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GARDEN STATE OUTDOOR LLC, Appellant, v. EGG HARBOR TOWNSHIP, EGG HARBOR TOWNSHIP PLANNING BOARD, Appellees.	NEW JERSEY SUPERIOR COURT APPELLATE DIVISION DOCKET: A-002830-23 TRIAL COURT DOCKET: ATL-L-1171-23 SAT BELOW: HON. MICHAEL BLEE, A.J.S.C.

APPELLANT GARDEN STATE OUTDOOR LLC'S REPLY BRIEF

Dated: October 31, 2024

On the brief: Justin D. Santagata, Esq.
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INTRODUCTION

This is Plaintiff Garden State Outdoor LLC's ("**Garden State**") reply in appeal of the trial court's affirmation of Defendant Egg Harbor Township Planning Board's ("**Board**") denial of bulk variance relief to Garden State to erect a billboard and its related upholding of Defendant Egg Harbor Township's ("**EHT**") requirement that no billboard could be within 1,000 feet of an intersection ("**Distance Regulation**").

EHT and the Board spend much of their opposition misciting Garden State's arguments. Garden State, for example, does not argue that E&J Equities Ltd. Liab. Co. v. Bd. of Adj. of Franklin, 226 N.J. 549 (2016), "set forth a new evidential standard for local planning board hearings." (Rb18.) It argues that E&J Equities Ltd. Liab. clearly holds that there is an evidential standard for zoning ordinances *regulating billboards* that is different than a "normal" zoning ordinance, i.e. intermediate scrutiny with the burden on the municipality. Nor does Garden State argue that the Board "failed to develop a sufficient evidential record" to defend the Distance Regulation. (Rb19.) This type of misdirection is meaningless and unhelpful. Garden State argues that *EHT* could not satisfy its fairly small burden to support the Distance Regulation.

From these elementary efforts at misdirection, EHT and the Board then argue, somehow, that E&J Equities Ltd. Liab. is not retroactive and only applies to new

ordinances. Obviously, the opposite is true— a holding is retroactive unless otherwise stated.

As for the Board's denial, the Board does its best to reinvent what it did below and what the trial court did, but the Court can read the resolution and see that the Board does not make proper findings of fact and conclusions of law. Reciting what was said is very different than making factual and legal determinations with some specificity. The Board plainly did not do the latter. There is no argument that it did.

FACTUAL REPLY

There is not much factual dispute here, but the following is worth highlighting.

First, the Board grasps at straws in criticizing Garden State's traffic safety expert, David Shropshire, for not reading a "study" he relied on for his expert testimony. (Rb14.) It is very clear that this was an excuse used by the Board, not a legitimate criticism. Mr. Shropshire testified as to the danger of billboards in Pennsylvania and other areas. He testified that he relied upon existing studies *and testimony from hearings on those same billboards that described the area and any purported danger*. (2T:21-22.)[1] Remember the question he is being asked here, in context; it is not *methodology*, it is the comparability of the other locations. He says he reviewed *that*, using sworn testimony from other hearings and he "looked at the location." (Id.)

[1] 4/17/24 transcript.

Mr. Shropshire completely answers this question and then some:

15 The one that was the
16 most intense one that I saw was the Quakertown one,
17 which I think, Joe, you had mentioned that there was
18 no backup in there, in what I put together. That one
19 I had seen in testimony that was given on another
20 application, and I didn't have any documentation, but
21 I did review that sign location with regard to its
22 location, the intensity of the roadway system. That's
23 literally a three faced monument sun. I'll call it a
24 gateway sun that's in the form of a compass. I mean,
25 it's substantial, nothing like what we're proposing.

THE CHAIRMAN: No, but I'm asking you,
2 is it on a country road?
3 MR. SHROPSHIRE: It is on 30ft off of
4 an intersection that is bigger than this intersection
5 and as commercialized as that property. There
6 absolutely every corner commercialized, yes. That
7 particular sign is almost looked at, from what I
8 understand. I didn't do the application, but it's
9 kind of like the gateway to the town type thing. But
10 it is way higher, three sided. It has digital on all
11 three sides with way larger face areas. It's an
12 interesting one to Google when you look at it. So
13 anyway, I looked at that, and unfortunately, I
14 couldn't give you the detail because I got that out of
15 testimony rather than seeing the study itself. But it
16 geed up with what we found in the TPD studies.

THE CHAIRMAN: What do you mean you
18 didn't see the study?
19 MR. SHROPSHIRE: It was testimony that
20 was given at a hearing, and I saw the accident racing.
21 The testimony, knew where the location was, looked at
22 the location, and professionally, it was another level
23 of support that I could give that backs up what the
24 feds say, what the state says, and what these studies
25 say, which is it's safe.

> THE CHAIRMAN: But you didn't read the
> 2 study?
> 3 MR. SHROPSHIRE: No, I didn't read the
> 4 study, but I looked at the location with regard to the
> 5 accident rates, and it's comparable in my mind.
> 6 THE CHAIRMAN: Is that something that
> 7 we can take as testimony?
> 8 MR. SHROPSHIRE: Take it as testimony,
> 9 but I think it probably goes to the weight and
> 10 credibility of that testimony. Right. I mean, it is
> 11 sworn testimony, but you don't necessarily have to
> 12 accept it all. And I will say that the backup to me
> 13 and why I tried to start there is, in the research
> 14 that has been done, the regulations that have been
> 15 promulgated that say this is safety that were
> 16 promoted, and then the permit that was gained for
> 17 that. To me, these other studies are just additional
> 18 support.
>
> [2T20:15-22:18.]

Mr. Shropshire's report never actually relies on the referenced study. It says he is relying on "other crash dated for at three-sided digital monument…in Quakertown." (Pa164.) This is precisely what he testified to. The Board just made excuses.[2]

Second, on that point, the Board's own expert, Joe Johnston, never had *any opinion*. He just kept writing he needed more data. He did nothing to create the foundation for an actual opinion *because he did not have one*— he renders no

[2] Mr. Shropshire was certainly entitled to rely on sworn testimony about other locations in order to answer the Board's questions. State v. Torres, 183 N.J. 554, 576 (2005).

opinion *on safety at all*. (Pa141.) The most he says is that the locations in Mr. Shropshire's study have differences from the one for the application, but that, by itself, is not an opinion on *safety*. As the Board notes, Mr. Johnston did not actually testify to *anything*. (Rb14.)

LEGAL REPLY

Most of EHT and the Board's opposition should be dismissed on its face as contrary to precedent.

I. EHT never properly defended the Distance Regulation

EHT's defense of the Distance Regulation is devoid of any connection to intermediate scrutiny or actual evidence.

First, EHT argues that E&J Equities Ltd. Liab. is not retroactive to existing ordinances. This is clearly wrong. "Generally, judicial decisions are applied retroactively…prospective application is appropriate when a decision establishes a new principle of law by overruling past precedent or by deciding an issue of first impression." Henderson v. Camden Cnty. Mun. Util. Auth., 176 N.J. 554, 561-62 (2003). E&J Equities Ltd. Liab. was only "new" as to its adoption of time/place/manner for content neutral billboards. E&J Equities Ltd. Liab., 226 N.J. at 580-81. The evidentiary standard for *defending* a billboard regulation that implicates the First Amendment is not new; the burden has been *on the municipality since* long before E&J Equities Ltd. Liab. See Bell v. Stafford, 110 N.J. 384, 395-96

(1988). In that regard, all E&J Equities Ltd. Liab. does is *reiterate* that "a governing body seeking to restrict expression cannot simply invoke those interests with scant factual support informing its decision-making and expect to withstand a constitutional challenge." E&J Equities, Ltd. Liab, 226 N.J. at 585.

Second, citing out of state precedent is no help here. Federal precedent is clearly different in the level of *factual support* required to defend a billboard regulation. Compare id. with Interstate Outdoor Advertising L.P. v. Zoning Bd. of Mt. Laurel, 706 F.3d 527 (3d Cir. 2013). On multiple occasions, the Appellate Division and New Jersey Supreme Court have rejected reliance on quotation of the "purposes" section of a billboard regulation. See Bell, supra ("no factual basis"); E&J Equities Ltd. Liab., supra. The "purposes" are not factual support; they merely direct the reader to what the factual support *should be*. But, alas, there is none here. EHT did not even *try*.

Third, E&J Equities Ltd. Liab. and its progeny poses no great burden to municipalities. It merely requires that facts exist to support the substantial interest and narrow tailoring. Those facts may exist, of record, from the standard process for creating a zoning ordinance or amending a master plan or, alternatively, the municipality could substantiate the facts through a plenary hearing if the billboard regulation is challenged. See Riya Finnegan Ltd. Liab. Co. v. Twp. Council of Tp. of S. Brunswick, 197 N.J. 184, 201-202 (2008) (referring ordinance to planning

board for creation of factual record prior to adoption); Twp. of Cinnaminson v. Bertino, 405 N.J. Super. 521, 536 (App. Div. 2009) (plenary hearing). But there is no option where the municipality can do *nothing*, *have nothing*, *rely on nothing*.

None of this requires a local planning board hearing on a development application to include evidence on substantial interest and narrow tailoring. **No one said that. No one argued it. Where does that argument appear anywhere in Garden State's merits brief!** Before questioning its burdens any further, EHT should perhaps review *what burdens already exist that easily could include the proof required by E&J Equities, Ltd. Liab.* and its progeny when dealing with a billboard regulation— planning board referral, master plan review. But Garden State's argument is still fairer because it argues that EHT has other options, such as using the plenary hearing. EHT, however, just wants a rubber stamp. That is not an option and it is not remotely supported by E&J Equities, Ltd. Liab. and its progeny.

Fourth, the trial court clearly erred in applying a pseudo-form of rational basis review when it hypothesized potential substantial interests and narrow tailoring. EHT does not even defend this. Rational basis review is "meaningfully different" than intermediate scrutiny. Silvester v. Becerra, 583 U.S. 1139, 1146 (2018). The former permits "rational speculation." The latter does not. The latter requires that "the harms…are real" and "a municipality that offers no evidence or anecdotes in support of a restriction should not prevail under intermediate scrutiny." Id. These are

big differences and the trial court clearly applied the former, which is wholly inconsistent with E&J Equities Ltd. Liab.

At base, EHT's opposition is simply a feint wish that all billboard regulations be reviewed on an assumed set of facts, as if all municipalities are the same. They are not. A billboard regulation in one municipality could be unconstitutional; in the next municipality over it could be constitutional. It depends on the nature of the municipality, the facts adduced, the narrow tailoring of the billboard regulation. E&J Equities, Ltd. Liab. clearly recognizes this when it says: "[a] more robust factual record in support of the cited government interests deemed substantial may satisfy the *Clark*/*Ward* standard." E&J Equities Ltd. Liab., supra at 585.

II. The trial court's affirmation of the Board's denial has several errors

Turning to the Board's denial, the first problem is simply that the resolution is defective. Resolutions like the one here have been rejected over and over again. The Board has to actually *make findings; it has to actually make legal conclusions*; it cannot simply say "we heard a lot of testimony, here is the criteria, here is a cursory conclusion, denied." It does not take much to satisfy N.J.S.A. 40:55D-10(g) but it takes more than this. Its sole conclusory statement is couched in statutory language and lacks any reference to specific facts and circumstances surrounding the application…This is exactly the sort of resolution that has repeatedly been

recognized as deficient by the courts." N.Y. SMSA, Ltd. P'ship v. Bd. of Adjustment of Tp. of Weehawken, 370 N.J. Super. 319, 333 (App. Div. 2004).

The second problem, related to the first, is that the statements Board members provide on the record are not a substitute for the resolution. That is *entirety of the Board's opposition*. But "because such remarks represent informal verbalizations of the speaker's transitory thoughts, they cannot be equated to deliberative findings of fact." Id. The Board proves this point on its own where, in the span of two pages, it cites Board members as providing no less than four different reasons for their denial: "visual," "negative criteria," "traffic," "siting." Sure, they could all be reasons *if properly adopted and explained in a resolution. But the Board hedged because it realized that it had no idea* why the Distance Regulation existed. The Board did not want to commit to an analysis.

The third problem is that the Board really cannot explain how this application was reviewed as a whole, as required. This is self-evident from the conflicting grant of some variances but not others. While that might have seemed clever, it betrays a total dereliction of the command to review the "entire proposal" for bulk variance relief. Pullen v. Twp. of S. Plainfield Planning Bd., 291 N.J. Super. 1, 7-8 (App. Div. 1996).

