BESADAR HOLDINGS LLC
AND SOLOMON HALPERN,
INDIVIDUALLY,

Plaintiffs-Respondents,

v

TOWNSHIP OF LAKEWOOD
PLANNING BOARD, JOHN DOES
1-30 (A FICTITIOUS NAME FOR
PERSONS PRESENTLY
UNKNOWN) AND XYZ, INC., 1-10
(A FICTITIOUS NAME FOR A BUSINESS
ENTITY PRESENTLY UNKNOWN

Defendants,

And

VIGGY BLECH,

Intervenor/Defendant

Superior Court of New Jersey
Law Division: Ocean County
DOCKET NO: A-002075-23

ON APPEAL FROM FINAL ORDER
ENTERED BY THE SUPERIOR
COURT OF NEW JERSEY, LAW
DIVISION, CIVIL PART, OCEAN
COUNTY (OCN-L-2115-22)

CIVIL ACTION

SAT BELOW: HON. CRAIG L.
WELLERSON, P.J.C.v.

APPELLATE BRIEF
FOR
INTERVENOR/DEFENDANT, VIGGY BLECH

EDWARD F. LISTON, JR., P.C.
9 Grand Avenue Bldg 1 Suite B
P.O. Box 1056
Toms River, NJ 08753
(732) 244-5900

On the brief: EDWARD F. LISTON, JR.
(ID #25791169; edwardliston@gmail.com)

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PROCEDURAL HISTORY [1]

On or about December 23, 2021, plaintiff Besadar Holdings LLC (the applicant) submitted an application for preliminary and final major subdivision approval with defendant Township of Lakewood Planning Board (the Board). See Ia18 [2] to Ia22 (application). Hearings were held on April 5, 2022 (1T) and June 14, 2022 (2T). On the latter date, the Board voted to deny the subdivision. See 2T144-9 to 2T145-8.

The applicant subsequently requested reconsideration. On August 2, 2022, the Board convened and declined the applicant's request. See 3T29-22 to 3T31-6. See the August 23, 2022 memorializing resolution at Ia64 to Ia72.

On September 23, 2022, the applicant and its principal (collectively, the plaintiffs) filed an action in lieu of prerogative writs in the Superior Court of New Jersey, Law Division, Ocean County (OCN-L-2115-22). See Ia1 to Ia17 (complaint). The Board answered on October 17, 2022. See Ia73 to Ia87.

On December 21, 2022, the Honorable Craig L. Wellerson entered a consent order (Ia88 to Ia89) permitting objector Viggy Blech to intervene. Mr. Blech's answer (Ia90 to Ia98) was filed on January 5, 2023.

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[1] Planning Board hearing transcript references: 1T (April 5, 2022); 2T (June 14, 2022; 3T (August 2, 2022). Superior Court trial transcript reference: 4T (December 20, 2023),

[2] "Ia__" refers to the Intervenor-Appellant's appendix.

The matter was remanded to the Board for additional findings and conclusions, see letters at Ia238 to Ia239; Ia240 to Ia241; the September 19, 2023 supplemental resolution is at Ia242 to Ia252.

Trial was held on December 20, 2023 (4T). On January 29, 2024, Judge Wellerson entered a final order reversing the Board and approving the subdivision. See Ia269 to Ia270. The court's reasoning is at 4T35-3 to 4T47-11.

On March 14, 2024, Mr. Blech filed a notice of appeal. See the amended notice at Ia271 to Ia274.

STATEMENT OF FACTS

This appeal concerns the proposed development of three lots (Lakewood Township Tax Map, Block 24, Lots 23, 24.01 and 34) to the south/west of Fourteenth Street. See Ia138 (Preliminary and Final Major Subdivision, first page). Combined, the tract consists of 3.20 acres. See Ia161 (page 2 of Terence M. Vogt's engineer/planning review letter).

The tract is in Lakewood's R-12 single-family district. See Ia162 (page 3 of the Vogt letter). The use and bulk standards for the zone are set forth in the Township's Unified Development Ordinance (UDO) at Section 18-902E (Ia181 to Ia183). "Basement apartments are permitted uses in all residential zones[.]" UDO Sec. 18-910D (Ia212).

The applicant proposed to subdivide the tract into nine residential lots; it was initially represented that each lot would be improved with a house consisting of three stories and a basement. See the testimony of Brian Flannery, PP, at 1T6-19 to 1T6-21; 1T13-2 to 1T13-3. The homes would front on a street to be created ("Charlotte's Walk"). See 2T10-14 (Flannery). The applicant had no intention of building any of the homes. The lots would be sold individually and the new owners would develop them. See the colloquy at 2T11-8 to 2T11-18.

The plans, prepared by Newlines Engineering & Survey, depict two lateral lines for each of the homes, see Ia167 (Vogt review letter at page 8, item #23), the implication being that the second lateral would service a basement apartment. Mr. Flannery represented that "[n]ot everybody is going to have two laterals " (2T34-11 to 2T34-12), but he did not prepare the plans. No one from Newlines appeared before the Board. The public notice states that "[t]he applicant proposes to subdivide an existing tract known as Lots 23, 24 .01, and 34 in Block 24 into nine (9) new single-family parcels" (Ia170), but approving the subdivision could result in as many as eighteen families on the nine parcels.

Ia25 to Ia32 is a purported traffic study submitted by the Applicant prepared by John H. Rea, PE and Scott T. Kenel, Senior Associate. The writers assumed the proposal was for "9 single family dwellings" (page 1), whereas basement apartments would increase the number to 18 single family dwellings. A Board Member recognized this "glaring discrepancy" (2T18-22).

Rea and Kenel did not conduct any traffic counts, but applied a multiplier to Institute of Transportation Engineers (ITE) data based on what they called "local research."

> Trip generation estimates for the 9 single family dwellings were made based on data published by the ITE in the *10th Edition* of the *Trip Generation Manual* and local trip generation rates developed by MRA for similar residential developments within Lakewood Township. The MRA research data in Lakewood Township has revealed a higher trip rate than the ITE recommended trip rate by

> 60-90 percent. Therefore, based on local research, a trip rate of 1.41 and 1.95 per dwelling for the AM and PM peak hours respectively was utilized. *Table II* details the peak hour traffic projections.
>
> Ia26 (page 2).

Rea and Kenel do not identify the "similar" developments for verification. The "MRA research data" are undisclosed. During colloquy, the applicant claimed that the firm routinely touts this local research in Lakewood applications.

> CHAIRMAN NEIMAN: 14 peak hour trips, I mean, that's, that's not, that's not, it's way more than 14 to 18, respectfully, of that peak hour trips.
>
> MR. FLANNERY: It's the same numbers that are used on every traffic report that McDonough and Rea submit, which they submit a majority of them as consistent with traffic counts that they've done . . . .
>
> 2T19-19 to 2T20-2.

No one from McDonough & Rea Associates appeared before the Board to defend the research. Mr. Neiman, the Board Chairman, observed that the proposed subdivision would intersect with a particularly narrow and congested area of Fourteenth Street. See 2T24-1 to 2T24-10.

Board Members expressed concern about drainage. The plans were revised prior to the April 5, 2022 hearing to address stormwater management issues raised by Board Engineer/Planner Vogt. See 1T3-9 to 1T3-17. The applicant represented that it would provide drainage analysis based on 25% lot coverage "[i]f the Board acts favorably on the application" (1T12-11 to 1T12-

12). Mr. Flannery vowed to "provide a plan that . . . show[s] that the drainage works" (1T21-21 to 1T21-22). It should be noted that the applicant sought a design waiver from the required placement of street trees to accommodate the proposed drainage system. See Da163 (Vogt review letter, item III-1); see also the Flannery testimony at 1T4-24 to 1T5-2; 2T28-4 to 2T28-15. Although Mr. Flannery represented that a homeowner association would be formed to manage stormwater (see 2T29-25 to 2T30-2), an objector's planning expert (Gordon Gemma) pointed out that no documentation had been submitted for review (see 2T79-4 to 2T79-23). And when Board Engineer/Planner Dave Magno suggested a conservation easement to alleviate drainage concerns, Mr. Flannery retorted that the applicant did not have to make any concessions since it was 'only' requesting waivers.

> MR. MAGNO: Well, I was going to make a suggestion. How about a 10-foot conservation easement and if the conservation easement, your plot plan, is left undisturbed, they won't have to provide a double row of screening trees. If it is disturbed, then they've got to put a double row of screening trees and a conservation easement.
>
> CHAIRMAN NEIMAN: That makes so much sense.
>
> MR. MAGNO: Exactly. Doesn't that make a lot of sense?
>
> MR. FLANNERY: It would make sense if the applicant was asking for relief and needed to --
>
> MR. MAGNO: Well, hold on. Hold on. [The applicant] is asking for relief. [The applicant is] asking for a design waiver. You don't have to put the stormwater management in front of the project and

> eliminate the street trees there. We recommend, we understand why you're doing that and we made a recommendation for to put some shade trees behind it, but this is a good compromise that the Board is asking you to do and justification for your design waiver request.
>
> BOARD MEMBER: I can't understand why you wouldn't do that.
>
> MR. MAGNO: Exactly.
>
> MR. FLANNERY: Because it's admitting to something that's not required by the ordinance . . . .
>
> 2T42-1 to 2T43-4.

Another waiver related to the lot lines. UDO Sec. 18-805C (Ia213) provides: "Insofar as is practical, side lot lines shall be at right angles to straight streets and radial to curved streets." Engineer/Planner Vogt reported that "[a] design waiver is required from providing non-radial lot lines." Ia163 (item III-2). See also Mr. Flannery's assertion at 2T28-20 to 2T28-24.

Flannery justified the requested "relief" by generally invoking the purposes underlying the Municipal Land Use Law (N.J.S.A. 40:55D-1 to -163) and the Township's Master Plan. See 2T44-20 to 2T45-23.

LEGAL ARGUMENT

I. LAKEWOOD REQUIRES WAIVERS TO BE BASED ON HARDSHIP, AND THE APPLICANT FAILED TO PROVIDE THE BOARD WITH EVIDENCE TO JUSTIFY EITHER OF THE TWO WAIVERS REQUESTED; THE TRIAL COURT EXCEEDED ITS AUTHORITY IN ORDERING THE SUBDIVISION. (Final Order at Ia269 to Ia270; opinion at 4T36-18 to 4T47-1).

Waivers are distinguishable from variances in that the former effect relief from site plan or subdivision standards while the latter concern zoning standards. See Wawa Food Market v. Planning Bd., Ship Bottom, 227 N.J. Super. 29, 34 (App. Div. 1988). "The distinction between site plan or subdivision conditions and zoning requirements are often subtle. For instance, onsite parking might be a waiver issue as to the size of the parking space but a zoning issue as to the number of parking spaces. Presumably, off street, off site parking not otherwise permitted by ordinance would require a variance." Cox & Koenig, Sec. 23-8(b) (2023 ed.). In Wawa, Judge Havey explained

> that off-street parking space and driveway width requirements, contained in the zoning ordinance, cannot be waived or relaxed by the planning board as part of site plan review. Relief from the provisions of a zoning ordinance must be sought under the variance procedure.
>
> 227 N.J. Super. at 31.

On the question of whether the provision for radial lines is a waivable subdivision standard -- as opposed to a zoning standard. UDO Sec. 18-805C states: "Insofar as is practical, side lot lines shall be at right angles to straight

streets and radial to curved streets." To be sure, Section 18-805 ("Lots") is part of Article VIII ("DESIGN STANDARDS"), but so are Section 18-806 ("Nonconforming Uses and Lots"), see Ia219 to Ia220, and Section 18-807 ("Off-Street Parking, Loading and Circulation"), see Ia221 to Ia223 -- clearly the existence/non-existence of a nonconforming use, and the minimum number of parking spaces, aren't waivable matters. The undersigned found that, in Wall Township, the lot line requirement is a "General Provisions" zoning standard (Sec. 140-113.1A (Ia224), whereas in Jackson Township, Sec. 244-194C (Ia225) it is part of "Design Standards and Improvement Specifications").

In any event, as with variances, reviewing courts consider whether a board "arbitrarily or capriciously" granted or denied a waiver. Coventry Square, Inc. v. Westwood Zoning Bd. of Adj., 138 N.J. 285, 301 (1994). "If denial of a variance or waiver which is required for a proposed subdivision plan would be arbitrary or unreasonable, the need for the variance or waiver cannot justify rejection of the subdivision proposal." Green Meadows at Montville, L.L.C. v. Planning Bd., Montville, 329 N.J. Super. 12, 18-19 (App. Div. 2000). Compare, Grungo v. Robles, 256 N.J. Super. 233, 238 (planning board reasonably denied waiver of site plan review, where there were legitimate safety and aesthetic concerns about rebuilding nonconforming gas station); Morris County Fair Housing v. Boonton Twp., 230 N.J. Super. 345, 347-48 (App. Div. 1989)

(planning board should have granted waiver from landscape buffer requirement, where easement prohibited same).

In the present case, the applicant sought two waivers: (1) whereas the applicant is supposed to place street trees, a waiver was sought to accommodate the proposed drainage system; and (2) whereas the proposed lots should not have radial lot lines, the applicant is proposing radial lot lines. In this regard, UDO Sec. 18-601 (Ia218) permits waivers, provided that they are based on proof of hardship:

> The rules, regulations and standards set forth in this section shall be considered the minimum requirements for the protection of the public health, safety and welfare of the citizens of the Township. However, if the applicant can clearly demonstrate that, because peculiar conditions pertaining to the subject parcel, the literal enforcement of this section is impracticable or will exact undue hardship, the Planning Board may permit such exemption(s) and waiver(s) as may be reasonable within the general purpose and intent of the rules, regulations and standards established by this section.

While addressing a variance as opposed to a waiver, Jacoby v. Zoning Bd. of Adjustment of Borough of Englewood Cliffs, 442 N.J. Super. 450 (App. Div. 2015), is instructive of the issue of what is and is not a hardship. The applicant in that case proposed an office building with fewer parking spaces than required. This Court held that the developer created the hardship by its design of the project:

> Where the hardship has been created by the applicant, a (c)(1) variance will normally be denied. Jock v. Zoning Bd. of Adjustment, 184 N.J. 562, 591 (2005). A [hardship] variance is not available to provide relief from a self-created hardship. Chirichello v. Zoning Bd. of Adjustment, 78 N.J. 544, 553 (1979). Here, the hardship was self-created. LG chose to reduce the number of parking spaces; the condition of the property did not demand it. Therefore, we conclude that the Board erred by finding that LG met the requirements of a (c)(1) variance.
>
> Id. art 470.

Consider also Green Meadows at Montville, L.L.C. v. Planning Bd., Montville, 329 N.J. Super. 12 (App. Div. 2000), where the proposed subdivision called for the creation of two deficient lots: "[T]he "hardship" is self-created because it was plaintiff who planned the subdivision in such a way as to make those lots nonconforming." Id. at 22.

In the present case, the applicant combined three lots into a clean-slate 3.2-acre developable tract. There is plenty of room for street trees, and a drainage system, and lots with radial lines -- as part of a subdivision with a reasonable number of lots. It is only because the developer wants to cram nine lots into the tract that it ran out of room for the drainage system and needs to use the space intended for street trees. There would be no need for non-compliant lines if there were fewer lots in this subdivision. These are quintessential self-created hardships.

At 4T36-18 to 4T37-4, the trial court touted Flannery's testimony that, without the street tree waiver, the stormwater system would have to be moved to a less convenient place on the tract. That 'inconvenience' stems from the desire to convert the land into nine lots instead of (say) four or six lots. With fewer lots there would be abundant room for a drainage system and the street trees. With fewer lots, there would not be a choice between the drainage system and the street trees.

