FILED, Clerk of the Appellate Division, August 09, 2024, **A-002771-23**, AMENDED

PLAINTIFF/APPELLANT

MICHAEL F. EVERS

vs.

DEFENDANTS / RESPONDENTS

ANN HOLTZMAN (in her capacity as the Hoboken Zoning Officer)
201 PARK AVENUE CORP

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002771-23T4

CIVIL ACTION

On Appeal from
A Final Order of the
Superior Court of New Jersey
Hudson County

Sat below:
Hon. Anthony V. D'Elia

APPELLANT'S BRIEF (corrected)

MICHAEL F. EVERS
252 SECOND STREET
HOBOKEN, NJ 07030
917-880-6682
evers@drumlish.com
PLAINTIFF/APPELLANT PRO SE

Michael F. Evers pro se appellant
On the Brief

FILED, Clerk of the Appellate Division, August 09, 2024, **A-002771-23**, **AMENDED**

TABLE OF CONTENTS

TABLE OF AUTHORITIES p. 2

TABLE OF JUDGEMENTS, ORDERS, RULINGS p. 3

TRANSCRIPT TABLE p. 3

PRELIMINARY STATEMENT p. 4

PROCEDURAL HISTORY p. 7

STATEMENT OF FACTS p. 10

LEGAL ARGUMENT p. 14

THE COURT ERRED WHEN IT REFUSED TO ADMIT A CRITICAL PIECE OF EVIDENCE DESPITE IT BEING HIGHLY RELEVANT AND THEREFORE ADMISSABLE UNDER NJRE 402; NO OTHER RULES OF EVIDENCE WERE CITED AS REASONS FOR BARRING THIS EVIDENCE. (1a, 2T p. 18 line 7 – p. 38 line 17)

CONCLUSION p. 24

REQUESTED REMEDIES p. 25

TABLE OF AUTHORITIES

CASES:

STATUTES AND MUNICIPAL ORDINANCES:

Municipal Code of the City of Hoboken

Section 196-6

Section 196-59

Section 196-61 A

Section 196-62

New Jersey Municipal Land Use Law

RULES OF COURT:

Rule 4:69-5

RULES OF EVIDENCE (OF COURT):

N.J.R.E. 401

N.J.R.E. 402

OTHER AUTHORITIES:

TABLE OF JUDGEMENTS, ORDERS,

AND RULINGS BEING APPEALED

Final Order Dismissing Plaintiff's Order to Show Cause and Verified Complaint (1a)

TRANSCRIPT TABLE

1T = Transcript of the Hearing before Judge Anthony V. D'Elia of March 6, 2024

2T = Transcript of the Hearing before Judge Anthony V. D'Elia of March 27, 2024

PRELIMINARY STATEMENT

Appellant was an active volunteer for many years in the Boy Scout Troop in which his two sons were members. One of them is now an Eagle Scout. Appellant's principal contribution involved taking older scouts on high-adventure trips.

The troop's scoutmaster was fond of saying that: "Scouting only works if you take it seriously."

Approximately 15 years ago, while serving as a zoning commissioner, Appellant discovered that an affordable housing ordinance that had been passed by the Hoboken City Council in 1988 had — to use the words of the Zoning Board's planner at the time — "never been implemented."

Appellant recruited the the nonprofit organization Fair Share Housing and helped set in motion an effort which yielded passage of a new affordable housing ordinance in Hoboken. Fair Share Housing's efforts in this this matter have included litigation in the NJ Superior Court, Appellate Court and – at least as regards certification – the Supreme Court. (Appellant well remembers listening to the Hon. Jose L. Fuentes asking during one of the hearings if the Court hadn't already decided this matter and why was it in front of the Court a second time for the same issues.)

The net effect of this action so far has resulted in over 400 affordable housing units either being built or scheduled to be built in Hoboken.

FILED, Clerk of the Appellate Division, August 09, 2024, **A-002771-23**, **AMENDED**

Appellant mentions this to point out the potential consequences of not taking the municipal land use process "seriously" (i.e. "No need to implement the Affordable Housing Ordinance – even though it's required by law – no need to get the Court's opinion on this ...) One need only ponder just how many affordable housing units were not built in Hoboken from, say, 1988 through 2012 to get an idea of the magnitude of the loss: Several times more than "over 400"?

The Hoboken Zoning Officer's failure to take the municipal land land use process seriously threatens a similar kind of harm. In the case of this litigation, a complaint was filed with the Zoning Officer concerning a substantial violation of a zoning board resolution. In response, the Zoning Officer – by her own admission – decided to disregard the conditions being violated, and then conducted a sham investigation to appear to comply with the requirements of the Hoboken Municipal Code.

To clarify, Appellant contends that "sham" is not at all an overly strong term for what transpired. The Zoning Officer literally compiled a report including a photograph of a purported height measurement in which one end of the tape measure used for taking the measurement does not actually reach the other end of the space being measured (112a, 113a). Appellant could add additional details. The implications are troubling.

More recently, both the Hoboken Zoning Board and the Hoboken City Council – on appeal -- ruled that ***the Municipal Land Use Law precluded***

FILED, Clerk of the Appellate Division, August 09, 2024, **A-002771-23**, **AMENDED**

them from considering the public good when granting variances. As a result, 18 families living in rent-controlled units now face potential displacement from their homes.

Erosion is a gradual thing. But the erosion of land use laws and regulations in Hoboken is now well under way, threatening the wellbeing – financial and otherwise -- of property owners and tenants alike. This is particularly the case if we treat "otherwise" as a synonym for displacement of lower income tenants.

Appellant's hope is that the Court will take this opportunity to provide a means of pushing back on this troubling, mounting problem.

FILED, Clerk of the Appellate Division, August 09, 2024, **A-002771-23**, AMENDED

PROCEDURAL HISTORY

11/16/2023 – Verified Complaint and Order to Show Cause filed by Plaintiff. (30a)

01/31/2024 -- Motion To Dismiss Complaint, Failure to State Claim Submitted by Glenn, Joshua, D Of Florio Perrucci Steinhardt Cappelli & Tipton, LLC On Behalf of Ann Holtzman Current Zoning Officer Of The City Of Hoboken. (Not included because motion to dismiss was withdrawn, 2T42 line 9)

02/09/2024 -- Opposition to Motion to Dismiss Submitted By Plaintiff. (Not included because order was withdrawn, 2T42 line 9)

02/12/2024 -- Request for Default for Failure to File Answers to Plaintiff's Verified Complaint Filed Against Defendants 201 Park Avenue Corp And Zoning Board Of Adjustment of The City Of Hoboken by Plaintiff. (Not included because not contested)

02/12/2024 – Motion Requesting Entry of Default Judgment against 201 Park Avenue Corp. and Zoning Board of the City of Hoboken Filed by Plaintiff with Oral Arguments Requested by Plaintiff. **Note:** This Motion Was Withdrawn and Resubmitted Twice Because of Technical Errors; Final Submission Is Dated 02/21/2024. (Not included because not contested)

02/16/2024 -- Opposition To Motion Requesting Entry of Default Judgement Submitted By Wine, Benjamin, T F of Prime & Tuvel, Llc Dba Prime Law on Behalf Of 201 Park Avenue Corp Against Plaintiff. (Not included because motion to dismiss was withdrawn, 2T42 line 9)

02/20/2024 -- Motion to Bar Defendants-in-Default Park Avenue Corp and Zoning Board of the City of Hoboken from Further Participation in this Legal Action filed by Plaintiff; Oral Arguments Requested by Plaintiff. (Not included because motion to dismiss was withdrawn, 2T42 line 9)

02/21/2024 – Opposition To Motion Requesting Default Submitted by Wine, Benjamin, T F of Prime & Tuvel, LLC dba Prime Law on Behalf of 201 Park Avenue Corp. (Not included because motion to dismiss withdrawn, 2T42 line 9)

03/05/2024 – Attorney Certification in Further Support of Motion to Dismiss Submitted by Glenn, Joshua, D of Florio Perrucci Steinhardt Cappelli & Tipton, LLC on Behalf Of Ann Holtzman Current Zoning Officer Of The City Of Hoboken against Plaintiff. (Not included because motion to dismiss was withdrawn, 2T42 line 9)

03/06/2024 – Hearing Held by Court which Establishes Date for Hearing of Order to Show Cause and Motion To Dismiss of 03/27/2024. 1T14, line 5)

03/19/2024 – Motion to Bar Defendants-in-Default Park Avenue Corp and Zoning Board of the City of Hoboken from Further Participation in this Legal Action filed by Plaintiff Denied by Court without Requested Oral Arguments. (Not included because motion to dismiss was withdrawn, 2T42 line 9)

03/19/2024 – Order Entering Default Judgement Denied by Court without Requested Oral Arguments. (Not included because motion to dismiss was withdrawn, 2T42 line 9)

03/27/2024 – Hearing Held Addressing Order to Show Cause and Motion to Dismiss Complaint; Motion To Dismiss Withdrawn (2T42 line 9); Order to Show Cause Denied; Order for Dismissal of Zoning Board of the City of Hoboken from the Litigation Granted. (1a)

05/06/2024 – Notice of Appeal Filed by Plaintiff. (116a)

FILED, Clerk of the Appellate Division, August 09, 2024, **A-002771-23**, **AMENDED**

STATEMENT OF FACTS

The Parties

Appellant/Plaintiff is a private individual who has been residing at 252-254 2nd Street in Hoboken, New Jersey since 1993. This property is located directly across the street from the property being developed by 201 Park Avenue Corp.

Ann Holtzman (hereafter "Hoboken Zoning Officer") is the current Zoning Officer of the City of Hoboken, a position established under Section 196-59 of the Municipal Code of the City of Hoboken.

201 Park Avenue Corp (hereafter 201 Park) is the owner of the property located on block 34 lot 17 in the City of Hoboken, commonly known as 138 Park Avenue, whose principal place of business is listed as 130 Park Avenue, Unit 2B, Hoboken, NJ 07030.

The Zoning Board of Adjustment of the City of Hoboken (hereafter "Hoboken Zoning Board") is a municipal board created pursuant to the New Jersey Municipal Land Use Law.

THE FACTS

At a hearing held on May 31, 2023 in Hudson County Superior Court before the Honorable Anthony D'Elia (HUD-L-2649-22) the Court vacated a grant of variance made by the Hoboken Zoning Board to 201 Park in a resolution dated 06/21/2022 and remanded it back to the Hoboken Zoning Board for amendment.

This decision was memorialized in a court order dated 06/05/2023 which indicates that the Court retained jurisdiction over this matter (2a).

The court order for this decision specifically referenced a rendering that the Hoboken Zoning Board was to use in its deliberations:

> *To explain whether the "rendering" submitted with the Application (relative to the height of the various buildings on the block) was significant to the Board's decision and, if not – why not? (2a)*

The more formal name of this rendering is "Park Avenue(West Side) Diagrammatic Elevation" (hereafter "the Diagrammatic Elevation") which can be found in the exhibit labeled Z-1 which was submitted as part of 201 Park's original application for variance relief to the Hoboken Zoning Board in 2022 (4a).

The Diagrammatic Elevation shows the relative height of the proposed building compared with neighboring buildings as represented to the Hoboken Zoning Board in the 2022 application that sought a height variance.

At a hearing held on 08/15/2023, the Hoboken Zoning Board approved an amended version of the original zoning resolution and subsequently forwarded it to the Court for review (hereafter "the Amended Resolution") (10a). Page 19, paragraph 21 of the Amended Resolution clearly states (emphasis added):

> *That the site be developed with the proposed use and in accordance with the current plans and renderings as submitted to the Zoning Board of Adjustment except as modified by the Board as set forth*

FILED, Clerk of the Appellate Division, August 09, 2024, **A-002771-23**, **AMENDED**

herein. (28a)

On 10/11/2023 a hearing was held before Judge Anthony V. D'Elia to review the Amended Resolution and the matter was satisfactorily resolved from the Plaintiff's perspective. Neither 201 Park nor the Hoboken Zoning Board chose to appeal the Court's decision. 201 Park also did not appeal the Amended Resolution within the statutory time limit.

On 11/07/2023, Plaintiff filed a complaint with the Hoboken Zoning Officer alleging that the relative height of the already erected first and second floors of the building indicated that the completed building would substantially exceed the height limitation stipulated by the Diagrammatic Elevation. (105a)

Specifically, Plaintiff asked the Hoboken Zoning Officer to verify that the three remaining yet-to-be-constructed floors of the building, plus façade, would "fit" into the remaining space so that the final structure would conform with the relative height limitations imposed by The Diagrammatic Elevation.

In an exchange of multiple emails occurring on 11/09/2023 (beginning 65a), the Hoboken Zoning Officer indicated that she would not be taking the measurements necessary to determine if, in fact, the remaining building could fit into the remaining space allowed by the Diagrammatic Elevation. Moreover, the Hoboken Zoning Officer rejected the validity of this rendering as a valid parameter:

> *Renderings a pretty pictures that help people who don't know how to read plans visualize something that they can't conceive of otherwise. I have approved site plans and construction drawings that I work off of and those will be what the building has to comply with. Plain and simple. (71a)*

Based on the Hoboken Zoning Officer's complete rejection of the amended resolution's requirement that "the site be developed with the proposed use and in accordance with the current plans and renderings as submitted to the Zoning Board of Adjustment …" Plaintiff concluded that he had exhausted "the available right of review before an administrative agency" per Rule 4:69-5.