The fourth problem is that the trial court plainly deviated from the negative criteria in a manner never before seen and that would upend review of variance relief

as established over the last fifty years. To defend what the trial court did, the Board points to the trial court's *recitation of the positive criteria*. (Rb35.) Yes, Garden State agrees that the purposes of zoning in N.J.S.A. 40:55D-2(a)-(o) are part of the *positive criteria*, such as here: whether the bulk variance was a better zoning alternative. Id. And, yes, the trial court erred on the positive criteria.

But that misses Garden State's point entirely on the negative criteria and actually ends up proving it. The *positive criteria* passage cited by the Board in defense of the trial court has nothing to do with what the trial court later says about the negative criteria, when the trial court obviously applied the positive criteria *to the negative criteria*.

The terminology "positive" and "negative" criteria derive from Yahnel v. Bd. of Adjustment, 79 N.J.Super. 509, 519 (App. Div. 1963). Bulk variances "represent a discretionary weighing function by the board wherein the **zoning benefits [positive criteria]** from the variance are balanced against the **zoning harm [negative criteria]**. If on adequate proofs the board without arbitrariness concludes that the harms, if any, are not substantial, and impliedly determines that the benefits preponderate, the variance stands." Id.

The trial court's recreation of the negative criteria creates a self-proving feedback loop: the purported lack of zoning benefit is, for the same reason, an existence of zoning harm. But that is not how it works. While some considerations

may certainly overlap, the positive and negative criteria are distinct, then balanced. Under the trial court's recreation of the negative criteria, any variance denial could be upheld by citing a "purpose" under N.J.S.A. 40:55D-2, even if the cited purpose was in contradiction to *the purpose the actual ordinance was adopted* or, as here, the cited purpose (morals or congestion for example) has absolutely no relation to the variance whatsoever.

CONCLUSION

Maybe on a fuller record this is a closer appeal, but there is no record here for EHT or the Board. At a minimum, there should be a remand, and a remand with an order to grant the application is certainly warranted.

Respectfully submitted,

/S/

JUSTIN D. SANTAGATA

Case No. A-002830-23

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

GARDEN STATE OUTDOOR LLC,

Plaintiff- Appellant,

v.

EGG HARBOR TOWNSHIP AND EGG HARBOR TOWNSHIP PLANNING BOARD,

Defendants- Appellee.

ON APPEAL FROM A FINAL CIVIL JUDGMENT IN THE SUPERIOR COURT OF NEW JERSEY
(Civil. No. ATL-L-001171-23)

BRIEF OF DEFENDANTS- APPELLEES EGG HARBOR TOWNSHIP AND EGG HARBOR TOWNSHIP PLANNING BOARD

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NEW JERSEY MUNICIPAL LAND USE LAW (MLUL)

I. PREAMBLE

The Trial Court correctly found that Distance Regulation is constitutional because it is based on substantial government interests of traffic safety and aesthetics. The Trial Court also correctly upheld the Egg Harbor Township Planning Board's denial of a bulk variance based on the Distance Regulation. Plaintiff argues that the Distance Regulation is unconstitutional because the Planning Board members failed to sufficiently identify the substantial government interest underpinning the Distance Regulation. In other words, Plaintiff argues that the Planning Board did not present sufficient evidence at the variance hearing that the Distance Regulation was constitutional and therefore the Trial Court should have found that the Distance Regulation is unconstitutional.

As will be explained below, this argument misses the mark entirely because it is extremely well settled law it is not the function of planning boards to decide constitutional questions and, in that regard, planning boards in New Jersey do not have the statutory authority to determine the constitutionality of an existing ordinance. Thus, contrary to Plaintiff's argument, the onus was not on the Planning Board, a body made up primarily (8 of 11) of appointed volunteer residents of the Township, to research the Distance Regulation's purpose prior to the variance hearing and defend its constitutionality at the hearing. Thus, even if Plaintiff is correct that "no one" on the Planning Board had a clear prior understanding of

purpose of the Distance Regulation, that does not advance the argument regarding the constitutionality of the Distance Regulation. On the contrary, as the case law makes clear, a municipal defendant must identify the substantial government interest(s) underlying a free speech restriction when there is a constitutional challenge to that restriction. In that regard, Defendants sufficiently identified the substantial government interests in regulating billboards based on traffic safety and aesthetic concerns at the Trial Court level and presented case law establishing that the Distance Regulation is sufficiently narrowly tailored to pass constitutional muster.

Moreover, Plaintiff is simply not correct that the Planning Board members "conceded" that they did not know that one of the purposes of the Distance Regulation was traffic safety. Plaintiff's entire initial presentation to the Planning Board regarding the Distance Regulation was explicitly premised on traffic safety being the underlying concern. Indeed, the very first person who spoke for Plaintiff at the Planning Board hearing immediately acknowledged that presumed purpose of the ordinance was traffic safety. Plaintiff's counterargument to the traffic safety rationale was to argue that studies show roadside billboards never present a safety issue and as such the Distance Regulation was invalid, and a variance should therefore be granted. In other words, Plaintiff readily acknowledged from the onset of the Planning Board hearing that traffic safety was a rationale for the Distance

Regulation and then Plaintiff set out to "disprove" the traffic safety rationale. It was in this context that there was some discussion regarding the purpose of the Distance Regulation, and it is primarily this discussion is what Plaintiff now disingenuously cherry-picks to claim that no one knew the basis for the Distance Regulation. On the contrary, it is clear from the transcript of the initial hearing that Plaintiff proceeded from the onset of that hearing under the presumption that traffic safety was one of the legislative purposes of Distance Regulation. Thus, it is a misrepresentation of the record evidence for Plaintiff to claim that the Planning Board had no idea why the Distance Regulation existed. It was simply that a majority of the Planning Board members did not find Plaintiff's argument, that billboards never create a traffic safety issue under any circumstances, to be persuasive.

Finally, Plaintiff has not established that the denial of variance by the Planning Board was "arbitrary, capricious, and unreasonable" because, as Plaintiff admits, at the conclusion of the hearing, the Planning Board members relied on traffic safety or "sizing" a/k/a aesthetics as reasons for denying the variance and upholding the Distance Regulation. It is extremely well settled that municipalities have wide discretion to regulate signs and billboards based on the substantial government interests of traffic safety and aesthetics which is precisely what occurred here.

II. PROCEDURAL HISTORY

According to Plaintiff's Complaint in Lieu of Prerogative Writs, on or about December 12, 2022, Plaintiff/Appellant Garden State Outdoor, LLC ("Plaintiff" or "Garden State") applied to the Egg Harbor Township Planning Board ("the Planning Board" or "the Board") to erect a digital billboard at 3319 Fire Road in Egg Harbor Township ("EHT"). (Pa26). Nonetheless, the formal application cited by Plaintiff in the appeal is dated July 26, 2024. (Pa44-49). Regardless, it is undisputed that Plaintiff appeared in front of the Planning Board for an initial hearing on March 20, 2023. (3/20/23 Transcript). A second hearing was held in front of the Planning Board on April 17, 2023, which resulted in a denial of variance application. (4/17/23 Transcript). Plaintiff filed a "Complaint in Lieu of Prerogative Writs and for Violation of the New Jersey Civil Rights Act" on June 19, 2023. (Pa25-30). On May 15, 2024, the Trial Court granted summary judgment to Defendants on both the Complaint in Lieu of Prerogative Writs and civil rights claim. (Pa1). This appeal followed.

III. STATEMENT OF FACTS

According to the Complaint, "[o]n December 12, 2022, Garden State applied to the Board to erect a digital billboard at the Property of 36 feet in height, where 70 feet is permitted, and more than 800 feet away from any residential use ("Application"). The Application required … variance relief: (i) distance from an intersection, 350 feet proposed and 1,000 feet required; (ii) change in messaging

every 8 seconds between 10:00pm and 6:00am; (iii) front yard setback for utility easement; and (iv) distance from an existing structure (solar panels), 8 feet proposed and 50 feet required. The Board granted every bulk variance except distinace [sic] to an intersection." (Pa26, para. 5).

The Complaint further alleges "[t]he 1,000-foot restriction for intersections only applies to digital billboards and other "off-premises advertising." "On-premises advertising" and other signage can be within 1,000 feet of an intersection even though, by the Board's and its professionals' assertions, they would create the same "safety" concerns. The subject intersection already has free-standing "Royal Farms" and "Sunoco" signs that are as high or nearly as high as the proposed height for the digital billboard." (Pa27, para. 8).

Regarding Count Two, the NJCRA claim, the Complaint alleges "[t]he 1,000-foot restriction and the Board's denial violates the First Amendment to the United States Constitution and its New Jersey analog." (Pa28, para. 15). Specifically, the Complaint asserts "[t]he 1,000-foot restriction is constitutionally overbroad, unjustified content-based discrimination, and impermissible time, place, and manner regulation. For example, under the 1,000-foot restriction, a wellness center at the subject intersection could advertise a particular form of therapy available at the center, but a business 500-feet away could not allow a sign of any kind advocating against such therapy." (Pa28-29, para. 17).

Almost immediately upon beginning its initial presentation to the Planning Board at the March 20, 2023, hearing, Plaintiff's initial presenter stated the following:

> *So we have two intersections, one at Fire Road and Tilton and the other one is going into the shopping center. So the presumed reason for that separation requirement, from what we've seen over the years, is a safety concern. Fair enough. But we're going to present testimony that there is no safety issue at the location we have. In fact, there's no study, no study that's ever shown that being close to an intersection with a digital billboard or other billboards is safely concerned. There are studies that show the contrary, that when you do a before and after analysis, when you add a digital board or a non-digital board near an intersection, there's no change in traffic accidents.*

(3/20/23 Transcript @ T52:8-T52:20).

After initially noting the presumed safety concern, Plaintiff's next opening remark point to the Planning Board on March 20, 2023, was to warn the Planning Board that Plaintiff contemplated a constitutional challenge to the ordinance if the variance were denied. Particularly, Engineer Sciullo stated right at the outset of Garden State's presentation:

> *So billboards are protected by the First Amendment Freedom of Speech issue, whether it's commercial speech or non-commercial speech. The US Supreme Court has said that in many, many opinions. The New Jersey Supreme Court has said that in many, many opinions. So there's a thousand foot separation requirement. So we ask ourselves, why to you have that requirement? What's the justification? Was there a study to justify that?... we're not aware of any. We don't know of any studies that would call for a separation requirement.*

(3/20/23 Transcript @ T53:13-T53:22).

Plaintiff's initial statement continued to discuss the constitutionality of the ordinance, wherein the speaker again acknowledged that the purpose of the Distance Regulation was safety:

> *Again, the First Amendment right to receive messages, communicate messages by local businesses. So again, we look at this 1000 foot separation issue, and talk a lot about that because one of the key variances we need, why is that in place? Is it necessary? Does it serve a real function? Because if it doesn't serve a real function, it's unconstitutional. Can't have a restriction about billboard unless it's a reason for it. And the only reason we can think of a 1000 board is safety. But again, there's no data support that.*

(3/20/23 Transcript @ T55:21-T56:5).

The Chairman of the Planning Board responded to question the First Amendment assertion, noting that the restriction is content neutral. (3/20/23 Transcript @ T53:25-T54:4). In response, Plaintiff's representative asserted that the First Amendment right of the public to receive messages was implicated by the 1,000-foot intersection restriction, requiring the Township to justify its implicit safety concerns underpinning the ordinance, opining that the proposed billboard would create no safety concern based upon an alleged "lack of data" available to support that concern. (3/20/23 Transcript @T54-T57).

Further into the initial presentation, the speaker for Plaintiff again discussed and acknowledged that the Distance Regulation's purpose was traffic safety:

> *So the 1000 foot separation ornament what is the presumed focus for that? Some places don't have that kind of distance of time. What is the presumed rationale. The engineer gave you a good set up as to the location of the sign with those pictures that you were provided. It shows a rendering of the sign with its location on the roadway.* ***From a traffic perspective, these signalized intersections are the concern that a motorist on the roadway would be distracted by a sign.*** *And in this case, we've already indicated that the sign is not 70 feet high. It's not 1000 feet square feet of image. It's lower. It's only 378 feet on each side. So it's much less than what the DOT would allow for a sign for the location from a traffic standpoint.*

> *Again, I'm looking at the signalized intersection. As you've seen in the pictures, the view is from beyond the intersection. We wanted to get the view, looking through the intersection, what the sign would look like behind the intersection. The sign is located 350 feet from the Tilton Road intersection and it's almost 400 feet from the driveway. I think it's 390 feet from the driveway. We actually took the light up. We took the pictures back further so that you would get a perspective of what the driver would see as they approach the intersection. Not just at the intersection, but at the intersection.* ***The point of seeing the billboard is as a distraction. It's no longer an issue.*** *They've already gone through the traffic signal. It's not one or the other. They're beyond traffic signal. We've done their movement through the intersection.*

(3/20/23 Transcript @ T69:13-T70:15) (*emphasis added*).