At 4T38-19 to 4T39-4, the court stated that the waivers do not contribute to the undesirable aspects of the subdivision cited by the Board when it denied the application. The judge misunderstood the ordinance and misplaced the burden of proof. UDO Sec. 18-601 requires the applicant to prove the waivers were justified by hardship. "Where the applicant fails to fulfill his responsibility in setting before the local agency the evidence necessary for it to exercise a seasoned discretion the failure is fatal . . . ." Tomko v. Vissers, 21 N.J. 226, 239 (1956). Because the applicant failed to produce any competent evidence of hardship, the Board had no basis to grant the waivers.

At 4T39-12 to 4T39-15, the Trial Court opined the waivers represent 'better alternatives.' That is not the standard. The Governing Body believes that street trees and compliant lot lines are the better alternatives for subdivisions. The Governing Body allows waivers, not when there are so-called better

alternatives, but when the applicant demonstrates hardship. There was no challenge to the standard for waivers in UDO Sec. 18-601. Had the plaintiffs argued that Lakewood cannot require proof of hardship to justify a waiver, the Township would have to have been joined as a party and given an opportunity to defend its ordinance. Cobble Close Farm v. Bd. of Adjustment of Middletown Tp., 10 N.J. 442, 455 (1952).

At 4T41-9 to 4T21-22, the court cited the arbitrary-and-capricious standard of review and questioned whether the applicant presented sufficient supporting evidence to justify the grant of the waivers. The applicant presented no competent evidence because it misunderstood the hardship required under Sec. 18-601. There are no "peculiar conditions pertaining to the subject parcel" requiring non-compliant lot lines or necessitating the placement of a drainage system where there are supposed to be street trees those are by-design self created hardships by those who prepared the subdivision plans at the direction of the applicant in order to increase Lot yield and is there for the applicant's profit.

At 4T41-23 to 4T47-6, the judge pointed out that the Board's professionals saw nothing wrong with the applications. None of the Board's professionals applied Sec. 18-601, which requires hardship as the basis of a waiver. The interpretation of an ordinance is a question of law, Wyzykowski v. Rizas, 132

N.J. 509, 518 (1993), and in the present case it is impossible to defer to professionals who do not recognize the standard for subdivision waivers in Lakewood Township.

The court's finding of hardship (4T43-3 to 4T43-8) is conclusory and legally erroneous as a matter of law. All of the aforementioned hardships originated on the desk of the applicant's engineer. There is plenty of room on 3.2 acres for a stormwater management system to service subdivision lots with compliant lines, behind the required street trees. The applicant's problem is that it wants nine lots in a noncompliant subdivision instead of fewer lots in a compliant subdivision. While perhaps understandable, the applicant's personal preference for increased yield and is there for its profit is not a Sec. 18-601 hardship.

At 4T43-16, the court envisions what developers should expect when they come to Lakewood. The plain language of Sec. 18-601 is there for all to read and understand. Every developer is expected to comply with the subdivision standards unless hardship can be established. If anything, the court's decision to approve this applicant's self-created hardship is inviting ad hoc application of the Township's standards, which inevitably lead to exactly the type of overdevelopment which has plagued development in Lakewood for well over two decades.

At 4T46-10, the court notes that Lakewood permits this type of development. The Township does permit residential subdivisions, with compliant lot lines and with street trees. The Township also permits deviations from those standards, "if the applicant can clearly demonstrate that, because peculiar conditions pertaining to the subject parcel, the literal enforcement of this section is impracticable or will exact undue hardship . . . ." The applicant here failed to meet its burden of proof, and the Board therefore had no record to grant the waivers, and thus the Trial Court's Order granting subdivision approval must be reversed. To the extent the Board did not specifically so find in its resolution, the matter could be remanded for specific findings. Smith v. Fair Haven Zoning Bd. of Adj., 335 N.J. Super. 111, 123 (App. Div. 2000).

The judge disputed whether "the lot line designation created that inappropriate lot yield" (4T46-25 to 4T47-1). This analysis is backwards. It is the nine-lot yield that created the need for irregular lines, and the absence of street trees to make way for the enlarged drainage system which only became necessary because of the applicants deliberate overdevelopment of the property in order to obtain a yield of nine lots.

II. THE BOARD'S STATED REASONS FOR DENYING THE SUBDIVISION WERE ENTITLED TO DEFERENCE; IT WAS ERRONEOUS FOR THE TRIAL COURT TO REVERSE. (Final Order at Ia269 to Ia270; opinion at 4T36-18 to 4T47-1).

In an action in lieu of prerogative writs, a board's decision "is tested against an indulgent standard, which permits the court to overturn the decision being reviewed only if it is arbitrary, capricious or unreasonable." Kane Properties, LLC v. City of Hoboken, 214 N.J. 199, 225 (2013). "[T]he decision of the board is entitled to deference; its factual determinations are presumed to be valid." Ibid. "'Where there is room for two opinions, [the board's] action is [valid] when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.'" Northgate Condominium Association, Inc. v. Borough of Hillsdale Planning Bd., 214 N.J. 120, 145-46 (2013) (quoting Worthington v. Fauver, 88 N.J. 183, 204-05 (1982)). "[P]lanning boards are granted 'wide latitude in the exercise of the delegated discretion' due to their 'peculiar knowledge of local conditions.'" Fallone Properties, L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 561 (App. Div. 2004) (quoting Burbridge v. Mine Hill Twp., 117 N.J. 376, 385 (1990)).

The applicant appealed the Board's denial of its proposed subdivision. "The primary purpose of site plan or subdivision review is to insure that an

applicant's plans for development conform to the standards outlined in the municipal land use ordinances." 36 N.J. Practice, Land Use Law Sec. 17.8 (David J. Frizell & Ronald D. Cucchiaro) (rev. 3d ed. 2022, Oct. 2023 update). N.J.S.A. 40:55D-48(b) requires approval "if the proposed subdivision complies with the ordinance and this act[.]"

In Lakewood, "[a] preliminary plat shall be reviewed to determine the acceptability of the detailed design concept and shall be in sufficient detail to enable the Board to ascertain compliance with the performance standards and other standards of this section as well as applicable Township ordinances[,]" UDO Sec. 609A [3] , "[p]reserv[ing] existing natural resources and giv[ing] consideration to the physical constraints of the land[,] "[p]rovid[ing for safe and efficient vehicular and pedestrian circulation[,]" "[p]rovid[ing] for screening, landscaping, signing and lighting[,]" "[e]nsur[ing] efficient, safe and aesthetic land development[,]" "[p]rovid[ing] for compliance with appropriate design standards to ensure adequate light and air, proper building arrangements, and minimum adverse effect on surrounding property[,]" "[d]evelop[ing] proper safeguards to minimize the impact on the environment including but not limited to soil erosion and sedimentation and air and water pollution[,]" "[e]nsur[ing]

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[3] Ia215.

the provision of adequate water supply, drainage and storm water management, sanitary facilities, and other utilities and services[,]" and "[p]rovid[ing] for recreation, open space and public use areas." Sec. 18-602 [4]. "At inception the planning board must pass upon basic matters of the highest significance to future community growth and well-being and the welfare of individuals who will ultimately become owners and occupants in the subdivision." Levin v. Livingston Twp., 35 N.J. 500, 510 (1961). "For instance, it is of essential importance to determine whether the whole tract proposed to be subdivided is fundamentally suitable for the projected development from the standpoint of area, topography, drainage, soil characteristics, accessibility, availability of utilities and the like, or, if not, in whole or in part, whether and to what extent special conditions can be imposed to make it so." Ibid. "[M]atters vital to the public health and welfare, such as drainage . . . [,] must be resolved before preliminary approval is granted, where the Board has not acted in bad faith." D'Anna v. Planning Bd., Washington, 256 N.J. Super. 78 (App. Div.), certif. denied, 130 N.J. 18 (1992). "Proper drainage should be resolved before a tentative approval is granted in order to insure a sufficient consideration of the public interest as well as to insulate a developer from any modifications that might seriously affect the economic feasibility of the project. Planning

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[4] Ia217.

derelictions at the local level, ill-conceived plans and insufficient facilities for drainage stemming from the fractionalization and development of lands have spawned horrendous difficulties at the community level." Hamlin v. Matarazzo, 120 N.J. Super. 164, 171 (Law Div. 1972).

In El Shaer v. Planning Bd., Lawrence, 249 N.J. Super. 323 (App. Div.), certif. denied, 127 N.J. 546 (1991), the plaintiff proposed a ten-lot subdivision which complied with all of the bulk standards. However, "plaintiff failed to present alternative plans which would have less of an environmental impact than the plan proposed, as required by the [subdivision] ordinance." Ibid. at 327. Additionally, four of the lots would front on a major highway, creating accessibility problems. "[T]he requirement that a subdivision provide safe ingress and egress is logically implied from the statutory language." Ibid. at 330. "Finally, the LDO requires that the applicant present alternatives in terms of site design and project location that may result in less of a negative impact than the development proposed. Plaintiff did not present such an alternative plan to the ten-lot configuration actually proposed." Ibid. at 332. The denial of plaintiff's subdivision was affirmed.

> That plaintiff may have met the specific bulk requirements of the development ordinance does not mean that he was entitled to an approval of his subdivision plan. A planning board "is not obligated to approve a subdivision merely because it does not violate any express provision of the zoning ordinance." Popular Refreshments, Inc. v. Fuller's Milk Bar & Recreation Center, Inc., 85 N.J. Super.

> 528, 537 (App. Div. 1964), certif. denied, 44 N.J. 409 (1965). It may require that all of the lots proposed on the development plat are shown to be adaptable for the intended purposes and without danger to the general welfare. Ibid. It is also duty-bound to protect the public and future owners of the property in the subdivision by requiring adequate road and drainage facilities.
>
> Ibid. at 327-28.

The scope of El Shaer was qualified in Pizzo Mantin Group v. Twp. of Randolph, 261 N.J. Super. 659 (App. Div. 1993), aff'd as modified, 137 N.J. 216 (1994). In that case, the planning board denied an application, not by reference to a zoning or subdivision ordinance, but rather based on its finding that the development was "unsuitable." 261 N.J. Super. at 661. As Judge Havey explained:

> El Shaer involved compliance with the bulk requirements of the zoning ordinance. What is implied in El Shaer, but not articulated, is that the applicant's design failed to conform with all of the specifications and standards of the subdivision ordinance. Hence, El Shaer properly concluded that rejection of the subdivision was sustainable because various design features presented dangers to the public welfare. However, by not referring to the pertinent subdivision standards, El Shaer implied that a planning board had the inherent power to reject a plan without reference to those standards. The trial court here understandably so interpreted El Shaer, and sustained the rejection of plaintiff's application without reference to any of the provisions of the local ordinance. We hold here that no such inherent power exists.
>
> Ibid. at 668.

In affirming, the Supreme Court "concur[red] generally in the Appellate Division's analysis[.]" 137 N.J. at 229. "The legislative scheme contemplates

that a planning board's review of a subdivision proposal, including the layout of the entire design, must be made within the framework of the standards prescribed by the subdivision and, if pertinent, the zoning ordinances." Ibid. Thus, a planning board's decision must not be "based primarily on the broad purposes of the MLUL rather than on the specific standards contained in the municipal subdivision and zoning ordinances[.] Ibid.

In the present case, the applicant's proposal failed to "[p]rovide for safe and efficient vehicular . . . circulation" (Sec. 18-602B) or "[e]nsure the provision of adequate water supply, drainage and storm water management" (Sec. 18-602G). A Board Member noted that the proposed Charlotte's Walk would intersect with an extremely congested portion of Fourteenth Street (2T24-1 to 2T24-7), raising concerns over safe ingress and egress. Mr. Flannery was not qualified as a traffic engineer and the so-called 'study' by McDonough and his Senior Associate was downright sloppy. Even if the subdivision plan didn't depict two lateral units per proposed home, the proposed basements meant that the nine homes would qualify for basement apartments (UDO Sec. 18-910) -- making the potential number of families eighteen, not nine. McDonough's study is useless as he assumed his client was proposing "9 single family dwellings" (page 1 of plaintiffs' Exhibit D).

The McDonough study also fails because the preparers did not disclose the "similar residential developments" considered in his "local research" on Lakewood traffic rates. A land use board may not base its findings on "net" opinions unsupported by data. New Brunswick Cellular v. Borough of South Plainfield Bd. of Adj., 160 N.J. 1, 16 (1999). See also Wilson v. Brick Twp. Zoning Bd., 405 N.J. Super. 189, 202 (App. Div. 2009) (board not bound by expert's opinion when "there was no detail given to support th[e] conclusion"). The Board Chairman knew from personal experience that the traffic is substantially greater than the rates that McDonough seemingly pulled from thin air. See 2T20-6 to 2T20-23. A board does not have to accept expert testimony, see, e.g., Klug v. Bridgewater Plan. Bd., 407 N.J. Super. 1, 13 (App. Div. 2009), Clifton City Bd. of Educ. v. Clifton City Zoning Bd. of Adjustment, 409 N.J. Super. 389, 434 (App. Div. 2009), and in this case the Planning Board was unpersuaded by an expert who did not even appear in defense of his 'research.' The Board "rejected the application on the basis of significant public safety concerns regarding the lack of street parking coupled with the substantial proposed density particularly in light of the basement apartments noted on the plans." Ia249 (Resolution, page 8, paragraph A).

As for drainage, the Newline engineers were also no-shows. The applicant's cheerleader (Flannery) had no role in preparing plans which left the

Board understandably concerned about stormwater management. "The Board found that an approval of this application would have significant detrimental effects on the safety of the neighborhood." Ibid.

The Board duly considered UDO Article VI ("SUBDIVISION AND SITE PLANS") including the standards set forth in Sec. 18-602. Among the criteria are satisfactory provisions for vehicular access and drainage. The Board clearly expressed its concerns in these areas, and the applicant chose to rely on Flannery's hearsay and his misguided belief that compliance with bulk standards means that a proposed subdivision must be approved.

The applicant in this matter referred to as a "by-right application". A "by-right" subdivision is one where "the plan would comply with all governing ordinance standards and would not require variances." Gandolfi v. Town of Hammonton, 367 N.J. Super. 527, 530 n. 1 (App. Div. 2004) (emphasis added) (citing Pizzo Mantin Group, 137 N.J. 216). While plaintiff's application might not require variances, it does not comply with all governing ordinance standards in UDO Article VI [5] .

At 4T44-8 to 4T44-12, the court noted that "off-street [sic] traffic conditions" cannot serve as a basis to deny an otherwise compliant application.

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[5] And, again, it must comply with the design standards, unless waivers are justified by hardship. See Point I.

To be sure, Dunkin' Donuts of New Jersey, Inc. v. Twp. of North Brunswick Plan. Bd., 193 N.J. Super. 513, 515 (App. Div. 1984), holds that a board is "without authority to deny site plan approval because of off-site traffic conditions." However, "[a] planning board should consider off-site traffic flow and safety in reviewing proposals for vehicular ingress to and egress from a site[.]" Id. "[C]oncerns as to ingress and egress and concerns as to on-site conditions related to off-site traffic flow and safety are appropriate to be addressed at the site plan stage." Allocco and Luccarelli v. Twp. of Holmdel, 299 N.J. Super. 491, 499 (Law Div. 1997) (citing Dunkin' Donuts, 193 N.J. Super. at 515). Among the Board's concerns was "that there is no parking on 14th Street, which will require that everyone park on the proposed street [Charlotte's Walk]." Second resolution at paragraph C. "The Board . . . found that a reduction in the number of units would offer more off-street parking and resolve some of the Board's concerns regarding parking safety." Ibid. "The proposed development would not encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes which result in congestion or blight." Id., paragraph F3. The Board had ample grounds for questioning whether Charlotte's Walk could accommodate as many as eighteen families' occupants, and their guests, and Amazon trucks, and emergency vehicles, etc.