LEGAL ARGUMENT

The Court erred when it refused to admit a critical pieces of evidence despite their being highly relevant and therefore admissable under NJRE 402; no other rules of evidence were cited as reasons for barring this evidence.

The Court effectively drove a stake through the heart of Appellant's complaint when it refused to admit as evidence a critical, and highly relevant document central to appellant's case. Quite literally, in a case in which Appellant sought to prove that a building had exceeded one of the height limitations imposed on it by a zoning resolution, the Court barred admission of the document memorializing the standard in question. This rendered Appellant's entire legal argument untenable.

The evidence in question consisted of a rendering submitted to the Zoning Board known as "Park Avenue (West Side) Diagrammatic Elevation" (hereafter "the Diagrammatic Elevation"), which can be found in the Exhibit labeled Z-1 and which was submitted as part of 201 Park's original application for variance relief to the Hoboken Zoning Board in 2022 (4a). It is referenced in the Amended Resolution of Approval Application of 201 Park Avenue Corp. (hereafter "Amended Resolution") as included in the plans submitted by the respondent, 201 Park, as part of its application for variance relief. (11a) It is

FILED, Clerk of the Appellate Division, August 09, 2024, **A-002771-23**, **AMENDED**

identified in transcript 2T as "P-1 Rendering of street on 2nd Street" (1a).

This Diagrammatic Elevation very clearly indicates that the building under construction, known as 138 Park Avenue, as measured from the top of its façade, was to stand approximately one foot taller than the building adjacent to it to the south, known as 136 Park Avenue. Appellant sought to submit the Diagrammatic Elevation document, along with two photographs (identified in transcript 2T, 2 as P2 and P3) he had taken of the site which clearly show an approximately 8-inch thick roof slab, five cinder blocks, and what appears to be a 2" x 6" board sticking up over the façade of the adjacent building. (6a, 7a).

The Court refused to admit the Diagrammatic Elevation (P1) as evidence but did admit the two photographs, Exhibits P2 and P3.

Appellant also sought admisson of a fourth piece of evidence (2T, 2 Exhibit P4), consisting of a page from Home Depot's website disclosing the dimensions of a commonly sold type of cinder block. This illustration suggested that the sides of the cinder blocks shown in the photographs were each 8 inches (8a).

The Court refused to admit this fourth piece of evidence (P4) as well.

For the sake of Argument, Appellant assumes that the Court barred them as not relevant under NJRE 402. The Court did not actually cite any rules of evidence in its decision, but Appellant can deduce no other rationale for them being barred.

FILED, Clerk of the Appellate Division, August 09, 2024, **A-002771-23**, **AMENDED**

Simple Math

Appellant's purpose in seeking admission of this evidence was to demonstrate that the building's dimensions had clearly exceeded a limitation placed on it by the Diagrammatic Elevation. These limitations were placed on it by paragraph 21 of the Amended Resolution's "Conditions" section, which reads:

> ***That the site be developed with the proposed use and in accordance with the current plans and renderings as submitted to the Zoning Board of Adjustment except as modified by the Board as set forth herein. (28a)***

Appellant filed his complaint once it became clear to him that 138 Park Avenue was going to exceed the height of the adjacent building to the south by substantially more than the one foot limitation imposed by the Diagrammatic Elevation. By Appellant's estimate, it is actually three or four feet taller than the adjacent building. This cannot be considered a de minimus variation. To illustrate:

5 cinder blocks @ 8" each =	40 inches
1 Roof Slab @ 8" (see note) =	8 inches
1 two-inch thick board =	2 inches
Total Approximate Height	50 inches
Convert to Feet	4 feet 2 inches

Note: estimate based on the fact that the roof slab appears to be the same width as the cinder blocks

Appellant would emphasize that none of this evidence can be used to *definitively* demonstrate the actual amount by which the height of the façade in question exceeded the one-foot limitation. This was not Appellant's goal in submitting it. Rather, it was to demonstrate that "probable cause" existed that a substantial violation had occurred so that the Court could order a responsible party – such as the Hoboken Zoning Officer, whose statutory duty it is to investigate alleged violations of the Section 196-62 of the Muncipal Code of the City of Hoboken – to take actual measurements, rather than the previously mentioned "sham" measurements in order to make a definitive determination. This is the remedy that Appellant has consistently sought.

At the 03/27/2024 hearing for this case, the Court refused to admit the rendering in question as evidence citing the following passage from Paragraph 46 of the "Findings of Fact" Section of the Hoboken zoning boards amended resolution as justification:

> *… During deliberation, none of the Commissioners expressed reliance on the MVMK rendering, nor mentioned same or gave it any weight on the record and during deliberation. Michael Evers took exception to the MVMK rendering during the hearings. The architectural plan prepared by MVMK contained the height of the proposed building, in terms of number of stories and height and the Applicant is bound by same unless additional relief is requested by way of an amended application to the Board. During deliberation, none of the Commissioners expressed reliance on the MVMK rendering, nor mentioned same or gave it any weight on the record and during deliberation. (25a)*

The Court's analysis of this:

> *THE COURT: -- in determining whether -- what the height of the building would be, you can't then tell me that the building violated the heights in this rendering because they didn't rely upon that. Now it goes back to you. How do you prove that the building did not comply with the plans? (T2 p 32 lines 14 – 17).*

The Court's argument in this regard suffers from a number of fatal flaws because it contradicts the actual language of the Amended Resolution.

Building Height vs. Relative Height

As a note of clarification, Appellant would mention that the Court seems to be confused with regards to the specific height the Appellant objects to. Section 196-6 of the Municipal Code of the City of Hoboken defines "building height" as measured to the "highest roof beams" of a flat-roofed building such as 138 Park Avenue. This is not the height Appellant has been challenging.

The height Appellant has been challenging is the relative height of 138 Park in relation to the building adjacent to it on the southerly side. The Diagrammatic Elevation specified that the height of the façade of 138 Park Avenue would not exceed the height of the property to its south by more than one foot (4a).

It may be that the maximum "building height" allowed by the Amended Resolution stands in conflict with the relative height limitation imposed by the Diagrammatic Elevation. If so, it would be incumbent on the developer, 201 Park, to return to the Hoboken Zoning Board to resolve the conflicts — not to simply ignore one of the limitations placed on the project by the Zoning Board. This possibility is foreseen in the Amended Resolution, which clearly stipulates the following condition of approval:

> *Revised plans, to the extent necessary, shall be submitted to the Board and the Board professionals for review and approval. (26a)*

FILED, Clerk of the Appellate Division, August 09, 2024, **A-002771-23**, **AMENDED**

Appellant lives within 200 feet of the building site and has not received any notice of any new zoning board hearings concerning 138 Park Avenue. So it is safe to say that no revised plans have been submitted to the Hoboken Zoning Board for its approval.

Findings Are Not Conditions

First, the passage cited by the Court comes from the "Findings of Fact" section of the Amended Resolution. It, of course, describes what was actually said at the hearings and records what documents the Applicant made available to them for their deliberations.

The section of the Amended Resolution on which Appellant based his complaint comes from what might be called the "Conditions" section of this document, which details the various conditions with which the applicant has to comply with going forward in order to complete the project in return for the grants of variance.

The section referenced by the Court recounts the fact that the Diagrammatic Elevation was not discussed during the deliberations as to whether the Zoning Board should or should not grant the requested variance relief. This section does not, however, make any statements regarding whether the Diagrammatic Elevation had somehow been excised from the "plans and renderings" reference in the condition that Appellant alleges 201 Park violated (28a).

Moreover, the same Findings section that the Court relies upon to claim that the limitations imposed by the Diagrammatic Elevation have been excised begins with the following statement (emphasis added):

> *The Applicant filed an application with the Board and public hearings were held on March 15, 2022 and April 26, 2022. Along with the application, the Applicant submitted the following:*
>
> - *Architectural Plans entitled "Proposed 4 Story Over DFE, 2 Residential Unit Building Over Ground Floor Retail at 138 Park Avenue" prepared by MVMK Architecture & Design, 360 Fourteenth Street, Hoboken, New Jersey 07030, dated October 11, 2021 (revised January 26, 2022) and unless noted herein, consisting of the following:*
>   - *Sheet Z-1: Proposed Four Story over DFE, 2 Residential Unit Building over Ground Floor Retail, Zoning Map – Site Located in R-1 Zone,* ***Park Avenue (West Side) <u>Diagrammatic Elevation,</u>*** *Second Street (South Side) Diagrammatic Elevation, Zoning Tabulations; (11a)*

Clearly, the author of the Amended Resolution and the zoning commissioners that voted unanimously to approve the Amended Resolution were under the impression that the Diagrammatic Elevation was still part of the "plans

and renderings" for this project. It is quite clearly listed as being part of these plans. The Court provides no explanation and cites no passages from what is the governing resolution that contradicts this claim.

This means that the limitations imposed by the Diagrammatic Elevation remained in force and 201 Park was required to abide by them, which in turn means that this rendering represented a highly relevant piece of evidence for a legal complaint claiming that this limitation had been violated.

Not Mentioning vs. Invalidating

A second error the Court committed in interpreting the governing document for this project was to conflate not mentioning something with invalidating it.

As mentioned earlier, the passage cited by the Court simply states that no one mentioned the Diagrammatic Elevation during deliberations. No one, for example, is on record saying something to the effect of: "Let's get rid of that Diagrammatic Elevation so that the developer can ignore the limitations it imposes when he builds his building." Nor does the passage the Court cites concerning the Diagrammatic Elevation say much about the impression that the rendering made on commissioners' at an individual, unspoken level concerning the application. Would some have felt differently if the rendering had been drawn to scale and provided a more accurate view of the proposed building's height relative to adjacent buildings? No one knows. Transcripts only capture

words and – on occaision – noises.

Appellant would also note that the Conditions Section of the Amended Resolution contains twenty-nine, numbered paragraphs filled with conditions. Few, if any, of these conditions were mentioned during deliberations either. Appellant finds it doubtful that any court would therefore conclude that all of these other, unmentioned conditions were rendered invalid because they weren't discussed during the Zoning Board's deliberations.

Finally, Appellant would mention that the language concerning the Diagrammatic Elevation cited by the Court was inserted into the Amended Resolution in response to a court order that remanded the case to the Zoning Board as a result of an earlier case filed by the Appellant (HUD-L-002649-22) because of multiple deficiencies in the resolution (the Diagrammatic Elevation is referred to in this passage of the court order as "the rendering"):

> *(b) To explain whether the "rendering" submitted with the Application (relative to the height of the various buildings on the block) was significant to the Board's decision and, if not – why not? (2a)*

This would explain – or at least give some insight – into why the Diagrammatic Elevation was singled out from among the twenty-nine paragraphs of conditions. It also suggests that failure to delete the Diagrammatic Elevation from the elements of the architectural plans and renderings that the project was

to be bound by was not simply an oversight. Clearly, the court order in question made sure that both the Amended Resolution's author and the zoning commissioners were well aware of its existence.

CONCLUSION

N.J.R.E. 402 clearly states:

> *All relevant evidence is admissible, except as otherwise provided in these rules or by law.*

N.J.R.E. 401 states:

> *"Relevant evidence" means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.*

The purpose of introduction the Diagrammatic Elevation and the information concerning the dimensions of common cinder blocks was to prove the fact that 201 Park had violated one of the limitations placed on it by the Amended Resolution (more precisely, to prove the fact that sufficient evidence existed to merit intervention by municipal authorities).

So clearly, this evidence was relevant and should have been admitted under N.J.R.E. 402. The Court based its refusal to admit this evidence on no other rules of evidence or laws. It relied entirely on its analysis of the Amended Resolution which Appellant has shown was flawed and erroneous.

As demonstrated, the Court clearly erred by misinterpreting selected sections of the Amended Resolution on which it based its arguments for denying the admission of highly relevant evidence. No language exists in the Amended resolution that supports the Courts claim that the Diagrammatic Elevation and the limitations it imposed on 201 Park were somehow rendered inoperative.

If those limitations were still operative, then the documents memorializing those limitations represented would fit the definition of relevant evidence per NJRE 401 for a complaint seeking to demonstrate that those limitations had been disregarded and exceeded. The Diagrammatic Elevation, as well as the Home Depot illustration should both have been admitted as evidence at the 03/27/2024 hearing for this matter under the provisions of NJRE 402.

REQUESTED REMEDIES

Appellant respectfully requests that the Court reverse the dismissal of this case and remand it back to the lower court with instructions to admit the Diagrammatic Elevation (Exhibit P1) and the supporting documentation indicating the likely dimensions of the cinder blocks (Exhibit P4) as well as the two previously admitted photographs (Exhibits P2 and P3) during a re-hearing of the Verified Complaint and Order to Show Cause filed on 11/29/2023.