The discussion of the purpose of the ordinance began because the Planning Board Chairman correctly observed that Plaintiff's entire presentation up to that point had operated under the explicit presumption that traffic safety was the only concern underlying the ordinance:

> *THE CHAIRMAN: What's the basis of your presumption.*
>
> *UNKNOWN SPEAKER: What am I presuming?*
>
> *THE CHAIRMAN: You just spent five minutes presuming the intention of a law and telling me why your presumption should invalidate that law. What's the basis of your presumption[?]*

(3/20/23 Transcript @ T72:32-T73:4).

In response, Plaintiff's representative responded that there was "no justification" for the Distance Regulation, i.e., that the Distance Regulation was unconstitutional. (3/20/23 Transcript @ T73:16-T73:21). The Chairman then

pointed out that a variance hearing in front of the Planning Board was not the proper forum determine the constitutionality of the Distance Regulation; rather, the Planning Board merely had the authority grant variances when warranted under specific circumstances. (3/20/23 Transcript @ T73:25-T74:4). Plaintiff's representative seemed to acknowledge that the Chairman was correct that this The Chairman then reiterated:

> *Just to reiterate my point respectfully, we've been friends for a long time. You're telling me that I should grant a variance based on a presumption rather than what typically occurs here, and that's the introduction of why the existing ordinance can be flexible to fit a hardship, to fit a necessity, something that can't be done. I don't hear that yet.*

(3/20/23 Transcript @ T75:9-T75:15).

There was then more discussion amongst the Plaintiff's representatives and Planning Board members regarding the difference between arguing against the validity (i.e., constitutionality) of the ordinance itself versus arguing for a variance from that ordinance. (3/20/23 Transcript @T75:16-T78:7). Plaintiff's position was that in arguing the ordinance itself was invalid, they were arguing in favor of granting a variance, while Planning Board members pointed out, in layman's terms because they are almost all non-elected volunteers, that a Planning Board variance hearing is not the proper forum for challenging the constitutionality of ordinances. (3/20/23 Transcript @T75:16-T78:7).

Plaintiff alleged that multiple studies have been done to show that crash rates do not change because of digital billboards. (3/20/23 Transcript @T80). Plaintiff's representative further testified that the studies were of billboards which were closer to intersections than the billboard Plaintiff was proposing. (3/20/23 Transcript @T80:25-T81:5). Plaintiff made reference to a "McMahon study" from 2018, taking into account 12 separate billboard locations and doing traffic studies. (3/20/23 Transcript @81:8-T81:14).

The Planning Board members or one of them then questioned whether the studies referred to concerned intersections similar in nature to the proposed site of the billboard at issue, to which Plaintiff's representative answered:

> *"yes, similar. Again, there's multiple locations of different types of settings. And so is it similar? Several of the intersections* ***would likely be similar****."*

(3/20/23 Transcript @T82:10-T82:13).

Plaintiff's representative further responded that he did not know the distance of the billboards from the intersections in the "McMahon study." (3/20/23 Transcript @T82:16-T82:17).

The discussion of the variance came to Plaintiff making the following statement:

> *We have more [guidance from professionals apart from the McMahon study], but not the specific. Couple of thoughts… I haven't had Mr. Sciulla [Plaintiff's engineer] actually provide the planning testimony yet, but… I think we're going to ask for a continuance to get that more specific data that you raised in terms of traffic accident[s] because I think it's relevant to a variance request, because certainly you have the authority to deny if you think it's unsafe, putting aside any other concern you might have. But your boarding [presumably the word was*

> *"ordinance" not "boarding"], for example, doesn't have an aesthetic standard. You can't just say, "I don't like billboards."*

(3/20/23 Transcript @T94:5-T94:15).

The Planning Board Solicitor, John Ridgeway, brought the March 20, 2023, session as to Plaintiff to a close, as to the variance at issue, explaining:

> *I think [a continuance is] appropriate. I think in particular, I think the board raised a number of insightful issues as it relates to maybe siting issues. There was a lot of references to what I presume are traffic industry expert reports, report or something along those lines. I would like the Board to have a little bit more foundation so you can make up your own mind whether there's a persuasive team [sic]. So I do think a continuance at this point is appropriate. And give the board the opportunity, give the applicant the opportunity to give more information.*

(3/20/23 Transcript @T97:24-T98:8).

It does not appear that the study first referred to on March 20, 2023, the "McMahon study" was submitted to the planning board.

On March 31, 2023, Garden State submitted a Safety Review prepared by David R. Shropshire, Shropshire Associates to the Planning Board. (Pa163-165). The Shropshire report is three pages, with attached an October 16, 2018, Traffic Planning and Design ("TPD") traffic study. (Pa166-170). This study provided a "crash analysis" as to crashes at the locations of four existing off premises signs, "two (2) of which reside at signalized intersections." (Pa168). The four sites of the study were in Chester, Delaware and Montgomery counties, in Pennsylvania. (Pa169).

The Shropshire report referred to the TPD study and Shropshire's otherwise undocumented review of one intersection in Quakertown, Pennsylvania, which appears to have ***not*** been an intersection controlled by a traffic light or signal.

(Pa163). The Shropshire report referred to the 2003 Virginia Tech report which had been mentioned at the March 20, 2023, meeting and a 2013 apparent traffic safety report, for which the geographical area studied is not indicated nor information about any of the relevant characteristics of the locations of the signs studied. (Pa164).

On April 10, 2023, Township Engineering traffic consultant Joseph E. Johnston provided a review of the Shropshire review of studies dated October 27, 2022, to the Planning Board. As to the Shropshire review, Johnston advised the Planning Board:

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REVIEW:

1. The report prepared by Shropshire Associates dated March 31, 2023, notes that a similar site in Quakertown, PA was reviewed and then concluded that the advertising sign did not negatively impact safety. However, no supporting technical data is provided for the study location.

2. The Shropshire report also included a document prepared by TPD dated October 16, 2018. The TPD study includes before/after crash rate companions at four sign locations. However, the limits of each study area appear to include long roadway sections that extend well beyond the visibility area of the relative signs. The crash rate comparison should be limited to sections of road where the sign is visible to motorists. As presented, the data included does not distinctly confirm or deny any statistical trends related to crash rates at these sign locations.

(Pa200).

Johnston revised the April 10, 2023, review and produced a revised April 11, 2023, review, which further undermined the applicability of the TPD study relied upon by Shropshire. (Pa140-141). The April 11, 2023, Traffic Report by the Board's Traffic Engineer Joseph Johnstone (Pa139-141) is expressly referenced in the

Planning Board's May 15, 2023, Decision and Order, the final decision by which the variance at issue was denied, (Pa117-128; see specifically, Pa124).

At the next, April 17, 2023, hearing, Plaintiff presented David R. Shropshire to discuss the "data that [Shropshire has seen] from other traffic engineers, particularly transportation planning and design on some evaluations that they've done safety before and after studies." (4/17/23 Transcript @T4). Garden State's representative Shropshire explained that "these studies" were done in relation to billboard locations over Pennsylvania, which proved there was no safety change before and after billboards were installed. Shropshire indicated that indeed there were demonstrated decreases in accident rates at each such location. (4/17/23 Transcript @T4). Garden State's representative noted that "Mr. Johnston took issue with some of the data with regard to how all of that works." (4/17/23 Transcript @T4). Shropshire referred to another study of "diver safety performance" of drivers, from Virginia Tech. (4/17/23 Transcript @T5). Shropshire explained that the safety of drivers did not change because of the presence or absence of billboards, and the study found that a person must glance away from the road for 1.6 seconds before any safety concern could be found. (4/17/23 Transcript @T6-T7).

The Planning Board Chairman asked Mr. Shropshire:

> *How similar or how analogous … is this Pennsylvania Road that the study is based on, with what we have here at Fire Road? I know it's not going to be the same. Right. But tell us the differences?*

(4/17/23 Transcript @T20:8-T20:14).

Shropshire responded that ***he had not read the study at issue***, "but I looked at the location with regard to accident rates, and its comparable in my mind." (4/17/23 Transcript @T22).

One of the EHT Planning Board members commented to the distractions already present for a driver at the intersection, expressing that the purported hearsay study conclusion that a billboard creates no additional distraction, regardless of the nature of the intersection. (4/17/23 Transcript @T27). Plaintiff's representative's response was to note that there is nothing in any research which proves that billboards create a safety concern based on drivers being distracted. (4/17/23 Transcript @T27:17-T27:25).

EHT Planning Board Chairman Aponte noted that EHT's traffic engineer, Joe Johnston, "had not yet spoken as to his report yet," which addressed the traffic studies relied upon by Garden State. (4/17/23 Transcript @T28).

Plaintiff's representative stated that he had not seen any traffic study which specifically examined the effect of the distance of a billboard from an intersection as a safety factor. (4/17/23 Transcript @T29:1-T29:7; T31-32).

The Board noted that the peculiarity of the particular site and intersection at issue is that there are six commercial driveways in this intersection. (4/17/23 Transcript @T 41-42).

Board Solicitor Ridgeway gave the following instructions to the Board members prior to the vote:

> *First thing you need to understand about your role is you get to weigh the weight and credibility of evidence. So just because it comes before you doesn't necessarily mean you need to believe it, or give it the same*

> *weight that the professional suggests you do. So that is part of your function is to weigh the evidence…*
>
> *The proofs have to convince you that one, the application furthers one of the purposes of zoning. Mr. Sciulla enumerated them. They are in the municipal land use law, letters A through Q.*
>
> *So if you need to determine that the application furthers one of the purposes of zoning, such as general welfare, the other thing that you will need to do is determine that the benefits of granting the variance substantially outweigh any detriment….*
> *And the final thing is that there is no harm to the intent or purpose of the zoning ordinance and the zone plan…*
>
> *So I think you've been presented with sufficient evidence to weigh it all out, and make those determinations.*

(4/17/23 Transcript @T61-T62).

Chairman Aponte noted particularly that the fact that Mr. Shropshire had not read the actual traffic study but had only read certain testimony related as a "strike against" the credibility of Mr. Shropshoire's report. (4/17/23 Transcript @T69:15-T69:22).

Chairman Aponte believed the siting/aesthetics were the intent of the ordinance, and voted "no." (A4/17/23 Transcript @T69-70).

Board Member Eykyn expressed that he was concerned about traffic safety, noting the heavily trafficked intersection location, and noted that the distance from the intersection for the variance would be 350 feet, not even close to the 1,000-foot restriction. He thus voted "no." (4/17/23 Transcript @T70).

Board Member Galvin noted the volume of "traffic and all the exits and entrances on everything that you have here [at this intersection] … [which is]

dangerous to begin with." Board Member Galvin also voted "no." (4/17/23 Transcript @T70-T71).

Board Member Hodson voted "yes" to granting the variance. (4/17/23 Transcript @T71-72).

Board Member Mayor Pfrommer noted that he did not think the location of the proposed billboard is "for the public good" and that "to me, the negative criteria far outdo the positive on this one." Mayor Pfrommer thus also voted "no… for all the other reasons stated." (4/17/23 Transcript @T72).

Board Member Schiffler noted that the billboard gave concern with "visual pollution" in the area of the intersection with the volume of signage already there. (4/17/23 Transcript @T72-T73). She voted "no," based on "the location only," as it would "add clutter, visual clutter to the area." (4/17/23 Transcript @T72-T73).

Board Member Slusarski stated that he agreed with Board Member Schiffler's reasoning (incorrectly called "Strickler" in the transcript) and notes that the site was a busy intersection congested already with signs on both sides. (4/17/23 Transcript @T73-T74). He thus voted "no… based on the intersection and the location." (4/17/23 Transcript @T73-T74).

The Board Vote was thus recorded as "Vote 6 No: Aponte, Eykyn, Galvin, Pfrommer, Schliffler, Slusarski; 1 Yes: Hodson." (4/17/23 Transcript @T69-T74).

IV. LEGAL ARGUMENT

A. Standard of Review

The standard of appellate review on a motion for summary judgment is de novo, applying the same standard used by the trial court, which mandates that summary judgment be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Gayles v. Sky Zone Trampoline Park, 468 N.J. Super. 17, 22 (App. Div. 2021), citing, Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199, 129 A.3d 1069 (2016), quoting, R. 4:46-2(c)). "A dispute of material fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Id. The Appellate Court owes no deference to the trial court's legal analysis, and its review is limited to the motion record. Id.

