, the Court stated "overall, notwithstanding the deference which we pay to the Decision of the Board, we find no basis to sustain its action or the Judgment in the Trial Court in dismissing this Case.
Degnan 210 N.J. Super at 186 (emphasis added)

> In the within situation, the Belmar Zoning Board of Adjustment has identified many, many reasons in support of the conditional grant of the Use Variance. Specifically, as referenced elsewhere herein, and as referenced in the Board's Resolution of Approval, the Board relied on many factors justifying the requested relief. The Court is directed to the memorializing Resolution of Conditional Approval.

As a result of the above, the Belmar Zoning Board respectfully submits that its Conditional Approval of the subject Application is in no way inconsistent with the holdings / guiding principles of the Degnan Case.

POINT 8
The Trial Court properly analyzed the overall merits of the Plaintiff / Appellant Appeal – and there is no reason to disturb the Trial Court decision.

It is respectfully submitted that the Trial Court properly and thoroughly reviewed all aspects of the Plaintiff / Appellant case, as well as all aspects of the Defendant / Respondent position. The arguments presented herein were soundly and definitively reviewed by the Trial Court. In its concluding affirmation, the Trial Court held as follows:

At bottom, the Board's 156-page Resolution was exhaustive. As recounted above: (1) the notice provided was sufficient; (2) the Board did not engage in impermissible zoning; and (3) its factual findings were amply supported by the record and exhaustively recapped in the comprehensive Resolution.

Could reasonable minds differ on the Board's conclusions? Of course, as demonstrated by the Board's split vote. But, on this point, this court must be mindful of its limited role: judicial review is intended to be a determination of the validity of the Board's action, not substitution of the court's judgment thereof. CBS Outdoor v. Lebanon Plan. Bd., *414 N.J. Super. 563, 578 (App. Div. 2010);* Rocky Hill Citizens for Responsible Growth v. Planning Bd. Of Rocky Hill, *406 N.J. Super. 384, 411-412 (App. Div. 2009).*

This court does not sit as an uber-Board member to supplant its judgment or preference for that of the Board which, like all local land use bodies, is "comprised of local citizens who are far more familiar with the municipality's characteristics and interests and therefore [are] uniquely equipped to resolve such controversies." First Montclair Partner, L.P. v. Herod Redevelopment I, L.L.C., *381 N.J. Super. 298, 302 (App. Div. 2005).*

In discussing the judiciary's role – both at the trial and appellate level – Judge Conford eloquently notes in Galdieri v. Board of Adjustments*:*

> *The members of the Board of adjustment and the Judge of the Law Division found this to be a close case, and so do we. A contrary determination by the board might well have withstood legal attack. But these observations only serve to emphasize the fact that the law reposes a large degree of discretion in a board of adjustment either to grant or deny relief.*

Those precepts set forth decades ago apply with equal force today. Accordingly, in view of the substantial deference owed the Board, this court cannot conclude that Plaintiffs bore their heavy burden of demonstrating the Board's presumptively valid decision was not supported by substantial evidence, such that it was arbitrary,

capricious, or unreasonable, nor was the decision contrary to law. Plaintiffs' prayers for relief must be rejected.

Ja 256

Respectfully, the applicable standard of review provides that the Appellate Court should not modify / reverse the Trial Court decision, unless the same is arbitrary, capricious, or unreasonable. The Trial Court decision, and the reasons / bases justifying the same were, respectfully, well-founded, appropriately cited, and well-documented. As such, the Respondent Zoning Board submits that there is no basis to disturb the underlying Trial Court Opinion.

POINT 9

The Land Use Board Action is Entitled to Presumption of Validity.