Appellant would note that virtually all the remedies requested in his complaints and motions head toward the same destination: that the Hoboken

Zoning Officer be required to conduct what might be called a court-supervised investigation of the alleged zoning violations, as she is required to do per Section 196-61 A. of the Hoboken Municipal Code. Should such an investigation find that the building at 138 Park Avenue exceeds the limitations imposed on it by the Diagrammatic Elevation – as it surely must, given the facts on the ground – then 201 Park would have to either modify the building or seek approval of its unauthorized changes by going before the Hoboken Zoning Board of Adjustment. Both of these remedies are actionable. Modification of the building would involve the reduction of its facade, not structural changes. And seeking approval of unauthorized changes would involve requesting and attending a hearing. Either of these are practical and doable remedies.

We sincerely hope that the Court uses this request as an opportunity to encourage those charged with land use decisions and the enforcement of land use laws and ordinances to start taking the law "more seriously".

Thank you.

****

I hereby certify, under penalty of law that, to the best of my knowledge, information and belief, that the subject matter of the within controversy does not form the basis of any action presently pending in any other court or arbitration proceeding. Also, to the best of my knowledge, information and belief, no other action or arbitration proceeding is contemplated at this time, and I know of no

other party who should be joined in this action. Finally, I hereby certify that the representations made in this document are true to the best of my knowledge.

Dated: 08/08/2024 By:

MICHAEL F. EVERS

FILED, Clerk of the Appellate Division, August 09, 2024, **A-002771-23**, **AMENDED**

FILED, Clerk of the Appellate Division, October 23, 2024, **A-002771-23**, **AMENDED**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

MICHAEL F. EVERS Plaintiff, v. ANN HOLTZMAN (aka THE HOBOKEN ZONING OFFICER), THE ZONING BOARD OF THE CITY OF HOBOKEN; 201 PARK AVENUE CORP, Defendants.	Appellate Docket No.: A-002771-23 CIVIL ACTION On Appeal From Final Judgment of The Superior Court of New Jersey, Law Division, Hudson County Docket No.: HUD-L-4083-23 SAT BELOW: Hon. Anthony V. D'Elia, J.S.C.

DEFENDANT-RESPONDENT'S APPELLATE BRIEF

FLORIO PERRUCCI STEINHARDT CAPPELLI & TIPTON LLC
Joshua D. Glenn, Esquire
Attorney I.D. No. 441222023
91 Larry Holmes Drive, Suite 200
Easton, PA 18042
Ph: 610-691-7900
F: 610-691-0841
jglenn@floriolaw.com
Attorneys for Defendant, Ann Holtzman (aka the Hoboken Zoning Officer)

TABLE OF CONTENTS

TABLE OF AUTHORITIES....................ii

TABLE OF TRANSCRIPTS....................iii

PRELIMINARY STATEMENT....................1

STATEMENT OF PROCEDURAL HISTORY....................2

COUNTERSTATEMENT OF FACTS....................3

A. THE PROPERTY....................3

B. THE RENDERING (5A)....................3

C. THE AMENDED RESOLUTION (10a)....................4

D. THE TRIAL COURT'S MARCH 27, 2024, HEARING (2T)....................6

E. ADDITIONAL FACTS SPECIFIC TO RESPONDENT HOLTZMAN........8

LEGAL ARGUMENT....................8

A. STANDARD OF REVIEW....................8

B. . THE TRIAL COURT PROPERLY EXCLUDED THE RENDERING AND HOME DEPOT ADVERTISEMENT AS IRRELEVANT....................10

C. THE TRIAL COURT WAS BOUND TO GIVE SUBSTANTIAL DEFERENCE TO THE AMENDED RESOLUTION....................13

CONCLUSION....................15

FILED, Clerk of the Appellate Division, October 23, 2024, **A-002771-23**, **AMENDED**

TABLE OF AUTHORITIES

Griffin v. City of East Orange,
225 N.J. 400 (2016) 10, 11

Matter of Comm'r of Ins.'s Issuance of Orders A-92-189&A-92-21,
274 N.J. Super. 385 (App. Div. 1993).......... 13

Rodriguez v. Wal-Mart Stores, Inc.,
237 N.J. 36 (2019) 10, 11, 12

Scully-Bozarth Post #1817 of Veterans of Foreign Wars of the U.S. v. Planning Bd. Of the City of Burlington,
362 N.J. Super. 296 (App. Div. 2003).......... 13

State v. Darby,
174 N.J. 509 (2002).......... 10

State v. Garcia,
245 N.J. 412 (2021).......... 8, 9

State v. Harris,
209 N.J. 431 (2012).......... 7

State v. Muhammad,
439 N.J. Super. 361 (App. Div. 2003).......... 9

State v. Singh,
245 N.J. 1 (2021).......... 8, 9

Statutes, Rules and Other Authorities:

N.J.R.E. 401.......... passim

N.J.R.E. 403.......... passim

TABLE OF TRANSCRIPTS

1T .... Transcript of March 6, 2024, Hearing

2T .... Transcript of March 27, 2024, Hearing

PRELIMINARY STATEMENT

This matter arises from the speculative, premature, and mistaken contention that a not-to-scale rendering concerning an ongoing development undertaken by 201 Park was erroneously ignored by the Zoning Officer of the City of Hoboken, Defendant-Respondent Ann Holtzman, ("Respondent Holtzman") and later, the Trial Court. The Appellant, after observing the ongoing development from his home nearby, demanded Respondent Holtzman take measures to stop work on the project, alleging the building would eventually contravene an applicable Amended Resolution adopted by the Zoning Board of the City of Hoboken. (105a). In an exchange of emails, Respondent Holtzman informed the Appellant that while she would investigate the Appellants complaint, a stop work order would not be issued based solely on Appellants' suspicions and speculation and without a compelling reason to do so. (66a-75a).

Appellant's complaint and request to Respondent Holtzman were made whilst the building was in the early stages of construction, and as such, the Appellant had no evidence at all which indicated that the project had or would violate the limits of the Amended Resolution. Critically, Respondent Holtzman informed the Appellant that it was necessary for the building to comply with the approved site plans included in the application, as the Zoning Board relied on those plans for the approval of the application. (110a-115a).

The rendering, which Appellant argues indicates that 201 Park violated an applicable zoning Resolution restricting the maximum height of new construction within the relevant zone, was not relied upon by the Zoning Board of the City of Hoboken ("Board") in adopting its Resolution, was not relied upon by Respondent Holtzman in her investigation and subsequently not relied upon by the Trial Court and thus dismissed as irrelevant. Appellant then attempted to rely upon a Home Depot advertisement displaying a cinderblock, in conjunction with photos taken by Appellant of the ongoing construction as evidence of 201 Park's failure to adhere to the rendering's limit.

The Trial Court provided the Appellant numerous opportunities to present any relevant evidence to support his claim, and Appellant's failed to do so. Because the rendering had already been dismissed as irrelevant and the Home Depot ad itself contained no evidence to suggest and much less prove the development violated the approved plans reviewed by Holtzman and the Board, the prerogative writ action was dismissed as no evidence presented by the Plaintiff-Appellant could support the claims as alleged.

I. STATEMENT OF PROCEDURAL HISTORY

On November 16, 2023, Appellant filed a Verified Complaint in Lieu of Prerogative Writ with Order to Show Cause. Appellant then filed an Amended Verified Complaint In Lieu of Prerogative Write with Order to Show Cause on

November 30, 2023.

In Lieu of an Answer, Defendant Holtzman filed a Motion to Dismiss the Complaint pursuant to R. 4:6-2(e), on January 31, 2024. Appellant filed Opposition to that Motion on February 9, 2024. A video hearing to hold oral argument regarding that January 31, 2024, Motion was conducted on March 6, 2024. (1T). The Trial Court scheduled a subsequent hearing for in-person oral argument to be held on March 27, 2024. (2T)

II. COUNTER STATEMENT OF FACTS

A. THE PROPERTY.

201 Park is the owner of property located at 138 Park Avenue, Hoboken, Hudson County, New Jersey 07030 and designated as Block 34, Lot 17 on the City of Hoboken Tax Map ("Property"). 201 Park sought to construct a new five-story building on the Property. In order to do so, 201 Park submitted Application No. HOZ-21-16 ("Application") to the Board. (10a-11a).

B. THE RENDERING (5A).

As part of its site plan application, 201 Park submitted the Rendering which was one of many documents including detailed floor plans, site plan, topographic survey map, etc. (11a). The Rendering is a simple graphic illustration of the West elevation and clearly states "NTS" on the document.

"NTS" indicates that the drawing was "Not-To-Scale".

The Rendering shows a five (5) story building on the Property at an elevation of "+/- 51'". (5a). The Rendering also shows five (5) adjacent buildings to the Property which are all five (5) stories at an elevation of "+/-50'" above grade level. While all five (5) buildings are indicated to be at or about the same elevation above grade level, the heights of the buildings depicted on the Rendering are all different. (5a).

C. THE AMENDED RESOLUTION (10a).

On August 15, 2023, the Board passed the Amended Resolution which unanimously approved 201 Park's Application to construct the five-story building. (10a). The Amended Resolution clearly states that the approval of the Application was conditioned on the building being constructed in accordance with the approved plans:

> 26. The proposed project shall be constructed in accordance with the approved plans. (28a),

(See also 13a, ¶6, 24a, ¶38 and 35a, ¶46). The Amended Resolution also definitively states that the building is to be built to a height that is

43'-6" above DFE. While the zoning requirements limited the height of the building to 40' above DFE, the Board granted the specific variance to 201 Park to construct the building to a height of 43'-6" above DFE.

> "The proposed building will be constructed at 43'-6" above DFE in accordance with the MVMK architectural plan." (15a).

(See also 24a, ¶38).

The Amended Resolution also specifically stated that the Board's Commissioners did not rely upon the Rendering, nor gave it any weight in approving the application. In addition, the Amended Resolution required 201 Park to build the building according to the height shown on the architectural plans, not the Rendering. (25a). Paragraph 46 states in part:

> During deliberation, none of the Commissioners expressed reliance on the MVMK rendering, nor mentioned same or gave it any weight on the record and during deliberation. Michael Evers took exception to the MVMK rendering during the hearings. The architectural plan prepared by MVMK contained the height of the proposed building,_in terms of number of stories and height and the Applicant is bound by same unless additional relief is requested by way of an amended application to the Board. (25a).

As found by the Trial Court, when taken as a whole, the Amended Resolution is clear and unambiguous: The site plan approved by the Board was

for a building to be constructed to a height of 43'-6" above DFE in accordance with 201 Park's architectural plans. The Amended Resolution made clear that the Rendering on which the Appellant's entire case is premised was irrelevant as to the approved height of the building. (2T20:24 to 21:5, 2T23:1-10, 2T23 :20-21, 2T30:19-24, 2T32:13-18, and 2T33:14-16).

D. <u>THE TRIAL COURT'S MARCH 27, 2024, HEARING (2T).</u>

During the hearing conducted by the Trial Court on March 27, 2024, the Appellant refused to accept the clear fact that the Board did not rely on the Rendering to establish the building's approved height. Instead, the Appellant solely relied on the Rendering and ignored the actual approved plans. Even after the Court made clear that the Rendering was irrelevant to the building's approved height, the Appellant then attempted to introduce the Rendering into evidence to demonstrate that the actual building height was higher than the height shown on the Rendering. 201 Park objected to the introduction of the Rendering into evidence on the grounds that the Rendering was not relevant because it was not considered by the Board. The Trial Court sustained 201 Park's objection and denied the introduction of the Rendering into evidence. (2T20:24 to 21:5, 2T23:1-10, 2T23:20-21, 2T30:19-24, 2T32:13-18, and 2T33:14-16).

The Appellant then attempted to introduce the Home Depot ad which showed cinder block dimensions to demonstrate that the building height exceeded the +/- 51' building height shown on the Rendering. As the Rendering had already been ruled irrelevant, the Trial Court held that the Home Depot ad to prove the building was somehow not built in accordance with the Rendering was likewise irrelevant and therefore inadmissible. (2T36:24 to 39:14). The Appellant's burden was to prove that the actual building height exceeded the approved building height of 43'-6" above DFE as shown on the approved plans **0**and not the Rendering. (2T39: 4-25).

The Trial Court gave the Appellant numerous opportunities to introduce relevant evidence to support his claim that the actual building height exceeded the building height shown on the approved plans. (2T40:12-16). Instead of introducing evidence that the building exceeded the height shown on the approved plans, the Appellant repeatedly attempted to introduce evidence related to the building's height in contrast to the irrelevant not-to-scale Rendering.

After excluding the Rendering and the Home Depot ad from evidence, the Trial Court appropriately dismissed the Complaint with prejudice as the Appellant failed to carry his burden of proof. (2T40:20 to 42:8).

E. ADDITIONAL FACTS SPECIFIC TO RESPONDENT HOLTZMAN

Respondent Holtzman, on November 9, 2023, responded to a zoning complaint submitted by Appellant pertaining to the height of the 201 Park development, informing him that an investigation at that time would only show the building in question remained in compliance with the approved plans. (2T4:16-5:11). On November 30, 2023, Respondent Holtzman further explained to Appellant that the 201 Park development was in compliance with the issued Zoning Permit as approved by the City of Hoboken's Zoning Board of Adjustment. (110a). On the basis of the site plans as approved by the Zoning Board, Respondent Holtzman concluded the investigation. (111a).