B. The Trial Court correctly found that the Distance Regulation is constitutional. (Pa14).

The Trial Court properly found that the Distance Regulation is constitutional. Plaintiff argues that "court made two distinct errors in upholding the Distance Regulation: (i) hypothesizing the factual basis for the purported substantial

government interest and how it could be narrowly tailored; and (ii) allowing EHT to succeed on supposition and hypothesis, rather than requiring a plenary hearing with actual evidence" which "compounded by the trial court's improper conversion of the "motion to dismiss" to summary judgment." (Pb9-10). As detailed below, Plaintiff is incorrect. Plaintiff's argument misapplies E & J Equities, Ltd. Liab. Co. v. Bd. of Adjustment of the Tp. of Franklin, a case which concerned the proofs necessary for the adoption of the new ordinance, to the instant which concerned a variance from an existing ordinance. 226 N.J. 549,146 A.3d 623 (2016).

1. The Defendants sufficiently identified the substantial government interests for the Distance Regulation.

The Defendants have sufficiently identified the substantial government interests concerning the Distance Regulation, Plaintiff simply miscomprehends and misrepresents E & J Equities, Ltd. Liab. Co. v. Bd. of Adjustment of the Tp. of Franklin, 226 N.J. 549,146 A.3d 623 (2016). Essentially, Plaintiff asserts that in E & J Equities the New Jersey Supreme Court set forth a new evidential standard for local planning board hearings. Plaintiff is incorrect. Plaintiff's reliance on E & J Equities is misplaced because that case concerned the evidential standard for adopting a new ordinance whereas the instant case concerns an existing ordinance. Id. at 556. Indeed, Plaintiff's own quotation from E & J Equities makes this clear: "A governing body ***seeking*** to restrict expression cannot simply invoke those interests with scant factual support informing its decision-making and expect to

withstand a constitutional challenge." (Pb15-16; quoting, E & J Equities, *supra*, at 585.) (*emphasis added*).

Plaintiff simply ignores that "seeking" aspect of the quotation. In the instant case, Defendants were not "seeking" anything; rather, it was Plaintiff who was "seeking" a variance from an already existing ordinance. Thus, Plaintiff is incorrect in arguing that based on E &J Equities, the EHT Planning Board failed to provide sufficient evidence to establish the substantial government interests for the Distance Regulation at the variance hearings.

In the instant case, the restriction at issue, the ordinance with the Distance Regulation, was already in place and it is well settled that it is "not the function of the board of adjustment or the planning board to decide constitutional questions." Messer v. Burlington, 172 N.J. Super. 479, 487, 412 A.2d 1059, 1063 (Super. Ct. 1980), citing, Honigfeld v. Byrnes, 14 *N.J.* 600, 603-604 (1954); Jantausch v. Verona, 41 *N.J. Super.* 89, 96 (Law Div.1956), aff'd, 24 *N.J.* 326 (1957). "Questions of law are the peculiar province of the courts." Id. Indeed, under New Jersey law, planning boards do not have the power to determine the constitutionality of ordinance. See, N.J. Stat. § 40:55D-25 ("Powers of planning board").

Thus, Plaintiff's argument that the Distance Regulation is unconstitutional because the Planning Board failed to develop a sufficient evidential record to

establish the constitutionality of the Distance Regulation at the variance hearing is meritless. Indeed, the Planning Board's lack of authority to adjudicate the constitutionality of the Distance Regulation was pointed to Plaintiff by the Planning Board Chairman at the initial variance hearing. (See, 3/20/23 Transcript @ T73:25-T74:4) ("It's not really the purpose of this board to determine what the governing body was thinking when they passed the law. We are typically charged with how far to break that law in layman's terms. So, I qualified it as layman's terms."). Nonetheless, Plaintiff pressed forward and based its argument for the variance on the non-constitutionality of the Distance Regulation, which, as will be explained in further detail below, was, unsurprisingly, not persuasive to the majority of the Planning Board members.

Furthermore, because this case concerned an existing ordinance not the adoption of a new ordinance, EHT's codified statements are sufficient evidence of "substantial governmental interests" as a matter of law. See, e.g., Metromedia [v. City of San Diego, 453 U.S. 490, 507-508 (1981); Hucul Advertising, LLC v. Charter Tp. of Gaines, 748 F.3d 273, 277-78 (6th Cir, 2014) (discussing stated goals in township's enactment of billboard spacing regulation); Prime Media, Inc. v. City of Brentwood, 398 F.3d 814 (6th Cir. 2005) (Reversing the District Court's finding that a revised ordinance was not "narrowly tailored" due to the "lack of factual record" by the municipality when adopting the revisions because the law regarding

the constitutionality of the restriction (size and height) and the substantial interests underpinning the restriction were well settled; and, in doing so, specifically citing to the "findings" section of a newly revised ordinance and well settled case law regarding size and height restrictions to find that the revised ordinance was constitutional); Int'l Outdoor, Inc. v. City of Roseville, No. 313153, 2014 Mich. App. LEXIS 815, at *15-16 (Ct. App. May 1, 2014) (Affirming the constitutionality of an ordinance by specifically citing and relying upon the "purposes" section of the ordinance to identify the substantial government interests).

In sum, the above cited case law demonstrates the fundamental flaw in Plaintiff's argument regarding the constitutionality of the Distance Regulation: the Planning Board was not required, and, more importantly, did not even have the statutory authority, to adjudicate the constitutionality of the Distance Regulation at the variance hearing. Thus, Plaintiff's argument that Planning Board failed to present sufficient evidence at the variance hearing regarding the "substantial government interest" underpinning the Distance Regulation is inapposite. Moreover, the case law above demonstrates that looking to the "purposes" section of an existing ordinance along with relevant case law is the proper method identifying the substantial government interest and the constitutionality of the restriction.

In that regard, the law regarding restrictions on "on-premises" versus "off-premises" signage is well settled. Indeed, the United States Supreme Court has held,

and the New Jersey Appellate Division has agreed, that where the only distinction at issue on the face of a regulation is the differential treatment of "on-premises" and "off-premises" signage, the First Amended is not "offend[ed]." See, In re Denial of the Outdoor Advert. Application No. 75708 ("Hartz Mountain Industries"), No. A-5468-16T1, 2019 N.J. Super. Unpub. LEXIS 1397, at *14-15 (Super. Ct. App. Div. June 18, 2019) ("On-premise [sic] signs are exempt from the 500-foot distance restriction and do not require permits. If that were the only distinction between the two, the different treatment would apparently not offend the First Amendment, notwithstanding that the regulation distinguishes between speakers."), citing, Reed v. Town of Gilbert, 576 U.S. 155, 175, 135 S. Ct. 2218, 2233 (2015)]. at 2233 (Alito, J., concurring) (stating that "[r]ules distinguishing between on-premises and off-premises signs" "would not be content based"); see also GEFT Outdoor LLC v. Consol. City of Indianapolis, 187 F. Supp. 3d 1002 (S.D. Ind. 2016) (post-Reed, upholding disparate treatment of on-premises and off-premises signs that applied only to commercial speech).

As explained by the Supreme Court in City of Austin v. Reagan Nat'l Advert. of Austin, LLC:

> *[T]o survive intermediate scrutiny, a restriction on speech or expression must be "'narrowly tailored to serve a significant governmental interest.'" City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 142 S. Ct. 1464, 1475-76 (2022), quoting, Ward v. Rock Against Racism, 491 U. S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989). To survive intermediate scrutiny, the*

> *government's interests need not be accomplished through the "least restrictive or least intrusive means." Ward, 491 U.S. at 798. "Rather, the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." Id. at 799*
>
> *[I]ntermediate scrutiny has "never required" a municipality to "demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully" achieve the desired end. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 439, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002). "[M]unicipalities must be given a reasonable opportunity to experiment with solutions to address the secondary effects of protected speech." Id. (quotation marks and citations omitted).* ***As a result, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."*** *Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 391, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000).*
>
> *In the context of sign codes, which are part of a "regulatory tradition" dating back well over a century, the Court has not required a great quantum of empirical support. See Reagan Nat'l Advert., 142 S. Ct. at 1469.* ***The Court upheld San Diego's off-premises commercial sign ban based on intermediate scrutiny, relying on the "accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety."*** *Metromedia [v. City of San Diego, 453 U.S. 490, 509 (1981).] We conclude there is enough evidence and common sense here supporting Austin's Sign Code distinction.*

Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 64 F.4th 287, 296-97 (5th Cir. 2023)

After the City of Austin Supreme Court decision, the case was remanded to the Fifth Circuit to examine the restriction at issue appropriately under this "intermediate scrutiny" standard. The regulation at issue prohibited "off-premises" digital signage altogether, while permitting "on-premises" digital signage, with the

stated goal "that eventually [off-premises signs] peter out and go away" as digital billboards replace conventional signage. Id. at 295. The Fifth Circuit found that the restriction survived intermediate scrutiny.

Furthermore, at least one other court has found, since City of Austin, that a ***total ban*** on "off-premises" signage passes intermediate scrutiny. Spring House Commercial, LLC v. City of Richmond, No. 5:21-149-KKC, 2022 U.S. Dist. LEXIS 217430 (E.D. Ky. Dec. 2, 2022) (Finding that the City's ban no off-premises commercial signage was constitutional in light of City of Austin). By contrast, the 1000 foot "off-premises" intersection restriction at issue in the instant case, is much narrower than a total ban on "off-premises" signage.

Indeed, in the case relied on by Plaintiff, E & J Equities, the Court specifically stated that governmental interests such as traffic safety, aesthetics and siting, have "long been recognized as [] legitimate and substantial government interest[s]." See E & J Equities, 226 N.J. at 583; Metromedia, 453 U.S. at 507-508 (holding that traffic safety is a "substantial government goal"). The Appellate Division, in Hartz Mountain Industries, 2019 N.J.Super. Unpub. LEXIS 1397, at *23, recognized that "anywhere a significant number of motorists are prone to shift lanes or to speed up or slow down, the risk of accidents increases, and reducing distractions may be important." The Hartz Mountain Industries Court also added that a court can consider "a long history, a substantial consensus, and simple common sense," Id. quoting Burson v. Freemen, 504 U.S. 191, 211 (1992) to conclude that a particular traffic safety-related regulation is indeed necessary to advance the government interest in traffic safety.

Thus, Plaintiff's argument that Defendants did not sufficiently identify the substantial government interests which underpin the Distance Regulation is meritless, as is the argument that Plaintiff was entitled to plenary hearing. The law regarding the constitutionality and substantial government interests for restrictions on "off-premises" versus "on-premises" signage is well settled. There was no need for a plenary hearing because case law above establishes the Distance Regulation passes the intermediate scrutiny test. Plaintiff simply misapplies E & J Equities, a case concerning the standard for adopting of a new ordinance, to the instant case which concerned the issue of a variance from existing ordinance for which there is well settled body of case law. Under Plaintiff's logic, E & J Equities mandates that local municipalities conduct a full constitutional analysis in every variance hearing. This is not just incorrect but in direct opposition to applicable law. On the contrary, the relevant case law demonstrates that when there is a constitutional challenge to an existing ordinance, as in the instant case, it is indeed proper for the trial court to analyze the "purposes" section of the ordinance and relevant case law regarding the subject restriction. In the instant case, it is well settled that the purposes outlined in the ordinance, traffic safety and aesthetics, are to sufficient government interest to regulate "off-premises" versus "on-premises" signage. Moreover, the relevant case law makes clear that a 1000-foot restriction on "off-premises" signage from an intersection is constitutional. Thus, the Trial Court correctly found that the Defendants identified a substantial government interest for the Distance Regulation.

2. The Court correctly pointed out that it is well settled that a local municipality may regulate "on-premises" versus "on-premises" signage because it has the substantial government interest in traffic safety.

Plaintiff's argument that E & J Equities "invalidated" traffic safety as a substantial government interest is a blatant misrepresentation. The Court in E & J Equities actually stated the exact opposite: that traffic safety is a well-settled substantial government interest but, when adopting a new ordinance restricting speech, a municipality must still develop a proper evidential record to demonstrate the applicability of that substantial government interests. Indeed, the Court in E & J Equities explicitly stated, "[t]he interests of aesthetics and safety upon which the Township relies have long been recognized as legitimate and substantial government interests related to billboards" but simply found that, "a more robust factual record in support of government interest" was necessarily. E & J Equities, *supra*, at 556. Thus, Plaintiff is simply misrepresenting E & J Equities in arguing that it somehow invalidated traffic safety as a viable substantial government interest.

3. The Court's conversion of the motion to dismiss to a motion for summary judgement was proper.

Plaintiff is incorrect that the Trial Court's "conversion" of the Defendants' countermotion to dismiss to one for summary judgement "highlights" the Trial Court's error. On the contrary, the Trial Court's conversion of the Defendants' motion to one for summary judgment highlights how well settled the law is regarding the constitutionality of restricting "off-premises" versus "on-premises" signage. In that regard, Plaintiff is incorrect that the Trial Court should have conducted a plenary

hearing. There was simply no need to do so in this case because, as explained above, the law regarding restricting "off-premises" signage is well settled and it is clear that the Distance Regulation passes the intermediate scrutiny test.

