ALLEN BERMAN; ANDREW SCHEFFER; JON BLATT; MATTHEW SCOBLE; and KATHERINE HARSCAR	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
Plaintiffs/Respondents,	:	Docket No.: A-001409-23 T1
vs.	:	CIVIL ACTION
BOROUGH OF RUMSON PLANNING BOARD; YELLOW BROOK PROPERTY CO., LLC	:	On Appeal From: Superior Court of New Jersey Law Division Monmouth County
Defendants/Appellants	:	Heard Below: Honorable Linda Grasso Jones, J.S.C.

BRIEF ON BEHALF OF PLAINTIFFS/APPELLANTS ALLEN BERMAN; ANDREW SCHEFFER; JON BLATT; MATTHEW SCOBLE; KATHERINE HARSCAR IN SUPPORT OF APPEAL

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Date of Submission: May 23, 2024

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STANDARD OF REVIEW ON APPEAL

The Appellate Court engages in a *de-novo* review of a trial court's opinion on a prerogative writ matter when making findings on a municipal board's interpretation of law. *See Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Twp. of Franklin,* 233 N.J. 546, 558 (2018). "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." *Chicalese v. Monroe Twp. Planning Bd.*, 334 N.J. Super. 413, 419 (Law Div. 2000) (*citations omitted)(quoting Jantausch v. Borough of Verona*, 41 N.J. Super. 89, 96 (Law Div. 1956). Board decisions on "purely legal" matters are to be reviewed de novo by a reviewing court and are not entitled to any particular deference. *Reich v. Borough of Fort Lee Bd. of Adjustment*, 414 N.J. Super. 483, 499 (App. Div. 2010); *see also 388 Route 22 Readington Realty Holdings, LLC v. Township of Readington,* 221 N.J. 318, 338 (2015). Under established rules of appellate review under *de novo*, the Appellate division is not bound and gives no deference to the legal conclusions of the lower court. *Toll Bros. Inc. v. Township of W. Windsor,* 173 NJ 502, 549 (2002).

PRELIMINARY STATEMENT

This matter involves plaintiffs' challenge to the defendant Borough of Rumson Planning Board's Resolution granting defendant Yellow Brook Property Co., LLC's application for Preliminary and Final Major Site Plan Approval to construct an inclusionary multifamily housing development consisting of fourteen (14) residential dwelling units in six (6) buildings on the property known as 91 Rumson Road in the Borough of Rumson.

The primary issue in this action is whether the defendant Borough of Rumson Planning Board incorrectly interpreted the Borough of Rumson Building Height Ordinance as to whether the proposed building height for any of the six (6) buildings in the subject development exceeds the allowable building height under the Ordinance requiring a d(6) use variance along with multiple bulk (c) variances before the Borough of Rumson Zoning Board.

If the subject application required a d(6) use variance for building height for any of the six (6) buildings, that is, if the building height is greater than ten (10) feet or ten percent (10%) of what the Ordinance permits, then the Planning Board lacked jurisdiction to hear the subject Application since only the Borough of Rumson

Zoning Board has jurisdiction to decide a use variance for building height under *N.J.S.A.* 40:55D-70.d(6). In that case, the defendant Planning Board approval would be null and void requiring Yellow Brook to resubmit its entire application to the Borough of Rumson Zoning Board for Preliminary and Final Major Site Plan Approval along with variance relief under *N.J.S.A.* 40:55D-70.d(6), and *N.J.S.A.* 40:55D-70(c) for Building Height.

The Borough of Rumson's Building Height Ordinance defines in Section 22-2.4 Building Height to mean "the vertical dimension measured to the highest point of a building . . . from the lowest original lot grade or any revised lot grade shown on the Site Plan . . . . Such revised lot grade shall not include ***mounding, terracing, or other devices designed to allow increased building height***" (*emphasis added).

Plaintiffs contend that the proposed building height for this development will exceed the allowable building height under the Ordinance by more than 10% for two (2) of the six (6) buildings, thereby requiring a d(6) use variance pursuant to *N.J.S.A.* 40:55D-70d(6) since the applicant's revised lot grade includes "mounding, terracing, or other devices designed to allow increased building height." Thus, the Planning

Board had no jurisdiction of the application since building height is properly calculated by measuring from the lowest original lot grade to the top of a building.

However, the defendant Planning Board found that it had jurisdiction over the subject application since the applicant's revised lot grade did not include "mounding" designed to increase building height. As such, the Board's misinterpretation of the definition of the Building Height Ordinance incorrectly resulted in the Board finding that none of the proposed six (6) buildings in the development exceeded the Building Height Ordinance.

First, the trial court erred in its interpretation of the word "design" in the context of the Building Height Ordinance language "designed to allow increased building height." Second, the trial court failed to consider whether the revised lot grade was the result of "mounding, terracing, or other devices designed to allow increased building height" as stated in the Ordinance. Third, the trial court erred in adopting the Board professionals' legal definition of the Ordinance under the "arbitrary, capricious, and unreasonable" standard.

PROCEDURAL HISTORY

On April 21, 2022, plaintiffs Allen Berman, Andrew Scheffer, Jon Blatt, Matthew Scoble, and Katherine Harscar filed a Complaint in Lieu of Prerogative Writs against the defendants Borough of Rumson Planning Board and Yellow Brook Property Co., LLC. *(Pa17-23).* On May 2, 2022, defendant Borough of Rumson Planning Board filed an Answer to plaintiffs' Complaint in Lieu of Prerogative Writs. *(Pa24-31).* On May 5, 2022, defendant Yellow Brook Property Co., LLC filed an Answer to plaintiffs' Complaint in Lieu of Prerogative Writ. *(Pa32-39).*

On June 23, 2023, the parties appeared for trial before the Honorable Linda Grasso Jones, J.S.C. of the Monmouth County Superior Court. On November 29, 2023, Judge Grasso Jones, J.S.C. entered an Order affirming the Planning Board Resolution of Approval which granted the defendant Yellow Brook's application for preliminary and Final Major Site Plan Approval. (*Pa1-2*). The Court issued a written opinion in conjunction with its Order. *(Pa3-16).*

STATEMENT OF FACTS

On February 3, 2021, the defendant Yellow Brook Property Co., LLC

(hereinafter referred to as the "Yellow Brook") submitted an application to the defendant Borough of Rumson Planning Board (hereinafter referred to as the "Board") for the property designated on the Borough of Rumson Tax Map as Block 124, Lot 31, commonly referred to as 91 Rumson Road (hereinafter referred to as the "Property"). The property is located in the Rumson Road Housing Zone District (RR). *(Pa40-49)*.

The Applicant sought Preliminary and Final Major Site Plan Approval to demolish the Lauriston Park building, and construct a multi-family residential housing development consisting of fourteen (14) residential dwelling units located in six (6) buildings with access off of Osprey Lane and numerous site improvements to serve the development. *(Pa40-49)*. The Applicant did not request variance relief in connection with the Application.

Pursuant to the terms of a Settlement Agreement between the Borough of Rumson and the Applicant dated January 16, 2020, as part of the Borough's affordable housing compliance litigation in the matter entitled In Re Borough of Rumson, Docket No.: MON-L-2483-15, the Borough of Rumson adopted an

Ordinance to create a Residential Zone known as the Rumson Road Housing District (RR) to allow the applicant's multi-family housing development as a permitted use on the subject property. *(Pa50-54)*. The RR Ordinance permits the development of up to fourteen (14) residential dwelling units. *(Pa50-54)*. The RR Ordinance provides for a maximum building height for the triplex and carriage home dwellings to not exceed thirty-five (35) feet and two and a half (2½) stories, and a maximum building height for the stand-alone garage building to not exceed twenty-two (22) feet in height and one and a half (1½ stories). *(Pa50-54)*. The Settlement Agreement and RR Ordinance are both silent as to the elevations of the grade on the property.

The Applicant's site plan shows, among other things, the existing and proposed grading profiles and topography for the revised lot grade. *(Pa55-59)*. As shown on the site plan, the revised lot grade slopes upward from the street level on Osprey lane from an elevation of 13' to an elevation of over 18' as a result of fill proposed by the applicant. *(Pa55-59)*. The grading profile sheet shows the difference between the existing grade and proposed grade. *(Pa59)*.

Each of the six (6) proposed buildings themselves have a "house height" anywhere between 32.89 feet to 34.73 feet. However, as a result of the revised lot grade due to the mounding of the buildings, the added feet of elevation for each building from the original lot grade to the revised lot grade is as follows:

Building #1 – Total Elevation Increase – 5.63 feet

Building #2 – Total Elevation Increase – 4.83 feet

Building #3 – Total Elevation Increase – 2.37 feet

Building #4 – Total Elevation Increase – 4.60 feet

Building #5 – Total Elevation Increase – 0.77 feet

Building #6 – Total Elevation Increase – 2.37 feet

Thus, the proposed total height of each of the buildings when measured from the original grade to the top of the buildings are as follows:

Building #1 – Total Height – 40.36 feet - 15.3% over allowable height in Ordinance

Building #2 – Total Height – 39.56 feet – 13.0% over allowable height in Ordinance

Building #3 – Total Height – 35.26 feet – 0.7% over allowable height in Ordinance

Building #4 – Total Height – 37.49 feet – 7.1% over allowable height in Ordinance

Building #5 – Total Height – 35.50 feet - 1.4% over allowable height in Ordinance

Building #6 – Total Height – 37.1 feet – 6.0% under allowable height in Ordinance

Please also see the table attached to the Appendix as to the building heights of each building. The added elevations below were never challenged by the defendants. (*See Pa188*).

The table shows that all the buildings, when measured from the original grade requires a Building Height Use Variance with Buildings #1 and #2 under *N.J.S.A.* 40:55D–70(d)(6), and a Building Height Bulk Variance for the remaining Buildings #3 - #6 under *N.J.S.A.* 40:55D–70(c).

The Borough of Rumson's Building Height Ordinance calculates in Section 22-2.4 Building Height to mean" the vertical dimension measured to the highest point of a building from the lowest original lot grade or any revised lot grade shown on the Site Plan. . . Such revised lot grade shall not include **mounding, terracing, or other devices designed to allow increased building height** (the "Ordinance") *(emphasis added)". (Pa60-62).*

The Borough of Rumson's Building Height Ordinance for the RR Zone is a maximum of thirty-five (35) feet. *(Pa50-54)*. The height of any buildings in the subject development greater than 10% above the maximum building height would require a d(6) use variance which can only be heard before the Borough of Rumson Zoning Board pursuant to *N.J.S.A.* 40:55D–70(d)(6). However, Yellow Brook only filed an application to the Planning Board for Preliminary and Final Site Plan Approval without seeking any variances. *(Pa40-49)*.

The Applicant, through its attorney, and on notice to all affected property owners (re-noticed due to jurisdictional issues) appeared before the Board for public hearings on November 8, 2021, December 20, 2021, January 10, 2022, and February 7, 2022. *(Pa88-187)*.

Plaintiffs are all within 200 feet of the subject property, and adjacent to the subject property on the neighboring streets, Tuxedo Road and Osprey Lane. Plaintiffs are located in the R-1 Residential Zone which surrounds the newly created RR Zone.

At one of the Board hearings (which all were conducted virtually), several of

the current plaintiffs, who objected to Yellow Brook's application, submitted a letter to the Board which was read into the record as follows:

> The site plan for 91 Rumson Road does not adhere to the Settlement Agreement. The site plan call for significant increases in grade elevation of the roadway accessing Osprey Lane, the roadway between buildings 1 through 4 and builders 1, 2 and 3. One, buildings 1 and 2: Elevations between the development roadway and the east side of the buildings will be raised between 4.9 feet and 1.7 feet depending on location, including 3.3 feet to 4.23 feet at the east walkway for these buildings fronting Osprey Lane . . . The Osprey Lane Elevation rendering below clearly does not contemplate the significant elevation increases included in the Yellow Brook's proposed site plan for the 91 Rumson Road property. The significant increase to elevations proposed by Yellow Brook for the property were not agreed to by the Borough of Rumson when it signed the Settlement Agreement as seen below. Section 4.1 of the Settlement Agreement states that, "Nothing herein shall preclude the Developer from seeking reasonable bulk variances, waivers or de minimus exceptions as part of the development applications." That said, the site plan elevations are not de minimus nor are they consistent with the scale and intensity referenced by Section E of Exhibit D to the Settlement Agreement. They are not reasonable to the residents in the immediate vicinity of this project and should not be approved.

(*Pa*127;70:23-25–71:1-7; 72:9-25).

The record below also contains various letters from objectors, including the plaintiffs, addressing the issue of building height. On December 20, 2021, the current plaintiffs Allen Berman and Andrew Scheffer corresponded with the Board arguing that the site plan for 91 Rumson Road does not adhere to the Settlement

Agreement since it calls for significant increases in the grade elevation for the roadway accessing Osprey Lane, specifically, buildings 1, 2 and 4. *(Pa63-66).* Plaintiffs state in their letter that the elevations of the mounding on the revised grade being raised up to approximately 5 feet in height from the roadway are elevation differences that were not agreed to by the Borough of Rumson when it signed the Settlement Agreement. *(Pa63-66).* The letter further states as follows:

> The grading and drainage plan for the preliminary and final major site plan document indicates the elevations of the two triplexes along Osprey Lane to be over 5 feet the curb line. Due to the number of buildings and the proposed development, the Applicant had to mound on the revised lot grade in order to accommodate stormwater management. This is evident with the detention basins in which there is limited room to accommodate the stormwater runoff. The result of the number of buildings and their proposed developments causes the Applicant to mound each of these buildings since there is less surface area to handle the stormwater management.

(Pa63-66).

In response to the objectors at the hearing, now plaintiffs in this matter, Brian DeCina, the Applicant's engineer, testified according to his interpretation of the Borough of Rumson Building Height Ordinance, the height of the buildings in the proposed development are measured from the proposed finished grade at the corners of each of the buildings. (*Pa132*;92:4-6, 18-20). However, plaintiff Jon Blatt,

through his counsel, Ronald Gasiorowski, Esq., presented the testimony of an objecting engineer, Alexander Litwornia objecting to Mr. DeCina's interpretation of the Building Height Ordinance. Mr. Litwornia testified as to his interpretation of building height as follows:

> The issue in that 35-feet is the code reveals that it is the function of the height over the surface level, the ground surface level at the time that exists prior to any regrading. Basically the height above the existing grade to the floor elevation of the new buildings varies from 4.9-feet to zero. So basically you have some buildings that are 4.9-feet higher than they were previously. Closest to Osprey Lane of 4.9-feet and 4.8-feet. Now, that means that according to the ordinance there may be a requirement. You're only allowed to go ten percent over the approved height which is approximately 35-feet which means you can't go more than ten percent before you get a variance. Ten percent would mean 3.5 feet. Now, since the building height is approximately the same as – well, it's approximately 35-feet. Ten percent of 35-feet is 3.5 feet. And since the buildings are 4.9 feet, 4.8 feet, 3.2 feet, 4-feet, there's a question whether you're going to need a variance for some of these buildings. Because first of all, it's over in excess of 10 percent of what the approved height should be when you measure against the ground elevation prior to any grading. Basically it's as if the buildings were put on pedestals to increase the height by 5-feet.
>
> *(Pa143*;20:5-25, 21:1-:12).

As such, Mr. Litwornia compared the mounding of the buildings to having the buildings being put on pedestals. Mr. Litwornia testified that the pedestals was caused by the applicant moving dirt onto the natural grade either by re-grading it or

bringing dirt in, but the affect was adding four (4) to five (5) feet to the building height. (*Pa144*;21:13-21). Mr. Litwornia opined that the pedestals that the applicant was using on the site was a device designed to allow increased building height. (*Pa144*;22:1-5). Mr. Litwornia further opined that a variance needed to be required for the building height based upon the pedestaling of the buildings. (*Pa144*;22:9-15).

Mr. Litwornia interpreted the Borough of Rumson Building Height Ordinance to include mounding, terracing or other devices which would increase the height. Mr. Litwornia testified that basic and overall grading would be the revised lot grading condition with the site plan. However, mounding would be putting dirt from one location whether it is for storing ground, storing earth and mounding it in one location in the elevations of different buildings prior to construction in order to get better views or to correct or change groundwater flows. (*Pa148*;40:3-12).