III. LEGAL ARGUMENT

A. STANDARD OF REVIEW

The applicable standard of review of the Trial Court's evidentiary rulings requires the reviewing appellate panel to determine if an abuse of discretion was exercised by the trial court. In all instances except where such an abuse of discretion has occurred, the reviewing panel will defer to the trial court. State v. Garcia, 245 N.J. 412, 430 (2021). Absent an abuse of discretion, an appellate court should not substitute its own judgment for that of the trial court unless trial court's ruling was "so wide of the mark that a manifest denial of justice resulted." State v.

Singh, 245 N.J. 1, 12-13 (2021). As such, review of such evidentiary rulings is limited and the broad discretion of trial judges to make same has long been respected. See Id. (citing State v. Harris, 209 N.J. 431 (2012); quoting State v. Muhammad, 439 N.J. Super. 361 (App. Div. 2003)).

Even in circumstances where the reviewing panel concludes a mistaken evidentiary ruling has been made, reversal is not a given. Only those mistakes which have "the clear capacity to cause an unjust result," require intervention on appeal. Garcia 245 N.J. at 430.

In this case, the record reflects that the Court was presented with certain evidence by the Appellant, which the Court determined was irrelevant. The rendering put forth by Appellant which purported to show a violation of an applicable zoning resolution, was not relied upon in adopting said Resolution. Likewise, the Home Depot advertisement provided no relevant or persuasive evidence and as such, the Trial Court determined it was irrelevant as well. This Appeal does nothing to offer additional context to the underlying facts of the claim, and further, the wide breath of deference afforded to the Trial Court's evidentiary ruling forecloses any need for additional review.

B. THE TRIAL COURT PROPERLY EXCLUDED THE RENDERING AND HOME DEPOT ADVERTISEMENT AS IRRELEVANT

Analyzing an evidentiary ruling made by a trial court begins with relevancy, the "hallmark of admissibility of evidence." Griffin v. City of East Orange 225 N.J. 400, 413 (2016). (quoting State v. Darby, 174 N.J. 509 (2002)). The Griffin Court, interpreting N.J.R.E. 401, described relevant evidence as evidence which has a tendency in reason to prove or disprove any fact of consequence to the determination of the action. Id. The analysis of relevancy, according to Griffin, thus, "should focus on the 'logical connection between the proffered evidence and a fact in issue' … or 'the tendency of evidence to establish the proposition that it is offered to prove.'" Id. (citing Green v. N.J. Mfs. Ins. Co., 160 N.J. 480 (1980)). Relevancy determinations are fact-specific evaluations of the evidence "in the setting of the individual case." Rodriguez v. Wal-Mart Stores, Inc., 237 N.J. 36, 58 (2019). The facts of the case at hand are unique to and highly sensitive for the analysis of admissibility of evidence. See Id.

The Trial Court's determination that both the Rendering and the Home Depot Advertisement were irrelevant was based on the facts specific to the Amended Resolution. It is clear from the record that the Amended Resolution did not rely upon either in granting approval for the application. As such, the

Trial Court properly excluded them from consideration in Appellant's Prerogative Writ action. The facts at issue show clearly that the Board, in adopting the Amended Resolution, did not rely upon the Rendering which Appellant sets forth as the entire basis of his claim. As such, if the Amended Resolution did not rely upon the Rendering when approving the Application, there can be absolutely no logical connection between the "standard," contained in the Rendering, and the applicable standard in the Amended Resolution. Griffin 225 N.J. at 413.

Appellant's characterization of the Rendering, as well the Home Depot Advertisement as the applicable standard for the approved height of the building is plainly incorrect. The Amended Resolution did not rely upon the Rendering, nor gave it any weight in approving the application. Paragraph 46 of the Amended Resolution states in part:

> During deliberation, none of the Commissioners expressed reliance on the MVMK rendering, nor mentioned same or gave it any weight on the record and during deliberation. Michael Evers took exception to the MVMK rendering during the hearings. The architectural plan prepared by MVMK contained the height of the proposed building,_in terms of number of stories and height and the Applicant is bound by same unless additional relief is requested by way of an amended application to the Board. (25a) (emphasis added).

The hallmark of admissibility is relevance, and in determining if evidence is relevant, "the trial court should focus on logical connection between the proffered evidence and a fact in issue…" Rodriguez, 237 N.J. at 58. In making relevancy determinations, trial courts are given broad discretion whilst they search for that logical connection. Id. at 57. As to the relevancy determination made by the Trial Court in this matter:

> THE COURT: I'm sustaining the objection. It's not relevant. I need not waste any time about the rendering. That's not what [the Board] based their opinion on. 2T22:18-21.

The issues raised by the Appellant would substitute the Rendering, and Home Depot advertisement, neither of which was relied upon, for the approved site plans submitted along with the application, which were the basis of the Amended Resolution. Because the Rendering was not relied upon and the Home Depot advertisement and accompanying photographs could not accurately provide any evidence regarding the height of the building, the Trial Court excluded them from the record. 2T22:18-21; see also 2T39:4-12. Because neither piece of Appellant's proffered evidence can be logically connected to the Board's decision, both were properly determined to be irrelevant by the Trial Court. See Rodriguez 237 N.J. at 58. That relevancy determination is to be afforded great deference upon appellate review and the decision of the Trial Court to exclude them as irrelevant should be upheld.

C. THE TRIAL COURT WAS BOUND TO GIVE SUBSTANTIAL DEFERENCE TO THE AMENDED RESOLUTION

Under the applicable and appropriate standard of review, the Trial Court properly afforded the Board's findings of fact and conclusions substantial deference. New Jersey courts consistently afford the decisions of administrative bodies a strong presumption of validity and reasonableness. Matter of Comm'r of Ins.'s Issuance of Orders A-92-189&A-92-21, 274 N.J. Super. 385, 397 (App. Div. 1993). When those decisions are challenged and reviewed, the party attacking the decision bears the burden of demonstrating the administrative action is arbitrary, capricious, or unreasonable. Id.

It is the Appellant's burden to establish that the Board's decision need not be given deference because it is arbitrary, capricious or unreasonable; as a reviewing Court is bound to provide that deference otherwise. See Matter of Comm'r of Ins., 274 N.J. Super. at 397. When, as is the case here, the questioned Resolution relies upon a thorough review of the submitted plans in the application, and its conclusions were not at all based on the Rendering Appellant sets forth as dispositive, there is no suggestion of arbitrary, capricious or unreasonable Board action. "A reviewing court may not substitute is judgement for that of local

officials." Scully-Bozarth Post #1817 of Veterans of Foreign Wars of the U.S. v. Planning Bd. Of the City of Burlington, 362 N.J. Super. 296, 314 (App. Div. 2003). Both Respondent Holtzman and the Board based their well-reasoned decisions on the contents of the application, specifically the approved site plans, and not the Rendering. Thus, the Trial Court was correct as a matter of law to determine both the Rendering and Home Depot advertisement were irrelevant to the Resolution.

CONCLUSION

The Trial Court correctly dismissed Appellants Prerogative Writ Action and Amended Verified Complaint as Appellant failed to provide any relevant evidence to support his claims. Further, the Trial Court's decision was a well-reasoned decision which directly applied the evidentiary rules to the facts at hand and declined to consider evidence which bears no logical connection to the actual evidence.

For the foregoing reasons, the Court should deny the appeal and uphold the Trial Court's March 27, 2024, ruling.

Respectfully Submitted,

FLORIO, PERRUCCI, STEINHARDT, CAPPELLI & TIPTON, LLC
Attorneys for Defendant-Respondent, *Ann Holtzman (aka the Hoboken Zoning Officer)*

By: ___Joshua D. Glenn____
Joshua D. Glenn, Esq.

Dated: October 21, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

MICHAEL F. EVERS Plaintiff, v. ANN HOLTZMAN (IN HER CAPACITY AS THE CITY OF HOBOKEN ZONING OFFICER); ZONING BOARD OF ADJUSTMENT OF THE CITY OF HOBOKEN; and 201 PARK AVENUE CORP., Defendants.	APPEAL NO. A-002771-23 **ON APPEAL FROM**: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY DOCKET NO: HUD-L-4083-23 **SAT BELOW**: Hon. Anthony v. D'Elia, J.S.C.

DEFENDANT/RESPONDENT 201 PARK AVENUE CORP. BRIEF AND APPENDIX IN OPPOSITION TO APPEAL

PRIME & TUVEL
1 University Plaza, Suite 500
Hackensack, N.J. 07601
Of Counsel and on the Brief:
Jason R. Tuvel, Esq. (028142004)
On the Brief:
Benjamin T.F. Wine, Esq. (289902018)

THE TURTELTAUB LAW FIRM LLC
98 Main Street, Second Floor
Madison, N.J. 07940
Of Counsel and on the Brief:
James M. Turteltaub, Esq. (008011993)
Linda A. Turteltaub, Esq. (010141994)

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

STATEMENT OF PROCEDURAL HISTORY 3

STATEMENT OF THE ISSUES PRESENTED 4

COUNTERSTATEMENT OF FACTS 5

- **A. THE PROPERTY.** 5
- **B. THE APPLICATION** 6
- **1. THE SKETCH (PA5).** 6
- **2. MVMK SIDE ELEVATION PLAN (DA5)** 6
- **3. THE AMENDED RESOLUTION (PA10).** 7
- **4. APPELLANT'S KNOWLEDGE OF THE HEIGHT APPROVED BY THE BOARD** 8
- **C. THE TRIAL COURT'S MARCH 27, 2024 HEARING (2T)** 10

LEGAL ARGUMENT 12

POINT I 12

STANDARD OF REVIEW 12

POINT II 13

THE TRIAL COURT PROPERLY RELIED UPON THE BOARD'S AMENDED RESOLUTION. 13

- **A. THE BOARD'S AMENDED RESOLUTION PROVIDED FINDINGS OF FACT AND CONCLUSION.** 13
- **1. THE APPROVED BUILDING HEIGHT EXCLUDED THE PARAPET** 14
- **2. THE BOARD DID NOT CONSIDER THE SKETCH.** 16
- **B. THE TRIAL COURT WAS BOUND TO GIVE SUBSTANTIAL DEFERENCE TO THE AMENDED RESOLUTION** 19
- **C. THE TRIAL COURT'S FINDINGS OF FACT ARE BINDING ON APPEAL.** 21

POINT III 22

THE TRIAL COURT PROPERLY EXCLUDED THE SKETCH AND HOME DEPOT ADVERTISEMENT AS IRRELEVANT. 22

TABLE OF CONTENTS
(Continued)

Page

CONCLUSION...26

FILED, Clerk of the Appellate Division, October 22, 2024, **A-002771-23**, **AMENDED**

TABLE OF APPENDIX

Page

Excerpt of City of Hoboken Ordinance §196-6 ....1a

City of Hoboken Ordinance §196-23...3a

MVMK Elevation and Attorney Certification (Page 1 Only)
Dated March 5, 2024 ....4a

Excerpts from Appellant's Brief in Opposition to Motion for Summary
Disposition Filed in this Appeal..6a

TABLE OF AUTHORITIES

Page

Cases

Belmont Condominium Association, Inc. v. Geibel,
432 N.J. Super. 52 (App. Div. 2013)....................12

Correia v. Sherry,
335 N.J. Super. 60 (App. Div. 2000)....................22

DeVito v. Sheeran,
165 N.J. 167 (2000)....................12

Estate of Hanges v. Metro. Prop. & Cas. Ins. Co.,
202 N.J. 369 (2010)....................12

Fagliarone v. Township of North Bergen,
78 N.J. Super. 154 (App. Div. 1963)....................21

Green v. N.J. Manufacturers Insurance Company,
160 N.J. 480 (1999)....................12, 23, 26

Greenfield v. Dusseault,
60 N.J. Super. 436 (App. Div. 1960), aff'd o.b. 33 N.J. 78 (1960)....................21

Grewal v. Greda,
463 N.J. 489 (2020)....................12

Kramer v. Board of Adjustment, Sea Girt,
45 N.J. 268 (1965)....................20

Kuzian v. Tomaszewski,
457 N.J. 458 (Law Div. 2018)....................22

New York SMSA v. Bd of Adjustment of Tp. Of Weehawken,
370 N.J. Super. 319 (App. Div. 2004)....................13

Rodriguez v. Wal-Mart Stores, Inc.,
237 N.J. 36 (2019)....................12

Rova Farms Resort, Inc. v. Investors Ins. Co. of America,
65 N.J. 474 (1974)....................21

Scully-Bozarth Post #1817 of Veterans of Foreign Wars of the U.S. v. Planning Bd. Of the City of Burlington,
362 N.J. Super. 296 (App. Div. 2003)....................13, 19, 20

FILED, Clerk of the Appellate Division, October 22, 2024, **A-002771-23**, **AMENDED**

TABLE OF AUTHORITIES

Page

Cases (Continued)

State v. Marrero,
148 N.J. 469 (1997) 12

State v. Morton,
155 N.J. 383 (1998) 12

State v. Swint,
328 N.J. Super. 236 (App. Div. 2000) 22

Verdicchio v. Ricca,
179 N.J. 1 (2004) 25

Wymbs ex rel. Wymbs v. Township of Wayne,
163 N.J. 523 (2000) 23, 26

Rules

N.J.R.E. 401 22

N.J.R.E. 403 23

Ordinances

City of Hoboken Ordinance §196-6 .... 5, 7, 15

City of Hoboken Ordinance §196-23 .... 5, 15

TABLE OF TRANSCRIPTS

1T ....Transcript of March 6, 2024 Trial Court Hearing

2T ....Transcript of March 27, 2024 Trial Court Hearing

PRELIMINARY STATEMENT

The gravamen of this appeal filed by the Appellant, Michael F. Evers ("**Appellant**"), is whether the Trial Court abused its discretion by not admitting a **not-to-scale** sketch ("**Sketch**") and Home Depot advertisement that contained measurements of a generic cinder block ("**Home Depot Ad**") into evidence on the grounds they each lacked relevancy to the merits of Appellant's claims. The **not-to-scale** Sketch had not been relied upon by the Defendant, Zoning Board of Adjustment of the City of Hoboken ("**Board**") when considering and approving Respondent's/Defendant's 201 Park Avenue Corp.'s ("**201 Park**") site plan application to construct a five story, mixed use building (the "**Approved Building**").