As explained above, Plaintiff misinterprets and misapplies E & J Equities. Under Plaintiff's interpretation of E & J Equities, every variance hearing in front of a local planning board would require a full hearing regarding the constitutionality of every underlying ordinance, lest the ordinance be rendered "unconstitutional" for lack of record evidence upon a legal challenge. This is obviously not a reasonable interpretation of E & J Equities, and it runs contrary to the applicable law regarding the powers and function of planning boards. Furthermore, even if Plaintiff were correct, there is a lengthy record from two hearings in front of the Planning Board wherein there was extensive testimony from experts and reports and studies submitted and analyzed. As Plaintiff acknowledges, a majority of the Planning Board member cited traffic safety as their primary reason for denying the variance.

Similarly, Plaintiff is also incorrect that E & J Equities set some sort of new evidential standard for planning board hearings. As detailed above, the municipal proceedings at issue in E & J Equities concerned the drafting and passage of a new ordinance. Thus, the constitutionality of the ordinance was directly at issue in the municipal proceedings. Obviously, when drafting and passing an ordinance restricting speech, a municipality must properly identify the substantial government interest and ensure the restriction is narrowly tailored. None of those issues were at issue in the instant case, which concerned whether to grant a variance on an existing

ordinance not the adoption of an ordinance. Thus, Plaintiff's argument that E & J Equities adopted some sort of new proof requirement for municipalities is incorrect.

C. The Trial Court correctly found that the Planning Board's denial of the variance on the Distance Regulation was not "arbitrary, capricious and unreasonable." (Pa16).

1. Plaintiff was not entitled to a bulk variance.

The Trial Court correctly found that the Planning Board's denial of Plaintiff's variance request was not "arbitrary, capricious and unreasonable." It is a well-recognized principle that zoning ordinances are strongly presumed valid, Kozesnik v. Montgomery Tp., 24 N.J. 154 at 167 (1957), and, as will be explained below, Plaintiff has failed to overcome this presumption.

It is a well-settled principle that "a decision of a zoning board may be set aside only when it is 'arbitrary, capricious or unreasonable.'" Cell S. of N.J., Inc. v. Zoning Bd. of Adj., 172 N.J. 75, 81 (2002), quoting, Medici v. BPR Co., 107 N.J. 1, 15 (1987)). "[P]ublic bodies, because of their peculiar knowledge of local conditions, must be allowed wide latitude in their delegated discretion." Jock v. Zoning Bd. of Adj., 184 N.J. 562, 597 (2005). Therefore, "[t]he proper scope of judicial review is not to suggest a decision that may be better than the one made by the board, but to determine whether the board could reasonably have reached its decision on the record." Ibid.

As a general rule, greater deference is given to a denial of a variance than to a grant of a variance. Funeral Home Mgmt., Inc. v. Basralian, 319 N.J. Super. 200, 208 (App. Div. 1999). Where a planning board has denied a variance, the applicant must prove that the evidence before the board was "overwhelmingly in favor of the

applicant." Nextel of N.Y., Inc. v. Borough of Englewood Cliffs Bd. of Adj., 361 N.J. Super. 22, 38 (App. Div. 2003). Accordingly, "we will not disturb a planning board's decision unless we find a clear abuse of discretion." Cell S., supra, 172 N.J. at 82 (citing Medical Realty Assocs. v. Bd. of Adj., 228 N.J. Super. 226, 233, (App. Div. 1988).

The New Jersey Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -112, authorizes local zoning and planning boards to grant variances pursuant to N.J.S.A. 40:55D-70. The part pertinent to this appeal is N.J.S.A. 40:55D-70(c), which provides two basic categories of variances. N.J.S.A. 40:55D-70(c)(1) is known as the "(c)(1) hardship variance" and N.J.S.A. 40:55D-70(c)(2) is known as the "flexible (c)(2) variance."

In Kaufmann v. Planning Bd. for Warren, 110 N.J. 551, 563-66 (1988), the NJ Supreme Court extensively addressed the negative criteria of the c(2) variance which requires "statutory focus on the surrounding properties."

> *By definition, no c(2) variance should be granted when merely the purposes of the owner will be advanced. The grant of approval must actually benefit the community in that it represents a better zoning alternative for the property. The focus of a c(2) case, then, will be not on the characteristics of the land that, in light of current zoning requirements, create a "hardship" on the owner warranting a relaxation of standards, but on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community.*
> *... [B]y rooting the c(2) variance in the purposes of the MLUL, the Legislature has confined the discretion of boards: they cannot rewrite ordinances to suit the owner or their own idea of what municipal development regulations should be. Rather, the board should seek, as we think this Board did, to effectuate the goals of the community as expressed through its zoning and planning ordinances.*

...

> *This case, then, is but one example of the c(2) power. The Legislature undoubtedly intended through the c(2) variance to vest a larger measure of discretion in local boards in a limited area of cases. Courts are obliged to respect that grant of power. This power is restrained both by its inherent limitation to the affirmative advancement of zoning purposes and by the negative criteria of N.J.S.A. 40:55D-70.*

In Ketcherick v. Borough of Mountain Lakes Bd. of Adjustment, 256 N.J. Super. 647, 657 (App. Div. 1992) the court stated the grant of relief under c(2) "must be rooted in the purposes of zoning and planning itself and must advance the purposes of the [Municipal Land Use Law]." The grant must benefit the community in that "it represents a better zoning alternative for the property" and may not be granted merely to advance the purposes of the owner. Id. at 563. Thus, the focus in a c(2) case is not whether the current zoning ordinance creates a "hardship" on the owner warranting a relaxation of the standard, but "on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community." Id. at 563.

Plaintiff's argument for a c(2) variance before the Board was unpersuasive and apparently driven more by its desire to attain the maximum financial and economic benefits derived from having the sign in the proposed location without addressing its burden of proof. Nevertheless, the Planning Board properly considered the sign's impact on the surrounding area and determined it would not affirmatively advance zoning purposes, and in fact would result in a substantial detriment to the public good. In Westfield Motor Sales Co. v. Westfield, 129 N.J. Super. 528 (1974) the court stated:

> *... a municipality may perceive that a plethora of signs of a certain size, no matter how tasteful, can have an undesirable cumulative effect upon the well-being of the entire community. Is the citizenry then powerless to deal with this problem when it beholds the fruits of a philosophy of noninterference? We think not. In such a situation, assuming the municipality acts reasonably and fairly in the process of balancing the various interests, the right of the businessman to promote his goods may become subservient to the community's interest in its appearance.*

N.J.S.A. 40:55-32 provides that zoning regulations shall be in accordance with a comprehensive plan and designed for one or more of the following purposes: to lessen congestion in the streets; secure safety from fire, flood, panic and other dangers; promote health, morals or the general welfare; provide adequate light and air; prevent the overcrowding of land or buildings; avoid undue concentration of population. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality. In short, the Plaintiff failed to convince the Board that it had satisfied any of the c(2)criteria under the statute.

In Ten Stary Dom Partnership v. Mauro, 216 N.J. 16, 30-31 (2013) the Supreme Court stated:

> *An application for a bulk or dimensional variance pursuant to either N.J.S.A. 40:55D-70(c)(1) or (c)(2) often implicates several purposes of the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -163, including to encourage a municipality to guide development of land in a manner that will promote the health, safety, and welfare of its residents, by providing "adequate light, air, and open space," N.J.S.A. 40:55D-2(c). A municipality is also authorized to guide development that will promote "a desirable visual environment,"*

As our Supreme Court stated in United Advertising Corp. v. Metuchen, 42 N.J. 1, 5 (1964),

> *The most that can be said with respect to the proof is that reasonable men can disagree as to whether the addition of off-premise signs would disserve the general welfare. Such policy questions are committed to the judgment of the local legislative bodies. As we have said so many times with respect to zoning and other legislative or quasi-legislative decisions, a judge may not interfere merely because he would have made a different policy decision if the power to decide had been his. A court can concern itself only with an abuse of delegated legislative power, and may set aside the legislative judgment only if arbitrariness clearly appears. [42 N.J. at 8]*

The findings and conclusions set forth in the Decision and Resolution (Pa117-128) are sufficient and support the concerns expressed by the board members that granting the variance will result in a substantial detriment to the public good or the zoning plan. Board Planner Hurless testified that under the Ordinance requirements of §225-65C, billboards and off premise signs are subject to the following conditions: size, height, the actual siting of the billboard and the location of the billboard associated with other structures on the same parcel. He further opined that §225-65C did not state and may have nothing to do with safety, but rather addresses a siting issue. Engineering traffic consultant Joseph E. Johnston issued an initial report and a revised report which was heavily critical of Plaintiff's expert report. (Pa140-141). This reasoning was adopted by the Chairman and other board members who cited the sign's negative impact on the surrounding area on both safety and siting concerns and incorporated into the

Decision and Resolution. (4/17/23 Transcript @T69-T74; Pa117-128). Thus, the Trial Court was correct in finding that the Planning Board's denial was not "arbitrary, capricious and unreasonable" and granting summary judgment to the Defendants' as to Count I, the Complaint in Lieu of Prerogative Writs.

2. The Planning Board's denial was based on a proper evidentiary foundation.

The Planning Board's denial was based on a proper evidential foundation and Plaintiff is incorrect that the Trial Court "improperly tried to fill in the blanks." (Pb23). Plaintiff argues that Defendants merely "recit[ed] random statements of Board members," whereas "it is the resolution [that should] provide the statutorily required findings of fact and conclusions," citing N.Y. SMSA Ltd. Partnership v. Bd of Adjustment of Twp of Weehawken, 370 N.J.Super. 319, 334 (App. Div. 2004). (Pb23). Plaintiff is incorrect.

In examining the resolution itself, it is clear it does exactly what it is supposed to do, i.e., it provides the statutorily required findings of facts and conclusions. (Pa117-128). As described by the New Jersey Supreme Court in Medici v. BPR Co., 107 N.J. 1, 23 (1987):

> *We also emphasize, for the guidance of boards of adjustment and their counsel, that in the event a use variance is challenged, a conclusory resolution that merely recites the statutory language will be vulnerable to the contention that the negative criteria have not been adequately established. The board's resolution should contain sufficient findings, based on the proofs submitted, to satisfy a reviewing court that the board has analyzed the master plan and zoning ordinance, and*

> *determined that the governing body's prohibition of the proposed use is not incompatible with a grant of the variance. If the board cannot reach such a conclusion, it should deny the variance. To the extent this requirement narrows the discretion of boards of adjustment to grant use variances for uses intentionally and persistently excluded from the zoning ordinance by the governing body, we believe it accurately reflects the strong legislative policy favoring zoning by ordinance rather than by variance.*

As explained above, the resolution denying Plaintiff's variance request contains sufficient findings based on the proofs submitted. The Decision and Resolution does not simply 'recite the statutory language." On the contrary, the Decision and Resolution quite literally references and incorporates both variance hearings and the evidence presented therein. (Pa117-128). Regarding expert testimony and evidence specifically, engineering traffic consultant Johnston produced two reports, one on April 10, 2023, review and a revised report dated April 11, 2023, both of which undermined the applicability of Plaintiff's expert Shropshire. (Pa139-141; Pa199-200). The April 11, 2023, Traffic Report by the Board's Traffic Engineer Joseph Johnston is expressly referenced in the Planning Board's May 15, 2023, Decision and Resolution. (Pa117-128; see specifically, Pa124). Plaintiff's argument that the Decisions and Resolution "does not make any real 'findings'" is an obvious mischaracterization as it ignores the prior ten pages wherein the Planning Board provided the basis for its conclusions. Thus, the Trial Court properly found that the Planning Board's denial of the variance was not "arbitrary, capricious and unreasonable."

i. The Trial Court did not create a new standard for the negative criteria.

Plaintiff is incorrect that the Trial Court "created a new standard for the negative criteria" of the c(2) variance. Plaintiff's argument improperly takes a quote from the Trial Court out of context. As the Trial Court explained in the paragraph prior to the one cited by Plaintiff:

> *Plaintiff's proposed billboard would not result in a substantial benefit to the community that would outweigh the traffic safety and open space congestion concerns. Plaintiff states the proposed billboard's benefits to the community include (1) a reduced size of the proposed billboard instead of the maximum permitted size, and (2) all local businesses would receive a 15% discount for advertising on the proposed billboard.* ***The Court finds these benefits to be insufficient to outweigh traffic safety, siting, and aesthetic concerns****. These benefits do not represent a better zoning alternative for the property of the proposed billboard. The proposed billboard would serve to advance the interests of Plaintiff rather than the community. This cannot be rectified by simply offering a discount to local businesses. Such businesses already have the opportunity to advertise on their own on-premises properties.* (Pa22).