Mr. Litwornia opined that a lot of different reasons could exist why the builder would mound. Any area that is susceptible to flooding can have some mounding of the buildings prior to building. (*Pa148*;40:3-12). Thus, Mr. Litwornia concluded

that the mounding was designed by the applicant to increase the building height, thus, requiring building height to be measured from the original lot grade.

The applicant's engineer, Mr. DeCina, rebutted Mr. Litwornia's testimony by concluding that the increase in elevations of the buildings did not constitute mounding. Mr. DeCina testified that although the Ordinance does not have a definition of what constitutes mounding or terracing, his interpretation of the ordinance was that the buildings would have to basically put on pedestals standing up on legs being six separate mounds or six different pedestals in order to constitute mounding. (*Pa151*;52:4-17). Mr. DeCina further testified that if you looked at the grading he did not consider it mounding, but rather re-grading to accommodate the site features of the development to work in terms of stormwater management, sanitary, sewer and grading. (*Pa151*;52:17-20).

Mr. DeCina testified that the purpose of the proposed elevation would not enhance the views from the proposed home, but was simply a functionality of the site. (*Pa151*;52:21-25). Mr. DeCina opined that the moving of grade or moving of dirt by Yellow Brook is not designed to allow an increased building height for these

structures, thereby not violating the Building Height Ordinance. (*Pa152*;53:1-8). Mr. DeCina interpreted the ordinance as requiring the applicant to have intent to increase building height for these structures.

The Board Planning Consultant, Kendra Lelie, provided her interpretation at the hearing of whether the application increased building heights by way of mounding or terracing. Ms. Lelie testified as follows:

> I also want to point out as it relates to the ordinance and the Settlement Agreement – both of which I'm intimately familiar with and was part of the negotiation with the Applicant -- there are very clear exhibits with regards to the building height. And it comes from grade. I don't think it matters whether it's existing grade or future grade. We know that it met the building height.

(*Pa154*; 63: 8-15).

However, Ms. Lelie's statement was clearly incorrect as the Settlement Agreement and ordinance are completely silent on elevations as it related to Building Height. Thus, without any factual basis or documentary support, Ms. Lelie interpreted without any reasoning or analysis that the proposed development does not exceed the Borough of Rumson's Building Height Ordinance. (*Pa156*;69:9-14). Ms. Lelie simply stated that the applicant did not exceed the height requirements of the RR Zone under the Building Height Ordinance, but provided no explanation whatsoever.

(*Pa158*;77:10-24).

Ms. Lelie further found that Yellow Brook's proposed development did not raise the original grade for the purpose of raising the height of the buildings, but rather the grading was in association with the overall site plan layout which includes stormwater management amongst other features. (*Pa162*;91:4-10). Ms. Lelie found that Yellow Brook's proposed development did not have the "intent" to raise the grade to make the building's higher, but rather was due to changes relating to stormwater management. Ms. Lilie testified that she believed the Building Height Ordinance definition talks to "intent", and in particular, intent of the grading has nothing to do with increasing the building height specifically only for that reason. (*Pa161*;91:16-25).

Accordingly, Ms. Lelie interpretation of the meaning of the Building Height ordinance was what the "intent" or reason was for Yellow Brook to raise the original grade creating a revised lot grade. Ms. Lelie would not provide further explanation or clarification of the Building Height Ordinance at the hearing other than stating that she believes it is a conforming application and that none of the proposed

buildings in the subject development exceeds the allowable building height. (*Pa162*;93:11-14).

The Board attorney interpreted the Building Height ordinance by referring to whether "mounding" is used in order to increase building height. The Board agreed with Ms. Lelie's interpretation of the Building Height Ordinance stating that the revised lot grade was not for the purpose of raising the building heights, but rather required grading for stormwater management. The Board attorney stated that the Building Height Ordinance does not have a bright line for measuring height from existing grade such as five (5) or ten (10) feet. Rather, the Building Height Ordinance simply states that if mounding is used in order to increase building height that is not appropriate. (*Pa170,* 125:15-26-127:1-7).

An objector during public comment questioned the Board as to what is the process or guideline by the Board in which they can test and evaluate the "intent" of the builder on whether the mounding of the revised lot grade was made increase the building heights. (*Pa171*;130:25-131:1-14). The Board professionals could not provide any comment or answer to that question other than advising that the question

was already addressed by the Applicant's engineer and Board planner. (Pa171;131:19-23).

At the next hearing, the Board approved the application. However, several Board members requested that the applicant work with the Board engineer to allow for the possibility of lowering the site reducing the height of the buildings. (*Pa182*;32:15-25-33:1-11). In fact, one of the Board members stated that the applicant should attempt to broaden the stormwater management system to reduce the size of the "generically milk crate looking things to help reduce the grade", and called upon the applicant to work with the Board engineer to reduce the grade dimension. (*Pa183*;33:13-17). Other Board members also upon approving the application requested that the applicant and Board engineers work to lower the overall height of the stormwater management system. (*Pa183*;33:18-25; 34:36-37). The Board confirmed as a whole that they would like the applicant to look at the stormwater management plan to see if there is any way to reduce the building height. (*Pa186*;46:18-20).

On February 7, 2022, the Board voted to approval Yellow Brook's application

for Preliminary and Final Site Plan Approval. On March 7, 2022, the Board adopted and memorialized the Resolution of Approval. *(Pa67-87).* The Resolution in Paragraph 14 references the testimony of Mr. Litwornia who opined that the proposed building height for this development would exceed the allowable building height by more than 10%. As such, Mr. Litwornia concluded that a variance is required pursuant to N.J.S.A. 40:55D-70.d(6). *(Pa78).*

Mr. Litwornia opined that the building height should be measured from existing grade in this case and not from the revised lot grade showed in the applicant's site plan. The Resolution states that Mr. Litwornia opined that when height was measured from existing grade, several buildings would be more than 10% greater than the 35 ft. height allowed in the ordinance which only the Zoning Board of Adjustment has jurisdiction to hear the application. The Resolution states that Mr. Litwornia took the position that the Applicant's grading of the site and the revised lot grade constitutes mounding, terracing or other devises and characterized the grading plan as setting the buildings on pedestals. *(Pa78).*

The Resolution in Paragraph 15 cites the testimony of Yellow Brook's

engineer, Mr. DeCina who testified contrary to Mr. Litwornia's opinion that the grading plan was designed to maintain the required two-foot separation between the first floor of the buildings and the seasonal high water table. Mr. Decina opined that the re-design of the grading of the entire site was in order to meet the requirements of the State and municipal stormwater management regulations which require addressing the quality, quantity and re-charge of stormwater, and not designed in order to increase allowable building height. *(Pa78-79).*

The Resolution also in Paragraph 15 refers to the Borough Planning consultant, Ms. Lelie who testified that she agreed with Mr. Decina. Ms. Lelie opined that the ordinance allowed variations in grades. Ms. Lelie's testified that she agreed with Mr. Decina that the grading plan presented was meant to design the entire site to properly function as a whole and not designed to raise building heights. Ms. Lelie's testified that she agreed that the design will properly control stormwater management and the required separations between buildings first floor and the seasonal high water table. Ms. Lelie opined that the Ordinance intends to permit the measurements for building height from any revised lot grade shown on an

approve site plan and that Yellow Brook's plan meets those requirements. Ms. Lelie's rejected the assertion that grading plan was designed to allow increased building height and noted that there were no articulated reasons to do so on the property. *(Pa78-79).*

The Resolution in Paragraph 16 finds that the testimony of Mr. Decina and Ms. Lelie is credible and supports Yellow Brook's position that the revised lot grade was developed for the purposes set forth in Mr. Decina's testimony and Mr. Lelie's testimony, and not designed to allow increased building height. *(Pa79).*

The Resolution in Paragraph 17 acknowledges the concerns raised by interested citizens about the height of the buildings to be constructed on the property. The Resolution states that as a condition of approval the Applicant shall be required to meet with the Borough Engineer in good faith to evaluate the overall stormwater collection system and alternative components in an effort to reduce proposed finished grades at the front section of the triplex buildings facing Osprey Lane without compromising the efficiency of the proposed stormwater collection system. Yellow Brook was not required to accomplish a reduction of finished grades, but

requires the Applicant to make a good faith effort to consider alternative design that would reduce the finish grades so as to reduce the height of the buildings and their impact upon Osprey Lane. *(Pa79)*.

The Resolution in Paragraph 19 acknowledges that it received a number of written comments from members of the public and also provided full opportunity for interested residents to present their views on the Application including the building height. The Resolution concludes that the Applicant's professionals provided sufficient expert testimony, exhibits and reports to satisfactorily address these issues subject to the conditions contained in the Resolution. The Resolution further concludes that with the exception of the minor design standard waivers requested by the Applicant, the proposed plans comply with the requirements of the Ordinance and the Settlement Agreement entered into by the Borough to meet its Affordable Housing obligation. *(Pa80)*.

As a special condition of the Resolution, in number 10, it references the Applicant's obligation to meet with the Borough Engineer in good faith to evaluate the overall stormwater collection system and alternative components in an effort to

reduce proposed finished grades at the front section of the tri-plex buildings facing Osprey Lane without compromising the efficiency of the proposed stormwater collection system. *(Pa83)*.

There is no evidence in the record that the Applicant meet with the Borough Engineer in a good faith effort to reduce the proposed finished grades. There is no record of any Amended Site Plan or other documentation showing any reduction or modification in the revised lot grade approved by the Board.

On June 23, 2023, the parties appeared for trial before the Honorable Linda Grasso Jones, J.S.C. of the Monmouth County Superior Court. On November 29, 2023, Judge Jones entered an Order affirming the Board Resolution of Approval, and granting Yellow Brook's application for Preliminary and Final Major Site Plan Approval. (*Pa1-2*). The Court issued a written opinion in conjunction with its Order. *(Pa3-16)*.

The trial court held that the interpretation of the language of the Building Height Ordinance, specifically the meaning of the word "designed" as contained within the ordinance, ultimately rests on a legal determination by the Planning Board

which is not subject to the "arbitrary, capricious, and unreasonable" standard, but rather is subject to "de novo" review by the Court. *(Pa12).* The trial court also held that the Court's obligation is to determine the legislative intent of the Borough of Rumson in adopting the ordinance in question. *(Pa12).*

The trial court found that it is clear from the face of the ordinance that the Borough of Rumson envisioned and permitted a change in grading on the property as being allowable in determining the "building height." *(Pa13).* The ordinance clearly envisions that a building height could be measured not solely from the "lowest original lot grade" but also, under certain circumstances, from "any revised lot grade …" *(Pa13).*

Thus, the trial court identified the issue before the court is the meaning of the remainder of the "building height" definition which provides that a revised lot grade may be used to measure building height only if the revised lot grade does not "include mounding, terracing, or other devices designed to allow increased building height." *(Pa13)(emphasis added by the trial court).*

The trial court, finding that the word "design" is not interpreted in the Borough

of Rumson ordinances, defined the word "design" used as a verb in the ordinance in the Merriam-Webster online dictionary as "(1) to create, fashion, execute, or construct according to plan; DEVISE, CONTRIVE; (2)(a) to conceive and plan out in the mind (b) to have as a purpose: INTEND; (c) to devise for a specific function or end." *(Pa14).*

Thus, the trial court found that the definition of "building height" adopted by the Borough of Rumson in its Ordinance specifically includes consideration of the ***plan or purpose*** of the mounding, terracing or other height-enhancing device that is included within the site plan and other documents presented to the land use board. *(Pa14)*(*emphasis added).* Thus, the trial court concluded that the legislative intent of the ordinance was for the land use Board to make a determination of whether the revised grading was done for the design, or purpose of allowing increased building height which is subject to review by the trial court using the "arbitrary, capricious and unreasonable" standard of review. *(Pa 15).* Accordingly, the trial Court found the Board's professionals were credible in that the purpose of the revised lot grade was for stormwater management and sanitary sewer, rather than designed for the

purpose of allowing increased building heights. *(Pa 15-16).* Therefore, the trial Court found that the Board properly interpreted the Building Height ordinance, and affirmed the Board Resolution below. *(Pa15-16).*

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ITS INTERPRETATION OF THE WORD "DESIGN" IN THE CONTEXT OF THE BOROUGH OF RUMSON BUILDING HEIGHT ORDINANCE STATING "DESIGNED TO ALLOW INCREASED BUILDING HEIGHT." *(SEE APPENDIX – OPINION Pa14-15).*

The trial court erred in its interpretation of the word "design" in the context of the Building Height Ordinance language "designed to allow increased building height". Interpretation of an ordinance is essentially a legal issue. *Wyzykowski v. Rizas*, 132 N.J. 509, 518 (1993); *Pullen v. Tp. of South Plainfield*, 291 N.J. Super. 1, 6 (App. Div. 1996); *Jantausch v. Borough of Verona*, 41 N.J. Super, 89, 96 (Law Div. 1956), *aff'd,* 24 N.J. 326 (1957).

Thus, in construing ordinances, the courts attempt to determine legislative intent along the same lines as in interpreting and construing statutes. *Atlantic Container, Inc. v. Eagleswood Planning Bd.,* 321 *N.J.Super.* 261, 269

(App.Div.1999); *see Township of Pennsauken v. Schad*, 160 *N.J.* 156, 170 (1999)("The established rules of statutory construction govern the interpretation of a municipal ordinance.").

An "analysis of a statute begins with its plain language, giving the words their ordinary meaning and significance." *In re Estate of Fisher*, 443 *N.J. Super.* 180, 190 (App. Div. 2015) (citing *State v. Olivero*, 221 *N.J.* 632, 639 (2015)), *certif. denied*, 224 *N.J.* 528 (2016). "It is a basic rule of statutory construction to ascribe to plain language its ordinary meaning. When that language 'clearly reveals the meaning of the statute, the court's sole function is to enforce the statute in accordance with those terms.' " *Ibid.* (citations omitted).

The term "building height" is not defined in the Municipal Land Use Law, but is usually defined in a local ordinance. *See Moskowitz, et al. "The Complete Illustrated Book of Development Definitions"* Transaction Publishers, 2015.

The Borough of Rumson's Building Height Ordinance calculates in Section 22-2.4 Building Height as follows:

> BUILDING HEIGHT – Shall mean the vertical dimension measured to the highest point of a building from the lowest original lot grade or any revised lot grade shown on the Site Plan. . . . Such revised lot grade

> shall not include ***mounding, terracing, or other devices designed to allow increased building height.***" *(emphasis added).*

(Pa60-62).

The Borough of Rumson Building Height Ordinance is very clear that building height shall mean the vertical dimension measured to the highest point of a point of a building from the lowest original lot grade or any revised lot grade.... The last sentence of the definition states: "Such revised lot grade shall not include mounding, terracing, or other devices designed to allow increased building height." *(Pa60-62).* The definition has no qualifier for or concept of intent that allows one to ignore the clear language. However, the trial court failed to properly interpret and define the meaning of the word "design" in the context of the Building Height Ordinance language "designed to allow increased building height."

The word "design" used as a noun, means "1. A plan or scheme. 2. Purpose or intention combined with a plan." *See Design,* Black's Law Dictionary (7th ed. 1999). However, the word "design[ed]" when used as a verb, as stated in the Building Height Ordinance, means "the pattern or configuration of elements in something . . ." *See Design,* Black's Law Dictionary (7th ed. 1999). The word

"design[ed]" as defined in the Merriam - Webster Dictionary which is relevant to the matter means "to create, fashion, execute, or construct according to plan," e.g. "the plan designed the look and functions of a building," "The Applicant produced what he has designed for the project." *Design,* Merriam-Webster Dictionary, 2022, *merriam-webster.com/dictionary/design. (Pa189).*

Merriam-Webster Definition of "Allow" as intransitive verb: 1) to make a possibility: ADMIT used with of: evidence that allows of only one conclusion; 2) to give consideration to circumstances or contingencies; a plan that allows for expansion; 3) to give an opportunity; she worked on the project here and there as time allowed. Merriam-Webster Dictionary, 2022, *merriam-webster.com/dictionary/allow. (Pa190-191).*

The Ordinance uses the specific phrase "designed to allow increased building height." The plain language of this phrase removes the purpose of the design from the equation. Does the design, whatever the reason, e.g., stormwater management, enhanced views, or to accommodate six (6) dwelling structures, allow increased building height? If the answer is yes, then the Board must calculated building

height in the proposed development from the lowest original lot grade, not the revised lot grade.