An Action of a Municipal Board is presumably correct, and the burden of proof is upon the parties challenging the Action of the Board. Weiner vs. Board of Adjustment of Glassboro, 144 N.J. Super. 509, 516 (App. Div. 1976) Cert. Denied, 73 N.J. 55 (1977). In that local officials are presumed to be "thoroughly familiar" with the characteristics of the subject community, Board decisions are generally cloaked with the presumption of validity. (Ward vs. Scott, 16 N.J. 23 (1954); Pullen vs. South Plainfield Planning Board, 291 N.J. Super. 303, 312 (Law Div. 1995), Aff'd, 291 N.J. Super. 1, 6 (App. Div. 1996). As succinctly stated in a recent Law Division case:

> *So long as there is substantial evidence to support it, the Court may not interfere with or overturn the decision of a municipal board. Even when doubt is entertained as to the wisdom of the Board's action, there can be no judicial declaration of invalidity absent a clear abuse of discretion by the Board.*
>
> New Brunswick Cellular Telephone Company
> 270 N.J. Super 122, 134 (Law Div. 1992)

In the within matter, as referenced in the detailed Resolution memorializing the Board's conditional approval, and as referenced in the extensive Hearing Transcripts, the Defendant Zoning Board conducted a very thorough analysis of the subject Application, and the associated / related issues. As explained herein, the Board extensively reviewed many aspects of the Application, in depth, and in no way acted in an arbitrary, capricious, and/or unreasonable manner. Thus, it is suggested that the thorough, complete, and legally sound analysis of the Zoning Board (and the Trial Court) should be entitled to a presumption of validity.

CONCLUSION

For the foregoing reasons, it is requested that the Appellate Court affirm the subject Trial Court decision and the subject Zoning Board decision.

Respectfully submitted,

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BRIAN MATTHEWS AND CECELIA MATTHEWS, Appellants, v. EDELMAN INVESTMENTS GROUP, LLC, 108 12TH AVENUE REDEVCO, LLC, RAINBOW HOSPITALITY, INC., and THE ZONING BOARD OF ADJUSTMENT OF BELMAR, Appellees.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000953-23 A-000977-23 On Consolidated Appeal from: SUPERIOR COURT OF NEW JERSEY, MONMOUTH COUNTY, LAW DIVISION Docket Nos.: MON-L-889-23 and MON-L-779-23 Sat below: Honorable Gregory L. Acquaviva, J.S.C.
ART AMMERMULLER, STEVEN BLOOM and LINDA BLOOM, Appellants, v. EDELMAN INVESTMENTS GROUP, LLC, 108 12TH AVENUE REDEVCO, LLC, RAINBOW HOSPITALITY, INC.,	

and THE ZONING BOARD OF ADJUSTMENT OF BELMAR,

Appellees.

REPLY BRIEF IN FURTHER SUPPORT OF APPELLANTS BRIAN MATTHEWS AND CECELIA MATTHEWS APPEAL OF THE TRIAL COURT'S OCTOBER 19, 2023 ORDER

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PRELIMINARY STATEMENT[1, 2]

The trial court's decision to uphold the Board's approval of the Application must be reversed as it is predicated on illegal considerations that are outright prohibited by binding New Jersey law. The reliance on illegal criteria resulted in the extraordinary grant of zoning relief, which could not have been reasonably granted if considered under the proper standards.

First, the binding precedent of *Degnan* expressly prohibits a board from relying on what is being removed as a special reason to allow a non-permitted use, when a permitted use would have exactly the same remedial result. Indeed, the Resolution mentions "rooming house" 371 times and "Condominium" 192 times demonstrating that the Board's approval was predicated overwhelmingly on the purported benefits of removing the Belmar Inn. In response to *Degnan*, the Respondents fail to identify any binding legal precedent that permits the Board's approval to stand. In fact, the only relevant law that the Respondents could muster is the ***unpublished*** *Puleo* decision. A decision which fails to discuss, analyze, or even mention *Degnan*. Moreover, Respondents double down in their briefs consistently asserting that the Board properly based its decision as to site suitability, positive and negative criteria, and floor area ratio in light of the existing Belmar Inn.

[1] Matthews does not concede any arguments that are not addressed herein, but instead relies on its arguments in the Matthews Appellate Brief ("AMb").
[2] Capitalized terms have the same meaning as in Matthews' Appellate Brief.

In reality there is not one piece of the approval granted for which the Board does not rely upon or justify its conclusion on the improper comparator, the Belmar Inn, a consideration prohibited by *Degnan*.