Second, the reference to "congestion" within the context of the Trial Court's decision was referencing the aesthetic concerns, i.e., the "visual pollution" referenced by several Planning Board members, in their denials, not traffic congestion. (Pa22; 4/17/23 Transcript @T69-T74). Finally, the Trial Court was clearly not holding that the Distance Regulation was or could be based on "morals" but merely setting forth the factors in N.J.S.A. § 40:55D-2(a)-(o), some of which applied here, i.e., traffic safety and aesthetic, and some of which, such as "moral"

obviously did not. Thus, Plaintiff is not correct that the Trial Court created a new standard for negative criteria.

ii. The Planning Board's Traffic Engineer Joseph Johnston

Plaintiff's argument that "all professional testimony supported the application" is misrepresentation of the evidential record. As set forth above, Defendants' traffic expert Johnston issued two reports which pointed out the flaws in Plaintiff expert Shropshire's report and the studies referenced therein. As made clear in transcript of the second variance hearing, and the Decision and Resolution, the Planning Board members relied on Johnston's reports in making their determinations. (Pa124; 4/17/23 Transcript). Thus, Plaintiff is not correct that Defendants improperly rejected the testimony and reports of Plaintiff's experts.

V. CONCLUSION

For all the foregoing reasons, the Appellate Court should affirm the Trial Court's grant of summary judgment to the Defendants on both counts in Plaintiff's Complaint in Lieu of Prerogative Writs and for Violation of the New Jersey Civil Rights Act and the dismissal of both counts with prejudice.

Respectfully submitted,

s/Todd J. Gelfand
Todd J. Gelfand, Esq.

s/Marc Friedman
Marc Friedman, Esq.

Dated: October 17, 2024

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GARDEN STATE OUTDOOR LLC, Appellant, v. EGG HARBOR TOWNSHIP, EGG HARBOR TOWNSHIP PLANNING BOARD, Appellees.	NEW JERSEY SUPERIOR COURT APPELLATE DIVISION DOCKET: A-002830-23 TRIAL COURT DOCKET: ATL-L-1171-23 SAT BELOW: HON. MICHAEL BLEE, A.J.S.C.

APPELLANT GARDEN STATE OUTDOOR LLC'S MERITS BRIEF AND VOLUME I OF APPENDIX (PA1-24)

Dated: August 15, 2024

On the brief: Justin D. Santagata, Esq.
Samantha Edgell, Esq.

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TABLE OF AUTHORITIES

Cases

Statutory Authority

Other Authority

TABLE OF APPENDIX

[1] 211a and 216a are submitted to document the objection, not as a "brief."

R. 2:6-1(A)(1) STATEMENT OF ALL ITEMS SUBMITTED TO THE TRIAL COURT ON THE "SUMMARY JUDGMENT MOTION"[2]

Item Submitted — Appendix Page

Per R. 2:6-1(a)(2), briefs submitted to the trial court on the "motion for summary judgment" are not included in the appendix.

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[2] This was not in fact a summary judgment motion. It was a "motion to dismiss."

[3] Per R. 2:6-1(a)(2) the copy of the complaint has not been reproduced here because it can already be found at 1a.

[4] Found at 139a.

[5] Found at 110a.

[6] Found at 162a.

INTRODUCTION

This is Plaintiff Garden State Outdoor LLC's ("**Garden State**") appeal of the trial court's affirmation of Defendant Egg Harbor Township Planning Board's ("**Board**") denial of bulk variance relief to Garden State to erect a billboard and its related upholding of Defendant Egg Harbor Township's ("**EHT**") requirement that no billboard could be within 1,000 feet of an intersection ("**Distance Regulation**"). At hearings before the Board, multiple Board members and professionals conceded they either did not know the basis for the Distance Regulation or that it was merely a "siting" requirement. In either event, the Distance Regulation is unconstitutional because the proposed billboard is protected by the First Amendment and no one could identify a substantial government interest for it. Rather than hold EHT to actual proofs, the trial court simply accepted that the "purposes" section of the Distance Regulation was a sufficient *evidential* foundation, contrary to existing precedent.

The Board relied on the Distance Regulation to deny bulk variance relief to Garden State. In denying such relief, the Board did not analyze such relief globally as part of the entire application, but instead improperly parsed out the Distance Regulation from the rest of the application, all the while as it conceded it did not even understand why the Distance Regulation existed.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Garden State has a lease to erect a digital billboard at 3119 Fire Road in EHT ("**Property**"). (Pa48.) The Property is the location of a "Canal's Liquor Store" at the intersection of Fire and Tilton Roads in EHT. (Pa63.) The proposed billboard would be forty-five (45) feet high, twenty-five (25) feet from Fire Road, and 378 square feet in area. (Pa127.)

The Property is in the "RCD Zone" (Pa118), which is retail and commercial-oriented. There is a variety of signage around the Property, including for "Canal's Liquor Store" and a gas station. (1T:70.)[2] The proposed billboard would "almost [be] lost between other signs." (Id.)[3] "There's a gas sign up on the intersection that would be more prominent to any driver approaching an intersection." (Id.; Pa63-64.)

The proposed billboard would be 350 feet from the Tilton Road intersection and 395 feet from the "Lidl Shopping Center interchange." (Pa127-128.) Both distances required a bulk variance from the Distance Regulation, which is set forth at EHT Code 225-63C(4)(c), which states that "billboards…shall be additional permitted principal uses, subject to the following":

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[1] Combined for brevity.
[2] 1T = 3/20/23 transcript; 2T = 4/17/23; 3T = 4/12/24.
[3] The transcript includes an unrelated hearing, so it starts after page 1 for the proposed billboard.

(4) Billboards or off-premises advertising signs shall not be located:

(a) Within 50 feet of a structure on the same lot.

(b) Within 500 feet of any residential district.

(c) Within 1,000 feet of an interchange or intersection.

(d) Within 1,000 feet of any other such sign on the same side of the highway. The measurement of 1,000 feet shall be along the nearest edge of the pavement between points directly opposite the edge of the sign face nearest the pavement edge and shall apply only to signs on the same side of the highway. The point of measurement for back-to-back signs shall be the midpoint between the nearest edge of the back-to-back sign faces.

(Pa148-149.)

I. Garden State's application

On July 26, 2022, Garden State filed an application with the Board for bulk variance relief to construct the proposed billboard. (Pa46.) The Board held two hearings on the application: March 20, 2023 and April 17, 2023. Ultimately, the Board granted all necessary bulk variances except the bulk variance for the Distance Regulation (and therefore denied site plan approval). (Pa129.) It granted bulk variances for minimum separation from a structure on a lot— fifty (50) feet required, eight (8) feet proposed— and to permit "sign face change between 10pm and 6am.[4]" (Pa128, 137.)

At the first hearing, the Board heard the following testimony on or related to the Distance Regulation and a bulk variance from it:

[4] The Board also granted a bulk variance for minimum setback for a utility easement. (Pa128.)

(i) The proposed billboard is "very small" and "at 1000 feet, you can't see the sign" (1T:61)

(ii) The "intention of this sign was to serve a need and market goal…it's not flashing, it's not moving, it's not scrolling, it just changes instantly…not like an animated sign" (id. at 62)

(iii) Drivers would not see the proposed billboard until they were already through the subject intersections (id. at 70)

(iv) The gas station sign at the Fire Road intersection is more of a distraction than the proposed billboard (id.)

(v) "As you're in the lane [at the subject intersections…your vision on the roadway is towards the signal indications, not to the left, which is where the sign would be" (id. at 71)

(vi) "Signal indications…are not impeded…by this digital field billboard" (id. at 72)

(vii) "Multiple studies…show[] that crash rates do not change from before and after billboards are installed…" (id. at 80-81.)

Much of the testimony at the first hearing before the Board focused on guessing at the purpose of the Distance Regulation. The Board's chairman conceded there appeared to be "no justification" for the Distance Regulation. (Id. at 73.) Others

guessed that it was more of a "sighting [sic]" requirement than based in safety or anything else. (Id. at 92.)

At the second hearing, Garden State provided additional testimony and evidence that the proposed billboard did not create any safety risk at the subject intersections:

(i) Driving behavior does not change in the "presence or absence of billboards" (2T:5-6)

(ii) 1.6 seconds of distraction is required to present a safety risk and billboards do not cause that extent of distraction (id.)

(iii) In studies, billboards are comparable to traffic signs in terms of distraction (id.)

(iv) The New Jersey Department of Transportation determined the proposed billboard was safe and granted an "outdoor advertising permit" (id. at 9-11; Pa165-166)

(v) There is no "safety reason for the" Distance Regulation (2T:8)

(vi) Traffic signals are not impeded by or "in the backdrop" of the proposed billboard (id.)

(vii) "There is no research support for the thousand feet and a safety component" (id. at 27)

(viii) The proposed billboard could be double its proposed size but Garden State limited the size to accommodate EHT and the surrounding area (id. at 31)

(ix) The 350-feet distance-to-an-intersection proposed by Garden State is consistent with "state…regulation" (id. at 38)

The Board's professionals conceded that the Distance Regulation was not based on "safety," but instead "it's sighting [sic] requirements…" (Id. at 60.) The Board's professionals themselves determined that Garden State's testimony on safety was "very compelling…" (Id.)

In denying the application, the Board's members overwhelmingly cited "safety." (Id. at 70-80.) The Board granted all bulk variance relief other than from the Distance Regulation: (i) "to change messaging every 8 seconds during restricted period [between 10pm and 6am]; (ii) "for Billboard distance from structure; and (iii) "for Front yard setback for utility easement." (Pa128.)

The Board issued a resolution of denial on May 15, 2023 that likewise only cites "safety" and only recites testimony, rather than making findings. (Pa128.)

II. Garden State's complaint and the trial court's dismissal

On June 19, 2023, Garden State sued EHT and the Board. Garden State's complaint challenged the Distance Regulation as unconstitutional and the Board's

denial as arbitrary, capricious, and unreasonable. (Pa27-29.) EHT and the Board answered on September 7, 2023. (Pa38.)

On December 12, 2024, the trial court entered a case management order for briefing pursuant to R. 4:69-4. (Pa212.) The order was amended on March 6, 2024 to extend the time for opposition. (Pa209.)

In response to Garden State's opening brief, EHT filed a "motion to dismiss" as to the challenge to the Distance Regulation, citing only testimony before the Board and without submitting any evidence of the factual basis for Distance Regulation. See Pa210; Statement of Record on Summary Judgment (listing only items submitted to the Board).

In reply, Garden State objected to the "motion to dismiss."[5] EHT then filed an improper sur-reply and called its motion one for "summary judgment." Garden State again objected. (Pa208, 214.)

The trial court eventually converted EHT's "motion to dismiss" to one for "summary judgment." (Pa9.) But the trial court did not convert the motion prior to oral argument or disposition. Instead, the trial court sent the following letter to Garden State prior to oral argument:

> The Court is in receipt of Mr. Santagata's correspondence regarding Defendant's cross-motion to dismiss Plaintiff's complaint. Mr. Santagata, please advise the Court if you are requesting more time to

[5] Reply brief omitted from appendix. R. 2:6-1(a)(2).

> respond to Defendant's motion. Otherwise, the Court is ready to proceed with oral argument this Friday, April 12, 2024 at 11:00AM.

(Pa213.) Garden State replied as follows:

> We represent Plaintiff in the above complaint in lieu of prerogative writs. Thank you for your April 9, 2024 letter. To answer your letter, Plaintiff is prepared to proceed to argument on April 12, 2024 on Defendants' "cross-motion to dismiss" and the prerogative writ. If the Court converts the "motion to dismiss" to one for summary judgment then we would file additional papers. We do not see the need or efficiency in such conversion. As set forth already, everything submitted by Defendants is in the record below and is properly before the Court as a prerogative writ. Thank you for your courtesies.

(Pa214.)

The trial court held oral argument on April 12, 2024. (3T:1.)

On May 15, 2024, the trial court dismissed Garden State's challenge to the Distance Regulation and upheld the Board's denial. (Pa1.) The trial court hypothesized, without any evidence before it, that the Distance Regulation advanced "substantial government interests…traffic safety, siting, and aesthetics." (Pa14.) All the trial court cited was the "purposes" section of the Distance Regulation. (Id.) In upholding the Board's denial, the trial court overlooked all the deficiencies in the Board's resolution and tried to fix what the Board could not, ultimately creating a positive/negative criteria analysis far beyond the applicable standard. (Pa20-23.)