Here the mounding, terracing or other devices resulting in the revised lot grade in the proposed development makes the increased building height a possibility and is a plan that is "designed to allow increased building height".

Therefore, the phrase "designed to allow" does not ask what the purpose of the design is, it simply asks does the design, whatever the reason for the design, allow increased building height. Otherwise, the application of the Building Height ordinance to different applications will be interpreted inconsistently since an applicant could argue that the purpose to raise the building height to address stormwater management does not exceed the height ordinance, but to raise the building height to enhance views or to simply increase the height of a building does exceed the height of the ordinance.

The trial court has respectfully misinterpreted "designed to allow increased building height." The trial court references the definition of "design" and the verb "designed." However, the trial court effectively leaving out the word "allow", and

replacing the word "increased" with the word 'increase.' The trial court is interpreting the last part of the last sentence to say 'designed to increase,' or 'designed for the purpose of' increased building height, rather than the actual language of the ordinance which states "designed to allow increased building height," and thus interjecting purpose of the design into its interpretation.

This seemly subtle difference may seem trivial, but the precise interpretation of the plain language of the ordinance is critical to whether Yellow Brook's application exceeds the maximum building height allowed in the RR Zone. The question for the Appellate Division to consider is as follows: Does Yellow Brook's proposed development application for Preliminary and Site Plan Approval before the Planning Board containing a revised lot grade include mounding, terracing, or other devices designed to allow increased building height? Since Yellow Brook's proposed development is designed to allow increased building height, and the result of the application is increased building height, then the original lot grade must be used in order to determine the Building Heights of the six (6) dwellings, resulting in the requirement of a d(6) use variance for two (2) of the six (6) proposed buildings.

Therefore, the Board did not have jurisdiction to hear Yellow Brook's application since only the Borough of Rumson Zoning Board has jurisdiction to decide a use variance for building height under *N.J.S.A.* 40:55D-70.d(6).

POINT II

THE TRIAL COURT FAILED TO CONSIDER WHETHER THE REVISED LOT GRADE OF THE PROPOSED DEVELOPMENT WAS THE RESULT OF "MOUNDING, TERRACING, OR OTHER DEVICES" DESIGNED TO ALLOW INCREASED BUILDING HEIGHT. ***(SEE APPENDIX – OPINION Pa15).***

The trial court failed to consider whether the revised lot grade was the result of "mounding, terracing, or other devices" designed to allow increased building height as stated in the Building Height Ordinance.

The word "mounding" as defined in the Merriam-Webster Dictionary means "an artificial bank or hill of earth or stones." *Mounding,* Merriam-Webster Dictionary, 2022, *merriam-webster.com/dictionary/mounding. (Pa192).* The word "terracing" as defined in the Webster Dictionary has several meanings as follows "(a) one of usually a series of horizontal ridges made in a hillside to increase cultivatable land, conserve moisture, or minimize erosion, (b) a raised embankment with the top leveled, or (c) a row of houses or apartments on raised ground or a

sloping site. *Terracing,* Merriam-Webster Dictionary, 2022, *merriam-webster.com/dictionary/terracing. (Pa193).* The word "devices" as used in the proper context of this Application is defined in the Merriam-Webster Dictionary as a "piece of equipment or a mechanism designed to serve a special purpose or perform a special function." *Devices,* Merriam-Webster Dictionary, 2022, *merriam-webster.com/dictionary/devices.* (*Pa194*).

Here, the trial court failed to even determine and address whether the revised lot grade of the proposed development was the result of "mounding, terracing, or other devices" designed to allow increased building height. Furthermore, the trial court failed to address the Board's failure to consider whether the revised lot grade is not just the result of "mounding", but whether it included either "terracing" or "other devices."

Here, Yellow Brook's proposed development unquestionably raises the original lot grade elevation with a revised lot grade. The Applicant's site plan shows, among other things, that the revised lot grade slopes upward from the street level on Osprey lane from an elevation of 13' to an elevation of 18' as a result of fill

proposed by the applicant. *(Pa55-59).* Moreover, the elevated lot grade of the Application includes "mounding, terracing, or other devices" increasing the elevation of the buildings from the original lot grade.

As stated above, the term "mounding" is defined as an "an artificial bank or hill of earth or stones." There is clearly no dispute that the Applicant is raising the original lot grade with fill to create an artificial bank or hill. *(Pa55-59).* The term "terracing" as applicable to the present matter is defined as either (b) a raised embankment with the top leveled, or (c) a row of houses or apartments on raised ground or a sloping site. Thus, there is also no question that the Applicant's site plan, as a result of the artificial fill, results in the revised lot grade being a raised embankment with the top leveled, or a row of buildings on raised ground on a sloping site. The Applicant's site plan clearly shows the upward slope from the street level on Osprey lane from an elevation of 13' to an elevation of 18' as a result of fill proposed by the applicant. *(Pa55-59).* The term "other devices" is simply a catch all similar to mounding or terracing which increases the elevation of a building on the property. The Ordinance is clear in its language of "mounding, terracing, **or**

other devices," which means only one of these conditions need to exist to use the original lot grade, not the revised lot grade for building height. *(Pa60-62)(emphasis added)*.

Nevertheless, the record below does not discuss what constitutes terracing or other devices in the revised lot grade. Mr. DeCina nor Ms. Lelie addressed "other devices" at the Board hearing which is left open as to whether the revised lot grade by Yellow Brook was the result of "other devices". The Board attorney only addressed the term "mounding" in interpreting the definition of the Building Height ordinance. The defendant's counsel and professionals never addressed what "other devices" would encompass, particularly as they do not deny there is a significant increase in elevation on the site as part of the plan. Therefore, their testimony on Building Height is not credible.

Thus, the trial court erred in not making any determination whether the revised lot grade was the result of "mounding, terracing, or other devices." The failure of the trial Court to address this issue does not sufficiently provide the proper and thorough interpretation of the Building Height Ordinance under de novo review, and

should result in the reversal of the trial court's opinion. *See State v. Olivero*, 221 *N.J.* 632, 639 (2015)), *certif. denied*, 224 *N.J.* 528 (2016).

POINT III

THE TRIAL COURT ERRED IN ADOPTING THE BOARD AND APPLICANT PROFESSIONALS' LEGAL DEFINITION OF THE BUILDING HEIGHT ORDINANCE UNDER THE "ARBITRARY, CAPRICIOUS, AND UNREASONABLE" STANDARD OF REVIEW. *(SEE APPENDIX – OPINION Pa0015-16).*

The trial court erred in adopting the Board and applicant's professionals' legal definition of the Ordinance under the "arbitrary, capricious, and unreasonable" standard.

Generally, 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. *See Burbridge v. Mine Hill Tp.,* 117 *N.J.* 376, 385 (1990); *Kramer v. Bd. of Adjustment, Sea Girt,* 45 *N.J.* 268, 296 (1965); *Md. Ctr. v. Princeton Zoning Bd. of Adjustment,* 343 N.J. Super. 177, 198 (App. Div. 2001). The factual determinations of the planning board are presumed to be valid and the exercise of its discretionary authority based on such

determinations will not be overturned unless arbitrary, capricious or unreasonable. *Burbridge, supra,* 117 *N.J.* at 385; *Rowatti v. Gonchar,* 101 *N.J.* 46, 51–52 (1985). Although the Courts give deference to a planning board's decision because it is presumed to be valid, a planning board's decision will be reversed if its action was arbitrary, capricious, or unreasonable. *New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. of Adjustment*, 160 N.J. 1, 14 (1999).

However, a municipal board's interpretation of the law is reviewed de novo and not entitled to deference. *See Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Twp. of Franklin,* 233 N.J. 546, 558 (2018). "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." *Chicalese v. Monroe Twp. Planning Bd.*, 334 N.J. Super. 413, 419 (Law Div. 2000) (*citations omitted) (quoting Jantausch v. Borough of Verona*, 41 N.J. Super. 89, 96 (Law Div. 1956); *see also 388 Route 22 Readington Realty Holdings, LLC v. Township of Readington,* 221 N.J. 318, 338, 113 A.3d 744 (2015*)* ("In construing the meaning of a statute, an ordinance, or our case law, our

review is de novo.").

Here, the trial court erred in deferring to the Board and applicant's professionals' definition and interpretation of the Building Height Ordinance, rather than making a legal interpretation of the ordinance under de novo review. The trial court concluded that the legislative intent of the ordinance was for the land use Board to make a determination of whether the revised grading was done for the design, or purpose of allowing increased building height which is subject to review by the trial court using the "arbitrary, capricious and unreasonable" standard of review. *(Pa 15).* Accordingly, the trial Court found the Board and applicant's professionals were credible in that the purpose of the revised lot grade was for stormwater management and sanitary sewer, rather than designed for a purpose or purposes which allows increased building heights. *(Pa 15-16).* Therefore, the trial Court found that the Board properly interpreted the Building Height ordinance, and affirmed the Board Resolution below. *(Pa15-16).*

The Board did not provide any rule or test to determine what the process was to evaluate the "intent" of the builder in raising the height under the Ordinance. The

Board did not provide any calculation or measure as to how high these buildings could be raised by mounding, terracing, or other devices which would not affect the building height.

Nevertheless, the trial court found that the definition of "building height" adopted by the Borough of Rumson in its Ordinance specifically includes consideration of the ***plan or purpose*** of the mounding, terracing or other height-enhancing device that is included within the site plan and other documents presented to the land use board. *(Pa14)(emphasis added).* As such, the trial court held that the determination of building height was not based upon whether the revised lot grade was designed to allow or result in the increased building height, but rather whether it was the plan or purpose of the applicant to revise the lot grade to enhance the height of the structure. *(Pa 15).* Accordingly, the trial court gave deference to the Board and applicant professionals to conclude that there interpretation of the Borough Ordinance was not "arbitrary, capricious, and unreasonable."

The question of the Building Height ordinance is ostensibly a legal question, to be decided under de novo review, not by deference to the Board under an arbitrary,

capricious and unreasonable standard. Mr. DeCina and Ms. Lelie are asked to opine on a legal question at the Board hearing even though they are an engineer and planner, respectively. Each gave an incomplete answer on the part of the definition they could comment on i.e. what is mounding, terracing or "other devices."

None of these professionals could have legally concluded the legal interpretation of the plain language of the statute. In fact, Ms. Lelie went so far as to state as it relates to the RR Zone)…."I don't think it matters whether it's existing grade or future grade. We know we met the building height." (*Pa154*; 63:13-15) Ms. Lelie's statement is a clear misinterpretation of the ordinance as, of course existing or future grade matters, it is part of the Building Height definition and which grade you use in this case yields different outcomes.

As it relates to the Rumson ordinance, the Building Height definition of Mounding or a mound is made of earth, soil, or other buildable material (all referred to as "Earth") on which a building can be constructed; terracing or a terrace is made of Earth (each of which, a mound or terrace, can be supported by one or more retaining walls). (A retaining wall is part of the Site Plan to separate elevated earth

from the freshwater wetland buffer zone in the NE corner of the lot to hold back earth just off the NE corner of Building #1) *(Pa55-59).* A mound or terrace raise the elevation of a lot, where they exist, with Earth. It is clear in this context that 'other devices' also refers to any measure that raises the elevation of the lot under a building with Earth. Therefore, if you raise the elevation with Earth as is being done here and you don't call it mounding or terracing it falls under "other devices.' These three items (i.e. mounding, terracing and "other devices") together clearly have the legislative intent of encompassing anything and everything that raises the elevation under a building with Earth.

Therefore, the trial Court should have determined the legal definition of the ordinance under the de novo review standard, rather than defer to the Board under the "arbitrary, capricious and unreasonable" standard. Thus, the failure of the Court to apply the de novo review standard should result in the reversal of the trial court below.

CONCLUSION

For all the aforementioned reasons, plaintiffs respectfully request that the trial

court's decision be reversed and the defendant Planning Board approval be null and void requiring Yellow Brook to resubmit its entire application to the Borough of Rumson Zoning Board for Preliminary and Final Major Site Plan Approval along with variance relief under *N.J.S.A.* 40:55D-70.d(6), and *N.J.S.A.* 40:55D-70(c) for Building Height.

Respectfully submitted,

Richard C. Sciria

RICHARD C. SCIRIA

Dated: May 23, 2024

ALLEN BERMAN; ANDREW SCHEFFER; JON BLATT; MATTHEW SCOBLE; KATHERINE HARSCAR	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION**
Plaintiffs,Appellants	**Docket NO: A-001409-23 T1**
vs.	
BOROUGH OF RUMSON PLANNING BOARD; YELLOW BROOK PROPERTY CO., LLC	**Civil Action On Appeal From: Superior Court of New Jersey Law Division Monmouth County Docket No. MON-L-1114-22**
Defendants, Respondents	**Heard Below: Honorable Linda Grasso Jones, J.S.C.**

BRIEF OF DEFENDANT/RESPONDENT BOROUGH OF RUMSON PLANNING BOARD

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Date of submission: July 3, 2024

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STANDARD OF REVIEW ON APPEAL

The Rumson Planning Board does not take issue with legal principles set forth at the inception of the Plaintiffs' brief regarding the standard of review and the application of the de-novo standard with respect to interpretations of law. However, in this case the Ordinance in question is clear and unambiguous on its face. It does not require interpretation.

Instead, the question of from what point "building height" is measured required a finding of fact by the Planning Board as to whether the revised lot grade on a subdivision, site plan or plot plan is designed to allow increased building height. If so, building height is measured from the original pre-development grade. If not, it is to be measured from the revised grade shown on the approved site plan, subdivision or plot plan.

In this case the Planning Board, after considering all of the evidence, made a finding of fact that the revised lot grade shown on the Applicant's plans were not designed to allow increased building height, but were designed to comply with applicable stormwater management and sanitary sewer regulations in accordance with standard subdivision and site plan practice. Their factual findings and conclusion must be evaluated under the arbitrary, capricious and unreasonable standard. As noted in **New Jersey Zoning and Land Use Administration, 2024 Edition, William M. Cox and Stuart R. Koenig, Section 42-2.1 at pg. 618 "**the

factual determination of the board is presumed to be valid. Its exercise of its discretionary authority based on such determinations will not be overturned unless arbitrary and capricious or unreasonable, and the burden of proof that the action of the board was arbitrary, capricious or unreasonable is upon the plaintiffs", citing **Dunbar Homes, Inc. v. Zoning Board, 233 N.J. 546,558 (2018).**

PROCEDURAL HISTORY

The Rumson Planning Board accepts the Procedural History set forth at page 5 of the Plaintiffs' brief.

PRELIMINARY STATEMENT

The Rumson Planning Board does not find it necessary to respond to Plaintiffs' Preliminary Statement and relies upon the body of this brief as the response.

STATEMENT OF FACTS

The case before this Court is an appeal from the Rumson Planning Board's grant of preliminary and final major site plan approval to construct an inclusionary multifamily development consisting of fourteen (14) residential units on property known as 91 Rumson Road in the Borough of Rumson which property is further known and designated as Block 124, Lot 31 on the Borough tax map. The property is located in the RR (Rumson Road Housing District) zone.

The RR zone was created as part of the Borough's affordable housing settlement agreement with Fair Share Housing Center (FSHC) and Yellow Brook Property Co., LLC (hereinafter "Yellow Brook") to provide its regional fair share of affordable housing pursuant to the Mount Laurel Doctrine. More particularly, the property was re-zoned pursuant to a Settlement Agreement between the Borough of Rumson, FSHC and Yellow Brook dated January 6, 2020. As part of the Borough's Affordable Housing Compliance Package Ordinance 20-014D was adopted December 15, 2020 and Ordinance 21-004D was adopted on April 13, 2021 re-zoning the subject property to the Rumson Road Housing District (RR) which permits the development of up to fourteen (14) residential dwelling units on this property. (Pa089; 5,1-6,6)[1] (Pa090; 10,11-11,19)

[1] The hearing was conducted on four dates. Transcript references shall be to Appellant's Appendix pages/lines.