Second, the Condominium cannot be particularly suited to the Property as shown by the need for ***11*** variances required by the Application, including: doubling the height and exceeding the FAR by ***five times*** what is permitted, thus dwarfing the surrounding single-family residences. Indeed, aerials and pictures reflected in the record make it clear that the Condominium starkly contrasts the surrounding area and is not particularly suited to the Property. Respondents seek to hide this fact by raising the inapplicable MF-75 overlay zone which was not the ordinance provision under which they sought their approvals, a provision later rescinded by the governing body, and a provision that was substantially exceeded by the applicant anyway. As such, the Condominium cannot meet the required standard that the "use would serve the general welfare because the proposed site is particularly suitable for the proposed use", nor did the application satisfy the positive and negative criteria requiring reversal by this Court.

LEGAL ARGUMENT

I. The Board's Approval Is Illegally Predicated On Replacing The Existing Rooming House.

This Court must overturn the trial court's decision to uphold the Board's approval of the Application because it is based on analysis that is in contravention to binding New Jersey law. While boards are authorized to make determinations of law and specifically authorized to interpret zoning ordinances, these purely legal determinations are not entitled to presumptions of validity and are subject to de novo review by the Law Division. *See Piscitelli v. Garfield ZBA*, 237 N.J. 333, 350 (2019). The de novo standard of review also extends to the Appellate Division's review of the trial court's legal determinations. *Id.*

Here, the Board erred on a ***legal basis*** by failing to apply the binding precedent set forth in *Degnan* and the trial court misinterpreted and erroneously discounted *Degnan*, wherein the Appellate Division reversed the grant of a use variance because "not to what will be built but rather what will be removed" was a primary consideration. *Degnan v. Monetti*, 210 N.J. Super. 174, 185 (App. Div. 1986). Notably, there is no dispute that the Board analyzed, considered, and relied upon the history, status, and existence of the Belmar Inn in granting the approval. The Resolution is replete with references to the Belmar Inn which clearly was not only a consideration, but ***the*** justification for each aspect of the variance relief granted. Further, Respondents full-throatily acknowledge the critical aspect that the Belmar

Inn played in the application and approval in their briefs. In short, there is no escaping the fact that the existing use at the property, the Belmar Inn, was the focus of the proofs at the hearings and the Board's decision to grant the approvals. Thus, the gravamen of the issue before this Court is whether or not *Degnan* prohibits approvals based upon such proofs and considerations. Appellants assert it does.

This Court owes no deference to the Board or trial court in their consideration of patently illegal criteria. *See Piscitelli*, 237 N.J. at 350 (The Supreme Court reasoned that "[w]e review issues of law before a Zoning Board de novo, owing no deference to the interpretive conclusions of either the Zoning Board, the trial court, or the Appellate Division"). As such, the trial court's misinterpretation and the Board's failure to apply *Degnan* are reviewable de novo.

The *Degnan* case is directly on point and is not distinguishable in any meaningful way. Factually, the applicant sought a use variance to construct numerous condominium units on a tract that was zoned for single-family homes. *Degnan*, 210 N.J. Super. at 278-79. Also like this case, the existing use was a legal, non-conforming pre-existing use that the developer posited was undesirable – an inoperative sewerage operation plant. *Id.* During the zoning board hearing, the applicant elicited testimony from a real estate expert regarding the economic viability of the application and a benefit of the project would be the removal of the existing use – again identical to this case. *See id.* at 179. The planning board in

Degnan granted the application because "the record supported a finding that the construction and sale of single-family homes may not be feasible, thus throwing into doubt the question of whether without the variance the property could be developed" -*and the sewage plant removed*. *Id.* at 182.

Here, the Board's approvals must be reversed for the same reasons expressed in *Degnan* – (1) the Board considered what was being replaced, not the proposed development, and (2) the Board considered economic factors. *Degnan*, 210 N.J. Super. at 183-185. *Degnan* expressly prohibits the consideration of what is being removed, rather than what is being built, as a reason to grant a variance. *Id.* at 185 ("As we indicated, a second basic reason for granting the variance relates not to what will be built but rather what will be removed. But in the circumstances of this case, we do not regard removal of the sewerage facilities, desirable as that may be, as a special reason for granting the variance for there is no question but that development of the property in accordance with the zoning ordinance would have exactly the same remedial consequence"). Like in *Degnan*, the existing Belmar Inn could be replaced by a permitted single family residential use and accomplish the same purported benefits of replacing the Belmar Inn with 24 condominium units.