The Sketch is merely a **not-to-scale** drawing that was to depict the **approximate** dimensions of the Approved Building. Based on the Board's resolution and findings, the Trial Court found the Sketch to be wholly irrelevant to the issue at the center of the Appellant's claim as to whether the building constructed by 201 Park exceeded the height approved by the Board. The Sketch was merely a schematic drawing that contained reference to the **approximate** rooftop height proposed for the Approved Building as compared to the approximate rooftop heights of adjacent buildings in the block. The Court found that the Home Depot Ad also did not provide any relevant evidence to prove that

the building constructed by 201 Park exceeded the height approved by the Board.

The Appellant repeatedly sought to introduce the Sketch and Home Depot Ad into evidence despite the Trial Court's finding that they lacked any evidentiary value in regard to Appellant's claims. The Trial Court held firm in its findings and conclusions. The Appellant's refusal to accept those findings and conclusions is now the basis of this appeal.

The actual approved height of the Approved Building was 43 feet 6 inches above the Design Flood Elevation ("**DFE**") as specified in the Board's Resolution (the "**Resolution**") memorializing its approval. The Appellant did not proffer any competent or otherwise relevant evidence to support his claim that the constructed height of the Approved Building exceeded the height approved by the Board.

The Appellant now asks this Court to reverse the Trial Court's sound findings of fact and conclusions of law and force 201 Park to reconstruct portions of its five (5) story building in a manner that complies with the **not-to-scale** Sketch as opposed to the dimensions expressly stated in the Resolution. As found by the Trial Court below, the Appellant's claims lack all merit in fact and in law. Accordingly, Trial Court's rulings and decision should be upheld by this Court and this appeal dismissed.

STATEMENT OF PROCEDURAL HISTORY

The Appellant filed his Verified Complaint In Lieu Of Prerogative Writ With Order To Show Cause on November 16, 2023. The Appellant then filed an Amended Verified Complaint In Lieu Of Prerogative Writ With Order To Show Cause ("**Complaint**") on November 30, 2023. (Pa30).

A virtual hearing on the Appellant's Order to Show Cause was held on March 6, 2024. (1T). During the hearing, the Trial Court scheduled an in-person argument for March 27, 2024, to address the Appellant's claim that the height of the constructed Approved Building exceeded the height approved by the Board.

On March 27, 2024, the Trial Court heard the parties' arguments and found that the Board had not relied on the Sketch nor made construction of the Approved Building as shown on the Sketch a condition of the approval. (2T20:24 to 21:5, 2T23:1-10, 2T23:20-21, 2T30:19-24, 2T32:13-18, and 2T33:14-16). Based on that finding, the Trial Court held that the Sketch and Home Depot Ad lacked relevance to the question of whether 201 Park had constructed the Approved Building in accordance with the Board's approval and therefore excluded these documents from evidence. (2T37:25 to 39:16). The Trial Court did admit two authenticated photographs taken by the Appellant into evidence. Based upon the extremely limited evidence offered by the Appellant,

the Trial Court ruled that the Appellant had failed to carry his burden to demonstrate that 201 Park's building was not built in accordance with the Board's site plan approval. (2T40: 20-25). Accordingly, the Trial Court denied the Appellant's Order to Show Cause and dismissed his Complaint with prejudice. (Pa1).

This appeal was filed on May 6, 2024. (Pa117). On August 30, 2024, 201 Park filed a Motion for Summary Disposition. On September 12, 2024, the other respondents joined in 201 Park's Motion for Summary Disposition. On September 20, 2024, the Appellant filed an opposition to the Motion for Summary Disposition. On October 7, 2024, the Court entered an Order denying the Motion for Summary Disposition,

STATEMENT OF THE ISSUES PRESENTED

1. Did the Trial Court properly find that the Board did not rely on the Sketch to establish the height of the Approved Building?

2. Did the Trial Court abuse its discretion when it relied on the Board's Resolution to find that the Board did not rely upon the Sketch when granting 201 Park site plan approval for the Approved Building?

3. Based on the Trial Court's finding that the Board did not rely upon the Sketch, did the Trial Court abuse its discretion when it ruled that the Sketch was irrelevant to prove the height of the Approved Building and therefore not

FILED, Clerk of the Appellate Division, October 22, 2024, **A-002771-23**, **AMENDED**

admissible into evidence?

4. Did the Trial Court abuse its discretion when it found the Home Depot Ad proffered by the Appellant to be irrelevant to prove whether the building constructed by 201 Park complied with the building height approved by the Board for the Approved Building and therefore not admissible into evidence?

COUNTERSTATEMENT OF FACTS

A. THE PROPERTY.

201 Park is the owner of property located at 138 Park Avenue, Hoboken, Hudson County, New Jersey 07030 ("**Property**"). 201 Park sought preliminary and final site plan approval from the Board to redevelop the Property with a new five-story building. In order to do so, 201 Park submitted Application No. HOZ-21-16 ("**Application**") to the Board. (Pa10-11).

The Property is located in the City's R-2 Zone which restricts the building heights to 40'-0" above the Design Flood Elevation ("**DFE**"). Under the City of Hoboken's Zoning Ordinance, a building's height is measured by the vertical distance from the DFE to the highest beam of the flat roof. See City of Hoboken Ordinance §196-6. (Da2). Certain roof appurtenances, such as parapets, are specifically excluded from the measurement of the building heights. See City of Hoboken Ordinance §196-23. (Da3).

B. THE APPLICATION

In its Application, 201 Park sought a variance so it could construct a building that would be 43'-6" above DFE.

1. THE SKETCH (Pa5).

As part of its site plan application, 201 Park submitted the Sketch which was one of many documents submitted to the Board. The other documents included detailed floor plans, side elevation plan, site plan, topographic survey map, etc. (Pa11). The Sketch is a simple illustration of the proposed west elevation that clearly indicates it was drawn "NTS" which means "Not-To-Scale".

The Sketch shows a five (5) story building on the Property with an **approximate** elevation of "+/- 51'". (Pa5). The Sketch also shows five (5) buildings adjacent to the Property which are all labeled as being five (5) stories at **approximate** elevations of "+/- 50'" above finished grade. While all five (5) buildings are indicated to be at or about the same **approximate** elevation, the heights of the buildings depicted on the Sketch are all different. (Pa5).

2. MVMK SIDE ELEVATION PLAN (Da5).

201 Park submitted a side elevation of the Approved Building that was prepared by MVMK Architects ("**MVMK Elevation**"). (Da5). Unlike the Sketch, the MVMK Elevation contained specific measurements drawn to scale which clearly showed the proposed building height as defined by to be 50'-6"

from the finished grade to the roof floor with the following exact dimensions:

43’-6”	Dimension from DFE to roof floor (which is the “Building Height” according to City of Hoboken Ordinance §196-6)
7’-0”	Dimension from the finished grade to DFE
50’-6”	Dimension from the finished grade to roof floor

More importantly, the parapet height is shown on the MVMK Elevation to be an **additional** 3’-3” (which is not included in the calculation of “Building Height”) above the roof floor so that the top of the parapet would be 53’-9” above finished grade. This foregoing is depicted on Da5.

3. THE AMENDED RESOLUTION (Pa10).

On August 15, 2023, the Board adopted its Amended Resolution which unanimously approved 201 Park’s Application to construct the five-story building (“**Amended Resolution**”). (Pa10). In relevant part, the Amended Resolution clearly states the approval of the Application was expressly conditioned on the Approved Building being constructed to the specific Building Height of 43’6” above DFE. While the zoning requirements limited the Building Height to 40’ above DFE, the Board granted 201 Park a specific variance to exceed the Building Height restriction in the R2 Zone and construct its building to a height of 43’-6” above DFE.

> “The proposed building will be constructed at 43’-6” above DFE in accordance with the MVMK architectural plan.” (Pa15).
>
> (See also Pa24, ¶38).

The Amended Resolution further stated that the building was to be constructed in accordance with the "approved plans":

> 26. The proposed project **shall** be constructed in accordance with the **approved plans**. (Pa28) (emphasis supplied),

(See also Pa13, ¶6, Pa24, ¶38 and Pa35, ¶46)

Moreover and relevant to this appeal, the Amended Resolution specifically stated that the Board's Commissioners did not rely on the Sketch nor gave it any weight in approving the Application. The Amended Resolution specified that 201 Park was to construct the Approved Building according to the height shown on the MVMK architectural plans, not the Sketch. (Pa25). See Amended Resolution Paragraph 46 which states in part:

> During deliberation, **none of the Commissioners expressed reliance on the MVMK rendering**, nor mentioned same or gave it any weight on the record and during deliberation. Michael Evers took exception to the MVMK rendering during the hearings. **The architectural plan prepared by MVMK contained the height of the proposed building**, in terms of number of stores and height and the Applicant is bound by same unless additional relief is requested by way of an amended application to the Board. (Pa25) (emphasis added).

4. APPELLANT'S KNOWLEDGE OF THE HEIGHT APPROVED BY THE BOARD

The testimony, evidence, Board findings and conclusions were memorialized in the Amended Resolution. In the Amended Resolution, the Board states that the Appellant attended the April 26, 2022, hearing on the Application (the "**Board Hearing**"). During the Board Hearing, the Appellant

questioned 201 Park's architect, Frank Minervini, AIA of MVMK Architecture, regarding the height of the building from the street to the parapet. Mr. Minervini clearly answered the question by stating the height would be 50 feet above the finished grade to the roof **plus** the parapet which would be approximately another 45 inches.

> Mr. Evers questioned as to how high the building from the street to the parapet is visible from the street. Mr. Minervini testified that the height is **50 feet to the roof** and the **parapet is approximately another 45 inches** … (Pa20) (emphasis added).

As memorialized in the Amended Resolution, the Board and the Appellant were well aware that the Application approved by the Board was to construct a building that had a height of approximately 53'-9" from the finished grade to the top of the parapet. Yet, despite this knowledge, the Appellant filed this action and appeal claiming that the approximate +/- 51' dimension on the Sketch was to the top of the parapet in contradiction to Mr. Minervini's responses to his questions. The Appellant then compounded this error by claiming that the +/- 51 reference on the Sketch was for the overall building height and superseded all other express provisions of the approval including the express condition that the Building Height was to be 43'-6" above DFE. The Appellant also claims that the Sketch superseded the approved architectural plans which show the parapet extending 45 inches above the roof top height of 43'-6" above DFE.

The Amended Resolution is clear and unambiguous: The site plan

approved by the Board was for a building to be constructed to a height of 43'-6" above DFE in accordance with 201 Park's approved architectural plans. Furthermore, there was to be a 45 inch parapet constructed above the roof top elevation. The Amended Resolution also unequivocally stated that the Sketch on which the Appellant's entire case is premised was irrelevant to the approval including the determination of the approved building height. (2T20:24 to 21:5, 2T23:1-10, 2T23:20-21, 2T30:19-24, 2T32:13-18, and 2T33:14-16).

C. THE TRIAL COURT'S MARCH 27, 2024 HEARING (2T).

During the hearing conducted by the Trial Court on March 27, 2024, the Appellant refused to accept the Court's factual finding that the Board did not rely on the Sketch to establish the building's approved height. Instead, the Appellant ignored the Court's ruling and repeatedly argued that the building was not constructed to the proper height based solely on the Sketch. The Appellant pointed to no other document or evidence to support his contention.

Notwithstanding the Trial Court's factual finding, the Appellant requested that the Sketch be moved into evidence. 201 Park objected to the admission of the Sketch into evidence on the grounds that the Sketch was not relevant because it was not considered by the Board. The Trial Court sustained 201 Park's objection and denied the admission of the Sketch into evidence. (2T20:24 to 21:5, 2T23:1-10, 2T23:20-21, 2T30:19-24, 2T32:13-18, and 2T33:14-16).