This appeal raises a single discrete issue of whether the height of the proposed homes is to be measured from the lowest original lot (pre-development) grade or from the revised lot grade shown on the approved site plan. If the former, some of the buildings exceed the 35 ft. height limitation by ten percent (10%) and require variances pursuant to N.J.S.A. 40:55D-70.d.(6) which may only be granted by the Zoning Board of Adjustment. If the latter, the buildings comply with the 35 ft. height limitation and the application was within the jurisdiction of the Planning Board to approve. The Planning Board and the Trial Court properly found that the latter case applies.

The Plaintiffs argue that the former applies, which deprived the Planning Board of jurisdiction to hear the application and nullifies the approval.

Section 22-2.4 of the Ordinance provides that **"BUILDING HEIGHT – Shall mean the vertical dimension measured to the highest point of a building . . . from the lowest original lot grade or any revised lot grade shown on a site plan, subdivision plan, or plot plan approved by the Planning Board or Zoning Board of Adjustment when acting pursuant to N.J.S.A. 40:55D-1 et. seq. and this chapter. Such revised lot grade shall not include mounding, terracing, or other devices designed to allow increased building height."** (PaO61-062)

In this case there is no question that the Planning Board approved the revised lot grade shown on the site plan that was presented to it by Yellow Brook. The Planning Board submits that its authority was properly exercised pursuant to N.J.S.A. 40:55D-1 et.seq., that the revised lot grade was properly applied to measure height and that no height variance was required.

The Plaintiffs contend that the revised lot grade included "mounding, terracing or other devices **designed** to allow increased building height." (Emphasis Added) Therefore, they contend that the height should be measured from the original lot grade. If so, some of the buildings exceed the height limitation by 10% or more which would deprive the Planning Board of jurisdiction to act on the application and nullify its action.

JURISDICTION

The Municipal Land Use Law (MLUL) clearly delineates within which Board (Planning or Zoning) jurisdiction lies. N.J.S.A. 40:55D-20 provides that "Any power expressly authorized by this act to be exercised by (1) planning board or (2) board of adjustment shall not be exercised by any other body, except as otherwise provided in this act."

N.J.S.A. 40:55D-25.a.(2) provides that a planning board shall exercise its power in regard to site plan review.

N.J.S.A. 40:55D-60.a. provides that "Whenever the proposed development requires approval pursuant to this act of a . . . site plan . . . **but not a variance pursuant to subsection d. of section 57 of this act (C. 40:55D-70)**, the planning board shall have the power to grant to the same extent and subject to the same restrictions as the board of adjustment: a. Variances pursuant to subsection 57c. of this act [40:55D-70} . . ." (Emphasis Added)

N.J.S.A. 40:55D-76.b. provides that "The board of adjustment shall have the power to grant, to the same extent and subject to the same restrictions as the planning board . . . site plan approval whenever the proposed development requires approval by the board of adjustment of a variance pursuant to subsection d. of section 57 of this act [C. 40:55D-70] . . ."

Based on the foregoing it is clear that if a height variance was required pursuant to N.J.S.A. 40:55D-70.d. the Planning Board lacked jurisdiction to hear the application and its approval would be null and void. It is submitted that a review of the transcript, exhibits and the Ordinance demonstrates that a height variance under subsection d. was not required in this case and that the Planning Board did have jurisdiction to grant the approval.

THE RECORD

The Planning Board submits that the determination in this case hinges upon the use of the words **"designed to allow"** in the ordinance. The ordinance

can be read in two parts. The first part states that height can be measured from the revised lot grade shown on a site plan approved by the planning board. The second part states that a revised lot grade shall not include mounding, terracing, or other devices **designed to allow** increased building height. The determinative issue is whether the revised lot grade was designed to increase building height or was designed for some other legitimate purpose. It is submitted that this required a finding of fact, not an interpretation of law.

The word "design" is not defined in the Ordinance. However, it is defined in other sources such as the Merriam-Webster Dictionary. The Merriam-Webster Dictionary definition of design includes 1. "to create, fashion, execute, or construct according to plan" 2.a "to conceive and plan out in the mind" 2.b To have as a purpose: intend" 2.c "to devise for a specific function or end". (Pa0189)

The Planning Board submits that the record establishes that the revised lot grade was not designed for the purpose of raising the height of the buildings. Instead, it was designed to create an overall plan for the entire site and particularly to address stormwater management. This was a finding of fact by the Planning Board well supported by the record.

Yellow Brook's engineer, Mr. Decina, testified that the overall site plan was required to be designed in accordance with State regulations and Borough regulations regarding stormwater management. He stated that "we are driven by

our stormwater management design. We need to detain our runoff." "In order to detain our runoff, we have to elevate certain portions based on water table." (Pa153; 57,21-58,2) He testified that the site was being regraded "to accommodate the site features to make this development work in terms of stormwater management, sanitary sewer and grading." (Pa151; 52,17-20)

That required a stormwater management basin to handle water quantity, water quality and groundwater recharge. He testified that the grading was designed so that water quantity, the volume of water needed to be detained on-site post development, would be reduced for the 2-year, 10-year and 100-year storms. (Pa117-118; 30,18-33,12)

He testified that water quality required a reduction in total suspended solids generated from additional pavement. This was addressed with a system including a pre-manufactured water treatment device, series of filters for collected stormwater and treating it before going into an underground storage tank, detention basin. (Pa117; 32,12-21) There is also a subsurface storage bin for the permeable paver entrance drive. (Pa117-118; 32,22-33,2) He further testified that the design had to provide for post-development groundwater recharge not to be less than pre-development. (Pa118; 33,3-9)

He further testified that the stormwater management regulations require that improvements be at least one foot above the seasonal high-water table. A series of

test pits were done throughout the site to determine the seasonal high-water table locations. The system was designed to meet that requirement. (Pa151; 51,13-52,3) He testified that the grading was done for the entire property, not just for individual buildings. He stated that the grading was done the same as any site plan. He testified that this grading is not mounding to increase building height. "If that were the case, we would have six separate mounds." He stated, "What we have proposed is site regrading to accommodate the site features to make this development work in terms of stormwater management, sanitary sewer and grading." (Pa151-152; 52,4-53,1)

Mr. Decina further testified that the revised grading plan was not to enhance views from the proposed homes. It is a functionality of the site. In response to the direct question "was it designed to allow an increased building height for these structures?" he responded, "As I mentioned, no, it hasn't." (Pa152; 53,2-8)

Mr. Decina's testimony was supported by the testimony of Borough planner Kendra Lelie. She agreed that the revised lot grade was not designed for the purpose of increasing building height. Instead, it was an overall site design to include grading and site layout. She opined that she agreed with Mr. Decina that the Ordinance calls for the revised lot grade to be used in measuring height for this development. On cross-examination she reiterated "My testimony was that I agreed with the building height interpretation by Mr. Decina. He indicated that he did not

grade specifically to increase the height of the buildings, but the grading was in association to the overall site plan layout which includes the stormwater management, amongst other features." (Pa154; 62,14-63,7) (Pa156; 69,2-14) (Pa158; 77,3-24) (Pa161; 91,4-24) (Pa162; 93,25-94,12) Borough engineer Rob Keady concurred with Ms. Lelie. (Pa154; 63,23-25)

The objectors presented the testimony of professional engineer Alexander Litwornia whose practice principally involves work as a traffic consultant. (Pa141; 11,15-24) (Pa142; 13,1-6) Notwithstanding that his principal expertise is in traffic, he nevertheless opined as to the height ordinance. He measured from the original lot grade. He opined that the grading was "as if the buildings were put on pedestals to increase the height by 5 feet" (Pa143-144; 20,16-21,12) He opined that pedestals should be considered as "other devices designed to allow increased building height" under the ordinance. (Pa144; 21,22-22,5) He provided no reason why an increase in building height would be desirable on this site. Nor did he address the issue of providing an overall revised lot grading plan for the entire site to address all factors including seasonal high-water table, sewerage and stormwater management regulations as was testified to by Mr. Decina and Ms. Lelie. Nor did he suggest an alternative plan that would not increase building height.

The Planning Board submits that it properly assessed the testimony of the witnesses, properly found that the revised lot grade presented by the applicant was

appropriate and was designed to address factors other than increasing building height. Although building height increased as the result of the revised lot grade, it was simply a byproduct of the design, not its purpose.

The Planning Board properly found that:

1. The Applicant's Engineer Mr. Decina testified, and thereafter reiterated, that the grading plan was designed to maintain the required separation between the drainage system and the seasonal high-water table. Moreover, it was a re-design of the grading of the entire site in order to meet the requirements of the State and Municipal stormwater management regulations which require addressing the quality, quantity and re-charge of stormwater. Mr. Decina opined that the grading plan was designed for those proper purposes and was not designed in order to increase allowable building height.
2. The Borough Planning consultant, licensed Planner Kendra Lelie testified that she agreed with Mr. Decina. She opined that the Ordinance allows for variation in grades. She testified that she agreed with Mr. Decina that the grading plan presented is meant to design the entire site to properly function as a whole and not designed to raise building heights. She agreed that, based on the testimony of the Applicant's Engineer and the Board Engineer, the design will properly control stormwater management

> and the required separations between the drainage system and the seasonal high-water table. She opined that the Ordinance intends to permit the measurement for building height from the revised lot grade shown on an approved site plan and that the Applicant's plan meets those requirements. She rejected the assertion that this grading plan was designed to allow increased building height and noted that there were no articulated reasons to do so on this property. (Pa 078-079; Resolution paragraphs 15 & 16)

The Planning Board submits that it properly found that the testimony of Mr. Decina and Ms. Lelie was credible and supported Yellow Brook's position that the revised lot grade was developed for the purposes set forth in Mr. Decina's testimony and Ms. Lelie's testimony and not designed to allow increased building height. Therefore, no height variance was required, and the Planning Board properly exercised its authority to approve the site plan pursuant to the provisions of the MLUL. This was a factual finding and conclusion.

LEGAL ARGUMENT

POINT ONE

THE TRIAL COURT PROPERLY APPLIED THE CORRECT STANDARD OF REVIEW IN ASSESSING THE PLANNING BOARD'S FINDING THAT THE APPLICATION OF YELLOW BROOK PROPERTY CO., LLC DID NOT REQUIRE A HEIGHT VARIANCE PURSUANT TO N.J.S.A. 40:55D-70.d.(6) WAS NOT ARBITRARY, CAPRICIOUS, UNREASONABLE AND IS SUPPORTED BY THE RECORD BELOW

The Planning Board disagrees with the Plaintiffs that the issue before this Court is one of ordinance interpretation and thus a matter of law. It is submitted that the issue before this Court is whether the Planning Board's factual determination that applicant's revised lot grade was not designed to allow increased building height was based on substantial evidence in the record and therefore was not arbitrary, capricious or unreasonable.

In this case the Planning Board properly found that the revised lot grade was "designed" to maintain the required separation between the drainage system and the seasonal high-water table and that it was a re-design of the grading of the entire site in order to meet the requirements of the State and Municipal stormwater management regulations which require addressing the quality, quantity and re-charge of stormwater.

The decision of the Planning Board was not based on the "interpretation" of the Ordinance. It was based upon the "application" of an unambiguous Ordinance. It is noteworthy that Plaintiffs have not challenged the validity of the Ordinance as being vague, unenforceable or otherwise unconstitutional. Our courts have long held that "ordinances are to receive a reasonable construction and application, to serve the apparent legislative purpose. We will not depart from the plain meaning of language which is free of ambiguity, for an ordinance must be construed according to the ordinary meaning of its words and phrases. These are to be taken in the ordinary or popular sense, unless it plainly appears that they are used in a different sense. **Sexton v. Bates, 17 N.J. Super, 246, 253 et. seq. (Law Viv. 1951) aff'd on opinion below 21 N.J. Super. 329 (App. Div. 1952)**

As noted previously the Ordinance is in two parts which are clear and unambiguous. The first part states:

"BUILDING HEIGHT – Shall mean the vertical dimension measured to the highest point of a building . . . from the lowest original lot grade or any revised lot grade shown on a site plan, subdivision plan, or plot plan approved by the Planning Board or Zoning Board of Adjustment when acting pursuant to N.J.S.A. 40:55D-1 et. seq. and this chapter." (Pa061-062)

The language is clear, unambiguous and not subject to question. If the Planning Board or Zoning Board of Adjustment acting pursuant the Municipal Land Use Law (MLUL) **N.J.S.A. 40:55D-1 et. seq.** approves a revised lot grade building height is measured from the approved revised lot grade.

The second part states a single exception:

"Such revised lot grade shall not include mounding, terracing, or other devices designed to allow increased building height." (Pa062)

Once again, the language is clear and unambiguous. If the revised lot grade includes mounding, terracing or other devices that are designed to allow increased building height then the height is measured from the lowest original lot grade. Conversely, if the revised lot grade includes mounding, terracing or other devices that are not designed to allow increased building height, but for some other legitimate purpose, the height is measured from the approved revised lot grade.

Based on the foregoing the function of the Planning Board was to make a factual determination as to whether the approved revised lot grade was designed to allow increased building height or for some other legitimate purpose. The fact that the approved revised lot grade might result in increased building height is irrelevant. The question is whether the revised lot grade was designed to create that result.

Based on the foregoing the Trial Court did not, as alleged by the Plaintiffs, "adopt" a definition of the ordinance advocated by the Planning Board and Yellow Brook. It simply and properly applied the facts to a clear and unambiguous Ordinance. Thus it is submitted that Point III of the Appellants' brief is without merit.

THE PRESUMPTION OF VALIDITY

Zoning Boards of Adjustment and Planning Boards exercising their authority to grant relief in connection with subdivisions and site plans, because of their peculiar knowledge of local conditions, must be allowed wide latitude in the exercise of their delegated discretion **Burbridge vs. Mine Hill Township 117 N.J. 376, 385 (1990)** citing **Medici vs. BPR Company, 107 N.J. 1, 23 (1987)** and **Kramer vs. Board of Adjustment of Sea Girt, 45 N.J. 268, 296 (1965)**. There is a presumption of validity that attaches to their decisions.

Where the testimony before the board is in conflict, the board must decide what the true facts are. The board has the choice of accepting or rejecting the testimony of witnesses, and where reasonably made, such decision is conclusive on appeal. **New Jersey Zoning and Land Use Administration, 2024 Edition, William M. Cox and Stuart R. Koenig, Section 18-4.2 at pg. 258 citing Kramer, Supra. at page 288 and Hughes v. Monmouth University, 394 N.J.**

Super. 207, 232 (Law Div.2006), aff'd 394 N.J. Super. 193 (App. Div.), certif. den. 192 N.J. 599 (2007).

SCOPE OF REVIEW

In reviewing a determination of a municipal board, the role of the judge is limited to ascertaining whether the action of the board is arbitrary. As set forth by the Supreme Court in **Bressman vs. Gash 131 N.J. 517, 529 (1993)** " . . . our role is to defer to the local land use agency's broad discretion and to reverse only if we find its decision to be arbitrary, capricious or unreasonable" citing **Charlie Brown vs. Board of Adjustment 202 N.J. Super 312, 321(App. Div. 1985).**

> ". . . the Trial Court cannot substitute its own judgment for that of the Municipal Board vested with the power and duty to pass upon the application" **Farrell vs. Estell Manor Zoning Board of Adjustment 193 N.J. Super 554, 556 (Law Div. 1984)**

This principle was recognized by our Supreme Court in **Bressman Supra. at pg. 527** when the Court noted ". . . the question is not whether a reviewing Court would have reached a different conclusion if it had initially decided the matter, but whether the . . . board was arbitrary, capricious or unreasonable. . ."

Thus**,** the Court must sustain the approval of an application in the absence of an affirmative showing that the approval was arbitrary capricious or unreasonable.

As set forth in **Shell Oil vs. Zoning Board of Adjustment of Shrewsbury, 127 N.J. Super 60, 63 (1974),** the conclusive consideration is not whether the Board could properly have denied the Plaintiffs application in this situation. Instead, it is whether the evidence was such that it was arbitrary and unreasonable for the Board to find otherwise. **Shell Oil Supra at pg. 63, 64 and 66**. Thus, the Court's review of the determination of the municipal authority is limited to whether the Board could reasonably reach the conclusion that it did.