To the extent Respondents assert *Degnan* is distinguishable because there the non-conforming sewer plant was inoperable and here the Belmar Inn would continue to operate but for the approvals, this is a distinction without a difference. Either

way, the offending status of the property would be remediated upon approval of an application, even a fully conforming one. *See S & S Auto Sales, Inc. v. Zoning Bd. Of Adjustment for Borough of Stratford*, 373 N.J. Super. 603, 613 (App. Div. 2004) ("[a]bandonment of a nonconforming use terminates the right to its further use"); *see also Hay v. Board of Adjustment*, 37 N.J. Super. 461 (App. Div. 1955) ("Obviously … total destruction by design, as here, or by accident, should terminate the use"); (Ja 453); (Ja 304-305).

To deflect the Board's attention from this truth, the Applicant presented testimony and evidence that the Belmar Inn would exist forever if the Application was not granted because no other project would be financially viable and thus no developer would be able to afford to purchase and remove the Belmar Inn. The Board allowed this clearly impermissible evidence to be presented, over the objection of Appellants. (T2 51:23-54:4); *Degnan*, 210 N.J. Super. at 184 ("But quite aside from the general reluctance of courts to consider economics in reviewing applications for special reasons use variances [internal citations omitted], there are particular reasons why such factors should not be considered here"); *see also* Respondent Belmar Zoning Board of Adjustments Brief ("RBb") at 27 ("Economic benefit is not a basis for approval of a Variance Application…"). Thus, the Board found the Applicant's appraiser's, Lamicella, testimony regarding the financial feasibility of the Application relevant enough to consider despite its claims to the

contrary in the Resolution. Indeed, actions are louder than words and the Board attempting to place curative language in the Resolution rings hollow against its failure to prohibit Lamicella's illegal testimony in the first place. (RBb27-30). As in *Degnan*, financial reasons fueled the Application and the presentation of an illegal binary choice proffered by the Applicant of the Belmar Inn or the Condominium.

Adding insult to injury, the Applicant bolstered its testimony with witnesses who added nothing with regard to the application itself, but instead provided a history of alleged code violations, police interactions, and other sundry wrongs which occurred at the Belmar Inn. (T3 46:14-73:20; T3 74:11-82:25). Unfortunately, the Board heard, considered, and applied this evidence as support for the approvals granted. It is clear that *Degnan* prohibits the Board's consideration of removal of the Belmar Inn and the economic viability of the Application – both of which were illegally considered at length as evidenced by the record and Resolution.

The Applicant's reliance on the *Kramer* case, which is distinguishable from *Degnan* and the case at bar, is misplaced. Inexplicably, the Applicant asserts that Matthews ignores the *Kramer* decision when in reality Matthews distinguished *Kramer* at length. *See* Applicant's Respondents Brief ("RAb")[3] at 22; (AMb20-23). The critical distinguishing factor is that *Kramer* addresses ***the extension or***

[3] Matthews' reference to the Applicant's Brief shall also encompass the Redevco and Rainbow Respondent briefs as all three briefs are identical.

enlargement of a preexisting non-conforming use. *See Kramer v. Board of Adjustment*, 45 N.J. 268, 287 (1965). Indeed, in *Kramer*, the applicant sought to permit the construction of a hotel in a residential zone where a hotel already existed as a legal non-conforming use on that property. *Id.* at 274-75. Thus, the *Kramer* court analyzed the approval of a variance to "substantially extend or enlarge a preexisting nonconforming use." *See id.* at 291 (*quoting Grundlehner v. Dangler*, 29 N.J. 256, 274-75 (1959)). That was not the case in *Degnan* where a developer applied for a variance to construct 20 condominium units where an inoperative sewage plant was a pre-existing non-conforming use in a single residential zone. Importantly, there was no finding that the use of an inoperative sewage plant was abandoned prior to the application to construct the condominium units. Thus, the pre-existing non-conforming use of the sewage plant would only be abandoned if the applicant's variance was granted. Exactly like *Degnan*, Applicant is seeking to abandon the current pre-existing non-conforming use of the Belmar Inn and adjacent homes in order to build a 24-unit condominium building. As this is not a situation where the non-conforming pre-existing use is being enlarged, *Kramer* is inapplicable especially in comparison to the uncanny similarities in *Degnan*.