Despite the Sketch having been excluded from evidence, the Appellant then attempted to move the Home Depot Ad into evidence. The proffer for the Home Depot Ad was to show the cinder block dimensions depicted in the advertisement demonstrated that the constructed building height exceeded the +/- 51' building height shown on the Sketch. As the Sketch had already been ruled irrelevant and therefore inadmissible, the Trial Court held that the Home Depot Ad to prove the building was not built in accordance with the Sketch was likewise irrelevant and therefore inadmissible. (2T36:24 to 39:14).

The Appellant's burden was to prove that the actual building height exceeded the approved building height of 43'-6" above DFE as shown on the **approved plans** and not the Sketch. (2T39: 4-25). The Trial Court gave the Appellant numerous opportunities to introduce **relevant** evidence to support his claim that the actual building height exceeded the building height shown on the approved plans. (2T40:12-16). Instead of introducing evidence that the building exceeded the height shown on the approved plans, the Appellant repeatedly attempted to introduce the Sketch and Home Depot Ad to prove his claim. Given the complete lack of relevant evidence introduced by the Appellant, the Trial Court appropriately dismissed the Complaint with prejudice as the Appellant failed to carry his burden of proof. (2T40:20 to 42:8).

LEGAL ARGUMENT

POINT I

STANDARD OF REVIEW

It is well-established that "evidentiary decisions are reviewed under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." Rodriguez v. Wal-Mart Stores, Inc., 237 N.J. 36, 57 (2019) (quoting Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369 (2010)). The Trial Court's evidentiary rulings are entitled to deference absent the showing of an abuse of discretion. State v. Marrero, 148 N.J. 469, 484 (1997). "On appellate review, a trial court's evidentiary ruling must be upheld 'unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide off the mark that a manifest denial of justice resulted.'" Belmont Condominium Association, Inc. v. Geibel, 432 N.J. Super. 52 (App. Div. 2013) (quoting Green v. N.J. Manufacturers Insurance Company, 160 N.J. 480 (1999)). See also, Grewal v. Greda, 463 N.J. 489 (2020); DeVito v. Sheeran, 165 N.J. 167 (2000); State v. Morton, 155 N.J. 383 (1998).

In this case, the Trial Court addressed the Appellant's claims and found that the Board did not consider the Sketch and therefore was not relevant to the Board's approval including the height to which 201 Park was to construct its building. Therefore, the Sketch did not support the Appellant's claim that the

Approved Building was not constructed in accordance with the Board's approval. The Trial Court's rulings were reasonable and correct under the law. Accordingly, based on the law set forth, the Trial Court's evidentiary rulings to exclude the Sketch, and the Home Depot Ad should be given deference and the dismissal of the Appellant's actions upheld in this Appeal.

POINT II

THE TRIAL COURT PROPERLY RELIED UPON THE BOARD'S AMENDED RESOLUTION.

A. THE BOARD'S AMENDED RESOLUTION PROVIDED FINDINGS OF FACT AND CONCLUSION.

A zoning board's resolution provides findings of fact and conclusion as to the board's decision whether to grant a variance. "It is the resolution, and not board members' deliberations, that provides the statutorily required findings of fact and conclusions." New York SMSA v. Bd of Adjustment of Tp. Of Weehawken, 370 N.J. Super. 319, 333-34 (App. Div. 2004). Zoning boards are deemed "best equipped to determine the merits of variance applications." Scully-Bozarth Post #1817 of Veterans of Foreign Wars of the U.S. v. Planning Bd. Of the City of Burlington, 362 N.J. Super. 296, 314 (App. Div. 2003).

In his Opposition to Motion for Summary Disposition ("**Opposition**[1]"),

---

[1] 201 Park filed a Motion for Summary Disposition in this Appeal (Appellate Motion M-007188-23). Excerpts from Appellant's Brief in Opposition to the Motion for Summary Disposition are included in 201 Park's Appendix at Da6-Da14.

the Appellant agreed with 201 Park's position that the Amended Resolution has the force of law. The Appellant further argued that the Amended Resolution should be enforced. (Da7, Da11, Da14). 201 Park agrees.

1. THE APPROVED BUILDING HEIGHT EXCLUDED THE PARAPET.

When the Amended Resolution is taken as a whole, the only logical conclusion is that 201 Park's site plan approval was based on the building be constructed to a height of 43'-6" above DFE as set forth in the **approved** architectural plans. (See Pa13, ¶6, Pa24, ¶38, Pa25, ¶46, and Pa28, ¶26).

- The building height was to be built 43'-6" above DFE in accordance with the MVMK architectural plan; (Pa15)
- The architectural plan prepared by MVMK contained the height of the proposed building; (Pa25), and
- The proposed project shall be constructed in accordance with approved [MVMK] plans. (Pa28).

Appellant in fact **agreed** that the approved building height would be measured from 43'-6" above DFE to the top of the flat roof. (Da9). Further, the Appellant **agreed** that DFE was approximately 7 feet above the finished grade. (Da9-10). Accordingly, Appellant therefore agrees that the building height from the finished grade to the top of the flat roof is a total of 50'-6".

This 50'-6" above finished grade dimension is consistent with the approved MVMK architectural plans which clearly showed this to be the finished grade to the top of the flat roof. (Da5). The approved MVMK

architectural plans also show a parapet which has a height of 3'-3" **above the flat roof**. Under City of Hoboken Ordinances §196-6 and §196-23, the height of the parapet is not included in the calculation of Building Height. (Da2-3). The parapet height extends **above** the Building Height as clearly shown on the approved MVMK architectural plans.

Appellant contends that the dimension shown on the Sketch is the basis for this appeal, not the approved height. (Da9). Appellant contends that the approximate +/- 51' dimensions "represent the distance from the street grade to the **top of the building's façade** and is only tangentially related to the approved building height." (Da9-10). (emphasis supplied). The Appellant's admissions, however, undermine his own arguments.

Appellant fails to recognize that the Sketch is not-to-scale and not intended to be used for construction purposes. 201 Park was required to build according to approved plans such as the detailed elevation architectural drawing which contained exact measurements. The Sketch was only a schematic drawing to illustrate the building's façade showing approximate dimensions that were not-to-scale. Regardless, the approximate +/- 51' dimension shown on the Sketch is actually close to the 50'-6" actual building height (within 00.08%) from the finished grade to the roof deck, excluding the parapet.

As the City Ordinance does not include the parapet in the calculation of

building height, the Appellant is simply incorrect in his claim that the height on the Sketch is to the top of the building façade including the parapet. His interpretation of the +/-51' dimension is not supported by anything shown on the Sketch or the approved plans. It is merely an unsupported and incorrect assertion made by the Appellant's in an attempt to contrive a claim that simply does not exist.

The Appellant's intentional misinterpretation of the +/- 51' to include the parapet was made clear by the Amended Resolution which memorialized the testimony during the Application Hearing. In particular, the Amended Resolution recounts how the Appellant specifically asked 201 Park's architect, Mr. Minervini, about the building's height to the top of the parapet. As documented in the Amended Resolution, Mr. Minervini expressly stated that "the height is 50 feet to the roof and the parapet is approximately another 45 inches". (Pa20). Appellant's spurious contention that the +/- 51 feet includes the parapet is therefore disingenuous at best.

2. THE BOARD DID NOT CONSIDER THE SKETCH.

As found by the Trial Court, Paragraph 46 of the Amended Resolution unequivocally states that the Sketch was not relied upon or even considered by the Board. (Pa25). Specifically, "none of the Commissioners expressed reliance on the MVMK rendering, nor mentioned same or gave it any weight on the

record and during deliberation." (Pa25). The Sketch was therefore not part of the "approved plans".

In an attempt to nullify the importance of Paragraph 46, the Appellant attempts to mislead the Court by paraphrasing the language of the Amended Resolution to spuriously state that none of the Commissioners "said anything about [the Sketch] during their deliberations." (Da13). Appellant's paraphrase of the Amended Resolution contradicts the actual plain meaning of Paragraph 46. Simply stated, the Commissioners did not rely upon the Sketch nor gave it any weight when they were considering the variance for the Application. Thus, the Sketch **had no relevance** to the Board's decision or approval.

The Appellant also completely ignored the clear mandate in Paragraph 26 of the Amended Resolution which states that the proposed project **shall** be constructed in accordance with the approved plans. (Pa28). It is important to note that the mandate in Paragraph 26 does not include the Sketch, only the approved plans. Thus, the proposed project was not required to be constructed in accordance with the Sketch which was only a schematic not-to-scale drawing. The Amended Resolution further stated that the Building Height was to be 43' 6" on which there the parapet would be constructed. This too was ignored by the Appellant.

Instead of addressing the foregoing provisions in the Amended

Resolution, the Appellant relies **entirely** upon his self-serving interpretation of Paragraph 21 which is misplaced. Amended Resolution Paragraph 21 is simply a finding of fact regarding the documents that 201 Park submitted to the Board as part of its application. (Pa11). Nothing in Amended Resolution Paragraph 21 either adopts the Sketch or makes it part of the final approval. Instead, it merely recognizes that, as a fact, it was submitted to the Board.

The Appellant's argument takes Paragraph 21 out of context and omits the bold text highlighted below in the full text of Paragraph 21:

> That the site be developed with the proposed use and in accordance with the current plans and renderings as submitted to the Zoning Board of Adjustment **except as modified by the Board as set forth herein**. (emphasis supplied) (Pa28).

Even if, *arguendo*, the Board did consider the Sketch, Paragraph 8 of the Amended Resolution states that the height of the building approved by the Board was 43'-6" above DFE as shown in the MVMK architectural plans. Therefore, the specified height of 43'-6" would constitute the Board's finding and approval as opposed to the approximate height referenced in the Sketch.

If the Appellant had an issue with the approved height, he should have appealed the Amended Resolution within the statutory time limit. He chose not to file any such appeal. Absent filing such a timely appeal, the Appellant is now bound by the express terms of the Amended Resolution including the permissible building height of 43'-6" above DFE excluding the parapet.

Having actively participated in the April 26, 2022 hearing, the Appellant was fully aware that the approved building height was approximately 50' above finished grade to the roof plus the 45" parapet. Yet, the Appellant alleged in his Complaint and continues in this appeal that the Sketch showed a dimension of +/- 51' above finished grade to the top of the parapet when he **knew** that the height to the top of the parapet was at least 53'-9".

A reading of the full Amended Resolution and transcripts of the proceedings below demonstrate that the Trial Court properly and reasonably held that the Sketch was not relied upon or considered by the Board, and therefore, the Sketch lacked any relevance to the issue of whether the constructed building exceeded the height approved by the Board. Accordingly, the Trial Courts findings of fact and conclusions of law consistent with the foregoing were reasonable. As such, those findings should be upheld in this appeal.

B. THE TRIAL COURT WAS BOUND TO GIVE SUBSTANTIAL DEFERENCE TO THE AMENDED RESOLUTION.

The Trial Court below was required to give substantial deference to the Board's decision as set forth in the Amended Resolution unless the Amended Resolution was found to be arbitrary, unreasonable or capricious. See Scully-Bozarth Post #1817, 362 N.J. Super. at 314 wherein it was held that "Courts will interfere with such local decisions only if they are arbitrary, unreasonable or

capricious". See also, Kramer v. Board of Adjustment, Sea Girt, 45 N.J. 268, 296 (1965).

In giving deference, the Court must **presume** the Amended Resolution to be valid, and it is the Appellant's burden to prove otherwise. Scully-Bozarth Post #1817, 362 N.J. Super. at 314. The Appellant never challenged the Amended Resolution. In fact, the Appellant has embraced the Amended Resolution and relied upon it for its argument by persistently citing Paragraph 21 in his argument before the Trial Court and in his Appellate Brief. (Da7, Da11, Da14).

The Trial Court had no choice but to give substantial deference to the Board's finding of fact in the Amended Resolution. In deferring to the Board, the Trial Court found that the Board did not base its findings, opinion or approval on the Sketch.

> THE COURT: I'm sustaining the objection. It's not relevant. I need not waste any time about the rendering. That's not what [the Board] based their opinion on. (2T22: 18-21).

The above statement by the Trial Court was a finding of fact. By giving deference to the Board's finding of fact, the Trial Court below made the finding of fact that the Board did not base their opinion on the Sketch.

"Fundamentally, a reviewing court may not substitute its judgment for that of local officials." Scully-Bozarth Post #1817, 362 N.J. Super. at 314. The Trial

Court could not, and appropriately did not, substitute its own judgment for that of the Board with regard to whether the Sketch should have been considered. In doing so, the Trial Court reasonably held that the Sketch and thus, the Home Depot Ad lacked any relevance to the action and appropriately excluded same.