In the instant case it is respectfully submitted that Yellow Brook's proofs were thorough, credible and supported the approval granted and the Planning Board's decision to approve the application is amply supported by the record below.

RELIANCE ON EXPERT TESTIMONY

The Plaintiffs repeatedly urge that the testimony of their Engineer addressing the application of the Height Ordinance must be accepted. The Planning Board submits that this is not the case and that its approval of the application was firmly grounded in the facts and the law.

Initially it should be noted that Boards of Adjustment and Planning Boards do not function in a vacuum. It is firmly settled that a Board may, and indeed is expected to, bring to bear in its deliberations the general knowledge of the local conditions, experiences of its individual members and common sense. A Boards'

consideration of its members personal knowledge in its deliberation is rooted in the well-founded notion that local officials, who are thoroughly familiar with their communities' characteristics and interests, are the proper representatives of its people and are undoubtedly the best equipped to pass initially on such applications for approvals under the MLUL.

Indeed, it is because of the board members' peculiar knowledge of local conditions that our courts are required to allow wide latitude in the exercise of the Boards delegated discretion. **Baghdikian vs. Board of Adjustment 247 N.J. Super 45 (App. Div. 1991)** citing **Kramer vs. Board of Adjustment of Sea Girt 45 N.J. 268, 284, 289 (1965), Ward vs. Scott 16 N.J. 16, 23 (1954) and Medici vs. BPR Company 107 N.J. 1, 23 (1987).**

Thus**,** the applicable Zoning Board of Adjustment or Planning Board is entitled to rely on its own personal knowledge and common sense in decision making. It is also entitled to give such credibility and weight to the testimony of expert witness conclusions as it may deem appropriate **El Shaer vs. Planning Board 249 N.J. Super 323, 330 (App. Div. 1991) Cert. denied 127 N.J. 546 (1992)** Thus the mere fact that the credentials of the Objector's professional are accepted does not bind the Board to blindly accept his/her conclusions.

In this case it was entirely appropriate for the Planning Board to consider all of the testimony presented, including that of the Board's and Yellow Brook's

experts, in assessing witness credibility and the weight to be given to their testimony. The Planning Board properly declined to blindly accept the testimony of the Objector's witness as undisputed and ignore everything else.

As noted previously the Objector's expert Mr. Litwornia's practice principally involves work as a traffic consultant and not as a civil engineer. (Pa141; 11,15-24) (Pa142; 13,1-6) He opined that the grading was "as if the buildings were put on pedestals to increase the height by 5 feet" (Pa143-144; 20,16-21,12) He opined that pedestals should be considered as "other devices designed to allow increased building height" under the ordinance. (Pa144; 21,22-22,5)

Although he opined that the buildings would be on pedestals, he didn't address the fact that buildings were not proposed to be raised above the surrounding grade as testified to by the applicant's engineer Mr. Decina. (Pa151; 52,4-15)

He provided no reason why an increase in building height would be desirable on this site to support an argument that the revised lot grade was designed to increase building height. Nor did he address the issue of having to provide an overall revised lot grading plan for the entire site to address all factors including seasonal high-water table, sewerage and stormwater management

regulations as was testified to by Mr. Decina and Ms. Lelie. Nor did he testify as to any alternative design that would avoid an increase in building height.

In addition, Mr. Litwornia's credibility was seriously compromised on cross examination. He admitted that he didn't review the ordinance or the site plan in their entirety. He had only been retained the week prior to the hearing. He had only been looking at the project for a couple of days. He had not reviewed the affordable housing Settlement Agreement or its exhibits relating to the project. He did not know what the ordinance permitted for density on the property. He did not review the zoning ordinance but relied on a summary of the ordinance given to him verbally by the Objectors' attorney and he "just went with what he told me on the RR zone analysis." (Pa148-149; 40,13-42,25)

By contrast the Yellow Brook's engineer, Mr. Decina, testified that he is a licensed professional engineer in New Jersey, Pennsylvania and Delaware. He is also a certified municipal engineer in New Jersey. He has prepared and managed many site plans and subdivisions throughout New Jersey and testified at various municipal planning and zoning boards. (Pa091; 16,4-18)

As noted previously herein, and bears repeating, Mr. Decina testified that the overall site plan was required to be designed in accordance with State regulations and Borough regulations regarding stormwater management. He stated that "we are driven by our stormwater management design. We need to detain our runoff." "In

order to detain our runoff, we have to elevate certain portions based on water table." (Pa153; 57,21-58,2)

That required a stormwater management basin to handle water quantity, water quality and groundwater recharge. He testified that the grading was designed so that water quantity, the volume of water needed to be detained on site post development, would be reduced for the 2-year, 10-year and 100-year storms. (Pa117-118; 30,18-33,12)

He testified that water quality required a reduction in total suspended solids generated from additional pavement. This was addressed with a system including a pre-manufactured water treatment device, series of filters for collected stormwater and treating it before going into an underground storage tank, detention basin. (Pa117; 32,12-21) There is also a subsurface storage bin for the permeable paver entrance drive. (Pa117-118; 32,22-33,2) He further testified that the design had to provide for post-development groundwater recharge not to be less than pre-development. (Pa118; 33,3-9)

He further testified that the stormwater management regulations require that improvements be at least one foot above the seasonal high-water table. A series of test pits were done throughout the site to determine the seasonal high-water table locations. The system was designed to meet that requirement. (Pa151; 51,13-52,3) He testified that the grading was done for the entire property, not just for individual

buildings. He stated that the grading was done the same as any site plan. He testified that this grading is not mounding to increase building height. “If that were the case, we would have six separate mounds.” He stated, “What we have proposed is site regrading to accommodate the site features to make this development work in terms of stormwater management, sanitary sewer and grading.” (Pa151-152; 52,4-53,1)

Mr. Decina further testified that the revised grading plan was not to enhance views from the proposed homes. It is a functionality of the site. In response to the direct question “was it designed to allow an increased building height for these structures?” he responded, “As I mentioned, no, it hasn’t.” (Pa152; 53,2-8)

The Planning Board found Mr. Decina’s testimony to be credible. Moreover, as set forth previously, his testimony was concurred with by the Planning Board engineer and planner.

The Planning Board properly found that the approved revised lot grading was not designed to allow for increased building height and the second portion of the Ordinance Section 22-2.4 did not apply to this application and no variance for height pursuant to N.J.S.A. 40:55D-70.d.(6)was required. Thus, jurisdiction was properly exercised by the Planning Board.

INTENTION

Plaintiffs argue in Point I of their Legal Argument that the Trial Court's and the Planning Board's assessment of intent was inappropriate. One need only look at the definition of "design" in the dictionary to see that intent is integral to the term. The Merriam-Webster Dictionary definition of design cited by the Appellants at page 27 includes 1. "to create, fashion, execute, or construct according to plan" 2.a "to conceive and plan out in the mind" 2.b To have as a purpose: intend" 2.c "to devise for a specific function or end". (Pa189)

Appellants argue that when coupled with the word "allow", which is "to make a possibility", the word "design" must be interpreted as a verb - "a pattern or configuration of elements". Appellants then conclude that those words together must be interpreted to ask, "Does the design, whatever the reason . . . allow increased building height?" However, that interpretation effectively eviscerates the word "designed". In that context the word is unnecessary, meaningless and useless. Had the Borough Council **not** intended "designed" to be interpreted to include purpose it could have simply left it out of the Ordinance language. The Ordinance would have read **"Such revised lot grade shall not include mounding, terracing or other devices that allow increased building height".** That would achieve the result the Appellants desire. But that is not the language chosen by the Borough Council. Common Sense dictates that the Borough Council chose to include "design" to add purpose to the equation.

Point II of the Appellants' brief assumes the correctness of their Point I. Since their position on Point I is incorrect their argument in Point II that the trial judge failed to determine whether the revised lot grade was the result of mounding, terracing or other devices is pointless. There has been no argument that the revised grading increased building height. That was conceded from day one. There was no need for the Trial Court to review that issue.

The language in the Ordinance "designed to allow increased building height" clearly demonstrates that the intent and purpose of the "design" must be to allow increased building height. The Planning Board properly considered whether the intent and purpose of the applicant's design was to increase building height and properly found that it was not. The Trial Court properly agreed.

In this case the testimony of Yellow Brook's and the Planning Board's witnesses demonstrated that the revised lot grade was created, fashioned, conceived and planned for the purpose of a specific function to comply with stormwater management, sanitary sewer and grading regulations and not to allow increased building height. While increased building height may be a byproduct of the design, it was not what the design was crafted to allow, facilitate or accomplish.

In fact, the Planning Board went further to ensure that the plan was not designed to allow increased building height. It included as Special Condition 10. of

the Resolution of Approval that the applicant "meet with the Borough Engineer in good faith to evaluate the overall stormwater collection system and alternative components in an effort to reduce proposed finished grades at the front section of the triplex buildings facing Osprey Lane without compromising the efficiency of the proposed stormwater collection system." Thus, even if the revised lot grade was designed to allow increased building height the condition removed that design objective from consideration. The revised lot grade was to be reduced to the lowest possible without compromising the stormwater collection system.

As noted by the Supreme Court in **O'Brien v. Muskin Corp., 94 N.J. 169,184 (1983)** "The assessment of the utility of a design involves the consideration of available alternatives. If no alternatives are available, recourse to a unique design is more defensible. The existence of a safer and equally efficacious design, however, diminishes the justification for using a challenged design." In this case the Objectors' expert Mr. Litwornia did not provide any testimony that another equally efficacious design was available. He admitted that he had only looked at the project for a couple of days and had not reviewed the entire site plan.

Finally, while the validity of a municipal ordinance is a question of law, the court will nevertheless accord deference to the municipality's interpretation. **Fallone Prop. V. Bethlehem Plan Bd., 369, N.J. Super. 552, 561 (App. Div. 2004)** Here the validity of the Ordinance has not been challenged, only its

application. The Planning Board submits that it and the Trial Court properly applied the Ordinance and made a factual finding and conclusion that the revised lot grade did not include mounding, terracing, or other devices designed to allow increased building height.

CONCLUSION

Based on all of the foregoing the Planning Board application and that its factual findings and conclusions as to the design of the approved revised lot grade are fully supported by evidence in the record and its decision should be affirmed.

Respectfully Submitted,

/S/ *Michael B. Steib*

Michael B. Steib

July 3, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001409-23

ALLEN BERMAN; ANDREW SCHEFFER; JON BLATT; MATTHEW SCOBLE; KATHERINE HARSCAR,

Plaintiffs-Appellants,

v.

BOROUGH OF RUMSON PLANNING BOARD; YELLOW BROOK PROPERTY CO., LLC,

Defendants-Respondents.

Original Submission Date: July 1, 2024
Submission Date: July 9, 2024

On Appeal From a Final Order of the Superior Court of New Jersey, Law Division, Monmouth County dated November 29, 2023

Sat below: Honorable Linda Grasso Jones, J.S.C.
Trial Court Docket No. MON-L-1114-22

BRIEF ON BEHALF OF DEFENDANT/RESPONDENT YELLOW BROOK PROPERTY CO., LLC

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PRELIMINARY STATEMENT

This appeal stems from resident objectors who continue to seek to delay the construction of fourteen residential dwellings that are part of an inclusionary affordable housing development critical to the Borough of Rumson's (the "Borough") court-approved affordable housing compliance plan ("HEFSP").

In March 2022, the Borough of Rumson Planning Board (the "Board") approved Yellow Brook Property Co., LLC's ("Yellow Brook") preliminary and final major site plan application to construct a multi-family residential housing development consisting of fourteen residential dwelling units located in two duplex townhouse buildings, two carriage buildings, and two triplex townhouse buildings (the "Project"), on 91 Rumson Road, Block 124, Lot 31 on the Borough's tax map (the "Property") in the Borough. The Project is part of a court-approved *Mount Laurel* settlement agreement between Yellow Brook and the Borough in the Borough's *Mount Laurel* affordable housing case and the Property was specifically rezoned to allow for the Project. The trial court subsequently affirmed the Board's resolution of approval for the Project. Yet, Plaintiffs, Allen Berman, Andrew Scheffer, Jon Blatt, Matthew Scoble, and Katherine Harscar (collectively, the "Plaintiffs") seem determined to prevent the Project by continuing to falsely claim that the Board incorrectly interpreted the Borough's definition of building height in its Ordinance (the "Building Height

Definition"). The trial court, however, carefully considered the record and legal arguments presented and issued a well-reasoned decision against Plaintiffs, which should not be disturbed on appeal.

There is no dispute as to the Building Height Definition within Ordinance 22-2.4 – namely "the vertical dimension measured to the highest point of the building... from the lowest original lot grade ***or any revised lot grade shown on a site plan....*** Such revised lot grade shall not include mounding, terracing, or other devices ***designed to allow increased building height***." (emphasis added). Plaintiffs continue to attempt in this appeal (as they did in the trial court) to reshape the Board's consideration of the issue of building height calculation as an *interpretation* of the Building Height Definition, when in reality the Board made a clear *factual determination* as to whether the regrading of the entire site constitutes "mounding, terracing, or other devices designed to allow increased building height." The issue is whether Yellow Brook could use the revised lot grade, consistent with the Ordinance, in measuring building height.

The trial court properly found that the Board's application of the Building Height Definition – and the factual findings therein – were amply supported by the record and, therefore, were not arbitrary, capricious or unreasonable. As Yellow Brook's civil engineer, Brian DeCina, the Board's own engineer, and the Borough's own professional planner, Kendra Lelie, all agreed, the regrading

of the Property did not constitute "mounding" and the purpose of increasing the grade elevations throughout the site was driven by the overall site design and stormwater management elements – particularly the underground stormwater management system (coupled with the seasonal high water table). Further, the revised grade where the residential dwellings were proposed did not exceed the existing elevation of 18 feet in the center of the Property where the existing home is located. Thus, the Property was essentially flattened out as opposed to creating a "mound." There was no credible evidence presented to contradict the expert testimony of Yellow Brook's civil engineer or the Board professionals.

The trial court also took an extra step to carefully analyze, under a *de novo* standard, the meaning of the word "designed" in the Building Height Definition based upon arguments raised by Plaintiffs to the trial court. The Board, and its professionals, apply this Building Height Definition on almost every single site plan application before involving a structure. The trial court agreed with the Board's determination that the Building Height Definition – particularly the word "designed" – required a showing that the revised grading was for the purpose or intent of increasing building height.

Accordingly, the trial court's decision should be affirmed.

PROCEDURAL HISTORY

On or about February 3, 2021, Yellow Brook filed an application with the Board requesting preliminary and final major site plan approval to construct the Project, in substantial compliance with the approved Market Concept Plans attached to the YB Settlement Agreement and RR Zone. (Pa4.) Board hearings on Yellow Brook's application were held on November 8, 2021, December 20, 2021, January 10, 2022, and February 7, 2022. (Pa4.) A resolution granting Yellow Brook's application was adopted by the Board on March 7, 2022 (the "Resolution"). (Pa4.)

Plaintiffs filed a complaint in lieu of prerogative writs (the "Complaint") on April 21, 2022, pleading that the Board acted in an arbitrary, capricious, and unreasonable matter in granting Yellow Brook's application for preliminary and final major site plan approval to construct the Project. (Pa17-Pa23.) The Board filed its Answer on May 2, 2022 (Pa24-Pa31), and Yellow Brook filed its Answer on May 5, 2022. (Pa32-Pa39.) Trial, consisting of argument on the parties positions, was held on June 23, 2023, before the Honorable Linda Grasso Jones, J.S.C. of the Monmouth County Superior Court. (Pa5.)

On November 29, 2023, Judge Jones entered an Order and written opinion affirming the Resolution. (Pa1-Pa16.) The trial court addressed Plaintiffs' contention that "the Planning Board incorrectly interpreted the ordinance in

question to provide for consideration of the applicant's intentions in regrading the property." (Pa12.) The trial court considered this issue de novo. (Pa12.) The trial court found that "[i]t is clear from the face of the ordinance . . . that the Borough envisioned and permitted a change in grading on the property as being allowable in determining the 'building height.'" (Pa13.) The issue before the trial court then was – as it is in this appeal – the application of the remainder of the "building height" definition and whether the Board properly interpreted the ordinance. (Pa13.)