Moreover, the *Degnan* court was undoubtedly aware of the *Kramer* decision as it was cited in *Degnan*, but not for the proposition at issue. *See Degnan*, 210 N.J. Super. at 182 (cited for the proposition that a board should

analyze special reasons as a whole when determining whether they accomplish zoning objectives). Thus, it is clear that the *Degnan* court made a determination distinct from the holding in *Kramer*.

Indeed, while the trial court noted the critical distinctions between *Degnan* and *Kramer*, it brushed them aside asserting a new theory of law allowing binding precedent to be ignored, a "jurisprudential cul de sac". While it is true that *Degnan* has not been cited in any subsequent published opinion, that does not make it any less binding. In fact, one possible reason for lack of citation is because boards do what the Board here failed to do, adhere to *Degnan* and not consider and rely upon an existing use as a justification to approve a proposed use. (AMb22-23). Accordingly, *Kramer* and *Degnan* stand for separate and parallel precedents, both of which are binding. The trial court's disposal and misinterpretation of *Degnan* must be overturned and *Degnan* must be applied requiring reversal of the Board's approval of the Application.

To the chagrin of the Board and Applicant, *Degnan* is the only binding precedent contained in the record on this issue, a point amplified by the Respondents' complete and utter failure to cite any binding precedent which contradicts *Degnan*. In desperation, Respondents claim that the unpublished *Puleo, et al. v. Zoning Board of Adjustment of the Borough of Belmar, et al.*, 2023 N.J. Super. Unpub. LEXIS 1685 (App. Div. Oct. 6, 2023) decision and an inapplicable

case, *Price v. Himej*, 214 N.J. 263 (2013), support their position. (Ea 50-53). They are wrong.

As acknowledged by the trial court, *Price* contains no legal analysis whatsoever contravening or even addressing the binding precedent that a variance cannot be granted based on what the proposed structure is replacing. Indeed, the sole quote relied on by the Applicant is contained in the recitation of the factual background of the case. *See id.* at 275. Specifically, the quote referenced by the Applicant is one of nine itemized considerations at the ***hearing stage***. *Id*. After merely listing this consideration of the zoning board, the Court does not so much as mention this consideration for the balance of the decision. *See id.* Simply, *Price* does not address the issue. Instead, *Price* was decided on two narrow grounds: (1) whether an application for a use variance based upon a property being particularly suitable requires proof that the site is the only one available for the use and (2) whether the Appellate Division had properly exercised its original jurisdiction in deciding issues related to bulk variances. 214 N.J. at 269. Even the trial court questioned the applicability of the *Price* case during trial and did not substantively cite it in its decision – further evidencing its inapplicability here. (T7 34:23 – 35:6) (In regard to *Price* the Court questioned its applicability stating "on that case you're citing to procedural history and trying to bring that in on substance. Where in the substance do they talk about this issue as opposed to paragraph 8 in the procedural

history where they're quoting ad nauseam the underlying resolution? Is that even … in front of the Court this issue in *Price?*").

The Defendants' only other ***legal*** dispute to *Degnan* is the unpublished *Puleo* decision. (RBb33-40); (RAb24-25). Notwithstanding that *Puleo* is unpublished and thus cannot be precedential, Defendants thrust it forward as if it overcomes the binding precedent of *Degnan*. It of course does not and as even acknowledged by the trial court is not germane here. (Ja 278) ("Neither the trial court's nor the Appellate Division's unpublished opinions are binding and, thus, are not germane here").

In addition to the lack of precedential posture, the *Puleo* Appellate decision fails to address the legal issue here as it does not so much as mentioned *Degnan*. Additionally, "each case must be decided strictly on the basis of the facts adduced at the hearing," which does not include the circumstances of the *Puleo* case that are distinct from this case. *Kramer*, 45 N.J. at 280, 284. For example, the applicant sought to construct six townhomes in *Puleo*, whereas a 24-unit condominium was applied for in this case. (Ea 051). Further, the character of the neighborhoods are starkly different as the property in *Puleo* is surrounded by "many condominium projects and apartment complexes," whereas the Property at bar is surrounded solely by single-family residences. (Ea 051). Accordingly, the *Puleo* case has no bearing here as it is not legal precedent and the evidence presented as well as the facts differ

significantly from this case.