The Board also had every right and reason to be concerned about access to and from Fourteenth Street -- the only way in or out of the development.

At 4T44-13 to 4T45-25, the court questioned what was "reasonable" and insinuated that the applicant had been subjected to "abuse." The Board had every right and reason to analyze the application as set forth above, especially when the applicant was seeking two waivers and could not base either on hardship.

At T46-22, the judge concluded that the Board denied the application because it felt the density was excessive. While the density may not have violated a zoning standard, the applicant would not have needed waivers from the subdivision standards but for its decision to shoehorn nine lots on this tract to increase its profit at the expense of Public Health Safety & Welfare as well as dictates of appropriate plan density as set forth in Sec. 18-601 of the UDO.

III. THE PUBLIC NOTICE WAS INSUFFICIENT, THUS DEPRIVING THE PLANNING BOARD OF JURISDICTION TO CONSIDER THE APPLICATION. (Final Order at Ia269 to Ia270; opinion at 4T37-5 to 4T37-14; 4T50-10 to 4T50-11).

In his sixth separate defense, Mr. Blech argued that the Board lacked jurisdiction because of a deficiency in its public notice. See Ia97. As is apparent from the colloquy at 4T49-25 to 4T50-11, plaintiffs disputed Blech's right to raise this issue. On October 30, 2023, Blech submitted a brief on this issue along with the unpublished opinion which appears at Ia253 to Ia268.

> THE COURT: All right. Well, you are free to appeal that determination.
>
> 4T50-10 to 4T50-11.

It is submitted that "'the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Berardo v. City of Jersey City, 476 N.J. Super. 341, 354 (App. Div. 2023) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)) (citation omitted).

Municipal power to regulate land use is derived from a State Legislative grant, being the Municipal Land Use Law (MLUL), (N.J.S.A. 40:55D-1 to -163). Municipalities do not have inherent land-use regulatory power, see Pizzo Mantin Group v. Township of Randolph, 137 N.J. 216, 222-23 (1994). Unless the land

use board is acting pursuant to the MLUL, the board's action is void for lack of jurisdiction.

One jurisdictional requirement is N.J.S.A. 40:55D-11:

> Notices pursuant to section [N.J.S.A. 40:55D-12] and N.J.S.A. 40:55D-13] shall state the date, time and place of the hearing, the nature of the matters to be considered and, in the case of notices pursuant to subsection [N.J.S.A. 40:55D-12], an identification of the property proposed for development.

There are several published opinions which establish the contours of notice requirements. In Perlmart v. Lacey Tp. Planning Bd., 295 N.J. Super. 234 (App. Div. 1996), the Court considered the portion of N.J.S.A. 40:55D-11 concerning "the nature of the matters to be decided."

> It is, to us, plain that the purpose for notifying the public of the "nature of the matters to be considered" is to ensure that members of the general public who may be affected by the nature and character of the proposed development are fairly apprised thereof so that they may make an informed determination as to whether they should participate in the hearing[,] or, at the least, look more closely at the plans and other documents on file.
>
> 295 N.J. Super. at 237-38.

The notice was deficient because it referred to the creation of commercial lots and did not identify that a shopping center (K-Mart) that was proposed. It also referred generally to variances without describing the. The Court added a caveat:

> Plaintiff also contends that the notice did not specify all of the particular variances required. We do not tarry long with this claim

> because we do not believe the Legislature intended the required public notice to be that specific.
>
> Id. at 237 n. 3.

While the nature and extent of every single variance is not necessary, some description of the variances was required.

In Pond Run Watershed v. Hamilton Tp., 397 N.J. Super. 335 (App. Div. 2008), a typographical error referring to the property's address was deemed not fatal. However, the reference to "retail/office" use was deemed material because it did not mention a 168-seat restaurant for which a liquor license was sought.

> [I]t is readily apparent that this 168–seat, 5,000 square foot restaurant is a component of this development that would be of heightened concern to neighbors and other members of the public, particularly as to issues of traffic, parking, noise and the possible consumption of alcoholic beverages on site.
>
> Id. at 354.

In re Hartz/Damascus Bakery, Inc., 404 N.J. Super. 49 (App. Div. 2008), is not an MLUL case, but it relies on Perlmart and is instructive as a 'counterpoint.' The Court public notice of a "continuous production bakery" was sufficient for a lay person to decide whether to participate. Id. at 62.

In Shakoor Supermarkets v. Old Bridge Planning Bd., 420 N.J. Super. 193 (App. Div.), certif. denied, 208 N.J. 598 (2011), the notice referred to a "main retail store" consisting of 150,000 square feet. The Court held that this description was sufficient even though it did not identify the store as a Walmart.

> [T}he proposed use was described in terms that would permit an ordinary layperson to understand how the property would be used and to be sufficiently alerted to the potential impact of that use upon him or her . . . .
>
> We are satisfied that notice of a proposed "main retail store of 150,000 s.f." adequately informed laypersons that a major "big box" store was proposed for the site and alerted them to the possible concerns . . . .
>
> 420 N.J. Super. at 203.

In Northgate Condominium Associates v. Bor. of Hillside Planning Bd., 214 N.J. 120, 141 (2013), the Court generally accepted the "reasonable person" standard enunciated in Perlmart and Pond Run.

While unpublished, the recent opinion in Lakewood Realty Associates, LLC v. Twp. of Lakewood Planning Bd., No. A-1899-21 (App. Div. October 5, 2023), Ia253 to Ia28, reaffirms the standard. There, the developer gave notice of a proposed hotel and bank, "both permitted uses" (slip op. at 4). Because the notice did not disclose that the hotel would have an 833-person banquet facility, the approval was nullified.

> We recognize the Planning Board's resolution disallows the hotel to be used as a "wedding hall." But that does not prevent other very large gatherings from being held at the banquet facility, such as fund-raising dinners, political events, galas, retirement dinners and anniversary parties, and so on. The banquet facility was a material aspect of the application that needed to be mentioned in the notice, regardless of the change in the ordinance's definition of a hotel.
>
> It is also concerning that the notice enumerates seven other activities that are specifically permitted for a "hotel," but

> conspicuously omits mention of a banquet facility. At oral argument on appeal, counsel for RD Lakewood candidly acknowledged the omission was not inadvertent. RD Lakewood presents no justification for why the public specified the hotel would have meeting rooms, a food prep area/kitchen, lounge, bar area, dining area, pool, and exercise room, but did not mention a banquet facility. Surely a banquet facility would have a far greater potential impact on site parking and traffic than, say, an exercise room.
>
> The exclusion of the banquet facility made the notice materially defective. Hence, consistent with the requirements of the MLUL and case law, we must reverse the trial court and vacate the approvals . . . .
>
> Ia266 to Ia267.

In the present case, the applicant provided notice of a proposal "to subdivide an existing tract known as Lots 23, 24 .01, and 34 in Block 24 into nine (9) new single-family parcels" (Ia170). However, approval of each lot would allow the applicant or its successors to develop a basement apartment thereon in addition to a single-family residence -- doubling the number of families from nine to eighteen. A reasonable person who might not mind nine units on three acres abutting a narrow portion of Fourteenth Street, might mind very much if they realized that there could potentially be eighteen units.

The trial court only indirectly addresses Mr. Blech's issue:

> There was much discussion at the time of the application regarding basement apartments. That was not before the board, nor is it before the Court, but would be disingenuous for the Court to assume that that was not a concern that was before the board and the public, that the applicant was creating a subdivision for nine single-family homes. Everyone recognized that the ordinances in Lakewood

> permits homeowners to seek permission to create basement apartments, so long as they comply with the Township requirements.
>
> 4T37-5 to 4T37-14.

If the notice referred to 'nine parcels' or 'nine residential parcels,' there could be an argument as to whether there was sufficient information under the Perlmart standard. However, this applicant affirmatively represented that the proposal was for "nine (9) new single-family parcels" (Ia170) when in fact the approved parcels could house as many as eighteen families. The representation on the notice was misleading, and it is unreasonable for the court to assume that 'everyone' in Lakewood who may have been interested in the application understood UDO Sec. 18-910D.

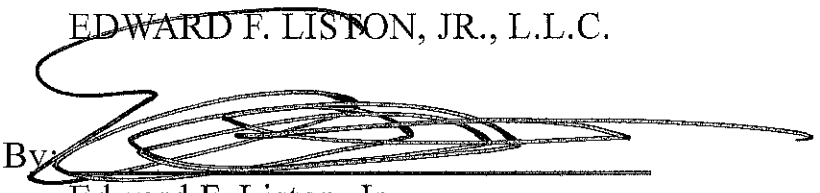
CONCLUSION

For the foregoing reasons, the Final Order Of theTrial Court granting subdivision approval should be reversed

Date: June 13, 2024

Respectfully Submitted,

EDWARD F. LISTON, JR., L.L.C.



By: Edward F. Liston, Jr.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-2075-23

BESADAR HOLDINGS LLC AND SOLOMON HALPERN, INDIVIDUALLY, Plaintiff/Respondent,	:	Civil Action
v.	:	**ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, COUNTY OF OCEAN**
TOWNSHIP OF LAKEWOOD PLANNING BOARD, JOHN DOES 1-30 (A FICTITIOUS NAME FOR PERSONS PRESENTLY UNKNOWN) AND XYZ, INC. 1-10 (A FICTITIOUS NAME FOR A BUSINESS ENTITY PRESENTLY UNKNOWN)	:	**DOCKET NO.: OCN-L-2115-22**
Defendants,	:	**SAT BELOW: HON. CRAIG L. WELLERSON, J.S.C.**
And	:	
VIGGY BLECH,	:	
Intervenor/Defendant	:	

BRIEF ON BEHALF OF DEFENDANT/RESPONDENT PLANNING BOARD OF THE TOWNSHIP OF LAKEWOOD

John J. Jackson III
(031791986)
JOHN J. JACKSON III & ASSOCIATES, ATTORNEYS AT LAW
2329 Highway 34 S, Ste 205
Manasquan, NJ 08736
(732)769-8350 (Ext. 102)
john@jjjlawfirm.com

JOHN J. JACKSON III
Of Counsel and On the Brief

JILIAN MCLEER, ESQ.
On the Brief

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PROCEDURAL HISTORY

On or about December 23, 2021, appellant, Besadar Holdings LLC (hereinafter the "applicant") submitted to the Planning Board an application for preliminary and final major subdivision to create 9 residential lots from 3 existing lots known as Lots 23, 24.01, and 34 in Block 24 in the Township of Lakewood, New Jersey. (Ia18). Hearings were held on April 5, 2022 (1T) and June 14, 2022 (2T). On June 14, 2022, the Board voted to deny the application. (2T144-9 to 2T145-8). The applicant thereafter requested reconsideration, and a reconsideration hearing took place on August 2, 2022. (3T) At that hearing, the Board declined the applicant's request for reconsideration. (3T29-22 to 3T31-6). A resolution of denial was memorialized on August 23, 2022 (Ia64).

On September 23, 2022, the applicant filed a three-count Complaint In Lieu of Prerogative Writs in which the applicant requested the entry of judgment reversing the Board's denial of the application for major subdivision to create 9 residential lots from 3 existing lots, to widen the existing Fourteenth Street, and construct a new 50' wide right of way terminating in a cul-de-sac. (Ia1) The applicant's allegations included that the Board's decision to deny the application was against the weight of the testimony presented at the hearings and therefore was arbitrary, capricious and unreasonable, and

also, that the resolution of denial contained insufficient findings of fact and conclusions of law. (Ia1)

The Board filed an answer to the complaint on October 17, 2022. (Ia73) Intervenor Viggy Blech filed a motion to intervene on December 1, 2022, and ultimately filed an Answer to the Complaint on January 5, 2023. (Ia90) The trial court initially ordered that the matter be remanded to the Board for the Board to adopt a supplemental resolution providing more detailed reasoning as to why the Board denied the application. (Ia236) The trial court conducted a plenary hearing on December 20, 2023, wherein the Honorable Craig L. Wellerson, P.J.Cv., ordered the reversal of the Board's determination and remanded the matter back to the Board to issue a resolution of approval. (4T) (Ia269) The Court opined, in pertinent part, that the proposed application had no impact on the zone plan in regard to density, and that the Court could not find any rational relationship between the designation of lot lines as radial or perpendicular or curved roads as to creating something more than what the developer was entitled to. (T4)

Said resolution of approval was duly adopted by the Board on January 23, 2024. Intervenor Viggy Blech thereafter filed the within appeal. (Ia271)

STATEMENT OF FACTS

On or about December 23, 2021, the applicant submitted to the Planning Board an application for preliminary and final major subdivision to create 9 residential lots from 3 existing lots known as Lots 23, 24.01, and 34 in Block 24 in the Township of Lakewood, New Jersey. (Ia18). The tract consists of 3.20 acres. (Ia161) The applicant's engineer and planner, Brian Flannery, testified that each lot would be improved with a house consisting of three stories and a basement. (1T6-19 to 1T6-21; 1T13-2 to 1T13-3) The lots would front on a new street to be called "Charlotte's Walk". (2T10-14)

The subdivision application also proposed to widen Fourteenth Street and construct a new 50' wide right-of-way terminating with a new cul-de-sac bulb. (Ia19) Newlines Engineering & Survey drew the plans submitted along with the application, which depicted two lateral sewer lines for each of the new homes. (Ia99) Notably, basement apartments are permitted uses in all residential zones per UDO Sec. 18-910D (Ia212)

While no variance relief was requested or required, the application called for several submission waivers and two design waivers: from proposing street trees along the entire Fourteenth Street frontage, and from providing non-radial lot lines. (Ia18) Per UDO Sec. 18-805C (Ia213): "Insofar as is practical, side lot lines shall be at right angles to straight streets and radial to

curved streets." The tract is located in Lakewood's R-12 single-family district. (Ia100), of which the use and bulk zoning standards are set forth in the Township's Unified Development Ordinance (UDO) at Section 18-902E. (Ia171)

At the initial public hearing on April 5, 2022, the applicant's attorney stated the following: "Except for the two design waivers that are requested . . . the application still satisfies essentially all of the criteria as set forth in the Municipal Land Use Law." (1T2-24 to 1T3-3) While Mr. Flannery tried to minimize the need for the design waivers and went so far as to call them "de minimus" at the April hearing (2T22-23 to 2T23-24), Mr. Flannery conceded that if the applicant wanted to eliminate the design waiver for street trees, it would result in the applicant having to adjust the drainage on the site to put stormwater management facilities in a less desirable position to accommodate street trees. (2T46-3 to 2T46-10) Mr. Flannery went on to testify that the subdivision plan shows building boxes on each of the proposed new lots because "we don't know what is going to be built there." (2T46-3 to 2T46-12) Mr. Flannery confirmed that, while the building envelopes are provided on the subdivision plan, the reality is that the applicant does not know the actual size of the houses that will ultimately be built on each lot. (1T10-19 to 1T10-24). Indeed, an objecting attorney pointed out the fact that two sewer lines were

proposed for every new lot, indicating that the presence of basement apartments at each of the proposed new homes was probable. (2T64-4 to 2T64-13) The Board was thus made aware that approving the subdivision could result in as many as eighteen families on the nine parcels of land.