The trial court carefully considered the word "design." (Pa13-Pa15.) Since the word is not interpreted in the ordinance, the trial court noted that the word "design" is defined "in the Merriam-Webster online dictionary as '(1) to create, fashion, execute, or construct according to plan; DEVISE, CONTRIVE; (2) . . . INTEND; (c) to devise for a specific function or end.'" (Pa14.) With this definition in mind, the trial court found that the definition of "building height" "specifically includes consideration of the plan or purpose of the mounding, terracing or other height-enhancing device that is included within the site plan and other documents presented to the land use board." (Pa14.) The trial court, therefore, explained that the land use board must consider evidence presented by the applicant that a change in grade was "made for an engineering, stormwater or other purpose and not to enhance the height of the structure."

(Pa15.) Likewise, the land use board must also consider arguments from challengers, if raised, that no evidence was presented by the applicant that a change in grade had an engineering purpose. (Pa15.) Ultimately, using a de novo standard of review, the trial court found that the "Board properly interpreted the Borough of Rumson ordinance." (Pa15.)

The trial court also considered – under an arbitrary, capricious and unreasonable standard of review – the Board's determination that the revised grading "was not designed in the manner shown for the purpose of allowing increased building height, but rather was for the purpose of providing for stormwater management and sanitary sewer on the property. (Pa11-Pa12; Pa15-Pa16.) The trial court noted that it was "clearly within the Planning Board's discretion" to determine that "the testimony of Mr. DeCina [Yellow Brook's civil engineer] and Ms. Lelie [the Board ," that the revised lot grade was *not* designed to allow increased building height "was more persuasive than the testimony of Mr. Litwornia [the Plaintiffs' traffic engineer]." (Pa12.) Since "[e]vidence supporting the Planning Board's determination was clearly presented at the hearings below," the trial court found that "the Planning Board's conclusion concerning the credibility of the experts and the reasons provided for the regrading of the property" was not arbitrary, capricious, or unreasonable. (Pa12; Pa16.)

STATEMENT OF FACTS

A. The Property

The Property is approximately 5.801 acres located in the Borough of Rumson on the west side of Osprey Lane with frontage along Rumson Road, county Route 520, Osprey Lane and Tuxedo Lane, and currently contains a two and one half story dwelling, covered porch, gravel driveway, various fences, and landscape walls. (Pa73.) There are some wetlands located near the frontage of Osprey Lane and in the rear of the Property. (Pa56.)

B. The Mount Laurel Action, The Affordable Housing Settlement Agreement, Rezoning, and Yellow Brook's Application

On July 2, 2015 the Borough filed its *Mount Laurel* declaratory judgment action, *In the Matter of the Application for the Borough of Rumson, County of Monmouth*, Docket No. MON-L-2483-15 (the "ML Action") with the Superior Court of New Jersey. Yellow Brook, as the then-owner of property located at 62 Carton Street, Block 59, Lot 10 on the Borough tax map ("Carton Street Property") and contract purchaser of the Property and 132 Bingham Avenue, Block 94, Lot 5 ("Bingham Avenue Property," together with Carton Property and Property, the "Yellow Brook Properties"), intervened in the ML Action and participated in the settlement negotiations with the Borough and Fair Share Housing Center ("FSHC").

As a result of the settlement between the Borough and Yellow Brook (the "YB Settlement Agreement"), Yellow Brook proposed to develop the Bingham Avenue Property and this Property ("Market Development Properties") with thirty-four (34) multi-family market-rate residential development units ("Market Development") as generally shown in the concept plans and elevations ("Market Concept Plans") attached to the YB Settlement Agreement. (Ra94-Ra175.)

To satisfy the required affordable housing obligation related to the Market Development, Yellow Brook agreed to provide the Borough with a payment in lieu of construction in connection with this Project and the Bingham Avenue project and to dedicate the Carton Street Property to the Borough to be developed as a 100% affordable housing project. (Ra94-Ra98.) The YB Settlement Agreement also set forth the requirement for the Borough to rezone the Market Development Properties to permit increased densities, consistent with the concept plan and architectural elevations, and the inclusion of the Market Development in the Borough's HEFSP. (Ra99.) Thus, given the dedication of land and funding for affordable housing development in the Borough, both this Project and the project on Bingham Avenue were considered "inclusionary developments" as defined in N.J.A.C. 5:93-1.3. Judge Jones approved the YB Settlement Agreement on July 29, 2020, following the duly

noticed Fairness Hearing conducted over the course of five days. (Ra456-Ra462.)

The Property was rezoned to the Rumson Road District (the "RR Zone") to allow for this Project on December 20, 2020 by Ordinance 20-014 D, as amended by 21-004 D, adopted on April 13, 2021 (collectively, the "RR Ordinance"). (Ra49-Ra93.) The RR Zone was created as part of the YB Settlement Agreement to address the Borough's constitutional affordable housing obligations. The Yellow Brook Properties, together, constitute an inclusionary development that is specifically referenced in the court-approved HEFSP to address the Borough's significant affordable housing obligation. (Ra4-Ra48.) The RR Zone incorporates the terms set forth in the YB Settlement Agreement by reference, and both the RR Zone and the YB Settlement Agreement include elevations, renderings, and floor plans for the proposed Market Development. (Pa50-Pa54; Ra49-Ra93; Ra94-Ra175.) The elevations, renderings, and floor plans of the residential townhomes and carriage homes that were exhibits to the approved YB Settlement Agreement and RR Ordinance are practically identical to the plans presented to the Board by Yellow Brook in connection with the Project, including with respect to height. (Ra176-Ra184; Ra185-Ra195; Ra196-Ra206.) There has been no increase in the height of dwellings in the architectural plans since the conception of the Project; the

architectural plans for the townhouses and the carriage houses that are in the RR Zone Ordinance and that were presented to the Board are the same.

On or about February 3, 2021, Yellow Brook filed an application with the Board requesting preliminary and final major site plan approval to construct the Project, in substantial compliance with the approved Market Concept Plans attached to the YB Settlement Agreement and RR Zone. (Pa4.)

C. Hearings on Yellow Brook's Application and the Board's Resolution

The Board conducted the first duly noticed hearing on November 8, 2021. (Ra215-Ra271.) The Board began the hearing by entering a number of exhibits into the record (Ra217 9:13 through Ra219 19:21), and then Yellow Brook presented direct testimony of: Brian DeCina, professional civil engineer (Ra220 24:9 through Ra230 61:2); Paul Grabowski, professional architect (Ra230 61:13 through Ra232 71:13); Frank Miskovich, professional traffic engineer (Ra232 71:14 through Ra237 90:4); and Art Bernard, professional planner (Ra 237 90:16 through Ra239 98:25). Mr. DeCina described the proposed drainage system for the Project, which would involve conventional curb-type inlets and underground storm conveyance piping, which would lead to an underground detention basin located under the roadway between Buildings 3 and 4 and Buildings 1 and 2. (Ra224 38:7-17.) He further opined that the proposed drainage system meets

the requirements of the Borough's zoning ordinances and the NJDEP stormwater management requirements, which was submitted to the Borough Engineer for review and comments. (Ra224 38:18-39:17.) Mr. Bernard testified and confirmed that the site plan and architectural plans are substantially consistent with the concept plan and architectural plans attached to the Settlement Agreement and the RR Zone. (Ra238 96:9-19.)

At the December 20, 2021 meeting, Mr. DeCina went into further detail as to the obligations under the New Jersey Stormwater Management Rules, noting that Yellow Brook is required to provide a stormwater management basin that handles water quality, water quantity and groundwater discharge. (Ra280 34:3-35:6.) Notably, Mr. DeCina described the underground detention basin as a storm tank module, which is effectively a plastic box, 30 inches tall, that is sized to handle the volume of runoff which will be released slowly into the storm pipe at a slower rate than what is currently occurring at the property. (Ra280 35:23-36:13.) He also described how the grading of the site was adjusted as part of the design of the project and comprehensive stormwater management plan. The Board then read a number of letters into the record from members of the public (including several of the Plaintiffs), generally objecting to the size and scale of the Project. (Ra28243:3 through Ra295 94:5.) After pointing to the increased grade elevations throughout the site plan, the December Letter argues,

amongst other unsupported claims, that there would be a "perpetual amplification and reverberation of noise pollution directed down to lower lying neighboring properties." (Ra293 88:17 through Ra294 89:20.) However, as the record shows, the Project proposed by Yellow Brook comports with the RR Zone and the Market Concept Plans that were approved by the Court and included as part of the Borough's HEFSP. (Ra49-Ra93; Ra94-Ra175.) Further, there was no testimony, expert or otherwise, to support the noise contention in the December Letter. At the December 20, 2021 meeting, in response to a question from Objector's counsel, Ronald S. Gasiorowski, Esq. ("Objector's Counsel") during cross-examination, Mr. DeCina confirmed that the measurement of height would be taken from the proposed finished grade of the Property in accordance with the Building Height Definition. (Ra299 111:2-24.)

At the January 10, 2022 meeting, objector's Counsel proffered Alexander Litwornia to the Board who, despite not having adequate credentials as a civil engineer and planner, and only being accepted by the Board as an expert in traffic engineering, provided "expert" testimony as to the Building Height Definition. (Ra345 13:16 through Ra355 56:3.) It is clear that Mr. Litwornia's background was in traffic engineering and traffic planning because: (i) he testified to his 30 years of experience in traffic and transportation planning (Ra345 14:4-13); (ii) in response to a question on direct as to his planning

expertise, he noted that he prepared traffic and transportation elements for various municipalities and reviewed master plans for 9 or 10 counties (Ra345 15:5-13); and (iii) he indicated that he has been a traffic engineer for 12 years just doing traffic engineering and traffic designs, and served as the traffic engineer for Burlington County (Ra345 15:14-21). In response to a question from Yellow Brook's counsel regarding Mr. Litwornia's professional planning credentials, he testified that he was the director of planning for Tri-State Regional Planning Commission, working on the commission's plans for planning for multiple states (including New Jersey) from 1970 to 1982, primarily focusing on transportation planning, including aviation and transit planning. (Ra345 16:3 through Ra 346 17:19.) Yellow Brook accepted Mr. Litwornia as an expert in the field of traffic engineering, but objected to him being accepted as an expert in the field of professional land use planning, to which the Board attorney, Michael B. Steib, Esq., confirmed that Mr. Litwornia would be accepted as a traffic engineer, "and to the extent his experience goes beyond that, he can identify that as the questioning goes." (Ra346 18:3-11.) At no point did the Board accept Mr. Litwornia as an expert in the field of professional planning or civil engineering.

Through Objector's Counsel's leading questions, Mr. Litwornia testified that the maximum height in the zone would be 35 feet, measured at the ground

surface level that exists prior to any regrading. (Ra347 22:19-23:19.) After opining on the height above existing grade to the floor elevation of new buildings ranging from 4.9 feet to 0 feet, Mr. Litwornia questioned whether a variance would be required for the buildings over 10% of the approved height (35 feet) when measured from the original grade. (Ra347 24:3 through Ra348 25:1.) Guided by Objector's Counsel, Mr. Litwornia opined that the buildings were effectively put on pedestals, and without any support, stated that he thought that an applicant "should [not] be bringing and regrading to such an extent that [they're] adding 4 or 5 feet." (Ra348 25:2-12.) During cross-examination, it was revealed that at the time of his testimony, Mr. Litwornia had "only been looking at this project for a couple of days or a week." (Ra353 47:2-6.) He did not review the RR Zone, the full site plan set, the YB Settlement Agreement, nor the exhibits to the YB Settlement Agreement at the time of his testimony. In fact, Mr. Litwornia only "reviewed" Objector's Counsel's summary of the RR Zone, noting that Objector's Counsel "just spoke to me about it" and "I just went with what he told me on the RR zone analysis." (Ra353 47:2 through Ra354 49:9.) Therefore, the only "expert" provided by Objector's Counsel never saw that the RR Zone included the same architectural elevations and renderings of the residential structures that were proposed to the Board and his "expert opinion" was based upon what Objector Counsel outlined for him.

Following Mr. Litwornia's testimony, Mr. DeCina, a recognized expert in civil engineering, noted that the Building Height Definition defines building height as being "measured from original lot grade or any revised lot grades shown on the site plan...Such revised lot grade should not include mounding, terracing or other devices designed to allow it to increase building height." (Ra356 58:11-21.) Mr. DeCina testified that the existing grade around the existing single family home in the center of the Property is approximately elevation 18 feet. (Ra356 59:9-60:2.) He also testified that to satisfy the State stormwater management requirements, the underground stormwater management system, located under the internal road near the proposed dwellings, would need to be at least 1 foot above the seasonal high water table. (Ra356 59:9-60:2.) The grading on the eastern portion of the Property (by the proposed dwellings) was driven by the seasonally high water table and the height of the underground stormwater system. The proposed grading throughout the site, particularly where the new dwellings are proposed, increased to approximately 18 feet but did not exceed elevation 18 feet (the existing highest grade elevation on the Property). (Ra356 60:3-6.) So effectively, the grade for the Property was flattened out except where there were wetlands that could not be disturbed along Osprey Lane and in the rear. Mr. DeCina further stated that the regrading of the Property was done as part of a comprehensive grading plan

for the entire site, which is common with any site plan. (Ra356 60:6-9.) As Mr. DeCina explained, mounding (or pedestals) occurs when you stand a building up on legs, or a mound of dirt, which would be evidenced through each residential structure having its own mound that it was built up on. (Ra356 60:10-15.) The elevated grade the Plaintiffs are complaining about is grading that is part of a comprehensive grading plan in connection with the site plan, which is for the purpose of addressing the site features to make the site work in terms of stormwater management, sanitary sewer, and grading. (Ra356 60:20-23.)

To assuage the Board's concerns, Kendra Lelie, the Board's professional planner, chimed in on the question of whether the Project complied with the height requirement based upon the Building Height Definition. Ms. Lelie agreed with Mr. DeCina that the clear language of the Building Height Definition allows for building height to be measured from the proposed site grade as part of a site plan. (Ra359 72:16-19.) Further, Ms. Lelie opined that mounding and terracing are typically interpreted as mounding around an existing or proposed building "where you would potentially have like a walkout basement to allow for a measurement to show that that height is at a different level." (Ra360 73:4-8.) Here, she noted the ultimate grades of the site are in relationship to the overall site design, including grading, stormwater management and the site layout. (Ra360 73:1-3.) Additionally, Ms. Lelie stated that both the RR Zone

and the YB Settlement Agreement included very clear exhibits with regard to the actual building height, noting that it met the building height requirements as part of the negotiation process. (Ra360 73:12-25.) It is notable that after Ms. Lelie told the Board that she did not think that there was a question of jurisdiction of the Application, Objector's Counsel did not challenge this opinion. (Ra360 73:21-74:11.)

The public portion of the hearing was closed after the conclusion of the January 10, 2022 meeting, with summations and the Board deliberation on the Application reserved for the next Board meeting. On February 7, 2022, Objector's Counsel and counsel for Yellow Brook provided the Board with summations (Ra426 7:12 through Ra433 35:23), followed by the Board deliberations.

Shortly thereafter, the Board voted and unanimously approved the Project, memorializing the approval in the Resolution dated March 7, 2022. (Pa67-Pa87.) The Board found "that the testimony of Mr. DeCina and Ms. Lelie is credible and supports [Yellow Brook's] position that the revised lot grade was developed for the purposes set forth in Mr. DeCina's testimony and Ms. Lelie's testimony and was not designed to allow increased building height." (Pa79.)