On May 17, 2024, Garden State appealed. (Pa204.)

STANDARD OF REVIEW

The trial court's holding on the Distance Regulation is subject to a de novo standard of review. E & J Equities, Ltd. Liab. Co. v. Bd. of Adjustment of the Tp. of Franklin, 226 N.J. 549, 565 (2016).

The trial court's affirmation of the Board's denial is reviewed by the same standard applied by the trial court: whether the Board's denial is based in substantial evidence and is not arbitrary, capricious, and unreasonable. Effectively, this Court reviews the denial anew as if it were the trial court. Cell S. of N.J. v. Zoning Bd. of Adjustment, 172 N.J. 75, 89 (2002).

The trial court and the Board's interpretation of how the positive/negative criteria should be applied is subject to de novo review. Price v. Himeji, LLC, 214 N.J. 263, 300 (2013).

LEGAL ARGUMENT

The Distance Regulation is unconstitutional because it has no apparent purpose and certainly no substantial government interest. If EHT overcomes that, Garden State still more than satisfied the criteria for a bulk variance from the Distance Regulation.

I. The trial court erred in upholding the Distance Regulation (Pa14)

The trial court made two distinct errors in upholding the Distance Regulation: (i) hypothesizing the factual basis for the purported substantial government interest

and how it could be narrowly tailored; and (ii) allowing EHT to succeed on supposition and hypothesis, rather than requiring a plenary hearing with actual evidence. The latter was compounded by the trial court's improper conversion of the "motion to dismiss" to summary judgment.

A. Citing the "purposes" section of the Distance Regulation is not competent evidence of a substantial government interest or narrow tailoring

The United States and New Jersey Constitutions prohibit laws abridging freedom of speech. U.S. Const. amend. I.; N.J. Const. art. I, ¶ 6. Although New Jersey's free speech clause is generally "interpreted [at least] as co-extensive with the First Amendment," Twp. of Pennsauken v. Schad, 160 N.J. 156, 176 (1999), it is actually one of the broadest in the nation, and affords greater protection than the First Amendment, Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 78-79 (2014).

While municipal ordinances generally enjoy a presumption of validity, that presumption disappears when "an enactment directly impinges on a constitutionally protected right." See Bell v. Stafford, 110 N.J. 384, 395-96 (1988) ("Courts are far more demanding of clarity, specificity and restrictiveness with respect to legislative enactments that have a demonstrable impact on fundamental rights."). "Because the exercise of first amendment rights and freedom of speech are at stake, the municipality cannot seek refuge in a presumption of validity. It clearly ha[s] the

burden to present and confirm those compelling legitimate governmental interests and a reasonable factual basis for its regulatory scheme in order to validate its legislative action. Its failure to do so is fatal." Id. at 396.

In determining the constitutionality of an ordinance regulating speech, different types of speech are accorded different levels of protection. E & J Equities, LLC, 226 N.J. at 568. Because the Distance Regulation is content neutral, it must be reviewed as time/place/manner regulation. Id.; see City of Austin v. Reagan Nat'l Adver. of Austin, LLC, 142 S. Ct. 1464 (2022); State v. Miller, 83 N.J. 402, 416 (1980) (content neutrality).

The time, place, and manner test is known as the "Clark/Ward test," named after Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 289 (1984), and Ward v. Rock Against Racism, 491 U.S. 781, 784 (1989). E & J Equities, LLC, 226 N.J. at 580-81. The test applies to content-neutral regulations of signs of any form, including billboards, affecting commercial and noncommercial speech equally. E&J Equities, LLC, 226 N.J. at 580; see also City of Austin, 142 S.Ct. at 1464; Miller, 83 N.J. at 416.

Under the Clark/Ward test, EHT "must demonstrate that the prohibition...is content neutral, that it is narrowly tailored to serve a recognized and identified government interest, and that reasonable alternative channels of communication exist to disseminate the information sought to be distributed." E & J Equities, LLC,

226 N.J. at 570 [cites omitted]. In assessing whether an ordinance is narrowly tailored, the inquiry is whether it promotes a substantial government interest that would be achieved less effectively absent the regulation." Id. at 582 [cites omitted]; see also State v. DeAngelo, 197 N.J. 478, 486 (2009).

For a municipality to constitutionally rely upon a purported government interest to restrict speech, it must do more than invoke an allegedly substantial government interest. See E&J Equities, LLC, 226 N.J. at 557 ("[s]imply invoking aesthetics and public safety to ban a type of sign, without more, does not carry the day"). The substantial government interest must be established with competent evidence. Id. Stated differently: the trial court's citation to the "purposes" section of the Distance Regulation *is not, by itself, competent evidence*. Id. The Board at times rejected the Distance Regulation as based on safety at all, calling it a mere siting requirement, which has never been held to be a substantial government interest. One of the Board's professionals opined it was actually intended to restrict speech without any purpose, which is another way of saying "siting." (2T:60.)

Bell is informative. There, the New Jersey Supreme Court held:

> The ordinance fails to reveal either its particular governmental objectives or **its factual underpinnings**. As the Appellate Division noted, the record is almost completely devoid of any evidence concerning what interests of Stafford are served by the ordinance and the extent to which the ordinance has advanced those interests. Because the exercise of first amendment rights and freedom of speech are at stake, the municipality cannot seek refuge in a presumption of validity. It clearly had the burden to present and confirm those compelling

> legitimate governmental interests and **a reasonable factual basis for its regulatory scheme in order to validate its legislative action. Its failure to do so is fatal**.

Id. at 396 [emphasis added].

E&J Equities, LLC further established that "safety" and "aesthetic" concerns must be grounded in real evidence, not "supposition"; there is no such real evidence here because the Board could not agree on the "factual basis" for the Distance Regulation and EHT did not even bother to try. E&J Equities, LLC, 226 N.J. at 585. Regardless, at hearings before the Board, Garden State established that the proposed billboard was "safe" for traffic and was not aesthetically different than other signage in the zone. There was no competent evidence to the contrary. In E&J Equities, LLC the New Jersey Supreme Court instructed municipalities to actually consider the safety studies on billboards because there was no competent evidence they were unsafe:

> The record reveals the existence of a considerable body of literature discussing the impact, or lack thereof, of digital billboards on traffic safety and standards that can be applied to such devices to enhance traffic safety and mitigate aesthetic concerns. A respected report concluded its exhaustive review of the impact of such devices stating that ample information existed to make informed decisions about such devices. In addition, NJDOT had promulgated regulations governing off-premises digital billboards. See N.J.A.C. 16:41C-11.1. Moreover, a digital billboard had been erected along I-287 in a neighboring municipality. It appears that standards were available to the Township to inform its decision-making.

Id.

In the challenge to the Distance Regulation below, EHT was required to provide an explanation of the qualitative differences between signage within 1,000 feet of an intersection and the proposed billboard and cannot do so. See id. at 583. This is the same analysis as Miller: "[t]o withstand the strict constitutional scrutiny required here, the restriction on signs must be tied to a *compelling municipal interest as well as to the uses permitted in a given zone*." 83 N.J. at 414 [emphasis added]. E&J Equities, LLC, too, focused on comparing the proposed billboard with what was permitted where the proposed billboard was not:

> To be sure, the record demonstrates that the Township has labored to preserve the bucolic character of sections of the municipality and to minimize the impact on a residential neighborhood across the highway. The Township Council also cited safety concerns. The Township, however, permits industrial and corporate development and has directed that static billboards may be erected in the M-2 zone. In fact, three static billboards can be erected along I-287 in the M-2 zone. The record provides no basis to discern how three static billboards are more aesthetically palatable than a single digital billboard.
>
> Clearly, the action by the governing body was informed by the work of the Planning Board and the advice of the Township Planner. That official informed the governing body that there was an absence of research upon which he could recommend standards to address those concerns.

E&J Equities, LLC, supra at 583-584. EHT did not do this and the trial court let EHT off the constitutional hook.

EHT submitted no actual evidence below in support of the Distance Regulation, but instead hypothesized the substantial government interest: maybe

safety, maybe aesthetics.[6] The Board's chairman said it had no justification. (1T:73.) Others said it was a "sighting [sic] requirement." (1T:73, 92.) And still another said it existed solely to restrict speech for no purpose. (2T:60.) The purpose of the Distance Regulation was simply so that the location would never "contemplate a billboard." (Id.) "I don't think there's a correlation between our sighting requirements, and the safety that he [Garden State's expert] mentioned in his testimony." (Id.) So EHT was at war with itself below. This continued even at oral argument, where EHT said the substantial government interest was safety; the Board said open space. (3T:17, 21, 23.)

Rather than confront EHT's contradictions, the trial court just held that every possibly hypothesized substantial government interest was sufficient, without actual evidence of what the interest, in fact, was when EHT adopted the Distance Regulation. This Court has already held a trial court may not do this in a First Amendment context. Twp. of Cinnaminson v. Bertino, 405 N.J.Super. 521, 536 (App. Div. 2009). "A generalized invocation of common sense is not sufficient to meet the burden of establishing that the ordinance promotes a substantial governmental interest." Id. "A governing body seeking to restrict expression cannot

[6] "Compelling government interest" is used when a regulation is not content-neutral; "substantial government interest" is used when a regulation is content neutral. E & J Equities, LLC, supra at 569. These phrases are not always used with exacting precision, however. See Bell, supra (referring to "compelling legitimate government interests," which is two different standards).

simply invoke those interests with scant factual support informing its decision-making and expect to withstand a constitutional challenge." E & J Equities, LLC, 226 N.J. at 585. At argument the trial court even recognized that the Board did not seem to know why the Distance Regulation existed: "I mean, it's not the planning and zoning board that enacted the legislation for the billboard." (3T:32.) The trial court then looked past that deficiency.

Obviously, an ordinance can have more than one substantial government interest. Garden State does not argue otherwise. But mouthing the words "aesthetics, safety, open space," as EHT and the Board did below, is nothing more than a generic recitation of the zoning purposes of the Municipal Land Use Law. The problem with this— as also fatal in the trial court's upholding the Board's denial— is that each interest is its own analysis. For example, citing "open space" as the interest, which the Board never did, presents conflict with narrow tailoring: there is already comparable signage in the RCD Zone. The trial court, in fact, applied a standard more akin to "rational basis" for constitutional scrutiny than E & J Equities, LLC's "intermediate scrutiny." The "rational basis" standard is merely whether "the state rationally could have believed [the enactment] would promote its legitimate interest" and whether the enactment is "wholly irrelevant to [the] goal." See e.g. Phila. Police & Fire Ass'n for Handicapped Children, Inc. v. Philadelphia, 874 F.2d

156, 164 (3d Cir. 1989). E & J Equities, LLC has a higher standard and requires actual evidence and more narrow tailoring (as already set forth).

Accordingly, EHT was entitled to a plenary hearing to defend the Distance Regulation, but that entitlement works both ways. The purpose of a plenary hearing is to allow a municipality to present proofs justifying a First Amendment restriction, but it is likewise to hold such proofs to adversarial challenge. See Twp. of Cinnaminson, supra. The trial court absolved EHT of its evidential failure, even though Garden State clearly raised the evidential problem in opposition to EHT's "motion to dismiss" and requested a plenary hearing if the Court were inclined to ignore EHT of its failure to submit any actual evidence.

B. The Board's and trial court's reliance on safety requires remand

The trial court's acceptance of EHT's non-existent proofs is particularly troublesome here because one of the purported substantial government interests is plainly invalid as a matter of law under E & J Equities, LLC: *safety*. Remember: the Board itself did not actually accept safety as the interest, but the trial court listed it as one. While E & J Equities, LLC left open the possibility that safety could be a substantial government interest for billboard regulation, it required competent evidence, not "supposition." By lumping all EHT's hypothesized interests together, the trial court effectively built in a remand because there is no record of the actual interest or the evidence for it and one of the interests, safety, is clearly invalid, but

cannot be divorced from the others on the current record. See Bd. of Educ. of City of Clifton v. Zoning Bd. of Adjustment of City of Clifton, 409 N.J.Super. 515, 536 (Law Div. 2006) (combination of potential valid/invalid interests requires remand.)

C. The trial court's conversion to summary judgment highlights the error in its holding on the Distance Regulation

The trial court's errors were compounded by the conversion to "summary judgment." The trial court held there were no "material facts in dispute," but EHT did not submit any "facts" in support of the Distance Regulation. It merely cited the record before the Board, where everyone disagreed on the supposed substantial government interest and the evidence to support it.[7] The record disputed itself, which is what Garden State argued to the trial court.

The trial court should have followed the procedure in Cinnaminson and Bell and held a plenary hearing, rather than attempt to jettison the constitutional challenge through a "motion for summary judgment" that was not even filed, not properly supported, and, regardless, clearly disputed.