The Board expressed concerns about drainage at the site. The Board questioned what the stormwater management plan submitted by the applicant was based on. Mr. Flannery announced that if the Board acted favorably, as a part of resolution compliance, the applicant would perform an analysis based on 25% coverage on each lot to see if the proposed drainage facilities could accommodate that. (1T12-11 to 1T12-18)) He reminded the Board that building coverage would be more than 25% if the future homeowner went to the zoning board for a variance. (1T12-16 to 1T12-18) Mr. Flannery testified that a homeowner association would be formed to manage the stormwater (2T29-25 to 2T30-2) but opposing expert Gordon Gemma reminded the Board that no proposed homeowners association documentation had been provided to the Board for review. (2T79-4 to 2T79-23). When Board Engineer/Planner Dave Magno made the suggestion that the applicant create a conservation easement to alleviate drainage concerns, Mr. Flannery responded that the applicant did not have to make any concessions since it was “only” requesting waivers. (2T42-1 to 2T43-4)

At the June 14, 2022 hearing, Plaintiff confirmed that a revised subdivision plan had been submitted. Mr. Flannery reiterated that the application required two design waivers. (2T12-1 to 2T12) He introduced Exhibit A-5 which was the updated plan set revised to show larger building envelopes reflecting 30% building coverage on each of the lots. (2T46-18 to 2T46-22) The Board discussed the traffic study submitted by the applicant, which was prepared by John H. Rea, PE and Scott T. Kennel, Senior Associate. The Board voiced substantial concerns regarding the submitted traffic report, which was indicated to be based on 9 residential units, rather than the 18 single-family dwellings that would be present at the site if basement apartments were built. (2T18-22) The Chairman, with intimate knowledge of Lakewood Township considering he lives in a nearby neighborhood in the Township, explained: "by my block, which is also ten houses with no basements . . . we generate triple that amount on peak hours" (referring to the 14 peak hour trips indicated in the McDonough and Rea traffic study submitted with this application) (2T20-6 to 2T20-10) He further noted that while the traffic counts are on 14th Street, the property at issue is not located on 14th Street, and that this is a very congested area: with many shuls, school bus routes, and narrow shoulders with cars parked in the shoulders. (2T24-1 to 2T24-10) The Board was reminded by the Board attorney that it is well within

the Board's rights and responsibilities to weigh and consider evidence such as a traffic report. (2T21-21 to 2T21-23)

Board members continued to voice concerns over the traffic movement in the area during the June 14, 2022 hearing. A board member asked Mr. Flannery if there was any indication as to how many cars will be turning left and/or turning right out of this development, and if there is any way to restrict it to right-turn only out of the development. (2T48-8 to 2T48-11) Mr. Flannery responded negatively to the first question, and as to the second, opined that to restrict the flow of traffic would be detrimental as it would send people down towards 14th Street or they'd make a U-turn and come back. (2T48-16 to 2T48-19) The Board expressed concern that, with the relatively new traffic light installed at Hope Chapel Road and 14th Street, traffic backs up very far during peak hours in this neighborhood. (2T49-17 to 2T49-18) Despite the substantial, significant concerns the Board voiced repeatedly at both public hearings considering the accuracy of the submitted traffic report and traffic movement at the site and in the immediate vicinity of the site, no one from McDonough & Rea appeared at any of the hearings before the Board to defend the research submitted in the report.

During the public comment portion of the June 2022 hearing, several individuals who live in or around the neighborhood at issue voiced concerns

regarding the abundance of traffic in the neighborhood, and the fact that these nine new homes, with or without the inclusion of basement apartments, will only add substantially to the traffic issue. One member of the public reiterated a concern of the board members, which is that there is no parking from Curtis Lane to Cedar Road, in addition to three large shuls in the area, two of which have full-time colleges and host events at night. (2T122-11 to 2T122-19)

Throughout the hearings, the Board members made suggestions to the applicant as to ways in which to improve the plan so that the Board would feel more comfortable approving same. For example, the prospect of a conservation easement was brought up several times by board members throughout the meetings. The Board engineer also suggested a conservation easement, which would alleviate the Board's concerns regarding clear cutting of trees and provide justification for the design waiver request as to street trees:

> MR. MAGNO: Well, I was going to make a suggestion. How about a 10-foot conservation easement and if the conservation easement, your plot plan, is left undisturbed, they won't have to provide a double row of screening trees. If it is disturbed, then they've got to put a double row of screening trees and a conservation easement.
>
> CHAIRMAN NEIMAN: That makes so much sense.
>
> MR. MAGNO: Exactly. Doesn't that make a lot of sense?
>
> MR. FLANNERY: It would make sense if the applicant was asking for relief and needed to –

> MR. MAGNO: Well, hold on. Hold on. [The applicant] is asking for relief. [The applicant is] asking for a design waiver. You don't have to put the stormwater management in front of the project and eliminate the street trees there. We recommend, we understand why you're doing that and we made a recommendation for to put some shade trees behind it, but this is a good compromise that the Board is asking you to do and justification for your design waiver request.
>
> BOARD MEMBER: I can't understand why you wouldn't do that.
>
> MR. MAGNO: Exactly.
>
> MR. FLANNERY: Because it's admitting to something that's not required by the ordinance . . . .
>
> 2T42-1 to 2T43-4.

At the end of the first public hearing, the Board engineer reminded the applicant that it should consult with the Department of Public Works as to the drainage and clarify whether the development would need a homeowner's association regarding same, as drainage owned by individual property owners is not allowed under the new stormwater regulations. (1T28-12 to 1T28-16) A board member asked the applicant if it would consider lessening the number of lots proposed and the applicant said no. (2T134-9)

The applicant refused to consider any of the recommendations of the Board, and never provided the Board with an answer as to whether a homeowner's association would be maintaining the stormwater management areas once the homes were built. (2T79-4 to 2T79-23) Brian Flannery justified

the requested design waiver relief by generally invoking the purposes underlying the Municipal Land Use Law (N.J.S.A. 40:55D-1 to 163) and the Township's Master Plan. See 2T44-2- to 2T45-23. The Board chairman made it extremely clear to the applicant prior to the vote that the Board felt the application, as proposed, was too much:

> CHAIRMAN NEIMAN: It's too much. And if there would be something here that you're giving back, you know what, we'll take away one, we'll take away two … we'll do away with the basements. I think, from what I can understand, I think that's where the Board is leaning. So, at this point you're not changing anything."
>
> (2T134-9 to 2T134-12)

The Board ultimately voted to deny the application based on significant traffic safety concerns regarding traffic and parking issues on-site and on the streets directly surrounding the subject property and based on concerns as to density of the development. (2T144-9 to 2T144-11)

The application was heard by the Board on August 2, 2022 at a reconsideration hearing. At this hearing, Mr. Shea requested reconsideration of the vote, but at the same time reiterated – again – that the applicant is not at liberty to amend the plans to reflect any of the changes discussed at the prior hearings. (3T8-18 to 3T8-20) The Chairman pointed out the intimate knowledge that the Board members had regarding this particular area of the Township:

> CHAIRMAN NEIMAN: But, if you're coming to a Board who, most of these Board members have lived here for a long time, understand the exclusiveness of the area there, but it's not … a joke. The sensitivity of that area." (3T24-3T24-12)

The applicant reiterated that there is no change to the 9 lots being proposed, and that the applicant would not consider a deed restriction for basement apartments. (3T28-10 to 3T28-13)

The resolution denying the application was memorialized at the August 23, 2022 Board meeting (Ia64) and the underlying litigation commenced with the filing of a Complaint on September 23, 2022. (Ia1)

LEGAL ARGUMENT

POINT I

THE BOARD'S DECISION TO DENY THE SUBDIVISION APPLICATION WAS NOT ARBITRARY, CAPRICIOUS, OR UNREASONABLE AND THUS THE COURT'S REMAND OF THE MATTER TO THE BOARD FOR APPROVAL WAS AN ERROR OF LAW(Final Order at Da5; opinion at 4T36-18 to 4T47-11)

a. Standard of Review

A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference. Thus, an appellate court's review of a trial judge's interpretations of law and the applications of law to facts is de novo. Klug v. Bridgewater Tp. Planning Bd., 407 N.J Super. 1 (App. Div. 2009).

b. The Applicant failed to provide sufficient proofs of hardship to support the requested design waivers.

Waivers are distinguishable from variances in that the former effect relief from site plan or subdivision standards while the latter concern zoning standards. See Wawa Food Market v. Planning Bd., Ship Bottom, 227 N.J. Super. 29, 34 (App. Div. 1988). To this appellant's knowledge, there is no case, statute, or other authority that definitively states that an applicant bears a lesser burden of proof when seeking a design waiver than it does when seeking a variance.

In the application before the Planning Board, the applicant sought two design waivers: (1) from proposing street trees along the entire Fourteenth Street frontage, whereas the applicant was supposed to place street trees; and (2) from providing non-radial lot lines, whereas the proposed lots should not have radial lot lines. The Lakewood Township UDO permits waivers in an instance wherein the applicant provides proof of hardship:

> The rules, regulations and standards set forth in this section **shall** be considered the **minimum requirements** for the protection of the public health, safety and welfare of the citizens of the Township. However, if the applicant can **clearly demonstrate** that, because peculiar conditions pertaining to the subject parcel, the literal enforcement of this section is impracticable or will exact undue hardship, the Planning Board may permit such exemption(s) and waiver(s) **as may be reasonable** within the general purpose and intent of the rules, regulations and standards established by this section.
>
> (UDO Sec. 18-601) (Da239) (Emphasis added)

The Supreme Court in Lang v. Zoning Bd. of Adjustment, 160 N.J. 41 (1999) has made clear that personal hardship as to variance relief is irrelevant to the statutory standard for hardship under N.J.S. 40:55D-70(c), and that the correct focus must be on whether the strict enforcement of the ordinance would cause undue hardship because of the unique or exceptional conditions of the specific property. Id. at 49. Hardship personal to the owner which is unrelated to the physical characteristic of the land is not contemplated by NJ

40:55D-70(c) and does not constitute sufficient grounds for the granting of a variance under that subsection. Id. at 53.

When questioned as to why the waivers for street trees and non-radial lot lines were necessary, the applicant's engineer/planner, Brian Flannery, responded that the stormwater management system would have to be moved to an "inconvenient" location. (2T46-3 to 2T46-10) The only purported demonstration for the design waivers that Brian Flannery provided to the Board during the two public hearings in this matter was a general invocation of the purposes underlying the Municipal Land Use Law (N.J.S.A. 40:55D-1 to 163) and the Township's Master Plan. (2T44-2- to 2T45-23). The applicant's attorney, Mr. Shea, conceded before the Court at the plenary hearing that the design waivers that were requested were "not testified to as being a hardship." (4T7:19-24). The reason for this is obvious: the "necessity" of the design waivers stems from the applicant's desire to create nine lots instead of a lesser number of lots, which this appellant submits is a purely self-created hardship. The applicant failed to produce any evidence of hardship to justify the waivers, and thus the Board had no basis to grant the waivers as per UDO Sec. 18-601.

As is the case with variances, reviewing courts must consider whether a board arbitrarily or capriciously granted or denied a waiver. Coventry Square, Inc., v. Westwood Zoning Bd. of Adj., 138 N.J. 285, 301 (1994). The Board did

not act arbitrarily or capriciously in denying a request for waivers when the applicant provided no basis of hardship whatsoever for the grant of those waivers.

During the plenary hearing, the applicant's attorney cherry picked certain statements made by the Board chairman during the course of the three hearings in an attempt to argue that the application was conforming despite the request for the design waivers. This appellant submits that the deliberative comments of the Board members are not the ruling of the board.

During the plenary hearing, the Court spent a significant amount of time questioning the rationale behind the design waivers for radial lot lines and street trees, and more specifically how a non-radial lot line might adversely impact the neighborhood. (4T16-12 to 4T-17-25; 4T22-2 to 4T26-11) The trial Court also ultimately opined that the Board overreached in recognizing that the density of this subdivision would create undesirable off-tract issues. (4T38-3 to 4T38-5) It is this appellant's position that the Court's inquiry into this question was erroneous. The Lakewood Township Governing Body felt strongly enough about the negative effects of non-radial lot lines in Lakewood Township to create an ordinance provision declaring non-radial lot lines a design waiver. While it is not within the board attorney's purview to question or analyze the thought process behind the ordinance and the ordinance itself

was not at issue in the prerogative writ matter, this appellant submits that radial lot lines, in part, regulate lot yield in Lakewood Township, and the Board's concerns regarding the application went directly to the layout, the number of homes, and the size of the homes proposed. This is squarely a planning issue, as pursuant to the Municipal Land Use Law, if an application is not completely conforming the Board is not required to grant the application, which means that it is within the Board's discretion, authority and judgment to deny the application.

The trial Court opined that it is the Court's job to look to see if the developer presented substantial evidence in order to seek the waivers requested, and further opined that in the Court's mind, the developer did present substantial evidence in the form of the board professionals deeming the waivers to be appropriate and something that was recommended.

The trial Court ultimately opined that strict compliance with the radial requirements creates a hardship for the applicant, and an "unusual and unworkable result" (4T43-8). However, Mr. Shea himself stated that the design waivers requested were not testified to as being a hardship. (4T721-23) As previously discussed, the "hardships" cited by the applicant were purely economic in nature. While the applicant could have presented a fully conforming subdivision with fewer lots, it chose to present a non-compliant

subdivision with more proposed lots simply for profit. The applicant failed to provide the requisite hardship proofs and as such the Board's decision to deny the application was not arbitrary, capricious or unreasonable, and further, the Court overstepped its authority in ordering the approval of the application.

c. **The Board's Reasons for Denial are Entitled to Deference by the Court**.

Not only was the Board's denial of the granting of the design waivers and of this application reasonable as per Coventry Square for the reasons cited above, but also, the Board was well within its purview to cite as reasons for its denial of the application the substantial concerns the Board had regarding safety in the surrounding neighborhood, and the deleterious effect an approval of this application would have on the same. There is no shortage of prior case law in New Jersey wherein the courts have held that the planning board may consider safety concerns in the grant or denial of a subdivision application. In Levin v. Livingston Tp., 35 N.J. 500, 510-511 (1961), the court pointed out that subdivision control, like zoning, is a tool of overall community planning. They are "closely related . . . in that both are preventive measures intended to avert community blight and deterioration by requiring that new development proceed in defined ways and according to prescribed standards." Id. at 506. Critically, the court pointed out that it is of essential importance [for the

planning board] to determine whether the whole tract proposed to be subdivided is fundamentally suitable for the projected development from the standpoint of area, topography, drainage, soil characteristics, accessibility, availability of utilities and the like. Id. at 511. In El Shaer v. Planning Bd., 249 N.J. Super. 323 (App. Div. 1991), certif. den. 127 N.J. 546 (1992), the plaintiff appealed from a judgment sustaining the planning board's denial of plaintiff's major subdivision application. Plaintiff proposed to subdivide a tract encumbered by wetlands and utility easements into ten residential lots. Id. at 566. The Board denied the application based on concerns over traffic safety and potential drainage and flooding problems. Id. at 567. The Court upheld the board's denial of the application, finding that while plaintiff may have met the specific bulk requirements of the development ordinance, that did not mean that the plaintiff was entitled to an approval of his subdivision plan. Id. at 327. The Court found that the Board applied sound planning concepts to protect the public interest, thereby concluding that the existing physical constraints upon developing the parcel required rejection of the subdivision configuration as designed. Id. at 328. In Pizzo v. Mantin Group v. Randolph Tp., 137 N.J. 216, 220, 645 A.2d 89, 91 (1994), the Supreme Court pointed out that the delegated powers to regulate land use are themselves part of the police powers exercised by local governments. Id. at 223. "Zoning is inherently an exercise of the

State's police power." Zilinsky v. Zoning Board of Adjustment, 105 N.J. 363, 367, 521 A.2d 841 (1987). Consequently, the general zoning authority, as any police power, must be exercised for public health, safety, and welfare. Holmdel Builders Ass'n v. Twp. Of Holmdel, 121 N.J. 550, 557, 583 A.2d 277, 280 (1990). Concededly, in Pizzo, the Court found that the denial of a by-right subdivision based on the "broad purposes of the MLUL" rather than on the specific standards contained in the municipal subdivision and zoning ordinances was not a valid exercise of its authority to control subdivisions. (Pizzo at 97). Here, however, the Board did not base its denial on the "broad purposes of the Municipal Land Use Law." Rather, the Board had significant concerns regarding specific issues – as evidenced by specific examples- directly tied to the property in question. The record is replete with concerns on the part of the Board members as to traffic, parking, and safety in the immediate vicinity of the subject property. The Board voiced concerns regarding the submitted traffic report, which was indicated to be based on nine (9) residential units whereas there was the potential for 18 single-family homes at the site. Chairman Neiman, with intimate knowledge of Lakewood Township considering he lives in a nearby neighborhood in the Township, explained: "but my block, which is also ten houses with no basements . . . we generate triple that amount on peak hours" (referring to the 14 peak hour trips

indicated in the McDonough and Rea traffic study submitted with this application). (2T20-6 to 2T20-10) He further noted that while the traffic counts are on 14th Street, the property at issue is not located on 14th Street, and that this is a very congested area: with many shuls, school bus routes, and narrow shoulders with cars parked in the shoulders. (2T24-1 to 2T24-10) A board member asked Mr. Flannery if there was any indication of how many cars will be turning left and/or turning right out of this development, and if there is any way to restrict it to right turn only out of the development. (2T48-8 to 2T48-11) Mr. Flannery responded negatively to the first question, and as to the second, opined that to restrict the flow of traffic would be detrimental as it would send people down towards 14th Street or they'd make a U-turn and come back. (2T48-16 to 2T48-19) The Board expressed concern that, with the relatively new traffic light installed at Hope Chapel Road and 14th Street, traffic backs up very far during peak hours in this neighborhood. (2T49-17 to 2T49-18) The Board was also aware of the fact that two sewer lines were proposed for every new lot, indicating the presence of basement apartments at these proposed new homes was a probability, and thus would further add to congestion in the neighborhood and on this street. (2T64-4 to 2T64-13) Despite all of these concerns centering around traffic, the applicant failed to provide expert testimony in an attempt to quell concerns or answer the

questions of the Board and rather chose to sit back and rely on the controversial traffic report that had been submitted and that the Board had made very clear it was rejecting.