ARGUMENT

I. STANDARD OF REVIEW

The scope of judicial review in land use cases is limited. It is well established that "the law presumes that boards of adjustment and municipal governing bodies will act fairly and with proper motives and for valid reasons [and] will be set aside only when it is arbitrary, capricious or unreasonable." *Kramer v. Bd. of Adjustment, Sea Girt*, 45 N.J. 268, 296 (1965); *see also Friends of Peapack-Gladstone v. Borough of Peapack-Gladstone Land Use Bd.*; 407 N.J. Super. 404, 424 (App. Div. 2009) (affirming the "judiciary's limited standard of review of local land use decisions"). A reviewing court, when considering an appeal from a planning board action, generally applies the "arbitrary, capricious, or unreasonable" standard. *Dowel Assocs. v. Harmony Twp. Land Use Bd.*, 403 N.J. Super. 1, 29 (App Div. 2008) (quotation marks omitted). The purpose of the judicial review of the planning board's decision is to determine whether "the board acted within the statutory guidelines and properly exercised its discretion." *See id.* at 30 (quotation marks omitted). Those who challenge the local board's actions, such as the Plaintiffs here, have the burden of proving the decision is arbitrary, capricious, and unreasonable. *See Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Twp. of Franklin*, 233 N.J._546, 558 (2018). A reviewing court may not substitute its judgment "for the proper exercise of the

Board's discretion." *CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd./Bd. of Adjustment*, 414 N.J. Super. 563, 578 (App. Div. 2010).

On the other hand, a land use board's interpretation of law is reviewed de novo. *Dunbar Homes*, 233 N.J. at 559 (emphasis added). Naturally, "[a]s with other legislative provisions, the meaning of an ordinance's language is a question of law that we review de novo." *Bubis v. Kassin*, 184 N.J. 612, 627 (2005) [emphasis added]. Even so, a municipality's informal interpretation of an ordinance is entitled to deference. *See id.* Though the deference is not limitless, the board's interpretation will necessarily inform the court's de novo review because "the Planning Board has input into the adoption of a master plan, N.J.S.A. 40:55D-28, as well as the adoption or amendment of a zoning ordinance, N.J.S.A. 40:55D-64" and "can be expected to have more than a passing knowledge of the legislative intent at the time of the enactment." *Atlantic Container, Inc. v. Twp. of Eagleswood Planning Bd.*, 321 N.J. Super. 261, 269 (App. Div. 1999). Further, like here, the local boards apply these definitions on a regular basis.

Here, the trial court properly applied a two part analysis under each standard. First, the trial court analyzed the Plaintiff's arguments pertaining to

the interpretation of the word "designed" in the Building Height Definition.[1] Second, the trial court reviewed the Board's factual findings in its application of the Building Height Definition, *i.e.*, that there was no mounding, terracing or other device designed to allow for increased building height. The trial court analyzed this issue under an arbitrary, capricious or unreasonable standard and recognized that the Board reasonably accepted Yellow Brook's expert testimony, and the testimony of the Board Planner and Board Engineer, over the objector's expert testimony. The arbitrary, capricious and unreasonable standard is the appropriate standard for the second part of the analysis because the Board was making a factual finding in the application of the Building Height Definition.

II. THE TRIAL COURT PROPERLY DETERMINED UNDER A STRICTLY DE NOVO STANDARD OF REVIEW THAT THE BOARD PROPERLY INTERPRETED THE WORD "DESIGN" IN THE ORDINANCE (Pa13-Pa15).

The trial court's careful consideration - under a strictly "de novo" review – as to whether the Board properly interpreted the use of the word "designed" in the Building Height Definition should not be disturbed on appeal. The express language of the Building Height Definition clearly supports a single

[1] Plaintiff now argues that there is also ambiguity in the term "to allow" in the Building Height Definition, but this issue was never raised before the trial court, which is why the trial court did not address it in its opinion.

interpretation – specifically that interpretation adopted by the Board, and affirmed by the trial court. *See Wynfield Corp. v. Killam Assocs.*, 385 N.J. Super. 20, 32 (App. Div. 2006) (holding that "[i]f the statute is clear and unambiguous on its face and admits of only one interpretation, a court need look no further in divining the Legislature's intent).

The Building Height Definition is clear on its face, defining building height as "the vertical dimension measured to the highest point of the building... from the lowest original lot grade ***or any revised lot grade shown on a site plan....*** Such revised lot grade shall not include mounding, terracing, or other devices ***designed to allow increased building height***." (Pa61-Pa62) (emphasis added). The trial court used the Merriam-Webster Dictionary definition of "design" to point out that intent is just another word for design or purpose. Was it ***designed*** to increase the height? Was it ***intended*** to increase the height? Was its ***purpose*** to increase the building height? All of these are asking the same question. The trial court correctly made the determination that, "the definition of 'building height' adopted by the Borough of Rumson in its ordinance specifically includes consideration of the plan or purpose of the revised grading that is included within the site plan and other documents presented to the land use board." (Pa14.)

Plaintiffs' proffered interpretation of the word "design" is not only trivial (as they point out in their brief), but is also illogical and unworkable in practice. Plaintiffs' argument that the "plain language of this phrase removes the purpose of the design from the equation" would mean that any time there is an increase in grade, one would not be allowed to measure from that new grade, regardless of the reason for the increased in grade. This is clearly not what the ordinance states or means, and indeed, is an argument that was carefully considered and debunked by the trial court. (Pa13-Pa15.) As the trial court pointed out, "[i]t is clear from the face of the ordinance [] that the Borough envisioned and permitted a change in grading on the property as being allowable in determining the 'building height.'" (Pa13.) The trial court explained that applicants must present evidence "that the change in grade was made for an engineering, stormwater or other purpose and not to enhance the height of the structure, [and] an objector can contest that the regrading was performed for the stated purpose." (Pa15.)

Plaintiffs' proffered interpretation of the word "designed" is that any revised grading that has the effect or result of increasing the building height (from the original grade) cannot measure height from the revised grade. Aside from being a circular argument, under Plaintiffs' interpretation, one could **never** use a revised grade that increased the grade of the property, even if slightly,

because that would have the effect of increasing the building height. That was clearly not what was envisioned. The plain reading of the definition is that one cannot use revised grading to measure building height if there is mounding, terracing or other devised used for the purpose or intent to allow an increase in building height.

Therefore, the trial court properly found, under a de novo review, that the Board was correct in finding that the revised grading plan could be used for measuring height if the purpose or intent for the revised grading was for something other than allowing for an increased building height.

III. THE TRIAL COURT DID NOT FAIL TO CONSIDER WHETHER THE REVISED LOT GRADE WAS THE RESULT OF "MOUNDING, TERRACING, OR OTHER DEVICES" DESIGNED TO ALLOW INCREASED BUILDING HEIGHT (Pa15-Pa16).

In order to determine whether the Board's interpretation of the word "designed" in the Building Height Definition was appropriate, the next part of the analysis for the trial court was to determine whether the Board's factual findings in the application of the Building Height Definition were arbitrary, capricious or unreasonable. In particular, the trial court first reviewed the Board's findings that there was no mounding or terracing for the purpose of increasing building height and that the revised grading was for the purpose of stormwater management and infrastructure. On this point, the trial court stated

that the credibility determinations the Board made are entitled to deference because "[e]vidence supporting the Planning Board's determination was clearly presented at the hearings below." (Pa12.)

A land use board "has the choice of accepting or rejecting the testimony of witnesses, and where reasonably made, such decision is conclusive on appeal." Cox & Koenig, *New Jersey Zoning & Land Use Administration*, § 18-4.2 (GANN 2022); *see also Sea Girt*, 45 N.J. at 288; *Bd. of Educ. of City of Clifton v. Zoning Bd. of Adjustment of City of Clifton*, 409 N.J. Super. 389, 434 (App. Div. 2009).

The record is clear that there was more than enough support for the Board's, and the trial court's, finding that Mr. DeCina and Ms. Lelie were more credible on the issue of whether there was mounding or terracing and what was the purpose of the revised grading. Again, Yellow Brook was the only one that presented testimony from an expert civil engineer – Mr. DeCina – as so accepted by the Board. (Ra220 24:9 through Ra230 61:2.) Mr. DeCina opined that the change in grade of the Property was not "mounding." (Ra356 60:10.) As he explained, "mounding" is typically seen where there is a development of a building where the grade immediately surrounding the building is raised compared to the existing grade for the rest of the property. (Ra356 59:1 through Ra357 61:11.) That raises the effective height of the structure because the home

or building is sitting on top of a "mound." (*Id.*) It is typically seen with single-family homes where from the street one can see that a home sits on top of a mound compared to the rest of the property.[2] As Mr. DeCina testified, there were no such mounds on the Property. (*Id.*) First, the grading for this Property was part of a comprehensive grading plan for the entire development to address stormwater management, sanitary sewer, utilities and internal roads. (*Id.*) The existing single-family home on the Property near center had a grade elevation of 18 feet. (*Id.*) In regrading the Property as part of this site plan (based upon stormwater management, street design, utilities, etc.), Yellow Brook did not exceed that 18 feet existing grade elevation at the center of the Property. In fact, the area where the proposed residential dwellings are located, the grade is approximately 18 feet. So by raising the grade on the eastern portion of the Property, Yellow Brook effectively flattened most of the Property where development was going to occur. That is certainly not a mound.

As Mr. DeCina also noted, if there was mounding, each carriage house, duplex, or triplex would be sitting on its own mound, which is not the case here. Mr. DeCina's expert testimony confirmed there was no mounding or terracing,

[2] This explains why the Borough has the Building Height Definition that it does. Prior to Yellow Brook's *Mount Laurel* settlement with the Borough, the Borough did not have any multifamily residential zones – only single-family residential zones where mounding could be more of an issue.

and that testimony was not disputed by the Board Engineer. (*Id.*) Additionally, Ms. Lelie confirmed that this is not mounding. (Ra360 73:4-8.)

In contrast, Mr. Litwornia, the objector's traffic engineer, made only conclusory statements during his testimony that the regrading of the entire site constituted mounding, such that the buildings were effectively placed on pedestals (which is not the terminology used in the definition). (Ra345 13:16 through Ra355 56:3.) Further, Mr. Litwornia opined that this "mounding" was done to provide better views, but there was no support in the record establishing that the extra feet provided by the regrading of the entire site would provide the buildings with better views. The Property abuts a County Road and is surrounded by other homes; it is not near a beach nor a river, and consequently, the views would not be a selling point to a potential buyer.

Notably, Mr. Litwornia, did not have the requisite qualifications to render an opinion as to the regrading of the site, nor was any relevant testimony presented that contradicted the opinions of Mr. DeCina and Ms. Lelie. Mr. Litwornia had very limited credentials as a civil engineer and planner, as it was clear that Mr. Litwornia's background was primarily in traffic engineering and traffic planning. Mr. Litwornia testified to his 30 years of experience in traffic and transportation planning (Ra345 14:4-13), relied on his experience preparing traffic and transportation elements as evidence of planning expertise (Ra345

15:5-13), and indicated that he has doing traffic engineering and traffic designs and served as the traffic engineer for Burlington County for 12 years (Ra345 15:14-21). Though Yellow Brook accepted Mr. Litwornia as an expert in the field of traffic engineering, counsel objected to Mr. Litwornia being accepted as an expert in the field of professional land use planning, which was confirmed by the board attorney Mr. Steib. (Ra346 18:3-11.) Mr. Litwornia was never accepted as an expert in professional land use planning or civil engineering, and therefore his testimony was given appropriate weight by the Board when it considered the credible, expert civil and planning testimony provided by Yellow Brook.

Remarkably, Mr. Litwornia did not even independently review the RR Zone, site plan, YB Settlement Agreement, nor the exhibits to the YB Settlement Agreement at the time of his testimony; he simply relied upon the conversations he had with Objector's Counsel "just a few days or a week" prior to providing testimony. (Ra353 47:2-6.) Therefore, the testimony presented by the objectors is only from a traffic engineer that (a) was only retained a few days prior to the hearing in which he provided testimony; (b) barely reviewed anything in the record; and (c) never even realized that the RR Zone specifically included the same elevations, renderings and floor plans of the residential structures that were

presented to the Board as part of this Application (based upon the Settlement Agreement).

Plaintiffs' attempts in its brief to define mounding, terracing, and devices, the first two of which are engineering terms, are irrelevant. The Board made a credibility determination based on the evidence and expert engineering and planning testimony provided that there was no mounding or terracing or other device designed to allow for an increased building height, and the trial court found that determination was not arbitrary, capricious, or unreasonable. There is no reason to disturb that finding on appeal.

IV. THE TRIAL COURT PROPERLY DETERMINED THAT THE BOARD'S FACTUAL FINDINGS IN CONNECTION WITH THE APPLICATION OF THE HEIGHT DEFINITION WERE NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE (Pa11-Pa12).

The trial court's ultimate determination that the Board's findings as to the reasons for the revised grading were not arbitrary, capricious, or unreasonable is adequately supported in the record. The trial court properly acknowledged that the Board had the prerogative to find persuasive and credible the testimony of Mr. DeCina, Yellow Brook's expert civil engineer, and the testimony of its own planning expert, Kendra Lelie – who were asked to give an expert opinion on the terms within the definition. Contrary to how Plaintiffs continue to attempt to spin this, the experts were not asked to make a legal determination.

Here, the Board properly found, based on the expert testimony of the licensed civil engineer who designed the project, and had over 20 years of experience in the field of civil engineering, and the Board's own licensed professional planner, that the revised grading was not designed to allow for an increased building height, but rather because of stormwater management and underground infrastructure improvements.

The record is clear that there was more than enough support for the Board's finding that a height variance was not required. First, Yellow Brook was the only one that presented testimony from an expert civil engineer – Mr. DeCina – as so accepted by the Board. (Ra220 24:9 through Ra230 61:2) Mr. DeCina testified that the change is grade was not "designed to allow increased building height." As Mr. DeCina explained the change in grade for this particular area was driven by (a) the seasonal ground water table and (b) the height / size of the underground stormwater management system. (Ra356 60:20-23.) That, combined with the sanitary sewer, utilities and roads drove what was needed for grading. The underground stormwater management system, designed in conformity with NJDEP requirements, needed to be "underground" - hence the name. However, the system can only go so far underground because, as Mr. DeCina explained, the system must be at least one foot above the seasonal ground water table. (Ra356 59:9-60:2.) From there, the stormwater

management system has a particular height dimension. As Mr. DeCina explained, in order to have the system underground with roads and curbing on top of it, the grade in this entire area needed to be increased. The grade was not increased beyond the 18 feet existing grade where the existing house sits at the center of the Property. (Ra356 60:3-6.) Thus, the change in grade was not designed to allow increased building height, but rather to allow for the stormwater management system and layout of the overall Project.

All of this was further confirmed by the Board's own planner, Ms. Lelie. Ms. Lelie opined, relying on the testimony of Mr. DeCina (as confirmed by the Board Engineer) that the change in grade was not designed to allow for an increased building height but rather for stormwater management and design layout. (Ra360 73:1-3.) As Yellow Brook's planner, Mr. Bernard, testified, the architectural elevations and dimensions of the plans presented to the Board are the same within the RR Zone ordinance and YB Settlement Agreement. (Ra238 96:9-19.) Recall, this RR Zone was specifically created to allow this Project and these dwellings. The record is clear that the Board properly found that the change in grade was not designed to allow increased building height.

In fact, during the Board hearings, Plaintiffs acknowledged that revised grading was for stormwater management purposes. In Plaintiffs' letter to the Board cited in their brief, it states "[d]ue to the number of buildings and the

proposed development, the Applicant had to mound on the revised lot grade in order to accommodate stormwater management." Though Yellow Brook's expert disagreed that there was mounding (discussed *supra.*), Plaintiffs' acknowledged that the revised grade was for stormwater management. The number of buildings is irrelevant to the analysis because the Borough agreed to rezone the Property for those number of dwellings as part of its Settlement Agreement and affordable housing compliance.

Accordingly, the trial court correctly determined that: "Evidence supporting the Planning Board's determination was clearly presented at the hearings below, and as a matter of the law the court cannot find that the Planning Board's conclusion concerning the credibility of the experts and the reasons provided for the regrading of the property were arbitrary, capricious and unreasonable." (Pa12.)

For the forgoing reasons, the trial court properly determined that the findings of the Board in agreeing with the expert testimony of Mr. DeCina and its own Board Planner and Board Engineer were not arbitrary, capricious or unreasonable.

CONCLUSION

For all of the foregoing reasons, Defendant respectfully requests that this Court affirm the trial court's decision.