C. THE TRIAL COURT'S FINDINGS OF FACT ARE BINDING ON APPEAL.

A trial court's findings of fact are considered binding on appeal unless they are wholly insupportable as to result in a denial of justice. Rova Farms Resort, Inc. v. Investors Ins. Co. of America, 65 N.J. 474, 483 (1974). See also, Greenfield v. Dusseault, 60 N.J. Super. 436, 444 (App. Div. 1960), aff'd o.b. 33 N.J. 78 (1960). "Findings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence." Rova Farms, 65 N.J. at 483. Factual findings are not reversed by the Appellate Court unless "they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interest of justice." Rova Farms, 65 N.J. at 483 (quoting Fagliarone v. Township of North Bergen, 78 N.J. Super. 154, 155 (App. Div. 1963).

The Trial Court's finding of fact that the Sketch was not considered by the Board is wholly supported by adequate, substantial and credible evidence. The plain language of the Amended Resolution clearly states that the Sketch was not considered by the Board. There was absolutely no evidence to the contrary

presented by the Appellant, and the Appellant never challenged the Amended Resolution. Accordingly, the Trial Court's findings of fact that the Sketch was not considered by the Board when approving 201 Park's Application must be upheld on appeal. Id.

POINT III

THE TRIAL COURT PROPERLY EXCLUDED THE SKETCH AND HOME DEPOT ADVERTISEMENT AS IRRELEVANT.

The Trial Court ruling that the Sketch was irrelevant and thus inadmissible as evidence was based on its finding of fact that the Sketch was not considered or relied upon by the Board in the approval of 201 Park's Application.

> THE COURT: I'm sustaining the objection. **It's not relevant**. I need not waste any time about the rendering. That's not what [the Board] based their opinion on. [emphasis supplied.] 2T22:18-21.

N.J.R.E. 401 defines relevant evidence as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." Therefore, for evidence to be "relevant" under N.J.R.E. 401, there must be a logical connection between the proffered evidence and a fact in issue. "In determining whether evidence is relevant, the inquiry should focus upon the logical connection between the proffered evidence and a fact in issue." Correia v. Sherry, 335 N.J. Super. 60, 68 (App. Div. 2000) (quoting State v. Swint, 328 N.J. Super. 236, 252 (App. Div. 2000)). See also, Kuzian v. Tomaszewski, 457 N.J. 458 (Law Div. 2018). Trial courts have broad discretion in determining

whether there is a logical connection between the proffered evidence and the fact in issue. Wymbs ex rel. Wymbs v. Township of Wayne, 163 N.J. 523, 537 (2000). Further, trial courts have broad discretion as to whether evidence which may be relevant should nonetheless excluded under N.J.R.E. 403. Wymbs, 163 N.J. at 537. See also, Green, 160 N.J. at 492. Herein, N.J.R.E. 403 cited by Appellant did not apply given the Trial Court's exclusion of the evidence based on relevance.

The key issue in the Appellant's claim is whether the actual building height exceeds the approved building height of 43'-6" above DFE as shown on the plans approved by the Board. The Appellant sought to introduce the Sketch as evidence of the building's approved height despite it having no bearing or "relevance" to that issue. Given the Sketch's use of "+/-" for the height of each depicted building could mean that the differentials between the drawing and actual heights could be anything. This is also why the Board must sign off on the signed and sealed scaled drawings, and not a "+/-" demonstrative exhibit, prior to the zoning officer's issuance of a zoning permit. Clearly, the Trial Court properly found that there was simply no basis on which the Sketch would tend to prove or disprove whether the height of the constructed building was compliant with the Board's approval.

Moreover, the Sketch clearly stated on the document that it was not-to-

scale. (The "NTS" shown on the Sketch is a common architectural notation for "not-to-scale".) The Trial Court properly excluded the Sketch as evidence given the Sketch had no logical connection to the key issues of the approved height for the building and the actual height of the constructed building.

The Appellant also attempted to introduce a Home Depot Ad into evidence which purportedly showed the dimensions of a cinder block. The Appellant sought to use the size of a Home Depot cinder block, which may or may not have been used in the actual construction of 201 Park's building, to prove the 201 Park's constructed parapet was taller than that shown on the irrelevant Sketch. Moreover, the height of only the parapet fails to provide **any** evidence of the building height because the parapet is not included in the calculation of building heights in the City of Hoboken. As the parapet is not included in the building height, the cinder block dimensions were irrelevant to the issue of the building height.

The Trial Court properly ruled that the Home Depot Ad was therefore inadmissible on the grounds of relevancy. As the Sketch was irrelevant, the Home Depot ad was also irrelevant as it was proffered to show the hypothetical, "+/-," not-to-scale building height <u>shown on the Sketch</u>. It was further ruled inadmissible because it was impossible for the Trial Court to ascertain the actual building height from the measurement of one cinder block.

> **THE COURT**: I'm barring [the Home Depot Ad]. It certainly shows the dimension of one cinder block. From the other photographs in this picture, disregarding [the Sketch], which I never moved into evidence, it is impossible to judge the height of the building from the measurement of one cinder block when there's only six rows of cinder blocks above the fourth-floor windows, and that's all the cinder blocks I see in any of the other photographs. 2T39:4-12.

Neither the Sketch nor the Home Depot Ad addressed the key issue of the actual building height or the approved building height. As such, the Trial Court properly ruled that both the Sketch and the Home Depot Ad were excluded from evidence. Verdicchio v. Ricca, 179 N.J. 1, 34 (2004).

The Trial Court's evidentiary rulings were reasonable and well within the law. This Court should note that after excluding the Sketch and Home Depot Ad, the Trial Court gave the Appellant numerous opportunities to introduce relevant evidence of the approved and actual building height. The Appellant had the opportunity to introduce the approved elevation plan, he but chose not to do so. Had he introduced the approved elevation plan, it would have shown that the building height dimension of 50'-6" above finished grade **did not include the parapet**. That would have defeated his entire argument of the dimension on the Sketch being somehow relevant.

Instead, the Appellant kept trying to prove his case based on the excluded Sketch. There was clearly no abuse of discretion or denial of justice by the Trial Court's factual findings and evidentiary ruling based thereon.

"The trial court is granted broad discretion in determining the relevance of evidence." Verdicchio, 179 N.J. at 34 quoting Green, 160 N.J. at 492. Absent abuse of discretion, the Trial Court's evidentiary rulings are entitled to deference. Wymbs, 163 N.J. at 537. Accordingly, the exclusion of the Sketch and Home Depot Ad into evidence should be upheld on appeal. Id.

CONCLUSION

For the foregoing reasons, the Trial Court did not abuse its discretion by excluding the Sketch and Home Depot Ad as evidence on the grounds that they lack relevance. Accordingly, the Trial Court's rulings and dismissal of the Complaint should be upheld.

Respectfully submitted,
Prime & Tuvel
Attorneys for Respondent
201 Park Avenue Corp.

/s/ Jason R. Tuvel
JASON R. TUVEL, ESQ.

The Turteltaub Law Firm LLC
Attorneys for Respondent
201 Park Avenue Corp.

/s/ James M. Turteltaub
JAMES M. TURTELTAUB, ESQ.

Dated: October 22, 2024.

FILED, Clerk of the Appellate Division, November 07, 2024, **A-002771-23**

PLAINTIFF/APPELLANT

MICHAEL F. EVERS

vs.

DEFENDANTS / RESPONDENTS

ANN HOLTZMAN (in her capacity as the Hoboken Zoning Officer)
201 PARK AVENUE CORP

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002771-23T4

CIVIL ACTION

On Appeal from
A Final Order of the
Superior Court of New Jersey
Hudson County

Sat below:
Hon. Anthony V. D'Elia

PLAINTIFF/APPELLANT'S REPLY BRIEF

MICHAEL F. EVERS
252 SECOND STREET
HOBOKEN, NJ 07030
917-880-6682
evers@drumlish.com
PLAINTIFF/APPELLANT PRO SE

Michael F. Evers pro se Appellant
On the Brief

FILED, Clerk of the Appellate Division, November 07, 2024, **A-002771-23**

TABLE OF CONTENTS

TABLE OF AUTHORITIES p. 2

TABLE OF JUDGMENTS, ORDERS, RULINGS p. 3

TRANSCRIPT TABLE p. 3

PRELIMINARY STATEMENT p. 4

PROCEDURAL HISTORY p. 7

OPPOSITION TO STATEMENT OF ISSUES PRESENTED p. 7

OPPOSITION TO COUNTERSTATEMENT OF FACTS p. 7

LEGAL ARGUMENT p. 8

POINT I

Respondents' Proposed Standard of Review Duplicates the Same Error the Trial Court Made in Denying Admission of the Evidence that Is the Subject of this Appeal p. 8

POINT II

In Their Second Legal Point, Respondents Continues To Make the Same Error as They Did in Their First Legal Legal Point While at the Same Time Making Arguably False Statement Concerning the Diagrammatic Elevation which Undermining Their Argument that the Trial Court Should Have Deferred to the Decision Set Forth in the Amended Resolution. p. 11

POINT III

Respondent Errs in Its Analysis of the Diagrammatic Elevation (aka "the Sketch") and again misrepresents the Appellant's basis for appeal. **p. 13**

CONCLUSION **p. 15**

CERTIFICATION **p. 18**

TABLE OF AUTHORITIES

CASES:

Belmont Condominium Association, Inc. v. Geibel, 432 N.J. Super. 52 (App. Div. 2013)

Green v. N.J. Manufacturers Insurance Company, 160 N.J. 480 (1999)

Scully-Bozarth Post #1817, 362 N.J. Super. at 314

STATUTES AND MUNICIPAL ORDINANCES:

RULES OF COURT:

RULES OF EVIDENCE (OF COURT):

NJRE 401

NJRE 402

OTHER AUTHORITIES:

TABLE OF JUDGMENTS, ORDERS,

AND RULINGS BEING APPEALED

Final Order Dismissing Plaintiff's Order to Show Cause and Verified Complaint (1a)

TRANSCRIPT TABLE

1T = Transcript of the Hearing before Judge Anthony V. D'Elia of March 6, 2024

2T = Transcript of the Hearing before Judge Anthony V. D'Elia of March 27, 2024

PRELIMINARY STATEMENT

Pay no attention to the man behind the curtain.

--- The Wizard of Oz

This famous line from the movie "The Wizard of Oz" lends a fitting motif for the Respondents' briefs. They seem determined to direct the attention of the Court everywhere ***except*** toward the actual basis for this appeal.

To review the actual basis for this appeal, Appellant claims that the Trial Court erred in denying admission of evidence needed to prove that the respondent 201 Park Ave Corp (hereafter "201 Park") had violated one of the binding conditions of a zoning board resolution that granted variance relief to 201 Park. The Trial Court erred by instead treating Appellant's complaint as a challenge to the zoning board's grant of variance and denied admission of the Appellant's evidence on the grounds that it was not relevant to the zoning board's decision to grant variance relief to 201 Park.

However the Appellant's complaint had nothing to do with the rationale or deliberations that lead to the granting of variances. Rather, Appellant alleged a violation of binding conditions of the zoning resolution in question by 201 Park. Put another way, the Trial Court erred both in its interpretation of the grounds for Appellant's complaint and its interpretation of the resolution granting variance relief. To explain further, the "Conditions"

section of the resolution in question states (emphasis added):

> *… the Board hereby grants the requested relief from the Zone requirements associated with the Property,* ***subject to the following conditions****:" (26a)*

Paragraph 21 of the list of conditions of this resolution states:

> *That the site be developed with the proposed use and in accordance with the current plans* ***and renderings*** *as submitted to the Zoning Board of Adjustment except as modified by the Board as set forth herein. (28a)*

This same resolution also provides a list of documents that represent the plans and renderings submitted to the Zoning Board of Adjustment of the City of Hoboken (hereafter "Hoboken Zoning Board") by which 201 Park is to be bound (11a). This list includes the **Park Avenue (West Side) Diagrammatic Elevation** (hereafter, "Diagrammatic Elevation")(11a, 4a). The Diagrammatic Elevation is one of the pieces of evidence Appellant sought to introduce as evidence to demonstrate that 201 Park had violated the conditions contained in Paragraph 21 of the "Conditions" section. The Diagrammatic Elevation shows that the façade of the property was supposed to be no more than approximately one foot higher than the façade of the adjacent building. Combined with photos the Trial Court did admit as evidence, and another document the Court did not admit, this evidence clearly demonstrates that the façade exceeds the height of the adjacent façade by more than four feet. Its admission was denied.

The basis of this appeal is that 201 Park Ave violated the binding

conditions of Paragraph 21 of the 08/15/2024 Amended Resolution of Approval (hereafter "Amended Resolution) and that the Trial Court – because of its errors of interpretation – denied admission of evidence relevant to proving this fact.

In their briefs, Respondents pursue a somewhat Oz-like strategy that encourages this Court to look everywhere but at the suppressed evidence and its relevance to Appellant's case. We hear a refrain of the Trial Court's error regarding the fact that the Hoboken Zoning Board of Adjustement (hereafter "Hoboken Zoning Board") did not discuss the rendering in question when granting a variance. We hear about the fact that some aspects of the rendering were not drawn to scale – although Appellant's complaint is based on actual numbers found in the rendering. We hear about the "approved height" of the building, which has nothing to do with the relative heights of the two facades.

"Pay no attention to the rendering referenced in the zoning resolution," one might hear the "Lawyers of Oz" say.