The Board was also very concerned about drainage at the site. At the first hearing, the applicant conceded that the actual size of the houses that will ultimately be built on each lot was unknown. (1T10-19 to 1T10-24). This was a significant issue to the Board, which questioned what the stormwater management plan submitted was based on if the fact of the matter was that the final size of the homes- which could greatly affect the drainage proposed- was an unknown. Even though the applicant ultimately updated the plan to show the maximum coverage as allowed by the ordinance, the Board's concerns remained as any of the future homeowners could potentially obtain a variance to create a larger home from the Board of Adjustment. Adding to the uncertainty was the fact that the applicant never provided the Board with a concrete answer as to whether a homeowner's association would be maintaining the stormwater management areas once the homes were built. This was a critical piece of information, considering that drainage owned by individual property owners is not allowed under the new stormwater regulations. (1T28-12 to 1T28-16)

The Board conducted two full public hearing(s) with adequate notice having been provided to the public. The Board duly considered the testimony of the applicant's professionals and the objector's professionals. For any expert witness, the Board can accept all, some, or none of the professional's testimony. Klug v. Bridgewater Tp. Planning Board, 407 N.J. Super. 1 (App. Div. 2009). The Board duly considered all evidence presented, including the testimony provided by Brian Flannery, the traffic report submitted by the applicant, and the substantial public comments voiced by several members of the public at both hearings, and voted to deny this subdivision application with design waivers for significant drainage, traffic and safety issues concerning the subject property and the immediate surrounding area.

Municipal actions enjoy a presumption of validity. Fanelli v. City of Trenton, 135 N.J. 582, 589, 641 A.2d 541 (1994). Thus, a challenge to the validity of a municipal ordinance or action must overcome the presumption of validity—a heavy burden. Assocs. v. City of Newark, 132 N.J. 180, 185, 623 A.2d 1366 (1993). New Jersey courts have consistently held that actions of municipal boards are presumed valid and will not be interfered with unless the local agency action is determined to be arbitrary, capricious, or unreasonable. Manalapan Builders Alliance, Inc. v. Township Committee, 256 N.J. Super. 295, 304 (App. Div. 1992); New Jersey Shore Builders Ass'n. v. Township of

Ocean, 128 N.J. Super. 135, 137 (App. Div. 1974), cert. denied, 65 N.J. 292 (1974). A court accords due deference to the local agency's broad discretion in planning and zoning matters and only reverses a local agency decision if it finds the decision to be arbitrary, capricious, or unreasonable. Kramer v. Board of Adj., Sea Girt, 45 N.J. 268, 296 (1965); Nunziato v. Planning Board, 225 N.J. Super. 124, 133 (App. Div. 1988).

In reviewing the decision of a local planning board, the Court's power is tightly circumscribed. New Brunswick Cellular Tel. Co. v. Old Bridge Planning Bd., 270 N.J. Super. 122, 134, 636 A.2d 588 (Law Div. 1993). Board decisions, when factually grounded, are cloaked with a presumption of validity, which presumption attaches to both the acts and the motives of its members. Pullen v. So. Plainfield Planning Bd., 291 N.J. Super. 303, 312, 677 A.2d 278 (Law Div. 1995), aff'd, 291 N.J. Super. 1, 6, 676 A.2d 1095 (App. Div. 1996). So long as there is substantial evidence to support it, the court may not interfere with or overturn the decision of a municipal board. Even when doubt is entertained as to the wisdom of a board's action, there can be no judicial declaration of invalidity absent a clear abuse of discretion by a board. Pullen, supra, 291 N.J. Super. at 312, 677 A.2d 278, aff'd, 291 N.J. Super. 1 at 6, 676 A.2d 1095; New Brunswick Cellular Tel. Co., supra, 270 N.J. Super. at 134, 636 A.2d 588. Furthermore, it is well-settled law that local officials,

because of their familiarity with their community's characteristics and interests, be allowed wide latitude in the exercise of their delegated discretion. Kramer v. Board of Adj., Sea Girt, supra, 45 N.J. at 296; Hawrylo v. Board of Adj., Harding Twp., 249 N.J. Super. 568, 579 (App. Div. 1991); Pullen, supra, 91 N.J. Super. 6, 7. Because variances tend to impair sound zoning, a court should give "greater deference to variance denials than to grants of variances." Medical Ctr. at Princeton v. Tp. of Princeton Zoning Bd. of Adjustment, 343 N.J. Super. 177, 199, 778 A.2d 482 (App. Div. 2001).

The court does not have the authority to substitute its judgment for the judgment of the planning board. The role of the Court is to look at the Board's action and determine if the action was arbitrary or capricious. The Board, on the other hand, is vested with the responsibility to do what is best for its community, and to apply the community's ordinances. Here, the Board did nothing illegal, nor did it make a careless, reckless or baseless decision. Rather, the Board cited well-grounded concerns regarding the safety and well-being of the neighborhood and good civic design arrangement and as such, the decision to deny the application was not arbitrary and capricious and the trial Court exceeded its authority in remanding the matter back to the Board for approval.

CONCLUSION

This respondent hereby joins in with the arguments raised in the appellant, Viggy Blech's, appellate brief.

For all of the foregoing reasons, the Final Order of the Trial Court granting subdivision approval should be reversed.

Respectfully submitted,

By: s/ Jilian McLeer
JILIAN MCLEER

Dated: July 18, 2024

BESADAR HOLDINGS LLC AND SOLOMON HALPERN, INDIVIDUALLY, Plaintiffs-Respondents, v. TOWNSHIP OF LAKEWOOD PLANNING BOARD, JOHN DOES 1-30 (A FICTITIOUS NAME FOR PERSONS PRESENTLY UNKNOWN) AND XYZ, INC. 1-10 (A FICTITIOUS NAME FOR A BUSINESS ENTITY PRESENTLY UNKNOWN) Defendants, And VIGGY BLECH, Intervenor/Defendant	Superior Court of New Jersey Law Division: Ocean County DOCKET NO: A-2075-23 ON APPEAL FROM THE FINAL ORDER ENTERED BY THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CIVIL PART, OCEAN COUNTY (OCN-L-2115-22) CIVIL ACTION SAT BELOW: HON. CRAIG L. WELLERSON, P.J.C.v.

BRIEF ON BEHALF OF PLAINTIFF/RESPONDENT BESADAR HOLDINGS LLC AND SOLOMON HALPERN, INDIVIDUALLY

R.C. SHEA & ASSOCIATES
I.D. 021011979
244 Main St., P.O. Box 2627
Toms River, NJ 08754
(732) 505-1212

Robert C. Shea, Esq., Of Counsel and on the Brief (RShea@rcshea.com)
Vincent J. DelRiccio, Esq, On the Brief (Vdelriccio@rcshea.com – ID 302562019
Dated: August 19, 2024

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Procedural History

On November 3, 2021, Besadar Holdings, LLC ("Plaintiff") applied to the Lakewood Township Planning Board ("Board") for a Major Subdivision for the purpose of creating nine (9) residential lots from three (3) existing lots. (**Ia18 and Ia23**) After two hearings on April 5, 2022 and June 14, 2022, the Board denied Plaintiff's application, citing concerns with off-site traffic and purported conflicts with N.J.S.A. 40:55D-2. The Board then heard and denied Plaintiff's request for reconsideration on August 2, 2022. (**Ia 64**)

On September 23, 2022, Plaintiff filed an action in lieu of prerogative writs, challenging the Board's denial. On December 21, 2022, a consent order was entered allowing objector Viggy Blech ("Blech") to intervene. (**Ia1**)

The Court heard oral argument on July 31, 2023. Following the hearing, Judge Wellerson ordered the Board to submit an amended Resolution to clarify its reasons for denying the application. (**Ia236**) After significant delay by the Board, a new Resolution was finally adopted on September 19, 2023. (**Ia242**) A trial was then held on December 20, 2023, where the Court found that the Board arbitrarily denied Plaintiff's application. The Board then entered an Order reversing the Board's denial. (**Ia269**)

Statement of Facts

On November 3, 2021, Besadar Holdings, LLC's ("Plaintiff") applied to the Lakewood Township Planning Board ("Board") for a Major Subdivision for the purpose of creating nine (9) residential lots from three (3) existing lots known as Lots 23, 24.01, and 34 in Block 24. (see Application **Ia18** and Project Narrative **Ia23**) The application further proposed to widen the existing Fourteenth Street and construct a new 50' wide right of way terminating in a cul-de-sac.

The site is located in the R-12 Single-Family Residential Zone, which lists "single family detached housing" as a permitted use pursuant to Lakewood's Unified Development Ordinances ("UDO") § 18-902 (E). UDO § 18-902(E) requires the following bulk Ordinance requirements for uses in the R-12 Zone, with the exception of Places of Worship:

a. Minimum Lot Area – 12,000 square feet
b. Minimum Lot Width – 90 feet
c. Front Yard Setback – 30 feet
d. Rear Yard Setback – 20 feet
e. Side Yard Setback – 10 feet with an aggregate of 25 feet
f. Accessory Building:
    i. Side Yard Setback – 10 feet
    ii. Rear Yard Setback – 10 Feet

g. Maximum Building Coverage – 30%
h. Maximum Building Height – 35 feet

Plaintiff's application complied with each of these Ordinance requirements. The application further sought to provide a minimum of four off-street parking spaces for each of the dwellings. There were no bulk variances requested as part of the application.

On November 23, 2021, a Traffic Study Report was submitted by John Rea, P.E. of McDonough & Rea Associates. The report concluded that the new dwellings would generate 14 trips during the AM peak street hours, and 18 trips during the PM peak street hours. The report further stated that the plan "meets and exceeds the RSIS design and accessibility standards." **(Ia28)**

On February 3, 2022, Township Engineer, Terence Vogt, PE, PP, CME ("Vogt") submitted an engineer review letter. (**Ia99**) The application was revised to address Vogt's comments regarding drainage. (**Ia107**) A second engineer review letter was issued on March 31, 2022. (**Ia129**) Vogt, in both letters, noted that the application contained two (2) design waivers from UDO §18-803 (D) and UDO § 18-805(c), both of which are located within Chapter 18, Article 8, which reads "design standards." Specifically, the Plaintiff requested:

1. A design waiver is required from proposing street trees along the entire Fourteenth Street frontage.

2. A design waiver is required from providing non-radial lot lines.

Vogt Reviewed the requested waivers, and recommended the following:

> The applicant's engineer is requesting the design waiver because of the proposed stormwater management system. Should the Board grant the required design waiver, we recommend shade trees be proposed to the southwest of the stormwater management facilities.
>
> The non-radial lot lines have been designed such that proposed Lots 24.06 and 24.07 will meet the minimum area and width requirements, while keeping stormwater management facilities entirely on new Lot 24.05. Therefore, **we recommend the Board grant the required design waiver. (Ia130)**

The first public hearing took place on April 5, 2022 ("April Hearing") Plaintiff was represented by Robert C. Shea, Esq. ("Shea"). Brian Flannery, PE, PP ("Flannery") provided testimony on behalf of the Plaintiff.

Flannery testified that the application complied with all of the requirements of § 18-902(E). He explained that the homes built on the subdivided lots would be custom homes but would all comply with the ordinance. When questioned by the Board as to why the plans did not reflect the exact size of any potential homes, Flannery responded:

> We show building boxes, because we don't know what's going to be built there. These are going to be sold to people that want to move into that neighborhood and they're going to put **houses that conform with the ordinance**.
>
> ...
>
> The drainage, if the building size is doubled it will be contemplated for by the, by a new drainage system and I believe this is something that at plot plan would be submitted, just as on an existing lot when somebody

> comes in to build on an existing lot and they build a bigger house, the Board, the Township engineer looks at that and says, well, you're creating some kind of drainage, you need to compensate that, and it's done all the time and it's very simple to accommodate any additional area. (**T1: p7, ln 8-25**)

The Board continued to ask about the potential building sizes. Flannery then testified that the R-12 Zone allows for 30% building coverage. He further testified that since the homes would be custom, there is no way to tell the exact building sizes. However, any future home would comply with the requirements of the R-12 Zone. Flannery testified, "all we're asking for is to subdivide it [the property] into conforming lots." (**T1: p8, ln 14-24**)

Flannery testified that, "whatever is required by ordinance and whatever the Board professionals during resolution compliance say we need, we will provide." (**T1: p13, ln 17-17**) Flannery then made it clear that no waiver was being requested regarding evergreen buffering, stating, "We're not requesting a waiver, because a waiver is not required… we will do everything with respect to landscaping that's required by the ordinance" (**T1: p14, ln 20-23**)

The Board then proceeded to further inquire about the size of the homes. At this time, Board Engineer Mr. Magno ("Magno") proposed that the applicant submit a new plan which shows the house boxes drawn at the maximum building coverage. (**T1: p18, ln 19 – p19, ln 9**) The Board then returned its focus to the issue of buffering. Despite having no basis in the ordinance or in the Municipal Land Use

Law ("MLUL"), a Board Member insisted on a conservation easement being put in place:

> Wouldn't it be respectful of the neighborhood just to put right on the plans, conservation easement or tree save area so everything is clear, this is what we're doing? … Wouldn't that be respectful, just be upfront and say, look, this a residential neighborhood, we want to try keep the integrity as best we can? We understand the Board has an application, but instead of just coming in and saying we're just going to do whatever we want to do? (**T1: p20, ln 6-18**)

Flannery responded:

> I think it's respectful to come in and not ask for variances… none of the surrounding lots have conservation easements on their property and, in fact, there's a reason for it in this situation, because Sydney Krupnick wanted the trees around him and he provided that benefit to these homeowners for years by him having trees on his property where he could have had houses. **These are houses that are similar to other houses in the neighborhood. They conform with the ordinance**. And, to the extent practical, the applicant does want to be a good neighbor and they're going to save as many trees as they can, but there's no ordinance requirement. We're following all of the municipal ordinances. (**T1: p20, ln 25 – p21, ln 12**)

The Board then again returned to the discussion of the size of the homes. The Board also again attempted to argue that a tree save plan would be required. The hearing concluded with Flannery, on behalf of the applicant, agreeing, per the recommendation of the Board, to revise the plans to show the maximum building size. Flannery however, made it clear that no such tree save plan or conservation easement would be considered outside of what the ordinance requires.