Finally, the *Puleo* decision noticeably avoids *Degnan* providing no analysis one way or the other as to why *Degnan* applies or not. Conversely, here the significance of *Degnan* to this case cannot be stressed enough and is squarely before this Court as the Resolution and approval are extensively predicated on the type of analysis expressly prohibited by *Degnan*. Indeed, the Board's analysis of the positive and negative criteria was entirely based on a binary choice between the Belmar Inn and the Application. By way of example that is characteristic of the entire Resolution, the Resolution's analysis of the "Goals and Objectives of the Master Plan" – a central consideration in meeting the negative criteria - is predicated almost entirely upon the demolition of the Belmar Inn. Indeed, the demolition of the Belmar Inn is central to four out of five of the substantive bullet points in this section. (Ja 380-81). This is just one example demonstrating that the demolition of the Belmar Inn was the Board's primary consideration when granting the Application, evidencing that the Board unlawfully weighed the replacement of the Belmar Inn as opposed to considering the Application on its merits when applied to the existing Zoning Ordinance. In short, the Board's improper consideration of the removal of the Belmar Inn is so intertwined in its reasoning and decision that adding another 100 pages to the Resolution could not cleanse the Board's unlawful decision.

II. The Variance Relief Cannot Be Particularly Suitable To The Property.

In order to grant the Application, the Applicant must show that the site is particularly suited for the variances sought, which Defendants cannot do when considering the sheer enormity of variance relief requested in the Application among a neighborhood of and zoned for ***single-family residences***. "[P]articularly suitable means that the 'general welfare is served because the use is peculiarly fitted to the particular location for which the variance is sought.'" *Price*, 214 N.J. at 287 (quoting *Kohl v. Fair Lawn*, 50 N.J. 268, 279 (1967)).

Respondents and the trial court attempt to gloss over the prodigious variance relief by comparing it to the Belmar Inn. As addressed at length above, comparing the sought relief to the pre-existing non-conforming use, which will be abandoned if any application were to be granted, is expressly prohibited by New Jersey law. Thus, the Respondents' and trial court's reasoning that the Application is particularly suitable based upon removal of the existing use is improper and cannot be considered. (RAb 21) ("[T]he property is particularly suited to a multi-family development of a 24-Unit Condominium Development as it removes a more intense, pre-existing, non-conforming 40-unit rooming House.."); (Ja 352-53); (Ja 278) (The trial court found that "[i]n finding the Property particularly suitable, the Board

observed that the Property has been historically utilized for an intense purpose and, as such, is suited for 'much less intense condominium use'").

Likewise, the only other reasoning that the trial court or Respondents could muster is the mischaracterization that other multi-family developments exist in the area consistent with the multi-family overly zone ("MF-75)[4]. This is easily rebuffed by Applicant's own aerials entered as evidence at the Board hearing of the surrounding area showing unform residential homes, not five-story condominium buildings. (Ja 751-753). Additionally, pictures taken by Matthews that were entered into evidence at the Board hearing also demonstrate that a five-story, 24-unit condominium complex is not characteristic of the surrounding neighborhood and would dwarf the other residences. (Ja 1079-1082). Further, Applicant's statement that multi-family developments are specifically permitted is grossly self-serving and fails to acknowledge that the Application does not come close to meeting the MF-75 zoning requirements even if they were to apply. (Ja 770) (For example, MF-75 allows 14 townhomes whereas the Application is seeking 24 condominium units).[5] Accordingly, the Applicant's position, which was accepted by the Board and upheld by the trial court, must be reversed. The Application plainly cannot be particularly

[4] The MF-75 zoning requirements are irrelevant to the Application, which was made under the R-75 zoning requirements as evidenced by the Application and the Board hearing testimony. (Ja 450); (T4 15:14-17).

[5] The MF-75 zone was later repealed by the governing body evidencing the desire to avoid even this more limited multi-family development in the zone. (Ea 43)

suitable to the Property as it requires massive zoning relief and is starkly contrasted to the surrounding neighborhood.

CONCLUSION

Based on the foregoing, the Matthews submit that this Court must overturn the trial court's Order denying Matthews' order requesting that the Board's grant of the Application be overturned.

Dated: Ocean, New Jersey
May 3, 2024

Respectfully submitted,

ANSELL GRIMM & AARON, P.C.

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