Respectfully submitted,

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Attorneys for Defendant/Respondent
Yellow Brook Property Co., LLC

By: */s/ Craig M. Gianetti*
CRAIG M. GIANETTI
A Member of the Firm

Date: July 01, 2024

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August 14, 2024

VIA ELECTRONIC FILING
Superior Court of New Jersey
Appellate Division
P.O. Box 006
Richard J. Hughes Justice Complex
Trenton, NJ 08625-0006

Re: **Allen Berman; Andrew Scheffer; Jon Blatt; Matthew Scoble; Katherine Harscar v. Borough of Rumson Planning Board; Yellow Brook Property Co., LLC**
Docket No. A-001409-23

On Appeal From:
Superior Court of New Jersey
Law Division – Civil Part
Monmouth County

Heard Below:
Honorable Linda Grasso Jones, J.S.C.

Richard C. Sciria, Esq. (035861999)
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Of Counsel and on the Brief

Dear Honorable Judges:

Please be advised that this law firm represents the plaintiffs/appellants Allen Berman, Andrew Scheffer, Jon Blatt, Mathew Scoble, and Katherine Harscar in the above matter. As such, please accept this letter brief in lieu of a more formal brief in reply to defendants/respondents' Yellow Brook Property Co., LLC, and Borough of Rumson Planning Board's opposition to plaintiffs/appellants' appeal brief.

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TABLE OF JUDGMENTS, ORDERS AND RULINGS

PRELIMINARY STATEMENT

Defendant/respondent Yellow Brook Property Co., LLC (hereinafter referred to as "Yellow Brook") argues in its opposition brief that the plaintiffs/appellants (hereinafter referred to as "plaintiffs") continue to seek to delay the construction of fourteen (14) residential dwellings that are part of an inclusionary affordable housing development critical to the Borough of Rumson's court-approved affordable housing compliance plan based upon false claims and without any legitimate basis. Yellow Brook also sets forth in its opposition brief the entire history of the Mount Laurel Action, the Affordable Housing Settlement Agreement, and Rezoning which is completely irrelevant to plaintiffs' appeal, including the elevations of the residential townhomes and carriage homes that were exhibits to the Settlement Agreement.

Despite Yellow Brook's discontent with plaintiffs' appeal, plaintiffs are permitted under the New Jersey Court Rules to appeal the trial court's decision upholding the Borough of Rumson's Planning Board (hereinafter referred to as the "Board") decision granting Yellow Brook's application for Preliminary and Final Major Site Plan Approval.

The issue on this appeal is technical and purely legal as to whether the Board misinterpreted the Building Height Definition within the Borough of Rumson Height Ordinance 22-2.4 (hereinafter referred to as the "Ordinance"). The Ordinance defines Building Height as "the vertical dimension measured to the highest point of a building . . . from the lowest original grade or any revised lot grade shown on the Site Plan . . . Such revised lot grade shall not include mounding, terracing, or other devices ***designed to allow increased building height.***" (emphasis added).

Defendants Yellow Brook and Board both argue that the Board made a clear factual determination as to whether the regrading of the entire site constitutes "mounding, terracing, or other devices designed to allow increased building height" in that the property did not constitute mounding since Yellow Brook did not "intend" to increase building height based upon the factual record from the Board. However, Yellow Brook and the Board misinterpret the Ordinance by defining "design" as the "intent" or "purpose" of the applicant for the increased building height.

Rather, the Ordinance contains the phrase "designed to allow" increased building height which means that the design of the revised lot grade shall not include

mounding, terracing, or other devices which design "allows" or "results" in increased building height. Thus, the building height definition is clear that irrespective of intent or purpose, if the mounding, terracing or other devices results in an increased building height, then building height must be measured from the original lot grade.

Nevertheless, the trial court erred by adopting the Board's factual findings of the Ordinance under the arbitrary, capricious, or unreasonable standard of review rather than interpreting the Ordinance under the *de novo* standard of review. Even so, the trial court, nonetheless, failed to properly define the word "design" under the Ordinance.

Therefore, the trial court's decision be reversed, and that plaintiffs' appeal be granted.

PROCEDURAL HISTORY

Plaintiffs rely upon the Procedural History set forth in its appeal brief.

STATEMENT OF FACTS

Plaintiffs rely upon the Statement of Facts set forth in its appeal brief.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN APPLYING THE ARBITRARY, CAPRICIOUS, OR UNREASONABLE STANDARD OF REVIEW, RATHER THAN ONE OF ORDINANCE INTERPRETATION AS A MATTER OF LAW. *(SEE APPENDIX – OPINION Pa15-16).*

Board decisions on "purely legal" matters are to be reviewed *de novo* by a reviewing court and are not entitled to any particular deference. *Reich v. Borough of Fort Lee Bd. of Adjustment*, 414 N.J. Super. 483, 499 (App. Div. 2010); *see also 388 Route 22 Readington Realty Holdings, LLC v. Township of Readington,* 221 N.J. 318, 338 (2015). Under established rules of appellate review under *de novo*, the Appellate division is not bound and gives no deference to the legal conclusions of the lower court. *Toll Bros. Inc. v. Township of W. Windsor,* 173 NJ 502, 549 (2002). Interpretation of an ordinance is essentially a legal issue. *Wyzykowski v. Rizas*, 132 N.J. 509, 518 (1993); *Pullen v. Tp. of South Plainfield*, 291 N.J. Super. 1, 6 (App. Div. 1996); *Jantausch v. Borough of Verona*, 41 N.J. Super, 89, 96 (Law Div. 1956), *aff'd,* 24 N.J. 326 (1957).

Here, the trial court erred in applying the arbitrary, capricious and unreasonable standard of review as to whether the Board's factual determination that Yellow Brook's revised lot grade was not designed to allow increased building height based upon the record at the Board hearings. The trial court should have strictly interpreted the Ordinance *de novo* as a matter of law. Therefore, the trial court misapplied the appropriate standard of review in this matter.

POINT II

THE TRIAL COURT DID NOT PROPERLY INTERPRET THE WORD "DESIGN" IN THE CONTEXT OF "DESIGNED TO ALLOW" IN THE BOROUGH OF RUMSON BUILDING HEIGHT ORDINANCE UNDER A STRICT DE NOVO STANDARD OF REVIEW *(SEE APPENDIX – OPINION Pa14-15).*

The Ordinance is very clear that building height shall mean the vertical dimension measured to the highest point of a point of a building from the lowest original lot grade or any revised lot grade.... The last sentence of the definition states: "Such revised lot grade shall not include mounding, terracing, or other devices designed to allow increased building height." *(Pa60-62)*. The definition has no qualifier for or concept of intent that allows one to ignore the clear language. However, the trial court failed to properly interpret and define the meaning of the

word "design" in the context of the Building Height Ordinance language "designed to allow increased building height."

Moreover, the defendants in their opposition briefs misinterpret the word "designed" in "designed to allow increase building height: to a purpose for the increased building height, which is irrelevant. The phrase "designed to allow" in the Ordinance is clearly interpreted as whether the design, for whatever purpose, allow or result in increased building height. If so, then the lowest original lot grade must be used for measuring building height.

The Building Height definition of the Ordinance clearly states that such revised lot grade shall not include mounding, terracing or other devices designed to allow for increased building height, irrespective of the purpose or intent. If the result of the design allows for increased building height, then Building Height must be measured from the original lot grade.

Otherwise, the Ordinance could not be applied consistently to different applications whereas the Board would measure building height from the original lot grade on one property, while measuring building height from a revised lot grade on another property. Such application of the Ordinance would cause a confusing,

unclear and subjective interpretation of Building Height which would not be applied consistently in different applications.

Yellowbrook is misleading in Footnote 1 of its brief stating that plaintiffs did not raise the issue "to allow" in the Building Height definition before the trial court. The trial court's opinion misinterpreted the definition of Building Height to read "designed to" instead of the phrase "designed to allow" in the Ordinance. *(Pa14-15)*. Thus, it is permissible for the plaintiffs to address the context of the trial court's opinion in its appeal.

Additionally, Yellow Brook's statement in its brief that any time there is an increase in grade, one could never use a revised grade that increased the grade of the property, even if slightly, because that would have the effect of increasing the building height is nonsense. First, the Building Height definition addresses the revised lot grade as to not include mounding, terracing, or other devices designed to allow increased building height. Secondly, measuring building height from an original lot grade as opposed to a revised lot grade does not result in the denial of an application. Rather, the purpose of the Ordinance is to determine whether the increased building height is substantial enough to require the applicant to apply for

a d(6) use variance[1] before a Zoning Board when the height is greater than ten (10) feet or ten percent (10%) under the maximum allowable building height.

Moreover, the Board argues in its opposition brief that the language of the Ordinance is clear and unambiguous that "[I]f the revised lot grade includes mounding, terracing or other devices *that are* designed to allow increased building height, then the height is measured from the lowest original lot grade. Conversely, if the revised lot grade includes mounding, terracing or other devices *that are* not designed to allow increased building height, but for some other legitimate purpose, the height is measured from the approved revised lot grade." *(emphasis added).*

The Board's statement above is misleading since it is adding two words, "*that are"* which do not exist in the actual definition, and alters the meaning of the Building Height definition in the Ordinance. The Board adding these two words changes the meaning of the definition to interject the purpose for the increased

[1] In Engleside at W. Condo. Ass'n v. Land Use Bd. Of Borough of Beach Haven, 301 N.J.Super. 628, 639 (Law Div. 1997), the court stated that in adopting subsection (d)(6), "the Legislature reasoned that when a height deviation reached that level of nonconformity [exceeding the maximum height by 10 feet or 10%], the resulting structure arguably could be seen as something out of character with the structures permitted in the zone and thus should be reviewed under the enhanced standards of subsection d."

building height in the definition, that is, the purpose of the mounding, terracing, or other devices to increase the height of the building.[2]

Yellow Brook and the Board in their opposition briefs keep espousing that the revised lot grade was not designed for the purpose of increasing the building heights on the property. Designed for the purpose of something as opposed to designed to allow something are two different concepts. The former means that something was designed for a specific purpose such as to increase building height. The latter means that the design allows for increased building height, rendering the purpose of the design irrelevant.

Therefore, under the proper interpretation of Building Height under the Ordinance, two (2) building on the subject property exceed the allowable building height by over ten percent (10%) making the approval null and void and as such the Board did not have the jurisdiction to hear this matter. Accordingly, plaintiffs' appeal should be granted reversing the decision of the trial court below.

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[2] Revised lot grades which include mounding, terracing, or other devices with no building(s) atop such mounding, terracing, or other devices DO NOT allow increased building height and are often used for landscaping purposes. Moreover, not all revised lot grades include mounding, terracing, or other devices and such revised lot grade may in fact reduce the original lot grade.

POINT III

THE TRIAL COURT FAILED TO CONSIDER WHETHER THE REVISED LOT GRADE WAS THE RESULT OF "MOUNDING, TERRACING, OR OTHER DEVICES" DESIGNED TO ALLOW INCREASED BUILDING HEIGHT *(SEE APPENDIX – OPINION Pa15-16).*

The trial court failed to determine and address whether the revised lot grade of the proposed development was the result of "mounding, terracing, or other devices" designed to allow increased building height. Furthermore, the trial court failed to address the Board's failure to consider whether the revised lot grade is not just the result of "mounding", but whether it included either "terracing" or "other devices." The fact that the trial court failed to address the entire Building Height definition on the property is plain error requiring reversal of the decision below.

Here, the revised lot grade for the property does include "mounding, terracing, or other devices" designed to allow increased building height because it raises the grade for all six (6) buildings. The Applicant's site plan shows, among other things, that the revised lot grade slopes upward from the street level on Osprey lane from an elevation of 13' to an elevation of 18' as a result of fill proposed by the applicant. *(Pa55-59).* Moreover, the elevated lot grade of the Application includes "mounding,

terracing, or other devices" increasing the elevation of the buildings from the original lot grade.

The Ordinance is clear in its language of "mounding, terracing, **or** other devices," which means only one of these conditions need to exist to use the original lot grade, not the revised lot grade for building height. *(Pa60-62)(emphasis added)*. Nevertheless, the trial court erred in not making any determination whether the revised lot grade was the result of "mounding, terracing, or other devices." The failure of the trial Court to address this issue does not sufficiently provide the proper and thorough interpretation of the Building Height Ordinance under de novo review, and should result in the reversal of the trial court's opinion. *See State v. Olivero*, 221 *N.J.* 632, 639 (2015)), *certif. denied*, 224 *N.J.* 528 (2016).

Yellow Brook argues in its opposition brief that it did not exceed the eighteen (18) feet of the existing residential dwelling, and by raising the grade on the eastern portion of the property, Yellow Brook "effectively flattened most of the property where development was going to occur. That is certainly not a mound." This logic is defective on two fronts. First, the building height is measured from the highest point of a building as the definition does not provide for the ability to substitute the

original lot grade of one building for another. Secondly, Yellow Brook continues to focus solely on the word(s) mound(ing), ignoring the fact that the Building Height definition includes the words "terracing, or other devices". The trial court did not address whether the revised lot grade included terracing or other devices resulting in plain error as indicated above.

Furthermore, Yellow Brook's footnote 2 of its opposition brief stating that the Borough of Rumson did not have any multifamily residential zones prior to the Yellow Brook Settlement is misleading and inaccurate. Notwithstanding that this information was not provided on the record below and irrelevant to the issue in this case, the developments Yellow Brook refers to on Bingham Avenue and Rumson Road which are multifamily zones, are developments with more dwelling units then buildings, i.e. eighteen (18) units in nine (9) buildings at Bingham and fourteen (14) units in six (6) buildings at Rumson Road. There are at least two other developments dating back to 1986 and 2010 in the Borough of Rumson where there are multiple dwelling units per building, which is what the 91 Rumson Rd development is doing. There are no mounding, terracing or other devices raising the elevation of the

buildings on these two pre-existing developments as is proposed at the Rumson Road development.

Regardless, the Appellate Division cannot consider this information presented by Yellow Brook since there was no factual record of the Borough of Rumson not having any multifamily residential zones in the record below.

Accordingly, plaintiffs' appeal should be granted reversing the decision of the trial court below.

POINT IV

THE TRIAL COURT ERRED IN ADOPTING THE BOARD'S FACTUAL FINDINGS OF THE BOROUGH OF RUMSON'S BUILDING HEIGHT ORDINANCE UNDER THE ARBITRARY, CAPRICIOUS, OR UNREASONABLE STANDARD OF REVIEW *(SEE APPENDIX – OPINION Pa11-12).*

The trial court erred in adopting the Board and applicant's professionals' legal definition of the Ordinance under the "arbitrary, capricious, and unreasonable" standard. Generally, 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. *See Burbridge v. Mine Hill Tp.,* 117 *N.J.* 376, 385 (1990); *Kramer v. Bd. of Adjustment, Sea Girt,* 45 *N.J.* 268,

296 (1965); *Md. Ctr. v. Princeton Zoning Bd. of Adjustment,* 343 N.J. Super. 177, 198 (App. Div. 2001). However, a municipal board's interpretation of the law is reviewed de novo and not entitled to deference. *See Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Twp. of Franklin,* 233 N.J. 546, 558 (2018); *see Point I, supra.*

Here, the trial court erred in deferring to the Board and applicant's professionals' incomplete definition and interpretation of the Building Height Ordinance, rather than making a legal interpretation of the ordinance under de novo review. The trial court concluded that the legislative intent of the ordinance was for the land use Board to make a determination of whether the revised grading was done for the design, or purpose of allowing increased building height which is subject to review by the trial court using the "arbitrary, capricious and unreasonable" standard of review. *(Pa 15).*

Yellow Brook and the Board in their opposition briefs both address in specific detail the factual findings of the Board and the credibility of all the witnesses in the Board hearing below. However, the question of the Building Height ordinance is ostensibly a legal question, to be decided under de novo review, not by deference to the Board under an arbitrary, capricious and unreasonable standard. The trial court

improperly deferred to the Board and applicant professionals to opine on a legal question at the Board hearing even though they are an engineer and planner, respectively. None of these professionals could have legally interpreted the plain language of the statute.

Therefore, the trial Court should have determined the legal definition of the ordinance under the de novo review standard, rather than defer to the Board under the "arbitrary, capricious and unreasonable" standard. Thus, the failure of the Court to apply the de novo review standard should result in the reversal of the trial court below.

CONCLUSION

For the foregoing reasons, plaintiffs' respectfully request that the trial court's decision be reversed, and that plaintiffs' appeal be granted.

Respectfully submitted,

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