The plans were revised as per the discussion at the April 5, 2022 hearing. (**Ia138**) On May 3, 2022, Vogt issued a third review letter. (**Ia160**) The review letter noted that the revisions included the 30% building coverage permitted by the R-12 Zone and revisions to the landscaping plan. No new variances or waivers were called out. The hearing was then rescheduled for June 14, 2022 ("June Hearing"). Plaintiff re-noticed for the June Hearing on June 3, 2022. (**Ia170**)

At the June Hearing, Ronald Gasiorowski, Esq. ("Gasiorowski") placed an objection on the record regarding jurisdiction. Gasiorowski argued that there are really 18 residential units proposed, not nine (9) due to the potential existence of basement apartments. The Board then allowed the application to proceed, and Shea recalled Flannery to testify.

Flannery began by introducing the new plans, which showed the maximum 30% coverage. He then testified:

> the grade was changed to direct the runoff towards Charlottes Walk, the new proposed roadway, and additional drainage and landscaping were put in so that there's no adverse impact on the neighbors and it provides a buffer, which is not required by ordinance, but based on the request we got from the Board to go above and beyond (**T2: p10, ln 13-19**)

Flannery then addressed Gasiorowski's objections, stating:

> The plot plan testimony is, we're not asking to build those house boxes. **We're not asking for basement apartments**. ***We're asking for a nine lot conforming residential subdivision***, to create nine conforming lots

> that individual home buyers are going to come in. (**T2: p10, ln 22 – p11, ln 2**)

An unidentified Board Member then voiced concern that the addition of nine new houses would create more traffic volume due to the narrowness of the surrounding streets. Flannery then pointed out:

> the Board attorney can probably instruct you that **on an applicant that's coming in with a permitted use, offsite traffic is not something that gets reviewed.** It gets reviewed to the extent of safety, but as far as are nine houses going to disrupt the pattern here, **the governing body by zoning this as R12 has determined that residential development is in accordance with the R12 and we are compliant with the R12**. It is, it's suitable for the area. (**T2: p16, ln 22 – p17, ln 6**)

Flannery then testified that the requested subdivision is similar to the adjacent neighborhood, Ivory Court. This again drew commentary from the Board, who stated that Ivory Court does not have basement apartments. Flannery once again testified that the applicant is not requesting basement apartments but is requesting a nine-lot subdivision.

An unidentified Board Member then asked about a conservation easement. (**T2: p36, ln 14-16**) Flannery testified that it was considered, but ultimately, the applicant decided against it. Flannery again noted that there is no landscaping required by the ordinance, let alone, a conservation easement. Flannery further testified that the applicant was not requesting a waiver from providing buffering

between the lots, as no buffering is required at all. (**T2: p39, ln 2-6**) When asked if the denial of the lot-line waiver would affect the application, Flannery stated:

> We would have to adjust the drainage to put in a less desirable position to accommodate the street trees. So, we could move the drainage to accommodate that. My opinion is that's not what's appropriate. … I'm referring to exhibit A-5, which is proposed Lot 24.02, in the northeast corner is where the stormwater facility is and we would put the stormwater facility back a little further. It would just make maintenance by the homeowner's association a little less efficient, but we could get nine, say, nine houses without that design waiver (**T2: p46, ln 6-10**)

When asked about the street tree waiver, Flannery testified:

> it's the number of trees which is really important so that if you're required by the spacing to put in ten trees and if you put in ten trees, you've provided ten trees. The exact location of them, sometimes it's less desirable if they're all one right after the other. In cases of any kind of a disease to the trees, it jumps from one to the other, versus if you have a bigger space, there's less. But, to me, I've driven by many trees in Lakewood and other towns as well and I couldn't tell you whether the trees are every 50 feet or whether they're 60. (**T2: p50, ln 22-p51, ln12**)

Flannery concluded his testimony with respect to the waiver by stating:

> If the Board doesn't feel inclined to grant that design waiver, approve the application without it and we'll adjust the plans to accommodate. (**2T: p52, ln 2-5**)

Gasiorowski then questioned Flannery. He inquired as to the provision of a homeowner's association. Flannery testified that while one was not required, one would be put in place. (**T2: p58, ln 21-23**)

Gasiorowski then called Gordon Gemma, P.P. to testify. Gemma presented testimony as to the definition of a single-family dwelling, then compared that with the definition for a duplex. The Board Attorney then clarified to the Board that the applicant was not seeking approval for basement apartments. Rather, the individual homeowners could build their homes in compliance with the ordinance and could seek any necessary relief through the building and zoning departments. Upon cross examination, Gemma admitted that the application only seeks a subdivision, and the determination of what homes will be built would be made later by the Construction and Zoning Departments. (**T2: p95-96**)

Following the public comment section, a Board Member asked if the applicant would consider a four-lot subdivision instead of nine. Shea indicated that the applicant would not and proceeded to make closing remarks. Shea noted that the applicant agreed to comply with the engineering report. He further noted that the Board's power was simply to follow the dictates of the relevant ordinance, and that only the Board of Adjustment could interpret ordinances. He concluded that the applicant in this case, complied with all of the requirements of § 18-902(e) which was confirmed by the boards professionals. (**T2: p128-130**)

The Board then asked if the applicant would agree to a deed restriction against basement apartments. Shea again indicated that he would not. The Board then asked its engineer about the waiver for non-radial lot lines. Magno indicated that the non-

radial lines were preferred in this instance. A Board Member then inquired further, asking if they had any "leverage" to deny that. (**T2: p136, ln 13**) The Board then deliberated and made a motion to deny the application based upon the increase of offsite traffic and potential offsite parking problems. (**T2: p 144, ln 9**)

On July 11, 2022, Plaintiff transmitted a letter to the Board seeking reconsideration of the vote. The matter was then heard by the Board on August 2, 2022 ("August Hearing"). At the August Hearing, Shea identified some concerns of the Board, such as the street parking. He also re-impressed upon the Board that the application complied with all requirements.

In addressing the Board, Ms. Hany Halpern, who spoke in favor of reconsideration, the Board Chairman then stated the following:

> You know, there's always that avenue of going to a judge or the court and working it out there, because, you know, like the way your son's attorney explained before we went to vote, **there are no variances here. There's no reason to turn down this application** and there is some credence to what he said. A judge might agree with him.(**T3: p22, ln 23 – p23, ln 5**)

The Chairman went on to state, "You know, yes, it's a conforming application, I get it, but it's also conforming in a very exclusive neighborhood." He continued:

> It is an exclusive neighborhood and it's a sensitive neighborhood. People have lived here for a long time. There are no basements in this area here. It's a certain look. He wants to change the look and he has no right to change the look, but he has to understand that that's why he's getting some opposition, because he's changing the look for a whole

> neighborhood and that's why we're here for the 15th time and probably it will go to 20 or so, that's why. (**3T: p23, ln 6-15**)

The Board voted to deny reconsideration, with only Chairman Neiman voting to reconsider, stating:

> **It's a conforming application** and all those changes, driveways, major flood, you have a piece of property they want to build houses on and **he has a right to build houses on his property**. (**T3: p29, ln 22-25**)

The Resolution denying the application was memorialized at the August 23, 2022 Board meeting. (**Ia64**) The Resolution set forth the Board's reasoning for the denial of the application. Specifically, it states:

> A. While the application represented a conforming subdivision, it is the duty of the planning board to weigh the evidence and to exercise its discretion in the event of significant concerns on the board [*sic*] of the board. The Board ultimately rejected the application on the basis of significant public safety concerns regarding the lack of street parking coupled with the substantial proposed density particularly in light of the basement apartments notes on the plans. The Board found that an approval of this application would have significant detrimental effects on the safety of the neighborhood.
>
> B. The Board finds the applicant's proposal does not further the purposes of zoning pursuant to N.J.S. 40:55D-2:
>
> 1. The applicant's proposal is not the best planning alternative.
> 2. The proposed development would not secure safety from fire, flood, panic and other natural and man-made disasters.

This litigation then commenced with the filing of Plaintiff's Complaint dated September 23, 2022. Following the intervention of Viggy Blech and the initial trial hearing, the Board adopted an Amended Resolution. (**Ia242**) The Amended Resolution again acknowledged that the application was conforming and only requested two waivers. The Amended Resolution stated purportedly more detailed reasons for the Board's denial. Paragraph A read claimed the Board denied the application due to:

> significant public safety concerns regarding the lack of street parking coupled with the substantial proposed density particularly in light of the proposed basement apartments noted on the plans.

Paragraphs B contained factual recitation. Paragraph C claimed "the Board found that 9 homes are too many for this application." Paragraph D contained factual recitation regarding the reconsideration. Paragraph E indicated that:

> The Board found that the applicant could not satisfy the negative criteria because an approval of this application would have significant detrimental effects on the safety of the neighborhood and would also substantially impair the intent and purpose of the municipal zoning plan and ordinances.

Finally, Paragraph F indicated that the applicant's proposal did not advance the purposes of zoning pursuant to N.J.S.A. 40:55D-2 as follows:

1) The applicant's proposal is not the best planning alternative.
2) The proposed development would not promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and religions and preserve the environment.

3) The proposed development would not encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes which results in congestion or blight

At the trial, Judge Wellerson correctly pointed out that the validity of the Board's denial hinged on whether or not the two waivers at issue created the harm that the Board claimed would result from an approval of this application. The Court then found that neither the provision of design waivers for non-radial lot lines, nor the modification to the street tree spacing were proper grounds to deny the application.

Legal Argument

I. The Court Correctly Found that the Applicant was Not Denied due to Either Design Waiver

Both Appellants indicate that Plaintiff is not entitled to relief due to the existence of two requested design waivers, even going so far as to suggest that Plaintiff did not prove its affirmative case regarding same to the Board. Under N.J.S.A. 40:55D-51, a planning board has the power to:

> …grant such exceptions from the requirements for site plan approval as **may be reasonable and within the general purpose and intent of the provisions for site plan review** and approval *of* an ordinance adopted pursuant to this article, if the literal enforcement of one or more

> provisions of the ordinance is **impracticable** or will exact undue hardship because of peculiar conditions pertaining to the land in question.

As the Court can see, while the Intervenor and the Board spend much time arguing that the Plaintiff was required to prove a hardship, a showing that a design is **impractical** and the grant of a waiver is ***reasonable*** is enough to satisfy the statute.

The application sought two (2) design waivers; one from providing radial lot-lines pursuant to UDO § 18-805(c), and the other from providing street trees along the entirety of the Fourteenth Street frontage pursuant to UDO § 18-803(d), both located in the "Design Standards" section of the UDO. (**Ia213**) It must be understood that these design waivers are governed by the UDO. UDO § 18-805 (c) governs the lot line waiver, and says the following, "***Insofar as is practical***, side lot lines shall be at right angles to straight streets and radial to curved streets." As such, the lot line waiver is governed, not by hardship, but by practicality. Practicality that, as will be explained below, has been proven by the Plaintiff's expert testimony, as well as the comments from the Board's own professionals. Interestingly, the Intervenor's own brief recognizes this standard on page 8-9, by their citation of UDO § 18-805(c). As such, the Intervenor's notations regarding the development regulations of Wall and Jackson Townships are wholly irrelevant. The applicable regulations are those of Lakewood's, and as such, only those of Lakewood matter.

It must be further understood that while the design waivers were properly proven, the application was conforming to all bulk requirements of the UDO in every other way, aside from the two waivers. As such, the critical question becomes, not only whether the design waivers should have been granted, but further, if those design waivers were truly the reason for the denial of the entire application.

The waiver regarding lot lines was recommended by the Township's own engineer both on the record, and in his review letter dated May 3, 2022. Specifically, the Board Engineer stated:

> The non-radial lot lines have been designed such that proposed Lots 24.06 and 24.07 will meet the minimum area and width requirements, while keeping stormwater management facilities entirely on new Lot 24.05. Therefore, we recommend the Board grant the required design waiver. (**Ia164**)

One of the reasons for the engineer's recommendation was that the stormwater management facilities will be located entirely on new Lot 24.05. As Flannery testified at the hearing:

> We would have to adjust the drainage to put in a less desirable position to accommodate the street trees. So, we could move the drainage to accommodate that. My opinion is that's not what's appropriate. … I'm referring to exhibit A-5, which is proposed Lot 24.02, in the northeast corner is where the stormwater facility is and we would put the stormwater facility back a little further. It would just make maintenance by the homeowner's association a little less efficient, but we could get nine, say, nine houses without that design waiver (**T2: p46, ln 6-10**)

Furthermore, the engineer made no objection to the waiver regarding street trees, and recommended that if same were granted, shade trees should be planted near the southwest of the stormwater management facility. The applicant represented that they would comply with this recommendation. Flannery testified that it was not the applicant's intention to waive the requirement to put in *any* street trees. Rather, the applicant only sought a waiver from planting them along the *entire* frontage. Specifically, Flannery stated:

> we're requesting a partial design waiver on the street trees, because there's a stormwater facility there and the recommendation from the Board engineer is, we recommend shade trees be proposed to the southwest of the stormwater management facility and we'll put in all these street trees that the Board and the professionals say fit. Wherever a street tree fits, we'll put a street tree in. We can't do the typical every 50 feet because of the unique circumstances, but if we have 30, 30, and 60 you're going to have the same thing." (T2: p28, ln 10-14)

As the Court can see, the Board's own professionals had no concerns regarding the design waivers' effects on drainage and any supposed hazards created by it. Furthermore, the applicant testified that it would comply with the engineer's recommendations for shade trees near the stormwater management system and would plant as many street trees as could fit to comply with the engineer's request. In fact, the testimony reflected that the *number* of street trees would not change, only the *placement* of same. As such, it is curious that the Board would seek to argue that

waivers, which their own engineer took no issue with, would somehow create a safety hazard.

Finally, despite the fact that Flannery clearly presented testimony that the location of the lot lines are most practical in a non-radial fashion due to the location of the drainage basin, he, as noted above, testified that the applicant was willing to re-work the lines to conform and that same would not affect the number of houses in the subdivision. Furthermore, Flannery said the same of the street trees. Addressing the waivers, he testified:

> If the Board doesn't feel inclined to grant that design waiver, approve the application without it and we'll adjust the plans to accommodate. **(2T: p52, ln 2-5)**

Plaintiff clearly proved the impracticality of the radial lot lines. As noted above, there is no "hardship" that must be proven. The Intervenor argues that the trial Court erred when it found that the waivers were "better alternatives." This position is untenable, as the language of UDO § 18-805(c) only requires practicality, not hardship, which is consistent with the language of N.J.S.A. 40:55D-51, which empowers a Board to grant said waivers if they are "reasonable". In fact, the Intervenor goes so far as to use an inapplicable section of UDO to justify their position. On page 12 of their brief, the Intervenor claims that UDO § 18-601 requires a showing of hardship to justify a waiver. Aside from the fact that the Intervenor

again leaves out the language about impracticability, the Plaintiff is seeking a waiver from § 18-805, not § 18-601.