When a motion to dismiss contains facts outside the pleadings, a trial court may convert it to summary judgment, on notice to the parties. R. 4:6-2; See e.g. MHA, LLC v. Brach Eichler, LLC, 2018 N.J.Super. Unpub. LEXIS 2111 at *7 (App.

[7] Obviously, an ordinance can have more than one substantial government interest. Garden State does not argue otherwise. But mouthing the words "aesthetics, safety, open space," as EHT and the Board did below, is nothing more than a generic recitation of the zoning purposes of the Municipal Land Use Law.

Div. Sep. 24, 2018) (reversing improper conversion to summary judgment without judicial notice to opposing party and opportunity oppose as summary judgment).

The trial court unfortunately did not do that here, but instead merely asked Garden State whether it needed more time to respond to the "motion to dismiss." Garden State then responded by saying it would file additional material if the motion was converted. The trial court only actually converted the motion in its holding. What the trial court did, effectively, was accept EHT's "motion to dismiss" as a certified factual record *on enactment of the Distance Regulation*, which it plainly was not. This was improper and highlights how the trial court misapplied the burden in this context— the burden was on *EHT*, which submitted *nothing beyond the self-disputing record before the Board*.

To be clear: the overarching point here is *not* that a municipality must be burdened with extensive litigation to defend *any ordinance*, or even to defend one that impinges on the First Amendment. The point is that, after E & J Equities, LLC, a municipality is required submit actual proof of why an ordinance was adopted and the factual basis for it at least in the context of a First Amendment challenge. This is no great burden. After all, the Distance Regulation, as a zoning ordinance, was required to be reviewed by the Egg Harbor Township Planning Board, a process that almost uniformly involves review and comment by professionals, i.e. there *should be a record of the factual basis for the Distance Regulation*. See e.g. N.J.S.A.

40:55D-26, 64. If the Distance Regulation was part of a period review of a master plan, then there should be an even better record. N.J.S.A. 40:55D-62.1. Here, given the lack of any record submitted by EHT, EHT likely adopted the Distance Regulation based on unsubstantiated assumptions from before E & J Equities, LLC and is unable, after E & J Equities, LLC, to even cogently explain why the regulation was passed or the factual basis for it.

II. The trial court wrongly upheld the Board's denial (Pa16)

A local land use board's factual determination must be based on substantial evidence. Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 33 (2013). This standard is not satisfied by conclusory recitation of variance criteria in a resolution, as here. Edison Bd. of Educ. v. Zoning Bd. of Adjustment of Edison, 464 N.J.Super. 298, 308 (App. Div. 2020). The Court cannot possibly discern the factual basis of the Board's denial from the Board's conclusory resolution and the denial should be reversed on that basis alone. Id.

A. Garden State was entitled to a bulk variance

The so called "flexible c" variance under N.J.S.A. 40:55D-70(c)(2) requires that "(1) the specific variances sought will advance the purposes of the [Municipal Land Use Law]," i.e. the positive criteria, and "(2)…the benefits of the variance [outweigh] against any detriment[;] and (3)…can be granted without substantial detriment to the public good or impairment of the intent and purpose of the zoning

ordinance," i.e. the negative criteria. Pullen v. Twp. of S. Plainfield Planning Bd., 291 N.J.Super. 1, 7-8 (App. Div. 1996). "The focus under a c(2) variance analysis is on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community." Id. at 9.

Here, as explained at hearings on the application, Garden State could build a billboard twice the size of the proposed billboard, but it opted for a reduced size at a location where there was comparable signage. This is an "opportunity for improved zoning…" and consistent with zoning purposes. See N.J.S.A. 40:55D-2(c), (i); see Burbridge v. Mine Hill, 117 N.J. 376, 386 (1990) (aesthetics alone can even justify a use variance). Local businesses would get a 15% discount to advertise on the proposed billboard and thereby benefits the community. (1T:55.)

The proposed billboard would not create any "substantial detriment to the public good" or impair the "zon[ing] plan [or] zon[ing] ordinance." Yahnel v. Bd. of Adjustment, 79 N.J.Super. 509, 518 (App. Div. 1963) "The key word here is substantially. It comes from the statute itself" and minor detriment (though none existed) was not enough for the Board to deny the application. Id. at 519. Importantly, the Board was required to review the application as a whole, not variance by variance, in assessing the criteria for bulk variance relief. Pullen, supra at 9. The Board granted variances that could just as easily be described as a "siting" requirement or based in "safety" or "aesthetics": "no change in messaging…between

10pm and 6am" and "50 feet from existing structure…" (Pa128, 137.) The Board's singular focus on the Distancing Regulation was not a comprehensive review of the application as a whole, as required by Pullen.

"A variance cannot be considered in isolation, but must be considered in the context of its effect on the development proposal, the neighborhood, and the zoning plan." Pullen, supra at 9. But the Board's obsession was only the Distance Regulation. There is no evidence or suggestion that the Board considered "the entire proposal" in assessing the application and bulk variance from the Distance Regulation. Id.

The Board's denial was entirely arbitrary and based in a Distancing Regulation that literally no one could explain with any consistency. For example, if billboards are a "safety" risk, why would it be permissible to allow changing signage late at night, as the Board did, but not within 1,000 feet of an intersection? An intersection would be more likely to have existing light and signage and therefore less *distracting*. A standalone billboard on a dark road with changing signage is *more distracting than a billboard lost among other light and signage at an intersection.* This is why Pullen requires assessment of the "entire proposal." The Board failed that requirement.

B. The Board's denial had no basis at all and the trial court improperly tried to fill in the blanks

As an evidential matter, the Board's denial fails to provide a sufficient justification for review. The resolution may not simply recite random statements of Board members and then say, in conclusory fashion, that the variance criteria is not satisfied. "While remarks made by individual Board members during the course of hearings may be useful in interpreting ambiguous language in a resolution, they are not a substitute for the [resolution]. Such remarks at best reflect the beliefs of the speaker and cannot be assumed represent the findings of an entire Board. Moreover, because such remarks represent informal verbalizations of the speaker's transitory thoughts, they cannot be equated to deliberative findings of fact. It is the resolution, and not board members' deliberations, that provides the statutorily required findings of fact and conclusions." N.Y. SMSA, Ltd. P'ship v. Bd. of Adjustment of Tp. of Weehawken, 370 N.J.Super. 319, 334 (App. Div. 2004).

The resolution does not make any real "finding" at all. It recites the statements of Board members and professionals, much of which was in conflict, and then says "denied" by an improper and invalid "bland recitation of applicable statutory criteria." Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 373 (2007). The resolution literally only makes the following "findings": (i) the address for the application; (ii) the purpose of the application; (iii) the bulk variance from the Distance Regulation is denied; (iv) the other bulk variances are granted; (v) the

criteria for a bulk variance from the Distance Regulation was not met. (Pa128.) Because the Board merely gave a "bland recitation of the statutory criteria," it is impossible for the Court to tell whether the Board actually *considered the "entire proposal*," as required by Pullen. Did the "entire" application "impair[] the intent…of the zoning plan" or just the bulk variance from the Distance Regulation? No one knows. The resolution suggests only the latter, which would be impermissible under Pullen because it refers only to the "requested relief" in its "bland recitation of the statutory criteria." The only "requested relief" that could reasonably be referred to there is the bulk variance for the Distance Regulation because the other "requested relief" was granted (and denial of site plan approval was separately set forth).

Similarly fatal, the Board made no finding *on the purpose of the Distance Regulation*. How could the Board "bland[ly] recite" that the "requested relief" would "impair…the purpose of the zoning plan" if it did not make a finding on *what the purpose is.* In most applications, the purpose is not in dispute, but here the Board and its professionals disputed it *among themselves*. Contra e.g. Bressman v. Gash, 131 N.J. 517, 530 (1993) (upholding the board's finding that the "proposed landscape buffer between the Steinhorn's back corner and Gash's lot met the purpose of the large rear-yard setback by enhancing privacy").

1. The trial court created a new standard for the negative criteria

The trial court tried to close this loop on the negative criteria but only made it far worse. It said:

> [T]he Distance Regulation variance would impair the purpose of the zoning plan as shown by the factors under N.J.S.A. § 40:55D-2(a)-(o). The 350-foot setback from the intersection would not promise public health, safety, morals, or the general welfare, nor would it provide adequate light, air, and open space, or a desirable visual environment. Alternatively, it would increase congestion.

(Pa22.) There are three problems with this passage. First, there is no evidence whatsoever of "congestion"; it is not even mentioned by the Board. Second, the "zoning plan" referred to in N.J.S.A. 40:55D-70, i.e. the negative criteria, is not the general purposes listed in N.J.S.A. 40:55D-2(a)-(o), but the *purposes of the particular zoning from which a deviation is sought.* See Medici v. BPR Co., 107 N.J. 1, 21 (1987) ("intent and purpose of the governing body when the ordinance was passed"). Not every zoning provision advances *every possible general purpose listed in N.J.S.A. 40:55D-70*. And third: "promot[ion]" of the factors in N.J.S.A. 40:55D-2 is part of the *positive criteria*, not the *negative criteria*. See Pullen, supra.[8]

The second problem creates an entirely different negative criteria analysis than exists under N.J.S.A. 40:55D-70(c). The trial court says "the intent and purpose

[8] The distinction is inherent in "positive" and "negative." The "positive criteria" requires proof of the existence of the applicable criteria, such as undue hardship. The "negative criteria" requires proof the absence of the applicable criteria, such as substantial detriment to the "zone plan." See e.g. Nash 96 N.J. at 108.

of the zone plan and zoning ordinance are demonstrated by the factors set forth N.J.S.A. § 40:55D-2(a)-(o),” but no citation is provided. (Pa16.) Examples show how this cannot be true. A municipality could create a “renewable energy zone,” N.J.S.A. 40:55D-2(n), with a windfarm or solar panels that might impact light, air, and open space, N.J.S.A. 40:55D(c). But the purpose of the “zone plan” is the *former*, not the latter. See Nash, 96 N.J. at 122 (referring to specific zones, i.e. “because of the smallness of the zone, the zone plan may be vulnerable to deviations on the domino theory”). A municipality could focus a “zone plan” on “planned unit development” or “senior citizen community housing,” N.J.S.A. 40:55D(k)-(l), either of which might create “density” that some residents think is too high, N.J.S.A. 40:55D(e). But the “zone plan” is the former, not the latter.

Using this application as an example, and using the passage above from the trial court, what does the Distance Regulation have to do with “morals”? This is, after all, a content-neutral enactment. It has nothing to do with speech itself (allegedly). There is no evidence or suggestion the Distance Regulation was based on “morals.” What the trial court basically held was that it could cite any “purpose” for an ordinance after-the-fact, even if that was not the “purpose” when it was enacted and even if the “purpose” could not possibly apply.

2. The Board did not render any actual findings on expert testimony

Equally importantly, all professional testimony supported the application. The Board made no finding that "[Garden State's] testimony was unbelievable, incompetent, or conflicting." See N.Y. SMSA, L.P. v. Bd. Of Adjustment of Tp. of Weehawken, 370 N.J. Super. at 338. "While a board may reject expert testimony, it may not do so unreasonably, based only upon bare allegations or unsubstantiated beliefs." Id. [citations omitted]. The resolution does not even try to argue that it did so, or that the Board's "decision" was "predicated on substantial evidence." See Cell S. of N.J., 172 N.J. at 89. Instead, the resolution merely says that one of the Board's professionals found Garden State's evidence on safety "unpersuasive," but there was no contrary evidence, not even from that same professional. (Pa126.) Without more, this is just a net opinion, if it is even that, but "the substantial evidence standard is not met if a municipality's decision is supported by only the net opinion of an expert." Gallenthin Realty Dev., Inc., supra at 373.[9] The trial court said that the Board found Garden State's professionals "unpersuasive," but the Board only recited the comment of one of its professionals; it did not make *any such finding*.

This is a textbook example of why a resolution matters: (i) failure to choose between conflicting expert testimony; (ii) failure to articulate the purposes advanced

[9] This is particularly important here, where the Board randomly mentioned "safety" in its denial, because this application has First Amendment implications and randomly saying "safety" is not enough. E&J Equities, LLC, supra.

or harmed by a bulk variance; (iii) failure to differentiate between valid and invalid considerations; and (iv) failure to evidence whether the application was considered as a whole.

CONCLUSION

There are so many holes in the record here that, at a minimum, a remand is necessary. The Board's denial, however, is so deficient and conflicting that the Court would be justified in simply reversing and remanding with an order to grant the application. This would avoid further challenge to the Distance Regulation.

Respectfully submitted,

/S/

JUSTIN D. SANTAGATA