But a violation of a condition of a zoning resolution is a violation of law. Can a Court really ignore it or "misinterpret" it away without poking a small hole in our system of laws – a "hole" likely to encourage actors to violate Hoboken's land use laws with ever greater impunity, which Appellant would argue is already the case. As the musician Neil Young says: "Rust never sleeps."

And, as Appellant asked in his intial brief: Is the law to be taken seriously or not?

PROCEDURAL HISTORY

Appellant includes and supplements the Procedure History provided in this brief with the following additions:

07/25/2024, Appellant's Brief filed

09/11/2024, 09/12/2024 Respondents motion for summary disposition filed

09/19/2024 Appellant's opposition to motion to dismiss filed

10/07/2024 Respondents' motion for summary disposition denied

10/22/2024, 10/23/2024 Respondents' Briefs filed

OPPOSITION TO STATEMENT OF ISSUES PRESENTED

Appellant disputes the validity of all of the issues presented by 201 Park because they refer to the relevance of the barred evidence to the Hoboken Zoning Board's deliberations in granting variance relief. These deliberations are irrelevant to the current appeal, which involves the relevance of the barred evidence introduced for the purpose of proving that 201 Park violated binding conditions of the Amended Resolution.

OPPOSITION TO COUNTERSTATEMENT OF FACTS

Appellant incorporates his statement of facts presented in the Appellant's brief and supplements it with the following commentary and opposition to Respondents "Counterstatement of Facts". Consistent with its

"Oz-like" strategy, Respondents attempt to characterize Appellant's dispute as having something to do with the approved height of the building in question, which it does not. Hence, most of the facts marshaled by Respondents in pursuit of this strategy are irrelevant.

Appellant would observe that 201 Park appears to go so far as to make demonstrably false statements when it claims: ***Appellant then attempted to introduce the Rendering into evidence to demonstrate that the actual building height was higher than the height shown on the rendering. (Turteltaub-Rb5)*** Appellant's evidence demonstrates that the façade of the building was over three feet higher than permitted by the Diagrammatic Elevation. This dimension has nothing to do with the actual, approved height of building and is simply false.

LEGAL ARGUMENT

STANDARD OF REVIEW

POINT I

Respondents' Proposed Standard of Review Duplicates the Same Error the Trial Court Made in Denying Admission of the Evidence that Is the Subject of this Appeal

Respondents continue what might be called "Operation Oz" in specifying a standard of review that has nothing to do the basis for this appeal:

In this case, the Trial Court addressed the Appellant's claims and found that the Board did not consider the Sketch and therefore was not relevant to the Board's approval including the height to which 201 Park was to construct its building. Therefore, the Sketch did not support the Appellant's claim that the Approved Building was not constructed in accordance with the Board's approval (Turteltaub-Rb 12-13).

Note: Appellant assumes "the Sketch" is the Diagrammatic Elevation rendering referred to in the Amended Resolution as a component of the architectural plans filed by 201 Park as part of its zoning application (4a). Perhaps calling the rendering a "sketch" is merely another "Ozian" tactic.

In making their assertion, Respondents echo the same error that the Trial Court made, which is that Appellant's complaint had something to do with the manner in which the Hoboken Zoning Board reached its decision to grant variance relief to 201 Park.

THE COURT: I'm sustaining the objection. It's not relevant. I need not waste any time about the rendering. That's not what [the Board] based their opinion on. (2T22: 18-21)

And later:

THE COURT: They didn't rely upon that rendering, so now you prove to me –

MR. EVERS: But the same --

THE COURT: -- how the existing height of this building violated the resolution that was approved. (2T30: 19-24)

As stated previously, the basis of the complaint that underlies this appeal is that the developer, 201 Park, violated a binding condition of the Amended Resolution that granted them variance relief. It had nothing to do with the approved height of the building, which is an entirely different dimension than the height of the façade and – to be specific to the complaint – the relative height of the building's façade as presented in the Diagrammatic Rendering.

In other words, the Trial Court denied the admission of Appellant's evidence based on an entirely different legal issue than the one for which the Appellant had filed a complaint. For reasons perhaps best known to the Respondents, they have chosen to make the same, erroneous argument. Appellant would argue that, for this reason, their argument is entirely irrelevant.

For a court to make a ruling based on a complaint that a plaintiff had not actually made while ignoring the actual complaint that the plaintiff did make is no small error.

Appellant would respectfully submit that the Trial Court's " 'finding was so wide off the mark that a manifest denial of justice resulted.' " (Belmont Condominium Association, Inc. v. Geibel, 432 N.J. Super. 52 (App. Div. 2013) (quoting Green v. N.J. Manufacturers Insurance Company, 160 N.J. 480 (1999)).

POINT II

In Its Second Legal Point, Respondents Continues To Make the Same Error as They Did in Their First Legal Legal Point While at the Same Time Making Arguably False Statement Concerning the Diagrammatic Elevation that Undermine Its Argument that the Trial Court Should Defer to the Decision Set Forth in the Amended Resolution.

Most of the Respondents' arguments concerning this legal point involve a continuation of the errors already outlined in Appellant's response to the first legal point. They can therefore be disregarded as irrelevant to this appeal.

One issue that does merit comment involves an arguably false statement made regarding the Diagrammatic Elevation that is the essential piece of evidence motivating this appeal.

Respondents attempt to argue that the Diagrammatic Elevation has somehow been deleted from the list of renderings that bind the dimensions of the building onstructed by 201 Park while at the same time apparently pretending that the frequently referenced Paragraph 21 does not really contain binding conditions. 201 Park states:

> *Amended Resolution Paragraph 21 is simply a finding of fact regarding the documents that 201 Park submitted to the Board as part of its application. (Pa11). Nothing in Amended Resolution Paragraph 21 either*

adopts the Sketch or makes it part of the final approval. (Turteltaub-Rb18).

The paragraph that 201 Park refers to in this quotation is, in fact, located in the section of the Amended Resolution that lists the ***conditions*** to which the developer must comply (24a, 28a). So this statement is simply false.

And, as discussed in this Reply Brief's Preliminary Statement, the same Diagrammatic Elevation remains listed among the plans and renderings that made up 201 Park's application for variance relief in the Amended Resolution (11a). It therefore most certainly would be among the plans and renderings referred to in the now-infamous Paragraph 21 of the Amended Resolution's "Conditions" section (28a). The Amended Resolution contains no language indicating that it had been deleted, merely that it had not been discussed or relied upon during deliberations concerning the granting of variances.

This grant of variance that makes no reference to the height of the façade, incidentally. But why would it? After all, the Diagrammatic Elevation, as part of the approved plans, addressed the issue of the dimensions of the façade.

Respondents Undermine Their Own "Deference" Argument

Respondents argue that the Trial Court was obligated to give substantial deference to the Hoboken Zoning Board's decision, citing Scully-Bozarth Post #1817, 362 N.J. Super. at 314 (Turteltaub-Rb19). Respondents

continue their argument by claiming that the Trial Court is obligated to "presume the Amended Resolution to be valid" (Turteltaub-Rb19).

The problem with this argument is that the Appellant was arguing that the Amended Resolution was indeed valid and that 201 Park had violated its conditions. In fact, it is the Trial Court that failed to give proper deference to the Amended Resolution when it decided that one of the elements of the plans and renderings listed at the beginning of the Amended Resolutions Findings of Fact section – the Diagrammatic Elevation -- should be disregarded as a binding condition based on the erroneous reasoning discussed in Legal Point 1 of this Reply Brief.

So, Appellant would heartily agree with Respondents' contention that the Trial Court should have given deference to the amended resolution. Unfortunately, the Trial Court did not give the required deference.

POINT III

Respondent Errs in Its Analysis of the Diagrammatic Elevation (aka "the Sketch") and Again Misrepresents the Appellant's Basis for Appeal.

To address the substantial factual misrepresentation, 201 Park states:

> *The key issue in the Appellant's claim is whether the actual building height exceeds the approved building height of 43'-6" above DFE as shown on the plans approved by the Board. The Appellant sought to*

introduce the Sketch as evidence of the building's approved height despite it having no bearing or "relevance" to that issue. (Turteltaub-Rb 23)

This is another, clearly false statement. Appellant has not argued – neither in his brief to this Court nor in his complaint to the Trial Court – that 201 Park had violated the building-in-question's approve height. Appellant describes the distinction between "approved" height and the relative height violation 201 Park exceeded at considerable length in his initial brief (Ab 17-18). Consequently, the arguments based on this false claim should be diregarded as irrelevant to Appellant's actual basis for appeal.

One point that Appellant would like to address, however, is the issue of the Diagrammatic Elevation not being drawn to scale. Aspects of the Diagrammatic Elevation may well not have been drawn to scale. Of course, one could ask the question of ***why*** the rendering was not drawn to scale -- other than with the possible goal of misleading Hoboken Zoning Board as to the size of the building relative to adjacent properties and the visual magnitude of the requested height variance. But this is speculation.

That said, Appellant's complaint to the Trial Court is based on the heights represented on this rendering as "+/- 50" feet for 136 Park Avenue, the adjacent building to the south, and "+/- 51" feet for the subject property.

Neither respondent seeks to explain how one can provide a number "not to scale". One can give approximations for numbers, as they rendering does, but a disinterested party would be hard-pressed to explain how a difference of "+/-" one foot winds up being "+/-" more than four feet. Whatever was not drawn to scale in the Diagrammatic Elevation, it is not going to be actual numbers.

Consequently, Respondents' arguments about what aspects of the Diagrammatic Elevation are or are not drawn to scale are irrelevant and should be disregarded, as should their demonstrably false claim.

CONCLUSION: Senator Daniel Patrick Moynihan and Broken Windows

As demonstrated, the Trial Court erred in this case by treating Appellant's complaint as if it was an appeal of a zoning board decision on the grounds that the decision was arbitrary and capricious. It should have treated Appellant's complaint as being about a violation of a binding condition of a zoning resolution. Had it done so, it would have seen the clear relevance of the two pieces of denied evidence per Rules 401 and 402. This is particularly the case regarding the Diagrammatic Elevation, because it literally expresses the condition which Appellant contends has been violated. As shown, the Trial Court's reasoning in this regard was erroneous and should be reversed.

Whatever the merits of Respondents' arguments arguments to the contrary may be, they all fail for the simple reason that they appear to be about

another, imaginary complaint in which the Appellant is apparently challenging a decision of a zoning board. But this was not the complaint the Appellant brought and should therefore be consigned to whatever place courts consign imaginary arguments of this kind.

All that said, it is not unreasonable to ask: ***"For God's sake, we're talking about three damned feet of façade. What difference does it make?"***

Appellant would respond by first citing the "Broken Windows" Theory of Crime. If the Law is not taken seriously in small matters, there is a marked tendency for the Law to be taken less seriously in progressively larger matters. As Appellant pointed out in the preliminary remarks to his Appellate Brief, this kind of erosion can culminate in truly terrible outcomes, such as the failure to construct hundreds – and, most likely – thousands of affordable housing units homes in a single municipality (Ab 10). If developers can ignore some height limitations because the Court does not enforce the Law, what limitations will it choose to ignore next? Better to fix the problem while it – and the harm it causes – remains small.

As the late United States Senator, Daniel Patrick Moynihan, pointed out, our society seems to be engaged in an unfortunate process of "dumbing deviancy down". Appellant would argue that ignoring this fairly clear-cut violation of law by coming up with some not particularly well-argued rationalization for a why limitation is not really a limitation and a why a violation

of law is not really a violation of law is an example of precisely the "dumbing deviancy down" process described by Senator Moynihan.

It is also interesting to note that 201 Park could have made this appeal go away by simply requesting a clarifying hearing from the Hoboken Zoning Board to approve the changes in its plan, as specified in Paragraph 2 of the Conditions section of the Amended Resolution:

> *Revised plans, to the extent necessary, shall be submitted to the Board and the Board professionals for review and approval.* (26a)

This would have taken all the air out of Appellant's case. Instead, 201 Park has preferred to go through the time, expense, and risk of an adverse court decision. Something does not add up there. If things are as clear-cut as the Respondents claim, how would going back before the Hoboken Zoning Board represent a riskier course of action than a court case?

The final question Appellant would pose to the Court is the same as the first one he asked: ***Is the law to be taken seriously, or not?*** Our hope is that the Court does see through the oppressive cloud of obfuscation hovering before it, and ***does*** pay attention to the "man behind the curtain" that is the Appellant's actual basis for appeal, and that it acts to enforce the law.

Thank you.

CERTIFICATION

I hereby certify under penalty of law that, to the best of my knowledge, information, and belief, that the subject matter of the within controversy does not form the basis of any action presently pending in any other court or arbitration proceeding. Also, to the best of my knowledge, information and belief, no other action or arbitration proceeding is contemplated at this time, and I know of no other party who should be joined in this action. Additionally, I certify that this opposition and the appeal to which it is related have been undertaken with a reasonable basis in law, and they are based on rational arguments and credible evidence and has not been filed for frivolous purposes. Finally, I hereby certify that the representations made in this document are true to the best of my knowledge.

Dated: 11/07/2024 By:________________________

MICHAEL F. EVERS

PLAINTIFF/APPELLANT PRO SE