The Intervenor's citation to Cobble Close Farm v. Bd. Of Adjustment of Middletown Tp., 10 N.J. 442, 455 (1952) is wholly misplaced. The Intervenor argues that the case requires a governing body be made a party to any action involving a challenge to an ordinance's validity. While this is what the case says, it has nothing whatsoever to do with the situation at issue. Plaintiff is not challenging an ordinance, they are correctly pointing out that the applicable ordinance, UDO § 18-805(c) does not require a showing of hardship.

The Intervenor's citation to Wawa Food Market v. Planning Bd. Of Ship Bottom, 227 N.J. Super. 29, 34 (App. Div. 1988) is similarly misplaced. That case involved a request for a waiver from the parking space requirement, which the court found was more properly a variance request, as same was located within the Zoning Ordinance, not the Subdivision Ordinance. UDO § 18-805 is located within Chapter 18, Article 8, which reads "design standards." As such, there can be no serious argument that the lot line angle is anything but a design waiver.

There is further, nothing whatsoever inherent to these requested design waivers that warranted the denial of the application. Regardless of the Defendants' arguments regarding the design waivers, neither waiver is of any consequence to the

issue at hand. The Resolution, not the Board's trial brief, is the document that sets forth the Board's reasoning for their denial of Plaintiffs' application. Id. As noted above, the Board denied the application, not for either design waiver, but for the following reasons:

> A. While the application represented a conforming subdivision, it is the duty of the planning board to weigh the evidence and to exercise its discretion in the event of significant concerns on the board [*sic*] of the board. **The Board ultimately rejected the application on the basis of significant public safety concerns regarding the lack of street parking** coupled with the substantial proposed density **particularly in light of the basement apartments notes on the plans**. The Board found that an approval of this application would have significant detrimental effects on the safety of the neighborhood.
>
> B. The Board finds the applicant's proposal does not further the purposes of zoning pursuant to N.J.S. 40:55D-2 (**Ia72**)

It should be noted that no waiver or variance relief was requested with regard to any parking or density requirement. As a matter of fact the Applicant comported with all Lakewood Township Land Use Ordinance requirements except for the waivers as discussed above. Furthermore, as explained above, and at length in Plaintiff's trial brief, no basement apartments were proposed as part of the application. Furthermore, the court in Pizzo Mantin Group v. Randolph Tp., 137 N.J. 216 (1994) prohibits a board from denying the application based on "the broad purposes of the MLUL" rather than on specific standards contained in the municipal ordinances. As is plainly obvious to anyone reading the Resolution, the Board did

not base its decision on any portion of Lakewood's ordinances. Further, despite the Board's insistence to the contrary, paragraph "B" of the denial is exactly a reference to the broad purposes of the MLUL. It should be further noted that there was not testimony provided that indicates that the project would adversely affect public safety.

As noted above, the Amended Resolution was revised to include a "clarification" of the reasons for denial. Paragraph A read claimed the Board denied the application due to:

> significant public safety concerns regarding the lack of street parking coupled with the substantial proposed density particularly in light of the proposed basement apartments noted on the plans.

As will be discussed in detail in Legal Argument Point II, no basement apartments were requested. In fact, the **Board Attorney** himself acknowledged:

> Mr. Chairman, I think it's even more straightforward than that. The way we have always viewed this, and I think the way this application is presented, **they're not saying they're putting in basement apartments.** They're saying they reserve the right to go to the zoning official and the building official and get a permit for downstairs apartments. This Board is not approving this as -- you're not approving this as -- you're approving single family residences and if they want to go get a permit to put an apartment downstairs, they can get a permit for the apartment. They're going to need a building permit. At that point he can appeal the determination of the zoning officer, whether it's applicable here, **but the Board's not approving downstairs apartments. (T2: p69, ln 20 – p70, ln 12)**

It should be noted that the application complied with all parking requirements and standards. The traffic report, which was never disputed by any expert testimony, indicated:

> The *Subdivision Plan* prepared by NLES was reviewed and it details a 32 foot wide roadway providing access to Fourteenth Street. The plan was compared to the roadway design standards set forth in the New Jersey Residential Site Improvement Standards (RSIS) and **the design meets and exceeds the RSIS design and accessibility standards**. **(Ia27)**

Furthermore, the Board is not permitted to use off-sight traffic as a reason for denial. The Board is "without authority to deny site plan approval because of offsite traffic conditions." Dunkin' Donuts of New Jersey, Inc. v. North Brunswick Planning Bd., 193 N.J. Super. 513, 515 (App. Div. 1984). The Dunkin' Donuts court also found that under N.J.S.A. 40:55D-2, 62, "the authority to prohibit or limit uses generating traffic into already congested streets or streets with a high rate of accidents is an exercise of the zoning power vested in the municipal governing body." Id. The trial court itself stated:

> The Planning Board recognized that the density here is going to create off track issues that may not be desirable. This is not the function of the planning board to regulate that. It is incumbent upon the Township council to draft a zoning ordinance, to create appropriate densities throughout the Township, and the Township has every right to look at an undeveloped piece of property or a developed piece of property and say what the appropriate future development of the site should be. **(T4: p38, ln 2-8)**

The trial court recognized that the off-site issues cited to by the Board were, by law, outside the scope of the Board's power. The Township Council, not the Board, has the power to adopt zoning regulations governing appropriate densities and parking requirements. In this case, Plaintiff was not seeking a waiver from those densities or parking requirements. As such, the reasons contained within Paragraph A fail to hold any logic in light of the record.

Paragraph B contained factual recitation. Paragraph C claimed "the Board found that 9 homes are too many for this application." It should be noted that there is nothing in any Township ordinance which would preclude a nine-lot conforming subdivision. Furthermore, a planning board is without any power to act in a contrary manner to the ordinance at issue. A planning board is bound by the provisions of the municipal land use ordinance governing the subdivision. Cox and Koenig *New Jersey Zoning and Land Use Administration.* § 24-2 (2022 edition). As per N.J.S.A. 40: 55D-48(b), "The planning board shall, if the proposed subdivision complies with the ordinance and this act, grant preliminary approval to the subdivision." As the Court can see, Paragraph C also contains no valid reasons for a denial of Plaintiff's application.

Paragraph D contained factual recitation regarding the reconsideration. Paragraph E indicated that:

> The Board found that the applicant could not satisfy the negative criteria because an approval of this application would have significant detrimental effects on the safety of the neighborhood and would also substantially impair the intent and purpose of the municipal zoning plan and ordinances.

It should be noted that, as set forth above, N.J.S.A. 40:55D-51 does not require any negative criteria be met for the grant of a waiver, unlike a variance. Rather, practicability or hardship is enough. As noted, while they could be revised into complete compliance, the waivers were necessary to avoid an impractical placement of the drainage basin as testified to by the applicants engineer and accepted by the Board's engineer, which would be split between two lots without the waiver.

Finally, Paragraph F indicated that the applicant's proposal did not advance the purposes of zoning pursuant to N.J.S.A. 40:55D-2 as follows:

1) The applicant's proposal is not the best planning alternative.
2) The proposed development would not promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and religions and preserve the environment.
3) The proposed development would not encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes which results in congestion or blight

As per the Court decision in Pizzo, a planning board may not deny an application using the general purposes of zoning. Furthermore, the Board appears to have once again confused design waivers with variances. Unlike a variance pursuant to N.J.S.A. 40:55D-70(C)(2), which requires a showing that the proposed variance

would advance one of the purposes of zoning as contained in N.J.S.A. 40:55D-2 a waiver does not. Rather, a waiver need only be reasonable. As set forth above, the testimony more than affirmed the reasonableness of the requested waivers.

As the Court can see, neither design waiver had any impact on why the application was denied. In fact, the first time the Board discussed the matter of safety came as a result, not of any expert testimony, but rather when an unidentified Board Member asked what "leverage" the Board has to deny the application. (**T2: p136, ln 12-13**) It is Plaintiff's position that the design waivers at issue are merely a red herring which is being used as the "leverage" for the denial the Board desired.

In ruling in the Plaintiff's favor, the trial court recognized that the Board, for whatever reason, did not like the idea of a nine-lot subdivision. The trial court acknowledged, however, that while the Board may not like the idea of nine (9) lots, there was nothing in the ordinance to prevent same. Furthermore, the design waivers themselves had nothing to do with the application's denial. The court stated:

> There is nothing to just in the ordinance or the resolution that the waivers which are being requested is somehow contributed to a result which is undesirable, yet permitted.

The court continued:

> the board does not come with any conclusions or any rationale that somehow the lot line waivers created this undesirable result of nine lots

Furthermore, the trial court agreed, as discussed above, that the waivers were properly addressed by Flannery. Specifically, the trial court indicated that Flannery:

> …Explained that the storm water facility would be pushed back a little further, which made maintenance more difficult for the homeowners association, would be a little less efficient, but the yield density would be the same, being nine houses. And Mr. Flannery's opinion was that if the design waiver was eliminated, it would create a development that was less beneficial to the Township of Lakewood. (**T4: p36, ln 22 – p37, ln 9**)

As the Court can see, the record is clear that Plaintiff properly addressed the requested design waivers. Furthermore, the record is clear that neither waiver was responsible for the alleged conditions which resulted in the Board's denial for Plaintiff's application. As such, the Court should uphold the trial court's conclusions that neither design waiver formed the basis of the Board's denial and therefore, should uphold the trial court's decision.

II. The Trial Court Correctly Determined that the Board Arbitrarily, Capriciously, and Unjustifiable Denied Plaintiff's Application

The action of a board will be overturned if it is found to be arbitrary, capricious, or unreasonable. Dunbar Homes, Inc. v. Zoning Bd. Of Adjustment of Twp. Of Franklin, 233 N.J. 546, 558 (2018); Grabowsky v. Twp. Of Montclair, 221 N.J. 536, 551 (2015). "A board acts arbitrarily, capriciously, or unreasonably if its findings of fact in support of [its decision] are not supported by the record" Ten Stary

Dom P'ship v. Mauro, 216 N.J. 16, 33 (2013).

A planning board is bound by the provisions of the municipal land use ordinance governing the subdivision. Cox and Koenig *New Jersey Zoning and Land Use Administration.* § 24-2 (2022 edition). As per N.J.S.A. 40: 55D-48(b), "The planning board shall, if the proposed subdivision complies with the ordinance and this act, grant preliminary approval to the subdivision." An application which conforms with all of the ordinance provisions is otherwise known as a "by-right" application. Gandolfi v. Town of Hammonton, 367 N.J. Super. 527 (App. Div. 2004). The first footnote of the Gandolfi case specifically explains that a "by-right" subdivision occurs when the plan complies with the governing ordinance and requires no variances, as is the case here. The Gandolfi court cited to Pizzo Mantin Group v. Township of Randolph, 137 N.J. 216 (1994) to support its explanation of a "by-right" subdivision. The Supreme Court ruled, in Pizzo, that under N.J.S.A. 40:55D-48, a planning board **must** approve a subdivision unless it fails to comply with requirements that are specifically delineated in the applicable ordinance.

In Pizzo, the plaintiff sought to subdivide its 79-acre tract of land in order to develop it. After initial comments from the planning board, the plaintiff submitted a conforming application, requiring no variances. Despite its conformity, the planning board denied the application, stating it was, "fundamentally flawed, environmentally unsound, and unsuitable to the area as a whole." Id. at 221. The Supreme Court

performed an analysis of a planning board's power under the Municipal Land Use Law as opposed to the older Planning Act of 1953, stating:

> Although the MLUL gives planning boards, in accordance with the standards of the subdivision ordinance, the power to require that subdivision proposals comply with zoning ordinances, N.J.S.A. 40:55D–38b(1), the MLUL has no provision, as did the Planning Act, that grants a planning board the power to require that lots in the subdivision plan be "adaptable for the intended purposes without danger to health or peril from flood, fire, erosion, or other menace." N.J.S.A. 40:55–1.20 (repealed 1975). Rather, the MLUL specifically provides that "[t]he planning board *shall,* if the proposed subdivision complies with the [subdivision] ordinance and this act, grant preliminary approval to the subdivision." N.J.S.A. 40:55D–48 (emphasis added)

The Supreme Court makes it very clear that under the MLUL, the planning board is **not** permitted the latitude to deny a conforming application. The Pizzo court upheld an Appellate Court decision, ruling that:

> …a municipal planning board in determining the validity of a subdivision was required to apply only the standards provided in the municipal subdivision ordinance and not those otherwise reflected in the broad purposes of the MLUL. Id. at 230

As noted above, the application was not denied for either of the design waivers it requested. Rather, it was denied simply because, as the Board itself explained, the neighborhood is very "exclusive" and "sensitive." The Board Chairman explained those details when he acknowledged that the application is conforming.

As explained in Legal Argument Point I, the stated reasons for the Board's denial are unrelated to either design waiver or to any legally cognizable authority to

deny this application. The Board was given a second chance to explain themselves and their reasoning in the Resolution via the drafting of an Amended Resolution, and ***still*** could not support their argument that a waiver for the angle of a lot line somehow cause serious safety concerns. The reason is simple: this application was not denied for any other reason than for the appeasement of the residents of the "exclusive" neighborhood, such as the intervenor, Mr. Blech. The Court should therefore uphold the trial court's ruling and find that the trial court properly found the denial to be arbitrary, capricious, and unreasonable.

III. The Public Notice was Sufficient as the Plaintiff did not Seek Approval for Basement Apartments

The Intervenor's third legal argument is largely irrelevant. The Intervenor suggests that Plaintiff's public notice is somehow deficient since it did not indicate that the Plaintiff sought approval for basement apartments. The reasons is simple, however: Plaintiff sought no such approval.

The application sought "a Major Subdivision approval for the purpose of creating nine residential lots from three existing lots." (**Ia18**) The project narrative also stated that the applicant sought "a Major Subdivision Approval for the purpose of creating nine (9) single family lots from three (3) existing lots." (**Ia23**) The Resolution, in its very first finding of fact, states:

> The applicant sought Preliminary and Final Major Subdivision approval to subdivide an existing tract known as Lots 23, 24.01, and 34 in Block 24 into nine (9) new single-family parcels with a cul-de-sac road. **(Ia64)**

Finally, the testimony below was indisputably clear. The application sought to subdivide lots, not to construct houses of any specific design. Brian Flannery ("Flannery"), the Plaintiff's expert engineer, whose testimony was unrefuted, testified:

> The plot plan testimony is, we're not asking to build those house boxes. **We're not asking for basement apartments**. ***We're asking for a nine lot conforming residential subdivision***, to create nine conforming lots that individual home buyers are going to come in. **(T2: p10, ln 22 – p11, ln 2)**
>
> Again, and for the record, we are here for a subdivision approval to get the lots. The information shown on the plans by the blue lines was to show a maximum situation so that the Board can see what the maximum looks like. We're not asking for houses with basements. **(T2: p27, ln 17-22)**
>
> We're not asking for basement apartments. We're asking for nine residential lots. **The plans that were submitted on the 17th were in response to the Board saying we want to see the maximum that could get built here**. So, new lines show the maximum that can get built there and show two laterals and a 30 percent building coverage. **(T2: p55, ln 15-22)**
>
> It's not predicated on basement apartments. These lots will be treated the same as every other R12 lot in Lakewood Township. **(T2: p56, ln 1-4)**

The **Board engineer further noted** that the question of basements is a matter to be addressed at the plot plan stage. Specifically, he stated:

> our initial comment was testimony should be provided whether basements are proposed or they're single family dwellings. The answer was since custom homes are proposed, basements will need to be addressed at plot plans. That was the response right from the beginning. That has never changed in any iteration of the plans. (**T2: p57, ln 16 – p58, ln 2**)

The Board's position that no testimony was presented as to this issue is even more bizarre given that Board attorney, John Jackson ("Jackson") presented an on-the-record summary of Plaintiff's application wherein he agreed that Plaintiff was not seeking approval for basement apartments. Following testimony from Gordon Gemma on behalf of an objecting party, Jackson stated the following:

> Mr. Chairman, I think it's even more straightforward than that. The way we have always viewed this, and I think the way this application is presented, **they're not saying they're putting in basement apartments.** They're saying they reserve the right to go to the zoning official and the building official and get a permit for downstairs apartments. This Board is not approving this as -- you're not approving this as -- you're approving single family residences and if they want to go get a permit to put an apartment downstairs, they can get a permit for the apartment. They're going to need a building permit. At that point he can appeal the determination of the zoning officer, whether it's applicable here, **but the Board's not approving downstairs apartments.** (**T2: p69, ln 20 – p70, ln 12**)

Given the extensive testimony by Flannery, as well as the on-record comments by both Jackson and the engineer, it is truly baffling as to how the Board, and Blech for that matter, can now argue to the Court that Plaintiff somehow refused or failed to address the Board's concern, however misplaced it may have been, regarding the existence of basement apartments.

As per N.J.S.A. 40:55D-11, Notices for hearings on applications for development must include the following:

> Notices pursuant to section 7.1 and 7.2 of this act shall state the date, time and place of the hearing, the nature of the matters to be considered and, in the case of notices pursuant to subsection 7.1 of this act, an identification of the property proposed for development by street address, if any, or by reference to lot and block numbers as shown on the current tax duplicate in the municipal tax assessor's office, and the location and times at which any maps and documents for which approval is sought are available pursuant to subsection 6b.

In Perlmart v. Lacey Tp. Planning Bd., 295 N.J. Super., 234 (App. Div. 1996), which is cited in the Intervenor's brief, the Court found a notice to be deficient because it identified a "commercial lot" as the proposed use instead of a "shopping center," which was in fact proposed. Further, in Pond Run Watershed v. Hamilton Tp., 397 N.J. Super. 335 (App. Div. 2008), also cited by the Intervenor, another notice was deemed deficient due to its failure to identify a 168-restaurant for which a liquor license was sought. The Pond Run notice, instead, only called out a "retail/office" use.

Neither Pond Run nor Perlmart are applicable to the current situation. As noted repeatedly above, the Plaintiff did not seek approval for basement apartments. Rather, Plaintiff sought a nine-lot subdivision. The testimony repeatedly indicated that whatever homes would be built there, the respective owners would need to conform with any ordinance requirements and/or seek approvals accordingly. As further noted, the Board Attorney acknowledged that the basement apartments were

not requested as part of this application. The trial court too acknowledged same, stated:

> There was much discussion at the time of the application regarding basement apartments. That was not before the board, nor is it before the Court. (**T4: p37, ln 5-7**)

As the Court can see, the issue of whether or not basement apartments were requested, and, by extension, needed to be noticed, was briefed, argued, and vetted out numerous times. It has been shown all throughout the record that basement apartments were not requested, despite the Intervenor's repetitive claims to the contrary. The basement boxes shown on the plans were, as noted above, were only placed on the plans due to the Board's request to see a plan with the maximum allowable building size depicted.

Based upon the on-record testimony, the acknowledgement by the Board Attorney, and the ruling of the trial court, it is clear that basement apartments were not a part of this application. The Board, furthermore, did not and has not taken the position that there was anything legally deficient about the Plaintiff's public notice. As such, the Court should uphold the decision of the trial court and find Intervenor's argument to be unconvincing.

Conclusion

For the foregoing reasons, the Court should reject the arguments of the Intervenor and the Board. It is clear that the application is conforming and was not denied for any reasons related to the two minor design waivers Plaintiff requested. Furthermore, the application was for a nine-lot subdivision, not to construct the homes on the plans, and certainly not for basement apartments. Therefore, the Court should uphold the trial court's ruling.

Respectfully submitted,

ROBERT C. SHEA

Dated: August 19, 2024

EDWARD F. LISTON, JR., LLC (ID #257911969)
A New Jersey Limited Liability Company
Attorneys at Law
P.O. Box 1056
9 Grand Avenue, Building 1, Suite B
Toms River, New Jersey 08754-1056
(732) 244-5900

Please reply to:
P.O. Box 1056
Toms River, NJ 08754-1056

E-Mail: edwardliston@gmail.com

September 30, 2024

Honorable Judges of the
Superior Court of New Jersey
Appellate Division
R.J. Hughes Justice Complex
25 W. Market Street, Box 006
Trenton, NJ 08625-0006

Re: BESADAR HOLDINGS LLC and SOLOMON HALPERN, Plaintiff-Respondents, V. TOWNSHIP OF LAKEWOOD PLANNING BOARD, JOHN DOES 1-30 (a fictitious name for persons presently Unknown) and XYZ, Inc. 1-10 (a fictitious name for a business entity presently unknown), Defendants, and VIGGY BLECH, Intervenor/Defendant.
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION (A-2075-23); ON APPEAL FROM SUPERIOR COURT, LAW DIVISION, OCEAN COUNTY (OCN-L-2115-22); CIVIL ACTION; SAT BELOW: HON. CRAIG L. WELLERSON, P.J.Cv.; SUBMITTED September 30, 2024

Dear Honorable Judges:

Please accept this Letter Brief in lieu of a more formal Reply Brief on behalf of Defendant/Appellant/Intervenor, Viggy Blech in response to the Brief filed by Robert C. Shea, Esquire, Attorney for Plaintiff/Respondents.[1]

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[1] On the brief: Edward L. Liston, Jr. (ID #257911969).

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REPLY TO PROCEDURAL HISTORY

Other than plaintiffs' procedural history being somewhat argumentative ("After significant delay by the Board, a new Resolution was finally adopted . . . ."), Mr. Blech does not object to the representations at Pb1.

REPLY TO COUNTERSTATEMENT OF FACTS

Plaintiffs point out that Besadar Holdings, LLC (the Applicant) applied for a "Major" subdivision. See Pb2. As will be explained in Point I, plaintiffs mistakenly premise waivers on N.J.S.A. 40:55D-51(a), which only applies to "minor" subdivisions.

At Pb3, plaintiffs tout the traffic study. The Applicant's engineer based his conclusions on the false assumption that the subdivision would house nine families. With basement apartments, there will be as many as eighteen families. In addition, as set forth in Intervenor/Defendant/Appellant's original Merits Brief the Applicant failed to produce his traffic expert for cross-examination and the Planning Board was therefore justified in rejecting the net opinion traffic report submitted by the Applicant.

At Pb3 to Pb4, plaintiffs reference several professional review letter reports. None of those documents addresses whether either design waiver can be justified based on hardship.

Mr. Blech objects to the presentation at Pb4 to Pb12. A respondent's brief must "conform . . . to the requirements of R. 2:6-2(a) . . . except that a counterstatement of facts need be included only if the respondent disagrees with such statements in the appellant's brief." R. 2:6-2(a)(5) requires the counterstatement to "be in the form of a narrative chronological summary

incorporating all pertinent evidence [;] [the counterstatement] shall not be a summary of all of the evidence adduced at trial, witness by witness." Plaintiffs improperly proceed speaker by speaker, e.g.: "Flannery testified that . . . " (Pb4); "The Board continued to ask about . . ." (Pb5); "Flannery testified that . . ." (Pb5); "Mr. Magno ("Magno") proposed that . . ." (Pb5); "Flannery responded . . ." (Pb6); "Gasiorowski argued that . . ." (Pb7); "An unidentified Board Member then voiced concern that . . ." (Pb8); "Flannery concluded . . ." (Pb9); "Gemma presented testimony as to . . ." (Pb10); "the Board Chairman then stated . . ." (Pb11); "with only Chairman Neiman voting to reconsider, stating . . ." (Pb12). And since the discussion never addresses the issue of whether the Applicant's design waiver requests are justifiable on hardship grounds, it amounts to filibuster.

Plaintiffs describe their application as "conforming" (Pb12). The Applicant required design waivers, and Lakewood requires such relief to be premised on hardship.

As for the content of the resolution (see Pb12 to Pb14), the plaintiffs did not even attempt proving hardship and thus the Board had no basis to grant waivers even if it had approved the application. If necessary, the matter should be remanded for a more specific finding on this issue.

REPLY TO LEGAL ARGUMENT

I. REPLYING TO POINT I, THE FACT REMAINS THAT THE BOARD DID NOT GRANT WAIVERS AND THE APPLICANT DID NOT MEET ITS BURDEN OF PROVING ITS RIGHT TO SUCH RELIEF.

At Pb14 to Pb15, plaintiffs misquote N.J.S.A. 40:55D-51 -- specifically, subsection (a). The statute actually reads as follows:

> The planning board when acting upon applications for preliminary or ***minor*** subdivision approval shall have the power to grant such exceptions from the requirements for subdivision approval as may be reasonable and within the general purpose and intent of the provisions for subdivision review and approval of an ordinance adopted pursuant to this article, if the literal enforcement of one or more provisions of the ordinance is impracticable or will exact undue hardship because of peculiar conditions pertaining to the land in question.
>
> (Emphasis added).

The Applicant proposed a major subdivision, thus the statute does not apply. Lakewood adopted its own waiver standard, as it is permitted to do under the MLUL. Rumson Estates, Inc. v. Mayor & Council of Borough of Fair Haven, 177 N.J. 338, 344 (2003) ("the MLUL does not preclude a municipality from adopting a zoning ordinance that defines terms differently from the definitions in the MLUL."). At Ia218 is Lakewood Ord. § 18-601:

> The rules, regulations and standards set forth in this section shall be considered the minimum requirements for the protection of the public health, safety and welfare of the citizens of the Township.

> However, if the applicant can clearly demonstrate that, because peculiar conditions pertaining to the subject parcel, the literal enforcement of this section is impracticable or will exact undue hardship, the Planning Board may permit such exemption(s) and waiver(s) as may be reasonable within the general purpose and intent of the rules, regulations and standards established by this section.
>
> (Emphasis added).

The question then becomes: what are the "peculiar conditions pertaining to the subject parcel" which render the Applicant unable to comply? The record is bereft of any such evidence, and that is because it is the Applicant's greed in creating more residential lots -- not any peculiar parcel conditions -- which causes irregular lot lines and the loss of street trees. The Applicant presented a classic case of self-created hardship which the Board had no record basis to approve.

At Pb15, plaintiffs argue that Lakewood Ord. § 18-805(c) (produced at Ia213), regarding side lot lines, includes the word "practical" and that this trumps the "peculiar conditions pertaining to the subject parcel"/hardship waiver provision in § 18-601. First, even if plaintiffs were correct, that does not change the fact that § 18-601 governs the other waiver (street tree reqirement). The Applicant would have plenty of room for the street trees with eight residential lots and a stormwater detention facility -- it is the profit-driven desire for nine residential lots which self-creates the need to sacrifice the street trees in order

to to accommodate drainage. Second, and regarding § 18-805(c), it is the number of lots which makes regular side lot lines 'impractical.' Third, the word "impractical" does not appear in the Planning Board hearing transcripts -- the Applicant failed to meet its burden to justify waiver relief regardless of the applicable standard(s).

At Pb15, plaintiffs urge that "[t]he applicable regulations are those of Lakewood's, and as such, only those of Lakewood matter." Precisely. N.J.S.A. 40:55D-51(a) does not apply to a "major" subdivision. Lakewood requires "peculiar conditions"/hardship relief for the street tree waiver (if not both waivers). The Applicant's proofs failed and thus the Board's denial in unassailable.

Plaintiffs' praise of the Board's professionals (Pb16 to Pb18) is unavailing. Neither the letters nor the testimony address the issue of peculiar-conditions/hardship necessary for waiver relief.

At Pb18, plaintiffs cite Flannery's testimony: "If the Board doesn't feel inclined to grant that design waiver, approve the application without it and we'll adjust the plans to accommodate." If his testimony is correct, then that proves that the is no peculiar-conditions/hardship. It is in any event unknown whether his testimony is correct; the Applicant did not submit a subdivision plan without the waivers.

At Pb18 to Pb19 is plaintiffs' citation-free what they "clearly proved" vis-à-vis the waivers. Plaintiffs must identify where in the record they established peculiar conditions/hardship. They do not because they cannot.

At Pb19, plaintiffs deny that they are challenging the validity of a Township Ordinance. At minimum, the street tree requirement can only waived upon a showing of peculiar conditions/hardship under § 18-601. Plaintiffs arguments are tantamount to challenging the Township's authority to restrict major subdivision waivers as per § 18-601. That would require joinder of the Township of Lakewood as a party Defendant which Plaintiff failed to do.

At Pb20 to Pb21, plaintiffs criticize the language of the resolution. As the Board's brief makes clear, the inability to find grounds to justify waiver relief on this record is understandable. "Where the applicant fails to fulfill his responsibility in setting before the local agency the evidence necessary for it to exercise a seasoned discretion the failure is fatal . . . ." Tomko v. Vissers, 21 N.J. 226, 239 (1956). If "[j]ustice will best be served by remanding the case to the Zoning Board for reconsideration and specific findings," Smith v. Fair Haven Zoning Bd. of Adjustment, 335 N.J. Super. 111, 123 (App. Div. 2000), the matter can be remanded for a supplement to the record.

At Pb21 to Pb26, the plaintiffs are simply repeating themselves.

II. REPLYING TO POINT II, THE BOARD COULD NOT GRANT § 18-601 RELIEF ON THE RECORD CREATED BY THE APPLICANT; IT WAS ERRONEOUS FOR THE TRIAL COURT TO SECOND-GUESS THE BOARD'S EXERCISE OF DISCRETION.

At Pb26 to Pb27, plaintiffs concede the formidable burden in overturning a land use board's decision. Mr. Blech would add that, per Tomko v. Vissers, it was the Applicant's burden to prove its entitlement to relief before the Board. The Applicant's proofs failed to establish peculiar conditions/hardship and the Board's authority to deny waiver relief is not subject to challenge.

At Pb27 to Pb28, plaintiffs refer to the application as 'by right.' Call it whatever they want, the application required waiver relief. Lakewood requires proof of peculiar conditions/hardship for waiver relief. No such evidence was presented, and on its face these waivers were the product of developer greed and not site-specific conditions. Moreover, even a 100% compliant application (no variance, no waiver) requires proper public notice in order for the Board to exercise jurisdiction. See Point III of the original merits brief; see also Point III of this brief.

III. REPLYING TO POINT III, THE PUBLIC NOTICE WAS INSUFFICIENT, AND, THEREFORE, THE BOARD LACKED JURISDICTION.

Mr. Blech will try not to repeat that which is set forth in Point III of the original merits brief.

The arguments at Pb29 to Pb31 serve only to prove Mr. Blech's point. The traffic study and other proofs were based on a nine-family development, when in fact the major subdivision approval would authorize an eighteen-family development.

At Pb31 to Pb33, plaintiffs urge that basement apartments were not part of the application. The application was for the approval of nine single-family homes -- the approval would authorize as many as eighteen single-family homes. Mr. Blech submits that this discrepancy would be highly material to an ordinary lay person and that the public notice should have explained this. Because the notice failed to do so, and because the Applicant did not publish new notice after being warned of the deficiency, the Board lacked jurisdiction even if the application were otherwise deserving of approval.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the original merits brief, it is respectfully but most strenuously urged that the Trial Court's Order granting major subdivision approval should be reversed and vacated by this Court.

Respectfully Submitted,

EDWARD F. LISTON, JR., L.L.C.
Attorney for Viggy Blech,
Intervenor/Defendant/Appellant

By:
Edward F. Liston, Jr.